Comments on Proposed Definition of Waters of the United States Under the Clean Water Act
Docket ID No. EPA-HQ-OW-2011-0880
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VIA Email and Online Submission to ow-docket@epa.gov and www.regulations.gov

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

Re: Comments of Waterkeeper Alliance and Waterkeeper Organizations – Proposed Definition of Waters of the United States Under the Clean Water Act Docket ID No. EPA-HQ-OW-2011-0880

To Whom it May Concern:

Thank you for the opportunity to submit comments on the United States Environmental Protection Agency ("EPA") and Department of Defense, Department of the Army, Corps of Engineers ("Corps") proposed Definition of “Waters of the United States” Under the Clean Water Act rulemaking, 79 Federal Register 22188 (April 21, 2014) (hereinafter “Proposed Definition” or “Proposed Rule”).

INTRODUCTION

Waterkeeper Alliance is a global movement uniting more than 225 Waterkeeper Organizations around the world and focusing citizen advocacy on the issues that affect our waterways, from pollution to climate change. Waterkeepers patrol more than 1.5 million square miles of rivers, streams and coastlines in the Americas, Europe, Australia, Asia, and Africa. Part scientist, teacher and legal advocate, Waterkeepers combine firsthand knowledge of their waterways with an unwavering commitment to the rights of their communities and to the rule of law. Whether on the water, in a classroom, or in a courtroom, Waterkeepers
speak for the waters they defend with the backing of their local community and the collective strength of Waterkeeper Alliance.

Waterkeepers are a steadfast and powerful voice for swimmable, fishable, drinkable waters in 136 watersheds across the nation. The federal Clean Water Act ("CWA") is the bedrock of Waterkeepers’ work to protect rivers, streams, lakes, wetlands, bays, and channels for the benefit of their communities. We use the CWA water quality standards and Section 303(d) List of Impaired Waters to evaluate pollution levels in waterbodies. We work with broad coalitions of government, private, non-profit, and individual partners to restore these waters through the Total Maximum Daily Load ("TMDL") process, participating in permitting and rulemaking processes, and development of innovative pollution control and cleanup projects. We use the CWA’s citizen suit provisions to enforce CWA permits and regulatory standards against facilities that would otherwise pollute our waterways in violation of the law. In these and in many other ways, Waterkeepers depend on the CWA to protect waterways and the people who depend on clean water for drinking water, recreation, fishing, economic growth, food production, and all of the other water uses that sustain our way of life, health and well-being.

Our work - in which we have answered Congress’s call for “private attorneys general” to enforce the CWA when government entities lack the time or resources to do so themselves - is extremely challenging and resource intensive – requiring us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand and have seen firsthand how important a clear definition of the “waters of the United States” is to the functioning and effectiveness of the CWA. We believe that a strong, clear definition and agency interpretation of “waters of the United States” is critical to our collective work to protect our waterways.

The importance of maintaining a broad definition of “waters of the United States” under the CWA cannot be overstated. In the simplest terms, if a waterbody is not included within the definition, it cannot be protected from pollution or destruction under the CWA, and failure to protect a waterbody from pollution or destruction will adversely impact downstream waters and water users. It has been well known for decades that if we want to control water pollution, we must control pollution at its source. This entails protecting waters throughout the
entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are traditionally navigable. This concept was firmly established with the passage of the CWA in 1972 and in agency definitions of “waters of the United States” in 1973 (EPA) and 1975 (Corps).

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain polluted, and by some indications pollution appears to be increasing. For example, while water quality in a large percentage of our nation’s waters has not been assessed, the most recent available data from EPA shows water pollution in assessed waters has impaired 558,999 river/stream miles, 12,197,097 lake acres, 26,120 sq. miles of estuarine waters, 7,204 miles of coastal waters, and 53, 270 sq. miles of the Great Lakes.\(^1\) By comparison, EPA’s 2004 CWA Section 305b Report showed that there were 246,002 miles of impaired rivers/streams and 10,451,401 acres of impaired lakes as of 2004.\(^2\) As noted in the 2013 Draft Connectivity Report and the 2014 Science Advisory Board (“SAB”) Review of that Report, there is strong scientific evidence to support the conclusion that ephemeral streams, intermittent streams, perennial streams, flood plain wetlands, non-floodplain wetlands, and other waters are either connected to downstream waters or sustain the physical, chemical, and/or biological integrity of downstream waters.\(^3\)

Our organizations support the Proposed Rule to the extent that it maintains protections for Traditionally Navigable Waters, Interstate Waters and Territorial Seas. Additionally, we support the agencies’ and the EPA Science Advisory


Board’s (“SAB”) work to document the "significant nexus" between these historically regulated waters and tributaries and adjacent waters. We agree that all of these waters (including headwaters, intermittent streams, ephemeral streams, and adjacent waters) are connected to downstream waters that are covered under the CWA, and that they should be categorically protected.

At the same time, we are greatly concerned by, among other things, the agencies’ decision to narrow the class of tributaries and impoundments that have been historically given categorical protection, the agencies’ removal of the broader interstate commerce grounds for protection of tributaries, adjacent waters and other waters, and the addition of new categorical exclusions for waters that have been covered historically and can have a significant impact on downstream water quality.

In recent years, the EPA and the Corps have implemented guidance documents that have reduced protections for our nation’s waters by limiting jurisdiction in a manner that “was not justified by science or law.”

If we can ever hope to restore the chemical, physical and biological integrity of our nation’s waters as envisioned and required by the CWA, it is essential that the definition of “waters of the United States” under the CWA protect traditionally navigable waters, interstate waters, tributaries, adjacent waters, wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes, lakes, estuaries, and other waterbodies that either provide important functions themselves or have an influence on downstream waters.

It is also essential that the agencies avoid creating definitional limitations and categorical exclusions designed to protect particular sources of pollution from regulation under the CWA. For example, while everyone agrees that agriculture is essential to our way of life, everyone also agrees that clean water is essential to our way of life. Agriculture remains one of the largest unaddressed sources of water pollution in the United States.

As described in the National Enforcement Priorities document for FY 2008-2010:

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5 Watershed Assessment, supra note 1.
States have consistently reported to EPA that agricultural activities, including CAFOs, are leading sources of pollutants such as nutrients (nitrogen and phosphorus), pathogens (bacteria), and organic enrichment (low dissolved oxygen) that are contributing to water quality impairment in U.S. surface waters. Adverse impacts on ecosystems and human health associated with discharges of animal wastes include fish kills, algal blooms, and fish advisories, contamination of drinking water sources, and transmission of disease-causing bacteria and parasites associated with food and waterborne diseases.\(^6\)

Agricultural pollution is a major contributor to well-documented, severe problems in key water resources like Lake Erie, the Chesapeake Bay, the Gulf of Mexico, North Carolina’s coastal estuaries, and many other significant water resources across the country.\(^7\) We believe that it is possible to protect and

\(^{6}\) [Emphasis added]


support both agricultural production and clean water, but we cannot protect 
water quality by grafting new exemptions for agriculture into the definition of 
“waters of the United States” under the CWA.

We urge the agencies to strengthen and clarify the final rule in line with our more 
detailed comments below, and to revise the preamble and Proposed Definition so 
that it protects the broadest category of waters allowed under the Commerce 
Clause, Article 1, Section 8, Clause 3 of the U.S. Constitution, as intended by 
Congress. Among other things, we urge the agencies to leave in place all portions 
of the existing definition that have not been invalidated by the Supreme Court, to 
remove new definitions and other language that limit jurisdiction in a manner not 
supported by law or science, remove categorical exclusions that are not 
supported by law or science, and to rely on all valid jurisdictional tests for 
categorically protecting waters to the full extent allowed under the Commerce 
Clause. While we agree that waters with a “significant nexus” to Traditional 
Navigable Waters, Interstate Waters and Territorial Seas should be jurisdictional, 
we do not agree that these are the only “other” waters that should be protected 
under the CWA.

I. THE PROPOSED DEFINITION SHOULD PROTECT ALL WATERS TO THE 
FULLEST EXTENT OF CONGRESS’ COMMERCE POWER.

Passed in 1972, the CWA is a “comprehensive water quality statute designed to 
‘restore and maintain the chemical, physical, and biological integrity of the
Nation’s waters.” Accordingly, Congress provided that it intended for the CWA to apply to all “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362. The Supreme Court, in United States v. Riverside Bayview Homes, Inc., held that Congress took a "broad, systemic view of the goal of maintaining and improving water quality” with the word integrity referring to “a condition in which the natural structure and function of ecosystems [are] maintained” and, the “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'”9 To accomplish these goals, the Bayview concluded, Congress defined the “waters covered by the Act broadly” to encompass all “waters of the United States.”10 The intended breadth of the CWA is apparent in the comprehensive goals, programs and directives in the Act, as well as in the legislative history, administrative decisions and case law interpreting the CWA.

Thus, unlike the Rivers and Harbors Act of 1899, the CWA was not focused on the prevention of “navigation-impeding” conduct in navigable waters.11 Instead, as the Supreme Court held in International Paper Co. v. Ouellette, the CWA established “an all-encompassing program of water pollution regulation” that “applies to all point sources and virtually all bodies of water.”12 While it was clear that the Commerce Clause provided adequate authority for regulation of navigable waters as demonstrated by extensive Rivers and Harbors Act precedent, it was equally clear that Congress’ Commerce Clause authority to control pollution was not limited to traditionally navigable waters or traditional tests of navigability.

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10 Id.


For example, in invalidating portions of the Corps’ 1974 regulations that limited their CWA jurisdiction to waters “which had been, are, or may be, used for interstate or foreign commerce,” the U.S. District Court for the District of Columbia held that “when Congress defined the term ‘navigable waters’ as ‘the waters of the United States, including the territorial seas’ it “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability.”\(^{13}\) This holding is consistent with the Conference Committee Report for the final bill which states “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”\(^{14}\) When Representative John Dingell presented the Conference version of the bill to the House of Representatives, he explained that in defining “navigable waters” broadly for the purposes of the CWA as “waters of the United States, including the territorial seas”:

The Conference bill defined the term ‘navigable waters’ broadly for water quality purposes. It means ‘all the waters of the United States’ in a geographic sense. It does not mean ‘navigable waters of the United States’ in the technical sense as we sometimes see in some laws. . . . Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.\(^{15}\)

The Supreme Court has explicitly recognized on at least three occasions that “navigable waters” under the CWA include “something more than traditional


\(^{15}\) 118 Cong. Rec. 33, 756 (1972); 1972 Legislative History, supra note 14, at 250-51.
navigable waters.” In *Bayview*, the Supreme Court held that “Act’s definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters, Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.”  

The *Bayview* Court also noted that, while “it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional test of navigability, it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term “waters” to encompass wetlands adjacent to waters as more conventionally defined.”

Consistent with Congressional intent, the EPA (1973) and the Corps (1977) adopted regulations further defining “waters of the United States” for the purposes of the CWA to include broad categories of waters beyond those protected by traditional navigability tests. When the Corps adopted its definition of “waters of the United States” in 1977, it recognized that “[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system.” In the Preamble to the Corps’ 1977 rule defining “waters of the United States,” the Corps stated:

> Waters that fall within categories 1, 2, and 3 are obvious candidates


17 *Bayview*, 474 U.S. at 133 (emphasis added).

18 *Id.*


for inclusion as waters to be protected under the Federal government’s broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have an effect on interstate commerce. The 1975 definition identified certain of these waters. These included waters used:

- By interstate travelers for water-related recreational purposes;
- For the removal of fish that are sold in interstate commerce;
- For industrial purposes by industries in interstate commerce; and
- In the production of agricultural commodities sold or transported in interstate commerce.

We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over ‘other waters’ such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.\(^{22}\)

Under the 1977 Definition, waters in Categories 1, 2, and 3, over which jurisdiction was “obvious” under the Federal Government’s broad powers to regulate interstate commerce, included: (1) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including

\(^{22}\) 42 Fed.Reg. 37127-37128 (emphasis added).
adjacent wetlands; (2) Tributaries to navigable waters of the U.S., including adjacent wetlands; and (3) Interstate waters and their tributaries, including adjacent wetlands. Additionally, based on reasoning set forth above, the Corps included “other waters” where the use or destruction of the waters could affect interstate commerce within the definition of “waters of the United States.”

