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BEFORE THE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
OF THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HEARING ON "STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF THE BIDEN ADMINISTRATION'S WATERS OF THE UNITED STATES (WOTUS) RULE."
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Chairman Rouzer, Ranking Member Napolitano, and members of the Subcommittee, thank you for the invitation to testify today on the Biden administration's final rule revising the definition of "Waters of the United States" (WOTUS).[2] I am currently a partner with the firm Earth & Water Law. I have worked on Clean Water Act (CWA) issues for my entire career, including while serving as staff director of this subcommittee and as chief counsel for the Senate Environment and Public Works Committee.

My goal today is to help the Subcommittee understand the scope and impacts of this new rule and clarify some of the statements made by EPA and the Corps in their preamble and background documents.

I want to make three points. First, the history of the CWA is a history of ever-expanding federal regulation through administrative interpretations, without any change in the statute. For this reason, the claims by EPA and the Corps of Engineers (the agencies) that the rule is simply a

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[2] 88 Fed. Reg. 3004 (Jan. 18, 2023).

return to the "pre-2015 regulatory regime"[3] is a myth. Second, it has required the intervention of the courts to push back on agency overreach. Third, the agencies have inaccurately characterized the 2023 WOTUS rule as a codification of Justice Scalia's and Justice Kennedy's opinions in *Rapanos*.[4] Instead, rule is a codification of the agencies' prior overreach and an attempt to get judicial deference for that overreach.

I. The Ever-Expanding CWA Jurisdiction.

No one disputes the ecological value of wetlands or the importance of water, whether the wetland abuts a navigable water or is isolated, and whether water is in a river or is rainfall, snowmelt, or groundwater. But just because wetlands and water supplies are important does not mean that Congress gave EPA and the Corps authority to regulate all water in "the Nation" under the CWA. As a former Congressional staffer, I deeply respect the role of Congress in deciding where and when to grant federal authority.

In 1972, Congress did not tell EPA and the Corps: "do whatever you think is necessary to protect water." Instead, the CWA represents a legislative compromise that carefully prescribes the scope of federal authority. For example, Congress was well aware of the importance of groundwater, but deliberately excluded groundwater from the regulatory provisions of the CWA. Congress was well aware of the ecological importance of wetlands, but as recognized in the 1973 final report of the congressionally chartered National Water Commission, Congress left the regulation of isolated wetlands and waters to the states.[5] Congress was well aware that nonpoint sources contributed to water pollution, but Congress deliberately excluded nonpoint sources from the regulatory authority of the Act. Congress was well aware of the importance of water supplies, but deliberately refrained from regulating water supply in the CWA.

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[3] 88 Fed. Reg. at 3046.
[4] *Rapanos v. United States,* 547 U.S. 715 (2006).
[5] *See* National Water Commission (June 1973), Water Policies For The Future: Final Report to the President and to the Congress of the United States at 200-201, 279 (identifying regulation of intrastate, non-navigable water as a gap in federal jurisdiction and recommending state protections).

But lack of a grant of authority from Congress has not stopped federal agencies from trying to expand their control. As noted by Justice Scalia in *Rapanos,* the agencies have sought to broaden federal jurisdiction through a series of actions over the course of many years.[6]

In 1973, EPA issued regulations that expanded federal authority to intrastate lakes rivers and streams based on use by interstate travelers, use for fishing for sale in interstate commerce, and use by industries engaging in interstate commerce.[7] This claim of authority was not grounded in Congress' authority over navigation and was called into question by the Supreme Court in *SWANCC*.[8]

In 1977, federal agencies floated the idea that the CWA could be used to regulate groundwater withdrawals and surface water diversions because water quantity is related to water quality.[9] In response, Congress added section 101(g) to the CWA to halt that effort.[10]

In 1977, the Corps expanded its interpretation of the term tributary. Even though the preamble to the Corps' 1975 interim final regulations specified that the upstream limit of jurisdiction is the headwaters or a point where average annual stream flow is five cubic feet per second,[11] the preamble to the Corps' 1977 regulations instead specified that jurisdiction extends to the entire surface tributary system.[12] This expansion of the scope of regulated tributaries was later called into question by the Supreme Court in *Rapanos*.

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[6] *Rapanos* at 725 ("Following our decision in *Riverside Bayview*, the Corps adopted increasingly broad interpretations of its own regulations under the Act.").
[7] 40 C.F.R. 125.1 (1973); 38 Fed. Reg. 13,528, 13,529 (May 22, 1973).
[8] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159, 171-72 (2001).
[9] *See* 42 Fed. Reg. 36,787, 36,793 (July 15, 1977).
[10] According to its sponsor, section 101(g) reaffirms Congressional intent to use the Federal Water Pollution Control Act to address water pollution only: "This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. …
This 'State's jurisdiction' amendment reaffirms that it is the policy of Congress that this act is to be used for water quality purposes only." 123 Cong. Rec. 39, 211-12 (1977) (floor statement of Senator Wallop).
[11] 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).
[12] 42 Fed. Reg. at 37,129.

