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Mr. David Olson
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314

(Submitted electronically via website www.regulations.gov)

RE: COE– 2015–0017

Dear Mr. Olson,

On behalf of the National Association of Home Builders (NAHB), I write to submit the following comments in response to the U.S. Army Corps of Engineers (Corps) "Proposal to Reissue and Modify Nationwide Permits," ("the Proposal") the availability of which was announced in the Federal Register on June 1, 2016.[1]

NAHB is a Washington, D.C.-based trade association representing over 140,000 builder and associate member firms organized in approximately 750 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Our members include those who design, construct, and supply single-family homes; build and manage multi-family, light commercial, and industrial structures; develop land; and remodel existing homes. Collectively, NAHB's members will construct about 80% of the new housing units projected for 2016.

NAHB is also a member of the Waters Advocacy Coalition. The Coalition represents a large cross-section of the nation's construction, housing, mining, agriculture, manufacturing, and energy sectors, all of which are vital to a thriving national economy, including providing much-needed jobs. In addition to these individual comments, NAHB fully supports the comments submitted by the Coalition in response to the Corps' Proposal.

I. Introduction

Section 404 of the Clean Water Act (CWA) requires a permit from the Corps for the discharge of dredged or fill material into any "waters of the United States" (WOTUS). Because land development and home building require substantial earth moving operations and because the Corps has historically asserted broad jurisdiction over WOTUS, NAHB members must often obtain "dredge or fill" permits and operate pursuant to the requirements of CWA Section 404. Section 404(e) authorizes the Corps to issue permits on a nationwide basis for discharges of dredged or fill material for activities that are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.[2] Rather than having to obtain expensive and time

[1] 81 Fed. Reg. 35,186 (June 1, 2016).
[2] 33 U.S.C. § 1344(e).

consuming "individual" permits, NAHB members often utilize nationwide permits (NWPs) to ensure compliance with the CWA.

The Corps last issued the NWPs in 2012, and those permits are set to expire on March 18, 2017. NAHB appreciates the Corps' efforts to ensure the continued availability and avoid a lapse of a permitting program upon which the home building industry and many others rely. However, we are seriously concerned about how the so-called "Clean Water Rule" redefining WOTUS (*hereinafter*, WOTUS Rule) – as issued by the Corps and the Environmental Protection Agency (EPA) on June 29, 2015[3] and currently under a nationwide stay[4] – will impact the NWPs. Specifically, it expands jurisdiction of the CWA and will require more Section 404 permits for activities in previously unregulated features, yet it is not clear these impacts and outcomes have been fully assessed.

Many NWPs have threshold disturbance limits (e.g., ½ acre of WOTUS, 300 linear feet of stream bed) and can only be used for projects with impacts that are less than those amounts. If the WOTUS Rule takes effect and jurisdiction expands to evermore marginal "waters" – including channels that only flow when it rains, isolated ponds, and most ditches – it will be increasingly difficult for permit applicants' proposed activities to stay within these limits and qualify for NWPs. Activities with impacts beyond the NWP thresholds must seek an individual permit. Of those projects that do still qualify for NWPs, more will require pre-construction notification (PCN) and compliance with additional conditions, including expensive compensatory mitigation. Further, the stayed WOTUS Rule contains definitions that should not be applied to the NWPs.

If the WOTUS Rule is put into effect, more activities will require costly and time-consuming individual permits, Corps staff will be increasingly over-burdened, and the intent of Congress to establish an efficient nationwide permitting program under CWA Section 404 will be undermined. Ultimately, an increased reliance on individual permits as a result of newly minted WOTUS will decrease housing affordability and do little to protect the environment. To avoid this undesirable result, NAHB urges the Corps to withdraw the WOTUS Rule and propose a new rule that limits CWA jurisdiction so that it aligns with the intent of Congress and the rulings of the Supreme Court. In the meantime, the Corps is urged to rely on the 1986 regulations[5] and 2008 *Rapanos* Guidance[6] and maintain the current NWP acreage / linear feet limits, waiver provisions, and PCN and compensatory mitigation thresholds. Alternatively, if the WOTUS Rule is implemented, the Corps must reissue and significantly modify the NWPs by expanding the current acreage / linear feet limits and waiver descriptions and relaxing the General Conditions so that they provide a streamlined option. Further, due to the nationwide stay of the WOTUS Rule, the Corps should clarify that the WOTUS Rule definitions will not apply to the final NWPs when they are issued.

These recommendations along with supporting rationale and background on the NWP program are discussed in detail in the following sections.

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[3] 80 Fed. Reg. 37,054 (June 29, 2015).
[4] *In re. E.P.A.*, 803 F.3d 804 (6th Cir. 2015).
[5] 33 C.F.R. §328.3 (1986) (Corps); 40 C.F.R. §122.2 (1986) (EPA).
[6] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) (*hereinafter*, *Rapanos* Guidance).

II. The Expedited Nationwide Permit Process is Necessary and was Authorized by Congress in Response to Expanded Clean Water Act Jurisdiction

The "general" permitting scheme was designed by Congress as a direct response to expanded CWA jurisdiction to create a simplified, streamlined process for authorizing minimal impact discharges. NWPs ease the regulatory burden on both the Corps and the public and allow the Corps to focus its efforts on higher impact activities via "individual" permits.

a. The Nationwide Permit Program is Necessary to Expedite Authorization of Activities that have Minimal Adverse Environmental Impacts

The CWA regulates discharges of pollutants into navigable waters, defined as "waters of the United States."[7] Section 404 of the CWA authorizes the Corps to permit discharges of dredged or fill material into navigable waters.[8] The Corps has authority to issue general permits under Section 404(e) for categories of discharges that will cause only minimal adverse environmental effects when performed separately and will have only minimal adverse cumulative effects.[9] One such type of general permit is an NWP, which is issued by the Chief of Engineers and is designed to regulate similar activities that take place anywhere in the country with "little, if any, delay or paperwork."[10] Examples of activities covered by NWPs include utility line activities, construction or expansion of single- and multifamily housing, and stream bank stabilization. As a general matter, if an activity or permittee satisfies all of an NWP's conditions (including General Conditions placed on all NWPs), the permittee is authorized to proceed with the activity.[11] Activities that do not qualify for authorization under an NWP must seek an individual permit granted by the Corps on a case-by-case basis through a rigorous review process, including public notice and permit conditioning.[12]

The NWPs enable the Corps to better protect waters by focusing its limited resources on more extensive evaluations through the individual permit process for activities that have the potential for causing more severe adverse environmental effects. The Corps notes that NWPs help protect the aquatic environment because they provide incentives to permit applicants to reduce impacts to jurisdictional waters and wetlands to meet the restrictive requirements of the NWPs and receive authorization more quickly than they would through the individual permit process.[13]

The overwhelming majority of dredge and fill authorizations issued by the Corps are general permits – most being NWPs – while only five percent go through the individual permitting process.[14] As a practical matter, project proponents rely on NWPs for a faster and cheaper authorization process relative to the time and cost to obtain an individual permit. For example, a 2002 study found that it takes an average of 313 days and $28,915 to obtain an NWP,

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[7] 33 U.S.C. §1362(7).
[8] *Id*. at §1344.
[9] *Id*. at §1344(e).
[10] 33 C.F.R. §330.1(b).
[11] *Id*. at §330.1(c).
[12] *Id*. at §325.
[13] 81 Fed. Reg. at 35,188.
[14] U.S. Army Institute for Water Resource. The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources. 2015-R-03 (October 2015) at 25, 45 (*hereinafter*, Mitigation Rule Retrospective).

whereas the average time and cost to secure an individual permit were 788 days and $271,596.[15] (For a more detailed discussion of the challenges associated with obtaining individual permits, see *Section V* below).

b. Congress Enacted the "General" 404 Permitting Scheme in Response to Expanded Clean Water Act Jurisdiction and to Create a Streamlined Authorization Process for Minimal Impact Discharges

In 1975, *Natural Resources Defense Council v. Callaway* held that the Corps was required to regulate "navigable waters" under the CWA "to the maximum extent permissible under the Commerce Clause of the Constitution."[16] Following the *Callaway* decision, the Corps and Congress both quickly realized that expanding the scope of regulated waters would require a streamlined permit process for activities crossing these waters that involved discharges of dredged or fill material with only minor effects. As a result, in 1977, Congress enacted section 404(e) of the CWA, authorizing the Corps to issue "general" permits on a State, regional, or nationwide basis for categories of discharges that have no more than minimal individual or cumulative environmental effects.[17]

Indeed, it was congressional concern with administrative burdens and permit delays that drove the enactment of Section 404(e). A House Report demonstrated concern that the Corps' expanded jurisdiction would "prove impossible of effective administration . . . Rather than managing a more limited program well, the Corps will be in a position of managing a too-large program poorly."[18] Echoing the House Report, a Senate Report took issue with "unnecessary regulation and redtape . . . [as well as delays in permit processing] that would ensue without a streamlined permit program.[19]

The "general" permitting scheme envisioned by Congress is intended to create a simplified, streamlined process for authorizing minimal impact discharges, in order to ease the regulatory burden on both the Corps and the public and to allow the Corps to focus its efforts on higher impact activities via "individual" permits. If the WOTUS Rule becomes effective, it will be all the more important that the Corps has an NWP program in place that both acknowledges and implements this congressional directive.

c. Successive Reauthorizations of the Nationwide Permits have Eroded Congressional Intent and made them Increasingly Difficult to Use

The Corps first issued NWPs as interim final rules adopted in 1977.[20] These initial "permits by rule" broadly authorized all discharges into remote waters and waters located above low flow

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[15] David Sunding & David Zilberman, The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Nat. Resources J, 59-90 at 74 (2002) (*hereinafter*, Sunding & Zilberman).
[16] 392 F. Supp. 685, 686 (D.D.C. 1975). The *Callaway* holding has subsequently been limited. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).
[17] 33 U.S.C. §1344(e).
[18] H.R. Rep. No. 95-139, at 22 (1977).
[19] S. Rep. No. 95-370, at 75 (1977).
[20] 42 Fed. Reg. 37,121 (July 19, 1977).

areas. The original NWPs had minimal or no acreage limitations or other conditions. Indeed, as the 1977 rule summary notes, "In the case of nationwide permits, no application at all is required."[21]

Over time through successive reauthorizations, however, the NWPs have become increasingly restrictive and complex to the point that they faintly resemble the streamlined permitting process Congress envisioned when it enacted Section 404(e). Since 1977, NWPs have become more specific with smaller and smaller acreage and linear foot limits and subject to longer permit review timeframes and greater conditions, including increased permit-by-permit Corps review through pre-construction notification (PCN) and mitigation.

