

April 15, 2019

The Honorable Andrew R. Wheeler
U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler:

On behalf of the 700 state and local associations and 140,000 firms that comprise the National Association of Home Builders (NAHB), please find attached comments on the proposed definition of “Waters of the United States” (WOTUS) under the Clean Water Act (CWA).¹ NAHB largely supports the proposal and appreciates the efforts of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) to further refine the limits of federal authority and ensure the rule is clear, understandable and workable. To address some of the concerns and challenges that our members have encountered in the field, we offer a number of clarifications and suggestions to make the implementation of the WOTUS regulation more efficient, predictable, and consistent for all stakeholders.

NAHB is a Washington, DC-based trade association whose mission is to enhance the climate for housing and the building industry, which includes providing and expanding opportunities for all people to have access to safe, decent, and affordable homes. NAHB’s membership includes firms engaged in land development, single family and multifamily home construction, remodeling, multifamily ownership, building material trades, and commercial and light industrial construction projects. Because our members routinely conduct earth moving and grading activities that may impact federally regulated “waters” or “wetlands”, the regulatory definition of WOTUS is critically important. Defining the extent of these jurisdictional areas, however, has never been easy or predictable. Making matters worse, ongoing litigation has led to the current situation where 22 states are subject to one WOTUS definition and 28 states are operating under another, even though federal rules are expected to be consistent nationwide. Clearly, change is needed, and we are pleased the Agencies have taken this important step.

For over 30 years, NAHB has worked with the EPA and USACE as they have sought to define the extent of CWA jurisdiction, regularly advocating for a definition of WOTUS that contains appropriate limits and is easily understood and applied in the field. Unfortunately, over that time, the Agencies have increasingly expanded their authority and continued to pursue definitions that are based on vague, confusing, and unpredictable criteria that make field identification difficult and sometimes impossible. These efforts culminated in the problematic 2015 rule that inappropriately extended federal authority to features such as isolated and temporary waters, all wetlands within 100-year floodplains, and wetlands that have a “significant nexus” to certain other waters.

¹ 84 Fed. Reg. 4154 (Feb. 14, 2019).

Importantly, today's proposal largely corrects the vast overreach of the prior rules, is consistent with case law and the Constitution, and reaffirms the primary role of states in protecting our nation's surface waters. Notably, the proposed rule asserts federal jurisdiction over only those "adjacent wetlands" that have a surface connection to a traditional navigable water and excludes ephemeral waters and most ditches. It also eliminates the "significant nexus" test that caused confusion and delays during the jurisdictional determination process and more appropriately focuses on commerce, which is consistent with the section of the Constitution that authorizes the CWA. Also, because it narrows federal jurisdiction, the proposed rule respects the CWA's stated authority for states to manage their land and water resources.

While the Agencies have proposed a rule that addresses many of the challenges posed by previous WOTUS definitions, we have attached detailed comments that suggest a number of revisions intended to provide additional clarity for landowners, reduce the need for subsequent regulatory guidance by the Agencies, and ultimately reduce subsequent permitting delays. We hope these suggestions are viewed favorably and incorporated into the final rule.

Finally, although today's proposal is a milestone in the effort to better define "Waters of the United States", given the ongoing uncertainty regarding how federal jurisdiction is presently being determined, we strongly urge the Agencies to rescind the 2015 rule as quickly as possible. The current situation, which determines federal authority based on the state where a property is located, is confusing, inappropriate, and unsustainable.

Thank you for considering our comments and we look forward to publication of the final rule. Should you have any questions or require additional information, please contact Evan Branosky, Program Manager, Environmental Policy, at ebranosky@nahb.org or (202) 266-8662.

Best regards,



Gregory F. Ugalde
2019 Chairman of the Board
National Association of Home Builders

Comments on the Revised Definition of “Waters of the United States”



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1. INTRODUCTION

The National Association of Home Builders (NAHB) is a trade association that seeks to protect the American Dream of housing opportunities for all, while working to achieve professional success for our members who build communities, create jobs, and strengthen the economy. A federation of more than 700 state and local home builder associations worldwide, NAHB represents over 140,000 firms engaged in land development, single and multifamily construction, remodeling, multifamily ownership, building material trades, and commercial and light industrial construction projects. NAHB's members are primarily "small businesses" as defined by the U.S. Small Business Administration, collectively employ over 3.4 million people nationwide, and build four out of every five new homes in the United States.

The definition of "waters of the United States" is critically-important to the home building industry. Creating residential subdivisions and constructing single and multifamily homes involves substantial land clearing and earth moving activities. Historically, because the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have asserted broad jurisdiction under the Clean Water Act's (CWA) definition of "waters of the United States, including 'navigable waters' and the territorial seas," NAHB members must often obtain CWA permits to complete their land development or construction projects. For example

- Section 303(a) requires states to establish Water Quality Standards that describe the desired conditions of a water of the United States and the criteria that would achieve them. Often, Section 402 permit conditions are based on Water Quality Standards.
- Section 303(d) requires Total Maximum Daily Loads (TMDLs), which establish the maximum amount of any given pollutant allowed in a water body, for waters that fail to meet their Water Quality Standards. TMDLs can further influence Section 402 permits and lead municipal and state regulators to impose additional requirements on the home-building industry.
- Section 401 requires applicants that seek federal licenses or permits for activities that could discharge pollutants into waters of the United States to obtain certification from the state in which the discharge originates, certifying that the discharge complies with applicable water quality standards.
- Section 402 establishes the National Pollutant Discharge Elimination System (NPDES) permit program, which regulates the point source discharge of pollutants into waters of the United States. Home builders are required to obtain such permits to discharge stormwater runoff from their projects.
- Section 404 requires a permit for the discharge of dredged or fill material into waters of the United States. Obtaining a Section 404 permit also creates a "federal nexus" that can initiate additional federal requirements under the Endangered Species Act, National Environmental Policy Act, and National Historic Preservation Act.

Because of its importance to our industry, NAHB has worked with EPA and the Corps (i.e., the Agencies) to clarify the meaning of "waters of the United States" for over 30 years. NAHB's engagement precedes the Final Rule for Regulatory Programs of the Corps of Engineers (1986 Rule),¹ which is still the basis for

¹ 51 Fed. Reg. 41206 (November 13, 1986).

federal jurisdiction in 28 states. More recently, NAHB has provided extensive comments in response to the various attempts by the Agencies to clarify the meaning of “waters of the United States” under the CWA. As such, NAHB incorporates by reference into today’s comments on the proposed rule all prior NAHB responses to the Agencies’ requests for public comment, including the following:

- 2003 Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States”;²
- 2008 Guidance Regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* (2008 *Rapanos* Guidance);³
- 2011 Draft Guidance on Identifying Waters Protected by the Clean Water Act;⁴
- Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act (2015 Rule);⁵
- “Waters of the United States”—Recodification of Pre-Existing Rules;⁶ and
- “Definition of Waters of the United States”—Schedule of Public Meetings (2017 Recommendations).⁷

Despite NAHB’s input, however, and against the intent of Congress, U.S. Supreme Court precedent, and states’ efforts to regulate non-navigable waters, the Agencies’ jurisdiction has expanded over time. For example, the 1986 Rule introduced the “Migratory Bird Rule”, which allowed the Corps to claim jurisdiction over isolated features that served as habitat for various avian species.⁸ Further, the 2008 *Rapanos* Guidance introduced the “significant nexus” concept, which extended federal jurisdiction through an inconsistent and uncertain evaluation process.⁹ Finally, the 2015 Rule went even further by requiring federal permits for impacts to features within ¼ mile of some jurisdictional waters among other expansions.¹⁰ The fact that the 2015 Rule has never been implemented nationally, was found

² National Association of Home Builders. April 15, 2003. Comments on Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States”, EPA-HQ-OW-2002-0050.

³ National Association of Home Builders. January 18, 2008. Comments on the U.S. EPA and U.S. Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*, EPA-HQ-OW-2007-0282.

⁴ National Association of Home Builders. August 1, 2011. Comments on the Draft Guidance on Identifying Waters Protected by the Clean Water Act, EPA-HQ-OW-2011-0409.

⁵ National Association of Home Builders. November 14, 2014. Comments on the Proposed Rule to Define Waters of the United States under the Clean Water Act, EPA-HQ-OW-2011-0880 (*hereinafter*, 2014 NAHB Comments).

⁶ National Association of Home Builders. September 27, 2017. Comments on the Proposed Rule—Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, EPA-HQ-OW-2017-0203.

⁷ National Association of Home Builders. November 28, 2017. Recommendations Regarding a Revised Definition of “Waters of the United States”, Submitted in Response to “Definition of ‘Waters of the United States’—Schedule of Public Meetings,” EPA-HQ-OW-2017-0480.

⁸ 51 Fed. Reg. 41217 (November 13, 1986). The Supreme Court reversed the Migratory Bird Rule in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

⁹ 2008 Guidance Regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* (December 2, 2008).

¹⁰ 80 Fed. Reg. 37105 (June 29, 2015).

illegal by various courts, and today applies in just 22 states is testament to its inconsistency with Congressional intent and case law.

Fortunately, today's proposal marks a vast improvement over the problematic, existing regulations. It is protective of surface waters while respecting the limits of federal authority as confirmed by Congress and clarified in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANNC)*, *Rapanos v. United States & Carabell v. United States*, 547 U.S. 715 (2006) (collectively, *Rapanos*), and *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside Bayview*). It is also firmly based on the Commerce Clause of Article 1, Section 8 of the U.S. Constitution. Further, it is far clearer and more easily applied in the field than the prior regulations, as it supports readily observable determinations of jurisdiction, eliminates ephemeral features from federal oversight, and eliminates the problematic phrases of "significant nexus," "neighboring," and "similarly situated" that rendered whole swaths of scattered features jurisdictional under the 2015 Rule.¹¹ Finally, it respects states' authority under Section 101(b)¹² and will help to reduce the redundant permitting requirements caused by layers of local, state, and federal regulations.

In addition to these written comments, NAHB has provided feedback on the proposed rule to the Agencies at several points during the public comment period. Three NAHB members provided verbal comments during the public hearing that was held on February 27-28, 2019 in Kansas City, Kansas. In addition, NAHB staff participated in the "small entity meeting" held on March 19, 2019 at EPA headquarters in Washington, DC. NAHB also supports the comments of the Federal Water Quality Coalition, which is comprised of industrial companies, municipal entities, agricultural parties, and trade associations that are affected by regulatory decisions made by the Agencies under the CWA. Finally, NAHB is a member of the Waters Advocacy Coalition that represents a large cross-section of the Nation's construction, real estate, mining, agriculture, energy, and public health and safety sectors, and endorses its comments on today's proposal.

2. BACKGROUND

The extent of federal jurisdiction over surface waters shifted in the years after Congress amended the Federal Water Pollution Control Act in 1972 to form the modern Clean Water Act, and has remained unclear since then. Between 1973 and 1977, the EPA and Corps issued separate definitions for the statutory terms "navigable waters" and "waters of the United States". Further, by 1985, two important court cases clarified the extent of federal jurisdiction. In *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975)(*Callaway*), the District Court for the District of Columbia ruled that "navigable waters" are not limited to traditional tests of navigability.¹³ Also, in *Riverside Bayview*, the Supreme Court ruled unanimously that the CWA authorized the Corps to assert jurisdiction over wetlands adjacent to traditional navigable waters.

The finalization of the Corps' 1986 Rule, although largely consistent with previous EPA regulations, represented somewhat of a turning point, as the Agencies began to use the same "waters of the United States" definition. The 1986 Rule also excluded "waste treatment systems" from the definition, moved a

¹¹ *Id.*

¹² Section 101(b) states Congress's "policy to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and elimination pollution" and "to plan the development and use... of land and water resources." 33 U.S.C. § 1251(b).

¹³ Revised Definition of "Waters of the United States" 84 FR 4154 (Feb. 14, 2019).

previous exclusion for ditches to the preamble text, and introduced the “Migratory Bird Rule”. Under the Migratory Bird Rule, the Corps’ jurisdiction was extended to isolated waters “which are or would be used” as habitat by birds that are protected by migratory bird treaties, crossed state lines, or were endangered species.¹⁴ In 1993, the Agencies amended the 1986 Rule to exempt “prior converted croplands”¹⁵ as defined at that time by the United States Department of Agriculture (USDA) National Food Security Act Manual.

Though the Agencies refrained from additional rulemakings for several years after the 1993 amendments, uncertainty over elements of the 1986 Rule continued to grow. In particular, the Migratory Bird Rule tested the limits of Congress’s authority to maintain the CWA within the bounds of the Commerce Clause of the U.S. Constitution. The Supreme Court addressed that concern in 2001, when *SWANNC* questioned whether the CWA conferred the Corps with authority over isolated, seasonal ponds at an abandoned sand and gravel pit near Chicago because they were susceptible to use by migratory birds. The Supreme Court’s ruling limited federal authority under the CWA for the first time, and the Agencies’ resultant “Legal Memoranda Regarding *Solid Waste Agency of Northern Cook County v. United States*” (January 15, 2003) restricted application of the Migratory Bird Rule.

The Supreme Court again interpreted the term “waters of the United States” in 2006, when it considered two consolidated cases from the 6th Circuit of Appeals. In both cases, the wetlands-of-concern were separated from traditional navigable waters (TNWs) by ditch and drainage networks. Thus, the cases sought answers to two similar questions—whether wetlands that did not physically abut navigable-in-fact waters were jurisdictional (*Rapanos v. United States*, 376 F.3d 704 (6th Cir. 2004)) and whether Corps’ jurisdiction extended to wetlands adjacent to, but hydrologically isolated from, any tributary of a “water of the United States” (*Carabell v. United States Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004)). Though the 4-1-4 decision produced five opinions with no single opinion commanding a majority, the plurality opinion authored by Justice Scalia, and a concurring opinion from Justice Kennedy, created two theories to determine jurisdiction.¹⁶ Justice Scalia claimed that the CWA extended beyond TNWs to include “relatively permanent, standing or flowing bodies of water”.¹⁷ In comparison, Justice Kennedy concluded that “waters of the United States” included wetlands that had a significant nexus to traditional navigable waters, “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”¹⁸

The Agencies responded to *Rapanos* with two memoranda in June 2007¹⁹ and the 2008 *Rapanos* Guidance.²⁰ Rather than focus on *points of consensus* between Justice Scalia’s plurality and Justice Kennedy’s concurrence, however, the documents reflected an understanding of jurisdiction over waters that satisfied *either* the plurality *or* concurrence conditions. Through these documents, the Agencies did

¹⁴ 51 Fed. Reg. 41206 (November 13, 1986).

¹⁵ 58 Fed. Reg. 45008 (August 25, 1993).

¹⁶ *Rapanos v. United States*, 547 U.S. 715 (2006).

¹⁷ *Id.* at 715.

¹⁸ *Id.* at 780.

¹⁹ Memorandum for Director of Civil Works and US EPA Regional Administrators, Subject: U.S. EPA and Corps Coordination on Jurisdictional Determinations (JDs) under Clean Water Act Section 404 in Light of *SWANCC* and *Rapanos* Supreme Court Decisions (June 5, 2007); Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007).