This basic approach to broadly defining “waters of the United States” has been in place since 1975 and is consistent with the intent of Congress announced in 1972. Accordingly, the current, longstanding definition of “Waters of the United States” includes:

A. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

B. All interstate waters, including interstate “wetlands.”

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

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

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

F. The territorial sea.


24 Id. at 37127-28.

25 See e.g., 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).
G. “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition

A. THE SUPREME COURT OPINIONS IN SWANCC AND RAPANOS DO NOT MANDATE THE NARROWING OF CWA JURISDICTION PROPOSED BY THE EPA AND THE CORPS.

It is important to recognize that this definition of “waters of the United States” has never been overturned by a court. In fact, the courts have fairly uniformly applied this definition to the CWA for several decades. Despite this fact, the Preamble to the Proposed Definition states this longstanding definition must be amended in a manner that will narrow the agencies’ jurisdiction over the nation’s waters in “light of the Supreme Court decisions in SWANCC and Rapanos” and that the Proposed Definition “retains many of the existing provisions of that definition where revisions are not required in light of Supreme Court decisions and other bases for revisions.”26 The Preamble further states that “[a]s a result of the Supreme Court decisions in SWANCC and Rapanos, the scope of regulatory jurisdiction of the CWA in this proposed rule is narrower than that under the existing regulations.”27

In particular, the agencies assert without explanation or justification that SWANCC and Rapanos require amendments to the existing definition’s protections for tributaries, adjacent waters, and other waters, as well as new definitions for various terms and new categorical exemptions. Of these changes, perhaps the most alarming is the agencies’ assertion that SWANCC and Rapanos mandate the removal of protections for “other waters” such as intrastate lakes, rivers, streams (including intermittent streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, where the “use, degradation, or destruction of which could affect interstate or foreign commerce.”28 Based on this change to the existing definition alone, the agencies conclude that “[w]aters in a watershed where there is no connection to a


28 Id.
traditional navigable water, interstate water or the territorial seas would not be 'waters of the United States.'”

With these changes in the existing regulatory definition, the EPA and the Corps propose to cease protecting waters across the country unless there is a demonstrable “significant nexus” to traditionally navigable waters, interstate waters or territorial seas. In other words, waters will no longer be protected under the CWA to the fullest extent allowed by the Commerce Clause thereby nullifying Congressional intent and four decades of precedent to the contrary. This change to the definition is not required by the Supreme Court decisions in SWANCC or Rapanos, and the EPA and the Corps lack the authority to narrow the scope of CWA jurisdiction in this manner.

With regard to SWANCC, in 2003, the EPA and the Corps made a similar proposal to consider, among other things, removing “other waters” and the associated commerce factors from the existing definition of “Waters of the United States” under the CWA in light of SWANCC. In the 2003 Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” the agencies asserted that SWANCC “calls into question whether CWA jurisdiction over isolated, intrastate, nonnavigable waters could now be predicated on the other factors listed in the ‘Migratory Bird Rule’ or the other rationales of 33 C.F.R. 328.3(a)(3)(i)-(iii) [the other waters interstate commerce factors].” However, the EPA and the Corps announced that they would not proceed with the proposed rule in December of 2003 after receiving opposition from around 99% of the 133,000 comments received, including numerous states,

29 Id.

30 Id.

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


nonprofits, individuals, and others.\textsuperscript{34}

What was true then, is true today. SWANCC held solely that 33 C.F.R. 328.3(a)(3) (1999), as clarified and applied to petitioner’s balefill site pursuant to the Migratory Bird Rule, 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA.\textsuperscript{35} Thus, the SWANCC decision was fact specific, related solely to Section 404 jurisdiction under the Migratory Bird Rule, and did not impact or limit the agencies’ jurisdiction over any other waters, including tributaries (including non-navigable ones), adjacent wetlands, or “other waters” that could affect interstate or foreign commerce.\textsuperscript{36} Because the Supreme Court limited its holding to the jurisdictional bases asserted by the Corps, the Migratory Bird Rule, the decision does not require or even imply that the agencies cannot rely on any other provisions of the current definition of “waters of the United States” to assert jurisdiction. The corollary is also true – SWANCC does not authorize the EPA and the Corps to delete any protections or jurisdictional bases under the Commerce Clause for tributaries, adjacent waters or other waters provided in the existing regulatory definition.

Similarly, the Supreme Court in Rapanos, did not invalidate the existing regulatory definition of “waters of the United States” when it opined on issues presented in the consolidated cases - the extent of CWA jurisdiction over wetlands adjacent to tributaries that are not traditionally navigable under Section 404 of the CWA.\textsuperscript{37} The Rapanos Court issued no majority opinion, however, several differing opinions suggested three different tests for determining whether wetlands adjacent to non-navigable tributaries can be


\textsuperscript{36} In support of our comments, we hereby incorporate by reference the comments submitted by national environmental organizations on the 2003 ANPRM and guidance, which are a part of the official public docket in 2003 at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2002-0050-0001 at HQ-OW-2002-0050-1674 (hereinafter “2003 Comments”).

\textsuperscript{37} Rapanos, 547 U.S. at 787.
covered under the CWA.38

- **Relatively Permanent Test** - The four-justice plurality opinion, written by Justice Scalia, recognized that the CWA covers non-navigable waters in addition to traditionally navigable waters but declined to “decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act.”39 Instead, the plurality focused on the meaning of “the waters” in 33 U.S.C. § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”) The plurality concluded that “[o]n this definition, ‘the waters of the United States’ include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in ‘streams,’ ‘oceans,’ ‘rivers,’ ‘lakes,’ and ‘bodies’ of water forming geographical features.’ All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.”40 The plurality also noted that “[b]y describing ‘waters’ as ‘relatively permanent,’” it did not “necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances” or “seasonal rivers which contain continuous flow during some months of the year...” and, further that it had “no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify a channel as a ‘wate[r] of the United States.’”41 Upon this opinion, the plurality remanded the cases back for a determination by the lower courts of “whether the ditches or drains near each wetland are “waters” in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in Riverside Bayview.”42 Based on this test,

38 Id.

39 Id. at 731.

40 Id. at 731-32 (internal citations omitted).

41 Id. at 732-33 (internal citations omitted).

42 Id. at 757.
wetlands adjacent to “relatively permanent” bodies of water are covered under the CWA as long as they possess as “continuous surface connection” to that water.

**Significant Nexus Test** – Justice Kennedy issued an opinion concurring that the cases should be remanded, but firmly rejecting the plurality’s reasoning for doing so. Justice Kennedy identified the issue to be decided in the consolidated case as “whether the term ‘navigable waters’ in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact.” According to the opinion of Justice Kennedy, “the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute’s goals and purposes . . . With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters-functions such as pollutant trapping, flood control, and runoff storage . . . Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”

Justice Kennedy further opined that “[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.” Notably, Justice Kennedy indicated that the record before the Court contained evidence of a possible

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43 *Id.* at 779-80.

44 *Id.* at 782.
significant nexus and that the end result of the remand may be that the “Corps assertion of jurisdiction is valid” as suggested by the dissent.45

- **Existing Definition Test:** The dissent, written by Justice Stevens, and joined by Justices Souter, Ginsburg, and Breyer, opined that the agencies’ existing regulatory definition is a reasonable interpretation of the statutory term “waters of the United States.” The dissent rejected the rationales of the plurality and Justice Kennedy, but stated that “[g]iven that all four Justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met.”46

In concurring with the plurality opinion, Chief Justice Roberts noted that the SWANCC decision issued five years prior to Rapanos, “rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act . . .” and that, with regard to the Court’s decision regarding jurisdiction over the wetlands at issue in Rapanos that “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act.”47 The SWANCC decision should be read as standing for the proposition that the Corps cannot rely on the Migratory Bird Rule to assert jurisdiction over a waters under the CWA and the Rapanos decision should similarly be applied to evaluate CWA jurisdiction over wetlands adjacent to non-navigable tributaries. However, because no opinion commanded a majority of the court, the agencies should not adopt the reasoning of any of the various opinions in the Rapanos decisions as the sole basis for asserting jurisdiction over any waterbody, and the agencies should not amend the existing definition of “waters of the United States” to remove the broad Commerce Clause grounds for covering tributaries, adjacent waters and other waters.

45 *Id.* at 784.

46 *Id.* at 810.

47 *Id.* at 758.
B. THE PROPOSED DEFINITION SHOULD NOT REMOVE LONGSTANDING COMMERCE CLAUSE BASES FOR ASSERTING JURISDICTION OVER WATERS OR BASE JURISDICTION FOR CERTAIN WATERS SOLELY ON THE “SIGNIFICANT NEXUS” TEST.

Guidance issued by the EPA and the Corps in response to these decisions interpreted the SWANCC and Rapanos opinions more broadly than the decisions allow or require, and imposed limitations on assertions of jurisdiction that were inconsistent with those decisions resulting in less protections for historically protected waters and inconsistent application by the agencies. For example, the 2008 Rapanos Guidance inappropriately subjected tributary streams to less-than categorical protection although the existing regulatory definition protected, without any limitation, all tributaries to other specified jurisdictional waters and despite the fact that the Supreme Court has not issued any holding limiting the jurisdictional status of tributaries. The 2003 and 2008 Guidance has left many categories of waters that had previously been protected vulnerable to pollution and destruction, and hindered regulatory and enforcement actions.

48 In support of our comments, we hereby incorporate by reference the comments submitted by national environmental organizations on the 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0001, which are a part of the official public docket in 2011 at EPA-HQ-OW-2011-0409-3608 (hereinafter “2011 Comments”).


50 Id. at p. 13-14.

However, neither the Guidance Documents nor the proposed 2011 Guidance Document\textsuperscript{52} asserted that \textit{SWANCC} and \textit{Rapanos} require the agencies to adopt the “significant nexus” test as their sole basis for asserting jurisdiction over tributaries, adjacent waters, and others waters. To the contrary, the EPA, the Corps, and the Department of Justice have applied the existing rule, the “relatively permanent” test, and/or the “significant nexus” test to make CWA jurisdictional determinations depending on the water at issue. While we continue to believe that the “relatively permanent” and “significant nexus” tests only apply to wetlands adjacent to non-navigable tributaries, we understand that it may be wise to employ multiple jurisdictional tests in light of the lack of a majority opinion in \textit{Rapanos}, as well as \textit{dicta} in both Supreme Court decisions and some differences in the lower courts as to how to apply these holdings.\textsuperscript{53}

However, we cannot support the EPA and the Corps’ assertion that the \textit{SWANCC} and \textit{Rapanos} decisions compel the agencies to adopt the “significant nexus” as the sole test for making categorical and case-by-case jurisdictional determinations for tributaries, adjacent waters and other waters. Nor can we support the agencies’ position that they are compelled by these decisions to make many of the other changes to the definition of “waters of the United States” that they are proposing as detailed below, including most importantly the deletion of the existing regulatory provision for other waters, including intrastate waters, where the use, degradation, or destruction of those waters could affect interstate or foreign commerce.\textsuperscript{54}

While it is beyond dispute that the CWA applies to waters with a significant nexus to traditionally navigable waters, it equally apparent that Congress intended for the CWA to fully protect the nation’s waters and aquatic ecosystems without regard to whether the waters could satisfy historic navigability tests under the Commerce Clause. It is important to note here that, prior to the enactment of the CWA, both traditionally navigable waters and their non-navigable tributaries


\textsuperscript{53} See, e.g., cases discussed in 2011 Comments, \textit{supra} note 48, at pp. 17-18.

\textsuperscript{54} 40 C.F.R. § 122.2.
were believed to be well within the Commerce Clause powers of the federal
government under traditional tests of navigability. Congress intended to
expand the number and nature of the waters covered under the CWA in order to
protect water quality and aquatic ecosystems to the fullest extent permitted by
the Commerce Clause. In other words, Congress intended to expand coverage
under the CWA beyond traditionally navigable waters and their tributaries, and
did not premise its expansion of jurisdiction on the manner in which waters were
connected to traditionally navigable waters. To the contrary, Congress intended
to repudiate the traditional navigability tests and limitations on federal authority
and instead utilize the full authority of the federal government to regulate
pollution of waters under the Commerce Clause. SWANCC and Rapanos do not
address, limit or establish the outer bounds of this authority for purposes of the
CWA.