At the same time the NWP program has been ratcheted down, the jurisdictional reach of the CWA has expanded far beyond the "navigable waters" originally envisioned by Congress. Whereas the 1975 Corps regulations specified that CWA permits would generally not be required for discharges above the "headwaters," defined as "the point on the stream above which the flow is normally less than 5 cubic feet per second,"[22] the federal reach of the Act will extend to the most distal portions of the landscape including isolated ponds and dry desert washes if the WOTUS Rule is put into effect. Given this broad expansion, it is clear that the current NWP program cannot fully serve its intended purpose.

III. The EPA and Corps Rule Redefining "Waters of the United States" is Currently Stayed and should not Apply to the Reissued Nationwide Permits

On June 29, 2015, EPA and the Corps published a final rule that changed the regulatory definition of "waters of the United States" for the first time in 30 years.[23] The new WOTUS Rule, currently under a nationwide stay issued by the United States Court of Appeals for the Sixth Circuit, expands federal jurisdiction under the CWA and introduces new concepts and definitions that will be burdensome to both regulators and the regulated community. Because the new rule is not in effect and will not likely be in effect when the NWPs are finalized, coupled with the fact that it will have significant impacts on the efficacy of the permit program, the Corps must refrain from relying on any aspect of the WOTUS Rule in the NWPs. (For NAHB's comprehensive assessment of the WOTUS Rule as originally proposed, please see https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2011-0880-19574&attachmentNumber=1&disposition=attachment&contentType=pdf).

a. With the WOTUS Rule Stay in Effect, it is Unwise to Apply the Rule to the Nationwide Permit Program

The WOTUS Rule litigation is ongoing, the nationwide stay ordered by the Sixth Circuit is still in effect, and, given the briefing schedule set by the Sixth Circuit, it is very unlikely that a final decision on the WOTUS Rule challenges would be issued before the Corps promulgates the final NWPs (sometime before March 2017).[24] Because the WOTUS Rule will still be stayed

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[21] *Id*. at 37,122.
[22] 40 Fed. Reg. 31,319 (July 25, 1975).
[23] 80 Fed. Reg. 37,054.
[24] *See* Case Management Order No. 2, *In re E.P.A.,* Case Nos. 15-3751, et al. (Jun. 14, 2016). Final briefs on the merits will be filed in February 2017 with oral argument to follow. Meanwhile, the Corps intends to promulgate the new NWPs before the current permits expire on March 18, 2017. 81 Fed Reg.

nationwide when the Corps reissues the NWPs, it is unwise for the Corps to incorporate the WOTUS Rule's new jurisdictional definitions into the final NWPs or cite to the stayed regulations.

Instead, the Corps should adhere to the Agencies' November 2015 joint memorandum responding to the nationwide stay, which directs both EPA and Corps staff to comply with the Sixth Circuit's stay, and to resume use of the Agencies' prior regulatory definition of "waters of the United States."[25] According to the memorandum, the Agencies should apply the regulations defining "waters of the United States" codified in 1986[26] and the *Rapanos* Guidance in making jurisdictional determinations. Similarly, to avoid any confusion with the NWP program, the Corps should comply with the Agencies' directive and clarify that the 1986 regulations and the *Rapanos* Guidance will apply to the reissued NWPs. Only upon conclusion of the litigation should the Corps consider incorporating any of the WOTUS Rule's language. This could only be done through significant amendment to existing NWP regulations, which the Corps could do through a new notice and comment rulemaking.

b. The Proposal Fails to Clarify Numerous Key Terms and Definitions Related to the WOTUS Rule

Although the WOTUS Rule is currently stayed, the Corps has not made it clear which regulations defining the scope of "waters of the United States" will apply to the reissued NWPs. And yet, critical definitions in the proposed NWPs refer to provisions in the stayed rule. For instance, definitions such as "waterbody," "non-tidal wetland," "tidal wetland," and "ordinary high water mark" cite to the WOTUS Rule regulations.[27]

i. The Corps Must Clarify or Eliminate the "Waterbody" Definition

The Proposal's use of the key term "waterbody" – which relies in part on the "adjacent" concept – causes unnecessary confusion. "Waterbody" is defined as:

> ". . . a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1) through (5), that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of ''waterbodies'' include streams, rivers, lakes, ponds, and wetlands."[28]

Based on the first clause of the "waterbody" definition, it appears that the Corps intends to use "waterbody" interchangeably with "water of the United States" in the NWP program. If that is the case, to alleviate this confusion, the Corps should eliminate the "waterbody" definition altogether and use the term "water of the United States" instead. Or, at a minimum, the Corps should

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35,189. According to the Proposal, "[t]he Corps will try to publish the final NWPs . . . approximately 90 days before the planned effective date," i.e. December 2016.

[25] *See* EPA and Dep't of the Army Memorandum, *Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule*, at 2 (Nov. 16, 2015).

[26] *Supra* note 5.

[27] *See, e.g.*, 81 Fed. Reg. at 35,239 (citing 33 C.F.R. § 328.3(c)).

[28] 81 Fed. Reg. at 35,240.

clarify the "waterbody" definition and avoid using concepts from the WOTUS Rule to do so.

ii. The Corps must Clarify that the Proposal Does not Adopt the WOTUS Rule's Definition of "Adjacent"

The term "adjacent" is critical to the implementation and application of the NWPs because it is incorporated into the descriptions of many NWPs, General Conditions, and related definitions. Unfortunately, the proposal does not provide a definition of "adjacent" or indicate whether the Corps intends to rely on the WOTUS Rule's definition of "adjacent." Rather than clarifying the term "adjacent," the Corps has removed the clause from the 2012 NWPs' "waterbody" definition that stated that "adjacent" means "bordering, contiguous, or neighboring."[29] Yet, there is no explanation in the preamble for the purpose or intent of this modification which leaves no formal definition of "adjacent" in the Proposal.

The meaning of this term is especially important for NAHB members because NWP 29 Residential Developments does "not authorize discharges into non-tidal wetlands *adjacent* to tidal waters."[30] Whereas the current regulations have a more limited definition of "adjacent" and allow for jurisdiction based on adjacency only for *wetlands*, under the WOTUS Rule's broad "adjacent" definition, any *water* would be jurisdictional if it is within the 100-year floodplain and 1,500 feet of any feature that qualifies as a "tributary" – the definition for which has also been significantly expanded.[31] In the context of NWP 29, the use of the WOTUS Rule's concept of adjacency could mean that fewer discharges associated with home building would qualify for the streamlined permits. Moreover, without clarification, regulators and applicants managing discharges associated with residential developments sited near tidal waters will have difficulty determining whether areas are jurisdictional and whether NWPs are required.

With the WOTUS Rule currently stayed and to avoid confusion, the Corps should retain the existing "waterbody" definition which defines adjacent as "bordering, contiguous, or neighboring." Additionally, the Corps must clarify that that the "adjacent" and "neighboring" definitions in the WOTUS Rule do not apply to the NWPs.

iii. The Corps must Remove Provisions in the Proposal Adopting or Incorporating Other Concepts from the Stayed WOTUS Rule

The Corps improperly relies on other concepts from the stayed WOTUS Rule throughout the Proposal. For example, NWP 43 Stormwater Management Facilities cites to the exclusion of certain stormwater features under the WOTUS Rule.[32] Definitions such as "non-tidal wetland," "tidal wetland," and "ordinary high water mark" cite to the new regulations in the WOTUS Rule.[33] And most importantly, the term "water of the United States" is used throughout the Proposal in nearly every NWP.

The Corps should remove provisions in the Proposal adopting or incorporating concepts from the stayed WOTUS Rule. If the WOTUS Rule is implemented at some point, the Corps will

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[29] *Compare* 77 Fed. Reg. at 10,184 and 10,290 (February 21, 2012) *with* 81 Fed. Reg. at 35,240.
[30] 81 Fed. Reg. at 35,233 (emphasis added).
[31] 80 Fed. Reg. at 37,078.
[32] *Id*. at 35,227.
[33] *Id*. at 35,230.

need to address the new definition's significant implications on the NWP program, which will likely necessitate revisions to the NWPs through the normal public notice and comment process.

IV. The WOTUS Rule will Exacerbate Challenges to Qualify for Nationwide Permits and Trigger More Individual Permits

While EPA claims that the WOTUS Rule simply clarifies the jurisdictional scope of the CWA,[34] the Corps appears to recognize the rule will have impacts on jurisdiction. To this end, the Corps has asked for comments on "how the 2015 revisions to the definition of 'waters of the United States' might affect the applicability and efficiency of the proposed NWPs."[35]

As a result of the expansive "tributary," "adjacent waters," "regional wetlands," and "waters within the 100-year floodplain or within 4,000 feet of another water" provisions and limited exemptions of the WOTUS Rule, more activities will trigger CWA Section 404 permitting requirements. Simply put: more WOTUS = more permits.

As the jurisdictional scope of the CWA expands, the usefulness of the NWP program is put in jeopardy due largely to the fact that many NWPs have a maximum acreage and/or linear foot threshold that can be disturbed pursuant to that permit. For example, and of particular utility to NAHB members, NWP 29 Residential Developments allows for discharges of dredged or fill material for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision that will not result in the loss of more than ½-acre of non-tidal waters of the United States or more than 300 linear feet of stream bed.[36] With more features and areas considered jurisdictional, it will be increasingly difficult to avoid and minimize impacts to these newly jurisdictional WOTUS. As a result, more activities will exceed the NWP eligibility thresholds, and applicants will be forced to rely upon individual permits.

