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Docket ID No. EPA-HQ-OW-2021-0602

Re: COMMENTS ON PROPOSED RULE: REVISED DEFINITION OF ''WATERS OF THE UNITED STATES,'' 86 FED. REG. 69,372 (DEC. 7, 2021)

I. INTRODUCTION

Harvard Law School's Emmett Environmental Law and Policy Clinic ("the Emmett Clinic") respectfully submits the following comments on behalf of the National Parks Conservation Association ("NPCA") regarding the proposed Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (Dec. 7, 2021) ("the Proposal"). NPCA represents over 1.6 million members and supporters as "the voice of America's National Parks."[1] It has been a leading independent, nonpartisan voice on natural resources issues since 1919. The Emmett Clinic works with scientists, medical professionals, nonprofit and public interest organizations, and government clients on environmental and energy issues at the federal, state, and local levels.[2]

Water quality is a critical issue for America's national parks, which hundreds of millions of people visit every year. For many of these parks, the waters that run through them provide crucial habitat for fish and wildlife, offer recreational opportunities for visitors, and are often central to the parks' unique character and value. Such water-dependent parks are found across the country—from the shorelines of Acadia National Park in Maine to the Colorado River running through Grand Canyon National Park and Glen Canyon National Recreation Area, and

[1] *Our Story*, NAT'L PARKS CONSERVATION ASS'N, https://www.npca.org/about/our-story (last visited Feb. 7, 2022).

[2] The Clinic has previously filed a comment letter on behalf of NPCA on the Navigable Waters Protection Rule. Shaun A. Goho, et al., Emmett Environmental Law & Policy Clinic for National Parks Conservation Association (NPCA), Comments on Proposed Rule: Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-7628.

from the Buffalo National River in Arkansas to the Rio Grande National Wild & Scenic River in Big Bend National Park. Although these waters are protected by statute and National Park Service ("NPS") regulations within park boundaries,[3] many of them originate outside of the parks or are otherwise substantially affected by waters outside of the parks, including tributaries and wetlands.[4] Thus the protection of water quality and fish and wildlife habitat in national parks depends on the protection of upstream wetlands and intermittent and ephemeral streams.

We support the decision by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers (the "Army Corps") (collectively, "the Agencies") to replace the Navigable Waters Protection Rule ("NWPR").[5] The NWPR threatened to harm national parks by removing Clean Water Act ("CWA" or "the Act") protections for upstream waters; was inconsistent with Supreme Court precedent, the purposes of the CWA, and the scientific record; was based on a misreading of section 101(b) of the Act and mistaken assumptions about the ability and inclination of states to fill the regulatory gaps it created; and improperly removed protections for interstate waters.

NPCA therefore generally supports the Agencies' decision to replace the NWPR with a rule based on the significant nexus standard. Nevertheless, the Proposal could be strengthened and clarified in some regards. In particular, the Agencies should:

- add more detail and explanation about "functions" in the regulatory definition of "significantly affect;"
- codify longstanding guidance on waters used in commercial waterborne recreation;
- consider establishing additional categories of waters that are jurisdictional by rule, to improve the administrability and protectiveness of the rule;
- clarify that field staff can make "significant nexus" determinations for "other waters" without seeking approval from headquarters; and
- restore protections to the categories of "other waters" protected under the 1986 regulations based on how the use, degradation, or destruction of the water could affect interstate or foreign commerce.

We also provide recommendations for changes to the regulatory text intended to increase the clarity of the rule.

[3] *See* 54 U.S.C. § 100751 (authorizing regulation "concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States"); 36 C.F.R. § 1.2(a) (National Park Service regulations "apply to all persons entering, using, visiting, or otherwise within . . . [w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System.").

[4] *Cf. Sturgeon v. Frost*, 139 S. Ct. 1066, 1076 (2019) (noting that outside of Alaska the Secretary of the Interior "acting through the Director of the Park Service, has broad authority under the National Park Service Organic Act (Organic Act), 39 Stat. 535, to administer both lands and waters within all system units in the country") (citing 54 U.S.C. §§ 100751, 100501 & 100102).

[5] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020).

As the Proposal rightly emphasizes, Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[6] For much of the past four decades, until the NWPR, the Agencies' regulations protected the waters, including tributaries and wetlands, that have a significant impact on national parks. This Proposal would largely restore those protections, though it can and should be strengthened and clarified as detailed below. NPCA, therefore, urges the Agencies to finalize the Proposal after adopting our recommended changes.

II. THE AGENCIES CORRECTLY SEEK TO REPLACE THE UNLAWFUL AND UNSCIENTIFIC NWPR

The faithful execution of the CWA requires the Agencies to replace the illegal and unscientific NWPR with a rule that is consistent with the Act's text and advances its purposes. Congress, aiming to enact a "comprehensive regulatory program" to protect water quality,[7] passed the Federal Water Pollution Control Act Amendments of 1972, now commonly referred to as the Clean Water Act. In doing so, Congress defined the term "navigable waters" to mean "the waters of the United States, including the territorial seas."[8] Congress intended this new definition to be broad: it "clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes."[9] By arbitrarily excluding entire categories of waters, including ephemeral streams and non-adjacent wetlands,[10] the NWPR contravened Congress's intent. Indeed, two federal courts have vacated the NWPR.[11] The Agencies' decision to replace it is therefore essential to the faithful execution of the CWA.

The NWPR "established four categories of jurisdictional waters: (1) The territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than jurisdictional wetlands)."[12] This list excluded interstate waters, which had previously been categorically jurisdictional. Moreover, the rule limited jurisdiction to "relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that

[6] 33 U.S.C. § 1251(a).

[7] *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

[8] 33 U.S.C. § 1362(7).

[9] U.S. GOV'T PRINTING OFF., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 250 (House consideration of conference report).

[10] In this comment, "non-adjacent wetlands" refers to wetlands that do not meet the NWPR's definition of "adjacent wetlands," which was "wetlands that abut jurisdictional waters and those non-abutting wetlands that are (1) 'inundated by flooding' from a jurisdictional water in a typical year, (2) physically separated from a jurisdictional water only by certain natural features (*e.g.*, a berm, bank, or dune), or (3) physically separated from a jurisdictional water by an artificial structure that 'allows for a direct hydrologic surface connection' between the wetland and the jurisdictional water in a typical year." 86 Fed. Reg. at 69,381 (citing 85 Fed. Reg. at 22,251).

[11] *Pascua Yaqui Tribe v. EPA,* No. 4:20-cv-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021); *Navajo Nation v. Regan,* No. 2:20-cv-00602, 2021 WL 4430466 (D.N.M. Sept. 27, 2021).

[12] 86 Fed. Reg. at 69,381 (citing 85 Fed. Reg. at 22,273).

abut or are otherwise inseparably bound up with such relatively permanent waters."[13] This requirement categorically excluded ephemeral streams from jurisdiction, and also excluded wetlands that were not directly adjacent to or that lacked a continuous surface connection to a jurisdictional water. As a result, "substantially fewer waters [were] protected by the Clean Water Act under the NWPR compared to previous rules and practices."[14] As discussed below, the reduced protections afforded by the NWPR threatened serious consequences for water quality, including for waters in and affecting national parks.

A. The NWPR Threatened to Harm National Parks

1. The NWPR Significantly Reduced the Number of Streams and Wetlands Protected under the CWA

In comments on the draft NWPR, NPCA pointed out that the adoption of that rule would dramatically reduce the number of waters protected under the CWA, with potentially devastating consequences for national parks.[15] As the Agencies now correctly recognize, during the NWPR's brief period of implementation, this prediction started to be confirmed.

Even before the adoption of the NWPR, the Agencies possessed an analysis that predicted the percentages of streams and wetlands that would lose protection under the rule.[16] Specifically, briefing materials prepared in September 2017 for then-EPA Administrator Scott Pruitt and then-Acting Assistant Secretary of the Army for Civil Works Douglas Lamont, indicated that the NWPR would preclude CWA protection for 18% of streams and 51% of wetlands.[17] These numbers track the information in the Resource and Programmatic Assessment for the proposed version of the NWPR, which also acknowledged that these estimates may underrepresent the percentage of streams nationwide that are ephemeral and would therefore lack CWA protection under the proposed NWPR. According to that document, "30 percent of streams are mapped as perennial, 52 percent are mapped as intermittent, and 18 percent are mapped as ephemeral. *However, the actual percentage of ephemeral streams across the country is likely higher than 18 percent* since many are not mapped or are mapped as intermittent."[18] Based on these data, at least 18% of streams in the United States would not be considered "waters of the United States" under the proposed NWPR. The potential removal of protection was even more dramatic in the arid west, where "13 percent of streams (by stream length) are mapped as perennial, 48 percent are mapped as intermittent, and 39 percent are mapped as ephemeral."[19] Many, if not most, of

[13] 85 Fed. Reg. at 22,273.

[14] 86 Fed. Reg. at 69,413.

[15] Goho et al., *supra* note 2, at 41–47.

[16] Ariel Wittenberg & Kevin Bogardus, *EPA Falsely Claims "No Data" on Waters in WOTUS rule*, E&E NEWS, Dec. 11, 2018, https://www.eenews.net/stories/1060109323.

[17] E-mail and attachments from Stacey M. Jensen, HQUSACE Regulatory Program Manager, to John Gooden, EPA, (Sept. 5, 2017, 1:00 PM), *available at* https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf.

[18] EPA & DEPARTMENT OF THE ARMY, RESOURCE AND PROGRAMMATIC ASSESSMENT FOR THE PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES" 38 (Dec. 11, 2018) (emphasis added).

[19] *Id.*

these ephemeral streams and wetlands would have been considered jurisdictional under the pre-NWPR regulations because of their significant nexus to downstream waters.[20]

Other evidence in the administrative record for the NWPR refined these estimates at a watershed level. For example, a study by researchers at Saint Mary's University of Minnesota found that the proposed NWPR would significantly reduce the percentage of protected wetlands in each watershed analyzed.[21] Another analysis estimated that 40% to 90% of streams in multiple Southeastern watersheds would have lost protection.[22] An earlier study had found that at least 30% of streams in each Montana ecoregion are ephemeral;[23] these waters were not jurisdictional under the NWPR.

As the Agencies now recognize in the Proposal, these predicted impacts of the NWPR began to occur while it was in force. The NWPR resulted in increases in "the number and proportion of jurisdictional determinations completed where aquatic resources were found to be non-jurisdictional" and "requests for the Corps to complete approved jurisdictional determinations (AJDs) rather than preliminary jurisdictional determinations (PJDs), which treat a feature as jurisdictional."[24] Because "these indicators account for only a fraction of the NWPR's impacts,"[25] the amount of pollution entering unprotected waters likely would have increased.

2. The NWPR's Reduced Protections Would Harm National Parks

If the NWPR had not been vacated, pollution entering unprotected waters such as ephemeral streams and non-adjacent wetlands would have posed significant risk for downstream water quality—and not just in uncertain, hypothetical locations, but in some of our most treasured landscapes. National parks need clean water to promote the CWA's goals of protecting fish, wildlife, and recreational uses of water. By failing to consider its environmental and economic impacts on national parks, the NWPR unlawfully ignored the fundamental purposes of the CWA.

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[20] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,060 (June 29, 2015) ("In the rule, the agencies determine that tributaries, as defined ('covered tributaries'), and 'adjacent waters', as defined ('covered adjacent waters'), have a significant nexus to downstream traditional navigable waters, interstate waters, and the territorial seas and therefore are 'waters of the United States.'").