In 1985, the EPA General Counsel tried to expand EPA's interpretation of the CWA even further by issuing a memorandum stating that "other waters" (not navigable, interstate, tributary, or adjacent) that are used or would be used by migratory birds or endangered species are categorically regulated under the CWA.[13] In 1986, the Corps adopted EPA's expansive interpretation and, in a preamble, claimed that it could presume jurisdiction under the Commerce Clause over isolated, intrastate waters:

> a. which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
> b. which are or would be used as habitat by other migratory birds which cross state lines; or
> c. which are or would be used as habitat for endangered species; or
> d. used to irrigate crops sold in interstate commerce.[14]

Under this theory, the Corps could claim jurisdiction over any isolated wetland, pond, or puddle based on its potential use by a migratory bird. As such, it became known as the "Migratory Bird Rule" or the "Glancing Goose" test.[15]

In 1986, the Corps removed an exclusion for ditches from its regulations.[16]

In 2000, in the preamble of its Nationwide Permits, the Corps specified that federal jurisdiction extends to ephemeral flows, if the Corps believes they can see an ordinary high-water mark.[17] This further expansion of the definition of tributary based on an ordinary high-water mark also is questioned by the *Rapanos* case.

In 2008, the Corps issued guidance that allows the Corps to claim jurisdiction over dry land in the arid west based on a 5-to-10-year flood event.[18] Use of the floodplain in lieu of an ordinary

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[13] Memorandum from Francis S. Blake, EPA General Counsel, to Richard E. Samderson, Acting Assistant Administrator, EPA Office of External Affairs (Sept. 12, 1985).
[14] 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).
[15] *See* January 16, 2001, Wall Street Journal, available at http://www.wsj.com/articles/SB979603030985179200
[16] 51 Fed. Reg. at 41,217.
[17] 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000).
[18] A Field Guide to the Identification of the Ordinary High-Water Mark (OHWM) in the Arid West Region of the Western United States A Delineation Manual, Robert W. Lichvar and Shawn M. McColley August 2008, at 31-32 (recommending use of a 5-to-10-year precipitation event to establish federal jurisdiction over the entire floodplain).

high-water mark to expand the definition of a tributary in the arid west is embraced in the 2023 WOTUS Rule.[19]

II. Judicial Push-Back on Claims of Expansive Federal Jurisdiction.

In the last twenty years, the Supreme Court has pushed back four times on broad authority claimed by EPA and the Corps under the CWA.

In the 2001 *SWANCC* decision, the Supreme Court rejected the "Migratory Bird Rule." The Court found no evidence that Congress acquiesced to "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters," and declined to hold "that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds."[20] Importantly, the Court held that CWA jurisdiction was an exercise of Congress' *authority over navigation* – hence the regulatory reach of the Act protects waters based on their use *as channels of commerce, not use as habitat.* That is why this Committee has jurisdiction over the CWA, not the Committee on Natural Resources.

Concern that the agencies were exceeding their statutory authority reached the Supreme Court again in 2006. In the *Rapanos* case both the plurality opinion, authored by Justice Scalia, and Justice Kennedy's concurring opinion, held that the Corps did not demonstrate that it could regulate wetlands adjacent to a ditch in Michigan. Justice Scalia's opinion held that CWA jurisdiction extended to "relatively permanent" waters and wetlands that abut those waters.[21] Justice Kennedy's opinion held that ''to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that

[19] 88 Fed. Reg. at 3083; Technical Support Document for the Final "Revised Definition of the Waters of the United States" Rule (Dec. 2022), at 165.
[20] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159, 171-72 (2001).
[21] *Rapanos* at 739, 742.

could reasonably be so made." [22] Importantly, neither Justice Scalia nor Justice Kennedy agreed that finding an ordinary high water mark was sufficient to establish federal jurisdiction.[23]

In 2012, the Supreme Court reviewed EPA's claim that it could order a couple to stop building a house and that the CWA did not allow the couple to challenge that order until EPA brought an enforcement action. In the *Sackett* case, a unanimous Supreme Court disagreed with EPA and held that the administrative order requiring a couple to stop building a house was juridically reviewable.[24] During the oral argument the Justices were appalled by the admission of the Deputy Solicitor General that EPA's claim of jurisdiction was only "initial," EPA believed it could issue an order without doing a sufficient investigation, and if the homeowner wanted to appeal a jurisdictional determination they had to first submit themselves to federal jurisdiction and make a permit application.[25]

In the 2016 *Hawkes* case the Supreme Court held that a landowner could get judicial review of a Corps jurisdictional determination that a peat farm 95 miles from the nearest navigable river was regulated.[26] Tellingly, in his concurring opinion in *Hawkes,* Justice Kennedy, the author of the "significant nexus" test, called the reach of the Act "ominous" and said "[t]he Act… continues to raise troubling questions the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[27] On January 24, 2017, following the Court's remand, the District Court for the District of Minnesota found that the record relied on by the Corps to assert jurisdiction in *Hawkes* continued to fail to demonstrate that a peat farm located more than 90 miles from the nearest navigable water was a water of the United States. In the record for that case, the Corps' relied on the same type of connections that would establish jurisdiction under

[22] *Id*. at 759.
[23] 547 U.S. at 725 (criticizing the Corps' use of an ordinary high water mark to establish jurisdiction noting that "[t]his 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'") (plurality opinion); 547 U.S. at 781 (criticizing use of an ordinary high water mark to delineate tributaries because "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 toward 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 (J. Kennedy, concurring).
[24] *Sackett v. EPA*, 566 U.S. 120 (2012).
[25] Transcript of oral argument, *Sackett v. United States*, Sup. Ct. No. 10-1062, at 52-53, 58.
[26] *U.S. Army Corps of Eng'rs v. Hawkes Co*., 578 U.S. 590, 598 (2016).
[27] 578 U.S. at 602.

the 2023 WOTUS Rule (the functions of wetlands in providing floodwater storage and in retaining nutrients and sediments, functions of streams and rivers and transport of nutrients and chemicals downstream). The court said that the Corps' reliance on these connections, in the absence of any data on the frequency, volume, and type of actual (not hypothetical) flow from the peat farm to the river, to claim a "significant" nexus was "arbitrary and capricious."[28]

Finally, even though it did not involve the definition of WOTUS, in the recent *Maui* case, Justice Breyer rejected the idea that the CWA would regulate "in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers."[29] Yet, as discussed below, the 2023 Rule's "significant nexus" test would do just that.

