



February 1, 2022

US Environmental Protection Agency/ Army Corp of Engineers
Via Electronic Portal

Re: Revised Waters of the United States
Docket ID No. EPA-HQ-OW-20210602

Dear Sirs:

Please accept this correspondence as the Organizations vigorous concerns regarding the revision of the definition of the “Navigable waters of the United States” (“The Proposal”) submitted from the recreation community. While the Organizations vigorously support the concept of clean water for a too many reasons to list, this support is not limitless and we need to understand how the proposal achieves this goal. Right now the path forward is not clear. We are also very concerned that the Proposal fails to comply with basic NEPA requirements for the development of a new regulation of this scale. A NEPA regulatory review would provide analysis of the economic impacts, fails to provide guidance on how the new rule may be applied on the ground and fails to address basic norms of sampling and good management decision making in the Proposal.

These systemic failures in analysis have led to conclusions that simply make no sense such as: “There is no economic impacts from the Proposal”. This conclusion simply defies logic, as there will definitely be additional costs and these must be borne by someone. Understanding what these costs are and who will absorb these costs is critical to the long-term success of the Proposal. Structuring the analysis around investigation of existing wetlands areas fails to reflect the scope of the Proposal as the Proposal would manage areas not generally associated with a wetland

designation as wetlands. While these costs being deferred to other people may be acceptable to some, it should be analyzed for the people that are going to incur these additional costs.

The Organizations are very concerned about the economic impacts that the Proposal will have on a huge amount of recreational activities, both from the perspective of larger amounts of management costs that will need to be covered but also from the perspective that opportunities could be lost if costs cannot be covered. Our concerns and these possible impacts are multi-faceted as many recreational opportunities occur on public lands and we have to believe that this revision of the definition of navigable waters will cause some type of review of existing recreational opportunities.

There can be no argument made that the Proposal will not be a significant immediate monetary cost to those in the recreation community, especially given the years of wetlands avoidance guidance that has been provided by all levels of professionals for projects. Existing guidance allows significant recreational opportunities to be developed in flood plains that would have to be subject to review and revision under the new definition. Clearly projects in areas that would have thought to avoid possible wetland issues would now be subject to wetland analysis and mitigation despite the fact they may be nowhere near navigable water. The second phase of these monetary costs would be remedying any deficiencies in analysis or existing management due to larger areas now having to be managed. This could not be exemplified more than by those in the snowmobile or skiing community who recreate on frozen water. Some guidance on the application of the new definition in a situation such as this would be highly valuable but has not been provided. The final cost that would have to be addressed would be the lost revenues to communities if the recreational activity was lost or restricted. This could be hugely impactful to communities that are now overly reliant on recreational revenue to provide their citizens with even basic services.

Our concerns around the Proposal extend far beyond costs that can be reflected in monetary costs and benefits as additional impacts could also result from lost goodwill between

communities and partners, or between various levels of government. This goodwill is often more valuable than the monetary costs of a project and warrants discussion as often recreational goodwill translates to how effectively an area or project can develop and maintain volunteers. These volunteers are critical to the success of any project and are often valued far in excess of cash funding that could be available for a project. The Organizations would have serious concerns about volunteer engagement on a project that had just completed its planning stage only to find out extensive new planning is needed after the new definition.

1. Who we are.

Prior to addressing the specific concerns of the Organizations regarding the Proposal, we believe a brief summary of each Organization is needed. The Colorado Off-Highway Vehicle Coalition ("COHVCO") is a grassroots advocacy organization of approximately 2,500 members seeking to represent, assist, educate, and empower all OHV recreationists in the protection and promotion of off-highway motorized recreation throughout Colorado. COHVCO is an environmental organization that advocates and promotes the responsible use and conservation of our public lands and natural resources to preserve their aesthetic and recreational qualities for future generations. The TPA is an advocacy organization created to be a viable partner to public lands managers, working with the United States Forest Service (USFS) and the Bureau of Land Management (BLM) to preserve the sport of motorized trail riding and multiple-use recreation. The TPA acts as an advocate for the sport and takes the necessary action to ensure that the USFS and BLM allocate a fair and equitable percentage of public lands access to diverse multiple-use trail recreational opportunities. Colorado Snowmobile Association ("CSA") was founded in 1970 to unite winter motorized recreationists across the state to enjoy their passion. CSA has also become the voice of organized snowmobiling seeking to advance, promote and preserve the sport of snowmobiling through work with Federal and state land management agencies and local, state and federal legislators telling the truth about our sport. CORE is a motorized action group dedicated to keeping motorized trails open in Central Colorado and the region. Idaho Recreation Council("IRC") is comprised of Idahoans from all parts of the state with a wide spectrum of recreational interests and a love for the future of Idaho and a desire to preserve recreation for future generations. Collectively, TPA, CSA, CORE, IRC and COHVCO will be referred to as "The

Organizations” for purposes of these comments. The Organizations have actively participated in all types of projects ranging from localized efforts to maintain or reroute portions of trails to large regional or national efforts, such as: The Desert Renewable Energy Efforts in California; Sage Grouse management efforts in the Rocky Mountains; recent revisions of the new USFS planning rule; development and revocation of the BLM 2.0 Planning Rule; and development of the USFS winter travel rule.

