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U.S. Environmental Protection Agency
EPA Docket Center, Water Docket
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Via Federal eRulemaking Portal

RE: Implementation of the Definition of Waters of the United States (Docket ID No. EPA-HQ-OW-2025-0093)

I. Introduction

Attorney General Russell Coleman, Agriculture Commissioner Jonathan Shell, and Department of Fish & Wildlife Resources Commissioner Rich Storm submit this comment, on behalf of the Commonwealth of Kentucky, in response to the notice published in the Federal Register on March 24, 2025, entitled *WOTUS Notice: The Final Response to SCOTUS*, 90 Fed. Reg. 13428 (Mar. 24, 2025) (the "Notice"), which invited the submission of recommendations for defining "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA"). Kentucky appreciates the opportunity to provide input on this critical definition.

As a State with extensive water features and a large agricultural community, Kentucky has a profound interest in a clear, lawful, and workable WOTUS definition. That definition should recognize the Commonwealth's sovereign interest in managing, protecting, and caring for its waters and lands, avoid unnecessary regulatory burdens, and protect the property rights of Kentuckians, while also

ensuring effective water quality protection. The undersigned write to emphasize the need for regulatory clarity and a definition of WOTUS that is consistent with statutory intent and Supreme Court precedent. This comment also offers practical recommendations, including suggestions about mapping tools and safe harbor provisions, that the undersigned believe would make the WOTUS definition more transparent and workable for landowners and regulators alike.

II. Control Over Waters

The "power to control navigation, fishing, and other public uses of water[] 'is an essential attribute of state sovereignty.'" *Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 631 (2013) (citation omitted); *see also Sackett v. Env't Prot. Agency*, 598 U.S. 651, 679 (2023) ("Regulation of land and water use lies at the core of traditional state authority."). Accordingly, "[f]or most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions." *Sackett*, 598 U.S. at 659. In contrast, the role of the federal government has been "largely limited" to regulating "traditional navigable waters—that is, interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in this way." *Id*. It is imperative the Agencies keep this division of control in mind when defining "waters of the United States."

The basis for Congress's authority to enact the CWA necessarily sets the outer boundaries of what constitutes WOTUS—that is, which waters the federal government can regulate. The Commerce Clause assigns to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with

the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. "From the beginning, it was understood that '[t]he power to regulate commerce, includes the power to regulate navigation,' but only 'as connected with the commerce with foreign nations, and among the states.'" *Sackett*, 598 U.S. at 686–87 (Thomas, J., concurring) (quoting *United States v. Coombs*, 12 Pet. 72, 78 (1838)); *Gibbons v. Ogden*, 9 Wheat. 1, 190 (1824) ("All America understands . . . the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed.").

In a predecessor statute to the CWA, Congress used the term "navigable waters" to refer to WOTUS. *See Sackett*, 598 U.S. at 661 (citing 33 U.S.C. § 1160(a) (1970 ed.)). The Supreme Court interpreted this phrase to mean "navigable in fact," that is, waters that "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1870). The Supreme Court distinguished navigable waters of the United States from "navigable waters of the States." *Id.* Waters that are navigable only within a State are not waters of the United States. *See United States v. The Montello*, 11 Wall. 411, 415 (1871); c*f. The Daniel Ball*, 77 U.S. at 564.

This was still the understanding when the CWA was enacted in 1972. Leading up to and around the time of enactment, courts "continued to apply traditional navigability concepts" in cases involving the regulation of waters. *Sackett*, 598 U.S. at 698 (Thomas, J., concurring) (citing *United States v. Standard Oil Co.*, 384 U.S.

224, 226 (1966); *United States v. Republic Steel Corp.*, 362 U.S. 482, 487–91 (1960); *see also Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1167 (10th Cir. 1974) ("Although the definition of 'navigability' laid down in *The Daniel Ball* has subsequently been modified and clarified, its definition of 'navigable water of the United States,' insofar as it requires a navigable interstate linkage by water, appears to remain unchanged." (internal citations omitted)).