III. The 2023 WOTUS Rule and Examples of Overreach That Would be Condoned Under the Rule.

In the 2023 WOTUS Rule (like the 2015 rule) the agencies are trying to codify the authority to expand their jurisdiction with case-by-case determinations by field staff and get judicial deference for those actions. They justify this action by claiming that the rule is implementing both Justice Scalia's and Justice Kennedy's opinions in *Rapanos.*

The final rule is superficially familiar, regulating traditional navigable waters, territorial seas, interstate waters (including interstate wetlands),[30] impoundments, tributaries, and adjacent wetlands. However, for the first time since the 2001 *SWANCC* decision, under the 2023 WOTUS rule the agencies also will claim jurisdiction over "other waters," *i.e., all other intrastate lakes, ponds, streams, and wetlands* (1) that are relatively permanent and that have a relatively permanent connection to navigable or interstate waters or territorial seas or relatively permanent tributaries, or (2) that the agencies believe significantly affect the chemical, physical, or biological integrity of navigable or interstate waters or territorial seas.

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[28] *Hawkes Co., Inc., et al. v. U.S. Army Corps of Engineers*, D. Minn., Civil No. 13-107 Memorandum Opinion and Order, January 24, 2017. The Corps finally gave up trying to regulate the Hawkes peat farm.
[29] *Cty. Of Maui, Hawaii v. Hawai'i Wildlife Fund,* 140 S. Ct. 1462, 1471 (2020).
[30] Although the statute does not include interstate waters in its definition of navigable waters, the agencies claim authority over all interstate waters and wetlands with no showing of any connection to navigable waters or territorial seas, citing their general Commerce Clause authority, even though the *SWANCC* case said jurisdiction had to be based on Congress' authority over *navigation*. 88 Fed. Reg. at 3073.

The rule language and, in particular, the guidance provided in the preamble and background documents, encourage the agencies to indulge in the same overreach that has been a concern of farmers, landowners, municipalities, and Congress for many years. The agencies do that by codifying the concept that CWA jurisdiction covers all waters with a "significant nexus" to a navigable water, interstate water, or a territorial sea. This argument is loosely based on Justice Kennedy's *Rapanos* opinion but would codify the practices that concerned Justice Kennedy in both the *Rapanos* and the *Hawkes* cases. The agencies also purport to codify the "relatively permanent" waters standard from Justice Scalia's plurality opinion in Rapanos. However, as described below, the 2023 WOTUS rule stretches that standard beyond recognition.

The agencies attempt to assure Congress and the public that regulatory exemptions will protect farmers and landowners. However, their own history of applying those exemptions demonstrates that this assertion is not true.

A. "Relatively Permanent" Test.

Under the final rule a tributary is federally regulated if it is a "relatively permanent, standing or continuously flowing body of water."[31] Wetlands that are adjacent to "relatively permanent" waters and with a "continuous surface connection" to those waters also are federally regulated.[32] Finally all other intrastate lakes, ponds, streams, and wetlands are federally regulated if they are "relatively permanent" and have a "continuous surface connection" to a relatively permanent water.[33] The agencies decide on a case-by-case basis whether a water body is relatively permanent and whether the connection is continuous.

Perhaps concerned that in its forthcoming *Sackett* decision the Supreme Court will disallow use of the "significant nexus" standard to find federal jurisdiction, EPA and the Corps have expanded the "relatively permanent" standard.

[31] 33 C.F.R. 328(a)(3)(i).
[32] 33 C.F.R. 328(a)(4)(ii).
[33] 33 C.F.R. 328(a)(5)(i).

Justice Scalia's plurality opinion in *Rapanos* held that the CWA authorized federal control over "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.'"[34] Justice Scalia emphasized that relatively permanent waters do not include tributaries "whose flow is `[c]oming and going at intervals . . . [b]roken, fitful' or 'existing only, or no longer than, a day…"[35] Accordingly, the 2008 Rapanos Guidance (which is now revoked by the 2023 WOTUS Rule) interpreted relatively permanent to mean only those non-navigable tributaries that flowed continuously or that had continuous flow at least seasonally (typically three months).[36] Further, in 2008 EPA and the Corps determined that "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally.[37]

In contrast, in the 2023 WOTUS Rule, water from "back-to-back precipitation events" can be considered relatively permanent flow.[38] Under that interpretation, the agencies could argue that almost any ditch or stormwater control feature in parts of California is a relatively permanent WOTUS as a result of repeated storms.[39]

Under the 2023 WOTUS Rule, the agencies don't even need to observe water to identify a "relatively permanent" tributary, wetland, pond, or puddle. Biological indicators, including the presence of aquatic insects or plant, can be used to determine that a tributary is relatively permanent.[40] An ordinary high-water mark also can be used to determine that a tributary is relatively permanent even though, as noted above, both Justice Scalia and Justice Kennedy agreed that an ordinary high-water mark was not sufficient to establish CWA jurisdiction.[41]

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[34] *Rapanos*, at 739.
[35] *Rapanos*, at 733.
[36] U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), at 1.
[37] Rapanos Guidance, at 7.
[38] 88 Fed. Reg. at 3086.
[39] *See* Appendix A, Exhibit 1.
[40] 88 Fed. Reg. at 3087-88.
[41] *Id*.