[21] Roger Meyer & Andrew Robertson, *Clean Water Rule Spatial Analysis: A GIS-based Scenario Model for Comparative Analysis of the Potential Spatial Extent of Jurisdictional and Non-jurisdictional Wetlands* 23–26 (Jan. 16, 2019), https://static1.squarespace.com/static/578f93e4cd0f68cb49ba90e1/t/5c50c0e988251bc68fe33388/1548796144041/Hewlett_report_Final.pdf.

[22] Moffat & Nichol, *Proposed Changes to the Waters of the United States (WOTUS) Definition–Summary of M&N Conclusions* (Apr. 7, 2019, attached as Exhibit B to Kelly F. Moser et al., S. Envtl. Law Ctr., Comment Letter (Apr. 15, 2019) (EPA-HQ-OW-2018-0149-9717).

[23] Linda K. Vance, *Geographically Isolated Wetlands and Intermittent/ Ephemeral Streams in Montana: Extent, Distribution, and Function* 26–28 (Jan. 2009), https://ia800501.us.archive.org/28/items/geographicallyis2009vanc/geographicallyis2009vanc_bw.pdf.

[24] 86 Fed. Reg. at 69,413.

[25] *Id.*

Many national parks incorporate and depend on waters. The National Park System has over 150,000 miles of rivers and streams and contains over 4 million acres of lakes and other water bodies.[26] These waters are integral aspects of many parks. Visitors rely on clean water for drinking, fishing, and swimming, and clean water supports wildlife habitats and ecosystems.[27] Moreover, many iconic parks, such as Grand Canyon National Park, Yosemite National Park, and Acadia National Park, rely on the presence of pristine water for stunning visuals that attract millions of visitors each year. Many water bodies that flow through national parks originate outside of park boundaries. Parks therefore depend on the CWA for protection because pollution that originates outside of parks impairs downstream park waters.

A significant percentage of these national park waters are already impaired. Of the 360 national parks that contain a body of water, about two-thirds of them have impaired waters.[28] Approximately 40% of park lakes, reservoirs, and ocean waters within parks do not meet water quality standards, as well as nearly 22% of the shoreline miles of parks.[29] In some cases, the majority or even all of a park's waters suffer from severe pollution.[30]

The pollution that threatens these park waters often originates beyond park boundaries. For instance, the waters in Congaree National Park in South Carolina are threatened in part by the effects of municipal and industrial wastewater discharges, urbanization, stormwater runoff and upstream poultry concentrated animal feeding operations.[31] Point Reyes National Seashore in California has degraded water quality in part from upstream sources of agricultural, urban, and industrial pollutants.[32] Obed Wild & Scenic River in Tennessee contains "severely polluted waters" threatened by wastewater discharges associated with upstream suburban and urban

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[26] *Water Quantity*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/water-quantity.htm (last visited Feb. 7, 2022).

[27] *See Water Use in National Parks*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/water-use.htm (last visited Feb. 7, 2022).

[28] *See Parks with Clean Water Act 303(d)-Listed Impairments*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/his-related.htm?category=303 (last updated Nov. 29, 2021) (242 out of 430 parks have water impairments); *Parks with No Hydrography*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/his-related.htm?category=noHydro (70 parks have no waters within their boundaries) (last updated Nov. 29, 2021).

[29] *See NPS Servicewide Statistics*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=ZZSE (last updated Nov. 29, 2021) (all national parks have: 4,440,512 total acres of waterbodies (lakes, reservoirs, and sea/ocean) and 1,797,175 total impaired waterbody acres; 45,676 total miles of shoreline (lakes, reservoirs, and sea/ocean) and 9,910 total impaired shoreline miles).

[30] *See, e.g.*, *Acadia National Park Statistics*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=ACAD (100% of park waters are impaired) (last updated Nov. 29, 2021).

[31] JOANN M. BURKHOLDER ET AL., NATURAL RESOURCE CONDITION ASSESSMENT: CONGAREE NATIONAL PARK, at xxii, 176 (2018), https://irma.nps.gov/DataStore/DownloadFile/606236.

[32] ANITRA PAWLEY, PH.D. & MUI LAY, NAT'L PARK SERV., COASTAL WATERSHED ASSESSMENT FOR GOLDEN GATE NATIONAL RECREATION AREA AND POINT REYES NATIONAL SEASHORE, at xl (2013).

growth, and by pollutants associated with timbering, mining, oil, and gas operations.[33] The impairment of many waters within Blue Ridge Parkway in Virginia and North Carolina is also caused by conditions that originate outside of the park's boundaries, such as urban development.[34]

The NWPR would have exacerbated these harms. The watersheds upstream from many national parks contain significant numbers of streams and wetlands that lost protection under the NWPR. Therefore, it was likely that the amount of pollution entering these waters—and from there flowing to downstream national parks—would have increased under that rule.

For example, several national parks in Massachusetts were at significant risk of becoming more polluted under the NWPR. Indeed, the Merrimack River, which flows through Lowell National Historical Park, continues to be threatened by upstream wastewater discharges, as well as urban and suburban land use.[35] It is only through the protections of the CWA that these discharges are prevented. If the NWPR had persisted, it would have likely increased the amount of pollution entering the river and the park, as experts estimate that 30–51% of the streams in the river's watershed lost CWA protections under the NWPR, and 25% of the watershed's wetlands were similarly unprotected.[36] The loss of CWA protections exposed Lowell National Historical Park to an increased risk of upstream water quality impairments, which could have negatively impacted the park's already degraded waters.

John H. Chafee Blackstone River Valley National Heritage Corridor ("Blackstone National Corridor"), located in Massachusetts and Rhode Island, was also put at risk. The Blackstone River is threatened by upstream wastewater discharges and urban land use.[37] Approximately 26–46% of the watershed's streams that were jurisdictional prior to the NWPR are ephemeral, and were therefore not protected by the rule. In addition, 16% of the watershed's wetlands were deemed not jurisdictional.[38] The loss of protection for these wetlands and streams increased the risk of water quality degradation in the Blackstone National Corridor.

Similar examples can be found all over the country. St. Croix National Scenic Riverway in Wisconsin and Minnesota was put at significant risk of additional water pollution as a result of the NWPR. In recent years, it has experienced greater pollution as a result of expanded

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[33] JAMES HUGHES ET AL., LONG-TERM DISCRETE WATER QUALITY MONITORING AT BIG SOUTH FORK NATIONAL RIVER AND RECREATION AREA, BLUE RIDGE PARKWAY, AND OBED WILD AND SCENIC RIVER, NAT'L PARK SERV. 15 (Dec. 2018).

[34] *Id.* at 18–19 ("These streams are 303d-listed for causes originating outside park boundaries.").

[35] *See Lowell National Historical Park: The Merrimack River*, NAT'L PARK SERV., https://www.nps.gov/lowe/learn/historyculture/the-merrimack-river.htm (last updated Nov. 9, 2018).

[36] Decl. Kurt Fesenmyer ¶ 11 (ECF No. 33), *Conservation Law Foundation v. U.S. EPA*, No. 20-cv-10820-DPW (D. Mass.) [hereinafter "Fesenmyer Decl."]; Decl. Stacy Woods, Ph.D., M.P.H. ¶ 47 (ECF No. 32), *Conservation Law Foundation v. U.S. EPA*, No. 20-cv-10820-DPW (D. Mass.) [hereinafter "Woods Decl."].

[37] NAT'L PARK SERV., BLACKSTONE RIVER VALLEY: SPECIAL RESOURCE STUDY: STUDY REPORT 2011, at 67 [hereinafter "Blackstone Report"]; KEITH W. ROBINSON ET AL., U.S. GEOLOGICAL SURVEY, WATER QUALITY TRENDS IN NEW ENGLAND RIVERS DURING THE 20TH CENTURY 18 (2003).

[38] Fesenmyer Decl. ¶ 7; Woods Decl. ¶ 48.

agriculture and urban development.[39] It is estimated that 64–77% of the streams in the watershed of the Namekagon River (a St. Croix tributary in the Wisconsin part of the Scenic Riverway) that were protected before the NWPR are ephemeral, and 26% of the watershed's wetlands were unprotected under the NWPR.[40]

The NWPR also detrimentally affected two of Florida's most famous national parks: Everglades National Park and Big Cypress National Preserve. Waters in these parks are nearly 100% impaired,[41] in part because "land-use activities that impair water quality [have] intensified in the upstream watersheds."[42] The parks are highly susceptible to the effects of upstream water management practices and are increasingly threatened by nearby land development and agricultural practices.[43] Park waters were further threatened by the NWPR, which failed to protect 81% of the wetlands in the watershed where the parks are located.[44]

A concrete example of the actual results of the NWPR occurred near Chaco Culture National Historical Park in New Mexico. The Bureau of Land Management has noted that there may be negative impacts to surface water quality from oil and gas development in the area, and the map accompanying this analysis revealed that potential projects could be developed in the park's watershed.[45] After the promulgation of the NWPR, the Corps issued jurisdictional determinations that classified ephemeral streams near the park as not jurisdictional.[46] By allowing developers to move forward with filling or polluting those streams without regulatory oversight, that decision risks harming downstream park waters.

3. Harms to National Parks Would Have Serious Economic Consequences and Impacts on Wildlife

The NWPR's impacts on national park waters would result in significant economic harm. In 2019, national parks received nearly 328 million recreation visits, which generated about $21

[39] ABIGAIL A. TOMASEK ET AL., U.S. GEOLOGICAL SURVEY, WASTEWATER INDICATOR COMPOUNDS IN WASTEWATER EFFLUENT, SURFACE WATER, AND BED SEDIMENT IN THE ST. CROIX NATIONAL SCENIC RIVERWAY AND IMPLICATIONS FOR WATER RESOURCES AND AQUATIC BIOTA, MINNESOTA AND WISCONSIN, 2007–08, at 3 (2012).

[40] Fesenmyer Decl. ¶ 13; Woods Decl. ¶ 58.

[41] *See Everglades National Park Statistics*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=EVER (last updated Nov. 29, 2021); *Big Cypress National Preserve Statistics*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=BICY (last updated Nov. 29, 2021).

[42] RONALD L. MILLER ET AL., U.S. GEOLOGICAL SURVEY, WATER QUALITY IN BIG CYPRESS NATIONAL PRESERVE AND EVERGLADES NATIONAL PARK—TRENDS AND SPATIAL CHARACTERISTICS OF SELECTED CONSTITUENTS 3 (2004).

[43] *Id.* at 3–4.

[44] Woods Decl. ¶ 53.

[45] *See* Decl. Michelle Wu, Ex. 25 (ECF No. 34), *Conservation Law Foundation v. U.S. EPA*, No. 20-cv-10820-DPW (D. Mass.) (map of potential projects near Chaco Culture National Historical Park, which are inherently located in the park's watershed) [hereinafter "Wu Decl."].

[46] Wu Decl., Exs. 21–24.

billion in spending in nearby regions.[47] Some of the most visited national parks are closely connected to water and depend on water quality. For instance, Grand Canyon National Park and Glen Canyon National Recreation Area received almost 6 million and 4.3 million visitors, respectively, in 2019.[48] Both of these parks are in an arid region where intermittent and ephemeral streams play a significant hydrological role.[49] Acadia National Park, on the coast of Maine, received over 3.4 million visitors in 2019, and the Chattahoochee River National Recreation Area in Georgia had over 3.3 million visitors.[50] Clean water is an integral part of the experience at these parks, and the water quality at these parks supports the conservation of a variety of fish and wildlife.

