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Submission via OW-Docket@epa.gov and www.regulations.gov

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Administrator
Environmental Protection Agency
EPA Docket Center, Water Docket, Mail Code 28221T,
1200 Pennsylvania Avenue NW,
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Adam Telle
Assistant Secretary of the Army (Civil Works)
Department of the Army

Re: Updated Definition of "Waters of the United States," Docket ID No. EPA–HQ–OW–2025–0322

Dear Administrator Zeldin and Assistant Secretary Telle:

Waterkeeper Alliance, Environmental Integrity Project, and the undersigned U.S. Waterkeeper groups (collectively "Commenters") submit the following comments on the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (collectively, the "agencies") notice[1] announcing a proposed rule revising the regulatory definition of "waters of the United States" ("WOTUS") to reduce the scope of waters covered under the Federal Water Pollution Control Act ("Clean Water Act" or "Act"),[2] in light of the agencies' impermissible policy objectives and new, erroneous interpretation of the Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) ("*Sackett v. EPA or Sackett*").

On behalf of our organizations and our respective individual members and supporters from across the United States, we write in full opposition to the agencies' ill-conceived proposed rule redefining "waters of the United States" in a way that obstructs achievement of the Clean Water Act's fundamental objective—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] The 2025 Proposed WOTUS Definition, including the myriad vaguely described alternative approaches and potential implementation measures included in the 2025 Proposed Rule Notice, is being pursued without observance of procedure required by law,

[1] Updated Definition of "Waters of the United States," Dkt. ID No. EPA–HQ–OW–2025–0322, 90 Fed. Reg. 52498 (Nov. 20, 2025) ("2025 Proposed Rule Notice," or "2025 Proposed WOTUS Definition").

[2] 33 U.S.C. § 1251 *et seq*.

[3] 33 U.S.C. § 1251(a).

exceeds the agencies' statutory authority, and is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of the Administrative Procedure Act ("APA").[4] The 2025 Proposed Rule Notice does not provide the public with a meaningful opportunity to review and provide comment on the agencies' action because, while very lengthy, it lacks adequate information and analysis to support the proposed rule and provides only 45 days for public comment in violation of the Clean Water Act and APA. We implore the agencies to abandon this radical proposed WOTUS definition, which is designed to directly and indirectly eliminate Clean Water Act protections against uncontrolled industrial, municipal, agricultural, and other pollutant discharges for many, if not most, rivers, streams, lakes, ponds, canals, wetlands, and other waters across the country.

The nation's waters have already lost significant protections as a result of the *Sackett v. EPA* decision and the September 2023 amendments to the WOTUS definition conforming it to that decision.[5] Further reductions in Clean Water Act protections for the nation's waters are not required or authorized by the *Sackett* or any other Supreme Court precedent and would be inconsistent with the text of the Act, its legislative history, and extensive case law confirming the breadth of the Act. The Clean Water Act regulatory definition of "waters of the United States" must fully encompass waters necessary to adequately protect the chemical, physical, and biological integrity of the nation's waters as intended by Congress. Thus, it is imperative that, at a minimum, the waters included in the current regulatory definitions be maintained and that any amendments or reinterpretations of those regulatory definitions through rulemaking, guidance, memoranda, or other means, fully maintain and restore longstanding protections consistent with the objective, structure, and text of the Clean Water Act, the entire body of case law interpreting the Act, and the best available hydrologic and water quality science.[6]

By contrast, in service of the agencies' goals of "eliminating red tape, cutting permitting costs, and lowering the cost of doing business"[7] and "ensuring clarity, simplicity, and improvements that will stand the test of time,"[8] the 2025 Proposed WOTUS Definition illegally eliminates protections for waters across the country by adopting novel unfounded reinterpretations of settled law; crafting arbitrary, unscientific categories and definitions of core terms; completely eliminating the more

[4] Administrative Procedure Act, 5 U.S.C. § 500 *et seq.,* 706.

[5] Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023) (codified at 33 C.F.R. § 328.3 (U.S. Army Corps of Engineers) and 40 C.F.R. § 120.2 (EPA)) (''September 2023 Definition'').

[6] *See, e.g.*, *County of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 185-86 (2020) ("*County of Maui")*.

[7] *See, e.g.*, U.S. EPA Media Advisory, *EPA and Army to Gather Public Comment on Proposed WOTUS Rule in Pittsburgh*, (Dec. 12, 2025) ("On November 17, the agencies announced a proposed rule revising the definition of WOTUS to follow the clear direction of the Supreme Court in *Sackett v. EPA* while eliminating red tape, cutting permitting costs, and lowering the cost of doing business in communities across the country.") (Attachment 1)

[8] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52515.

than 75 year-old interstate waters category; expanding definitional exclusions; and proposing a grab bag of half-baked, potential alternative approaches and implementation measures. In addition to the impermissible policy objectives driving the agencies' decision to eliminate protections for even more waters, the proposed definition is premised on full implementation of the *Sackett v. EPA* decision, unsupportable interpretations of the Clean Water Act text and Supreme Court precedent, and an impermissibly narrow view of Congress' Commerce Clause authority.[9] But even if the agencies were advancing reasonable legal bases for the proposed rule, the agencies' proposed revisions to the September 2023 Definition are not actually tied to, or supported by, the agencies' novel interpretations and theories.

Neither *Sackett v. EPA* nor any other authority requires or empowers the agencies to eliminate protections for interstate waters, exclude tributaries that flow through non-jurisdictional channels and features, exclude wetlands that do not physically touch jurisdictional waters and have semi-permanent surface water, expand ways for waters to be converted to waste treatment systems, exclude ditches and canals that function like tributaries, or any of the other amendments included in the 2025 Proposed Rule Notice. Nor do any authorities empower the agencies to select any of the numerous other vaguely described alternative approaches that they indicate they may adopt in a final rule, which are included in the notice without adequate legal or technical support. One particularly extreme example of those unsupported alternatives would exclude all waters except traditional navigable waters, tributaries that flow directly into them, and wetlands with a continuous surface connection to those waters—an interpretation that would decimate the nation's waters even though not a single court in the history of the Federal Water Pollution Control Act has interpreted the Act to be constrained to those extremely limited categories of waters.

It is notable that the agencies never state in the 2025 Proposed Rule Notice that they are revising the WOTUS regulatory definition to achieve the objective of the Clean Water Act or even to better protect water quality. In fact, the agencies expressly state that they are defining "waters of the United States" without regard to how it will impact the Nation's waters.[10] Instead, they claim they are somehow balancing the "comprehensive nature and objective of the Clean Water Act" with host of other considerations, including their administrative policy choices, to arrive at their very non-comprehensive definition of waters protected by the Act. This is impermissible, as is the agencies' failure to even meaningfully evaluate the impact of the proposed WOTUS definition and alternative approaches on water quality and failure to demonstrate that water quality will be protected by the 2025 Proposed WOTUS Definition or its alternatives. While the agencies attempt to overcome these failures by looking to potential state and tribal responses to lost federal protections, the agencies cannot rely on speculation about what tribal or state governments may do under their own laws to determine whether the agencies' proposed definition is consistent the

[9] *Id*. at 52499.

[10] *Id*. at 52501.

federal Clean Water Act or whether it will protect water quality in the nation's waters as required by the Act.

If the agencies go through with their predetermined plan to revise the WOTUS definition in pursuit of their current deregulatory policy objectives, it will be the sixth time since 2014 that the agencies will improperly attempt to create a novel regulatory interpretation of the Clean Water Act that would eliminate water quality protections for the nation's waters contrary to the intent of Congress. As a unanimous Supreme Court determined in *United States v. Riverside Bayview Homes*, "[p]rotection of aquatic ecosytems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . [This is precisely why] Congress chose to define the waters covered by the [Clean Water] Act broadly."[11] The 2025 Proposed WOTUS Definition is facially inconsistent with Congress's intent to broadly define "water of the United States" and will not control the discharge of pollutants at the source.

Instead of yet again adopting a legally and technically flawed regulatory definition, we urge the agencies to provide clarity and certainty, as well as consistency with the law, by maintaining the protections provided in the current regulatory definition and restoring longstanding protections for the nation's waters wherever possible, consistent with Supreme Court precedent. The Supreme Court's decision in *Sackett v. EPA* set legal boundaries, but it in no way compels or empowers the agencies to diminish Clean Water Act protections beyond what the Court required. To the contrary, the agencies retain—and must exercise—their authority to implement the Act as Congress intended, i.e., in a manner that maximizes protection of waters and communities to the fullest extent allowed by law. The 2025 Proposed WOTUS Definition would instead move in the exact opposite direction, narrowing federal jurisdiction over the nation's waters well beyond the Court's interpretation of the Act in *Sackett v. EPA*, at grave expense to people, communities, aquatic ecosystems, and the economy.

Rather than redefining "waters of the United States" to eliminate water quality protections for the nation's waters in service of the agencies' extralegal deregulatory agenda, the agencies' actions must be guided by their mission to protect human health and the environment, as well as the requirements of the Clean Water Act, APA, Endangered Species Act ("ESA"),[12] and National Environmental Policy Act ("NEPA").[13] A clear definition of "waters of the United States" that protects the integrity of the nation's waters greatly benefits the public, farmers, businesses, landowners, and state and tribal governments in myriad ways, including reduced compliance and

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[11] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) ("*Riverside Bayview*") (citation omitted).

[12] Endangered Species Act, 16 U.S.C. § 1531 *et seq*.

[13] National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.

production costs. Constantly reinterpreting this more than 50-year-old law to suit the most recent bureaucratic objectives and justify the adoption of yet another new, narrower WOTUS definition creates uncertainty, benefits no one, and endangers everyone.

I. Interests of the Commenters

Waterkeeper Alliance is a not-for-profit environmental organization and global movement dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable, and swimmable. We are composed of more than 300 community-based Waterkeeper groups that patrol and protect nearly six million miles of rivers, lakes, and coastlines in the Americas, Europe, Australia, Asia, and Africa. In the United States, Waterkeeper Alliance represents the interests of more than 150 U.S. Waterkeeper groups, as well as the interests of our more than one million collective members and supporters that live, work, and recreate in or near waterways across the country—many of which are severely impaired by pollution. In the past three years alone, Waterkeeper Alliance, Waterkeeper groups, and our respective supporters in the U.S. have submitted more than 50,000 public comments on EPA actions, and Waterkeeper Alliance and Waterkeeper groups regularly attend public meetings and hearings with EPA, demonstrating our collective knowledge about EPA processes and our strong interest in engaging on issues that impact our communities, water, and the environment.

The Environmental Integrity Project is a nonprofit organization dedicated to protecting public health and our natural resources by holding polluters and government agencies accountable under the law, advocating for tough but fair environmental standards, and empowering communities fighting for clean air and clean water.

The Clean Water Act is the bedrock of our work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of people and communities that depend on clean water for drinking, subsistence fishing, recreation, their livelihoods, and their survival. Our work—in which we have answered Congress' call for "private attorneys general" to enforce and defend the Clean Water Act when regulators lack the willingness or resources to do so themselves—requires us to develop and maintain scientific, technical, and legal expertise on a broad range of water quality and quantity issues.

Commenters and their members have substantial interests in clean water for drinking, recreation, fishing, economic growth, food production, and other beneficial uses. These interests will be injured if the agencies adopt this proposed rule narrowly redefining "waters of the United States" under the Clean Water Act because, as explained below, the proposed definition: (1) is arbitrary, capricious, an abuse of discretion, and contrary to law, (2) would unlawfully reduce jurisdiction over the nation's historically protected waters contrary to the CWA and in excess of the agency's statutory authority, and (3) violates the APA, NEPA, and the ESA.

II. The Clean Water Act Requires Broad Protections for the Nation's Waters Consistent with Congressional Intent to Restore and Maintain the Integrity of the Nation's Waters

As the Supreme Court has repeatedly recognized, Congress passed the Clean Water Act with a singular objective—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[14]—and it intended to achieve that objective, primarily, by regulating pollution at its source.[15] The Congressionally intended breadth of the Clean Water Act is indisputably apparent in the comprehensive and interrelated goals, policies, definitions, programs, and directives set forth in text of the Act itself, as well as in Congress' direction that the entire Act applies broadly to protect the "waters of the United States, including the territorial seas."[16]

A long line of Supreme Court cases confirms the breadth of the Clean Water Act and its protections for the nation's waters (i.e., "waters of the United States"), as well as the Act's objective of completely eliminating water pollution in those waters. For example:

- In *City of Milwaukee v. Illinois & Michigan* (1981), a unanimous Supreme Court determined that Congress' intention in amending the Water Pollution Control Act in 1972 was "clearly to establish an all-encompassing program of water pollution regulation . . . [and] 'to establish a *comprehensive* long-range policy for the elimination of water pollution.' S.Rep.No.92–414, at 95, 2 Leg.Hist. 1511 (emphasis supplied)."[17]

- In *Riverside Bayview* (1985), a unanimous Supreme Court determined that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . [This is precisely why] Congress chose to define the waters covered by the Act broadly."[18] The Court also confirmed the breadth of Clean Water Act jurisdiction over "waters," including "lakes, rivers, streams, and other bodies of water," and found that the Corps had reasonably drawn that line by protecting "wetlands adjacent to lakes, rivers, streams, and other bodies of water"—i.e., wetlands adjacent to "waters of the United States."[19]

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[14] *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).

[15] *County of Maui*, 590 U.S. at 178-79 (citing *EPA v. Cal. ex rel. State Water Res. Control Bd*., 426 U.S. 200, 202-04 (1976) (basic purpose of the Clean Water Act is to regulate pollution at its source)).

[16] 33 U.S.C. § 1362(7).

[17] *City of Milwaukee*, 451 U.S. 304, 318 (1981) ("*City of Milwaukee II*") (internal footnotes omitted).

[18] *Riverside Bayview*, 474 U.S. at 132-33 (citation omitted).

[19] *Id*. at 131-35.

- In *Int'l Paper Co. v. Ouellette* (1987), the Supreme Court, based on its holding in *Riverside Bayview*, the text of the Act, and the legislative history of the Act, held that the Clean Water Act has long been recognized as "an all-encompassing program of water pollution regulation" that "applies to all point sources and virtually all bodies of water" and "virtually all surface water in the country."[20] The Court noted that "Congress intended to dominate the field of pollution regulation" and that the goal of the Act is the "elimination of water pollution."[21]

- In *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology* (1994), the Supreme Court described the Clean Water Act as a "complex statutory and regulatory scheme that governs our Nation's waters" and recognized its application to "all intrastate waters."[22]

Three more recent cases addressed Clean Water Act jurisdiction over two types of features where the distinctions between land and jurisdictional waters is less obvious—a non-adjacent abandoned sand and gravel pit and wetlands adjacent to non-navigable tributaries.

- In *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs* (2001), ("*SWANCC*") the Court held that "33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed.Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA."[23] Thus, the *SWANCC* decision was particularly fact-specific as to the respondents' abandoned sand and gravel pit, which was not adjacent to open water, and it addressed the Corps' asserted basis for jurisdiction under Clean Water Act Section 404, the Migratory Bird Rule. The Court expressly declined to address the jurisdictional reach of the Clean Water Act under the Commerce Clause.[24]

- In *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"), the Court issued no majority opinion and instead issued three different opinions setting forth differing tests for determining whether wetlands adjacent to non-navigable tributaries (there, ditches and drains) of traditional navigable waters may be protected under the Clean Water Act: the

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[20] *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486, 492 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.") (internal citations omitted).

[21] *Id.* at 492, 494.

[22] *PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 704, 717.

[23] *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). In the 2025 Proposed Rule Notice, the agencies incorrectly claim that the Court in SWANCC held that "interpreting the statute to extend to nonnavigable, isolated, intrastate ponds that lack a sufficient connection to navigable waters would invoke the outer limits of Congress' power under the Commerce Clause." 2025 Proposed Rule Notice, 90 Fed. Reg. at 52506. To the contrary, the Court found that the Corps' assertion of jurisdiction over the abandoned sand and gravel pits at issue in that case based on the Migratory Bird Rule raised "significant constitutional questions." *SWANCC*, 531 U.S. at 173.

[24] *Id.* at 174.

Relatively Permanent Test, the Significant Nexus Test, and application of the Pre-2015 Definition.[25] With regard to the Relatively Permanent Test, which was later adopted by the Court in *Sackett*, the plurality opinion determined:

- The Clean Water Act covers non-navigable waters in addition to traditional navigable waters, but the plurality declined to "decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act." Instead, the plurality focused on the meaning of "the waters" in 33 U.S.C. § 1362(7). The plurality concluded that "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in **'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features**.'"[26]

- The plurality also noted that "[b]y describing 'waters' as 'relatively permanent,'" it did not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances" or "*seasonal* rivers which contain continuous flow during some months of the year," and, further, that it had "no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.'"[27]

- Upon this opinion, the plurality sought remand of the cases for a determination by the lower courts "whether **the ditches or drains near each wetland are 'waters'** in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of **possessing a continuous surface connection** that creates the boundary-drawing problem we addressed in *Riverside Bayview*."[28]

- In *Sackett v. EPA*, another case addressing jurisdiction over adjacent wetlands, the Court adopted the approach of the *Rapanos* plurality to defining "waters" under the Clean Water Act and held that "the party asserting jurisdiction over adjacent wetlands [must] establish 'first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters);

[25] *See generally Rapanos v. United States*, 547 U.S. 715 (2006).

[26] *Id.* at 731-32 (emphasis added) (citations omitted).

[27] *Id.* at 732, n.5 (emphasis in original).

[28] *Id.* at 757 (emphasis added).

and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.'"[29]

III. A Broad and Legally Sound WOTUS Regulatory Definition is Critically Important to Achieving the Objective of the Clean Water Act

The 2025 Proposed WOTUS Definition constitutes the latest effort by the agencies to define the statutory phrase "waters of the United States," as set forth in 33 U.S.C. § 1362(7), for the purpose of identifying the waters subject to federal Clean Water Act jurisdiction. As explained in detail below, and in previous comments on the agencies' regulatory proposals,[30] the agencies have neither provided for meaningful public participation under the Clean Water Act nor complied with the APA in the development and publication of this proposed rule. The 2025 Proposed WOTUS Definition is also contrary to the Clean Water Act and violates the requirements of the ESA, NEPA and Executive Order 13778. As a result, the proposed definition of "waters of the United States" will severely undermine or eliminate fundamental Clean Water Act protections across the country—polluting and destroying our nation's water resources.

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[29] *Sackett v. EPA*, 598 U.S. 651, 678-79 (2023) (quoting *Rapanos*, 547 U.S. at 742) ("*Sackett*").

[30] Natural Resource Defense Council *et al*., Comments on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (June 5, 2007), Docket ID No. EPA–HQ–OW– 2007–0282 (Jan, 21, 2008) ("2007 Comments"); Natural Resource Defense Council et al., Comments on 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, Docket ID No. EPA-HQ-OW-2011-0409, (Aug. 1, 2011) ("2011 Comments"), available at: https://www.regulations.gov/comment/EPA-HQ- OW-2011-0409-3608; Final Waterkeeper Comments on EPA-HQ-OW-2011-0880 (Nov. 14, 2014) ("Waterkeeper CWR Comments"), available at: https://www.regulations.gov/document/EPA-HQ-OW-2011-0880-16413; Waterkeeper Alliance, *et al*., Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017) ("Repeal Comments"), available at: https://www.regulations.gov/document/EPA-HQ-OW-2017-0203-13681; Comments of Waterkeeper Alliance *et al*., on Definition of ''Waters of the United States" – Schedule of Public Meetings: Docket ID No. EPA-HQ-OW-2017-0480 (Nov. 28, 2017), ("Step 2 Comments") available with attachments at: https://www.regulations.gov/document/EPA-HQ-OW-2017-0480-0750; Waterkeeper Alliance *et al*., Comments on Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA–HQ–OW–2017–0644 (Dec. 13. 2017), ("Delay Comments") available at: https://www.regulations.gov/document/EPA-HQ-OW-2017-0644-0401; Waterkeeper Alliance *et al*., Comments on Definition of Waters of United States - Recodification of Pre-Existing Rules ("Supplemental Notice Comments"), Docket ID No. EPA–HQ–OW–2017–0203, (Aug. 12, 2018) ("Repeal Supplemental Comments"), available with attachments at: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0203-15360; Waterkeeper Alliance *et al.*, Comments on Revised Definition of Waters of the United States, Docket ID No. EPA-HQ-OW-2018-0149, (April 14, 2019) ("Waterkeeper NWPR Comments") available with attachments at: https://www.regulations.gov/comment/EPA-HQ- OW-2018-0149-11318; and Waterkeeper Alliance *et al.*, Comments on Notice of Public Meetings Regarding ''Waters of the United States''; Establishment of a Public Docket; Request for Recommendations, Docket ID No. EPA–HQ–OW– 2021–0328-0285 ("Waterkeeper 2021 Public Notice Comments"), available with attachments at https://www.regulations.gov/comment/EPA-HQ-OW-2021-0328-0285; Waterkeeper Alliance *et al*., Comments on Revised Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2021-0602 ("Waterkeeper 2022 Proposed Rule Comments"), available with attachments at https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0307 (collectively "Previous Comments"), all of which are attached hereto as (Attachment 2).

The Clean Water Act regulatory definition of "waters of the United States" is critically important to the protection of human health, the wellbeing of communities, the success of local, state and national economies, and the functioning of our nation's vast, interconnected aquatic ecosystems, as well as the many endangered and threatened species that depend upon those resources. As a nation, we cannot have clean water unless we control pollution at its source—wherever that source may be.

If a water is not included in the definition of "waters of the United States," untreated toxic, biological, chemical, and radiological pollution can be discharged directly into it without meeting any of the Clean Water Act's permitting and treatment requirements.[31] When waters are excluded from the definition of "waters of the United States," all of the protections of the Clean Water Act—the Section 402 NPDES discharge standards and permitting requirements, the Section 404 Dredge and Fill standards and permitting, water quality standards, effluent limitation guidelines, total maximum daily loads, water quality certifications, and myriad other standards and programs—become inapplicable and cannot prevent pollution, degradation, and destruction as Congress intended.

Waters excluded from the definition of "waters of the United States" can be dredged, filled, and polluted with impunity because the Clean Water Act's most fundamental human health and environmental safeguard—the prohibition of unauthorized discharges in 33 U.S.C. § 1311(a)—no longer applies. Unregulated pollution discharged into waterways that fall outside the agencies' regulatory definition will not only harm those receiving waters but will also travel through well-known hydrologic processes before harming other water resources, drinking water supplies, recreational waters, fisheries, industries, agriculture, endangered and threatened species, and, ultimately, human beings.

Prior to August 27, 2015, the Clean Water Act regulatory definition of "waters of the United States" had remained in place largely unchanged since the 1970s and broadly encompassed jurisdiction over the nation's waters.[32] The Pre-2015 Definition was never vacated by any court and is, in fact, currently being applied by the agencies in 26 states.[33] These broad categories of

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[31] For example, the Clean Water Act contains the following core water quality protections: point sources discharging pollutants into waters must have a permit, 33 U.S.C. §§ 1311(a), 1342; the absolute prohibition against discharging "any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste," § 1311(f); protections against the discharge of oil or hazardous substances, § 1321; and restrictions on the disposal of sewage sludge, § 1345.

[32] *See* regulatory definitions at 33 C.F.R. part 328 and 40 C.F.R. parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401 ("Pre-2015 Definition").

[33] According to the agencies, the Pre-2015 Definition is currently being "implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience, consistent with *Sackett.*" March 24, 2025 Notice, 90 Fed. Reg. at 13429 n. 4; *see also Definition of "Waters of the United States": Rule Status*

waters included in the Pre-2015 Definition are necessary to achieve the objectives of the Clean Water Act and implement the Act's "comprehensive regulatory program" that established "a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit."[34] The definition[35] includes:

a. 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.

b. All interstate waters, including interstate wetlands.

c. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

    1. Which are or could be used by interstate or foreign travelers for recreational or other purposes;

    2. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

    3. Which are used or could be used for industrial purposes by industries in interstate commerce.

d. All impoundments of waters otherwise defined as waters of the United States under this definition.

e. Tributaries of waters identified in paragraphs (a) through (d) of this definition.

f. The territorial seas.

g. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

However, after the Supreme Court's decisions in *SWANCC* and *Rapanos*, the agencies stopped implementing the text of the Pre-2015 Definition as it is written with regard to tributaries, adjacent

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and Litigation Update, EPA, available at: https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update, (last accessed Jan. 5, 2026); 2025 Proposed Rule Notice, 90 Fed. Reg. at 52512 (In 26 states, "the agencies are interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime and the Supreme Court's Sackett decision.").

[34] *City of Milwaukee II*, 451 U.S. at 310-11, 317.

[35] *See, e.g.*, 40 C.F.R. § 230.3 (1993).

wetlands, impoundments, and "other waters."[36] Under the Pre-2015 practice, until perhaps recently, the agencies have asserted jurisdiction over wetlands adjacent to traditional navigable waters, interstate waters, and the territorial seas; impoundments of jurisdictional waters; relatively permanent non-navigable tributaries of traditional navigable waters, interstate waters, or the territorial seas (i.e. where the tributaries typically flow year-round or have continuous flow at seasonally); and wetlands that abut such relatively permanent tributaries.[37] Prior to *Sackett v. EPA*, the agencies also asserted jurisdiction over other waters using the significant nexus standard from *Rapanos* Guidance or the 2003 *SWANCC* Guidance.[38] For the purpose of these comments, references to the Pre-2015 Definition include the definitional categories as implemented under the Pre-2015 practice described above unless otherwise noted.

The agencies first made major substantive changes to their longstanding regulatory interpretation of the waters that are subject to the Clean Water Act's critical safeguards in the June 29, 2015 "Clean Water Rule."[39] Although the Clean Water Rule reaffirmed Clean Water Act jurisdiction over some waters historically protected under the Act, it also included many legally and scientifically indefensible provisions and impermissibly excluded waters that should be protected as a matter of law. The agencies' second change came in an October 22, 2019, rule repealing the Clean Water Rule and reinstating the text of the Pre-2015 Regulatory Definition along with new, unsupportable, and unexplained reinterpretations of that longstanding rule.[40]

The agencies' third redefinition, the Navigable Waters Protection Rule ("NWPR"), was proposed a few months later and became effective on June 22, 2020.[41] Contrary to more than 40 years of

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[36] *See, e.g.*, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 5, Dkt. ID No. EPA-HQ-OW-2025-0322-0110. In the 2025 Proposed Rule Notice, the agencies state that "[a]s a practical matter, field staff have rarely, if ever, sought such approval and therefore the agencies have not asserted jurisdiction under the 'other waters' category of the 1986 regulations since *SWANCC*." 2025 Proposed Rule Notice, 90 Fed. Reg. at 52510. This is not accurate. *See, e.g.*, Waterkeeper 2022 Proposed Rule Comments, *supra* n. 30, at 63-70.

[37] *See, e.g.*, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 5, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[38] *Id.*; U.S. EPA and Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (Dec. 2, 2008) (hereinafter "*Rapanos* Guidance*"*) *available at*:

https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf; Legal Memoranda Regarding *Solid Waste Agency of Northern Cook County (SWANCC) v. United States* (Jan. 15, 2003) ("*SWANCC Guidance*"), *available at*:

https://www.epa.gov/sites/default/files/2016-04/documents/swancc_guidance_jan_03.pdf.

[39] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) ("Clean Water Rule").

[40] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019) ("Repeal Rule").

[41] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020) ("NWPR").

legal precedent and longstanding, well-settled agency interpretations of the Clean Water Act, in the NWPR, like the current proposed rule, the agencies' concocted unsupportable legal theories and utilized arbitrary, unscientific line drawing and undisclosed "policy choices" to attempt to justify their unprecedentedly narrow definition of "waters of the United States." The agencies did not evaluate whether the definition would achieve the objective and goals of the Clean Water Act for the nation's waters and failed to meaningfully assess which waters would remain protected under their new definition of "waters of the United States."[42] Claiming their first-of-its-kind interpretation of the Clean Water Act was so clear the agencies lacked discretion to protect important rivers, streams, lakes, and other waters across the country, the agencies also refused to consider scientific information in the record demonstrating that their narrow jurisdictional definition eliminated protections for waters that are essential to the integrity of the nation's waters and endangered drinking water supplies, recreational waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across the nation.[43] This regulatory definition was vacated by two federal district courts in 2021, resulting in restoration of the longstanding Pre-2015 Regulatory Definition text.[44]

The agencies' fourth redefinition was proposed on December 4, 2021, and published as a final rule on January 18, 2023.[45] This regulatory definition rejected the legal approach taken under the NWPR and maintained or restored protections to many categories of the nation's waters that had long been jurisdictional under the Clean Water Act and the Pre-2015 Regulatory Definition consistent with many longstanding legal interpretations and science. However, it also adopted yet another set of novel legal theories that resulted in exclusion of many longstanding definitional categories and previously jurisdictional waters. This regulatory definition was amended on August 29, 2023, to conform it to the *Sackett* decision, and this definition became effective on September 8, 2023.[46]

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[42] *See, e.g.,* U.S. EPA and Corps, The Navigable Waters Protection Rule—Public Comment Summary Document, Response to Comments, Topic 5, at 44 and Topic 11, at 3, 8-9, 13, 16, 103 (2020), https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574 ("NWPR RTC"). (Attachment 3)

[43] *See, e.g., id.* at Topic 11, at 3, 8-9, 13, 16.

[44] On August 30, 2021, the U.S. District Court for the District of Arizona in *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021), vacated the NWPR, which had the effect of restoring the Pre-2015 Regulatory Definition. Less than one month later, the U.S. District Court for the District of New Mexico also issued an order vacating and remanding the NWPR. *See generally Navajo Nation v. Regan*, 563 F. Supp. 3d 1165 (D.N.M. 2021).

[45] *See, e.g.*, Revised Definition of ''Waters of the United States," 86 Fed. Reg. 69372 (proposed Dec. 7, 2021) ("2021 Proposed Definition"); Revised Definition of ''Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023). ("January 2023 Definition").

[46] September 2023 Definition, 88 Fed. Reg. 61964 (codified at 33 C.F.R. § 328.3 (Corps) and 40 C.F.R. § 120.2 (EPA)).

The September 2023 Definition includes:

1) Waters which are:
    a) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
    b) The territorial seas; or
    c) Interstate waters;
2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;
3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;
4) Wetlands adjacent to the following waters:
    a) Waters identified in paragraph (a)(1) of this section; or
    b) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;
5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

Adjacent is defined as having a continuous surface connection. The current definition expressly exempts certain waste treatment systems; prior converted cropland; ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water; certain artificially irrigated areas; certain artificial lakes or ponds; certain artificial reflecting or swimming pools or other small ornamental bodies of water; certain waterfilled depressions and fill, sand, and gravel pits excavated in dry land for the purpose of obtaining fill, sand, or gravel; and swales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow.

A. Historical Impacts of Eliminating Protections in the WOTUS Regulatory Definition

Commenters understand and have seen first-hand how important a broad definition of "waters of the United States" is to the functioning and effectiveness of the Clean Water Act to protect and

restore water quality across the country. While the Clean Water Act has been very effective in controlling pollution in many respects, many of our major waterways remain severely polluted, and by some indications, pollution appears to be increasing.[47] Given the water quality challenges our nation continues to face almost 50 years after the passage of the Clean Water Act, it is obvious that the Act's requirements and enforcement desperately need to be supported and strengthened, not diminished. Weakening the Clean Water Act by further reducing the scope of federal jurisdictional waters and assuming that state and tribal governments all have the desire, will, resources, and capacity to pick up the slack, would be an unreasonable and unsupportable course of action.

The NWPR was particularly dangerous because it stripped protections against uncontrolled industrial, municipal, agricultural, and other pollution discharges into many—and in some parts of the country, nearly all—rivers, streams, lakes, ponds, wetlands, and other waters. It left vast swaths of the nation's waters unprotected against dangerous pollution discharges and destructive dredging and filling that harm drinking water supplies, fisheries, and recreational waters, people, endangered and threatened species, and the nation's vast, interconnected aquatic ecosystems that have been exposed to dangerous levels of pollution and destruction in both directly impacted and downstream waters. It irresponsibly impeded the ability of states, tribes, communities, as well as other federal agencies and the agencies themselves, to protect waters and ecosystems and the people and wildlife that depend on them across the country.

The harm from the NWPR that started propagating across the country in June 2020 was apparent in the agencies' own administrative record for the NWPR rulemaking. At the time, however, the agencies refused to consider any of the scientific information in the record. That information demonstrated that their narrow jurisdictional definition eliminated protections for waters that are essential to the integrity of the nation's waters and would endanger drinking water supplies, recreational waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across the country.[48]

After it had been in place for only a short time, the agencies noted that a "broad array of stakeholders—including states, Tribes, local governments, scientists, and non-governmental organizations—are seeing destructive impacts to critical water bodies under the [NWPR]," and EPA Administrator Regan was quoted as saying that EPA had "determined that [the NWPR] is leading to significant environmental degradation."[49] For example, EPA determined that the NWPR

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[47] *See, e.g.,* Section VIII.A. *infra*.

[48] *See, e.g.*, NWPR RTC, Topic 11, at 3, 8-9, supra n. 42.

[49] EPA, *Army Announce Intent to Revise Definition of WOTUS*, (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus (Attachment 4); *see also* EPA, *Memorandum of Law in Support of Motion for Voluntary Remand Without Vacatur*,

removals of jurisdiction were already causing harm to various sensitive ecosystems and that the definition removed Clean Water Act protections from nearly all waters in some arid states.[50] The agencies also conducted an extensive review of the NWPR during the rulemaking for the January 2023 Definition and concluded that the NWPR did not "appropriately consider the effect of the revised definition of 'waters of the United States' on the integrity of the nation's waters, and that the rule threatened the loss or degradation of waters critical to the protection of traditional navigable waters, among other concerns," including, for example, implementation challenges that made clear the "foundational concepts underlying much of the 2020 NWPR were confusing and difficult to implement" particularly with regard to the "typical year" metric, determining "adjacency," and identifying jurisdictional ditches.[51]

Waterkeeper Alliance submitted extensive written comments to the administrative record during the public comment period for the NWPR identifying similar concerns, including a comment letter containing evidence and 12 demonstrating that: (1) important water resources would lose Clean Water Act protections under NWPR without any sound legal or scientific basis, and (2) the NWPR would cause serious harm to waters, people, aquatic systems, and endangered and threatened species and their designated critical habitats.[52] For example, Waterkeeper Alliance's NWPR Comments documented the expected loss of Clean Water Act jurisdiction from the rule to: [53]

- Large numbers of rivers and streams protected by the Missouri Confluence Waterkeeper that briefly flow subsurface and then reemerge as surface waters, which would have significant adverse impacts on waters throughout Missouri, including large, important downstream waterways, such as the Missouri and Meramec Rivers.

- Texas coastal prairie wetlands crucial to the health of Lower Galveston Bay, which is protected on behalf of its members by Bayou City Waterkeeper.

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https://www.epa.gov/wotus/request-remand-and-supporting-documentation (Feb. 21, 2025) (Attachment 5) ("NWPR Request for Remand").

[50] *See, e.g.*, Declaration of Radhika Fox ¶¶ 15, 17, *Conservation L. Found. v. EPA* (D. Mass. June 9, 2021) (No. 20-cv-10820-DPW), https://www.epa.gov/sites/default/files/2021-06/documents/conservation_law_found._d._mass._-_radhika_fox_declaration_signed.pdf ("Fox Dec."); Declaration of Jaime A. Pinkham ¶ 15, *Conservation L. Found. v. EPA* (D. Mass. June 9, 2021) (No. 20-cv-10820-DPW), https://www.epa.gov/sites/default/files/2021-06/documents/2_conservation_law_found._d._mass._-_jaime_pinkham_declaration_final_signed_508c.pdf ("Pinkham Dec.") (Attachment 6)

[51] January 2023 Definition, 88 Fed. Reg. at 3017-18; *see also* U.S. EPA and Corps, Technical Support Document for the Final "Revised Definition of 'Waters of the United States'" Rule, at 81-149 (Dec. 2022), available at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-2500 ("TSD for the January 2023 Definition"). (Attachment 7)

[52] *See,* Waterkeeper NWPR Comments, *supra* n. 30.

[53] *See*, Waterkeeper Watershed Evaluations. (Attachment 8)

- Streams, reservoirs, ditches, and canals that receive pollution discharges and flow into Boulder Creek—the primary drinking water supply for the Colorado cities of Boulder, Louisville, Lafayette, Erie, Superior, and Nederland—which were protected on behalf of its members by Boulder Waterkeeper.

- Between an estimated 500 and 1,000 miles of ephemeral and ditched streams that flow into the Niagara River—the channel that connects two Great Lakes, Erie and Ontario— which is protected on behalf of its members by Buffalo Niagara Waterkeeper.

- Pocosins, Carolina Bays, and ditched and ephemeral streams that receive animal waste and other pollution discharges in the Cape Fear Basin of North Carolina, which is protected on behalf of its members by Cape Fear Riverkeeper.

- Streams that provide habitat and water supply for federally threatened Chinook salmon, coho salmon, chum salmon and steelhead trout, and ditched streams that receive animal waste, industrial, and municipal pollution discharges in the Puget Sound Basin of Washington, which is protected on behalf of its members by Puget Soundkeeper.

- An estimated 9,165 miles of ephemeral streams in the Rogue River Basin in Oregon that provide drinking water for the region, as well as habitat and spawning grounds for federally threatened Southern Oregon/Northern California Coast coho salmon and steelhead; numerous canals and ditches that receive pollution discharges that are hydrologically connected to and influence the quality of the Rogue River; and the Agate Desert vernal pools that are the only vernal pools in Oregon and support unique species, such as the vernal pool fairy shrimp listed as threatened under the federal ESA. These waters are protected on behalf of its members by Rogue Riverkeeper.

- All of the waters, including premiere trout streams and critical habitat for federally threatened bull trout, located within the 5,185-square-mile "closed basin" area in the upper Snake River Basin of Idaho, that are connected to the Snake River by subsurface flows and springs, and 14,866 miles of ditches, ditched streams and canals that receive pollution discharges and flow into the Snake River. These waters are protected on behalf of its members by Snake River Waterkeeper.

- An estimated 30,297 miles (85 percent) of the streams in the Upper Missouri River Basin of Montana that feed into and impact water quality in the Big Hole River (world-class trout fishery), Beaverhead River (premiere brown trout fishery), Jefferson River (Westslope cutthroat habitat and drinking water supply), Madison River (Yellowstone cutthroat and Westslope cutthroat trout habitat), and the Gallatin River (Yellowstone Park and

downstream recreation). These waters are protected on behalf of its members by Upper Missouri Waterkeeper.

After the 2020 NWPR became effective, the massive scope and geographic extent of the loss of Clean Water Act protections for the Nation's waters began to be documented, to some extent, in a database maintained on an EPA webpage showing approved Clean Water Act jurisdictional determinations by the EPA and the Corps.[54] A review of the database and associated maps showed massive numbers of waters that were not protected under the NWPR. For example, as of June 29, 2021, maps from that database indicate that out of the 14,435 approved Clean Water Act jurisdictional determinations made under the 2020 NWPR across the country, 13,290 waters were found to be non-jurisdictional and only 1,145 were found to be jurisdictional.[55]

Because the 2025 Proposed Rule Notice adopts certain provisions from the NWPR, considers adopting certain other provisions from the NWPR as an alternative approach, or adopts provisions that are more jurisdictionally limiting than the NWPR, the assessments of the NWPR's impacts on the nation's waters serve to illustrate the likely damaging impacts of the current proposed rule.

B. Current Impacts of Lost Protections under the September 2023 Definition

The September 2023 Definition dramatically reduced protections for rivers, streams, lakes, wetlands, and waters across the country. After finalizing the September 2023 Definition in response to *Sackett*, EPA estimated that 63 percent of wetlands and roughly 1.2 to 4.9 million miles of streams would no longer be protected by the Clean Water Act.[56] Although the agencies have not conducted a national assessment of the impacts of their September 2023 Definition on the nation's waters, there are multiple indications that many types of waters have already lost Clean Water Act protections across the country. For example, the AJD database shows that 16,011 out of 18,882 jurisdictional determinations made under the September 2023 Definition found the feature to be non-jurisdictional, including many wetlands, rivers, streams, ditches, and other waters across the country.[57]

For example, a recent analysis of the impacts of the *Sackett v. EPA* decision by the Natural Resources Defense Council ("NRDC") looked at the 48 continental U.S. states and Washington,

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[54] *See* EPA, *Clean Water Act Approved Jurisdictional Determinations*, https://watersgeo.epa.gov/cwa/CWA-JDs/ (last visited January 4, 2026).

[55] *See id*; Waterkeeper 2022 Comments, *supra* n. 30, at 103.

[56] *See* EPA, *Policy Webinar: Updates on the Definition of "Waters of the United States",* YouTube, 24:01-24:18 (Sept. 12, 2023), https://www.youtube.com/watch?v=lcCVelsAy2c.

[57] *Clean Water Act Approved Jurisdictional Determinations*, Webpage, EPA, https://watersgeo.epa.gov/cwa/CWA-JDs/, (as of Jan. 1, 2026) (Attachment 9); *Clean Water Act Approved Jurisdictional Determinations*, Records Spreadsheet, EPA, https://watersgeo.epa.gov/cwa/CWA-JDs/, (as of Jan. 1, 2026) (Attachment 10).

D.C., provided estimates for wetlands at risk in each, and combined these estimates into different national scenarios finding that: (1) under the Least Damaging Scenario, approximately 60 percent of individual wetlands, covering more than 19 million acres, would lack federal protection and (2) under the Most Damaging Scenario, the least protective scenario NRDC analyzed, an estimated 95 percent of individual wetlands, covering nearly 71 million acres, would lack protection—rending the Clean Water Act "virtually meaningless for wetlands protection."[58] NRDC's report found similarly dramatic impacts to the nation's rivers and streams by assessing the impacts of two scenarios: (1) excluding ephemeral rivers and streams—which renders nearly 2.5 million miles non-jurisdictional and (2) excluding both ephemeral and intermittent rivers and streams—which would render more than 8 million miles non-jurisdictional.[59] The exclusion of ephemeral and intermittent rivers and streams would equate to the elimination of roughly 77% of the NHD-mapped rivers and streams in 48 continental U.S. states and Washington, D.C.[60]

The most damaging scenarios in NRDC's report were not based on the text of the September 2023 Definition or the requirements of *Sackett v. EPA*, but instead reflect unfounded interpretations of the *Sackett* decision pushed by industry to exclude non-perennial streams, human-made features like ditches and canals, and wetlands that do not have surface water for a very substantial part of the year.[61] Accordingly, the impact of the most damaging scenarios are relevant to assessing the potential impacts of the proposed WOTUS definition and alternative approaches in the 2025 Proposed Rule Notice, which adopts or considers adopting much of industry's advocacy wish list.

The state level results are even more concerning because they indicate that many states could lose Clean Water Act protections for nearly all of their rivers, streams, and wetlands under the most damaging scenarios. For example, in Arkansas, the report predicts that 83 percent of 2,378,881.8 wetland acres and 94 percent of individual wetlands could lose protection under the report's most damaging scenario and 80.9% of stream lengths in Arkansas are non-perennial. In Missouri, the report predicts that 99% of 979,625.5 wetland acres and 99% of individual wetlands could lose protection under the report's damaging scenario and that 86.4% of stream lengths in Missouri are non-perennial. Other states with very high percentages of non-perennial rivers and streams include, for example, Arizona (98.6%), California (93.2%), Colorado (87%), Kansas (88.5%), Montana

[58] NRDC, Mapping Destruction: Using GIS Modeling to Show the Disastrous Impacts of Sackett v. EPA on America's Wetlands, (Mar. 2025), at 6, 12-14 available at: https://www.nrdc.org/sites/default/files/2025-03/Wetlands_Report_R_25-03-B_05_locked.pdf ("NRDC: Mapping Destruction"). (Attachment 11)

[59] *Id*. at 15-16

[60] *Id*. at 16-17.

[61] *Id*. at 11.

(86.1%), Nebraska (88%), New Mexico (97.2%), North Dakota (92.5%), and South Dakota (90.1%).[62]

IV. The Proposed Definition

In the 2025 Proposed Rule Notice, the agencies are proposing the revise numerous provisions of the September 2023 Definition in specific ways that are referred to throughout these comments as the 2025 Proposed WOTUS Definition. With regard to the 2025 Proposed WOTUS Definition, the agencies are proposing to revise the following categories of "waters of the United States" under 33 CFR 328.3 and 40 CFR 120.2 paragraph (a) by deleting the interstate waters category under paragraph (a)(1)(iii) and deleting "intrastate" from the paragraph (a)(5) category for lakes and ponds. In addition, ministerial changes are proposed to add in one place and delete in another place an "or" from paragraph (a)(1) to conform to the deletion of the interstate waters category. In addition, the agencies are proposing to revise the following exclusions: the (b)(1) waste treatment system exclusion, the (b)(2) prior converted cropland exclusion, and the (b)(3) ditch exclusion. The agencies are also proposing to add an exclusion for groundwater at (b)(9). The agencies are also proposing to add definitions of "continuous surface connection," "ditch," "prior converted cropland," "relatively permanent," "tributary," "and waste treatment system" in paragraph (c) of their regulations.[63] As noted previously, several of the proposed revisions readopt portions of the NWPR, even though that rule was overturned by two courts and the agencies just recently determined that it was inconsistent with the Clean Water Act, impractical to implement, and caused significant environmental damage during the short period it was in effect.[64]

In the 2025 Proposed WOTUS Definition, these revisions are all designed to reduce the number and types of waters protected by the Clean Water Act by either eliminating a protected category, narrowing a protected category, or expanding exclusions from protected categories as follows:[65]

- Eliminate the longstanding Interstate Waters category like the NWPR;
- Reduce jurisdiction over Tributaries by eliminating the Interstate Waters category and:
    - Narrowly defining "Relatively Permanent" to mean "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."

[62] *Id*. at 15-16.

[63] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52499

[64] *See, e.g.*, January 2023 Definition, 88 Fed. Reg. at 3017-3018; TSD for January 2023 Definition, at 81-149, *supra* n. 51.

[65] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52546.

- Narrowly defining "Tributary" to mean "a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow. A tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow. When the tributary is part of a water transfer (as that term is applied under 40 CFR 122.3) currently in operation, the tributary would retain jurisdictional status."