Further, when regulating a wetland that is adjacent to a relatively permanent water, the regulatory text does not require a relatively permanent hydrological connection. Only the geographic or artificial feature that forms the connection needs to be continuous.[42]

B. "Significant Nexus" Test.

Under the final rule the agencies can regulate a tributary that lacks "relatively permanent" flow if, on a case-by-case basis, EPA or the Corps decide that it "significantly affects the chemical physical, or biological integrity" of a navigable or interstate water or a territorial sea.[43] Adjacent wetlands also can be regulated based on such effects.[44] Finally *all other intrastate lakes, ponds, streams, and wetlands* also are federally regulated if the Corps or EPA determine that they "significantly affect the chemical physical, or biological integrity" of a navigable or interstate water or a territorial sea.[45]

Jurisdiction based on a "significant nexus" to navigable water is not a long-standing agency interpretation of the Act. In 2009, the agencies took the position that the *Rapanos* case severely limited their jurisdiction and encouraged Congress to act.[46] Some members of Congress introduced legislation to remove the term "navigable" from the CWA.[47] After that legislation failed to advance over the course of two Congresses, in 2011 the agencies changed their strategy and developed a draft guidance to reinterpret both the CWA and Justice Kennedy's opinion.[48]

The logic for the new interpretation goes as follows: federal jurisdiction over water is as broad as the objective of the CWA set forth in section 101(a) (stating that the objective of the Act is "to

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[42] *Id*. at 3092, 3117. *See also, id*. at 3096 ("A continuous surface connection is not the same as a continuous surface water connection, by its terms and in effect.")
[43] 33 C.F.R. 328(a)(3)(ii).
[44] 33 C.F.R. 328(a)(4)(iii).
[45] 33 C.F.R. 328(a)(5)(ii).
[46] *See* May 20, 2009, letter from CEQ Chairman Nancy Sutley, EPA Administrator Jackson, Acting Assistant Secretary of the Army Rock Salt, Agriculture Secretary Tom Vilsack, and Interior Secretary Ken Salazar to Senator Boxer.
[47] The Clean Water Restoration Act (HR 2421 and S. 1870 110th Congress; S. 787 111th Congress).
[48] EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act," 76 Fed. Reg. 24,479 (May 2, 2011).

restore and maintain the chemical, physical and biological integrity of the Nation's waters"). Continuing the logic: a "significant nexus" to navigable water can be formed by any chemical, physical, or biological connection.

Far from being grounded in Justice Kennedy's Rapanos concurrence, this interpretation of the CWA is in fact based on Justice Steven's dissenting opinion and an *amicus* brief he cited in support.[49]

This interpretation is deeply flawed. First, it turns an objective of a law into an operative jurisdictional statement, despite admonitions against doing so by the Supreme Court.[50] Second, it violates a standard canon of statutory interpretation by reading the terms "chemical, physical, and biological integrity" in section 101(a) of the Act to refer to the scope of *waters* to be protected even though in the seven other places where that phrase is used in the Act, it refers to the *level of protection* for the waters that are already subject to the Act.[51] Even Justice Kennedy considered such an interpretation of his "significant nexus" test to be an overreach.[52] Finally, the agencies' legal interpretation takes a term used *once* in the CWA, "Nation's waters," and assumes that this term is equivalent to the term "waters of the United States." That assumption also violates principles of statutory interpretation. Congress is assumed to mean different things when it uses different terms.[53] The "Nation's waters" addressed by the CWA through

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[49] *SWANCC,* 531 U.S. at 176 n. 2 (Justice Stevens, dissenting); Brief for Dr. Gene Likens et al. as Amici Curiae in *SWANCC*. This brief was included in the docket for the 2015 WOTUS rule, document no. EPA-HQ-OW-2011-0880-8591.

[50] The Supreme Court has stated, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). The *Rapanos* plurality made the same point: "This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose. … It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that "significantly affect the chemical, physical, and biological integrity of" waters of the United States. It did not do that, but instead explicitly limited jurisdiction to "waters of the United States." *Rapanos*, 547 U.S. at 755-56 (2006) (Scalia, J., plurality).

[51] *See* 33 U.S.C. § 1362(11), § 1362(15), § 1362(19), § 1314(a)(1)(B), § 1314(b)(1)(A), § 1254(b), and § 1255(d)(3). A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); Antonin Scalia and Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012), at 170 (discussing the "Presumption of Consistent Usage" canon) (hereinafter "Reading Law").

[52] *U.S. Army Corps of Eng'rs v. Hawkes Co*., 578 U.S. at 602 (concurring opinion by Justice Kennedy "point[ing] out that, based on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern'' and referring to the ''ominous reach'' of the Act).