²⁰ Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 8, 2008).

not change the regulatory definition of “waters of the United States” but clarified that federal jurisdiction would encompass TNWs and the wetlands adjacent to them, non-navigable tributaries of TNWs that are relatively permanent with waters that flow year-round or at least seasonally and the wetlands that directly abut them, and water bodies in combination with their adjacent wetlands that have a significant nexus with a TNW.²¹ Within the guidance, the Agencies also conveyed major changes in their treatment of isolated features and navigable waters. Specifically, the “significant nexus” criteria would expand federal jurisdiction to non-navigable tributaries and adjacent wetlands that affected the chemical, physical, and biological integrity of downstream TNWs.²² Appendix D of the guidance extended TNWs to waters used broadly in commerce. In 2011, the Agencies proposed guidance that went even further, including interstate waters and a new category of “other waters”, and expanding “navigability” to include waters that could support recreation.²³

Due to the confusion of multiple memoranda and guidance documents, the Agencies initiated a rulemaking for a new “waters of the United States” definition in 2014. On June 29, 2015, they published the final 2015 Rule, which included six categories of “jurisdictional by rule” waters; two categories of waters subject to case-specific analysis to establish a significant nexus to a TNW, interstate water, or the territorial seas; and seven categories of excluded features. Compared to the 1986 Rule, the 2015 Rule could extend jurisdiction in theory to nearly every water feature in the country that was not categorically excluded. Major changes included:

- New definitions for “tributary” and “tributaries”: The terms were defined to include water that “contributes flow, either directly or through another water” to a TNW, interstate water, or the territorial seas and have the physical indicators of a bed, bank, and ordinary high water mark (OHWM).²⁴
- Broad ditch jurisdiction: All ditches were regulated unless they were excavated in uplands, drained only uplands, and had less than perennial flow or did not contribute flow to an otherwise jurisdictional water. As a result, ditches with ephemeral flows could become jurisdictional. Further, under the 2015 rule, ditches could make isolated wetlands jurisdictional by connecting them to other jurisdictional waters.
- New category for “all waters”: Whereas the 1986 Rule included *wetlands* adjacent to jurisdictional water, the 2015 Rule extended adjacency to a category that covered “all waters” and included wetlands, ponds, lakes, oxbows, impoundments, and similar waters.
- New definition for “neighboring”: The concept of neighboring, which was also included in the 1986 Rule, was newly-defined to include all waters located within 100 feet of the OHWM, or within the 100-year floodplain but not more than 1,500 feet of the OHWM, of a “jurisdictional by rule” water and waters located within 1,500 feet of the high tide line (HTL) of a TNW, interstate water, or the territorial seas.

²¹ *Id.*

²² 2008 Guidance Regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008) (Appendix D).

²³ 76 Fed. Reg. 24479 (May 2, 2011).

²⁴ 80 Fed. Reg. 37105 (June 29, 2015).

- Expansive use of “significant nexus”: Five types of waters, as well as all waters located within the 100-year floodplain, are deemed jurisdictional if they are found to have a significant nexus to a TNW, interstate water, or the territorial seas. Further, waters within 4,000 feet of the HTL or OHWM of a jurisdictional water would be jurisdictional if found to have a significant nexus to that water.²⁵ Finally, the process to determine a significant nexus was further refined, with jurisdiction extending to any water that exhibited one of nine chemical, physical, or biological functions.

Soon after the Agencies finalized the 2015 Rule, numerous groups filed lawsuits around the country. Many groups filed their lawsuits in both District Court and Circuit Court because the Agencies declared that they were issuing the 2015 Rule under 33 U.S.C. § 1369(b) (Section 509(b)), which explains that lawsuits pursuant to certain Agency actions may only be brought in a federal court of appeals.²⁶

On August 27, 2015, one day before it was to become effective, the U.S. District Court for the District of North Dakota issued an injunction against the 2015 Rule in 13 states.²⁷ Subsequently, in October 2015, the Court of Appeals for the 6th Circuit preliminarily enjoined the rule nationwide.²⁸ However, it was unclear whether the 6th Circuit had jurisdiction over the rule pursuant to Section 509(b). That issue was raised to the Supreme Court and, in 2018, the Court ruled that the 6th Circuit lacked jurisdiction under Section 509(b), which resulted in the nationwide stay of the 2015 Rule being dissolved.²⁹

Consequently, in June and September of 2018, the Southern District of Georgia and the Southern District of Texas preliminarily enjoined the 2015 Rule in 11 and three states, respectively.³⁰ Further, in September 2018, the District of North Dakota added Iowa to its injunction. Finally, in March 2019, the Southern District of Ohio denied a motion to preliminarily enjoin the 2015 Rule because the states did not prove an irreparable injury.³¹ Therefore, there are currently 28 states that are operating under the 1986 definition of “waters of the United States”, including the 2008 and 2011 *Rapanos* Guidance, and 22 states operating under the 2015 Rule.³²

3. GUIDING PRINCIPLES

As a result of these various rulemakings, legal challenges, and judgements, several guiding principles have emerged that inform the legal extent of the Agencies’ jurisdiction under the CWA. While the current definition may be unclear, what is clear is that the definition of “waters of the United States” must include certain waters, exclude certain waters, and adhere to certain defined legal boundaries.

²⁵ Order, *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D. September 18, 2018).

²⁶ 80 Fed. Reg. 37054, 37104.

²⁷ The states include Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming.

²⁸ *In re EPA*, 803 F.3d 804, 808–09 (6th Cir. 2015), vacated sub nom. *In re United States Department of Defense*, 713 F. Appendix 489 (6th Cir. 2018).

²⁹ *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 634 (2018).

³⁰ *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018); *American Farm Bureau Federation, et al. v. U.S. Environmental Protection Agency, et al.*, No. 3:15-CV-00165, 2018 WL 6411404, at *1 (S.D. Tex. Sept. 12, 2018).

³¹ *Ohio v. U.S. Environmental Protection Agency*, No. 2:15-CV-2467, 2019 WL 1368850, at *1 (S.D. Ohio Mar. 26, 2019).

³² The states of New Mexico and Colorado have requested to be dismissed from the North Dakota lawsuit. The court has not yet acted on those motions.

3.1. Commerce Clause of the Constitution

It is generally understood that Congress's authority for enacting environmental laws is found under the Commerce Clause of the Constitution. The clause provides: "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."³³ Congress's commerce power was subsequently interpreted to include three conditions. In *United States vs. Lopez*, 514 U.S. 549, 558-59 (1995), the Supreme Court clarified the boundaries of the Commerce Clause to include the use of channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and those activities having a substantial relation to interstate commerce. Thus, the basis of Agencies' jurisdiction lies with "commerce" waters and must be limited to those waters that *transport* commerce (See Section 5.1.2).

3.2. Congressional Intent for the Clean Water Act

The language of the CWA itself, including statutory definitions and descriptions of "navigable waters" and the Act's cooperative federalism structure, also plays a role in determining the allowable extent of federal jurisdiction. Under the CWA, the federal government has authority to regulate the additions of pollutants to the navigable waters from point sources.³⁴ Certain "navigable waters" are defined or described within the text of the Act. For example, Section 502 (7) defines "navigable waters" as "the waters of the United States, *including the territorial seas*."³⁵ Accordingly, "the territorial seas" must be "waters of the United States".

In addition, Section 404(g), which establishes a process by which states may assume the responsibility of administering a "dredge and fill" permit program, provides insight regarding the extent of "navigable waters".³⁶ Three types of "navigable waters" would remain under federal control when states assume permitting authority within their borders, as the statute states:

The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than [1] *those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including* [2] *all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including* [3] *wetlands adjacent thereto*), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.³⁷

Since the Corps would retain authority over these waters under state-assumed programs, it must have authority over such waters in the first place. Thus, the CWA defines or describes four types of "navigable waters" that must be incorporated into the regulatory definition of "waters of the United States" including the territorial seas; those waters which are subject to the ebb and flow of the tide; those waters which are presently used, or are susceptible to use in their natural condition or by reasonable

³³ U.S. Const. Art. I, §8, cl. 3.

³⁴ 33 U.S.C. §§ 1311(a), 1362(12).

³⁵ 33 U.S.C. § 1362(7) (emphasis added).

³⁶ 33 U.S.C. § 1344(g).

³⁷ 33 U.S.C. § 1344(g) (emphasis added).

improvement as a means to transport interstate or foreign commerce; and wetlands adjacent to the waters of Section 404(g).

3.3. Case Law

Finally, in addition to the Constitution and statutory text of the CWA, court opinions from four cases provide clarity on the boundaries of the Agencies' authority.

Of the first three cases, as explained in Section 2, two extended the Agencies CWA jurisdiction. In *Callaway*, the District Court for the District of Columbia ruled that "navigable waters" are not limited to traditional tests of navigability.³⁸ Then, in *Riverside Bayview*, the Supreme Court ruled unanimously that the CWA authorized the Corps to assert jurisdiction over wetlands adjacent to traditional navigable waters. Only in *SWANNC*, under a 5-4 decision, did the Supreme Court reject an expanded assertion of jurisdiction because the Corps' interpretation of the CWA gave no effect to the word "navigable" in "navigable waters."

While these court rulings provided some direction, their reach was limited and questions remained. As a result, the Supreme Court's ruling in *Rapanos* provides the most extensive and current guidance on the extent of federal jurisdiction. Though no clear opinion in *Rapanos* commanded a majority, existing case law provides guidance on how to interpret a court holding among five justices. The "Marks formulation", based on *Marks v. United States*, 430 U.S. 188, 193 (1977) (*Marks*), requires an examination of those differing opinions that "concurred in the judgments on the narrowest grounds."³⁹ Thus, *Rapanos* must be interpreted by examining Justice Scalia's plurality opinion and Justice Kennedy's concurrence because those opinions received support from the five justices who concurred in the judgement.⁴⁰ However, adding to the challenge, the *Marks* formulation is only workable when one opinion is a subset of the other. Since neither Justice Scalia's plurality opinion nor Justice Kennedy's concurrence are a subset of the other, the Agencies can only base their proposed rule on points of consensus between both opinions.

Fortunately, although the plurality and Justice Kennedy's concurrence initiated two different theories for establishing CWA jurisdiction, they agree on several points:

- The CWA's scope is not restricted to traditional navigable waters.
 - Plurality: "The Act's term 'navigable waters' includes something more than traditional navigable waters...."⁴¹ The plurality "affirmatively reject[ed]" an interpretation that the CWA "includes only navigable-in-fact waters."⁴²

³⁸ Revised Definition of "Waters of the United States" 84 FR 4154 (Feb. 14, 2019).

³⁹ *Marks v. United States*, 430 U.S. 188, 193 (1977).

⁴⁰ *Rapanos*, 547 U.S. at 756 (plurality) ("We vacate the judgments of the Sixth Circuit in both No. 04-1034 [*Rapanos*] and No. 04-1384 [*Carabell*], and remand both cases for further proceedings"); *id.* at 787 (Justice Kennedy, concurring) ("In these consolidated cases I would vacate the judgments of the Court of Appeals...").

⁴¹ *Rapanos*, 547 U.S. at 731.

⁴² *Id.* at 751.

- Concurrence: “Congress’ choice of words creates difficulties, for the Act contemplates regulation of certain ‘navigable waters’ that are not in fact navigable.”⁴³
- The word “navigable,” in the phrase “navigable waters,” has meaning.
 - Plurality: “[T]he traditional term ‘navigable waters’... carries some of its original substance....”⁴⁴
 - Concurrence: “[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word ‘navigable’ in ‘navigable waters’ be given some importance.”⁴⁵ “Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term ‘navigable’ some meaning, 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.”⁴⁶
- A mere hydrologic connection cannot provide the basis for CWA jurisdiction.
 - Plurality: Rejecting the federal government’s hydrologic connection theory in deciding that the phrase “the waters of the United States” “cannot bear the expansive meaning that the Corps would give it.”⁴⁷ “[R]elatively continuous flow is a necessary condition for qualification as a ‘water,’ not an adequate condition.”⁴⁸
 - Concurrence: Criticizing the dissent because it “would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that may eventually flow into traditional navigable waters.”⁴⁹ “[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.”⁵⁰
- Hypothetical, speculative, or eventual water flows do not support CWA jurisdiction.
 - Plurality: “[T]he phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,]... oceans, rivers, [and] lakes.’”⁵¹ “[O]nly 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 ‘adjacent to’ such waters and covered by the Act.”⁵²

⁴³ *Id.* at 779.

⁴⁴ *Id.* at 734.

⁴⁵ *Id.* at 778.

⁴⁶ *Id.* at 779, citing *Riverside Bayview*, 474 U.S. 121 (1985).

⁴⁷ *Id.* at 731.

⁴⁸ *Id.* at 736 n.7

⁴⁹ *Id.* at 778.

⁵⁰ *Id.* at 784-85.

⁵¹ *Id.* at 739.

⁵² *Id.* at 742.

- Concurrence: “The Corps’ theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps’ assertion of jurisdiction cannot rest on that case.”⁵³ “When... wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”⁵⁴ In remanding *Carabell* back to the Sixth Circuit, Justice Kennedy stated that “[t]he conditional language in [the Corps’] assessments—‘potential ability,’ ‘possible flooding’—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps’ claims....”⁵⁵ In *Carabell*, “the Corps based its jurisdiction solely on the wetlands’ adjacency to the ditch opposite the berm on the property’s edge.... [M]ere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles away from any navigable-in-fact water and carry only insubstantial flow towards it.”⁵⁶
- Mere presence of an ordinary high water mark does not render a feature a jurisdictional “tributary,” or the wetlands next to such a feature jurisdictional “adjacent wetlands”.
 - Plurality: As set out above, “‘the waters of the United States’ includes only those relatively permanent, standing, or continuously flowing bodies of water ‘forming geographic features’....”⁵⁷ And, as to wetlands, only those with a “continuous surface connection to bodies that are ‘waters of the United States’ in their own right....”⁵⁸
 - Concurrence: “[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high-water mark.... This standard presumably provides a rough measure of the volume and regularity of flow.... [T]he breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.”⁵⁹
- CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.
 - Plurality: Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: “We... do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS’ dissent....”⁶⁰ “[N]o one

⁵³ *Id.* at 780

⁵⁴ *Id.*

⁵⁵ *Id.* at 786.

⁵⁶ *Id.*

⁵⁷ *Id.* at 739

⁵⁸ *Id.* at 742

⁵⁹ *Id.* at 781

⁶⁰ *Id.* at 732 n.5.

contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels.”⁶¹

- Concurrence: “The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river... Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete... over a length of some 50 miles... Though this particular waterway might satisfy the plurality’s test, it is illustrative of what often-dry watercourses can become when rain waters flow.”⁶²
- As a general matter “navigable waters” and “point sources” are not the same thing, and normally a feature cannot be both.
 - Plurality: The CWA’s definitions “conceive of ‘point sources’ and ‘navigable waters’ as separate and distinct categories. The definition of ‘discharge’ would make little sense if the two categories were significantly overlapping.”⁶³
 - Concurrence: “[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies could conceivably constitute both a point source and a water.”⁶⁴

4. TODAY’S PROPOSAL

Against this backdrop, the Agencies published a “Revised Definition of ‘Waters of the United States’” on February 14, 2019 in the *Federal Register* for public comment.⁶⁵ The proposed rule is a response to President Trump’s Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule.⁶⁶ As directed, the proposed definition seeks to interpret the term “navigable waters” in a “manner consistent with the opinion of Justice Antonin Scalia” in *Rapanos*.⁶⁷ It includes six categories of jurisdictional waters, 11 categories of excluded features and 15 definitions.

The proposal reads:⁶⁸

- (a)(1) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;
- (a)(2) Tributaries of waters identified in paragraph (a)(1) of this section;

⁶¹ *Id.* at 733 n.6.