It is essential to the continued protection of our nation’s waters that the EPA and
the Corps continue to assert jurisdiction over waters to the fullest extent permitted by the Commerce Clause. In order to do so, the agencies should retain
the following language in the regulatory definitions of “waters of the United
States”:

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

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

56 See e.g., Bayview, 474 U.S. at 133.

57 In SWANCC, the Supreme Court expressly declined to address the reach of Commerce Clause
jurisdiction. See 531 U.S. at 162, 174; Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1071 (D.C. Cir.
2003) (observing that in SWANCC, the Supreme Court “expressly declined to reach” the
Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in Rapanos
commanded a majority of the Court “on precisely how to read Congress' limits on the reach of the
1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

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

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

4) All impoundments of waters otherwise defined as waters of the United States under this definition;\(^{58}\)

There are many significant waterways that provide valuable ecological, recreational, drinking water, and economic services that may lose protections under the CWA if this language is removed. In particular, EPA representatives have identified certain waters that may lose CWA protections, including so-called “closed basins” and other waters that lack a connection to Traditionally Navigable Waters, which have historically been protected under these interstate commerce factors for “other waters.”\(^{59}\)

“Closed-basins” make up roughly 20% of the land area in New Mexico, and include many rivers, streams and wetlands. These waters provide recreation, fishing and waters supply in a region with scarce water resources and must be protected under the CWA.\(^{60}\) Similarly, in southern Idaho, the Lost River drainages contain “numerous creeks and rivers that do not flow on the surface beyond the borders of the state,” but do flow into the Snake River Plain Aquifer,

\(^{58}\) See, e.g., 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a)


which supplies water to the Snake River. Some rivers and streams within the Lost River Drainages have been determined to be jurisdictional based on navigability, however, others are jurisdictional solely because they have an impact on interstate commerce, including their use for irrigation water for cropland and the fact that they support “high-quality trout fisheries that attract anglers from all over the United States.”

Additionally, the EPA and the Corps should maintain the original regulatory language in definition of waters of the United States, particularly the precise language for tributaries, and should expressly retain all Commerce Clause grounds for including all waters within the regulatory definition of “waters of the United States.” As set forth in the 2003 Comments on the ANPRM, “the chemical, physical, and biological integrity of the Nation’s waters cannot be restored and maintained without Clean Water Act regulation of all waters protected by the current regulations – including those identified by the (a)(3) factors [other waters interstate commerce factors].” As stated by the court in U.S. v. Holland:

It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution. Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms . . . Congress is not limited by the ‘navigable waters’ test in its authority to control pollution under the Commerce Clause.

To the extent that the EPA and the Corps need to clarify the existing definition, they should do so by adding language to the existing definition or making minor

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62 Id.

63 See 2003 Comments, supra note 36, at pp. 29-38.

64 Holland, 373 F. Supp. at 673.
amendments to address the limitations on regulation of non-adjacent wetlands and similar waters raised by SWANCC and Rapanos. We support the addition of a case-by-case analysis for waters that are not covered by the existing definition or which are called into question by SWANCC and Rapanos as one such addition to the existing rule but believe that “relatively permanent” waters must also be included. We also support the agencies significant nexus analysis in the Preamble based on the Connectivity Report and the work of the SAB to provide additional jurisdictional grounds for inclusion of tributaries, adjacent water and other waters within the regulatory definition of “waters of the United States.”

II. TRADITIONALLY N AVIGABLE WATERS, INTERSTATE WATERS, TERRITORIAL SEAS, AND IMPOUNDMENTS.

The EPA and the Corps do not propose any changes to the existing definition of “waters of the United States” for: (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters, including interstate wetlands; and (3) The territorial seas. We support the agencies’ decision not to propose any changes to these sections of the definition. It is beyond dispute that these waters are encompassed within the meaning of “waters of the United States.”

However, it is essential that the agencies clarify the meaning of the term traditionally navigable waters in the Preamble consistent with our previous comments on this subject.65 One particularly high-profile example of the potential for differing agency interpretations of navigability under the CWA involves the Los Angeles River where, in 2008, the Corps determined that only 4 miles of the 51-mile river was “navigable” and, therefore, subject to the automatic protections of CWA.66 While public outcry and action by EPA eventually reversed

65 See 2011 Comments, supra note 48, at pp. 18-28.

that decision finding the river to be a Traditionally Navigable Water, the time and resources spent on this exercise would have been better spent in actually protecting the River.\textsuperscript{67} The meaning of “navigability” under the CWA is especially important given the agencies decision to adopt the “significant nexus” test.

With regard to impoundments, although the agencies state in the Preamble that they are not making any substantive changes to this portion of the regulatory definition, the proposed language for impoundments would limit the types of impounded waters that will be subject to CWA protections. The existing regulatory definition includes “[a]ll impoundments of waters otherwise defined as waters of the United States under this definition.” The proposed language only includes impoundments of traditionally navigable waters, interstate waters, the territorial seas, and certain defined tributaries. No scientific or legal basis exists for excluding impoundments of adjacent waters and other waters included on the basis of a significant nexus analysis, and none was provided in the Preamble. As stated in the preamble, “[i]mpoundments are jurisdictional because as a legal matter an impoundment of a ‘water of the United States’ remains a ‘water of the United States’ and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters traditional navigable waters, interstate waters, or the territorial seas.”\textsuperscript{68} There is equally true for adjacent waters and “other waters.”

\textbf{III. ALL TRIBUTARIES TO ANY OTHER WATER OF THE U.S. MUST CONTINUE TO BE INCLUDED IN THE DEFINITION.}

The Proposed Definition improperly narrows jurisdiction over tributaries. First, it limits jurisdiction to tributaries of traditionally navigable waters, interstate waters, territorial seas, and impoundments. Second, it improperly relies on the “significant nexus test” as the sole basis for asserting jurisdiction. Third, it adopts a new definition of tributaries that reduces the types of tributaries covered by the

\textsuperscript{67} Id.

\textsuperscript{68} \textit{S. D. Warren Co. v. Maine Bd. of Envtl. Prot.}, 547 U.S. 370, 379 n.5 (2006) (“[N]or can we agree that one can denationalize national waters by exerting private control over them”), and \textit{U.S. v. Moses}, 496 F.3d 984 (9th Cir. 2007), \textit{cert. denied}, 554 U.S. 918 (2008) (“[I]t is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.”).
rule in a manner that is not supported by law and science. Fourth, it categorically exempts “ditches” from coverage even if the ditches are otherwise tributaries contrary to law and science.

Under the agencies’ existing regulations, all tributaries to traditionally navigable waters, interstate waters, impoundments, and “other waters” are defined as “waters of the United States.”69 All of the tributaries protected under the existing regulation must continue to be covered in the Proposed Definition. As demonstrated previously, the Supreme Court has not issued any opinion that limits the jurisdiction over tributaries. To the contrary, it is well settled that tributaries are jurisdictional waters within the meaning of “waters of the United States.”70 Neither SWANCC nor Rapanos invalidated or limited the scope of jurisdiction provided by the existing definition’s inclusion of tributaries.71 Additionally, all tributaries to all other “water of the United States” must be included with the definition and given categorical protection. Tributaries are obviously connected, and thus adversely impact, their downstream waters. This is consistent with the findings of the Connectivity Report and the SAB Report, as well as the individual comment of the SAB members.72

69 See e.g., 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

70 See, e.g., N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 997 (9th Cir. 2007) (“The Supreme Court has since confirmed that regulable waters of the United States include tributaries of traditionally navigable waters and wetlands adjacent to navigable waters and their tributaries. The only question reserved in Riverside Bayview Homes was the issue of CWA jurisdiction over truly isolated waters.” citing Bayview, 474 U.S. at 106; 33 C.F.R. 328.3(a)(1),(4),(7); and Rapanos, 547 U.S. at 792 n. 3); see also Benjamin v. Douglas Ridge Rifle Club, 673 F.Supp.2d 1210, 1215 & n. 2 (D. Or. 2009) (indicating that jurisdiction over tributaries did not require demonstration of significant nexus); United States v. Vierstra, 2011 WL 1064526, at *5 (D. Id. Mar. 18, 2011) (“It is an open question as to whether Justice Kennedy’s concurrence applies in the tributary context.”). But see, e.g., United States v. Robison, 505 F.3d 1208 (11th Cir 2007) (applying “significant nexus” analysis to tributary stream).

71 See 2011 Comments, supra note 48, at pp. 9-15; see also 2003 Comments, supra note 36 at pp. 4-6.

Further, the agency must clarify in the definition of tributary and/or the Preamble what it intends when it states that in order to be defined as a tributary, the tributary must contribute “flow, either directly or through another water, to a water identified in paragraphs (l)(1)(i) through (iv).” It is unclear from this language whether the agencies will require “another water” to also be a defined “water of the United States.” We urge the agencies to clarify that they mean any body of water whether it is a defined “water of the United States or not.” This would be consistent with the Connectivity Report and the law. While this interpretation is implied by the language in footnote 3 of the Proposed Definition, it requires further clarification.\textsuperscript{73}

Jurisdictional limitations for tributaries under the existing definition arose nearly exclusively from the agencies’ 2003 and 2008 Guidance. This Guidance placed additional requirements on the agencies’ ability to assert CWA jurisdiction over tributaries that were not required or supported by law and science. However, even under the 2008 Guidance, the agencies claimed jurisdiction over non-navigable tributaries that met the “relatively permanent” or the “significant nexus” test.\textsuperscript{74} Although we disagree with the interpretation of the “relatively permanent” and “significant nexus” tests reflected in the 2008 Guidance for the reasons set forth in our comments,\textsuperscript{75} the 2008 Guidance document illustrates that the agencies believed that tributaries could be protected under both of these \textit{Rapanos} jurisdictional tests. Accordingly, it is difficult to understand why the agencies are only applying the “significant nexus” test to determine the extent of jurisdiction over tributaries in the Proposed Definition and Preamble.\textsuperscript{76} We

\textsuperscript{73}See 79 Fed.Reg. at 22191, fn. 3.

\textsuperscript{74} Jurisdiction Following \textit{Rapanos v. United States} and \textit{Carabell v. United States}, supra note 49.

\textsuperscript{75} In support of our comments, we hereby incorporate by reference the comments submitted by national environmental organizations on the 2008 Guidance, which are a part of the official public docket in 2011 at \url{http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2002-0050-1674}.

\textsuperscript{76} Proposed Definition, 79 Fed.Reg. at 22189, 22201 ("The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus,
strongly object to the agencies’ approach – the EPA and the Corps should be asserting jurisdiction over all tributaries covered under the existing regulations, all tributaries that meet the “relatively permanent” test and all tributaries that meet the “significant nexus” test. There is simply no valid legal or scientific reason to do otherwise.

Although we believe that the EPA and the Corps should not rely solely on the “significant nexus” analysis as the agencies’ basis for including tributaries in the definition, we do agree that the inclusion of ephemeral, intermittent and perennial tributaries, as “waters of the United States” is legally and scientifically sound and is supported by the EPA’s “significant nexus” analysis, the Connectivity Report, and the SAB Member Comments. We also believe that wetlands, lakes and ponds should be included as tributaries based on the findings of the Connectivity Report and many individual SAB Member Comments.77

In addition to the Connectivity Report and SAB Report, numerous scientific reports and government documents from across the country illustrate the importance of protecting these waters. A recent report produced by Trout Unlimited, using USGS National Hydrography Dataset, documents the abundance and importance of intermittent and headwater streams across the country showing, for example, that 48 percent of stream miles with native trout historical range are classified as intermittent or ephemeral, and 58 percent of stream miles are in headwater streams.78 The Trout Unlimited Report also states that 64 percent of stream miles with salmon/steelhead range are classified as intermittent or ephemeral, and 57 percent of stream miles are in headwater streams. In North Carolina, research conducted by the North Carolina Department of Natural Resources – Division of Water Quality, concluded that:

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alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw.”).

77 See e.g., Connectivity Report supra note 3, at 1-8 (nutrient removal and cycling); Member Comments, supra note 72 Rosi-Marshall at 81 and Sullivan at 85.

In summary, staff of the Division of Water Quality have been conducting intensive research on headwater streams and headwater wetlands across the state for the past several years. Headwater streams are very common and provide significant benefits to downstream water quality and aquatic life. Intermittent streams have significant aquatic life even though their flow is not constant throughout the year. Headwater wetlands are often associated with these streams and provide important water quality filtration to protect downstream water quality as well as significant aquatic life habitat. Therefore based on this on-going research, the Division of Water Quality believes that protection of these headwater streams and wetlands is essential to protect downstream water quality.\textsuperscript{79}

Further, the agencies should not narrow jurisdiction over tributaries through the adoption of a mandatory requirement for tributaries to possess a bed, bank, and Ordinary High Water Mark ("OHWM"). The existence of an OHWM should not be a requirement for asserting jurisdiction over tributaries, as it is not supported by law and science. As noted in the Connectivity Report and the Member Comments, the requirement of an OHWM improperly limits jurisdiction, and is not consistent with the science regarding how tributaries are affected by pollution or how tributaries impact downstream waters.

