



Washington University in St. Louis

SCHOOL OF LAW

Interdisciplinary Environmental Clinic

April 15, 2019

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460
Via regulations.gov

**Re: Comments on the Proposed Revised Definition of “Waters of the United States”
Docket ID No. EPA-HQ-OW-2018-0149**

Dear Administrator Wheeler:

On behalf of the Missouri Coalition for the Environment (“MCE”), the Interdisciplinary Environmental Clinic at Washington University in St. Louis submits these comments on the proposed Revised Definition of “Waters of the United States” (“Revised Definition”), 84 Fed. Reg. 4154, as jointly proposed by the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (collectively, the “Agencies”). MCE is an independent, citizens' organization advocating in defense of Missouri's people and their environment. MCE opposes the Revised Definition because it is inconsistent with the fundamental purpose of the Clean Water Act, and it strongly encourages the Agencies to withdraw the proposed rule and to implement the 2015 Clean Water Rule (“CWR”) instead of rescinding it, as the Agencies have proposed in a separate rulemaking.¹

Among its many deleterious effects, the Revised Definition strips essential federal protections from the roughly 200,000 acres of Missouri wetlands located behind levees constructed along – and thus physically separated from – the Mississippi and Missouri Rivers, as well as from an unknown but undoubtedly significant portion of the remaining 1.5 million acres of floodplain wetlands in Missouri because they do not abut or have a direct hydrologic surface connection to other waters of the United States. This is of grave concern to MCE; which has worked for decades to protect Missouri's wetlands and floodplains, because these wetlands provide significant environmental and economic benefits to the people of Missouri. Allowing their destruction without a permit or any oversight from the Corps, and without requiring mitigation to compensate for the resultant loss of wetland functions and values, would have disastrous consequences for the state of Missouri.

¹ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules; Proposed Rule, 82 Fed. Reg. 34899 (July 27, 2017).

This comment letter begins by tracing the legislative history and judicial interpretation of the phrase “waters of the United States” (“WOTUS”). It follows by comparing the CWR with the Revised Definition. The comment then provides an ecological analysis of wetlands, the functions and values they provide, and the effect that the Revised Definition would have on wetlands in Missouri. The comment concludes by addressing several reasons for its adoption presented in the Preamble of the Revised Definition.

I. THE LEGISLATIVE INTENT AND JUDICIAL INTERPRETATION OF THE PHRASE “WATERS OF THE U.S.” FAVOR THE CLEAN WATER RULE OVER THE REVISED DEFINITION.

A. As Used in the Clean Water Act, the Phrase “Waters of the U.S.” was Intended to be Given the “Broadest Possible Constitutional Interpretation.”

The phrase “waters of the U.S.” has its origins in the 1972 Amendments to the Federal Water Pollution Control Act (“FWPCA”), more commonly known as the Clean Water Act (“CWA” or “Act”). Congress enacted the CWA in order to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters” by eliminating the discharge of pollutants into “navigable waters,”² which the Act defined as “waters of the United States, including the territorial seas.”³ This was a departure from previous definitions of “navigable waters” which focused more on the actual navigability of the waterway.⁴ The central reason for the shift away from a definition based upon traditional navigability was the difference in purpose between earlier legislation and the CWA; while earlier acts were concerned with water only as a means for maritime trade, the Act was designed to protect water quality. During legislative debate over the jurisdictional reach of the CWA, a Conference Report to the Senate emphasized that “the conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation.”⁵ Thus, a broad interpretation of WOTUS under the CWA is a core aspect of the CWA that has been accepted and encouraged by Congress since the Act’s inception.

B. The Revised Definition’s Jurisdictional Limitations Run Contrary to Judicial Interpretation of the CWA.

Judicial interpretation of WOTUS has recognized the CWA’s emphasis on protecting water quality. In 1985, the first major challenge to the Corps’ jurisdiction over wetlands—*United States v. Riverside Bayview Homes, Inc.*—was decided unanimously in favor of a broad interpretation that included wetlands adjacent to navigable waters, with the Supreme Court citing “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems” in its decision.⁶ In 2001, the Supreme Court explained in *Solid Waste Agency of Northern Cook County v. U.S.*

² 33 U.S.C. § 1251.

³ 33 U.S.C. § 1362.

⁴ See Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. §401.

⁵ S. REP. NO. 92-1236 as found in 1972 U.S.C.C.A.N. 3776, 3822.

⁶ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

Army Corps of Engineers that the existence of a significant nexus between determinably jurisdictional waters and other waterbodies invoked this concern and made those bodies subject to Corps jurisdiction.⁷ In both cases, the Supreme Court confirmed Congress’s intent to mitigate ecological harm through the CWA. Neither of the cases require the narrow interpretation of federal jurisdiction provided by the Revised Definition.

The most recent Supreme Court case, *Rapanos v. United States*, provided the basis for both the Revised Definition and the CWR it is designed to replace. *Rapanos* involved the consolidation of two cases on appeal in which landowners challenged the Corps’ jurisdiction over what the landowners called “hydrologically isolated” wetlands that “do not even abut a navigable water.”⁸ The controversial decision was determined by a four-Justice plurality, with Justice Kennedy concurring only in the judgment. Therefore, the decision did not create binding precedent and the Agencies can elect to follow either opinion.