- Broadly defining "Ditch" the same as the NWPR to mean "a constructed or excavated channel used to convey water."

- Expanding the Ditch Exclusion to encompass any "Ditches (including roadside ditches) constructed or excavated entirely in dry land" by eliminating the current language ensuring that any ditches carrying relatively permanent flow were ineligible for the exclusion. The new exclusion would not apply to "Ditches" that are Traditional Navigable Waters.

- Reduce jurisdiction over "Adjacent Wetlands" by eliminating the Interstate Waters Category, reducing jurisdiction over Tributaries, and:

  - Narrowly defining "Continuous Surface Connection" to mean "having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water."

  - Expanding the Prior Converted Cropland Exclusion by adopting the NWPR definition such that it means "any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(1) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned."

- Reduce jurisdiction over (a)(5) Lakes and Ponds by eliminating the Interstate Waters Category, reducing jurisdiction over Tributaries, and narrowly defining "Continuous Surface Connection" and "Relatively Permanent."

- Reduce jurisdiction over Impoundments, Tributaries, Adjacent Wetlands, Impoundments, and (a)(5) Lakes and Ponds by expanding the Waste Treatment System Exclusion through deletion of "including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" from the text of the exclusion and:

    - Broadly defining "Waste Treatment System" in a manner similar to the NWPR to mean "all components of a waste treatment system designed to meet the requirements of the Clean Water Act, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)."

- Add a Groundwater Exclusion similar to NWPR Exclusion but more expansive.

In the 2025 Proposed Rule Notice, the agencies are also proposing numerous, inadequately described and considered alternative approaches that would limit jurisdiction, often in even more extreme ways, that the agencies are considering for adoption in the final rule, such as:

- Excluding all waters except traditional navigable waters, tributaries that flow directly into them, and wetlands with a continuous surface connection to those waters.[66]

- Changing, likely narrowing, which waters are protected as Traditional Navigable Waters through "clarifications" in the final rule preamble or another rulemaking that could, among other things, reinterpret the meaning of "may be susceptible to use in interstate or foreign commerce."[67]

- Among other things, limiting "Relatively Permanent" waters to perennial waters or other limits; setting minimum flow volume thresholds; setting minimum flow duration metrics or bright lines by region like for flow at least 90 or 270 days; and adopting the *Rapanos* Guidance approach.[68]

- Among other things, adopting an approach to Tributaries that is similar to the NWPR, adopting requirement for a bed and banks or other indicators of flow, and adopting an

[66] *Id*. at 52515.

[67] *Id*.

[68] *Id*. at 52519-521.

approach that eliminates jurisdiction if the tributary flows to a jurisdictional water through subsurface means.[69]

- Among other things, requiring wetlands, lakes, and ponds to touch a jurisdictional water and have permanent, perennial flow into it; covering only abutting (touching) wetlands; setting a minimum wet season metric or bright lines like having surface water for at least 90 or 270 days; excluding permafrost wetlands in Alaska.[70]

- Completely eliminating the (a)(5) Lakes and Ponds Category.[71]

- Excluding all ditches that lack relatively permanent flow; excluding irrigation and drainage ditches regardless of flow and all ditches excavated or constructed entirely in dry land.[72]

The scope of waters encompassed by the 2025 Proposed WOTUS Definition and/or the alternative approaches will also significantly depend on which of the vaguely described implementation measures discussed throughout the 2025 Proposed Rule Notice (or which unknown alternatives to these measures) are ultimately adopted by the agencies in a final rule.[73]

V. The Agencies' Failed to Comply with Clean Water Act and APA Public Notice and Comment and Federal Executive Order Consultation Requirements

The Clean Water Act requires that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act **shall be provided for, encouraged, and assisted by the Administrator** and the States."[74] This includes seeking the views of those likely to be affected by a rulemaking prior to issuing a notice of proposed rulemaking.[75] Additionally, the APA requires agencies to provide notice of a proposed rule and the opportunity for comment.[76] The agencies

[69] *Id*. at 52522-523.

[70] *Id*. at 52529-530.

[71] *Id*. at 52533.

[72] *Id*. at 52540.

[73] *See, e.g*., *id*. at 52523-52526, 52530-52533, 52535, 52537-52538, 552540.

[74] 33 U.S.C. § 1251(e) (emphasis added).

[75] *See, e.g.*, Executive Order 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3822, § 2(c) (Jan. 21, 2011) ("Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.").

[76] 5 U.S.C. § 553.

must comply with the APA and provide for public participation in all agency actions that create (or eliminate) a law, i.e. promulgation of legislative or substantive rules.[77]

Courts at all levels have stressed the importance of public participation in rulemaking, and as the D.C. Circuit has stated, notice and comment works: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[78] These considerations are especially pressing in the context of redefining "waters of the United States" for the purposes of the Clean Water Act, yet as described in more detail below, the agencies have utterly failed to provide the public with any meaningful opportunity for comment on the 2025 Proposed WOTUS Definition.

In the 2025 Proposed Rule Notice, the agencies unsuccessfully attempt to create the appearance of a record of extensive opportunity for public input and consultation with state, tribal, and local governments on the agencies' proposed definition of "waters of the United States." In reality, the agencies: (1) provided sparse, vague information to public and governmental stakeholders at the pre-proposal stage; (2) arbitrarily constrained the issues on which they sought stakeholder feedback and consultation; (3) have provided only sparse, vague information explaining the basis for, implementation of, and impacts of the 2025 Proposed WOTUS Definition and a host of unsupported alternative options; and (4) provided woefully inadequate time for comment on both the pre-proposal notice and the 2025 Proposed Rule Notice. The agencies' wide-ranging failures to engage the public, conduct mandatory consultations,[79] and provide the public with adequate notice and meaningful opportunity for comment violates the Clean Water Act and APA.

As Commenters explain in detail below, it is apparent that the agencies are marching toward a predetermined outcome wherein the Clean Water Act can no longer adequately protect the nation's waters against pollution and destruction. Every action the agencies have taken since March 2025 has been designed to achieve that end, including minimizing opportunities for the public and for state, tribal, and local governments to provide meaningful input that might in any way hinder or delay their misguided and unlawful scheme to thwart the objective of the Clean Water Act by narrowly defining WOTUS.

The agencies rely on their defective "stakeholder engagement" and "federalism consultations" to create the misimpression that the public and state, tribal, and local governments have had a

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[77] *See, e.g.*, *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

[78] *International Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[79] *See* Executive Order 13132 (64 FR 43255, August 10, 1999).

meaningful opportunity for input that has been considered by the agencies, and to justify the draconian and unreasonably short 45-day comment period (which the agencies knowingly timed to coincide with Thanksgiving, Christmas, New Year's Day, and other important holidays) for the 2025 Proposed Rule Notice. This is not how the APA and EPA's own public participation process is required to function.[80] To change the law, as is proposed here, the agencies must engage in substantive evaluation and careful analysis of their action, provide a reasoned explanation for it, and engage in formal rulemaking based on this information while providing the public with meaningful opportunities and adequate time for substantive input, which should include a comment period of at least 60 days.[81] With this proposed rule, the unreasonably short timeline for comment, lack of meaningful pre-proposal input opportunities,[82] and failure to provide any adequate legal or factual bases for the 2025 Proposed WOTUS Definition, all demonstrate the capriciousness and illegality of the agencies' action.

Although Commenters request that the agencies' abandon the 2025 Proposed WOTUS Definition in its entirety, if the agencies intend to proceed with this rulemaking and issue a final rule that will redefine "waters of the United States," they must, at a minimum, conduct the required consultations with state, tribal, and local governments; issue a supplemental notice that adequately explains their proposed definition, as well as the legal and technical basis for it and any alternatives they are considering; provide the public with additional, adequate time for review and comment on the proposed WOTUS definition and supporting information (90 days); and provide additional opportunities for public hearings.

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[80] The Agencies approach to this rulemaking is also inconsistent with EPA's own regulations. *See, e.g.,* 40 C.F.R. §25.3 ("Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.").

[81] *See, e.g.,* Executive Order 12866 – Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 4, 1993) (emphasis added) ("Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). ***In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.***"); *see also* Executive Order 13563, 76 Fed. Reg. at 3821-3822, § 2(b) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.")

[82] *Id.*; 40 C.F.R. §25.3.

A. The Agencies Improperly Predetermined the Outcome of this Rulemaking

On March 24, 2025, the agencies issued their notice[83] requesting recommendations on the WOTUS regulatory definition and announcing listening sessions on the issues identified in the notice to be held in April-May 2025. The March 24, 2025 Notice stated that the agencies sought "to gather recommendations on the meaning of key terms in light of *Sackett* to inform any potential future administrative actions to clarify the definition of 'waters of the United States' and to ensure transparent, efficient, and predictable implementation."[84] Despite this outreach and the listening sessions soliciting feedback on the definition, it was apparent that the outcome of this effort was predetermined and would result in the agencies proposing a new narrow WOTUS definition that would leave water across the country unprotected.

For example, EPA Administrator Zeldin's March 12, 2025 press release announcing the agencies' review of the definition is entitled "*Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule,*" and it indicated that the agencies had already decided to revise the September 2023 Definition, which had just been revised in response to the *Sackett* decision in September 2023. Specifically, EPA Administrator Zeldin announced that, in adopting the current definition, "EPA has failed to follow the law and implement the Supreme Court's clear holding in *Sackett*," and that this definition "placed unfair burdens on the American people and drove up the cost of doing business."[85] Administrator Zeldin also stated that "[t]he agencies will move quickly to ensure that a revised definition follows the law, reduces red-tape, cuts overall permitting costs, and lowers the cost of doing business in communities across the country while protecting the nation's navigable waters from pollution."[86]

The agencies also created a slide show presentation for the Listening Sessions that included a slide with the heading "*Revising the Definition Once And for All*" that explained the agencies goals for their revised definition, none of which was associated with restoring and protecting the nation's waters.[87] The same slide demonstrating the agencies had already reached a decision was also used in the agencies' "Kick Off" presentation for their Federalism Consultations in April of 2025, prior to consulting with state, tribal, and local governments and more than six months before the

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[83] WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, Dkt. ID EPA–HQ–OW–2025–0093, 90 Fed. Reg. 13428 (Mar. 24, 2025) ("March 24, 2025 Notice").

[84] March 24, 2025 Notice, 90 Fed. Reg. at 13429.

[85] *Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule*, EPA (Mar. 12, 2025), https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule ("March 12, 2025 Press Release"). (Attachment 12)

[86] *Id*.

[87] *See, e.g.*, U.S. EPA and Corps, "Waters of The United States" Listening Session for Environmental and Conservation Stakeholders, at 13 (May 1, 2025), Dkt. ID No. EPA-HQ-OW-2025-0322-0121_attachment_4, at 13 ("*Listening Session Presentation*").

agencies initiated this rulemaking process.[88] Although it is apparent that the agencies had already made their decision, the agencies did not disclose the substance of the decision, which we now know includes narrowing nearly every category of protected waters in the September 2023 Definition. Instead, the agencies consulted governments and engaged the public by asking for feedback only on specific questions related to three discrete topics.[89]

B. The Agencies Did Not Provide the Public with a Meaningful Opportunity for Comment

The agencies have provided the public with only two inadequate opportunities for public comment. The first, a March 24, 2025 Notice, provided only 30 days for "stakeholder feedback" on a series of broad questions related to three topics that were vaguely described in a four-page notice.[90] The March 24, 2025 Notice specifically sought perspectives from stakeholders on jurisdictional scope and specific technical questions regarding three discrete topics associated with the September 2023 Definition—the scope of "relatively permanent waters," the scope of "continuous surface connection," and the scope of "jurisdictional ditches."[91] The agencies did not provide the public or the government with any proposed changes to the September 2023 Definition or provide adequate supporting information or analysis of the issues or questions in their March 24, 2025 Notice.

The second public comment opportunity, this 2025 Proposed Rule Notice provided only 45 days to review and comment on a wide range of previously undisclosed legal theories, regulatory interpretations, and amendments to the WOTUS definition in a 49-page Federal Register notice and 123 supporting documents, including a 107-page Regulatory Impact Analysis,[92] a 23-page Federalism Consultation Summary, a 19-page Tribal Consultation Summary, and a 14-page Pre-Proposal Listening Session Summary. The proposed changes to the September 2023 Definition in the 2025 Proposed Rule Notice had not been previously disclosed to the public and many of the changes were not even hinted at in the March 24, 2025 Notice, including the elimination of protections for interstate waters, the expansion of the Waste Treatment System Exclusion, the expansion of the Prior Converted Cropland Exclusion, and the exclusion of groundwater.

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[88] *See, e.g.*, U.S. EPA and Corps, "Waters of The United States" Federalism Kick-off Meeting, at 13 (April 3, 2025), EPA-HQ-OW-2025-0322-0122_attachment_1 ("*Federalism Presentation*").

[89] *See, e.g.*, March 24, 2025 Notice, 90 Fed. Reg. at 13430-31; Listening Session Presentation, at 15; Federalism Presentation, at 14.

[90] March 24, 2025 Notice, 90 Fed. Reg. at 13428, 13430-431.

[91] March 24, 2025 Notice, 90 Fed. Reg. at 13430-31, Listening Session Presentation at 15.

[92] U.S. EPA and Corps, *Regulatory Impact Analysis for the Proposed Updated Definition of Waters of the United States Rule,* (Nov. 2025), Dkt. ID. No. EPA-HQ-OW-2025-0322-0120 ("*RIA*").

The 2025 Proposed Rule Notice also proposes to limit jurisdiction based on vaguely described concepts not included in the March 24, 2025 Notice, such as the "wet season," that are not fully developed by the agencies, as well as a host of potential alternative definitions and jurisdictional limitations that the agencies may adopt in a final rule redefining WOTUS. In addition, the 2025 Proposed Rule Notice contains a large number of "implementation" questions regarding unresolved issues central to the agencies' interpretation and application of their proposed WOTUS definition that will also impact the final rule. Additionally, the agencies indicate that they may alter the scope of longstanding, settled protections for traditional navigable waters in some unspecified manner through the preamble in the final rule or some other manner.[93]

The agencies generated a wholly inadequate assessment of the impacts of the 2025 Proposed WOTUS Definition and the large number of alternatives and implementation approaches they may rely on in adopting the final rule redefining WOTUS. For example, the RIA for the 2025 Proposed WOTUS Definition does not provide the public with information necessary to understand the proposed rule's impacts on the nation's waters and Clean Water Act programs, and it does not include a meaningful assessment of the impacts, cost, and benefits of the proposed rule.[94] The agencies acknowledge the many "uncertainties and limitations of the existing data described in this document" and express their intention to improve their analysis of the proposed rule and meet "gold standard" scientific standards at some later time through "further analysis, potential identification of additional data and methods described in this document, and public input."[95]

In sum, the agencies provided the public with a grossly inadequate amount of time to comment on a large number of lengthy documents, which despite their length, provide inadequate descriptions of the proposed definition, the agencies' bases for that definition, the alternative definitions, implementation questions, and other unresolved potential changes to the definition that are under consideration by the agencies. The agencies also failed to provide a meaningful assessment of how the proposed and potential changes to the WOTUS definition will impact the nation's waters and Clean Water Act regulatory programs. The agencies' inability or unwillingness to provide this key information about such significant proposed and alternative regulatory changes to the nation's primary water pollution control law ensures that, contrary to the APA, the public is denied a meaningful opportunity to comment on the 2025 Proposed Rule Notice, including the proposed WOTUS definition, alternatives, and its supporting information.

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[93] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52515-516 ("This proposal does not propose to change the scope of paragraph (a)(1)(i), addressing traditional navigable waters. However, the agencies are considering whether clarifications to the scope of that provision may be warranted in the final rule preamble or in a separate administrative action.").

[94] *See, e.g.,* Section VI.D., *infra*.

[95] RIA, at 2.

C. The Agencies Failed to Engage in Required Governmental Consultations

From the beginning, it has been apparent that the agencies were only seeking input in a perfunctory manner that was actually designed to limit meaningful input from the state, tribal, and local governments on their predetermined outcome. The agencies did so by submitting only three discrete topics for consideration during the consultation process—certain questions related to the scope of "relatively permanent waters," the scope of "continuous surface connection," and the scope of "jurisdictional ditches"—and by providing a very limited time for the consultation process. In a matter of weeks after receiving a large number of comments from these governments, they announced their decision to proceed with a proposed rule redefining WOTUS to achieve the agencies' current policy goals.

The agencies have determined "that this proposed rule may have federalism implications but believe that the requirements of the Executive Order will be satisfied, in any event."[96] When the agencies are "undertaking to formulate and implement policies that have federalism implications, agencies shall . . . where national standards are required by Federal statutes, consult with appropriate State and local officials in developing those standards."[97] "To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, unless: (1) funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government; or (2) the agency, prior to the formal promulgation of the regulation, (A) consulted with State and local officials early in the process of developing the proposed regulation."[98] Additionally, "[t]o the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation, . . . consulted with State and local officials early in the process of developing the proposed regulation . . . ."[99] EPA has interpreted Executive Order 13132 to require "meaningful and timely" consultation that should begin as early as possible and continue as the proposed rule is developed, including letting states and local governments know if the agencies' approach changes and why it changed.[100]

The agencies also determined that the proposed action may have Tribal implications, but inexplicably determined that "it will neither impose substantial direct compliance costs on

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[96] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52544.

[97] Executive Order 13132, 64 Fed. Reg. 43255, § 3(d)(4) (Aug. 10, 1999).

[98] *Id*. at § 6(b).

[99] *Id*. at § 6(c)(1).

[100] EPA, EPA's Action Development Process: Guidance on Executive Order 13132: Federalism, at 9 (Nov. 2008), available at: https://downloads.regulations.gov/EPA-HQ-OLEM-2016-0177-0030/content.pdf (Attachment 13).

federally recognized Tribal governments, nor preempt Tribal law," despite simultaneously discussing how the proposed rule would significantly impact tribal waters and how tribal waters are uniquely governed by the WOTUS definition and Clean Water Act programs.[101] The agencies noted that "[d]uring the Tribal consultation and engagement efforts and in Tribal consultation comments, many Tribes urged the agencies not to revise the definition and expressed concern that the proposed rule would reduce Federal jurisdiction or could adversely impact Tribal waters."[102]

According to Executive Order 13175, "[w]hen undertaking to formulate and implement policies that have tribal implications, agencies shall," among other things, "in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes."[103] It further requires that "[t]o the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless: (1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or (2) the agency, prior to the formal promulgation of the regulation, (A) consulted with tribal officials early in the process of developing the proposed regulation . . . ."[104] Additionally, "[t]o the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation, (1) consulted with tribal officials early in the process of developing the proposed regulation . . . ."[105] EPA has established extensive requirements for consultations with tribal governments to ensure "meaningful" consultation on regulatory actions and recently committed to improving and strengthening those processes.[106]

The consultation for state and local governments took place via a Kick-Off Presentation at Listening Sessions and submission of written feedback by the governments.[107] Consultation with

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[101] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52544.

[102] *Id*.

[103] Executive Order 13175, 65 Fed. Reg. 67249, § 3(c)(3) (Nov. 9, 2000).

[104] *Id*. at § 5(b).

[105] *Id*. at § 5(c).

[106] *See* U.S. EPA, *U.S. Environmental Protection Agency Plan for Implementing the Policies and Directives of Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*, available at: https://www.epa.gov/system/files/documents/2021-08/epa-plan-to-implement-eo-13175.pdf (Attachment 14).

[107] Federalism Presentation, at 14; EPA and Corps, *Summary Report of Federalism Consultation and Engagement for the Proposed Updated Definition of "Waters of The United States" Rule* at 3 (Nov. 2025) ("Summary of Federalism Consultation"), Dkt. ID No. EPA-HQ-OW-2025-0322-0122 (the lone exception was a briefing for the National Association of State Departments of Agriculture and their members where "when possible, the agencies provided responses to the clarifying questions posed during the meetings.").

state and local governments was initiated on April 3, 2025, and ended on June 2, 2025, allowing only 60 days for the consultation on this significant rulemaking.[108] The time allotted for the consultation process with tribal governments was slightly better but still inadequate. It was initiated via letter on March 21, 2025, leading to a Kick-Off presentation on March 31, 2025, and a Listening Session on April 30, 2025.[109] The consultation process ended on May 20, 2025, although the agencies accepted requests for consultation and comment letters after that time.[110]

Additionally, the agencies did not consult with state, tribal, and local governments regarding any potential amendments to the September 2023 Definition the agency was planning to propose or the text of the 2025 Proposed Definition that the agencies actually proposed in November 2025.[111] The first time the agencies released text of a proposed definition or any supporting analysis for it was in the 2025 Proposed Rule Notice. As the agencies stated in their *Summary of Federalism Consultation*, the agencies only consulted "with State and local governments to solicit their pre-proposal comments on what they thought a revised definition of 'waters of the United States' should entail **related to key topics,**" which they identified as (1) the scope of "relatively permanent waters" and to what features this phrase applies, (2) the scope of "continuous surface connection" and to which features this phrase applies, and (3) The scope of jurisdictional ditches.[112] The agencies also consulted with the tribal governments only on those same limited topics.[113] As noted previously, these topics do not encompass most of the issues, proposed rule amendments, alternative proposals, and implementation issues included in in the 2025 Proposed Rule Notice.

Consistent with the obvious reality that the outcome was predetermined, on June 17, 2025, roughly two weeks after the deadline for governments to submit their views during the consultation process, EPA Administrator Zeldin issued a press release announcing that "EPA and Army intend to issue a proposed rule in the coming months that will prioritize clear interpretation and implementation of the law, reducing red-tape, cutting overall permitting costs, and lowering the cost of doing business in communities across the country while protecting the nation's waters from

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[108] Federalism Presentation at 1, 16; Summary of Federalism Consultation at 2.

[109] *See, e.g.*, U.S. EPA and Corps, *Summary Report of Tribal Consultation and Engagement for the Proposed Updated Definition of "Waters of The United States" Rule*, (Nov. 2025) at 3-4, Dkt. ID No. EPA-HQ-OW-2025-0322-0123 ("Summary of Tribal Consultation") (The agencies also "convened eight one-on-one consultation meetings with individual Tribal governments and presented at the National Tribal Water Council Spring meeting and the National Tribal Caucus Monthly meeting.")

[110] *Id*.

[111] *See, e.g.*, Summary of Federalism Consultation, at 4; Summary of Tribal Consultation, at 5.

[112] *Id*. (emphasis added).

[113] Summary of Tribal Consultation at 3.

pollution."[114] The agencies received responsive letters or other communications from 47 state government agencies and state Associations, 26 letters representing 380 tribal governments, eight tribal consultations, and 51 local government agencies and local government associations. It is impossible for the agencies to reasonably review and consider all of those state, tribal, and local government comment letters, let alone follow up with the governments to consult regarding their views and concerns and reach a final decision about amendments to a significant rule like the WOTUS definition—all in a span of roughly two weeks.

VI. The Agencies Provided an Inadequate Legal Basis for the 2025 Proposed WOTUS Definition

In service of their mission to create a post-hoc legal justification for protecting the fewest waters possible, the agencies are attempting to rewrite the meaning and purpose of the Clean Water Act, as well as the history of our nation's water pollution control laws over the last century. Although it is well-settled that the Clean Water Act is a comprehensive regulatory statute for the nation's waters under which cooperative federalism was employed by Congress to balance state and federal interests,[115] the agencies have reimagined it as one where only a subset of the nation's waters – "waters of United States" – are regulated, and in which Congress empowered the agencies to make policy choices ostensibly to achieve the proper balance of federal and state interests for that subset.

In order to reach that position, the agencies ignore, disregard, misinterpret, or misrepresent the plain text of the Clean Water Act, legislative history, Supreme Court and lower court precedent, and their own longstanding legal interpretations that together powerfully demonstrate Congress' intention to establish "***an all- encompassing program of water pollution regulation***" that "applies to all point sources and ***virtually all bodies of water***."[116] Instead, the agencies appear to have only considered the portions of the Clean Water Act, legislative history and case law that could be used to support their predetermined outcome of adopting a narrow definition of "waters of the United States" and, thus, eliminate CWA protections for waters across the country.

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[114] EPA, *EPA and Army Wrap Up Initial Listening Sessions, Move Toward Proposal to Revise 2023 Definition of WOTUS* (June 17, 2025), https://www.epa.gov/newsreleases/epa-and-army-wrap-initial-listening-sessions-move-toward-proposal-revise-2023.

[115] See e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 289 and n. 30 (1981) ("The Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs . . . In this respect, the Act resembles a number of other federal statutes . . . [including the Clean Water Act]) (internal citations omitted); *New York v. United States*, 505 U.S. 144, 167 (1992) ("Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation . . . This arrangement, which has been termed 'a program of cooperative federalism,'. . . is replicated in numerous federal statutory schemes. These include the Clean Water Act . . . .") (internal citations omitted).

[116] *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

The previous longstanding views of the agencies, and the positions of other interested parties, were not meaningfully considered by the agencies in the development of the 2025 Proposed WOTUS Definition. It is extremely concerning that the agencies are willing to employ such obvious artifices to attempt to justify this capriciously narrow, arbitrary, and hopelessly vague definition of "waters of the United States" that is intentionally designed to undermine the effectiveness of the Clean Water Act. It is not legally permissible for the agencies to manufacture a new interpretation of the more than 50-year-old Clean Water Act in pursuit of extraneous policy goals that are contrary to the Congressional objective, goals, policies, and requirements of the Act.

The agencies identify numerous, divergent bases for the proposed rule, none of which accurately describe the agencies approach or provide an adequate legal basis for the proposed rule. For example, the agencies state that the "fundamental basis for this proposed revised definition is the text, structure, and history of the Clean Water Act and Supreme Court precedent, **taking into account other relevant factors**."[117] In another part of the notice, the agencies state they are "implementing the *Sackett* decision."[118] The agencies also claim that the proposed rule is "intended to adhere faithfully to the Supreme Court's direction, respect the Act's careful balance between Federal authority and State responsibilities over waters, and carry out Congress' overall objectives to restore and maintain the integrity of the Nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources pursuant to the cooperative federalism framework predicated by the Act."[119] The agencies also state that the proposed rule is intended to "ensure clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public," and that it is "ultimately" to "ensure that the agencies are operating within the scope of the Federal Government's authority over navigable waters under the Clean Water Act and the Commerce Clause of the U.S. Constitution."[120]

The regulatory definition of WOTUS must be consistent with all relevant legal precedent, the objective of the Clean Water Act, the text and legislative history of the Act.[121] In fact, the object of the agencies' rulemaking must be "to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve."[122] The agencies proposed revisions to the definition must maintain that consistency considering evidence of the specific impacts of the proposed amendments on the physical, chemical, and biological integrity of the

[117] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52499 (emphasis added).

[118] *Id.* at 52500.

[119] *Id.* at 52499.

[120] *Id.*

[121] *See, e.g.*, *County of Maui,* 590 U.S. at 183 (2020) (interpreting the Clean Water Act "in light of the statute's language, structure, and purposes . . . . ").

[122] Cf., *id*. at 184 (Finding that the EPA must ensure consistency "with the statute's language, the statutory purposes that Congress sought to achieve" when making functional equivalent determinations under the Clean Water Act.").

nation's waters and Clean Water Act's statutory goals, requirements, and programs.[123] As the agencies recently acknowledged, "[t]wo recent Supreme Court Clean Water Act decisions, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) ("*Maui*") and *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018) ("National Association of Manufacturers"), affirm that Congress used specific language in the definitions of the Act in order to meet the objective of the Act, that the definition of 'waters of the United States' is fundamental to meeting the objective of the Act, and, therefore, that the objective of the Act must be considered in interpreting the term 'waters of the United States.'"[124]

In the 2025 Proposed Rule Notice and supporting documents, the agencies were also required to demonstrate that their revised definition is consistent with the "single, best" meaning of the Clean Water Act and that they have engaged in "reasoned decision making."[125] Additionally, the agencies must act within the scope of their statutory authority, avoid arbitrary and capricious decision making, fully consider all important aspects of their actions, and eschew pursuit of policy objectives that are counter to the objective, goals, and text of the Clean Water Act.[126] The agencies must give adequate reasons for their decisions and, after examining the relevant data, they must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[127] Where, as here, agencies are attempting to completely reverse course, dramatically alter the scope of the Clean Water Act, and disregard their own longstanding findings and interpretations in a rule of national significance, the APA requires agencies to "show that there are good reasons" for revising the WOTUS regulatory definition in the manner proposed

[123] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*") ("Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (citations omitted); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68, (1962) ('The Commission must exercise its discretion under s 207(a) within the bounds expressed by the standard of [the statute] . . . And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence.") (citations omitted).

[124] 2021 Proposed Rule, 86 Fed. Reg. at 69387.

[125] *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 371, 400 (2024) ("Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning.").

[126] *See, e.g.*, *State Farm* 463 U.S. at 43 44, 46, 59 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

[127] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *State Farm*, 462 U.S. at 43).

by the agencies and to provide a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" the agencies' prior determinations.[128]

As detailed throughout these comments, the agencies have utterly failed to meet these requirements in the 2025 Proposed Rule Notice, most fundamentally, by advancing unsupportable interpretations of the Clean Water Act and impermissible policies as support for the proposed rule, but also by failing to adequately explain how any of their new legal theories and policies such as cutting "red tape" are related to or support the choices the agencies made in redefining WOTUS. The agencies' failure to carefully evaluate and follow the text of the Clean Water Act, all relevant legal precedent, and legislative history in the development of the proposed rule is contrary to law. The agencies do not possess unbridled discretion to pick and choose the portions of the law they prefer in furtherance of agency policy choices and other relevant factors, and completely ignore the parts of the law that don't suit their purposes (including shrugging off the bedrock "objective" of the Act), as they attempt to do here. The agencies have also proposed a host of potential, vaguely described alternative amendments to the WOTUS definition, as well as a wide range of undeveloped potential implementation methods, that they may adopt in a final rule redefining WOTUS, but the agencies have not provided meaningful legal or factual bases supporting and explaining them, have not demonstrated that they are consistent with the Clean Water Act, and have not assessed their impacts, costs, or benefits.

Additionally, although they claim that the proposed rule is intended to "carry out Congress' overall objective to restore and maintain the integrity of the nation's waters,"[129] the agencies also state that they are defining WOTUS without consideration of the impacts that their definition will have on the nation's waters based on a misreading of language in *Sackett v. EPA*.[130] Contrary to the agencies' interpretation of *Sackett*, the Court did not direct or empower the agencies to adopt a WOTUS definition without regard to whether it is consistent with Congress' objective for the Clean Water Act. The agencies' refusal to consider how their proposed WOTUS definition will impact the nation's waters—i.e., whether it will restore and maintain the nation's water or degrade and destroy the nation's waters—amounts to a failure to ensure that the definition is consistent with the text of the Clean Water Act and will carry out Congress' overall objective for the Act.

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[128] *See FCC v. Fox Television Stations, Inc.* 556 U.S.502, 516 (2009) ("*Fox*"); *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981–982 (2005).

[129] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52499.

[130] *Id.* at 52501 ("The agencies now recognize that, as the Supreme Court explained in *Sackett*, 'the CWA does not define the EPA's jurisdiction based on ecological importance' or similar impacts. 598 U.S. at 683. Rather, the impacts of faithfully implementing the statute's jurisdictional reach are a result of 'the Act's allocation of authority' between the Federal Government and the States, and States, Tribes, and localities 'can and will continue to exercise their primary authority to combat water pollution by regulating land and water use.' *Id.* The agencies seek comment on the view that impacts are not an appropriate decisional basis in implementing the Act's jurisdictional scope and, if so, on what basis and to what extent the agencies may consider such impacts.")

The agencies did not generate and examine the relevant data about the impacts of the proposed rule; provide a rational connection between the available evidence, the facts found by the agencies, and the choices made in the proposed rule; provide a reasoned explanation for the proposed rule; and demonstrate that there are good reasons for revising the WOTUS definition in the manner they have proposed. Moreover, the agencies did not meaningfully assess the costs and benefits of the proposed rule, indicating that they would undertake a more substantial evaluation for the final rule and, thereby, denying the public any opportunity to review and comment on it.

The 2025 Proposed WOTUS Definition will have significant impacts on dischargers, the broader regulated community, the public, the states, and tribal governments because it represents an extreme departure from the agencies', the courts', and the states' understanding of the scope of federal jurisdiction over waters under the Clean Water Act. For example, it will determine which point source water pollutant discharges require a National Pollutant Discharge Elimination System ("NPDES") permit under Clean Water Act Section 402,[131] which bodies of water may be destroyed through dredging or filling without a permit issued under Section 404,[132] and whether citizens or the EPA can bring an enforcement action to address unpermitted pollutant discharges to a particular water.[133]

The 2025 Proposed WOTUS Definition will necessarily and dramatically alter Clean Water Act jurisdiction by directly reducing jurisdiction over nearly every category of waters currently protected under September 2023 Definition, yet the agencies claim that they cannot adequately assess the impacts of the 2025 Proposed WOTUS Definition on the nation's waters and Clean Water Act programs, and the agencies have not even attempted to assess the impacts of the array of conflicting alternative definitional options and implementation approaches that are speckled throughout the 2025 Proposed Rule Notice.[134] Commenters submit that this is due, in part, to the fact that the agencies have failed to seek meaningful input and consultation and, in separate part, due to the fact that the proposed definition is not based on the law or sound science.[135] However, as shown below, information and data is available to assess the impacts of the proposed rule but the agencies simply chose not to meaningfully evaluate it. Whatever the explanation for the agencies' failures, the result is an arbitrary and capricious agency action that exceeds the agencies'

[131] 33 U.S.C. §1342.

[132] 33 U.S.C. §1344.

[133] *See, e.g.*, 33 U.S.C. §§1319, 1365.

[134] *See, e.g.,* Section VI.D. *infra*.

[135] *See, e.g.,* Sections V, *supra* and VII, infra.

statutory authority[136] by excluding waters from protection contrary to the APA, Clean Water Act, and other federal laws.

In sum, the 2025 Proposed WOTUS Definition exceeds the agencies' statutory authority and is arbitrary, capricious, an abuse of discretion, and contrary to law.[137] The breadth of the Clean Water Act is confirmed by: (1) the history of the legislative acts that preceded, and formed the basis of, the CWA, (2) more than four decades of judicial precedent confirming it, and (3) the longstanding federal and state regulations, programs, permits, standards, and enforcement actions implementing it. The agencies' failure to consider all of this is arbitrary, capricious and contrary to law. There is a plethora of precedent, including Supreme Court opinions, confirming the intended breadth of the phrase "waters of the United States," and consistently applying the agencies' long-standing interpretation of that phrase. However, not a single court has interpreted "waters of the United States" in a manner consistent with the narrow interpretation that the agencies proffer in the 2025 Proposed Rule Notice.

A. The 2025 Proposed WOTUS Definition is Contrary to the Clean Water Act's Statutory Objective and Text

Prior to the enactment of the Clean Water Act, both navigable waters and their non-navigable tributaries were believed to be well within the Commerce Clause powers of the federal government under traditional tests of navigability.[138] As the agencies have previously recognized,[139] interstate waters have been protected under the nation's water quality laws since the 1948 Federal Water Pollution Control Act and subsequent iterations of that law,[140] including under the 1972 Clean Water Act since its inception more than 50 years ago.[141] With the 1972 Amendments, Congress

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[136] *Cf. NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (striking down an EPA rule that attempted to exempt certain categories of point sources from the permit requirements of Clean Water Act section 402 where contrary Congressional intent was clear).

[137] 5 U.S.C. § 706(2).

[138] The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to navigable waters and "into any tributary of any navigable water from which the same shall float or be washed into such navigable water..." 33 U.S.C. § 407.

[139] *See, e.g.*, 2021 Proposed Definition, 86 Fed. Reg at 69417 ("The 1948 Water Pollution Control Act declared that the 'pollution of interstate waters' and their tributaries is 'a public nuisance and subject to abatement.' 33 U.S.C. 466a(d)(1) (1952) (codifying Pub. L. 80– 845 section 2(d)(1), 62 Stat. 1156 (1948)). Interstate waters were defined without reference to navigability: 'all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.' 33 U.S.C. 466i(e) (1952) (codifying Pub. L. 80–845 section 10(e), 62 Stat. 1161 (1948))."); TSD for 2021 Proposed Rule, at 11-25, *infra*. n. 393.

[140] Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 2(d)(1), (4), 62 Stat. 1156-57.

[141] *See, e.g.,* 33 U.S.C § 1313. The only exception to this continuous inclusion is the brief period after the agencies unsuccessfully attempted to eliminate the interstate waters category in the NWPR. In the NWPR, the agencies provided no valid legal or scientific basis for removing interstate waters from Clean Water Act. Compare NWPR, 85

intended to expand coverage under the Clean Water Act beyond interstate waters, traditional navigable waters and their tributaries, and did not premise such expansion of jurisdiction on the extent to which waters were connected to traditional navigable waters. To the contrary, Congress intended to repudiate the traditional navigability tests and limitations on federal authority, and to instead utilize the full authority of the federal government to regulate water pollution under the Commerce Clause.

Congress deliberately redefined previous definitions of "navigable waters" to encompass "waters of the United States" when it passed the 1972 amendments to the Federal Water Pollution Control Act. Both the House and Senate versions of the bills to amend the Federal Water Pollution Control Act ("FWPCA") were written to expand federal authority to control and ultimately eliminate discharges of water pollution across the country.[142] Both the House and Senate sought to radically restructure the nation's federal authority to control water pollution even though their bills borrowed some language from earlier versions of federal water pollution control law, as well as from the Refuse Act ("RA") and the Rivers and Harbors Act ("RHA"). In their respective bills, both bodies initially borrowed the term "navigable waters" from the RA and RHA, and included a definition that itself used the term "navigable."[143] However, in the reports discussing their respective versions of the legislation, both the House and Senate expressed concern about potential narrow interpretations of which waters they intended to be covered by the new Act.

The House Public Works Committee stated its concern as follows:

> One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.[144]

Fed. Reg. at 22282-283 with Repeal Rule, 84 Fed. Reg. at 56669–670 (reinstating 1986 definition, including interstate waters); National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13529 (May 22, 1973) (EPA's first "navigable waters" definition, including interstate waters).

[142] H.R. 11896, 92nd Cong. (1971); S. 2770 92nd Cong (1971).

[143] In the Senate, the earlier definition read "the term navigable waters means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. S. 2770, 92nd Cong. § 502(h) (1971), Reprinted in Legislative History, Committee on Public Works, Committee Print, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 1698 (hereinafter "1972 Legislative History") (hereinafter "1972 Legislative History"). The House bill's initial definition read, "The term 'navigable waters' means the navigable waters of the United States, including the territorial seas." H.R. 11896, 92nd Cong. § 502(8) (1971), 1972 Legislative History at 1069.

[144] H.R. Rep. No. 92-911 at 131 (1972), 1972 Legislative History at 818.

The Senate Committee on Public Works stated:

> Through **a narrow interpretation of the definition of interstate waters** the implementation of 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source.[145]

So while the House Report focused upon the need for a broad constitutional interpretation of the Act's scope, and the Senate Report spoke to need for broad protection of interstate waters, the scientific reality of waters being interconnected, and the need for broad protections to control pollution at its source, both bodies signaled their desire not to constrain the reach of the Act to those waters previously protected primarily on the grounds of navigability.

When the House and Senate met in Conference Committee, they took an additional step to ensure that the definition of "navigable waters" did not result in unduly narrow interpretations. As discussed in the report of the Conference Committee, the House version of the definition was accepted into the final bill, but **the word "navigable" was deleted from the definition**.[146] Thus, the new definition read as follows: "The term 'navigable waters' means the waters of the United States, including the territorial seas."[147]

The Conference report spoke to this change, using the exact terminology of the earlier House Public Works Committee report confirming that the term "be given the broadest possible constitutional interpretation," and expressing that the interpretation of this definition must be "unencumbered by agency determinations which have been made or may be made for administrative purposes."[148]

The debate in Congress on final passage of the Act confirmed the conference report's intent that the law be given broad application. For example, when Representative John Dingell presented the Conference version of the bill to the House of Representatives, he explained that in defining "navigable waters" broadly for the purposes of the CWA as "waters of the United States, including the territorial seas" as follows:

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[145] S. Rep No. 92-414 at 77 (1971) 1972 Legislative History at 1495 (emphasis added).

[146] The definition of "navigable water" in an earlier version of the bill that became the Federal Water Pollution Control Act of 1972 had made express reference to "navigability." 211 80 Stat. 1253.

[147] S. Rep. No. 92-1236 at 144 (1971) 1972 Legislative History at 327. The agencies claim that the "Court has also used the phrase 'waters of the United States" in this context for centuries," 2025 Proposed Rule Notice, at 52506, but the Court in *Sackett* noted that "waters of the United States" "was decidedly not a well-known term of art" at the time of the 1972 Amendments. *Sackett*, 598 U.S. at 671.

[148] S. Rep. No. 92-1236 at 144 (1971) 1972 Legislative History at 327.

> The Conference bill defined the term 'navigable waters' broadly for water quality purposes. It means 'all the waters of the United States' in a geographic sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws…. Thus, **this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes**. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.[149]

Indeed, the Conference Report states: "[t]he conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[150]

Thus, it is beyond dispute that Congress intended to expand the number and nature of the waters covered by the Clean Water in order to fully protect the nation's waters—meaning all water bodies, mainstems and their tributaries, and aquatic ecosystems— as "waters of the United States" without regard to whether the waters could satisfy historic navigability tests under the Commerce Clause. Congress also intended to prohibit agency determinations that narrow the broad scope of waters protected by the Clean Water Act.[151] Accordingly, Congress defined "navigable waters" broadly as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

Consistent with this intention, Congress designed the Clean Water Act to achieve a singular objective—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[152] The national goal of the Clean Water Act is the elimination of discharges of pollutants into "waters of the United States," with the interim goal of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."[153] "To do this, the [Clean Water Act] does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally, see § 1251(b), which Congress defined to mean 'the man-made or man-induced alteration of the **chemical, physical, biological, and radiological integrity of water**,' § 1362(19)."[154]

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[149] 118 Cong. Rec. 33, 756-57 (Oct. 4, 1972); 1972 Legislative History at 250-51 (emphasis added).

[150] *Id.*

[151] *See, e.g.*, Conference Report, Senate Report No. 92-1236, Sept. 28, 1972 at 144, U.S. Code Cong. & Admin. News 1972, p. 3822; Legislative History, at 327 (emphasis added); *see also NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); 39 Fed. Reg. 12119 (April 3, 1974).

[152] *PUD No. 1 of Jefferson County*, 511 U.S. at 704 (quoting 33 U.S.C. § 1251(a)).

[153] 33 U.S.C. § 1251(a)(1)-(2).

[154] *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 385 (2006) (emphasis added).

The Act accomplishes its objective and goals in carefully constructed and interconnected ways, including through the establishment of permitting programs and water quality standards for navigable waters, interstate waters, and intrastate waters. This includes waters specifically referenced in the text of the Clean Water Act, such as navigable waters, interstate waters, state boundary waters, intrastate waters, wetlands, streams, rivers, lakes and other surface waters, territorial seas, coastal waters, sounds, estuarian waters, tributaries, and bays.[155]

For example, Clean Water Act Section 301(a)[156] prohibits the discharge of any pollutant by any person, unless such discharge complies with the terms of any applicable permits and with Clean Water Act Sections 301, 302, 306, 307, 318, 402, and 404.[157] "Discharge of a pollutant" means "any addition of any pollutant to navigable waters [i.e. "waters of the United States"] from any point source."[158] Clean Water Act Section 402[159] establishes the statutory permitting framework for regulating pollutant discharges under the NPDES program. Clean Water Act Section 404[160] establishes the permitting framework for regulating the discharge of dredged or fill material into "waters of the United States." Clean Water Act section 401[161] establishes a program for states to provide water quality certifications for federal licenses.

Consistent with the objective and text of the Clean Water Act, the WOTUS definition must include broad categories of waters to ensure that section 303 water quality standards "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter" and can be designed for the "protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water" in the nation's waters as intended by Congress.[162]

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[155] 33 U.S.C. § 1362(7); *see, e.g.*, *City of Milwaukee II*, 451 U.S. at 318-19; 33 U.S.C. § 1313 (applying water quality standard to "interstate waters," "intrastate waters," "navigable waters" and simply "waters."); *Sackett*, 598 U.S. at 672-72; 33 U.S.C. § 1252(c)(3) ("rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes"); Hines History of the CWA, *infra.* at n. 209.

[156] 33 U.S.C. § 1311(a).

[157] 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, 1344.

[158] 33 U.S.C. § 1362(12).

[159] 33 U.S.C. § 1342

[160] 33 U.S.C. § 1344

[161] 33 U.S.C. §1341.

[162] *See, e.g.*, 33 U.S.C. § 1312(a) and 1313(c)(2)(A) ("Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation").

1. The Nation's Waters are "Waters of the United States"

This rulemaking is based on the wholly novel and erroneous premise that the "nation's waters" has a different meaning than "waters of the United States" first conceived of as the basis for the vacated NWPR.[163] Under the agencies' contrived view, the Clean Water Act has an undefined set of provisions the agencies deem a "non-regulatory framework to provide technical and financial assistance to states" that apply to the "nation's waters" defined broadly, and a separate, unidentified, set of "regulatory" provisions that only apply to a "subset" of the nation's waters—the "waters of the United States" defined narrowly.[164] The agencies' legal basis for their proposed rule narrowly defining WOTUS is based, in large part, on this flawed interpretation and characterization of the Clean Water Act.

Despite an utter dearth of precedent for this view of the Clean Water Act, or any analysis of the extensive precedent to the contrary,[165] the agencies thus proceed to: (1) create a new undefined category of waters called the "nation's waters," (2) decree that some undefined "non-regulatory" portions of the Clean Water Act apply to the "nation's waters," (3) create a new definition of "waters of the United States" that is narrower than the "nation's waters" and does not include many currently jurisdictional waters, and (4) decree that some undefined "regulatory programs" only apply to this new narrow definition of "waters of the United States."[166] No court or administration, excluding this and the prior Trump administration, ever interpreted the Clean Water Act in this manner, and there is no support for it in the text of the Act, case law or its legislative history. This interpretation, and the resulting proposed definition, are arbitrary, capricious, and plainly contrary to law.