⁶² *Id.* at 769-70

⁶³ *Id.* at 735-36

⁶⁴ *Id.* at 772

⁶⁵ 2008 Guidance Regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008).

⁶⁶ Exec. Order No. 13,778, 82 Fed. Reg. 12497 (February 28, 2017).

⁶⁷ *Id.*

⁶⁸ 84 Fed. Reg. 4203-4204 (February 14, 2019).

- (a)(3) Ditches that satisfy any of the conditions identified in paragraph (a)(1) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;
- (a)(4) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (a)(1) through (5) of this section in a typical year;
- (a)(5) Impoundments of waters identified in paragraphs (a)(1) through (4) and (6) of this section; and
- (a)(6) Adjacent wetlands to waters identified in paragraphs (a)(1) through (5) of this section.

The following are not “waters of the United States”:⁶⁹

- (b)(1) Waters or water features that are not identified in paragraphs (a)(1) through (6) of this section;
- (b)(2) Groundwater, including groundwater drained through subsurface drainage systems;
- (b)(3) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;
- (b)(4) Ditches that are not identified in paragraph (a)(3) of this section;
- (b)(5) Prior converted cropland;
- (b)(6) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;
- (b)(7) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (a)(4) or (a)(5) of this section;
- (b)(8) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;
- (b)(9) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

⁶⁹ 84 Fed. Reg. 4204-4205 (February 14, 2019).

(b)(10) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(b)(11) Waste treatment systems.

The Agencies also propose 12 new or revised definitions compared to the 1986 Rule and 2015 Rule.⁷⁰ The terms “high tide line” and “ordinary high water mark” are unchanged from their 1986 and 2015 definitions, while the definition for “wetlands” includes only minor editorial changes.

- Adjacent wetlands: The term *adjacent* wetlands means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (a)(1) through (5) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (a)(1) through (5) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (a)(1) through (5) water. Wetlands physically separated from a paragraph (a)(1) through (5) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.
- Ditch: The term *ditch* means an artificial channel used to convey water.
- Ephemeral: The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).
- Intermittent: The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).
- Perennial: The term *perennial* means surface water flowing continuously year-round during a typical year.
- Prior converted cropland: The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (c)(15) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.
- Snowpack: The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

⁷⁰ *Id.*

- Tidal waters and waters subject to the ebb and flow of the tide: The terms *tidal waters and waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.
- Tributary: The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.
- Typical year: The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.
- Upland: The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(15) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (a)(1) through (6) of this section. Waters identified in paragraphs (a)(1) through (6) of this section are not upland.
- Waste treatment system: The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

With the proposed rule, the Agencies intend for the definition of “waters of the United States” to “increase CWA program predictability and consistency” and “clearly implement the overall objective of the CWA” while “respecting State and tribal authority over their own land and water resources.”⁷¹

NAHB believes that today’s rule will make it easier for builders and developers to identify federal waters because it bases jurisdiction on observable, surface connections. It also eliminates confusing elements of past rules, such as the “significant nexus” concept that extends federal jurisdiction and subsequent federal permitting requirements to areas with uncertain water quality impacts on navigable waters and the requirement to identify tributaries by observation of obscure physical traits. NAHB also commends the Agencies for excluding waters that form in response to rainfall and for reducing the types of ditches that are potentially subject to federal oversight. These changes will empower NAHB members to better identify and avoid regulated areas, understand their permitting needs earlier, and reduce permitting redundancy with local, state, and other federal requirements.

⁷¹ 84 Fed. Reg. 4154 (February 14, 2019).

Despite the Agencies vastly improved definition of “waters of the United States”, NAHB suggests several revisions and/or clarifications for certain categories, as they will help builders and developers to better comply with the final rule. Also, though today’s proposal is a milestone in the process to define “waters of the United States”, work remains to be done. Specifically, NAHB continues to support the rescission of the 2015 Rule⁷² as soon as possible and looks forward to publication and implementation of the final revised rule in the months to come.

5. SPECIFIC COMMENTS

5.1. Traditional Navigable Waters and Territorial Seas

The Agencies retain the same language in 33 C.F.R § 328.3(a)(1)⁷³ as the 1986 and 2015 rules to define what the preamble describes as the traditional navigable waters.⁷⁴

One point of consensus in *Rapanos* is that jurisdiction under the CWA covers more than just TNWs.^{75,76} The determination of whether an aquatic feature is a TNW, however, is the crucial, foundational component of both the plurality’s and Justice Kennedy’s CWA analyses. Justice Scalia wrote that one “finding” necessary to determine if a wetland is covered by the CWA is if the “adjacent channel contains a ‘wate[r] of the United States,’ (i.e., a relatively permanent body of water connected to a traditional interstate navigable water)....”⁷⁷ Justice Kennedy stated that “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.”⁷⁸ Thus, while the CWA’s purview is not coterminous with TNWs, waters deemed navigable in the traditional sense remain critical to determining the reach of the Agencies’ authority.

5.1.1. Limits to Navigability Must be Clarified

Neither Justice Scalia nor Justice Kennedy explained exactly what they were referring to when they discussed “traditional” navigable waters. However, both Justices referred to *The Daniel Ball* when describing TNWs.⁷⁹ *The Daniel Ball* provides:

The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law which are navigable in fact. Rivers are navigable in

⁷² 82 Fed. Reg. 34899 (July 27, 2017).

⁷³ NAHB recognizes that the Agencies propose to amend numerous C.F.R. sections with this proposal. However, NAHB will generically refer to 33 C.F.R. § 328.

⁷⁴ 84 Fed. Reg. 4203 (February 14, 2019).

⁷⁵ See Section 2.1, bullet one.

⁷⁶ *Rapanos v. United States*, 547 U.S. 715, 731, 767 (2006)(Justices Scalia and Kennedy’s opinions).

⁷⁷ *Id.* at 742.

⁷⁸ *Id.* at 779.

⁷⁹ Justice Scalia explained: “The *Rapanos* petitioners contend that the terms ‘navigable waters’ and ‘waters of the United States’ in the Act must be limited to the traditional definition of *The Daniel Ball*, which required that the “waters” be navigable in fact, or susceptible of being rendered so... We have twice stated that the meaning of “navigable waters” in the Act is broader than the traditional understanding of that term.” *Id.* at 730. Justice Kennedy cited *The Daniel Ball* when referring to the “the traditional understanding of the term ‘navigable waters of the United States.’” *Id.* at 760.

fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.⁸⁰

This definition has two parts. The first is denoted by the use of the word “navigable” and involves a determination of whether a waterbody is “navigable-in-fact”. The second is denoted by the phrase “of the United States” and involves a determination of whether the waterbody forms by itself or in conjunction with other waters, a continuous interstate highway for waterborne commerce.

The Agencies explain that they interpret 33 U.S.C. § 328.3(a)(1) to cover waters “defined in 33 C.F.R. § 329, which implements sections 9 and 10 of the Rivers and Harbors Act, and by numerous decisions of the federal courts, as well as all other waters that are navigable-in-fact.”⁸¹ NAHB agrees that the foundational (a)(1) waters should mirror 33 C.F.R § 329. As the Eighth Circuit Court of Appeals explained, “Since the Rivers and Harbors Act of 1899 was an exercise by Congress of its power under the Commerce Clause... we agree with the District Court that the extent of federal regulatory jurisdiction under the [Rivers and Harbors] Act is to be determined in accordance with the basic test set forth in *The Daniel Ball*.”⁸²

After explaining that the (a)(1) waters are the Section 329 waters, the Agencies go on to state “and by numerous decisions of the federal courts....”⁸³ To the extent that this phrase is meant to encompass the federal court decisions that interpret the jurisdiction of the Rivers and Harbor Act, NAHB does not take issue with the statement. However, if that statement is interpreted to mean any federal court decision that deals with whether a waterbody is navigable or not under any statute, NAHB would argue that the interpretation constitutes a gross overreach. As the Supreme Court explained in *PPL Montana*, “the test for navigability is not applied in the same way” depending on the issue at hand.⁸⁴ Therefore, it is not reasonable to base the foundation of CWA jurisdiction on court decisions that deal with title or admiralty or other issues unrelated to navigability.

Finally, the Agencies state that they interpret the (a)(1) waters to cover “all other waters that are navigable-in-fact.” NAHB disagrees that the term “traditional navigable waters”, as used by Justices Scalia and Kennedy, is not intended to refer to waters that are merely “navigable in-fact.” As Justice Scalia noted, Congress used both the term “navigable” and “waters of the United States” to bound the jurisdiction of the CWA.⁸⁵ Ignoring the second part of *The Daniel Ball* test, the Agencies inappropriately remove the concept “of the United States.”

⁸⁰ 77 U.S. (10 Wall.) 557, 563 (1871).

⁸¹ 84 Fed. Reg. 4170 (February 14, 2019).

⁸² *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979); see *Lykes Bros. v. U.S. Army Corps of Engineers*, 64 F.3d 630, 634 (11th Cir. 1995).

⁸³ 84 Fed. Reg. 4170 (February 14, 2019).

⁸⁴ *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012).

⁸⁵ “[T]he phrase “of the United States” in the definition retains some of its traditional meaning.” *Rapanos*, 547 U.S. at 731 n.3

Plainly stated for a waterbody to be considered a foundational traditional navigable water, it must meet both parts of the test the Supreme Court established in *The Daniel Ball*.

Further, even if the Agencies believe that TNWs equate to navigable in-fact waters, NAHB does not agree that the language used in (a)(1) describes waters that are “navigable in-fact.” The proposed rule uses the words “use[d] in interstate or foreign commerce...”⁸⁶ and equates those words to “navigable in-fact” waters.⁸⁷ Navigable in-fact waters are, however, “used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”⁸⁸ Thus, “navigable in-fact” waters must be capable of moving goods and people on the water, not simply being used in commerce.⁸⁹

For example, consider a small isolated pond that is not “navigable in-fact” because it has not, and would never be used to transport goods or people. However, such a pond could be used to provide water for cattle that is sold in interstate commerce. A reasonable argument can be made that the pond is “used” in interstate commerce. By employing the phrase “use in interstate or foreign commerce...” the Agencies fail to provide any constraints on the foundational waters of this rule.

Therefore, NAHB suggests that the Agencies amend 33 U.S.C. § 328.3(a)(1) as follows:

- (a)(1) Waters which are currently used, or were used in the past, or ~~may be~~ are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

5.1.2. Appendix D of the 2008 *Rapanos* Guidance Should be Revoked

The Agencies request comment on whether Appendix D is sufficiently clear with respect to TNWs and whether it should be amended. NAHB suggests that upon finalization of a new regulatory definition of the term “the waters of the United States” all previous guidance documents should be rescinded including Appendix D.

The *Rapanos* guidance documents were written to interpret the 1986 Rule in relation to the U.S. Supreme Court’s *Rapanos* decision. As the 1986 Rule will be eliminated upon finalization of the new definition, all of the *Rapanos* guidance documents should also be rescinded. Further, because the Agencies have integrated their reading of *Rapanos* into the new definition, there should no longer be a need for a document that provides guidance on how to interpret the *Rapanos* decision—the Agencies have done that with this rule.

⁸⁶ 84 Fed. Reg. 4203 (February 14, 2019).

⁸⁷ 84 Fed. Reg. 4170 (February 14, 2019).

⁸⁸ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

⁸⁹ 2008 Guidance Regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008) (Appendix D). Appendix D also supports NAHB’s opinion that “navigable in-fact” waters must be used to transport commerce. Further, appendix D refers to nine cases, all of which agree that a waterbody must be used (or capable to be used) to transport commerce to be considered navigable.

Equally problematic, Appendix D is a non-sequitur. Appendix D cites seven U.S. Supreme Court cases and two Courts of Appeals' decisions. All nine decisions agree that the "gist" of the federal navigability test is that the waterbody in question be used as a "highway" of commerce.⁹⁰ In other words, the waterbody must be used (or susceptible to use) to *transport* commerce by boat. Yet, the Agencies incorrectly conclude in Appendix D that a waterbody would satisfy the test if it were merely used for interstate commerce.

Appendix D also misinterprets 33 C.F.R. § 329 by providing that a "navigable water of the United States" is a "water body [that is] presently used or has been used in the past or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce."⁹¹ As explained above, the Courts have agreed that the jurisdiction of the Rivers and Harbors Act (and of 33 C.F.R § 329) is founded on the two-part test of *The Daniel Ball*.⁹² This description of 33 C.F.R. § 329 improperly abandons the second part of the test. Thus, even if the Agencies retain the most recent *Rapanos* Guidance, Appendix D is incorrect and must be withdrawn or re-written.

5.2. Interstate Waters

5.2.1. Removal of the Interstate Waters Category Supported

The proposed rule eliminates the category of "interstate waters", which both the 1986 and 2015 rules included. NAHB applauds the Agencies' decision not to include "interstate waters" as a standalone category of waters of the United States because such waters may not have a connection to TNWs.

In *SWANCC*, the U.S. Supreme Court explained that the term "navigable" indicates "what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Additionally, that Court provided that nothing in the legislative history of the CWA provides any indication that "Congress intended to exert anything more than its commerce power over navigation." Further, as explained in Section 5.1, in *Rapanos*, both Justice Scalia and Justice Kennedy tethered the scope of the CWA to traditionally-navigable waters. The term "interstate waters" provides no link to navigation or even to commerce.

Additionally, in the 2015 Rule, the Agencies asserted jurisdiction over tributaries and other waters that flow into (or impact) interstate waters. This allowed the Agencies to assert authority over remote waterbodies that have no impact on commerce or navigation simply because they may influence an interstate water that also has no impact on commerce or navigation. Similarly, it allowed the Agencies to claim federal jurisdiction over isolated waterbodies that had no connection or water quality impact upon actual TNWs. This paradigm not only put the Agencies at "the outer limits of Congress' power" but puts them well beyond it. Thus, the removal of interstate waters as a jurisdictional category is proper because it realigns the Agencies' jurisdiction with Congressional intent.

⁹⁰ *Utah v. United States*, 403 U.S. 9, 11 (1971).

⁹¹ Appendix D, p.2.

⁹² See *Minnehaha Creek Watershed Dist.*, 597 F.2d at 623-24 (describing various opinions that agreed that The Rivers and Harbors Act waters must meet both parts of *The Daniel Ball* test).

5.3. Tributaries

The proposed rule's tributaries category and its definition of the term are significantly changed from prior rules. First, jurisdiction only extends to tributaries of TNWs and the territorial seas⁹³ (as compared to TNWs, interstate waters, all other waters, and impoundments that are included in the 1986 Rule⁹⁴ or all TNWs, interstate waters, and the territorial seas that are included in the 2015 Rule).⁹⁵ Second, the proposed definition of "tributary" applies solely to natural channels and bases jurisdiction on the presence of a direct or indirect, and intermittent or perennial, surface connection to a TNW or territorial sea. The 1986 Rule did not define tributaries, and the 2015 Rule's definition encompassed both natural and man-made channels if they had physical indicators of hydrology (i.e., bed, banks, OHWM) that demonstrated a volume, frequency, and duration of flow.⁹⁶

5.3.1. Treatment of Tributaries is Appropriate

The proposed tributary category and definition correct the inconsistency of prior rules regarding Congressional intent under the CWA, as well as existing case law. For example, the proposed definition, which focuses on tributaries with intermittent and perennial surface connections and excludes ephemeral features,⁹⁷ reaffirms states' land use authority under Section 101(b)⁹⁸ to regulate beyond federal jurisdiction by excluding features that form only in response to rainfall. Further, the proposed definition is based on relevant points of consensus between the Justice Scalia plurality and Justice Kennedy's concurrence in *Rapanos*, including the recognition that 1) a mere hydrologic connection cannot provide the basis for CWA jurisdiction,⁹⁹ and 2) hypothetical, speculative, or eventual water flows do not support CWA jurisdiction.¹⁰⁰ The proposed rule is also respectful of the *Rapanos* plurality's scolding of 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,'"¹⁰¹ and the concurring view that "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."¹⁰²

Beyond improved consistency with statutory and legal requirements, the tributary definition provides further clarity by omitting reliance on physical indicators of hydrology. In 2014, NAHB explained the challenges stemming from the Corps' inconsistent interpretation of OHWM across the nation, including the particular difficulty our members have had in identifying the OHWM in arid regions of the western United States where xeric conditions generate innumerable ephemeral and intermittent streams.¹⁰³ In

⁹³ 84 Fed. Reg. 4203 (February 14, 2019).