We are aware of the challenges that the existing definition of navigable waters under the Clean Water Act and appreciate the desire to clarify the scope of enforcement of the Clean Water Act. This lack of clarity can certainly create high levels of frustration and conflict in this process but the Organizations are aware that anytime there is a definition of any activity, there are always gray areas in every definition boundary. While a new definition may reduce these issues, the Organizations also are aware these issues don’t go away. The Organizations are aware there has been a large amount of focus on the drought that has plagued the Western United States for the last several years and have to believe that this situation partially driving the Proposal.

The Organizations have partnered with the USFS/BLM/other federal managers and state level parks and recreation programs (generally referred to as “land managers” for purposes of these comments) for decades in addressing trail related maintenance issues of all sizes through the voluntary registration fees for OHVs and OSVs that have been adopted in numerous states. These registration programs started around grooming of winter trails for OSV recreation in the 1970’s and remain basically the only source of funding for winter grooming of routes generally on public lands. Seeing the success of these programs the OHV community soon adopted similar voluntary registration programs in the 1980s. These are some of the longest, largest and strongest partnerships in place with land managers and are not matched really in any manner by other user groups. With funding at these levels, we have questions about what the new definition means for the recreational community. There will be actual costs and we may absorb a significant portion of these costs in some areas. We would like the Proposal to at least attempt to summarize the possible impacts to various interests.

As an example of these collaborative funding models, the Colorado Parks and Wildlife motorized program provides between \$6 and \$8 million in direct funding to projects that results in almost 60 maintenance crews for summer and winter trails and extensive project specific funding. The California OHMVR program easily provides five times this amount of funding to the land manager offices in California much of which provides the major source of funding for maintenance and operations of recreational facilities on public lands. The State of Idaho program also provides land managers more than \$1 for every resident of the state to support trail maintenance. Winter programs in states with small amounts of federal public lands also provide significant economic contributions from trails, as evidenced by the State of New Hampshire program contributing \$3 million annually to the state trail network. Each of these State level partnerships is leveraged with countless volunteer hours and support, addressing a huge range of roles including basic volunteer labor on projects, to engineers volunteering time to design bridges and heavy equipment businesses working for the cost of fuel from the programs and many of the programs funded would simply cease to exist without this volunteer support. This volunteer support which multiplies the impact of this funding to have an impact on the ground of spending several times more money that comes from these programs. This intangible benefit is a critical component of the success of these programs and protecting this intangible would be a major benefit of reforming the Proposal.

The Organizations support clean water, as clean water is an indication of a healthy eco-system and healthy eco-systems provide quality recreational experiences for all type of recreation. The snowmobile community relies on water in frozen form for its recreational activity, and as a result is VERY concerned regarding the scope and possible impacts to recreation from the new definition. While our Organizations and members are centered around motorized opportunities generally, our interested are not exclusively motorized usages and our members have express serious concerns around possible impacts to ALL recreational opportunities from the Proposal.

2a. Basic questions are simply not answered.

Prior to addressing the technical application of NEPA regulations to the Proposal, the Organization would like to raise a glaring omission in the analysis. Mainly the Proposal spends huge amounts of time discussing the legal authority believed to be available to undertake the amended definition but fails to provide any discussion of why the decision should be made. This leaves a huge question for recreational community, in all forms, mainly “What is the scope and scale of the problem we are fixing?”. Basic questions around the Proposal remain unanswered such as:

- How much of the water supply is being impacted by unregulated discharges?
- How polluted is the water that is not regulated?
- What is the probability of the Proposal in impacting this pollution?

Failing to address basic questions such as this have arbitrarily limited the scope of analysis and failed to educate the public in any manner on benefits and costs from the Proposal. From a recreational perspective the only facet of recreation that is addressed is beach recreation and that is simply identified as a positive impact from the Proposal.

The Proposal makes no attempt at all to address possible negative and positive impacts to a range of uses or answer basic questions on how the assertion was made. This provides a great example of why NEPA analysis is necessary, as questions such as these must be answered: Are a large portion of beach goers recreating in polluted water? How polluted is the water? What are the impacts of this pollution on members of the recreating community? Will the regulation fix this issue. These question become far more important to the recreational public when usages are not as directly related to water as a beached based recreational experience. Ballparks, trail networks, parks and other resources are commonly in areas where jurisdiction may change. While we don’t see these areas as major polluters, they will still be burdened with significant additional expense simply by having to provide data for their updated permit process to confirm this. We are concerned about the indirect impacts of the Proposal, as our Organizations partner with federal, state and local managers to provide a wide range of maintenance services directly and through our grant programs. Questions such as cost/benefit discussions are critically important to our

interests as we often are paying the bills and would like to understand what is needed to comply with the new Proposal requirements.

3(a). Legally NEPA analysis must be conducted on the Proposal and simply has not occurred.

