August 13, 2018

Submitted via www.regulations.gov

The Honorable Andrew Wheeler
Acting Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
108 Army Pentagon
Washington, DC 20310

EPA-HQ-OW-2017-0203

Re: Definition of "Waters of the United States"—Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018)

Dear Acting Administrator Wheeler and Assistant Secretary James:

The undersigned agricultural organizations appreciate the opportunity to provide additional comments on the U.S. Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers' (Corps) supplemental notice of proposed rulemaking, "Definition of 'Waters of the United States' – Recodification of Existing Rule," published at 83 Fed. Reg. 32,227 on July 12, 2018. Most of the undersigned organizations previously submitted comments in support of the Agencies' July 27, 2017, proposal[1] to repeal the 2015 rule defining "waters of the United States"[2] (hereinafter, "2015 Rule"). In these comments, we provide additional detailed reasons why we believe the Agencies should finalize their pending proposal to permanently repeal the 2015 Rule.

The undersigned organizations, or their members, own, operate, or have an interest in lands and facilities that produce or contribute to the production of the row crops, [forests,] livestock, and poultry that provide safe and affordable food, fiber, and fuel to Americans all across the United States. We and our members represent, own and operate facilities that are water-dependent enterprises. For that reason, we have a strong interest in protecting and restoring the Nation's wetlands and waters. Given the broad array of potentially jurisdictional water features that exist on the Nation's farm, ranch, and [forest] lands, clarity, predictability, and consistency is of the essence. Farmers, ranchers, and [foresters] need to know what features on their lands are subject to federal jurisdiction under the Clean Water Act (CWA) and, by extension, whether their day-to-day activities are lawful.

[1] 82 Fed. Reg. 34, 899 (July 27, 2017).
[2] 80 Fed. Reg. 37,054 (June 29, 2015).

The undersigned organizations remain concerned that the 2015 Rule expanded CWA jurisdiction well beyond the limits that Congress established, as interpreted and recognized by the Supreme Court. This unprecedented expansion readjusted the federal-state balance and, contrary to Congress's stated policy in the CWA, failed to recognize, preserve, and protect the states' traditional and primary authority over land and water use. Equally important, the 2015 Rule fell woefully short of meeting its stated objective of providing clarity and certainty regarding the scope of the CWA. Just the opposite, the rule is so unclear in its scope as to be unconstitutional. In particular, the Rule's definitions and discussions of certain key terms and concepts are vague in a way that violates the Fifth Amendment's Due Process Clause, while its purported scope improperly treads on the States' traditional prerogatives and violates the Commerce Clause because, to put it simply, there is nothing commercial about it.

These are not the only reasons for repealing the 2015 Rule, but they are more than sufficient to justify doing so. If the Agencies repeal the Rule, it will be replaced by the regulatory definitions that preceded it. Those preexisting regulations are far from perfect, and the undersigned organizations urge the Agencies to continue to engage stakeholders and develop a workable definition of WOTUS—one that not only respects the limits Congress placed on the CWA's scope, but that also takes account of the realities facing ordinary landowners. As an interim measure, however, reinstatement of the pre-2015 regulatory framework for defining "waters of the United States" is certainly preferable to the confusion and overreach that would result should the 2015 Rule become applicable in any states.

I. Legal Background

The CWA establishes multiple programs that, together, are designed to achieve the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] Among other things, the Act envisions that states will address water pollution through a variety of programs, funding, grants, research, training and many other measures, with differing levels of federal involvement. One of the Act's main provisions is Section 301(a), which prohibits the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source," except "in compliance with" other provisions of the Act.[4] Notably, this discharge prohibition and the regulatory permitting programs in the Act (*e.g.*, Sections 402 and 404) apply only to discharge[s] of pollutants"[5] to "navigable waters,"[6] as opposed to all "pollution"[7] of the "Nation's waters." That is not to say the Act leaves the rest of the nation's waters unprotected. Rather, Congress expressly "recognize[d]" and sought to "preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution" and "plan the development and use" of "land and water resources"[8] and thus, Congress left States and localities responsible for protecting all waters (including groundwater) and wetlands that are not "navigable waters." The distinction between navigable waters and the rest of the nation's waters is critically important: every expansion of federal

[3] 33 U.S.C. 1251(a).
[4] *Id.* §§ 1311(a), 1362(12).
[5] *Id.* § 1362(12).
[6] *Id.* § 1362(7).
[7] *Id.* § 1362(19).
[8] *Id.* § 1251(b).

jurisdiction—*e.g.*, by broadly interpreting the term "navigable waters" in pursuit of the 101(a) objective—readjusts the federal-state balance that Congress struck in the Act.[9]

In 1977, the Corps defined "waters of the United States" to include not only traditional navigable waters, but also "adjacent wetlands" and "[a]ll other waters" the "degradation or destruction of which could affect interstate commerce."[10] Even though the text of the regulations remained largely unchanged for over three decades, the Agencies' interpretation and application of those regulations steadily expanded over time. On three separate occasions, the Supreme Court had to weigh in to address the government's efforts to bring more waters under federal jurisdiction.

First, in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Court addressed the question of whether non-navigable wetlands constitute "waters of the United States" where they are "adjacent to" navigable-in-fact waters and "inseparably bound up with" them because of their "significant effects on water quality and the aquatic ecosystem."[11] Finding that Congress intended the CWA "to regulate at least *some* waters that would not be deemed 'navigable,'" the Court held that it is "a permissible interpretation of the Act" to conclude that "a wetland that *actually abuts on* a navigable waterway" fits within the "definition of 'waters of the United States.'"[12] Notably, the Court's holding was based heavily on the fact that Congress unquestionably acquiesced to, and approved of, the Corps' regulations interpreting the CWA to encompass wetlands adjacent to navigable waters.[13]

Second, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court struck down the Migratory Bird Rule, which the Agencies used to assert jurisdiction over various features that bore little or no relation to traditional navigable waters. In that case, the Corps claimed jurisdiction over isolated "seasonally ponded, abandoned gravel mining depressions" because they were "used as habitat by [migratory] birds."[14] The Supreme Court explained that, "to rule for [the agency], we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water," but "the text of the statute will not allow this."[15] To hold otherwise would effectively read the term "navigable" out of the Act and strip it of any independent significance.[16] The *SWANCC* court also held that allowing the government to "claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use," all without anything "approaching a clear statement from Congress that it intended" such a result."[17] "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to

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[9] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001) (*SWANCC*).
[10] 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).
[11] 474 U.S. at 131-135 & n.9.
[12] *Id*. at 133, 135 (emphasis added).
[13] *Id*. at 135-39 (discussing 1977 CWA amendments and legislative history).
[14] 531 U.S. at 162-65 (quoting 51 Fed. Reg. 41,217 (Nov. 13, 1986)).
[15] *SWANCC*, 531 U.S. at 168.
[16] *See id.* at 171-72.
[17] *Id.* at 174.