To analyze the real-world impacts of the WOTUS Rule on the applicability and efficiency of use of NWP 29 for Residential Developments, NAHB contracted with two consulting firms to compare CWA jurisdiction and Section 404 permitting requirements pre- and post-rule. These case studies underscore the ramifications of expanded CWA jurisdiction on the ability of home builders to use NWPs.

a. Case Study #1: Increased Jurisdiction over Isolated Wetlands in Florida will Trigger more Individual Permits

The definitions contained in the WOTUS Rule for "tributary," "adjacent," and "neighboring" fundamentally expand CWA jurisdiction. To further evaluate the potential effects of the 2015 revisions to the definition of WOTUS on the applicability and efficiency of use of NWPs, Breedlove, Dennis & Associates completed an evaluation for an example proposed residential development that would qualify for a NWP 29 based on an existing Corps approved jurisdictional determination (AJD). (For Breedlove, Dennis & Associate's complete analysis of the impacts of the WOTUS Rule on the NWP program, please see *Appendix A*).

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[34] 80 Fed. Reg. at 37,055: "In this final rule, the agencies clarify the scope of 'waters of the United States' that are protected under the Clean Water Act (CWA) . . ."
[35] 81 Fed. Reg. at 35,190.
[36] *Id*. at 35,219.

In order to use NWP 29, the proposed discharge must not cause the loss of greater than ½-acre of non-tidal WOTUS. The proposed example project subject to this analysis is depicted in Figure 1 and is based on a Corps AJD. According to the approved determination, approximately 48.40 acres of wetlands were considered to be under federal jurisdiction. In addition, a total of 14.46 acres of wetlands were determined to be non-jurisdictional isolated wetlands. Proposed impacts to jurisdictional wetlands resulting from the proposed example project total 0.42 acres. The proposed example project qualifies for review under NWP 29 given that the total proposed impacts to jurisdictional WOTUS are less than ½-acre.

Figure 2 depicts the same project example overlain with the Federal Emergency Management Agency (FEMA) 100-year floodplain data publically available for the State of Florida (FEMA Digital Flood Insurance Rate Map). This figure demonstrates that all of the wetlands determined to be isolated pursuant to the AJD and located within the proposed project footprint are also located within the 100-year floodplain. It is also important to note that the isolated wetlands located within this project footprint are located less than 1,500 feet from a large ditch system that is hydrologically connected to jurisdictional wetlands determined to be directly abutting a relatively permanent water (RPW). Since the RPW is associated with a tributary that is connected to a traditional navigable water, the ditch located in close proximity to the proposed example project would meet the definition of a tributary in the WOTUS Rule. Since the proposed example project is also located within the 100-year floodplain, the isolated wetlands located within the project area would meet the definition of "neighboring"[37] and thus be considered "adjacent" to a water identified in paragraphs (a)(1) through (3) of the 2015 definition of WOTUS and be considered jurisdictional by rule.

Under this scenario, 14.46 acres (100%) of the previously determined non-jurisdictional isolated wetlands would be considered jurisdictional under the WOTUS Rule. Based on this analysis, the total area of jurisdictional wetlands would increase by approximately 30% (48.40 acres to 62.86 acres), encompassing 100% of the total wetland acreage. Proposed impacts to jurisdictional WOTUS resulting from the example project would increase by 13.43 acres relative to the AJD for a total of 13.85 acres according to the WOTUS Rule. This represents an over 3,000% increase in the total acreage of impacts to jurisdictional wetlands (0.42 acres to 13.85 acres). The proposed example project would now require review under the individual permitting standards given that the total proposed impacts to jurisdictional WOTUS are substantially greater than ½-acre.

[37] *See* 80 Fed. Reg. at 37,105. (The WOTUS Rule defines "neighboring" as "(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark; (ii) All waters located within the 100- year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain; (iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.")

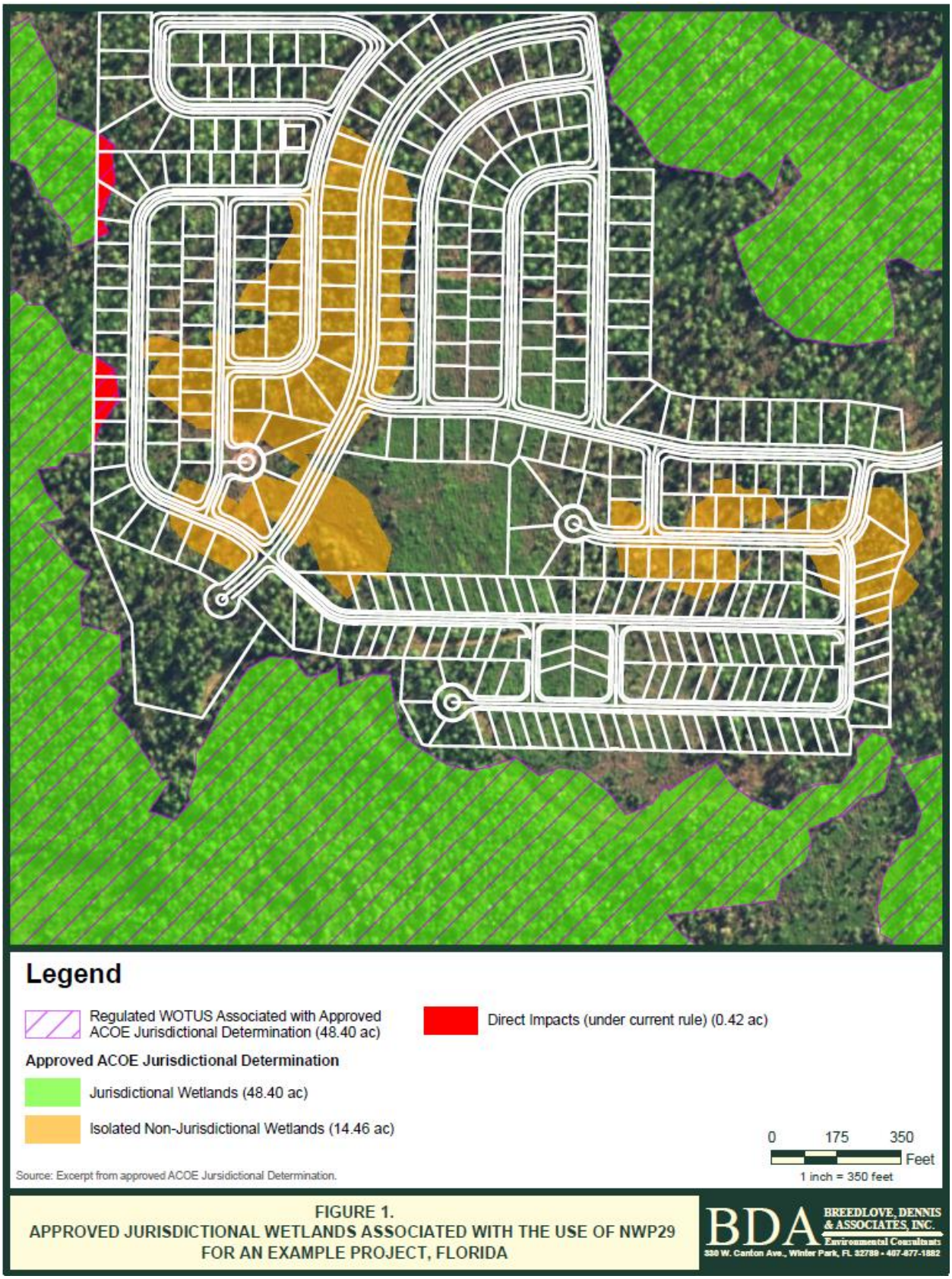

FIGURE 1.
APPROVED JURISDICTIONAL WETLANDS ASSOCIATED WITH THE USE OF NWP29 FOR AN EXAMPLE PROJECT, FLORIDA

BDA BREEDLOVE, DENNIS & ASSOCIATES, INC.
Environmental Consultants
338 W. Canton Ave., Winter Park, FL 32789 - 407-677-1882

FIGURE 2.
APPROVED JURISDICTIONAL WETLANDS IN RELATION TO THE 100-YEAR FLOODPLAIN ASSOCIATED WITH THE USE OF NWP29 FOR AN EXAMPLE PROJECT, FLORIDA

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It is also important to note that according to the AJD Form developed following *Rapanos* and currently used in jurisdictional determinations, an isolated wetlands determination can be made based upon:

1) a lack of a significant nexus, or if
2) "[p]rior to the Jan 2001 Supreme Court decision in '*SWANCC*,' the review area would have been regulated based *solely* on the 'Migratory Bird Rule' (MBR)" "…(i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture)…"[38]

The non-jurisdictional isolated wetlands determination associated with the excerpt of the AJD utilized for the example project subject to this analysis (depicted in Figure 1) was based on the MBR. Under the 2015 revisions to the definition of WOTUS, all of the previously approved non-jurisdictional isolated wetlands (per the MBR) would be considered jurisdictional categorically by rule by virtue of being "adjacent" waters. Footnote 32 of the *Rapanos* Guidance clarifies that:

> "[T]he significant nexus standard, rather than being articulated for the first time in *Rapanos*, was established in *SWANCC*. 126 S. Ct. at 2246 (describing *SWANCC* as 'interpreting the Act to require a significant nexus with navigable waters'). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*."[39]

This analysis demonstrates that the WOTUS Rule, if put into effect, would:

1) result in an expansion of CWA jurisdiction over waters currently approved by the Corps as non-jurisdictional;
2) result in an expansion of CWA jurisdiction over areas previously determined to be isolated wetlands in accordance with *SWANCC*; and
3) require many projects that previously qualified for review under NWP 29 to be reviewed under the individual permit standards.

b. Case Study #2: Increased Jurisdiction over Ephemeral Streams in the Arid Southwest will Trigger more Individual Permits

To further evaluate potential effects of the new WOTUS definition on the applicability and efficiency of use of NWPs in the arid Southwest, Fennemore Craig, P.C., analyzed existing AJDs made by the Corps on ephemeral streams in the State of Arizona and assessed how jurisdiction would be interpreted in light of the expansive "tributary" definition in the WOTUS Rule.

