



**Comments of the Waters Advocacy Coalition
on the Environmental Protection Agency and U.S. Army Corps of Engineers
Proposed Repeal of 2015 Clean Water Rule and Recodification of Pre-Existing Rules
EPA-HQ-OW-2017-0203**

September 27, 2017

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I. Introduction

The Waters Advocacy Coalition (“WAC” or “Coalition”) writes to provide comments in support of the Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (together, “the Agencies”) proposed rule to rescind the 2015 Clean Water Rule (“2015 Rule” or “Rule”) and recodify the definition of “waters of the United States” in place prior to the 2015 Rule, as it is currently being implemented, 82 Fed. Reg. 34,899 (July 27, 2017). The Agencies extended the comment deadline to September 27, 2017. 82 Fed. Reg. 39,712 (Aug. 22, 2017).

The Coalition represents a large cross-section of the nation’s construction, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors – all of which are vital to a thriving national economy and provide much needed jobs. Both individually and collectively, the Coalition’s members are of critical importance to the nation’s economy.

The Coalition’s members are committed to the protection and restoration of America’s wetlands and waters, and possess a wealth of expertise directly relevant to the proposal to rescind the 2015 Rule. The Coalition has a long history of involvement on the critical issues concerning the scope of federal jurisdiction under the Clean Water Act (“CWA” or “Act”). We submitted robust comments on the Agencies’ 2015 Rule,¹ and have submitted comments on the Agencies’ previous rulemakings and guidance documents on the “waters of the United States” definition, including: the 2011 Draft Guidance on Identifying Waters Protected by the Clean Water Act,² the 2008 Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*,³ and the 2003 Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States.”⁴ Many individual members of the Coalition have also submitted

¹ Waters Advocacy Coalition, Comments on the EPA’s and Corps’ Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, (Nov. 13, 2014, corrected Nov. 14, 2014), Doc. No. EPA-HQ-OW-2011-0880-17921 (“WAC Comments on 2015 Rule”). We incorporate by reference and attach those comments here.

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

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

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

comments on these rulemakings and guidance documents on the definition of “waters of the United States.” In all of these comments, we have consistently raised concerns with expansive theories of CWA jurisdiction that: (1) fail to preserve the States’ traditional and primary authority over land and water use; and (2) ignore the limits set by Congress and recognized by the Supreme Court.

Members of the Coalition include:

Agricultural Retailers Association
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Iron and Steel Institute
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association
American Society of Golf Course Architects
Associated Builders and Contractors
The Associated General Contractors of America
Association of American Railroads
Association of Oil Pipe Lines
Club Managers Association of America
Corn Refiners Association
CropLife America
Edison Electric Institute
The Fertilizer Institute
Golf Course Builders Association of America
Golf Course Superintendents Association of America
The Independent Petroleum Association of America
Industrial Minerals Association – North America
International Council of Shopping Centers
International Liquid Terminals Association
Leading Builders of America
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS®
National Association of State Departments of Agriculture
National Cattlemen’s Beef Association
National Club Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Industrial Sand Association
National Mining Association
National Multifamily Housing Council
National Oilseed Processors Association
National Pork Producers Council

National Rural Electric Cooperative Association
National Stone, Sand and Gravel Association
Public Lands Council
Responsible Industry for a Sound Environment
Southeastern Lumber Manufacturers Association
Texas Wildlife Association
Treated Wood Council
United Egg Producers
U.S. Chamber of Commerce

As detailed below, the Coalition supports rescinding the 2015 Rule because it is inconsistent with Supreme Court precedent, fails to preserve the States' authority to regulate non-navigable waters, and fails to provide needed clarity and certainty for both regulators and the regulated community. Rescission of the 2015 Rule and the corresponding recodification of the pre-existing regulations will return to the Code of Federal Regulations the regulations that existed prior to the 2015 Rule and reflect the current legal regime under which the Agencies are operating pursuant to the Sixth Circuit's October 9, 2015, nationwide stay order. *In re EPA*, 803 F.3d 804 (6th Cir. 2015). Finally, WAC notes that, although rescinding the 2015 Rule and the corresponding recodification of the pre-existing regulations is necessary in the near term for clarity and regulatory certainty, there are many issues with the pre-existing regulations and guidance documents that should be addressed through a new rulemaking. Accordingly, the Coalition supports a second, future rulemaking to define "waters of the United States" in a manner consistent with the statute, case law, and principles of cooperative federalism.

