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U.S. Environmental Protection Agency U.S. Army Corps of Engineers

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**RE: Docket ID No. EPA-HQ-OW-2017-0203: Definition of “Waters of the United States”—Recodification of Pre-Existing Rules; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018)**

To Whom It May Concern:

The undersigned forest products industry associations offer the following comments on the United States Environmental Protection Agency’s (“EPA”) and United States Army Corps of Engineers’ (“Corps”) supplemental notice of proposed rulemaking, titled “Definition of ‘Waters of the United States’ – Recodification of Existing Rule,” published in the *Federal Register* at 83 Fed. Reg. 32,227 on July 12, 2018.

Private working forests support 2.4 million American jobs and provide $87 billion annually in paychecks. Nationwide, there are 11.3 million private forest owners, who manage 420 million acres—about 56% of the forested land in the entire country. These working forests are vital to our nation’s natural resource infrastructure, providing forest products, open space, wildlife habitat, clean water and air, recreation, and much more. America’s forest owners lead the world when it comes to sustainable forestry practices. They operate under a framework engineered largely by the States, which enact and administer the world’s most effective forestry laws, regulations, and agreements. One key to that framework’s success is the way in which it is carefully tailored to account for and address local conditions and satisfy local needs.

Today, the greatest threat of deforestation comes from the conversion of forests to non-forest uses that produce a higher economic value. To make new investments in sound, long-term forest management, the people, families, and businesses that own nearly 60% of our nation’s forests depend on the returns they get from the products their forests yield. When existing markets for forest products are strong or when new markets like bio-energy emerge, it makes forestry economical and thus gives forest owners the means of keeping their lands forested. By contrast, when regulatory costs and barriers increase, forest owners necessarily lose some of their ability to maintain the land as forested; the economic pressures are simply too great. When land converts from forest land to some other use, it increases pressure on water and other natural resources and reduces the quality of the land compared to what exists in working forests.

Forests are a renewable resource. Like other resources, as their value increases, the number of forests will increase proportionally. Economic returns to wood production and forest-based manufacturing provide important incentives for private forest stewardship in the United States. Absent these incentives, which regulatory costs and uncertainty tend to substantially diminish, many working forests would, at a minimum, suffer decreased productivity, which often leads to conversion into non-forest uses.

For decades, the jurisdictional reach of the Clean Water Act (“CWA”) has been of considerable consternation to the forestry industry. Foresters have been left to guess about the meaning of “waters of the United States” (“WOTUS”) in the CWA and about how regulators will interpret and apply certain ambiguous terms in the regulatory text. When, in 2015, EPA and the Corps (collectively “the Agencies”) promulgated a revised definition of WOTUS,[[1]](#footnote-1) it only served to make matters worse. The Rule overreached by stretching the scope of CWA jurisdiction well beyond what Congress intended. It also introduced a host of new terms into the CWA lexicon that are so ambiguous as to be incapable of practical, real world application in the forest industry.

**Summary**

The National Alliance of Forest Owners (“NAFO”) previously commented in support of the Agencies’ July 2017 proposal[[2]](#footnote-2) to repeal the 2015 Rule.[[3]](#footnote-3) Those comments discussed the Agencies’ statutory authority to rescind the 2015 Rule through a new notice-and-comment rulemaking proceeding, and expressed NAFO’s agreement that the 2015 Rule should be repealed because it impermissibly alters the federal-state framework in contravention of Congress’s stated policy in CWA Section 101(b).[[4]](#footnote-4) NAFO also urged EPA and the Corps to further justify the proposed repeal by pointing to the many flaws identified by federal courts that preliminarily stayed the 2015 Rule and by concluding that the rule failed to achieve clarity and was instead unconstitutionally vague.[[5]](#footnote-5) Finally, those comments agreed with the Agencies’ conclusion that repeal of the 2015 Rule would result in the reinstatement of previous rules and policies and that the previous rules are an acceptable alternative until the Agencies adopt a revised WOTUS definition. The undersigned associations endorse NAFO’s prior comments in addition to submitting the comments below.