The Proposed Definition incorporates the definition of OHWM from existing regulations developed for the CWA Section 404 Program into the definition of tributary. The definition is taken from 33 C.F.R. 328.3(e) which provides:

\begin{quote}

The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical \end{quote}

\textsuperscript{79} Memo from John Dorney, Wetlands Program Development Unit, NC DWQ. April 5, 2006. Background information on the water quality and aquatic life values of headwater streams and headwater wetlands, available at \url{http://aswm.org/pdf_lib/cover_letter_and_summary_nc.pdf}. 
characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

While this definition may have some reasonable meaning in the context of determining the boundaries of waters where dredge and fill activities are proposed, it has nothing to do with the extent of “waters of the United States” in the context of regulating and responding to the discharge of pollutants. As the Corps noted in 1977:

Prior to enactment of the FWPCA, the mean tide line or (mean higher tide line on the West Coast) was used to delineate the shoreward extent of jurisdiction over the regulation of most activities in tidal waters under the 1899 Act as well as for mapping, delineation of property boundaries, and other related purposes. In freshwater lakes, rivers and streams that are navigable waters of the United States, the landward limit of Jurisdiction has been traditionally established at the ordinary high water mark. The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.80

Thus, the concept of an OHWM or High Water line was utilized in the context of the Rivers and Harbors Act of 1899 and jurisdictional consideration related to traditional navigability where “[t]he need to protect navigable capacity of a waterway above the mean high water line was obviously minimal.”81 The inapplicability of this limitation to the CWA was addressed in the *Holland* case


81 *Holland*, 373 F. Supp. at 670-673.
which outlined both the authority and need to regulate waters beyond the reach of the traditional navigability tests and stated that “to recognize this and yet hold that pollution does not affect interstate commerce unless committed in navigable waters below the mean high water line would be contrary to reason.”

These long-held views as to the inapplicability of the OHWM to the meaning of “waters of the United States” under the CWA are confirmed by the Connectivity Report which further provides that “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associates alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.” There is nothing in the Connectivity Report to support the idea that these connections are limited to tributaries with OHWMs or that OHWMs are the sole indicator of connectivity. Individual SAB members also expressed disagreement or concern with the addition of a requirement for an OHWM for tributaries. For example, on member stated that:

The definition of the lotic-type tributary is appropriately comprehensive because it inherently includes ephemeral and intermittent streams (as well as perennial) streams. The former types are often overlooked but ecologically important, particularly in arid landscapes with seasonal patterns of precipitation. However, there may be some types of tributaries, such as spring-fed streams, that lack an obvious OHWM because their groundwater sources dominate the water budget, are temporally stable, and so there is no fluctuation in the hydrograph to generate a ‘line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear line on the banks . . .’ Therefore the definition should be ‘bed and bank, and sometimes an OHWM.’

82 Id.

83 Connectivity Report, supra note 3, at 1-3, and related Chapters.

84 Member Comments, supra note 72, Aldous at 2-3 (internal citations omitted).
Another SAB member similarly commented that the Proposed Definition should allow “flexibility to for [sic] field personnel to define functional tributaries, even where those functional tributaries might lack obvious indicators of bed and bank (e.g., alluvial deposits on the bed of a headwater stream in a humid mountain setting) but have less obvious indicators of tributary flows (e.g., directionally bent herbaceous vegetation and subtle debris lines in swales connecting vernal pools to downstream waters in arid and semi-arid settings).”

In addition to the fact that there is no sound legal or scientific basis for adding the requirement for an OHWM to the jurisdictional requirements, it is important to note there have been extensive problems with interpretation and implementation of the OHWM requirement in the CWA Section 404 Program. This issue also demonstrates why the OHWM requirement should not be included in the definition of tributary. For example, the U.S. General Accounting Office ("GAO") has noted that the Corps’ definition of OHWM is ambiguous, and may be reasonably interpreted differently by competent staff. For example:

- The Portland District reported that it was difficult to identify the OHWM, even in portions of the Columbia River and that three different staff would likely make three different jurisdictional determinations.

- The Philadelphia District reported that identifying OHWMs in the upper reaches of watersheds was one of its most difficult challenges, as one progresses upstream, the depth of the bed and bank diminishes, and the key indicators of an ordinary high water mark gradually disappear.

The GAO also noted that "officials from the Chicago District said that because their district was heavily urbanized many channels had been manipulated and contained, often in ways that obscured the ordinary high water mark" and that identifying the OHWM in the arid West was particularly difficult due to intermittent flow and flooding. There is no valid scientific or legal basis for excluding channelized streams, the upper reaches of tributaries, or streams in

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85 Member Comments, supra note 72, Rains at 71.

86 GAO Report, supra note 34.
arid regions that lack an OHWM from the definition of “waters of the United States.” To the contrary, the need to include and protect these waters is well documented through the Connectivity Report and is supported by the SAB Report.

IV. DITCHES SHOULD NOT BE CATEGORICALLY EXCLUDED FROM THE DEFINITION.

The Proposed Definition also provides a categorical exclusion for certain defined ditches and we strongly object to this provision. There is no sound legal or scientific basis for categorically excluding ditches, and this is especially true when those ditches otherwise meet the definition of tributary or any other defined “water of the United States.” The Proposed Rule establishes, for the first time, a categorical exclusion for two types of ditches and states that they are not “waters of the United States” notwithstanding whether they would otherwise meet the requirements for being identified as a traditionally navigable water, interstate water, territorial sea, impoundment, tributary, adjacent water, or other water with a significant nexus.

Although the agencies state in the Preamble that they are simply codifying longstanding exemptions for waters over which the agencies “have generally not asserted CWA jurisdiction,”87 with regard to ditches, the proposed categorical exemption is not consistent with any longstanding exemption.88 Historically, ditches have commonly been protected under the CWA because they are actually streams that have been altered, transport pollutants to downstream waters, or have begun to serve ecological functions like natural tributaries. Ditches can and are required to be regulated under the CWA if they flow into other “waters of the United States” even when they are man-made.89


89 See, e.g., Holland, 373 F. Supp. at 673-74; Headwaters, Inc. v. Talent Irrigation Dist., 243 F. 3d 526, 533-34 (9th Cir. 2001); U.S. v. St. Bernard Parish, 589 F.Supp. 617, 620 (E.D. La. 1984); U.S. v. Gerke Excavating, Inc., 412 F.3d 804, 805-06 (7th Cir. 2005) (“A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It
With regard to tributaries, the Proposed Definition states “[a] tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.” There are compelling legal and scientific reasons for ensuring that man-altered and man-made waters are covered as tributaries, and those reasons apply equally to ditches. As the 11th Circuit stated in the case of U.S. v. Eidson, “[t]here is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country’s water quality whether they travel along man-made or natural routes.”

We believe that ditches should be categorically included when they otherwise meet the definition of a “water of the United States,” including specifically a tributary. We also believe that ditches should be protected when they meet either the “relatively permanent” or “significant nexus” test without regard to the agencies’ unspecified policy considerations. The agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of “waters of the United States” for policy or any other agency administrative purpose.

We are equally concerned that the agencies are proposing to adopt a categorical exemption for ditches, yet they did not define many of the key terms in the exemptions, including “ditches,” “uplands,” “perennial” or “through another

wouldn’t make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart.”), vacated 126 S.Ct. 2964 (2006), on remand 464 F.3d 723 (7th Cir. 2006) (remanding to district court to apply Rapanos), cert. denied 128 S.Ct. 45 (2007); Community Assn. for Restoration of Env’t v. Henry Bosma Dairy, 305 F.3d 943, 954-955 (C.A.9 2002).


92 See USGS, Defining Perennial, Intermittent and Ephemeral Channels in Eastern Kentucky; Application to Forestry Best Management Practices (2001) (“Although the USGS monitors thousands of perennial streams, they seldom monitor intermittent or ephemeral streams. The
water” which are subject to varying interpretations. While as stated previously, we object to any categorical exemption for ditches, we believe it is important to point out that the failure to define these key terms can have significant impacts on the ability of the agencies to protect water quality.

For example, as noted by the plurality in Rapanos, a “ditch” can mean different things in different contexts, but when ditches hold water permanently they are typically referred to as “rivers,” “creeks,” “streams,” “moats,” or “canals.” While we are not sure that this is always the case, the Rapanos Court's discussion of the issue illustrates the problem with the agencies' failure to define the term “ditches.” For example, it seems apparent that the agencies would not intend to categorically exempt any water that may be equally referred to as either as ditch or as a ditch or a canal, river, creek, or stream.

Simply adding a common definition of ditches will not resolve the concern with the categorical exemption because it is often difficult or impossible to determine whether a “ditch” is a natural waterway or a man-made waterway, and the answer to the question is legally and scientifically irrelevant in any event because both can have significant impacts on water quality. Ditches on agricultural lands “result in rapid removal of excess water over a relatively short time period. This water flowing over the land surface has relatively high energy sufficient to detach and transport soil particles and constituents attached to them, such as phosphorus, organic nitrogen, and many pesticides.”

map delineation between perennial-intermittent and intermittent-ephemeral is based on conceptual landscape relationships with very little supportive data, and the accuracy is certainly questionable, especially at the site level.”) available at http://water.usgs.gov/wrri/00grants/KYchannels.html.

93 Rapanos, 547 U.S. at 736, fn. 7.


channelization are prevalent in the Chesapeake Bay watershed, and “[d]itching on agricultural lands in the Pocomoke River watershed is an extensive practice that has been used to drain wetlands”, which have been found to be a significant source of sediment loading to the watershed.”

A significant percentage of stream miles within the coastal plain of North Carolina are modified natural stream channels and ditches. According to the North Carolina Department of Environment and Natural Resources, “[i]t may be difficult to differentiate between an artificial feature (e.g. ditch or canal) and a natural stream that has been modified (e.g. straightened or relocated).” In North Carolina, many swine concentrated animal feed operations (“CAFOs”) are located “in an area of the coastal plain where the groundwater table is high which requires ditching or tile drain in order to allow for crop harvesting and waste application. These are direct conveyances for the highly nutrient laden water to reach surface waters. These operations are having a significant negative impact on the Neuse River water quality.” Without regulatory oversight over these waters that feed North Carolina’s rivers and coastal estuaries, we are likely to be unable to restore water quality and fisheries that are severely impaired by pathogens, nitrogen and phosphorus.

DRAINAGE: WHAT IS IT and HOW DOES IT WORK?, available at http://www.soil.ncsu.edu/publications/BMPs/drainage.html


Additionally, there is no sound scientific reason to categorical exclude upland ditches with less than perennial flow. Upland ditches that contribute flow ephemerally, intermittently or perennially can have substantial impacts on downstream water quality to the same extent as any other tributary. In fact, they can often have a more significant impact if they are very near a discharge point as they often serve to increase water flow downstream. As noted in the Connectivity Report, “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associates alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.” This view is echoed in the comments from many individual SAB members:

- “In response to the query, I suggest that the flow regime in identified ditches should be less than intermittent flow, rather than less than perennial flow as proposed, based on my familiarity with the science associated with the Connectivity Report. This would apply only to those ditches not excluded by the proposed regulation and that meet the proposed definition of tributary as ‘waters of the United States.’”