In his plurality opinion, Justice Scalia adopted a bright-line rule limiting the Corps’ jurisdiction to “relatively permanent, standing or continuously flowing bodies of water[,]” with wetlands only falling within the definition if they have a “continuous surface connection” to another WOTUS.⁹ This interpretation rested upon the common dictionary definitions of selected words and did not attempt to engage the existence of an actual hydrological connection between the two waters. It also was considerably narrower than the Agencies’ then-existing regulations defining WOTUS.

In his concurring opinion, Justice Kennedy proposed the competing “significant nexus” test, which was based upon the reasoning in *SWANCC*. Kennedy’s test would extend jurisdiction to a wetland when that wetland would “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.’”¹⁰ Wetlands would be excluded from jurisdiction when their “effects on water quality [were] speculative or insubstantial.”¹¹ Whereas Scalia’s opinion depended heavily on a textual analysis of WOTUS, Kennedy’s focused on the purpose of the CWA and the effects of various waterbodies on water quality.

C. The Clean Water Rule Represents the Most Effective Agency Interpretation of the Clean Water Act and Prevailing Judicial Precedent.

Rapanos left lower courts to decide for themselves which approach they wished to apply. The Agencies issued their own interpretation of *Rapanos*, published as guidance in 2008, which explained that jurisdiction would exist over any waterbodies satisfying either approach and grouped the jurisdictional analysis into three types of waters: (1) those that were categorically WOTUS; (2) those that may be deemed WOTUS on a case-by-case basis (and were thus subject to a significant

⁷ *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 (2001).

⁸ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁹ *Id.* at 742.

¹⁰ *Id.* at 754.

¹¹ *Id.* at 779-80.

nexus analysis); and (3) waterbodies that were excluded from WOTUS.¹² This guidance remained in effect until the CWR was enacted in 2015.

The CWR retained the three classifications of waterbodies used in the 2008 guidance. However, it also provided precise definitions of covered waters that previously had either been legally undefined or defined in vague terms. The table below delineates these clarifications and compares them to the provisions in the Revised Definition:

Subject ¹³	2008 Guidance	Clean Water Rule	Revised Definition ¹⁴
Tributaries to the Traditionally Navigable Waters	“Tributary” undefined.	“Tributary” defined as water features with bed, banks and, ordinary high-water mark, and flow downstream. Open waters without beds, banks, and high-water marks would be evaluated for adjacency.	“[R]ivers and streams that flow to traditional navigable waters” are covered if they convey “perennial or intermittent flow downstream.” Tributaries can connect to navigable waters directly, through other WOTUS, or through non-jurisdictional surface waters.
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments, or tributaries.	Included waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high-water mark.	Wetlands must physically touch jurisdictional waters to be considered “adjacent.” “Surface water connection” results from inundation by WOTUS or perennial/intermittent flow between wetlands and “adjacent” WOTUS. Wetlands separated by berms, levees, upland,

¹² ENV’T PROT. AGENCY & U.S. ARMY CORPS OF ENG’RS, REVISED MEM. FROM ENV’L. PROT. AGENCY & DEP’T OF THE ARMY ON CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT’S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES* (June 5, 2007), available at <https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf>.

¹³ Table info found in ENV’T PROT. AGENCY, Factsheet: Clean Water Rule (2015), available at https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf.

¹⁴ Info pertaining to Revised Definition found in ENV’T PROT. AGENCY, Factsheet: Proposed Revised Definition of “Waters of the United States” (2018), available at https://www.epa.gov/sites/production/files/2018-12/documents/factsheet_-_wotus_revision_overview_12.10_1.pdf.

Subject ¹³	2008 Guidance	Clean Water Rule	Revised Definition ¹⁴
			etc. would only be adjacent where there is surface water connection over or through the barrier.
Isolated or “Other” Waters	Included all other waters the use, degradation, or destruction of which could affect interstate or foreign commerce.	Included specific “similarly situated” waters (prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands) when they have a significant nexus. Included waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.	Non-jurisdictional.
Exclusions to WOTUS (not including Section 404 excluded activities)	Excluded waste treatment systems and prior converted cropland.	Categorically excluded groundwater, gullies, rills and non-wetlands swales. Expands exclusion for ditches and excludes constructed	Incorporates exclusions of the CWR. Also excludes ephemeral flows. Expands some exclusions for ditches.

Subject ¹³	2008 Guidance	Clean Water Rule	Revised Definition ¹⁴
		components for MS4s and water delivery/reuse and erosional features.	

Contrary to the Agencies’ assertions, the CWR actually provided far greater clarity regarding jurisdictional waters that increased the consistency and predictability of Section 404 permitting. The CWR provided specifications for the “adjacent to” language that had complicated wetlands regulation and was at the center of *Rapanos*. The significant nexus analysis, in application to isolated waters, was explicitly limited to only five unique types of waters.¹⁵ Jurisdiction over waters within a 100-year floodplain or 4,000 feet of a jurisdictional water was no longer governed by a blunt proxy for ecological significance such as physical surface connectivity. Rather, agencies could include or omit debatably jurisdictional waters based on hydrological realities.