The agencies err in relying on *S.D. Warren Co. v. Maine Bd. of Environmental Protection* as a basis for their unfounded theory that the Clean Water Act has voluntary, as well as regulatory, programs to deal with pollution of the nation's waters generally, but the Act only regulates the discharge of pollutants into a subset of the nation's waters—"navigable waters" specifically.[167] In the 2025 Proposed Rule Notice, to support this theory, the agencies cite to a partial quote from *S.D. Warren* out of context as follows: "the Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally."[168] In context, however, the full quote directly

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[163] 2025 Proposed Rule Notice, 90 Fed. Reg. 52503-52506, .

[164] *Id*.

[165] *See, e.g., City of Milwaukee II,* 451 U.S. at 310–11 ("The [Federal Water Pollution Control Act Amendments of 1972] established a **new system of regulation** under which it is **illegal for anyone to discharge pollutants into the Nation's waters** except pursuant to a permit.") (emphasis added).

[166] *See, e.g.*, 2025 Proposed Rule Notice, 90 Fed. Reg. 52502-525.

[167] 2025 Proposed Rule Notice, at 52502.

[168] *Id*.

contradicts the agency's theory distinguishing the "nation's waters" from the "waters of the United States." The Court cited the objective of the Act, as well as one its goals, and stated "[t]o do this, the Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally, see § 1251(b), which Congress defined to mean 'the man-made or man-induced alteration of the **chemical, physical, biological, and radiological integrity of water**,' § 1362(19)."[169] The language in the Court's decision about the Clean Water Act dealing with "pollution generally" relates to affirming that the Clean Water Act Section 401 "regulatory" program gives states authority to control discharges, i.e. pollution generally, through the enforcement of state laws, in addition to the Clean Water Act Section 402 "regulatory" program, which controls discharges of pollutants, i.e. the addition of pollutants.[170] Thus, neither the Act nor the Court make any distinction whatsoever between the nation's waters and the "waters of the United States." The agencies have identified the Section 401 State and Tribal Water Quality Certification section of the Clean Water Act as one of the "regulatory" programs to which they assert the WOTUS definition applies.[171]

The agencies also claim that there are "dozens of non-regulatory grant, research, nonpoint source, groundwater, and watershed planning programs" and "including *all* of the Nation's waters within the Act's Federal regulatory mechanism would call into question the need for the more holistic planning provisions of the Act and the State partnerships they entail."[172] It is unclear why the agencies believe that holistic planning provisions are not necessary to implement a broad, comprehensive statute designed to eliminate all discharges and restore the chemical, physical, and biological integrity of the nation's waters. All of the major federal environmental laws include a mix of provisions to conduct planning, monitor for and investigate pollution, set regulatory standards, prohibit conduct, require permits, provide grant funding, direct research and development, support state delegated actions, provide for cooperative partnerships, address unregulated sources, and similar provisions. The existence of these provisions in the Clean Water Act demonstrates the comprehensiveness of the law and Congress's intention that it be implemented cooperatively with state and tribal governments. Contrary to the agencies' assertion, their proposed definition does not "fully implement the entire structure of the Act while respecting the specific word choices of Congress."[173] Quite the opposite is true. The agencies' proposed WOTUS definition will make it impossible to fully implement the Act and achieve Congress' objective.

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[169] *S.D. Warren Co.*, 547 U.S. at 385 (emphasis added).

[170] *Id*. at 375-76, 380, 385, 387.

[171] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52503-504.

[172] *Id.* at 52515.

[173] *Id.*

The agencies do not identify these "dozens" of "non-regulatory" programs they believe preclude the broad protections for the Nation's waters, but they do provide seven examples. In these examples, the agencies selectively quote and mischaracterize the meaning and intent behind Clean Water Act Sections 105, 106, 108, 117, 118, 119, and 120 to provide support for the agencies' theory that Congress "crafted a non-regulatory statutory framework to provide technical and financial assistance to the States to prevent, reduce, and eliminate pollution in the Nation's waters generally."[174]

However, the cited sections do not constitute a "non-regulatory statutory framework" to support states in their independent efforts to protect water quality in the non-jurisdictional waters,—i.e. what the agencies call the Nation's waters generally. The Clean Water Act makes technical assistance and grants available to assist states and others in achieving the requirements and goals of the Act, but the grants and technical assistance are not independent non-regulatory programs, and they are not designed to target non-jurisdictional waters. For example, several of the sections referenced by the agencies are directed toward supporting pollution controls in the Great Lakes, the Chesapeake Bay, Long Island Sound, and Lake Champlain, as well as other waters and their watersheds, that are protected as "waters of the United States" under the Clean Water Act and to which "regulatory" programs apply.[175] The language in Sections 108 and 118 confirm that Congress intended "waters of the United States" to be broad enough to eliminate or control pollution "within all or any part of the watersheds of the Great Lakes," which includes "all of the streams, rivers, lakes, and other bodies of water within the drainage basin of the Great Lakes," and, among many other Clean Water Act "regulatory" activities, for EPA to "take the lead in the effort to meet [the goals of the Great Lakes Water Quality Agreement, as well as any other agreements and amendments] working with other Federal agencies and State and local authorities."[176]

Additionally, contrary to the agencies characterization of Section 106 in the 2025 Proposed Rule Notice, EPA makes Section 106[177] grants available to states and territories that "have established programs to protect and restore fresh waters, coastal waters, and wetlands as outlined in the Clean Water Act" and the grants support "implementation of these CWA programs, including:" (1) monitoring and assessment of ambient water quality, (2) developing and reviewing water quality standards, (3) developing total maximum daily loads ("TMDLs"), (4) providing NPDES permits to dischargers, (5) Overseeing and enforcing NPDES permits, (6) developing watershed and

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[174] *Id.* at 52502-504.

[175] 33 U.S.C. §§ 1258, 1267, 1268, 1269, and 1270. *See also, e.g, Sackett*, 598 U.S. at 672-73 (citing Sections 117 and 118 as examples of "waters of the United States.")

[176] 33 U.S.C. §§ 1258 and 1268.

[177] 33 U.S.C. § 1256.

groundwater plans, and (7) providing training and public information.[178] Additionally, the relation of Section 105 to Clean Water Act permitting programs is apparent in the title of its very first subsection, which is "Demonstration Projects Covering Storm Waters, Advanced Waste Treatment and Water Purification Methods, and Joint Treatment Systems for Municipal and Industrial Wastes," as well as in its multiple references to providing funding to address activities subject to Clean Water Act permitting in "any waters" "water," and "river basins or portions thereof," such as research and development grants for prevention of industrial water pollution "to carry out the purposes of Section 1311" of the Act.[179]

This section of the Act, Section 301, makes it illegal to discharge pollutants into navigable waters, i.e. "waters of the United States," except in compliance with other sections of the Act, including Sections 402 and 404, and requires, among other things, the establishment of effluent limitations that are used to control the discharge of pollutants in NPDES permits.[180] Accordingly, the fact that Section 105, in order to carry out the purposes of Section 301, establishes a mechanism for EPA to conduct and fund "research and development projects for prevention of pollution of **any waters** by industry . . . ." both confirms the breadth of "waters of the United States" and that this section is not part of some separate "non-regulatory framework" to support states' water pollution actions in non-jurisdictional waters. To the contrary, just like all of the other provisions of the Clean Water Act, Section 105 is one piece of "complex statutory and **regulatory scheme that governs our Nation's waters**, a scheme that implicates both federal and state administrative responsibilities."[181]

Since the agencies acknowledge that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" and agree that Clean Water Act Sections 105, 106, 108, 117, 118, 119, and 120 "reveal Congress' intent to restore and maintain the integrity of the Nation's waters,"[182] we urge the agencies to recognize that the context of those sections of the Act encompasses a multitude of Clean Water Act "regulatory" programs and confirms that those programs apply to the nation's waters. Given that context, it becomes indisputable that the

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[178] *See, e.g.*, EPA, Grants for State and Interstate Agencies under Section 106 of the Clean Water Act, available at: https://www.epa.gov/water-pollution-control-section-106-grants/grants-state-and-interstate-agencies-under-section-106#stateeligible. (Attachment 15).

[179] 33 U.S.C. § 1255.

[180] 33 U.S.C. § 1311.

[181] *PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 704 (emphasis added).

[182] 2025 Proposed Rule Notice, at 52503 (citing *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs*., 484 U.S. 365, 371 (1988) (''Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear[.]'') (citation omitted).).

definition of "waters of the United States" and the Nation's waters are synonymous and equally broad to achieve Congress's objective for the Clean Water Act.

The language from *Sackett v EPA* cited by the agencies[183] does not lead to a contrary conclusion—the phrase "anything defined by the presence of water" is not synonymous with the "Nation's waters." With that language, the Court was evaluating the agencies' argument that "wetlands" are "waters" under the Act because "the presence of water" is universally regarded as the most basic feature of wetlands, and the Court indicated it would be hard to conceive of a role for the states under such a broad concept of "water." However, nothing in the Act indicates Congress intended for EPA to assert jurisdiction over "the presence of water" and, as explained below, Congress intentionally designed the Clean Water Act to empower state and tribal governments to take a primary role in implementing the Act.[184] As the agencies acknowledge, the Act also empowers state and tribal governments to "retain authority implement their own programs to protect the waters in their jurisdiction more broadly and more stringently" than required by the national standards.[185] It is in these ways that states and tribes[186] maintain their primary roles in regulating water resources consistent with a broad definition of "waters of the United States."

2. Clean Water Act Section 101(b) Does Not Empower the Agencies to Narrowly Define the "Waters of the United States"

The agencies attempt to support their narrow proposed definition by claiming that it somehow "reflects the balance Congress struck between the Clean Water Act section 101(a) statutory objective". . . "and the policy in Clean Water Act section 101(b) to '"recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'" and 'to plan the development and use . . . of land and water resources.'"[187] The agencies also cite to Clean Water Act Section 510 in support of this theory. Relatedly, the agencies attempt to justify their unprecedented, narrow proposed WOTUS definition with an analysis of state and tribal government legal authorities and hollow speculation regarding their ability to simply "choose" to fill the massive gap in water quality protections for the nation's waters that will result from the proposed rule.[188] But the agencies previously acknowledged the reality that:

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[183] *Sackett*, 598 U.S. at 674 ("It is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water.").

[184] *See, e.g.*, 2025 Proposed Rule, at 52504-505.

[185] *See* 2025 Proposed Rule Notice, 90 Fed. Reg. at 52504.

[186] *See, e.g.,* 33 U.S.C. § 1377.

[187] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52514.

[188] *See, e.g.*, RIA, at 32-40, *see also* 2025 Proposed Rule Notice, 90 Fed. Reg. at 52515 ("States and Tribes have authority to regulate waters that do not meet the proposed rule's definition of "waters of the United States" as they deem appropriate.")

> Given the limited authority of many Tribes and States to regulate waters more broadly than the federal government, a narrowing of federal jurisdiction would mean that discharges into the newly non-jurisdictional waters would no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation's waters.[189]

The agencies have also noted that "[e]ven if a tribe has the legal authority to regulate 'waters of the tribe' more broadly than the federal government, the agencies have heard from many tribes that they lack the resources and expertise to do so as a practical matter, and therefore rely on Clean Water Act protections."[190]

A narrow WOTUS definition undermines state and tribal authorities and tools that can be used to protect their waters under the Clean Water Act. Putting aside the fact that the agencies know that state and tribal governments depend on the Clean Water Act for the protection of their water resources and cannot adequately protect them in the absence of the Act,[191] the existence of state or tribal laws that protect water quality does not provide a valid legal basis for narrowly defining WOTUS to eliminate federal Clean Water Act protections and, in any event, the agencies do not know if or how states and tribes regulate water quality under their own laws and regulations.[192] Given this, it is clear the agencies are not truly attempting to achieve the objective of the Clean Water Act by achieving some kind of balance between state and federal authorities.

Additionally, contrary to the agencies' theory, Congress did not balance the objective of the Clean Water Act with the policy statements in Sections 101(b) and 510, and Congress did not intend for those sections to limit the jurisdictional scope of the Act via a narrow regulatory definition of WOTUS adopted by the agencies. The Supreme Court has made clear on numerous occasions that Congress established that balance of state and federal power over water pollution when it enacted the Clean Water Act and established broad jurisdiction over the Nation's waters, i.e., "virtually all

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[189] TSD for January 2023 Definition, *supra* n. 51, at 108.

[190] *Id*. at n. 29.

[191] *See, e.g*., RIA at 32-40; January 2023 Definition, 88 Fed. Reg. at 3065-66; Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 44-50, Dkt. ID No. EPA-HQ-OW-2025-0322-0110; Summary of Tribal Consultation and Attchs.; Summary of Federalism Consultation and Attchs. (Letter from Karen Peters, Arizona Dept. of Env. Quality to Lee Zeldin, EPA Administrator, *Arizona Department of Environmental Quality's public comment on the March 24, 2025, WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations Docket ID No. EPA-HQ-OW-2025-0093*, (June 2, 2025), ("ADEQ Recommendations"); Dkt. ID No. EPA-HQ-OW-2025-0322-0122_attachment_4; Missouri June 2015 WOTUS Recommendations). *See also*, Section VII of these comments, *infra*.

[192] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52501.

surface water in the country," in order to eliminate water pollution.[193] Additionally, the agencies' theory completely ignores the burdens that eliminating Clean Water Act protections will place and state and tribal governments, particularly the impact that its narrow proposed definition will have on tribal governments that rely on the Clean Water Act for regulation and protection of their water resources and whose land, water, and resources the United States has a unique duty to protect.[194]

The Clean Water Act, as reflected in the text of Sections 101(b) and 510, establishes a system of cooperative federalism. Cooperative federalism "allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."[195] With the Clean Water Act and many other federal environmental laws, the Supreme Court has confirmed that Congress employed a program of cooperative federalism under which States are given the "choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation"[196] and, as such, the Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[197]

CWA Section 101(b) provides that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and **implement the permit programs under sections 1342 and 1344 of this title.** It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction,

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[193] *See, e.g., Int'l Paper Co. v. Ouellette*, 479 U.S. at 489.

[194] *See, e.g.*, Grewal, R. K., & Scanlan, M. K., *Navigating Rough Waters After Sackett v. EPA: Federal, Tribal, and State Strategies*, Columbia Journal of Environmental Law, *50*(1), at 83-87, 90-94, 110-114, (Jan. 2025), available at: https://doi.org/10.52214/cjel.v50i1.13314 (Attachment 16); RIA, at 35-39; TSD for the January 2023 Definition, at 61–126, *supra* n. 51.

[195] *Hodel v. Virginia Surface Min. & Reclamation Ass'n,* 452 U.S. 264, 289 (1981).

[196] *See, e.g., New York v. United States*, 505 U.S. 144, 167 (1992) ("Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation . . .This arrangement, which has been termed 'a program of cooperative federalism,' . . . is replicated in numerous federal statutory schemes. These include the Clean Water Act. . . .") (internal citations omitted).

[197] *Arkansas v. Oklahoma*, 501 U.S. at 101.

and elimination of pollution."[198] Contrary to the agencies' characterization of this section,[199] it was in recognition of states' retention of primary responsibilities and rights that Congress provided States with a primary role in implementing the Clean Water Act.

According to the Supreme Court, Section 101(b) recognizes "that the States should have a significant role in protecting their own natural resources" and, thus, the Clean Water Act:

> [P]rovides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U.S.C. § 1342(b) . . . Even if the Federal Government administers the permit program, the source State may require discharge limitations more stringent than those required by the Federal Government. See 40 CFR § 122.1(f) (1986). Before the Federal Government may issue an NPDES permit, the Administrator must obtain certification from the source State that the proposed discharge complies with the State's technology-based standards and water-quality-based standards. 33 U.S.C. § 1341(a)(1). The CWA therefore establishes a regulatory "partnership" between the Federal Government and the source State.[200]

Similarly, the Supreme Court found in *EPA v. California* that "[c]onsonant with its policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution' [in Section 101b], Congress also provided that a State may issue NPDES permits for discharges into navigable waters within its jurisdiction, but only upon EPA approval of the State's proposal to administer its own program."[201]

Similarly, Section 510 states:

> **Except as expressly provided in this chapter**, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard,

[198] 33 U.S.C. § 1251(b) (emphasis added).

[199] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52502-52503.

[200] *Int'l Paper Co. v. Ouellette*, 479 U.S. at 489-90 (citing 33 U.S.C. § 1251(b)).

[201] *Env't Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 206–08 and n. 16 (1976), (citing s 101(b), 33 U.S.C. s 1251(b) (1970 ed., Supp. IV)"). The Clean Water Act also preserves substantial responsibility and autonomy of the States over groundwater and nonpoint source pollution. *County of Maui*, 590 U.S. at 174.

> prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.[202]

When the full text of the Section 510 is evaluated, its meaning becomes apparent. It preserves states' rights "to adopt and enforce rules that are more stringent than federal standards" within the confines of its boundary waters."[203]

The Clean Water Act has many policies, programs, standards, and goals, and just one single expressed overall objective—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[204] The Clean Water Act does not authorize the agencies to give equal weight to the central objective of the Act expressed in Section 101(a), and a singular policy statements in Sections 101(b) and 510, and then somehow "balance" them as a basis for redefining and narrowing the jurisdictional reach of the Act. Similarly, the intent of Congress as to which waters are protected under the Clean Water Act cannot be gleaned by balancing the national objective to restore and maintain water quality in the nation's waters against state's responsibilities and rights to prevent, reduce, and eliminate pollution. That is nonsensical.

To achieve Congress' ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments.[205] Having due regard for the role of the states is not the same thing as defining "waters of the United States" in a manner that reduces federal, and increases state, jurisdiction—which is plainly the agencies' intent in elevating and contorting the meaning of Clean Water Act Sections 101(b) and 510. The Supreme Court, in *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, confirmed that Congress protected states' interests by broadly

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[202] 33 U.S.C. § 1370 (emphasis added).

[203] *See Arkansas v. Oklahoma*, 503 U.S. 91, 98–100 (1992) ("On remand, Illinois argued that § 510 of the Clean Water Act, 33 U.S.C. § 1370, expressly preserved the State's right to adopt and enforce rules that are more stringent than federal standards. The Court of Appeals accepted Illinois' reading of § 510, but held that that section did 'no more than to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters.' *Illinois v. Milwaukee*, 731 F.2d 403, 413 (CA7 1984), *cert. denied*, 469 U.S. 1196, 105 S. Ct. 979, 83 L.Ed.2d 981 (1985). This Court subsequently endorsed that analysis in *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S. Ct. 805, 93 L.Ed.2d 883 (1987).").

[204] 33 U.S.C. § 1251(a).

[205] *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 700.

protecting the nation's waters and providing mechanisms for the states to protect the interests articulated in Sections 101(b) and 510 through the Clean Water Act itself:

> Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns. See 33 U.S.C. § 1251(b) ("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"); § 1256(a) (federal funds for state efforts to prevent pollution); see also § 1370 (States may impose standards on the discharge of pollutants that are stricter than federal ones). State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970). These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge.[206]

It is indisputable that the states can take a primary role in eliminating pollution in waters that are protected by the federal Clean Water Act.[207] This is the system of cooperative federalism under the Clean Water Act that has been in place since 1972, and that system is essential to achieving the Act's objective—without it the achieving the goals of the Clean Water Act will become "an impossible dream."[208] Nothing in this Sections 101(b) and 510, or any other section of the Act,

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[206] *S.D. Warren Co.*, 547 U.S. at 386.

[207] *See, e.g.*, RIA at 32 ("States and Tribes have inherent sovereign authority to establish more protective standards or limits than the Federal Clean Water Act, and many, though not all, Clean Water Act programs can be authorized or assumed under State or Tribal law"), 69 ("Forty-seven States and the U.S. Virgin Islands are currently authorized to administer the NPDES permit program. Only three States (New Mexico, Massachusetts and New Hampshire) and the District of Columbia are not authorized.").

[208] *See, e.g.*, *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 129 (D.C. Cir. 1976) ("Thus, without the national standards required by s 301, the fifty states would be free to set widely varying pollution limitations. These might arguably be different for every permit issued … The plainly expressed purpose of Congress to require nationally uniform interim limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.")

authorizes the agencies to narrowly define "waters of the United States" by somehow balancing states' rights against the objective of the CWA. Congress has already considered and resolved those issues in the CWA,[209] and it is not within the authority of the agencies to insert their own judgment to the contrary.

B. The Proposed WOTUS Definition is Contrary to Binding Legal Precedent Interpreting the Clean Water Act

As explained in Section II *supra*, a long line of Supreme Court cases confirms that the Clean Water Act requires broad protections for "waters of the United States" consistent with Congress' objective for the Act. Contrary to the agencies' legal theories underpinning the 2025 Proposed WOTUS Definition, the Clean Water Act is an all-encompassing program of water pollution regulation that applies to the Nation's waters - i.e., the "waters of the United States."[210] The Clean Water Act is "complex statutory and **regulatory scheme that governs our Nation's waters**, a scheme that implicates both federal and state administrative responsibilities." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't. of Ecology*, 511 U.S. 700, 704 (1994 (emphasis added). Congress' intention in amending the Water Pollution Control Act in 1972 was "clearly to establish **an all-encompassing program of water pollution regulation** . . . [and] 'to establish a comprehensive long-range policy for the elimination of water pollution.' S.Rep.No.92–414, at 95, 2 Leg.Hist. 1511 (emphasis supplied). No Congressman's remarks on the legislation were complete without reference to the 'comprehensive' nature of the Amendments." *City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 318 (1981) (internal footnotes omitted). Thus, the agencies' new view of the Clean Water Act as a comprehensive "voluntary as well as regulatory" scheme[211] is directly contradicted by longstanding Supreme Court precedent, as is the agencies' view that the Clean Water Act's "regulatory" programs do not apply to all of the nation's waters.[212]

Despite extensive precedent to the contrary, based on a misreading of *SWANCC*, the agencies claim that "Congress' authority to regulate navigable waters derives from its Commerce Clause power over the channels of interstate commerce," and in defining WOTUS, the agencies intend to interpret that power as if it were still 1899.[213] Ignoring the history of the FWPCA, RA, and RHA,

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[209] *See* N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 J. Energy & Envt'l L 80, note 36, at 82, 89 (2013), https://gwujeel.files.wordpress.com/2013/10/4-2-hines.pdf (hereinafter "Hines History of the CWA") (Attachment 17).

[210] *See City of Milwaukee II*, 451 U.S. at 318–19 (1981); 33 U.S.C. § 1313 (applying water quality standard to "interstate waters," "intrastate waters," "navigable waters" and simply "waters."); and Hines History of the CWA, note 36 at pp. 92-195, *supra* n. 209.

[211] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52502.

[212] *Id.*

[213] *Id.* at 52501.

which as discussed in more detail in in Section VII *infra* includes federal jurisdiction over navigable waters, interstate waters, and their non-navigable tributaries, the agencies also erroneously claim that "[n]avigability remained the lodestar of Federal authority over water regulation for most of our Nation's history prior to the Clean Water Act."[214] Specifically, rejecting the evolution of the Court's Commerce Clause jurisprudence,[215] the agencies are attempting to adopt an extremely narrow WOTUS definition "to appropriately limit the scope of Federal authority consistent with the centuries-old boundaries of Congress' Commerce Clause authority."[216] However, neither *SWANCC*[217] nor any other Supreme Court decision has limited the scope of federal Clean Water Act jurisdiction based on this historically-constrained view of Congress' Commerce power, and the agencies lack statutory authority to take it upon themselves to diminish Congress' Commerce Clause authority and narrow the longstanding, broad scope of the Clean Water Act that has been repeatedly recognized by the Court (and previously by the agencies).

Unlike the RHA of 1899, which the agencies repeatedly and mistakenly imply is the primary predecessor to the Act,[218] the Clean Water Act is not focused on the prevention of "navigation-

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[214] *Id.*

[215] *See, e.g., United States v. Lopez,* 514 U.S. 549, 558–59 (1995) (Identifying "three broad categories of activity that Congress may regulate under its commerce power": (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce.)

[216] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52506 (citing *Sackett*, 598 U.S. at 704 (Thomas, J., concurring). However, Justice Thomas disagrees with the Court's Commerce Clause jurisprudence and believes it "has significantly departed from the original meaning of the Constitution," particularly with regard federal environmental law, which he says is "uniquely dependent on an expansive interpretation of the Commerce Clause." Accordingly, Justice Thomas would limit the scope of the Clean Water Act to Congress' authority of channels of interstate commerce. *Sackett v. EPA*, 598 U.S. at 708-09 (Thomas, J., concurring). The agencies, on the other hand, are bound by the Court's Commerce Clause jurisprudence, which does not so limit Congress' authority or the scope of the Clean Water Act. Perhaps nowhere is this deviation more evident than in federal environmental law, much of which is uniquely dependent upon an expansive interpretation of the Commerce Clause.

[217] In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. *See* 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court "expressly declined to reach" the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, "in *Rapanos* it appears five justices had no constitutional concerns in any event … [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause …." *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), *cert. denied sub nom.,* 577 U.S. 1138 (2016) (citing *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring)).

[218] *See, e.g.*, Proposed Rule Notice, 90 Fed. Reg. at 52502 ("Prior to 1972, the ability to control and redress water pollution in the Nation's water largely fell to the Corps under the RHA."), 52506 ("enactment of the Federal Water Pollution Control Act expanded the scope of Federal jurisdiction over waters from what was covered under the RHA.").

impeding" conduct in navigable waters.[219] Instead, as the Supreme Court held in *International Paper Co. v. Ouellette*, the Clean Water Act established "an all-encompassing program of water pollution regulation" that "**applies to all point sources and virtually all bodies of water**."[220] While extensive RHA precedent demonstrates that the Commerce Clause provides adequate authority for regulation of navigable waters and their tributaries, it is equally clear that Congress' Commerce Clause authority to control pollution is not limited to traditionally navigable waters or traditional tests of navigability. For example, the Supreme Court explained in *Kaiser Aetna v. U.S.*,

> Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause . . . *Appalachian Power Co*. indicates that congressional authority over the waters of this Nation does not depend on a stream's "navigability." And, as demonstrated by this Court's decisions in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), *United States v. Darby*, 312 U.S. 100, 657, 61 S.Ct. 451, 85 L.Ed. 609 (1941), and *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), a wide spectrum of economic activities "affect" interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved.[221]

Additionally, as the Supreme Court noted in *Hodel*, the "Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."[222] Accordingly, as used in the [Clean] Water Act, the term "navigable waters" is not limited to the traditional tests of navigability."[223] In fact, the Supreme Court has explicitly recognized on at least four occasions that "navigable waters" under the Clean Water Act "extends to more than traditional navigable waters . . . ."[224]

For example, in *Riverside Bayview*, the Supreme Court held that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the

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[219] *See U.S. v. Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974); *see also Quarles Petroleum Co. v. United States*, 551 F.2d 1201, 1206 (Ct. Cl. 1977) ("In addition, the overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States.").

[220] *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

[221] *Kaiser Aetna v. United States*, 444 U.S. 164, 172-74, (1979).

[222] *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

[223] *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

[224] *See, e.g., Sackett,* 598 U.S. at 672; *Rapanos*, 547 U.S. at 731.

Act is of limited import. In adopting this definition of 'navigable waters,' **Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes** and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term."[225] And, as stated by the court in *U.S. v. Holland*:

> It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution . . . Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms. To recognize this and yet hold that pollution does not affect interstate commerce unless committed in navigable waters below the mean high water line would be contrary to reason. Congress is not limited by the 'navigable waters' test in its authority to control pollution under the Commerce Clause.[226]

In the 2025 Proposed Rule Notice, the agencies attempt to minimize the significance of the Supreme Court's opinion in *Riverside Bayview* by selectively citing portions of the opinion and constraining its relevance to determining where to draw the line between where water begins and land ends in asserting jurisdiction over adjacent wetlands.[227] The Court's decision in *Riverside Bayview* is far more significant than the agencies suggest and must be given far more weight as they endeavor to redefine "waters of the United States." Based solely upon the agencies' treatment of the case in the 2025 Proposed Rule Notice, one might think *Riverside Bayview* supports the agencies' narrow interpretation, when in truth it plainly demonstrates that the 2025 Proposed WOTUS Definition would contravene Congress' express intent to broadly protect the nation's waters.

Contrary to the agencies' framing, the Supreme Court in *Riverside Bayview* recognized the breadth of the Clean Water Act's jurisdiction over "waters," including "lakes, rivers, streams, and other bodies of water" and "aquatic ecosystems"—as the Court has done on many other occasions.[228] The difficult boundary drawing identified by the Court in Riverside Bayview related solely to whether Congress also intended for the Clean Water Act to protect wetlands adjacent to "rivers,

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[225] *Riverside Bayview*, 474 U.S. at 133 (emphasis added).

[226] *U.S. v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974); *see also United States v. Ashland Oil & Transp. Co*., 504 F.2d 1317, 1323–1329 (6th Cir. 1974); *P. F. Z. Properties, Inc. v. Train*, 393 F. Supp. 1370, 1381 (D.D.C. 1975); *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

[227] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52506.

[228] *Riverside Bayview*, 474 U.S. at 131-35.

streams, and other hydrographic features more conventionally identifiable as 'waters.'"[229] Specifically, the Supreme Court held that Congress took a "broad, systemic view of the goal of maintaining and improving water quality" with the word "integrity," contained in the Act's "objective," referring to "a condition in which the natural structure and function of ecosystems [are] maintained."[230] The "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[231] To accomplish these goals, the Court in *Riverside Bayview* concluded, Congress defined the "waters covered by the Act broadly" to encompass all "waters of the United States."[232] The unanimous *Riverside Bayview* opinion confirms the breadth of the Clean Water Act and constrains the agencies' ability to remove waters from the regulatory definition of WOTUS as proposed in the 2025 Proposed Rule Notice.

As the Supreme Court recently confirmed in *County of Maui*, regulation of pollution at its source is "one of the key regulatory innovations of the Clean Water Act."[233] In March of 2025, the Supreme Court again affirmed this view in *San Francisco v. EPA* when it stated that the 1972 Clean Water Act amendments were "aimed directly at the sources of pollution."[234] It is impossible for the Clean Water Act to control pollution at its source if the majority of the nation's waters are excluded from the Act, as they would be under the agencies' proposed WOTUS definition. Accordingly, the agencies proposed WOTUS definition is inconsistent with the Clean Water Act.

Because the central objective of the Clean Water Act is to ensure broad protections for the nation's waters by controlling pollution at its source, it is imperative that the regulatory definition broadly encompass the nation's waters—both to protect their physical, chemical and biological integrity and to protect the integrity of any downstream surface waters to which they are connected. In other words, the inclusion of broad categories that encompass traditional navigable waters, interstate waters, the territorial seas, rivers, streams, lakes, wetlands, impoundments, ponds, canals, ditches and other waters in the definition of "waters of the United States" is necessary to implement the CWA's "comprehensive regulatory program" that established "**a new system of regulation under**

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[229] *Id.* (The Court in *Riverside Bayview* resolved this question: "whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'")

[230] *Id.* at 132.

[231] *Id.* at 132-33 *(citing* H.R.Rep. No. 92–911 at 76 (1972); S.Rep. No. 92–414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742).

[232] *Id*.

[233] *County of Maui*, 590 U.S. at 178–79 ("We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act."), citing *California ex rel. State Water Resources Control Bd.*, 426 U.S. at 202–04 ("basic purpose of Clean Water Act is to regulate pollution at its source").

[234] *City & Cnty. of San Francisco, California v. Env't Prot. Agency*, 604 U.S. 334, 340 (2025).

which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit."[235] As the Third Circuit noted in a case involved a Total Maximum Daily Load for the Chesapeake Bay, a massive watershed impacted by pollution many types of waters in multiple states:

> In response to that fire and to the general degradation of American water that followed the post-war industrial boom, Congress determined that the EPA should have a leadership role in **coordinating among states to restore the Nation's waters** to something approaching their natural state. See 33 U.S.C. § 1251 . . . [and] "[a]s the Supreme Court has admonished in the water-pollution context, 'We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.' *E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 132, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 777, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968)) (emphasis added)."[236]

C. Agency Policy Objectives Cannot Contradict the Objective of the Clean Water Act

As noted previously, the objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. This is the central policy Congress established for the Clean Water Act that, along with the text of the Act, should drive the agencies' rulemaking.[237] In contrast to the policies the agencies are pursuing in this rulemaking, the policies Congress established in the Clean Water Act were plainly **not** intended to promote economic growth, minimize regulatory uncertainty, or push this administration's particular ideology regarding states' rights. Instead, Congress focused on, among other things, goals that would achieve the objective of the Clean Water Act, such as the national goal "of eliminating all discharges of pollutants into navigable waters by 1985" and an "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water … by 1983."[238]

Thus, rather than attempting to minimize industry's burden, reduce "red-tape" or reducing the cost of doing business, Congress intentionally tasked the government with a single, unambiguous "objective"—"to restore and maintain the chemical, physical, and biological integrity of the

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[235] *City of Milwaukee II*, 451 U.S. at 310-11, 317 (emphasis added).

[236] *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 305, 309 (3d Cir. 2015).

[237] *See, e.g., County of Maui*, 590 U.S. at 184 ("The object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve.").

[238] 33 U.S.C. § 1251(a)(1), (a)(2).

Nation's waters"—and imposed "on American industry (and the American public through passed-on product costs) the economic burden of ending all discharges of pollutants by the year 1985."[239] Contrary agency policies do not, and cannot, supersede or modify any of the Congressional statements of policy and associated legal requirements in the Clean Water Act. But that is exactly the agencies are attempting to accomplish through this proposed rule.

The agencies are charged with defining WOTUS in a manner that is consistent with the text of the Clean Water Act and that ensures the protection of the chemical, physical, and integrity of the nation's waters.[240] As stated in the Conference Committee Report for the final 1972 Clean Water Act Amendments, "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[241] Thus, the agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of "waters of the United States" to achieve their own independent (and ever-shifting) bureaucratic policy goals.[242] Congress did not charge the agencies with defining WOTUS in order to "reduce red-tape, cut overall permitting costs, and lower the cost of doing business," which are the policy goals that EPA Administrator Zeldin stated motivated the agencies' actions to quickly revise the definition in March 2025.[243] Similarly, Congress did not charge the agencies with defining WOTUS or implementing the Clean Water Act in a manner that would "cut red tape and provide predictability, consistency, and clarity for American industry, energy producers, the technology sector, farmers, ranchers, developers, businesses, and landowners," or "clear and practical rules of the road that accelerate economic growth and opportunity," which are policies and objectives EPA identified as underpinning the 2025 Proposed Rule Notice.[244]

It is impossible to determine how the agencies translated these policies to into the actual text of the proposed definition. It appears the agencies have simply attempted to make the definition as narrow as they thought they could get away with without appearing to completely disregard the Clean Water Act and legal precedent in their entirety. For example, even assuming spurring

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[239] *Am. Frozen Food Inst. v. Train*, 539 F.2d 107,113 (D.C. Cir. 1976).

[240] *See, e.g.*, 33 U.S.C. § 1251(a); *County of Maui*, 590 U.S. at 185-86.

[241] Conference Report, Senate Report No. 92-1236, Sept. 28, 1972 at 144, U.S. Code Cong. & Admin. News 1972, p. 3822; Reprinted in Legislative History, Committee on Public Works, Committee Print, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 327 (hereinafter "1972 Legislative History").

[242] *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 325, 328 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. . . . We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.")

[243] March 12, 2025 Press Release, *supra* n. 85.

[244] EPA, *EPA & Army Corps Unveil Clear, Durable WOTUS Proposal*, (Nov. 17, 2025), https://www.epa.gov/newsreleases/epa-army-corps-unveil-clear-durable-wotus-proposal. (Attachment 18)

economic growth and cutting red tape were permissible policy considerations for defining which waters are protected by the Clean Water Act, the agencies have not articulated, and could not create, a rational basis for using those policy goals to establish minimum flow frequencies for tributaries, the period of time during which a wetland must have surface water, or any other proposed or potential alternative jurisdictional limits in the 2025 Proposed Rule Notice. The agencies' reliance on ever-changing administrative policy choices to limit Clean Water Act jurisdiction over the nation's waters is blatantly arbitrary, capricious, in excess of the agency's statutory authority, and contrary to law.

D. The Agencies' Regulatory Impact Analysis is Legally and Factually Inadequate

Finding that the 2025 Proposed WOTUS Definition constitutes a significant regulatory action, pursuant to Executive Orders 12866 and 13563,[245] the agencies claim that they prepared the RIA "to inform the public of potential effects associated with the proposed rulemaking" and to provide the public with "the potential impacts of the proposed changes to the definition of 'waters of the United States' based on the anticipated effects on the Clean Water Act programs that rely on" that definition.[246] The agencies assert that they prepared the RIA "for informational purposes to analyze the potential cost savings and forgone benefits associated with this proposed action," that it is a "qualitative assessment of the potential effects of the revised definition of the Federal coverage of waters and water resources," and that they assessed "the potential impacts of the changes to the definition of 'waters of the United States' based on the potential effects to Clean Water Act programs that rely on" that definition.[247]

Unfortunately, however, the RIA does not meaningfully evaluate the impacts of the agencies' proposed rule redefining WOTUS on the nation's waters and Clean Water Act programs, and it is inconsistent with the requirements for Regulatory Impact Analyses described in EPA's Guidelines for Preparing Economic Analyses[248] and Office of Management and Budget (OMB) Circular A-4.[249] To be consistent with the requirements of statutes and Executive Orders, Economic Analyses

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[245] Executive Order 13563, 76 Fed. Reg. at 3821, §§ 1(a) and 1(c) ("[The regulatory system] must be based on the best available science. It must allow for public participation and an open exchange of ideas . . . It must measure, and seek to improve, the actual results of regulatory requirements . . . each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. " and "In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.")

[246] RIA, at 1.

[247] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52499-52500.

[248] EPA, Guidelines for Preparing Economic Analyses, EPA-240-R-24-001, at 1-1 (Dec. 2024), Dkt. ID No. EPA-HQ-OW-2025-0322-0100 ("*EPA Guidelines for Preparing Economic Analyses*").

[249] Office of Management and Budget Circular A-4, Regulatory Analysis (Sept. 27, 2003), available at: https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4 ("*OMB Circular A-4*"). (Attachment 19)

require the use of sound scientific, technical, and economic data to inform agency decision making and developing sound environmental policies and provide "the public with data-driven information needed to systematically assess the consequences of various actions or options."[250] The RIA must evaluate "the evidence on the key effects, good and bad, of the various alternatives that should be considered in developing regulations" to "(1) learn if the benefits of an action are likely to justify the costs or (2) discover which of various possible alternatives would be the most cost-effective."[251] According to OMB Circular A-4, "[a] good regulatory analysis is designed to inform the public and other parts of the Government (as well as the agency conducting the analysis) of the effects of alternative actions"[252] and it should include "a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis."[253] For a major rulemaking like this one, the agencies action should be supported by both benefit-cost analysis (BCA) and cost-effectiveness analysis (CEA).[254]

The RIA for the 2025 Proposed Rule Notice, however, does not include this required analysis and information. To the contrary, the public cannot find even the most basic information about the impacts of the proposed rule revisions and alternative approaches because, although it is 107 pages long, the RIA does not provide any meaningful information about the proposed rule's impacts to the nation's waters, the programs that protect those waters, and the people, cities, business, farmers, aquatic life, or wildlife that depend upon those waters. In fact, the agency does not once mention the most obvious impacts of eliminating Clean Water Act protections for a river, stream, lake, wetland, or other water—pollution or destruction due uncontrolled discharges of pollutants into that water and the well-known resulting costs and forgone benefits associated with polluted water.

At best, a thorough review of the RIA will only reveal that the agencies are taking a deregulatory action designed to eliminate Clean Water Act protections for a broad range of waters that will reduce the scope of Clean Water Act programs and that this action will have some unassessed costs and benefits.[255] Improperly denying the public access to information about the impacts of the proposed rule, the agencies simply state they "have not quantified cost savings and forgone benefits for the purposes of this proposed rule . . ." and describe methods they can use to conduct

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[250] EPA Guidelines for Preparing Economic Analyses, at 1-1; OMB Circular A-4, Transparency and Reproducibility of Results.

[251] OMB Circular A-4, *supra* n. 249.

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52000; RIA at 28.

a quantitative analysis later for the final rule.[256] However, an adequate RIA is required at the proposed rule stage to both inform government decision making and the public about the impacts of the proposed action.[257] The agencies failed to produce that required analysis for the proposed rule and cannot permissibly defer compliance to the final rule stage.

Thus, the agencies did not meaningfully assess the impact of the proposed rule on jurisdiction over the nation's waters, the Clean Water Act's programs, or on the people and entities that are affected by reducing the scope of Clean Water Act protections for the nation's waters. The agencies' statements and conclusions reveal almost nothing about the impacts of the 2025 WOTUS Proposed Definition and nothing at all about the impacts of the alternative approaches under consideration for the final rule. Most importantly, due in large part to these failures, the RIA does not assess how the proposed rule's elimination of Clean Water Act protections will affect the chemical, physical and biological integrity of the nation's waters. Given the extreme reductions in the scope of Clean Water Act jurisdictions proposed and under consideration by the agencies, based on previous agency economic analyses and the importance of this proposed rule to wellbeing of the entire country, there is an obvious need for the agencies to conduct an extensive, through regulatory impact analysis. Unfortunately, it is apparent that the agencies are attempting to avoid evaluating the impacts of their proposed changes to the WOTUS definition given the severity the impacts to the nation's waters that will result from the proposed rule.[258]

First, the RIA does not include a "reasonably detailed description of the need for regulatory action" or explain "how the regulatory action will meet that need."[259] To the contrary, in the Executive Summary, the agencies merely list the changes to the September 2023 Definition in the 2025 Proposed WOTUS Definition and state they are amending it to "reflect the agencies' determination of the scope of the 'waters of the United States' **informed by Supreme Court precedent**."[260] The agencies do not even identify the alternative approaches and implementation measures they are considering adopting in a final rule, and the agencies do not explain how or why their determination of the scope of WOTUS was informed by Supreme Court precedent. Executive Order 12866 states that "[f]ederal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material failures of private markets to protect or improve the health and safety of the public, the

[256] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52500–501; RIA, at 28.

[257] *See, e.g.*, OMB Circular A-4, *supra* n. 249.

[258] *Compare* RIA to EPA and Corps, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[259] EPA Guidelines for Preparing Economic Analyses, at 1-5 Text Box 1.1.

[260] RIA, at 1 (emphasis added).

environment, or the well being of the American people . . .."[261] The agencies have not demonstrated that the changes to the September 2023 Definition are required for any of these reasons.

The RIA also fails to include a "clear, plain language executive summary, including an accounting statement that summarizes the benefit and cost estimates for the regulatory action under consideration, including qualitative and non-monetized benefits and costs."[262] This is due to the fact that, as explained in detail below, the agencies did not conduct any meaningful analysis of costs and benefits associated with the proposed rule. Additionally, the agencies improperly failed to meaningfully evaluate how jurisdiction and Clean Water Act programs would change for any waters that fall within the definitional categories impacted by their proposed rule. Instead of doing that, the agencies provided partial descriptions of certain sections of the Clean Water Act and provided vague, qualitative descriptions of the potential effects of the 2025 Proposed WOTUS Definition on certain programs and waters.[263] The information provided by the agencies does not explain anything meaningful about how the nation's waters and Clean Water Act Programs will be impacted or the costs and benefits of the proposed rule. For example, in the Executive Summary and Introduction:

- The agencies describe parts of one of the most central parts of the Clean Water Act, Section 303, and state that the "potential effect of the proposed definitional change on the number of waterbodies with Clean Water Act-effective water quality standards and that appear on the impaired waters list (and subsequent TMDL development) is uncertain."[264]

- With regard to Clean Water Act Section 311, a section of the Act that prohibits discharges of oil and hazardous substances to WOTUS and establishes a wide range of requirements applicable to that those discharges, the agencies only looked at impacts to two components of section 311 to conclude that potential impacts on the entire Section 311 program "would not be significant": (1) EPA's Spill Prevention, Control, and Countermeasure and Facility Response Plan regulations and (2) Spill Notification and Response under the National Contingency Plan. To support their conclusion, the agencies relied on some assumptions from the NWPR regarding compliance costs, their belief that most facilities will continue to comply with spill prevention measures, and a statement that the agencies did not observe a material effect on spill notification and response in the brief period that the NWPR was in effect.[265] This is obviously not a logically or scientifically sound approach, but the

[261] OMB Circular A-4, *supra* n. 249 (quoting Executive Order 12866, 58 Fed. Reg. at 51735, § 1(a)).

[262] EPA Guidelines for Preparing Economic Analyses, at 1-5 Text Box 1.1.

[263] RIA, at 2-5; 12-22.

[264] *Id.* at 2-3.

[265] *Id.* at 3-4.

agencies also failed to even consider, let alone summarize the impacts, costs, and benefits, of eliminating the Section 311 prohibition on the discharge of oil and hazardous substances to waters that would no longer be included in the WOTUS definition.

- With regard to Clean Water Act Section 401, a section that provides state and tribal governments with the right to review federal permits and licenses that may result in discharges to WOTUS and deny or put conditions on such discharges through water quality certifications, the agencies merely indicates the number of such water quality certification would decrease and that provide a cost savings to States and authorized tribes in terms of reviews and staff time.[266]

- Even worse, the agencies do not summarize any potential impacts with regard to Clean Water Act Section 402 NPDES permits despite the fact these permits are one of two primary mechanisms for achieving a central goal of the Act—eliminating pollutant discharges to the nation's waters—and would no longer be required for many waters under the 2025 Proposed WOTUS Definition and alternative approaches. Section 402 governs NPDES permitting for discharges of pollutant into the nation's waters, pretreatment requirements, municipal and industrial stormwater discharges, combined sewer overflows, discharges from recreational vehicles, and other matters. However, the RIA only partially describes scope of this section and says that "[t]he agencies note that, under the proposed rule, some existing NPDES may still be needed if a discharge of a pollutant is no longer directly to a jurisdictional water" and "[u]nder such circumstances, some existing permits may need to be modified, subject to anti-backsliding requirements."[267] Such statements reveal nothing about the impacts, costs and benefits of eliminating Clean Water Act Section 402 requirements for discharges to waters that are non-jurisdictional, yet eliminating the requirements will have dramatic negative effects on the nation's waters with significant attendant costs and benefits. For example, the agencies recognized that the number of 404 permits would decrease due waters no longer being included in the WOTUS definition, but the agencies failed to recognize that fact with regard to Section 402 despite it being equally and obviously true.