[53] Reading Law, at 170 (presumption of consistent usage also means that a material variation in words suggests a variation in meaning).

nonregulatory programs includes waters that are not WOTUS. In fact, the policies and goals listed in section 101(a) include "the national policy that areawide treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State," a provision of the Act that expressly addresses waters that are *not regulated* at the federal level.[54]

To support expanded jurisdiction under the 2023 WOTUS Rule, the agencies now claim that an isolated water can affect the "biological integrity" of a navigable water.[55] The preamble uses anadromous fish, like salmon, to provide an example of biological connections.[56] To understand what the agencies really mean, one has to read the Technical Support Document. That document reveals that the agencies believe they can claim jurisdiction over an isolated water if they determine that birds can fly from the isolated water to a navigable water and leave bird droppings that contain seeds of aquatic plants or they determine that beavers that live in the isolated water can move from the pond to a tributary of a navigable water and leave scat that includes larva of aquatic insects.[57] The agencies call this "dispersal."

The Technical Support Document is replete with examples of "dispersal studies" that purportedly support jurisdiction over isolated waters. These include studies of mammals "that can disperse overland," insects that "hitchhike on birds and mammals from non-floodplain wetlands to the stream network," insects "that are flight-capable," and "frogs, toads, and newts" that "move between streams or rivers and non-floodplain "other waters."[58] The Technical Support Document even cites papers to support the idea that the agencies can assert federal jurisdiction over land

[54] CWA section 101(a)(5), referring to section 208 of the Act, which encourages the development of plans to address "substantial water quality control problems," including identifying pollution problems associated with nonpoint sources, saltwater intrusion, and pollution of groundwater, all of which fall outside the regulatory reach of the Act. *See* CWA section 208(a)(1) and (b)(2)(F), (I), and (K).
[55] 33 C.F.R. 328.3(c)(6).
[56] 88 Fed. Reg. at 3021.
[57] *See* Technical Support Document, at 209 and studies cited including Figuerola, J., and A.J. Green. 2002. "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies." *Freshwater Biology* 47:483-494; Figuerola, J., *et al*. 2005. "Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates." *American Naturalist* 165:274-280; dispersal capacity of a broad spectrum of aquatic invertebrates via waterbirds," Aquatic Sciences 69:568-574 (2007); and Roscher, J. P., "Alga dispersal by muskrat intestinal contents," Transactions of the American Microscopical Society 86:497-498 (1967).
[58] Technical Support Document, at 212.

and water based on the *hypothesis* that birds transport fairy shrimp to vernal pools.[59] In all, the Technical Support Document uses the word "dispersal" *140 times.*

In the preamble, the agencies repeatedly state that they will not base federal jurisdiction over isolated waters on use of water as habitat by migratory birds. However, this claim is disingenuous. Rather than relying on *use of a water body by a bird*, the Technical Support Document makes it clear that they will assert jurisdiction based on *dispersal of insects and plants by a bird*.

Jurisdiction based on dispersal of biota is likely to become the new "Glancing Goose" test. The Technical Support Document states that: "Biological connections are likely to occur between *most* non-floodplain wetlands and downstream waters through either direct or stepping stone movement of amphibians, invertebrates, reptiles, mammals, and seeds of aquatic plants, including colonization by invasive species."[60] The Technical Support Document further states that "[e]mergent and aquatic vegetation found in non-floodplain 'other waters' disperse downstream by water, wind, and *hitchhiking* on (i.e., adhering to) *migratory* animals" (emphasis added).[61]

The 2023 WOTUS Rule preamble claims its "significant nexus" standard is based on protection of water quality.[62] However, in the 2023 WOTUS Rule *for the first time ever* the agencies claim that they consider the *presence of animals* to be water quality parameters.[63]

Contrary to this novel interpretation of the CWA, there is no basis in the text or history of the CWA to support the idea that federal jurisdiction is based on the movement of animals. Water quality is the presence or absence of *pollution* that impacts the ability of a body of water to meet its designated uses. As stated in section 101(a)(1), water quality "*provides for* the protection and

[59] Technical Support Document, at 64, 548.
[60] Technical Support Document, at 22.
[61] Technical Support Document, at 209.
[62] *See* 88 Fed. Reg. at 3034 ("The standard is consistent with the plain language of the Act's objective because it is based upon effects on the water quality of paragraph (a)(1) waters…").
[63] *See* Section 12 of the Response to Comments Document, at 46 (describing storage of water and providing habitat for aquatic species as functions that improve water quality).

propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." It is not the presence or absence of an animal or recreation itself. Despite this fact, the 2023 WOTUS Rule allows the federal government to assert jurisdiction over water based on functions such as "provision of habitat and food resources for aquatic species located in [navigable or interstate waters or territorial seas]."[64]

To support expanded jurisdiction under the 2023 WOTUS Rule, the agencies also claim that an isolated water can affect the integrity of a navigable water by either preventing or contributing water flows.[65] These flows include overland sheet flow spilling from a wetland[66] and contributions to groundwater that later recharges to surface water.[67] They make this claim even though claiming jurisdiction based on water supply functions contravenes section 101(g) of the CWA. Further, in 2015 the Corps' Assistant Secretary of the Army (Civil Works), Jo-Ellen Darcy, responded to written congressional questions stating that: "The Corps has never interpreted groundwater to be jurisdictional water *or a hydrologic connection* because the Clean Water Act (CWA) *does not provide such authority.*"[68] Despite the admission that groundwater connections are not a basis for jurisdiction the Technical Support Document for the 2023 WOTUS Rule does just that, finding that "[n]on-floodplain wetlands and open waters are frequently connected to their local and regional aquifers, and hence to the stream networks, through groundwater flows."[69]

The agencies claim that the rule relies on their "extensive experience" in making jurisdictional determinations.[70] However, those claims were thoroughly rebutted by internal Corps of Engineers memoranda repudiating the suggestion that the Corps' experience supports the significant nexus framework of the 2015 Rule, which is repeated in the 2023 WOTUS Rule.[71]