- “It is important to note, however, that even when not jurisdictional waters, these non-wetland swales, gullies, rills and specific types of ditches may still be a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) or for purposes of a significant nexus analysis under paragraph (a)(7). For example, a wetland may be a ‘water of the United States,’ meeting the proposed definition of ‘neighboring’ because it is connected to such a tributary by a non-jurisdictional ditch that does not meet the definition of a ‘tributary.’ The entire concept of water body connectivity is that integrated ecological units comprised of aquatic systems distributed across the landscape are intimately linked through a suite of pathways. How is it consistent with this notion or in the spirit of the CWA that the ditch that connects two

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100 Member Comments, supra note 72, Dr. Jennifer Tank Comments at 93.
‘waters of the U.S.’ is not jurisdictional? . . . I am not convinced that the science currently exists to summarily exclude certain groups other waters including gullies, swales, artificial lakes and ponds, and ditches that do not contribute flow to a jurisdictional water body. These waters should be assessed along a gradient of connectivity on a case-specific basis until the science is available to make an appropriate determination for the respective class as a whole.”\(^{101}\)

- “Exclusion b(3) – ‘ditches that are excavated wholly in uplands, drain only uplands, and have less that perennial flow’ – together, these three criteria may suffice, but the distinction between perennial and less-than-perennial flow may be a cause for concern. P 22203 states, ‘Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and therefore any such upland ditch would not be subject to regulation.’ In parts of southeast Michigan, Ohio and Indiana, topography is very flat and ditches flow primarily during times of heavy rain. Some ditches are sufficiently deep that they will pond water until the receiving river stage drops enough for water to flow from the ditch to the river. Yet such ditches commonly receive from surrounding lands, and episodically deliver, significant nutrients to downstream waters. In the aggregate, they are the source/conduit for the majority of contaminants reaching downstream waters (‘most of the materials found in rivers originate outside of them.’) P 22247). Indeed, this situation describes much of the drainage into western Lake Erie, where harmful algal blooms due to excessive nutrient loading have caused beach closings, and in August 2014 a three-day ban on drinking water for some 400,000 of the residents in and near Toledo, OH. In short, using the criterion of ‘less-than-perennial’ flow to exclude ditches may not be consistent with addressing nutrient and sediment loading that affects drinking water, beach use, fishing, and other uses.”\(^{102}\)

\(^{101}\) Member Comments, \textit{supra} note 72, Dr. Mazeika Sullivan at 89-90.

\(^{102}\) Member Comments, \textit{supra} note 72, Dr. David Allen at 14.
• “On page 2203[sic], the EPA seeks guidance on the appropriate flow requirements for a ditch located wholly in uplands to be jurisdictional. In particular it would appear that ditches with intermittent flow would supply considerable water, sediment, nutrients, metals such as zinc from tire wear, etc. to downstream waters and there would appear to be no reason such features should not be considered jurisdictional.” 103

• “Each of these types of human alterations affect connectivity and therefore can impact the chemical, physical, and biological integrity of the downgradient waters. As surface water features, ditches and canals function as either perennial or intermittent streams or tributaries and should be legally treated as such. Regardless of source, these ditches convey or store water and chemical/physical/biological sediment and materials spatially on a temporal basis (rate, magnitude, and frequency). The water from ditches can leak to provide groundwater recharge to the sediments or bedrock beneath the ditch, or accumulate groundwater discharge in its flow (serve as a drain) or both. These functions can be temporal (seasonal) and spatial. In all, the ditch impacts many of the hydrologic systems in the vicinity of its location, and is connected . . . Constructed ditches change the hydrologic flow paths of local and subregional hydrologic systems. Ditches are perennial, intermittent, or ephemeral water conveyors, and should be regulated as such.” 104

V. ADJACENT WATERS.

We support the inclusion of “adjacent waters” into the definition of “waters of the United States.” The inclusion of adjacent waters is generally consistent with the science and law, 105 but needs to be modified in accordance with the scientific analysis to ensure that adjacency includes the outer extent of the floodplain and

103 Member Comments, supra note 72, Dr. Judson Harvey at 22.

104 Member Comments, supra note 72, Dr. Kenneth Kolm at 49-50.

105 See, e.g., Connectivity Report, supra note 3, at 1-9 to 1-10; Member Comments, supra note 72, Brooks at 17.
all riparian areas.\textsuperscript{106} Similarly, the agencies should amend and clarify their approach to groundwater as it relates to adjacent waters and how it is considered in the Proposed Rule to conform to the extensive comments of the individual SAB members. Further, the agencies need to remove the categorical groundwater exemption from the Proposed Definition. The agencies should incorporate a more robust definition of adjacent that fully considers the four dimensional hydrologic connectivity and effects on downstream waters as discussed extensively in the Connectivity Report.

VI. OTHER WATERS SHOULD BE PROTECTED UNDER ALL OF THE JURISDICTIONAL TESTS.

We fully support the proposal to provide jurisdictional coverage in the Proposed Definition to “other waters” on a case-specific basis, “where those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.” \textsuperscript{107} However, as noted previously, we do oppose the removal of other jurisdictional bases for protecting such waters, and urge the agencies to retain the existing “other waters” language in the current definition. The rule should protect waters to the fullest extent permitted by the Commerce Clause and the basis for including waters pursuant to that authority must be included in the Preamble and Response to Comments. We also urge the agencies to include all “relatively permanent” waters, maintain the existing language and jurisdictional bases for tributaries in the current definition, and include all jurisdictional bases in the Preamble. Additionally, the agencies should categorically include all waters for which there is adequate

\textsuperscript{106} Members Comments, supra note 72, Kolm at 34 (“Distance to water body frequently is not the story”); Rains at 71; Rosi-Marshall at 82 (“River ecologists have known for a long time that it is more appropriate to think of rivers as part of a larger landscape or “riverscape” comprised of a river’s mainstem and adjacent floodplain or wetland habitats) (emphasis added); Sullivan at 86 (“...the scientific literature unequivocally supports the finding that floodplains and waters and wetlands in floodplain and riparian setting support the physical, chemical and biological integrity of downstream waters” and “[a]lthough distance can be one measure to help ascertain the degree of hydrological connectivity, biological and chemical connectivity should also be considered”).

\textsuperscript{107} 79 Fed.Reg. at 22272.
scientific and legal basis to do so. According to a recent report from the Congressional Research Service, “[s]ince issuing [the 2003 and 2008] guidance documents, the agencies have not found jurisdiction over any ‘other water’ based solely on significant nexus.” 108 The agencies have only found other waters “jurisdictional because they meet another provision of the existing definition of ‘waters of the United States,’ such as a determination that the water as a traditional navigable water.” 109 Because of this, it is essential that the agencies fully use the Connectivity Report, the SAB Report and the Member Comments to categorically include waters.

Additionally, in conducting its “significant nexus” analysis, the agencies need to fully consider all aspects of connectivity,110 ensure that aggregate connections and functions are evaluated,111 and evaluate groundwater connections.112 Further, the agencies should make one-time determinations for similarly situated waters and apply the determinations to future decisions.113 Lastly, the agencies should ensure that geographic proximity not be used in the analysis in a manner that inappropriately minimizes the nexus.


109 Id.

110 See e.g. Member Comments, supra note 72, Aldous at 4; Kolm at 33 (“The flowpath framework should highlight the four-dimensional nature of connectivity, because four-dimensional connectivity scaled in a habitat-to-catchment context is a foundational aspect of freshwater ecology”) and 34 (noting that “these flowpaths are inherently four-dimensional (i.e., longitudinal, lateral, vertical, and through time”); Rains at 73; Sullivan at 87.

111 See Member Comments, supra note 72, Kolm at 49; Rosi-Marshall at 81-83; Sullivan at 84 and 88.

112 See Member Comments, supra note 72, Kolm generally, especially 41 and 43.

113 See e.g., Member Comments, supra note 72, Rains, at 72 (springs in Western States); Connectivity Report, supra note 3 at 1-12 (depressional wetlands in Texas).
VII. THE AGENCIES SHOULD CONFIRM THAT THIS RULEMAKING DOES NOT ALTER EPA’S LONGSTANDING AND CONSISTENT INTERPRETATION REGARDING DISCHARGES VIA HYDROLOGIC CONNECTION. FURTHER, THE AGENCIES SHOULD NOT CATEGORICALLY EXCLUDE GROUNDWATER FROM THE DEFINITION OF WATERS OF THE UNITED STATES.

With respect to groundwater, commenters have two distinct requests:

- First, the agencies should confirm in its response to comments that nothing in this rule alters EPA’s longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water.

- Second, EPA should not categorically exclude all groundwater from the definition of waters of the United States. Instead, consistent with the recommendations of the SAB and the conclusions of some courts, EPA should treat groundwater as “other waters” and allow groundwater to be considered a water of the United States on a case-by-case basis where a significant nexus can be established.

A. The Proposed Rule Does Not Alter EPA’s Longstanding and Consistent Interpretation that the CWA May Cover Discharges of Pollutants from a Point Source to Surface Water that Occur Via Groundwater that Has a Direct Hydrologic Connection to the Surface Water.

EPA has a longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water. To be sure, in EPA’s repeated expressions of that interpretation over the past 24 years, the Agency has not said that groundwater is a water of the United States, but rather that discharges to waters of the United States through groundwater may be covered by the CWA if the hydrologic connection is direct. That interpretation was not at issue in any of the Supreme Court decisions or called into question by
those decisions, and EPA is, wisely, not undertaking to revisit that interpretation in the current rulemaking.

Indeed, EPA could not revisit that issue in the final rule because it did not propose to do so in the April 21, 2014 Notice of Proposed Rulemaking, and such a change would not be a logical outgrowth of that notice. Moreover, the proposed rule provides further scientific support for EPA's longstanding and consistent interpretation concerning discharges via groundwater in that it extensively discusses the critical role that groundwater plays in establishing hydrological, chemical, and biological connections between surface waterbodies.

To aid in clarity, the agencies should confirm in their response to comments that nothing in this rule alters EPA's longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water. Such confirmation may be useful, for example, to those who might otherwise confuse the issue of discharges to surface waters “via groundwater” with the separate issues of: (1) whether certain surface waters, including wetlands, are waters of the United States due to their subsurface connection to a jurisdictional water; or (2) whether certain groundwaters might themselves be considered waters of the United States under the significant nexus test.

While the EPA is well aware of its own pronouncements in the Federal Register and elsewhere, we review them here for the record, along with federal court decisions on this issue. As EPA explained to Congress in 2012:

The EPA has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a

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114 Furthermore, any attempt to revisit that interpretation in the future would face a heavy burden given that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987).

115 See, e.g., 79 Fed. Reg. at 22196, 22207-08, 22222, 22242, and 22248.
direct hydrologic connection to the surface water.\textsuperscript{116}

EPA has expressed that longstanding and consistent interpretation in final regulations published in the Federal Register following notice-and-comment rulemaking, in individual and general National Pollution Discharge Elimination System ("NPDES") permits issued by EPA, in a brief filed by the Department of Justice on behalf of EPA in federal district court, and in the memorandum to Congress quoted above. In addition, the vast majority of federal courts that have considered the issue have likewise found that the CWA may cover discharges into directly hydrologically connected groundwater, if such connection can be demonstrated.

1. EPA’s Rulemaking Determinations.

The earliest rulemaking decision of which we are aware came in 1990, in a final stormwater rule, in which EPA responded to a public comment concerning CWA jurisdiction by stating: "... discharges to ground waters are not covered by this rulemaking (\textit{unless there is a hydrological connection between the ground water and a nearby surface water body...})."\textsuperscript{117}

The following year, in a final water quality standards regulation for Indian reservations, EPA explained the issue in slightly more detail:

EPA and most courts addressing the issues have recognized two limited instances where, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. First, the Act requires NPDES permits for discharges to groundwater \textit{where there is a direct hydrological connection between groundwaters and surface waters} ... because such discharges are effectively discharges to the directly connected surface waters. Second, it is EPA’s long-established position that

\textsuperscript{116} Letter from Arvin Ganesan to Hon. John L. Mica, Enclosure at 1, dated Feb. 13, 2012 (internal footnotes omitted).

\textsuperscript{117} 55 Fed. Reg. 47990, 47997 (col. 3) (Nov. 16, 1990) (citations omitted) (emphasis added).
water quality standards are required for certain underground segments of surface waters. See Kentucky v. Train, 9 ERC 1280 (E.D. Kentucky 1972). In such streams, the subterranean component must be sufficiently stream-like so as to possibly allow the passage of fish and other aquatic organisms from a surface segment of the stream into the underground segment.\(^{118}\)

In 1998, again in a final stormwater rule, EPA reiterated:

EPA interprets the CWA’s NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection (“hydrologically connected”) between the groundwater and the surface water.\(^{119}\)

Following those three 1990s rulemakings, EPA articulated its interpretation and legal analysis at considerable length in a 2001 proposed rule for CAFOs. Under the heading “Applicability of the Regulations to Operations That Have a Direct Hydrologic Connection to Ground Water,” EPA stated:

Because of its relevance to today’s proposal, EPA is restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water.\(^{120}\)

Under the heading “Legal Basis,” in a detailed and extensive analysis, EPA explained its statutory authority to “determin[e] that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act,” and why “the Act is best interpreted to cover such discharges.”