II. The Agencies Should Rescind the 2015 Rule.

In enacting the CWA, Congress granted EPA and the Corps very specific, limited powers to regulate "navigable waters," defined as "the waters of the United States." 33 U.S.C. § 1362(7). The CWA was founded in federalism. With CWA § 101(b), Congress recognized and sought to preserve the States' traditional and primary authority over land and water use. 33 U.S.C. § 1251(b). The CWA contemplates that the goals of the Act would be addressed through a complementary array of protections and tools – e.g., permits for point source discharges and planning by local agencies for nonpoint source runoff, among others. As the Agencies note in their proposal, States and local governments regulate waters that are not federally regulated through robust water quality programs and other mechanisms based on state law. 82 Fed. Reg. at 34,900. Consistent with Congress's objectives, any "waters of the United States" definition should preserve the States' traditional and primary authority over land and water use and provide clarity sufficient to allow States to identify which waters are and are not subject to federal CWA regulation.

In line with these statutory objectives, the Supreme Court has recognized important limits on CWA geographic jurisdiction. When Congress enacted the CWA, it intended to exercise its traditional "commerce power over navigation," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 n.3 (2001), ("*SWANCC*") and "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (emphasis added); *SWANCC*, 531 U.S. at 171-72. But the Supreme Court emphasized that Congress's use of the

term “navigable waters” reflects a fundamental limit on the Agencies’ permitting authority. *SWANCC*, 531 U.S. at 171 (citing *Riverside Bayview*, 474 U.S. at 138). The term “navigable” has at least some import and must be given effect. *SWANCC*, 531 U.S. at 172. The 2015 Rule erroneously interprets the limits imposed by the Supreme Court and instead adopts an overly expansive view of federal CWA authority.

A. The 2015 Rule Is Inconsistent with the Supreme Court’s Holdings in *Riverside Bayview*, *SWANCC*, and *Rapanos*.

The 2015 Clean Water Rule fails to recognize these key limits, and its definition of “waters of the United States” is inconsistent with the three seminal Supreme Court cases examining CWA jurisdiction – *Riverside Bayview*, *SWANCC*, and *Rapanos v. United States*, 547 U.S. 715 (2006).

In *Riverside Bayview*, the Supreme Court considered whether CWA jurisdiction extends beyond the waters traditionally regulated by the federal government to include wetlands abutting navigable waters. Based on its finding that the Act’s definition of “navigable waters” as “the waters of the United States” indicated an intent to regulate “at least some waters” that were not navigable in the traditional sense, the Court upheld Corps jurisdiction over wetlands that “actually abut[] . . . a navigable waterway.” 474 U.S. at 133, 135. In reaching its decision, the Court concluded that Congress, in adopting the 1977 amendments to the 1972 Act, had acquiesced to the Corps’ assertion of jurisdiction over such wetlands. *Id.* at 136-38; *SWANCC*, 531 U.S. at 170-71.

Later, in *SWANCC*, the Supreme Court noted that its *Riverside Bayview* holding was based in large measure on Congress’s unequivocal acquiescence to, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands adjacent to navigable waters – *i.e.*, “wetlands ‘inseparably bound up with the ‘waters of the United States.’”” *SWANCC*, 531 U.S. at 167 (citing *Riverside Bayview*, 474 U.S. at 134). By contrast, the *SWANCC* Court held that isolated gravel ponds (even though used as habitat by migratory birds) were “a far cry, indeed, from the ‘navigable waters’ and ‘waters of the United States’ to which the statute by its terms extends.” *Id.* at 173. The Court concluded that “the text of the statute will not allow” regulation of ponds that “are *not* adjacent to open water,” *id.* at 168 (original emphasis), noting that it was the “significant nexus between the wetlands and ‘navigable waters’” to which those wetlands actually abutted that supported CWA jurisdiction in *Riverside Bayview*. *Id.* at 167.

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

The *Rapanos* plurality (authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito) determined that the Agencies lacked authority to assert jurisdiction over the four sites at issue based on the Agencies' expansive "any hydrological connection" theory. *Id.* at 742 (plurality). Justice Kennedy concurred, criticizing the Agencies for leaving "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," and for asserting jurisdiction over wetlands "little more related to navigable-in-fact waters" than the isolated ponds at issue in *SWANCC*. *Id.* at 781-82 (Kennedy, J., concurring).

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

The concurring and plurality opinions agreed, however, on a number of critical points:

1. The term "navigable waters" must be given some importance and effect, *id.* at 779 (Kennedy, J., concurring);
2. Congress intended to regulate at least some waters that are not navigable in the traditional sense, *id.* at 767 (Kennedy, J., concurring);
3. To be jurisdictional, non-navigable waters must have a substantial relationship with traditional navigable waters, *id.*;
4. The Corps' standard for defining tributaries went too far, *id.* at 781-82 (Kennedy, J., concurring);
5. "Mere adjacency to a tributary" is insufficient, *id.* at 786 (Kennedy, J., concurring);
6. Regulatory jurisdiction does not reach all wetlands, or even "all 'non-isolated wetlands,'" *id.* at 779-80 (Kennedy, J., concurring); and
7. The presence of a hydrologic connection to navigable-in-fact waters is not enough, standing alone. *Id.* at 784-85 (Kennedy, J., concurring).