All of the aforementioned justifications for repeal remain valid today. If anything, they are even stronger now that another federal court has preliminarily enjoined the 2015 Rule after finding, among other things, that numerous states are likely to succeed on the merits of both substantive and procedural challenges to the rule.[[6]](#footnote-6) But apart from that, we offer these supplemental comments to detail additional reasons why the Agencies should repeal the 2015 Rule in its entirety:

* By extending the scope of CWA jurisdiction to various water and landscape features across the country, such as man-made ditches, ephemeral “tributaries” that are rarely wet and not identifiable by field observation, and ponds and depressions in floodplains that have unclear boundaries, the 2015 Rule effectively reads the term “navigable” out of the statute. Many of these features have little or no relation to what Congress had in mind when it enacted the CWA: navigable waters in the traditional sense.
* The rule’s broad definitions of terms such as “tributary,” “adjacent,” and “significant nexus” cannot be reconciled with Supreme Court opinions. Among other things, the rule stretches jurisdiction well beyond what either the plurality or concurring opinions in *Rapanos* would allow and impermissibly revives the theory of jurisdiction (in the Migratory Bird Rule) that the Court rejected in *SWANCC*.
* Numerous provisions in the rule lack record support. In the final 2015 Rule, the Agencies seemingly plucked arbitrary floodplain and distance cutoffs out of thin air.

These are just some of the reasons why the Agencies should finalize their proposal to repeal the 2015 Rule. While there are undoubtedly additional justifications for repeal, the reasons discussed in these comments (and in NAFO’s prior comments) provide a strong basis to finalize a defensible repeal. We recognize that a repeal of the 2015 Rule effectively reinstates the prior regulations. While those regulations are not ideal, they are better than the 2015 Rule. Nonetheless, the undersigned organizations urge the Agencies to continue to work on an improved definition of WOTUS that respects the limits Congress placed on the CWA’s scope, while taking into account the realities facing the forestry industry and landowners nationwide.

**Detailed Comments: The 2015 Rule Exceeds the Agencies’ CWA Authority and Lacks Adequate Scientific Support.**

In the supplemental notice, the Agencies expressed concern about whether the 2015 Rule exceeded their CWA authority:

[A]s a result of the agencies’ review and reconsideration of their statutory authority and in light of court rulings against the 2015 Rule that have suggested that the agencies’ interpretation of the ‘significant nexus’ standard . . . does not comport with and accurately implement the limits on jurisdiction reflected in the CWA and decisions of the Supreme Court, the agencies are also concerned that the 2015 Rule lacks sufficient statutory basis.[[7]](#footnote-7)

The Agencies then “propos[ed] to conclude, in the alternative that, at a minimum, the interpretation of the statute adopted in the 2015 Rule is not compelled, and a different policy balance can be appropriate.”[[8]](#footnote-8)

For the reasons set forth below, the Agencies should definitively conclude that the 2015 Rule exceeded their statutory authority and is contrary to Supreme Court precedent in numerous respects. Merely concluding that the 2015 Rule was not compelled by the statute does not go far enough. Such a conclusion improperly ignores the many reasons why the 2015 Rule was unlawful.

# The Rule fails to give any effect to the statutory term “navigable.”

The term “navigable” in the CWA bears independent significance, as the Supreme Court has long recognized. In *SWANCC*, the Supreme Court explained that the text of the CWA would not allow it “to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water.”[[9]](#footnote-9) The Court rejected the Corps’ invitation to read the term “navigable” out of the statute, and it instead emphasized that the term “navigable” “has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”[[10]](#footnote-10) Less than a decade later, both the plurality opinion and Justice Kennedy’s concurrence in *Rapanos* reinforced the need to give the term “navigable” some effect.[[11]](#footnote-11)Justice Kennedy, for instance, stated that “the word ‘navigable’” must “be given some importance,” and he emphasized that “the Court has held that the statute’s language invokes Congress’ traditional authority over waters navigable in fact or susceptible of being made so.”[[12]](#footnote-12)

The 2015 Rule nevertheless fails to give any effect to the term “navigable” in the statute. For example, the rule would extend federal jurisdiction to countless ephemeral features that are far removed from navigable waters in the traditional sense. Not only that, it goes even further to extend jurisdiction to *isolated* water features merely because they are within a certain distance from those ephemeral “tributaries.” None of these water features are fairly characterized as navigable nor could they reasonably be so made. Many of these features bear no relationship to any navigable water and do not abut or contribute flow to any navigable water. By asserting jurisdiction over these types of features, the 2015 Rule unlawfully reads the term “navigable” out of the CWA.