⁹⁴ 51 Fed. Reg. 41228 (November 13, 2019).

⁹⁵ 80 Fed. Reg. 37104 (June 29, 2015).

⁹⁶ 80 Fed. Reg. 37105 (June 29, 2015).

⁹⁷ 84 Fed. Reg. 4204 (November 13, 2019).

⁹⁸ Section 101(b) states Congress's "policy to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and elimination pollution" and "to plan the development and use... of land and water resources." 33 U.S.C. § 1251(b).

⁹⁹ See Section 2.1, bullet three.

¹⁰⁰ See Section 2.1, bullet four.

¹⁰¹ *Rapanos*, 547 U.S. at 734.

¹⁰² *Id.* at 778, 779.

¹⁰³ See 2014 NAHB Comments at 58.

his *Rapanos* plurality, Justice Scalia also recognized the impracticality of jurisdiction based on presence of OHWM, noting that the Corps extended jurisdiction to ephemeral streams and drainage ditches “provided that they have a perceptible ‘ordinary high water mark’...This interpretation extended ‘the waters of the United States’ to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only ‘the presence of litter and debris.’ 33 CFR. section 328.3(e)....”¹⁰⁴ The focus on concepts such as ephemeral, intermittent, perennial, and typical year, which are familiar to practitioners of hydrology, will provide greater consistency for tributary identification across the diverse landscapes of the country.

Finally, the tributary definition is supported because it is informed by relevant science. In particular, a tributary’s jurisdictional status depends on whether it maintains a minimum of intermittent flow to a TNW, meaning “surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).”¹⁰⁵ Further, by basing jurisdiction on the presence of an “intermittent” connection, the proposal is consistent with the conclusions of *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (hereinafter, Connectivity Report)*.¹⁰⁶ The report found, in part, that “Connectivity of streams and wetlands to downstream waters occurs along a continuum....”¹⁰⁷ Indeed, as Dr. Michael Josselyn, Expert Panel Member on the Scientific Advisory Board for the Connectivity Report, explains in his comments on the proposed rule,¹⁰⁸ “[t]he definitions for intermittent and ephemeral as used in the proposed rule are consistent with the science on stream classification.”¹⁰⁹ Several concepts in the proposed intermittent definition, such as “certain times”, “typical year”, and “seasonally”, accommodate the idea of a connectivity gradient.

5.3.2. “Intermittent” Waters Need Clarification

Despite its vast improvements, some concepts in the proposed tributary definition remain vague. In particular, “certain times” is undefined and lacks the clarity necessary to distinguish a jurisdictional intermittent feature from an excluded, ephemeral one. Such distinction is important because a tributary that is jurisdictional could extend jurisdiction to the many streams, ponds, impoundments, and adjacent features that connect to or from it. Without additional clarification, a practitioner could interpret “certain times” in a variety of ways ranging from a few days to continuous flow. Though the definition’s reference to seasonality could be interpreted to establish a baseline of at least seasonal duration, the reference is placed in parenthesis and given only as an example which indicates that it may not have to be followed.¹¹⁰

NAHB understands the challenge of creating a nationwide methodology to distinguish an intermittent feature from an ephemeral one. Indeed, the proposed rule’s preamble states “The agencies believe establishing a specific flow volume requirement for all tributaries would be inappropriate given the wide spatial and temporal variability of flow volume in rivers and streams across the country.”¹¹¹ These

¹⁰⁴ *Rapanos*, 547 U.S. at 725-726.

¹⁰⁵ 84 Fed. Reg. 4204-4205 (February 14, 2019).

¹⁰⁶ 80 Fed. Reg. 2100 (January 15, 2015).

¹⁰⁷ *Id.* at ES-4.

¹⁰⁸ Josselyn, Michael. April 8, 2019. Comments on Proposed Revised Definition of ‘Waters of the United States’, EPA-HQ-OW-2018-0149.

¹⁰⁹ *Id.*, at 3.

¹¹⁰ 84 Fed. Reg. 4204 (February 14, 2019).

¹¹¹ 84 Fed. Reg. 4175 (February 14, 2019).

challenges are reinforced in Agency guidance, scientific literature, and case law. For example, the 2008 *Rapanos* Guidance extended federal jurisdiction to tributaries “that typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).”¹¹² Further, the Connectivity Report recognized that the connectivity gradient could include multiple descriptors, such as “frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters.”¹¹³ Justice Scalia’s *Rapanos* opinion also explained “We... do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day continuously flowing stream postulated by Justice Stevens’ dissent....”¹¹⁴ Finally, Justice Kennedy focused on a different parameter, 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....”¹¹⁵

NAHB, as noted in its 2017 Recommendations, has not recommended a specific descriptor or value to identify an intermittent stream, but the Agencies could make a determination in this rulemaking.¹¹⁶ Further, though the Agencies “believe establishing a specific flow volume for all tributaries would be inappropriate,”¹¹⁷ a national *baseline* could establish a *floor* for Corps’ Districts to exceed. Regarding their discretion, the Corps’ Section 404 regulatory history suggests impacts to “headwaters,” defined as waterbodies with a flow volume of less than five (5) cubic feet per second, causes only minimally adverse environmental effects.”¹¹⁸ Current Corps regulations under the CWA nationwide permit program include a definition of “headwaters” that states:

- (d) Headwaters means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five [5] cubic feet per second. The D[istrict] E[ngineer] [DE] may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, DEs may establish the point where headwaters begin as that point on the stream where a flow of five [5] cubic feet per second is equaled or exceeded [fifty] 50 percent of the time.¹¹⁹

Thus, it would be reasonable for the Agencies to limit federal jurisdiction to waters that connect to TNWs and have a mean annual surface flow greater than five (5) cubic feet per second for a defined period of time. Regardless of which descriptor or value the Agencies choose, however, they must include it in the regulatory definition of tributary.

¹¹² 2008 Guidance Regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008).

¹¹³ Connectivity Report at ES-3.

¹¹⁴ *Id.* at 732 n.5.

¹¹⁵ *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring) (emphasis added).

¹¹⁶ 2017 Recommendations at 18.

¹¹⁷ 84 Fed. Reg. 4175 (February 14, 2019).

¹¹⁸ See 42 Fed. Reg. 37,129; 37,145 (July 19, 1977), where in the preamble, the Corps emphasized “that the ‘headwaters’ concept... is the point on the stream above which individual or general permits ordinarily will not be required;” with the term “headwaters” defined as “the point on non-tidal streams above which the average annual flow is less than five cubic feet per second.”

¹¹⁹ 33 C.F.R. § 330.2(d).

Should the Agencies forego selection of a baseline descriptor or value, a modification to the proposed intermittent definition could provide additional clarity. In the proposed rule's preamble, the Agencies ask for comment on 1) whether the definition should indicate that the flow originate from a particular source;¹²⁰ 2) an alternate definition that would change the focus of the proposed definition from intermittent flow occurring during certain times of a typical year to "seasonal flow;"¹²¹ and 3) whether "intermittent" could instead mean "water flowing continuously during certain times of a typical year as a result of a melting snowpack or when the channel bed intersects the groundwater table."¹²² Each of these changes would provide clarity, but NAHB recommends a hybrid revision of the proposed definition that would read:

- (5) Intermittent: The term *intermittent* means surface water flowing continuously during certain times of seasonally in a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts) as a result of melting snowpack or when the channel bed intersects the groundwater table.

This definition provides benefits over the proposed definition. For example, it adds clarity by striking the vague "certain times" concept and adding "seasonally in a typical year" and "as a result of melting snowpack or when the channel bed intersects the groundwater table." However, it retains elements of flow duration by focusing on seasonal flow and periods of time when climactic conditions would support melting snowpack or periods with an elevated groundwater table. Further, by elevating "melting snowpack" and groundwater intrusion from its parenthetical under the proposed rule, the revised definition draws a clearer distinction between ephemeral features and intermittent flow. Under the proposed rule, "ephemeral" clearly applies to those waters forming in response only to precipitation and the definition of intermittent should similarly identify the presence of periodic base flow. The Agencies are asked to consider adopting NAHB's proposed definition of intermittent.

5.3.3. A Replicable Process to Identify Ephemeral Waters Must be Provided

In addition to revising the definition of intermittent, the Agencies should further clarify how they will identify uncertain ephemeral features. The preamble recognizes that the Agencies, co-regulators, and consultants to the development community have vast experience in identifying flow regimes using various approaches, including state tools.¹²³ However, each of these approaches, as well as the numerous other approaches identified in the preamble, can cause confusion and are subject to uncertainty. For example, in 2014, the Association of State Wetland Managers found that twenty-three states formally defined "perennial," "intermittent," and/or "ephemeral" but those definitions were not consistent among states.¹²⁴ Equally problematic, NAHB assumes those definitions would have inconsistencies with the proposed rule's definitions. Further, the report found that "some states use the term 'intermittent' to include some or all streams which could also be scientifically classified as

¹²⁰ 84 Fed. Reg. 4177 (February 14, 2019).

¹²¹ 84 Fed. Reg. 4178 (February 14, 2019).

¹²² *Id.*

¹²³ 84 Fed. Reg. 4177 (February 14, 2019).

¹²⁴ Zollitsch, Brenda and Jeanne Christie. April 2014. *Report on State Definitions, Jurisdiction and Mitigation Requirements in State Programs for Ephemeral, Intermittent and Perennial Streams in the United States*. The Association of State Wetland Managers. Available at https://www.aswm.org/stream_mitigation/streams_in_the_us.pdf (March 22, 2019).

‘ephemeral.’”¹²⁵ Clearly, relying on the states would not yield appropriate or consistent results, so additional guidance is needed.

NAHB, however, shares the Agencies’ concerns regarding the National Hydrography Dataset (NHD).¹²⁶ Though the NHD is the most comprehensive dataset of flow regimes in the country, it cannot be used to identify jurisdictional waters. There are many documented examples of misclassification in the NHD.¹²⁷ For example, the Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States” notes that the dataset does “not use terms that directly correspond to the categories in the proposed rule,” “does not differentiate between streams with intermittent or ephemeral flow for the most of the country,” and “has been demonstrated to under-represent the upstream-downstream extent of channel networks.”¹²⁸ Indeed, Fritz et al. field-verified the flow regimes of 105 headwater stream reaches in nine U.S. forests, and 178 headwater stream reaches in Oregon, finding misclassification of the high resolution NHD flow regime respectively 44.8 percent and 57.9 percent of the time.¹²⁹ Any analysis that would attempt to identify “waters of the United States” based on the high resolution NHD dataset would likewise include errors by extension.¹³⁰

Given these many challenges, the Agencies must provide a clear process, or case study example that explains how ephemeral features are to be identified. In many cases, the presence of a surface hydrologic connection within the parameters of the regulatory text (e.g., seasonally, in a typical year) will be sufficient to determine jurisdiction. However, in unusual cases, additional steps may be necessary. For example, in their oft-cited work, Poff et al. inventory observable ecological responses to alterations in flow regimes, which could inform approaches to identify ephemeral features.¹³¹ In addition, Berhanu et al. use various means of hydrological indices to identify and categorize flow regimes.¹³² Finally, ecological consultants use their own methods, such as auger hole drilling to test for groundwater and identification of vegetation that requires perennial hydration. Not only must any protocol follow the rule’s parameters, it must be credible, replicable, and understood.

¹²⁵ *Id.* at 2.

¹²⁶ 84 Fed. Reg. 4177 (February 14, 2019).

¹²⁷ See, for example, Fritz, Ken M., Elisabeth Hagenbuch, Ellen D’Amico, Molly Reif, Parker J. Wigington, Jr., Scott G. Leibowitz, Randy L. Comelo, Joseph L. Ebersole, and Tracie-Lynn Nadeau. 2013. *Comparing the Extent of Permanence of Headwater Streams from Two Field Surveys to Values from Hydrographic Databases and Maps*. (August 2013)49(4)867-882; Colson, Thomas, James Gregory, John Dorney, and Periann Russell. 2008. *Topographic and Soil Maps Do Not Accurately Depict Headwater Stream Networks*. National Wetlands Newsletter. (May-June 2008)25-28; and Sheng, Jingfen, John P. Wilson, Ning Chen, Joseph S. Devanny, and Jaime M. Sayre. 2013. *Evaluating the Quality of the National Hydrography Dataset for Watershed Assessments in Metropolitan Regions*. *GIScience & Remote Sensing* 44(3)283-304.

¹²⁸ U.S. Environmental Protection Agency and U.S. Department of the Army. 2018. *Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States.”* (December 11, 2018).

¹²⁹ Fritz, Ken M., Elisabeth Hagenbuch, Ellen D’Amico, Molly Reif, Parker J. Wigington, Jr., Scott G. Leibowitz, Randy L. Comelo, Joseph L. Ebersole, and Tracie-Lynn Nadeau. 2013. *Comparing the Extent of Permanence of Headwater Streams from Two Field Surveys to Values from Hydrographic Databases and Maps*. (August 2013)49(4)867-882.

¹³⁰ See, for example, Wittenberg, A. (April 1, 2019). Where EPA saw no data, Trout Unlimited crunched the numbers. E&E News. Available at <https://www.eenews.net/stories/1060134013> (April 11, 2019). Regarding Trout Unlimited’s Analysis of Ephemeral Streams, the article notes that “estimates are by no means perfect and that whether individual streams flow only after precipitation is best determined on the ground.”

¹³¹ Poff, N.L., J.D. Allan, M.B. Bain, J.R. Karr, K.L. Prestegard, B.D. Richter, R.E. Sparks, J.C. Stromberg. 1997. *The Natural Flow Regime*. *BioScience*, Vol. 47(11):769-784.

¹³² Berhanu, Belete, Y. Seleshi, Solomon S. Demisse, and Assefa M. Melesse. 2015. *Flow Regime Classification and Hydrological Characterization: A Case Study of Ethiopian Rivers*. *Water* 2015, 7, 3149-3165.

5.3.4. Clear Sources and Methods for Determining “Typical Year” Needed

The term “typical year,”¹³³ defined to mean within the normal range of precipitation over a rolling thirty-year period for a particular geographic area, is foundational to the definitions of intermittent and perennial, and also referenced in the lakes and ponds and adjacent wetlands categories. NAHB supports the typical year concept because it ensures that surface hydrologic connections exist consistently over time and are not due to extreme rainfall events or occasional years of high precipitation. However, some of that certainty could be lost without additional clarification. Specifically, the Agencies should identify the data sources, statistical methods, and range parameters that are to be used to calculate “normal range of precipitation” to reduce inconsistent and unpredictable “typical year” determinations.