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[64] 33 C.F.R. 328.3(c)(6)(i)(E).
[65] 33 C.F.R. 328.3(c)(6)(i)(A) and (C).
[66] 88 Fed. Reg. at 3094 (discussing water spilling from wetlands).
[67] 88 Fed. Reg. at 3033, 3120 (discussing groundwater recharge from wetlands).
[68] *See* Response to Follow-Up Questions for Written Submission to Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) (June 2, 2015) (emphasis added) (attached).
[69] TSD, at 65 (citations omitted).
[70] The preamble to the final rule makes this claim at least eight times.
[71] *See* April 24, 2015, Memorandum from Lance Wood to MG Peabody (legal analysis); April 24, 2015, memorandum from Jennifer Moyer to MG Peabody (technical analysis), introduced into the record of S. Hrg. 114-203, "Oversight of the Army Corps of Engineers' Participation in the Development of the New Regulatory

As the agencies admit, they have no experience asserting jurisdiction over intrastate, nonnavigable waters based on "significant nexus."[72]

The Technical Support Document notes that most connections with navigable waters are through biological or groundwater connections."[73] Dispersal of biota and groundwater are likely to become the primary ways EPA and the Corps claim control over private property, even though nothing in the CWA or its legislative history supports this outcome.

C. Expansion of the Concept of "Tributary"

The 2023 WOTUS Rule does not define the term "tributary." Tributaries of navigable or interstate waters or territorial seas or impoundments are regulated.[74] The preamble states that a tributary is a water body that flows directly or indirectly to one of those waters.[75] On its face, this definition appears to be uncontroversial. However, the preamble makes it clear that a feature on the land can be considered a tributary as long as EPA or the Corps decide they can see an ordinary high-water mark.[76] For example, in 2014 comments on the proposal that became the 2015 WOTUS Rule the State of Tennessee noted that the Corps claimed jurisdiction over a Tennessee farmer's field by claiming erosion from an ephemeral flow was a regulated tributary.[77]

Definition of "Waters of the United States," before the Senate Environment and Public Works Committee, Sept. 30, 2015, and available at https://www.congress.gov/114/chrg/CHRG-114shrg99458/CHRG-114shrg99458.pdf

[72] 88 Fed. Reg. at 3102-03 (admitting that the agencies have not asserted jurisdiction over isolated waters since the *SWANCC* decision in 2001).

[73] In the studies they reviewed, the agencies found that biological connections are the most common type of connection for all stream types (including ephemeral channels) (Technical Support Document, at 51) and floodplain wetlands and open waters (Technical Support Document, at 52). For isolated waters, the Technical Support Document, found groundwater was the most common basis for finding a connection (Technical Support Document, at 65).

[74] 33 CFR 328.3(a)(3).

[75] 88 Fed. Reg. at 3083.

[76] 88 Fed. Reg. at 3116.

[77] See the photo in the Appendix, Exhibit 2, from the Comments of the State of Tennessee, Department of Environment and Conservation on the 2014 proposed WOTUS Rule, document no. EPA-HQ-OW-2011-0880-17074, at 19, available at https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-17074

In fact, the 2023 WOTUS Rule goes even further and states that a surface flowpath is not needed.[78] Water also can be considered a tributary even if it no longer is an identifiable hydrographic feature, such as a stream that disappears underground, including through groundwater aquifers in karst geology found below about 20 percent of the United States.[79]

The preamble also gives EPA and the Corps the discretion to decide that a buried stream is a tributary.[80] This language could convert a city sewer into a regulated water of the United States.[81]

Under the rule, the agencies can use aerial photographs, light detection and ranging (LIDAR) date, and even soil surveys to identify a tributary and determine that it is "relatively permanent.[82] This can put landowners in an untenable situation.

For example, in 2014, a farmer in Indiana cleared trees from his property to expand his farming operation. The Corps claimed that this activity destroyed a regulated tributary of a "water of the United States." The Corps claimed jurisdiction based on a soil survey (although the Corps did not claim wetlands were present), Google Earth aerial photographs taken before the trees were cleared, and speculation that a drainage existed beneath the tree canopy. The landowner submitted an affidavit from the person who performed the clearing, affirming that no stream existed on the parcel cleared in 2014 and any marks on the ground were log skidder tracks from logging that took place in the early 2000s. Although the nearest traditional navigable water was 117 miles away and the nearest relatively permanent water feature (Mud Ditch) was a mile and a half away, the Corps ordered the farmer to cease and desist his tree clearing.[83] Under the 2023

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[78] 88 Fed. Reg. at 3084.
[79] *Id*. at 3083.
[80] 88 Fed. Reg. at 3083.
[81] *See* Hidden Washington: Tiber Creek (describing how Tiber Creek formerly found in Northwest Washington was converted in the 19th century to an underground sewer that discharges to the Anacostia River), available at https://parkviewdc.com/2011/09/08/hidden-washington-tiber-creek/ *See also*, Senator James M. Inhofe, "Your Sewers and Streets Could be Waters of the United States, Municipal Water Leader, Vol. 1, Issue 3, October 2015, at 24, available at https://municipalwaterleader.com/vol-1-iss-3/
[82] 88 Fed. Reg. at 3087 (tributaries generally), 3114 (discussing how to determine a ditch is not excluded).
[83] Testimony submitted by Martin Farms, Hearing on "Erosion of Exemptions and Expansion of Federal Control – Implementation of the Definition of Waters of the United States, May 24, 2016, before the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 See Appendix A, Exhibit 4 for photo.