'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."[18]

Finally, in *Rapanos*, the Court dealt with the Corps' assertions of jurisdiction over sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water."[19] The Corps viewed those sites as adjacent wetlands because they were "near ditches or man-made drains that eventually empty into traditional navigable waters."[20] Justice Scalia, writing for a four-Justice plurality, rejected the Corps' position, holding that "waters of the United States" include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[21] By treating "ephemeral streams" and "dry arroyos" as jurisdictional, the agencies had stretched the text of the CWA "beyond parody" to mean "'Land is Waters.'"[22] Moreover, under the plurality opinion, wetlands are jurisdictional based on adjacency "*only* [if they have] a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[23] "[A]n intermittent, physically remote connection" to navigable waters is not enough under either *Riverside Bayview* or *SWANCC*.[24]

Justice Kennedy concurred in the judgment in *Rapanos*. In his opinion, "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."[25] When "wetlands' effects on water quality [of traditional navigable waters] are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[26] While Justice Kennedy left open the possibility that this test "*may*" allow for the assertion of jurisdiction over a wetland abutting a major tributary to a traditional navigable water, he categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his test for significant nexus.[27] He further suggested that any agency regulation identifying which tributaries are jurisdictional would need to rest on considerations including "volume of flow" and "proximity to navigable waters" "significant enough" to provide "assurance" that they and "wetlands adjacent to them" perform "important functions for an aquatic system incorporating navigable waters."[28]

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[18] *Id.* (quoting 33 U.S.C. § 1251(b)).
[19] 547 U.S. at 720-21.
[20] *Id.* at 729.
[21] *Rapanos*, 547 U.S. at 732, 739.
[22] *Id.* at 734.
[23] *Id.* at 742.
[24] *Id.*
[25] *Id.* at 779.
[26] *Id*. at 780.
[27] *Id*. at 781; *see also id.* at 778 (Act does not reach wetlands alongside "a ditch or drain" that is "remote or insubstantial" just because it "eventually may flow into traditional navigable waters").
[28] *Id.* at 781.

II. The Agencies Have Ample Legal Justification for Repealing the 2015 Rule.

The Agencies are rightly concerned that the "2015 Rule lacks sufficient statutory basis."[29] As discussed in the supplemental notice, the 2015 Rule stretches the "significant nexus" concept so far as to be inconsistent with Justice Kennedy's concurring opinion in *Rapanos*, and that fundamental defect justifies repeal given that "significant nexus" is the backbone of the 2015 Rule's expansion of jurisdiction over tributaries (as newly defined), adjacent waters and wetlands, and various other waters.[30] But that is just the tip of the iceberg. As explained in the following sections, there are many more reasons why the Agencies should repeal the 2015 Rule.

A. The 2015 Rule Improperly Treats Justice Kennedy's Concurring Opinion in *Rapanos* as Controlling.

The 2015 Rule characterized Justice Kennedy's "significant nexus" test for what constitutes jurisdictional wetlands "as the touchstone" for CWA jurisdiction and then applied it "to other categories of water bodies."[31] But Justice Kennedy's opinion, which no other justice joined, was not the holding of *Rapanos*. Because the 2015 Rule is based explicitly on that opinion, it is unlawful and must be repealed.

Courts have struggled with how to interpret the 4-1-4 decision in *Rapanos* given that no rationale supporting the judgment enjoyed support from a majority of the Justices. The Supreme Court's decision in *Marks v. United States* provides some guidance on interpreting fractured decisions such as *Rapanos*.[32] There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[33] But this holding has been of limited help in interpreting *Rapanos*, because neither the plurality opinion nor Justice Kennedy's concurrence is a logical subset of the other.[34]

Simply put, "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's views."[35] Faced with this dilemma, when crafting the 2015 Rule (or any future definition of "waters of the United States"), the Agencies had several options to choose from in determining the scope of the "waters of the United States":

Waters must satisfy both the plurality and Justice Kennedy's opinions. Under this approach, only those waters that satisfy both opinions would be jurisdictional because that is the

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[29] 83 Fed. Reg. at 32,238.
[30] *See id.* at 32,240-42.
[31] *See* 79 Fed. Reg. at 22,192.
[32] 430 U.S. 188 (1977).
[33] *Id.* at 193.
[34] *See United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009) (explaining how the search for the "narrowest opinion" in *Rapanos* that "relies on the least doctrinally far-reaching common ground" "breaks down" in the *Rapanos* context because neither opinion is a "logical subset" of the other); *see also Nichols v. United States* 511 U.S. 738, 745 (1994) (declining to apply *Marks* because "[a] number of Courts of Appeals have decided there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding").
[35] *Cundiff*, 555 F.3d at 210.

narrowest "position" taken by the opinions, read together, of the Justices who concurred in the judgment. *Rapanos* would therefore require that: (i) jurisdictional waters have a relatively permanent flow that reaches traditional navigable water; (ii) wetlands have a continuous surface connection to navigable waters; and (iii) the flow or connection must be sufficient in frequency, duration, and proximity to affect the chemical, physical, and biological integrity of covered waters.

Waters must satisfy points of agreement between the two opinions. The five Justices who concurred in the judgment in *Rapanos* shared the same view on some important issues. For instance, both opinions held that "the word 'navigable' in 'navigable waters [must] be given some importance."[36] Both opinions also agree that the term "navigable waters" encompasses some waters and wetlands that are not navigable-in-fact but that have a substantial connection to navigable waters.[37] Finally, both opinions agree that "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less the waters or "wetlands [that] lie alongside [such] a ditch or drain."[38] Under this approach, the foregoing are the controlling holdings of *Rapanos* that bind the Agencies.

Treat the majority opinions as persuasive authority. Under this approach, the plurality and Kennedy opinions would be deemed persuasive authority that must be considered in conjunction with other binding precedent such as *SWANCC* and *Riverside Bayview*. Neither the plurality nor the Kennedy opinion, by itself, would be deemed to have superseded any of the authoritative holdings in either of those earlier cases. Nor would either opinion be treated as controlling.

Had the Agencies taken any of these three approaches, the 2015 Rule would have been compatible with *Marks*. What the Agencies could not do, however, was to proclaim that waters that satisfy only Justice Kennedy's concurring opinion are jurisdictional. That opinion clearly is not the narrowest reading of the *Rapanos* majority opinions. Nor is it permissible to conclude that "waters of the United States" are those waters that meet either the plurality or the Kennedy opinion. Such a conclusion ignores the principle in *Marks* that the holding of the Supreme Court is the "position taken by those Members who concurred in the judgments on the narrowest grounds."[39] Because the 2015 Rule was based on the faulty legal premise that Justice Kennedy's opinion is the "touchstone" of jurisdiction, it must be repealed.

One final point deserves mention. Amidst all of the confusion over how to apply *Marks* to interpret the *Rapanos* decision, at least one thing is clear: dissenting opinions are not entitled to any weight. As the Supreme Court explained in *O'Dell v. Netherland*, *Marks* requires a court to identify "the narrowest grounds of decision among the Justices *whose votes were necessary to the judgment*."[40] Courts of appeals have similarly interpreted *Marks* to mean that dissenting opinions carry no precedential value. The Sixth Circuit explained that *Marks* "instruct[ed] lower

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[36] *Rapanos*, 547 U.S. at 778 (Kennedy); *id.* at 731 (plurality).
[37] *See* 547 U.S. at 739, 742 (plurality); *id.* at 784-85 (Kennedy).
[38] *Id.* at 781 (Kennedy); 733-34 (plurality).
[39] *Id.* at 193.
[40] 521 U.S. 151, 160 (1997) (emphasis added).

courts . . . to ignore dissents."[41] Likewise, the Ninth Circuit recently proclaimed that "the dissent that did not support the judgment is out."[42] And the Seventh Circuit cautioned that "under *Marks*, the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions."[43] To sum up, in the words of the D.C. Circuit sitting *en banc*,[44] courts cannot "combine a dissent with a concurrence to form a *Marks* majority."