Under the current CWA jurisdictional guidance, streams that do not flow year round are not automatically deemed jurisdictional.[40] Rather, the federal government is required to perform a

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[38] U.S. Army Corps of Engineers Approved Jurisdictional Determination Form, part F.
[39] *Rapanos* Guidance at 9.
[40] *See id.* at 6,7: " . . . CWA jurisdiction over [ephemeral tributaries] will be evaluated [on a case-by-case basis] under the significant nexus standard . . ." . . . "The following geographic features generally are not

case-by-case analysis of intermittent and ephemeral streams to prove that they have a "significant nexus" and significantly impact the chemical, physical, and biological integrity of downstream waters before deeming them jurisdictional. In light of the expansive "tributary" definition in the WOTUS Rule, any feature that is characterized by the presence of the physical indicators of flow (e.g., bed and banks and ordinary high water mark) and contributes flow to a traditional navigable water – including ephemeral streams that only flow when it rains – will be automatically jurisdictional.[41] As a result, almost any activity resulting in discharge of dredged or fill material into even a dry stream bed will require a federal CWA 404 permit.[42]

In the arid Southwest, implementation of the WOTUS Rule is likely to substantially increase the acreage and linear feet of jurisdictional features and thereby substantially limit the usefulness of NWPs. The utility of NWP 29 for Residential Developments will decrease, and the permitting burden on development projects will increase. In comments filed on the proposed WOTUS Rule by NAHB member associations (the Central Arizona Home Builders Association and the Southern Arizona Home Builders Association), the Associations demonstrated that, contrary to the assertions that implementation of the WOTUS Rule would only result in an increase of between 2.84 and 4.65 percent in positive jurisdictional determinations annually,[43] there was likely to be a substantial increase in jurisdiction and therefore significantly greater permitting burdens.[44] The rule is likely to have a similar impact on the ability to use NWPs.

The Associations, in conjunction with other Arizona business interests, reviewed AJDs in Arizona posted on the Corps Los Angeles District's website at the time comments were prepared (through October 2014). On that website, 32 AJDs were listed as having been completed in 2013 or the first ten months of 2014. After excluding those AJDs where no link to supporting information was provided, or where the supporting information was so limited that an accurate assessment was not possible based on what was publicly available online, 22 AJDs were left for analysis. Six of the 22 AJDs involved relatively permanent waters, all of which were found to be jurisdictional. The remaining sixteen AJDs addressed ephemeral washes, only one of which resulted in a finding of jurisdiction (encompassing washes immediately adjacent to a flowing portion of the Gila River). Of the fifteen AJDs involving ephemeral washes that concluded no jurisdictional waters were present, three did so on the basis of a lack of an ordinary high water mark (OHWM), and the remaining twelve did so based on the lack of a significant nexus between the washes and a traditional navigable water (even though an OHWM was present in all washes evaluated in these fifteen AJDs).

For this nearly two year period, therefore, 68% (15 of 22) of Arizona AJDs analyzed by the joint commenters found no jurisdictional waters to be present. When only AJDs involving ephemeral washes are considered, 94% of Arizona AJDs in this period (15 of 16) resulted in a finding of no jurisdiction. For the 13 AJDs where a significant nexus analysis was performed on ephemeral

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jurisdictional waters: swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow)."

[41] 80 Fed. Reg. at 37,105.

[42] *Id*. at 37,054.

[43] *Id*. at 37,101.

[44] *See* Comments of Home Builders Association of Central Arizona on the Proposed Rule, Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014); Docket ID No. EPA–HQ–OW–2011–0880 (Nov. 13, 2014). Substantially similar comments were filed by Southern Arizona Home Builders Association.

washes where an OHWM was present, 92% (12 of 13) concluded that a significant nexus with a TNW did not exist. Due to the expansive "tributary" definition in the WOTUS Rule, however, some or all of these currently non-jurisdictional washes would likely become categorically regulated if the rule takes effect.

It is expected, therefore, that if the WOTUS Rule survives judicial challenge, substantially more ephemeral features now not considered jurisdictional would be subject to CWA permitting requirements. Not only will these projects be subjected to new permitting requirements, but most larger projects will be unable to qualify for the limited impact thresholds of the NWPs (e.g., ½-acre, 300 linear feet). This will be especially true in arid portions of the country where ephemeral channels are ubiquitous.

This analysis also demonstrates that the WOTUS Rule, if put into effect, would:

1) result in an expansion of CWA jurisdiction over waters currently approved by the Corps as non-jurisdictional;
2) result in an expansion of CWA jurisdiction over ephemeral washes previously determined to lack a significant nexus with traditional navigable waters according to the *Rapanos* Guidance;
3) require many projects that did not require 404 permits to obtain them; and
4) require more projects that previously would have qualified for review under NWP 29 to be reviewed under the individual permit standards.

V. An Increased Reliance on Individual Permits Relative to Nationwide Permits will be Problematic

a. Individual Permits are more Costly and Time Consuming to Obtain than Nationwide Permits and will Increase the Burden Placed on Corps Regulators

Importantly, individual permits are much more costly to obtain than general NWPs. In 2002, the average cost to prepare an NWP application was $28,915, while the average cost to prepare an individual permit application was $271,596.[45] In the fourteen years since these costs were calculated, it is certain that they have increased considerably.

An increased number of individual permits also means increased delays for permit applicants and increased workloads for Corps permit writers. While an NWP can take up to ten months to obtain, it can take over two years to secure an individual permit.[46] And a large increase in individual permit applications is likely to overwhelm already taxed Corps and state staff, further increasing delays. These delays will result in lost opportunity costs for stakeholders. For instance, home builders and land developers often obtain construction and development loans to finance their projects. The terms and conditions of these loans can require the builder or developer to begin repayment as early as six months after issuance. If a project requires an individual permit, the applicant may not even be able to get a project off the ground before he/she needs to begin repaying the loan needed to fund it.

Without question, the costs and delays associated with more individual permits that will occur

[45] Sunding & Zilberman at 74.
[46] *Id*. at 69.

due to an expanded scope of federal jurisdiction will disrupt the ability of home builders and land developers to do business. More broadly, the increased costs and delays associated with individual permitting could thwart development and maintenance of critical infrastructure, such as highways, railroads, and utility lines that previously would have relied heavily on general permits. Indeed, the new and expanded definition of WOTUS could jeopardize the future of the entire NWP program if the WOTUS Rule takes effect and significant program modifications are not made.

b. An Increased Reliance on Individual Permits will Adversely Impact Housing Affordability

As the case studies above illustrate, the expanded WOTUS definition will trigger more individual permits for residential development projects that once would have qualified for NWP 29. Due to the increased project costs and delays associated with individual (relative to general) permits, the cost to construct single and multifamily homes will increase and be passed on to home buyers and renters. The following discussion illustrates the impact of individual versus nationwide permitting on housing affordability.

A 1999 study found the median time it takes to obtain an individual permit is 726 days at a median cost of $155,000. The same study reported the median time to obtain a "streamlined" nationwide permit is 196 days at a median cost of $11,800.[47] Adjusting these permit cost estimates to 2016 dollars using the Consumer Price Index (CPI) suggests the median cost to obtain an individual permit is $220,000 in current dollars and the median cost to obtain a nationwide permit is $16,700 in current dollars. Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant, ranging from an estimated $24,989 to $49,207 per acre nationwide.[48]

To understand the potential increase in the cost of a new home in a typical subdivision in light of the new tributary definition, let us consider, for instance, a scenario in which a residential developer has purchased a 40 acre property. On his property are 400 feet of "streams" that only flow after it rains. Under previous regulations, many of these stream feet would not have been considered jurisdictional. And even if they were, the government would have been required to prove that they have a "significant nexus" to downstream waters. Under the WOTUS Rule, these often dry channels will be automatically jurisdictional as "tributaries." Because these dry features are common in the landscape, they crisscross the developer's property, making it impossible for him to avoid them if he wishes to clear the property, grade lots, and establish access roads and driveways for new homes. As such, his activities will impact more than 300 linear feet of stream and greater than 1/2-acre of WOTUS and he will have to apply for and obtain an "individual" CWA 404 permit from the Corps.

As stated above, the median cost to obtain an "individual" permit is $220,000. According to a study conducted by NAHB, the median number of homes in a single-family development is 48.[49]

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[47] *Id*. at 74.
[48] EPA, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 12 (March 2014), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0003
[49] Paul Emrath, Typical American Subdivisions, National Association of Home Builders Economics and Housing Policy Group Special Study (2014), available at http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=235108&channelID=311

If the median size subdivision (48 homes) requires an "individual" permit at the median cost ($220,000), the cost to the developer is $4,583 per single-family lot. Because this occurs early in the development process, by the time the lots are developed and sold to a builder, and the homes are constructed and sold to the ultimate buyer, interest costs, brokers' fees, etc. will add 39 percent onto this value.[50] Thus, the cost of obtaining an "individual" permit for the median size subdivision results in an average increase in cost of $6,371 per home.

An analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a $1,000 price increase.[51] Nationally, this price difference means that when a median new home price increases from $225,000 to $226,000, 206,269 households can no longer afford that home. An increase of more than $6,000 would price out tens of thousands more.

To preserve a functioning NWP program and avoid unnecessary increased housing costs, the Corps and EPA must withdraw the WOTUS Rule. If the agencies are unwilling to do so, at a minimum, the Corps must reissue and modify the NWPs by increasing acreage / linear foot eligibility limits, PCN thresholds, and waiver amounts as described below.

