



**Regulatory
Transparency
Project**
Unlocking Innovation & Opportunity

Restoring Meaningful Limits to “Waters of the United States”

Energy & Environment Working Group

Daren Bakst

Mark C. Rutzick

Adam J. White

This paper was the work of multiple authors. No assumption should be made that any or all of the views expressed are held by any individual author. In addition, the views expressed are those of the authors in their personal capacities and not in their official/professional capacities.

To cite this paper: D. Bakst, et al., “Restoring Meaningful Limits to “Waters of the United States””, released by the Regulatory Transparency Project of the Federalist Society, September 26 2017 (<https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-WOTUS.pdf>).

26 September 2017

Table of Contents

Executive Summary	3-4
The Constitutional Foundations of Federal Water-Quality Regulation	4-5
The Clean Water Act Muddies the Legal Waters	6-7
The 2015 “Waters of the United States” Rule Asserts Effectively Unlimited Authority Over Private Lands	7-8
The 2015 “Waters of the United States” Rule Imposes Immense Costs and Burdens on Private Property Rights and on Economic Growth	9-10
Conclusion	11

Executive Summary

On June 27, 2017, the Environmental Protection Agency, Department of Army, and Army Corps of Engineers proposed a rule that would rescind the “Waters of the United States Rule.” The following material was written before this event.

In a 2012 decision rejecting the Environmental Protection Act’s assertion of effectively unlimited discretion under the Clean Air Act, the Supreme Court observed that the “EPA asserts newfound authority to regulate millions of small sources — including retail stores, offices, apartment buildings, shopping centers, schools, and churches — and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate.”¹ Such a regulatory program violates basic notions of limited government and the rule of law, which is why the Court emphatically refused “*to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery.*”²

Justice Scalia’s nautical metaphor would have applied even more aptly to the EPA’s other major statute, the Clean Water Act. The EPA, with the U.S. Army Corps of Engineers, interpret the Clean Water Act’s grant of power over “navigable waters” to give regulators effectively *unlimited* powers — even claiming power to regulate dry lands as nominal “wetlands.”

Of course, environmental laws should protect wetlands. But the key word is “*wet*.” As self-evident as that distinction might seem, it was ignored by the last major regulatory initiative to interpret the Clean Water Act’s key term: “navigable waters.” The Act defines “navigable waters,” in turn, as “the waters of the United States.”³ And in recent years regulators have attempted to interpret that term so expansively as to effectively eliminate any limits on regulators’ powers: specifically, in the Obama Administration’s controversial “Waters of the United States Rule” (or, as the Administration labeled it, the “Clean Water Rule”), the EPA and Army Corps attempted to redefine “waters of the United States” to include patches of land that are rarely damp, let alone “navigable.”⁴

That expansive regulatory approach comes at great cost: The nation already spends \$1.7 billion annually on wetlands permits, as Supreme Court justices recently observed.⁵ The U.S. Chamber of Commerce states the matter even more bluntly: the EPA and Army Corps are attempting to put themselves “effectively in charge of zoning the entire country.”⁶

¹ Util. Air Reg. Group v. EPA, 134 S. Ct. 2427, 2446 (2014).

² *Id.* (emphasis added).

³ 33 U.S.C. § 1362(7).

⁴ 80 Fed. Reg. 37054 (June 29, 2015).

⁵ Rapanos v. U.S., 547 U.S. 715, 721 (2006) (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 74–76 (2002)).

⁶ Sean Hackbarth, Above the Fold, U.S. Chamber of Commerce, *Full Stream Ahead: Why the EPA’s Water Rule Goes Too Far* (May 27, 2015), <https://www.uschamber.com/above-the-fold/full-stream-ahead-why-epa-s-water-rule-goes-too-far>.

The National Association of Home Builders offered concrete examples: “[T]he final rule contains overly broad language that could place millions of additional acres of private land and countless miles of dry stream beds under federal jurisdiction. The rule is so extreme that the federal government will actually regulate certain roadside ditches, isolated ponds and channels that may only flow after a heavy rainfall. This means, for example, that a builder in Arizona would have to get a permit for an activity in a dry desert wash that could be 30 miles from the nearest river. Such intrusive federal encroachment is bad governance and will inevitably lead to bureaucratic delays, increased project costs and mitigation fees, and ultimately, decreased housing affordability.”⁷

President Trump already has signed an executive order directing the EPA and Army Corps to go back to the drawing board on the last “Waters of the United States Rule,” and urging the agencies to consider the much more constrained interpretation of federal power that Justice Scalia and a plurality of justices endorsed in a 2006 opinion (described further below).⁸ And the EPA and Army Corps already have formally announced their intent to revise the “Waters of the United States Rule” accordingly.⁹

A new rulemaking could help to reform some of the last rule’s excesses, but a more fundamental question remains: Should Congress reform the Clean Water Act itself, to provide more meaningful guidance to regulators and courts, and thus to prevent regulatory abuses?