Despite these holdings, the 2015 Rule improperly looked to the *Rapanos* dissent for support. For example, the Technical Support Document (at 51) makes no secret that the agencies looked "to the votes of the dissenting Justices" to stitch together "a majority view."[45] And to support its adoption of Justice Kennedy's "significant nexus" test over the plurality view, the final rule cites the *Rapanos* dissent as support for the notion that the Agencies were free to follow either the plurality or the concurring opinion.[46] For these reasons, the 2015 Rule's reliance on the *Rapanos* dissent was unlawful.

B. The 2015 Rule Exceeds the Agencies' CWA Authority and is Contrary to Supreme Court Precedent and Science.

1. The Rule reads the term "navigable" out of the CWA.

The CWA grants the Agencies jurisdiction over "navigable waters," which are defined as "the waters of the United States."[47] In *SWANCC*, the Supreme Court explained that "Congress' separate definitional use of the phrase 'waters of the United States' [does not] constitute[] a basis for reading the term 'navigable waters' out of the statute."[48] While the Court acknowledged its prior statement in *Riverside Bayview* that "the word 'navigable' in the statute" may have "limited effect," it clarified in *SWANCC* that the word "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[49] The Court also found nothing in the legislative history that "signifies that Congress intended to exert anything more than its commerce power over navigation."[50]

In *Rapanos*, both the plurality opinion and Justice Kennedy's concurrence again recognized the need to give the term "navigable" some effect.[51] Justice Kennedy, in particular, stated that "the word 'navigable'" must "be given some importance," and he emphasized that if jurisdiction over wetlands is to be based on a "significant nexus" test, the nexus must be to "navigable waters *in the traditional sense*."[52] For that reason, the CWA cannot be understood to

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[41] *Cundiff*, 555 F.3d at 208.
[42] *United States v. Robertson*, 875 F.3d 1281, 1292 (9th Cir. 2017).
[43] *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014).
[44] *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc).
[45] *See also* 79 Fed. Reg. at 22,260 (endorsing the dissent's view of adjacency).
[46] *See* 80 Fed. Reg. at 37,061.
[47] *See* 33 U.S.C. §§ 1311(a), 1362(12).
[48] 531 U.S. at 172.
[49] *Id.* at 172-73 (citing *Riverside Bayview*, 474 U.S. at 133).
[50] *Id.* at 168 n.3.
[51] 547 U.S. at 734-35 (plurality); *id.* at 778-79.
[52] *Id.* at 778-79.

"permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."[53]

The 2015 Rule flouts these important precedents. It asserts federal jurisdiction over a wide variety of normally dry land features (as "tributaries") and nearby isolated water features (as "adjacent" or case-by-case "significant nexus" waters). Such water features are not navigable in any sense of the word and cannot reasonably be so made. And many of the features that would be jurisdictional under the rule bear no relationship to any navigable water and do not abut or contribute flow to any navigable water. By subjecting these sorts of water features to federal jurisdiction, the 2015 Rule impermissibly reads the term "navigable" out of the CWA.

Perhaps the most obvious examples of how the 2015 Rule ignores the statutory text are the "seasonally ponded, abandoned gravel mining depressions" that were at issue in *SWANCC*.[54] A majority of the Supreme Court agreed that those "nonnavigable, isolated, intrastate waters" are not within the scope of federal jurisdiction under the CWA;[55] yet the very same features could be jurisdictional under the 2015 Rule. Those depressions are within 4,000 feet of Poplar Creek, a tributary to the navigable Fox River. And there can be little doubt that the Corps would find the existence of a significant nexus to the Fox River because the depressions retain water and may have the ability to store runoff or contribute other ecological functions in the watershed.[56] The 2015 Rule's expansive view of "significant nexus" would therefore improperly gut the holding in *SWANCC* by doing exactly what the Court held was unlawful: read the term "navigable" out of the text and open the door to a significant impingement upon the States' traditional and primary authority over land and water use without a clear statement authorizing such a readjustment of the federal-state balance.[57] Thus, the Agencies must repeal the rule.

2. <u>The 2015 Rule's overbroad definition of "tributaries" finds no support in law or science.</u>

The 2015 Rule introduced a new definition of "tributary" that was among the most expansive and problematic terms in the rule. The rule defined "tributary" to mean any feature contributing any minimal amount of flow to a category (1)-(3) water, "either directly or through another water," and "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark."[58] Under this definition, ephemeral drainages, minor creek beds, and other features that are dry for months, years, or even decades can be jurisdictional so long as they exhibit physical indicators of a bed, banks, and an ordinary high water mark. Features can be jurisdictional as tributaries even if they pass "through any number of [non-jurisdictional] downstream waters" or natural or man-made physical interruptions (*e.g.*, culverts, dams, debris

[53] *Id.* at 778.
[54] 531 U.S. at 164.
[55] *Id.* at 169; *see also Rapanos*, 547 U.S. at 767 (Kennedy) (concluding that "[b]ecause such a [significant] nexus was lacking with respect to isolated ponds, the [*SWANCC*] Court held that the plain text of the statute did not permit" the assertion of jurisdiction over them).
[56] *See* 83 Fed. Reg. at 32,249.
[57] *See* 531 U.S. at 171-74.
[58] 33 C.F.R. § 328.3(c)(3); *see also* 80 Fed. Reg. at 37,076 (stating that flow can be "intermittent or ephemeral").

piles, boulder fields, or underground features) *of any length*, so long as a bed, banks, and ordinary high water mark can be identified upstream of the break.[59]

To make matters worse, under the 2015 Rule, regulators could conclusively establish the presence of both "waters" and "physical indicators of a bed and banks and ordinary high water" using desktop tools.[60] Specifically, the Agencies can rely on "[o]ther evidence, besides direct field observation," such as "remote sensing or mapping information," including "USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Services (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling."[61] And in establishing the presence of tributaries, the Agencies may use historical information alone. The preamble to the 2015 Rule asserted that where remote sensing and other desktop tools indicate a prior existence of a bed, banks, and an ordinary high water mark, that is enough to establish jurisdiction, even if those features do not even exist on the landscape today.[62]

The 2015 Rule's heavy reliance on the ordinary high water mark is extremely problematic. The rule defines ordinary high water mark to mean "that line on the shore established by the fluctuations of water and indicated by physical 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."[63] That is the same definition that Justice Kennedy criticized in *Rapanos* as too uncertain and attenuated to serve as the "determinative measure" for identifying waters of the United States.[64] Because an ordinary high water mark is an uncertain indicator of "volume and regularity of flow," it brings within the Agencies' jurisdiction "remote" features with only "minor" connections to navigable waters—features that "in many cases" are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."[65]

The record confirms that the definition of "tributary" in the 2015 Rule reaches way too far, covering countless miles of previously unregulated features.[66] Not only is the geographic breadth and issue, the rule establishes categorical jurisdiction over many isolated, often dry land features regardless of their distance to navigable waters or whether "their effects on water quality are speculative or insubstantial."[67] Although Justice Kennedy contemplated that it might be permissible for the Agencies to promulgate a rule that "identif[ies] categories of tributaries" (and

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[59] 33 C.F.R. § 328.3(c)(3).
[60] *See* 80 Fed. Reg. at 37,081, 37,098.
[61] *Id.* at 37,076-77.
[62] *Id.* at 37,077.
[63] *Id.* at 37,106.
[64] 547 U.S. at 781.
[65] *Id*. at 781-782 (Kennedy, J.).
[66] *See, e.g.*, NAHB Comments 56-59, 121-123, ID-19574 (JA__) (the Rule will extend jurisdiction over nearly 100,000 miles of intermittent and ephemeral drainages in each of Kansas and Missouri alone); Waters Working Group Comments 27, ID-19529 (JA__) (water supply systems and municipal separate storm sewer systems); Comments of Delta County, Colorado 3, ID-14405 (JA__) ("artificial stock ponds west of the Mississippi").
[67] *Rapanos*, 547 U.S. at 780 (Kennedy).