The preamble’s text and data sources provide examples of such uncertainty. Though the Agencies are “not proposing to codify specific tools or resources in the regulation to determine a ‘typical year,’”¹³⁴ the preamble lists two sources of precipitation data, including the Watershed Enhancement Tracking System (WETS) tables¹³⁵ and Web-based, Water-Budget, Interactive Modeling Program (WebWIMP).¹³⁶ Of these sources, the WETS tables (Figure 1) most closely report data in the format that the Agencies currently use. In addition, the preamble text explains the process used by the Agencies to calculate a “typical year”, but does not require permit applicants to follow the same process. The text reads:¹³⁷

AgACIS								
WETS Station: WILMINGTON NEW CASTLE CO AP, DE								
Requested years: 1980 - 2018								
Month	Temperature (°F)				Precipitation (inches)			
	Avg daily max	Avg daily min	Avg daily mean	Avg	30% chance will have		Avg number of days with 0.10 inch or more	Average total snowfall
					less than	more than		
Jan	41.2	25.4	33.3	3.14	2.48	3.62	6	6.2
Feb	43.9	26.7	35.3	2.80	1.80	3.37	5	7.4
Mar	52.4	33.6	43.0	4.03	2.98	4.83	7	3.0
Apr	63.8	43.1	53.5	3.45	2.53	4.09	6	0.2
May	73.2	53.2	63.2	3.76	2.71	4.44	7	0.0
Jun	82.0	62.8	72.4	4.45	2.50	5.42	7	0.0
Jul	86.4	68.0	77.2	4.73	3.27	5.64	7	0.0
Aug	84.6	66.4	75.5	3.82	2.48	4.60	6	0.0
Sep	78.0	58.9	68.5	4.40	2.59	5.35	6	0.0
Oct	66.7	46.7	56.7	3.52	1.99	4.29	5	0.0
Nov	55.7	37.2	46.4	3.01	2.09	3.58	6	0.4
Dec	45.5	29.6	37.5	3.65	2.47	4.36	6	3.2
Annual					40.55	48.39		
Average	64.4	46.0	55.2	-	-	-	-	-
Total	-	-	-	44.77			74	20.4

Figure 1: The WETS table for New Castle County, DE provides 30th to 70th percentile precipitation ranges based on 30 years of average rainfall.

To determine whether the year in question is a “typical year,” the agencies presently use observed rainfall amount and compare it to tables developed by the Corps using data from the National Oceanic and Atmospheric Administration (NOAA). The agencies consider a year to be “typical” when the observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average generated at NOAA weather stations.

In addition to the “presently used” process lacking codification in the regulatory text, the statistical methods that are to be used to calculate typical year are also undefined. Rather, the typical year definition only means “within the normal range of precipitation over a rolling thirty-year period.” Compared to the WETS tables, which provide the 30th to 70th percentile precipitation range for a weather station based on 30 years’ of average rainfall, WebWIMP does not report the period of time or statistical method used to calculate precipitation outputs. “Normal precipitation” is commonly interpreted to mean average,¹³⁸ but “normal range of precipitation” could encompass weighted

¹³³ 84 Fed. Reg. 4204 (February 14, 2019).

¹³⁴ 84 Fed. Reg. 4177 (February 14, 2019).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See, for example, Hayes, Michael, Christina Alvord, and Jessica Lowery. July 2007. *Drought Indices. Intermountain West Climate Summary*. Available at <https://www.colorado.edu/climate/iwcs/archive/>

average, median, mode, or other statistical approaches to accommodate unique situations such as bimodal distributions. Such methods are common to precipitation measurement,¹³⁹ but may not be appropriate for assessing a stream's flow regime. Further, "range" could encompass higher percentiles than those currently used by the Agencies. For the building industry, different approaches among consultants and the Agencies could lead to permit delays and payments to consultants for multiple "typical year" analyses.

NAHB suggests that the Agencies clearly explain which data sources, statistical methods, and ranges should be used to calculate "typical year." Alternatively, the Agencies could provide additional clarity by revising the typical year definition to require an average calculation. The revised definition would read:

- Typical year: The term *typical year* means within the ~~normal~~ 30th to 70th percentile range of average precipitation over a rolling thirty-year period for a particular geographic area.

5.3.5. The Definition of "Snowpack" Requires Clarification

The term "snowpack" is also integral to the definition of "intermittent", but its definition is unclear. Specifically, the proposed rule does not differentiate between snow fall and its associated melting, which would contribute to ephemeral waters and therefore be excluded, from melting snowpack that would form intermittent or perennial waters.

Uncertainty arises from several elements of the proposed definition. The proposed rule defines "snowpack" to mean "layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes."¹⁴⁰ However, the concepts of "extended periods of time" and "certain geographic regions" are not clear. The preamble adds to the confusion, noting "[t]he large water contribution source for those northern and mountainous geographic regions which do not have significant elevation changes but which do have a consistent, predictable snowfall that accumulates on the ground for extended periods of time would be covered in a proposed definition of 'snowpack.'" Further, NOAA national snow analyses maps,¹⁴¹ which are noted in

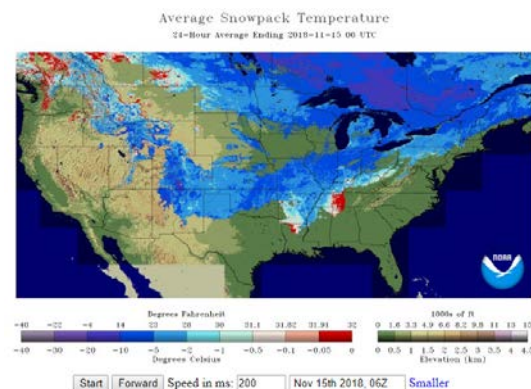


Figure 2: The NOAA "average snowpack temperature" map includes low elevation areas, which is inconsistent with the proposed rule's focus on "northern climes and mountainous regions".

IWCS_2007_July_feature.pdf (March 22, 2019); and University of Nebraska National Drought Mitigation Center.

What is Normal Precipitation? Available at <https://drought.unl.edu/ranchplan/DroughtBasics/WeatherandDrought/WhatIsNormalPrecipitation.aspx> (March 22, 2019);

¹³⁹ See, for example, National Oceanic and Atmospheric Administration. National Weather Service. *Precipitation Measurements*. Available online at <https://www.weather.gov/abrfc/map> (April 8, 2019); Sumner, Jaclyn P., Michael J. Vepraskas, and Randall K. Kolka. 2009. Methods to evaluate normal rainfall for short-term wetland hydrology assessment. *Wetlands*. 29(3) 1,049-1,062; and Brisette, Francois and Jie Chen. July 30, 2012. Finding the most appropriate precipitation probability distribution for stochastic weather generation and hydrological modelling in Nordic watersheds. *Hydrological Processes*. 27(25) 3,718-3,729.

¹⁴⁰ 84 Fed. Reg. 4177 (February 19, 2019).

¹⁴¹ National Oceanic and Atmospheric Administration. National Weather Service National Operational Hydrologic Remote Sensing Center. *National Snow Analyses*. Available at <https://www.noahrs.noaa.gov/nsa/> (April 8, 2019).

the preamble as a source for identifying snowpack, extend “snowpack” conditions to nearly every state in the country at some point during the year (Figure 2). NAHB assumes that snowpack would form only in certain regions, and not extend to the entire country. However, neither the definition nor NOAA maps provide adequate geographical bounds.

The Agencies must clearly distinguish melting of the annual snowfall from melting of snowpack. Such a distinction should account for the inherent gradient of snow accumulation. For example, international guidelines consider liquid and solid particles as “precipitation” that would form ephemeral features and be excluded under the proposed rule. The Government of Canada’s Manual of Climatological Observations categorizes “frozen precipitation” as snow, snow grains, snow pellets, ice pellets, and hail.¹⁴² Further, in their text book on precipitation measurement, Hou et al. note “[p]recipitation, which converts atmospheric water vapor into *rain* and *snow*, is a central element of the [global energy and water cycle].”¹⁴³ Comparatively, the “snow line” is defined as “the lower margin of a perennial snowfield”.¹⁴⁴ Thus, the distinction between melting from snow precipitation and melting of standing snowfields is dependent on seasons and elevation. A clarification would take both of these factors into account.

5.4. Ditches

The proposal creates a new category of ditches, but asserts authority over only those that satisfy the conditions of a TNW, alter or relocate an existing tributary, or are constructed in a tributary or adjacent wetland.¹⁴⁵ The new ditch category differs significantly from the 2015 Rule, which regulated all ditches unless they met two narrow criteria.¹⁴⁶ Under that rule, ditches in uplands or with ephemeral flows could become jurisdictional, and further act as conduits of regulation, thereby extending permit requirements to isolated wetlands across the landscape. Similarly, the 2015 Rule extended the uncertain and overreaching “significant nexus” concept to the jurisdictional analysis for ditches.

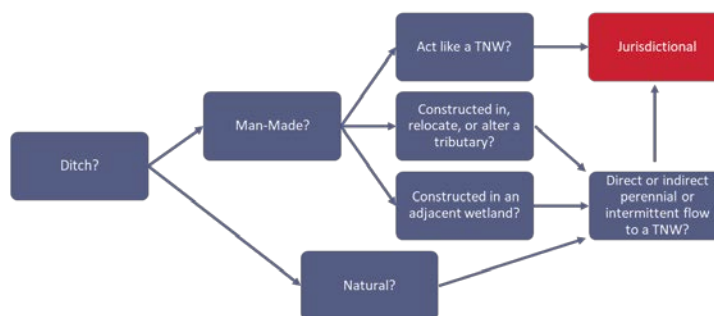


Figure 3: The ditch category and exclusion provide builders with clarity and certainty.

Importantly, the proposed ditch exclusion category is also broadly consistent with longstanding CWA interpretations. Because it narrows the definition of which ditches are jurisdictional, the proposed rule better aligns the various sections of the CWA with one another. For example, in 1972, Congress identified ditches as “point sources” that were “discernable, confined, and discrete conveyances... from

¹⁴² Government of Canada. *MANCLIM Manual of Climatological Observations: Precipitation*. Available at <https://www.canada.ca/en/environment-climate-change/services/weather-manuals-documentation/manclim-climatological-observations/precipitation.html#ch004> (April 8, 2019).

¹⁴³ Hou A.Y., Skofronick-Jackson G., Kummerow C.D., Shepherd J.M. (2008) *Global precipitation measurement*. In: Michaelides S. (eds) *Precipitation: Advances in Measurement, Estimation and Prediction*. Springer, Berlin, Heidelberg.

¹⁴⁴ “snow line” *Merriam-Webster.com*. Merriam-Webster, 2019. Online. April 8, 2019.

¹⁴⁵ *Id.*

¹⁴⁶ 80 Fed. Reg. 37105 (June 29, 2015).

which pollutants are or may be discharged”¹⁴⁷ and thus subject to permitting under Section 402 of the CWA, the National Pollutant Discharge Elimination System (NPDES) program. Also, the Corps’ 1975 regulations stated that “[d]rainage and irrigation ditches have been excluded” from CWA jurisdiction.¹⁴⁸ Further, the preamble of the 1977 regulations read “[N]ontidal drainage and irrigation ditches that feed into navigable waters will not be considered ‘waters of the United States’ under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Section 208 and 402.”¹⁴⁹ The 1977 regulations also explained “manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition.”¹⁵⁰ The proposed rule corrects overreach of the 2015 Rule, placing ditches under the purview of Section 402 as Congress intended.

Further, no prior rule has provided stakeholders with as much clarity and certainty as the proposed rule (Figure 3). Despite these improvements, a number of challenges remain. The Agencies are urged to reframe the ditch category and instead of creating a wholly new category of inclusion, should specifically include ditches within the list of waters that are not waters of the United States.

5.4.1. The Ditch Category Should be Eliminated

Clearly, man-made alterations to the landscape that contain water and are used to transport interstate commerce are within the Agencies’ jurisdiction. Likewise, physical alterations to jurisdictional tributaries and wetlands can create jurisdictional waters and do not remove the existing water bodies from CWA jurisdiction. However, Congress has already included “any... ditch”¹⁵¹ in its detailed definition of the term “point source”. The specific, detailed statutory provisions defining ditches as “point sources” must take precedence over the more general term “waters of the United States” where Congress provided no definition.¹⁵² Under the rule of statutory construction that specific provisions supersede general ones, the Agencies should avoid any possible regulatory interpretation that places “ditches” under the term “waters of the United States.”¹⁵³ Creating a specific category for ditches would do just that.

Moreover, deeming certain ditches as waters of the United States disrupts the statutory paradigm that Congress created. Sections 301 and 502 of the CWA, in conjunction with one another, make it unlawful for a person to add pollutants to a water of the United States from a point source without a permit.¹⁵⁴ However, by defining certain ditches as waters of the United States, the Agencies have made it unlawful to add pollutants from a point source to a point source (namely a ditch). Further, if these specific ditches are waters of the United States, one can argue that pollutants that leave these ditches must also be

¹⁴⁷ 33 U.S.C. 1362(16).

¹⁴⁸ 40 Fed. Reg. 31320 and 31321 (July 25, 1975).

¹⁴⁹ 42 Fed. Reg. 37127 (July 19, 1977).

¹⁵⁰ 42 Fed. Reg. 37122 (July 19, 1977).

¹⁵¹ 33 U.S.C. § 1362(14).

¹⁵² “However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.” *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotes omitted).

¹⁵³ The idea that the “the specific governs the general” is “a warning against applying a general provision when doing so would undermine limitations created by a more specific provision.” *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996).

¹⁵⁴ 33 U.S.C. § 1311(a); 33 U.S.C. §§ 1362(5), (6), (7), (12), (14).

permitted—but this creates a situation whereby a person needs a permit to discharge pollutants from a water of the United States. This “turns the statute on its head.”¹⁵⁵

Also, NAHB discourages the Agencies from inserting language into the rule to clarify that a ditch which is a water of the United States is not also point source. Such an approach would be a direct confrontation to Congress’s definition of point source, which includes “any... ditch.” “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’ Webster’s Third New International Dictionary 97 (1976).”¹⁵⁶ Therefore, such clarification does not sufficiently deal with the statutory problem generated by creating a category of waters of the United States that are “ditches.”

A better approach would be to remove the ditch category completely and replace it with revisions to both the ditch exclusion and definition. The revised regulatory text would exclude ditches that satisfy the conditions of a TNW, which are generally referred to as canals. Further, the definition would exclude ditches that alter or relocate an existing tributary or are constructed in a tributary or adjacent wetland.¹⁵⁷

5.4.2. A Man-Made Ditch Cannot Also Be a Natural Tributary

The Agencies must also correct the logical inconsistency in the proposed rule’s ditch category. The proposal defines a ditch as “...an artificial channel used to convey water”¹⁵⁸ and the category establishes jurisdiction for ditches that “...satisfy the conditions of the tributary definition....”¹⁵⁹ However, a tributary is defined as “a river, stream, or similar naturally occurring surface water channel....”¹⁶⁰ Since “artificial” and “natural” are antonyms, the regulatory text of the ditch category would require revision. But as stated above, NAHB believes that the ditch category should be removed.

To address issues with the ditch category, the following could be included in the list of features that are not “waters of the United States:”

(b)(1) Man-made ditches ~~Ditches that are not identified in paragraph (a)(3) of this section;~~

The Agencies could then define the term “ditch.”