VI. Specific Comments

In addition to NAHB's general concerns related to the potential detrimental effects of the WOTUS Rule on the NWPs, the following sections describe specific concerns related to NWP eligibility and PCN acreage thresholds, waiver provisions, and compensatory mitigation requirements.

a. NWP Eligibility and PNC Acreage Thresholds should at a Minimum be Maintained; if the WOTUS Rule Takes Effect, however, Thresholds should be Increased

To qualify for NWPs 12, 14, 21, 29, 39, 42, 43, 44, 50, 51, and 52, "the total loss of waters of the United States . . . cannot exceed ½-acre."[52] And several NWPs (e.g., 12 and 14) require applicants to notify the Corps via PCN if their actions result in impacts > 1/10-acre of WOTUS. These current conservative acreage limits were developed and refined over decades of successive public notice and comment to meet the statutory objectives of the NWP program to provide a streamlined authorization process. Under the current regulatory definition of "waters of the United States" and *Rapanos* Guidance, the thresholds are appropriate to meet this goal and well supported by the record. Additionally, they meet the "minimal effects" statutory standard. The Corps is urged, therefore, at a minimum, to maintain the eligibility and PCN acreage thresholds for the NWPs.

However, if the WOTUS Rule goes into effect, the Corps must modify the NWPs and increase

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[50] Paul Emrath, Building Fee Increases and Home Prices, National Association of Home Builders Economics and Housing Policy Group Special Study, available at http://www.nahb.org/~/media/Sites/NAHB/SupportingFiles/2/Bui/BuildingFeeIncreasesandHomePrices_20120131101718.ashx?la=en

[51] Natalia Siniavskaia, State and Metro Area House Prices: The 'Priced Out' Effect, National Association of Home Builders Economics and Housing Policy Group Special Study (2014), available at http://www.nahb.org/en/research/housing-economics/special-studies/state-and-metro-area-house-prices-the-priced-out-effect-2014.aspx

[52] 81 Fed. Reg. at 35,191.

these thresholds to continue to provide the necessary streamlined process and avoid an overwhelming influx of individual permit applications and associated burdens that will be placed on both permit applicants and Corps regulators.

b. District Engineers must Retain Authority to Issue Waivers of Certain NWP Limits, Especially if the WOTUS Rule is put into Effect

Since 2002, certain NWPs, including NWP 29 Residential Development, have had a 300-linear foot limit for losses of stream bed that could be waived by a district engineer for ephemeral and intermittent streams. In the proposal, the Corps solicits comment on whether to retain the authority of the district engineers to issue activity-specific waivers of certain NWP limits.[53] NAHB believes it is important that district engineers maintain the authority to issue waivers and opposes any changes that would restrict or narrow this authority. Maintaining the current waiver provisions will continue to provide district engineers the flexibility to grant waivers where appropriate. Removing this authority would require activities that exceed certain numeric limits to obtain individual permits even in instances when they have minimal adverse environmental impacts.

If, however, WOTUS is put into effect, the waiver limits must be increased, as jurisdiction will extend to countless non-perennial features that meet the "tributary" definition. Importantly, under the *Rapanos* Guidance, ephemeral and intermittent streams are not categorically jurisdictional.[54] Such features are only determined to be jurisdictional on a case-by-case basis if they are relatively permanent tributaries (e.g., typically flowing year-round or having continuous flow at least seasonally) of traditional navigable waters or if they are found to significantly impact the chemical, physical, and biological integrity of a traditional navigable water (i.e., possess a "significant nexus").[55] Now, in light of an expansive "tributary" definition in the final but currently stayed WOTUS Rule, all streams, including ephemeral streams that only flow when it rains, will be automatically jurisdictional provided they are characterized by the presence of the physical indicators of flow – bed and banks and ordinary high water mark – and contribute flow to a traditional navigable water.[56] As a result, any activity resulting in discharge of dredged or fill material into even a dry stream bed will likely require a federal CWA 404 permit.[57]

The fact that ephemeral streams will generally be considered jurisdictional by rule, as described in Case Study #2 above, has the potential to create a scenario in which common land development and home building activities will be unable to avoid these small, often dry channels that are ubiquitous on the landscape. It is critical, therefore, that district engineers be granted flexibility to authorize increased waivers of certain NWP linear foot limits for ephemeral and intermittent stream beds. Otherwise, exponentially more land development activities – particularly those where non-perennial streams are most common (e.g., the arid Southwest) – will unnecessarily require costly and burdensome individual permits.

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[53] *Id*.
[54] *Supra* note 40.
[55] *Rapanos* Guidance.
[56] 80 Fed. Reg. at 37,105.
[57] *Id*. at 37,054.

c. Linear Foot Waiver Caps are Unnecessary and should not be Imposed

In the Proposal, the Corps solicits comment on whether to impose a linear foot cap on losses of intermittent and ephemeral stream beds that are potentially eligible for waivers of the 300 linear foot limit in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.[58]

For these NWPs the total loss of waters of the United States, including any waivers of the 300 linear foot limit for the loss of ephemeral and intermittent streams, cannot exceed ½ acre. To clarify this point, the proposal now includes the following sentence for the above ten NWPs: "The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½ acre."[59] This restriction effectively acts as a waiver cap. As such, linear waiver caps considered in the proposal are unnecessary, and the Corps should not impose a linear foot cap on losses of intermittent and ephemeral stream bed potentially eligible for waivers of the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

Indeed, stream beds vary greatly based upon topography, geology, and climate. An ephemeral dry wash in the Arid West could be several hundred feet wide while an ephemeral high mountain channel in Appalachia might only be several feet wide. Capping linear foot waivers would have the effect of "short changing" projects – particularly those with relatively narrow ephemeral and intermittent stream beds – where no other losses of WOTUS (e.g., an acreage amount of wetland) occur. The existing acreage cap (i.e., ½ acre of WOTUS) accounts for the variability in stream bed geomorphology whereas a linear foot cap would not.

d. Compensatory Mitigation is Unnecessary and Impractical for the Vast Majority of Nationwide Permits

In the recent Mitigation Rule Retrospective, the Corps and EPA note that "over 90 percent of activities authorized by general permits do not require compensatory mitigation because they involve small impacts to jurisdictional waters and wetlands where the adverse environmental effects are minimal and it would be *unnecessary* or *impractical* to require compensatory mitigation for such small impacts."[60] The Corps attributes this statistic to the stringent avoidance and minimization requirements in regulations and general permit conditions[61] and the fact that project proponents regularly "minimize wetland losses so that they are less than 1/10-acre, below the threshold . . . for requiring compensatory mitigation for wetland losses."[62]

The WOTUS Rule, however, threatens the ability of project proponents to minimize impacts to jurisdictional waters. If the WOTUS Rule is implemented, more wetlands and waters will be treated as jurisdictional. With more WOTUS, it will be increasingly difficult for projects to avoid and minimize impacts to jurisdictional features (see, for instance, *Case Study #1* above). As a result, more projects will require costly compensatory mitigation ranging from $24,989 to

[58] 81 Fed. Reg. at 35,191.
[59] *Id*. at 35,222, 35,224, 35,227, 35,228, 35,229, 35,230.
[60] Mitigation Rule Retrospective at 32 (emphasis added).
[61] *Id*. at 11.
[62] 81 Fed. Reg. at 35,210.

$49,207 per acre nationwide.[63]

In the Proposal, the Corps seeks comment regarding changes in the terms and conditions of the NWPs, including the 1/10-acre threshold for requiring wetland compensatory mitigation.[64] In light of the fact that the Corps itself notes that compensatory mitigation for the minimal adverse effects that NWPs authorize would be "unnecessary" or "impractical" indicates that this threshold should, at a minimum, be maintained at 1/10-acre and not decreased. If, however, the WOTUS Rule is implemented, the Corps must revisit the NWP compensatory mitigations conditions and assess the need to increase this threshold so as not to require costly and unwarranted offsets for minimal impacts to features for which jurisdiction is arguably questionable (e.g., non-perennial streams, isolated waters, and ditches) and ecological value low.

Importantly, the Corps is proposing that if the district engineer determines compensatory mitigation is required for a proposed NWP activity, the preferred mechanism of providing mitigation is either mitigation bank credits or in-lieu fee credits.[65] However, as the Mitigation Rule Retrospective and Figures 3 and 4 highlight, large portions of the country are not served by Corps-approved mitigation banks or in-lieu fee programs. This is especially true in the Southwest, where – as Case Study #2 above indicates – CWA jurisdiction is expected to increase significantly if the WOTUS Rule and its "tributary" definition take effect. In addition to the fact that compensatory mitigation is unnecessary and unpractical for the vast majority of NWP-authorized activities, given the lack of available offset options in many locations, it will be challenging for many project proponents to obtain mitigation credits. If mitigation is required, the Corps must provide sufficient flexibility and mitigation options, including permittee responsible mitigation, so that the lack of available mitigation banks and in-lieu fee programs do not thwart land use opportunities.

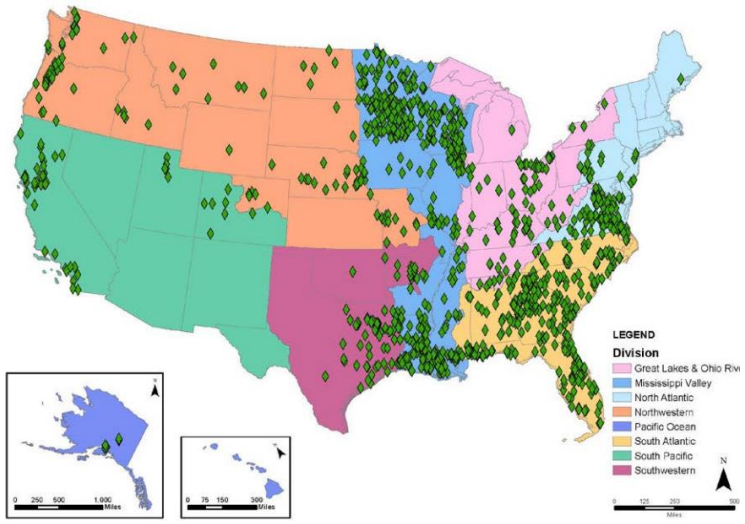

Figure 3. Locations of all Corps-approved mitigation bank sites through 2014.[66]

[63] *Supra* note 48.
[64] *Id*. at 35,191.
[65] *Id*. at 35,209.
[66] *From* Mitigation Rule Retrospective at 60.