adjacent wetlands) that, due to "volume of flow," "proximity to navigable waters," and other relevant considerations "are significant enough" to support federal jurisdiction,[68] the 2015 Rule did not do that. Rather than provide for consideration of frequency and volume of flow or proximity to navigable waters, the 2015 Rule proclaims that the presence of "physical indicators" of bed and banks and ordinary high water mark *guarantee* there will be a significant nexus to navigable waters.[69] But those physical indicators do no such thing. To use an example, many ephemeral washes in Maricopa County, Arizona experience flow infrequently, sometimes less than once per year, with each flow event lasting less than five hours. Perhaps not surprisingly, the Corps has previously found that many such washes *do not* have a significant nexus following case-specific analyses, even though these washes often exhibit physical indicators of an ordinary high water mark and therefore would be treated under the 2015 Rule as jurisdictional tributaries.[70]

Not only is the 2015 Rule's definition of "tributary" contrary to law, it also lacks scientific support. As noted above, the rule places heavy emphasis on the ordinary high water mark. According to the technical support document, an ordinary high water mark "forms due to some regularity of flow and does not occur due to extraordinary events."[71] The assumption is that if such a mark is present, a water feature with relatively constant and significant water flow must also be present. This is simply not true. The Agencies made an important concession in promulgating the 2015 Rule: the jurisdictional status of some tributaries—especially "intermittent and ephemeral" features that may not experience flow for months and years at a time—has long been "called into question,"[72] and the evidence of connectivity for such features is "less abundant" than for perennial features in water-rich regions.[73] Once again, the arid West provides an important case study. In that region, erosional features with beds, banks, and ordinary high water marks often reflect one-time, extreme water events, and are not reliable indicators of regular flow.[74] Because rainfall occurs infrequently, and because sandy, lightly-vegetated soils are highly erodible, washes, arroyos, and other erosional features often reflect physical indicators of a bed, banks, and an ordinary high water mark, even though they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow.[75]

Given these conditions, it comes as no surprise that the Corps' studies have found "no direct correlation" between the location of ordinary high water mark indicators and future water flow in arid regions.[76] In fact, such "indicators are distributed randomly throughout the [arid] landscape and are not related to specific channel characteristics."[77] For obvious reasons, "randomly" distributed indicators cannot provide a rational basis for a finding that all features

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[68] *Id.* at 780-81.
[69] *See* 80 Fed. Reg. at 37,076.
[70] *See* City of Scottsdale Comments 2-3.
[71] TSD at 239.
[72] 79 Fed. Reg. at 22,231.
[73] 80 Fed. Reg. at 37,079.
[74] *See* Ariz. Mining Ass'n Comments at 7-11.
[75] *See* Barrick Gold Comments at 15-16.
[76] *See* Ariz. Mining Ass'n Comments 10-11 (quoting U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability* 14 (2006)).
[77] *Id.* at 11 (quoting U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes* 17 (2013)).

that satisfy the definition of "tributary" automatically meet the "significant nexus" standard set forth in the rule.

The Agencies relied almost exclusively on a case study of the San Pedro River to justify the breadth of the "tributary" definition and its application to arid parts of the country.[78] But that river is *not* representative of arid regions nationwide.[79] Although the Connectivity Report claims that characteristics "similar to the San Pedro River" "have been observed in [three] other southwestern rivers," it candidly acknowledges that each of those systems has *more* flow than the San Pedro.[80] To put things in perspective, the mainstem San Pedro has surface flows 261 days a year because its tributaries generate large storm water runoff, due to unusual soil composition that prevents water loss.[81] By contrast, the Santa Cruz River, which is typical of features in arid parts of the country, has a median annual flow of *zero* cubic feet per second, is dry 90% of the time, and is part of a system of "tributaries" that generally have less frequent surface flow than the mainstem channel, "behave more like deep sandboxes than streams," and lack surface flow or a shallow subsurface connection to groundwater.[82] The Agencies' heavy reliance on the San Pedro consequently overstated the connections between arid channels and downstream navigable waters and was thus arbitrary.

3. The 2015 Rule's definition of "adjacent" is similarly flawed.

The 2015 Rule defines "adjacent" as "bordering, contiguous, or neighboring." The term "neighboring" is defined to include, among other things, (i) waters within 100 feet of the ordinary high water mark of a navigable water or tributary, and (ii) waters within the 100-year floodplain of such a water and within 1,500 feet of its ordinary high water mark.[83] This definition conflicts with Supreme Court precedent and lacks record support.

The Supreme Court has consistently given the term "adjacent" its ordinary meaning in interpreting the CWA. In *Riverside Bayview*, the Court described "wetlands adjacent to [jurisdictional] bodies of water" as wetlands "adjoining" and "actually abut[ting] on" a traditional "navigable waterway."[84] To be jurisdictional, adjacent wetlands must be "inseparably bound up with the 'waters' of the United States" and not meaningfully distinguishable from them.[85] Many years in later in *SWANCC*, the Court rejected the Corps' assertion of jurisdiction over *isolated* non-navigable waters "that [we]re *not* adjacent to open water" and thus not "inseparably bound up" with "navigable waters."[86] Finally, in *Rapanos*, the plurality opinion explained that "[h]owever ambiguous the term may be in the abstract, as we have explained earlier, 'adjacent' as used in *Riverside Bayview* is not ambiguous between 'physically abutting' and merely 'nearby.'"[87] Despite these holdings, the 2015 Rule nevertheless interprets the word

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[78] *See* 79 Fed. Reg. at 22,231-22,232; *see also* Connectivity Report at B-37, B-55.
[79] *See*, *e.g.*, Southwest Developers Comments 2 (of "1,016 publications" in the Draft Connectivity Report, "only three include research on arid west headwaters in small watersheds").
[80] Connectivity Report B-48 to B-49.
[81] *See* Freeport-McMoRan Comments 6.
[82] *See id.*; Freeport-McMoRan Technical Comments 4, 12-15.
[83] 33 C.F.R. § 328.3(c)(2).
[84] 474 U.S. at 135.
[85] *Id.* at 134-35 & n. 9.
[86] 531 U.S. at 167-68, 171.
[87] 547 U.S. at 748.

"adjacent" to encompass "nearby" waters based on notions of "functional relatedness," rather than physical and geographical proximity, thereby extending the meaning of the word beyond reason.

The 2015 Rule even violates Justice Kennedy's concurring opinion in *Rapanos* by asserting jurisdiction based on adjacency to not just navigable waters in the traditional sense, but also to any category (1) through (5) feature, including "tributaries" with only ephemeral flow. Justice Kennedy, however, plainly rejected the notion that a wetland's mere adjacency to a minor tributary could be "the determinative measure" of whether it was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[88] "[W]etlands adjacent to [such] tributaries," Justice Kennedy explained, "might appear little more related to navigable-in-fact waters than were the isolated ponds [in *SWANCC*]."[89] For that reason, Justice Kennedy voted to vacate the agencies' assertion of jurisdiction over wetlands supposedly "adjacent" to a ditch that indirectly fed into a navigable lake.[90] Simply put, "mere adjacency to a tributary of this sort is insufficient."[91] Seemingly ignoring these discussions in Justice Kennedy's opinion, the 2015 Rule categorically asserts jurisdiction over any waters based on their "adjacency" to "tributaries" "however remote and insubstantial,"[92] including ephemeral features, drains, ditches, and streams remote from navigable waters.