- Ditch: The term *ditch* means an artificial channel used to convey water. The following features are not ditches:
 - i) Artificial channels that satisfy the definition of (a)(1);
 - ii) Artificial channels constructed in a tributary or that relocate or alter a tributary as long as those artificial channels also act as a surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (a)(1) in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) or through water

¹⁵⁵ *Gregory v. Ashcroft*, 501 U.S. 452, 478 (1991) (Justice White concurring in part and dissenting in part).

¹⁵⁶ *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

¹⁵⁷ 84 Fed. Reg. 4205.

¹⁵⁸ 84 Fed. Reg. 4204 (February 14, 2019).

¹⁵⁹ 84 Fed. Reg. 4205 (February 14, 2019).

¹⁶⁰ 84 Fed. Reg. 4206 (February 14, 2019).

features identified in paragraph (b) that convey perennial or intermittent flow downstream;
or

- iii) Artificial channels constructed in an adjacent wetland as long as those artificial channels also act as a surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (a)(1) in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) or through water features identified in paragraph (b) that convey perennial or intermittent flow downstream.

5.4.3. The Agencies Should Clarify Data and Time Limits to Classify a Historic Ditch

Whether the Agencies remove or retain the ditch category, identification and classification of historic ditches is critical for determining their jurisdictional status. In order for a feature to be regulated under the ditch category, it must meet a two-part test. First, the feature must be identified as man-made. Then, it must meet the conditions of the ditch category (i.e., satisfy conditions of the tributary definition and be constructed in a tributary or wetland, or relocate or alter a tributary). However, based on experience from implementing previous rules, it can be difficult to differentiate a historic ditch from a natural tributary (Figure 4).¹⁶¹ By



Figure 4: This stream shows the challenge of distinguishing "surface water drainage" from "natural watercourse drainage" in New York.

extension, it will be equally difficult under the proposed rule to determine whether a ditch relocated or altered an existing tributary or was constructed in a tributary or wetland.

Several changes would improve the process for identifying and classifying historic ditches. First, the Agencies should clearly identify the sources that should be consulted for the evidence that is to be used in ditch classification. Currently, the preamble includes broad categories of evidence, such as field data, historic aerial photographs, and agricultural records among other sources.¹⁶² However, more specific sources, particularly those available online, such as aerial photographs from the USDA National Agriculture Imagery Program,¹⁶³ USGS EarthExplorer,¹⁶⁴ or NetOnline Historic Aerials¹⁶⁵ would provide certainty and consistency to the identification process. In addition, the Agencies should include a clear process for identifying and classifying a historic ditch. For example, the Agencies could first consult the NWI dataset and then compare it to online USGS EarthExplorer aerial imagery. After that point, if sufficient evidence were not found to classify the ditch, the Agencies could not exert jurisdiction over the feature.

¹⁶¹ Harp, Darrell W. 2015. *Drainage Law and Drainage Situations and Problems in New York State*. Cornell Local Roads Program: New York Local Technical Assistance Program (LTAP) Center. June 2015. Available at http://senecacountyswcd.org/wp-content/uploads/2015/12/drainage_law.pdf (March 25, 2019).

¹⁶² 84 Fed. Reg. 4181 (February 14, 2019).

¹⁶³ USDA Farm Service Agency. *National Agriculture Imagery Program*. Available at <https://www.fsa.usda.gov/programs-and-services/aerial-photography/imagery-programs/naip-imagery/> (March 25, 2019).

¹⁶⁴ USGS. Earth Explorer. Available at <https://earthexplorer.usgs.gov/> (March 25, 2019).

¹⁶⁵ NetOnline. *Historic Aerials*. Available at <https://www.historicaerials.com/> (March 25, 2019).

NAHB further recommends that the Agencies limit the period of time that must be spent locating evidence and classifying a historic ditch. Based on discussions with several wetland delineators, the process to identify a ditch using online aerial photography and satellite imagery takes generally between two and 48 hours. If the ditch classification process were to extend to excessively long periods, builders and developers would experience project delays. NAHB recommends that the Agencies commit to a time limit of no more than 14 days for classifying a historic ditch. If sufficient evidence is not found during that time, they should exclude the feature from their oversight. A 14-day period is extremely generous, but still ensures that the process is time bound and avoids project delays.

5.4.4. The Government Retains the Burden to Prove that a Feature is Jurisdictional

As the proposal is written, the burden of proof for determining the historic status of a ditch lies with the Agencies. If evidence is not found to support a jurisdictional determination, the feature will be considered non-jurisdictional.¹⁶⁶ This is an improvement over the 2015 Rule, which placed the burden of proof wholly upon the permit applicant to prove that his/her ditch was not a “water of the United States.”¹⁶⁷

Should the Agencies develop a ditch exclusion, the burden of proof would not significantly change. The person claiming the exclusion would properly be burdened with documenting that the feature in question meets the definition of a ditch and is therefore excluded. However, should the government claim that the ditch satisfied the conditions of a TNW, altered or relocated an existing tributary, or was constructed in a tributary or adjacent wetland, then the burden would switch to the government to prove the ditch in question fails to meet the exclusion and is therefore jurisdictional.

5.5. Lakes and Ponds

The proposed rule includes a new category for lakes and ponds. Such features are jurisdictional when they satisfy at least one of two conditions—they are a TNW or contribute direct or indirect, perennial or intermittent flow to a TNW in a typical year; or they are flooded by a TNW, tributary, ditch, other lake or pond, or impoundment in a typical year.¹⁶⁸ The lakes and ponds category is consistent with the Justice Scalia plurality and Justice Kennedy concurrence opinions in *Rapanos* that hypothetical, speculative, or eventual water flows do not support CWA jurisdiction.¹⁶⁹ The lakes and ponds category is also much clearer than the “all waters” category in the 2015 Rule, which extended jurisdiction to wetlands, ponds, lakes, oxbows, impoundments, and similar waters that are adjacent to other jurisdictional waters.¹⁷⁰ Specifically, the proposal eliminates confusing concepts of the 2015 Rule, such as “neighboring” and “similarly situated” that extended jurisdiction to all waters within the 100-year floodplain or 4,000 feet of the HTL or OHWM of a jurisdictional water.¹⁷¹

Several previous comments will also provide clarity to the lakes and ponds category. Specifically, NAHB comments in Section 5.3 regarding the intermittent definition, ephemeral features, and “typical year”

¹⁶⁶ 84 Fed. Reg. 4181 (February 14, 2019).

¹⁶⁷ 79 Fed. Reg. 22203 (June 18, 2014).

¹⁶⁸ 84 Fed. Reg. 4204 (February 14, 2019).

¹⁶⁹ See Section 2.1, bullet four.

¹⁷⁰ 80 Fed. Reg. 37104-37105 (June 29, 2015).

¹⁷¹ *Id.*

also apply to the lakes and ponds category. Further, recommended improvements to the definition of intermittent; clarifying the process for identifying an ephemeral feature; and using consistent sources, methods, and ranges for calculating typical year will all provide additional clarity to the lakes and ponds category.

5.5.1. Methods to Identify Inundation Periods Are Unclear

Specific to the lakes and ponds category, the second test of jurisdiction—be flooded by an (a)(1) through (a)(5) water in a typical year—requires further guidance. Unlike the first test, which requires a minimum of intermittent flow and by extension a seasonal surface connection that forms more than in response to precipitation,¹⁷² the second test simply requires flooding in a typical year. The regulatory text does not define “flooded,” though the preamble explains that “these lakes and ponds would receive flood waters from (a)(1)-(5) waters via overtopping in a typical year.”¹⁷³

More detail is needed to determine when and how such flooding occurs and what conditions would be necessary to deem that a lake or pond meets Justice Scalia’s requirement that “...relatively continuous flow is a necessary condition for qualification as a ‘water,’ not an adequate condition.”¹⁷⁴ As written, NAHB cannot determine whether the Agencies intend to exert jurisdiction over an oxbow lake that receives flood water from a jurisdictional water seasonally in a typical year, or whether the necessary overtopping could be a single occurrence or must occur over an undefined period of time.

While there are multiple ways to define flood events (e.g., recurrence intervals, flood magnitude value, periodicity), these approaches tend to identify trends in inundation periods *across* years. The proposed rule requires clarification *within* a typical year. For that reason, NAHB recommends the following revision to regulatory text for the lakes and ponds category:

- (a)(1) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded for a sustained period either seasonally or more regularly by a water identified in paragraphs (a)(1) through (5) of this section in a typical year.

5.6. Impoundments

Consistent with the 1986 and 2015 Rules, the proposed rule retains a category for impoundments. The preamble explains “Impoundments have historically been determined by the agencies to be jurisdictional because impounding a ‘water of the United States’ generally does not change the water body’s status.”¹⁷⁵ Indeed, U.S. Supreme Court Justice David Souter’s majority opinion in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 379 n.5 (2006) notes “...nor can we agree that one can denationalize waters by exerting private control over them”. However, unlike prior rules, the

¹⁷² 84 Fed. Reg. 4203 (February 14, 2019).

¹⁷³ 84 Fed. Reg. 4182 (February 14, 2019).

¹⁷⁴ *Rapanos*, 547 U.S. at 739.

¹⁷⁵ 84 Fed. Reg. 4172 (February 14, 2019).

proposed rule bases jurisdiction on surface connection to certain waters and includes a new category for lakes and ponds—which, combined, removes the need for a separate impoundments category. The preamble specifically requests comment on “whether impoundments are needed as a separate category of ‘waters of the United States,’ or whether the other categories of waters... effectively incorporate the impoundment of other jurisdictional waters”.¹⁷⁶

5.6.1. Impoundments Category Unnecessary

The proposed rule provides an opportunity to eliminate the impoundments category and the confusion that it may cause. In today’s proposal, all waters except TNWs (i.e., tributaries, ditches, lakes and ponds, adjacent wetlands, and presumably impoundments) are jurisdictional when they have a *surface* connection to another jurisdictional water or a TNW during defined periods of time. The adjacent wetlands category further notes that “wetlands physically separated from a [jurisdictional water] by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic *surface* connection to such waters are *not* adjacent”.¹⁷⁷ Thus, determination of jurisdiction based on the presence of a physical barrier that permanently severs surface connection is inconsistent with the main factor used to determine jurisdiction in the proposed rule. If the overtopping of a structure were to establish a surface hydrologic connection, the downstream or upstream waters would be jurisdictional under the lakes and ponds category. The preamble seems to recognize this possibility, noting that “an impounded wetland frequently becomes a pond...”,¹⁷⁸ and NAHB has yet to identify an impoundment that would retain a surface connection without forming a regulated water under the lakes and ponds category.

In addition to reducing confusion, the Agencies would also reduce improve the permitting process by eliminating the impoundments category. In no previous definition of “waters of the United States”, including today’s proposal, have the Agencies defined “impoundment” within the regulatory text.¹⁷⁹ Prior rules, and the research that supports them such as the Connectivity Report¹⁸⁰ and Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (Technical Support Document),¹⁸¹ have described “impoundments” to include berms, levees, and dams. Confusion also exists over whether “impoundment” refers to a structure that impounds a water, or the separated water itself. Further, the Technical Support Document cites Field and Lichvar (2007) in explaining that the “purpose of a dam is to impound (store) water for any of several reasons (e.g., flood control, human water supply irrigation, livestock water supply, energy generation, containment of mine tailings, recreation or pollution control)”.¹⁸² Notably, the act of installing a structure to perform several of these functions *would initiate* the Section 404 permitting process, which forbids discharge of dredged or fill material when a practicable alternative could exist or the impact would significantly degrade the nation’s waters.¹⁸³

¹⁷⁶ 84 Fed. Reg. 4173 (February 14, 2019).

¹⁷⁷ 84 Fed. Reg. 4204 (February 14, 2019).

¹⁷⁸ 84 Fed. Reg. 4173 (February 14, 2019).

¹⁷⁹ As NAHB has previously commented, the lack of a definition for “impoundment” raises several questions and causes regulatory confusion. See 2014 NAHB Comments at 51.

¹⁸⁰ 80 Fed. Reg. 2100 (January 15, 2015).

¹⁸¹ *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015).

¹⁸² Field, J.J., and R.W. Lichvar. 2007. *Review and Synopsis of Natural and Human Controls on Fluvial Channel Processes in the Arid West*. ERDC/CRREL TR-07-16. U.S. Army Engineer Research and Development Center, Cold Regions Research and Engineering Laboratory, Hanover, NH.

¹⁸³ U.S. EPA. *Section 404 of the Clean Water Act: Section 404 Permit Program*. Available at <https://www.epa.gov/cwa-404/section-404-permit-program> (March 18, 2019).

To demonstrate this permitting redundancy, NAHB notes the many Nationwide Permits (NWP) that commonly apply to structures that could create “impoundments”, including NWP 2 (Structures in Artificial Canals), NWP 15 (U.S. Coast Guard Approved Bridges), NWP 17 (Hydropower Projects), and NWP 52 (Water-Based Renewable Energy Generation Pilot Projects), among others.¹⁸⁴

5.7. Adjacent Wetlands

Today’s proposal includes a category for all wetlands that are adjacent to other jurisdictional waters. Though the definition of “wetlands” is unchanged from the 1986 Rule, the term “adjacent wetlands” is defined to include wetlands that “abut or have a direct hydrologic surface connection” to a jurisdictional water in a typical year.¹⁸⁵ The term “abut” is also defined to mean touching at least one point of a jurisdictional water.¹⁸⁶ Further, the proposed rule includes a new definition for “uplands”¹⁸⁷ and states explicitly that wetlands separated by uplands from other jurisdictional waters are not jurisdictional themselves.¹⁸⁸ Because wetlands must touch or have a surface connection, the “significant nexus” concept that was introduced through the 2008 *Rapanos* Guidance, expanded in the 2015 Rule, and extended jurisdiction to various isolated features, is irrelevant under the proposed rule. Also, the concept of “neighboring,” which was introduced in the 1986 Rule¹⁸⁹ and defined in the 2015 Rule to broadly include all waters within 100 feet of the OHWM, 100-year floodplain, or 1,500 feet of the HTL of a jurisdictional water,¹⁹⁰ is eliminated. NAHB’s comments regarding ephemeral and intermittent waters, and typical year, apply to adjacent wetlands as well.

5.7.1. Adjacent Wetlands Treated as Intended

NAHB appreciates the Agencies adherence to Supreme Court clarifications in defining which adjacent wetlands are jurisdictional. The adjacent wetlands category, and its supporting definitions, are consistent with points of consensus in *Rapanos*.¹⁹¹ For example, Justice Scalia’s plurality opinion explained that an isolated wetland required a “continuous surface connection” to a water of the United States and could not be considered “adjacent” based on a mere hydrologic connection.”¹⁹² Further, Justice Kennedy’s concurrence explained that wetlands were encompassed by “navigable waters” when they “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”¹⁹³ By requiring adjacent wetlands to abut or have a surface connection to other jurisdictional waters, the Agencies are consistent with these directives. Since the wetlands category also excludes isolated wetlands, it is further consistent with *SWANCC* and the Court’s rationale for eliminating the Migratory Bird Rule.

¹⁸⁴ A full list of NWPs is available at U.S. Army Corps of Engineers. January 5, 2017. Summary of the 2017 Nationwide Permits. Available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/6711> (March 18, 2019).

¹⁸⁵ 84 Fed. Reg. 4204 (February 14, 2019).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ 51 Fed. Reg. 41251 (November 13, 1986).

¹⁹⁰ 80 Fed. Reg. 37105 (June 29, 2015).

¹⁹¹ See Section 2.1, bullet five.

¹⁹² *Rapanos*, 547 U.S. at 742

¹⁹³ *Id.* at 780.