This sharply contrasts with the Revised Definition, where wetland jurisdiction relies almost exclusively upon abutting or having a direct hydrologic surface connection to a traditionally navigable water.¹⁶ To have a direct surface connection, wetlands need to either be inundated by a jurisdictional water or contribute or receive perennial or intermittent flow from a jurisdictional water within a typical year. A farmer assessing whether she is required to apply for a 404 permit would therefore need to assess the yearly hydrological cycle of a waterbody, which is more difficult than simply determining distance to a jurisdictional water. Thus, the Revised Definition could actually make it more difficult for farmers to determine whether a 404 permit is required than the CWR.

The CWR did more to protect farmers’ interests than simply add clarity. As shown in the table above, the CWR added several categorical exclusions to the WOTUS definition in order to ensure that the CWR would not be misapplied in a manner that injured the economic interest of farmers. In fact, the rule explicitly declared the “intent of the agencies to minimize potential regulatory burdens on the nation’s agriculture community.”¹⁷ It also explained the risks of overapplication of the case-specific analysis and the Agencies’ intent to limit these cases through the CWR.¹⁸ The Revised Definition has expanded these exclusions only marginally, recognizing the breadth of the CWR’s exclusions that were added “in response to concerns raised by...stakeholders during the public comment period.”¹⁹

¹⁵ Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37054, 37059 (June 29, 2015) (hereinafter Clean Water Rule), available at <https://www.govinfo.gov/content/pkg/FR-2015-06-29/pdf/2015-13435.pdf>.

¹⁶ Revised Definition of “Waters of the United States”, 84 Fed. Reg. 4154, 4195 (Feb. 14, 2018) (hereinafter Revised Definition), available at <https://www.federalregister.gov/documents/2019/02/14/2019-00791/revised-definition-of-waters-of-the-united-states>.

¹⁷ Clean Water Rule, at 37080.

¹⁸ *Id.* at 37056.

¹⁹ Revised Definition, at 4160.

The CWR achieved an increase in predictability, consistency, and clarity. Replacing it with a rule that is actually less clear and lacks any scientific support risks ambiguity and runs contrary to the purpose of the CWA. It also puts invaluable ecological resources at risk. Not least among these are the nation's wetlands.

II. DESPITE PROVIDING ESSENTIAL FUNCTIONS AND VALUES, A SIGNIFICANT PORTION OF MISSOURI'S WETLANDS HAVE BEEN DESTROYED, AND THE REVISED DEFINITION WOULD LEAVE MANY MORE VULNERABLE TO FUTURE DESTRUCTION.

A. Wetlands Provide a Host of Environmental and Economic Benefits.

Wetlands provide a broad range of functions and values to society. Wetlands serve as sinks for flood waters, provide habitat for diverse populations of plants and animals, improve water quality by filtering out pollutants, and support outdoor recreational opportunities for hunters, fishermen, and other outdoor enthusiasts.²⁰ This section is not meant to provide a comprehensive list of all the benefits of wetlands, but rather highlights some of the most important ones while emphasizing the potential negative effects of wetland loss.

i. Wetlands Function as Temporary Stores for Floodwaters, Preventing Flood Damage to Surrounding Areas.

At the macro level, wetlands function to temporarily store excess floodwaters, which prevents flood damages from occurring to surrounding areas.²¹ As wetlands become filled and converted into other land types, their ability to store floodwaters becomes compromised.²² The loss of floodplain wetlands in Missouri and other states in the Missouri and Mississippi River basins has resulted in the loss of a natural and effective flood abatement tool.²³ For example, the upper Mississippi River basin's 26 million acres of wetlands lost since the late 18th century would have mitigated much of the flooding caused by the 40 million acre-feet of excess water (i.e., in excess of bank-full discharge) that passed St. Louis during the 80 days of flooding in 1993.²⁴

Since many of the wetlands that historically lined the Missouri and Mississippi Rivers in Missouri have been destroyed, protection and preservation of the remaining floodplain wetlands should be a

²⁰ FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 13 (1984).

²¹ Ing-Marie Gren e al., *Primary and Secondary Values of Wetland Ecosystems*, 4 ENVTL. & RES. ECON. 55, 76 (1994).

²² RALPH W. TINER, U.S. DEP'T OF INTERIOR, FISH & WILDLIFE SERV., WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 21 (1984).

²³ JANE E. EPPERSON, MO. DEP'T OF NAT. RES., WATER RESOURCES REP. NO. 39, MISSOURI WETLANDS: A VANISHING RESOURCE 13 (1992).