EPA’s extensive legal analysis was comprehensive. First, EPA framed the legal issue. Rather than asking whether groundwater is regulated under the Clean

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Water Act (as a point source or as a water of the United States), EPA asked “whether a discharge to surface waters via hydrologically connected ground water is unlawful.” EPA stated that it:

does not argue that the CWA directly regulates ground water quality. . . . the question of whether Congress intended the NPDES program to regulate ground water quality . . . is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water.121

Exercising its authority to “fill gaps in the statutory framework.” EPA reasoned that excluding discharges that occur via groundwater would create a loophole inconsistent with the CWA’s statutory purposes:

[T]he Act is best interpreted to covers such discharges. . . . An interpretation of the CWA which excludes regulation of point source discharges to the waters of the U.S. which occur via groundwater would . . . be inconsistent with the overall Congressional goals expressed in the statute. . . . [T]here is no evidence that Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water.122

To reach this conclusion, EPA “utilized its expertise in environmental science and policy to determine the proper scope of the CWA,” as well as the policymaking authority delegated by Congress.123 “Given the Agency’s knowledge of the hydrologic cycle and aquatic ecosystems, the Agency has determined that when it is reasonably likely that such discharges will reach surface waters, the goals of the CWA can only be fulfilled if those discharges are regulated.”124 Applying that

121 Id. at 3015-3016.
122 Id.
123 Id. at 3018 (col. 1).
124 Id. at 3018 (col. 1-2).
knowledge of hydrology and aquatic ecosystems, EPA further explained that the existence of a hydrologic connection is a question of fact: “The determination of whether a particular discharge to surface waters via ground water which has a direct hydrological connection which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations.” To assure itself that its reasoning was sound and well-grounded, EPA examined the legislative history and found it consistent with EPA’s interpretation: “Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible discharges which entered the ‘navigable waters.’” EPA also found that the courts agree: “[T]he majority of courts have determined that CWA jurisdiction may extend to surface water discharges via hydrologic connections. . . . The decisions which did not find authority to regulate such discharges under the CWA may, for the most part, be distinguished.”

In 2003, EPA finalized that CAFO rule, which the U.S. Court of Appeals reviewed in Waterkeeper Alliance, Inc. v. U.S. E.P.A. In that case, the Second Circuit explained that the shift from certain uniform national requirements governing discharges to surface waters via groundwater (in the proposed rule) to fully case-by-case determinations of hydrologic connection (in the final rule) did not alter EPA’s position on the scope of the CWA:

> It is thus clear that when the EPA stated, in the Preamble to the Final Rule, that ‘requirements limiting the discharge of pollutants to surface water via groundwater ... are beyond the scope of today’s ELGs,’ Preamble to the Final Rule at 7216, the EPA meant only that uniform national requirements are beyond the scope of today’s ELGs. The EPA did not, in other words, mean to suggest that NPDES authorities lacked the power to impose groundwater-

\[125\] Id. at 3017 (col. 1).

\[126\] Id. at 3016 (col. 2).

\[127\] Id. at 3017 (col. 2-3).

\[128\] 399 F.3d 486 (2d Cir. 2005).
related requirements on a case-by-case basis, where necessary.129

2. NPDES Permits Issued by EPA.

In 2011, EPA issued a NPDES permit to the Menominee Neopit Wastewater Treatment Facility in Wisconsin, based on data showing that the groundwater beneath the site "has a direct hydrologic connection to the adjacent surface water, the navigable waters of Tourtilotte Creek."130

EPA explained:

Based on the modeling and the porosity of the soil, the first of the new discharge plume would take 3 to 5 years to reach the creek and 13 to 21 years before the entire breadth of the plume reaches the creek. However, since the existing facility had been discharging to the groundwater since the facility began operations in the 1970's, the existing discharge plume is already reaching Tourtilotte Creek.131

EPA has permitted other facilities on a similar basis.132

3. EPA’s 2012 Memorandum to Congress.

As noted above, EPA expressed its position on this issue directly to Congress. In 2012, an EPA Associate Administrator responded to questions posed by U.S. Representative John L. Mica, in a memorandum, which EPA stated:

129 Id. at 514 n.26.

130 EPA Region 5, NPDES Permit No. WI0073059 Fact Sheet (April 2011) at 2.

131 Id.

132 See, e.g., EPA Region 6, NPDES Permit No. NM0022306 Fact Sheet for Molycorp Mine (May 2006) at 4-6; see also id. at 7 describing NPDES permits issued to U.S. Liquids of Louisiana, Ltd. in 1999, Texas Eastman in 1976, and a CAFO general permit in 1993.
The EPA has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. . . . Whether or not such a hydrological connection exists, and the need for a National Pollutant Discharge Elimination System (NPDES) permit for any given source, is highly dependent on the facts and circumstances surrounding each permitting situation. . . . A number of factors are relevant in evaluating the connection between ground water and surface water, such as geology, flow and slope. A fact-specific evaluation could support a determination that an NPDES permit is required. . . .

4. EPA’s Federal Court Brief.

In 2012, the U.S. Department of Justice, on behalf of EPA, confirmed to a federal district court that:

There can be circumstances where a discharge to groundwater, or even a discharge to soil which eventually leads to groundwater, is so directly and immediately connected hydrologically to surface water that a NPDES permit is required . . . . Accordingly, specific [discharges] can, under given circumstances, be found to be subject to NPDES permitting requirements.

5. Federal Court Decisions.

In numerous cases, federal courts around the country have reached similar conclusion as EPA and DOJ, upholding CWA jurisdiction over discharges of pollutants to surface waters that occur via groundwater.

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As noted above, in Waterkeeper Alliance, Inc. v. U.S. EPA, the Second Circuit upheld EPA’s requirements for the discharge of pollutants from CAFOs to surface water via groundwater to be regulated, “as necessary, on a case-by-case basis.”\textsuperscript{135} The court found “sufficient record support for EPA’s determination that groundwater-related requirements are better imposed on a case-by-case basis,” given “that variability in topography, climate, distance to surface water, and geologic factors influence whether and how pollutant discharges at a particular site enter surface water via groundwater.”\textsuperscript{136}

An overwhelming majority of other courts are in accord. At least 18 federal decisions have held that the CWA covers discharges to surface waters via hydrologically connected groundwater. The reasoning behind these decisions is clear: Congress did not intend to exempt from the CWA “the introduction of pollutants into the groundwater [that] adversely affects the adjoining surface waters.”\textsuperscript{137} As one court explained:

\begin{quote}
  it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.\textsuperscript{138}
\end{quote}

Notably after EPA’s comprehensive discussion of the issue in its 2001 rulemaking, courts typically have deferred to that interpretation.\textsuperscript{139}

\begin{itemize}
\item \textsuperscript{135} Waterkeeper Alliance, 399 F.3d at 514-15 n.26.
\item \textsuperscript{136} Id. at 515.
\item \textsuperscript{137} Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001).
\item \textsuperscript{139} Greater Yellowstone Coal. v. Larson, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009).
\end{itemize}
The 18 federal court decisions of which we are aware, in addition to Waterkeeper Alliance v. U.S. EPA, finding that the CWA may cover discharges of pollutants to surface waters that occur via groundwater having a direct hydrologic connection are:

- **Dague v. City of Burlington**, 935 F.2d 1343, 1347, 1355 (2d Cir. 1991), *rev’d in part on other grounds*, 505 U.S. 557 (1992) (where a city allowed groundwater to flow through contaminants in its landfill and then to migrate beyond the landfill boundaries into a pond and wetlands that were waters of the United States, court of appeals held that “district court’s conclusion that the city discharged pollutants into navigable waters from a point source properly applied the statute”);

- **U.S. Steel Corp. v. Train**, 556 F.2d 822, 852 (7th Cir. 1977) (CWA “authorizes EPA to regulate the disposal of pollutants into deep wells, at least when the regulation is undertaken in conjunction with limitations on the permittee’s discharges into surface waters”), *overruled on other grounds by City of West Chicago v. U.S. Nuclear Regulatory Comm’n*, 701 F.2d 632, 644 (7th Cir. 1983);

- **Hawai’i Wildlife Fund v. County of Maui**, No. 12-00198 SOM/BMK, 2014 U.S. Dist. LEXIS 74256, *35* (D. Hawaii May 30, 2014) (“liability arises even if the groundwater under the [sewage treatment facility] is not itself protected by the Clean Water Act, as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water”);


- **Greater Yellowstone Coal. v. Larson**, 641 F. Supp. 2d 1120, 1138 (D.
Idaho 2009) (referring to EPA’s interpretation and stating “there is little dispute that if the ground water is hydrologically connected to surface water, it can be subject to” the CWA);


- *Hernandez v. Esso Std. Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) (“CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States”);

- *Coldani v. Hamm*, 2007 U.S. Dist. LEXIS 62644, *25 (E.D. Cal. Aug. 14, 2007) (“because Coldani has alleged that Lima Ranch polluted groundwater that is hydrologically connected to surface waters that constitute navigable waters, he has sufficiently alleged a claim within the purview of the CWA”);


- *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) (“CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States”);
• *Mutual Life Ins. Co. of New York v. Mobil Corp.*, No. 96-CV-1781, 1998 U.S. Dist. LEXIS 4513, at *6-*8 (N.D.N.Y. Mar. 31, 1998) (court denied motion to dismiss complaint alleging a hydrological connection, explaining that “plaintiff ultimately will have to prove a link between contaminated ground waters and navigable waters…”);

• *Friends of the Coast Fork v. County of Lane*, No. 95-6105-TC, 1997 U.S. Dist. LEXIS 22705, *8* (D. Or. Jan. 31, 1997) (“Defendant violated the CWA by discharging pollutants . . . into the groundwater which is hydrologically connected to the surface water”);

• *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) (“Because the CWA’s goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater”);

• *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995) (“[T]he Tenth Circuit’s expansive construction of the Clean Water Act’s jurisdictional reach … foreclose[s] any argument that the CWA does not protect groundwater with some connection to surface waters”);

• *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) (“since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation”);

pollutants into the soils and groundwater . . . which then make their way to [a surface water] through the groundwater state a cause of action under the Clean Water Act”;

- *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988) (plaintiff can prevail by showing discharges into “groundwater [that] is naturally connected to surface waters that constitute ‘navigable waters’ under the Clean Water Act”), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995); and

- *New York v. United States*, 620 F. Supp. 374, 380-81 (E.D.N.Y. 1985) (where State of New York asserted a claim under the CWA for an unpermitted discharge to surface water occurring via groundwater, declined to reach defendant’s argument that the CWA does not apply to groundwater, “since it is clear that plaintiff has alleged that the [subsurface discharges] threaten to contaminate . . . navigable waters”).

While a few decisions have found groundwater-related claims to be beyond the reach of the CWA, most of those cases pre-date EPA’s 2001 explanation of the CWA’s authority over hydrologically connected groundwater. Furthermore, the few contrary cases typically arose in situations where a hydrological connection to surface water had not been pled, was remote or entirely unproven, the plaintiff claimed that the CWA applies to *all* discharges to groundwater, or the court construed the issue as such. The most notable pre-2001 case is *Umatilla Waterquality Protective Ass’n, Inc. v. Smith Frozen Foods, Inc.*[^140] But the holding in *Umatilla* depended heavily on the absence – at that time – of an authoritative statement from EPA.[^141] Indeed, in the wake of EPA’s 2001 determination, the


[^141]: See id. at 1317, 1319, 1320 (“these considerations ... would not signify if Congress or EPA had clearly spoken to the issue of groundwater coverage.”).

The current rulemaking does not alter EPA’s longstanding and consistent interpretation. The agencies should acknowledge that fact in their response to comments on the Proposed Definition.

**B. EPA and the Corps Should Not Categorically Exclude All Groundwater from the Definition of Waters of the United States.**

The agencies’ proposal to include language in the regulation categorically excluding groundwater from the definition of waters of the United States is scientifically and legal unsound. Many SAB panelists questioned this exclusion.

For example:

- Dr. David Allan questions the exclusion of “Groundwater, including groundwater drained through subsurface drainage systems” because “an important pathway for some nutrients and contaminants is via subsurface drainage systems to ditches that may not have perennial flow, but which may deliver much of the nonpoint runoff to downstream waters.” Dr. Allan concluded that “this exclusion is a concern, and should be recognized as such.”\footnote{Member Comments, *supra* note 72, compilation of comments of members at 14.}

- Likewise Dr. Robert Brooks stated that this exclusion “seems ill-advised because of the likely connectivity of surface flows into features such as karst sinkholes, with a potential to contaminate groundwater aquifers used for human water supplies, plus the
possibility of reconnections to surface water a reasonable distance away.”