WOTUS Rule, the same kind of information can be used to claim that a farm has a "relatively permanent" tributary.

D. Expansion of the Concept of "Adjacency."

Under the 2023 WOTUS rule, adjacency is determined on a case-by-case basis, with no outer boundary. The preamble points out that even if a wetland is more than a few hundred feet from a navigable or interstate water or a territorial sea or an impoundment, or a tributary of any of these waters, EPA and the Corps can still claim a wetland is adjacent based on a surface or shallow subsurface connections, pipes, ditches, or – like tributaries – karst geology.[84]

The Corps has claimed a wetland was adjacent due to the presence of damp soil 12 inches below the surface.[85]

The Corps has claimed wetlands are adjacent based on ruts formed by a log skidder.[86]

The Corps has claimed that a puddle is an adjacent wetland based on tire ruts. In 2007, the Corps required a landowner to obtain a permit for tire ruts along a dirt road even though the ruts, which collected rainwater, lacked both hydric soils and wetlands vegetation, and therefore did not meet the definition of a wetland. To justify regulating a tire rut, the Corps surmised that use of the road prevented the growth of vegetation. In 2014, when the landowner was seeking approval of phase II of its project, the Corps again asserted jurisdiction over the road. Depressions made by cars collected standing water following a heavy rain. The Corps again called these wetlands. [87]

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[84] 88 Fed. Reg. at 3089.
[85] *See* Testimony submitted by Valerie Wilkinson, Hearing on "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States," May 20, 2016, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66
[86] Testimony of Gary W. Perkins, Hearing on "Inconsistent Regulation of Wetlands and Other Waters," Before the Committee on Transportation and Infrastructure, Water Resources and Environment Subcommittee, Mar. 30, 2004, 108th Congress (GPO Serial No. 108-58).
[87] Response to Questions for the Record submitted by Don Parrish, Case Study 1, Hearing on "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States," May 20, 2016, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 *See* Appendix A, Exhibit 6.

The agencies plan to use aerial photos to identify wetlands that it may consider adjacent.[88] That can lead to abuses as well. In 2015, the Corps claimed that lichen covered rock outcroppings were wetlands based on a review of an aerial photograph.[89]

Finally, EPA and the Corps will consider a wetland to be adjacent even if there is no surface or subsurface connection to a jurisdictional water based by inferring that the wetland is close enough to have an impact on an aquatic ecosystem.[90]

E. Erosion of Exemptions.

In the preamble of the 2023 WOTUS Rule, the agencies repeatedly say that farmers are exempt from CWA permitting under section 404(f)(1) of the statute. This claim is disingenuous. Section 404(f)(2) allows the agencies to require permits for discharges into navigable waters for a new use that reduces the waters' flow or circulation or reach. The agencies have interpreted that "recapture" provision so broadly that one court called it an administrative repeal."[91]

In 2013, the Corps issued a "cease and desist" order to Subcommittee member Congressman John Duarte claiming that he needed a CWA 404 permit to plow a field on his farm. The Corps claimed that the field contained wetlands and plowing caused the mounded soil next to the furrows to dry out, calling those mounds "mini mountain ranges," "uplands," and "dry land."[92] According to the Corps, notwithstanding section 404(f) of the CWA, plowing is not exempt because it converts wetlands to uplands.

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[88] 88 Fed. Reg. at 3094.
[89] Response to Questions for the Record submitted by Don Parrish, Case Study 9, Hearing on "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States," May 20, 2016, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66
[90] 88 Fed. Reg. at 3089.
[91] *See* Memorandum and Order, United States v. County of Steams, Civ. 3-89-616 (D. Minn. March 15, 1990), at 18.
[92] *See "*From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act," Sept. 20, 2016, available at https://www.epw.senate.gov/public/_cache/files/9/9/99dc0f4b-50a8-4b9e-a604-cb720e7f19bc/1C09C14A8FD18AB786684EB1E6538262.wotus-committee-report-final1.pdf and the photograph in Appendix Exhibit 4.

In 2015, the Corps claimed that changing use of a field from alfalfa to orchards was a change and therefore was not an exempt normal farming activity.[93]

The 2023 WOTUS Rule also greatly reduces the scope of the long-standing exemption for prior converted cropland. This exemption was included in the regulatory definition of WOTUS in 1993. The preamble of that rule stated that an area would lose its status as prior converted cropland if the cropland is ''abandoned,'' meaning that crop production ceases and the area reverts to a wetland state. Specifically, the preamble to the 1993 regulations stated that prior converted cropland that now meets wetland criteria will be considered abandoned unless "once in every five years it has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production."[94] In 2005, the Corps attempted to change that interpretation for its field staff in a memorandum, replacing the "abandonment" test with a change of use test. The District Court for the Southern District of Florida set aside that memorandum as a spurious rulemaking that violated the Administrative Procedure Act.[95] Notwithstanding the Corps' attempt to change the definition of prior converted cropland, EPA continued to use the abandonment test until now.[96] Thus, the 2023 WOTUS Rule is a change from "pre-2015 practice," despite claims to the contrary, which will result in costs to farmers. The agencies recognize this in their Economic Analysis although they claim they cannot quantify the costs.[97] In comments on the proposal that led to the 2023 WOTUS Rule, the agriculture community estimated that the cost could be *billions*.[98]