# The 2015 Rule’s definition of “tributaries” is contrary to law and lacks scientific support.

The Agencies defined “tributary” in the regulatory text for the first time in the 2015 Rule. That term means any feature con­tributing any minimal amount of flow to a category (1)-(3) water, “either directly or through another water,” and “characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark.”[[13]](#footnote-13) Given the breadth of this definition, ephemeral drainages, minor creek beds, and other features that are typically dry can be jurisdictional. This is so even if they pass “through any number of [non-jurisdictional] downstream waters” or natural or man-made physical interruptions (*e.g.*, cul­verts, dams, debris piles, boulder fields, or underground features) *of any length*, so long as a bed, banks, and ordinary high water mark can be identified upstream of the break.[[14]](#footnote-14)

Not only is the scope of this definition troubling, so is the way agency staff can apply it. Regulators can establish the presence of both “waters” and “physical indicators of a bed and banks and ordinary high water” without ever stepping foot in the forest.[[15]](#footnote-15) Rather than having to conduct “direct field observation,” the Agencies can instead rely on “[o]ther evidence,” including “remote sensing or mapping information,” such as topographic data, state or local maps, aerial photos, and other desktop tools.[[16]](#footnote-16) The information need not even be current. The Agencies may look to historical information to try to find the prior existence of a bed, banks, and an ordinary high water mark, even when those features are absent in the forest today.[[17]](#footnote-17)

The 2015 Rule’s approach to tributaries conflicts with the holdings in *Rapanos*. Contrary to the plurality’s view of jurisdiction, it encompasses countless features that lack the “ordinary presence of water” such as ephemeral streams and other features that the Act “by and large” treats as point sources, *not* waters of the U.S.[[18]](#footnote-18) And contrary to Justice Kennedy’s view of jurisdiction, the central focus on the ordinary high water mark allows for the assertion of jurisdiction over a broad range of features that Justice Kennedy viewed as insufficient to serve as the “determinative measure” for identifying waters of the United States.[[19]](#footnote-19) Given that an ordinary high water mark is an uncertain indicator of “volume and regularity of flow,” the 2015 Rule improperly asserts jurisdiction over too many “remote” features that have only “minor” connections to navigable waters.[[20]](#footnote-20)

The definition of “tributary” also lacks support in the scientific record for the 2015 Rule. According to the Agencies, an ordinary high water mark “forms due to some regularity of flow and does not occur due to extraordinary events.”[[21]](#footnote-21) But that is demonstrably false, at least in some parts of the country. The Agencies candidly admitted in the preamble to the final rule that evidence of connectivity for intermittent and ephemeral features is “less abundant” than for perennial features in water-rich regions.[[22]](#footnote-22) Take the arid West for example. Even the Corps’ own studies have found “no direct correlation” between the location of ordinary high water mark indicators and future water flow in arid regions.[[23]](#footnote-23) The Corps has also found that such “indicators are distributed randomly throughout the [arid] landscape and are not related to specific channel characteristics.”[[24]](#footnote-24) It goes without saying that “randomly” distributed indicators are not a reasonable basis for a finding that all features that satisfy the definition of “tributary” are categorically jurisdictional because they have a “significant nexus” to navigable waters in the traditional sense.

# The 2015 Rule’s definition of “adjacent” exceeds the Agencies’ CWA authority.

Like the prior regulations, the 2015 Rule defined “adjacent” as “bordering, contiguous, or neighboring.” But the addition of a new definition of “neighboring” significantly changed the universe of “adjacent” waters. That term includes, among other things, (i) waters within 100 feet of the ordinary high water mark of a navigable water or tributary, and (ii) waters within the 100-year floodplain of such a water and within 1,500 feet of its ordinary high water mark.[[25]](#footnote-25) This definition is incompatible with Supreme Court precedent.

*R**iverside Bayview* upheld the assertion of jurisdiction over wetlands “adjoining” and “actually abut[ting] on” a traditional “navig­able waterway.”[[26]](#footnote-26) To be jurisdictional, adjacent wet­lands had to be “inseparably bound up with the ‘waters’ of the United States” and not meaningfully dis­tinguish­able from them.[[27]](#footnote-27) In *SWANCC*,the Court rejected the Corps’ assertion of jurisdiction over *isolated* non-navigable waters “that [we]re *not* adjacent to open water”[[28]](#footnote-28) And in *R**apanos*, the plurality opinion explained that “‘adjacent’ as used in *Riverside Bayview* is not ambiguous between ‘physically abutting’ and merely ‘nearby.’”[[29]](#footnote-29) A “*continuous* surface connection” is required between adjacent wetlands and navigable waters in their own right under the *R**apanos* plurality.[[30]](#footnote-30) Contrary to these cases, the 2015 Rule stretched the concept of “adjacent” to include non-abutting, “nearby” waters (not just wetlands) based on notions of “functional relatedness,” rather than physical and geographical proximity to traditional navigable waters.