- And following a lengthy analysis, Dr. Kenneth Kolm concluded: “In no cases should groundwater that is shown to be connected to ‘waters of the US’ be exempt.”

Courts have also agreed that groundwater can, and in some circumstances should, itself, be considered waters of the United States. For example, in the Hawai’i Wildlife Fund v. County of Maui case cited above, the court held that “liability arises even if the groundwater under the [discharging facility] is not itself protected by the Clean Water Act, as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water.” However, the court went on to note:

That is not to say that groundwater can never be regulated under the Healdsburg test [i.e., under the Ninth Circuit’s decision in N. Cal. River Watch v. City of Healdsburg, which applied Justice Kennedy’s concurrence in Rapanos to find CWA coverage based on a subsurface connection]. An aquifer with a substantial nexus with navigable-in-fact water may itself be protected under the Clean Water Act even if it is not necessarily a conduit for pollutants.

The agencies’ proposed categorical exclusion of groundwater will leave ecologically important waters unprotected. The groundwater exclusions are scientifically and legally indefensible. Given that the proposed rule provides that a significant nexus between two surface waters can be demonstrated on the basis of a subsurface hydrologic connection, it makes no sense to categorically exclude

\[144\] Id. at 17.
\[145\] Id. at 49.
\[147\] Id. at *45.
all groundwater, including the very same groundwater that forms the hydrologic connection between the two surface waters and establishes that significant nexus. Instead, EPA and the Corps should include groundwater as a subcategory of “other waters,” and leave its jurisdictional status to be determined on a case-by-case basis.

VIII. CATEGORICAL INCLUSION OF ADDITIONAL WATERS

The agencies requested comment on whether it should categorically include or exclude prairie potholes, vernal pools, Delmarva and Carolina bays, pocosins and playas, in the definition of “waters of the United States.” These waters should be categorically included within the definition because they either alone or in the aggregate have significant impacts on the quality of the nation’s water as demonstrated by the Connectivity Report and individual SAB member comments.148

As noted in the Connectivity Report notes, when considered in the aggregate and from a biological perspective, waters that appear isolated on the landscape are not isolated at all from a biological and hydrological perspective.149 As noted by SAB member Dr. Sullivan, “the science is currently available (partially summarized starting 22250) to demonstrate that sufficient connectivity exists without a case-specific analysis for certain subcategories of “other waters” (22216) (e.g. prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, western vernal pools). However, I do not believe that the science is sufficiently developed to support a determination to exclude any groups of ‘other waters’ (or subcategories thereof, e.g., Great Plains playa lakes) from jurisdictional status at this time in spite of the resource-intensive nature of a case-specific analytical approach.”150

148 With the one small exception of playas where the experts conclude that the science is not adequately developed but that it should simply mean that they be decided on a case-by-case basis, not categorically excluded. See Member Comments, supra note 72, Sullivan at 88; Connectivity Report supra note 3.

149 Connectivity Report, supra note 3, at 1-11 and 1-12.

150 Member Comments, supra note 72, Dr. Mazeika Sullivan at 88.
With regard to pocosins, “seventy percent of the nation’s pocosins are found in North Carolina, and they comprise approximately 50 percent of the State’s freshwater wetlands . . .” and these pocosins:

- Serve as the last refuge for many upland and floodplain species requiring large blocks of habitat, especially area-sensitive, forest-interior birds and the black bear;

- Provide important habitat for four federally-listed endangered species and one federally-listed threatened species. Two other State-listed endangered species are also found there;

- Stabilize estuaries by controlling the rate of freshwater flow thereby regulating salinity. Much of the State’s $63 million commercial fishery depends on this estuarine regime;

- Contain 6 National Wildlife Refuges, 1 national and 2 State forests, 7 State parks, 5 State game lands, and 2 State natural areas. About 18 percent is owned by Federal and State forestry agencies.\footnote{151}

By 1993, Only 695,000 acres (31 percent) of North Carolina’s original 2.5 million acres of pocosins remained in their natural state resulting in fragmentation of wildlife habitat and removal of pollutant filtering capacity.\footnote{152} The U.S. Department of Interior describes the impact of pocosin alteration as follows:

The remaining "islands" support less species diversity in fewer numbers. Thousands of contiguous acres are required for forest interior bird species and the black bear to survive. Drainage systems


\footnote{152}{Id.}
interrupt the sheetflow that moves slowly across the wetland surface. Under natural conditions the runoff rises slowly after storms, often peaking several days after the rain. This process modulates the flow of water and controls the salinity of receiving waters. Nutrients, pollutants, and silt from agricultural runoff are filtered, as well. Once [agricultural] drainage is installed, peak and annual flows increase, and pulses of freshwater containing increased loads of chemicals and sediments are discharged into streams, marshes, and shallow estuarine nursery areas. Over 90 percent of North Carolina’s commercial fish harvest depends on the estuaries. Comparisons show that unaltered areas maintained stable salinity, while areas which received drainage from ditched pocosins and non-alluvial swamp forests had salinity which varied by 100 percent over short periods of time. The altered areas produced fewer shrimp, finfish, and oysters. Other studies have linked agricultural drainage to excessive algal blooms and food chain disruptions. Studies of the Chowan River, which flows into Albemarle Sound, have linked increased nutrient loads from agricultural drainage and point source discharges to excessive algae blooms, subsequent food chain disruptions, and red sore disease problems. In 1976, about 95 percent of the white perch and half of the commercial fish caught in Albemarle Sound was discarded due to lesions.\textsuperscript{153}

Pocosins occur in the southeastern Coastal Plain of the U.S. from Virginia to north Florida and

\ldots are often found adjacent to estuaries and have surface hydrologic connections that are linked to the regional water quality and salinity gradients found in estuarine areas along the southeastern coast. This hydrologic connection, combine with the vast continuous expanses of pocosins on the landscape, suggests that they are connected to regulated tributary waters of the United States. In addition, a survey of U.S. Army Corps of Engineers personnel in North Carolina indicates that most pocosins are considered hydrologically connected to

\textsuperscript{153} Id.
regional water supplies since they are the source of water flow on the landscape where they dominate. 154

IX. WASTE TREATMENT SYSTEMS SHOULD NOT BE CATEGORICALLY EXCLUDED FROM THE DEFINITION

A. History of the Waste Treatment System Exclusion

On May 19, 1980, EPA issued a final rule that made clear that waste treatment systems created by impounding "waters of the United States" are not exempt from regulation under the CWA. 155 Specifically, the rule stated:

[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. 156

In response to industry pressure, however, EPA suspended the final sentence of the regulation, which states that “[t]he exclusion applies only to manmade bodies of water which neither were original created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States,” just a few months later. 157


155 45 FR 33,290, 33,424 (May 19, 1980)

156 Id. at 33,424 (emphasis added).

EPA expressly cited the utility industry's concern that they would now have to obtain an NPDES permit to discharge into existing coal ash dumps that were created by impounding “waters of the United States” as part of its justification for suspending this part of the rule. At that time, EPA claimed that this was a temporary suspension and promised to “promptly [ ] develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA [stated] it w[ould] amend the rule, or terminate the suspension.”

EPA never followed through on its promise to address this important issue, allow the public an opportunity to provide comments, and finalize a new regulation or terminate the suspension. EPA, along with the Corps, is now proposing to formally codify the waste treatment system exclusion without providing notice and comment. In the current proposed rule, the agencies state that they are not accepting public comment on the waste treatment exclusion because they maintain they have proposed no changes to the waste treatment system exclusion. Instead of making good on the promise it made over thirty years ago, EPA is now attempting to evade compliance with the CWA and Administrative Procedures Act by bootstrapping the impermissible exclusion onto the “waters of the United States” rule without notice and comment.

B. Coal Ash Surface Impoundments

This exclusion has had and will continue to have serious consequences for our nation’s waters if the agencies finalize the proposed waste treatment exemption. For example, it has been a common practice for the utility industry to impound streams and rivers to create waste dumps for coal ash and other wastes

\[158\] Id.

\[159\] Id.


\[161\] 79 Fed. Reg. at 22,190.

\[162\] Coal combustion waste or coal ash are wastes “from the combustion of coal in power plants and captured by pollution control technologies, like scrubbers.” U.S. Envtl. Prot. Agency, Coal
associated with coal-fired power plants. In fact, EPA cited the utility industry’s concern about coal ash impoundments as one of the primary reasons EPA suspended the sentence making clear that permits are required for discharges into a waste treatment system created by impounding waters of the United States.163 Coal-fired power plants generate millions of gallons of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. This pollution is discharged directly from the power plant; flows from old, unlined surface impoundments or “ponds” that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge; and seeps from unlined ponds and landfills into ground and surface waters. EPA estimates that at least $5.5 \text{ billion pounds}$ of pollution are released into the environment by coal-burning power plants every year.164 Coal-burning power plants are responsible for at least 50 to 60 percent of the toxic pollutants discharged into waters of the U.S—more than the other nine top polluting industries combined.165

Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Due to the bio-accumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems. In short, coal plant water pollution has serious public health consequences and causes lasting harm to the environment. According to EPA, power plant pollution has caused over 160 water bodies not to meet state water quality standards, prompted government agencies to issue fish consumption


165 Id. at 3-13.
advisories for 185 waters, and degraded 399 water bodies across the country that serve as public drinking water supplies.166

Utilities in other states have also created coal ash dumps by impounding or burying a waters of the United States. For example, the FirstEnergy Little Blue Run impoundment in Pennsylvania, the nation’s largest coal ash impoundment, was created by damming Little Blue Run stream. The Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment and recently ordered a $169 million dollar cleanup and closure of Little Blue Run.167

Although EPA claims that the waste treatment exclusion is not a wholesale exemption from compliance with the CWA because they interpret it to apply only to impoundments that had been in existence for many years at the time it first suspended the final sentence of the definition, the plain language of the regulation includes no grandfather provisions or other limiting language related to the age of the impoundment. Further, EPA appears to be backtracking on this interpretation to allow new impoundments to claim the exemption so long as they obtain a § 404 permit. In short, EPA is proposing to codify a regulation that creates a gaping hole in the CWA and authorizes utilities and industrial operators to use our nation’s waters as their own private sewers—all while refusing to follow notice and comment requirements of the CWA and the Administrative Procedures Act.

C. EPA is prohibited from codifying the waste treatment exclusion without providing notice and an opportunity for public comment.

EPA may not codify the waste treatment exclusion without following notice and comment requirements. The CWA requires that “[p]ublic participation in the

166 http://water.epa.gov/scitech/wastetech/guide/steam-electric/proposed.cfm.

development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. Under the Administrative Procedures Act, EPA must provide for public participation for agency actions that create law (i.e. legislative rules or substantive rules). Courts at all levels have stressed the importance of public participation in rulemaking, and the D.C. Circuit has determined that notice and comment works “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” Yet thirty-four years after promising to promptly publish a proposed rule setting forth a revised definition of “waste treatment system,” EPA and the Corps are attempting to circumvent the Administrative Procedures Act and CWA Act by codifying the illegal waste treatment system exclusion without notice and comment rulemaking.

1. EPA’s proposed waste treatment system exclusion and codification of the suspension is a legislative rule.

There can be no doubt that the proposed waste treatment system exclusion and codification of the suspension is a legislative rule subject to notice and comment under the CWA and the Administrative Procedures Act. “To determine whether a regulatory action constitutes promulgation of a regulation, [courts] look to three factors: (1) the Agency’s own characterization of the action; (2) whether the action was published in the Federal Register . . . ; and (3) whether the action has binding effects on private parties or on the agency.”

168 33 U.S.C. § 1251(e).

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


171 Iowa League of Cities v. EPA, 711 F.3d 844, 862 (8th Cir. 2013) (citing Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999)).
In the proposed rule, EPA expressly identified the action as a regulation (as opposed to an interpretive rule or general statement of policy). The action was published in the Federal Register. Finally, the action has had and will continue to have a binding effect on both dischargers and the EPA. Industrial operators will arguably have a right to discharge into waste treatment impoundments created by impounding waters of the United States without a NPDES permit so long as the impoundments are “designed to meet the requirements of the Clean Water Act.” Accordingly, the regulation will confer rights or obligations on private parties and the agency. Thus, the waste treatment system exclusion is subject to public review and comment.