- With regard to Section 404, the agencies claim without any support that impacts of the proposed rule would be most significant for Clean Water Act Section 404 dredge and fill permits, reducing the number of permits and "potentially the number of wetland acres mitigated, relative to baseline."[268] Most notably, the agencies err in asserting that only wetland acres will be impacted as Section 404 permits are required for dredging and filling

[266] *Id*. at 4.

[267] *Id.* at 4-5.

[268] *Id.* at 5.

of any WOTUS and the proposed definition will eliminate jurisdiction over many rivers, streams, lakes, ponds, canals, ditches, and other waters in addition to wetlands. Additionally, the agencies only mention cost savings to project proponents and a few examples of forgone benefits in terms of potential costs and benefits when the true costs and benefits of the proposed rule would be far more significant and wide ranging.

- With regard to interstate waters, the agencies claim without support that they "rarely identify waters as jurisdictional solely because they are interstate."[269] Failing to actually evaluate the impact, however, the agencies simply state "[t]he proposed rule **may therefore reduce the number of waters considered to be subject to Federal jurisdiction** compared to baseline where they would not meet one of the categories of jurisdictional waters under the proposed rule."[270] Nothing more is provided regarding the number or identity of waters impacted by the proposed rule or the impacts, costs, or benefits of excluding interstate waters from the WOTUS definition.

- With regard to relatively permanent waters, which includes a wide range of waters, the agencies state only that "there are **at least some streams** that would be jurisdictional under the baseline that would not be jurisdictional under the proposed rule" and "[the Pre-2015 Definition approach] **may result in differences** compared to the proposed rule."[271] Nothing more is provided regarding the number or identity of waters impacted by the proposed rule or the impacts, costs, or benefits of excluding relatively permanent waters from the WOTUS definition.

- With regard to tributaries, the agencies state that the proposed changes "**represent a change in jurisdiction** under the paragraph (a)(3) tributaries category that may not be easily quantified;" the water transfer changes "**could have a significant impact** on which relatively permanent tributaries are found to the jurisdictional under the proposed rule compared to the baseline; particularly in the arid West and some mountainous regions, the requirement for bed and banks will **result in some streams that do not have a bed and banks losing jurisdiction** under the proposed rule; "**at least some streams** that would be jurisdictional as tributaries under the baseline would not be jurisdictional as a result of the relatively permanent definition," the "deletion of the interstate waters category **would also limit those streams that are found to be jurisdictional** under the proposed rule compared to the baseline;" and the proposed rule's approach to assessing stream reach (something not in the text of the proposed WOTUS definition) "**may result in some streams** being found jurisdictional as relatively permanent tributaries under the proposed rule that would

[269] *Id.* at 12 (emphasis added).

[270] *Id.* at 12-13 (emphasis added).

[271] *Id.* at 13 (emphasis added).

have been non-relatively permanent under the baseline and vice versa."[272] Nothing more is provided regarding the number or identity of waters impacted by the proposed rule or the impacts, costs, or benefits of excluding tributaries from the WOTUS definition.

- With regard to continuous surface connection, the agencies simply explain the definitional change in the proposed rule.[273] Nothing more is provided regarding the number or identity of waters impacted by the proposed rule or the impacts, costs, or benefits of excluding waters that would otherwise be found to have a continuous surface connection from the WOTUS definition.

- With regard to adjacent wetlands, the agencies state simply that "[t]he proposed rule would **necessarily include fewer wetlands** as "waters of the United States," and thereby include fewer wetlands subject to Federal jurisdiction, than the baseline;" the proposed rule's requirement that surface water be present during the wet season "may result in additional processing times of approved jurisdictional determinations due to the need for additional data collection;" the "agencies anticipate that wetlands in more arid parts of the country, including the arid West, **may be most impacted** by this aspect of the proposed definition;" the "[e]limination of the interstate waters category **would also impact jurisdiction** whose sole basis of jurisdiction under the baseline is that they are an interstate water;" the proposed changes to implementation of "tributaries would also mean that **would also likely no longer meet the definition** of 'waters of the United States.;'" and "**not many wetlands in permafrost areas in Alaska . . .** would be found to be adjacent . . . whereas under the baseline, there may be many acres of continuous permafrost wetlands that . . . would be considered adjacent."[274] Nothing more is provided regarding the number or identity of waters impacted by the proposed rule or the impacts, costs, or benefits of excluding adjacent wetlands from the WOTUS definition.

- With regard to subsection (a)(5) lakes and ponds, the agencies state without basis that they "do not believe that [deletion of the word intrastate in] the proposed rule represents a significant change in jurisdiction compared to the baseline;" that the deletion "result in some 'interstate' lakes and ponds being included in this category of waters under the proposed rule, as compared to the baseline where they would have been included under the interstate waters category;" that due to the abutment requirement there "**would likely be fewer lakes and ponds** that would be found to have a continuous surface connection under the proposed rule;" and the wet season requirements "would likely not have an impact on lakes and ponds that are abutting but **might impact those lakes and ponds** whose

[272] *Id.* at 13-15 (emphasis added).

[273] *Id.* at 15-16 (emphasis added).

[274] *Id.* at 16-17 (emphasis added).

continuous surface connection under the baseline was fulfilled by a discrete feature or due to evidence provided by a natural landform."[275] Nothing more is provided regarding the number or identity of waters impacted by the proposed rule or the impacts, costs, or benefits of excluding (a)(5) lakes and ponds from the WOTUS definition.

- With regard to waste treatment systems, despite expanding the exclusion in numerous ways, the agencies simply state without providing any support that they "**do not anticipate a significant change** from the baseline for the exclusion for waste treatment systems . . . ."[276]

- With regard to prior converted cropland, the agencies claim that, because **they lack reliable data to "inform analysis from baseline**," they do not know how the proposed rule changes may result in expansion of the exclusion; that the returning wetlands would be less likely to be jurisdictional under the proposed rule than the baseline due to the definition of continuous surface connection; that "**there may be a change from the baseline** with the proposed codification of the 'abandonment' principle, as well as the proposed changes to the categories of jurisdictional waters including for those wetlands that would be found to be "adjacent" under paragraph (a)(4);" and that making the agencies responsible for determining whether a parcel or tract of land is prior converted cropland "**may potentially result in additional areas being called prior converted cropland** under the proposed rule compared to the baseline."[277]

- With regard to "ditches," despite making significant changes to the exclusion and definition of ditch that will result in the elimination of Clean Water Act protections many more waters, the agencies do not make any statements characterizing the number or identity of waters impacted by the proposed rule or the impacts, costs, or benefits of excluding waters from the WOTUS definition under the ditch exclusion and definition.[278] Instead, the agencies simply summarize the differences between the baseline and proposed rule approaches.

Additionally, the agencies did not use an appropriate baseline that assesses "how the world would look in the absence of the proposed action."[279] Although the agencies are implementing an undisclosed interpretation of the Pre-2015 Regulatory Definition in 26 states, the agencies chose to use the 2025 Proposed WOTUS Definition "as the primary baseline for the RIA" and evaluated

[275] *Id.* at 17-18 (emphasis added).

[276] *Id.* at 18-19 (emphasis added).

[277] *Id.* at 20-21 (emphasis added).

[278] *Id.* at 21-22.

[279] EPA Guidelines for Preparing Economic Analyses at 1-5 Text Box 1.1; OMB Circular A-4, *supra* n. 249.

it in relation to the September 2023 Definition "for the purposes of meeting the statutory and executive order requirements for a significant rulemaking."[280] The "baseline should be the best assessment of the way the world would look absent the proposed action," which in this instance includes two alternative baselines that require consideration.[281] For example, for the January 2023 WOTUS Definition, the agencies assessed two baselines—a primary baseline of the pre-2015 regulatory regime and a secondary baseline of the 2020 NWPR—to be consistent with EPA's Guidelines for Preparing Economic Analyses and OMB Circular A-4.[282] By contrast, in the RIA, the agencies treated the September 2023 Definition and the Pre-2015 Definition as "equivalent with respect to the 'baseline' for the economic analysis for the proposed rule."[283] Thus, the agencies did not select evaluate the proposed changes in relation to the correct baselines and, as a result, significant potential effects of the proposed rulemaking were not evaluated in any manner.

Further, the information in the RIA is not "based on the best reasonably obtainable scientific, technical, and economic information."[284] For example, as recently as December 2022, the agencies were able to evaluate scientific, technical, and economic information to conduct a more thorough quantitative and qualitative evaluation of their changes to the WOTUS definition.[285] Examples of that information include "a detailed appendix of how change in aquatic resources are protected (*see* Supplementary Material), jurisdictional scope was quantified (Appendix A), a wetland meta-analysis (Appendix B), the State-level results of the overall analysis (Appendix C), a sensitivity analysis of national benefits from increases in wetland mitigation requirements (), mapped NHD stream mileage and NWI wetland acreage by State (Appendix E), State-level results for the environmental justice analysis (Appendix F), a sector impact analysis which tracks economic sectors that tend to directly or indirectly be involved in Clean Water Act section 404 permitting (Appendix G)."[286]

Throughout the RIA for the 2025 Proposed Rule Notice, however, the agencies cite to and discuss data limitations that they claim prevent them from conducting necessary analyses of the impacts, costs, and benefits of the 2025 Proposed WOTUS definition.[287] Yet, the agencies simultaneously

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[280] EPA Guidelines for Preparing Economic Analyses at 1.

[281] *See, e.g.*, OMB Circular A-4. *supra* n. 249.

[282] Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022) at 1-2, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[283] RIA, at 7.

[284] EPA Guidelines for Preparing Economic Analyses at 1-5 Text Box 1.1.

[285] *See, e.g.*, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022) at xii-xx, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[286] *Id.* at 3.

[287] Many of the agencies' statements regarding data limitations are contradicted by the agencies' own finding in a recent detailed assessment of the same datasets. *See* TSD for the January 2023 Definition, at 129-35, *supra* n. 51.

state that the proposed revisions to the September 2023 Definition are "to ensure clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public."[288] If the proposed WOTUS definition actually increased clarity and predictability, the agencies should have had no problem assessing its impact on the nation's waters. However, the agencies inability to assess their proposed rule due to lack of data is strong evidence that the proposed rule is not, in fact, clear and predictable. When, like here, an agency's uncertainty has significant effects on the final conclusion about net benefits of a proposed rule, according to OMB Circular A-4, the agency "should consider additional research prior to rulemaking. The costs of being wrong may outweigh the benefits of a faster decision. This is true especially for cases with irreversible or large upfront investments . . . For example, when the uncertainty is due to a lack of data, [the agency] might consider deferring the decision, as an explicit regulatory alternative, pending further study to obtain sufficient data."[289] The proposed rule definitely falls into the case of irreversible investments given the fact that it will alter regulatory requirements and allow for waters to be polluted or destroyed, leading to harms that will be expensive or impossible to address in the future.

Additionally, despite claiming there are uncertainties with limited available data that would prevent evaluations of costs and benefit, the agencies did "identify potential data sets and propose potential methodologies to quantify such costs and benefits" and quantitatively estimate the impacts of a revised WOTUS definition in the final rule RIA.[290] All of the methodologies and data the agencies contemplate using for quantitatively evaluating the impacts of an amended WOTUS definition in a final rule are already available to the agencies and should have been used to develop the RIA for the proposed rule. Even in instances where full quantitative and monetary evaluations are legitimately infeasible, the RIA must still include all available quantitative information (such as stream miles of decreased water quality), a description of unquantified effects (such as decreases in quality of life, aesthetics, risks due to exposure to pollutants), and "detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs."[291] However, the agencies failed to include and to evaluate this information.

For example, for the final rule, the agencies propose using the National Hydrography Dataset Plus High Resolution to conduct an analysis of relatively permanent stream lengths upstream from ephemeral breaks and using the National Hydrography Dataset, National Wetlands Inventory, and three published scientific studies to assess wetlands to conduct an analysis of wetlands that would satisfy the abutting and wet season requirements for continuous surface connection.[292] With regard

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[288] RIA, at 6.

[289] OMB Circular A-4, Treatment of Uncertainty, *supra* n. 249.

[290] RIA, at 28.

[291] OMB Circular A-4, Methods for Treating Non-Monetized Benefits and Costs, *supra* n. 249.

[292] RIA, at 43.

to quantifying economic impacts in the final rule, the agencies propose utilizing an approach similar to the 2020 NWPR Economic Analysis for Clean Water Act Section 404 permit impacts.[293] It is not permissible to delay assessment of available data until the final rule stage as it undermines agency decision making and denies the public the opportunity to review, understand, and provide comment on the agencies' bases and the impacts of the proposed rule.

Neither did the RIA quantify and monetize the anticipated costs and benefits of the regulatory action or "explain and support a reasoned determination that the benefits of the intended regulation justify its costs."[294] More specifically, the agencies did not quantify or even adequately qualitatively describe the costs and benefits associated with their proposed deregulatory changes to the WOTUS definition,[295] and they did not evaluate the alternatives approaches they are considering at all. At most, the agencies acknowledge the 2025 Proposed Rule Notice is "deregulatory in nature" and will "reduce the scope of Federal CWA jurisdiction over certain waters." But the agencies did not "conduct national level analyses regarding the potential effect of the proposed rule" on the jurisdictional status and chemical, physical, and biological integrity of nation's waters.[296] In sum, the agencies simply did not "quantify the costs, avoided costs, and forgone benefits of the proposed rule."[297]

Instead, the RIA consists primarily of indefinite or tautological narrative statements regarding potential changes resulting from the 2025 Proposed WOTUS Definition to Clean Water jurisdiction over certain waters (e.g., "the agencies anticipate fewer waters would be relatively permanent under the proposed definition" and "the proposed rule would necessarily include fewer wetlands . . . ."),[298] a handful of Clean Water Act Programs (e.g., "a change in the scope of the Clean Water Act jurisdiction could affect existing and future State or Tribal section 303(d) lists and TMDL restoration plans under section 303(d)" and "[c]hanges in jurisdiction could prompt questions regarding the status of wasteload allocations and load allocations in TMDLs . . ."),[299] and some of the impacts to certain sectors that have historically sought Clean Water Act Section 404 permits ("the agencies expect that the decrease in future Clean Water Act section 404 permit obligations could result in cost savings for permittees . . . However, the agencies are not able to

[293] *Id.* at 45-49.

[294] EPA Guidelines for Preparing Economic Analyses at 1-5 Text Box 1.1.

[295] *See, e.g.*, 2025 Proposed Rule Notice, 90 Fed. Reg. at 52500-501.

[296] *See, e.g.*, RIA, at 22, 28.

[297] *Id.* at 28.

[298] *Id.* at 16, 42.

[299] *Id.* at 57.

identify the permits and mitigation activities that would no longer be required under the proposed rule . . . .").[300]

In their assessment of changes to jurisdictional waters under the 2025 Proposed WOTUS Definition in relation to baseline, the agencies failed to produce meaningful information and analysis, which in turn, ensures there can be no meaningful assessment of the change in Clean Water Act programs or costs and benefits of the proposed rule. For example, in Section 3 – Assessment of Changes in Jurisdictional Waters under the Proposed Rule Relative to Baseline, the agencies provided largely vague indications of potential changes, such as a "decrease" or "fewer waters," as follows:

- With regard to interstate waters, the agencies indicate there will be a **decrease** in federal jurisdiction compared to baseline, but they state they are "unable to quantify the magnitude of the change" and "lack reliable data to quantify the number and distributions of waters determined to be jurisdictional as interstate waters in the baseline."[301] While they cite to some AJD information in the ORM2 database finding 15 aquatic resources were found to be jurisdictional as interstate waters in that database, the agencies have also noted the limitations of using AJD information in ORM2 to assess potential changes in jurisdiction that would result from the proposed rule.[302]

- With regard to relatively permanent waters, the agencies note differences between the 2025 Proposed WOTUS Definition, the September 2023 Definition, and the Pre-2015 Definition in how the standard is implemented but only recognize the potential for "certain intermittent streams" and "certain monsoon-driven stream systems" to not meet the proposed rule's relatively permanent standard despite major, significant changes to the relatively permanent requirements in the proposed rule that would affect nearly all definitional categories.[303] Based on this limited information and analysis, the agencies merely say that they "anticipate that **fewer waters** would be relatively permanent under the proposed rule compared to current practice," but claim they cannot quantify the change in scope "at this time. . . ."[304]

- With regard to the proposed definition of "tributary," the agencies only state that they expect their approach to breaks in flow to "**reduce the scope** of jurisdictional waters relative to baseline, with relatively greater reduction in Federal jurisdiction in areas where

[300] *Id.* at 85.

[301] *Id.* at 41 (emphasis added).

[302] *Id.* at 26-28, 41.

[303] *Id.* at 41-42 (emphasis added).

[304] *Id.* at 42 (emphasis added).

a greater proportion of waters have less than year-round flow, like the arid West."[305] They do not address the impacts of the rest of the definition. Despite claiming elsewhere that the agencies cannot rely on the NHD to identify non-jurisdictional waters under the proposed rule, the agencies provide two examples of non-jurisdictional waters that would break upstream jurisdiction based on the NHD in Arizona and New Mexico and state that they "intend to work to quantify the regulatory impacts to waters related to the proposed tributary interpretation of non-relatively permanent flow features serving to sever upstream Federal jurisdiction in any final rule analysis, to the extent practicable."[306] The agencies also lay out their proposed method for conducting that quantitative assessment.[307] Thus, it is clear the agencies could have, but improperly chose not to, quantitatively and qualitatively evaluate the impacts to tributaries resulting from the proposed rule.

- With regard to adjacent wetlands and "continuous surface connection," the agencies state that they expect the proposed definition to "**substantially reduce the scope** of jurisdictional oversight over wetlands" and would "**further limit coverage** of CWA jurisdiction over permafrost wetlands."[308] The agencies state they "intend to estimate the change in CWA jurisdiction of wetlands due to the proposed definition of 'continuous surface connection' for the final rule, to the extent practicable," and they set out a detailed methods for doing that analysis, but they did not complete it for the proposed rule.[309] However, unlike other categories of water, the agencies did provide some partial evidence of potential impacts to wetlands based on the proposed rule's requirement that surface water be present at least during the wet season, finding that it "suggests" the "majority of wetland acreage in most States" would likely be non-jurisdictional under the proposed rule. Notably, the agencies state that "data limitations and other factors make it challenging to estimate the change in the 'waters of the United States' due to the proposed definition" and that there are a "variety of ways continuous surface connection impacts could be calculated . . . ." These statements from the agencies, if true, demonstrate that their proposed rule will not increase clarity or predictability.

- With regard to (a)(5) lakes and ponds, the agencies state that they do not believe deleting intrastate from the definition "represents a significant change in jurisdiction . . . but [they] are unable to quantify any potential reduction."[310] The agencies also state that the

[305] *Id.*

[306] *Id.* at 43.

[307] *Id.*

[308] *Id.* at 45 and 50 (emphasis added).

[309] *Id.* at 44-49.

[310] *Id.* at 50.

"continuous surface connection" requirement will "**result in a reduction** in jurisdiction," and that due to the elimination of the interstate waters category and changes to relatively permanent tributaries "**some lakes and ponds** may be jurisdictional under the baseline that would be non-jurisdictional under the proposed rule."[311] These difference "would likely lead to **fewer lakes and ponds** meeting the criteria to be considered an (a)(5) water."[312]

- With regard to waste treatment systems, the agencies simply state they do not intend for the proposed rule to change "the application under the current regulatory regimes" and, thus, they **do not anticipate a "significant change** from the baselines for the exclusion . . . ."[313]

- With regard to prior converted cropland, the agencies state that "**fewer wetlands** may be identified as jurisdictional under the proposed rule compared to the baseline of the Amended 2023 Rule" and the "continuous surface connection" requirements under the proposed rule "**would limit the areas** found to be jurisdictional as adjacent wetlands as compared to baseline."[314] The agencies also state that allowing the agencies to designate areas under the proposed rule "**may increase those areas** that meet the exclusion."[315] The agencies also stated that they expect the changes attributable to the proposed rule's treatment of abandonment to be small relative to the implementation of change in use.[316]

- With regard to ditches, the agencies state that they "anticipate that there would be a **decrease** in Federal jurisdiction under the proposed rule relative to the baseline; however, the agencies are unable to quantify the magnitude of that change."[317] The agencies also cite some data from the ORM2 database and state "[o]f those **some** would likely no longer be jurisdictional under the proposed rule."[318]

In Section 4 – Analysis of the Impacts of Clean Water Act Jurisdictional Changes Across Programs, the agencies provide vague assessments of how only some of the Clean Water Act's programs may be affected by the elimination of jurisdiction over waters under the proposed rule. However, the agencies cannot meaningfully assess those impacts because they failed to

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[311] *Id.* at 51 (emphasis added).

[312] *Id.* (emphasis added).

[313] *Id.* at 52.

[314] *Id.* (emphasis added).

[315] *Id.* at 52-53 (emphasis added).

[316] *Id.* at 53.

[317] *Id.* at 54 (emphasis added).

[318] *Id.* (emphasis added).

meaningfully assess how the proposed rule will reduce jurisdiction over and impact the nation's waters. In assessing the impacts to Clean Water Act programs, in attempt to minimize the dramatic loss of protections that will result from the proposed rule, the agencies attempt to rely on implications and predictions that state and tribal governments may continue to apply the same or similar requirements standards under state and tribal law to waters that are no longer protected by the Clean Water Act. This is inappropriate. The agencies cannot know what state and tribal governments will do with regard to the adoption of state or tribal clean water requirements or whether any state or tribal law requirements would be implemented in the same manner or at the same level of stringency as the Clean Water Act.[319] In any event, the agencies are charged with evaluating how Clean Water Act programs will be impacted by their proposed definition. State or tribal government actions under their own separate authorities do not add to or subtract from the scope of Clean Water Act programs and are, thus, irrelevant to assessing the impact of the proposed rule on Clean Water Act programs.

Other than describing what state and tribal governments might do under their own authorities, the agencies primarily simply provide general explanations of certain Clean Water Act programs and the ways that the programs could generally change if jurisdiction is reduced. However, simply listing out the obvious ways in which the programs could change does not constitute an assessment of how the program will actually be impacted by the proposed rule. For example:

- With regard to Clean Water Act Section 303, the agencies focus only on water quality standards, 303(d) lists, and TMDLs and primarily discuss what state and tribal governments might do under their own authorities. The agencies do not discuss or evaluate the impacts of losing federal water quality standards for waters that become non-jurisdictional due to the proposed rule. With regard to 303(d) lists and TMDLs, the agencies merely state the obvious—that reductions in Clean Water jurisdiction could potentially affect 303(d) programs "in several ways," such as reducing the total number of stream miles or acres of water covered by the Act, the number of TMDL restoration plans developed, changing existing and future 303(d) lists, result in challenges to waste load allocations and load allocations in TMDLs and water quality-based effluent limitations in NPDES permits, shift pollution reduction requirements to other dischargers, result in requests to review and revise NPDES permits, and result in revisions of TMDLs.[320]

- With regard to Clean Water Act Section 311, the agencies ignore the impact of losing the prohibition on discharges of oil and hazardous substances and only discuss two programs related to oil spill prevention, reporting, or removal. Again, other than describing those

[319] *See, e.g.*, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 46-50, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[320] RIA, at 55-58

programs, the agencies focus on what state and tribal governments may do under their own authorities but they also claim to be unable to determine benefits and costs of eliminating Clean Water Act programs in non-jurisdictional waters without knowing what state and local law requirements and measures the facilities may implement voluntarily.[321] In terms of the SPCC program, which includes 550,000 facilities, the agencies simply state that they anticipate "inland onshore oil production and farms sectors would be most likely affected by changes to the scope of Clean Water Act jurisdiction given their locations."[322] With regard to the FRP program, the agencies state the change in jurisdiction due to the proposed rule "could lead some facilities to no longer incur compliance costs to maintain their FRP, maintain a contract with an oil spill removal organization, or conduct periodic drills and exercises to maintain preparedness"[323] and that it could change the scope of waters that trigger the "reportable discharge" applicability criterion but expect that the later will have a small effect based on program data showing that only applied to two facilities.[324] With regard to the remaining 2,115 FRP planholders, the agencies state they lack data needed to complete an assessment but "anticipate that few facilities could be affected by the change" in the WOTUS definition.[325] With regard to FRP requirements for pipelines, the agencies "expect marginal changes in the number of jurisdictional water crossings" to have "no material effect" on the number of FRPs that operators may develop and "anticipate no material impact on the number of rail operators required to develop a facility response plan." With regard to spill notification and removal programs, the agencies do not address the impacts to the Clean Water Act program claiming that impacts will turn on the existence state and local government requirements, responsible party actions, and "other factors."[326]

- With regard to Clean Water Act Section 401, the RIA largely discusses the program and then state the obvious—that the proposed definition "would affect where Federal permits are required and where section 401 certification applies" and "reduced Clean Water Act coverage will likewise reduce the applicability of section 401."[327] Rather than considering how loss of that authority will negatively impact state and tribal authorities, the agencies note that this "could result in avoided costs for States and authorized Tribes by decreasing the number of section 401 reviews and staff workload."[328] The agencies also note that it

[321] *Id.* at 61-62, 65.

[322] *Id.* at 61.

[323] *Id.* at 62.

[324] *Id.* at 62-63.

[325] *Id.* at 64.

[326] *Id.* at 65.

[327] *Id.* at 67.

[328] *Id.* at 68.

"could also result in discharges into newly non-jurisdictional waterbodies and lead to ecosystem impacts and related forgone benefits" but provides no information about those impacts and forgone benefits.[329]

- With regard to Clean Water Act Section 402, which encompasses permit coverage for approximately 850,000 facilities or activities according to the RIA,[330] the agencies primarily discuss parts of the NPDES program and focus on state and tribal authorities to act under their own separate authorities to address pollution of waters that lose Clean Water Act protection under the proposed rule. With regard to impacts to Section 402 Clean Water Act programs, however, the agencies state merely that the proposed definition "would decrease the scope of Clean Water Act jurisdiction compared to baseline" and "waters outside the scope of the agencies' authority under the Clean Water Act likewise fall beyond the agencies' enforcement authority under the Act."[331] The agencies seem to recognize that this means NPDES permits would no longer be required to control pollutant discharges from municipal, industrial, and other sources into these non-jurisdictional waters, but unreasonably assert without any basis whatsoever that the potential impacts to NPDES permits will be "limited."[332] The agencies also state, without providing any basis, that they "anticipate that both avoided costs to the industry and the potential environmental impacts from construction activities [associated with construction stormwater water permits] due to a change to the definition of 'waters of the United States, would likely be modest."[333] Similarly, with regard to industrial stormwater permits, the agencies say they lack data to estimate potential cost savings and environmental disbenefits, but still assert without any reasonable basis that potential impacts "may be limited" because "[t]hese types of facilities are generally large and due to their scale, may be more likely to discharge into perennial streams (outside of the arid West). . . ."[334] EPA possesses data on the location, size, and receiving waters for industrial dischargers and, thus, should have evaluated these impacts rather making such an unreasonable assumption. The agencies made similarly unreasonable assumptions with regard to Municipal Separate Storm Sewer System

[329] *Id.*

[330] The Economic Analysis for the January 2023 Definition indicates that there are 250,000. See, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 61, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[331] RIA, at 71.

[332] *Id.* at 72. The agencies lack any basis for reaching this type of conclusion about the scale of impacts in the absence of an assessment identifying the number and types of waters that would be non-jurisdictional, an assessment of how many and what types of NPDES permits would no longer be required, and an assessment of what types and volumes of pollutants would be discharged into which types of waters.

[333] *Id.*

[334] *Id.* at 73.

discharges by stating, without any proof or analysis, that there would only be "a minor impact to cost savings or water quality disbenefits" because these facilities "often" implement their stormwater management programs uniformly across their area.[335] With regard to pesticide discharges, the agencies simply describes the NPDES requirements for these discharges and says the proposed rule does not change the NPDES requirements, which is obvious and does not address the proposed rule's impact on making those unchanged requirement applicable to fewer waters.[336] With regard to water transfers, the agencies say the impact of the change in jurisdiction on this program is unknown.[337] Lastly, the agencies do not assess the impact of the proposed definition on Clean Water Act enforcement by the agencies or through citizen suits.

- With regard to Clean Water Act Section 404, like with the other programs, the agencies focus heavily on describing the program and on speculating how state and tribal governments may use their own authorities may or may not be able to protect waters that lose Clean Water Act protections as a result of the proposed rule. With regard to impacts to the Section 404 program, however, the agencies simply state that they "anticipate that, if finalized, this proposed rule would result in a negligible change in regulatory violations" and, after referencing a "conceptual value" diagram showing lists of forgone public ecosystem service values from decreased compensatory mitigation requirements under the proposed rule, "no such loss of benefits would be expected where State and Tribes have, or develop, commensurate requirements."[338] Instead of actually completing an evaluation of impacts to the Section 404 programs, the agencies included a "Potential Approach to Quantify Economic Impacts" that the agencies would potentially undertake for the final rule.[339] In that part of the RIA, the agencies state that the proposed rule "could likely reduce requirements to obtain CWA section 404 permits" and for "permittees to mitigate

[335] *Id.*

[336] *Id.*

[337] *Id.* at 74.

[338] *Id.* at 77. It appears this conceptual diagram was simply reproduced from the 2022 Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule. However, that conceptual diagram was included in the 2022 Economic Analysis not to assess impacts, costs, or benefits, but merely to help illustrate "how increased mitigation requirements resulting from the final rule, on the left side of the diagram, can generate public ecosystem service benefits derived from increased wetlands and streams, shown on the right." *See* Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022) at 80-82, Dkt. ID No. EPA-HQ-OW-2025-0322-0110. Accordingly, it does not support the agencies' conclusion in the RIA.

[339] The agencies previously modified the NWPR approach under consideration in the RIA to improve its accuracy, but this approach is not mentioned in the RIA. *See* Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 83-93, Dkt. ID No. EPA-HQ-OW-2025-0322-0110. The agencies could have applied this approach in the RIA for the proposed rule but failed to do so. Although the agencies provided inadequate information to be able to provide detailed comments on their proposed quantification approach, the methods employed in the 2022 Economic Analysis should be incorporated into the agencies' analysis.

> unavoidable impact from those activities, where applicable."[340] They further acknowledge that, in non-jurisdictional waters under the proposed rule, the "amount of mitigation required to offset impacts may decrease" and the Clean Water Act may no longer motivate developers and other project proponents to "take the same steps to avoid impacts to wetlands and other water resources" or require them "to demonstrate that they have minimized potential impacts to the maximum extent possible."[341] The agencies also expect the number of 404 permits to decrease and expect this to produce a cost savings to project proponents, as well as forgone benefits from avoided impact minimization and mitigation. However, the agencies did not quantitatively or qualitatively evaluate those impacts, costs, or benefits despite laying out a methodology for doing so.

Based on this inadequate analysis, the agencies conclude without any basis that the impacts of the proposed rule will "be most significant for the Clean Water Act section 404 program" and will "produce cost saving to project proponents from avoided permitting and mitigation activities, as well as potential indirect benefits from long-term reduction in regulatory burden."[342] The agencies also state that they "expect forgone benefits from avoided minimization and mitigation measures" but those are "contingent on a number of factors . . . ." Because of this conclusion, the RIA is improperly focused on potential impacts to the Section 404 permitting program. For example, in Section 4.5.5, the agencies discussion of potential approaches to quantifying economic impacts in the final rule is improperly focused exclusively on Section 404 and primarily wetlands,[343] and the surficial Sector Impact Analysis[344] in Section 5 of the RIA is entirely focused on assesses impacts to the types of entities that have historically sought Section 404 permits.[345] However, despite this focus, the agencies still failed to meaningfully assess the impacts to the Section 404 program and the all of the waters that would no longer be jurisdictional under the 2025 Proposed WOTUS Definition or the agencies' alternative approaches.

Additionally, although it may be of some interest to know which one of the Clean Water Act's many programs the agencies' believe will be most severely impacted by the proposed rule, it is more important to know how all of the nation's waters and Clean Water Act programs will be impacted by the 2025 Proposed WOTUS Definition and the alternative approaches the agencies

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[340] RIA, at 78.

[341] *Id.*

[342] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52500.

[343] RIA, at 55, 80-84.

[344] *Compare* RIA, at 85-91 to Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 119-122, App. G, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[345] RIA, at 85-92.

are considering for a final rule, as well as the cost and benefits of the proposed rule and alternatives. The agencies have improperly failed to produce information regarding the latter subject.

Because the agencies failed meaningfully evaluate the impacts, costs, and benefits of the proposed rule on the jurisdictional status of waters and on Clean Water Act programs, there is no rational basis for their ultimate conclusion that the most significant impacts of the proposed rule will be to wetlands through the Section 404 Program. For example, based on their analysis, the agencies can only say that they anticipate the Section 402 permitting program will decrease in scope compared to baseline—not how much it will decrease, how many NPDES permits will no longer be required, how many waters will be impacted, or how those waters will be impacted. Given this, the agencies do not possess any information that would enable them to determine that impacts to the Section 402 program (or any other program) will be more or less significant that the impacts to the Section 404 program. But the lack of a rational basis for this conclusion of the agencies' finding is also apparent from the agencies' statement that they "are considering methods to estimate the changes in the number of 404 permits . . . issued by the U.S. Army Corps and the characteristics of the projects, notably the magnitude of wetland impacts that would no longer be minimized and mitigated, for the final rule Regulatory Impact Analysis."[346] In the absence of knowing the magnitude of wetland impacts (or impacts to other waters and programs), it is logically impossible to conclude that impacts to wetlands under the Section 404 program will be the most significant.

Further, the RIA does not analyze alternatives, including those that that achieve additional benefits or costs less, or explain why the planned regulatory actions is preferable to any alternatives.[347] The RIA should describe all available alternatives for each of the key provisions of the proposed rule, explain the reasons for choosing one alternative over another, and compare the anticipated benefits to the corresponding costs separately for each alternative.[348] Additionally, none of the alternative approaches or implementation issues under consideration for the final rule were evaluated in the RIA. Accordingly, the agencies completely failed to evaluate the impacts of changes they know they may make to the definition in a final rule. Lastly, the RIA does not analyze the effects on disadvantage or vulnerable populations.[349]

The agencies must evaluate the proposed rule, and all of the alternatives under consideration, in relation to the September 2023 Definition, as well as the Pre-2015 Definition, to determine the impacts of the proposed rule on nation's waters and Clean Water Act programs. The agencies have failed to properly undertake that analysis. Accordingly, the RIA provides no meaningful support

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[346] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52500.

[347] EPA Guidelines for Preparing Economic Analyses, at 1-5 Text Box 1.1.

[348] *See, e.g.*, OMB Circular A-4, Evaluation of Alternatives, supra, n. 249.

[349] EPA Guidelines for Preparing Economic Analyses, at 1-5 Text Box 1.1.

for the 2025 Proposed WOTUS Definition or it myriad alternative approaches, and it is arbitrary, capricious and contrary to law.

By failing to fully evaluate and consider the impact that the proposed rule's WOTUS definition will have on the nation's waters, the agencies are repeating the erroneous, illegal approach taken in the adoption of the NWPR. After the NWPR had been adopted and began to be implemented, the agencies determined that the NWPR improperly failed to account for harm to the chemical, physical, and biological integrity of the nation's waters.[350] In the context of the Clean Water Act, this is the most fundamental failure possible because the agencies did not even consider whether the WOTUS definition was consistent with *the sole objective* of the Act: to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

VII. The 2025 Proposed WOTUS Definition is Arbitrary, Capricious, an Abuse of Discretion, in Excess of the Agency's Authority, and Contrary to Law

The 2025 Proposed Rule Notice makes clear that the agencies have no intention of interpreting and implementing the Clean Water Act in a manner intended to best achieve Congress' objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. Rather, the agencies' obvious goal is to reduce the scope of federal jurisdiction over the nation's waters as much as possible. The agencies claim that they "intend to provide great regulatory certainty and increase Clean Water Act program predictability and consistency" with the proposed rule.[351] However, nothing in the law or science supports the definitional limitations the agencies are proposing, and as a result, neither the agencies nor the public can discern which waters will be protected under 2025 Proposed WOTUS Definition or the alternative approaches the agencies are considering for adoption in a final rule. The obvious corollary to this is that the agencies cannot evaluate the impact of their proposed definition on the nation's waters and Clean Water Act programs, which, in turn, means the agencies cannot determine or demonstrate that their definition is consistent with the Clean Water Act and will achieve its objective for the nation's waters.

We do know that, by dramatically narrowing federal protections under the guise of claiming merely to be delineating the boundary between federal and state authority, the agencies knowingly ignore the foreseeable and unavoidable consequence that entire classes of waters will be left wholly unprotected from pollution and destruction in large portions of the country. When waters are excluded from the definition of "waters of the United States," all of the protections of the Clean

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[350] *See, e.g.*, EPA & Dep't of the Army, Memorandum for the Record: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Database to Assess Effects of the Navigable Waters Protection Rule (2021), https://www.epa.gov/sites/default/files/2021-06/documents/3_final_memorandum_for_record_on_review_of_data_web_508c.pdf and Attachment A: Data Analysis (2021), https://www.epa.gov/sites/default/files/2021-06/documents/combined_4_thru_12_508.pdf ("Memorandum for the Record"). (Attachment 20)

[351] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52498.

Water Act—the discharge standards and permitting requirements for pollution discharges, dredging and filling standards and permitting, water quality standards, effluent limitation guidelines, total maximum daily loads, water quality certifications, and myriad other Clean Water Act standards and programs— become inapplicable and cannot prevent or even mitigate the harm.

Federalism comments submitted to the agencies from the Association of Metropolitan Water Agencies ("AMWA"), an organization representing the largest publicly owned drinking water utilities in the United States, illustrate one of the most dangerous aspects of the agencies' proposed definition of "waters of the United States" and the agencies' rejection of their obligation to consider the impacts of their proposed definition on the nation's waters—failure to protect waters that are vital for providing drinking water for people across the country.[352] The AWMA explains:

> It is essential that when developing a revised WOTUS rule, EPA and USACE are mindful of the rule's impact on source waters, particularly those used for drinking water, and as a result, finalize definitions of "relatively permanent" and "continuous surface connection" that are protective of these vital resources. USGS estimates that surface water sources provided 61 percent of the total water withdrawn for public supply use in 2015. These water sources are vulnerable to potential chemical and biological contamination. AMWA supports the protection, preservation, and restoration of the nation's surface water resources through comprehensive pollution control measures. It is generally most effective to control pollutants at their source, where they are highly concentrated, rather than remove them at the consumer's expense after entering a water body or supply source. This proactive approach supports the "polluter pays" principle and helps ensure that those who pollute our natural resources are not allowed to pass the cost of cleanup onto public drinking water utilities and their customers . . . Wetlands are inseparably related to the supply of safe, high-quality drinking water, as they provide essential functions in local and regional hydrologic cycles that filter sediment, remove pollutants, recharge aquifers, control flooding, and reduce erosion. Water intake structures, reservoirs, and other facilities must often, by their nature, be located in or utilize wetland areas. Such use is appropriate with proper mitigation since water supplies provide essential public health, safety, and economic benefits. AMWA encourages both EPA and the USACE to consider these points when determining which wetlands should be considered jurisdictional under the new rule.[353]

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[352] Letter from Tom Dobbins, AMWA Chief Executive Officer to Stacy Jensen, Director of EPA Office of Water – Oceans, Wetlands, and Communities Division, *et al.*, *Federalism Consultation on Revised Definition of Waters of the United States*, (June 2, 2025) ("AMWA Federalism Comments"), Dkt. ID No. EPA-HQ-OW-2025-0322-0122_attachment_16.

[353] *Id*. at 2.

For the agencies to finalize such draconian reductions to the scope of federal protections of the nation's waters flies in the face of the Clean Water Act's objective, goals, requirements, and text. To do so without a clear understanding and demonstration of the public health, environmental, and economic costs of that action, reflects a shocking indifference to the agencies' missions and the law. The agencies' action "should not create serious risks . . . [of] creating loopholes that undermine the statute's basic federal regulatory objectives."[354] The proposed rule, however, will intentionally create loopholes in the Clean Water Act that will preclude, not merely undermine, achievement of the Act's regulatory objectives. Each and every proposed change would be detrimental to the statute's objective and disrespect Congressional intent. In fact, a careful review of the 2025 Proposed Rule Notice reveals that not a single change to the regulatory WOTUS definition that the agencies have proposed would even arguably help to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The scope of jurisdiction over relatively permanent waters and adjacent wetlands had already been resolved by the Supreme Court in *Sackett v. EPA*. The agencies also claim that they are revising the WOTUS definition "in light of" *Sacket v. EPA*,[355] however, the agencies already incorporated any changes required or authorized by that decision into the September 2023 Definition. Additionally, in developing the January 2023 and September 2023 Definitions, the agencies engaged in extensive evaluations of the legal and technical issues relevant to defining WOTUS, including multiple outreach efforts to stakeholders, and the results of those evaluations are already reflected in the September 2023 Definition and its extensive supporting administrative record.[356] In reality, the agencies are not truly attempting to amend the WOTUS to implement the *Sackett v. EPA* decision. This is obvious from statements throughout the 2025 Proposed Rule Notice[357] and the fact that the agencies are proposing amendments to the definition that go far beyond what is required or authorized by *Sackett v. EPA* or are completely unrelated to that decision.

For example, the agencies are also proposing to adopt multiple provisions from the NWPR. As noted previously, the NWPR radically redefined "waters of the United States" under the Clean Water Act in a manner that is contrary to the objective of the Act and the scientific information in the that rule's administrative record. The U.S. District Court for the District of Arizona in *Pascua*

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[354] Cf., *County of Maui*, 590 U.S. at 185 (Holding that the underlying statutory objectives should guide EPA's decisions implementing the functional equivalent standard under the Clean Water Act).

[355] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52499.

[356] *See, e.g.*, January 2023 Definition, 88 Fed. Reg. at 3084-88 (approach, basis, and tools for identifying relatively permanent tributaries), 3095-96 (approach, basis, and tools for identifying adjacent wetlands under the relatively permanent standard), 3102 (implementing the relatively permanent standard for (a)(5) waters).

[357] *See, e.g.*, 2025 Proposed Rule Notice, 90 Fed. Reg. at 52499 ("With this action, the agencies are proposing to revise the Amended 2023 Rule to implement the Sackett decision, provide greater regulatory certainty, and increase Clean Water Act program predictability and consistency by clarifying the definition of 'waters of the United States.'").

Yaqui Tribe, et al., v. EPA,[358] the District Court for the District of New Mexico in *Navajo Nation v. Regan*,[359] and the agencies themselves[360] have already determined that the NWPR was plagued with procedural and substantive legal error; was causing significant, actual environmental harm to the nation's waters; and would have continued to cause harm so long as it remained in place. In sum, the agencies cannot adopt provisions of the NWPR in the proposed WOTUS definition because the NWPR flew in the face of congressional intent; harmed public health, water quality, and wildlife; constituted arbitrary and capricious agency action and an abuse of discretion; and was otherwise unlawful. The NWPR's illegal elimination of Clean Water Act protections for vast swaths of the nation's waters harmed drinking water supplies, fisheries, and recreational waters, as well as people, threatened and endangered species, and the nation's vast, interconnected aquatic ecosystems that are exposed to dangerous levels of pollution and destruction in both directly impacted and downstream waters.

The agencies' true agenda is deregulation—an objective that is contrary to the Clean Water Act, will cause enormous harm to people, aquatic life, and wildlife across the country, and that the agencies lack statutory authority to pursue. In fact, on the same day the agencies announced their intention to revise the WOTUS definition, March 12, 2025, EPA Administrator Zeldin issued a press release and video statement entitled "EPA Launches Biggest Deregulatory Action in U.S. History" to "advance President Trump's Day One executive orders and Power the Great American Comeback" and to "unleash American energy, lower cost of living for Americans, revitalize the American auto industry, restore the rule of law, and give power back to states to make their own decisions."[361] Deregulation is directly at odds with Congress' intent in enacting the Clean Water Act, and gutting the Act through administrative fiat disregards the rule of law, disempowers state and tribal governments, and will have devasting impacts on the economy.

To achieve their deregulatory agenda, the agencies improperly rejected longstanding court and agency interpretations of the Clean Water Act and the scope of its jurisdiction. Under the APA, the agencies are required to "provide reasoned explanation" for their proposal to replace this

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[358] The court vacated and remanded the rule based on "[t]he seriousness of the Agencies' errors in enacting the NWPR, the likelihood that the Agencies will alter the NWPR's definition of 'waters of the United States,' and the possibility of serious environmental harm if the NWPR remains in place . . . ." *Pascua Yaqui Tribe v. EPA*, at *5.

[359] The court vacated the NWPR, in part, because of "'fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition . . .'" and "[t]he Agencies' own findings thus demonstrate that 'allowing the Rule to remain in place' upon remand 'would set back achievement of the environmental protection required by the CWA,' thus presenting a very real possibility of serious environmental harm." *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164, 1168-69 (D.N.M. 2021) (citations omitted).

[360] *EPA, Army Announce Intent to Revise Definition of WOTUS*, *supra* n. 49; *see also* EPA and Corps, *Request for Remand and Supporting Documentation*, *supra* n. 49; Memorandum for the Record, supra n. 350, Fox Dec. and Pinkham Dec., *supra* n. 50.

[361] EPA, *EPA Launches Biggest Deregulatory Action in U.S. History* (Mar. 12, 2025), available at: https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history. (Attachment 21)

definition with the Proposed Rule definition, and "must show that there are good reasons" for doing so.[362] As the Supreme Court explained in *Fox*, a more detailed justification is required when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy" and "[i]t would be arbitrary or capricious to ignore such matters … [because] a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[363] The agencies have completely failed to provide good reasons for rejecting longstanding agency interpretations[364] and for replacing the September 2023 Definition with the definition in the proposed rule. In addition to being contrary to law, the agencies' failure to evaluate both the factual findings underpinning the agencies' prior regulatory definitions and to adequately evaluate the regulatory impacts of the 2025 Proposed WOTUS Definition is arbitrary and capricious.

The agencies' Proposed WOTUS Definition is inconsistent with agency understandings of the Act that have persisted throughout its history. For example, until 2015, the definition of "waters of the United States" under the Clean Water Act had remained in place largely unchanged since the 1970s[365] and broadly encompassed jurisdiction over the nation's waters consistent with the with the objective of the Act.[366] Consistent with Congressional intent, the EPA (1973)[367] and the Corps (1977)[368] adopted regulations further defining "waters of the United States" for the purposes of the Clean Water Act to include broad categories of waters beyond those protected by traditional navigability tests. When the Corps adopted its definition of "waters of the United States" in 1977, it recognized that "[t]he regulation of activities that cause water pollution cannot rely on . . .