Unfortunately, as discussed in more detail below (*see* Section II.C.1), the 2015 Rule ignores these limitations, asserts sweeping jurisdiction based on connections as tenuous as the Migratory Bird Rule that was rejected in *SWANCC*, and essentially amounts to the "any connection" theory that was rejected in *Rapanos*.

B. The 2015 Rule Fails to Preserve the States' Authority to Regulate Non-Navigable Water Resources.

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

Court has explained that when an agency takes action that infringes on traditional State powers, agencies must be able to point to a clear grant of such authority from Congress in the relevant statute. *See SWANCC*, 531 U.S. at 172 (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”). The CWA contains no such clear statement that Congress intended to alter that scheme. Nonetheless, the 2015 Rule infringes on traditional State powers without pointing to any clear grant of authority from Congress.

The 2015 Rule’s sweeping assertions of jurisdiction over features with little or no relationship to navigable waters (*e.g.*, channels that infrequently host ephemeral flows, non-navigable ditches, and isolated waters) raise serious federalism concerns. As was the case with the jurisdictional theories at issue in *SWANCC* and *Rapanos*, the 2015 Rule would result in authorization for the federal government to take control of land use and planning by extending jurisdiction to essentially all wet and potentially wet areas. Indeed, under the 2015 Rule, many types of waters and features that were previously regulated as “waters of the State” or that States purposely chose not to regulate (*e.g.*, roadside ditches, channels with ephemeral flow, arroyos, industrial ponds) would be subject to federal regulation as “waters of the United States.”⁵

The Agencies failed to conduct sufficient federalism consultation with State and local entities on the 2015 Rule, which is particularly problematic in light of the Act’s emphasis on federalism. Failure to seek input from State and local entities contributed to the Rule’s legal flaws and lack of clarity, and resulted in a 2015 Rule that does not adequately preserve the States’ authority to regulate non-navigable water resources. Many State and local agencies raised this concern in comments on the 2014 Proposed Rule⁶ and in response to the Agencies’ May 2017 request⁷ for comments from State and local officials and organizations on federalism issues. For example, the Florida Department of Agriculture and Consumer Services (“FDACS”) noted in its comments on the 2014 Proposed Rule that the Rule’s “changes in definition, combined with Florida’s flat topography and broad expanse of floodplains, wetlands and sloughs, could subject virtually all of Florida’s water bodies to federal jurisdiction under the CWA, even concrete lined flood control conveyances and other man made systems intended to capture and treat stormwater flows.”⁸ In its June 2017 federalism consultation comments, FDACS further noted that the 2015 Rule’s expansive definition would “greatly complicat[e] Florida’s efforts to protect water quality and quantity, imposing costs and uncertainty on private and public entities in the state.”⁹

⁵ Importantly, the fact that the Agencies may disagree with a State’s decision whether to regulate “non-CWA” waters bears no relationship whatsoever to the question of federal jurisdiction and cannot be used to bootstrap an imagined federal authority where the Constitution has provided none.

⁶ 79 Fed. Reg. 22,188 (Apr. 21, 2014).

⁷ *See, e.g.*, Letter from the Hon. Scott Pruitt, Adm’r, EPA, & Douglas W. Lamont, P.E., Sr. Official Performing Duties of the Assistant Sec’y of the Army (Civil Works), to the Hon. Dennis Daugaard, Governor, State of South Dakota (May 8, 2017).

⁸ *See* FDACS, Comments on Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, at 1 (Oct. 31, 2014), Doc. No. EPA-HQ-OW-2011-0880-10260.

⁹ *See* FDACS, Comments on 2015 Clean Water Rule, at 1 (June 16, 2017).

Similarly, Kansas explained that the 2015 Rule would burden “the state’s ability to manage and regulate the water resources under Kansas jurisdiction” and “threatened to disrupt and undermine Kansas water quality management.”¹⁰ And joint comments submitted on behalf of the nation’s mayors, cities, counties, and regional governments and agencies explained that the 2015 Rule’s “lack of clarity and uncertainty” for key terms such as “tributary,” “floodplain,” and “significant nexus” “opens the door unfairly to litigation and citizen suits against local governments,” and would “lead to unnecessary project delays, added costs to local governments and inconsistency across the country.”¹¹

The Pennsylvania Department of Environmental Protection’s (“PDEP”) comments on the 2015 Rule explained, “[o]ne of DEP’s significant concerns with this rulemaking is EPA’s unfamiliarity with existing state law programs”¹² PDEP noted that an Environmental Law Institute (“ELI”) report cited by EPA in the proposed rule characterized Pennsylvania’s State program as one in which protection of water resources is lacking and stated that “[t]his characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with the states.” PDEP Comments at 2.