5.7.2. Elimination of Significant Nexus Supported

In addition to supporting the proposed rule's treatment of adjacent wetlands, NAHB appreciates the elimination of the significant nexus analysis. Not only is its removal consistent with judicial decisions, its elimination removes uncertainty and arbitrary decision-making and will ease burdens on the Section 404 permitting process.

The Agencies' proposal to eliminate significant nexus is soundly supported by case law. Though some groups may question the Agencies' ability to develop a definition of "waters of the United States" without requiring a case-by-case determination of whether a wetland has a "significant nexus" to a TNW, Justice Kennedy's *Rapanos* decision does not raise such a concern. In his discussion of "significant nexus," he observed the distinction between the wetlands in *Riverside Bayview* and the wetlands in *SWANCC*.¹⁹⁴ In *Riverside Bayview*, the wetlands abutted a navigable-in-fact waterbody and the Court held they were within the Corps' CWA jurisdiction. In contrast, Justice Kennedy recognized that, in *SWANCC*, the Court found no jurisdiction "over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters."¹⁹⁵

Justice Kennedy was concerned that the Corps' regulations (as written in 2006) "leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it...."¹⁹⁶ Additionally, he explained that "in many cases wetlands adjacent to tributaries covered by [the regulation in effect in 2006] might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."¹⁹⁷ Therefore, he was concerned¹⁹⁸ that the current rules allowed for the regulation of features that the Court had already deemed outside the scope of the CWA.

To deal with the problem he saw with the 2006 regulations, Justice Kennedy provided that:

Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters."¹⁹⁹

But, until the Agencies developed those regulations, Justice Kennedy required that "the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."²⁰⁰ Because of "the potential overbreadth of the Corps' regulations, this showing [was] necessary to avoid unreasonable applications of the statute."²⁰¹ Thus, according to Justice Kennedy, the "significant nexus" determinations were required to deal with the overbroad language used in the Agencies' 2006 regulations.

¹⁹⁴ *Rapanos*, 547 U.S. 715, 779-81.

¹⁹⁵ *Id.* at 779.

¹⁹⁶ *Id.* at 781.

¹⁹⁷ *Id.* at 781-82.

¹⁹⁸ This concern was heightened because the Agencies failed to amend their regulations after the Court's *SWANCC* decision.

¹⁹⁹ *Id.* at 781.

²⁰⁰ *Id.* at 782.

²⁰¹ *Id.*

With the current proposal, the Agencies are following Justice Kennedy's order. To avoid making case-by-case significant nexus determinations, they have identified a category of tributaries that impact downstream TNWs. Therefore, the wetlands adjacent to them (as the word adjacent was used in *Riverside Bayview*) "are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters."²⁰² This paradigm keeps the Agencies from asserting jurisdiction over wetlands and waters that are no more related to navigable-in-fact waters than the nonjurisdictional wetlands and mudflats the Court addressed in *SWANCC*.

NAHB also appreciates the clarity and certainty provided by basing jurisdictional determinations on observable connections between wetlands and jurisdictional waters. As Justice Kennedy explained, significant nexus was intended to "... be assessed in terms of the [CWA's] goals and purpose. Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"²⁰³ However, under the 2015 Rule, the Agencies substituted the conjunctive "and" for the disjunctive "or" by allowing a significant nexus determination based on the presence of one of several functions including (i) sediment trapping; (ii) nutrient recycling; (iii) pollutant trapping, transformation, filtering, and transport; (iv) retention and attenuation of flood waters; (v) runoff storage; (vi) contribution of flow; (vii) export of organic matter; (viii) export of food resources, and (ix) provision of life cycle-dependent aquatic habitat.²⁰⁴ Because of the proposed rule, builders will be better able to determine for themselves based upon observable landscape features whether waters on their property are jurisdictional, and not be subject to illegal determinations based on inconsistent results of field testing and assessments.

Finally, elimination of the significant nexus test will also streamline the jurisdictional determination process and reduce strains on the already overburdened permitting process. In the Economic Analysis for the 2015 Clean Water Rule,²⁰⁵ the Agencies cite a 2002 study that found costs of \$271,596 for obtaining an individual permit and \$28,915 for obtaining a "streamlined" nationwide permit.²⁰⁶ Sunding and Zilberman also found that it took an average of 788 days to obtain an individual permit and 313 days to obtain a nationwide permit.²⁰⁷ Unfortunately, these times are increasing due to additional workloads on Corps' staff as a result, in part, of conducting the time-intensive significant nexus analyses. For example, the Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States"²⁰⁸ found that requests for preliminary jurisdictional determinations (PJDs), which treat "all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional so that a permit applicant can move ahead expeditiously to obtain a permit decision" were increasing. In FY2015, of the total jurisdictional determinations issued by the Corps, 65 percent were PJDs and that number grew to 80 percent in FY2016.²⁰⁹ This is likely because permit

²⁰² *Id.* at 781.

²⁰³ 33 U.S.C § 1251(a).

²⁰⁴ 80 Fed. Reg. 37106 (June 29, 2015).

²⁰⁵ U.S. Environmental Protection Agency and U.S. Department of the Army. 2015. *Economic Analysis of the EPA-Army Clean Water Rule* (May 20, 2015).

²⁰⁶ D. Sunding and D. Zilberman. 2002. "The economics of environmental regulation by licensing: An assessment of recent changes in the wetland permitting process." *Natural Resources Journal*. V. 42, Winter.

²⁰⁷ *Id.*

²⁰⁸ U.S. Environmental Protection Agency and U.S. Department of the Army. 2018. *Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States."* (December 11, 2018).

²⁰⁹ *Id.* at 97.

applicants are requesting preliminary determinations to avoid the delays associated with waiting for the Corps to conduct and approve significant nexus analyses.²¹⁰

5.7.3. “Uplands” Definition Demonstrates Progress but More Remains to Be Done

Defining “wetlands” has always been a challenge, but there has also never been a corollary term to define non-wetlands or uplands. While NAHB notes the benefits of the Agencies’ proposed definition of “uplands,” additional steps must be taken to make the proposed definition workable. Stated simply, wetlands must satisfy three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils)²¹¹ and uplands must satisfy two or fewer criteria and must be located above the HTL or OHWM of a jurisdictional water.²¹²

NAHB is hopeful that the new regulatory text addresses a longstanding problem with the Corps’ Wetlands Delineation Manual (1987 Manual).²¹³ Specifically, the 1987 Manual allows regulators to determine wetlands jurisdiction by assuming the presence of hydric soils in cases where indicators of hydrophytic vegetation and wetland hydrology are present but soils have not developed hydric characteristics.²¹⁴ By allowing regulators to essentially ignore the requirement that hydric soils be present, the Agencies are able to exert authority over areas that experience wetland conditions due to temporary human activities, such as stormwater runoff from construction-phase access roads at building sites and water displacement due to pumping for irrigation. The Agencies should clearly explain that the definition of uplands supersedes the 1987 Manual. The new definition should also help in difficult cases, so may ease delineation burdens for both the Corps and landowners.

Though the uplands definition could help to address problems caused by the 1987 Manual, more work remains to be done.²¹⁵ Specifically, the Energy and Water Development Appropriation Act of 1993²¹⁶ explains that the Corps “will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted.”²¹⁷ However, Regional Supplements

²¹⁰ To further demonstrate permitting delays due to significant nexus analyses, NAHB notes the Home Builders Association of Central Arizona (HBACA) comments on the 2015 Rule. HBACA analyzed publicly-available Approved Jurisdictional Determinations (AJDs) issued in 2013 and the first ten months of 2014. Of 16 AJDs on ephemeral washes in that period, where sufficient information was available to analyze, 15 found no jurisdiction (three lacked an OHWM and 12 lacked a significant nexus with a TNW). See Home Builders Association of Central Arizona. November 13, 2014. Comments of Home Builders Association of Central Arizona on the Proposed Rule, Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014); Docket ID No. EPA-HQ-OW-2011-0880.

²¹¹ 84 Fed. Reg. 4205 (February 14, 2019).

²¹² 84 Fed. Reg. 4204 (February 14, 2019).

²¹³ U.S. Army Corps of Engineers. Corps of Engineers Wetlands Delineation Manual. Wetlands Research Program Technical Report Y-87-1 (on-line edition). January 1987.

²¹⁴ *Id.* at 48, 54, 58, 61, and 83. These NAHB members describe problematic jurisdictional determinations due to Regional Supplements and provide recommendations to address them.

²¹⁵ See, for example, Russell, Eddie. April 12, 2019. Comments on Proposed Rule, Revised Definition of “Waters of the United States” 33 CFR Part 328. Docket ID No. EPA-HQ-OW-2018-0149 and Randolph, Parthenia. April 15, 2019. Comments on Proposed Rule, Revised Definition of “Waters of the United States” 33 CFR Part 328. Docket ID No. EPA-HQ-OW-2018-0149.

²¹⁶ P.L. 102-377, 106 Stat. 1315, 1324 (1992)

²¹⁷ *Id.*

expand the Agencies' jurisdiction beyond Congressional intent²¹⁸ and NAHB members across the country have identified issues with them that require immediate attention. For example, in just the Atlantic and Gulf Coastal Plain Region, the Regional Supplement²¹⁹ alters the 1987 Manual by

- Lowering the threshold for what constitutes a wetland plant species;²²⁰
- Reducing the duration of time in a year that wetland hydrology must be present;²²¹
- Expanding the number of "indicators" of wetland hydrology thereby making the wetland hydrology criteria easier to satisfy;²²²
- Extending the start date for the growing season into the winter months, which allows the Corps to look for direct evidence of wetland hydrology when the water table is transiently nearer the surface;²²³ and
- Expanding the concept of "Problem Areas" for a finding of regulated "wetlands" in the Corps Manual by adding a new category and chapter for "Difficult Wetland Situations."²²⁴

The Agencies could begin to address these issues with changes and additions to the proposed rule. NAHB recommends that the Agencies revise the definition of "wetlands" to read

- Wetlands. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. The Corps of Engineers Wetland Delineation Manual is to be used to identify and delineate the extent of jurisdictional wetlands.

In addition, the Agencies should either withdraw the Regional Supplements or refrain from amending them further until a rulemaking defines several ambiguous terms related to the wetlands definition. Those terms include wetland hydrology criteria, wetland ("hydric") soils criteria, wetland ("hydrophytic") vegetation criteria, and "normal circumstances."

5.8. Exclusions

Most of the proposed rule's exclusions were included in prior rules, but the Agencies have added one for ephemeral features (including diffuse stormwater runoff) and provided clarifying text to others.

²¹⁸ For example, the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region* (Version 2.0, November 2010) states that it takes precedence over the 1987 Manual (Page 1, Table 1).

²¹⁹ U.S. Army Corps of Engineers. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region*. ERDC/EL TR-10-20 (November 2010).

²²⁰ *Id.* at 20.

²²¹ *Id.* at 77.

²²² *Id.*

²²³ *Id.* at 79.

²²⁴ *Id.* at 112.

Revisions of importance to the home building industry include the exclusion for ditches and new definitions for “prior converted cropland” and “waste treatment systems.” The proposed rule also retains exclusions for stormwater control features and water-filled depressions, which are common features found on many building and land development sites.

NAHB supports the proposed exclusions and commends the Agencies for clarifying and expanding those of importance to the home building industry. Broadly, the (b)(1) text, which explains that waters not excluded by rule are also not “waters of the United States” is an important inclusion. The Agencies should also make clear in the final rule that features meeting any of the exclusions should not be considered waters of the United States even if they satisfy the conditions of an (a)(1) through (6) jurisdictional category. The 2015 Rule included such language, stating that excluded features “are not [waters of the United States] even where they otherwise meet the terms of” a jurisdictional category.²²⁵

5.8.1. Exclusion of Ephemeral Waters and Ditches Appropriate

NAHB appreciates the categorical exclusion of ephemeral waters and diffuse stormwater runoff in (b)(3) and ditches in (b)(4) for the reasons explained in Sections 5.3 and 5.4 above. The exclusion for ephemeral features is consistent with Justice Scalia’s position that the Corps “stretched the term ‘waters of the United States’ beyond parody” by applying its definition to “ephemeral streams,” “wet meadows,” and “directional sheet flow during storm events.”²²⁶ Further, as explained previously, the *exclusion* for all ditches, unless they meet categorical descriptions, is much clearer than the 2015 Rule, which *regulated* all ditches unless they met narrow exclusions.

5.8.2. Prior Converted Cropland Definition Represents Major Improvements

For the first time, the proposed rule defines “prior converted cropland” and states within the regulatory text that the Agencies “will recognize designations of prior converted cropland made by the Secretary of Agriculture.”²²⁷ NAHB applauds both of these improvements. Home builders regularly acquire former agricultural land and value PCC designations, but inconsistencies in the treatment of PCC land under the “waters of the United States” rule and PCC land defined under USDA *Swampbuster* regulations²²⁸ has always been confusing.

Two clarifications could build upon the proposed rule’s improvement to the PCC exclusion. First, the Agencies should clarify that the PCC exclusion is lost *only* when the land is abandoned within the meaning of the PCC definition, regardless of whether the land is subsequently used for non-agricultural purposes, and that any change to such a requirement would be subject to a notice-and-comment rulemaking.²²⁹ Further, the final rule should state clearly that ditches, laterals, and canals within PCC-designated land are also part of the PCC exclusion.

²²⁵ 80 Fed. Reg. 37105 (June 29, 2015).

²²⁶ *Rapanos*, 547 U.S. at 734.

²²⁷ 84 Fed. Reg. 4204 (February 14, 2019).

²²⁸ 7 C.F.R. § 12.5.

²²⁹ Notice-and-comment rulemaking is consistent with *New Hope Power Corp. v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010).

5.8.3. New Definition for Waste Treatment Systems Welcomed

NAHB supports the exclusion of waste treatment systems and appreciates the Agencies' new definition of "waste treatment systems." Builders and developers use such systems regularly for compliance with erosion and sediment control and NPDES permit requirements, so their treatment as "waters of the United States" is unnecessary. In 2014, NAHB listed several ambiguities associated with the exclusion for waste treatment systems,²³⁰ due primarily to the lack of a definition for the term. The proposed definition addresses many of those concerns—in particular, NAHB appreciates the definition's clarity regarding features that are not performing active treatment. Under the proposed definition, those features would still qualify for the exclusion. In addition, NAHB appreciates that the exclusion applies to the entire system including all components and conveyances.

5.8.4. Exclusion for Stormwater Control Features Requires Clarification

The proposed rule retains the exclusion for Stormwater Control Features (SCFs), adding clarifying language to the exclusion category from the 2015 Rule. Specifically, where the 2015 Rule excluded SCFs "constructed to convey, treat or store stormwater that are created in dry land,"²³¹ the proposed rule excludes those that are "excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off."²³² Although the continued exclusion of SCFs is important to reduce redundant regulations, the Agencies must provide additional clarification in the final rule's regulatory text.