Additionally, the degradation of park waters would have threatened wildlife habitats. In many cases, the affected wildlife would include threatened or endangered species. For instance, the Obed Wild and Scenic River hosts "one of only two existing populations of the federally-endangered Alabama lampshell mussel" as well as the spotfin chub, a federally-threatened fish species.[51] Further impairment of the park's already degraded waters could jeopardize the survival of these vulnerable species. The Blackstone National Corridor mainly hosts pollution-tolerant species of fish because of its impaired water quality.[52] The NWPR threatened the park's ability to host less pollution-tolerant species. This failure of the NWPR to adequately protect various species of animals undermined the CWA's purpose to "provide[] for the protection and propagation of fish, shellfish, and wildlife."[53]

B. The NWPR Was Based on an Incorrect Interpretation of Precedent and the Act

When finalizing the NWPR, the Agencies misinterpreted Supreme Court precedent as well as core statutory provisions regarding the Act's purpose and its cooperative federalism scheme.

1. The NWPR Was Inconsistent with Supreme Court Precedent

Even though the NWPR repeatedly emphasized that it was based on law rather than science, it was inconsistent with Supreme Court precedent. Most notably, the Agencies failed to provide a

[47] National Park Service, *2019 National Park Visitor Spending Effects* 1, 10 (2020), https://www.nps.gov/nature/customcf/NPS_Data_Visualization/docs/NPS_2019_Visitor_Spending_Effects.pdf.

[48] *Annual Park Report for Recreation Visits in 2019*, NAT'L PARK SERV., https://irma.nps.gov/STATS/SSRSReports/National%20Reports/Annual%20Park%20Ranking%20Report%20(1979%20-%20Last%20Calendar%20Year).

[49] *See* JULIANE M. BOWEN, U.S. GEOLOGICAL SURVEY, REVIEW OF AVAILABLE WATER-QUALITY DATA FOR THE SOUTHERN COLORADO PLATEAU NETWORK AND CHARACTERIZATION OF WATER QUALITY IN FIVE SELECTED PARK UNITS IN ARIZONA, COLORADO, NEW MEXICO, AND UTAH, 1925 TO 2004, at 5 (2008).

[50] *Annual Park Report for Recreation Visits in 2019*, *supra* note 48.

[51] JAMES HUGHES ET AL., NAT'L PARK SERV., LONG-TERM DISCRETE WATER QUALITY MONITORING AT BIG SOUTH FORK NATIONAL RIVER AND RECREATION AREA, BLUE RIDGE PARKWAY, AND OBED WILD AND SCENIC RIVER 17 (2018).

[52] Blackstone Report, *supra* note 37, at 42.

[53] 33 U.S.C. § 1251(a)(2).

rule consistent with the Court's decision in *Rapanos v. United States*.[54] In that case, the Court split 4-1-4. Writing for four justices, Justice Scalia's plurality opinion would have interpreted "waters of the United States" to limit jurisdictional streams to those with a "relatively permanent flow" and jurisdictional wetlands to those with a "continuous surface connection" to another covered water.[55] Justice Kennedy's concurring opinion rejected both of these limits. First, Justice Kennedy indicated that Congress had not drawn "a line to exclude irregular waterways" such as ephemeral streams—"Quite the opposite."[56] Second, Justice Kennedy wrote that the 1986 regulations' approach to wetlands adjacency drew "support from the structure of the Act, while the plurality's surface-water-connection requirement does not."[57]

Although the NWPR gestured towards both the plurality and Justice Kennedy's concurring opinion, on the two limitations identified above, it squarely adopted the plurality's approach. In so doing, it ignored that a majority of the Court would have affirmed jurisdiction "in all [] cases in which either the plurality's or Justice Kennedy's test is satisfied."[58] Moreover, as the Agencies recognized prior to the NWPR, the significant nexus test does not derive only from Justice Kennedy's opinion, but is "informed by the ecological and hydrological connection the Supreme Court noted in *Riverside Bayview*, established by the Supreme Court in *SWANCC*, and refined in Justice Kennedy's opinion in *Rapanos*."[59]

Since *Rapanos*, the federal judiciary has accepted Justice Kennedy's significant nexus standard, with some courts endorsing the plurality's approach but only as an alternative to Justice Kennedy's. Indeed, no circuit court has found the plurality opinion alone to be controlling, while three circuits have found Justice Kennedy's opinion controlling. As the Ninth Circuit noted, "Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment. His concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases. . . . Justice Kennedy's concurrence provides the controlling rule of law."[60] The Sixth and Eleventh Circuits reached the same conclusion.[61] Three other circuits have ruled that waters that meet either Justice Kennedy's test or Justice Scalia's test may be considered jurisdictional.[62] Taken together, the judiciary's application of *Rapanos* highlights that Justice Kennedy's concurrence cannot be ignored.

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[54] 547 U.S. 715 (2006).

[55] *Rapanos*, 547 U.S. at 757 (plurality opinion).

[56] *Rapanos*, 547 U.S. at 770 (Kennedy, J., concurring in the judgment).

[57] *Id.* at 774.

[58] *Id.* at 810 (Stevens, J., dissenting).

[59] EPA & U.S. DEPT. OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 48 (May 27, 2015).

[60] *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007); *see also United States v. Robertson*, 875 F.3d 1281, 1292 (9th Cir. 2017) (ruling *City of Healdsburg* to still be good law).

[61] *See United States v. Gerhke Excavating, Inc.*, 464 F.3d 723, 724 (6th Cir. 2006); *United States v. Robinson*, 505 F.3d 1208, 1221 (11th Cir. 2007).

[62] *See United States v. Donovan*, 661 F.3d 174, 184 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006).

Despite claiming that the rule adequately incorporated insights from both opinions, when finalizing the NWPR the Agencies eliminated the categories of waters in which Justice Kennedy's concurrence and the plurality disagreed (*i.e.*, ephemeral streams and non-adjacent wetlands). Now, the Agencies are correct to recognize in the Proposal that the NWPR was inconsistent with Supreme Court precedent.

2. The NWPR Failed to Account for the Act's Objective

In addition to being inconsistent with Supreme Court precedent, the NWPR ignored the fundamental purpose of the CWA. As noted by the Agencies in the Proposal,[63] the objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[64] The Agencies now recognize (1) that the objective of the Act, in addition to its text and Supreme Court decisions, "is important in defining the scope of the Act," and (2) "that consideration of the objective of the Act for purposes of a rule defining 'waters of the United States' must include substantive consideration of the effects of a revised definition on the integrity of the nation's waters."[65] Accordingly, the Agencies follow the direction in Justice Kennedy's opinion in *Rapanos* that the "required nexus [between wetlands and other jurisdictional waters] must be assessed in terms of the statute's goals and purposes."[66] NPCA supports implementing this standard because it appropriately reflects the Act's express mandate "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[67]

Moreover, the NWPR failed to serve the CWA objectives of achieving a level of water quality sufficient to "provide[] for the protection and propagation of fish, shellfish, and wildlife" and to "provide[] for recreation in and on the water."[68] Notably, the Agencies had previously concluded that "wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter."[69] The recreational value of downstream waters depends on water quality that is determined by the functions of tributaries, including ephemeral streams, and non-adjacent wetlands. Likewise, development or degradation of ephemeral streams or non-adjacent wetlands significantly affects downstream water quality, which in turn impacts interstate commerce in recreation as well as fish and wildlife habitat. Therefore, by failing to protect those crucial ephemeral streams and non-adjacent wetlands, the

[63] 86 Fed. Reg. at 69,387.

[64] 33 U.S.C. § 1251(a).

[65] 86 Fed. Reg. at 69,388.

[66] *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in the judgment).

[67] 33 U.S.C. § 1251(a).

[68] *Id.* § 1251(a)(2).

[69] EPA, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF SCIENTIFIC EVIDENCE 6-3 (2015) (emphasis added).

NWPR failed to advance the Act's goals to for aquatic recreation and to protect fish and wildlife habitat.

3. The NWPR Misconstrued Section 101(b) as Justifying Narrow Federal Protections

The Agencies now correctly interpret section 101(b) with reference to the whole text of the statute. The NWPR, by contrast, justified its narrower definition of "waters of the United States" in part on "the limitations on federal authority embodied in CWA section 101(b)."[70] Specifically, the Proposal aims to satisfy the executive's mandate to protect the integrity of the waters of the United States, creating a baseline for further state action. In doing so, the Agencies fully realize the import of section 101(b)'s provision that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."[71]

The purpose of section 101(b) is to provide a role for states in protecting water quality as implementers of the CWA, not to narrow federal authority. Rather than limit federal authority, section 101(b) does two things. First, it recognizes that states will take the lead role in enforcing the Act through its cooperative federalism scheme. Second, it preserves the ability of states to go above and beyond the minimum federal standards established by the CWA. Both of these aims reflect Congress's intent to allow states to be active partners of the federal government in promoting the CWA's goals. Neither involves limiting federal authority.

Section 101(b) identifies the role for states to play in the cooperative federalism framework established by the CWA. As part of this scheme, the Supreme Court found that state certifications under section 401 are one way that "the Clean Water Act provides for a system that respects the States' concerns."[72] Similarly, state issuance of section 402 or section 404 permits is another way that states implement the CWA "[c]onsonant with its policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,' . . . but only upon EPA approval of the State's proposal to administer its own program."[73] Justice Blackmun also considered it to be "entirely understandable that Congress thought it neither imperative nor desirable to insist upon an exclusive approach to the improvement of water quality" because the CWA "contemplates a shared authority between the Federal Government and the individual States."[74] Far from limiting federal jurisdiction, section 101(b) contributes to a broader statutory framework that establishes the complementary roles of the federal government and the states.

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[70] 85 Fed. Reg. at 22,313.

[71] 33 U.S.C. § 1251(b).

[72] *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (citing 33 U.S.C. § 1251(b)).

[73] *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 206–08 (1976) (quoting 33 U.S.C. § 1251(b)).

[74] *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 341 (1981) (Blackmun, J., dissenting) (citing 33 U.S.C. § 1251(b)).

C. The NWPR was Inconsistent with the Best Available Scientific Information

The Agencies correctly observe that the NWPR "established a test for jurisdiction that did not adequately address the impacts of degradation of upstream waters on downstream waters, including traditional navigable waters, and was therefore incompatible with the objective of the Clean Water Act."[75] This is because the relatively permanent standard "runs counter to the science demonstrating how such waters can affect the integrity of downstream waters, including traditional navigable waters, interstate waters, and territorial seas."[76] Indeed, the EPA's Science Advisory Board had previously informed the Agencies that the NWPR (1) offered "no scientific justification for disregarding the connectivity of waters accepted by current hydrological science," (2) "introduc[ed] new risks to human and environmental health," and (3) lacked "consistency with the objective of [the CWA]."[77]

The Proposal is also correct in stating that, by contrast, the significant nexus standard reflects the interconnections among waters that affect the physical, chemical, and biological integrity of the waters of the United States.[78] For example, the significant nexus standard better accounts for the fact that "[t]ributaries play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream foundational waters."[79] The Proposal, in adopting the significant nexus standard, similarly recognizes that tributaries, including ephemeral streams, "slow and attenuate floodwaters; provide functions that help maintain water quality; trap and transport sediments; transport, store and modify pollutants; and sustain the biological productivity of downstream mainstem waters."[80]

In addition, the Proposal's application of the significant nexus standard allows the Agencies to better fulfill the objectives of the Act in the context of climate change. As noted by the Agencies, the relatively permanent standard "may not allow the Agencies to take into account the contribution of upstream waters to the resilience of the integrity of downstream waters."[81] This is because many perennial streams are transforming to ephemeral streams and these newly-changed streams will no longer be jurisdictional.[82] Moreover, a warming climate could lead to a decline in water levels and flows, which can increase the concentrations of organic waste and

[75] 86 Fed. Reg. at 69,373–74.