These comments demonstrate that the input of State and local entities is critical for any rulemaking to define “waters of the United States.” The Agencies should rescind the 2015 Rule so they can adequately consider the input of State and local entities in developing any new “waters of the United States” definition.

C. Failure to Seek Input From States and Local Entities Contributed to the Rule’s Numerous Legal Flaws and Lack of Clarity.

Failure to seek input from States and local entities on the 2015 Rule contributed to the Rule’s numerous legal flaws and lack of clarity. Groups from all sides have raised numerous issues with the 2015 Rule in comments and in litigation. In issuing its nationally applicable stay of the 2015 Rule on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit found that petitioners had demonstrated “a substantial possibility of success on the merits of their claims.”¹³

1. The 2015 Rule’s Definition of “Waters of the United States” Raises Constitutional Questions and Is Contrary to Supreme Court Case Law.

State, industry, and environmental petitioners have argued that the 2015 Rule’s provisions are, in various respects, beyond the Agencies’ statutory authority and inconsistent with Supreme Court precedent and the Constitution. By extending jurisdiction to isolated

¹⁰ See Letter from the Hon. Sam Brownback, Governor, State of Kansas, to the Hon. Scott Pruitt, Adm’r, EPA, & Douglas W. Lamont, P.E., Sr. Official Performing the Duties of the Assistant Sec’y of the Army (Civil Works), at 1, 4 (June 19, 2017).

¹¹ See National League of Cities, National Association of Counties, and U.S. Conference of Mayors, Comments on Waters of the U.S. Rulemaking, at 4 (June 19, 2017).

¹² PDEP, Comments on Proposed Rulemaking: Definition of “Waters of the United States” Under the Clean Water Act, at 2 (Oct. 8, 2014), Doc. No. EPA-HQ-OW-2011-0880-7985 (“PDEP Comments”).

¹³ *In re EPA*, 803 F.3d at 807.

features and ephemeral washes, the Rule improperly reads the word “navigable” out of the statute, raises constitutional questions, and is contrary to *Riverside Bayview*, *SWANCC*, and *Rapanos*. For these reasons, the Agencies should rescind the 2015 Rule.

With its broadened concept of “tributary,” the 2015 Rule would extend CWA jurisdiction to any channelized feature (e.g., ditches, ephemeral drainages, and stormwater conveyances), lake, or pond that contributes flow to navigable waters, without consideration of the duration or frequency of flow or proximity to navigable waters. *See* 80 Fed. Reg. 37,054, 37,105 (June 29, 2015). The Rule’s definition is inconsistent with the plurality’s and Justice Kennedy’s *Rapanos* opinions, both of which were concerned about far-reaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow. The plurality chastised the Corps for extending jurisdiction to “ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert.” *Rapanos*, 547 U.S. at 734 (plurality) (internal quotation marks omitted). Similarly, Justice Kennedy criticized the Agencies’ use of ordinary high-water mark (“OHWM”) to identify tributaries because it “leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it.” *See id.* at 781 (Kennedy, J., concurring). Contrary to the limits of CWA jurisdiction recognized by the *Rapanos* plurality and Justice Kennedy’s concurrence, the 2015 Rule’s definition of tributary would allow for *per se* jurisdiction over features with remote proximity and tenuous connections to navigable waters, such as ephemeral drainages, and goes well beyond the Agencies’ previous assertions of jurisdiction that were criticized by the *Rapanos* Justices as exceeding the scope of their CWA authority.

In addition, the 2015 Rule’s assertion of jurisdiction over “adjacent waters,” which could include any wetland, water, or feature located within the floodplain of and within 1,500 feet of a jurisdictional water, 80 Fed. Reg. at 37,104-05, is inconsistent with *Riverside Bayview*, *SWANCC*, and *Rapanos*. The 2015 Rule’s categorical determination that all waters and wetlands that fall within this distance threshold have a significant nexus is a serious departure from the plain meaning of “adjacent”¹⁴ and is a far cry from the actually abutting wetlands found to be adjacent in *Riverside Bayview*. Moreover, the 2015 Rule’s inclusion of non-wetlands in its “adjacent waters” category is an impermissible expansion of Agency jurisdiction. The *SWANCC* Court rejected assertion of jurisdiction over “adjacent” non-wetlands, and held that regulation of these isolated waters was beyond the scope of the Agencies’ authority under the Act. *SWANCC* 531 U.S. at 168.

