Comments of the Waters Advocacy Coalition (WAC)
on the Environmental Protection Agency and U.S. Army Corps of Engineers'
Proposed Rule, Revised Definition of "Waters of the United States"
Docket Id. EPA–HQ–OW–2018–0149

Table of Contents

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I. Introduction

The Waters Advocacy Coalition ("WAC" or "Coalition") writes to provide comments on the Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") proposed rule to revise the definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or the "Act"), 84 Fed. Reg. 4154 (Feb. 14, 2019) (the "proposed rule"). WAC appreciates the agencies' efforts to increase predictability and consistency by clarifying the scope of WOTUS regulated under the Act. In enacting the CWA, Congress exercised its commerce power over navigation and granted EPA and the Corps (together, the "agencies") specific, limited powers to regulate "navigable waters," defined in the CWA as "waters of the United States." For years, the agencies' regulations and guidance documents have attempted to expand the WOTUS definition beyond its constitutional and statutory limits, and this proposed rule is an important step in re-aligning the WOTUS definition with Congress's intent for the scope of federal jurisdiction under the Act. The proposed rule gives meaning to the term "navigable" and recognizes that a defining feature of the CWA is to preserve the states' traditional and primary authority over land and water use, attempting to restore the appropriate balance between state and federal oversight authority in this area.

As detailed in these comments, the Coalition supports the agencies' proposal to revise and refine the regulatory definition of WOTUS, which would draw clearer lines and provide needed predictability for the regulated community. The proposed WOTUS definition is grounded in and consistent with the CWA and judicial precedent interpreting it. It goes a long way to correct past agency practices, guidance, and interpretations that have improperly expanded the scope of federal authority beyond the appropriate bounds of regulation under the CWA and the Constitution. In these comments, WAC recommends some clarifications and changes to further improve the proposed regulatory definition and its implementation.

The Coalition represents a large cross-section of the nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much needed jobs. The Coalition's members are committed to the protection and restoration of America's wetlands and waters, and believe that a clear regulation that draws lines between federal and state waters will help further those goals. The Coalition's members possess a wealth of expertise directly relevant to the agencies' proposed revision of the WOTUS definition.

Members of the Coalition include:

Agricultural Retailers Association
American Exploration & Mining Association
American Exploration & Production Council
American Farm Bureau Federation
American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
American Gas Association
American Iron and Steel Institute
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association
American Society of Golf Course Architects
Associated Builders and Contractors, Inc.
Associated General Contractors of America
Association of American Railroads
Association of Oil Pipe Lines
Club Management Association of America
Corn Refiners Association
CropLife America
Edison Electric Institute
Florida and Texas Sugar Cane Growers
Golf Course Builders Association of America
Golf Course Superintendents Association of America
Independent Petroleum Association of America
Industrial Minerals Association, N.A.
International Council of Shopping Centers
International Liquid Terminals Association
Leading Builders of America
National Association of Home Builders
National Association of Manufacturers
National Association of Realtors
National Association of State Departments of Agriculture
National Cattlemen's Beef Association
National Club Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Mining Association
National Multifamily Housing Council
National Oilseed Processors Association
National Pest Management Association
National Pork Producers Council
National Rural Electric Cooperative Association
National Stone, Sand and Gravel Association
Responsible Industry for a Sound Environment
Southeastern Lumber Manufacturers Association, Inc.
Texas Wildlife Association
The Fertilizer Institute
Treated Wood Council
United Egg Producers
U.S. Chamber of Commerce
USA Rice

The Coalition and its members have a long history of involvement on the critical issues concerning the scope of federal jurisdiction under the CWA. We submitted robust comments on the agencies' 2014 proposed rule to re-define "waters of the United States"[1] and have submitted comments on the agencies' previous rulemakings and guidance documents on this definition, including: the 2018 supplemental notice of proposed rulemaking to repeal the 2015 Clean Water Rule ("2015 Rule");[2] the 2017 "Step 1" proposal to repeal the 2015 Rule;[3] the 2011 Draft

[1] Waters Advocacy Coalition, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (Nov. 13, 2014, corrected Nov. 14, 2014), Doc. No. EPA-HQ-OW-2011-0880-17921 ("WAC Comments on the 2014 Proposed Rule") (attached as Exhibit 1).

[2] Waters Advocacy Coalition, Comments on the Supplemental Notice of Proposed Rulemaking to Repeal the 2015 Clean Water Rule and Recodify the Pre-existing Rules (Aug. 13, 2018), Doc. No. EPA-HQ-OW-2017-0203-15249 ("WAC Comments on 2018 Supplemental Repeal Notice") (attached as Exhibit 2).

Guidance on Identifying Waters Protected by the CWA;[4] the 2008 Guidance Regarding CWA Jurisdiction After *Rapanos*;[5] and the 2003 Advanced Notice of Proposed Rulemaking on the CWA Regulatory Definition of WOTUS.[6]

Many individual members of the Coalition also submitted comments on these rulemakings and guidance documents concerning the WOTUS definition. In all of these comments, we have advocated for observance of the limits on CWA jurisdiction set by Congress (and recognized by the Supreme Court), respect for the states' traditional and primary authority over land and water use, and a clear, implementable WOTUS definition.

II. Executive Summary

A. WAC Supports the Proposed Rule Because It Maintains Protections for Waters and Wetlands While Providing Much-Needed Clarity and Transparency.

WAC supports the proposed rule, because it strikes a balance between regulatory clarity and transparency on the one hand, and the need for robust environmental protection of waters and wetlands on the other. It better aligns with the CWA and Supreme Court precedent than did the 2015 rule, and it reflects an effort to preserve states' roles in regulating the waters and natural resources within their boundaries. It is grounded in science but also reflects a legal and policy decision on the appropriate scope of the agencies' regulation under the CWA. Many of the proposed rule's critics have mischaracterized the scope and impact of the proposed rule. In reality, the proposal:

- Provides Much-Needed Clarity. The scope of the agencies' jurisdiction under the Act has, in previous years, been marked by uncertainty, ambiguity, and inconsistency.[7]

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[3] Waters Advocacy Coalition, Comments on Comments on the Proposed Repeal of 2015 Clean Water Rule and Recodification of Pre-Existing Rules (Sept. 27, 2017), Doc. No. EPA-HQ-OW-2017-0203-11027 ("WAC Comments on 2017 Proposed Repeal") (attached as Exhibit 3).

[4] Waters Advocacy Coalition, et al., Comments in Response to the Draft Guidance on Identifying Waters Protected by the Clean Water Act (July 29, 2011), Doc. No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011) (attached as Exhibit 4).

[5] American Farm Bureau Federation, et al., Comments in Response to the Guidance Pertaining to Clean Water Act Jurisdiction After the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, (Jan. 22, 2008), Doc. No. EPA-HQ-OW-2007-0282-0204 (attached as Exhibit 5).

[6] Foundation for Environmental and Economic Progress, et al., Comments in Response to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," (Apr. 16, 2003), Doc. Nos. EPA-HQ-OW-2002-0050-1816 (comments), -1829 to -30 & -1832 to -35 (Exhibits and Appendices) (together, attached as Exhibit 6).

[7] *See, e.g.*, WAC Comments on the 2014 Proposed Rule at 14-15; Matthew K. Mersel, U.S. Army Corps of Engineers, Cold Regions Research and Engineering Laboratory, Development of National OHWM Delineation Technical Guidance, slide 3 (Mar. 4, 2014), http://insideepa.com/sites/insideepa.com/files/documents/apr2014/epa2014_0760.pdf (subscription required) (noting that inconsistent interpretations of the OHWM concept have led to inconsistent field

The agencies' sweeping assertion of jurisdiction under the 2015 Rule encompassed features with little or no relationship to navigable waters, raising serious federalism concerns and creating confusion among the regulated community.[8] This approach relied in part upon case-by-case subjective assessments that provide little to no predictability as to which waters are jurisdictional and which are not. If finalized, the agencies' proposed rule would cure these issues by drawing clear lines between jurisdictional and non-jurisdictional features. Rather than "rolling back" the scope of WOTUS regulation, the proposed rule adds an element of clarity and transparency by setting clear categories to guide jurisdictional determinations, while simultaneously clarifying those waters over which states and tribes have sole authority.

- Maintains Protections for Clean Water While Preserving States' Traditional Authority Over Local Land and Water Use. Congress never intended for *all* water in the country to be subject to federal regulation as WOTUS. Instead, Congress recognized that some waters were to be federally regulated and the remaining water features would be addressed through other federal, state, and local means. Indeed, the CWA itself provides a comprehensive scheme of non-regulatory protections and programs that apply to all of the Nation's waters, coupled with federal regulation of the discharge of pollutants to a subset of waters identified as "waters of the United States." Preservation of the states' roles under the cooperative federalism regime is a hallmark of the Act. Under this regime, waters, wetlands, and related features are subject to robust protections even where they would not be designated as WOTUS, which the agencies' Economic Analysis appropriately recognizes in assessing how states would respond to changes in CWA jurisdiction. Moreover, other non-CWA regulatory programs contribute to the protection of aquatic resources, such as the federal Safe Drinking Water Act (SDWA) and the Resource Conservation and Recovery Act (RCRA), as well as the numerous robust state and local laws and programs that protect waters and related ecosystems well beyond the scope of WOTUS. The agencies' proposal to refine and clarify the WOTUS definition is only one component of a holistic framework with both regulatory and non-regulatory components for the

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indicators and delineation practices); U.S. General Accounting Office, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO No. 04-297, at 26 (Feb. 2004).