[76] *Id.* at 69,398.

[77] Dr. Michael Honeycutt, Chair, Science Advisory Board, Letter to Andrew R. Wheeler, Administrator, U.S. EPA, *Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act* 2, 4 (Feb. 27, 2020).

[78] 86 Fed. Reg. at 69,373.

[79] *Id.* at 69,390.

[80] *Id.*

[81] *Id.* at 69,394.

[82] S. Mažeika P. Sullivan et al., *Opinion: The Proposed Change to the Definition of "waters of the United States" Flouts Sound Science*, 116 PROC. NAT'L ACAD. SCI. U.S. 11,558 (2019), https://www.pnas.org/content/116/24/11558#ref-16.

nutrients and therefore intensify water impairments.[83] Additionally, it is also likely that rain and snowstorms will increase in frequency and intensity, which will worsen stormwater pollution.[84] The significant nexus standard would better allow the Agencies to leverage their expertise to determine how best to combat rapidly changing realities in the hydrologic cycle and the effects of these changes on water quality.

D. The States Have Not Been Filling the Gaps Left by the NWPR

The NWPR's harmful impacts were not mitigated by state gap-filling. The NWPR hypothesized that "States may elect to make changes to their statutes or regulations to regulate waters that are no longer jurisdictional under the final rule" and that such "complete State 'gapfilling' could result in a zero-net impact in the long-run."[85] There was no evidence that this would occur; indeed, the number of states with regimes more protective than the CWA has *decreased* since the publication of the NWPR.[86] This troubling trend is unlikely to change given that "28 states have adopted laws or policies that limit the authority of state agencies to protect waters more stringently than would otherwise be required" under the CWA.[87] Because a "nationwide floor of water pollution controls" under the CWA is essential to protect states from upstream pollution,[88] NPCA supports the Agencies' proposal not to rely on individual states to fill gaps left in federal regulations.

Moreover, relying upon the states to fill gaps left by federal protections would impose significant administrative costs onto the states. This problem was highlighted in Colorado's challenge of the NWPR. In *Colorado v. EPA*,[89] the state of Colorado argued that it would experience substantial harm if it were required to meet the increased enforcement burden under the NWPR. By contrast, the Proposal's recognition of the CWA's cooperative federalism framework is better suited to spreading the cost of enforcement, which will better enable federal and state agencies to enforce regulations on water quality.

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[83] RONALD L. MILLER ET AL., U.S. GEOLOGICAL SURVEY, WATER QUALITY IN BIG CYPRESS NATIONAL PRESERVE AND EVERGLADES NATIONAL PARK—TRENDS AND SPATIAL CHARACTERISTICS OF SELECTED CONSTITUENTS 3, 31 (2004).

[84] *Cleaning Up Stormwater Pollution*, CONSERVATION LAW FOUNDATION, https://www.clf.org/strategies/stormwater-pollution/ (last visited Feb. 7, 2022).

[85] 85 Fed. Reg. at 22,333.

[86] 86 Fed. Reg. at 69,415; *see also* Enrique Saenz, *Governor Signs Bill Repealing Most State Protections for Wetlands into Law*, IND. ENVTL. RPTR., Apr. 29, 2021, https://www.indianaenvironmentalreporter.org/posts/governor-signs-bill-repealing-most-state-protections-for-wetlands-into-law (describing Indiana law that removes or weakens protections for 97% of wetlands in the state).

[87] ENVIRONMENTAL LAW INSTITUTE, STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 11 (May 2013), https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf.

[88] Compl. ¶ 77, *California v. Wheeler*, No.3:20-cv-03005-RS (N.D. Cal. May 1, 2020).

[89] 989 F.3d 874 (10th Cir. 2021).

E. The NWPR Improperly Eliminated Categorical Protections for Interstate Waters

Finally, the NWPR lacked sufficient justification for eliminating categorical protections for interstate waters. The NWPR attempted to justify this change by citing *SWANCC*,[90] which stands for the limited proposition that the Act did not authorize federal jurisdiction over the type of isolated *intrastate* waters at issue in that case. The case says nothing about the jurisdictional status of *interstate* waters.

The Proposal appropriately recognizes that interstate waters, including interstate wetlands, are waters of the United States regardless of navigability. Indeed, the Supreme Court long ago made clear that interstate water pollution is intrinsically a federal concern.[91]

Furthermore, as the Agencies note, the text of the CWA reflects Congress's understanding that interstate waters would be protected. The pre-1972 version of the Act defined "interstate waters" without reference to whether those waters were navigable or not, and provided for the development of water quality standards for such waters.[92] In section 303(a) of the 1972 Act, Congress explicitly referenced those pre-existing water quality standards.[93] The subsection provided that any such standard that had been approved, or was awaiting approval, by EPA would remain in effect unless EPA determined the standard did not satisfy applicable requirements.

Moreover, this provision did not address a merely hypothetical category of waters; when Congress included section 303(a) in the Act, the practice of regulating interstate waters regardless of navigability was well established. For example, a 1972 compilation of the water quality standards for interstate waters crossing Massachusetts' borders with neighboring states includes standards for small, isolated lakes or streams that are not traditional navigable waters.[94] Accordingly, the Proposal properly reverses the NWPR's mistaken elimination of the category.

Another reason NPCA supports the Proposal's recognition of interstate waters, including wetlands, as categorically jurisdictional is that it will increase the administrability of the Act. States may have vastly different regulatory regimes. By exercising federal jurisdiction over interstate waters, the Agencies can better ensure that a coordinated regime is in place to protect the waters of the United States.

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

[91] *See City of Milwaukee v. Illinois*, 451 U.S. 304, 209 (1981).

[92] 33 U.S.C. §§ 1160(c)(1), 1173(e) (1970).

[93] 33 U.S.C. § 1313(a); *see* 86 Fed. Reg. at 69,417–18.

[94] *Cf.* EPA, *Summary of Water Quality Standards for the Interstate Waters of Massachusetts* 48 fig. 2 (1972), https://tinyurl.com/yckn8xy8 (indicating that water quality standards had been set for isolated interstate waters, including Miscoe Lake and Wallum Lake, at the time Congress enacted section 303(a)).

III. THE SIGNIFICANT NEXUS STANDARD IS AN APPROPRIATE APPROACH TO DEFINING WATERS OF THE UNITED STATES

Subject to the recommendation below, NPCA supports the Agencies' use of a significant nexus standard and their limited adoption of the relative permanence requirement. The Proposal properly recognizes that Justice Kennedy's significant nexus standard "advances the objective of the Act" and aligns with the Act's text, science, and case law, while the *Rapanos* plurality's relative permanence requirement is best understood as an "administratively useful" means of identifying waters that "will virtually always have the requisite nexus."[95] At bottom, as the Agencies recognize, a proper definition of "the waters of the United States" must "adequately address[] the effects of degradation of upstream waters on downstream waters, including traditional navigable waters."[96] The significant nexus test does so, while the relatively permanent standard does not.

Additionally, NPCA agrees that the relatively permanent standard is inconsistent with the Act's text,[97] and the analysis by Seran Gee attached as an Appendix to this comment letter explains in detail why this is so. The Appendix draws upon technical insights from linguistics to explain how the *Rapanos* plurality relied on mistaken assumptions about language to arrive at its conclusion that "the waters of the United States" excludes ephemeral waters.

The Appendix then provides a sound construction of the definition, deploying both traditional tools of statutory interpretation and techniques developed in formal semantics. The Appendix argues that "the waters of the United States, including the territorial seas" in fact encompasses all waters over which the federal government may assert sovereign authority. This result is consistent both with the view that Congress exercised its full Commerce Clause powers when it passed the Act (as argued for below), and with the significant nexus approach.

IV. THE PROPOSAL WOULD BENEFIT FROM ADDED CLARIFICATION

Although the Proposal is far more faithful to the CWA's objective, Supreme Court precedent, and the science than was the NWPR, it can still be improved. This section explains that the Agencies should:

(A) add more detail and explanation about "functions" in the regulatory definition of "significantly affect,"
(B) codify longstanding guidance on waters used in commercial waterborne recreation,
(C) consider establishing additional categories of waters that are jurisdictional by rule, to improve the administrability and protectiveness of the rule, and
(D) clarify that field staff can make "significant nexus" determinations for "other waters" without seeking approval from headquarters.

[95] 86 Fed. Reg. at 69,395.

[96] *Id.* at 69,407.

[97] *Id.* at 69,397.

A. The Agencies Should Add More Detail and Explanation about "Functions" in the Regulatory Definition of "Significantly Affect"

The Agencies have requested comment on whether the definition of "significantly affect" should include a "specific list of functions of upstream waters to assess when making a significant nexus determination."[98] We urge the Agencies to include a non-exhaustive list of functions. In addition, they should adjust the definition to clarify that evaluating upstream waters' (including wetlands') functions is an essential component of the significant nexus analysis. This clarity is needed because the proposed definition of "significantly affect" includes only one instance of "functions" and does not sufficiently explain the role of those functions in the "significantly affect" analysis. Finally, the proposed definition can also be made clearer with some wording changes, as shown below.

The Proposal addresses why upstream waters' functions are critical to the significant nexus analysis, in order to reflect both scientific understanding of waters' interconnections as well as Justice Kennedy's explication of the "significant nexus" concept:

> while the scientific literature does not use the term 'significant' in the same manner used by the Supreme Court, the literature does provide information on the strength of the effects on the chemical, physical, and biological functioning of the downstream water bodies that permits the agencies to judge when an effect is significant such that a water, alone or in combination, should be protected by the Clean Water Act.[99]

As the Agencies note, Justice Kennedy and the Science Report identified many of the same valuable functions of waterways, such as pollutant trapping, flood control, and runoff storage.[100] Moreover, the Agencies already have extensive experience under the *Rapanos* guidance of analyzing these and other functions as part of the significant nexus analysis.[101]

NPCA recommends the following edits to the "significantly affect" definition to better capture the role of the functions analysis within the "significantly affect" concept. These edits also reflect some typographical suggestions for clarity—with additions in bold and underlined, and deletions in bold and strike-through:

> (g) Significantly affect means **likely to have an effect that is**[102] more than speculative or insubstantial ~~**effects**~~ on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section. **Waters will be assessed by evaluating the function or combination of**

[98] 86 Fed. Reg. at 69,431.

[99] *Id.* at 69,396.

[100] *Id.* at 69,397; *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in the judgment).

[101] 86 Fed. Reg. at 69,431.

[102] This language is taken from the *Rapanos* guidance. 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* 11 (Dec. 2, 2008).

> **functions they provide, including but not limited to: sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species that also live in paragraph (a)(1), (2), or (6) waters.**[103] When assessing whether the effect that the functions **provided by**[104] waters have on waters identified in paragraph (a)(1), (2), or (6) of this section is more than speculative or insubstantial, the agencies will consider: …

B. The Agencies Should Codify Longstanding Guidance on Waters Used in Commercial Waterborne Recreation

The Agencies should incorporate into the final regulation the longstanding guidance that waters are considered jurisdictional as traditional navigable waters if they "are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments)."[105] Specifically, the Agencies should amend 40 C.F.R. § 120.2(a)(1) and 33 C.F.R. § 328.3(a)(1) as follows:

> All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce **(including waters currently being used for commercial waterborne recreation such as boat rentals, guided fishing trips, or water ski tournaments)**, including all waters which are subject to the ebb and flow of the tide

Adopting this change will advance Congress's intent in the CWA to provide for aquatic recreation.[106] It will also promote transparency and ensure the continued stability of the test reflected in this longstanding guidance.