Moreover, contrary to Justice Kennedy’s *Rapanos* opinion, the 2015 Rule’s adjacent waters standard would allow for jurisdiction based on “adjacency” to features that are not “major tributaries.” *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). In *Rapanos*, Justice Kennedy explicitly rejected the Corps’ attempts to assert jurisdiction based on “adjacency to tributaries, however remote and insubstantial.” *Id.* Nor does the *Rapanos* plurality allow for such an expansive assertion of jurisdiction over “navigable waters.” The plurality found that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are

¹⁴ *See Rapanos*, 547 U.S. at 748 (plurality) (“‘[A]djacent’ as used in *Riverside Bayview* is not ambiguous between ‘physically abutting’ and merely ‘nearby.’”).

‘adjacent to’ such waters and covered by the Act.” *Id.* at 742 (plurality) (emphasis in original). Thus, the plurality explained, “Wetlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters” *Id.* Ignoring these limits set forth by the Supreme Court and codifying practices specifically rejected by the *Rapanos* justices, the 2015 Rule would allow for jurisdiction over waters, including wetlands, based on location within the floodplain of and within 1,500 feet from non-navigable, remote features it would classify as tributaries.

Further, if a feature would not qualify as jurisdictional under the 2015 Rule’s broad “tributary” or “adjacent waters” categories, the Rule contains a catch-all category for all waters within the 100-year floodplain of a navigable water or located within 4,000 feet of a jurisdictional water that, when aggregated with all other “similarly situated” wetlands and waters in the entire watershed, have a “more than speculative or insubstantial” effect on navigable waters. 80 Fed. Reg. at 37,105-06.¹⁵ The 2015 Rule’s assertion of jurisdiction over these remote features is contrary to the *SWANCC* Court’s holding that “nonnavigable, isolated, intrastate waters” – which, unlike the wetlands at issue in *Riverside Bayview*, did not actually abut a navigable waterway – are not jurisdictional under the CWA. *SWANCC*, 531 U.S. at 169-71. The *SWANCC* Court found that assertion of jurisdiction over such features would raise “significant constitutional questions” and “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* at 174. With its essentially limitless jurisdictional reach, the 2015 Rule would most certainly reach features like the remote waterbodies that troubled Justice Kennedy that are “little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.” *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring). The 2015 Rule would apply the “waters of the United States” definition to a whole host of features that are remote from navigable waters and carry minor water volumes, all of which the *Rapanos* Court made clear are beyond the scope of federal jurisdiction. *Id.* at 734 (plurality); *id.* at 781 (Kennedy, J., concurring).

2. The 2015 Rule Fails to Provide Needed Clarity and Certainty.

The Act’s reach is notoriously unclear, and the consequences to landowners even for inadvertent violations can be crushing.¹⁶ The Agencies stated that the purpose of the 2015 Rule was to provide clarity and certainty on the scope of the “waters of the United States.” *See* 80 Fed. Reg. at 37,055. However, petitioners and thousands of public commenters have suggested that the 2015 Rule lacks clarity on key terms and definitions, hinders administrability of the “waters of the United States” definition, would create significant confusion, and failed to put parties on notice regarding when their conduct might violate the law.

¹⁵ Under the 2015 Rule, ditches, groundwater, and erosional features (*i.e.*, gullies, rills, and swales) could serve as hydrological connections that would demonstrate that a feature has a “significant nexus” and is therefore jurisdictional. *See* 80 Fed. Reg. at 37,093.

¹⁶ *See Sackett v. EPA*, 132 S.Ct. 1367, 1375, (2012) (Alito, J., concurring). The CWA imposes civil penalties of up to \$51,570 per day for unauthorized discharges to waters of the U.S. 82 Fed. Reg. 3633, 3636 (Jan. 12, 2017).