I. The Constitutional Foundations of Federal Water-Quality Regulation

The Constitution grants Congress no express authority to exercise environmental regulation of water quality, or any environmental regulation at all. Congress’s power to regulate water quality has instead been inferred from the Commerce Clause, which provides that “[t]he Congress shall have power . . . to regulate *commerce* with foreign nations, and among the several states, and with the Indian tribes.”¹⁰

Specifically, Congress’s authority in this area is rooted in the expansive interpretations of federal authority set forth in a series of seminal Supreme Court opinions. In *Gibbons v. Ogden*, the Supreme Court began by determining that “commerce,” as that word is “used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word ‘commerce.’”¹¹ Thus, the Court later reiterated, Congress’s power to regulate navigation “extend[s] to the navigable waters of the states[.]”¹²

⁷ National Association of Home Builders, *NAHB to EPA: See You in Court* (July 2, 2015), <http://nahbnow.com/2015/07/nahb-to-epa-see-you-in-court/>.

⁸ Exec. Order 13778 (Feb. 28, 2017), 82 Fed. Reg. 12497 (Mar. 3, 2017) (citing *Rapanos*, 547 U.S. 715 (plurality op.)).

⁹ 82 Fed. Reg. 12532 (Mar. 6, 2017).

¹⁰ U.S. CONST. art. I, § 8, cl. 3.

¹¹ 22 U.S. 1, 193 (1824).

¹² *Mayor, Aldermen & Commonalty of City of N.Y. v. Miln*, 36 U.S. 102, 134 (1837).

The term “navigable waters” often defined rights established under various statutes.¹³ In *Nelson v. Leland*, the Court limited federal admiralty law to “all navigable waters, except to a commerce exclusively within a State. Many of our leading rivers are sometimes unnavigable; but this cannot affect their navigability at other times.”¹⁴

The English common law definition of navigable waters was traditionally limited to waters subject to the ebb and flow of tide. In *The Daniel Ball*,¹⁵ the Supreme Court determined that definition was too narrow for the geography of America, with its broad mid-continental rivers far from any ocean tide, and provided a new “navigable-in-fact” definition:

A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in laws which are navigable in fact. And they are navigable in fact when they 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. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, *when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.*¹⁶

This “new world” definition of navigability became fixed in American law. “*The Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds.”¹⁷

For well over a century, Congress followed the Supreme Court’s limitation of federal regulatory authority to “navigable waters,” in laws such as the Rivers and Harbors Appropriations Act of 1899 and the Steamboat Act of 1838.¹⁸ But this changed abruptly in 1972, when Congress enacted the Clean Water Act.

¹³ *Waring v. Clarke*, 46 U.S. 441, 504 (1847).

¹⁴ 63 U.S. 48, 56 (1859).

¹⁵ 77 U.S. 557 (1870).

¹⁶ *Id.* at 563 (emphasis added).

¹⁷ *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012) (citing cases); *see also Escanaba Cnty. v. Chicago*, 107 U.S. 678, 682–83 (1883) (observing that the English rule “has long since been discarded in this country”).

¹⁸ Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1121, 1151 (codified in 33 U.S.C. § 401) (“It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any . . . navigable water of the United States until the consent of Congress shall have been obtained[.]”); An Act to Provide Security for the Lives of Passengers on Board of Vessels Propelled by Steam, 5 Stat. 304 (1838) (providing that “it shall not be lawful for the owner . . . of any steamboat . . . to transport any goods, wares, merchandise or passengers, in or upon . . . navigable waters of the United States . . . without having first obtained . . . a license”); *see also* Stephen P. Mulligan, *Evolution of the Meaning of “Waters of the United States” in the Clean Water Act*, CONGRESSIONAL RESEARCH SERVICE (Aug. 8, 2016), <https://fas.org/sgp/crs/misc/R44585.pdf> (citing both Acts).