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[362] *Fox*, 556 U.S. at 516.

[363] *Id.* at 515-16 (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, (1996)).

[364] *See, e.g.,* January 2023 Definition: Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), Dkt. ID No. EPA-HQ-OW-2025-0322-0110; TSD for the January 2023 Definition, *supra* n. 51; September 2023 Definition; Memorandum - Waters that Qualify as 'Traditional Navigable Waters' Under Section (a)(1) of the Agencies' Regulations, available at: https://www.epa.gov/system/files/documents/2022-12/Water%20that%20Qualify%20as%20TNWs_Final_0.pdf, Dkt. ID No. EPA-HQ-OW-2021-0602-2486 (Attachment 22); U.S. EPA and Corps, September 24, 2024, Presentation: Updates on "Waters of the United States", at slide 47 ("[w]etlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert…"), available at https://www.epa.gov/system/files/documents/2024-09/wotus-overview_9-24-24_508c.pdf (Attachment 23); EPA and Corps, Presentation – November 15, 2023, Updates for Tribes and States on 'Waters of the United States," at 48, available at: https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf (Attachment 24).

[365] *See* regulatory definitions at 33 CFR part 328 and 40 CFR parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401.

[366] This is true with the exception of the illegal waste treatment exclusion described in Section VII.K. of these comments.

[367] 38 Fed. Reg. 10834 (1973).

[368] 42 Fed. Reg. 37122 (1977).

artificial lines . . . but must focus on all waters that together form the entire aquatic system."[369] In the Preamble to the Corps' 1977 rule defining "waters of the United States," the Corps stated:

> Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce **even though they are not interstate waters or part of a tributary system to navigable waters of the United States**. The condition or quality of water in these other bodies of water will have an effect on interstate commerce.[370]

Under the Corps' 1977 Definition, waters in Categories 1, 2, and 3, over which jurisdiction was "obvious" under the Federal Government's broad powers to regulate interstate commerce, included: (1) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands; (2) Tributaries to navigable waters of the U.S., including adjacent wetlands; and (3) Interstate waters and their tributaries, including adjacent wetlands.[371] Additionally, based on reasoning set forth above, the Corps included "other waters" where the use or destruction of the waters could affect interstate commerce within the definition of "waters of the United States."41 This "other waters" provision remained in place for decades prior to the Clean Water Rule. *See, e.g.*, 33 C.F.R. § 328.3(a)(3) (2015). The proposed rule will not protect many of the waters over which the Corps determined jurisdiction was obvious.

In fact, the 2025 Proposed WOTUS Definition would not even protect all of the waters that were protected under federal water pollution laws in effect prior to the 1972 Clean Water Act Amendments.[372] As a result, it would illegally transform the Clean Water Act from the federal "all-encompassing program of water pollution regulation" the Supreme Court described in *City of Milwaukee v. Illinois*, *International Paper Co. v. Ouellette,* and *Arkansas v. Oklahoma*, into the type of supplemental pollution control program dependent on state laws that "gave us the 1969 burning of the Cuyahoga River, the consequence of a classic "tragedy of the commons," which occurs when society fails to create incentives to use a common resource responsibly."[373] This is

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[369] 42 Fed. Reg. 37128 (July 19, 1977) (emphasis added).

[370] 42 Fed. Reg. 37127-37128 (emphasis added).

[371] *See, e.g.*, 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

[372] *See* Section VI, *supra*; *see also* Hines History of the CWA, *supra* n. 209 (Overview of waters protected under prior statutes).

[373] *Am. Farm Bureau Fed'n*, 792 F.3d at 309 ("In response to that fire and to the general degradation of American water that followed the post-war industrial boom, Congress determined that the EPA should have a leadership role in coordinating among states to restore the Nation's waters to something approaching their natural state. *See* 33 U.S.C. § 1251.")

clearly contrary to Congressional intent and endangers the nation's waters in violation of the Clean Water Act.

A. The Agencies' Proposed Definition, Alternative Approaches, and Implementation Questions are Vague, Arbitrary, and Contrary to Law

As one of the bases for the proposed rule, the agencies state that it would "achieve the agencies' goals of ensuring clarity, simplicity, and improvements that will stand the test of time, while providing for durable, stable, and more effective and efficient jurisdictional determinations and permitting actions."[374] However, the proposed rule definition is hopelessly vague and arbitrary, and the 2025 Proposed Rule Notice is riddled with a wide range of even more vaguely described alternative approaches and implementation questions. These facts alone demonstrate that there is nothing clear or simple about the agencies' proposed definition.

Taken together, the proposed rule's improper, unscientific, limitations on Clean Water Act jurisdiction over tributaries, wetlands, lakes, ponds, ditches, and other waters undermine the entire Act by creating unsupported and vaguely defined barriers to controlling pollution in historically protected waters. The agencies' use of non-scientific definitions and arbitrary requirements determining jurisdiction will result in the loss of Clean Water Act protections for waters that are commonly understood as jurisdictional using established scientific terms.

This will have devastating impacts on the nation's waters. In addition to the harm caused by simply eliminating long-standing protections for large numbers of rivers, streams, lakes, wetlands and other waters, the uncertainty flowing from the agencies' nonscientific and unreasonable definitions and implementation will result in confusion and uncertainty that ensures fewer pollution discharges being controlled, contrary to the objective of the Clean Water Act and the intent of Congress.

As demonstrated through Section VI.D. *supra*, the agencies are proposing a definition of "waters of the United States" is so novel and unsupported by law and science that they could not assess its impact on the nation's waters or the Clean Water Act. The agencies state that they will have the burden to prove a water is jurisdictional and if they cannot meet their burden the water will simply be deemed non-jurisdictional,[375] but the agencies are proposing a vague, unscientific definition that they do not know how to implement and for which data and tools are not readily available. The agencies explain:

> [T]he agencies bear the burden of proof in demonstrating that an aquatic resource meets the requirements under the proposed rule to be jurisdictional or excluded.

[374] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52515.

[375] *Id.*

> The agencies' jurisdictional determinations must adequately document the basis of jurisdiction—that is, summarize the indicators that support the determination such as the information that demonstrates that the waters, including any wetlands, at issue meet the requirements of paragraphs (a) or (b) of the proposed rule, as applicable. Under any definition of "waters of the United States," the agencies will rely on a weight of evidence approach when determining whether a water meets the regulatory requirements for asserting Federal jurisdiction. This means that if the agencies do not have adequate information to demonstrate that a water meets the jurisdictional standards to be a "water of the United States," the agencies would find such a water to be non-jurisdictional. The agencies invite comment on approaches for increasing predictability in jurisdictional determinations, including options for leveraging data and tools discussed *infra* in section V of this preamble and in section 3 of the Regulatory Impact Analysis for the Proposed Rule." [376]

As noted, previously, this approach is arbitrary, capricious, and contrary to law and it will improperly leave many waters across the country unprotected. It hardly seems accidental that the agencies are attempting to establish standards of proof in this definition that often will not be able to be met for many waters across the country.

B. Traditional Navigable Waters

The 2025 Proposed Rule Notice states that the agencies are not proposing to change the scope of paragraph (a)(1)(i) for traditional navigable waters in the September 2023 Definition.[377] However, this is not particularly reassuring, given the agencies' flawed interpretations of case law associated with "navigable waters,"[378] the agencies' request for comment on whether they should adopt a WOTUS definition based on Justice Thomas' concurring opinion in *Sackett* that asserts "navigable waters" refers solely to the aquatic channels of interstate commerce over which Congress traditionally exercised authority,[379] and the fact that the agencies state without meaningful explanation that they are "are considering whether clarifications to the scope of [traditional navigable waters] may be warranted in the final rule preamble or in a separate administrative action."[380] The agencies also cryptically state in the 2025 Proposed Rule Notice that "are

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[376] *Id.*

[377] *See, e.g., id.* at 52515.

[378] *Id.* at 52501-52502. For example, the agencies state that "Congress' authority to regulate navigable waters derives from its Commerce Clause power over the channels of interstate commerce. *See Solid Waste Agency of Northern Cook Cnty v. Army Corps of Eng'rs*, 531 U.S. 159, 168 & n.3, 172, 173-174 (2001) (*SWANCC*)." The Supreme Court simply did not say this in *SWANCC*.

[379] *Id.* at 52515.

[380] *Id.*

considering whether it may be necessary to elucidate what it means for a water to be 'susceptible to use in interstate or foreign commerce'" and they solicit comment from the public "about any experiences they may have had with findings that waters are 'susceptible to use in interstate or foreign commerce,' any concerns they may have with current or potential future implementation of that provision, or other aspects of this provision that may warrant additional clarification or interpretation by the agencies." Lastly, the agencies ask whether they should reinstate a joint agency coordination memo "requiring elevation of **certain** traditional navigable waters determinations . . . ."[381]

That is the extent of the information the agencies have provided the public on their potential "clarifications to the scope" of protections for this foundational category of waters protected by the Clean Water Act. Thus, it is impossible for the public to determine, among other things: (1) which waters the agencies believe are currently encompassed within the traditional navigable waters category, (2) why the agencies think clarifications may be warranted, (3) what clarifications are under consideration, (4) what aspect of the category would be addressed by the clarification, (4) how would the clarifications impact jurisdiction over traditional navigable waters, impoundments, tributaries, and adjacent wetlands, (5) why is there a potential need for elucidation of "susceptible to use in interstate and foreign commerce," and (6) why the agencies think they should or should not reinstate the elevation memo.

The only thing that can be gleaned from the notice is that the agencies are considering changing the scope of protected traditional navigable waters and how they make "certain" jurisdictional determinations. Because the agencies are considering altering their longstanding interpretation of traditional navigable waters, the agencies are obligated to provide the public with a reasoned explanation and basis for what they are considering, including how the interpretation may change, in the rulemaking notice so that the public can understand and comments on what is being proposed. The agencies have failed to do that in violation of the CWA and APA.[382]

This is particularly egregious given that the agencies are proposing this category—traditional navigable waters—as the hub through which they intend to define all or nearly all other jurisdictional waters, but the agencies have previously indicated that they do not even know which waters in the United States are included in this category. For example, when the agencies attempted to evaluate the impacts of the NWPR on the nation's waters and Clean Water Act programs, they

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[381] *Id*.

[382] *See, e.g., FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 516 (2009); *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals.").

admitted they were unable do so for traditional navigable waters because the agencies stated: (1) they make case-by-case determinations for this category of waters that they claim cannot be relied upon in future determinations; (2) the USGS National Hydrography Dataset does not identify these waters; and (3) there is no national map of traditional navigable waters.[383] Because the agencies intend to limit the WOTUS definition in such a narrow manner contrary to the Clean Water Act, if the agencies do not know whether a water is a traditional navigable water, they cannot assess whether other waters will be jurisdictional and, thus, cannot evaluate the impacts of the 2025 Proposed WOTUS Definition or any of it alternatives. For this reason alone, the 2025 Proposed Rule is arbitrary, capricious, and contrary to law.

The proper approach to identifying traditional navigable waters is to encompass all waters that have been considered "navigable waters" under various laws and judicial decisions, as well as any water that is navigable-in-fact, given Congressional intent to broadly protect the nation's waters. In so doing, it is important for the agencies recognize that the pre-Clean Water Act statutes that include the term "navigable waters" all have different purposes, and over time, lines of cases have developed interpreting each of these sources of authority.[384] In the 2025 Proposed Rule Notice, the agencies appear to recognize that the phrase "navigable waters" has "different meanings depending on the context of the statute in which it is used,"[385] but the agencies discuss only few of these cases and present them in a manner that fails to recognize their different purposes in order to represent a narrower view of jurisdiction (and Congress' Commerce Clause Authority) than is justified. Generally, there are three different lines of federal navigability cases: (1) those involving the Commerce Clause (i.e. Regulation of Commerce, Rivers and Harbors Act Cases, Federal Power Act Cases, Navigational Servitude Cases); (2) Admiralty Cases (i.e. those involving admiralty jurisdiction), and (3) Equal Footing Doctrine Cases (i.e. those involving determinations over the ownership of the beds of navigable waters). These lines of cases are explained in detail in "Natural Resource Defense Council *et al*., Comments on 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA"[386] and "U.S. EPA and Corps, Waters that Qualify as 'Traditional Navigable Waters' Under Section (a)(1) of the Agencies' Regulations" (also known as "Appendix D").[387]

For purposes of the Clean Water Act, the agencies have consistently interpreted the term "traditional navigable waters" to include all of the "navigable waters of the United States," defined

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[383] *See* NWPR Proposed Rule, Resource and Programmatic Assessment Docket, at 35-36, https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-0005 (Attachment 25).

[384] *See, e.g*., *Kaiser Aetna v. United States*, 444 U.S. 164, 172-74, (1979).

[385] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52502, n. 2.

[386] Waterkeeper 2011 Comments, *supra* n. 30.

[387] Waters that Qualify as 'Traditional Navigable Waters' Under Section (a)(1) of the Agencies' Regulations, *supra* n. 364.

in 33 C.F.R. Part 329 and by the numerous decisions of the federal courts, plus all other waters that are navigable-in-fact under the standards that have been used by the federal courts.[388] Accordingly, there is no need or justification for the agencies to "clarify" the scope of traditional navigable waters or "elucidate" the meaning of "susceptible to use." For similar reasons, the agencies should not reissue the June 2020 TNW Elevation Memo, which was rescinded on November 17, 2021.[389] That memo directed that "certain case-specific and standalone" jurisdictional determinations for traditional navigable waters under the NWPR should be elevated to the agencies' headquarters. Elevation was required when determinations concluded a water is "susceptible to use," and thus a traditional navigable water, solely based on evidence of recreation-based commerce, and when a NWPR exclusion would apply to a traditional navigable water. The agencies rescinded that memo because it created confusion[390] and "by establishing new procedures for one category of traditional navigable waters, the 2020 elevation memorandum created an unnecessary extra step for making traditional navigable waters determinations that the agencies have been making for many years."[391] Nothing has changed since the agencies made these determinations and, because the agencies are not proposing that any exclusions apply to traditional navigable waters in the proposed rule, there is no need to assess that issue at all.

After rescinding the TNW Elevation Memo, the agencies reaffirmed that:

> The Supreme Court has been clear that "[e]vidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use." *PPL Montana v. Montana*, 565 U.S. 576, 600–01 (2012) (in the context of navigability at the time of statehood); *id*. at 601 ("[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." (quoting *United States v. Appalachian Elec. Power Co*., 311 U.S. 377, 416 (1940))); *id*. (noting that the "fact that actual use has 'been more of a private nature than of a public, commercial sort . . . cannot be regarded as controlling'" (quoting *United*

[388] *Id*.; U.S. Army Corps of Eng'rs, Jurisdictional Determination Form Instructional Guidebook App. D (2007) available at: https://www.epa.gov/sites/default/files/2017-05/documents/app_d_traditional_navigable_waters.pdf. ("Appendix D") (Attachment 26); 2021 Proposed Definition, 86 Fed. Reg. at 69447; Clean Water Rule Comment Compendium Topic 2: Traditional Navigable Waters (TNWs), Interstate Waters, Territorial Seas, and Impoundments, Dkt. ID No. EPA-HQ-OW-2011-0880-20872, (Attachment 27), available at: https://www.epa.gov/sites/default/files/2015-06/documents/cwr_response_to_comments_2_tnw.pdf.

[389] U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA), (June 2020), Dkt. ID No. EPA-HQ-OW-2025-0322-0023.

[390] *See, e.g.* 2021 Proposed Rule, 86 Fed. Reg. 69417.

[391] Corps, Rescission of the 30 June 2020 NWPR Memo, "EPA and U.S. Army Corps of Engineers Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act, (Nov. 17, 2021), available at: https://www.usace.army.mil/Media/Announcements/Article/2875944/17-november-2021-rescission-of-the-30-june-2020-nwpr-memo-epa-and-us-army-corps/. (Attachment 28)

> *States v. Utah*, 283 U.S. 64, 82 (1931))). Therefore, the agencies are maintaining their longstanding position that commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments) can be considered when determining if a water is a traditional navigable water."[392]

For example, in July 2010, EPA Region 9 and EPA Headquarters determined, using the current Bush era guidance and its approach to identifying traditional navigable waters that the Los Angeles River is a traditional navigable water.[393] Although the determination looked at the current commercial uses of the rivers, as well as the historic uses of the river, an expedition of kayakers and canoeists down the Los Angeles River played a prominent role in convincing the EPA that the river was a traditional navigable water.[394] Recreational trips, such as the one down the Los Angeles River, are precisely the type of examination that should be conducted to determine whether a water body is a traditional navigable water. On many rivers the only commerce that will occur in the future is recreational use by paddlers in canoes, kayaks, and rafts.

Additionally, consistent with the agencies' longstanding views as reflected in Appendix D,[395] if a water is found to have supported "historic commerce," that is all that is necessary to find that the water is a traditional navigable water, even if that commerce only involved a trapper using the creek to get his beaver pelts to market. The "susceptible to being used for future commercial navigation" test need only be applied if there is no evidence of historic commerce. And while a "susceptibility" determination *may* involve an inquiry into the size, depth, and flow velocity of a creek, that same inquiry has no place in a determination of the presence or absence of evidence of historic commerce.

C. Interstate Waters and their Tributaries Must Be Included in the WOTUS Regulatory Definition

In a proposed rule notice that is full of shocking and inexplicable statements, conclusions and proposals, the agencies' proposed elimination of interstate waters as a category of "waters of the United States" is the most outrageous and concerning. In sum, the agencies propose to eliminate federal protections for interstate waters based on the circular argument that the Clean Water Act only protects "navigable waters." It is as if the agencies don't realize that "navigable waters" are

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[392] January 2023 Definition, 88 Fed. Reg. at 3071.

[393] *See* Letter from Jared Blumenfeld, EPA Region 9 Administrator, to Colonel Mark Toy, District Engineer, Los Angeles District, U.S. Army Corps of Engineers & Attachment, at 3 (July 6, 2010), available at http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf (Attachment 29).

[394] *Id*. at 23-26.

[395] Waters that Qualify as 'Traditional Navigable Waters' Under Section (a)(1) of the Agencies' Regulations, *supra* n. 364; U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D, 'Traditional Navigable Waters," *supra* n. 388.

defined in the statute as "waters of the United States," and that this is the phrase they purport to be defining.

As recently as December 2022, the agencies reaffirmed their longstanding view that protecting interstate waters, as well as the territorial seas and traditional navigable waters, "is a fundamental aim of the Clean Water Act" and all three of these categories constitute "waters where the federal interest is indisputable."[396] Departing from an interpretation of the Clean Water Act's scope held since the EPA adopted its first WOTUS definition including interstate waters as a protected category in 1973,[397] the agencies now assert that they were wrong because Congress only intended to protect interstate waters if they "meet the test laid out in *Sackett,* and the *Rapanos* plurality opinion," employing legal theory that is also contrary to their longstanding views."[398] The agencies recognize that action is a departure from its long-held views to the contrary,[399] but they have not provided a sound basis for overturning it. The 2025 Proposed Rule Notice simply does not provide a reasoned basis for overturning a longstanding, legally sound agency interpretation and the novel agencies' legal theories do not provide a permissible bases for eliminating the protections for interstate waters that have been in place under the 1972 Clean Water Act and its predecessors since 1948.

Standing in contrast to the agencies' purported legal basis eliminating interstate waters from the WOTUS definition is the text of the Clean Water Act, multiple Supreme Court cases, legislative history, agency practice, and common sense.[400] As the Supreme Court explained in *Illinois v. City*

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[396] *See, e.g.*, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 5, Dkt. ID No. EPA-HQ-OW-2025-0322-0110; *see also* Technical Support Document for the Proposed "Revised Definition of 'Waters of the United States Rule,'" at 12 (Dec. 6, 2021) (The agencies stated that "[t]he Clean Water Act is clear that interstate waters that were previously subject to federal regulation remain subject to federal regulation.") ("TSD for 2021 Proposed Rule") available at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081 (Attachment 30).

[397] 38 Fed. Reg. 13528 (May 22, 1973). The only exception to this continuous inclusion is the brief period after the agencies unsuccessfully attempted to eliminate the interstate waters category in the NWPR.

[398] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52517; *compare*, *e.g.*, EPA and Corps, Draft Guidance on Identifying Waters Protected by the Clean Water Act, WOTUS Interstate Waters Attachment: Interstate Waters are "Waters of the United States" Under Section (a)(2) of the Agencies Regulations (Apr. 2011). (Attachment 31)

[399] *See, e.g.,* EPA and Corps, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 2015) (Docket ID: EPA–HQ–OW–2011–0880–20869), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869 ("CWR TSD") (Attachment 32); *see also* January 2023 Definition.

[400] *See, e.g., Am. Farm Bureau Fed'n*, 792 F.3d at 304 ("At the same time, federal power over interstate waterways, 'from the commencement of the [federal] government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.); *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 190, 6 L.Ed. 23 (1824). And for at least a century, federal common law has governed disputes over interstate water pollution. *Arkansas v. Oklahoma*, 503 U.S. at 98 (citing *Missouri v. Illinois*, 200 U.S. 496 (1906) and *Georgia v. Tennessee Copper Co*., 206 U.S. 230 (1907)); *but see Georgia v. Wheeler,* 418 F. Supp. 3d 1336 (S.D. Ga. 2019) (District court ruling on summary judgment that agencies lacked authority to include interstate waters category in the Clean Water Rule definition.)

of Milwaukee, "Congress has enacted numerous laws touching interstate waters. In 1899 it established some surveillance by the Army Corps of Engineers over industrial pollution, not including sewage, Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, a grant of power which we construed in *United States v. Republic Steel Corp*., 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903, and in *United States v. Standard Oil Co.*, 384 U.S. 224, 86 S.Ct. 1427, 16 L.Ed.2d 492."[401] The 1899 RHA was "enforced and broadened by a complex of laws . . . ."[402] This includes the 1948 Water Pollution Control Act,[403] a predecessor to the 1972 Clean Water Act, which declared the pollution of interstate waters, "whether the matter causing or contributing to such pollution is discharge directly into such waters or reaches such waters after discharge into a tributary of such waters," that endangers the health or welfare of persons to be a public nuisance, subject to abatement provided by the Act, including suit by the United States.[404] Interstate waters encompass "all rivers, lakes, and other waters that flow across, or form a part of, state boundaries," without regard to navigability.[405]

The 1948 WPCA was enacted "in connection with the exercise of jurisdiction over the **waterways of the Nation** and in the consequence of the benefits to public health and welfare by the abatement of stream pollution."[406] Like the 1972 Clean Water Act, the 1948 WPCA authorized technical assistance and financial aid to states for stream pollution abatement programs, required comprehensive programs for interstate waters and their tributaries, and authorized loans for sewage treatment plants discharging into those waters.[407] Although the 1948 Water Pollution Control Act declared federal jurisdiction over "the waterways of the Nation," it left the primary responsibility for pollution control in the hands of the states.[408]

The purpose of the 1948 WPCA, and all of its subsequent amendments, has consistently been to protect public water supplies, propagation of fish and aquatic life, recreation, agricultural, industrial, and other legitimate uses.[409] The 1956 Amendments renamed the WPCA as the Federal Water Pollution Control Act ("FWPCA") and strengthened requirements for controlling pollution

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[401] *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 101 (1972), *disapproved in later proceedings sub nom., City of Milwaukee II*, 451 U.S. 304, (1981).

[402] *Illinois v. City of Milwaukee, Wisc.*, 406 U.S. at 101.

[403] Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948) (1948 WPCA"). This Act was renamed the Federal Water Pollution Control Act in 1956.

[404] See 1948 WPCA at § 2(d)(1),(4), 62 Stat. at 1156-1157.

[405] See *id.* at § 10, 62 Stat. 1161.

[406] *Id*. (emphasis added).

[407] *See id*. at § 2(d)(1),(4), 62 Stat. at 1156-1157

[408] *Id*. §7, 62 Stat. 1169; *see also* Hines History of the CWA, *supra* n. 209.

[409] *See* 1948 WPCA, 62 Stat. 1155 and 33 U.S.C. § 466 (1952), 33 U.S.C. § 466 (1958), 33 U.S.C. § 466 (1964), 33 U.S.C. § 1151 (1970); *see also* Hines History of the CWA, *supra* n. 209.

through, among other things, cooperative action by the federal and state governments to develop "comprehensive programs for eliminating or reducing the pollution of interstate waters and their tributaries . . . ."[410] Federal jurisdiction under the FWPCA was expanded to encompass "navigable or interstate waters" in the 1961 Amendments.[411] As a result, the provision of the FWPCA applied to all interstate waters, all navigable waters, and all tributaries to interstate and navigable waters.

In 1965, Congress amended the FWPCA to require each state to develop water quality standards for interstate waters within its boundaries by 1967, or through federal regulations if a state failed to act.[412] Like the 1972 Clean Water Act, and as the Supreme Court determined in *Illinois v. City of Milwaukee, Wisc.,* the FWPCA, Section 1(b):

> [D]eclares that it is federal policy 'to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution.' But **the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters**. While the States are given time to establish water quality standards, s 10(c)(1), if a State fails to do so the federal administrator promulgates one. s 10(c)(2). Section 10(a) makes pollution of interstate or navigable waters subject 'to abatement' when it 'endangers the health or welfare of any persons.'[413]

The Court also found that resolution of interstate pollution problems requires application of federal law citing *Texas v. Pankey* as follows:

> Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of State against improper impairment by sources outside its domain... Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.[414]

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[410] Pub. L. No. 84-660, 70 Stat. 498 (1956).

[411] *See* Pub. L. No. 87-88, 75 Stat. 208 (1961).

[412] See Public Law 89-234, § 5(a), 79 Stat. 908 (1965) ("1965 FWPCA").

[413] *Illinois v. City of Milwaukee, Wis*., 406 U.S. at 102–03, n. 4 (internal references omitted) (emphasis added) ("The powers granted the Secretary of the Interior under the Federal Water Quality Act of 1965, 79 Stat. 903, were assigned by the President to the Administrator of the Environmental Protection Agency pursuant to Reorganization Plan No. 3 of 1970. *See* 35 Fed. Reg. 15623.").

[414] *Illinois v. City of Milwaukee, Wis*., 406 U.S. at 107, n. 9 (citing *Texas v. Pankey*, 441 F.2d 236, 241-242 (10th Cir. 1971)).

In language that is nearly identical to the 1972 Clean Water Act, the 1965 Amendments directed that water quality standards for interstate waters "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. In establishing such standards, the Secretary, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses."[415] In addition to the pollution abatement, water quality standards and enforcement provisions discussed above, prior to the 1972 Amendments, the FWPCA also contained provisions for federal grants (including grants to states and interstate agencies to assist with the costs of measures to control water pollution), assistance to states, research, investigations, training, water pollution surveys, development of treatment methods, evaluating water quality, studies and many other topics similar to the 1972 Clean Water Act.[416]

This approach failed to address the nation's serious pollution problems, in large part because of narrowly defined categories of protected waters and limited federal authority.[417] To address these and other shortcomings, Congress passed the 1972 FWPCA Amendments recognizing that solving the nation's water quality problems required "broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[418] To accomplish these goals, as the Supreme Court in *Riverside Bayview* concluded, Congress defined the "waters covered by the Act broadly" to encompass all "waters of the United States."[419]

Congress clearly did not intend to make the Clean Water Act less protective of the nation's waters than its predecessor laws.[420] To the contrary, as discussed in detail in Section VI above, Congress intended to expand the scope of the FWPCA through the 1972 Amendments to protect waters in addition to interstate waters, navigable waters, and their tributaries, which were already protected by the Act. In fact, the Clean Water Act's coverage of, and regulatory programs for, interstate waters are so broad and comprehensive that it eliminated alternative remedies in interstate pollution cases according to the Supreme Court in *City of Milwaukee II* (displaced federal common

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[415] *See* 1965 FWPCA, Public Law 89-234, at § 5(a)(3).

[416] EPA, Federal Water Pollution Control Act (Sept. 1971) (Attachment 33).

[417] *See* Hines History of the CWA, *supra* n. 209.

[418] *Riverside Bayview,* 474 U.S. at 132-33.

[419] *Id*.

[420] *See, e.g.,* S. Rep. No. 92-1236, at 144 (1972); *see also* S. Rep. No. 414, 92d Cong., 1st Sess. 77 ("Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. . . . Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.").

law),[421] *International Paper v. Ouellette* (preempted downstream state's common law),[422] and *Arkansas v. Oklahoma* (a downstream state's remedy is to enforce its water quality standard against an upstream state in an interstate water through the CWA's NPDES permitting process).[423]

In *City of Milwaukee II*, the Supreme Court concluded that Congress had passed such comprehensive legislation regulating water pollution through the 1972 FWPCA Amendments that it had exercised its authority under federal law to occupy the field of water pollution regulation. As a result, the Court found that although federal law still governed water pollution problems in interstate waters, there was no longer any basis for applying the federal common law of nuisance. The Court stated:

> Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law "touching interstate waters"... Rather, the Amendments were viewed by Congress as a "total restructuring" and "complete rewriting" of the existing water pollution legislation considered in that case.[424]

If interstate waters are not protected by the Clean Water Act after the 1972 Amendments as the agencies now posit, the Court would have had no basis for finding the Act provided such comprehensive regulatory programs for their protection and federal common law (not state law) would have continued to govern resolution of water pollution problems in interstate waters.

Additionally, for example, Clean Water Act Section 303 makes it indisputable that Congress intended for existing federal regulation of water pollution in interstate waters to continue. Section 303 directs that, "**in order to carry out the purposes of** [the Clean Water Act]," any water quality standard for interstate waters adopted by states under the 1965 FWPCA prior to the 1972 Amendments and submitted to, and approved by, or is awaiting approval by, the EPA Administrator "shall remain in effect" unless the Administrator determined changes are necessary.[425] If the EPA Administrator found the standards did not meet federal requirements, the

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[421] City of *Milwaukee II,* 451 U.S. 304 (1981).

[422] *International Paper Co.* 479 U.S. at 497-98.

[423] *Arkansas v. Oklahoma*, 503 U.S. at 98–100.

[424] *City of Milwaukee II,* 451 U.S. at 317.

[425] 33 U.S.C. § 1313(a)(1) (emphasis added) (This section also provides "any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the

Act directs the Administrator to notify the state of needed changes and, if the state failed to adopt the changes within 90 days of notification, the Administrator is required to promulgate the changes.[426] Once approved, these water quality standards become the federal standards for implementing the CWA.[427]

There would be no reason for Congress to provide a mechanism for dealing with existing water quality standards for interstate waters if the Clean Water Act no longer applied to interstate waters after 1972. It is obvious, however, that this provision is in the Clean Water Act because the only waters that had federally approved water quality standards at that point were interstate waters. It is equally obvious that Congress did not decide to stop protecting interstate waters, which they had prioritized protecting over any other type water since 1948, when it decided to define the "waters covered by the Act broadly" to encompass all "waters of the United States" in 1972.[428] The agencies assert that the inclusion of interstate waters in Clean Water Act Section 303 only includes interstate navigable waters,[429] but that is an unreasonable view given the fact that the states had adopted water quality standards for any interstate water, not just navigable ones, under the 1965 FWPCA and Clean Water Act section 303 expressly requires the states to submit the standards they adopted prior to the 1972 Amendments for approval by the EPA under the Clean Water Act.

Eliminating Clean Water Act jurisdiction and programs for interstate waters by removing them from the definition of "waters of the United States" would leave states in a worse position to address interstate water pollution than they were for the century preceding the Clean Water Act, since they have been held by the Supreme Court to have lost the common law remedies that were available to them prior to the Act.[430] This result would be contrary to Congressional intent, the

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Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.").

[426] 33 U.S.C. § 1313(a)(1).

[427] See *Arkansas v. Oklahoma*, 503 U.S. at 110 ("In such a situation, then, state water quality standards promulgated by the States with substantial guidance from the EPA and approved by the Agency-are part of the federal law of water pollution control.") (footnote omitted).

[428] *Id*.

[429] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52517.

[430] *See, e.g*., *City of Milwaukee II,* 451 U.S. at 325–26. ("It is also significant that Congress addressed in the 1972 Amendments one of the major concerns underlying the recognition of federal common law in *Illinois v. Milwaukee*. We were concerned in that case that Illinois did not have any forum in which to protect its interests unless federal common law were created. See 406 U.S., at 104, 107, 92 S.Ct., at 1393, 1394. In the 1972 Amendments Congress provided ample opportunity for a State affected by decisions of a neighboring State's permit- granting agency to seek redress."), *see also International Paper Co.,* 479 U.S. at 497; *Arkansas v. Oklahoma*, 503 U.S. at 98–100.

plain text of the Act[431] and extensive Supreme Court and lower court precedent,[432] and would leave "the environmental rights of States against improper impairment by sources outside its domain" unprotected.[433]

Ignoring that reality, the agencies preposterously claim that interstate waters "are more appropriately regulated by the States and Tribes under their sovereign authorities."[434] Despite the agencies purported concern for state's rights sprinkled throughout the 2025 Proposed Rule Notice, the agencies have not provided any suggestion as to how they believe states are supposed to regulate water pollution outside their boundaries or protect themselves against interstate water pollution originating in another state in the absence of the Clean Water Act. Elimination of Clean Water Act protections for interstate waters is irresponsible, dangerous, and illegal.

The agencies also claim without a reasonable basis that "[t]he change would likely have few practical impacts and would not undermine significant reliance interests, as the agencies rarely identify waters as jurisdictional solely because they are interstate as they often fall under one of the other categories of "waters of the United States" . . . ."[435] As noted previously in Section VI.D., the agencies have utterly failed to meaningfully assess the impact of eliminating jurisdiction on the nation's waters in their RIA, do not know how many or the nature of interstate waters will lose protections, and have provided no basis for concluding that eliminating protections for interstate waters (as well as their tributaries, impoundments, and adjacent wetlands) "few practical impacts."

The only evidence the agencies cite in the 2025 Proposed Rule Notice is a review of the Corps' Approved Jurisdictional Database for a period of ten years wherein they identified 15 waters that

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[431] *See, e.g.*, 33 U.S.C. § 1313(a)(1) (This section provides "any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to [October 18, 1972], shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to [October 18, 1972].").

[432] *See, e.g., Am. Farm Bureau Fed'n*, 792 F.3d at 304 ("At the same time, federal power over interstate waterways, 'from the commencement of the [federal] government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.' *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 190, 6 L.Ed. 23 (1824). And for at least a century, federal common law has governed disputes over interstate water pollution. *Arkansas v. Oklahoma*, 503 U.S. at 98, 112 S. Ct. 1046 (citing *Missouri v. Illinois*, 200 U.S. 496 (1906); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)").

[433] *See Illinois v. City of Milwaukee, Wis,* 406 U.S. at 107, n. 9.

[434] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52517. The agencies also claim, without providing any explanation or case citations, that "[t]his approach would also address persistent litigation over this category." Commenters are not aware, and do not believe, that jurisdiction over interstate waters has been a persistently litigated issue over the history of the Act. Regardless, the mere fact that an issue has been raised in litigation does not justify changing the WOTUS definition to eliminate any dispute.

[435] *Id.* at 52516.

were found to be jurisdictional as interstate waters. First, as explained in detail in the RIA,[436] that database is not a comprehensive source for determining the jurisdictional status of a water under the Clean Water Act. Second, Approved Jurisdictional Determinations are only issued if requested by an individual or organization in relation to Section 404 of the Clean Water Act, which is the part of the Clean Water Act implemented by the Corps.[437] Third, EPA, the states, and courts make determinations regarding the jurisdictional status of waters for other programs that are not included in the Corps' Approved Jurisdictional Determination Database.[438] Fifth, interstate waters may have been determined to be jurisdictional decades ago such that no additional jurisdictional question existed requiring a determination. Sixth, the agencies have previously noted that "[t]he Rapanos AJD form associated with the pre-2015 regulatory regime, and the associated ORM2 data do not indicate whether a water is jurisdictional as an 'interstate water.'"[439] Thus, it is unreasonable and arbitrary for the agencies to claim that there will be few impacts from eliminating this foundational category of waters from the WOTUS definition. The public and courts obviously cannot countenance agency beliefs when they avoid carefully considering important aspects action they propose and engage in speculation about the impacts of their action.

Commenters maintain that the agencies are legally required to include all interstate waters, including rivers, streams, lakes, and any other waters that flow across, or form a part of, state boundaries, without regard to navigability. The impact of not protecting interstate waters could be devastating to the nation's waters.[440] In addition to eliminating protections for interstate waters themselves, the elimination of the interstate waters category will result in loss of Clean Water Act protections for their tributaries, impoundments, and adjacent wetlands that are only protected because of their connection to an interstate water—yet another impact of the agencies' proposed definition they have failed to consider and evaluate.[441]

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[436] RIA, at 26-27 ("It is important to note the limitations of using CWA approved jurisdictional determinations (AJDs) from the ORM2 database to assess potential changes in jurisdiction that would result from the rule . . . .").

[437] *See, e.g.,* 2025 Proposed Rule Notice, 90 Fed. Reg. at 52515 (citing Regulatory Guidance Letter (RGL) 16-01, available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1256). In the guidance letter, at page 1, the Corps states that "Approved jurisdictional determinations (AJDs) and preliminary JDs (PJDs) are tools used by the U.S. Army Corps of Engineers (Corps) to help implement Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA) . . . The Corps recognizes the value of JDs to the public and reaffirms the Corps commitment to continue its practice of providing JDs when requested to do so, consistent with the guidance below." Dkt. ID No. EPA-HQ-OW-2025-0322-0030.

[438] *Id*.

[439] Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule (Dec. 2022) at 14, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[440] *See, e.g.*, Waterkeeper Watershed Evaluations, *supra* n. 53, including the Rio Grande, Upper Missouri, Missouri Confluence, Snake River, and Upper Potomac Fact Sheets.

[441] *See, e.g.,* 2025 Proposed Rule Notice, 90 Fed. Reg. at 52514.

D. Impoundments

Although the agencies state in the 2025 Proposed Rule Notice they are not making any substantive changes to this portion of the regulatory definition, the proposed language in the definition would dramatically reduce the types of impounded waters that will remain subject to Clean Water Act protections.[442] However, the agencies improperly failed to assess the impact of the proposed WOTUS Definition on impoundments in the RIA or the proposed rule notice.

The Pre-2015 Definition includes "[a]ll impoundments of waters otherwise defined as waters of the United States under this definition," which is a broad definition that covers most types of waters.[443] In the RIA, the agencies state that "[i]mpoundments were not addressed directly by the *Riverside Bayview*, *SWANCC*, or *Rapanos* Supreme Court decisions, but under pre-2015 practice, impoundments of jurisdictional waters remain jurisdictional."[444]

The September 2023 Definition includes impoundments of waters otherwise defined as WOTUS under the definition with the exception of (a)(5) intrastate lakes and ponds.[445] Additionally, under the September 2023 Definition, "impoundments can be created by impounding one of the 'waters of United States' that was jurisdictional under this rule's definition at the time the impoundment was created, and impoundments of waters that at the time of assessment meet the definition of 'waters of the United States' under paragraph (a)(1), (a)(3), or (a)(4) of this rule, regardless of the water's jurisdictional status at the time the impoundment was created."[446]

Thus, even though the 2025 Proposed WOTUS Definition would not change the language in the September 2023 Definition, it will still narrow jurisdiction over impoundments because that category will only include impoundments of the new, far more narrow categories of waters that would be protected by the proposed definition. The 2025 Proposed WOTUS Definition would also cutoff jurisdiction over a relatively permanent tributary if it flows through a human-made feature such as a dam if that feature does not also convey relatively permanent flow (or potentially if it flows through a dam at all).[447] Obviously, many impoundments of tributaries will involve dams, yet the agencies have not explained how this requirement for tributaries would impact jurisdiction over the impoundment if the impoundment renders the tributary non-

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[442] *Id.* ("Section I.B of this preamble contains a summary of the agencies' proposed revisions. All other aspects of the agencies' regulations defining 'waters of the United States' would remain unchanged.").

[443] *See, e.g.*, RIA, at 10.

[444] *Id.* at 10, n. 5.

[445] *See, e.g.,* 40 C.F.R. § 120.2(a)(2).

[446] Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022) at 20, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.20.

[447] 2025 Proposed Rule, 90 Fed. Reg. at 52521.

jurisdictional. There is simply no rational basis for cutting off jurisdiction over a tributary or an impoundment in such as situation. Either way, the agencies proposed WOTUS definition would protect far fewer impoundments than either the Pre-2015 Definition or the September 2023 Definition contrary to law. No scientific or legal basis exists for excluding impoundments of any water protected under the prior definitions, and none was provided in the Proposed Rule Notice. The agencies failed to assess the impact of such these changes.

E. Relatively Permanent Waters

Under the September 2023 Definition, *Sackett v. EPA*, and the *Rapanos* plurality standard, a tributary to a traditional navigable water, interstate water, or the territorial seas is jurisdictional for the purposes of the Clean Water Act if it is a relatively permanent, standing or continuously flowing body of water.[448] In the 2025 Proposed Rule Notice, the agencies propose to amend the September 2023 Definition by defining "relatively permanent" to mean "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."[449] This definition narrows the current scope of jurisdiction by adding a requirement that relatively permanent waters, including tributaries and (a)(5) lakes and ponds, must either: (1) have standing or continuously flowing water "year-round" or (2) have "surface hydrology" continuously throughout the entirety of "wet season."[450] In other words, the agencies are requiring that "relatively permanent waters" must actually be permanent or permanent for a significant portion of the year.[451] This definition would likely leave most of the rivers and streams in the United States without any protections under the Clean Water Act, which in turn leaves all or nearly all of the nation's waters unprotected from uncontrolled pollution discharges contrary to the Clean Water Act.[452] For example, "intermittent and ephemeral streams conservatively account

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[448] *See, e.g.*, 40 C.F.R. § 120.2(a)(3).

[449] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52517.

[450] *Id.* at 52517-52518.

[451] *See, e.g.*, 2025 Proposed Rule Notice, 90 Fed. Reg. at 525 ("It is faithful to the *Rapanos* plurality opinion and the *Sackett* decision because bodies of water that have standing or flowing surface water year-round are, by definition, permanent.")

[452] *See, e.g.*, NRDC: Mapping Destruction, *supra* n. 58, at 15-16 (The exclusion of ephemeral and intermittent rivers and streams would equate to the elimination of 77% of the NHD-mapped rivers and streams in 48 continental U.S. states and Washington, D.C.); TSD for the January 2023 Definition, at 153 ("The scientific literature unequivocally demonstrates that tributaries exert a strong influence on the physical integrity of larger downstream waters. Tributaries, even when seasonal, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to main stem river segments . . . In the northeastern United States headwater streams contribute greater than 60% of the water volume in larger tributaries, including navigable rivers . . . a study of ephemeral tributaries to the Río Grande in New Mexico found that after a storm event contributions of the stormflow from ephemeral tributaries accounted for 76% of the flow of the Río Grande."); EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2015), https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0074 ("2015 Science Report") (Attachment 34); U.S. EPA Science Advisory Board Review of the

for 59% of the total length of streams in the contiguous United States, most of which are comprised of headwater networks."[453]

These changes to the September 2023 Definition are arbitrary and capricious, inconsistent with the agencies' prior interpretations of "relatively permanent" in the NWPR, January 2023 Definition, and September 2023 Definition, and with the Clean Water Act, Supreme Court and lower court precedent, including *Sackett v. EPA*. Rather than grounding the proposed definition in the law, the agencies impermissibly arrived at this definition ostensibly to "enhance administrative efficiency" and through some kind of unexplained "balancing of the law, common sense, science, and stakeholder input received pre-proposal,"[454] but actually to establish a non-scientific jurisdictional hurdle that will be nearly impossible to overcome. The agencies lack authority to define "waters of the United States" based on their incomprehensible balancing of these disparate factors, and the scope of Clean Water Act jurisdiction cannot be narrowed to achieve the agency's deregulatory agenda.

Under the proposed rule, if a body of water does not have standing or continuously flowing water "year-round," it must have standing or continuously flowing water "at least during the wet season."[455] In the proposed rule preamble, the phrase "at least during the wet season" is further defined in a vague and circular manner as being "intended to include extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year **in response to the wet season,** such as when average monthly precipitation exceeds average monthly evapotranspiration."[456] The proposed rule also requires that "surface hydrology" must be "continuous throughout the entirety of the wet season" and the "wet season" must be an extended period where there is continuous surface hydrology resulting from predictable seasonal precipitation patterns year after year."[457]

Draft EPA Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2014), https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0101 ("2014 SAB Review of Draft Science Report") (Attachment 35); U.S. EPA Science Advisory Board, *Consideration of the Scientific and Technical Basis for the EPA and Department of the Army's Proposed Rule titled "Revised Definition of Waters of the United States*" (2022), https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-2503 ("SAB Review of January 2023 Definition TSD") (Attachment 36).

[453] TSD for the January 2023 Definition, *supra* n. 51, at 118 ("A recent global model by Messager *et al.* (2021) estimated that 44-53% of stream reach length dries for at least 1 month per year, and that the wettest climate zone still had up to 30% of stream length being non-perennial whereas the driest climate zone had 99% of stream length being non-perennial.").

[454] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52519.

[455] *Id.* at 52517-52518. This concept is also applied to the "continuous surface connection" definition and the comments here in apply equally in that context.

[456] *Id.* at 52518.

[457] *Id.*

The agencies implausibly claim that their "relatively permanent" definition implements the *Sackett* and *Rapanos* plurality decisions in "an understandable and implementable way for both ordinary citizens and expertly trained scientists," that it incorporates terms that are "easily understood in ordinary parlance," and will serve as a "bright line test as it would provide a duration threshold."[458] As demonstrated by the fact that the agencies were unable to evaluate the impact of this proposed change on the jurisdictional status of waters and on Clean Water Act programs[459] and by the fact that, in this rulemaking, the agencies have posed a host of questions about how to implement their proposed definition,[460] the agencies' proposed definition of "relatively permanent" is impermissibly vague, arbitrary, and capricious. It is neither understandable nor implementable by the agencies themselves. The agencies do not define "wet season," "continuous surface hydrology," or "predictable seasonal precipitation," and they do not provide any legal or scientific basis for the use of these phrases as jurisdictional limitations. These phrases and concepts have never before been utilized by the agencies to define "waters of the United States" because they are not legally or scientifically sound approaches.