The 2023 WOTUS Rule also raises the specter of CWA regulation of rice fields. The 2015 WOTUS rule expressly excluded flooded rice fields in the regulatory text and they would not

[93] Response to Questions for the Record submitted by Don Parrish, Case Study 7, Hearing on "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States," May 20, 2016, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66
[94] 88 Fed. Reg. at 3106-07.
[95] *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010). The Corps followed the directive of the court only in the area subject to the court's jurisdiction. 88 Fed. Reg. at 3107.
[96] Economic Analysis, at 49-50.
[97] Id.
[98] 88 Fed. Reg. at 3109.

have been jurisdictional under the 2020 rule. However, the 2023 WOTUS Rule exempts flooded rice fields only if they are used *exclusively* for purposes such as rice growing.[99] This "exclusive use" limitation ignores the fact that many rice farmers lease their fields to duck hunters and obtain another source of revenue. The preamble to the 2023 WOTUS Rule says the agencies will not claim jurisdiction over a rice field if it is being used by waterfowl or other wildlife but says nothing about use by duck hunters.[100]

Finally, the 2023 WOTUS Rule fails to exclude stormwater control features, wastewater recycling basins, and groundwater recharge basins even though those features were excluded from the 2015 rule and would not have been swept in by the 2020 rule.

The 2023 WOTUS Rule gives EPA and the Corps extensive tools to claim control over land, creating uncertainty for and imposing burdens on landowners, farmers, and municipalities across the United States.

[99] 33 CFR 328.3(b)(5).
[100] 88 Fed. Reg. at 3116.

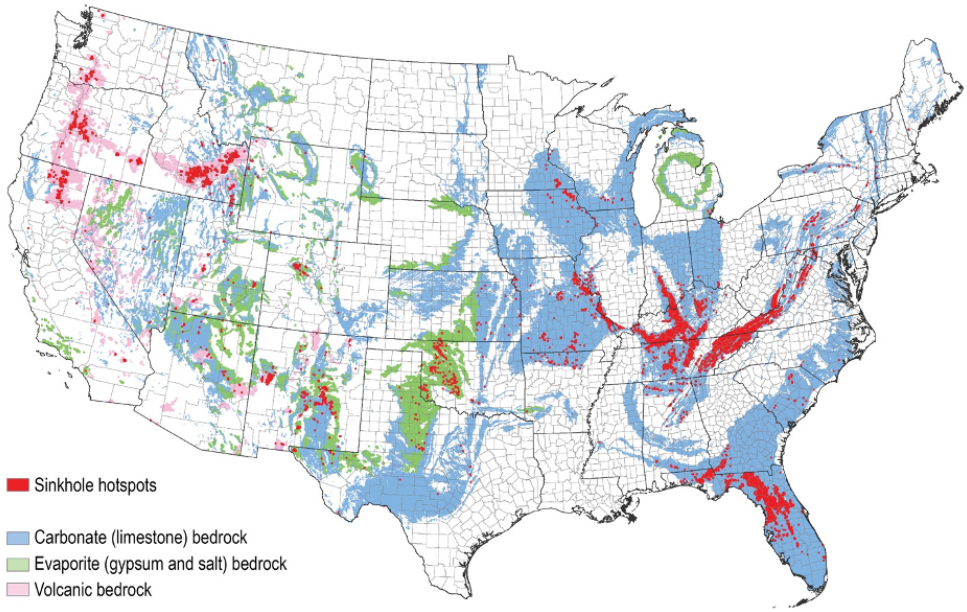
APPENDIX A

EXHIBIT 1. Back-to-back storms.

Windsor, California, Jan. 9, 2023.

EXHIBIT 2. Tennessee farmer's field identified as WOTUS by the Corps in

EXHIBIT 3. Karst Map of the Conterminous United States – 2020

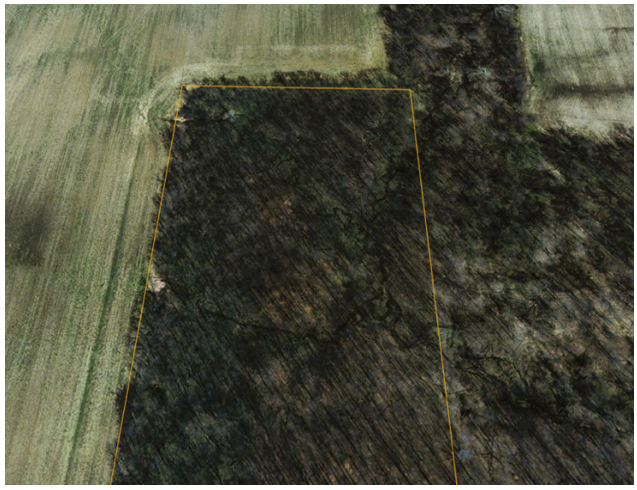


United States Geological Survey at https://www.usgs.gov/mission-areas/water-resources/science/karst-aquifers

EXHIBIT 4. Photograph of Congressman Duarte's field.

Photograph from U.S. Department of Justice, Expert Team Rebuttal Report, Duarte Nursery, Inc. et al. U*S Army Corps of Engineers/United States v. Duarte Nursery, Inc. et al.*, No. 2:13-cv-02095, Document 244-4, filed Aug. 15, 2016.

EXHIBIT 5: Martin's Farm



Before clearing

After clearing.

EXHIBIT 6: Tire ruts that the Corps claimed were jurisdictional wetlands.