II. The Clean Water Act Muddies the Legal Waters

In 1972, Congress enacted the Clean Water Act, giving federal regulators authority to promulgate and enforce regulations protecting America's "navigable waters." And the Act defined "navigable waters" as "the waters of the United States, including the territorial seas."¹⁹

The Army Corps initially interpreted this provision in a manner consistent with the previous century of American constitutional history: that is, in 1974 it interpreted "waters of the United States" to cover waters that are readily navigable in fact.²⁰ In 1975, the Corps expanded its interpretation, "to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce."²¹ Then, in the late 1970s and early 1980s, the Army Corps began to extend this interpretation still further, to include "wetlands" (*i.e.*, bogs, swamps, marshes, etc.) that are adjacent to the aforementioned navigable waters.²²

In 1985, the Supreme Court concluded that the Army Corps's interpretation to that point was reasonable. "On a purely linguistic level," the Court conceded, "it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" But "common experience tells us that . . . the transition from water to solid ground is not necessarily or even typically an abrupt one," with swamps, marshes, shallows, and mudflats lying between a river and dry land. "Where on this continuum to find the limit of 'waters' is far from obvious," the Court urged, and to that end the justices concluded that the Army Corps's inclusion of wetlands as "waters of the United States" was a reasonable construction of a statute intended by Congress to go beyond actually navigable waters. "[I]t is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined."²³

But after this initial 1985 decision, federal regulators continued to stretch the bounds of the statute, well beyond the "adjacent wetlands" at issue in this case. And in subsequent cases, the Supreme Court *rejected* the agencies' assertions of power.

First, in *Solid Waste Agency of Northern Cook County*, the Army Corps attempted to define a sand and gravel pit as a "wetland." Specifically, the Army Corps asserted jurisdiction over a 533-acre parcel near Chicago, "which had been the site of a sand and gravel pit mining operation for three decades up until 1960." The old mining site began to revert to a more natural state, "with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds." During seasons when they were actually wet, these ponds and puddles ranged in depth from several inches to several feet. The Army Corps asserted that this qualified as "wetlands" — and thus developers would need to obtain federal permits before redeveloping the abandoned sand and gravel pit — simply because

¹⁹ 33 U.S.C. § 1362(7).

²⁰ See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 (2001) (quoting Army Corps's 1974 interpretation) (hereinafter, "SWANCC").

²¹ See *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123–124 (1985) (describing 1975 rule).

²² See *id.* at 124.

²³ *Id.* at 132–133.

these seasonal ponds and puddles were visited by birds migrating from one waterway to another.²⁴ But the Supreme Court rejected this expansive interpretation, concluding that the Army Corps’s approach raised “significant constitutional questions”: “Permitting [federal regulators] to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States’ traditional and primary power over land and water use.”²⁵

Second, in *Rapanos v. U.S.*, the Supreme Court struck down the Army Corps’s attempt to regulate wetlands lacking a meaningful connection to traditional navigable waters. In that case, the Corps had attempted to impede development of a 54-acre plot of land in Michigan, which “was 11 to 20 miles away” from the nearest body of navigable water.²⁶ The Court struck down this assertion of power, in a pair of opinions: Justice Scalia’s opinion for a four-justice plurality concluded that, “on its only plausible interpretation, the phrase ‘waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water,” and not mere “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”²⁷ Justice Kennedy wrote separately, agreeing that the Army Corps’s interpretation was unlawful but concluding that a broader set of lands might fall within the Clean Water Act’s scope if they have a “significant nexus” to readily navigable waters.²⁸

After the Court emphatically rejected the regulators’ expansive interpretation of their Clean Water Act powers, one might have expected the regulators to re-evaluate the statute with more modest reach.

But instead, federal regulators did precisely the opposite.

III. The 2015 “Waters of the United States” Rule Asserts Effectively Unlimited

Authority Over Private Lands

On June 29, 2015, the EPA and Army Corps published a final rule to clarify what waters are “waters of the United States.”²⁹ Rather than narrowing their reach after *Rapanos*, the EPA and Army Corps continued to interpret their powers *expansively*.

The final WOTUS rule defined “waters of the United States” by listing several broad and vague categories of waters that are always automatically covered (*i.e.*, jurisdictional waters). If a water does not fall into one of those categories, it still might fall into the EPA and Corps’ net; there is a catch-all provision that helps to make sure a water falls within the rule; this catch-all provision allows the agencies to do a case-by-case “significant nexus” analysis to determine if the waters are covered.

²⁴ *SWANCC*, 531 U.S. at 162–164.

²⁵ *Id.* at 174.

²⁶ *Rapanos*, 547 U.S. at 719–721 (plurality op.).

²⁷ *Id.* at 739 (plurality op.).

²⁸ *Id.* at 759 (Kennedy, J., concurring in the judgment).

²⁹ 80 Fed. Reg. 37054 (June 29, 2015).