[8] *See, e.g.*, WAC Comments on 2018 Supplemental Repeal Notice, at 6-21; WAC Comments on 2017 Proposed Repeal, at 4-12; Florida Dep't of Agric. & Consumer Servs., Comments on 2017 Proposed Repeal, at 1 (June 16, 2017), Doc. No. EPA-HQ-OW-2017-0203-13823 (noting that virtually all of Florida's water bodies could be subject to federal jurisdiction under the 2015 Rule's definitions given the State's flat topography and broad expanse of floodplains, wetlands, and sloughs); State of Kansas, Comments on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, at App. A (Oct. 23, 2014), Doc. No. EPA-HQ-OW-2011-0880-16636 (predicting a more than four-fold increase under the 2015 Rule from approximately 31,000 miles of jurisdictional streams to approximately 174,000 miles of jurisdictional streams); American Farm Bureau Federation & Geosyntec, WOTUS Maps and Analysis (2015), *available at* https://www.floridafarmbureau.org/wp-content/uploads/2015/10/WOTUS-Florida-Maps.pdf (WOTUS in Florida Farmland); https://www.pfb.com/images/stories/news-docs/WOTUS/WOTUS_Pennsylvania_MAP-How-Final-Rule-Impacts-PA.pptx (WOTUS in Pennsylvania Farmland); https://www.ndfb.org/image/cache/MontanaWOTUSMap.pdf (WOTUS in Montana Farmland).

protection of aquatic resources that currently exists under federal, state, and local laws.

- Enhances Transparency. A flaw observed by many commenters on the 2015 Rule was the failure of the agencies to evaluate the implications of redefining WOTUS for CWA programs beyond the section 404 program. By contrast, the proposed rule and its supporting analyses, for the first time, reflect consideration of the implications of the WOTUS definition for other CWA programs, as well for state and local programs. This analysis, which was largely absent in the 2015 Rule and its supporting analysis, greatly enhances transparency by allowing regulated entities and states to understand the scope of the proposed federal regulation and what the implications of the revised WOTUS definition would be for *all* CWA regulatory programs.

- Reflects Legal and Policy Decisions Informed by Science. As part of the rulemaking effort leading up to the 2015 Rule, EPA developed a report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (the "Connectivity Report"). Rather than abandoning this previous work, the agencies relied upon the Connectivity Report to inform the jurisdictional categories set forth in the proposed rule. Specifically, the agencies recognized one of the fundamental scientific principles detailed in the Connectivity Report—that hydrologic connectivity occurs along a gradient. Informed by the Connectivity Report's analysis of the connectivity gradient, the agencies determined that federal regulatory jurisdiction should extend only to those features on the gradient that have the strongest influence on downstream waters.

B. WAC Offers Several Recommendations to Further Improve the Proposal.

In sum, WAC supports the agencies' proposed rule, which maintains key protections for aquatic resources and is consistent with the statute and judicial precedent. To improve the clarity and implementability of the rule, we offer several suggestions to streamline the regulatory definition and clarify certain regulatory terms and definitions. These recommendations, explained in more detail in these comments, are briefly described as follows:

- Need for Oversight on Implementation. As noted throughout these comments, it will be very important for the Corps and EPA to exercise oversight of field staff implementing this new rule. EPA and the Corps have to be sure, for example, that field staff will not simply fall back on National Hydrography Dataset (NHD) and National Wetlands Inventory (NWI) maps, which the agencies correctly note do not provide accurate representations of ephemeral, intermittent, and perennial streams or wetlands, to determine whether a stream is a jurisdictional tributary or if a wetland is a jurisdictional adjacent wetland. Similarly, EPA and the Corps must ensure that, in practice, the burden of proof is actually on the agencies to establish jurisdiction for ***all*** categories.

- Traditional Navigable Waters (TNWs). Over the years, and in particular with the publication of Appendix D to the *Rapanos* guidance, the agencies have broadened their interpretation of traditional navigable waters (TNWs). To return to the concept

of TNWs that was intended by Congress, the agencies should revise the proposed text of this section to include waters "which are currently used, or were used in the past, or may be susceptible to use *to transport* interstate commerce . . . ." rather than "use in interstate commerce." This change is supported by *The Daniel Ball* case law and its progeny. The agencies should also revoke Appendix D to clarify that the agencies will no longer apply Appendix D's overly-broad view of TNWs.

- Tributaries. The agencies should clarify the tributaries definition. Specifically, the agencies should clarify the terms embedded within this definition as follows:

    - Clarify that any feature that meets the rule's definition of "ephemeral" is *not* a WOTUS, even if it could otherwise be interpreted to fall into any of the rule's categories of WOTUS.

    - Revise the "intermittent" definition by refining the concept of "certain times" and clarifying, with examples and step-by-step instructions, how the agencies will evaluate a feature to determine whether it is ephemeral as opposed to intermittent or perennial.

    - Clarify the "typical year" concept and provide more specifics as to how to determine whether a year is "within the normal range of precipitation over a rolling thirty-year period for a particular geographic area."

- Ditches. The agencies should not treat ditches as a separate category of WOTUS. Instead, they should revise the regulatory exclusion for ditches to specify the types of ditches that are excluded (*i.e.*, ephemeral ditches and intermittent/perennial ditches that were not created in/relocate a tributary or adjacent wetland).

- Lakes and Ponds. The agencies should provide additional clarity on how to determine when a lake or pond is "flooded by" other jurisdictional waters "in a typical year."

- Impoundments. The agencies should remove "impoundments" as a standalone category of WOTUS in the final rule. The inclusion of the lakes and ponds category makes this long-fraught category unnecessary.

- Adjacent Wetlands. The agencies should provide more clarity on how to determine that a wetland is inundated by a jurisdictional water in a typical year. The agencies should also revise the definition of "wetlands" to explicitly state that areas must satisfy all three wetland delineation criteria (*i.e.*, hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances to qualify as wetlands.

- Exclusions. The agencies should clarify and make explicit in the final rule that any feature that qualifies for one of the rule's exclusions is *not* a WOTUS, even if it could arguably fall within a WOTUS category based upon its particular features.

III. Statutory and Legal Background

The Rivers and Harbors Act (RHA) of 1899 was enacted primarily to prohibit obstructions to navigation. Section 13 of the RHA prohibits the discharge of "refuse matter" of any kind "into any navigable water of the United States" or into any tributary thereof except as authorized by a permit from the Corps. 33 U.S.C. § 407.

With the subsequent enactment of the Federal Water Pollution Control Act (commonly referred to as the CWA following the 1977 amendments), Congress established a comprehensive scheme with both regulatory and non-regulatory components with the overall objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The CWA sets up a regulatory framework to address certain discharges of pollutants into a subset of the Nation's waters, those waters identified as "navigable waters," which the Act defines as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). These waters are protected in several ways under the CWA, including via the discharge prohibition in CWA Section 301; the oil and hazardous substance liability provisions of Section 311; the water quality certification procedures of Section 401; the National Pollutant Discharge Elimination System ("NPDES") program established under CWA Section 402; and dredge-and-fill permitting under Section 404.

As the agencies note in the preamble to the proposed rule, the CWA preserves a significant and primary role for the States in implementing these various aspects of the CWA, reflecting an intent to balance the states' traditional powers to regulate land and water resources within their borders with the need for national water quality regulation. 84 Fed. Reg. at 4156. *See also* 33 U.S.C. § 1251(b) (articulating congressional policy to "preserve . . . 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"). Congress declared as a national policy that States manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id.* To name a few examples, states establish water quality standards and enforce those standards through permitting, enforcement, and their Section 401 water quality certification authority, among other means. Almost all states administer portions of the NPDES permit program and two oversee the section 404 permit program for certain waters. Additionally, states and tribes retain authority over those waters that are not navigable within the meaning of the CWA. The states and the federal agencies therefore work cooperatively to manage the nation's water resources under the framework established by the CWA.