Notably, EPA must follow public notice and comment procedures under the Administrative Procedures Act not only when it enacts a rule, but when it repeals a rule as well. As discussed previously, in spite of its promise, EPA has never provided notice and comment on the suspension even though the suspension of the last sentence alters the definition and is akin to an actual repeal of a portion of the final rule. Thus, EPA must follow public participation requirements for the waste treatment system exclusion.

2. The waste treatment system exclusion is not an interpretative rule or general statement of policy exempt from notice and comment requirements.

172 79 Fed. Reg. at 22,217 (“The agencies’ longstanding regulations exclude waste treatment systems designed to meet the requirements of the CWA . . . .”).

173 Id.at 22,188.

174 Id. at 22,268.


The proposed regulation is not an interpretative rule or general statement of policy exempt from notice and comment requirements. First, the regulation is not an interpretative rule because it grants substantive rights to private parties. As discussed, the exclusion arguably works to allow persons to discharge into waters of the United States without a permit so long as it is a waste treatment system designed to meet the requirements of the CWA.

Further, the mere fact that an agency action amends an existing legislative rule may disqualify it from qualification as an interpretative rule. EPA’s suspension of the limits to the waste treatment system exception, whether “temporarily” on July 21, 1980 or again on April 21, 2014, amends the legislative rule finalized on July 18, 1980. Thus, because it amends an existing legislative rule, the waste treatment system exclusion cannot be an interpretative rule.

EPA knows how to classify an action as an interpretative rule when it intends to do so. For example, in the current proposed rule, EPA included a section on “discharges of dredged or fill material associated with certain agricultural conservation practices . . .” and identified it as an interpretative rule. EPA is unequivocal that it intends this latter section to be an interpretive rule rather than a substantive rule—mentioning “interpretive rule” five times over the course of a single paragraph. EPA never suggests the waste treatment system exemption is an interpretative rule in the proposal.

Second, the proposed regulation is not a general statement of policy. General statements of policy are “statements issued by an agency to advise the public

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177 See 5 U.S.C. § 553(b)(3)(A) (stating that notice and comment is not required for interpretative rules or a general statement of policy).

178 See, e.g., Brown Exp., Inc. v. U.S., 607 F.2d 695,700 (5th Cir. 1979) (noting that rules that grant substantive rights are not interpretative rules).


180 Gunderson v. Hood, 268 F.3d 1149, 1154 (9th Cir. 2001) (“If a rule is inconsistent with or amends an existing legislative rule, then it cannot be interpretive.”).

prospectively of the manner in which the agency proposes to exercise a discretionary power.\textsuperscript{182} In this case, it is clear the definition of the waste treatment system definition is not a general statement of policy. In conclusion, the waste treatment system exclusion is not an interpretative rule or general statement of policy.

For all of these reasons, EPA must follow the public participation requirements set forth in the CWA and Administrative Procedures Act. EPA cannot bootstrap a procedurally deficient regulation into the current rulemaking and evade public participation requirements.

\textbf{D. EPA does not have the authority to exempt waters of the United States from coverage under the Clean Water Act.}

The waste treatment system exemption is in direct conflict with the CWA and fails Step One and Step Two of the \textit{Chevron} test. The plain language of the proposed waste treatment system exclusion is that a waste treatment system designed to meet the requirements of the Clean Water Act is not a water of the United States even if it is created by impounding waters of the United States even if it is created by impounding waters of the United States.\textsuperscript{183} The proposed regulation states that “notwithstanding whether they meet the terms of paragraphs (a)(1) through (a)(3) of this definition,” “[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.”\textsuperscript{184} Without the second part of the waste treatment system definition—“This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.” – the broad exclusion for waste treatment systems from CWA jurisdiction is directly contrary to the CWA and decades of law holding that once a body of water is a waters of the United States, it is always a waters of the United States.

\textsuperscript{182} \textit{Brown}, 607 F.2d at 701 (citing U.S. Department of Justice, Attorney General’s Manual on the Administrative Procedure Act 30 n. 3 (1947)).

\textsuperscript{183} See 79 Fed. Reg. at 22,268.

\textsuperscript{184} \textit{Id.}
1. It is unambiguous that EPA lacks the authority to exclude “waters of the United States” from coverage under the Clean Water Act.

While “waters of the United States” itself may be an ambiguous term that EPA is charged with promulgating regulations to define, it is clear from legislative history and decades of case law that Congress did not intend for EPA to allow our nation’s rivers, streams, and lakes to be used as private sewers for the utility industry and other polluters. Under Chevron v. Natural Res. Def. Council, courts examine “the intent of Congress” in creating the statute.\textsuperscript{185} If the intent is clear, a court “gives effect to the unambiguously expressed intent of Congress.” \textsuperscript{186} If, however, the statute is ambiguous, a court will defer to an agency’s interpretation of the statute if it is a “permissible construction.”\textsuperscript{187}

Here, senate reports speak directly to this issue and the general common law rule prior to the enactment of the CWA was that a body of water forever remains a waters of the United States once it has been identified as a waters of the United States.\textsuperscript{188} Thus, the waste treatment system exclusion fails Step One.

2. The waste treatment system exclusion is directly contrary to the statute.

There is no doubt that Congress intended the broadest possible reach of the CWA. The original conferees stated that “the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative

\textsuperscript{185} 467 U.S. 837, 842 (1984).

\textsuperscript{186} Id. at 842-43.

\textsuperscript{187} Id. at 843.

\textsuperscript{188} See, e.g., United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408 (1940) (“When once found to be navigable, a waterway remains so.”).
purposes.”\textsuperscript{189} The Senate Committee on Public Works, in approving the Federal Water Pollution Control Act Amendments of 1971 explicitly found that “[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable.”\textsuperscript{190} Several years later, another Senate Report stated that the CWA “stipulated that the Nation’s fresh and marine waters would not be an element of the waste treatment process. That continues to be national policy.”\textsuperscript{191} There appear to be no contrary statements in the legislative history.

3. **The waste treatment system exclusion is directly contrary to decades of judicial decisions reviewing the scope of “waters of the United States.”**

In addition to legislative history that makes clear that the waste treatment system exclusion is contrary to Congressional intent, it is settled law that once a body of water is found to be waters of the United States, it always remains waters of the United States.\textsuperscript{192}

While some of these decisions examined the term “navigable waters” as opposed to “waters of the United States,” the Clean Water Act defines “navigable waters” as “the waters of the United States . . . .”\textsuperscript{193} “[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In

\begin{footnotesize}
\begin{enumerate}
\item See Scott Snyder, Note, The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA’s Definition of “Waters of the United States”, 21 N.Y.U. Envtl. L.J. 504, 522-23 (2014) (providing overview of federal cases prior to the enactment of the Clean Water Act holding that once a body of water has been classified as a waters of the U.S., it remains a waters of the U.S. forever).
\item 33 U.S.C. § 1362(7).
\end{enumerate}
\end{footnotesize}
such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.”194

In this case, there is no evidence Congress intended to depart from well settled law to allow EPA to remove bodies of water that fall squarely within the definition of “waters of the United States” from the reach of the CWA, especially where those “waters of the United States” are impounded to create a private dump for a utility or other industrial operation.195 Further, it is difficult to justify a claim that navigable waters retain a protected status forever, while waters of the United States – by definition also “navigable waters” – can be excluded from protection when they are impounded for the purposes of creating a dump.196

E. The waste treatment system exclusion is arbitrary, capricious, and directly contrary to the Clean Water Act.

Even if a court did find that the issue is ambiguous, EPA’s charge to define “waters of the United States” is not without bounds. EPA’s definition of “waters of the United States” is permissible so long as it is not “arbitrary, capricious, or manifestly contrary to the statute.”197 In this case, the broad waste treatment system exclusion is directly contrary to the statute, and is arbitrary and capricious because the legislative history and decades of common law make clear that EPA cannot carve out “waters of the United States” from the scope of the CWA to create waste disposal sites, which is precisely what the waste treatment system exclusion does.198


195 Id. at 523.

196 Id. at 522-23.


198 See discussion infra.
F. EPA’s interpretation of the proposed waste treatment exclusion does not make it a permissible construction of the Clean Water Act.

EPA has asserted that the waste treatment system exemption is not really as broad as the plain language suggests because it interprets the regulation to exclude only older waste treatment systems constructed from waters of the United States. Generally, an agency’s interpretation of its own regulations is subject to judicial deference unless it is “plainly erroneous or inconsistent with the regulation.” In this case, the agency’s interpretation conflicts with the plain language of the regulation, and EPA has also advanced a second interpretation that does exclude newly created waste treatment systems in some circumstances.

When it first finalized the waste treatment system definition in 1980, EPA stated that Congress did not intend for the CWA to exempt waste treatment systems created by impounding waters of the United States. Specifically, EPA said:

\[\text{because CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting interstate or foreign commerce.}\]

Even when the agency suspended the final sentence of the regulation, it reiterated its purposes, noting that “[t]he Agency’s purpose in the new last sentence was to ensure that dischargers did not escape treatment requirement by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands.”


\[200\] 45 Fed. Reg. at 33,298.

\[201\] Id.

After promulgating a rule that reflected the intent of Congress that our nation’s rivers, lakes, and streams not be used as private dumps and then backtracking, EPA came up with a new spin on how to treat coal ash and other industrial impoundments instead of following through on its promise to revisit the suspension. In a 1986 memorandum, EPA stated that it evaluates what is an exempt waste treatment system on a case-by-case basis, treating “newly created impoundments of waters of the U.S. as ‘waters of the U.S.,’ not as ‘waste treatment systems designed to meet the requirements of the CWA,’ whereas impoundments of ‘waters of the U.S.’ that have existed for many years and had been issued NPDES permits for discharges from such impoundments as ‘wastewater treatment systems designed to meet the requirements of the CWA’ and therefore are not ‘waters of the U.S.’”

EPA states that, in fact, it suspended the last sentence of the waste treatment system in order to allow for such case-by-case decisions. EPA has echoed the interpretation articulated in the 1986 memorandum in various scenarios.

The fact of the matter is that the proposed waste treatment exemption does not include any language limiting the exclusion to treatment systems created by impounding waters of the United States that have been in existence “for many years” or for any other time period. Further, it is illogical—and courts have held as much—to suggest that a waste impoundment created prior to the CWA has

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203 Memo from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, at 7 (Apr. 2, 1986).

204 Id. (noting that EPA suspended the sentence in order to “restor[e] the ambiguity of the earlier regulations, so that each case must be decided on its own facts”). This is, of course, contrary to the purpose EPA provided when it suspended the sentence. 45 Fed. Reg. at 48,620 (noting that EPA would re-examine the waste treatment system definition and “promptly . . . develop a revised definition and to publish it as a proposed rule for public comment”).

been designed to meet the requirements of the CWA. In any event, the plain language of the proposed regulation arguably exempts all waste treatment systems designed to meet the requirements of the CWA created by impounding waters of the United States regardless of when the treatment systems are constructed.

In fact, EPA and the Corps have attempted to reverse this interpretation in recent years to exclude newly created waste treatment systems from “waters of the United States.” See, e.g., Jon Devine et al., The Intended Scope of the Clean Water Act, 41 Envtl. L. Rep. News & Analysis 11,118, 11,125 (2011) (noting that the agencies have advanced this broader interpretation in a 1998 Federal Register notice, a 2000 guidance document, and by the Corps in recent litigation. “Under the agencies’ revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is covered by a § 404 permit; that way, the system is ‘designed to meet the requirements of the Act,’ as required by the regulation.”

EPA’s interpretation of the regulation does not make the proposed waste treatment system exemption a permissible construction of the CWA. EPA’s interpretation is inconsistent with the language of the regulation itself, and EPA has advanced a broader interpretation that does exclude newly created impoundments. For all these reasons, the waste treatment system exclusion is illegal and fails Step One and Step Two of the Chevron test.

For all of the reasons set forth above, Commenters strongly urge EPA and the Corps to eliminate the exclusion or publish a revised definition of waste treatment system that complies with the CWA. At a minimum, EPA must provide full notice and comment rulemaking for the proposed waste treatment system exclusion.

See, e.g., California Sportfishing Prot. Alliance v. Cal. Ammonia Co., 2007 WL 2738477, *6 (E.D. Cal 2007) (noting that the fact that a waste treatment impoundment is created prior to the Clean Water Act is evidence that it is not “designed to meet the requirements of the Clean Water Act”).


Id.
Thank you for the opportunity to comment on this important proposal.

Sincerely,

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