C. The Agencies Should Establish Additional Categories of Waters that Are Jurisdictional by Rule to Improve the Administrability of the Definition

NPCA supports the identification of categories of waters that virtually always share a significant nexus with traditionally navigable waters and the designation of such waters as jurisdictional by rule.[107] For example, because relatively permanent tributaries "will virtually always have the requisite nexus"[108] to traditionally navigable waters, the Agencies have already asserted that

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[103] This list of functions is based on prior lists prepared by the Agencies. *See* 80 Fed. Reg. at 37,125; 86 Fed. Reg. at 69,431.

[104] These words are added to provide additional clarity to the definition.

[105] 86 Fed. Reg. at 69,416.

[106] The purposes of the CWA include the protection of water quality in order to "provide[] for recreation in and on the water." 33 U.S.C. § 1251(a)(2).

[107] *See* 86 Fed. Reg. at 69,399, 69,432 n.53.

[108] *Id.* at 69,395.

"relatively permanent tributaries and adjacent wetlands that have a continuous surface connection to such tributaries are jurisdictional under the Clean Water Act as 'waters of the United States.'"[109] Likewise, the Agencies have confirmed that they will continue to exercise jurisdiction over wetlands adjacent to traditionally navigable waters.[110] These categorical approaches to determining jurisdiction increase transparency and improve administrative efficiency.

We therefore urge the Agencies to establish additional bright-line tests for determining when a tributary, wetland, or other water meets *sufficient conditions* for being classified as relatively permanent. This would increase transparency and reduce administrative burdens on the Agencies and other stakeholders. At the same time, the Agencies should continue to make it clear that waters not included categorically (*e.g.*, ephemeral streams) will continue to be assessed on a case-by-case basis under the significant nexus and relatively permanent standards.

For example, we recommend that the Agencies categorically determine that *all* intermittent streams satisfy the "relatively permanent" test and are therefore jurisdictional. Managing the water quality of intermittent streams is essential to achieving the objectives of the CWA. Intermittent streams "help maintain biodiversity in the landscape and perform fundamental ecosystem services such as nutrient cycling and groundwater renewal."[111] Furthermore, as EPA has previously observed, intermittent streams "cumulatively generate a large fraction of the nation's stream and river flows."[112] Because national parks rely on the continued physical, chemical, and ecological integrity of intermittent streams, NPCA supports the designation of all intermittent streams, and not merely those that have a continuous flow at least seasonally, as categorically jurisdictional.[113]

Moreover, if the Agencies define flow classifications in the final rule, including the terms "perennial," "intermittent," and "ephemeral,"[114] they should clarify that "intermittent streams under the relatively permanent standard may flow less than three months . . . as certain intermittent streams may flow for shorter periods of time but are still distinct from 'ephemeral' streams."[115] This addition would clarify that the Agencies' "approach would *not* limit

[109] *Id.* at 69,434.

[110] *Id.* at 69,422.

[111] Catherine Leigh et al., *Ecological Research and Management of Intermittent Rivers: An Historical Review and Future Directions*, 61 FRESHW. BIOL. 1181–1199, 1188 (2016).

[112] EPA, *supra* note 69, at 3-7.

[113] Although the "relatively permanent" standard has no textual basis in the CWA, NPCA recognizes that the standard may provide a useful shorthand metric for determining what tributaries are virtually always jurisdictional. *See* 86 Fed. Reg. at 69,395.

[114] *Cf. id.* at 69,436 ("This proposed rule does not provide specific definitions for tributary flow classifications, including the terms "perennial," "intermittent," and "ephemeral." The agencies are seeking comment on whether they should define these flow classifications in the final rule.").

[115] *Id.*

intermittent tributaries under the relatively permanent standard to only those that have continuous flow at least seasonally (e.g., typically three months)."[116]

D. The Agencies Should Clarify that Field Staff Can Make "Significant Nexus" Determinations for "Other Waters" Without Seeking Approval from Headquarters

Under the *SWANCC* Guidance, the Agencies prohibited field staff from designating "other waters" as jurisdictional without first seeking approval from agency headquarters.[117] This approach reflected the Agencies' view at the time that the commerce-based categories for jurisdiction over "other waters" under the 1986 regulations were in tension with the Supreme Court's decision in *SWANCC*.

This rationale does not apply to the "other waters" category under the Proposal. To the contrary, "other waters" are jurisdictional under the Proposal if they either (a) are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to (a)(1), (a)(2), (a)(5)(i), or (a)(6) waters, or (b) significantly affect—either alone or in combination with similarly situated waters in the region—the chemical, physical, or biological integrity (a)(1), (2), or (a)(6) waters. Nevertheless, the Agencies seek comment on whether "significant nexus" determinations for "other waters" should continue to require review by headquarters.[118]

Such review should not be necessary. Agency field staff have considerable experience with and expertise regarding the significant nexus test, which they have been applying, on and off, since the adoption of the initial *Rapanos* guidance in 2007. Moreover, the requirement to seek headquarters approval serves in practice to discourage field staff from asserting jurisdiction, as reflected in the Proposal's observation that, following the introduction of this requirement after *SWANCC*, "the Corps has not asserted jurisdiction over [isolated] other waters."[119] The Agencies should allow field staff to make "significant nexus" determinations for "other waters" without headquarters approval.

V. CWA JURISDICTION COVERS WATERS THAT, IN THE AGGREGATE, SUBSTANTIALLY AFFECT INTERSTATE COMMERCE

For waters requiring individual assessment, the significant nexus and relatively permanent standards will more faithfully execute the Act than the NWPR. Nevertheless, the Agencies' removal of the commerce-based categories of "other waters" in the 1986 regulations unduly narrows their authority and is inconsistent with Congress's intent in enacting the CWA. We therefore urge the Agencies to restore those definitions.

Even before the enactment of the CWA, the Supreme Court read the authority of Congress over navigable-in-fact waters at a watershed level to include not just those waters but also their tributaries. Specifically, the Supreme Court, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson*

[116] *Id.* (emphasis added).

[117] *Id.* at 69,440.

[118] *Id.*

[119] *Id.*

Co.,[120] found it "clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions" even when the project would have only "an incidental effect in protecting or improving the navigability" of those waters. In reaching this conclusion, the Court recognized federal power over non-navigable tributaries for purposes other than directly regulating navigation. Indeed, the Court stated that "[t]here is no constitutional reason why Congress cannot under the commerce power treat the *watersheds* as a key to flood control on navigable streams *and their tributaries*."[121]

In passing the CWA in 1972, Congress intended to exercise the broad authority recognized by the Court in *Oklahoma ex re. Phillips* by defining jurisdictional waters more broadly than in previous statutes. Traditionally, "navigable waters" in federal laws referred to waters that could be navigated in interstate commerce. For waters to fall within this category, they needed to be "navigable-in-fact," meaning they could be used "as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[122] In 1961, however, Congress expanded the jurisdiction granted to the federal government to include both "navigable waters" and "interstate waters" (*i.e.*, "waters that flow across, or form a part of, a State's boundaries").[123]

In passing the CWA in 1972, Congress expanded the definition of "navigable waters" to include a broader set of waters (*i.e.*, "the waters of the United States"). In the House consideration of the CWA conference report, one of the bill's primary sponsors, Representative John Dingell, repeatedly emphasized this point. First, he noted that "the conference bill defines the term 'navigable waters' *broadly for water quality purposes*."[124] At another point, after reviewing the Supreme Court's precedents, he explained: "Thus, this new definition clearly encompasses *all water bodies, including main streams and their tributaries, for water quality purposes*. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill."[125] As explained in the Appendix, the text of the CWA supports the conclusion that Congress intended to use its full Commerce Clause power.

What is more, even if the Agencies were correct to assert that Congress intended to exercise only its constitutional power over navigation,[126] that argument would not limit the jurisdictional scope

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[120] 313 U.S. 508, 523 (1941).

[121] *Id.* at 525 (emphasis added).

[122] *See The Daniel Ball*, 77 U.S. 557, 563 (1870).

[123] *See* Federal Water Pollution Control Act of 1948, P.L. 845, § 10(e), 62 Stat. 1155, 1161 (defining "interstate waters"); Federal Water Pollution Control Act Amendments of 1961, P.L. 87-88, § 8(a), 75 Stat. 204, 208 (codified in 33 U.S.C. § 1160(a) (1970)) (expanding jurisdiction to "interstate or navigable waters").

[124] U.S. GOVT. PRINTING OFF., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 250 (House consideration of conference report) (emphasis added).

[125] *Id.* (emphasis added).

[126] This possibility is hinted at in footnote dicta of *SWANCC*, 531 U.S. at 168 n.3 ("[N]either this [conference report quotation], nor anything else in the legislative history *to which respondents point*, signifies that Congress intended to exert anything more than its commerce power over navigation.") (emphasis added). Importantly, even this suggestion is limited only to the sources that were cited by the respondents—it does not refer to the legislative history of the CWA more generally.

of the CWA in such a way as to exclude waters used in recreation. Congress's constitutional power over navigation is broad and includes the power to regulate water for purposes beyond navigation.[127] Indeed, as mentioned earlier, the Supreme Court has previously stated that Congress's broad power to regulate navigation extends even to matters only incidentally related to navigation.[128] Consistent with this unequivocal precedent, the *SWANCC* Court recognized that "the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'"[129] The Supreme Court concluded on this understanding that "it was the significant nexus between the wetlands and 'navigable waters' that informed" their prior reading of the CWA's text.[130] Additionally, as discussed in the Appendix, the fact that "navigable waters" is a defined term indicates that it should be interpreted not in its ordinary or common usage but, rather, in the sense prescribed by Congress.[131]

Congress has a "paramount" power over navigable waters.[132] This power may be invoked "irrespective of whether navigation . . . is used."[133] As the Supreme Court recognized seven years after the passage of the CWA: "Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause."[134] Prior to the passage of the CWA, the Supreme Court also described the "plenary power of Congress over navigable waters."[135] Therefore, even if Congress exercised only its navigation power in the CWA, this would not justify the limits to the jurisdictional scope of the CWA in the Proposal.

Moreover, this interpretation of the Agencies' authority under the CWA does not raise constitutional concerns because protecting non-navigable waters used for recreational purposes is well within Congress's Commerce Clause authority under the test established by the Supreme Court in *United States v. Lopez* and *United States v. Morrison*. *Lopez* established three categories of activities or things that Congress may regulate under the interstate commerce clause: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3)

[127] *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 522–23 (1941) ("A part of the local benefits of flood control is frequently protection of navigation in the tributary itself.").

[128] *Id.* at 523.

[129] *SWANCC*, 531 U.S. at 183 (quoting *Riverside Bayview*, 474 U.S. at 133).

[130] *Id*.

[131] Larry M. Eig, Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* 8 (2014).

[132] *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979).

[133] *Id.*

[134] *Id.* at 173.

[135] *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 427 (1940).

"activities that substantially affect interstate commerce."[136] Congress may properly regulate waters in closed basins used in waterborne recreation under the third category.