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

- Interstate waters: The 2015 Rule would assert jurisdiction over “interstate waters” and allows for features to be jurisdictional based on their relationship to “interstate waters,” 80 Fed. Reg. at 37,074, but fails to provide a definition of the term, and sweeps in remote and minor volume waters contrary to the Supreme Court decisions. The Agencies failed to respond to comments seeking clarity on what waters are considered “interstate waters,” and whether, for example, waters that cross tribal boundaries are considered “interstate waters.” *See* WAC Comments on 2015 Rule at 31.
- Impoundments: The 2015 Rule would assert jurisdiction over “impoundments” and allows for features to be jurisdictional based on their relationship to “impoundments” without defining the term. 80 Fed. Reg. at 37,104-05. The Agencies likewise failed to respond to comments seeking to understand the meaning of “impoundment” and, for example, which features on the landscape holding water (*e.g.*, farm ponds? stock ponds? industrial ponds?) can be considered impoundments. *See* WAC Comments on 2015 Rule at 32-33.
- Ordinary high water mark (“OHWM”): OHWM is the lynchpin concept of the 2015 Rule’s “tributary” definition, but the 2015 Rule fails to change or clarify the OHWM definition, which Corps experts have said is one of the most inconsistent and ambiguous terms in the CWA regulatory program.¹⁷ The Agencies failed to respond to commenters’ concerns that use of the existing, imprecise regulatory definition of OHWM is problematic because many of the OHWM physical indicators can occur wherever land may have water flowing across it, regardless of frequency or duration. *See* WAC Comments on 2015 Rule at 37-38.
- Floodplain: The 2015 Rule would provide for jurisdiction over waters within the floodplain of and within 1,500 feet of a jurisdictional water, as well as waters within the 100-year floodplain of a water identified in categories (1) through (3) of the Rule¹⁸ (“(1)-(3) water(s)”) that has a significant nexus, but the Rule fails to provide adequate clarity for the term “floodplain.” 80 Fed. Reg. at 37,104-05. The preamble provides that the Agencies would use the 100-year floodplain where a Federal Emergency Management Agency (“FEMA”) Flood Zone Map is available, but acknowledges “much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of

¹⁷ Matthew K. Mersel, U.S. Army Corps of Engineers, Cold Regions Research and Engineering Laboratory, Development of National OHWM Delineation Technical Guidance, slide 3 (Mar. 4, 2014), http://insideepa.com/sites/insideepa.com/files/documents/apr2014/epa2014_0760.pdf (subscription required) (noting that inconsistent interpretations of the OHWM concept have led to inconsistent field indicators and delineation practices).

¹⁸ The first three categories of jurisdictional waters under the 2015 Rule are: “(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters, including interstate wetlands; (3) The territorial seas.” 81 Fed. Reg. at 37,104.

date and may not accurately represent existing circumstances on the ground.” *Id.* at 37,081. Thus, for many instances, the 2015 Rule leaves it to the widely varying discretion of the agency field staff to assess the applicable floodplain. Again, the Agencies failed to respond to commenters’ questions, such as whether areas behind levees are still within the “floodplain” for purposes of adjacency determinations. *See* WAC Comments on 2015 Rule at 52.

- **Significant nexus:** The 2015 Rule would categorically determine that all features that meet the “tributary” and “adjacent waters” definitions have a “significant nexus.” 80 Fed. Reg. at 37,068-70. It would also allow for jurisdiction over other features (*e.g.*, prairie potholes, Western vernal pools, waters within 4,000 feet of a jurisdictional water) if the Agencies find a “significant nexus.” *Id.* at 37,104-05. The Rule would allow for a significant nexus determination where a feature “alone, or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity” of a (1)-(3) water, and instructs the Agencies to find a significant nexus where one of nine ecological functions could be demonstrated to occur. *Id.* at 37,106. As the Corps noted, the 2015 Rule “does not provide clarity for how ‘similarly situated’ is defined” and fails to explain how the definition’s “‘more than speculative or insubstantial’” standard would be quantified.¹⁹
- **Dry land:** Many of the 2015 Rule’s exclusions apply only to features that were “created in dry land.” 80 Fed. Reg. at 37,105 (excluding, among others, artificial lakes and ponds, reflecting and swimming pools, water-filled depressions, stormwater control features, and wastewater recycling structures that were created in dry land). Yet, the Agencies refused to define the term “dry land” in the regulatory text despite commenters’ requests for a regulatory definition. Instead the preamble gives a very confusing explanation of the term, and explains that the Agencies did not define “dry land” because they “determined that there was no agreed upon definition.” *Id.* at 37,099.

Moreover, the public was not given the opportunity to comment on the evaluation of specific ecological functions because it was not a component of the Proposed Rule. However, as Dr. Michael Josselyn, EPA Science Advisory Board (“SAB”) Panel Member and Certified Professional Wetland Scientist, noted in a recent Congressional hearing, “These functions are extremely broad, sometimes contradictory, and provide little room for any true evaluation of the particular nature of the wetland being evaluated nor the significance of that wetland on downstream TNWs.”²⁰ Dr. Josselyn also noted that the 2015 Rule provided “no guidance as to the specificity of the information required, how to quantify any of these variables, and what measures would be used to assess how they influenced downstream [waters].” Josselyn Testimony at 6-7.

¹⁹ Memorandum from Jennifer A. Moyer, Chief, Regulatory Program, Dep’t of the Army, Corps, to John W. Peabody, Deputy Commanding Gen. for Civil & Emergency Ops., Corps, Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of “Waters of the United States,” at 6 (May 15, 2015) (“Moyer Memorandum”).

²⁰ *A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule Before the S. Comm. on Env’t & Pub. Works*, 115th Cong. (Apr. 26, 2017) (written testimony of Dr. Michael Josselyn, Certified Professional Wetland Scientist, Principal, WRA, Inc., at 6) (“Josselyn Testimony”).