²⁴ Donald L. Hey & Nancy S. Philippi, *Flood Reduction through Wetlands Preservation: The Upper Mississippi River Basin as a Case History*, 3 RESTORATION ECOLOGY 4, 13 (1995).

top priority for the state. The Revised Definition strips protection from these wetlands when they are separated from other jurisdictional waters by man-made structures, such as levees. Ironically, levees are less effective than natural flood control systems, as wetlands provide both temporary storage and treatment of floodwaters, while levees channelize the river and force more water downstream.²⁵ Missouri's floodplain wetlands are in need of restoration, not further destruction. The deregulation of these wetlands would make it easier for developers to build in large floodplains, further eliminating any floodwater storage potential they have left, and diminishing some of the other functions these wetlands still provide.²⁶

ii. Wetlands Provide Natural Filtration of Pollutants that Would Otherwise End Up in Major Waterbodies.

Wetlands function as water filtration systems in three main ways: nutrient removal; chemical and organic waste processing; and sediment load reduction.²⁷ Wetlands pull nutrients like nitrogen and phosphorus from waters. This fosters plant growth in the wetlands themselves while preventing eutrophication from occurring downstream as a result of dissolved nutrient oversaturation.²⁸ Eutrophication – an excess of nutrients – results in the formation of dead zones, which harm all organisms in an ecosystem and are very difficult to recover from.²⁹ Wetlands also function to remove waste from waters through retention of chemicals.³⁰ For example, the Tinicum Marsh in Philadelphia, Pennsylvania, filters treated sewage from three different sewage treatment plants. This wetland removes from waters 7.7 tons of biological oxygen demand, 4.9 tons of phosphorus, 4.3 tons of ammonia, and 138 pounds of nitrate per day.³¹ The removal of sediment is another important function wetlands provide. They decrease floodwater turbidity, and remove sediment which would otherwise transport harmful pesticides, metals, and other toxins downstream and poison the waters.³² Missouri, home of two of the continent's largest rivers, needs wetlands that can perform these functions.

iii. Wetlands Support a Diverse Array of Plant and Animal Species.

Wetlands are home to rare species that have carved out niches to exist in these unique hydrologic environments.³³ Wetlands are home to many migratory bird species, providing a place to stop during their migrations, and also providing wintering and breeding grounds.³⁴ Of Missouri's more

²⁵ EPPERSON, *supra* note 23, at 12.

²⁶ *Id.* at 13-15

²⁷ TINER, *supra* note 22, at 18.

²⁸ *Id.*

²⁹ Laurence Mee, *Reviving Dead Zones*, 295 SCI. AM. 78, 83-84 (November 2006).

³⁰ Gren, *supra* note 21, at 57.

³¹ TINER, *supra* note 22, at 18.

³² *Id.*

³³ Edward Maltby & Mike C. Acreman, *Ecosystem Services of Wetlands: Pathfinder for a New Paradigm*, 56 HYDROLOGICAL SCI. J. 1341 (2011).

³⁴ See Gren, *supra* note 21; see also J. M. Amezaga et. al, *Biotic Wetland Connectivity—Supporting a New Approach for Wetland Policy*, 23 ACTA OECOLOGICA 213 (2002).

than 430 bird species, at least 110 can be found in wetlands for some or all of their life cycle.³⁵ Along with birds, over 200 of Missouri's native plant and animal species listed as endangered or threatened make their primary homes in wetlands.³⁶ Congress has protected biodiversity through the Endangered Species Act ("ESA"), which is also administered by the federal government.³⁷ Protection of wetlands – and the wetland species at risk of extinction – serves both the biodiversity goals of the ESA and the CWA's goals of water quality protection.

iv. Wetlands Provide a Quality-of-Life Benefit to Humans as a Source of Recreation.

Wetlands can support hunting, fishing, birdwatching, hiking, biking, photography, and even swimming or ice skating, depending on the season and wetland type.³⁸ Fish and wildlife recreation contributes \$4 billion dollars annually to Missouri's economy and the further destruction of wetland habitats where these activities occur would be detrimental to this source of revenue.³⁹ In addition, a 2013 survey conducted by the University of Missouri found that 86% of Missourians enjoy the presence of wildlife around their homes, with 89% saying they view protection of outdoor places as important.⁴⁰ These strong majorities highlights the importance of preserving and maintaining wetlands as home for so many of Missouri's native wildlife species.

B. At Both the National and State Level, Wetlands Have Been Destroyed and Converted to Other Types of Land Since the Early Settlers.

Historically, wetlands have been considered economically worthless. Because they lack commercial value, they have often been filled in and converted to a more "useful" purpose, like agriculture or residential development.⁴¹ But this understanding of wetlands' worth is short-sighted. As detailed in the previous section, wetlands provide vital ecosystem services, despite their perceived lack of monetary value. This misperception of wetlands' value, combined with a lack of understanding of the important functions and values wetlands provide, has resulted in the destruction of a significant portion of the nation's wetlands. Since colonial settlement, 53% of the original 221 million acres of wetlands in the contiguous United States have been destroyed.⁴²

Now that wetlands' functions and values are better understood, there have been attempts at preventing future wetland loss. The "no net loss" policy is one such attempt. Established by Executive Order in 1988, it resulted in the Army Corps of Engineers requiring developers to conduct compensatory mitigation, which involves them restoring or creating at least as many

³⁵ Bonnie Chasteen, *Wonderful Wetlands*, MO. CONSERVATIONIST MAG., Dec. 2016, at 18.