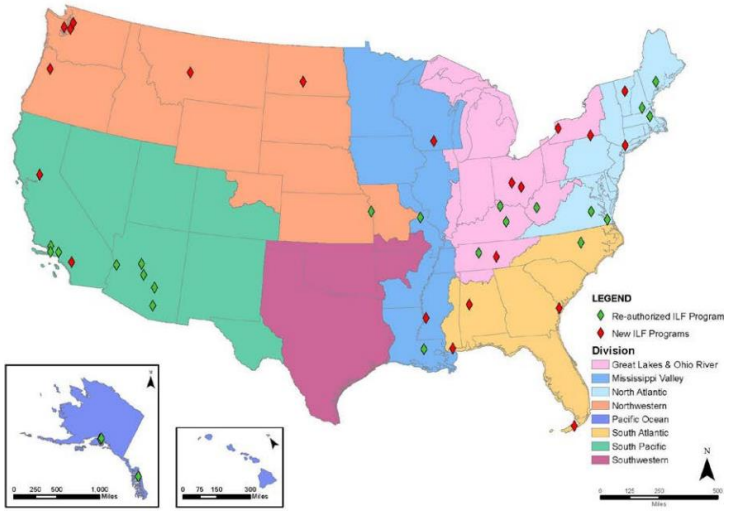

Figure 4. Location of Corps-approved in-lieu fee programs as of 2014.[67]

VII. The Corps Failed to Conduct the Necessary Analysis to Certify the NWPs will not have a Significant Impact on Small Businesses

In addition to the practical concerns NAHB raises regarding the NWP program, there is an important procedural shortcoming associated with the Corps' Proposal. Since 2007, the Corps has recognized its obligation to comply with the Regulatory Flexibility Act (RFA) when it promulgates NWPs.[68] However, the Corps has consistently certified that the NWPs will not have a significant economic impact on a substantial number of small entities without conducting a threshold certification analysis to substantiate its certification.

The RFA allows an agency to bypass the requirement to perform an Initial Regulatory Flexibility Analysis where the agency certifies "that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[69] The agency must include "a statement providing the factual basis for such certification."[70]

In order to certify that there is no significant economic impact on a substantial number of small entities, the agency must, at a minimum, be able to identify which, if any, small entities will be impacted, as well as the economic impact of the proposed rule. The Small Business Administration's (SBA) Office of Advocacy recommends that agencies be able to answer the following three questions:

- Which small entities will be affected?
- Have adequate economic data been obtained?

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[67] *From id.* at 67.
[68] The U.S. Court of Appeals for the D.C. Circuit decided in 2005 that NWPs constitute final agency action subject to judicial review. *National Assoc. of Home Bldrs. v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005).
[69] Regulatory Flexibility Act, 5 U.S.C. § 605(b).
[70] *Id.*

- What are the economic implications/impacts of the proposal or do the data reveal a significant economic impact on a substantial number of small entities?[71]

While the Corps states that NWPs are less costly than individual permits, it provides no description of the universe of regulated entities that will be impacted by the proposed 2017 NWPs. The Corps fails to provide any data on the number of small entities that use the NWP program. SBA encourages agencies to conduct a "threshold" certification analysis as early as possible in the rulemaking process.[72] SBA identifies six criteria that should be addressed in the threshold analysis:

1) Description of small entities affected
2) Economic impacts on small entities
3) Significant economic impact criteria
4) Substantial number criteria
5) Description of assumptions and uncertainties
6) Certification statement[73]

The Corps' certification statement fails to satisfy any of these criteria. It presents no estimate of the number of small entities that will be impacted by the NWPs; the economic impacts on small entities; the criteria the agency uses to determine "significant economic impact" or a "substantial number of small entities," and no discussion of assumptions or uncertainties. Instead the agency makes a few conclusory statements positing that NWPs "are expected" to cost less than obtaining individual permits.[74]

An agency's certification is judicially reviewable, and courts have remanded rules where an agency's certification statement is inadequate.[75] NAHB urges the Corps to perform a threshold certification analysis in line with the SBA Guide and legal precedent to ensure that the agency and the public are fully informed of the impacts the NWPs will have on small entities.

VIII. Conclusion

Nearly 40 years ago, the general permitting program and NWPs were authorized by Congress in response to an expanded interpretation of CWA jurisdiction for the purpose of establishing an efficient, streamlined permitting process for discharges of dredge or fill material that will have no more than minimal adverse environmental effects. NAHB members rely on the streamlined permits offered under the NWP program. Similarly, the NWPs enable the Corps to better protect the aquatic environment by focusing its limited resources on activities with the potential to cause more significant adverse environmental impacts. However, over the years the program has evolved to capture more water features, with NWPs that contain lower eligibility thresholds and

[71] SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (*hereinafter*, SBA Guide), at 11, May 2012.
[72] *Id*. at 12.
[73] *Id*. at 12-13.
[74] 81 Fed. Reg. at 35,215.
[75] *See, e.g., Southern Offshore Fishing Assoc. v. Daley*, 995 F.Supp. 1411 (M.D. Fla. 1998) (remanding a fisheries regulation back to the agency for failure to adequately analyze the impact of the rule on small businesses).

increased permit conditions.

With the recent finalization of the WOTUS Rule, yet again CWA jurisdiction is set to expand. And as jurisdiction expands to new WOTUS and evermore marginal “waters” across the landscape – including streams that only flow when it rains, isolated ponds, and countless ditches – more activities, including those common to the residential construction industry, will require CWA 404 permits. Because many NWPs have acreage and/or linear streambed impact limits and more WOTUS will be impacted, fewer activities will qualify for NWPs and more will require expensive, burdensome individual permits.

Although the WOTUS Rule is currently stayed, if it is put into effect the Corps must at that point re-propose the NWPs and expand the current acreage and linear feet impact limits, waiver descriptions, and PCN thresholds in order to preserve the congressional intent of CWA Section 404(e). In the meantime, it is critical that the Corps maintain the acreage and linear foot impact thresholds to qualify for NWPs and avoid PCN. Additionally, the flexibility of district engineers to issue linear stream bed waivers must be maintained and compensatory mitigation requirements should not be increased. Additionally, the Corps should clarify that the WOTUS Rule definitions will not apply to the final NWPs when they are issued.

Thank you for your consideration of our comments. If you have any questions or would like to discuss any of the issues raised, please do not hesitate to contact Owen McDonough, NAHB Environmental Policy Program Manager at omcdonough@nahb.org or 202 266-8662.

Sincerely,

Susan Asmus
Senior Vice President
Regulatory Affairs

APPENDIX A

TECHNICAL ANALYSIS OF THE POTENTIAL EFFECTS OF THE PROPOSED REVISIONS TO THE DEFINITION OF THE "WATERS OF THE UNITED STATES" RULE ON THE APPLICABILITY AND EFFICIENCY OF USING THE PROPOSED NATIONWIDE PERMITS (Docket Number COE-2015-0017 and/or RIN 0710-AA73)

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1.0 INTRODUCTION

The Department of the Army, Corps of Engineers (ACOE) issues Nationwide Permits (NWPs) to "authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects" (ACOE June 1, 2016, Proposal to Reissue and Modify Nationwide Permits). The primary goals of the NWP program are to provide for timely authorizations for projects meeting the specified criteria, allowing the ACOE to focus their limited resources on more extensive evaluations associated with the issuance of Individual Permits, and protecting the Nation's aquatic resources. The NWPs reissued by the ACOE on February 13, 2012, went into effect on March 19, 2012, and are scheduled to expire on March 18, 2017. The ACOE published a proposal to reissue and modify NWPs in the Federal Register on June 1, 2016 (81 FR 35186). The ACOE is proposing to reissue 50 NWPs along with the general conditions and definitions, and is proposing to issue two new NWPs and one new general condition. As part of this proposal, the ACOE is also soliciting comments on the "views of NWP users on how the 2015 revisions to the definition of "waters of the United States" [WOTUS] might affect the applicability and efficiency of the proposed NWPs".

Breedlove, Dennis & Associates, Inc. has prepared the following analysis on behalf of the National Association of Home Builders (NAHB). The purpose of this analysis is to evaluate the potential effects of the 2015 rule revising the definition of WOTUS under the Clean Water Act (CWA), as published by the U.S. Environmental Protection Agency (EPA) and the ACOE in 80 FR 37054 (June 29, 2015), particularly with regard to the potential effects of this proposed rule on the applicability and efficiency of use of NWP 29 for Residential Developments. Comments to the Notice of Proposed Rulemaking for the reissuance and modification of the NWPs are due by August 1, 2016. The following analysis is submitted as part of an overall evaluation of the proposed reissuance of the NWPs by the NAHB in response to the request for public comment associated with Docket ID No. COE-2015-0017.

2.0 OVERVIEW OF THE 2015 REVISIONS TO THE DEFINITION OF "WATERS OF THE UNITED STATES"

The EPA and ACOE jointly published a rule in the June 29, 2015, edition of the Federal Register (80 FR 37054) amending the definition of WOTUS in the ACOE's regulations contained in 33 CFR part 328. As noted in the ACOE's June 1, 2016, Proposal to Reissue and Modify Nationwide Permits, "[n]umerous parties filed multiple challenges to the 2015 final rule, which currently are pending. On October 9, 2015, the United States Court of Appeals for the Sixth Circuit issued a stay of the rule pending further order of that court."