As a result of the 2015 Rule’s ambiguity and lack of regulatory certainty, the Rule fails to provide adequate notice to landowners that would be regulated under the Rule’s definition of “waters of the United States.” In addition, the Rule’s lack of clarity has the potential to result in inconsistent and arbitrary application or enforcement. *See, e.g.*, Moyer Memorandum at 6-7 (noting that the Rule’s use of linear distances and floodplains for case-specific determinations would lead to confusion in implementation in the field).

III. The Record Established During the 2015 Rulemaking Process Does Not Restrain the Agencies’ Authority to Rescind the 2015 Rule.

It is well established that Agencies possess unequivocal authority to change or repeal rules to reflect changes in circumstance, statutory interpretation, policy, or technical analysis, or to correct and remedy prior mistakes and defective rulemaking. *See, e.g., Fed. Commc’n’s Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 (D.C. Cir. 1990) (per curiam) (“[A]n agency *always* retains the power to revise a final rule through additional rulemaking.”) (emphasis in original); *Ctr. for Sci. in the Pub. Interest v. Dep’t of the Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) (upholding agency’s repeal action that concluded simply that the prior decision “was unwise . . . [and] a different decision is preferable”) (internal quotation marks omitted); *id.* at 999 & n.1 (“[I]t is not improper for an agency to engage in new rulemaking to supersede defective rulemaking. . . . [A]n agency must be free to rectify errors by engaging in new rulemaking.”) (internal quotation marks omitted); *id.* at 999 (an agency may repeal a rule if it determines that “the existing rule has no rational basis to support it”) (internal quotation marks omitted).

The Supreme Court specifically has acknowledged an administration’s discretion to reevaluate regulations promulgated by the immediate past administration. *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As Justice Rehnquist noted in his concurring opinion in *State Farm*:

[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

Id. at 59 (Rehnquist, J., concurring in part & dissenting in part).

In a repeal action, the Agencies are required to “examine the relevant data and articulate a satisfactory explanation for its action.” *Fox*, 556 U.S. at 513 (internal quotation marks omitted). They do not have to rebut all findings that supported the prior rulemaking. As such, in rescinding the 2015 Rule, the Agencies do not have to rebut or abandon the record that was created by the 2015 Rule. That record did not dictate a particular definition of “waters of the U.S.” For example, the EPA report on the connectivity of waters, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, EPA/600/R-14/475F, (Jan. 2015), <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414> (“Science Report”), essentially concluded that all waters are connected and that connectivity exists on a gradient, but the report does not draw lines or address the legal question of what should be jurisdictional under

the statute. As the government argued in its Sixth Circuit brief, “[i]t is well within the Agencies’ rulemaking authority to identify a point on the continuum” at which waters are considered jurisdictional.²¹ The Agencies also noted in the 2015 Rule and supporting documents that “science does not provide bright lines,” and thus “the agencies’ interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, *but not dictated by them.*” 80 Fed. Reg. at 37,060 (emphasis added); EPA & U.S. Dep’t of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States at 93 (May 27, 2015), Doc. No. EPA-HQ-OW-2011-0880-20869.

In fact, major components of the 2015 Rule are not justified by or based on the Science Report, as evidenced by the fact that the bright-line distance limitations used in the 2015 Rule’s “adjacent waters”²² and case-by-case significant nexus categories are not based on the science. Instead, the Agencies drew these bright lines based on legal and policy considerations, as well as their “experience and expertise.” *See* 80 Fed. Reg. at 37,059.

The Agencies can rescind the 2015 Rule so long as they “examine the relevant data and articulate a satisfactory explanation” for their decision. *Fox*, 556 U.S. at 513 (internal quotation marks omitted). And they can (and should) undertake a new, separate analysis of the appropriate scope of CWA jurisdiction that is informed by the objectives and requirements of the CWA, the relevant Supreme Court decisions, available scientific information, and the Agencies’ technical expertise and experience.

IV. The Agencies Should Codify the Status Quo by Rescinding the 2015 Rule.

The U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the 2015 Rule, finding that petitioners had shown a “likelihood . . . of success on the merits” of their challenges to the Rule. *In re EPA*, 803 F.3d at 806, 807. The Sixth Circuit noted that the nationwide stay “temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule.” *Id.* at 808. Consistent with the Sixth Circuit’s order, while the 2015 Rule is stayed, the Agencies have continued to implement the regulations defining the term “waters of the United States” that were in effect immediately before the August 27, 2015, effective date of the Rule, by applying relevant case law and applicable policy. *See* 82 Fed. Reg. at 34,902.