Moreover, although the Supreme Court has never allowed such an approach, the 2015 Rule asserts jurisdiction not only on just adjacent "wetlands," but all other adjacent "waters." This novel expansion is unjustified. As the *Rapanos* plurality explained, *non-wetland* "waters"—especially those separated from traditional navigable waters by physical barriers or significant distances—"do not implicate the boundary-drawing problem" that made it appropriate to defer to the Corps' approach to adjacency in *Riverside Bayview*.[93] Tellingly, lower courts have rejected similar attempts to assert "adjacency" jurisdiction over non-wetlands. For example, the Ninth Circuit rejected jurisdiction over an isolated pond located within 125 feet of a navigable tributary of San Francisco Bay.[94] In so holding, the Court explained that any nexus between the pond and the tributary "falls far short of the nexus that Justice Kennedy required in *Rapanos*."[95] The 2015 Rule, however, would assert jurisdiction over that pond and countless others like it due to the expansive definitions of "adjacent" and "significant nexus."

Finally, the 2015 Rule improperly defines "adjacency" with reference to "the 100-year floodplain."[96] Such a standard flouts the "*continuous* surface connection" required by the *Rapanos* plurality.[97] Equally problematic, a water that is merely located within the 100-year floodplain of a navigable water is so rarely connected to that navigable water that it cannot be said to "significantly affect the chemical, physical, and biological integrity of the other covered

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[88] *Id.* at 781.
[89] *Id.* at 781-782.
[90] *Id*. at 764; *accord id.* at 730 (plurality).
[91] *Id.* at 786.
[92] *Id.* at 764 (Kennedy).
[93] 547 U.S. at 742.
[94] *See S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir. 2007).
[95] *Id.*
[96] 33 C.F.R. § 328.3(c)(2)(ii).
[97] *See* 547 U.S. at 742.

water[].”[98] At most, such a water would have an “insubstantial” “effect[] on water quality” that “fall[s] outside the zone fairly encompassed by the statutory term ‘navigable waters.’”[99]

4. The 2015 Rule defines “significant nexus” so broadly that it revives the defunct Migratory Bird Rule.

In addition to categorically asserting jurisdiction over various types of water bodies, the 2015 Rule allows for case-by-case assertions of jurisdiction over additional water features that meet the rule’s definition of “significant nexus.” Because the rule’s definition of that term goes far beyond what *SWANCC* or Justice Kennedy’s concurrence in *Rapanos* envisioned, the rule is unlawful and needs to be repealed.

Justice Kennedy looked to the concept of “significant nexus” “to give the term ‘navigable’ some meaning” by limiting federal jurisdiction to wetlands (not all waters) with a significant impact on traditional navigable waters.[100] In his view, a water feature is jurisdictional only if it “significantly affect[s] the chemical, physical, and biological integrity of … waters more readily understood as ‘navigable.’”[101] Justice Kennedy believed his “significant nexus” test provides assurance that the CWA’s jurisdiction would not extend to features that are too “remote” or whose “effects on [navigable] water quality are speculative or insubstantial.”[102]

The “significant nexus” standard in the 2015 Rule does not provide such assurance. That is because the rule asserts jurisdiction over any water feature so long as it affects the “chemical, physical, *or* biological integrity” of a traditional navigable water, interstate water, or territorial sea,[103] thereby ignoring the conjunctive nature of both the statute (CWA § 101(a)) and Justice Kennedy’s test. Changing the conjunctive to the disjunctive has profound consequences. By requiring only one type of connection (*e.g.*, biological), the 2015 Rule effectively reinstates the Migratory Bird Rule that the Supreme Court struck down in *SWANCC*. Indeed, the 2015 Rule allows for jurisdiction based on a single function, such as the “[p]rovision of life cycle dependent aquatic habitat” between one water and some other distant water.[104] That is the exact theory of jurisdiction reflected in the Migratory Bird Rule, under which isolated non-navigable ponds were jurisdictional solely “because they serve[d] as habitat for migratory birds.”[105]

In fact, the 2015 Rule does even more than improperly revive the Migratory Bird Rule. In discussing the significant nexus test, the Agencies stated that they can find evidence of biological connectivity by identifying the presence of “amphibians, aquatic and semi-aquatic reptiles, [and] aquatic birds.”[106] Elsewhere in the preamble to the final 2015 Rule, the Agencies discussed the biological connectivity of waters in floodplains to include “integral components of river food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for

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[98] *Id*. at 780 (Kennedy).
[99] *Id.*
[100] 547 U.S. at 778-79.
[101] *Id.* at 780.
[102] *Id.*
[103] *See* 33 C.F.R. § 328.3(c)(5) (emphasis added).
[104] *See* 33 C.F.R. 328.3(c)(5)(ix).
[105] *SWANCC*, 531 U.S. at 171-72.
[106] *Id.*

stream invertebrates and maturation habitat for stream insects."[107] What this means is most anything else that could live in and around water can singlehandedly serve as the basis for asserting jurisdiction over countless non-navigable, intrastate, isolated water features. Such a capacious assertion of jurisdiction "would result in a significant impingement of the States' traditional and primary power over land use" and thus must be repealed in light of *SWANCC*.[108]

5. The Rule's distance thresholds lack scientific support.

Water features are categorically jurisdictional as "adjacent" if they are within the 100-year floodplain of a category (1)-(5) feature and within 1,500 feet of its ordinary high water mark.[109] Additionally, waters are categorically jurisdictional if they are within 100 feet of the ordinary high water of a category (1)-(5) feature or within 1,500 feet of the high tide line of a category (1)-(3) feature.[110] On a case-specific basis, water features can be jurisdictional if they are within the 100-year floodplain of a category (1)-(3) feature or 4,000 feet of the ordinary high water mark of a (1)-(5) feature, and they are found to have a "significant nexus" to a category (1)-(3) feature.[111] In a nutshell, the Agencies failed to explain these distance cutoffs, and nothing in the record supports them.

The preamble to the final rule comes very close to admitting that the Agencies relied on the 100-year floodplain (to define "adjacent" and "significant nexus" waters) based on administrative convenience, not science.[112] And if that were true, why did the Agencies choose that particular floodplain, rather than using a shorter period for which flood limits can be determined more easily and with more certainty? Given that the record contains no justification for using the 100-year floodplain, it is perhaps understandable that the Agencies concede the lack of "scientific consensus" over which flood interval to use.[113] In any event, the lack of consensus does not justify the Agencies' dart throw.