³⁶ *Id.*

³⁷ Endangered Species Act of 1973, 16 U.S.C. §1531 et seq.

³⁸ TNER, *supra* note 22, at 24.

³⁹ Tim Ripperger, *[Note to Our Readers]*, MO. CONSERVATIONIST MAG., Feb. 2015, at i.

⁴⁰ Jason Jensen, *Did You Know?*, MO. CONSERVATIONIST MAG., Feb. 2015, at 9.

⁴¹ T. E. DAHL, U.S. DEP'T OF INTERIOR, FISH & WILDLIFE SERV., *WETLANDS LOSSES IN THE UNITED STATES 1780'S TO 1980'S* 2 (1990).

⁴² *Id.* at 1.

wetlands as their projects disrupt or destroy.⁴³ However, even with the construction of a wetland that fully performs the functions of lost wetlands, temporal losses are still experienced. The replacement wetland's functions will not exceed those of the original wetland, meaning the consequences of the lag between the alteration of the original wetland and attempted restoration cannot be offset.⁴⁴ So, while “no net loss” wetland policy sounds good in theory, it still fails to account for temporal losses associated with lag between wetland destruction and restoration. Therefore, the remaining wetlands are more important than ever.

C. With the Revised Definition of Waters of the United States, Many of Missouri's Wetlands Will Become Non-Jurisdictional.

The preservation of the nation's remaining wetlands serves many important purposes and functions. But the Revised Definition removes the protections of the CWA from many of these wetlands within Missouri. Wetlands that are separated from jurisdictional waters by “upland or by dikes, barriers, or similar structures” and that, as a result, “lack a direct and continuous hydrologic surface connection to jurisdictional waters” will not be considered WOTUS.⁴⁵ Many navigable waters have been separated from their floodplains by levees and the Revised Definition will make it easier to destroy wetlands behind these structures despite their substantial nexus with the river.⁴⁶ Missouri has 2,053 miles of levees, the vast majority of which border the Mississippi and Missouri Rivers.⁴⁷ Based on a GIS analysis of National Wetlands Inventory (“NWI”) data, the Revised Definition immediately places 202,244 acres of wetlands located behind these levees beyond the scope of the CWA. In addition, the Revised Definition also removes CWA protections from wetlands that do not “abut” or have a direct hydrologic surface connection to another WOTUS.⁴⁸ According to the NWI, Missouri has approximately 1.5 million acres of floodplain wetlands that are not located behind levees.⁴⁹ While the Revised Definition's effect on these wetlands cannot easily be quantified, it is likely a large portion of them will also become non-jurisdictional under the Revised definition because they do not abut or have a direct surface connection to other jurisdictional waters. Combining the previously mentioned 202,244 acres of wetlands behind levees with a significant portion of the 1.5 million acres of floodplain wetlands not behind levees but also not abutting or having a direct connection to other waters, the Revised Definition could strip protections from upwards of half of the state's remaining wetlands.

If a wetland is considered non-jurisdictional, and thus outside of the CWA's protections, it can be destroyed without the need for a permit and without any requirement to perform compensatory

⁴³ DAVID J. HAYES & NICOLE GENTILE, CENTER FOR AMERICAN PROGRESS, NO NET LOSS: HOW MITIGATION POLICY CAN SPUR PRIVATE INVESTMENT IN LAND AND WILDLIFE CONSERVATION 4 (2016).

⁴⁴ Todd BenDor et al., *Landscape Characteristics of a Stream and Wetland Mitigation Banking Program*, 19 *ECOLOGICAL APPLICATIONS* 2078, 99 (2009).

⁴⁵ Revised Definition, at 4184.

⁴⁶ ENV'T PROT. AGENCY, EPA/600/R-14/475F, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE EVIDENCE 2-5 (2015) (hereinafter CONNECTIVITY REPORT).

⁴⁷ NATIONAL LEVEE DATABASE, <https://levees.sec.usace.army.mil/#/> (last updated April 11, 2019).

⁴⁸ Revised Definition, at 4184.

⁴⁹ National Wetland Inventory, <http://www.fws.gov/wetlands/Data/State-Downloads.html> (last updated March 22, 2019)

mitigation. In Missouri, developers would be able to fill and convert these wetlands for building projects,⁵⁰ many of dubious value. The majority of Missouri's wetlands have already been destroyed by human activity; if the Revised Definition becomes law Missouri could lose many of its remaining wetlands.⁵¹

The Revised Definition limits jurisdictional wetlands to those that have a direct surface connection unimpeded by a man-made barrier or those that directly abut other jurisdictional waters, but such limitations ignore the hydrological realities of wetlands. In contrast, the CWR's definition of hydrological connection was informed by the EPA's Connectivity Report.⁵² The report examined the state of the science of hydrological systems, including physical, chemical, and biological connections among river networks and other water systems. It was prepared by the scientists in EPA's Office of Research and Development and was reviewed by EPA's Science Advisory Board before publication. Here is how it explains the connections between rivers and the wetlands in their floodplains:

Riparian/floodplain wetlands can be hydrologically connected to streams and rivers through unidirectional flows (i.e., from wetlands to rivers and streams, but not vice versa) of surface water and ground water from upgradient areas (e.g., hillslopes and nearby uplands). In addition, riparian/floodplain wetlands have bidirectional connections to streams and rivers (i.e., from wetlands to streams and rivers and vice versa) through lateral movement of surface and ground water between the channel and riparian/floodplain areas. Connections between riparian/floodplain wetlands and streams or rivers occur over a gradient of connectivity, for example, they can be permanent, can occur frequently (e.g., if the wetland is located within the mean high-water mark), or can occur infrequently (e.g., if the wetland occurs near the edge of the floodplain; Sections 1.2.2 and 2.4.2). Even riparian/floodplain wetlands that rarely flood can have important, long-lasting effects on streams and rivers.⁵³

The report goes on to discuss how a direct, continuous surface connection is not the only way wetlands are connected to other waters:

Our review of subsurface flows emphasizes shallow (local) groundwater, because flows in this category have the greatest interchange with surface waters (Winter et al., 1998) although relevant surface-subsurface exchanges occur at depths ranging from centimeters to tens of meters, depending on geographic location, stream channel geometry, and other factors (Woessner, 2000) ...⁵⁴

Similar to streams, the occurrence and persistence of riparian/floodplain wetland and non-floodplain wetland hydrologic connections with river networks, via surface water (both channelized and non-channelized) or ground water, can be

⁵⁰ STACIA BAX, MO. DEP'T OF NAT. RES., MISSOURI STATE WETLAND PROGRAM SUMMARY 1 (2015).

⁵¹ T. E. DAHL, WETLANDS LOSSES IN THE UNITED STATES 1780'S TO 1980'S, U.S. DEP'T OF INTERIOR (1990).

⁵² CONNECTIVITY REPORT.

⁵³ CONNECTIVITY REPORT, at 4.1.

⁵⁴ *Id.* at 1.14.

continuous, seasonal, or ephemeral, depending on the overall hydrologic conditions in the watershed. For example, a non-floodplain wetland might have a direct ground-water connection with a river network during wet conditions but an indirect regional groundwater connection (via ground-water recharge) under dry conditions...⁵⁵

These statements acknowledge that wetlands can also be connected to river networks via groundwater, which may flow continuously but is not covered by the CWA simply due to the fact that it occurs below ground. While groundwater may not be jurisdictional, waters connected to other jurisdictional waters by groundwater clearly should be, as they have a clear hydrological connection to them. Basing jurisdiction only on a surface connection ignores the complex connectivity of water systems.

D. A Current Development Project in Maryland Heights, Missouri, Highlights the Negative Consequences the Revised Definition Would Have.

To highlight the harm the Revised Definition would cause, consider a planned floodplain development project west of St. Louis, Missouri. Since 1989, the city of Maryland Heights, Missouri has been working to develop the “Maryland Park Lake District” (MPLD), an 8,100-acre area of land located behind the Howard Bend levee in the floodplain of the Missouri River.⁵⁶ The MPLD already contains a mixture of office and industrial developments and entertainment venues, including a casino and amphitheater. It also contains agricultural and public and private recreational lands and green space, including 1,356 acres of wetlands, one of the larger wetlands tracts in the area.⁵⁷ The “Maryland Heights Lake District” is an 1800-acre plot within the MPLD.⁵⁸ This smaller area has been the focus of recent development attempts. Two current proposals are being considered; one featuring the construction of industrial, commercial, recreational, and residential use, and the other featuring only recreational and residential developments. Selection of a plan will likely depend on the amount of infrastructure improvements made by the developers.⁵⁹

Under the CWA as it currently stands, development that impacts these wetlands cannot occur without obtaining a 404 permit which in turn requires making up for the soon-to-be-destroyed wetlands through mitigation – creating or restoring wetlands elsewhere.⁶⁰ But, since the MPLD is located behind the man-made Howard Bend levee, these wetlands would no longer be considered WOTUS under the Revised Definition. This would strip away the regulatory protection they currently have and remove one of the biggest barriers to filling them and developing in the floodplain. This might be good news for the developers, but not for the birds and other creatures who call the Maryland Heights wetlands their home, not for anyone who enjoys the wildlife, and

⁵⁵ *Id.* at 2.14.

⁵⁶ MARYLAND PARK LAKE DISTRICT, CITY OF MARYLAND HEIGHTS, COMPREHENSIVE PLAN 7.2.3 (2016) (hereinafter COMPREHENSIVE PLAN).

⁵⁷ *Id.* at 7.2.4.

⁵⁸ *Plans & Studies*, MARYLAND PARK LAKE DISTRICT (2016), <http://mplakedistrict.com/index.php/resources/>.