As the Agencies note in their proposal, the Supreme Court’s resolution of the question as to which courts have original jurisdiction over challenges to the 2015 Rule could impact the Sixth Circuit’s exercise of jurisdiction and its nationwide stay of the 2015 Rule. *Id.* Given the uncertainty of the nationwide stay, and to avoid potential for confusion, the Agencies should codify the status quo by rescinding the 2015 Rule. Rescission of the 2015 Rule is a better course of action than alternative approaches, such as an administrative stay of the 2015 Rule, that would

²¹ Br. for Resp’ts at 95, *In re EPA*, 803 F.3d 804 (6th Cir. 2015) (No. 15-3799).

²² Indeed, in its review of the Proposed Rule, the SAB advised that “adjacent waters and wetlands . . . not be defined solely on the basis of geographical proximity or distance to jurisdictional waters.” Memorandum from Dr. David T. Allen, Chair, SAB, to the Hon. Gina McCarthy, Admin., EPA, Consideration of the Adequacy of the Scientific and Technical Basis of the EPA’s Proposed Rule titled “Definition of the Waters of the United States under the Clean Water Act,” at 3 (Sept. 30, 2014), Doc. No. EPA-HQ-OW-2011-0880-7531.

leave the flawed regulatory text in the Code of Federal Regulations and thus cause uncertainty over what regulatory requirements are to be met. Rescission of the 2015 Rule and the corresponding recodification of the pre-existing regulations will allow the Code of Federal Regulations to reflect the current legal regime under which the Agencies are operating pursuant to the Sixth Circuit’s October 9, 2015 order. Codifying the status quo will, in the words of the Sixth Circuit, “restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime.” *In re EPA*, 803 F.3d at 808.

Recodifying the regulations that were in place prior to the 2015 Rule, which has been stayed for almost two years, will maintain the status quo. In fact, the 2015 Rule took effect in 37 States for only about six weeks between the Rule’s August 28, 2015, effective date and the Sixth Circuit’s October 9, 2015, nationally applicable stay order. During that 43-day period, there were no enforcement actions under the Rule. Since the nationwide stay has been in place, well over 19,000 approved jurisdictional determinations (“AJDs”) have been issued pursuant to the “familiar” pre-Rule regime.²³ The Sixth Circuit found no indication “that the integrity of the nation’s waters will suffer imminent injury if the [2015 Rule] is not immediately implemented and enforced.” *In re EPA*, 803 F.3d at 808. The court was concerned, however, with the “burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule’s redrawing of jurisdictional lines over certain of the nation’s waters.” *Id.*

Moreover, the Agencies’ economic analysis for the proposal shows that the annual avoided costs of repealing the 2015 Rule and recodifying the status quo would largely outweigh the annual forgone benefits.²⁴ Indeed, the benefits of recodifying the status quo are actually much greater here than the Agencies’ economic analysis shows because their analysis relies on the economic analysis for the 2015 Rule, which grossly underestimated the costs of the 2015 Rule.²⁵

For all these reasons, the Agencies should codify the status quo by rescinding the 2015 Rule.

V. Step Two (Promulgation of a New Definition of “Waters of the United States”) Is Critical.

The Agencies indicate in their proposal that they intend to do a separate rulemaking (“Step 2”) to develop a new definition of “waters of the United States.” 82 Fed. Reg. at 34,902. The Coalition agrees with this approach. Although rescinding the 2015 Rule (and the corresponding recodification of the pre-existing regulations) is necessary in the near term for clarity and regulatory certainty, there are many issues with the current regulations and guidance

²³ EPA, Clean Water Act Approved Jurisdictional Determinations, <https://watersgeo.epa.gov/cwa/CWA-JDs/> (last visited Sept. 12, 2017).

²⁴ See EPA & U.S. Dep’t of the Army, Economic Analysis for the Proposed Definition of “Waters of the United States”—Recodification of Pre-existing Rules, at 11 (June 2017), Doc. No. EPA-HQ-OW-2017-0203-0002.

²⁵ See WAC Comments on 2015 Rule, Exhibit 19, David Sunding, Ph.D., The Brattle Group, Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States (May 15, 2014), EPA-HQ-OW-2011-0880-17921 (select Exhibits Vol. 11 of 11).

documents that should be addressed through a new rulemaking. The Coalition continues to support a rulemaking to reasonably and clearly articulate federal and State CWA authorities.

VI. Conclusion

For the reasons outlined above, the Coalition strongly supports the Agencies' proposal to rescind the 2015 Rule and eliminate confusion by recodifying the regulations that were in place prior to the 2015 Rule. In addition, WAC encourages EPA and the Corps to consider any individual comments filed by WAC's member organizations, which may raise additional points or further expand on issues highlighted in this comment letter.