The Agencies acted in a similarly arbitrary manner in choosing the 1,500-foot and 4,000-foot distance thresholds from the ordinary high water mark. While they vaguely claim reliance on unidentified "scientific literature," their own "technical expertise and experience," and the convenience "of drawing clear lines,"[114] it appears as though the Agencies plucked numbers from thin air. Indeed, the 2015 Rule offered no evidentiary basis for numbers that the Agencies basically *admitted* they made up.[115] While it is true that the Agencies enjoy considerable deference from reviewing courts examining their technical and scientific judgments, such deference is inappropriate in the absence of evidence demonstrating how they arrived at the

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[107] *Id.* at 37,063.
[108] 531 U.S. at 174.
[109] *See* 33 C.F.R. § 328.3(c)(2)(ii).
[110] *Id.* § 328.3(c)(2)(i), (iii).
[111] *Id.* § 328.3(a)(8).
[112] *See* 80 Fed. Reg. at 37,089 (noting that the 100-year floodplain serves "purposes of clarity" and "regulatory certainty").
[113] *See* EPA, *Questions and Answers—Waters of the U.S. Proposal* 5, perma.cc/7RRP-V46X.
[114] 80 Fed. Reg. at 37,085; *see also id.* at 37,090 (referencing the Agencies' "extensive experience making significant nexus determinations" as having "informed the[ir] judgment" in selecting the 4,000-foot boundary).
[115] *See* 80 Fed. Reg. at 37,090 (acknowledging that "the science does not point to any particular bright line").

specific numbers in the final rule. Because the 2015 Rule relies heavily on an arbitrary floodplain interval and distance thresholds, it must be repealed.

C. The 2015 Rule is Unconstitutional

The supplemental notice does not propose to repeal the 2015 Rule based on constitutional violations, though the Agencies indicate they are evaluating additional concerns such as whether the rule exceeded Congress's authority under the Commerce Clause.[116] The Agencies also recognize (in the legal background discussion) that it is important to provide fair and predictable notice of the limits of federal jurisdiction under the CWA given the Act's substantial criminal and civil penalties.[117] For the reasons articulated below, the undersigned organizations believe the 2015 Rule is unconstitutional in at least two ways. First, it is vague to the point of violating basic principles of due process. Second, it violates the Commerce Clause and federalism principles.

1. The 2015 Rule is so vague that it violates the Due Process Clause.

The Fifth Amendment's Due Process Clause demands that a law provide regulated parties with fair notice so that they "know what is required of them [and] may act accordingly."[118] A regulation that fails to do so is void for vagueness. "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns."[119] First, it ensures that citizens have fair notice of the rules governing them. Second, it provides standards for enforcement "so that those enforcing the law do not act in an arbitrary or discriminatory way."[120] Of those concerns, the second is "the more important" because, absent objective guidelines, the law "may permit a standardless sweep [that] allows [government officials] to pursue their personal predilections."[121] Thus, the Due Process Clause is offended by regulations "so imprecise that [arbitrary or] discriminatory enforcement is a real possibility."[122]

A review of a few of the 2015 Rule's key terms and provisions shows that they fall woefully short of providing the kind of objective guidelines the Constitution requires.

Ordinary high water mark: In deciding whether the presence of physical indicators of an ordinary high water mark exist and where they lie, agency staff are allowed to rely on whatever "other … means" they deem "appropriate."[123] As if this catch-all language were not enough to permit standard-less sweeps by agency staff, existing Corps guidance states that "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination."[124]

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[116] *See* 83 Fed. Reg. at 32,248-49.
[117] *See id.* at 32,237.
[118] *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).
[119] *Id.*
[120] *Id.*
[121] *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).
[122] *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991).
[123] 33 C.F.R. § 328.3(c)(6).
[124] Corps Regulatory Guidance Letter No. 05-05, at 3 (Dec. 7, 2005).

Not only does the 2015 Rule fail to meaningfully constrain the Agencies in determining *what* constitutes an ordinary high water mark, it also fails to constrain them in deciding *how* to make that determination. Agency staff making these determinations need not visit any sites; instead, the rule blesses their ability to "establish" ordinary high water marks using "[o]ther evidence besides direct field observation."[125] Regulators may, for instance, rely on computer models, "local stream maps," "aerial photographs," "light detection and ranging" data, and other unidentified "desktop tools that provide for the hydrologic estimation of discharge" to identify an ordinary high water mark, even where "physical characteristics" of bed and banks and an ordinary high water mark "are absent in the field."[126] Landowners seeking to learn whether they have a jurisdictional water on or near their property are thus left to make their best guess—using whatever current or historic information they might be able to get their hands—with no guarantee that the Agencies will rely on the same factors. Just the opposite, the rule makes clear that decisions about which factors to rely on in assessing the presence of an ordinary high water mark are left to the Agencies' "experience and expertise." That is not the type of meaningful constraint that due process requires.[127]

100-year floodplain: The provisions in the 2015 Rule dealing with adjacency (specifically, the definition of "neighboring") and case-specific assertions of jurisdiction over waters with a "significant nexus" to jurisdictional waters both reference the 100-year floodplain.[128] While at first glance, it appears that landowners may be readily able to verify whether water features on their lands fall within this particular floodplain, the preamble to the final 2015 Rule demonstrates why the 100-year floodplain concept fails to give fair notice and is conducive to arbitrary enforcement.

The Agencies stated that they will rely on "published FEMA Flood Zone Maps to identify the location and extent of the 100-year floodplain" in implementing the 2015 Rule, yet they acknowledge that "much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground."[129] The Agencies further stated that they will assess accuracy "based on a number of factors" and, in the absence of an accurate and up-to-date FEMA map, the Agencies indicate they will rely on "other available tools to identify the 100-year floodplain," including "other Federal, State, or local floodplain maps, Natural Resources Conservation Service (NRCS) Soil Surveys (Flooding Frequency Classes), tidal gage data, and site-specific

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[125] 80 Fed. Reg. at 37,076.
[126] *Id.* at 37,077.

[127] For similar reasons, the 2015 Rule is just as vague when it comes to ascertaining whether ditches are jurisdictional "tributaries" or whether they fall under one of the narrow ditch exclusions. Determining the applicability of the ditch exclusions can involve an inquiry into the "historical presence of tributaries using a variety of resources, such as historical maps, historical aerial photographs, local surface water management plans, street maintenance data, wetland and conservation programs and plans, as well as functional assessment and monitoring efforts." 80 Fed. Reg. at 37,078-79. How individual farmers and ranchers are expected to access and assess all of that data is a mystery, meaning they have no viable means of learning whether a ditch on their property is jurisdictional. That is particularly true because the Rule does not say how far back in history regulated parties must look in ascertaining the presence of a previously existing tributary.

[128] *See* 33 C.F.R. §§ 328.3(a)(8), 328.3(c)(2).
[129] 80 Fed. Reg. at 37,081.

modeling."[130] This approach does nothing to put landowners on notice of when waters on their property may be considered jurisdictional as either "adjacent" waters or as case-specific "significant nexus" waters. Even if landowners happen to be in a part of the country where FEMA has generated a floodplain map, they may not know whether agency staff will decide to deem those maps inaccurate or outdated. Should agency staff decide FEMA maps are not accurate, landowners then face the additional task of trying to figure out what "available tools" regulators may use to determine the 100-year floodplain for purposes of asserting jurisdiction.

Significant nexus: The 2015 Rule's "case-by-case" significant nexus test is obviously lacking in objective limits. At every stage, it turns on subjective observations and opaque analyses. Take the case of a farmer who has a small, isolated pond on his property. Even if everyone agrees that the pond has a direct connection to a primary water, the farmer's challenge is only beginning, because, in deciding whether his pond has a "significant nexus" to a primary water, he must still identify all traditional navigable waters, interstate waters, and tributaries within 4,000 feet of the pond. If the farmer finds such a water, he must then figure out whether regulators will conclude that the pond, together with "other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of the nearest primary water.[131] Such a task borders on crystal ball gazing.