The CWA also provides a non-regulatory statutory framework to provide technical and financial assistance to the states, municipal groups, and cooperation with other federal agencies to improve the quality of the nation's waters. These programs are not limited to protection of waters that qualify as "waters of the United States." They include, for example:

- Grants to states and municipal agencies for research to improve methods of pollution control and/or prevention of discharges from sewers that carry stormwater (§ 1255(a)(1));

- Grants to states and municipal agencies for projects to improve waste treatment and water purification methods (§ 1255(a)(2));

- Grants to states for research on treatment and pollution control from point and nonpoint sources in river basins (§ 1255(b));

- Grants for research and demonstration projects for prevention of water pollution by industry (§ 1255(c));

- Development of waste management and waste treatment methods and improved methods to identify and measure the effects of pollutants (§ 1255(d));

- Grants for research projects for methods of preventing and reducing pollution from agriculture and from sewage in rural areas, in consultation with the Secretary of Agriculture (§ 1255(e)); and

- Programs for management of the Great Lakes (§ 1268), Chesapeake Bay (§ 1267), Long Island Sound (§ 1269), and Lake Champlain (§ 1270).

Other non-CWA regulatory programs contribute to the protection of aquatic resources, including other federal statutes (e.g., SDWA and RCRA), as well as the numerous robust state and local laws and programs that protect waters and related ecosystems. A common criticism over the years is that states cannot or will not adequately protect water resources. For instance, the Economic Analysis for the 2015 rule relied on a 2013 Environmental Law Institute report (*State Constraints: State-Imposed Limitation on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*) to assert that approximately two-thirds all states place restrictions on adopting aquatic resource protections beyond the CWA definition of WOTUS. These concerns are overblown and misdirected, as WAC previously explained in our 2014 comments (at 7-11), which included state practitioner reviews of the ELI report focusing on eleven states. We incorporate those discussions by reference here.

As the agencies note, the CWA's comprehensive scheme was designed to achieve the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through a combination of non-regulatory programs and grants for all of the Nation's waters, and a more targeted federal permitting program for a subset of discharges of pollutants to the subset of the Nation's waters identified as WOTUS.

The agencies regulate "navigable waters" under the CWA pursuant to power delegated by Congress. Because Congress can only delegate power that it has been granted under the Constitution, the agencies' regulatory authority over WOTUS is subject to the constitutional limitations on Congress's own power. When Congress enacted the CWA, it intended to exercise its traditional "commerce power over navigation." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), 531 U.S. 159, 177 (2001). As the Supreme Court recognized in *SWANCC*, Congress's power under the Commerce Clause, "though broad, is not unlimited." *Id*. at 173. Recognizing the "inherent difficulties of defining precise bounds to regulable waters," the Court has over the years addressed the constitutional bounds of the

agencies' jurisdiction over WOTUS. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985).

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

The *SWANCC* decision's holding is not limited to the particular isolated, intrastate water features or the Migratory Bird Rule that were before the Court. It applies with equal force to any interpretation of CWA jurisdiction. Under this controlling precedent, in adopting a WOTUS definition, the agencies must give full effect to the term "navigable" and respect the limits of federal authority that flow from Congress's explicit choice to preserve and protect the States' traditional and primary authority over land and water use. Any assertion of jurisdiction over the very ponds at issue in *SWANCC* under some alternative theory, such as the 2015 Rule's theory of what constitutes a "significant nexus," is incompatible with that holding. The *SWANCC* Court's holding was reaffirmed in Justice Kennedy's *Rapanos* concurrence.

Most recently, the Court interpreted the term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). While all members of the Court agreed that the term encompasses some waters that are not navigable in the traditional sense, the plurality and Justice Kennedy, in a concurring opinion, articulated various limitations on the agencies' CWA regulatory jurisdiction. The plurality held that the CWA confers jurisdiction over only "relatively permanent bodies of water connected to traditional interstate navigable waters," and "only those wetlands with a continuous surface connection" to those waters, *id*. at 734, 742 (plurality) (emphasis in original), while Justice Kennedy held that the agencies' CWA jurisdiction extends only to waters and wetlands with a "significant nexus" to traditional navigable waters. *Id*. at 767 (Kennedy, J., concurring).

Since *Rapanos*, the agencies have resumed pushing the constitutional boundaries of their regulatory authority, as evidenced by the promulgation of the 2015 Rule. In asserting jurisdiction over features that are not "waters," much less navigable ones, the agencies ignored the plain language of the CWA, as well as key limitations articulated by the Supreme Court. The

2015 Rule adopted an overly expansive view of federal CWA authority, asserting sweeping jurisdiction over features with little or no relationship to traditional navigable waters.[9]

The proposed rule would address and correct previous attempts by the agencies to overstep the bounds of their regulatory authority under the CWA. First, the agencies' proposal would give full effect to the term "navigable," in accordance with the principles articulated by the Court in *SWANCC*. Second, the agencies' proposal would more closely adhere to the limits of federal authority that flow from Congress's explicit choice to preserve and protect the states' traditional and primary authority over land and water use and avoids the significant constitutional questions raised by prior interpretations of the CWA. Finally, unlike the 2015 Rule, which misconstrued Justice Kennedy's *Rapanos* concurrence and ignored the plurality altogether, the agencies' proposal observes the "substantial similarities," 84 Fed. Reg. 4167, in the key principles articulated by the plurality and Justice Kennedy in that decision. As detailed in WAC's 2017 Comments on the agencies' Proposed Repeal, the concurring and plurality opinions agreed on a number of critical points, including on the principle that a wetland must have a close connection to traditional navigable waters to be jurisdictional, and that a mere hydrologic connection (however attenuated) does not suffice. The proposed WOTUS definition is consistent with both the *Rapanos* plurality and concurring opinions. The Coalition appreciates the agencies' return to a more sensible WOTUS definition that better aligns with the legal framework established by Congress and interpreted by the Supreme Court.

IV. Proposed Rule Categories

A. Traditional Navigable Waters and Territorial Seas

The agencies do not propose to make changes to the regulatory text for this category of waters, other than to consolidate traditional navigable waters ("TNWs") and the territorial seas into a single category to "streamline and simplify" the WOTUS definition. 84 Fed. Reg. at 4170. As proposed, this category would include those waters "which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." *Id*. at 4203. The agencies otherwise propose no changes to these categories of waters.

The scope of the TNWs category is of fundamental importance in the proposal, given that numerous other categories of waters are deemed jurisdictional based on their relationship to TNWs. The preamble appropriately recognizes that an evaluation of whether a water qualifies as a TNW is rooted in the test for "navigability" under the RHA articulated by the Supreme Court in *The Daniel Ball v. United States*, 77 U.S. 557 (1870) and subsequent RHA case law. 84 Fed. Reg. at 4,170. Those cases define "navigable" waters for RHA purposes as those that: (1) are navigable-in-fact (or capable of being rendered so) and (2) together with other waters, form waterborne highways used to transport commercial goods in interstate or foreign commerce. *See The Daniel Ball*, 77 U.S. at 563 (emphasis added). This test was recognized by the plurality and Justice Kennedy in *Rapanos*, who both based their jurisdictional tests on what they referred to,

[9] *See* WAC Comments on 2017 Proposed Repeal at 5-6 (describing how the 2015 Rule ignores limitations on the agencies' regulatory authority articulated by the Supreme Court and presents significant federalism concerns).

respectively, as "traditional navigable waters" and "navigable waters in the traditional sense." 547 U.S. at 742.

In recent years, and in particular, with the publication of Appendix D to the *Rapanos* Guidance, the agencies have given TNWs a broader interpretation to allow waterways that are merely *used in* commerce rather than used *for the transportation of goods* in interstate commerce to be considered TNWs. For instance, Appendix D sets forth an interpretation that the TNWs category would include any water that "a federal court has determined . . . is navigable-in-fact under federal law *for any purpose*," (emphasis added), and that is currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments). Appendix D at 5. The preamble to the 2014 proposed rule set forth a similar interpretation. 79 Fed. Reg. at 22,255, 22,200. Application of the standards in Appendix D has caused confusion among regulators and the regulated community, and has led to inclusion as TNWs a broad array of features that are not tied to the transport of interstate commerce. A map that was used by the Corps in a meeting of the National Advisory Counsel for Environmental Policy and Technology ("NACEPT") Assumable Waters Subcommittee, which was prepared by the Corps' Kansas City District, confirms how the interpretation set forth in Appendix D could be interpreted to broadly expand the scope of the TNWs category.[10] These interpretations are far afield of the traditional notion of what constitutes a navigable water under the RHA and *The Daniel Ball* and its progeny and drastically broaden the scope of TNWs under the CWA. WAC has discussed at length the agencies' improper, gradual expansion of the TNW concept in its 2011 and 2014 Comments, which we incorporate by reference here. *See* 2011 WAC Comments at 25-34; 2014 WAC Comments at 29-30 & A-1 to A-2.

To return to a traditional understanding of navigability as articulated in *The Daniel Ball* and avoid confusion on this issue, the agencies should amend the proposed regulatory text for this category to read (new language in bold):

> "waters which are currently used, or were used in the past, or may be susceptible to ~~use in~~ **transport** interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide."

In addition, the agencies should withdraw Appendix D accordingly. This clarification is consistent with the Act and relevant case law, and would address some of the issues created by problematic statements in Appendix D.