In order to evaluate the potential effects of the 2015 revisions to the definition of WOTUS on the applicability and efficiency of use of the proposed reissuance of the ACOE's NWPs, it is important to identify the points of potential expansion of federal wetlands regulatory jurisdiction that would result from the adoption of the 2015 rule. The following outlines the current definition of WOTUS in Part 328.3 of the CFR and notates, in strike-through and underline, changes to the definition of WOTUS as proposed in paragraph (a) of the 2015 rule published in the Federal Register.

(1) All waters which are currently used, ~~or~~ were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3)~~(6)~~ The territorial seas;

(4) All impoundments of waters otherwise ~~defined~~ identified as waters of the United States under this section ~~the~~ ~~definition~~;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through ~~(4)~~(3) of this section;

(6)~~(7)~~ All waters ~~Wetlands~~ adjacent to a water~~s~~ identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters; ~~(other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section;~~

(7)~~(3)~~ All ~~other~~ waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

~~such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:~~

~~i. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or~~

~~ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or~~

~~iii. Which are used or could be used for industrial purpose by industries in interstate commerce;~~

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

The comparison outlined above highlights significant expansion in the definition of WOTUS in the 2015 rule. This expansion is due primarily to the following:

1) The definition of "tributary" and the categorical capture of tributaries as WOTUS.
2) The definition of "adjacent" to include the definition of "neighboring", which can, in some cases, result in the categorical capture of previously determined isolated wetlands.

The 2015 rule defines "tributary" and "tributaries" as:

> "a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made

> water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a nonjurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section."

This definition can include features such as ditches, wetlands, lakes, and ponds that lack a bed and banks or ordinary high water mark should they contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (3) of this section. Under the 2015 rule, tributaries are considered to be jurisdictional categorically by rule [unless excluded under section (b)].

The 2015 rule defines the term "adjacent" as:

> "bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent."

In applying the definition of "adjacent", it is important to also note the definition of "neighboring" as defined in the 2015 rule, which is used in determining if a water is considered to be adjacent and thus jurisdictional by rule. The 2015 rule defines "neighboring" as:

> "(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
>
> (ii) All waters located within the 100- year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
>
> (iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes."

Under the 2015 rule, adjacent waters (to include those that are considered neighboring) are considered to be jurisdictional categorically by rule and do not require a case-specific significant nexus analysis.

Based on the clear language in the 2015 rule, additional areas are categorically WOTUS and become subject to federal regulation under Section 404 of the CWA. On the face of it, the language in the 2015 rule expands the limits of WOTUS beyond existing regulatory policy. This overview emphasizes how the definitions of "tributary", "adjacent" and "neighboring" as defined in the 2015 rule are integral to evaluating the potential expansion of federal wetlands jurisdiction relative to the applicability and efficiency of use of NWPs in the ACOE's permitting process.

3.0 POTENTIAL EFFECTS OF THE 2015 RULE ON THE APPLICABILITY AND EFFICIENCY OF USE OF NWP 29 FOR RESIDENTIAL DEVELOPMENTS

As discussed earlier in this report, the definitions contained in the 2015 rule for "tributary", "adjacent", and "neighboring" create the potential for expanded federal wetlands jurisdiction. To further evaluate the potential effects of the 2015 revisions to the definition of WOTUS on the applicability and efficiency of use of NWPs, we completed an evaluation for an example proposed residential development that would qualify for a NWP 29 based on an existing approved federal wetlands jurisdictional determination.

NWP 29 authorizes the discharge of "dredged or fill material into non-tidal [WOTUS] for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision" (ACOE June 1, 2016 Proposal to Reissue and Modify Nationwide Permits). In order to utilize this NWP, the proposed discharge must not cause the loss of greater than ½ acre of non-tidal WOTUS. The proposed example project subject to this analysis is depicted on Figure 1 and is based on an approved federal wetlands jurisdictional determination. According to the approved determination, approximately 48.40 acres of wetlands were considered to be under federal jurisdiction. In addition, a total of 14.46 acres of wetlands were determined to be non-jurisdictional isolated wetlands. Proposed impacts to ACOE jurisdictional wetlands resulting from the proposed example project total 0.42 acre. The proposed example project qualifies for review under NWP 29 given that the total proposed impacts to ACOE jurisdictional wetlands are less than 0.5 acre.

Figure 2 depicts the same project example overlaid with the Federal Emergency Management Agency (FEMA) 100-year floodplain data publically available for the state of Florida (2015 FEMA Digital Flood Insurance Rate Map). This figure demonstrates that all of the wetlands determined to be isolated pursuant to the approved federal wetlands determination and located within the proposed project footprint are also located within the 100-year floodplain. It is also important to note that the isolated wetlands located within this project footprint are located less than 1,500 feet from a large ditch system that is hydrologically connected to jurisdictional wetlands determined to be directly abutting a Relatively Permanent Water (RPW). Since the RPW is associated with a tributary that is connected to a Traditionally

Figure 1 Approved Jurisdictional Wetlands Associated with the use of NWP 29 for an Example Project, Florida

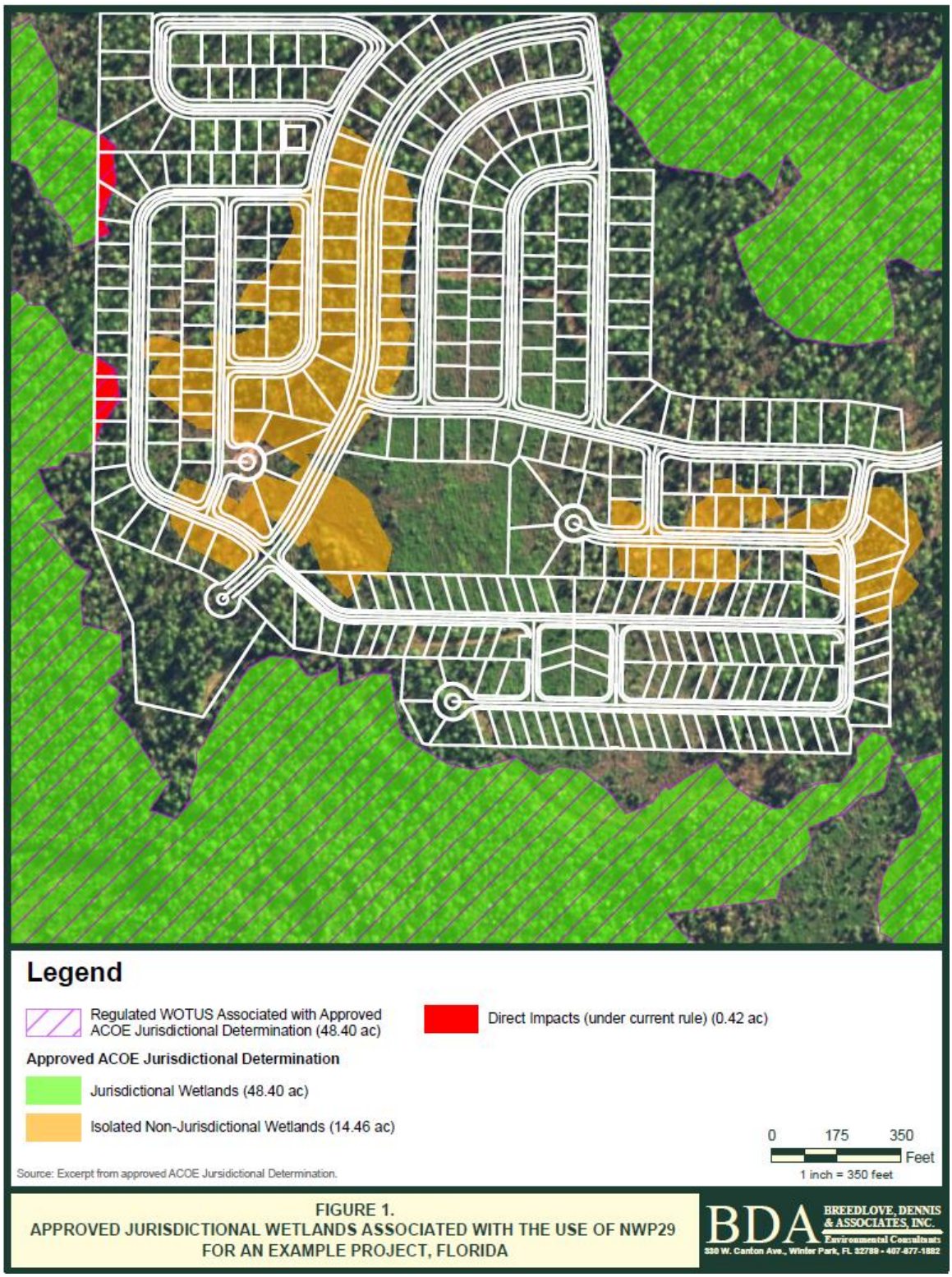
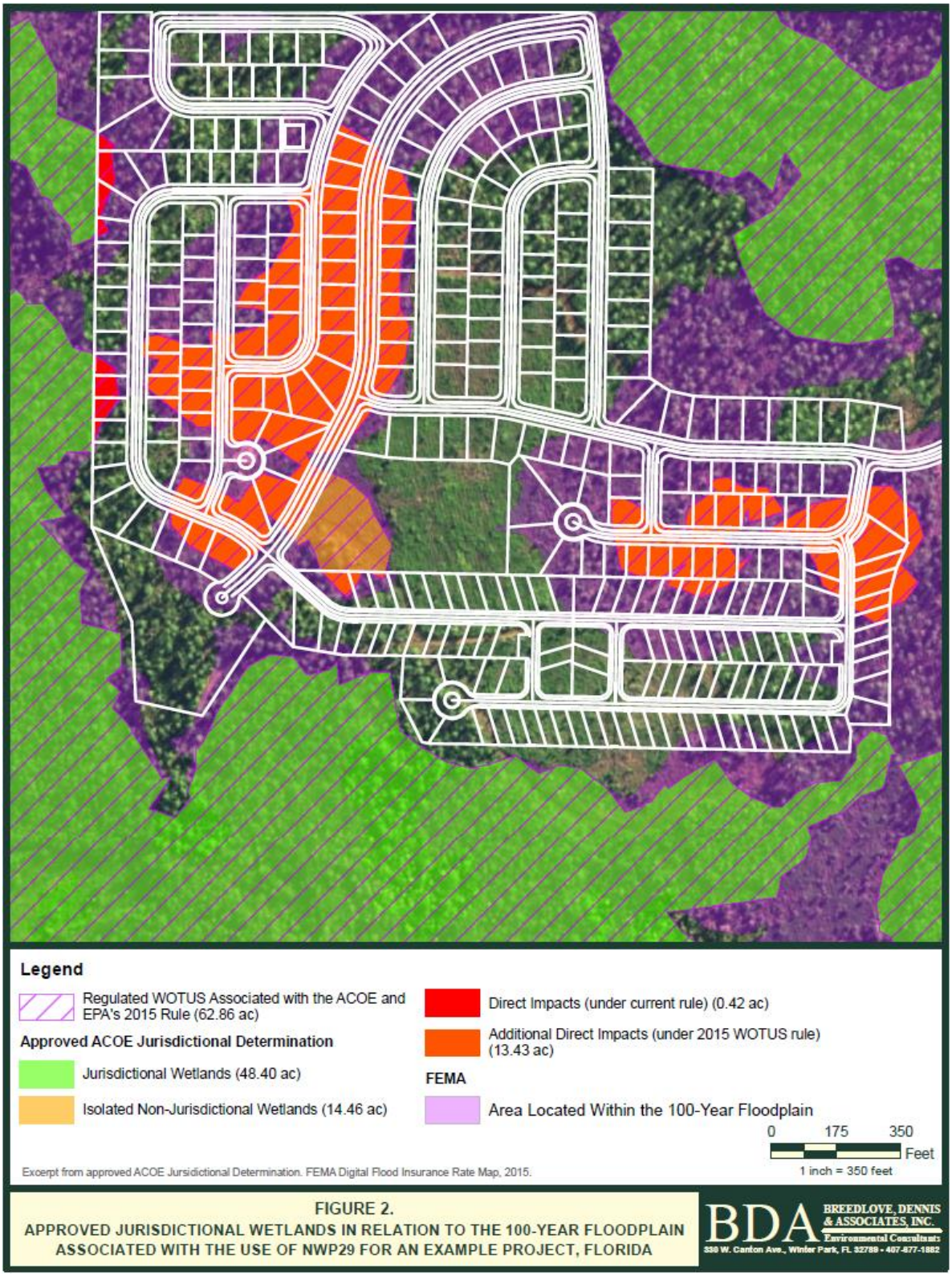