Even Justice Kennedy’s concurring opinion in *Rapanos* did not view adjacency this expansively. Justice Kennedy held that a wetland’s mere adjacency to a minor tributary cannot be “the deter­minative measure” of whether it was “likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally under­stood.”[[31]](#footnote-31) This is because “wetlands adjacent to [such] tributaries” “might appear little more related to navigable-in-fact waters than were the isolated ponds [in *S**WANCC*].”[[32]](#footnote-32) But the 2015 Rule nevertheless asserts jurisdiction over such wetlands. Indeed, waters are categorically jurisdictional so long as they are adjacent to even remote and insubstantial “tributaries” such as ephemeral features, drains, ditches, and streams far removed from traditional navigable waters.

Moreover, the expansion of “adjacency” to all waters (not just wetlands) lacks support in Supreme Court precedent. The *R**apanos* plurality explained that *non-wetland* “waters”—especially those separated from traditional navigable waters by physical barriers or significant distances—“do not implicate the boundary-drawing problem” that made it appropriate to defer to the Corps’ approach to adjacency in *R**iverside Bayview.*[[33]](#footnote-33) Perhaps unsurprisingly, other courts have previously rejected attempts to expand “adjacen­cy” jurisdiction to non-wetland waters. For example, in *San Francisco Baykeeper v. Cargill Salt Division*, the Ninth Circuit rejected jurisdiction over a pond located within 125 feet of a navigable tributary of San Francisco Bay because any nexus between the two waters “falls far short of the nexus that Justice Kennedy required in *Rapanos*.”[[34]](#footnote-34) But under the 2015 Rule, that pond and others like it would be jurisdictional.

# The 2015 Rule improperly reinstates the Migratory Bird Rule.

The 2015 Rule allows for case-by-case assertions of jurisdiction based on a new definition of “significant nexus.” That definition is irreconcilable with the holding in *SWANCC* as well as Justice Kennedy’s concurrence in *Rapanos*. In Justice Kennedy’s view, a water feature is jurisdictional only if it “significantly affect[s] the chemical, physical, *and* biological integrity of … waters more readily understood as ‘navigable.’”[[35]](#footnote-35) This test, according to Justice Kennedy, ensures that the CWA’s jurisdiction would not extend to features that are too “remote” or whose “effects on [navigable] water quality are speculative or insubstantial.”[[36]](#footnote-36)

The 2015 Rule, however, defines “significant nexus” differently than what Justice Kennedy envisioned. The rule asserts jurisdiction over any water if it affects the “chemical, physical, *or* bio­log­ical integrity” of a traditional navigable water, interstate water, or territorial sea.[[37]](#footnote-37) Changing “and” to “or” is contrary to both Justice Kennedy’s opinion and the text of CWA Section 101(a). And by requiring only one type of connection (*e.g.*, biological), the 2015 Rule effectively breathes life back into the invalidated Migratory Bird Rule. The 2015 Rule allows for jurisdiction based only on one function like the “[p]rovision of life cycle dependent aquatic habitat” between one water and some other distant water.[[38]](#footnote-38) That is no different from the Migratory Bird Rule, which the Corps used to assert jurisdiction over isolated non-navigable ponds merely “because they serve[d] as habitat for migratory birds.”[[39]](#footnote-39)

The 2015 Rule’s transgressions do not stop there. Rather, the Agencies stated that they can find evidence of biological connectivity (and hence, “significant nexus” jurisdiction) based on the presence of “amphibians, aquatic and semi-aquatic reptiles, [and] aquatic birds.”[[40]](#footnote-40) The Agencies also point to the biological connectivity of waters in floodplains to include “integral components of river food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for stream invertebrates and maturation habitat for stream insects.”[[41]](#footnote-41) These statements suggest that anything that lives in and around water might be the sole basis for asserting jurisdiction over non-navigable, intrastate, isolated water features. Surely such assertions of jurisdiction “would result in a significant impingement of the States’ traditional and primary power over land use” contrary to *SWANCC*.[[42]](#footnote-42)