B. Interstate Waters

The agencies propose to remove interstate waters and interstate wetlands as a separate category of WOTUS. 84 Fed. Reg. at 4171. The agencies discuss the rationale for this change in

[10] *See* NACEPT Assumable Waters Subcommittee, Sept. 28-29, 2016 Meeting Summary, at 12-13 (discussing how the map depicted a total of 887 stream miles of RHA Section 10 waters, as compared to 2,476 of TNW stream miles determined pursuant to Appendix D of the *Rapanos* Guidance), *available at* https://www.epa.gov/sites/production/files/2017-01/documents/assumable_waters_meeting_summary_9-28_to_9-29-2016_final_0.pdf.

detail in the proposed rule preamble, noting among other things that "[b]ecause the agencies' authority flows from Congress' use of the term 'navigable waters' in the CWA, the agencies lack authority to regulate waters untethered from that term. Therefore, those interstate waters that would satisfy the definitions in today's proposed rule would be jurisdictional; interstate waters without any connection to traditional navigable waters would be more appropriately regulated by the States and Tribes under their sovereign authorities." *Id.* at 4172.

WAC supports the agencies' proposal to eliminate "interstate waters" (and "interstate wetlands") as a separate WOTUS category. WAC agrees with the agencies' interpretation of the statutory text, as well as its detailed recounting of the legislative history and how the language in federal water pollution control statutes has evolved over time. *See* 84 Fed. Reg. at 4171-72. Congress deliberately replaced the term "interstate" with "navigable" in the 1972 Act. Despite that replacement, the 2015 Rule inappropriately accorded interstate waters the same status as TNWs, allowing for features to be jurisdictional based on either crossing state lines or their relationship to such waters—without any requirement that interstate waters have a connection to TNWs or meet any flow or permanence requirements. This is problematic because interstate waters may differ from TNWs in that they are sometimes non-navigable and in many circumstances do not qualify as highways for commerce. WAC addressed this issue in depth in its 2014 Comments, *see* 2014 WAC Comments at A-2 to A-3, incorporated by reference here.

Indeed, the 2015 Rule inappropriately allows for the inclusion of small non-navigable features that happen to cross State lines, regardless of whether they have any connection to a TNW or interstate commerce. In doing so, the agencies effectively equated such features with TNWs without providing any legal or scientific basis for doing so. WAC agrees that interstate waters without any connection to TNWs are more appropriately regulated by the States and Tribes under their sovereign authorities. *Id*.

WAC thus supports the agencies' proposal to eliminate this category from the WOTUS definition. As the agencies note, doing so more closely aligns the definition to the constitutional and statutory authorities reflected in the CWA and judicial interpretations of the term "navigable waters." *Id.* at 4171. Interstate waters that are navigable-in-fact and are part of a highway of commerce will still be jurisdictional under the proposed rule as TNWs. Interstate waters can also qualify as jurisdictional if they qualify for one of the other jurisdictional categories, such as tributaries or lakes and ponds.

C. Tributaries

The proposed rule would include tributaries as a WOTUS category and would define "tributary" as a "river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [TNW] in a typical year either directly or indirectly through [other jurisdictional waters] or through water features [expressly excluded] in paragraph (b) . . . so long as those water features convey perennial or intermittent flow downstream." 84 Fed. Reg. at 4203; 4204.[11] Tributaries as defined in the proposal do *not*

[11] The proposed "tributary" definition also specifies that "[a] tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or

include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features because these lack the required perennial or intermittent flow regimes to satisfy the tributary definition under this proposal and therefore would not be jurisdictional. *Id*. The agencies have proposed the following definitions for the key terms for this category:

- "Ephemeral" is defined as "surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall)." *Id*.

- "Intermittent" is defined as "surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts)." *Id*.

- "Perennial" is defined as "surface water flowing continuously year-round during a typical year."

- "Typical year" is defined as "within the normal range of precipitation over a rolling thirty-year period for a particular geographic area." *Id*.

- "Snowpack" is defined as "layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions." *Id.*

The Coalition supports the agencies' proposed tributary definition. We agree that the agencies should limit the scope of this category to cover only those streams that contribute perennial or intermittent (as opposed to ephemeral) flows to a TNW. This limitation reflects the appropriate balance of state and federal roles under the CWA, preserving states' land use authority over features that are wet only periodically. As acknowledged by the agencies, it better aligns the tributary category with the case law, specifically the *Rapanos* plurality view that the CWA confers jurisdiction over only "relatively permanent bodies of water," 547 U.S. at 734, and Justice Kennedy's concurring view that a tributary definition is too broad if it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it," *id*. at 781.

The agencies' proposed approach also aligns with the scientific principles detailed in the Connectivity Report, which explains that hydrologic connectivity occurs along a gradient and that some waters have more impact on downstream waters than others. As discussed in more detail in Section VI.A below, the Connectivity Report essentially concluded that all waters are connected and that connectivity exists on a gradient, but the report does not draw a line or address the legal question of what should be jurisdictional under the CWA. In promulgating the 2015 Rule, the agencies noted that their interpretation of the CWA "was informed by the Science Report and the review and comments of the SAB, but not dictated by them." 80 Fed. Reg. at 37,060. Likewise, the proposed tributary definition is informed by the Connectivity Report and

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intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition." 84 Fed. Reg. at 4204.

reflects the agencies' legal and policy determination, based upon the science of the Connectivity Report, to extend federal protections to those waters that have the greatest influence on downstream waters and may reasonably be considered "navigable waters."

Practically speaking, the proposed tributary definition is a vast improvement over the 2015 Rule, under which tributaries were identified solely based on the presence of the physical indicators of a bed and banks and an ordinary high water mark ("OHWM"). 80 Fed. Reg. 37104. As noted in the WAC Comments on the 2014 Proposed Rule, determining jurisdiction solely based on physical indicators such as bed, banks, and OHWM is problematic because the application of OHWM is inconsistent and those physical indicators can sometimes be seen in features, such as ephemeral drainages, without ordinary flow. By shifting the tributary definition to focus on the well-understood concepts of ephemeral, intermittent, and perennial flow, the proposed rule allows for far more clarity and predictability in identifying tributaries subject to CWA jurisdiction.

WAC offers several suggestions to improve the tributary definition to enhance clarity and predictability in determining whether a surface feature contributes "perennial or intermittent flow" to a TNW or territorial sea in a "typical year." Although in most cases, the distinction between channels that contribute ephemeral flow and channels that contribute intermittent/perennial flow will be obvious, there will likely be some cases where it may be difficult to draw that distinction. That is, in some instances, it can be challenging in the field to distinguish between flow that results only from precipitation and flow that is attributable to either a rising groundwater table or melting snowpack. And, as the agencies note, existing National Hydrography Dataset (NHD) and National Wetlands Inventory (NWI) maps do not provide accurate representations of ephemeral, intermittent, and perennial streams or adjacent wetlands. 84 Fed. Reg. 4177, 4200. This is because these maps designate intermittent and ephemeral streams based on aesthetics rather than studies or scientific information. It would be inappropriate to rely upon them for making the sometimes nuanced distinction between intermittent and ephemeral features.[12]

To further clarify this distinction and provide more guidance for implementation of the proposed tributary definition, WAC recommends the following:

- First, to eliminate some of the inherent ambiguity in making these determinations, the agencies should clarify in the regulatory text of the final rule that if a feature meets the rule's definition of "ephemeral"—flowing or pooling only in direct response to rainfall—it is *not* a jurisdictional WOTUS, even if it could otherwise be characterized as falling into any of the rule's categories of WOTUS (*i.e.*, regardless of whether it could also be interpreted to satisfy the intermittent definition).

- Second, the agencies should revise the proposed definition of "intermittent." The proposed concept of "surface water flowing continuously during certain times of a

[12] *See, e.g.*, Fritz, et al., Comparing the Extent and Permanence of Headwater Streams From Two Field Surveys to Values From Hydrographic Databases and Maps. 49 Journal of the American Water Resources Association 4, 867-82 (2013); Colson, et al. Topographic and Soil Maps Do Not Accurately Depict Headwater Stream Networks, 30 National Wetlands Newsletter 3, 25-28 (2008).

typical year" begs the questions of how long a channel must flow and how many times per year must it flow. Because the agencies are trying to differentiate between ephemeral (flow in direct response to precipitation) and intermittent (flow that is more than in direct response to precipitation), they should consider including in the regulatory text a specific flow characteristic, such as "X" number of days of continuous surface flow or average annual flow volume of greater than "Y" cubic feet per second. WAC members will be offering a variety of recommendations for additional specificity in their individual comments for the agencies' consideration. We believe that a definition of intermittent that includes some sort of specific flow characteristic would provide more clarity. Additionally, the agencies have relied on specific flow characteristics in the past, for instance in the 2008 *Rapanos* guidance ("continuous flow at least seasonally (e.g., typically three months)"), as well as the Corps' definition of "headwaters" codified at 33 C.F.R. § 330.2 (using "five cubic feet per second" to identify headwaters). Finally, the Connectivity Report (at 6-9) discusses how various "connectivity descriptors," *e.g.*, "frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters" can be used to "characterize the range over which streams and wetlands vary and shift along the connectivity gradient in response to changes in natural and anthropogenic factors[.]"