The final rule covers “waters” including:

- Many man-made ditches.³⁰
- *Intermittent streams*. As explained in the preamble of the final rule, intermittent streams “are those that have both precipitation and groundwater providing part of the stream’s flow, and flow continuously only during certain times of the year (*e.g.*, during certain seasons such as the rainy season).”³¹
- *Ephemeral streams*. As explained in the preamble of the final rule, ephemeral streams “have flowing water only in response to precipitation events in a typical year, and are always above the water table. Precipitation can include rainfall as well as snowmelt.”³² In other words, a depression in land that is dry virtually every day of the year but holds water for a few days due to one rainfall could be covered.
- *Tributaries*. A tributary can be characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. There does not actually have to be a visible high water mark, and according to the preamble, the physical indicators no longer have to be present. The agency can determine the existence of a tributary through aerial photography or remote sensing. The American Farm Bureau Federation explains:

“This means that distant regulators using “desktop tools” can *conclusively* establish the presence of a “tributary” on private lands, even where the human eye can’t see water or any physical channel or evidence of water flow. That’s right — *invisible tributaries!* The agencies even claim “tributaries” exist where remote sensing and other desktop tools indicate a *prior existence* of bed, banks, and OHWM, where these features are *no longer present* on the landscape today.”³³
- “*Adjacent waters*” to certain covered waters. In the final rule, these “adjacent waters” do not have to be adjacent by any reasonable understanding of the word “adjacent.” It does not have to be next to the waters. Instead, “adjacent” means bordering, contiguous, or *neighboring*. For “neighboring,” the rule covers a water if any part of it is within one of the distance thresholds identified in the rule, such as within 1,500 feet of the high tide line of certain covered waters.³⁴
- *Waters that are within the 100-year floodplain of certain covered waters*, if they have a significant nexus to such covered waters.³⁵

³⁰ Environmental Protection Agency, “Waters of the United States (WOTUS) Rulemaking,” <https://www.epa.gov/cleanwaterrule/final-clean-water-rule>.

³¹ *Ibid.*

³² *Ibid.*

³³ American Farm Bureau Federation, “FACT or FICTION? Shedding the light on EPA’s “Facts” about the new “waters of the U.S.” rule,” (June 11, 2015) https://www.ndfb.org/image/cache/FACT_or_FICTION_-_Copy.pdf.

³⁴ Environmental Protection Agency, “Waters of the United States (WOTUS) Rulemaking,” <https://www.epa.gov/cleanwaterrule/final-clean-water-rule>.

³⁵ *Ibid.*

IV. The 2015 “Waters of the United States” Rule Imposes Immense Costs and Burdens on Private Property Rights and on Economic Rights

Currently, the WOTUS rule is not being enforced because of a nationwide stay issued by the Sixth Circuit Court of Appeals.³⁶ And as noted above, President Trump already has signed an executive order directing the EPA and Army Corps to rewrite the rule,³⁷ and the agencies already are beginning to do so.³⁸

But any attempt to re-interpret “waters of the United States” and “navigable waters” in a reasonable manner will certainly be met with resistance from those who want expansive federal power over the nation’s waters. The current WOTUS rule’s scope, and the actual impact that it has on landowners, demonstrate why a reasonable definition of “navigable waters” is so critical.

First and foremost, regulators’ expansive WOTUS rule makes it exceedingly difficult for landowners to use their own property. To build a home, to farm the land, or to engage in other normal activities on lands covered by the Clean Water Act, the landowners must obtain permits from federal regulators. This is a costly and time-consuming process.

It is important to recognize that such permits are required not just for classic pollution in pristine waters. The Act prohibits actions that do not even cause environmental harm. Someone might need a permit for kicking some sand into a jurisdictional water.³⁹

Property owners could be required to secure a permit if there is a discharge of dredged material (material excavated or dredged from waters of the U.S.) or fill material (“material placed in waters such that dry land replaces water — or a portion thereof — or the water’s bottom elevation changes”).⁴⁰ In other words, common activities, from farming to home building, could require a permit.

Justice Scalia summarized many of these costs in his plurality opinion in *Rapanos*: “The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the

³⁶ See *State of Ohio v. U.S. Army Corps of Eng’rs*, No. 15-3799 (6th Cir. 2015).

³⁷ Exec. Order 13778 (Feb. 28, 2017), 82 Fed. Reg. 12497 (Mar. 3, 2017).

³⁸ 82 Fed. Reg. 12532 (Mar. 6, 2017).

³⁹ The definition of “pollutant” is extremely broad. Environmental Protection Agency, “Clean Water Act, Section 502 General Definitions” (Mar. 6, 2012), at <http://water.epa.gov/lawsregs/guidance/wetlands/sec502.cfm>.