# The scientific record does not support the 2015 Rule’s distance and floodplain requirements.

“Adjacent” waters include those that are within the 100-year floodplain of a category (1)-(5) feature and within 1,500 feet of its ordinary high water mark.[[43]](#footnote-43) Additionally, waters are categorically jurisdictional as “adjacent” if they are within 100 feet of the ordinary high water of a category (1)-(5) feature or within 1,500 feet of the high tide line of a category (1)-(3) feature.[[44]](#footnote-44) The 2015 Rule also allows for case-specific assertions of jurisdiction over water features that are (i) within the 100-year flood­plain of a category (1)-(3) feature or 4,000 feet of the ordinary high water mark of a category (1)-(5) feature; and (ii) found to have a “significant nexus” to a category (1)-(3) feature.[[45]](#footnote-45) Because these distance and floodplain cutoffs lack any justification or record support, they must be repealed.

The 2015 Rule preamble suggests that the Agencies chose the 100-year floodplain for “clarity” and “regulatory certainty,” not because of any science.[[46]](#footnote-46) Indeed, the Agencies elsewhere admitted there is no “scientific con­sensus” over which flood interval to use.[[47]](#footnote-47) This so-called justification falls far short of a reasoned explanation for selecting the 100-year floodplain in particular. The Agencies’ justification for establishing the 1,500-foot and 4,000-foot distance thresholds in the 2015 Rule is similarly deficient. The 2015 Rule vaguely alludes to un­ident­ified “scientific literature,” the Agencies’ “technical expertise and exper­ience,” and the convenience “of drawing clear lines,”[[48]](#footnote-48) but at bottom, it appears that the Agencies simply made up these numbers.[[49]](#footnote-49)

# Conclusion

For the foregoing reasons and those set forth in our original comments, the undersigned organizations respectfully urge the Agencies to repeal the 2015 Rule. Because the rule was an amendment to then-existing regulations, its repeal will have the effect of reinstating those regulations. We appreciate the opportunity to provide these written comments and thank you in advance for your consideration. Should you

have any questions concerning these comments or if you would like additional information, please do not hesitate to contact us.

 Sincerely, 

 William R. Murray

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 National Alliance of Forest Owners

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On behalf of:

Alabama Forestry Association

Arkansas Forestry Association

California Forestry Association

Empire State Forest Products Association

Florida Forestry Association

Forest Landowners Association

Forest Resources Association

Georgia Forestry Association

Louisiana Forestry Association

Louisiana Logging Council

Maine Forest Products Council

Massachusetts Forest Alliance

Michigan Forest Products Council

Minnesota Forest Industries

Minnesota Timber Producers Association

Mississippi Forestry Association

National Alliance of Forest Owners

New Hampshire Timber Owners Association

North Carolina Forestry Association

Oregon Forest & Industries Council

South Carolina Forestry Association

Southeastern Lumber Manufacturers Association

Tennessee Forestry Association

Texas Forestry Association

Virginia Forestry Association

Washington Forest protection Association

1. *See generally* 80 Fed. Reg. 37,054 (June 29, 2015) (hereinafter, “the 2015 Rule”). [↑](#footnote-ref-1)
2. *See* 82 Fed. Reg. 34,899 (July 27, 2017). [↑](#footnote-ref-2)
3. *See* EPA-HQ-OW-2017-0203-9569. [↑](#footnote-ref-3)
4. 33 U.S.C. § 1251(b). [↑](#footnote-ref-4)
5. In the supplemental notice, the Agencies propose to repeal the 2015 Rule to better achieve regulatory certainty. *See* 83 Fed. Reg. at 32,237. As the Agencies correctly observe, one of the reasons the 2015 Rule fails to achieve its stated goal of providing clarity and certainty is the rule’s vague terms and provisions have generated considerable confusion. *See id.* at 32,239. The undersigned organizations believe that the rule is unconstitutionally vague, as explained in NAFO’s prior comments. In light of the Agencies’ recognition of the important due process concerns at issue, *see id.* at 32,237, the Agencies should either conclude that the 2015 Rule is void for vagueness or, at a minimum, it should find that the interpretation in the 2015 Rule was unreasonable because it implicates serious due process questions. [↑](#footnote-ref-5)
6. *See* *Georgia v. Pruitt*, No. 15-cv-79, 2018 U.S. Dist. LEXIS 97223 (S.D. Ga. June 8, 2018). [↑](#footnote-ref-6)
7. 83 Fed. Reg. at 32,238. [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. 531 U.S. at 167. [↑](#footnote-ref-9)
10. *Id.* at 172-73 (citing *United States v. Appalachian Power Co.*, 311 U.S. 377, 407-08 (1940)). [↑](#footnote-ref-10)
11. 547 U.S. at 734-35 (plurality); *id.* at 778-79. [↑](#footnote-ref-11)
12. 547 U.S. at 778. [↑](#footnote-ref-12)
13. 33 C.F.R. § 328.3(c)(3); *see also* 80 Fed. Reg. at 37,076 (stating that flow can be “intermittent or ephemeral”). [↑](#footnote-ref-13)
14. 33 C.F.R. § 328.3(c)(3). [↑](#footnote-ref-14)
15. *See* 80 Fed. Reg. at 37,081, 37,098. [↑](#footnote-ref-15)
16. *Id.* at 37,076-77. [↑](#footnote-ref-16)
17. *Id.* at 37,077. [↑](#footnote-ref-17)
18. *See* 547 U.S. at 734-36 (plurality). [↑](#footnote-ref-18)
19. 547 U.S. at 781. [↑](#footnote-ref-19)
20. *I**d*. at 781-782 (Kennedy, J.). [↑](#footnote-ref-20)
21. TSD at 239. [↑](#footnote-ref-21)
22. 80 Fed. Reg. at 37,079. [↑](#footnote-ref-22)
23. *See* Ariz. Mining Ass’n Comments 10-11 (quot­ing U.S. Army Corps of Eng’rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability* 14 (2006)). [↑](#footnote-ref-23)
24. *Id.* at 11 (quoting U.S. Army Corps of Eng’rs, *Survey of OHWM Indicator Distribu­tion Patterns Across Arid West Landscapes* 17 (2013)). [↑](#footnote-ref-24)
25. 33 C.F.R. § 328.3(c)(2). [↑](#footnote-ref-25)
26. 474 U.S. at 135. [↑](#footnote-ref-26)
27. *Id.* at 134-35 & n. 9. [↑](#footnote-ref-27)
28. 531 U.S. at 167-68, 171. [↑](#footnote-ref-28)
29. 547 U.S. at 748. [↑](#footnote-ref-29)
30. *Id.* at 742. [↑](#footnote-ref-30)
31. *Id.* at 781. [↑](#footnote-ref-31)
32. *I**d.* at 781-782. [↑](#footnote-ref-32)
33. 547 U.S. at 742. [↑](#footnote-ref-33)
34. *See S**.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir. 2007). [↑](#footnote-ref-34)
35. 547 U.S. at 780 (emphasis added). [↑](#footnote-ref-35)
36. *Id.* [↑](#footnote-ref-36)
37. *See* 33 C.F.R. § 328.3(c)(5) (em­phasis added). [↑](#footnote-ref-37)
38. *See* 33 C.F.R. 328.3(c)(5)(ix). [↑](#footnote-ref-38)
39. *S**WANCC*, 531 U.S. at 171-72. [↑](#footnote-ref-39)
40. *Id.* [↑](#footnote-ref-40)
41. *Id.* at 37,063. [↑](#footnote-ref-41)
42. 531 U.S. at 174. [↑](#footnote-ref-42)
43. *See* 33 C.F.R*.* §328.3(c)(2)(ii). [↑](#footnote-ref-43)
44. *I**d*. § 328.3(c)(2)(i), (iii). [↑](#footnote-ref-44)
45. *Id.* § 328.3(a)(8). [↑](#footnote-ref-45)
46. *See* 80 Fed. Reg. at 37,089. [↑](#footnote-ref-46)
47. *See* EPA, *Questions and Answers*—*Waters of the U.S. Proposal* 5, perma.cc/7RRP-V46X. [↑](#footnote-ref-47)
48. 80 Fed. Reg. at 37,085; *see also id.* at 37,090 (referencing the Agencies’ “extensive experience making significant nexus determinations” as having “informed the[ir] judgment” in selecting the 4,000-foot boundary). [↑](#footnote-ref-48)
49. *See* *id.* at 37,090 (acknowledging that “the science does not point to any partic­ular bright line”). [↑](#footnote-ref-49)