- Third, the agencies should provide more clarity as to how applicants and the agencies will evaluate the "typical year." WAC agrees that the evaluation of a "typical year" should be based on the "normal range" of precipitation and generally should not include times of drought or extreme flooding, as this is consistent with standard practice. To provide further clarity, we suggest that the agencies provide more specifics in the final rule preamble and regulatory text as to how exactly to calculate the normal range of precipitation over a rolling thirty-year period. The proposal lays out descriptions of the Corps' current approach, along with potential data sources, but the agencies do not clearly state how "typical year" determinations will be done following promulgation of the final rule. We urge the agencies to provide as much specificity as possible to ensure that regulators and stakeholders are following a uniform approach. Moreover, because there can be wide variation in data—even within National Oceanic and Atmospheric Administration (NOAA) weather stations within the same geographic area—there is a risk that regulators' and stakeholders' "typical year" determinations will be inconsistent and unpredictable, and will vary depending upon the data source used or method of calculation. For example, the agencies could state that they will generally use WETS table data (based on USGS precipitation data). Or they could state that they will use UCAN reports (based on Natural Resources Conservation Service (NRCS) data). To ensure consistency and predictability in the "typical year" analysis, it is important for the agencies to identify the data sources it will use.

- Fourth, the agencies should very clearly distinguish between "snowpack" and "snow melt." We understand that the agencies mean for features that flow as a result of melting snowpack—layers of snow that accumulate over extended periods of time in certain regions of the country—to qualify as intermittent, and not simply features that are carrying water because of snow melt. Many parts of the country have snow melt,

which can also result in water collected in channels for extended periods of time. The agencies should confirm they do not mean the definition of "intermittent" to capture mere snow melt, and explain how they will distinguish between snowpack and snow melt in evaluating tributaries. The proposal sets forth various sources of information on "snowpack," without specifying what particular information stakeholders and regulators should use to identify areas of snowpack. Moreover, it is far from clear whether NOAA and NRCS use the same definition of "snowpack" or how that definition compares to how the agencies have proposed to define "snowpack" in this proposal. Additional clarification in the final rule is needed.

- Finally, the agencies could also enhance clarity by providing examples in the final rule that walk through the step-by-step analysis the agencies will undertake to evaluate features to determine if they are jurisdictional tributaries. These examples should include aerial photographs of the features at issue and an explanation of how the agencies would determine that the feature was ephemeral or intermittent (including data sources for "typical year" calculation).

These changes would help improve the tributary category as well as the other categories that rely on the concept of contributing intermittent/perennial flow to a TNW.

D. Ditches

The agencies propose to add a new "ditches" category to the WOTUS definition, "to provide regulatory clarity and predictability regarding the regulation of ditches and similar artificial features." 84 Fed. Reg. at 4179. Under the proposal, ditches would be included as WOTUS if they: (1) are TNWs; (2) are constructed in, or relocate or alter, a tributary ***and*** meet the tributary definition;[13] or (3) are constructed in adjacent wetlands ***and*** meet the tributary definition. *Id*. (emphases added). *Id*. at 4179; 4180. All other ditches would be expressly excluded from the WOTUS definition. *Id*. at 4204. The agencies also propose to define the term "ditch" as "an artificial channel used to convey water." *Id*.

WAC supports the agencies' efforts to provide increased clarity with respect to regulation of ditches. As the Coalition has previously commented,[14] ditches are common features, and treating them all as jurisdictional would drastically change the regulatory landscape, overstep the agencies' CWA authority, and infringe upon state and local agencies' authorities over local land use. WAC makes several recommendations for clarifying the proposed regulation of ditches as WOTUS.

As a threshold matter, the agencies should provide more clarity as to how they will determine whether a feature is an "artificial channel" that should be evaluated as a ditch or a "naturally occurring surface water channel" that should be evaluated as a tributary. In the proposed framework, this distinction is important because a different analysis is performed to

[13] WAC notes that the agencies' proposal to tie the "ditches" definition to the "tributary" definition reinforces the need to clarify and improve the "intermittent/perennial flow in a typical year" construct, discussed above.

[14] *See, e.g.*, WAC Comments on 2014 Proposed Rule at 39-40.

determine jurisdiction depending on whether the feature is artificial rather than natural. Although this distinction will be obvious in many cases, it may not be readily apparent in all cases. The agencies should provide some more explanation as to how they will draw that distinction.

In addition, WAC is concerned that including ditches as a separate category will result in more, not less, confusion. As the agencies note, many ditches are not "waters" within the ordinary meaning of the term. 84 Fed. Reg. at 4180. There is no reason to regulate ditches as a separate category of WOTUS, particularly where doing so could be misinterpreted to suggest that most ditches are WOTUS. Instead, to provide more clarity, the agencies should address ditches through the proposed exclusion provision of the WOTUS definition. The Coalition recommends that the agencies include the following language in the ditch exclusion:

- **All ditches are excluded unless they convey perennial or intermittent flow to downstream TNWs and were constructed in a tributary, relocate or alter a tributary, or were constructed in an adjacent wetland.**

This approach would not alter the scope of the ditches the agencies have proposed to include as jurisdictional. It would simplify the ditches discussion and help convey that only a narrow subset of ditches can be jurisdictional under the rule.

Further, because the proposed construct requires an inquiry as to whether ditches were "constructed in" or "relocate or alter" a tributary or were "constructed in an adjacent wetland," the proposed definition would require landowners and regulators to consider the historical conditions of the area at the time the ditch was constructed. Many ditches, such as most railroad ditches, were constructed well before the CWA and well before tools were readily available that would help demonstrate the historic conditions. The preamble states that the burden of proof would be on the agencies to determine the historic status of the ditch's construction, and "if field and remote-based resources do not provide sufficient evidence to show the ditch was constructed in a tributary or an adjacent wetland then a determination would be made that the ditch is not jurisdictional under this rule." 84 Fed. Reg. at 4181. The agencies seek comment on potential evidentiary concerns that may arise in the permitting context for historic ditches. *Id*. at 4182.

WAC agrees that the burden of proof should be on the agencies to show that a ditch is WOTUS. *Id.* at 4181. WAC would like more clarity, however, on this point. The agencies should clarify what applicants will be required to provide in order to assist the agencies in meeting their evidentiary burden. The Coalition also suggests that the agencies specify the types of information and data that applicants may reasonably be expected to provide, specifically the historical information that may be used to determine whether a ditch is jurisdictional or not. For example, the agencies could specify that the agencies may issue one request for information from the applicant on the historical conditions of the area, such as aerial photos or other documentation, and clarify that the applicant is not required to collect or gather new information that is not readily available to respond to that request. The agencies could also state that the time period for making these determinations should be, for example, no longer than 60 days from receipt of responsive information from the applicant. Finally, regulators and stakeholders need finality when it comes to the jurisdictional status of ditches. The agencies therefore should acknowledge in the final rule that if a ditch is determined to be excluded from jurisdiction, either

because historical information confirms that it is properly excluded or because the agencies are unable to carry their evidentiary burden, the ditch will remain excluded. Landowners should not be subjected to perpetual attempts to reassert jurisdiction.

WAC notes that the discussion in the proposed rule preamble of burden of proof issues is limited to the ditches discussion. For clarity and consistency, WAC requests that the agencies clarify in the final rule that the burden of proof is on the agencies to establish WOTUS jurisdiction for *all* categories.

E. Lakes/Ponds

The agencies propose to add a new category of WOTUS to include lakes and ponds that are: (1) TNWs; (2) contribute perennial or intermittent flow to a TNW in a typical year either directly or indirectly through a WOTUS or through an excluded feature that conveys perennial or intermittent flow downstream; or (3) flooded by a jurisdictional TNW, tributary, ditch, lake/pond, or impoundment in a typical year. 84 Fed. Reg. 4182. The agencies are proposing to eliminate the case-specific "significant nexus" analysis for these waters. *Id*. The proposed category does not include lakes and ponds which only contribute ephemeral flow. *Id*.

As discussed above with respect to tributaries (see Section III.C), the agencies should provide more clarity in any final rule with respect to what it means for a lake or pond to "contribute perennial or intermittent flow" to another water feature "in a typical year" so as to be regulated under the second category of lakes and ponds.

With respect to the third category of lakes and ponds in the WOTUS definition (*i.e*., those that are flooded by a WOTUS in a typical year), WAC recommends that the agencies clarify in the final rule how they will determine whether a lake or pond is "flooded by" other jurisdictional waters "in a typical year." The agencies use the concept of "inundated" in a typical year and they should use the same concept in the lakes and ponds definition. The agencies propose to use flood records, elevation data, aerial photography, and field observations to make this determination, 84 Fed. Reg. at 4184, and they request comment on whether more specific parameters should be included (*e.g*., whether the agencies should establish a specific flooding periodicity or magnitude or frequency). *Id*. The Coalition agrees that that the agencies should provide more specifics in the final rule as to how the determination will be made that a lake or pond is inundated in a typical year, and what data will be relied upon to make that determination.