⁴⁰ Environmental Protection Agency, “Managing Your Environmental Responsibilities: A Planning Guide for Construction and Development,” April 2005, <http://www.epa.gov/compliance/resources/publications/assistance/sectors/constructmyer/>. See also the EPA regulations at 33 U.S.C. §323.2, <http://www.law.cornell.edu/cfr/text/33/323.2>. The regulations provide more specific definitions of dredged material, fill material, and discharge of dredged or fill material. The precise definitions of terms such as “fill material” are a matter of controversy. See Claudia Copeland, Cong. Res. Serv., *Controversies over Redefining “Fill Material” Under the Clean Water Act*, Congressional Research Service Report for Congress (Aug. 21, 2013), <http://fas.org/sgp/crs/misc/RL31411.pdf>.

average applicant for a nationwide permit spends 313 days and \$28,915 — not counting costs of mitigation or design changes.”⁴¹

These permits, as can be seen, are costly and can a significant amount of time. For many property owners, securing permits is impractical and effectively acts as a restriction on how the property will be used. When the EPA and Corps seek to expand the waters that can be regulated, as they have done repeatedly in the past and have taken to a new level with the WOTUS rule, this undermines property rights. For property owners, they have to secure even more of these costly permits often for ordinary activities or forego engaging in such activities altogether.

The scope of the WOTUS rule is particularly problematic given the EPA and Corps’ overreach when enforcing the CWA and the harm imposed on property owners across the country. Some recent examples provide a chilling reminder of why there needs to be a proper definition of “navigable waters”:

- *Sackett v. EPA*. The EPA sought to impose fines of \$75,000 a day on a couple for placing gravel on virtually dry land to build a home in a built-out subdivision.⁴²
- *Smith v. United States Army Corps of Engineers*. A couple purchased property in the desert outside of Santa Fe, New Mexico where they built a home. To improve their property, they removed dead trees and trash from a dry arroyo (*i.e.*, ditch) that crosses their property. The Corps learned of their activity and sent a letter demanding that the couple stop any more work in the arroyo because it was a navigable water. The agency eventually backed down from its claim that this desert land was a navigable water — after legal action was brought against the Corps.⁴³
- *Johnson v. EPA*. A Wyoming farmer created a stock pond on his property. The CWA expressly exempts stock ponds from permit requirements. Regardless, the EPA demanded that he eliminate the pond or else face \$75,000 per day in fines.⁴⁴

Such cases are in addition to horror stories detailed in a 2016 report released by the Senate Committee on Environment and Public Works Majority Staff: the Corps asserted that furrows, caused by plowing, qualify as “mini uplands” and small mountain ranges; the Corps repeatedly asserted that tire ruts along a dirt road qualify as “wetlands,” requiring a permit for landowners; and the Corps asserted that the Clean Water Act empowers them to regulate even small depressions in gravel roads and dirt roads.⁴⁵

⁴¹ *Rapanos v. U.S.*, 547 U.S. 715, 721 (2006) (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Res. J. 59, 74–76 (2002)).

⁴² *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012); *see also, e.g.*, Pacific Legal Foundation, “*Sackett v. EPA* Fact Sheet,” <http://www.pacificlegal.org/old-site/document.doc?id=566>.

⁴³ *See e.g.*, “Reason, Front Porches Now Ground Zero in Property Rights Fight,” <http://reason.com/archives/2013/04/21/front-porches-now-ground-zero-in-propert>.

⁴⁴ *See e.g.*, <https://www.pacificlegal.org/Cases/Case-johnson-1-1494>.

⁴⁵ United States Senate Committee on Environment and Public Works, “From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of

V. Conclusion

On February 28, 2017, President Trump signed an executive order directing the EPA and Army Corps to review the WOTUS Rule, and to consider interpreting the Clean Water Act's term, "navigable waters," in a manner consistent with the opinion of Justice Scalia in *Rapanos*. The agencies published their notice of proposed rulemaking on July 27. As the agencies consider public comments and write the final rule, they must take care to draw lines that are truly faithful to the Clean Water Act's letter and spirit; that respect federalism and other fundamental constitutional values that are the Act's foundation; that respect private property and promote economic growth; and that dispel the cloud of regulatory uncertainty that has loomed over landowners since the last WOTUS Rule was announced.

Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act” (September 20, 2016) <https://www.epw.senate.gov/public/cache/files/99dc0f4b-50a8-4b9e-a604-cb720e7f19bc/wotus-committee-report-final1.pdf>.