Congress has the authority to regulate individual activities when it has a "rational basis" to conclude that regulated "activities, taken in the aggregate, substantially affect interstate commerce."[137] This type of analysis is particularly relevant when considering a "comprehensive regulatory regime."[138] The CWA is such a "comprehensive regulatory program."[139] Although the filling of an individual wetland or degradation of an individual stream may not substantially impact interstate commerce by itself, in the aggregate the impact of changes to these waters could substantially affect interstate commerce by, among other things, affecting the millions of visitors to national parks and the billions of dollars in economic activity that they contribute.

Importantly, the regulation of non-adjacent wetlands need not suffer from the asserted deficiencies of the "migratory bird rule" in the 1986 regulations. In *SWANCC*, the Supreme Court held that the migratory bird rule "exceeds the authority granted to" the Corps and EPA "under § 404(a) of the CWA."[140] The Court, therefore, did not rule on the constitutionality of this justification under the Commerce Clause. However, Chief Justice Rehnquist wrote that there were "significant constitutional questions" raised by the justification and that the Court "would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."[141] Furthermore, the Court sought a "clear indication" of congressional intent where "an administrative interpretation of a statute invokes the outer limits of Congress' power."[142] Regulation of wetlands based on their benefits to recreation would not raise the same intent question because Congress has clearly indicated that protecting recreational activities, such as fishing and swimming, is among the CWA's objectives.[143]

While the relationship between the migratory bird rule and interstate commerce is perhaps tenuous, Congress readily satisfies the low burden of establishing a rational basis for asserting that water quality in intrastate waters used by interstate travelers for waterborne recreational

[136] *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). However, if the activity is not commercial, then Congress can regulate only if there is a relatively strong connection between the activity and interstate commerce.

[137] *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

[138] *Id.* at 27.

[139] *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981); *see also id.* at 318 ("No Congressman's remarks on the legislation were complete without reference to the 'comprehensive' nature of the Amendments."); *SWANCC*, 531 U.S. at 179 (Stevens, J., dissenting) (quoting same).

[140] *SWANCC*, 531 U.S. at 172 (majority opinion).

[141] *Id.* at 173.

[142] *Id.* at 172.

[143] *See, e.g.*, 33 U.S.C. § 1251(a)(2) ("[I]t is the national goal that *wherever attainable*, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."). Notably, while the *SWANCC* Court acknowledge the Act's broader goal of "of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 531 U.S. at 166 (citing 33 U.S.C. § 1251(a)), it did not reference this more concrete objective of the Act.

activities has a substantial effect on interstate commerce. Indeed, in Colorado alone, waterborne recreational activities contribute nearly $19 billion each year.[144]

In a pre-*Lopez* opinion that is consistent with the test the Supreme Court subsequently developed in that case, the Tenth Circuit upheld Congress's power to regulate intrastate waters used for recreational purposes in the CWA.[145] In that case, the State of Utah challenged the constitutionality of the application of section 404 of the CWA to an intrastate lake. At the district court, evidence showed that the lake "affects interstate commerce because, inter alia, the lake is used by interstate travelers for public recreation."[146] In language that tracks the third *Lopez* category, the Tenth Circuit held that "the discharge of dredged or fill material into [the intrastate lake] by plaintiff or others could well have a *substantial economic effect* on interstate commerce."[147] Describing the movement of interstate visitors to the lake, the Tenth Circuit ruled that "interstate movement of travelers has been held to be within the reach of the Commerce Clause."[148] This reasoning fits squarely within the *Lopez* framework and demonstrates why recreational use of intrastate waters justifies CWA jurisdiction.

VI. TECHNICAL AND STRUCTURAL SUGGESTIONS FOR THE PROPOSAL

In addition to the above comments on the substance of the Proposal, NPCA offers the following comments on certain technical and structural aspects of the Proposal.

- In the regulatory language sections—Parts 328 and 120 ("Definition of the waters of the United States"), the Agencies should delete the examples of "other waters" provided in § 328.3(a)(3) and § 120.2(a)(3)—*i.e.*, delete "such as intrastate lakes, rivers . . . or natural ponds." Because these waters should be considered on a case-by-case basis, these examples could create confusion. This is especially true for the inclusion of intermittent streams, which virtually always have the requisite nexus to a traditional navigable water to be jurisdictional. (Alternatively, if the Agencies keep the list of examples, the list should not include intermittent streams.)

- Likewise, § 328.3(a) and § 120.2(a) begin with "Waters of the United States means," followed initially by a list of categories of waters that are waters of the United States. However, the last two paragraphs in the list, (a)(8) and (a)(9), are not waters of the United States but instead exclusions from those waters. This structure creates ungrammatical constructions within the text—*i.e.*, the introductory phrase and (a)(8),

[144] *See* Business for Water Stewardship, *The Economic Contributions of Water-related Outdoor Recreation in Colorado* 12 (2020), https://businessforwater.org/wp-content/uploads/2020/06/Southwick-Technical-report-2020.pdf. The Report also notes that "an estimated 6.7 million people, both resident and non-residents, participate in one of the selected outdoor activities along the water in Colorado." *Id.* at ii.

[145] *Utah v. Marsh*, 740 F.2d 799, 803 (10th Cir. 1984).

[146] *Id.* at 801; *see also id.* at 803 ("The lake also provides recreationists with opportunities to fish, hunt, boat, water ski, picnic, and camp, as well as the opportunity to observe, photograph, and appreciate a variety of bird and animal life; non-resident visitation at the lake has averaged 6,919 persons per year, or 2% of total visitation, over the 1967-1980 period.").

[147] *Id.* at 803 (emphasis added).

[148] *Id.* at 804 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)).

read together, state: "Waters of the United States means Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States." If these exclusions are included in the final rule, they should be placed in a separate subsection for "exclusions." The text of this subsection could begin with the phrase: "Notwithstanding 328.3(a)(1)-(7) [or 120.2(a)(1)-(7)], the following waters are not waters of the United States: …."

* * *

Thank you for your consideration of these comments. NPCA and the Clinic appreciate the opportunity to submit these comments and welcome the opportunity to participate further in efforts to protect clean water. Please direct any follow-up communications to Shaun A. Goho, 617-496-5692 (sgoho@law.harvard.edu).

Sincerely,

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APPENDIX: A LINGUISTICS-INFORMED TEXTUAL ANALYSIS SUPPORTS THE FULL COMMERCE CLAUSE VIEW

By Seran Gee, JD & PhD Candidate[1]

The proper interpretation of "the waters of the United States, including the territorial seas" ("the Definition") has been debated for decades because it determines the scope and scale of the protections guaranteed under the Clean Water Act ("CWA" or "the Act").[2] Nearly all of the Act's crucial safeguards are linked to whether a particular waterbody satisfies the Definition.

By applying principles from the field of linguistics[3] to interpret the Definition's ordinary meaning, this appendix establishes that: (A) the plurality opinion in *Rapanos* narrows the meaning of "the waters of the United States" without a textual basis, (B) the ordinary meaning of "the waters of the United States" embraces all waters that fall under the federal government's sovereign power to regulate, and (C) this sound interpretation encompasses standards based on either significant nexus or substantial, aggregate effects on interstate commerce.

In his four-Justice plurality opinion in *Rapanos v. United States*,[4] Justice Scalia concluded that the Definition is limited, in part, to relatively permanent bodies of water and thus excludes ephemeral waters. In reaching this conclusion, Justice Scalia reasoned:

> The Corps' expansive approach might be arguable if the CWA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") shows plainly that § 1362(7) does not refer to water in general. In this form, "the waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second). On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of

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[2] *See* 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

[3] Technical insights from the field of linguistics are increasingly being recognized as valuable for the purpose of statutory interpretation. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (assessing the original meaning of the Second Amendment with reference to corpus linguistics); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) (mentioning linguistic constraints in the majority opinion and corpus linguistics in the concurring opinion); *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (using Google's linguistic analysis tools to examine the popular meaning of the word "harbor" in the context of "harboring an alien"); *see also* Ben Zimmer, *The Corpus in the Court: "Like Lexis on Steroids,"* THE ATLANTIC (Mar. 4, 2011), http://bit.ly/LexisOnSteroids (commenting on the apparent influence of a linguist's amicus brief on the decision in *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011)).

[4] 547 U.S. 715 (2006).

> water "forming geographical features." *Ibid*. All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely, "streams," connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as "rivers," "lakes," and "oceans."[5]

Justice Scalia also found support for his view in other provisions of the Clean Water Act. Specifically, he read "point source" and "navigable waters" as wholly distinct categories such that an "intermittent" water could not fall under "waters of the United States."[6]

As argued below, a linguistics-informed textual analysis refutes the plurality's "relative permanence" requirement and demonstrates that "the waters of the United States" covers all waters which the federal government has authority to regulate, a scope consistent with the Agencies' "significantly affects" standard and, more broadly, with categories based on substantial, aggregate effects on interstate commerce.

A. The "Relative Permanence" Requirement Lacks a Textual Basis in the Act

The plurality's "relative permanence" requirement lacks any basis in the Act's text because it:

1. violates the core principle that "what is not said is not the case,"
2. misinterprets dictionary definitions of "waters,"
3. misconstrues the semantic significance of the definite article "the," and
4. wrongly draws a bright line between point sources and navigable waters.

1. The Plurality's Interpretation Violates the Principle that "What is not Said is not the Case"

Language scholars have generally accepted that "what is not said is not the case."[7] Applying this principle to the CWA, it is critical to note that Congress did not add language to the definition of "navigable waters" that would limit it to relatively permanent bodies of water. To the contrary, the fact that Congress used a broad term without limiting language indicates an intent to provide a broad grant of jurisdiction.[8] The Agencies rightly, therefore, "find no exclusion of waters that are not relatively permanent in the text of the statute."[9]

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[5] *Rapanos*, 547 U.S. at 732–33 (plurality opinion) (footnotes omitted).

[6] *Id.* at 735–36.

[7] Stephen C. Levinson, *Three Levels of Meaning*, *in* GRAMMAR AND MEANING: ESSAYS IN HONOUR OF SIR JOHN LYONS 90–115, 97 (F.R. Palmer ed., 1995).

[8] *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (invoking the Court's "duty to refrain from reading a phrase into the statute when Congress has left it out").

[9] Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372, 69,398 (Dec. 7, 2021).

2. The Plurality's Interpretation is Inconsistent with Dictionary Definitions of "Waters"

The plurality relied on the *Webster's New International Dictionary: Second Edition* definition of "waters" as "refer[ing] more narrowly to water [a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes, *or the flowing or moving masses, as of waves or floods, making up such streams or bodies.*"[10] On the basis of this definition, the plurality concluded that "the waters of the United States" does not include ephemeral streams.

This reasoning has at least two flaws. First, if the goal of parsing statutory terms is, as Justice Scalia articulated, to "determin[e] the application of a governing text to given facts on the basis of how a reasonable reader . . . would have understood the text *at the time it was issued*,"[11] then the plurality relied on the wrong dictionary. *Webster's Second* was first published in 1931, and by the time the CWA was enacted in 1972, it had been superseded by *Webster's Third New International Dictionary*, first published in 1961. The latter dictionary defines "waters" as, among other things, "the water occupying or flowing in a particular bed."[12] The water in an ephemeral stream that flows only in response to precipitation is water that flows in a particular, well-defined streambed, and therefore satisfies this definition. At a minimum, the 1961 definition provides no support for a requirement of relative permanence.