Figure 2 Approved Jurisdictional Wetlands in Relation to the 100-Year Floodplain Associated with the use of NWP 29 for an Example Project, Florida



Navigable Water, the ditch located in close proximity to the proposed example project would meet the definition of a tributary in the 2015 rule. Since the proposed example project is also located within the 100-year floodplain, the isolated wetlands located within the project area would meet the definition of "neighboring" and thus be considered "adjacent" to a water identified in paragraphs (a)(1) through (3) of the 2015 definition of WOTUS and be considered jurisdictional by the ACOE categorically by rule. Under this scenario, 14.46 acres (100%) of the previously determined non-jurisdictional isolated wetlands would be considered jurisdictional under the 2015 rule. Based on this analysis, the total federal wetlands jurisdiction for this area would increase by approximately 30% (48.40 acres to 62.86 acres), encompassing 100% of the total wetland acreage. Proposed impacts to ACOE jurisdictional wetlands resulting from the proposed example project now total 13.85 acres, representing a 3,198% increase (0.42 acres to 13.85 acres) in the total acreage of impacts to ACOE jurisdictional wetlands. The proposed example project would now require review under the Individual Permitting standards given that the total proposed impacts to ACOE jurisdictional wetlands are substantially greater than 0.5 acre.

It is also important to note that according to the approved ACOE Jurisdictional Determination Form[1] developed following Rapanos and currently used in jurisdictional determinations, an isolated wetlands determination can be made based upon: 1) lack of a significant nexus, or if 2) "[p]rior to the Jan 2001 Supreme Court decision in '*SWANCC*,' the review area would have been regulated based solely on the 'Migratory Bird Rule' (MBR)" "…(i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture)…" It is important to note the non-jurisdictional isolated wetlands determination associated with the excerpt of the approved jurisdictional determination utilized for the example project subject to this analysis (depicted on Figure 1) was based on the MBR. Under the 2015 revisions to the definition of WOTUS, all of the previously approved non-jurisdictional isolated wetlands (per the MBR) would be considered jurisdictional categorically by rule by virtue of being "adjacent" waters. The footnotes of the December 2, 2008, Memorandum clarify that:

[1] Approved Jurisdictional Determination Form is referenced in Appendix B of the *Department of the Army, Corps of Engineers Jurisdictional Determination Guidebook* (May 30, 2007).

"The significant nexus standard, rather than being articulated for the first time in Rapanos, was established in SWANCC. 126 S. Ct. at 2246 (describing SWANCC as 'interpreting the Act to require a significant nexus with navigable waters'). It is clear therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in SWANCC."

This analysis demonstrates that the 2015 revisions to the definition of WOTUS would:

1) **result in an expansion of federal wetlands jurisdiction over waters currently approved by the ACOE as non-jurisdictional,**
2) **result in an expansion of federal wetlands jurisdiction over areas previously determined to be isolated wetlands in accordance with SWANCC, and**
3) **require a project that previously qualified for review under NWP 29 to be reviewed under the Individual Permitting standards.**

4.0 REGULATORY PERMITTING IMPLICATIONS OF EXPANDED JURISDICTION UNDER SECTION 404 OF THE CLEAN WATER ACT

A review of the 2015 revisions to the definition of WOTUS, as well as a Geographic Information System analysis of a project specific example utilizing NWP 29, indicates a likely expansion of federal wetlands regulatory jurisdiction that could have far-reaching effects on the regulated community. Under the 2015 definition of WOTUS, previously determined isolated wetlands could be subject to expanded permitting requirements under Section 404 of the CWA for any proposed activity that would discharge dredged or fill material to them, unless the activity is exempt from regulation (see Section 404 Permitting, U.S. Environmental Protection Agency. Web. 22 July 2016). As noted earlier in this report, the primary goals of the NWP program are to provide for timely authorizations for projects meeting the specified criteria, allowing the ACOE to focus their limited resources on more extensive evaluations associated with the issuance of Individual Permits, and protecting the Nation's aquatic resources. As noted in the ACOE's June 1, 2016, Proposal to Reissue and Modify Nationwide Permits, NWPs are "intended to reduce administrative burdens on the [ACOE] and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent in the 1977 amendments to the Federal Water Pollution Control Act."

The analysis completed in Section 3.0 of this report for the proposed residential development example utilizing NWP 29 demonstrated that the 2015 revisions of the definition of WOTUS not only resulted in an expansion of federal regulatory jurisdiction by categorically including previously approved isolated wetlands, but also resulted in an associated 3,198% increase in the total acreage of impacts to ACOE jurisdictional wetlands. The impacts previously considered to be no more than minimal adverse environmental effects and subject to a streamlined review process under the NWP program would now be subject to the Individual Permit review process, which is a more extensive and time-consuming process that utilizes more federal resources to complete. Under Section 404, the Individual Permit review process requires the applicant to:

1. Demonstrate through an "alternatives analysis" that the proposed project is the "least environmentally damaging practicable alternative." Section 230.10(a), 40 CFR, states that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic

ecosystem, so long as the alternative does not have other significant adverse environmental consequences."

2. Demonstrate how impacts to waters of the United States have been minimized. Section 230.10(d), 40 CFR, states that "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." Subpart H of 40 CFR Part 230 outlines several actions that can be taken by the applicant to meet the minimization criteria.

3. Provide sufficient compensatory mitigation consistent with the criteria outlined in the 2008 Compensatory Mitigation Rule (40 CFR Part 230; 33 CFR Parts 325 and 332). After conducting the sequential review of the alternatives analysis and complying with avoidance/minimization criteria, the applicant may be required to provide compensatory mitigation to "offset environmental losses resulting from unavoidable impacts to waters of the United States…" (Section 230.93(a), 40 CFR, Part 230).

The ACOE's June 1, 2016, Proposal to Reissue and Modify Nationwide Permits indicated that any analysis should consider that:

1) "general permits are an important tool for protecting the environment by providing incentives to minimize impacts to jurisdictional waters and wetlands to qualify for a streamlined authorization process. If those incentives are removed by reducing the acreage limits so that designing projects to qualify for NWP authorization is no longer practical, project proponents may submit permit applications for activities with substantial adverse environmental impacts."

   and

2) "General permits are also an important tool for managing the [ACOE's] Regulatory Program, and allow the [ACOE] to focus its resources on evaluating individual permit applications for proposed activities that have the potential for resulting in substantial adverse environmental impacts."

Expanded Federal jurisdiction associated with the 2015 revisions to the definition of WOTUS would be inconsistent with the intent of Congress for a streamlined process for authorizing

regulated activities that result in no more than minimal individual and cumulative adverse environmental effects as outlined in the 1977 amendments to the Federal Water Pollution Control Act. The expanded federal jurisdiction associated with the 2015 revisions to the definition of WOTUS is not directly correlated with the quality of wetlands, but rather reflects the incorporation of additional features that were not previously subject to regulation under the existing definition of WOTUS or under SWANCC. Consequently, expanded Federal jurisdiction would result in an increased review times for applicants (i.e., disincentive to reduce impacts to qualify for a streamlined review process) and an increase in federal resources to review applications with no demonstrated benefit to environmental protection.

The incorporation of alternative acreage limits into the NWP language may help to minimize these effects. However, further analysis would be required to more accurately assess the effects of potentially expanded wetland jurisdiction to the NWP program on a nation-wide basis in order to determine what acreage limitation would provide comparable benefits to the current NWP program under the existing definition of WOTUS.