⁵⁹ *Id.*

⁶⁰ COMPREHENSIVE PLAN, at 7.2.15.

not for the other developments in MPLD which will lose the flood control benefits of the large wetlands complex. With the lack of state laws protecting Missouri's wetlands, development projects like the MPLD could occur across the state with no regard for any of the non-jurisdictional wetlands under the new rule, resulting in significant losses in wetland functions and values.

III. NOT ONLY WOULD THE REVISED DEFINITION EXCLUDE MANY VALUABLE RESOURCES, BUT IT LACKS EVEN ITS CLAIMED ADVANTAGES.

A. Federalism is Already Protected by Existing Legislation and Regulations.

The damage to wetland preservation that will follow if the Revised Definition is adopted is not redeemed by any other considerations. The Agencies and proponents of the Revised Definition argue that it reflects the original intent of Congress to grant states a larger regulatory role over WOTUS than they have had for the last 40+ years so that they can protect the wetlands they supposedly know best. The current regime – not only the CWR but the regulations that preceded it – allowed for an extensive system of cooperative federalism in the development of water quality standards under 40 C.F.R. §§ 131.20, and gave states the option for an even larger role if they wanted to assume control over the Corps' 404 program within their borders. But based on states like Missouri's history, the Revised Definition's enthusiasm for state autonomy in wetlands permitting is not shared by the states themselves. To date, only two states—Michigan and New Jersey—have assumed 404 permit responsibility.⁶¹ In the nearly fifty years since the CWA was passed, Missouri has not attempted to assume the 404 program from the Corps. Past inaction reveals that, despite the Agencies' assumptions to the contrary and no matter their comments in response to the current proposal, states like Missouri are not eager to protect their waters absent the current status of federal jurisdiction over self-regulation.

Federalism for Missouri means neglect of its natural resources. Missouri's relationship with EPA and the Corps could more accurately be described as “uncooperative federalism.” The CWA requires “coordination,” defined by Webster's Dictionary—an authority cited extensively in both the Revised Definition and *Rapanos*—as “the process of organizing people or groups so that they work together **properly** and **well**” or “the harmonious functioning of parts for **effective results**.”⁶² Missouri has resisted the commands of the CWA for decades, assigning uses and water quality criteria to its rivers and streams only when compelled to do so by litigation and the fear of federal action.⁶³ This is neither harmonious nor effective and the Revised Definition will yield more of the same.

⁶¹ *States Given Section 404 Permit Authority*, FARM PROGRESS (Aug. 8, 2018), <https://www.farmprogress.com/farm-policy/states-given-section-404-permit-authority>.

⁶² *Coordination*, MERRIAM-WEBSTER (Mar. 17, 2019), <https://www.merriam-webster.com/dictionary/coordination> (emphasis added).

⁶³ See *Missouri Coalition for the Environment v. McCarthy*, No. 2:16-cv-04069-NKL (W.D. Mo. filed Feb. 24, 2016); *Missouri Coalition for the Environment v. Jackson*, No. 10-0416-CV-C-NKL (W.D. Mo. filed Aug. 2, 2010); *Missouri Coalition for the Environment v. Leavitt*, No. 03-4217-CV-C-NKL (W.D. Mo. filed Oct 7, 2003).

Missouri has not exercised its existing authority to protect wetlands within its borders, irrespective of whether they are considered WOTUS or waters of the state. As of 2016, 87% of Missouri's former wetlands areas had been lost to urban development, farming, and road building.⁶⁴ If the Revised Definition is adopted as proposed, so that large swaths of Missouri's wetlands are left unprotected by federal regulation, they will be abandoned completely by Missouri regulators.

In addition, federalism as envisioned by the Agencies cannot solve the problems for which the CWA was enacted in the first place. While the environmentally detrimental activities can occur within one state, their effects do not obey state boundaries. For example, if a company releases pollutants into wetlands within Minnesota but hydrologically connected to the Mississippi River, Iowa, Illinois, Missouri, and every other downstream state suffers the negative effects of those pollutants. Even if Missouri were to adopt the strictest possible protections for its waters, it would still remain at the mercy of other states. Only a federal policy setting a minimum floor of protection for wetlands can ensure that all states are equally protected from water pollution.

In short, the Agencies' invocation of federalism as a positive virtue provides a thin cover for the likely result of the Revised Definition – the removal of streams and wetlands from any framework of environmental protection.

B. The Revised Definition Does Not Add Clarity to the Clean Water Act and Instead Increases the Likelihood of the Act's Misinterpretation.

The Agencies extol what they claim is the enhanced clarity of the Revised Definition, claiming it provides greater simplicity as to which bodies constitute WOTUS and are therefore subject to 404 permit requirements. To be sure, clarity is a benefit all sides can agree upon. Yet discarding valuable protections merely for the purpose of making regulations easier to understand for commercial actors is not an appropriate means to that end. To do so would be to contradict the purpose of the CWA and the fundamental mission of the EPA.