Take, for instance, the Rule's definition of "similarly situated." This phrase encompasses waters that "function alike and [are] sufficiently close to function together in affecting downstream waters."[132] But what does it mean for two ponds function alike or to function together? The Rule does not say, which means agency personnel are free to make their own judgment calls. Likewise, what qualifies as "significantly affect[ing]" a primary water? The Rule says only that an effect is significant when it is "more than speculative or insubstantial,"[133] but that poor attempt at a definition is no clearer than the word "significant." And what it means for a water feature to "significantly affect[]" the "integrity" of a primary water is anybody's guess.

Categorical exemptions: Many of the 2015 Rule's exemptions are difficult to apply, such as the exclusions for farm and stock watering ponds and various other features "created in dry land." While common sense suggests it should be easy to figure out whether something was created in "dry land," the lack of a definition for that term, combined with the Agencies' circular explanations, leave landowners puzzling over how to apply the "dry land" exclusions. In trying to explain what is "dry land," the Agencies first say the "term is well understood based on the more than 30 years of practice and implementation" and that it "refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, and the like."[134] The Agencies immediately turn around and state that they declined to define "dry land" in the rule because they "determined that there was no agreed upon definition given geographic and regional variability."[135] Thus, the rule punts on providing "further clarity" until "implementation."[136] The refusal to clarify a key term that is used in numerous exclusions

[130] *Id.*
[131] 33 C.F.R. § 328.3(c)(5).
[132] *Id.*
[133] *Id.*
[134] 80 Fed. Reg. at 37,098.
[135] *Id.* at 37,098-99.
[136] *Id.*

means, of course, that agency staff retain broad discretion to limit the scope of exclusions that apply only to features created in "dry land." This opens the door to inconsistent and arbitrary results.

Elsewhere, the 2015 Rule includes an exemption for "puddles,"[137] but not for "depressional wetlands."[138] This leaves farmers and ranchers to wonder what exactly distinguishes a recurring puddle from a small depressional wetland. The Rule does not clearly provide them answers. Similar problems exist in distinguishing "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of a tributary,"[139] from jurisdictional tributaries. The rule defines a tributary in part based on the presence of "a bed and banks and an ordinary high water mark"—all of which are often present in the very gullies, rills, and other ephemeral features the rule says are exempt from its scope. Where to draw the line will ultimately be a question for agency staff to answer apparently based on little more than whim. Due process demands more.

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Even where the Agencies have some relatively objective means of ascertaining the existence of a jurisdictional water, the vagueness problem will remain an intractable one for many regulated parties, who will be unable themselves to figure out whether waters on their lands are subject to federal jurisdiction. A rule is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits."[140] The 2015 Rule easily flunks that test. As noted above, in identifying ordinary high water mark, to use an example, the Agencies will be using remote sensing technology and desktop tools that are simply not available to the average landowner. That means the Agencies are free to assert jurisdiction over a depression in the landscape that is largely undetectable except through sophisticated digital photography or satellite imaging that most people cannot access.

Predictably, it is the Rule's "case-by-case" waters category that presents some of the greatest headaches for landowners. The ambiguity and complexity inherent in deciding whether a water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of" a primary water based on "any single function or combination of functions performed by the water,"[141] hardly needs elaborating. It bears special mention, however, that determining a water feature's chemical, physical, or biological effects requires technical, scientific, and financial resources well beyond what most landowners possess. Because the Rule gives regulators too much discretion and regulated parties too little notice of what it covers, it violates due process. That is another independent reason for rescinding it.

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[137] 33 C.F.R. § 328.3(b)(4)(vii)
[138] 80 Fed. Reg. at 37,093.
[139] 33 C.F.R. § 328.3(b)(4)
[140] *Chicago v. Morales*, 527 U.S. 41, 56 (1999).
[141] 33 C.F.R. § 328.3(c)(5).

2. The 2015 Rule violates the Commerce Clause and federalism principles.

The States' authority to regulate and manage local lands and waters has long been viewed as a core sovereign interest. It is, in fact, "perhaps the quintessential state activity,"[142] which is one reason why the CWA expressly recognizes the States' inherent powers over local lands and water resources.[143] Indeed, principles of federalism are interwoven throughout the CWA.[144]

The Supreme Court has relied on the "traditional state power" over land and water regulation to support narrower interpretations of the CWA's scope. In *SWANCC*, for example, the Court reasoned that allowing federal jurisdiction over an isolated, seasonal pond based solely on the presence of migratory birds not only failed to give effect to the statutory term "navigable," it raised "significant constitutional and federalism questions."[145] On the latter holding, the Court clarified that, even were there some ambiguity regarding whether the Federal Government has jurisdiction over nonnavigable, isolated, intrastate waters, the Court would nevertheless have rejected the Corps' interpretation because would impermissibly "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power"—namely, the States' "traditional and primary power over land and water use."[146]

The plurality opinion in *Rapanos* likewise recognized the importance of respecting the federal-state balance that Congress struck in the CWA. The plurality chastised lower courts for "continu[ing] to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries,'" and for "continu[ing] to define 'adjacent' wetlands broadly."[147] The four Justices expressed concern over how "even the most insubstantial hydrological connection may be held to constitute a 'significant nexus,'" despite the Court's holding in *SWANCC*.[148] Of particular importance here, the plurality emphasized that regulation of the "development and use" of "land and water resources" is a "quintessential state and local power."[149]

The 2015 Rule fundamentally readjusts the federal-state balance and pushes the federal government's authority well beyond the limits of the Commerce Clause. As 31 States recently explained to the Sixth Circuit, the Rule covers "virtually every potentially wet area of the country," ranging "[f]rom prairie potholes in North Dakota, to arroyos in New Mexico, ephemeral drainages in Wyoming, and coastal prairie wetlands in Texas."[150] The Agencies themselves admit that the Rule potentially covers "the vast majority of the nation's water features."[151] What is left, one asks, of the States' longstanding and fundamental power to

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[142] *FERC v. Mississippi*, 456 U.S .742, 768 n.30 (1982).
[143] *See* 33 U.S.C. § 1251(b).
[144] *See SD Warren Co. v. Maine bd. of Envt'l Protection*, 547 U.S. 370, 386–87 (2006) (observing that the CWA "provides for a system that respects the States' concerns" and interpreting another CWA provision in a way that "preserve[d] the state authority apparently intended").
[145] 531 U.S. at 164, 172.
[146] *Id.* at 173-74.
[147] 547 U.S. at 726-29.
[148] *Id.* at 728.
[149] *Id.* at 737-38.
[150] *Murray Energy Corp. v. U.S. EPA*, No. 15-3799, Doc. # 141, at 71.
[151] *Id.* (quoting Rule's Economic Analysis).

regulate the lands and waters within their borders, if so many water and land features are now under the Agencies' jurisdiction?