Accordingly, when Congress enacted the CWA, the terms "'navigable waters,' 'navigable waters of the United States,' and 'waters of the United States' were still understood as invoking only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce." *Sackett*, 598 U.S. at 685 (Thomas, J., concurring). And these terms were used interchangeably. *See id.* at 699. "The terms 'navigable waters' and 'waters of the United States' shared a core requirement that the water be a 'highway over which commerce is or may be carried,' with the term 'of the United States' doing the independent work of requiring that such commerce 'be carried on with other States or foreign countries.'" *Id.* (quoting *The Daniel Ball*, 10 Wall. at 563). As Justice Thomas noted in his concurrence in *Sackett*, "[i]t would be strange indeed if Congress sought to effect a fundamental transformation of federal jurisdiction over water through phrases that had been in use to describe the traditional scope of that jurisdiction for well over a century and that carried a well-understood meaning." *Id.* In fact, Congress explicitly recognized the primacy of the States' control over waters when it enacted the CWA. In § 1251(b) of the CWA, Congress said the Environmental Protection Agency ("EPA") and the

U.S. Army Corps of Engineers ("Corps") (collectively, "the Agencies") must "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . ." *See* 33 U.S.C. § 1251(b).

A few years after the CWA was enacted, the Corps issued a rule that reflected the long-understood division of control over waters. The rule defined "waters of the United States" as those waters that have been, are, or may be, used for interstate or foreign commerce. *Permits for Activities in Navigable Waters or Ocean Waters*, 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) ("The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."). The Supreme Court found no persuasive evidence that the Corps "mistook Congress' intent" when it promulgated these regulations and used navigability as a determinative factor. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) (*SWANCC*). Indeed, the Court said "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172.

This limitation on WOTUS has been reiterated by the Supreme Court several times. In *Rapanos v. United States*, Justice Scalia's plurality opinion emphasized that

the traditional concept of "navigable waters" must inform and limit the construction of the phrase "the waters of the United States." 547 U.S. 715, 734–36 (2006). Then again in *Sackett*, the Court reaffirmed its refusal to read "navigable" out of the CWA because the term "at least shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'" 598 U.S. at 672 (citation omitted).

Defining WOTUS must begin and end with a recognition of the division of control over water. States have primary control over waters, and the federal government only has authority through the Commerce Clause to assert control over waters that impact interstate and foreign commerce. A definition that is untethered from—or even too loosely tethered to—this division of control will exceed the Agencies' authority under the CWA and violate the principles of federalism and the Constitution.

III. Harm to Water-Abundant States Caused by an Overbroad Definition

Kentucky is a water-abundant state. Three sides of it are bordered by rivers.[1] There are thirteen major river basins in Kentucky that contain more than 90,000 miles of streams.[2] And it has 1,100 commercially navigable miles of running water, which is more than any other state except Alaska.[3] That means that much of the Commonwealth's land—and the land owned by its citizens—contains water features.

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[1] *Kentucky Geological Survey Water Fact Sheet*, UNIVERSITY OF KENTUCKY (2014), *available at* https://www.uky.edu/KGS/education/factsheet/factsheet_water.pdf [hereinafter UK Fact Sheet].

[2] *Id.*

[3] *See* GOVERNMENT RESOURCES: STATES: KENTUCKY FACTS, UNIVERSITY OF LOUISVILLE, https://library.louisville.edu/ekstrom/gov_states/kyfacts#:~:text=Kentucky%20has%20more%20miles%20of,of%20the%20state's%20land%20area (last visited Apr. 16, 2025); UK Fact Sheet, *supra* note 1.

Therefore, a vague or overly broad definition of WOTUS has an outsized negative effect on Kentucky.

Landowners who fail to correctly identify whether a water is WOTUS are subjected to substantial civil and criminal penalties. *Sackett*, 598 U.S. at 660–61. Uncertainty about whether a water is jurisdictional can lead to the Commonwealth and its citizens not undertaking projects—particularly because recent regulations have defined WOTUS broadly. *See Sackett*, 598 U.S. at 669–70 ("[B]ecause the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of 'waters of the United States' means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties."). For instance, the Kentucky Department of Fish & Wildlife Resources ("KDFWR") owns approximately 169,373 acres throughout the Commonwealth. It manages these acres as part of its mission to conserve, protect, and enhance Kentucky's fish and wildlife resources and to provide opportunities for hunting, fishing, trapping, boating, shooting sports, wildlife viewing, and related activities on those properties. For projects on these properties that impact a "water of the United States," KDFWR must seek a federal permit and sometimes pay mitigation fees. A broader definition of "waters of the United States" increases the number of projects for which KDFWR must seek permits and pay mitigation. This means KDFWR must expend more of its funds to do projects and could potentially cause the department to forgo some projects because it could not justify the mitigation fees.