At a minimum, the Agencies should specifically exclude Municipal Separate Storm Sewer Systems (MS4s) because they are excavated or constructed in upland to convey, treat, infiltrate, or store stormwater runoff. In addition, the Agencies should consider excluding Combined Sewer Systems (CSSs), since they are permitted under the NPDES program similar to MS4s. MS4s—and the drains, roads, pipes, curbs, gutters, ditches, Stormwater Control Measures, Best Management Practices, and other component parts of these systems that channel runoff—are regulated "point sources" that discharge pollutants conveyed in stormwater. Through Section 402(p), Congress required all regulated MS4s to obtain NPDES permits for stormwater discharges,²³³ and their inclusion as "waters of the United States" would create double regulation. Further, all of the municipally-owned conveyances that comprise an MS4 system collect and carry stormwater to designated outfalls that discharge to waters of the United States. As such, MS4s cannot and should not be considered jurisdictional waters. If an MS4 is a water of the United States, not only would it create permitting nightmares, but states and EPA would be compelled to establish water quality standards, criteria, and total maximum daily loads for municipally-owned storm sewers. Nothing in the CWA's language, structure, or legislative history supports such an interpretation. NAHB has made these points previously in comments on the 2015 Rule,²³⁴ and through comments submitted by the Coalition of Real Estate Associations (CORE) that were filed through the Federal eRulemaking Portal on August 8, 2014.²³⁵ Both are incorporated here by reference.

²³⁰ See 2014 NAHB Comments at 102.

²³¹ 84 Fed. Reg. 4204 (February 14, 2019).

²³² *Id.*

²³³ 33 U.S.C. § 1342(p)(1)

²³⁴ See 2014 NAHB Comments at 103-106.

²³⁵ Coalition of Real Estate Associations. August 8, 2014. Comments on the U.S. EPA and U.S. Army Corps of Engineers proposed "Definition of 'Waters of the United States' Under the Clean Water Act," EPA-HQ-OW-2011-0880.

NAHB also notes that the exclusion, which applies to SCFs constructed in uplands, should also apply to SCFs constructed in non-jurisdictional waters. By only excluding SCFs in uplands, the rule is ambiguous regarding exclusions for waters that meet the wetland definition, such as isolated wetlands.

5.9. Supporting Analysis

5.9.1. Economic Analysis Understates the Avoided Costs of Narrower Regulation

As required by several statutes and executive orders,²³⁶ the Agencies prepared an economic analysis to accompany the proposed rule.²³⁷ The economic analysis is organized into two stages—*Stage 1* quantifies the avoided costs and foregone benefits of the 2015 rule compared to the pre-2015 practice, and *Stage 2* uses qualitative assessments and case studies to compare the pre-2015 practice to the proposed rule. The economic analysis follows federal guidelines for conducting cost-benefit analysis including the EPA’s *Guidelines for Preparing Economic Analyses*²³⁸ and Office of Management and Budget *Circular A-4*.²³⁹ For *Stage 1*, which represents a reduction in the extent of federal jurisdiction and various state responses, the Agencies found avoided costs of up to \$164 million and avoided benefits of up to \$38 million.²⁴⁰ The combined avoided costs for Section 404 permitting and mitigation could reach \$134 million, while foregone benefits are valued at up to \$17 million.²⁴¹

In 2014, NAHB identified several problems with the Agencies’ economic analysis for the 2015 rule,²⁴² including its failure to consider all costs associated with residential land development construction when a Section 404 permit is required. Where those omissions underestimated the *cost* of the 2015 rule, they could now represent an underestimated *avoided cost* resulting from a narrower “waters of the United States” definition.

For example, the proposed rule’s economic analysis focuses on the hard costs of permit application and mitigation (Figure 5). However, the residential construction industry would realize far greater savings from a more certain and clearly specified regulatory definition of “waters of the United States”. Lack of clarity can cause developers to spend additional time and money evaluating the status of landscape features that may be jurisdictional, even in cases where it may not be required. Developers and builders can also spend significant resources evaluating alternatives, only to find that such exercises are unnecessary. Further, the lack of clarity also results in an unnecessarily complicated permitting process by increasing the difficulty of reconciling sometimes conflicting requirements for different types of permits and imposing unnecessary burdens on government agencies with limited resources to process

²³⁶ See, for example, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (January 21, 2011); Exec. Order No. 13,497, 74 Fed. Reg. 6113 (February 4, 2009); and Exec. Order No. 12,866, 58 Fed. Reg. 51735 (October 4, 1993).

²³⁷ U.S. Environmental Protection Agency and U.S. Department of the Army. 2018. *Economic Analysis for the Proposed Revised Definition of “Waters of the United States”* (December 14, 2018). Available at https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf (April 9, 2019).

²³⁸ U.S. Environmental Protection Agency. December 2010. *Guidelines for Preparing Economic Analyses*. Available at <https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses> (April 9, 2019).

²³⁹ White House Office of Information and Regulatory Affairs. September 2003. *Circular A-4, “Regulatory Impact Analysis: A Primer”*. Available at https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf (April 9, 2019).

²⁴⁰ 2018 *Economic Analysis*, pg xv.

²⁴¹ *Id.*

²⁴² See 2014 NAHB Comments at 133.

permit applications. Dealing with such complications lengthens the time it takes to develop and construct housing units, which translates into higher costs. A substantial share of the development and construction of typical residential projects is debt financed and extending the timeframe between construction and when the project can start generating revenue and pay off these construction loans increases the developers' interest costs. These costs are ultimately borne by future homebuyers and renters, as the loans will not be underwritten unless the projects are designed with a margin that at least covers the interest costs. Uncertainty about wetlands delineations also increases the risk of development, and therefore the rate of return necessary to attract capital investment for the project.

Table ES-4: Estimates of avoided costs and forgone benefits of the potential CWA jurisdictional change from the 2015 Rule to the Pre-2015 Practice excluding the impact from states that are likely to continue the 2015 rule practices (Scenario 1)

	Annual Avoided Costs (2017\$ millions)		Annual Forgone Benefits (2017\$ millions)	
	Low	High	Low	High
CWA 402 CAFO Administration	\$0.1	\$0.1		
CWA 402 CAFO Implementation	\$2.8	\$2.8	\$1.7	\$3.0
CWA 402 Stormwater Administration	\$0.1	\$0.1		
CWA 402 Stormwater Implementation	\$14.3	\$17.8	\$14.2	\$18.0
CWA 404 Permit Application	\$15.7	\$39.5		
CWA 404 Mitigation – Wetlands	\$37.7	\$57.6	\$16.7	\$16.7
SUBTOTAL	\$70.7	\$117.8	\$32.6	\$37.7
CWA 311 Compliance	\$7.3	\$7.3	not quantified	not quantified
CWA 401 Administration	\$0.4	\$0.4	not quantified	not quantified
CWA 402 Pesticide General Permit Implementation	\$1.8	\$2.0	not quantified	not quantified
CWA 404 Mitigation – Streams ¹	\$18.0	\$36.6	not quantified	not quantified
TOTAL	\$98.2	\$164.2	\$32.6	\$37.7

These results exclude the costs and benefits for 404 permit applications and wetland mitigation for states classified as response category 4 for regulation of dredged or fill material, and they exclude the costs and benefits for all other categories for states classified as response category 3 for other surface water regulation.

¹Stream mitigation benefits are not quantified in this Economic Analyses due to a lack of available studies estimating the value of mitigation.

Figure 5: The proposed rule's economic analysis focuses on the hard costs of permitting and mitigation.

When implementing the final rule and preparing any guidance materials associated with it, the Agencies must consider these additional costs and impacts on the housing industry. A thorough understanding of total cost would consider both hard and soft costs, as well as primary and secondary economic impacts.

5.9.2. Willingness-to-Pay Approach Could Overstate Foregone Benefits

Where the *avoided cost* methodology omits costs to the building and development industry, the foregone benefits methodology could overstate wetland values. To estimate foregone benefits, the proposed rule's economic analysis adapts the findings of certain studies used in the benefits valuation for the 2015 Rule,²⁴³ and includes one additional study.²⁴⁴ Using practices relevant to environmental economics, the Agencies derive willingness-to-pay (WTP) values from the studies for all fifty states. These values are intended to quantify the financial benefit of jurisdictional wetlands in each state. The results show a mean estimate of foregone benefits of \$59,416,523 with a lower 5th percentile value of \$238,021 and upper 95th percentile value of \$121,700,961. In other words, these are the values that would be offset by avoided costs when moving from the 2015 Rule to the pre-2015 practice. While the

²⁴³ See, Blomquist, G.C. and J.C. Whitehead. 1998. Resource quality information and validity of willingness to pay in contingent valuation. *Resource and Energy Economics* 20: 179-196; Loomis, J., M. Hanemann, B. Kanninen, T. Wegge. 1991. Willingness to Pay to Protect Wetlands and Reduce Wildlife Contamination from Agricultural Drainage. *The Economics and Management of Water and Drainage in Agriculture*. Chapter 21, pp411-429; Mullarkey, D.J. and R.C. Bishop. 1999. Sensitivity to Scope: Evidence from a CVM Study of Wetlands. Working paper presented at the American Agricultural Economics Association Annual Meetings, Nashville, TN; and Whitehead, J.C. and G.C. Blomquist. 1991. Measuring Contingent Values for Wetlands: Effects of Information about Related Environmental Goods. *Water Resources Research*. Vol 27.10, pp 2523- 2531.

²⁴⁴ Newell, Laurie W. & Swallow, Stephen K., 2013. Real-payment choice experiments: Valuing forested wetlands and spatial attributes within a landscape context. *Ecological Economics*, Elsevier, vol. 92(C), pages 37-47.

Agencies' methodology for unit and meta-analysis based transfer is consistent with federal guidance and best practices, NAHB notes multiple issues with WTP surveys.

First, WTP values often lack validity and reliability. For example, Stephen Clowney notes "It is important to emphasize that contingent valuation theory is based on what people say they would do, as opposed to what people actually do; this imbues the process with great flexibility, but also opens its methodology to criticism."²⁴⁵ Clowney further notes²⁴⁶ that participant results can vary depending on the phrasing of survey questions, and that people generally demand a higher price for entitlements that they already possess. This is called the "offer/asking gap," and he provides several papers that assess the gap's impact.²⁴⁷ To summarize, WTP approaches can overestimate perceived values, compared to supply and demand that support discovery of an object's actual value.

Second, consumer variables, including age, education, gender, income, preferences, and race will also impact WTP. Likewise, WTP depends on the discretion of the consumer and the situation. In an environment where there are few water resources, for example, consumers may be willing to pay more to protect them. Similarly, if WTP surveys are conducted among people with similar interests or demographics, the results can be skewed. NAHB asks the Agencies to ensure that WTP approaches do not result in overstated benefits valuation when finalizing the rule or developing guidance materials.

6. CONCLUSION

NAHB supports the Agencies' proposed revised definition of "waters of the United States." Once finalized, the new definition will help to reduce regulatory burdens and provide certainty and consistency to not only home builders, but communities and businesses across the nation as well. Though the Agencies have proposed a rule that is consistent with case law and the Constitution, our recommendations will improve it even further and make it more easily implemented in the field. In summary, NAHB's recommendations include:

- (a)(1) Traditional Navigable Waters: The rulemaking provides an opportunity to reverse the Agencies' expansion of TNWs over time—to include, for example, waters that are only used for recreation—and better follow Congressional intent. The Agencies should:
 - Limit (a)(1) from waters used "in interstate commerce" to waters used "to transport interstate commerce"; and
 - Revoke Appendix D of the 2008 *Rapanos* Guidance.
- (a)(2) Tributaries: While NAHB commends the Agencies for their definition of "tributary", the concepts of "certain times" and "typical year" in the definition of "intermittent" remain vague. To clarify them, the Agencies should:

²⁴⁵ Clowney, Stephen. 2006. Environmental Ethics and Cost-Benefit Analysis. *Fordham Environmental Law Review*. 18 *Fordham Env'tl. L. Rev.* 105 (Fall 2006).

²⁴⁶ *Id.* at 30.

²⁴⁷ See Russell Korobkin, The Endowment Effect and Legal Analysis, 97 *NW. U. L. REV.* 1227, 1227-30 (2003); Duncan Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 *STAN. L. REV.* 387, 401 (1981); and Russell Korobkin, Note, Policymaking and the Offer/Asking Price Gap: Toward a Theory of Efficient Entitlement Allocation, 46 *STAN. L. REV.* 663 (1994).

- Replace “certain times” with a national, minimum descriptor and value or clarify the definition of “intermittent” by striking “certain times” from the proposed definition of “intermittent” and adding “surface water flowing in a typical year as a result of melting snowpack or when the channel bed intersects the groundwater table”;
- Explain the process for identifying precipitation-fed (i.e., ephemeral) waters;
- Clarify the data sources and methods that could establish a “typical year”; and
- Clearly distinguish melting snow precipitation from melting snowpack.
- (a)(3) Ditches: Identification of historic ditches is important to determining their jurisdiction, but doing so can also be difficult in many cases. The Agencies should
 - Remove the ditch category and revise the ditch exclusion and definition;
 - Clarify that a ditch cannot also be a natural tributary; and
 - Clarify the sources, and limit the amount of time available, for the Agencies to classify a historic ditch in order to avoid permitting delays.
- (a)(4) Lakes and Ponds: Concepts used to determine lake and pond jurisdiction—such as “intermittent”, “typical year”, and “flooding”—are vague. The Agencies should:
 - Clarify “intermittent” and “typical year” as recommended for the tributaries category;
 - Clarify that flooding must occur seasonally, at a minimum; and
 - Exclude overtopping that occurs due to pumping or other artificial means of water displacement.
- (a)(5) Impoundments: The impoundments category has never been clear, is redundant with the 404 permitting process, inconsistent with the proposed rule’s focus on surface hydrologic connection, and impounded features are jurisdictional under the lakes and ponds category. The Agencies should:
 - Eliminate the impoundments category.
- (a)(6) Adjacent Wetlands: NAHB commends the Agencies on the adjacent wetlands category, elimination of the “significant nexus”, “neighboring”, and “similarly situated” categories, and inclusion of a new definition for “uplands.”²⁴⁸ For the Final Rule, the Agencies should:
 - Clarify “typical year”, as recommended for the tributaries and lakes and ponds category;

²⁴⁸ 84 Fed. Reg. 4204 (Feb. 14, 2019).

- Revise the definition of “wetlands” to reference the Corps’ Wetlands Delineation Manual;²⁴⁹ and
- Either withdrawal the Regional Supplements or refrain from revising them until additional wetlands terms are defined.
- (b) Exclusions: NAHB supports the proposed rule’s exclusions, many of which have been retained from prior rules. In particular, the exclusions for ephemeral features and ditches, and the new definition for prior converted cropland (PCC), provides much more clarity. For the final rule, NAHB suggests that the Agencies:
 - Clarify that features meeting any of the exclusions should not be considered waters of the United States even if they satisfy the conditions of an (a)(1) to through (6) jurisdictional category;
 - Clarify that the PCC exclusion is lost *only* when land is abandoned within the meaning of the PCC definition, regardless of whether the land is subsequently used for non-agricultural purposes;
 - State clearly that ditches, laterals, and canals within PCC-designated land are also part of the PCC exclusion; and
 - Clearly exclude Municipal Separate Storm Sewer Systems (MS4s) from the regulatory definition of “waters of the United States.”
- Supporting Analysis: The proposed rule’s economic analysis focuses on hard costs of permitting and mitigation, but omits many other costs that accrue to builders, developers, and home buyers due to the Section 404 permitting program. NAHB requests that the Agencies:
 - Consider the full hard and soft costs, and primary and secondary economic impacts, of Section 404 compliance on the housing industry when developing future Agency guidance; and
 - Ensure that WTP approaches do not result in overstated valuation of benefits.

Thank you for the opportunity to provide feedback on the proposed rule. NAHB looks forward to rescission of the 2015 Rule, and issuance of the final rule, in the months to come.

²⁴⁹ U.S. Army Corps of Engineers. Technical Report Y-87-1, Corps of Engineers Wetlands Delineation Manual (January 1987). Available online at <http://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf>. T.