The concern here is not merely over the geographic extent of federal regulation, but the effects of that regulation. When the Agencies assert jurisdiction under the CWA, the effect is often to displace state and local regulation. Compounding the problem, the federal standards and requirements that accompany federal jurisdiction under the CWA necessarily impose burdens directly on the States themselves. For example, States are required to develop, review, and (if appropriate) update water quality standards for federal jurisdictional waters within their borders.[152] For waters not meeting those standards, States must develop often complicated total maximum daily loads.[153] States must also issue water quality certifications for federal permit and licenses, including Section 404 permits issued by the Corps.[154]

To accomplish such a sweeping grab of traditional state powers, the Agencies must identify some basis in the Constitution for doing so, but no such basis exists. Throughout the Technical Support Document for the 2015 Rule, the Agencies attempted to justify the Rule under the Commerce Clause, but those attempts fall flat. The Commerce Clause grants the Federal Government power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[155] That power extends to just three areas: (1) the "channels of interstate commerce," (2) the "instrumentalities of interstate commerce," and (3) "activities that substantially affect interstate commerce."[156]

The 2015 Rule imposes federal authority outside of those areas. Most notably, because it reaches so far beyond waters that can actually be used for interstate commerce, it cannot be upheld as a regulation of the channels of interstate commerce. To be sure, the Commerce Clause gives Congress authority to regulate more than just navigable portions of waters.[157] But the Rule goes far beyond that by sweeping in numerous local land and water features that are not navigable-in-fact and have only the barest connection to navigable-in-fact waters—even those features that connect to navigable waters just once in a century. Ephemeral trickles that happen to cross state lines, dry washes in Western deserts, and isolated wetlands nearly a mile from any tributary are all swept up in the Rule's scope. So are water features that are "adjacent" to navigable waters, even if there is no indication that those features ever connect to or otherwise affect navigable waters. Regulation of those features cannot possibly be justified as regulation of a channel of interstate commerce.

Nor can the Rule be justified as one covering activities that "substantially affect interstate commerce." For starters, it bears emphasis that the Supreme Court in *SWANCC* clearly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause will allow, such as waters that are jurisdictional based on the regulation of activities that cumulatively

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[152] 33 U.S.C. § 1313.
[153] *Id.* § 1313(d).
[154] *Id.* § 1341(a)(1).
[155] U.S. Const. art. I, § 8, cl. 3.
[156] *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).
[157] *See, e.g.*, *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) (recognizing that "Cognress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions").

have a substantial effect on interstate commerce.[158] The Court declined the agency's invitation to engage in a substantial effects analysis and instead chose to avoid the significant constitutional and federalism questions raised by the Corps' Migratory Bird Rule.[159]

Nonetheless, even if a court were to undertake a substantial effects analysis, the 2015 Rule would be unlikely to pass muster. In deciding whether regulation covers activities substantially affecting interstate commerce, the Supreme Court has considered: (1) whether the regulation addresses economic activity; (2) whether the regulation's reach is limited to activities having a connection with interstate commerce; and (3) whether the regulation's connection to interstate commerce is so attenuated that it would "effectually obliterate the distinction between what is national and what is local."[160] The 2015 Rule does not qualify under any of those factors.

- The rule does not address economic activity. The Agencies can prohibit landowners from disposing of brush or leaves in shallow depressions on their properties, provided those depressions are within 1,500 feet of the ordinary high water mark of a "tributary" to a navigable water. That is not economic activity.

- The rule does not limit its reach to activities having a connection with interstate commerce. It defines tributaries, adjacent waters, and case-by-case waters in ways that capture numerous water features and usually-dry lands lacking any meaningful connection to interstate commerce. As just one example, the Agencies' case-by-case jurisdiction under the Rule authorizes regulation over lands or waters that "export … organic matter" to a primary water.[161] So if a deer travels from a secluded land or water feature to a primary water and a plant or invertebrate hitchhikes on the deer's fur, that would be sufficient for the Agencies to assert jurisdiction under the Rule. Likewise, if the land feature "[e]xport[s] … food resources, because the deer travels to eat there and then visits the primary water where it deposits seeds from the food resource, the Agencies could deem the land feature jurisdictional under the Rule. None of that has anything to do with interstate commerce.

- Like the legislation in *Lopez* and *Morrison*, the 2015 Rule relies on an attenuated causal chain that would, if followed, "obliterate the distinction between what is national and what is local."[162] In *Lopez* and *Morrison*, the Court invalidated legislation in part because, whatever the aggregate effect of regulating noneconomic activity in those cases, allowing such regulation by the Federal Government would impermissibly permit the Federal Government to take over whole "areas of traditional state regulation."[163] The same goes here, inasmuch as the rule's assertion of authority over the majority of hydrologic features

[158] *See* 531 U.S. at 168 n.3 & 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)).
[159] *See id.* at 173.
[160] *Lopez*, 514 U.S. at 557; *see also United States v. Morrison*, 529 U.S. 598 (2000).
[161] 33 C.F.R. § 328.3(c)(5)(vii).
[162] *See Lopez*, 514 U.S. at 557.
[163] *Morrison*, 529 U.S. at 615.

throughout the country intrudes upon the States' authority to manage local lands and waters.

At bottom, the Rule is not supportable as an exercise of the Commerce Clause power. Instead, it usurps the States' longstanding and primary authority to regulate and oversee the lands and waters within their borders. In that respect, it is unconstitutional and ought to be repealed on that basis too. But even if repeal were not constitutionally required, the canon of constitutional avoidance, which requires that statutes be construed so as to minimize constitutional problems, calls for a far narrower interpretation of the CWA than the Rule puts forth.[164] In addition, as the Supreme Court instructed in *SWANCC*, the CWA should not be read in a manner that displaces traditional state regulation absent a clear statement authorizing such displacement. There is nothing in the CWA authorizing displacement of state authority over land and water use. In fact, the Act contains the opposite statement: it recognizes, preserves, and protects such primary responsibilities and rights of the states.[165]

III. Conclusion

For the foregoing reasons, the undersigned organizations strongly support the Agencies' supplemental proposal to permanently repeal the 2015 Rule. That rule would effectively confer federal control over all but the most remote and unconnected waters, including features that are ubiquitous on farm and ranchlands that more closely resemble land than water, even though Congress did not intend to give the Agencies such control. While it is true that the rule does not currently apply, the Agencies cannot allow it to remain on the books and must instead repeal the rule in its entirety. Because the rule was an amendment to then-existing regulations, its repeal will effectively reinstate the pre-2015 regulations. As the undersigned organizations have long maintained, those preexisting regulations are far from ideal from the perspective of landowners who need to have a set of clear and logical rules to follow. Thus, the undersigned organizations encourage the Agencies to move forward with their ongoing efforts to develop a new rule that finally achieves the Agencies' goal of defining "waters of the United States" in a way that is faithful to Congress's intent, is consistent with Supreme Court precedent, and achieves clarity and regulatory certainty. For now, however, the Agencies can take a step in the right direction by finalizing their proposal to repeal what several courts have strongly suggested is a fatally flawed rule.

Sincerely,

American Farm Bureau Federation
Agri-Mark, Inc.
American Dairy Coalition
American Sugar Cane League
CropLife America
Dairy Producers of New Mexico

[164] *E.g.*, *Clark v. Martinez*, 543 U.S. 371, 379 (2005).
[165] *SWANCC*, 531 U.S. at 172-74.

Dairy Producers of Utah
Idaho Dairymen's Association
Illinois Farm Bureau
Iowa Farm Bureau Federation
Minnesota Agricultural Water Resource Center
Missouri Dairy Association
National Alliance of Forest Owners
National Association of State Departments of Agriculture
National Cattlemen's Beef Association
National Chicken Council
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Milk Producers Federation
National Turkey Federation
Northeast Dairy Farmers Cooperatives
Ohio AgriBusiness Association
Ohio Corn & Wheat Growers Association
Oregon Dairy Farmers Association
South Dakota Agri-Business Association
St. Albans Cooperative Creamery
Texas Association of Dairymen
Texas Cattle Feeders Association
The Fertilizer Institute
United Egg Producers
United States Cattlemen's Association
Upstate Niagara Cooperative, Inc.
U.S. Poultry & Egg Association
USA Rice
Washington State Dairy Federation
Wyoming Ag-Business Association

CC: Matthew Z. Leopold, General Counsel, U.S. Environmental Protection Agency
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