In addition, WAC understands that this category is meant to capture lakes and ponds that flood naturally, such as oxbow lakes. Flooding and overtopping can also occur from pumping, such as flooding rice fields. The agencies should clarify that they intend this category to cover only lakes and ponds that are *naturally* flooded by other jurisdictional waters in a typical year.

F. Impoundments

The agencies propose to retain within the WOTUS definition all impoundments of jurisdictional waters. As the agencies explain in the proposed rule, "[i]mpoundments have historically been determined by the agencies to be jurisdictional because impounding a 'water of the United States' generally does not change the water body's status" as a WOTUS. 84 Fed. Reg. at 4172. Thus, under the proposed rule, alteration of a WOTUS by impounding it would

not change the water's jurisdictional status, consistent with longstanding agency practice, unless jurisdiction has been affirmatively relinquished. *Id*.

The Coalition recommends that the agencies eliminate impoundments as a separate category of WOTUS. As WAC has previously commented, the term "impoundment" is a broad, amorphous term that should not be *per se* regulated. *See* 2014 WAC Comments at 32-33, incorporated by reference here. Removing the separate impoundments category from the WOTUS definition would not create a jurisdictional gap because many of the other categories in the proposed rule, such as the lakes and ponds category, effectively incorporate the impoundment of other jurisdictional waters.

Alternatively, if the agencies intend to regulate impoundments as a separate category, they should provide a clear definition of the term. There have been many practical problems with understanding what an "impoundment" is because the term has been undefined and the proposed rule does not provide the requisite clarity on what features constitute "impoundments," nor does it set limitations on the agencies' assertions of jurisdiction based upon this category of waters. In outreach meetings for the 2015 Rule, for example, EPA officials have referred to impoundments as "lakes made by damming a water of the U.S." If this is what the agencies mean to regulate, they can do so through the lakes and ponds category or, at the very least, they should use this language in the definition. Indeed, if impoundments are retained as a separate category, the regulation of impoundments should focus on the water feature that is created by impounding WOTUS, not by the impoundment (*e.g.*, dam) itself.

Significantly, the proposed rule would assert jurisdiction over other tributaries based upon their relationship to an impoundment. *See, e.g.*, 84 Fed. Reg. at 4172 (explaining that "the agencies would consider tributaries upstream of impoundments to be tributaries to downstream jurisdictional waters even where the impoundment might impeded the flow of water"). It is thus important that the agencies, to the extent that they decide to retain this WOTUS category, clearly define what an impoundment is so that the jurisdictional status of related features can be readily determined.

G. Adjacent Wetlands

The agencies propose a category of WOTUS to include all wetlands adjacent to the other categories of jurisdictional waters listed in the definition. 84 Fed. Reg. at 4204. The agencies propose to maintain their longstanding regulatory definition of "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id*. at 4205 (also specifying that "[w]etlands generally include swamps, marshes, bogs, and similar areas"). Wetlands are "adjacent" under the proposed rule where they "abut or have a direct hydrologic surface connection to other WOTUS in a typical year." *Id*. A "direct hydrologic surface connection" occurs "as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water." *Id.* Wetlands that are "physically separated from [jurisdictional waters] by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to jurisdictional waters are not adjacent." *Id*.

The Coalition supports the agencies' proposed changes to the definition of "adjacent wetlands," to include only those wetlands that abut or have a direct hydrologic surface connection to other WOTUS in a typical year. WAC agrees that the concepts of "bordering, contiguous, neighboring" (all of which were incorporated into the definition of "adjacent" in the 2015 Rule, *see* 80 Fed. Reg. at 4205) were problematic in that they caused confusion and allowed for broader jurisdiction over adjacent waters than what the statute and case law allow.

By refining this category—and providing clear guideposts with respect to "adjacent wetlands"—the agencies have brought the category more in line with the fundamental tenets articulated in *Riverside Bayview*, *SWANCC*, and *Rapanos*, as well as the CWA and Constitution. As the plurality explained in *Rapanos*, a wetland may not be considered "adjacent to" a remote WOTUS based on a "mere hydrologic connection." 547 U.S. at 742. Rather, only those wetlands with a "continuous surface connection" to waters that are WOTUS in their own right may be considered jurisdictional on the basis of being "adjacent" to such waters. *Id*. Under Justice Kennedy's formulation in his *Rapanos* concurrence, wetlands possess the requisite nexus to TNWs (and thus come within the statutory phrase "navigable waters") where they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. On the other hand, "[w]hen . . . wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id*. The agencies' proposed definition of adjacent wetlands (and accompanying definitions) reflects these fundamental principles by requiring such waters to "abut" or have a "direct hydrologic surface connection" to other WOTUS categories. As proposed, the category would exclude isolated wetlands with only physically remote hydrologic connections to jurisdictional waters, as required under *Rapanos* and *SWANCC*.

WAC also supports the agencies' proposal to maintain the current "wetlands" definition. The Coalition recommends specifying in the regulatory text, as the agencies note in the preamble, that areas must satisfy all three wetland delineation criteria (*i.e*., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances to qualify as wetlands, as doing so would provide regulatory clarity by aligning the definition with the Corps' wetland delineation criteria. Along these same lines, WAC supports the agencies' proposed definition of "upland" as areas that do not meet the Corps' delineation criteria, as this definition will further clarify the distinction between wetland and upland areas.

V. Proposed Exclusions

WAC supports the proposed exclusions from the WOTUS definition, many of which are longstanding. These exclusions are critical for providing clarity and regulatory certainty with respect to the reach of the CWA. Moreover, confirming in the regulatory text that certain features that are used for treatment, such as stormwater control features and waste treatment system features, are not WOTUS helps to further the goal of the statute **to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.** In addition to the more detailed comments provided below on specific exclusions, the Coalition offers the following general suggestions:

- Scope of Exclusions. The agencies should clarify and make explicit in the regulatory text of the final rule that features that meet any of the listed exclusions are not

WOTUS even if they could otherwise meet any of the (a)(1) through (6) categories of WOTUS. The exclusion provision in the 2015 Rule contained a similar disclaimer, stating that features expressly excluded under (b) "are not [WOTUS] even where they otherwise meet the terms of" the WOTUS definition in (a)(4) through (a)(8). 80 Fed. Reg. at 37105. The Coalition requests that the agencies include language in the final rule that clearly states that features that meet an exclusion are not WOTUS even if they might meet any of the jurisdictional categories.

- Excluded Features That Develop Wetland Characteristics. The agencies explain the proposed rule preamble that "a proposed excluded feature that develops wetland characteristics within the confines of the water/feature would remain excluded from the definition of [WOTUS]." 84 Fed. Reg. at 4,192. This clarification is critical for ensuring the utility of the exclusions and helps to avoid disincentives for green infrastructure and other types of environmentally beneficial treatment features that are mimic natural hydrological processes to manage stormwater. WAC urges the agencies to provide similar language in the preamble for the final rule.

- Features Constructed in "Upland." As discussed above, WAC supports the agencies' proposed definition of "upland." WAC is concerned, however, that tying many of these exclusions to whether the feature was created or constructed in uplands, which requires a backward-looking inquiry rather than a determination based on current conditions, will limit the utility of these exclusions. Tying the proposed exclusions to whether a feature was "constructed in upland" may create evidentiary challenges by placing the burden on applicants to prove historic conditions for features that should be excluded, many of which were created decades before the enactment of the CWA. It can be difficult for applicants to demonstrate the conditions at the time of a feature's creation. In any event, areas that may once have been "waters of the United States" but have been transformed to dry land, either before the passage of the Act or pursuant to a valid permit, should no longer subject to CWA regulation, as the agencies have recognized in prior interpretations.[15] The Coalition recommends that the agencies remove the requirement that features be created in uplands to qualify for the relevant exclusions below. Or, at the very least, WAC requests that the agencies specify in the final rule the type of evidence that will be sufficient to show that a feature was created in uplands.

The Coalition also offers the following comments on several of the specific exclusions in the proposed rule:

[15] *See* 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980) (EPA's recognition that section 404 does not regulate existing "waters" and thus "[w]hen a portion of the [w]aters of the United States has been legally converted to fast land . . . it does not remain waters of the United States"); 42 Fed. Reg. 37,122, 37,128 (July 19, 1977) (Corps' recognition that "Section 404 . . . regulate[s] discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a period of time" and thus, the agency does not "assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which in the past, have been transformed into dry land for various purposes").