An overly expansive definition of "waters of the United States," therefore, limits the freedom of the Commonwealth to engage in projects on many of its properties. And it also discourages Kentucky citizens from engaging in projects on the lands they own. As a result, Kentucky suffers injuries to its economy and to its sovereignty as it is kept from controlling the waters that should be within the exclusive control of the Commonwealth. While this happens in every State because of an improper and unclear WOTUS definition, the impact is more severe in water-abundant States like Kentucky.

IV. Defining WOTUS

Thus, it is crucially important that the scope of WOTUS be clearly and correctly defined. The regulatory text defining "waters of the United States" must align with the CWA and acknowledge the source of Congress's authority for enacting the CWA. The Supreme Court's decision in *Sackett* offers important guidance. Moreover, for transparency and ease of understanding the scope of WOTUS, the undersigned suggest revising the definition to enumerate the categories of jurisdictional waters in a concise manner, followed by a list of exclusions.

Kentucky proposes the following jurisdictional categories:

(a) *Traditional Navigable Waters (TNWs)* are water bodies currently used or susceptible for use in interstate or foreign commerce (*e.g.*, navigable rivers, navigable lakes, tidal waters, and the territorial seas).

(b) *(Jurisdictional) Tributaries* are perennial tributary streams of a traditional navigable water, provided they have relatively permanent flow (aside

from infrequent droughts) and a continuous surface connection to a traditional navigable water. This language aligns with longstanding practice but removes the significant nexus element. For added clarity, a "tributary" should be defined as a water conveyance with a natural bed and banks and an ordinary high-water mark that contributes surface flow to a downstream navigable water in a typical year. Further, the regulation should note that flow is required for tributaries. Standing or pooling water that is not flowing due to an obstruction, whether natural or man-made, that prevents navigability and eliminates the continuous surface connection is not jurisdictional. Additionally, ephemeral streams, which are streams with downstream flow only in response to rainfall, and intermittent streams, which have only seasonal flow, are also not jurisdictional.

(c) (*Jurisdictional) Lakes, Ponds, and Impoundments* are natural lakes, ponds, and impoundments (reservoirs) of otherwise jurisdictional waters that are relatively permanent (*i.e.*, hold water year-round in normal years). This would cover, for example, a natural lake that feeds a navigable river or a long-standing impoundment on a jurisdictional tributary. It would *not* include isolated ponds (*see* exclusions below) or ephemeral features.

(d) *Adjacent Wetlands* are only those wetlands that physically touch and share a continuous surface water connection with other jurisdictional waters (so there is no clear demarcation between the water and the wetland). This category should explicitly require the *continuous surface connection* test from *Sackett*. The regulation

should explain that wetlands separated from a jurisdictional water by upland or barriers are not adjacent and not jurisdictional.

Following the jurisdictional categories, the regulation should list specific exclusions to eliminate any doubt. Kentucky recommends the following express exclusions:

(a) *Ephemeral tributary streams* are streams, channels, swales, gullies, or low areas that carry water only after precipitation events. This captures the non-jurisdictional status of ephemeral streams. The Agencies should look to the flow and downstream surface connectivity to determine if the feature is ephemeral or intermittent. Man-made berms or culverts that have created pooling may allow for the seasonal presence of water, but the feature is nevertheless ephemeral if there is no outflow or surface connectivity downstream.

(b) *Intermittent tributary streams* are streams that have continuous surface flow only for part of the year. The *Sackett* court held "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.'" *Sackett*, 598 U.S. at 671 (cleaned up, citation omitted). Intermittent tributary streams are not jurisdictional because they are not navigable and because their connection to traditional navigable waters is not relatively permanent.[4] Determining jurisdiction over intermittent streams has been a complicated process for the Agencies, involving the consultation of several field

[4] *See infra* Section V for a discussion on defining "relatively permanent."

manuals and regional streamflow duration assessment methods.[5] The Agencies should avoid this unpredictable and inefficient process—and realign the WOTUS definition with the authority for the federal government's control—by explicitly excluding intermittent streams from federal jurisdiction.

(c) *Ditches or Man-Made Features* are irrigation ditches, ponds, settling basins, water reuse pits, stormwater retention or detention ponds, roadside and storm sewer ditches that lack a hydrological connection. While some of these features had been excluded by policy already,[6] including the exclusion in formal regulations will remove uncertainty for municipalities and landowners. It will also correct the Agencies' prior regulatory efforts that refused to require a hydrologic connection or confusingly asserted that "[a] continuous surface connection is not the same as a continuous surface water connection." *See, e.g.*, *Waters of the United States*, 88 Fed. Reg. 3,004, 3051, 3095, 3096 (Jan. 18, 2023).