The agencies use of these phrases is also irrational. For example, the "season" in which a body of water is relatively permanent is irrelevant from the standpoint of protecting water quality and from the standpoint of whether it is relatively permanent consistent with the *Sackett* and *Rapanos* plurality opinions, as is whether the water body is relatively permanent in the same season "year after year" and whether the relatively permanent body of water it is due to "surface hydrology" and "predictable seasonal precipitation patterns." It is also illogical to mandate that "surface hydrology" exist "in response to the wet season," as opposed to existing due to sources such as "groundwater, upstream contributions, effluent flow, or snowpack melts," especially given that the agencies state the proposed definition does not require that flow "come from particular sources."[461] Tributaries are obviously connected to, and thus adversely impact, the downstream waters into which they flow without regard to whether the water flowing in them is from rainfall, groundwater, snowfall, or snowmelt.[462] Similarly, the agencies state that "[i]n some parts of the country, there may be two distinct wet seasons that are separated by drier

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[458] *Id.* at 52518-519. The agencies also assert that they are implementing Clean Water Act Section 101(b) by "excluding features that lack flow during the wet season." As explained extensively in Section VI.A.2 *supra*, Section 101(b) does not provide the agencies with authority to exclude jurisdictional waters from the definition of WOTUS nor does it empower the agencies to narrowly define "waters of the United States."

[459] *See, e.g.*, RIA, at 42 (Based on extremely limited information and analysis in the RIA, the agencies merely state that they "anticipate that **fewer waters** would be relatively permanent under the proposed rule compared to current practice," but claim they cannot quantify the change in scope "at this time. . . .") (emphasis added).

[460] *See, e.g.*, 2025 Proposed Rule, 90 Fed. Reg. at 52519-52521, 52525-52526.

[461] *Id.* at 52524 ("This proposed rule's approach is consistent with the plurality opinion in *Rapanos*, which lays out the relatively permanent standard and does not require that relatively permanent waters originate from any particular source. *See, e.g.*, 547 U.S. at 739.").

[462] *See, e.g.,* 2015 Science Report, *supra* n. 452; 2014 SAB Review of the Draft Science Report, *supra* n. 452.

months and in such cases, the tributary would need to have continuous surface hydrology at least during both wet seasons to meet the definition of 'relatively permanent' under the proposed rule,"[463] but they do provided any the basis for requiring longer periods of continuous "surface water hydrology" in some locations but not others or explain how having multiple "wet seasons" translates to the likelihood that there will be fewer "relatively permanent" waters due to that requirement.

The scope of jurisdiction over relatively permanent waters has already been resolved by the Supreme Court. The Court in *Sackett* found the plurality in *Rapanos* to be "correct,"[464] and the *Rapanos* plurality defined waters as "relatively permanent, standing or flowing bodies of water . . . as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'"[465] In response to that decision, the agencies amended the January 2023 Regulatory Definition so that it includes only: "[t]ributaries of waters identified in paragraph (a)(1) or (2) of this section that are **relatively permanent, standing or continuously flowing bodies of water**."[466] This includes relatively permanent streams, rivers, lakes, ponds, impoundments, ditches, canals, and other bodies of water forming geographical features. Because the Clean Water Act is designed to achieve its objective by ensuring broad protections for the nation's waters so that pollution is controlled at its source, it is imperative that the regulatory definition broadly encompass all of those connected waters—both to protect their physical, chemical, and biological integrity and to protect the integrity of any downstream surface waters to which they are connected.

The agencies claim that the 2025 Proposed WOTUS Definition is based on recent Supreme Court decisions and the agencies' expertise,[467] but proposed rule is inconsistent with the agencies' longstanding interpretations of Supreme Court precedent and the relatively permanent standard, and the agencies failed to provide reasoned explanation for disregarding their prior interpretations and scientific findings. In the September 2023 Definition, the agencies adopted the requirement for flow "continuously during certain times of the year" because they determined "it is consistent

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[463] 2025 Proposed Rule, 90 Fed. Reg. at 52524.

[464] *Sackett*, 598 U.S at 671 ("And for the reasons explained below, we conclude that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'"). (internal citations omitted).

[465] *Rapanos,* 547 U.S. at 732-33. Specifically, the *Rapanos* plurality concluded that "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.' All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* (internal citations omitted).

[466] *See, e.g.*, 40 C.F.R. § 120.2(a)(3) (2023) (emphasis added); *see also* January 2023 Definition, 88 Fed. Reg. at 3080; Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 15, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[467] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52518.

with the *Rapanos* plurality opinion, it reflects and accommodates regional differences in hydrology and water management, and it can be implemented using available, easily accessible tools."[468] In the January 2023 Notice, the agencies noted that the *Rapanos* plurality held that "relatively permanent" did "'not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,' or 'seasonal rivers, which contain continuous flow during **some months of the year** but no flow during dry months.'"[469] Accordingly, the agencies determined:

> The phrase "certain times of the year" is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought. The defining characteristic of relatively permanent waters with flowing or standing water continuously during only certain times of the year is a temporary lack of surface flow, which may lead to isolated pools or dry channels during certain periods of the year. The phrase "direct response to precipitation" is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.[470]

Under Pre-2015 Definition and *Rapanos* Guidance, "tributaries are considered relatively permanent if they typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)."[471] However, the agencies expressly rejected that approach for the September 2023 Definition for numerous reasons, including that "directly describing the scenarios in which waters would be 'relatively permanent' is clearer than using the term 'seasonal,' the meaning of which can vary and could be misunderstood to establish a specific required flow duration."[472] Similarly, for the September 2023 Definition, the agencies noted that many factors may affect the period in which relatively permanent flow may occur, the factors are climatically and geographically specific (e.g. likely to vary by region such as where precipitation is distributed somewhat uniformly during the year or where streams are fed by high elevation snowpack melt).[473]

The agencies also determined that that there are "challenges associated with requiring a specific flow duration," and that it is important to also encompass waters that have relatively permanent flow that is not linked to recurring annual or seasonal cycles, such as tributaries with flow that is

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[468] January 2023 Definition, 88 Fed. Reg. at 3084-3085 (citing *Rapanos*, 547 U.S. at 739, 742).

[469] *Id.* at 3084 (citing *Rapanos*, 547 U.S. at 732 n.5 and the NWPR, 85 Fed. Reg. at 22289) (emphasis added).

[470] *Id.* at 3085.

[471] *Id.*

[472] *Id.*

[473] *Id.* at 3086.

driven by water management regimes like those "with extensive flow alternations (e.g., diversions, bypass channels, water transfers) and effluent-dependent streams."[474] With regard to establishing flow duration and timing requirements, such as a minimum of three months, the agencies determined not to include such requirements "because flow duration varies extensively by region . . . [and] [e]stablishing a uniform number equally applicable to the deserts in the arid West, the Great Lakes region, and New England forests would not be scientifically sound."[475] The agencies further noted that "[m]oreover, it would often be infeasible for the regulated community or agency staff to determine whether a stream ordinarily flows or whether a lake contains standing water, for example, 12 weeks as opposed to 11 weeks per year. Even if this determination was possible, such a bright line cutoff would not reflect hydrological diversity among different regions and alterations in flow characteristics."[476]

The agencies also determined that not including a minimum duration is consistent with both the NWPR and Pre-2015 approaches.[477] For example, in the NWPR, the agencies decided not to provide a specific during like the number of days, week, or months "of surface flow that constitutes intermittent flow, as the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions."[478] Under the September 2023 Definition, the agencies also evaluate the entire reach of the tributary that is of the same Strahler stream order and lakes, ponds, and impoundments that are part of a tributary network are assessed in conjunction with the stream they connect to.[479] This is, in part, because "individual streams often transition longitudinally between flow duration classes, from ephemeral to intermittent to perennial, creating patchworks of ephemeral, intermittent, and perennial reaches within a single segment or tributary of a stream network."[480]

Despite all of the agencies' previous findings and longstanding interpretations, the agencies are now proposing that "relatively permanent" be defined based on a particular season and what they assert is a "bright line" minimum duration threshold without regard to regional differences. In the 2025 Proposed Rule Notice, the agencies even acknowledge this serious flaw in their proposed rule approach by stating that "surface hydrology may not always exactly overlap with the wet season, for example in regions exhibiting a time lag or delay in demonstration of surface hydrology

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[474] *Id.* at 3085.

[475] *Id.*

[476] *Id.* at 3085-3086.

[477] *Id.* at 3086 ("The agencies' conclusion that a minimum duration is not feasible is consistent with the pre2015 regulatory regime, which did not establish a bright line cutoff (though provided three months as an example of seasonal flow) and with the approach of the 2020 NWPR. See 85 Fed. Reg. 22292 (April 21, 2020)")

[478] *See id.*

[479] January 2023 Definition, 88 Fed. Reg. at 3086.

[480] TSD for January 2023 Definition, supra n. 51, at 119.

due to various factors . . . for example, as a result of snowpack melt occurring several months after repeated snowfall creates a snowpack . . . [or when] streams experience delayed (*i.e.*, lagged) surface hydrology during the transition from the dry season to the wet season, as it may take some time for the water table to rise due to seasonal precipitation patterns."[481] The agencies also state that their proposal to require "the flow 'at least during the wet season' be specifically bound by the wet season such that the number of months with continuous flow would need to be at least throughout the entirety of the wet season" may be problematic due to "a lag in the surface hydrology response to seasonal precipitation . . .[that] could result in many streams in the arid West not meeting the proposed definition of 'relatively permanent'. . . ."[482]

The agencies are also "proposing to evaluate tributaries to determine if they have relatively permanent flow on a 'reach' basis utilizing the approach used in the NWPR, where "reach" would mean a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope."[483] Under this approach, "non-relatively permanent reaches would sever jurisdiction of upstream reaches under the proposed rule, except where the tributary is part of a water transfer currently in operation."[484] As the agencies are aware, transitions in flow conditions are common in rivers and streams and, thus, this requirement does not have a sound scientific basis and would eliminate jurisdiction over numerous "relatively permanent" waters contrary to longstanding agency practice and the law. Flow in many of the nation's waters, including large lakes and rivers, are impacted by diversions, withdrawals, groundwater pumping, drought, climate change and other flow restrictions that can have extreme local and regional impacts on the availability of flow.[485] Evaluating reaches in the manner proposed by the agencies is not a rational, science-based approach. Further, Congress did not intend for jurisdiction over the nation's waters to come and go based on the continuity of water flow in such situations.

The agencies do not provide any reasonable basis for ignoring these flaws and simply proceeding to adopt a rule that would unreasonably and unscientifically render these types of waters non-jurisdictional. To the contrary, the agencies implausibly state "the agencies' proposed approach would also allow for regional variation given the range of hydrology and precipitation throughout the country."[486] Perhaps because of the obvious flaw in that statement, the agencies supplement it with the admission that the line they are drawing between jurisdictional and non-jurisdictional

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[481] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52518.

[482] *Id.* at 52521.

[483] *Id.* at 52525.

[484] *Id.*

[485] *See, e.g.,* Waterkeeper Watershed Evaluations, *supra* n. 53, including Rio Grande, Snake River and Rogue River Fact Sheets; 2015 Science Report, *supra* n. 452.

[486] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52519.

waters "enhances administrative efficiency and reflects a balancing of the law, common sense, science, and stakeholder input received pre-proposal."[487] The scope of the Clean Water Act, however, is not determined by "efficiency" or a balancing of those factors.

In addition to the proposed definition in the 2025 Proposed Rule Notice, the agencies state that they are also considering a large number of diverse alternative approaches, but they have provided only sparse information about the alternatives and virtually no information about the legal and technical bases for them contrary to the APA. The agencies are requesting comment and suggestions about the alternatives, indicating they may select them in a final rule without the public having an opportunity to review and comment on them. This would be inconsistent with the APA. Some of these alternatives include, for example:[488]

- Limiting the definition of "relatively permanent waters" to only "perennial" waters, which are the "most obviously 'permanent,' consistent with the *Sackett* decision and the *Rapanos* plurality opinion." This is not, however, consistent with those opinions. The agencies also indicate perennial streams are rare in the Arid west, but it may simplify implementation to adopt this approach anyway. Simplification is not a valid justification for excluding most of the tributaries in the arid West from the Clean Water Act. Notably, the agencies also admit a very serious flaw with this proposal and with the proposed rule definition's focus on permanent waters, as opposed to relatively permanent waters consistent with *Sackett* and the *Rapanos* plurality, by acknowledging that "it may be more challenging to identify whether a stream flows year-round or a few days less than year-round. Such methods or the use of remote tools may require repeated or continuous monitoring over the course of a year or longer to ensure water is standing or flowing year-round." Jurisdiction should not turn on whether a water is flowing for 365 or 363 days, and most waters do not have either repeated or continuous monitoring.

- The agencies also discuss an alternative that would set certain minimum flow volume thresholds, noting in contradiction to their previous statement, that "the proposed definition of 'relatively permanent' does not establish bright line requirements . . . ." The agencies also discuss establishing minimum flow duration metrics. As noted above, establishing such thresholds would not be a scientifically sound approach to ensuring consistency with the law. For the latter topic, the agencies state they would "welcome any supporting rationales for particular thresholds that take into account the broad nationwide applicability of the proposed rule, as well as address any implementation challenges, in particular related to the minimum 90-day or 270-day flow duration requirement under this alternative approach and whether and how continuous flow could be identified under such a regime."

[487] *Id.*

[488] See *id.* at 52519-521.

The public cannot meaningfully weigh in on any supporting rationales the agency may end up considering or adopting based on this broad series of topics.

- The agencies also solicit comment on whether they should define "relatively permanent" consistent with the Pre-2015 "regulatory regime." The public has no way to know what that regime entails exactly because it is based on undisclosed agency interpretations and practices rather that the text of the Pre-2015 Regulatory Definition. However, to the extent the agencies only mean defining relatively permanent waters as "those that typically have standing or flowing water year-round or that have standing or continuously flowing water at least seasonally (*e.g.*, typically three months)," the agencies have already determined that the September 2023 Definition approach is preferrable for the reasons described above. For the same reasons, the agencies should not adopt the other alternatives they have identified, which would "implement seasonal flow to mean continuous surface flow except during dry months."

- The agencies also solicit comment on an alternative approach where the agencies could "interpret 'at least during the wet season' where surface hydrology must occur for at least a proportionate amount of time as the identified wet season duration which would be in response to the wet season but need not be coincident with the specific wet season timeframe" and on another alternative approach where the agencies would "interpret 'at least during the wet season' where surface hydrology must occur for at least some months in response to the wet season . . . This duration would extend beyond merely weeks, or even one month, and would require flow for at least an extended period of time of some months during or in response to the wet season." These vaguely described alternatives are difficult to interpret but illustrate that the agencies have not fully evaluated the issues associated with their proposed definition. Instead of doing that prior to engaging in rulemaking, the agencies appear to be simply testing out ideas and engaging in a form of crowdsourcing the resolution of the unresolved issues and questions they have created by attempting to revise the September 2023 Definition using approaches similar to ones previously rejected based on their inconsistency with sound science and the law.

The agencies are also soliciting comment on "the most appropriate method to identify the wet season under the proposed definition of 'relatively permanent.'"[489] In one part of the notice, the agencies say that they will use "the Web-based Water-Budget Interactive Modeling Program (WebWIMP), which are reported in the APT, as a primary source for identifying the wet season,"[490] and in another part, the agencies say that they "recognize that the WebWIMP outputs

[489] *Id.* at 52520.

[490] *Id.* at 52519.

reported in APT may not have complete functionality in certain territories . . . ."[491] In the proposed rule preamble, the agencies also assert that use of the "wet season" to identify "relatively permanent" waters is implementable because "the agencies apply the concept of 'wet season in the use of the Corps' Antecedent Precipitation Tool (APT), which is routinely used to inform wetland delineations and jurisdictional determinations."[492] This is not an accurate statement and incorrectly implies that the agencies are currently using APT to determine whether waters are relatively permanent. According to the January 2023 Definition Notice, the APT is:

> [A] desktop tool developed by the Corps and is commonly used by the agencies **to help determine whether field data collection and other site-specific observations occurred under normal climatic conditions**. In addition to providing a standardized methodology to evaluate normal precipitation conditions ("precipitation normalcy"), the APT can also be used to assess the presence of drought conditions, as well as the **approximate dates of the wet and dry seasons** for a given location . . . precipitation data are **often not useful in providing evidence as to whether a surface water connection exists in a typical year**, as required by the 2020 NWPR. However, the agencies have long used the methods employed in the APT to provide evidence that wetland delineations are made under normal circumstances or to account for abnormalities during interpretation of data."[493]

The APT relies on WebWIMP for identifying approximate "wet seasons" and "dry seasons," but APT method documentation states that "the spatial and temporal resolution of WebWIMP is relatively coarse and may limit WebWIMP effectiveness during transitional periods between the wet season and dry season."[494] WebWIMP is an online tool hosted by the University of Delaware that was developed in 2003 and was last updated in 2009.[495] The site is maintained on a "voluntary basis, and technical support is not available."[496] If a user has questions about the tool, they are advised to email a retired Professor that is listed as one of the tool's developers.[497] Thus, APT and

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[491] *Id.* at 52520.

[492] *Id.* at 52518.

[493] January 2023 Definition, 88 Fed. Reg. at 3138.

[494] Sparrow, K.H., Brown, S.W., French, C.E., Gutenson, J.L., Hamilton, C.O., and Deters, J.C. 2025. *Antecedent Precipitation Tool (APT) Version 3.0: Technical and User Guide*. U.S. Army Corps of Engineers, ERDC/TN WRAP-25-1, at 7, (July 2025), available at: https://erdc-library.erdc.dren.mil/items/af14290c-ed08-411b-ae5d-effa5b5b947d *and* EPA, Antecedent Precipitation Tool (APT), https://www.epa.gov/wotus/antecedent-precipitation-tool-apt. (Attachment 37).

[495] WebWIMP: The Web-based, Water-Budget, Interactive, Modeling Program, available at: http://cyclops.deos.udel.edu/wimp/public_html/index.html, (last accessed Jan. 1, 2026). (Attachment 38)

[496] *Id*.

[497] *Id*.

WebWIMP should not be used "as a primary source for identifying the wet season" that will determine whether a water is relatively permanent.[498] The agencies have previously noted the limitations of WebWIMP and similar models and, while they may be useful in other contexts, they indicated that those methods did not answer the jurisdictional questions associated with the NWPR.[499] The same is true for the proposed rule.

The agencies also briefly and vaguely describe other potential precipitation-based approaches to identifying the "wet season" and then indicate they are considering adopting a definition of "wet season" that is somehow related to the methods and discussion. In addition to the fact that this illustrates the legal and technical flaws in the agencies' proposed definition, the agencies have failed to provide meaningful information about the measurement and definitional alternatives to explain the basis for them and allow the public to understand and provide comment on them.

Similarly, the agencies do not know how they intend to identify when surface hydrology occurs in a given waterbody at least during the wet season and are seeking comment from the public about how to do that. One very unreasonable method the agencies mentions is relying on landowners that "often know when surface hydrology is occurring in waterbodies on their land . . . ."[500] It is highly doubtful that very many landowners, if any at all, know where waterbodies on their land "have 'surface hydrology' continuously throughout the entirety of 'wet season'" as required by the proposed definition. The agencies also indicate that regional streamflow duration assessment methods (SDAMs) or the USGS Enhanced Runoff Method "could also be used. . . ."[501] The agencies have already identified appropriate tools for appropriately evaluating relatively permanent waters as part of the January 2023 Definition rulemaking process.[502]

The agencies' approach in the September 2023 Definition is consistent with how courts have interpreted the *Rapanos* plurality's test, consistently finding that waters flowing continuously for some months of the year are "waters of the United States." [503] Additionally, unlike the 2025

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[498] *See also, e.g.*, Sparrow, Kent H., Gutenson, Joseph L., Wahl, Mark D., Cotterman, Kayla A.*, Evaluation of climatic and hydroclimatic resources to support the US Army Corps of Engineers Regulatory Program*, U.S. Engineer and Development Center, ERDC/CHL TR-22-19, (Sept. 2022), available at: https://erdc-library.erdc.dren.mil/items/a21658e4-4107-49dc-8f86-aac4fd518c0c ("The findings suggest that practitioners need access to data and tools that more holistically consider the impact of short-term antecedent hydroclimatology on the entire hydrologic cycle, rather than tools based solely on precipitation."). (Attachment 39).

[499] TSD for January 2023 Definition, *supra* n. 51, at 139.

[500] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52521.

[501] *Id*.

[502] *See, e.g.,* January 2023 Definition, 88 Fed. Reg. at 3087.

[503] *See, e.g.*, *United States v. Lucero*, 989 F.3d 1088, 1104 (9th Cir. 2021) (tributary with "continuous (albeit seasonal) flow" can constitute a "jurisdictional 'tributary'"); *Sequoia Forestkeeper v. U.S. Forest Serv.*, No. CV F 09-392 LJO JLT, 2011 WL 902120, at *5 (E.D. Cal. Mar. 15, 2011) (seasonal creek that dried up during summer months is a water

Proposed WOTUS Definition, the agencies had no difficulty identifying the specific tools they can use to determine whether a tributary meets the relatively permanent standard in the September 2023 Definition. The agencies were also able to explain in detail how the tools would be used.[504] Accordingly, the agencies should not revise the September 2023 Definition to add the proposed rule definition of "relatively permanent" or proceed with any of the alternative approaches described in the 2025 Proposed Rule Notice. In fact, the agencies should not attempt to create any new, unscientific jurisdictional limitations for flow regime, flow duration, or seasonality that are unrelated to the chemical, physical, or biological integrity of waters, inconsistent with the Act or binding legal precedent, or for which data is unavailable or unobtainable.

Despite the agencies assertion that they are proposing this extremely narrow interpretation of "relatively permanent" to somehow preserve state and tribal authority,[505] authority that the states and tribes already possess, state and tribal governments appear to largely oppose the agencies' elimination of Clean Water Act protections in the manner proposed by the agencies. The agencies reported that "[m]any States and their associations, as well as some local governments and their associations, provided feedback related to the need to consider regional specific approaches in some capacity when defining RPW . . . [and] The need to incorporate regional variance was recommended most in regard to the scope of relatively permanent waters [and] Many federalism comments recommended defining the scope of relatively permanent waters regionally under a science-based approach to more accurately assess systems with varied flow regimes."[506] For example, the Arizona Department of Environmental Quality emphasized that:

> A uniform, nationwide approach to determining flow regime is unsuitable. Recognizing the significant variations in climate, ecology, and hydrology across the U.S., we advocate for a framework that places greater trust in state expertise through enhanced collaboration between EPA, USACE, and states on jurisdictional decisions regarding waterbodies within state boundaries . . . ADEQ makes these recommendations based on our extensive efforts to create a robust science-based evaluation process to determine flow regime of waterbodies in Arizona. ADEQ's established, scientifically rigorous methodology for determining flow regimes is directly relevant to the latest WOTUS rule's focus on RPW. To our knowledge,

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of the United States). Indeed, relatively permanent waters include rivers and streams that flow continuously for less than half the year. *E.g.*, *United States v. Moses*, 496 F.3d 984, 990-91 (9th Cir. 2007) (creek flowing for two months during spring runoff); *United States v. Mlaskoch*, No. CIV. 10-2669 JRT/LIB, 2014 WL 1281523, at *17 (D. Minn. Mar. 31, 2014) (tributaries enjoying "seasonal flow for at least three months" meet relatively permanent standard); *see also Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 293, n.12 (4th Cir. 2011) (accepting Army Corps' determination that a manmade ditch that flowed annually for three months a year was "relatively permanent").

[504] January 2023 Definition, 88 Fed. Reg. at 3087-88.

[505] *See, e.g.*, 2025 Proposed Rule Notice, 90 Fed. Reg. at 52518, 52522.

[506] Summary of Federalism Consultation, at 5.

> ADEQ is the only state employing a comprehensive, scientific, and data-driven approach to determine flow regimes . . . This sophisticated and regionally-attuned approach to flow regime determination is particularly critical for accurately identifying RPW within the unique hydrological context of the arid West. Unlike many other regions, Arizona's waterbodies are predominantly non-perennial, making the precise classification of intermittent and ephemeral flows essential for appropriate jurisdictional determinations under the WOTUS rule. ADEQ's weight of evidence methodology, with its ability to discern subtle differences in flow regimes using diverse data sources, provides a far more nuanced and scientifically defensible basis for identifying RPW in our arid environment than a one-size-fits-all national standard continuous number of flow days. This ensures that jurisdictional determinations in Arizona are grounded in robust science that reflects the reality of our distinct hydrological conditions, ultimately leading to more effective and environmentally sound water resource management in the arid West.[507]

With regard to tribal governments, the agencies reported that:

> Recommendations from Tribes on the relatively permanent waters under Federal jurisdiction reflected their view of the importance of both ecological integrity and cultural considerations. Several Tribes advocated against revising the existing definition of 'waters of the United States,' asserting that the current regulations (the Amended 2023 Rule) already comply with the *Sackett* ruling. A significant number of Tribes and some Tribal organizations supported the inclusion of seasonal waters under CWA jurisdiction . . . Many Tribes recommended all water (perennial, intermittent, and ephemeral) should be federally jurisdictional. Many Tribes in arid regions expressed a similar concern over ephemeral and intermittent streams that dominate their arid lands. Some Tribes contended that federal protection under the CWA is essential because Tribal regulations alone may not be enough to safeguard waters impacted by upstream activities. Overall, Tribal feedback underscored a critical need for a scientifically defensible and culturally informed regulatory framework that prioritizes the protection of all water resources essential to Tribal communities and lifeways."[508]

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[507] Summary of Federalism Consultation, attch. ADEQ Recommendations, at 2.

[508] Summary of Tribal Consultation, at 6.

F. Definition of Tributary

In combination with the agencies' proposed definition of "relatively permanent," the agencies' ill-conceived and unworkable proposed definition of "tributary" threatens to transform the Clean Water Act from a comprehensive statute designed to eliminate all pollutant discharges into a patchwork system for reducing some pollution in a small fraction of the nation's waters. Upstream rivers, streams, lakes, canals, and other waters throughout the watershed of major rivers and lakes could be converted from protected water resources supplying drinking water, recreation, and fisheries to communities into industrial pollutant and sewage conveyance systems if, at any point, a downstream tributary flows through a natural or human-made feature that briefly or temporarily reduces the tributaries' flow. The agencies indicated in the 2025 Proposed Rule Notice that this approach, along with the changes to "continuous surface connection," will cause the greatest reductions in the scope of Clean Water Act jurisdiction compared to current protections.[509] Thankfully, the agencies do not have legal authority to redesign the Clean Water to achieve their vision for the future of the nation's waters.

It is important to recognize that tributaries were categorically protected under the Clean Water Act at its inception. In fact, tributaries to "navigable waters" have been protected since 1899, and tributaries to interstate waters have been protected since 1948.[510] Because the 1972 Clean Water Act Amendments were intended to expand jurisdiction over the nation's waters, tributaries were broadly encompassed within EPA's earliest regulation defining "waters of the United States" in 1973.[511] Tributaries remained broadly protected throughout most of the Act's more that 50-year history, with the exception of the brief period in which the NWPR was in effect. Consistent with this, under the Pre-2015 Definition, all tributaries that flow directly or indirectly to traditional navigable waters, interstate waters, impoundments, and "other waters" are categorically defined as "waters of the United States."[512] Under the September 2023 Definition, all "relatively permanent" tributaries that flow directly or indirectly to traditional navigable waters, interstate waters, the territorial seas, and impoundments of other WOTUS (excluding impoundments of (a)(5) water) are defined as "waters of the United States."[513]

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[509] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52542.

[510] The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to navigable waters and "into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. § 407. The 1948 Water Pollution Control Act declared that the "pollution of interstate waters" and their tributaries is "a public nuisance and subject to abatement." 33 U.S.C. § 466a(d)(1) (1948) (codifying Pub. L. 80–845 section 2(d)(1), 62 Stat. 1156 (1948)).

[511] 38 Fed. Reg. 13528 (May 22, 1973).

[512] 40 C.F.R. § 230.3(e) (1993).

[513] 40 C.F.R. § 120.2.

In the 2025 Proposed Rule Notice, the agencies are attempting to dramatically reduce the scope of protections for tributaries through the adoption of an extremely narrow, unscientific definition of "tributary." Under the 2025 Proposed WOTUS Definition, a "tributary" would only include "a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow."[514] The proposed definition of "tributary" also clarifies that, unless it is part of a currently operating water transfer, a "tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow . . . ."[515]

This definition reduces protections for tributaries in multiple unprecedented, unscientific ways that are inconsistent with the Clean Water Act and longstanding agency interpretations of the Act.[516] The definition is also arbitrary and capricious and alters the scope of Clean Water Act jurisdiction in a manner that is not required or authorized by *Sackett v. EPA* or any other legal precedent, including: (1) requiring tributaries to have "relatively permanent flow," as narrowly defined by the proposed rule, as opposed to simply being "relatively permanent, standing or continuously flowing bodies of water;" (2) requiring tributaries, regardless of the type of water, to have a bed and bank, (3) requiring "relatively permanent flow" in all of the waters and tributary segments downstream from the relatively permanent tributary; and (4) excluding tributaries (and other upstream waters) when the tributaries flow through other natural and human-made features that do not themselves convey relatively permanent flow unless, arbitrarily, the feature is associated with a "currently operating" water transfer.[517] With regard to the last exclusion, based on language in the preamble, it is unclear from the notice whether the agencies actually intend that merely flowing through a natural or human-made feature could cut off jurisdiction over all upstream tributaries and other waters throughout a watershed.

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[514] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52521.

[515] *Id*.

[516] *See, e.g.*, Section VI, *supra*.

[517] The agencies, for unstated reasons, recognized that flow through non-jurisdictional features associated with water transfers does not eliminate Clean Water Act jurisdiction over tributaries but provided no rational basis for eliminating jurisdiction in every other case when a tributary flows through such features. This is arbitrary and capricious, and there is no scientific or legal basis for making such a distinction. For example, the agencies note that "particularly in the arid West, inter- and intra-basin water transfers may originate in relatively permanent waters that may be disconnected from downstream waters by non-relatively permanent stream reaches. In many circumstances, those non-relatively permanent stream reaches may be caused by water management systems, including through water transfers, water storage reservoirs, flood irrigation channels, and similar structures." 2025 Proposed Rule Notice, 90 Fed. Reg. at 52523. This is equally true for stream reaches associated with tributaries across the country.

By contrast, under the agencies' longstanding interpretation of the Clean Water Act, including the September 2023 Definition and the Pre-2015 Definition, direct and indirect tributaries to traditional navigable waters, interstate waters, and the territorial seas, including natural, modified, or constructed rivers, streams, lakes, ponds, impoundments, canals, ditches, and other waters, are "waters of the United States."[518] Jurisdictional tributaries can:

> [F]low through a number of downstream waters, including non-jurisdictional features and jurisdictional waters that are not tributaries, such as an adjacent wetland. But, the tributary must be part of a tributary system that eventually flows to a traditional navigable water, the territorial seas, or an interstate water to be jurisdictional. A tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flows to a traditional navigable water, the territorial seas, or an interstate water. Tributaries are not required to have a surface flowpath all the way down to the traditional navigable water, the territorial seas, or the interstate water. For example, tributaries can contribute flow through certain natural and artificial breaks (including certain non-jurisdictional features), some of which may involve subsurface flow.[519]

Even the NWPR, which dramatically and illegally eliminated Clean Water Act protections for tributaries across the country, protected more rivers and streams than the 2025 Proposed Definition. The NWPR definition of "tributary" included only rivers and streams with perennial and intermittent flow and which directly or indirectly contributed surface water flow to a traditional navigable water or the territorial seas in a 'typical year.'[520] The NWPR defined "perennial" as "surface water flowing continuously year-round" and "intermittent" as "surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts)," and "ephemeral" as "surface water flowing or pooling only in direct response to precipitation (e.g.,

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[518] *See, e.g.,* Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 14, Dkt. ID No. EPA-HQ-OW-2025-0322-0110; 40 C.F.R. § 120.2.

[519] *See, e.g.*, TSD for the January 2023 Definition, *supra* n. 51, at 251-52.

[520] *See*, e.g., Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 16, Dkt. ID No. EPA-HQ-OW-2025-0322-0110. (Under the NWPR, "tributaries were jurisdictional if they were perennial or intermittent and contributed surface water flow to a traditional navigable water or the territorial seas in a 'typical year' either directly or through one or more waters that were jurisdictional under that rule, and excluded ephemeral features," but impoundments, lakes, and ponds were assessed under a different category.)

rain or snow fall)."[521] Certain times of the year" included "extended periods of predictable, continuous surface flow occurring in the same geographic feature year after year."[522] In addition:

> The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term tributary includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.[523]

Although ephemeral streams could "serve as a non-jurisdictional connection between upstream and downstream jurisdictional tributaries, it did not protect perennial or intermittent streams that flowed into ephemeral features that did not contribute surface water flow in a typical year to a downstream jurisdictional water . . . ."[524] The agencies also added a provision to their groundwater exclusion to "clarify that subterranean rivers, as compared to groundwater and other subsurface waters, may not break jurisdiction of upstream tributaries, including any jurisdictional lakes, ponds, and impoundments of jurisdictional waters that contribute surface water flow through these tributaries, depending on the factual circumstances."[525]

As the EPA concluded in 2015, "[t]he scientific literature documents that tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks."[526] In the preamble to the Proposed Clean Water Rule, the agencies noted that "tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, or biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."[527] Consistent with the 2015 Science Report, the 2014 SAB of the Draft Science Report, and the TSD for the January 2023 Definition, rivers, streams, lakes, ponds,

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[521] *See, e.g.,* Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 7, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[522] 85 Fed. Reg. at 22275.

[523] *See*, e.g., Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 6, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[524] *See, e.g., id.* at 16.

[525] NWPR, 85 Fed. Reg. at 22279.

[526] CWR TSD, *supra* n. 399.

[527] Proposed Clean Water Rule, 79 Fed. Reg. at 22188, 22,224 (April 21, 2014).

ditches, canals, impoundments, and other waters must be protected as tributaries without any of the limitations included in the proposed rule definition.

Tributaries consist of all waters flowing into another body of water[528] and waters include "'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features."[529] No further definition of "tributary" is required or justified. The *Rapanos* plurality only requires that the relatively permanent water be connected to a downstream jurisdictional water—it did not require the connection to occur through specific means or at any particular rate of flow. Relative permanent tributaries cannot be transformed into waters that are not subject to water quality standards and the Clean Water Act's prohibitions on unpermitted discharges simply because the waters flow through non-jurisdictional waters, flow through a tunnel or culvert, go subsurface, or flow through any other kind of natural or human-made feature, whether those features impeded flow or not. There is no evidence that Congress intended to create a loophole in the Clean Water Act through which the discharge of pollutants could flow unregulated to surface water.[530]

According to the Federalism Report for the 2025 Proposed Rule Notice, "[m]any commenters supported including waters that have temporarily interrupted flow due to drought conditions, dry spells, low tides, or human conduct."[531] For example, comments from the State of Missouri stated:

> We support that artificial breaks **do not negate jurisdiction**, and we recommend that this principle be codified with examples that reflect both seasonal and permanent systems. Jurisdictional connectivity should persist even when physically interrupted by artificial structures, such as culverts, levees, pumps, water control

[528] *See, e.g., United States v. Hercules, Inc., Sunflower Army Ammunition Plant, Lawrence, Kan.*, 335 F. Supp. 102, 106 (D. Kan. 1971) ("The defendant next makes a motion to dismiss on the ground that, if any ammonia was dumped into a watercourse, it was dumped into a tributary of a tributary of a navigable water and not the 'tributary of a navigable water' as stated in the statute. This contention borders on the frivolous. Defendant argues that the words of the statute should be interpreted in the ordinary every day sense. This Court agrees. A tributary is defined in Bouvier, Dictionary of Law Vol. II, p. 384 (5th ed.); Black's Law Dictionary p. 1677 (4th ed.), as "all streams flowing directly or indirectly into a river.").

[529] *Rapanos,* 547 U.S. at 732-33.

[530] *Cf*., *County of Maui*, 590 U.S. at 178–79 ("We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act.") citing *California ex rel. State Water Resources Control Bd.*, 426 U.S. at 202–204 ("basic purpose of Clean Water Act is to regulate pollution at its source"); *see also* 66 Fed. Reg. 2960, 3016 (Jan. 12, 2001) ("[T]here is no evidence . . . that Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water." and "[g]iven the Agency's knowledge of the hydrologic cycle and aquatic ecosystems, the Agency has determined that when it is reasonably likely that such discharges [through groundwater] will reach surface waters, the goals of the CWA can only be fulfilled if those discharges are regulated.")

[531] Summary of Federalism Consultation, at 6.

> structures, or road crossings. These features are common across Missouri's landscape and should not sever jurisdiction when a hydrologic or ecological connection remains.[532]

Eliminating Clean Water Act jurisdiction over tributaries due to breaks in flow is not support by the science either. For example, according to the TSD for the January 2023 Definition:

> The connections between a tributary and a downstream water and associated functions remain intact even where the tributary flows underground for a portion of its length, such as in regions with karst geology or topography or lava tubes. Artificial breaks can occur, for example, when a stream has been buried (e.g., diverted into pipes or other conveyances), which is common in urban watersheds. See, e.g., id. at 3-3. Where the hydrologic connection still exists, chemical and biological connections mediated by the hydrologic connection can also still exist. Similarly, flow through boulder fields does not sever the hydrologic connection. When a tributary flows through a wetland enroute to another or the same tributary, connectivity and effects still exist even though the channel or ordinary high water mark is broken for the length of the wetland. Adjacent wetlands located within a tributary can provide numerous benefits downstream (see section III.B), and the location of the wetland in-stream can provide additional water quality benefits to the receiving waters.

With regard to subsurface flow, karst geology is widespread across the United States, with many such areas designated as state and national parks, and it impacts the flow of "relatively permanent" tributaries in numerous ways, including causing rivers and streams to temporarily go subsurface.[533] A narrow definition of tributary that excludes these important rivers and streams would imperil not only the rivers and streams themselves, but also the downstream waters, underlying aquifers, and connected springs.[534] Missouri has a large number of losing streams, which are streams or parts of stream where a significant amount of water flows

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[532] Letter from Matt Vitello, Policy Coordinator, Missouri Department of Conservation, to Lee Zeldin, EPA Administrator, *Recommendations related to the implementation of the definition of "waters of the Untied States,"* at 2 (June 2, 2025) Dkt. ID No. EPA-HQ-OW-2025-0322-0122_attachment_5 ("Missouri June 2025 WOTUS Recommendations").

[533] *See, e.g.*, U.S. Geological Survey, Karst Map of the Conterminous United States – 2020, available at: https://www.usgs.gov/media/images/karst-map-conterminous-united-states-2020 (Attachment 40); U.S. Geological Survey, Karst Interest Group Proceedings, Nashville, Tennessee, October 22-24, 2024, Open-File Report 2024-1067, available at: https://pubs.usgs.gov/publication/ofr20241067/full (Attachment 41); U.S. Geological Survey Karst Interest Group Proceedings, October 19–20, 2021, Scientific Investigations Report 2020-5019, https://pubs.usgs.gov/publication/sir20205019. (Attachment 42).

[534] *Id*.

underground, particularly in karst areas with sinkholes, springs and caves.[535] Protecting these Missouri losing streams is important because they frequently reemerge downstream or through springs, such as Meramec Spring, which is fed by numerous losing streams.[536] Accordingly, in the State of Missouri's pre-proposal federalism consultation comments, the state opposed the any provision that would cut off jurisdiction over tributaries that go subsurface:

> Hydrology varies substantially nationwide and Missouri's hydrology is regionally diverse, with perennial, intermittent, and ephemeral streams playing critical roles in ecological function and watershed connectivity. Many of these systems contribute directly to flow in downstream waters through surface or subsurface networks and are vital components of Missouri's aquatic networks. In comments on a previous WOTUS revision, the Department emphasized the importance of retaining jurisdiction over losing streams that exist in karst landscapes. We reiterate that losing streams should not lose status as a jurisdictional water simply due to their interaction with subsurface flow pathways.[537]

Similar to Missouri, Tennessee is also characterized by karst geology and limestone with sinkholes, caves, and underground streams resulting in a prevalence of "losing streams" that can disappear and emerge at the surface "after several hundred meters or even a mile or two."[538] Arkansas also has a significant number of losing streams that, due to karst geology, disappear into the subsurface through fractures and passageways and travel underground for some distance before re-appearing downstream or discharging as a spring elsewhere."[539] Where these streams are "relatively permanent" or otherwise meet the current regulatory definition, they must remain protected.

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[535] *See* Losing Streams, Mo. Dept. of Nat. Res, https://dnr.mo.gov/land-geology/geology/karst-missouri/losing-streams and Missouri Department of Natural Resources GIS, Gaining and Losing Streams, available at https://gis-modnr.opendata.arcgis.com/maps/92ac44710548492f9bd09e7a1f6b3a5f/explore?location=38.316713%2C-91.926392%2C8 (last accessed Jan. 1, 2026) (Attachment 43).

[536] *See, e.g.,* Missouri Department of Natural Resources, Water Resources Report No. 55, The Hydrology of Maramec Spring, (1996) available at: https://share.mo.gov/nr/mgs/MGSData/Books/Water%20Resources/The%20Hydrology%20of%20Maramec%20Spring/WR55.pdf (Attachment 44).

[537] Summary of Federalism Consultation, attach. Missouri June 2025 WOTUS Recommendations, at 1.

[538] Jess Martin, Understanding the Connection Between Surface Water and Groundwater in Tennessee, Harpeth Conservancy, (July 3, 2024), available at: https://harpethconservancy.org/understanding-the-connection-between-surface-water-and-groundwater-in-tennessee. (Attachment 45)

[539] Arkansas Geological Survey, Arkansas Geology: Karst and Caverns, Educational Workshop Series 07 (2014), available at: https://www.geology.arkansas.gov/docs/pdf/publication/educational-workshops/EWS-07.pdf. (Attachment 46)

Subsurface flow also occurs in the context of certain "closed basins." In southern Idaho, the Upper Snake Closed Basin contains "numerous creeks and rivers that do not flow on the surface beyond the borders of the state," but do flow into the Snake River Plain Aquifer, which supplies water to the Snake River.[540] These waters have an impact on interstate commerce, including their use for irrigation water for cropland and the fact that they support "high-quality trout fisheries that attract anglers from all over the United States."[541]

The agencies have also long recognized "[t]he Supreme Court has confirmed that damming or impounding a 'water of the United States' does not make the water non-jurisdictional."[542] The same logic applies to all other human-made features that may temporarily or briefly reduce flow in a tributary. As the Court stated in *S. D. Warren Co. v. Maine Bd. of Envtl. Prot*., "[N]or can we agree that one can denationalize national waters by exerting private control over them."[543] For example, impeding and controlling downstream flow are often the primary purposes for creating a dam or impoundment, but that does not transform the with the impounded tributary or the impoundment into a non-jurisdictional water. Under the agencies' proposed definition, however, the impoundment or dam would eliminate jurisdiction over the tributary if the flow leaving it does not meet the agencies' arbitrary, unscientific definition of "relatively permanent." In circular fashion, it appears the impeding of flow would also eliminate jurisdiction over the impoundment itself. This is contrary to law.

Simply designating a river, stream, or impoundment as a point source in such a situation is also inconsistent with the Clean Water Act, in addition to being an unworkable and unreasonable way to control water pollution,[544] because those waters have important beneficial uses that are required to be protected consistent with Clean Water Act Section 303 and the downstream impacts of impoundments are also required to be addressed under the Act.[545] Considering only dams, this aspect of the agencies proposed "tributary" definition could inappropriately eliminate Clean Water Act protections for a large number of waters across the country given that "[t]he

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[540] *See* Waterkeeper Watershed Evaluation for Snake River, *supra* n. 53.

[541] *Id*.

[542] *See, e.g.*, CWR TSD at 230, *supra* n. 399.

[543] *S. D. Warren Co.*, 547 U.S. at 379, n. 5.

[544] For example, if the existence of a dam or impoundment severs jurisdiction over the impounded tributary and all other upstream waters, the watershed would become either unregulated or one massive, shared point source. There is no precedent for such an outcome, and it raises untold questions about how the municipal and industrial dischargers into that point source would be controlled, such as what standards would apply to discharge permits, how would the share of any pollution be divvied up amongst the dischargers, how would compliance be monitored, where would the compliance point be, and many other questions. Such as approach is obviously inconsistent with the Clean Water Act. Additionally, if the discharges are unregulated, the owner of the impoundment or dam could be on the hook for controlling the pollutants from all of the unregulated discharges upstream under an NPDES permit.

[545] *PUD No. 1 of Jefferson Cty*, 511 U.S. at 717.

United States has more than 80,000 dams, over 6,000 of which exceed 15 m in height (USACE, 2009)."[546]

Similarly, nothing in the text or history of the Clean Water Act, the *Sackett* decision, or any other authority justifies requiring that tributaries have a bed and bank to be a "water of the United States." This requirement is also not supported by sound science and, as the agencies acknowledge, will exclude waters that display other indicators of relatively permanent flow from the Clean Water Act. The agencies claim without support that these waters are not bodies of water forming geographic features, but the agencies' position is contrary to sound science.[547] According to the agencies' TSD for the January 2023 Definition:

> Physical channels are defined by continuous bed-and-banks structures, which can include apparent disruptions (such as by bedrock outcrops, braided channels, flow-through wetlands) associated with changes in the material and gradient over and through which water flows. The continuation of bed and banks downgradient from such disruptions is evidence of the surface connection with the channel that is upgradient of the perceived disruption.[548]

With regard to breaks, the agencies report that:

> The connections that tributaries have to downstream waters and functions they provide that impact those downstream waters continue even where the tributary has a natural or human-made break in its channel or ordinary high water mark (OHWM). The presence of a channel, bed and banks, or other indicators of OHWM upstream or downstream of the break is an indication that hydrological connections still exist. *See, e.g., id.* at 2-2. . . .Flow in flat areas with very low gradients may temporarily break a tributary's channel or OHWM, but these systems continue to be connected downstream and can provide functions that benefit downstream waters. These are just illustrative examples of break in the stream channel or ordinary high water mark."[549]

Comments from the Arizona Department of Environmental Quality further illustrate the problem with requiring that tributaries have a bed and bank as follows:

> [In] Arizona . . . the classic pattern for basin hydrology, with drier headwaters and wetter downstream reaches—typical to the basins of the

[546] 2015 Science Report, *supra* n. 452, at 3-48.