A. Groundwater

The proposed rule retains the exclusion in the 2015 Rule for "groundwater, including groundwater drained through subsurface drainage systems." 84 Fed. Reg. at 4204. As explained in the proposed rule preamble, "[t]he agencies have never interpreted [WOTUS] to include groundwater and would continue that practice through this proposed rule by explicitly excluding groundwater." *Id*. at 4190. WAC supports the continued express exclusion of groundwater from the WOTUS definition, consistent with the text of the CWA, agency practice and case law confirming that groundwater is not WOTUS. As the Coalition explained in its comments on the 2014 Proposed Rule, there is significant confusion surrounding the distinction between groundwater and "shallow subsurface hydrological connections." *See* WAC Comments on the 2014 Proposed Rule at 63. The Coalition thus supports the alternative language for the groundwater exclusion (on which the agencies seek comment), which would exclude "groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems." 84 Fed. Reg. at 4195. We believe that this language would help provide clarity in the applicability of this exclusion.

B. Ephemeral Features and Diffuse Stormwater Run-off

The agencies propose to exclude "[e]phemeral features and diffuse stormwater run-off, including directional sheet flow over upland." 84 Fed. Reg. at 4204. For the legal and policy reasons discussed in Section III.C, the Coalition supports the categorical exclusion of ephemeral features from regulation as WOTUS. The express exclusion of "stormwater run-off, including directional sheet flow over upland" is similarly appropriate, given that this is precisely the type of "water" for which the agencies' assertion of jurisdiction was chastised in *Rapanos*. In that case, the plurality noted that the Corps had "stretched the term 'waters of the United States' beyond parody" by applying its definition to "ephemeral streams," "wet meadows," and "directional sheet flow during storm events." 547 U.S. at 734. As explained by the Court, "[t]he plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction." *Id*.

C. All Ditches Not Identified as WOTUS

As discussed above, the agencies should address ditches through this exclusion rather than create a separate jurisdictional category for ditches. To do so, the agencies should revise the exclusion text to outline specifically which ditches are excluded (*i.e*., ephemeral ditches, perennial/intermittent ditches that were not constructed in a tributary or adjacent wetland). To correspond with this change, the agencies should eliminate the reference to the jurisdictional ditches category from the proposed exclusion text.

D. Prior Converted Cropland

The agencies propose to exclude prior converted cropland ("PCC") from the WOTUS definition. 84 Fed. Reg. at 4204. The agencies propose to define PCC as "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." *Id*. The agencies also propose to recognize designations of PCC made by the Secretary of Agriculture. *Id*. Importantly, the

proposed definition would memorialize the fact that "[a]n area is no longer considered [PCC] for purposes of the [CWA] when the area is abandoned and has reverted to wetland" as defined under the rule and that "[a]bandonment occurs when PCC is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years." *Id*. The proposed rule specifies that for purposes of the CWA, the EPA Administrator will have final authority to determine whether PCC has been abandoned. *Id*.

WAC supports the continued exclusion of PCC and the proposed PCC definition to ensure consistency with the preamble to the agencies' 1993 final rule codifying the PCC exclusion. *See Clean Water Act Regulatory Programs; Final rule*, 58 Fed. Reg. 45,008 (Aug. 25, 1993) (the "1993 Rule"). The Coalition appreciates that, consistent with the agencies' precedent and relevant case law, the agencies propose to incorporate abandonment principles into the proposed definition by providing that an area will lose its status as PCC when it is abandoned and reverts to wetland. The Coalition requests that the Corps clarify in the final rule preamble that the PCC exclusion is lost ***only*** when the land is abandoned within the meaning of the PCC definition, regardless of whether the land is subsequently used for non-agricultural purposes, and that—consistent with *New Hope Power Corp. v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010)—any policy change in this regard would be effectuated via notice-and-comment rulemaking.

To further clarify the scope of this exclusion, the Coalition also requests that the agencies:

- State affirmatively in the final rule preamble that ditches, laterals, and canals within PCC are part of the PCC exclusion;

- Provide examples of the evidence a landowner would be required to provide to demonstrate that PCC has not been abandoned, as well as documentation that the agencies will evaluate in determining whether an area is PCC; and

- In addition to withdrawing the agencies' 2005 Corps/USDA joint memorandum on change in use, withdraw any other PCC guidance that incorporates change-in-use principles.

E. Artificially Irrigated Areas

WAC supports the agencies' proposal to retain the longstanding exclusion for artificially irrigated areas that would revert to upland if the irrigation ceased. Specifically, the agencies propose an exclusion for "[a]rtificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease." 84 Fed. Reg. at 4204. The agencies clarify in the proposed rule preamble that this exclusion "would apply only to the specific land being directly artificially irrigated" and that "it is not the case that all waters within watersheds where irrigation occurs would be excluded." *Id*. at 4194.

F. Artificial Lakes and Ponds

WAC supports the continued exclusion of artificial lakes and ponds. The agencies propose this exclusion to encompass "[a]rtificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds), which are not identified [as WOTUS under the (a)(4) (lakes and ponds) or (a)(5) (impoundments) categories]." 84 Fed. Reg. at 4204. As proposed, this exclusion would apply to artificial lakes and ponds created as a result of impounding non-jurisdictional waters or features. *Id*. at 4194. Conveyances created in upland that are physically connected to and are a part of the proposed excluded feature would also be excluded. *Id*. As stated above, WAC recommends that the agencies remove the requirement that these artificial features be created in uplands. Alternatively, WAC recommends that the agencies revise the regulatory text to state clearly that the exclusion applies to "artificial lakes and ponds constructed in upland *or created as a result of impounding non-jurisdictional waters or features . . .*"

The agencies explain in the proposed rule preamble that they have removed language regarding "use" of the ponds, which was included in 1986 and 1988 WOTUS rule preambles. *Id*. at 4192. WAC agrees that applicability of this exclusion should not be based on the "use" of the feature and appreciates the agencies' recognition that these features "are often used for more than one purpose and can have a variety of beneficial purposes, including water retention or recreation."[16] *Id*. As the Coalition has previously commented, features in this category (such as stormwater retention ponds) may in some instances be required under the CWA stormwater program, and their exclusion is warranted to avoid duplicative and potentially inconsistent regulation. Further, oversight of these features as WOTUS is largely unnecessary, particularly given that—as the agencies point out—some could be regulated as point sources subject to CWA Section 301. *Id*. at 4194.

It is problematic, however, that the proposed rule ties the exclusion for artificial lakes and ponds to the (a)(4) (lakes and ponds) and (a)(5) (impoundments) categories. Artificial lakes and ponds constructed in upland should be excluded regardless of whether they could otherwise qualify for one of the jurisdictional categories. To provide additional clarity and to ensure that these features are excluded, the agencies should remove the clause of (b)(7) that references (a)(4) and (5).

G. Water-filled Depressions Created in Upland Incidental to Mining or Construction Activity

The proposed rule retains the exclusion for "[w]ater-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel." 84 Fed. Reg. at 4204. WAC supports the continued exclusion of water-filled depressions and pits. However, as noted above, we recommend that the agencies remove the requirement that such depressions and pits be created in uplands to qualify for the exclusion.

[16] WAC recommends that the agencies revise the reference to "log cleaning ponds" in the proposed regulatory text to refer simply to "log ponds," as such ponds historically have functions beyond cleaning, such as log conditioning prior to milling.

H. Stormwater Control Features

The proposed rule also retains the exclusion for stormwater control features, specifying that this exclusion would apply to "[s]tormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off." 84 Fed. Reg. at 4204. The continued exclusion of stormwater control features is critical. WAC recommends that the agencies make certain changes to further clarify and ensure the utility of this exclusion.

As discussed in the introduction to Section IV with respect to the exclusion of features "constructed in upland," this phrasing is potentially problematic if it requires historic evidence of a feature's construction. The Coalition thus recommends that the agencies clarify—for this and other exclusion categories for features that are "constructed in upland"—that this determination will focus on current rather than historic conditions.

To provide further clarity and ensure the utility of the exclusion for stormwater control features, the agencies should also explicitly exclude MS4 systems and components that are managed through state/local permits through this provision. As the Coalition of Real Estate (CORE) Associations explained in their comments on the 2014 Proposed Rule, *see* EPA-HQ-OW-2011-0880-5175, at 11-17, incorporated here by reference, exclusion of MS4s (including all of their internal components) from the WOTUS definition is intended to avoid double regulation. MS4s—and the drains, roads, pipes, curbs, gutters, ditches and other component parts of these systems that channel runoff—are regulated "point sources" that discharge pollutants conveyed in stormwater. Through CWA § 402(p), Congress required all MS4s to obtain NPDES permits for stormwater discharges. 33 U.S.C. § 1342(p)(1). All of the municipally owned conveyances that comprise an MS4 system collect and carry stormwater to a designated outfall that discharges to WOTUS. WAC urges the agencies to revise the text of the stormwater control features exclusion to clarify that MS4s and the component conveyances that comprise these systems and are already permitted through the NPDES program are not WOTUS.