(d) *Prior Converted Cropland (PCC)* is farmland that was drained or filled to cultivate crops prior to a certain date. As already recognized, PCC is not WOTUS.

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[5] *See* Fritz, Ken M., et al., *Field Operations Manual for Assessing the Hydrologic Permanence and Ecological Condition of Headwater Streams*, EPA, *available at* https://cfpub.epa.gov/si/si_public_record_report.cfm?LAB=NERL&dirEntryID=159984; Levick, Lainie R., et al., *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest,* EPA, https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf; REGIONAL STREAMFLOW DURATION ASSESSMENT METHODS, EPA, https://www.epa.gov/streamflow-duration-assessment (last visited Apr. 15, 2025).

[6] *See, e.g., Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, EPA & Corps (Dec. 2, 2008), *available at* https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (explaining the Agencies "generally will not assert jurisdiction over . . . ditches . . . that are excavated wholly in and draining only uplands and that do not carry relatively permanent flow of water").

This exclusion is critical for the agriculture community. It should remain, and EPA should coordinate with the U.S. Department of Agriculture on maintaining an updated registry of PCC for clarity.

(e) *Isolated, Intrastate Waters with No Surface Connection to TNWs* are any waters that do not fall into the defined jurisdictional categories (with their connection requirements). Waters that lack a surface connection to other jurisdictional waters are excluded per *SWANCC* and *Sackett*, but it helps to be explicit that geographic isolation puts a feature outside federal jurisdiction.

V. Comments on WOTUS Key Terms

The Notice seeks input on the meaning of several key terms in light of *Sackett*. The undersigned offer the following definitions:

(a) *"Relatively Permanent"*: This term should encompass only perennial streams, *i.e.*, waters that have a year-round continuing flow and have a continuous surface connection to downstream waters. Traditionally there are three categories of streams based on their flow regime: perennial, intermittent, and ephemeral.[7] As recommended above, ephemeral and intermittent streams should not be jurisdictional because they are not relatively permanent as required under *Sackett*, 598 U.S. at 671. The drought situations of perennial streams are contemplated by the adverb "relatively" that modifies "permanent." Intermittent streams do not have to be jurisdictional for "relatively" to serve a purpose.

[7] *See, e.g.,* LEARN ABOUT REGIONAL SDAMS, EPA, https://www.epa.gov/streamflow-duration-assessment/learn-about-regional-sdams (last visited Apr. 16, 2025).

(b) *"Continuous Surface Connection"*: This phrase should be defined in a straightforward, literal way. Continuous surface connection means an unbroken hydrologic connection at the surface between the water feature in question and a TNW, such that they form a single contiguous water body. For example, if a wetland directly abuts or touches a jurisdictional water (with no intervening upland or barrier), it has a continuous surface connection and thus falls within "adjacent wetlands" jurisdiction. If there is any break, such as natural berms, uplands, man-made levees, elevated culverts, ditches, or other features that allow a person to visually distinguish where the water ends and land (or the wetland) begins, then the connection is not continuous in the sense used by the Court in *Sackett*. *See* 598 U.S. at 678. While the undersigned acknowledge there can be close cases, such as a wetland separated from a stream by a narrow natural berm through which some water may seep or flow subsurface, the Supreme Court's emphasis in *Sackett* was on surface connection. *See, e.g., id.* at 678–79, 684. Thus, *subsurface hydrologic connections* (like groundwater exchanges) do not suffice for CWA jurisdiction. This is because federal jurisdiction over waters derives from Congress's authority to regulate *navigable* waters to protect and promote interstate and foreign commerce. In determining whether a water is jurisdictional, therefore, the Agencies shall be required to inspect all waters to ensure that there is a continuous surface connection to a TNW.

(c) "*Abut*": If the wetland and TNW do not physically touch in a normal year, the wetland is not jurisdictional. The Agencies should revise the regulatory

definition of "adjacent" to make it coterminous with the *Sackett* test. *See id*. at 678–79. The rule should state "adjacent" means "adjoining" in that an adjacent wetland is one that abuts and shares a continuous surface water connection with a TNW. The Agencies should delete any reference in regulations to "neighboring" or to specific distance-based adjacency criteria.

(d) "*Ditches*": Ditches and other artificial or man-made drainage features are always non-jurisdictional.

VI. Suggestions for WOTUS Implementation

Given the severe penalties for violations of the CWA, landowners and businesses must have confidence they can determine the status of waters on their properties without undue delay or confusion. As the *Sackett* court correctly observed, "[d]ue process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 680 (internal quotation marks omitted). The following suggestions would aid landowners in determining what conduct is prohibited under the CWA.