The so-called clarity provided by the Revised Definition seems like a mere recasting of de-regulation. This is even more obvious when considering the plethora of guidance issued by the Corps and EPA on the implementation of the CWR.⁶⁵ The Agencies' *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* was based on a meticulous examination of the scientific evidence for physical, chemical, and biological interconnection of waters of the U.S.⁶⁶ This publication—as well as the preamble to the CWR itself—extensively explains how waters that might at first glance be considered non-navigable are inextricably tied to

⁶⁴ Bonnie Chasteen, *Wonderful Wetlands*, MO. DEP'T OF CONSERVATION (Dec. 1, 2016), <https://mdc.mo.gov/conmag/2016-12/wonderful-wetlands>.

⁶⁵ See ENV'T PROT. AGENCY & U.S. ARMY CORPS OF ENG'RS, MEMORANDUM FOR DIRECTOR OF CIVIL WORKS AND US EPA REGIONAL ADMINISTRATORS, *available at* <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll5/Id/1418>; *see also* ENV'T PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES (May 27, 2015), *available at* https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf

⁶⁶ TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE 3-5.

the more traditionally navigable waters even when those connections may not be visible while recognizing that the strength of the connection lies on a continuum.

The terminology of “adjacent waters” and “tributaries” in the CWR recognized the strength of the scientific evidence for a broad spectrum of hydrological connections and did so in a clear way. The only element of the CWR that required some subjective deliberation in its application was the “significant nexus” test. Everything else—including the “adjacent wetlands” that will lose jurisdictional status under the Revised Definition—had clear objective standards governing their inclusion as a WOTUS. The CWR used objective measures like a prescribed distance in its definitions. It is hard to get clearer than “1500 feet.” What the Revised Definition offers instead of clarity is simply the wholesale removal of waters from the protections of the CWA.

The Revised Definition does not grapple with the scientific evidence of connectivity and fails to present any of its own scientific evidence that would justify, for example, redefining “adjacent wetlands” to exclude wetlands behind levees.⁶⁷ Instead, it claims that it can ignore the science and make a “a legal determination based on the language and structure of the Act and applicable judicial precedent,”⁶⁸ although it does a poor job of that as well. The Agencies cite the CWR scientific review only to highlight what they claim is the difficulty inherent in selecting a point along the water continuum at which waters will only have insubstantial effects on other downstream bodies.⁶⁹ As a result, the agencies reason that, because “the science does not provide a precise point[,]... science cannot be used to draw the [jurisdictional] line.”⁷⁰

So, instead of using science, the Agencies here simply picked a spot on the hydrological continuum. The “clarity” touted by proponents of the Revised Definition is no more than an arbitrary line that excludes many valuable and important waters that are scientifically tied to WOTUS. Such an arbitrary selection facilitates inconsistency and unpredictability in judicial interpretation and implementation. Without factual evidence keeping law tied to reality, the same textual hoops used by the Revised Definition can be jumped through to arrive at an entirely different conclusion. Thus, failure to recognize the scientific realities governed by a law in that law’s interpretation is illogical and an affront to rule of law.

IV. THE AGENCIES DESIGNED THE PUBLIC COMMENT PERIOD TO MAXIMIZE THE VOICES OF THEIR SUPPORTERS INSTEAD OF THE PUBLIC.

MCE would also like to raise issue with the logistics of the comment period for the Revised Definition. Not only did the Agencies refuse an extension of the comment period despite the intense public interest in the proposal, they also scheduled only one public hearing on the rule. This lone hearing, held in Kansas City, KS, happened to take place in a metropolis bordering the state with

⁶⁷ Revised Definition.

⁶⁸ *Id.*

⁶⁹ *Id.* Perhaps this is not surprising since the Agencies chide the previous administration for paying too much attention to science, writing that “the 2015 Rule may have failed to appropriately recognize that the science in the Connectivity Report, while informative and important to consider, is not dispositive.”

⁷⁰ *Id.*

the second-greatest number of farms in the United States.⁷¹ Kansas also neighbors Iowa, the state with the third-greatest number of farms and the state in which Farm Bureau Financial Services—the financial arm of the most adamant supporter of the Revised Definition—is headquartered. In contrast, the CWR featured both an extension of the comment period and four public hearings in states ranging from Alaska to Nebraska to Washington D.C. Instead of using the public hearing to foster public participation in the passage of a rule with widespread social effects, the Agencies seemed to use it merely to record its supporters on public record while fulfilling a procedural obligation.

V. THE AGENCIES SHOULD WITHDRAW THE PROPOSED RULE AND IMPLEMENT THE 2015 CLEAN WATER RULE.

The proposed rule is a step backwards for environmental protection and regulation. MCE strongly encourages the EPA and Corps to reinstate the CWR, as it aligned far more strongly with the goals of the CWA while maintaining predictable and consistent regulatory standards. The Revised Definition ignores the biological, economic, and social effects of deregulating all wetlands located behind man-made features. It prioritizes cost-saving for some landowners over environmental protection for all.

Sincerely,



Elizabeth J. Hubertz
Counsel for Missouri Coalition for the Environment

⁷¹ Rob Cook, *Ranking of States with the Most Farms*, Beef2Live (Mar. 24, 2019), <http://beef2live.com/story-ranking-states-farms-0-113143%E2%80%8B>.