[547] *See, e.g.*, 2015 Science Report, *supra* n. 452; TSD for January 2023 Definition, *supra* n. 51.

[548] TSD for January 2023 Definition, *supra* n. 51, at 76.

[549] TSD for January 2023 Definition, *supra* n. 51, at 150-151.

> eastern U.S.—inconsistently applies. In Arizona, presence of headwater springs and perennial or intermittent streams in mountainous regions that are surrounded by deserts often give way to drier and more ephemeral waters downstream . . . A complete surface connection, even if not perpetually present, can be determined utilizing numerous factors, such as evidence of an ordinary high water mark, the absence of permanent physical impediments to flow, analysis of historical imagery, the influence of predictable seasonal weather patterns (e.g., the North American Monsoon), and other scientifically verifiable indicators of recurrent surface flow. We urge EPA to develop rule language and guidance that explicitly embraces this nuanced, weight-of-evidence approach, allowing states to leverage their expertise and localized data.[550]

Nothing in the law or science supports the definitional limitations the agencies are proposing, and as a result, neither the agencies nor the public can discern which tributaries will be protected under this proposed definition. The obvious corollary to this fact is that the agencies cannot evaluate the impact of their own narrow definition on the nation's waters and Clean Water Act programs, which means the agencies cannot determine or demonstrate that their definition is consistent with the Clean Water Act. In fact, the agencies have not even taken meaningful steps to do so, and it is obvious that they could have provided the public with more information and analysis than they did.[551]

Because the agencies are attempting to define "tributary" through arbitrary, unscientific limitations that are not consistent with or tied to any legal standard or longstanding agency practice, they did not evaluate the impact of the definition on the jurisdictional status of waters and on Clean Water Act programs.[552] For example, in the RIA, the agencies state the proposed definitional changes "represent a change in jurisdiction under the paragraph (a)(3) tributaries category that may not be easily quantified" and that the changes "could have a significant impact on which tributaries relatively permanent tributaries are found to the jurisdictional . . . ."[553] The agencies also failed demonstrate that the definition can be implemented using available data and readily available tools, instead providing a generalized discussion about tools they may be able

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[550] Summary of Federalism Consultation, attach. ADEQ Recommendations, at 3.

[551] *See* Section VI.D, *supra*; Email from Stacy Jensen, Army Corps, to John Goodin, EPA, Subject: RE Two actions, (Sept. 5, 2017) (Analyzing the breakdown of flow regimes in streams and in the Arid West and wetlands in NWI, including wetlands intersecting NHD mapped streams) (Attachment 47**).**

[552] *See, e.g.*, RIA, at 13-15, 42-43 (For example, the agencies state that they expect their approach to breaks in flow to "**reduce the scope** of jurisdictional waters relative to baseline, with relatively greater reduction in Federal jurisdiction in areas where a greater proportion of waters have less than year-round flow, like the arid West.") (emphasis added).

[553] RIA, at 13-15 (emphasis added).

to use along with a host of questions about how to implement their proposed definition.[554] This is particularly alarming given that "if the agencies do not have adequate information to demonstrate that a water meets the jurisdictional standards to be a 'water of the United States,' the agencies would find such a water to be non-jurisdictional."[555] It is the essence of arbitrary and capricious action for the agencies to adopt a vague, unimplementable definition and then deem waters non-jurisdictional when information is not available to apply it.

The agencies' "tributary" definition, along with other statements and definitional changes throughout the proposed rule preamble, improperly narrows jurisdiction over tributaries in many ways, including but not limited to: (1) limiting Clean Water Act jurisdiction to tributaries of an undefined subset of "traditional navigable waters," and the territorial seas; (2) eliminating the interstate waters category; (3) requiring "relatively permanent flow" to continue all the way to a traditional navigable water or a territorial sea; (4) eliminating jurisdiction over relatively permanent tributaries that flow through natural and human-made features that do not themselves carry relatively permanent flow; (5) eliminating jurisdiction over relatively permanent waters that go subsurface if subsurface flow is less than permanent; (5) failing to identify reasonable methods for identifying jurisdictional tributaries, relatively permanent flow, and non-jurisdictional features; and (6) requiring jurisdictional tributaries to have a bed and banks.

Taken together, these improper, unscientific, limitations on Clean Water Act jurisdiction over tributaries undermine the entire Act by creating many unsupported and vaguely defined barriers to controlling pollution in historically protected rivers, streams and other waters. The agencies' use of non-scientific definitions and arbitrary requirements for jurisdictional tributaries will result in the loss of Clean Water Act protections for waters that are commonly understood to be jurisdiction using scientific terms. This will have devastating impacts on our Nation's waters.[556]

In addition to the TSD for the January 2023 Rule, the 2015 Science Report and the 2014 SAB Review, numerous scientific reports and government documents from across the country illustrate the importance of broadly protecting tributaries. Several of these reports are summarized and discuss in a report produced by the American Fisheries Society which states:

> Headwater streams and wetlands are integral components of watersheds that are critical for biodiversity, fisheries, ecosystem functions, natural resource-based economies, and human society and culture. These and other ecosystem services provided by intact and clean headwater streams and wetlands are critical for a

[554] *See, e.g.*, 2025 Proposed Rule, 90 Fed. Reg. at 52523-52526.

[555] *Id.* at 52515.

[556] *See, e.g.*, Waterkeeper Watershed Evaluations, *supra* n. 53; 2015 Science Report, *supra* n. 452; TSD for the January 2023 Definition *supra* n. 51; TSD for the 2015 Clean Water Rule, *supra* n. 399.

> sustainable future. Headwater streams comprise 79% of U.S. stream networks; wetlands outside of floodplains comprise 6.59 million ha in the conterminous United States. Loss of legal protections for these vulnerable ecosystems would create a cascade of consequences, including reduced water quality, impaired ecosystem functioning, and loss of fish habitat for commercial and recreational fish species. Many fish species currently listed as threatened or endangered would face increased risks, and other taxa would become more vulnerable. In most regions of the USA, increased pollution and other impacts to headwaters would have negative economic consequences. Headwaters and the fishes they sustain have major cultural importance for many segments of American society. Native peoples, in particular, have intimate relationships with fish and the streams that support them. Headwaters ecosystems and the natural, socio-cultural, and economic services they provide would face severe threat under the Waters of the United States rule recently proposed by the [previous] Trump administration.[557]

The report goes on to describe some of the consequences of failing to protect headwater streams under the Clean Water Act, as follows:

> [P]ollution of headwaters, including runoff of excess nutrients and other pollutants, degrades water quality affecting downstream ecosystems. Two striking U.S. examples are discharge effluent from mining (Woody et al. 2010; Daniel et al. 2015; Giam et al. 2018) and nutrient loading in the Mississippi River causing the Gulf of Mexico's "dead zone", a vast area of hypoxia that reduces biodiversity and commercial fisheries, with major economic and social costs (Rabalais et al. 1995; Rabotyagov et al. 2014). Similarly, polluted headwaters contribute to harmful algal blooms that result in toxic water, fish kills, domestic animal and human morbidity, and economic damage (Tango 2008; Staletovich 2018; Zimmer 2018).[558]

Similarly, in North Carolina, research conducted by the North Carolina Department of Natural Resources – Division of Water Quality, concluded that:

> In summary, staff of the Division of Water Quality have been conducting intensive research on headwater streams and headwater wetlands across the state for the past several years. Headwater streams are very common and provide significant benefits to downstream water quality and aquatic life. Intermittent streams have significant aquatic life even though their flow is not constant throughout the year.

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[557] American Fisheries Society, *Headwater Streams and Wetlands are Critical for Sustaining Fish, Fisheries, and Ecosystem Services* (Dec. 2018). (Attachment 48).

[558] *Id*. at 6.

> Headwater wetlands are often associated with these streams and provide important water quality filtration to protect downstream water quality as well as significant aquatic life habitat. Therefore based on this on-going research, the Division of Water Quality believes that protection of these headwater streams and wetlands is essential to protect downstream water quality.[559]

A report produced by Trout Unlimited, using USGS National Hydrography Dataset, documents the abundance and importance of intermittent and headwater streams across the country showing, for example, that 48 percent of stream miles with native trout historical range are classified as intermittent or ephemeral, and 58 percent of stream miles are in headwater streams.[560] The Trout Unlimited Report also states that 64 percent of stream miles with salmon/steelhead range are classified as intermittent or ephemeral, and 57 percent of stream miles are in headwater streams.[561]

As is the case with the other categories, the agencies also posit numerous potential alternative approaches that are mentioned briefly without adequate supporting information or legal basis. One of those alternatives is adopting "whether they should instead adopt the approach similar to the NWPR, whereby a tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or other similar artificial feature, or through a debris pile, boulder field, or similar natural feature."[562] To the extent this means the agencies would eliminate this language:

> [A]tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow

from the proposed rule then, of course, the agencies should eliminate it for all of the reasons discussed above.

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[559] Memo from John Dorney, Wetlands Program Development Unit, NC DWQ. April 5, 2006. (background information on the water quality and aquatic life values of headwater streams and headwater wetlands), available at https://www.nawm.org/pdf_lib/cover_letter_and_summary_nc.pdf. (Attachment 49).

[560] Rising to the Challenge – How Anglers Can Respond to Threats to Fishing in America, available at https://www.uppermissouriwaterkeeper.org/wp-content/uploads/2023/02/TU_Rising_to_the_Challenge_web.pdf. (Attachment 50)

[561] *Id*.

[562] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52523.

However, the agencies should not readopt the NWPR rule approach to tributaries or any other WOTUS. The agencies have already determined that the NWPR is plagued with procedural and substantive legal errors and caused significant, actual environmental harm to the nation's waters.[563] For example, the "typical year" requirement[564] was not applied in a consistent manner between Corps districts; the agencies found it to be inconsistent with science, "challenging and sometimes impossible to implement;" and the agencies found that data to evaluate the "typical year" requirement is frequently unavailable or unobtainable.[565] Additionally, like the 2025 Proposed WOTUS Definition, the agencies used the term "reach" in the NWPR "to mean a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope."[566] This improperly created this situation where jurisdiction would come into existence and disappear at unpredictable intervals in response to development, water withdrawals, water inputs, and other factors.[567]

In sum, the agencies' narrow approach to determining jurisdiction over tributaries in the 2025 Proposed Rule Notice is contrary to more than 40 years of legal precedent and longstanding agency interpretations of the Clean Water Act. The agencies have failed to "provide reasoned explanation" for the tributary definition, and have failed to "show that there are good reasons" for changing the scope of tributary protections provided by the September 2023 Definition and the Pre-2015 Definition.[568] In this context, that would also entail providing a "reasoned explanation" for disregarding facts and circumstances that "underlay or were engendered by" the Pre-2015 Definition and the September 2023 Definition.[569] The agencies have also failed to demonstrate that their revised definition is consistent with the "single, best" meaning of the Clean Water Act and that they have engaged in "reasoned decision making."[570] Accordingly, the agencies cannot finalize the proposed definition of "tributary" or any of the alternative approaches.

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[563] *See, e.g.*, 2021 Proposed Definition, 86 Fed. Reg. at 69407-69416; TSD for January 2023 Definition, *supra* n. 51, at 81-149.

[564] *See, e.g.*, NWPR, 85 Fed. Reg. at 22340-341.

[565] *See, e.g.*, January 2023 Definition, 88 Fed. Reg. at 3058-61, 3081.

[566] *See, e.g.,* Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 7, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[567] *See, e.g.*, NWPR RTC, *supra* n. 42, Topic 5, at 14; NWPR, 85 Fed. Reg. at 22291.

[568] *Fox*, 556 U.S. at 516. *See also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change," and that an agency's change in practice without explaining a prior inconsistent finding—such as the plethora of technical conclusions in the 2015 Science Report, which the agencies relied upon to support their interpretations in the Clean Water Rule—is arbitrary and capricious).

[569] *Fox*, 556 U.S. at 516.

[570] See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 371, 400 (2024) ("Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning.").

G. Continuous Surface Connection

The agencies' proposed definition of "continuous surface connection" is designed to largely eliminate Clean Water Act protections for the nation's wetlands by establishing jurisdictional criteria that the agencies know most wetlands lack and employing vague, arbitrary standards to implement those criteria. According to 2025 Proposed Rule Notice, the resulting definition's requirement for the persistent presence of surface water uninterrupted throughout the wet season "might result in few wetlands being found to have a continuous surface connection under the proposed rule, particularly in the arid West."[571] More specifically, in the RIA, the agencies state that they expect the proposed definition to "substantially reduce the scope of jurisdictional oversight over wetlands" and that it would "further limit coverage of CWA jurisdiction over permafrost wetlands."[572]

To accomplish this objective, the agencies propose to reduce jurisdiction over adjacent wetlands, lakes, and ponds protected under the September 2023 Definition by narrowly defining "continuous surface connection." The agencies would define this term to mean "having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water."[573] Under this definition, in addition to meeting the existing definitional requirements, adjacent wetlands and section (a)(5) lakes and ponds would have to (1) physically touch another jurisdictional water **and** (2) have surface water at least during the vaguely defined, unscientific time period the agencies refer to as the "wet season." In addition, the agencies are proposing to treat a mosaic wetland as multiple individual wetlands that each have to meet the definition such that a single wetland could be found to be jurisdictional and non-jurisdictional.[574] The agencies use the same flawed and arbitrary concept of "wet season" that they use for the definition of "relatively permanent" and also propose to use WebWIMP to identify the "wet season." Accordingly, for the reason discussed above, the proposed definition is arbitrary and capricious and does not, in any sense, create a bright line jurisdictional test as the agencies suggest.[575]

The agencies inexplicably claim that, by requiring wetlands to abut other jurisdictional waters and have surface water at least during the wet season, they are defining "continuous surface connection" in a way that is "consistent with the traditional Federal role in protecting and promoting the navigability of waters used in interstate commerce" because wetlands that touch jurisdictional waters "are most likely to provide certain hydrological and ecological benefits such

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[571] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52527.

[572] RIA at 45 and 50 (emphasis added).

[573] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52527.

[574] *Id.* at 52530.

[575] *Id.*

as recharge of based flow and valuable fish and wildlife habitat."[576] First, it is indisputable that the Clean Water Act does not charge the agencies with protecting and promoting the navigability of the nation's waters—that subject matter is address through different federal laws. The agencies are, however, charged with achieving the objective of protecting and restoring the chemical, physical and biological integrity of the nation's waters so the agencies should define "continuous surface connection" in way that is consistent with that role instead. Second, the agencies' assertion that the wetlands that touch jurisdictional waters are most likely to provide hydrological and ecological benefits to jurisdictional waters is contrary to an extensive scientific record.[577] For example:

> Wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers and other jurisdictional water via functions that can benefit from, but are not dependent upon, near-permanent, continuous surface water connections established by outflows from jurisdictional waters. Wetlands improve water quality of nearby jurisdictional waters by transformation and/or sequestration of pollutants that can degrade water integrity, intercept sediment, and store local ground water for late-season baseflow in rivers. They also provide breeding and nursery habitat for fish, amphibians, and aquatic insects that are integral components of riverine, lacustrine, and estuarine food webs . . . Wetlands in non-floodplain landscape settings lack bidirectional hydrologic connections with channels (*i.e.*, water flows from the wetland to the channel but not from the channel to the wetland). These settings, however, have the potential for unidirectional hydrologic flows from wetlands to the river network through surface water or ground water. Non-floodplain wetlands can attenuate floods through depressional storage and can recharge ground water and thereby contribute to baseflow. These wetlands can affect nutrient delivery and improve water quality by functioning as sources (*e.g.*, of dissolved organic carbon) and as sinks for nutrients (*e.g.*, nitrogen), metals, and pesticides. Non-floodplain wetlands also can provide habitat or serve as sources of colonists for biological communities in downstream waters, through movement of amphibians, reptiles, birds, and mammals . . . Non-floodplain wetlands that are connected to the river network through a channel (*i.e.*, wetlands that serve as stream origins) will have an effect on downstream waters, regardless of whether the outflow is permanent, intermittent, or ephemeral.[578]

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[576] *Id.* at 52529.

[577] *See, e.g.*, 2015 Science Report, *supra* n. 452; 2014 SAB Review of Draft Science Report, *supra* n. 452; TSD for January 2023 Definition, *supra* n. 51.

[578] *Id.* at 127-28; *see also* pages 12-14.

The proposed rule is also contrary to longstanding agency interpretations and practice. Under the September 2023 Definition, wetlands are WOTUS if they are adjacent to traditional navigable waters, interstate waters, the territorial seas, or adjacent to jurisdictional impoundments or tributaries and have a continuous surface connection to those waters.[579] According to the January 2023 Preamble, "under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they physically abut, or touch, a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, or if the wetlands are connected to these waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert."[580] The agencies stated this "is consistent with science, as well as the regulatory definition of 'wetlands,' which does not require such aquatic resources to have water on the surface" and that "[s]ince wetlands frequently do not contain surface water, a requirement for continuous surface water between a relatively permanent water and adjacent wetlands would be illogical as a scientific and practical matter."[581] Additionally, "longstanding practice is that wetlands in the mosaic are not individually delineated, but that the Corps considers the entire mosaic and estimates percent wetland in the mosaic."[582]

Under the Pre-2015 Definition, adjacent wetlands have a continuous surface connection where they "physically abut or touch a jurisdictional water" (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent) or "are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior practice."[583] Similarly, the *Rapanos* Guidance provides that wetlands can be adjacent if "there is an unbroken surface or shallow subsurface connection to jurisdictional waters" and if "if "their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters."[584]

On March 12, 2025, at the same time the agencies informed the public of their intent to seek feedback on the September 2023 Definition, the agencies issued a guidance document narrowly interpreting "continuous surface connection" and rescinding "any components of guidance or

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[579] 40 C.F.R. § 120.2(a)(4).

[580] January 2023 Definition, 88 Fed. Reg. at 3090; *see also* September 24, 2024, Presentation: Updates on "Waters of the United States" at 26-27, *supra* n. 364.

[581] TSD for January 2023 at 169-70, *supra* n. 51.

[582] *Id.* at 258.

[583] *See, e.g.*, September 24, 2024, Presentation: Updates on "Waters of the United States" at 47, *supra* n. 364; November 15, 2023, Updates for Tribes and States on 'Waters of the United States" at 48, *supra* n. 364.

[584] *Rapanos* Guidance at 5-6.

training materials that assumed a discrete feature established a continuous surface connection."[585] Specifically, in direct contradiction to the January 2023 Definition Preamble and thus, the September 2023 Definition, the agencies' March 2025 Continuous Surface Connection Memorandum established a requirement for adjacent wetlands to directly abut a jurisdictional water ("e.g., they are not separated by uplands, a berm, a dike, or similar feature") in order to meet the continuous surface connection requirement.[586] The agencies' revision of the September 2023 Definition through this Memorandum was premised on their assertion that the "discrete features" language is in "tension with the pre-2015 regime and *Sackett*" and stated that the purpose of the memo is to "align the agencies' interpretation of adjacency with *Sackett*."[587] Training materials produced by the agencies for the March 2025 Continuous Surface Connection Memorandum explain this new interpretation and provide examples of wetlands that would remain jurisdictional, including a wetland connected to a relatively permanent water through a culvert and wetlands abutting a relatively permanent water that flows through a culvert.[588]

The agencies attempt to rely on this Memorandum as support for the proposed rule's abutment requirement despite having adopted it to change the meaning of a final rule without following APA notice and comment requirements. Further, despite just finding in March of 2025 that requiring an adjacent wetland to directly abut a requisite jurisdictional water aligned the agencies' interpretation of "continuous surface connection" with the Court's decision in *Sackett v. EPA*, in this proposed rule, they now seek to establish a new hurdle for establishing adjacency that the agencies claim somehow also arises from the *Sackett* decision. Despite a total absence of any support for this new requirement in the *Sackett* decision, the agencies seek to exclude all wetlands unless they physically touch a traditional navigable water, the territorial seas, a jurisdictional impoundment, or a relatively permanent tributary **and** "have at least semipermanent surface hydrology that is persistent surface water hydrology uninterrupted throughout the wet season except in times of extreme drought."[589]

Perhaps it is for this reason that the agencies say their proposed definition of "continuous surface connection" reflects "the agencies' best efforts to interpret the *SWANCC*, *Rapanos* plurality, and *Sackett* holdings with respect to adjacency in an implementable way, **informed by** the agencies'

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[585] EPA and Corps, Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proposer Implementation of "Continuous Surface Connection" under the Definition of "Waters of the United States" under the Clean Water Act, (Mar. 12, 2025), ("*March 2025 Continuous Surface Connection Memorandum*"), Dkt ID No. EPA-HQ-OW-2025-0322-0022.

[586] *Id*. at 5.

[587] *Id*. at 4.

[588] EPA and Corps, Training: 2025 Continuous Surface Connection Guidance at 11-12 (Apr. 29, 2025), available at https://www.epa.gov/system/files/documents/2025-06/csc_memo_training_4-29-25_508.pdf. (Attachment 51)

[589] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52527.

technical expertise in implementing the Clean Water Act for over fifty years."[590] Notably absent from this list of Supreme Court cases is *Riverside Bayview*, which as explained in detail in Section VI.B *supra* precludes the agencies' narrow interpretation of the Clean Water Act jurisdiction over adjacent wetlands. But in addition, as demonstrated by the agencies' inability to assess the impacts of this proposed definition in the RIA and the agencies' unresolved questions and requests for comment on numerous alternative approaches, various ways to implement the definition, and data limitations in the 2025 Proposed Rule Notice, the agencies definition is not actually implementable. Further, the agencies have never interpreted or implemented the Clean Water Act in the manner now proposed by the agencies during its more than 50-year history, so these limitation on the protection of adjacent wetlands are not supported by any agency technical expertise.

Putting aside the fact that the "semipermanent surface hydrology" requirement is unscientific and unintelligible, both of the new requirements in the proposed rule are contrary to the Court's holdings in *Sackett*, *Rapanos*, and *Riverside Bayview.* It is also contrary to the agencies' interpretation of *Rapanos*, *Riverside Bayview* and other precedent set forth in the Preamble to the January 2023 and September 2023 Definition.[591] Neither *Sackett* nor *Rapanos* stand for the proposition that only adjacent wetlands that physically touch another WOTUS and have "surface water at least during the wet season" can be determined to have a continuous surface connection. In *Sackett*, the Court expressly announced the following test for asserting jurisdiction: "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[592]

It is settled that this is a physical-connection requirement,[593] as opposed to a constant-hydrologic one, and that non-jurisdictional streams, ditches, culverts, and similar features can "serve as a physical connection that maintains a continuous surface connection between an adjacent wetland

[590] *Id.* (emphasis added).

[591] *See, e.g.*, January 2023 Definition, 88 Fed. Reg. at 3095-96.

[592] *Sackett*, 598 U.S. at 678-79.

[593] *Rapanos*, 547 U.S. at 751 n.13; TSD for January 2023 Definition, *supra* n. 51, at 169 ("The plurality opinion indicates that 'continuous surface connection' is a 'physical connection requirement.' 547 U.S. at 751 n.13 (referring to 'our physical-connect requirement' and later stating that Riverside Bayview does not reject 'the physical-connection requirement'").

and a relatively permanent water."[594] The agencies recently confirm this longstanding view in their review of the NWPR.

> A continuous surface connection does not mean a continuous *surface water connection* and does not require surface water to be continuously present between the wetland and water to which it is adjacent. The plurality opinion indicates that "continuous surface connection" is a "physical connection requirement." 547 U.S. at 751 n.13 (referring to "our physical-connect requirement" and later stating that *Riverside Bayview* does not reject "the physical-connection requirement"). The agencies' approach is consistent with science, as well as the regulatory definition of "wetlands," which does not require such aquatic resources to have water on the surface . . . While some wetlands are permanently or semipermanently inundated, many aquatic resources that meet the regulatory definition of "wetlands" may never have surface water (i.e., have saturated soils), may only have surface water during or immediately after precipitation events (i.e., are irregularly inundated), or may only have water at the surface seasonally (i.e., are seasonally inundated). Since wetlands frequently do not contain surface water, a requirement for continuous surface water between a relatively permanent water and adjacent wetlands would be illogical as a scientific and practical matter. As discussed in section III.B.ii.1, scientific literature and the agencies technical expertise supporting regulating such wetlands with a continuous surface connection to tributaries that meet the relatively permanent standard and to jurisdictional relatively permanent impoundments as "waters of the United State" under the final rule.[595]

Natural berms or similar natural landforms that provide evidence of a continuous surface connection do not sever jurisdiction for similar reasons.[596] If the Court had wanted to impose the alternative or additional requirement that the adjacent wetland physically touch the jurisdictional "water of the United States" and have "semipermanent surface hydrology that is persistent surface water hydrology uninterrupted throughout the wet season except in times of extreme drought," the Court would have expressly stated those requirements. It did not.

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[594] January 2023 Definition, 88 Fed. Reg. at 3095 ("This approach to the continuous surface connection is supported by the scientific literature, case law, and the agencies' technical expertise and experience. As the Court of Appeals for the Sixth Circuit has explained, 'it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally.' *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) ('Cundiff') (holding wetlands were jurisdictional under the *Rapanos* plurality where plaintiff created a continuous surface connection by digging ditches to enhance the acid mine drainage into the creeks and away from his wetlands).").

[595] TSD for 2023 Definition, *supra* n. 51, at 169-70.

[596] *Id*. at 3095.

Moreover, both *Rapanos* and *Sackett* build upon the Court's decision in *Riverside Bayview*, which expressly stated that Clean Water Act jurisdiction over adjacent wetlands was not limited solely to wetlands that border "other waters of the United States." Long ago, the agencies compellingly established the importance of protecting wetlands adjacent to other "waters of the United States" and the Court in *Riverside Bayview* upheld the agencies' view as a reasonable interpretation of the Clean Water Act. The Court found the Corps' basis for asserting jurisdiction over adjacent wetlands, which was stated as follows, to be reasonable and "an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act:[597]

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on **all waters that together form the entire aquatic system**. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of **or are in reasonable proximity to other waters of the United States**, as these wetlands are part of this aquatic system . . . [598]

The agencies erroneously claim that, in *Rapanos* at 742, 747 n. 12, and 748, "[t]he plurality said that 'adjacent' means 'physically abutting,' and used 'abutting" and 'adjacent' interchangeably."[599] In reality, the cited excerpts are only discussing the import of Clean Water Act Section 1344(g)(1) and describing the Court's opinion in *Riverside Bayview*, which upheld Clean Water Act jurisdiction over wetlands adjacent to other jurisdictional waters and determined that the particular wetland at issue in that case was jurisdictional where it abutted a navigable water. [600] The agencies ignore the language in *Riverside Bayview* that expressly contradicts their abutment requirement—that federal jurisdiction "must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system" protected by the Clean Water Act.

The proposed definition of "continuous surface connection" does not appear to have support from most of the states, whose interests the agencies claim to be preserving by eliminating federal protections for wetlands.[601] According to the Federalism Report for the 2025 Proposed Rule

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[597] *Riverside Bayview*, 474 U.S. at 134.

[598] *Id.* at 133-34 (emphasis added) (citing 42 Fed. Reg. 37128 (1977)).

[599] 2025. Proposed Rule Notice, 90 Fed. Reg. at 52507.

[600] *Rapanos*, 547 U.S. at 747, n. 12; *compare Riverside Bayview,* 474 U.S. at 135("Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.").

[601] *See* 2025 Proposed Rule Notice, 90 Fed. Reg. at 52528.

Notice, "[m]any States and their associations, along with some local governments and their associations supported an approach where temporary interruptions in surface water connection **would not sever jurisdiction**, as they note that such interruptions are reflective of natural processes, such as temporary dry spells, subsurface flows, low tides, or regional variation across systems."[602] For example, the State of Missouri told the agencies:

> We emphasize the risk of wetland loss under a narrow application of "continuous surface connection." Missouri has already lost over 85% of its historic wetlands and continues to lose wetlands at an increasing rate. Further narrowing protections to wetlands indistinguishable to adjacent jurisdictional waters could result in additional degradation of isolated or seasonally connected wetlands that provide flood storage, wildlife habitat, and water quality functions.[603]

Similarly, "[t]he majority of Tribal commenters recommended that natural and artificial features not inherently sever continuous surface connection . . . [and] Tribes stressed the need to consider regional variations, such as seasonal dry periods and drought conditions common in Tribal reservations and boundaries, as well as tidal variations affecting coastal Tribal communities, in the definition of 'continuous surface connection.'"[604]

As with the other aspects of the proposed definition, the agencies also put forth numerous inadequately described alternative approaches without providing an adequate legal or scientific basis for those alternatives. For example, the agencies propose an alternative whereby they would require "continuous surface connection" to mean the "perennial presence of surface water (i.e. year-round) over the wetland, lake, or pond, for example, in a permanently flooded wetland," which they indicate would encompass a "very small percentage" of wetland acreage in the United States."[605] The agencies also request comment on alternatives that would (1) only require abutment (i.e. touching) a jurisdictional water, (2) establish either a 90 or 270 day period in place of the "wet season, and (3) exclude certain permafrost wetlands in lands with high agricultural potential in Alaska.[606] For all of the reasons stated above, including failure to comply with the APA in proposing these alternatives, the agencies should not adopt any of these alternatives in a final rule.

The agencies are also "seeking comment on all aspects of implementation of the proposed definition of 'continuous surface connection' as it relates to adjacent wetlands discussed in this [continuous surface connection] section, including the availability and efficacy of all of the tools

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[602] Summary of Federalism Consultation, at 9.

[603] Summary of Federalism Consultation, attch. Missouri June 2025 WOTUS Recommendations, at 2.

[604] Summary of Tribal Consultation, at 7.

[605] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52529-530.

[606] *Id*.

and resources discussed and the availability and efficacy of tools that are not addressed in this section."[607] The agencies then describe a host of tools that could be used to determine if a wetland meets the abutting requirement, but they do not identify the tools or approaches that would actually be used.[608] Similarly, the agencies indicate they are using the National Wetlands Inventory but are modifying it is some way they do not fully explain using the flawed "wet season" approach as for "relatively permanent" waters.[609] They also indicate that may ask "landowners, farmers, outdoorsmen, and local communities, including indigenous communities in Tribal areas" about the "seasonal timing and extent of surface waters in wetlands" and state that a host of remote information "may be useful."[610] How the agencies implement their definition can have significant impacts on the jurisdictional scope of the WOTUS definition. The agencies' failure to identify how they will implement the proposed definition and to provide the public with adequate information to be able to comment on their potential implementation measures is contrary to law. Additionally, the methods identified do not appear to be based on sound science.

H. Lakes and Ponds

Building on the agencies' improper elimination of the interstate waters category, the agencies propose to delete the word "intrastate" from the section (a)(5) lakes and ponds category.[611] In addition to leaving interstate waters as a stand along protected category in the definition of "waters of the United States," the agencies should not revise the (a)(5) lakes and ponds category to delete the word "intrastate" or eliminate the category all together as is proposed as another alternative.

Lakes and ponds are jurisdictional as traditional navigable waters, interstate waters, and relatively permanent tributaries, under the September 2023 Definition and Pre-2015 Definition. Under the September 2023 Definition, intrastate lakes and ponds are also jurisdictional if they are "relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a traditional navigable water, interstate water, territorial seas, or a relatively permanent tributary."[612] Lakes and ponds can meet the continuous surface connection requirement:

> [I]f they are connected to a traditional navigable water, the territorial seas, or an interstate water or a tributary that is relatively permanent by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. Similarly, a natural berm, bank, dune, or similar natural landform between a water assessed under paragraph (a)(5)

[607] *Id*. at 52530.

[608] *Id*.

[609] *Id*.

[610] *Id*. at 52532.

[611] *Id.* at 52533.

[612] *See, e.g.*, 40 C.F.R. § 120.2(a)(5).

> and a traditional navigable water, the territorial seas, or an interstate water or a tributary that is relatively permanent does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection.[613]

The importance of including this category is fully spelled out in the record for the January 2023 Definition.[614]

Under the NWPR, lakes and ponds were in a separate category from tributaries and included only "standing bodies of open water that contribute surface water flow to a territorial sea or traditional navigable water in a typical year either directly or through one or more jurisdictional waters," directly or indirectly.[615] However, a lake or pond "did not lose its jurisdictional status if it contributed surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature."[616] Additionally, a lake or pond was jurisdictional if it was "inundated by flooding from a territorial sea, a traditional navigable water, a tributary, or another jurisdictional lake, pond, or impoundment of a jurisdictional water in a typical year."[617]

Relatively permanent lakes, ponds, and other non-navigable bodies of water forming geographic features are waters under *Sackett* and *Rapanos* and are WOTUS when they are (a)(1) waters or are connected to (a)(1) waters directly or through other jurisdictional waters.[618] *Sackett* and *Rapanos* do not require the connection to (a)(1) to be limited to a "continuous surface connection" in order for those waters to be jurisdictional. If the agencies revised this category, they should leave interstate in the text but eliminate the continuous surface requirement. To the extent it remains in the definition, "continuous surface connection" must be defined in the same manner as the September 2023 Definition.

I. Exclusions

Under the January and September 2023 Definitions, the agencies adopted certain exclusions to the definition that the agencies assert "would have generally not been considered 'waters of the United States' consistent with the agencies' longstanding practice and each of the subsequent rules

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[613] TSD for the January 2023 Definition, *supra* n. 51, at 202-03.

[614] *Id.* at 202-14.

[615] *See* NWPR, 85 Fed. Reg. at 22251.

[616] *Id*.

[617] *Id*.

[618] *See, e.g.*, 40 C.F.R. § 120.2(a)(1) (2023); *Rapanos*, 547 U.S. at 731-32, 742; *Sackett*, 598 U.S. at 678-79 (citing *Rapanos*, 547 U.S. at 742).

defining 'waters of the United States.'"[619] These "[e]xcluded waters are non-jurisdictional and are not subject to the regulation under the Clean Water Act . . . even where the feature would otherwise be jurisdictional under paragraphs (a)(2) through (5) of this rule . . .[however] [p]aragraph (a)(1) waters (traditional navigable waters, the territorial seas, and interstate waters) are not subject to the exclusions, consistent with longstanding practice (other than the 2020 NWPR)."[620] The agencies added language that remains in the September 2023 Definition to clarify that the exclusions do not apply to traditional navigable waters, the territorial seas, and interstate waters.[621]

In the 2025 Proposed Rule Notice, the agencies are proposing to modify three of these exclusions—the waste treatment system, prior converted cropland, and ditch exclusions—and to add an exclusion for groundwater.[622] According to the Notice, "[t]he agencies are not proposing to revise the current regulatory language which states that paragraph (b) exclusions apply to paragraph (a)(2) through (5) waters even in circumstances where the feature would otherwise be jurisdictional. Thus, consistent with longstanding practice, the agencies are proposing to continue the policy that exclusions do not apply to the paragraph (a)(1) traditional navigable waters and the territorial seas."[623]Additionally, "[t]he agencies are not proposing to codify the additional exclusions that were added in the NWPR."[624]

J. Ditches

The agencies claim that they are revising the "ditch" exclusion to address "confusion" but, in reality, the agencies are attempting to drastically narrow the scope of the Clean Water Act and exclude waters that have long been considered by the agencies to be jurisdictional. In the 2025 Proposed Rule Notice, the agencies that that the proposed rule will exclude all ditches that are "constructed or excavated entirely in dry land" and they define "ditch" in as overly broad manner like the NWPR to mean "a constructed or excavated channel used to convey water."[625] The agencies should not create unique jurisdictional criteria for ditches because, as the agencies have repeatedly recognized, they function like tributaries, and the agencies should not adopt the

[619] *See, e.g*., Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 28, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[620] *Id.*

[621] *See, e.g.,* 40 C.F.R. § 120.2(b).

[622] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52533.

[623] *Id.* at 52534.

[624] *Id.*

[625] *Id.* at 52538-52539.

definition of ditch from the 2020 NWPR, as that definition is a piece of a larger, seriously flawed legal approach to defining "waters of the United States" that was ultimately vacated.[626]

Under the NWPR, the term "ditch" was defined as "'a constructed or excavated channel used to convey water."[627] Ditches were jurisdictional if they were traditional navigable waters or non-excluded tributaries that relocated a tributary, were constructed in a tributary, or were constructed in an adjacent wetland and "contribute perennial or intermittent flow to a traditional navigable water or the territorial seas in a typical year."[628] All upland ditches were excluded regardless of flow, unless they were traditional navigable waters, and there were other limits on which ditches could be covered as tributaries, such as requiring that "a ditch needed to relocate an 'entire portion' of the tributary rather than divert some of the flow and indicating that a ditch created in uplands would be excluded even where it drained a wetland."[629]

The agencies have already determined that the NWPR requirements for identifying jurisdictional ditches are unworkable, "impractical," and inconsistent with the objective of the Clean Water Act.[630] For example, the agencies determined that the NWPR approach would fail "to implement the objective of the Clean Water Act by removing protections for waters that are properly within the statute's scope."[631] In addition, the NWPR definition (and thus the proposed rule definition) of "ditch" is overbroad and could incorrectly encompass a broad array of "channels" that are not, in fact, ditches, including altered or relocated rivers and streams and man-made canals. Because of this, under the September 2023 Definition, the agencies rejected the NWPR definition of "ditch" and stated that "a tributary ditch does not need to relocate a tributary, be constructed in a tributary, or be constructed in an adjacent wetland to be considered a jurisdictional tributary, so long as it meets" the relatively permanent standard."[632]

Consistent with *Rapanos* and numerous other precedents, ditches, canals, and similar bodies of water should be categorically included in the definition of "waters of the United States" when they otherwise meet the definition of a "water of the United States."[633] The approach to determining

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[626] *See e.g.*, *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 957 (D. Ariz. 2021).

[627] NWPR, 85 Fed. Reg. at 22299.

[628] *See, e.g.,* Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 17, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[629] *See, e.g., id.* at 16-17.

[630] *See, e.g.*, January 2023 Definition, 88 Fed. Reg. at 3061; TSD for January 2023 Definition, *supra* n. 51, at 145.

[631] TSD for January 2023 Definition, *supra* n. 51, at 142.

[632] *See, e.g.,* Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 17, Dkt. ID No. EPA-HQ-OW-2025-0322-0110; 40 C.F.R. § 120.2(a)(3) and (b)(3).

[633] The importance of maintaining jurisdiction over ditches and canals is illustrated in Waterkeeper Watershed Evaluations, including the Boulder Creek, Cape Fear, Puget Sound, and Rio Grande Evaluations, *see supra* n. 53.

the jurisdictional status of non-navigable ditches and drains was at issue in *Rapanos* and the plurality set forth the standard as follows: "the lower courts should determine, in the first instance, whether the ditches or drains near each wetland are **'waters' in the ordinary sense of containing a relatively permanent flow**; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*."[634]

Upon this opinion, the *Rapanos* plurality sought remand of the cases for a determination by the lower courts "whether **the ditches or drains** near each wetland are "waters" in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in Riverside Bayview."[635] The ditches and drains (i.e. the non-navigable tributaries) to which the wetlands were alleged to be adjacent consisted of (1) a "drain" that flowed to a creek then to a navigable river, (2) a "drain" that flowed to a tributary of a navigable river, and (3) a "drain" or ditches that eventually flowed to Lake St. Clair. Thus, the *Rapanos* plurality concluded that assertion of jurisdiction over adjacent wetlands in these types of circumstances (i.e. wetlands adjacent to drains or ditches) required application of the "relatively permanent" test. Accordingly, the only requirement for drains and ditches to be jurisdictional WOTUS is for them to be "relatively permanent," and the agencies lack authority to promulgate a regulatory definition that creates a more restrictive standard excluding relatively permanent ditches and drains from the Clean Water Act.

Consistent with the *Rapanos* plurality and *Sackett v. EPA*, the September 2023 Definition encompasses ditches excavated or constructed in dry land if they function like a tributary and carry a relatively permanent flow of water "consistent with the agencies' longstanding practice and technical judgment . . . and informed by *Rapanos*.[636] The agencies also concluded that it "would not be appropriate to exclude a broader set of ditches from the definition of 'waters of the United States.'"[637] In the 2025 Proposed Rule Notice, the agencies assert without any basis whatsoever that excluding ditches excavated or constructed in dry land despite their interface with a jurisdictional waters is consistent with longstanding practice and that such ditches are "not part of the naturally occurring tributary system and do not fall under the ordinary meaning of the term 'waters' with the scope of the Clean Water Act."[638] The agencies have previously determined, on multiple occasions, that human-made and human-altered tributaries—such as "ditches, canals,

[634] *Rapanos*, 547 U.S. at 757.

[635] *Id.* (emphasis added).

[636] January 2023 Definition, 88 Fed. Reg. at 3112. The agencies indicated this approach is consistent with the Rapanos Guidance approach.

[637] *Id.*

[638] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52539.

channelized streams, piped streams, and the like,"—"likely enhance the extent of connectivity" between streams and downstream rivers, "because such structures can reduce water losses from evapotranspiration and seepage."[639] In other words, to the extent tributaries have significant impacts on downstream waters, the increased flow associated with man-made or man-altered ditches may exacerbate these effects. The agencies have also determined that "[h]uman-made tributaries like ditches can provide functions that restore and maintain the chemical, physical, and biological integrity of downstream paragraph (a)(1) waters."[640] In the January 2023 Definition preamble, the agencies stated their longstanding view as follows:

> In addition, the agencies' longstanding interpretation of the Clean Water Act is that it is not relevant whether a water has been constructed or altered by humans for purposes of determining whether a water is jurisdictional under the Clean Water Act. In *S.D. Warren v. Maine Board of Envt'l Protection*, Justice Stevens, writing for a unanimous Court, stated: ''nor can we agree that one can denationalize national waters by exerting private control over them.'' 547 U.S. 370, 379 n.5 (2006).[641]

The agencies further stated "no Federal Court of Appeals has interpreted *Rapanos* to exclude ditches from the Clean Water Act. This case law demonstrates that certain ditches have long been subject to regulation as 'waters of the United States.'"[642] The courts have also noted that there are compelling legal and scientific reasons for ensuring that human-altered and human-made waters are covered as tributaries, and those reasons apply equally to ditches, canals, and similar features.[643] As the 11th Circuit stated in *U.S. v. Eidson*, "[t]here is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes."[644] Similarly, the court in *U.S. v. Holland* stated:

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[639] TSD for 2021 Proposed Rule, at 256-57, *supra* at n. 396; TSD for January 2023 Definition, *supra* at n. 51.

[640] January 2023 Definition, 88 Fed. Reg. at 3113.

[641] *Id.*

[642] *Id*.

[643] *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist*., 243 F. 3d 526, 533-34 (9th Cir. 2001); *U.S. v. St. Bernard Parish, 589 F. Supp. 617*, 620 (E.D. La. 1984); *U.S. v. Gerke Excavating, Inc*., 412 F.3d 804, 805- 06 (7th Cir. 2005) ("A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart."), vacated, 126 S. Ct. 2964 (2006), on remand 464 F.3d 723 (7th Cir. 2006) (remanding to district court to apply *Rapanos*), cert. denied 128 S.Ct. 45 (2007); *Community Assn. for Restoration of Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954-956 (9th Cir. 2002).

[644] *U.S. v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) *abrogation recognized by United States v. Robison*, 505 F.3d 1208, 1215–16 (11th Cir. 2007).

> The conclusion that Congress intended to reach water-bodies such as these canals with the FWPCA is inescapable. The legislative history quoted supra manifests a clear intent to break from the limitations of the Rivers and Harbors Act to get at the sources of pollution. Polluting canals that empty into a bayou arm of Tampa Bay is clearly an activity Congress sought to regulate. The fact that these canals were man-made makes no difference. They were constructed long before the development scheme was conceived. That the defendants used them to convey the pollutants without a permit is the matter of importance."[645]

Comments the agencies received during the federal consultation process demonstrate the importance of maintaining the existing protections for tributaries. For example, in the Federalism Consultation Summary, the agencies reported that:

> Many States who commented supported that human-made features should be jurisdictional if they function like natural features and are an RPW. Many commenters supported jurisdiction extending to ditches constructed in or that alter natural water features or that have the physical characteristics of a water and to ditches that drain or intersect jurisdictional wetlands. Similarly, the agencies received recommendations that jurisdictional ditches must contain the same attributes as jurisdictional tributaries with at least continuous seasonal flow, have flow more than in direct response to precipitation, and connect to a TNW.[646]

For example, consistent with the agencies' longstanding views, the State of Missouri commented that:

> We recommend that ditches be considered jurisdictional when they function as tributaries to jurisdictional waters, particularly when they: carry perennial or intermittent flow, are excavated to alter or supplant a natural stream channel, or drain wetlands or hydric soils . . . A definition based on function and hydrology, rather than construction origin alone, will better align with the ecological realities of Missouri's landscapes and avoid excluding artificial channels that perform critical hydrologic roles."[647]

Similarly, the agencies reported that "[o]f the feedback received on the treatment of ditches, several Tribes advocated for all relatively permanent waters ditches to be jurisdictional, pointing out their importance in overflow scenarios during high precipitation events."[648]

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[645] *United States v. Holland*, 373 F. Supp. at 673-74.

[646] Summary of Federalism Consultation, at 10.

[647] Summary of Federalism Consultation, attach. Missouri June 2025 WOTUS Recommendations, at 2-3.

[648] Summary of Tribal Consultation, at 7.

The agencies are also seeking comment on an alternative approach that would "exclude all ditches that carry less than a relatively permanent flow of water regardless of where and how the ditch was constructed or excavated or what purpose it serves" claiming that it is similar to the agencies' current approach. This alternative appears to contemplate exclusion of traditional navigable and interstate ditches contrary to the Clean Water Act and longstanding interpretations of the Act. Alternatively, the agencies are soliciting comment on yet another approach that "exclude all non-navigable irrigation and drainage ditches, regardless of flow duration or if the ditch is constructed or excavated entirely in dry land," which they claim is consistent with the Corp's original exclusion from 1975. As demonstrated above, all ditches that meet the definition of tributary must be encompassed within the WOTUS definition. With regard to both of the alternatives, contrary to the Clean Water Act and APA, the agencies completely failed to provide adequate information about the legal and scientific bases for the potential approaches to enable the public to understand and provide comment on them.