I. Wastewater Recycling Structures

WAC also supports the continued exclusion of wastewater recycling structures, which under the proposed rule would cover "[w]astewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins." 84 Fed. Reg. at 4204. The agencies describe this exclusion as "clarif[ying] the agencies' current practice that waters and water features used for water reuse and recycling would not be jurisdictional when constructed in upland," in recognition of the "importance of water reuse and recycling, particularly in areas like California and the Southwest where water supplies can be limited and droughts can exacerbate supply issues." *Id*. at 4192. The Coalition supports the agencies' purpose in preserving this exclusion to avoid discouraging or creating barriers to water reuse and conservation and believes that this exclusion is at times legally compelled, given that these isolated features fit squarely within the holding of *SWANCC* and are beyond the scope of CWA regulation.

J. Waste Treatment Systems

Finally, WAC supports the continued exclusion of waste treatment systems (WTS) and the proposed definition of "waste treatment system," which will codify existing practices and help ensure clarity and consistency. "Waste treatment systems" would be defined, for the first time, to include "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)." 84 Fed. Reg. at 4205. The WTS exclusion is consistent with both the structure and the goals of the Act. It allows for systems to serve an important function of managing and treating waste prior to discharge. Treating these features as WOTUS would be redundant, make the features essentially useless for their intended purpose, and impose additional burdens and costs on both facilities and permitting agencies without a corresponding environmental benefit.

WAC supports the agencies' proposed approach for the WTS exclusion and agrees that the proposed definition appropriately reflects the agencies' longstanding practice in identifying waste treatment systems. In particular, the definition confirms that features need not perform active treatment to qualify for the WTS exclusion and that the WTS exclusion and that the exclusion applies to the system as a whole, including related conveyances.

VI. Supporting Analyses

The proposed rule describes the agencies' analyses of the potential effects of the proposed rule across CWA programs. These analyses are contained and described more fully in two primary documents published in the regulatory docket for this rulemaking: (1) *Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States"* (Dec. 11, 2018) (the "RPA") and (2) *Economic Analysis for the Proposed Revised Definition of "Waters of the United States"* (Dec. 14, 2018) (the "EA").

In these analyses, and in the proposed rule preamble, the agencies describe the difficulty of quantifying the impacts of the proposed changes in CWA jurisdiction with any precision, given the many changes to the jurisdictional scope over the years and the fact that there is no map or dataset that accurately portrays this scope at any point in the history of the CWA regulatory program. The agencies have thus taken a multi-tiered approach to analyzing the potential impacts of the proposed rule, using the best available data and assessment methodologies. WAC appreciates the difficulty and complexity in assessing the potential impacts of the proposed rule and notes that these analyses are vast improvements from the economic analysis and technical support document issued in support of the 2015 Rule. The Coalition appreciates the fact that the agencies incorporated many of the suggestions we provided in our comments on the 2014 Proposed Rule, including the recommendation that the agencies better describe the impacts of WOTUS definitional changes on non-Section 404 programs. We also note that, as we suggested in our 2014 comments, the agencies have acknowledged the limited usefulness of the data in the Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database, given that this database documents Corps jurisdictional determinations for various aquatic resource types that do not directly correlate with the terms used in the proposed rule. 84 Fed. Reg. at 4200.

WAC has carefully considered the RPA and EA prepared in support of this rulemaking and believes that they thoroughly address the potential impacts of the proposal. Overall, these analyses reflect that the forgone costs of the proposal far outweigh any forgone benefits, providing further justification—in addition to the legal and policy reasons discussed above—for the agencies' proposed action. The Coalition offers the following comments on the supporting analyses, highlighting both its support for the agencies' analyses and suggestions for further improvements.

A. The Proposal Is Appropriately Informed By the Science

The 2015 Connectivity Report essentially concluded that all waters are connected and that connectivity exists on a gradient, but the report did not draw lines or address the legal question of what should be jurisdictional under the statute. As the agencies concluded in the preamble to the 2015 Rule, "the science does not provide bright line boundaries" for distinguishing WOTUS from waters of the States. 80 Fed. Reg. at 37,060.

The agencies' proposed approach aligns with the scientific principles detailed in the Connectivity Report, which explains that hydrologic connectivity occurs along a gradient and that some waters have more impact on downstream waters than others. It reflects the agencies' legal and policy determination, informed by the science of the Connectivity Report, to extend federal protections to those waters that have the greatest influence on downstream waters, such as waters that contribute perennial and intermittent flow and wetlands that directly abut those waters. The science also establishes that ephemeral features and isolated wetlands in many cases have limited chemical, physical, and biological effects on downgradient waters. As Dr. Michael Josselyn noted, "[t]hese low order features may have flow for only a few hours or days following storm events and are the most likely candidates for being on the low end of the [connectivity] gradient . . . ." SAB Panel Member Comments on Proposed Rule at 42 (Sept. 2, 2014). Likewise, Dr. Mark Murphy observed, "inclusion by rule of all ephemeral tributaries, 'regardless of size or flow duration,' is not scientifically justified. *Id.* at 99. Finally, as Dr. Josselyn explained most recently, the agencies' proposed definitions of intermittent and ephemeral are consistent with the science on stream classification. *See* Comments of Dr. Michael Josselyn on the Proposed Rule, Revised Definition of "Waters of the United States," Docket ID. No. EPA-HQ-OW-2018-0149-***** (Apr. 8, 2019).

As such, the proposal also reflects a sound policy determination about the appropriate balance between state and federal regulation, and it aligns with the legal limitations on the agencies' CWA authority.

B. Resource and Programmatic Assessment

In the RPA, the agencies describe how the proposed regulation compares to the baseline of the 2015 Rule and an alternate baseline of pre-2015 practice (*i.e.*, the pre-2015 regulations as interpreted by the Supreme Court and implemented through agency guidance), both of which represent current practice in some areas of the country. *See* RPA at 28-32 (describing the agencies' "primary" and "alternative" baselines). The agencies' analysis is based upon research of current state laws and programs for the oversight of waters and the identification of the relevant datasets for determining the scope of potential jurisdictional changes for different types

of aquatic resources. These datasets included: (1) the Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database, which documents Corps decisions regarding the jurisdictional status of various aquatic resource types (i.e., jurisdictional determinations); and (2) the National Hydrography Dataset (NHD) at High Resolution and the National Wetlands Inventory (NWI). The agencies correctly acknowledged the technical limitations in using these datasets for the analysis, given that neither is designed nor able to accurately portray jurisdictional waters under the CWA (nor provide water resource data that correlates with the terms used in the proposed rule). WAC appreciates the thorough nature of this analysis, which provides a comprehensive analysis of the potential implications of the proposal for all of the relevant CWA programs and the interplay between relevant state and federal regulation.

C. Economic Analysis

For the EA developed in support of the proposed rule, the agencies applied a two-stage analysis to make use of limited local and national level water resources information to assess the potential implications of the proposed rule. In Stage 1, the agencies assessed the potential impacts of moving from the 2015 Rule to the pre-2015 practice baseline (*i.e*., repealing the 2015 Rule and recodifying the prior regulations). Under the most conservative Stage 1 scenario, which assumes the fewest number of States regulating newly non-jurisdictional waters, the agencies estimate the proposed rule would produce annual avoided costs ranging between $98 and $164 million and annual forgone benefits ranging between $33 to $38 million. *See* EA at 82. Under the least conservative Stage 1 scenario, which assumes the greatest number of States are already regulating newly non-jurisdictional waters, the agencies estimate there would be avoided annual costs ranging from $9 to $15 million and annual forgone benefits are estimated to be approximately $3 million. *Id*. at 83.

Stage 2 of the agencies' analysis consists of a series of qualitative analyses and three detailed case studies of moving from the pre-2015 practice to the 2018 proposal. The agencies noted that, because of limitations of available data needed to quantitatively assess impacts of the proposal, they conducted a qualitative analysis intended to provide information intended to reflect the likely direction of the effects of the proposed rule based on the best professional judgments of the agencies. *Id*. at 84. They also conducted three case studies in three major watersheds to provide in-depth information on the likely quantitative effects of the proposal. Finally, the agencies conducted a national-level analysis of the proposed CWA jurisdictional changes on the CWA Section 404 program.

Again, the Coalition appreciates the difficulty and complexity of assessing the economic impacts of the proposed rule and notes the vast improvement of the EA over the similar analysis provided in support of the 2015 Rule. In particular, this EA is much more closely aligned with relevant EPA Guidelines for Preparing Economic Analyses and the OMB A-4 Circular. However, WAC believes that the agencies have largely underestimated the forgone costs. For example, the agencies' cost figures for the Section 404 program focus almost exclusively on the costs of permitting and mitigation, but they do not at all account for the significant costs associated with the diminution in property value and project delays once it is determined that Section 404 authorization is required. Further, WAC notes that the agencies' cost and benefit estimates under the various scenarios in the EA rest on many assumptions about what states will

and will not do in response to the issuance of a final rule. For a more conservative evaluation the Coalition thus suggests that the analysis be revised to focus more on the forgone costs and benefits of the agencies' actions under the "no state response" scenario, without trying to speculate as to what the states might do.

VII. Conclusion

For the foregoing reasons, the Coalition supports the proposed rule, which will provide much needed clarity and certainty. The recommendations provided by WAC in these comments will help further improve the WOTUS definition and its implementation.