Second, even the plurality's preferred definition of "waters" does not support the "relative permanence" requirement. This definition refers to "the flowing or moving masses, as of waves or floods, making up" streams or other waterbodies, provided those bodies "form geographical features." Ephemeral streams are, by definition, comprised of flowing masses of waters resulting from precipitation. Moreover, they are characterized by having a bed and banks, which makes them geographical features. This definition also, therefore, contains no "relative permanence" requirement and plainly encompasses ephemeral streams.

3. Linguistic Theories of Definiteness do not Support Limiting "the Waters" to Relatively Permanent Bodies of Water

Given that the dictionary definition of "waters" does not support the plurality's interpretation, the next question is whether the combination of that term with the definite article "the" requires relative permanence. The plurality asserted that this was so, stating that "[t]he use of the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general" but instead "more narrowly" to the definition from *Webster's Second* quoted

[10] *Rapanos*, 547 U.S. at 732–33 (plurality opinion) (quoting *Webster's New International Dictionary: Second Edition* 2882 (2d ed. 1954)) (emphasis added).

[11] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33 (2012); *see also Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (The Court's "job is to interpret the words consistent with their 'ordinary meaning . . . *at the time Congress enacted the statute*.'") (emphasis added); *Perrin v. United States*, 444 U.S. 37, 45 (1979) (rejecting the argument that the Travel Act incorporated the common-law definition of "bribery" because, by 1961 when the Act was passed, "the common understanding and meaning of 'bribery' had extended beyond its early common-law definitions'").

[12] Webster's Third New International Dictionary 2581 (1961).

above. To the extent the plurality relied on the word "the" itself to convey the concept of relative permanence, it was incorrect. In over one hundred years of linguistics research on the concept of definiteness, there has never been an observed link between permanence (relative or otherwise) and definiteness.[13]

Instead, this extensive literature has established that definiteness encodes the feature of being identifiable. Linguists have found that definiteness denotes a referent's uniqueness, familiarity (to the speaker and/or addressee), and specificity.[14] Although no single theory of definiteness captures all of its potential senses, these general senses (or combinations thereof) encompass the range of meanings of definiteness, which can be narrowed or enriched by context.[15] However, the plurality's approach, under which the word "the" indicates relative permanence, is inconsistent with all three main linguistic theories of definiteness.

a. The Plurality's View is Not Supported by the Uniqueness Theory

Many linguists have observed that definiteness often denotes a referent's uniqueness.[16] The uniqueness theory is supported by how adjectives of a singular nature require the definite article when introducing a referent.[17] For example, one can say, "the best athlete" but not "a best

[13] None of the following sources (including those published by some of the most prestigious publishers in the field, such as the flagship journal for the Linguistic Society of America, *Language*) mentions, let alone argues for, the idea that definiteness refers to anything like "relative permanence": Barbara Abbott, *Support for a Unique Theory of Definite Descriptions*, *in* SEMANTICS AND LINGUISTIC THEORY IX 1–15 (1999) (describing how definiteness relates to the feature of uniqueness); Mira Ariel, *Referring and Accessibility*, 24 J. LINGUISTICS 65 (1988) (associating definiteness with relevance and salience); BETTY J. BIRNER & GREGORY WARD, INFORMATION STATUS AND NONCANONICAL WORD ORDER IN ENGLISH (1998) (proffering "identifiability" as the basis of definiteness rather than familiarity); Tyler Burge, *Demonstrative Constructions, Reference, and Truth*, 71 J. PHIL. 205 (1974) (discussing the referential features of definite demonstratives); PAUL CHRISTOPHERSEN, THE ARTICLES: A STUDY OF THEIR THEORY AND USE IN ENGLISH (1939) (arguing that definiteness denotes the referent's familiarity to the speaker and hearer); Keith Donnellan, *Reference and Definite Descriptions*, 77 PHIL. REV. 281 (1966) (describing uses of definiteness); Charles J. Fillmore, *On the Syntax of Preverbs*, 1 GLOSSA 91 (1967) (describing functions of definiteness); Jeanette K. Gundel, Nancy Hedberg & Ron Zacharski, *Cognitive Status and the Form of Referring Expressions in Discourse*, 69 LANGUAGE 274 (1993) (categorizing definite descriptors in terms of familiarity, identifiability, and ability to denote referents); Lauri Karttunen & Stanley Peters, *Conventional Implicature*, *in* SYNTAX AND SEMANTICS 11: PRESUPPOSITION 1–56 (Oh & Dinneen eds., 1979) (relating definiteness to the feature of specificity); James D. McCawley, *Presupposition and Discourse Structure*, *in* SYNTAX AND SEMANTICS 11: PRESUPPOSITION 371–88 (Oh & Dinneen eds., 1979) (suggesting that definiteness corresponds to uniquely salient referents); Ellen F. Prince, *The ZPG Letter: Subjects, Definiteness, and Information-Status*, *in* DISCOURSE DESCRIPTION: DIVERSE ANALYSES OF A FUNDRAISING TEXT 295–32 (S.A. Thompson & W. C. Mann eds., 1992) (contending that definiteness encodes a presupposition that the referent is familiar to the addressee); François Recanati, *Domains of Discourse*, 19 LINGUISTICS AND PHIL. 445 (1996) (theorizing that definiteness is related to the presentation of unique information in discourse); Bertrand Russell, *On Denoting*, 14 MIND 479 (1905) (describing definiteness as a marker of uniqueness in declarative statements).

[14] Barbara Abbott, *Definiteness and Indefiniteness*, *in* THE HANDBOOK OF PRAGMATICS 122–149 (R.L. Horn, & G. Ward eds., 2006) [hereinafter *Definiteness and Indefiniteness*].

[15] *See id*.

[16] *See, e.g.*, Abbott, *supra* note 13; Recanati, *supra* note 13.

[17] *See Definiteness and Indefiniteness*, *supra* note 14, at 125.

athlete." By contrast, adjectives that are not superlative may be paired with either definite or indefinite articles: "the red apple" and "a red apple."

While the uniqueness theory of definiteness was first applied only to definite descriptions of referents in the singular (*e.g.*, "the Queen of England"), the theory has been extended to plurals and mass nouns (*e.g.*, "the dancers" or "the furniture"). In such cases, definiteness has been described as the inclusive reference of the *totality* of potential subjects or subject matter to which the reference could apply.[18] For example, "the dogs in the back yard are black" means "more than one dog is in a specific, identifiable backyard (known to at least the speaker), and all of these dogs are black."

The uniqueness theory of definiteness does not support the plurality's "relative permanence" requirement. Given that the uniqueness theory of definiteness indicates that all potential subjects of a reference are encompassed by a definite plural noun, even ephemeral waters are denoted by the phrase "the waters of the United States." In other words, because definiteness denotes the maximal applicable scope of a potential plural reference,[19] "the waters of the United States" would refer to *all* the bodies of water that are "of" the United States. (The proper interpretation of the applicable scope is determined by the possessive relationship, which is discussed below.)

b. The Plurality's View is Not Supported by the Familiarity Theory

The familiarity theory of definiteness posits that definiteness generally encodes a presupposition of referential familiarity.[20] In this view, definiteness generally denotes a referent that "has been explicitly introduced into the discourse context or is common knowledge between speaker and addressee."[21] That is, definiteness "marks" the referent as something that is presumably "known" to the addressee. By contrast, indefinite noun phrases (in this view) would function to refer to new/unfamiliar referents. Definiteness corresponds with information that an addressee is known or thought to know, but this is not always the case: "some [noun phrases] which are definite in form can introduce entities not assumed to be known to the addressee at the time of the utterance."[22]

The plurality's view of definiteness is also inconsistent with the familiarity theory of definiteness. This is evidenced by how one can readily and unremarkably use the definite determiner to specify familiar referents that are not relatively permanent (*e.g.*, "the wildfires of California"). Given that definiteness can readily refer to inherently ephemeral referents (*e.g.*, wildfires), the plurality's view of definiteness is untenable.

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[18] JOHN A. HAWKINS, DEFINITENESS AND INDEFINITENESS (1978).

[19] Gianluca Storto, *Possessives in Context*, *in* POSSESSIVES AND BEYOND: SEMANTICS AND SYNTAX 59–86, 77 (Ji-yung Kim, Yury A. Lander & Barbara H. Partee eds., 2005).

[20] *See* DWIGHT BOLINGER, MEANING AND FORM 90–123 (1977); CHRISTOPHERSEN, *supra* note 13; Prince, *supra* note 13.

[21] *See Definiteness and Indefiniteness*, *supra* note 14, at 134.

[22] *Id.* at 132.

c. The Plurality's View is Unrelated to the Concept of Specificity

Linguists have also observed that definiteness is associated with specific (rather than non-specific) referents. For instance, the phrase "Snow White ate *the* apple" conveys the idea that "Snow White didn't just eat any apple, she ate *the apple* given to her by the Evil Queen." Traditionally, the specific-nonspecific distinction has been characterized as something akin to a referential-attributive distinction.[23] A referential statement is one whereby a speaker uses definiteness as a way of identifying a referent. By contrast, an attributive statement is one whereby a speaker makes a general statement about a situation. For example, the statement "Smith's murderer is insane" has a referential sense ("the person who murdered Smith is insane") and an attributive sense ("although it is unclear who murdered Smith, they are certainly insane").

The specificity theory of definiteness does not provide much help in the interpretation of the Definition, but it is certainly unrelated to relative permanence. The features of specificity encoded in the Definition can be understood as referential: Congress was referencing those waters that fall under federal jurisdiction (and this would demarcate a category of waters subject to federal regulation). An attributive sense for "the waters of the United States" is implausible. In any event, the concept of specificity provides no support for a relative permanence requirement.

4. The Plurality Erred by Drawing a Bright Line Between "Point Sources" and "Waters of the United States"

Likewise, the plurality incorrectly assumed that an ephemeral stream cannot simultaneously satisfy definitional requirements of two categories (that are never stated to be mutually exclusive): "point source" and "navigable waters."[24] After noting that the statutory definition of "point source" includes "channels,"[25] the plurality wrongly inferred that a channel carrying intermittent flows of water can only be a "point source" and not also a "navigable water." But nothing in the Act precludes a body of water from satisfying the definitional requirements of these two categories. Indeed, if a "channel" (by virtue of being mentioned as an example of a "point source") is categorically not capable of being a "navigable water," the plurality's subsequent reference to channels that are navigable waters is incomprehensible.[26]

Likewise, the Agencies have already observed that "it would be impossible to achieve Congress's objective if the scope of authority were constrained to *waters traditionally understood as navigable* because *those channels* cannot be protected without protecting the tributaries that flow into them and wetlands adjacent to them."[27] If the ordinary meaning of

[23] *Id.* at 146.

[24] *Rapanos*, 547 U.S. at 735 (plurality opinion) (citing 33 U.S.C. § 1362(12)(A)) ("The definition of 'discharge' would make little sense if ['point sources' and 'navigable waters'] were significantly overlapping.").

[25] *Id.* at 716 (citing 33 U.S.C. § 1362(14)).

[26] *See id.* at 733 (indicating that "streams" comprised of a continuous flow of water through a *channel* may be considered navigable waters).

[27] 86 Fed. Reg. at 69,394 (citing *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974)).

channels could not be consistent with both the statutory definition of "point source" and "navigable waters," this excerpt would be nonsensical.