It is often difficult or impossible to determine whether a "ditch" is a natural waterway or a manmade waterway, and whether the ditch was constructed in a dry land or in a streambed, and the answer to the question is legally and scientifically irrelevant in any event because both can have significant impacts on water quality. For example, a significant percentage of stream miles within the coastal plain of North Carolina are modified natural stream channels and ditches. According to the North Carolina Department of Environment and Natural Resources, "[i]t may be difficult to differentiate between an artificial feature (e.g. ditch or canal) and a natural stream that has been modified (e.g. straightened or relocated).[649] Accordingly, the agencies should not exclude any ditches that function like relatively permanent tributaries from the definition.

K. Waste Treatment Systems

The agencies are proposing to readopt the NWPR approach and expand the "waste treatment system" exclusion by "adding a definition of 'waste treatment system' under paragraph (c)(11) and deleting redundant language in paragraph (b)(1), so as to clarify which waters and features are considered part of a waste treatment system and therefore excluded. Under the proposed rule, a waste treatment system 'includes all components of a waste treatment system designed to meet the requirements of the Clean Water Act, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).'"[650] Although the proposed rule would differ substantially from the exclusion in the

[649] North Carolina Division of Water Quality, Identification Methods for the Origins of Intermittent and Perennial streams, Version 4.11 (NCDENR 2010), available at: https://files.nc.gov/ncdeq/Water%20Quality/Surface%20Water%20Protection/401/Policies_Guides_Manuals/StreamID_v_4point11_Final_sept_01_2010.pdf. (Attachment 52)

[650] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52534.

September 2023 Definition, the agencies claim that proposed rule "generally reflects the agencies' current practice" and "would further the agencies' goal of providing greater clarity over which waters are and are not jurisdictional under the Clean Water Act for both the regulated community as well as the regulators."[651] These are not valid legal and scientific bases for the proposed rule's revisions to the waste treatment system exclusion.

On May 19, 1980, EPA promulgated a rule establishing the requirements for several environmental permitting programs, including the NPDES program.[652] As part of this action, EPA promulgated a definition of the term "waters of the United States." That rule stated:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*[653]

The preamble to this 1980 rule explains that the second sentence of this regulation was included "[b]ecause [the] CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems[.]"[654]

Two months later, EPA suspended the second sentence of this regulation (italicized above) by removing it from the regulation entirely. In its place, EPA inserted a footnote stating that the sentence was "suspended until further notice."[655] EPA explained in a Federal Register notice that it was suspending this sentence due to industry's objections that the regulation "would require them to obtain permits for discharges into existing waste water treatment systems, such as power plant ash ponds, which had been in existence for many years."[656]

EPA did not provide the public with an opportunity to comment on the suspension at the time this significant regulatory action was taken in 1980. Instead, EPA noted its intent to "promptly develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of

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[651] *Id.*

[652] *See* 45 Fed. Reg. 33290 (May 19, 1980).

[653] 45 Fed. Reg. at 33424 (emphasis added); *see also* 40 C.F.R. § 122.3 (1980).

[654] 45 Fed. Reg. 33290, 33298.

[655] 45 Fed. Reg. 48620 (July 21, 1980).

[656] *Id*.

that rulemaking, EPA will amend the rule, or terminate the suspension."[657] EPA never developed a revised definition, and thus never submitted a proposed rule regarding this limitation on the waste treatment system exclusion for notice and comment. The public, therefore, never had the opportunity to comment on or legally challenge the unilateral suspension of this sentence from the Code of Federal Regulations.

The Proposed Clean Water Rule included the "suspended" second sentence of the waste treatment system exclusion but noted in a footnote that the suspension was still in effect.[658] In addition, in the preamble to the Proposed Clean Water Rule the agencies purported to make only "ministerial" changes to the waste treatment system exclusion and, thus, stated that they were not seeking comment on this exclusion.[659] The preamble to the Final Clean Water Rule also described the changes to the waste treatment system exclusion as "ministerial," and noted that "[b]ecause the agencies are not making any substantive changes to the waste treatment system exclusion, the final rule does not reflect changes suggested in public comments."[660]

The definition of "waters of the United States" in 40 C.F.R. § 122.2, as revised by the Final Clean Water Rule, provided that "[t]he following are not 'waters of the United States' even where they otherwise meet the terms of (1)(iv) through (viii) of the definition" [i.e., even if they are otherwise jurisdictional as impoundments, tributaries, adjacent waters, or waters with a significant nexus to traditional navigable waters, interstate waters, or the territorial seas]:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.][661]

As it did before, "Note 1" of the revised 40 C.F.R. § 122.2 purports to continue the suspension of the last sentence of the waste treatment system exclusion.

Thus, under the waste treatment system exclusion in the Clean Water Rule (including the ongoing suspension of the last sentence of that exclusion), waters such as adjacent wetlands, ponds, or tributaries were not subject to CWA jurisdiction if they are deemed to be part of a "waste treatment system"—even if they are naturally occurring waters, were created entirely within a naturally

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[657] *Id.*

[658] Proposed Clean Water Rule, 79 Fed. Reg. at 22268.

[659] *Id*. at 22190, 22217.

[660] Clean Water Rule, 80 Fed. Reg. at 37114, 37097.

[661] *Id*. at 37114.

occurring water, or were created by impounding another water of the United States. This provision allowed, for example, an industrial facility to unilaterally destroy Clean Water Act jurisdiction over a naturally occurring wetland, lake, tributary, or other water merely by using that otherwise protected water as part of its on-site "waste treatment system." This exemption is contrary to the fundamental purposes of the Clean Water Act and flies in the face of any permissible reading of "waters of the United States."

Under the NWPR, the agencies falsely claimed that the NWPR's exclusion of waste treatment systems from Clean Water Act jurisdiction has "been expressly included in regulatory text for decades, but [that] the agencies are defining [the exclusion] for the first time to enhance implementation clarity."[662] To the contrary, the exclusion for "waste treatment systems" in the NWPR expanded the exclusion to encompass **any** jurisdictional water from Clean Water Act protections if it was used for a waste treatment system prior to 1972 or if it is converted to a waste treatment system thereafter "in accordance with the requirements of the CWA."[663] Under the NWPR, and contrary to the Clean Water Act, the agencies expressly announced they were "affirmatively relinquishing jurisdiction" over otherwise jurisdictional waters that are converted to waste treatment systems through Clean Water Act Sections 402 and 404 permits.[664] And, for the first time, the agencies defined waste treatment systems to include cooling ponds, which encompasses large public lakes – often used for boating, fishing, recreation, and other public uses - that were created by impounding jurisdictional waters to provide cooling water for industry.[665]

In so doing, the agencies attempted to evade compliance with the Clean Water Act and APA by bootstrapping the impermissible exclusion onto a new "waters of the United States" definition without ever having provided an adequate legal or factual basis for the exclusion. The exclusion allows industries to transform the Nation's waters into waste treatment systems and thereby strip them of Clean Water Act jurisdiction contrary to the Act, legislative history, and case law.[666] Even navigable-in-fact lakes, important for navigation, interstate commerce, drinking water, and recreation, could be rendered non-jurisdictional, destroyed, and turned into treatment systems for industrial waste under the NWPR.

Except for applying the waste treatment exclusion to traditional navigable waters and the territorial seas, the 2025 Proposed Rule Notice indicates the agencies are restoring the NWPR approach to broadly exempt waste treatment systems and all of their components from the definition of "waters

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[662] NWPR, 85 Fed. Reg. at 22317, 22324.

[663] *Id*. at 22325.

[664] *Id*. at 22322.

[665] *Id*. at 22328-39.

[666] *See, e.g.*, 45 Fed. Reg. 48620, 48620 (July 21, 1980).

of the United States." The agencies intentionally eliminated that aspect of the exclusion in the January 2023 Definition[667] and there is no adequate legal or scientific basis for expanding the exclusion in that manner. The January 2023 Definition adopted a version of the waste treatment exclusion that the agencies claimed was consistent with "pre-2015 practice"[668] and also deleted the suspended sentence "limiting application of the waste treatment system exclusion to manmade bodies of water."[669]

The broad exclusion for waste treatment systems is directly contrary to the Clean Water Act and decades of law holding that once a body of water is a water of the United States, it is always a water of the United States.[670] While some of these decisions examined the term "navigable waters" as opposed to "waters of the United States," the CWA most certainly encompasses the narrower category of "navigable water" under other statutes. There is no evidence Congress intended to depart from this well settled law to allow the agencies to remove bodies of water that fall squarely within the definition of "waters of the United States," especially where those "waters of the United States" are impounded to create a private dump for a utility or other industrial operation.[671]

To the contrary, legislative history speaks directly to this issue and the general common law rule prior to the enactment of the CWA was that a body of water forever remains a water of the United States once it has been identified as a water of the United States.[672] The Senate Committee on Public Works, in approving the Federal Water Pollution Control Act Amendments of 1971, explicitly found that "[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable."[673] Several years later, another Senate Report stated that the Clean Water Act

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[667] *See, e.g.*, 2021 Proposed Definition, 86 Fed. Reg. at 69426-428; January 2023 Definition, 88 Fed. Reg. at 3109-3111; Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 28-32, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[668] Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 31, Dkt. ID No. EPA-HQ-OW-2025-0322-0110

[669] January 2023 Definition, 88 Fed. Reg. at 3110.

[670] *See* Scott Snyder, Note, *The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA's Definition of "Waters of the United States,"* 21 N.Y.U. Envtl. L.J. 504, 522-23 (2014) (providing overview of federal cases prior to the enactment of the CWA holding that once a body of water has been classified as a water of the U.S., it remains a water of the U.S. forever). (Attachment 53)

[671] *Id.* at 523.

[672] *See, e.g.*, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) ("When once found to be navigable, a waterway remains so."); *see also* Technical Support Document for the Clean Water Rule at 230. ("The Supreme Court has confirmed that damming or impounding a 'water of the United States' does not make the water non-jurisdictional; *see S. D. Warren Co. v. Maine Bd. of Envtl. Prot*., 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them."); *U.S. v. Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008) ("[I]t is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.").

[673] S. Rep. No. 92-414, at 7 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

"stipulated that the Nation's fresh and marine waters would not be an element of the waste treatment process. That continues to be national policy."[674] There appear to be no contrary statements in legislative history.

This exclusion has had, and will continue to have, serious consequences for our nation's waters if it is not eliminated. For example, it has been a common practice for the utility industry to impound streams and rivers to create waste dumps for coal ash[675] and other wastes associated with coal-fired power plants. In fact, EPA cited the utility industry's concern about coal ash impoundments as one of the primary reasons it suspended the sentence making clear that permits are required for discharges into a waste treatment system created by impounding "waters of the United States."[676]

Coal-fired power plants discharge a large volume of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. This pollution is discharged directly from the power plant; flows from old, unlined surface impoundments or "ponds" that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge; and seeps from unlined ponds and landfills into ground and surface waters. These coal ash "[i]mpoundments, EPA tells us, have been 'largely ineffective at controlling discharges of toxic pollutants and nutrients.'"[677] Historically, EPA estimated that *at least 5.5 billion pounds* of pollution were released into the environment by coal-burning power plants every year.[678] At that time, coal-burning power plants were responsible for at least 50 to 60 percent of the toxic pollutants discharged into waters of the U.S—more than the other nine top polluting industries *combined*.[679] Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Due to the bio-accumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems.[680] According to EPA, "[c]oal ash

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[674] S. Rep. No. 95-370, at 4 (1977) *reprinted in* 1977 U.S.C.C.A.N. 4326, 4330.

[675] Coal combustion residuals ("CCR") "are generated from the combustion of coal by electric utilities and independent power producers for the generation of electricity. CCR include fly ash, bottom ash, boiler slag, and flue gas desulfurization materials and are commonly referred to as coal ash." U.S. EPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure, 85 Fed. Reg. 53516 (Aug. 28, 2020).

[676] 45 Fed. Reg. at 48620.

[677] *Sw. Elec. Power Co. v. United States Env't Prot. Agency*, 920 F.3d 999, 1003 (5th Cir. 2019) (internal citation omitted).

[678] U.S. EPA, Environmental Assessment for the Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category 3-14 (Apr. 2013), available at: https://www.regulations.gov/docket/EPA-HQ-OW-2009-0819-2260 ("EA").

[679] *Id.* at 3-13.

[680] *See, e.g.*, Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 89 Fed. Reg. 40198 (May 9, 2024).

contains contaminants like mercury, cadmium, chromium, and arsenic associated with cancer and/or various other serious health effects. Many facilities stored coal ash in surface impoundments, which have the potential to leak or to fail, sending coal ash and its contaminants into water sources, including surface water and groundwater. [681]

Despite these horrific realities, utilities have effectively been allowed to steal our Nation's waters to create these toxic lagoons in some cases. For example, an analysis of coal ash disposal units in seven southeastern states by Waterkeeper Alliance shows that 113 of 405 dumps were created by impounding or burying a "water of the United States."[682] Of those 113 dumps, 85 are currently classified as surface impoundments, 26 as landfills, and 2 as Flue Gas Desulfurization (FGD) waste disposal units.[683] Waterkeeper Alliance's analysis identified more than 140 stream segments that have been impounded or otherwise obstructed by coal ash disposal units, with a combined length of 113 miles. The estimated volume of toxic coal ash in the dumps built on top of or in a water of the United States in these eight states alone is 132 billion gallons.[684]

Utilities in other states have also created coal ash dumps by impounding or burying a "water of the United States." For example, the FirstEnergy Little Blue Run impoundment in Pennsylvania, the nation's largest coal ash impoundment, was created by damming Little Blue Run stream. In 2014, the Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment and ordered a $169 million dollar cleanup and closure of Little Blue Run.[685]

In short, the agencies must reverse course and close this gaping hole they illegally created in the Clean Water Act that authorizes utilities and industrial operators to use our nation's waters as their own private sewers.

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[681] EPA, Fact Sheet: Legacy Coal Combustion Residuals Surface Impoundments and CCR Management Units Final Rule, available at: https://www.epa.gov/system/files/documents/2024-04/legacy_ccrmu_final-_fact_sheet_april2024.pdf. (Attachment 54); *see also* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38950 (May 8, 2024).

[682] Waterkeeper Alliance performed a geospatial analysis by overlaying coal ash disposal sites on historical topographical maps published by the U.S. Geological Survey, allowing the identification of coal ash ponds and landfills that were constructed by impounding or burying one or more preexisting blue-line streams. The analysis examined known coal ash sites in Alabama, Georgia, Florida, North Carolina, South Carolina, Tennessee, and Virginia. (Attachment 55).

[683] *Id*.

[684] *Id*.

[685] Pa. Dep't of the Env't, DEP Issues Permit Requiring Closure of FirstEnergy's Little Blue Run Impoundment (Apr. 3, 2014), *available at:* http://www.paenvironmentdigest.com/newsletter/default.asp?NewsletterArticleID=28339&SubjectID=&SearchWord=blue+run (Attachment 56)

L. Prior Converted Cropland

The agencies claim that they are continuing the longstanding exclusion of "prior converted cropland" but, in reality the agencies are proposing to dramatically expand the exclusion in manner that is inconsistent with the Clean Water Act through the proposed rule.[686] Claiming that their proposed rule is somehow consistent with Clean Water Act Section 101(b), but not explaining how it is consistent, the agencies are "proposing to clarify, consistent with the NWPR, that the prior converted cropland exclusion would no longer apply for Clean Water Act purposes when the cropland is abandoned (*i.e.*, the cropland has not been used for or in support of agricultural purposes for a period of greater than five years) *and* the land has reverted to wetlands."[687] Claiming that their approach is consistent with the 1993 preamble,[688] the agencies also "propose that prior converted cropland is considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years" and that "[a]gricultural purposes include land use that makes the production of an agricultural product possible, including, but not limited to, grazing and haying. This proposed rule would also clarify that cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use (*i.e.*, it is used for, or in support of, agriculture purposes), and therefore maintains the prior converted cropland exclusion."[689] The 2025 Proposed Rule Notice also provides an extensive, but non-exclusive listing of "agricultural purposes" that are not, in fact, "crop production."[690] Under the agencies proposed approach, "[t]he agencies expect the majority of prior converted cropland in the nation to fall into this category and not to be subject to the Clean Water Act, even after it is abandoned."[691]

For all of the reasons the agencies rejected the overbroad NWPR approach to the prior converted cropland exclusion, the agencies should maintain the "longstanding and familiar" approach to this this exclusion in the September 2023 Definition and should not readopt the NWPR approach to the exclusion in the proposed rule.[692] The prior converted cropland exclusion was added to the Pre-2015 Regulatory Definitions in 1993.[693] The exclusion was intended to exempt cropland that no "longer performs the [wetland] functions or has values that the area did in its natural condition"

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[686] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52535-52536.

[687] *Id.* at 52536.

[688] 58 Fed. Reg. 45033 (August 25, 1993), *but see* January 2023 Definition, 90 Fed. Reg. at 3106.

[689] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52536.

[690] *Id.* at 52537.

[691] *Id.* at 52538.

[692] *See, e.g.*, January 2023 Definition, 90 Fed. Reg. at 3105-3109; Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 28-32, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[693] 58 Fed. Reg. 45008, 45031 (Aug. 25, 1993).

from the Clean Water Act and ensure consistency with other federal programs affecting wetlands.[694] The NWPR rule approach "substantially reduced the likelihood that prior converted cropland would ever lose its excluded status."[695] The agencies should continue to follow the original intent and practice from 1993 such that "if the cropland is 'abandoned,' meaning that crop production ceases and the area reverts to a wetland state" the area will no longer be considered prior converted cropland. Consistent with the "change of use" approach, the agencies should ensure that if an area that is put to a non-agricultural use, such as for development, it immediately loses its exempt status and once again becomes potentially jurisdictional under the Clean Water Act.[696] The exclusion should also maintain "consistency and compatibility between the agencies' implementation of the Clean Water Act and the U.S. Department of Agriculture's (USDA) implementation of the Food Security Act by providing that prior converted cropland under the Clean Water Act encompasses areas designated by USDA as prior converted cropland."[697]

M. Groundwater

The agencies are proposing to add a groundwater exclusion to the proposed WOTUS definition to "explicitly codify the NWPR's exclusion of groundwater."[698] In the January 2023 Rule, the agencies specifically declined to include an exclusion for groundwater in the WOTUS definition because "there is no need for a regulatory exclusion" and they provide an extensive explanation for their views.[699] By contrast, in the 2025 Proposed Rule Notice, the agencies simply state that "[t]he agencies propose that there is a need for a regulatory exclusion to provide clarity on this matter," but they do not identify that need or what needs to be clarified, or explain why they are changing their views. Instead, the agencies merely restate the bases for not including the exclusion in the January 2023 Definition.[700]

In the 2025 Proposed Rule Notice, the agencies do not define groundwater for the purpose of the proposed exclusion, which renders this exclusion impermissibly vague. Additionally, given the agencies' proposed rule language and alternative approaches that would cut off jurisdiction over tributaries with subsurface flow and the agencies' approaches to subsurface flow associated with wetlands, lakes, and ponds, it appears that this exclusion may be intended as alternative, but

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[694] 2021 Proposed Rule, 86 Fed. Reg. at 69424.

[695] January 2023 Definition, 88 Fed. Reg. at 3016.

[696] *See* 2021 Proposed Rule, 86 Fed. Reg. at 69425.

[697] January 2023 Definition, 88 Fed. Reg. at 3105.

[698] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52541.

[699] January 2023 Definition, 88 Fed. Reg. at 3105.

[700] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52541.

unexplained and unsupported, basis for eliminating jurisdiction over other water categories. This would be contrary to law. For example, the agencies have previously recognized that:

> Tributaries may temporarily flow underground in regions with karst geology or lava tubes, for example, maintaining similar flow characteristics underground and at the downstream point where they return to the surface . . . [and] tributaries can be relocated below ground to allow reasonable development to occur. In urban areas, surface waters are often rerouted through an artificial tunnel system to facilitate development . . . Underground streams are distinct from groundwater due to their very direct hydrologic connection to the portions of the tributaries that are or re-surface above ground. Tributaries that have been rerouted underground are contained within a tunnel system or other similar channelized subsurface feature, while naturally occurring subterranean streams flow within natural conduits like karst formations or lava tubes.[701]

In the NWPR, to ensure that the groundwater exclusion did not eliminate jurisdiction over other water categories, the agencies also added a provision to their groundwater exclusion to "clarify that subterranean rivers, as compared to groundwater and other subsurface waters, may not break jurisdiction of upstream tributaries, including any jurisdictional lakes, ponds, and impoundments of jurisdictional waters that contribute surface water flow through these tributaries, depending on the factual circumstances."[702]

Tributaries that temporarily flow subsurface are not groundwater and cannot be excluded from the definition of "waters of the United States" merely because of subsurface flow. As EPA stated in the 1991 Final Rule amending the water quality standards regulation for "Indian Reservations," " . . . [i]t is EPA's long-established position that water quality standards are required for certain underground segments of surface waters. *See* Kentucky v. Train, 9 ERC 1280 (E.D. Kentucky 1972). In such streams, the subterranean component must be sufficiently stream-like so as to possibly allow the passage of fish and other aquatic organisms from a surface segment of the stream into the underground segment."[703]

Because the agencies have not proposed a definition of "groundwater" and the groundwater exclusion would preclude jurisdiction over waters that would otherwise be jurisdictional under (a)(2)-(a)(5) of the September 2023 Definition, the agencies proposed rule could potentially be used to improperly exclude waters that are actually "waters of the United States." To prevent

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[701] January 2023 Definition, 88 Fed. Reg. at 3083.

[702] NWPR, 85 Fed. Reg. at 22279.

[703] Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876, 64892 (Dec. 12, 1991).

confusion and avoid creating exclusions of waters that must remain jurisdictional, and because the agencies have not provided an adequate basis for adopting the exclusion,[704] the agencies should not adopt the proposed exclusion for groundwater.

VIII. States and Tribes Cannot and Will Not Fill the Enormous Regulatory Gap in Water Quality Protections Created by the Proposed WOTUS Definition

The agencies have apparently forgotten, or are purposefully ignoring, the adage, "[t]hose who fail to learn from history are doomed to repeat it." The statements throughout the 2025 Proposed Rule Notice asserting and suggesting that the redefinition and draconian narrowing of "waters of the United States" will merely shift regulatory and enforcement authority from the federal government back to the states flies directly in the face of many decades of history and empirical data.[705]

As the agencies are well-aware, the passage of the Clean Water Act and a host of other federal laws in the 1970s occurred as a direct result of public outcry regarding dangerous pollution problems that resulted from the failure of state regulation to protect people and public trust resources from pollution.[706] The agencies certainly also know how extremely unlikely it is that most states will be able or willing to sufficiently regulate dangerous pollution on newly deregulated rivers, streams and wetlands utilizing state law alone, and without the federal regulatory "floor" established by Congress in the Clean Water Act.

Moreover, the very concept encapsulated in the agencies' rationale for the 2025 Proposed WOTUS Definition of simply "shifting" regulatory responsibility from the federal government to the states is irrational and nonsensical. As Cynthia Giles, the former head of EPA's Office of Enforcement and Compliance Assurance, has astutely observed:

> Don't be fooled by the suggestion that if the EPA walks away, everything will still be fine because states will step to the plate and enforce the law. The EPA's retreat will only embolden industry and weaken states. If the EPA is not there to enforce laws, then in many cases no one will.[707]

Ms. Giles continued in her op-ed to provide several specific and noteworthy reasons why proposals to shift regulatory and enforcement responsibility to states (such as the Proposed Rule) are

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[704] *See also* Waterkeeper 2011 Comments, *supra* n. 30, at 54-55.

[705] *See* Hines History of the CWA, *supra* n. 209.

[706] *Id.* at 81-82.

[707] Cynthia Giles, *Why We Can't Just Leave Environmental Protection to the States*, Grist, (Apr. 26, 2017), https://grist.org/opinion/why-we-cant-just-leave-environmental-protection-to-the-states/ (Attachment 57).

anathema to good public policy. These reasons were so clearly spelled out by Ms. Giles that we will repeat portions of her article verbatim:

- First, states often don't enforce the laws within their own borders when the people primarily harmed live downwind or downriver in another state. States don't want to spend their money or their political capital to benefit other states….

- Second, many significant violators are national companies that operate in many states. Individual states can't effectively take on nationwide operations. Filing cases one state at a time is inefficient and leads to inconsistent results. The EPA enforces against national and multinational companies, and, through a single case, can secure an agreement that cuts pollution at all of a company's facilities nationwide. States frequently join the EPA in these national cases….

- Third, many states don't take action to enforce criminal environmental laws. Environmental crimes have real victims, who are injured and sometimes killed by companies that cut corners on toxic pollution control. The EPA's criminal enforcement, especially against individual managers, sends a powerful deterrent message: Company managers who are considering cheating on drinking-water tests or turning off air-pollution controls better think twice before making choices that could land them in jail,

- Fourth states don't always have the political will to take on powerful companies. When the EPA sued Southern Coal Corporation for long-standing and serious water-pollution violations across Appalachia, four states — Alabama, Kentucky, Tennessee, and Virginia — joined the EPA in that case. West Virginia did not sign on, even though many of the violations occurred there. Why? The owner of the company was influential in the state, and now serves as its governor. The EPA is far less likely to be held hostage to companies with local political clout.

- Fifth, companies that play by the rules need protection from companies that cheat. Weak enforcement gives an unfair competitive advantage to companies that violate the law. The EPA helps to ensure a level playing field and prevent a race to the bottom by providing backup for states that don't have the resources or the will to insist on compliance….

- Sixth, sidelining the EPA won't empower states, it will weaken them. Companies have known that if they don't resolve their enforcement problems at the state level, they may have to face the EPA instead. Announcing that the EPA is no longer a threat will change that dynamic. A diminished EPA will encourage companies to push back against state

> enforcers. The proposal that Trump claims will help states will instead make their jobs harder.[708]

Of course, none of this should come as a surprise to the agencies. It is plainly arbitrary and capricious for the agencies to ignore history and reality in their obvious effort to eviscerate modern federal water pollution regulation.

A. Water Pollution Regulation and Enforcement by States is Currently Insufficient to Protect Water Quality

The CWA and many other federal environmental statutes provide for, encourage and in some cases even require federal delegation of regulatory programs to states. For example, only three states have *not* been delegated NPDES permitting authority under Section 402 of the Act.[709] EPA provides significant grant funding to states that carry out regulatory programs to implement federal law. Notwithstanding this substantial federal investment, however, many states are currently failing to adequately protect communities, waterways and ecosystems from dangerous water pollution. EPA's Solicitor General has made this observation, noting that state enforcement efforts are "incomplete and inconsistent."[710] Additionally, many of the nation's waters are not even monitored by the states for pollution assessments under the Clean Water Act due to lack of funding, prioritization, and other resources.

These ongoing challenges are borne out in EPA's own water quality assessment data as well. The most recent national summary of state water quality assessments estimates that of those waters that had been assessed, around 53 percent of river and stream miles, 71% of lake acreage, and 80% of estuary and bay square mileage were not safe for fishing, swimming, or other beneficial uses.[711]

According to the 2022 National Lakes Assessment, among other water quality problems, 47% of lakes are in poor condition due to nitrogen pollution, 50% of lakes are in poor condition due to phosphorus pollution, algal toxins were present in 50% of lakes tested, an estimated 58,747 lakes contain fish with detectable levels of mercury and polychlorinated biphenyls (PCBs), every fish tissue sample contained detectable levels of mercury and polychlorinated biphenyls (PCBs), and

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[708] *Id*.

[709] The three states are Massachusetts, New Hampshire and New Mexico. Notably, only three states (Florida, Michigan, and New Jersey) have received full delegation to administer dredge and fill permit programs under CWA Section 404. *See* RIA at 67, 74.

[710] *Irreplaceable: Why States Can't and Won't Make Up for Inadequate Federal Enforcement of Environmental Laws*, Institute for Policy Integrity, New York University School of Law (June 2017) (citing U.S. EPA Office of the Inspector General, 12-P-0113, EPA Must Improve Oversight of State Enforcement 8 (2011)).

[711] U.S. EPA, Watershed Assessment, Tracking & Results, 2017 National Summary of State Information, available at: http://ofmpub.epa.gov/waterslO/attains_nation_cy.control (last accessed on Sept. 3, 2021) (hereinafter "Watershed Assessment") **(**Attachment 58).

an estimated 95% of fish in lakes sampled for per- and polyfluoroalkyl substances ("PFAS") contained detectable levels of perfluorooctane sulfonic acid ("PFOS").[712]

According to the 2018-2019 National Rivers and Streams Assessment, 44% of rivers and streams are in poor condition due to nitrogen pollution, 42% of rivers and streams are in poor condition due to phosphorus pollution, 47% of rivers and streams were in poor conditions for biological communities, only 35% of rivers and streams had healthy fish communities, and PFOS exceeded screening levels in at least 92% of fish samples.[713]

According to the 2021National Wetlands Condition Assessment, 82% of wetlands were in fair or poor condition due to physical alteration, less than half of wetland area was rated as good (45%), nitrogen and phosphorus conditions were found to be poor at 17% and 24% of wetlands respectively, and microcystins were detected in 30% of wetlands.[714]

The most recent *National Water Quality Inventory: Report to Congress from EPA* demonstrates that, where waters have been monitored, significant pollution problems persist.[715] For example, EPA's 2024 national monitoring report showed:

- Nutrients and degraded habitat are pervasive issues impacting waters across the country, with excessive levels of phosphorus reported in 42% of river and stream miles, 45% of lakes and approximately 20% of coastal water square miles.

- Habitat degradation is widespread across the country with 36% of wetland acres, 29% of lakes, and 27% of river and stream miles in poor condition.

- Fish communities in 65% of assessed rivers and streams were in poor condition.

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[712] EPA, National Lakes Assessment 2022 Key Findings: National Lakes Assessment: The Fourth Collaborative Survey of Lakes in the United States, available at: https://www.epa.gov/national-aquatic-resource-surveys/national-lakes-assessment-2022-key-findings (last accessed Dec. 16, 2025) **(**Attachment 59).

[713] EPA, National Rivers & Streams Assessment: The Third Collaborative Survey Web Report (2018-19), available at: https://riverstreamassessment.epa.gov/webreport/#key-findings-on-2018-19-condition (last accessed Dec. 16, 2025) **(**Attachment 60).

[714] EPA, National Wetlands Condition Assessment 2021 Key Findings, National Wetland Condition Assessment: The Third Collaborative Survey of Wetlands in the United States, available at: https://www.epa.gov/national-aquatic-resource-surveys/national-wetlands-condition-assessment-2021-key-findings (last accessed Dec. 16, 2025). (Attachment 61).

[715] National Water Quality Inventory: Report to Congress, EPA, Report # 841-R-23-00, (Oct. 2024), https://www.epa.gov/system/files/documents/2025-01/national-inventrory-report-to-congress.pdf (last accessed Dec. 16, 2025) (Attachment 62).

- Whole fish composite samples in the Great Lakes nearshore waters and in rivers found all samples had detectable levels of mercury and polychlorinated biphenyls (PCBs), and more than 92% of the samples contained detectable levels of perfluorooctane sulfonate (PFOS).

Given the water quality challenges our nation continues to face more than 50 years after the passage of the Clean Water Act, it is obvious that the Act's requirements and enforcement desperately need to be supported and strengthened, not diminished. Weakening the Act by reducing the scope of federal jurisdictional waters, and blindly assuming in the face of strong evidence to the contrary that states will have the desire, political will, and capacity to pick up the slack, stretches credulity well beyond the breaking point and is a classic example of arbitrary and capricious decision-making.

B. Regulation and Enforcement Will Further Diminish Under the Proposed "Waters of the United States" Redefinition

Very recent past experience contradicts the agencies' assertion that they are preserving state authority and that state regulation of waters that lose Clean Water Act protections will serve to mitigate the harm caused by the 2025 Proposed WOTUS Definition. The agencies know that most states and tribal governments will not be able or willing to sufficiently regulate dangerous pollution on deregulated rivers, streams, and wetlands utilizing state law alone and without the federal regulatory "floor" established by the Clean Water Act.[716] For example, information gathered by the agencies after the adoption of the NWPR demonstrated that states and tribal governments had not replaced, and in many instances could not replace, the federal protections provided by the Clean Water Act for the nation's waters. In a section of the 2021 Proposed Definition entitled "*States and Tribes Did Not Fill the Regulatory Gap Left by the NWPR*," the agencies stated that "[g]iven the limited authority of many states and tribes to regulate waters more broadly than the Federal government, the narrowing of federal jurisdiction would mean that discharges into the newly non-jurisdictional waters would in many cases no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation's waters."[717] In fact, instead

[716] *See, e.g.,* Environmental Integrity Project, One Year After Key Supreme Court Decision, Almost Half of States Leave Many Wetlands Unprotected, (May 23, 2024), available at: https://environmentalintegrity.org/wp-content/uploads/2025/09/EIP_Report_WetlandsReport_5.23.pdf (Attachment 63); James McElfish, State Protection of Nonfederal Waters: Turbidity Continues, 52 Env't L. Rep. 10679, 10679 (Sept. 2022), available at: https://www.eli.org/sites/default/files/files-pdf/52.10679.pdf. (Attachment 64); Navigating Rough Waters at 61–126, *supra* n. 194; Atchafalaya Basinkeeper Lawsuit, Iberville Parish, LA, https://lailluminator.com/2025/06/04/louisiana-bill-wetlands/ (Attachment 66).

[717] 2021 Proposed Definition, 86 Fed. Reg. at 69415.

of stepping in to address lost protections, certain states actually began taking deregulatory steps to change their state regulatory practices to match the NWPR.[718]

The agencies found that the NWPR unrealistically and incorrectly considered states' actions to reduce their own clean water protections in response to the reductions in jurisdiction from the NWPR. In adopting the NWPR, the agencies had incorrectly and unrealistically asserted that states would not amend their own clean water protections to bring them down to the new federal floor represented by the NWPR and that this retention of state jurisdiction would ameliorate environmental harm from the NWPR.[719]

The agencies also previously reported that the NWPR would result in discharges without any regulation in states and tribal lands where regulation of waters beyond those covered by the Clean Water Act are not authorized.[720] In fact, the agencies determined that two states, Indiana and Ohio, de-regulated certain waters after the adoption of the NWPR, and those states, along with 29 other states and the District of Columbia, did not regulate surface water discharges as broadly as the January 2023 Definition.[721] Indeed, the NWPR removed CWA protections from nearly all waters in some arid states.[722] There can be no serious question that removing potentially large numbers of rivers, streams, lakes, wetlands, and other waters from federal water pollution regulation and enforcement will make matters significantly worse for water quality across the country.

C. The Agencies' Evaluation of State and Tribal Regulatory Information is Insufficient to Overcome the Enormous Weight of Evidence that States Won't Fill the Regulatory Gap.

A careful review of the 2025 Proposed Rule Notice and RIA reveals no meaningful evidence to support the agencies' suggestion or belief that states can simply choose to protect federally deregulated waters from dangerous pollution. For example, in the 2025 Proposed Rule Notice, the

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[718] *See* Memorandum for the Record and Data Analysis, *supra* n. 350; Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 46-50, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[719] *See* Memorandum for the Record, *supra* n. 350, at 4 ("The agencies are also aware of certain states that have already begun taking deregulatory steps to change their state regulatory practices to match the NWPR, contrary to the agencies' estimates in the "[l]ikely response category" for such states identified the NWPR's EA. *See* NWPR EA at 39-41 (estimating that some states are likely to continue their current dredged/fill permitting practices; however, some of those states have instead sought to reduce the scope of state clean water protections after the NWPR was finalized).").

[720] *See* Fox Dec. ¶ 18, Pinkham Dec. ¶ 18, *supra* n. 50; Memorandum for the Record at 4, *supra* n. 350.

[721] *See, e.g.,* Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule, (Dec. 2022), at 48-49, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

[722] *See, e.g.,* Fox Dec. ¶ 15, *supra* n. 50 ("These changes have been particularly significant in arid states. In New Mexico and Arizona, for example, of over 1,500 streams assessed under the NWPR, nearly every stream has been found to be a non-jurisdictional ephemeral resource, which is very different from the status of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.").

agencies explain that "States and Tribes may choose to expand their coverage of their waters beyond 'waters of the United States' to include other waters as 'waters of the State' or 'waters of the Tribe.' Although some States and Tribes already exceed the aquatic resource or surface water discharge protections of the proposed rule, the way States or Tribes would interpret and apply their own regulations as a result of the revised definition of 'waters of the United States' is unknown."[723] In the RIA, the agencies acknowledge the possibility that States and Tribes "could not implement any State or Tribal regulations beyond Federal requirements. For example, a few States and all Tribes are currently not authorized to implement the National Pollutant Discharge Elimination System (NPDES) program, and so they would potentially not have the capacity (staff and resources) to regulate discharges to waters that would no longer be jurisdictional."[724]

Moreover, as previously noted, the agencies have not even identified, via mapping or otherwise, which waters would, and which would not, be considered a WOTUS under the 2025 Proposed Rule Definition or under any of their alternative approaches. Such analysis would clearly be required in order to present to the public with an assessment of impacts from the agencies' elimination of federal Clean Water Act protections for rivers, streams, lakes, ponds, ditches, canals, and other waters, and to accurately evaluate the extent to which states will be ready, willing and able to rise to the task of filling the enormous gap in regulation of water pollution across the United States.

IX. The Agencies Failed to Comply with the ESA and NEPA in Proposing the Revised WOTUS Definition

A. The Agencies Must Comply with the Endangered Species Act's Consultation Requirements

Contrary to the APA, the agencies provided no meaningful information about the numbers or types of waters that will be impacted by the 2025 Proposed WOTUS Definition or alternative approaches, but it is indisputable that fewer waters will be protected under the Proposed Rule than under September 2023 Definition, including wetlands, streams, lakes, rivers and other waters.[725] These waters provide habitat for numerous endangered species across the nation, and the gain or loss of Clean Water Act jurisdiction due to this proposed rule will have adverse impacts on those species that have not been quantified or evaluated in this rulemaking. A loss of Clean Water Act jurisdiction means that a water can be subjected to unregulated pollution, degradation, and even total destruction as a matter of federal law. Given the 2025 Proposed WOTUS Definition's and the alternative approaches' far-reaching impacts for these aquatic ecosystems, and the many

[723] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52542.

[724] RIA at 31.

[725] *See* Sections VI.D and VII, *supra*.

threatened or endangered species that depend upon them, the agencies are required to ensure that the proposed rule will not jeopardize the continued existence of any such species and engage in interagency consultation under section 7(a)(2) of the ESA. The agencies' failure to consult prior to issuing the 2025 Proposed Rule Notice represents a clear and egregious violation of the ESA.

Section 7 of the ESA requires each agency to engage in consultation with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service (the "Services") to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species… determined… to be critical…."[726] Section 7 "consultation" is required for "any action [that] may affect listed species or critical habitat."[727] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[728]

Because the Clean Water Act does not command EPA or the Corps to promulgate a particular set of regulations defining which "waters of the United States" are protectable under the law, the agencies' decision to do so in the 2025 Proposed Rule Notice is a discretionary action. As a result, just like every other agency, the agencies must consult when they develop a proposed rule if it crosses the "may affect" threshold of the ESA. Case law reinforces the proposition that a regulation that may affect endangered species must be the subject of consultation.[729] Because the Proposed Rule will have effects on endangered species and their critical habitats, consultations with the Services are required before the agencies can proceed.

Under the joint regulations implementing the ESA, if an impact on a listed species is predicted to occur, then the agencies must complete consultations with the Services.[730] If the agencies elect to first complete an informal consultation, it must first determine whether its action is "not likely to adversely affect" (NLAA) a listed species or is "likely to adversely affect" (LAA) a listed

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[726] 16 U.S.C. § 1536(a)(2).

[727] 50 C.F.R. § 402.14.

[728] 50 C.F.R. § 402.02 (emphasis added).

[729] *See*, *e.g.*, *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*., 481 F. Supp. 2d 1059 (N.D. Cal. 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006).

[730] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (March 1998), at xv, available at https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf.

species.[731] The Services define "NLAA" determination to encompass those situations where effects on listed species are expected to be "discountable, insignificant, or completely beneficial."[732] Discountable effects are limited to situations where it is not possible to "meaningfully measure, detect, or evaluate" harmful impacts.[733] Discountable and insignificant impacts are very rare.

Under the informal consultation process, if the agency reaches an NLAA determination, and the Services concur in that determination, then no further consultation is required. In contrast, if the action agency determines that its activities are likely to adversely affect listed species, then formal consultations must occur. The agencies may, of course, skip the informal consultation process and move directly to the formal consultation process.

During the formal consultation process, the Services assess the environmental baseline—"the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process"[734]—in addition to cumulative effects to the species—"those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation"—and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.[735] Here, the environmental baselines are the agencies' Pre-2015 Definition and the September 2023 Definition. All effects of the 2025 Proposed WOTUS Definition and the alternative approaches must thus be assessed in light of that baseline.

For example, as NRDC recently reported, "even though wetlands cover only about 5 percent of the land in the continental United States, they support nearly half of all species federally listed as threatened or endangered (more than one-third of which live only in wetlands), harbor more than 30 percent of plant species, and provide essential habitat for up to half of all North American bird species."[736] Many wetlands that are protected under the Pre-Regulatory Definitions and the

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[731] *Id.*

[732] *Id*.

[733] *Id.*

[734] *Id*. at xiv.

[735] *Id.* at xiii.

[736] NRDC: Mapping Destruction, *supra* n. 58, at 5 (citing U.S. Fish & Wildlife Service, "American Wetlands Month: Essential Habitats," accessed March 6, 2025, https://www.fws.gov/wetlands-month/essential-habitats ("More than one-third of the U.S. federally threatened and endangered species live only in wetlands, and nearly half use wetlands at some point in their lives.") (Attachment 65); *see also* Waterkeeper Watershed Evaluations, *supra* n. 53; TSD for

September 2023 Definition but would lose protection if the 2025 Proposed WOTUS Definition or one of the alternative approaches is finalized,[737] meaning that they could be destroyed as no Clean Water Act Section 404 permit would be required to conduct dredge and fill activities in those waters. Fewer rivers and stream will also be protected,[738] and a wide range of threatened and endangered species depend on these waters.[739] Thus, endangered species may be harmed by the 2025 Proposed WOTUS Definition or alternative approaches. Consequently, the EPA's action here easily crosses the "may affect" threshold requiring consultations under the ESA.

The agencies cannot avoid their obligation to consult by claiming that states may step in to address waters no longer protected by the Clean Water Act. The issues in the 2025 Proposed Rule Notice that the agencies are required to evaluate relate solely to jurisdictional waters under the federal Clean Water Act. The existence of similar or broader state or tribal water quality laws is completely irrelevant to whether the 2025 Proposed WOTUS Definition may affect endangered species. In any event, the agencies' own analysis demonstrates that there are not broader water quality laws in all 50 state and tribal jurisdictions,[740] and the agencies are aware that all state and tribal governments will not be able to fill the gap created by the loss of Clean Water Act protections contemplated by this rule.[741]

With the 2025 Proposed Rule Notice, the agencies are using their discretion to create a regulatory WOTUS definition. As a result, just like every other agency, the agencies must consult when they embark upon the discretionary task of developing regulations, if and when the effects of those regulations cross the "may affect" threshold set forth in the ESA. Indeed, case law is clear that when a regulation may affect endangered species it must be the subject of consultation. Because the 2025 Proposed WOTUS Definition and alternative approaches may affect endangered species

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the January 2023 Definition, *supra* n. 51; 2015 Science Report, *supra* at n. 452; 2014 SAB Review of the Draft Science Report, *supra* n. 452.

[737] *See, e.g.*, RIA at 16 ("Thus, the proposed rule would necessarily include fewer wetlands as 'waters of the United States,' and thereby include fewer wetlands subject to Federal jurisdiction, than the baseline.")

[738] 2025 Proposed Rule Notice, 90 Fed. Reg. at 52542 ("The agencies analyzed the effects of the changes qualitatively and assessed the impacts of the proposed changes to the definitions of "continuous surface connection" and "tributary" (specifically, with respect to the latter, that tributaries are limited to bodies of water that contribute surface water flow to a downstream jurisdictional water through features that convey relatively permanent flow, unless the tributary is part of a currently operative water transfer), to be the most important in terms of reducing the scope of jurisdictional waters relative to the baseline.")

[739] *See, e.g.*, Waterkeeper Watershed Evaluations, *supra* n. 53; 2022 SAB Review *supra* n. 452; TSD for the January 2023 Definition, *supra* n. 51; 2015 Science Report, *supra* n. 452; 2014 SAB Review of the Draft Science Report, *supra* n. 452.

[740] *See, e.g.*, RIA, at 37-39.

[741] *Id.*; *see also* Section VI.D., *supra*.

and their critical habitats as it is implemented in the future, consultations must occur before the Proposed Rule is finalized.

B. The Agencies Failed to Comply with NEPA

Under NEPA, the agencies must prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment."[742] Under NEPA, the agencies must evaluate the "environmental consequences and feasible alternatives" as to their proposed action.[743] Promulgation of a rule is a "federal action" under NEPA,[744] and there is little doubt that this proposed rule will significantly affect the quality of the human environment. However, the agencies have not prepared either an Environmental Assessment or an Environmental Impact Statement for this action as required by NEPA. NEPA is designed to ensure that agencies take a required "hard look" at the environmental consequences of their actions and imposes procedural requirements to "ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."[745] However, there is no indication in the 2025 Proposed Rule Notice or the RIA that the agencies conducted any NEPA analysis or engaged in reasoned decision-making regarding the environmental impacts associated with the proposed rule as required by law. Accordingly, the agencies have failed to comply with NEPA in conducting this rulemaking.

Conclusion

For all of the reasons stated above, Commenters urge the agencies to withdraw the proposed rule, Docket ID No. EPA–HQ–OW–2025–0322, and to undertake an evaluation of how the agencies can support cooperative federal, state, and tribal government implementation of the Clean Water Act, including assessing how the September 2023 Definition and Pre-2015 regime are impacting the nation's waters and what actions the agencies can take to address ongoing water quality impairments and restore protections to waters that are not currently encompassed with those definitions.

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[742] 42 U.S.C. § 4332(2)(C).

[743] *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colo.*, 605 U.S. 168, 180 (2025) (citations omitted).

[744] 42 U.S.C. § 4332.

[745] *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 23 (2008) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-350 (1989)).

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