A. Abandon the 1987 Wetlands Delineation Manual

The 1987 U.S. Army Corps of Engineers Wetlands Delineation Manual[8] ("1987 Wetlands Manual") was published to "describe[ ] technical guidelines and methods using a multiparameter approach to identify and delineate wetlands for purposes of

[8] *Corps of Engineers Wetlands Delineation Manual*, U.S. ARMY CORPS OF ENGINEERS (Jan. 1987), *available at* https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Website%20Organization/Corps%20of%20Engineers%20Wetlands%20Delineation%20Manual%20(1987).pdf.

Section 404 of the Clean Water Act."[9] This "technical" approach sought evidence of hydrophytic vegetation, hydric soils, and wetland hydrology to determine that an area is a wetland.[10] The problem is that the technical approach is not practical for ordinary people, and it therefore fails to meet the level of due process demanded. *See Sackett*, 598 U.S. at 680 (explaining due process requires Congress to define penal statutes so "ordinary people can understand what conduct is prohibited"). For this reason, and because the technical approach is unnecessary after *Sackett*, the 1987 Wetlands Manual and its multiparameter technical approach should be eliminated. A simpler *safe harbor* system should be used instead.

B. Create an Upland Plant Safe Harbor

In calculating the amount of hydrophytic vegetation under the 1987 Wetlands Manual, landowners are to use the National Wetland Plant List ("NWPL") to classify plants into one of five categories (obligate wetland, facultative wetland, facultative, facultative upland, and obligate upland) while considering geographic region.[11] This method means the same species of plant is likely to have a different hydrophytic category depending upon the region in which it is found. In addition to being only one step in a complicated and technical—yet imprecise—approach to wetland delineation, there is real difficulty in distinguishing between species (especially immature plants), which results in more variability among different delineations.

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[9] *Id*. at vii.

[10] *Id*. at v.

[11] *See id*. at 12–14; ABOUT US, NWPL, https://nwpl.sec.usace.army.mil/about/ (last visited Apr. 16, 2015) ("The NWPL contains wetland indicator status ratings for individual plant species, which are used in determining whether the hydrophytic vegetation factor is met when conducting wetland delineations under the Clean Water Act[.]").

While the NWPL should not be used as part of the technical approach of the 1987 Wetlands Manual any longer, the NWPL can still be useful going forward. The presence of mature upland plants is a reliable indicator that an area is not a wetland, so the presence of mature upland plant species should be a safe harbor assurance that the area is not jurisdictional. This safe harbor would help the Agencies meet the ordinary person standard required by due process. *See Sackett*, 598 U.S. at 680. The Agencies should therefore review the NWPL and provide a list of upland plants, the existence of which, if photographed, can be used as a safe harbor that landowners can rely on to show an area is not jurisdictional.

C. Create a USGS Mapping System Safe Harbor

The USGS Mapping System[12] shows the classification of certain waters of the United States. The mapping system should be updated using the clear, navigable-based definition of TNWs suggested earlier in this comment. Then, only connected blue-line streams upstream from TNWs should be considered as potentially jurisdictional. There should be a safe harbor assurance for any landowner who impacts a stream that is not connected to a TNW on the USGS Mapping System. The public should be able rely on the government's mapping system.

While creating this safe harbor will reduce the amount of jurisdictional determination requests made to the Agencies, it will not eliminate all jurisdictional determinations. A landowner should be allowed to request a field inspection for any water on his property regardless of the water's label on the USGS Mapping System,

[12] THE NATIONAL MAP - ADVANCED VIEWER, USGS, https://apps.nationalmap.gov/viewer/ (last visited Apr. 15, 2025).

and the Agencies should timely provide a jurisdictional determination. The current practice of waiting over a year for the Corps to provide a determination is untenable. Jurisdictional determinations should be completed within ninety (90) days of a request.

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These implementation changes will give landowners confidence to proceed with projects when they have done their due diligence. They will also incentivize use of the jurisdictional determination process, which, while resource-intensive for the Agencies, ensures compliance up front rather than necessitating enforcement later. These changes therefore aid the Agencies in meeting the demanded standard of due process.

VII. Conclusion

How WOTUS is defined has far-reaching impacts. As the Agencies consider revising the definition, they must keep in mind the source of their authority and their responsibility to ensure due process. The undersigned hope this comment aids the Agencies in meeting their obligations and look forward to the Agencies restoring the proper division of control over waters between the federal government and the States.

Respectfully submitted,

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