B. The Ordinary Meaning of "the Waters of the United States" Includes all Bodies of Water that Fall under the Federal Government's Sovereign Power

Under the canon of ordinary meaning, "the waters of the United States, including the territorial seas" should be interpreted consistently with how Congress would have presumed the public to understand the term. And research from semantics and linguistics are critical in assessing that public understanding. These disciplines provide that possessive constructions, like "the waters of the United States, including the territorial seas" generally include three elements: the denotation of the *possessor*, the *relation* between the *possessor* and *possesseum* (the thing possessed), and the denotation of the *possesseum*.[28] This section clarifies the meaning of each: (1) "the United States" (the possessor), (2) the possessive relation between the possessor and possesseum, and (3) "the waters" (the possesseum).

1. The Possessor, "the United States," Refers to the Federal Government

First, it is worth noting the distinction between "United States" and "*the* United States." The former is a term of art that is used in many statutory schemes to specify geographic areas. For example, 22 U.S.C. § 408a defines "*United States*" as "the Canal Zone and all territory and waters, continental or insular, *subject to the jurisdiction of the United States*" (emphasis added). Likewise, 18 U.S.C. § 5 defines "*United States*" as including "all places and waters, continental or insular, *subject to the jurisdiction of the United States*, except the Canal Zone" (emphasis added). Notably, "United States" is defined in relation to "*the* United States" in these definitions, indicating a distinction (because the definition would otherwise be circular).

These definitions imply that "*the* United States" is an entity that may exercise jurisdiction over those geographic areas—land masses and bodies of water. Several statutes under the same title as the Clean Water Act similarly demonstrate that "the United States" is an entity that may exercise jurisdiction. For example, the Great Lakes Environmental Sensitivity Index Act of 2020 defines the "Great Lakes" as meaning "Lake Erie, Lake Huron, Lake Michigan, Lake Ontario, Lake St. Clair, Lake Superior, the Saint Mary's River, the Saint Clair River, the Detroit River, the Niagara River, the Saint Lawrence River to the Canadian border, to the extent such lakes and rivers are *subject to the jurisdiction of the United States*."[29] Likewise, 33 U.S.C. § 1907(c)(2)(A) provides that "[w]hile at a port or terminal subject to the jurisdiction of the United States, a ship . . . may be inspected . . . to verify whether or not the ship has discharged a harmful substance." Thus "the United States" refers not to the country's geographic extent but rather to the federal government as the entity to which Congress grants authority to exercise jurisdiction over certain areas.

[28] Storto, *supra* note 19, at 59.

[29] 33 U.S.C. § 883a (emphasis added).

2. The Possessive Relation in the Phrase "the Waters of the United States" is Characterized by the Sovereign Power to Exercise Jurisdiction

Possessive relations can have highly flexible meanings not limited to the concept of possession or ownership (*e.g.*, "John's picture" may refer to a picture John owns [of something or someone else], or a picture that depicts John [regardless of whether he owns it]).[30] Here, the proper interpretation of the possessive relation in the Definition is one of sovereign power to regulate rather than ownership or mere geographic inclusion (*i.e.*, all bodies of water inside of the nation's borders).

In addition to semantics and linguistics, traditional tools of statutory interpretation provide important insights on the nature of the relationship between "the waters" and "the United States" in the possessive construction being examined. Specifically, the whole-text canon, the associated-words canon (*noscitur a sociis*), the related-statutes canon (*in pari materia*), and the constitutional-doubt canon similarly indicate that the relationship between possessor (the United States) and possesseum ("the waters . . ., including the territorial seas") is primarily characterized by the sovereign power to exercise jurisdiction rather than other potentially applicable possessive relations (*e.g.*, geographic and ownership).

The whole-text canon indicates that the possessive relation in this instance is not characterized by ownership. Nowhere in the Clean Water Act is the federal government empowered to purchase waters, which would be necessary if the possessive relationship were one of ownership. By contrast, the Endangered Species Act, for example, empowers the federal government to purchase land as a means of meeting its congressional mandate to preserve biodiversity.[31] Reading the Clean Water Act and the Endangered Species Act statutes *in pari materia*, the Clean Water Act does not provide the federal government with the means to regulate water via ownership.

As for *noscitur a sociis*, which provides that associated words bear on the interpretation of a term, the term "the waters of the United States" is associated with "the territorial seas" in such a way that "the territorial seas" is inclusive in the set of "the waters of the United States." In semantics, this relationship is considered *taxonomical* (*e.g.*, the word "color" and "red" have a taxonomical relationship). Specifically, "the territorial seas" is a *hyponym* of "the waters of the United States." A hyponym is a term that falls within the broader category of a more general term, the hypernym (*e.g.*, "cat" is a hyponym of "mammal," which is the hypernym of "cat"). A hyponym necessarily shares the general features of the broader hypernym. For example, given that mammals are warm-blooded, all cats must be warm-blooded.

Thus, the relationship between "the waters"—which expressly include "the territorial seas"—and "the United States" must cohere with the relationship between "the United States" and "the territorial seas," which primarily involves sovereign power. By definition, "the territorial seas" extends beyond a nation-state's land boundaries and internal waters, and the concept of a

[30] *Id.*

[31] 16 U.S.C. § 1534.

nation's territory implicates its sovereign authority over that area.[32] Thus the primary relationship between the United States and territorial waters is one of sovereign power, and the United States' relationship over "the waters" must be consistent with and inclusive of the nature of that relationship. Although the relationship between the territorial seas and a nation's land mass is in a sense geographical—because it is defined by reference to distance from the shore—it is better understood as being based on the sovereign power to exercise jurisdiction. Notably, as discussed earlier, "the United States" is construed in statutes as an entity that may exercise jurisdiction.

Additionally, the Clean Water Act's definition of "the territorial seas" is consistent with the traditional usage of "territorial seas" in international law. In that context, the "canon shot" rule traditionally defined territorial seas as the *sovereign* waters of a nation, which extended outward from a nation's shores by 3 miles (or the range of a canon at the time).[33] Although under current international law, territorial seas are defined as "[t]he ocean waters over which a coastal country has *sovereignty*, extending seaward up to 12 nautical miles from the coastline;"[34] the Clean Water Act's definition limits the statute's reach to the traditional 3 miles. 33 U.S.C. § 1362(8). Applying *noscitur a sociis*, it is reasonable to conclude that "the waters," which is associated with "the territorial seas," is similarly related to sovereignty.

3. The Possesseum, "the Waters," in the Context of the Definition, Refers to All the Bodies of Water that Fall under the Federal Government's Sovereign Power to Regulate

A threshold issue is whether the Definition has a technical meaning. The canon of ordinary meaning provides that judges interpret words and terms "in their ordinary, everyday meanings unless the context indicates that they bear a technical sense."[35] Courts generally accept that a word bears a technical meaning for the purposes of a statute when it is defined by that statute, or if the term has been reappropriated from another legal source (*e.g.*, another statute or the common law) and has an accepted meaning in that legal context.[36] If the term is defined by statute or if it has an accepted meaning in another statutory context (from which it was borrowed) or the common law, it is understood to be a term of art or a technical term.[37]

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[32] *See* 33 U.S.C. § 1362(8) (defining the "territorial seas" as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles."). Conversely, "high seas" traditionally refer to "[t]he ocean waters beyond the jurisdiction of any country . . . 3 miles from the coastline." *Sea*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

[33] PHILLIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 6 (1927) (emphasis added).

[34] *Sea*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added); *see also* Convention on the Law of the Sea, art. 3, 1833 U.N.T.S. 397 (Dec. 10, 1982) ("Every [nation] has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.").

[35] SCALIA & GARNER, *supra* note 11, at 6.

[36] Larry M. Eig, Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* 7 (2014), https://fas.org/sgp/crs/misc/97-589.pdf.

[37] *Id*.

However, while accepting the specialized meanings of technical language is generally preferred, courts will still sometimes accept the ordinary meaning of a term over its technical sense(s).[38]

As applied here, "navigable waters"—being a defined statutory term—bears a technical sense. Accordingly, as noted by a unanimous Court in *Riverside Bayview*, the term "navigable waters" is of "limited import" compared to its statutory definition, "the waters of the United States."[39] By contrast, "the waters"—being part of this definition (rather than a defined term) and not having been appropriated from another legal source—is not a technical term.[40] Indeed, courts seek to discern its meaning, rather than identify its accepted meaning as they would if it were a technical term. Having determined that "the waters" does not bear a technical sense, the ordinary meaning of the phrase must be identified.

In addition to the features of definiteness discussed earlier, definite determiners have a special interaction with possessive constructions: where both the possessor and possesseum are definite (*e.g.*, "*the* waters of *the* United States"), the possesseum is interpreted as referring to the maximal set possible within the scope of reference delineated by the possessive relation.[41] For example, "the legs of the chair" refers to *all* the legs of a particular chair. It does not mean all chair legs in the world because it is limited by its relation to the possessor, the chair. "The waters," then, should similarly be interpreted as referring to the maximal set of "waters" possible within the limits of the possessive relation (*i.e.*, sovereign authority).

At the same time, because the possesseum's meaning is narrowed by the relational element of the possessive construction,[42] the possesseum cannot refer to entities beyond the delineated range set by the possessive relation. For example, the phrase "the pictures of the lake house" limits the term "the pictures" to the possessive relation, which is characterized by representational likeness. The phrase essentially states that "there are photographs that depict the likeness of the lake house, and the photographs being referred to are the photographs that depict the likeness of the lake house." The possessive relation limits the reference to exclude photographs that do not depict the lake house. In this same way, the possessive relation of sovereign authority results in the meaning of "the waters of the United States" being "there are bodies of water that the United States has a sovereign right to regulate, and the bodies of water being referred to in this phrase are the bodies of water which the United States has a sovereign power to regulate."

In summary, because the Definition is a possessive construction, its meaning may be identified by assessing its possessor, possessive relation, and possesseum. As argued above, the possessor is the federal government, the possessive relation is one of sovereign power, and the possesseum is all bodies of water delimited by the possessive relation with respect to the possessor.

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[38] *Id.* at 8.

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

[40] By contrast, "the territorial seas" is a technical term as evident both by the term's use in international legal discourse and by the need for a subsequent definition. *Cf.* 33 U.S.C. § 1362(8).

[41] Storto, *supra* note 19, at 77.

[42] *See* CHRIS BARKER, POSSESSIVE DESCRIPTIONS (1995).

Accordingly, "the waters of the United States" includes all bodies of water that fall under the federal government's sovereign power.

C. The Definition's Ordinary Meaning Bolsters the View that Congress Exercised its Full Commerce Clause Power when Enacting the Clean Water Act

The upshot of the Definition's proper understanding—as all waters subject to the federal government's regulatory powers—is that the Definition, by itself, imposes no limit on the CWA's jurisdictional reach beyond the limits inherent in the Constitution. In other words, if Congress has an enumerated power to regulate a water, then that water falls under the Definition. Consequently, the Definition's proper meaning is consistent with the view that, in enacting the CWA, Congress exercised its full Commerce Clause power.

As NPCA argues in its comment letter, because Congress was exercising its full Commerce Clause power, and not only its power over navigation, the Agencies should restore the commerce-based categories of "other waters" contained in the 1986 regulations. Moreover, given this conclusion, Justice Kennedy's "significant nexus" concept and, in particular, the Proposal's "significantly affects" test, are well within the Agencies' authority under the Act. The *Rapanos* plurality's narrower test, by contrast, contravenes the Act's text. Most importantly, as argued in full in the comment, the Agencies' "significantly affects" test—particularly if modified as argued for in the comment—reflects the scientific reality of the interconnectedness of waters, the Act's purpose, and Supreme Court and other case law.