The first question the Organizations must ask is why is there no NEPA analysis for the Proposal? The Organizations vigorously assert that NEPA analysis of the Proposal is required, as rulemaking of this type is specifically identified in the Code of Federal Regulations as needing NEPA analysis. The CFR provisions identifying the scope of NEPA analysis specifically states this as follows:

“(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.”¹

Any ambiguity regarding the need for NEPA analysis for the Proposal should have been resolved with a brief review of the Council of Environmental Quality's 40 questions on NEPA implementation. Question #24 specifically states this as follows:

“24a. Environmental Impact Statements on Policies, Plans or Programs. When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. *Section 1508.18. **In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal***

¹ 40 CFR 1508.18 emphasis added.

documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23."

The Organizations welcome the volumes of information around the Proposal, but also assert merely providing information is not NEPA, as there is no attempt to reconcile the information provided with the decision making process or explain how the information relates to the decision. The analysis that is provided is hyper technical and poorly explained by even those with a background in the topic being analyzed. The public's ability to distill the information into a body of work that supports the decision is made more complex by the fact the information is often directly contradictory to other parts of the discussion. This is the responsibility of the manager, not the public to explain how the analysis supports the decision being made. The public should not have to theorize a basis for the decision. During the distilling of information by the manager to support the Proposal, the Organizations would hope that some of the more problematic conclusions that are provided could be remedied. These conclusions are discussed in detail later in these comments.

3(b)(1). NEPA mandates detailed statements of high quality information for all decisions made in the planning process.

Prior to addressing the Organizations more specific concerns in the Proposal, the Organizations believe a brief review of NEPA requirements provided in regulation, various implementation guides and relevant court rulings is warranted to allow for comparison of analysis provided in the Proposal and the proper standard. The Organizations believe that the high levels of quality analysis that is required by these planning requirements frequently gets lost in the planning process. The Organizations are very concerned that the need to document the cause and effect relationship between management changes and impacts that will result is a significant weakness

in the Proposal. The Organizations believe meaningfully analyzing this cause and effect relationship will result in significant changes to the preferred alternatives proposed in supplemental works.

It is well established that NEPA regulations require an EIS to provide all information under the following standards:

"... It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment..... Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses.... " ²

The regulations included the development of the Council of Environmental Quality, which expands upon the detailed statement theory for planning purposes, provide as follows:

"You must describe the proposed action and alternatives considered, if any (40 CFR 1508.9(b)) (see sections 6.5, Proposed Action and 6.6, Alternative Development). Illustrations and maps can be used to help describe the proposed action and alternatives." ³

These regulations clearly state the need for the quality information being provided as part of this relationship as follows:

"The CEQ regulations require NEPA documents to be "concise, clear, and to the point" (40 CFR 1500.2(b), 1502.4). Analyses must "focus on significant

² 40 CFR 1500.1

³ See, BLM Manual H-1790-1 - NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK – pg 78.

environmental issues and alternatives” and be useful to the decision-maker and the public (40 CFR 1500.1). Discussions of impacts are to be proportionate to their significance (40 CFR 1502.2(b)).”⁴

The Organizations are intimately aware of the high burdens placed on all phases of any project under the National Environmental Policy Act, as the Organizations have undertaken many NEPA analysis in partnership with Federal Agencies throughout the Country. The Organizations do not believe a comparable level of analysis and resources have been directed towards the Proposal preparation. The Organizations believe this full and fair discussion of many issues has not been provided in the Proposal and associated documents. This type of analysis is critical to the long term success of the Proposal and avoiding unintended negative impacts from the Proposal.

3(b)(2). NEPA is designed to stimulate public involvement and scrutiny and these goals should be important benchmarks for the Proposal development.

The Organizations believe the association of impacts from changes proposed to the management issue that is the basis of the rulemaking is a critical component in developing public comments. The role of NEPA in public involvement as frequently members of the public do not have sufficient time, resources or understanding to make these connections. These concerns are summarized in the NEPA regulations which clearly provide the reason for the need for high quality information to be provided in the NEPA process. NEPA regulations provide as follows:

"(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. *The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.*"⁵

⁴ See, BLM Manual H-1790-1 - NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK – pg 4.

⁵ See, 43 CFR 1500.1(b)

The desire for NEPA analysis to stimulate public involvement and comment as part of federal planning actions is woven throughout the NEPA regulations and the implementation documents. For example the BLM Planning manual clearly states this desire as follows:

“The CEQ regulations also require that agencies “make diligent efforts to involve the public in preparing and implementing their NEPA procedures” (40 CFR 1506.6(a)).”⁶

The Organizations vigorously assert that high quality information on basic issues has simply never been provided in the Proposal and as a result the Organizations are forced to theoretically address numerous issues despite the asserted priority and importance of the issues in the Proposal. The lack of high-quality information has materially impaired the Organizations ability to meaningfully and completely comment on a variety of issues. With this type of failure, we must question how the public will engage in these efforts.

3(b)(3). NEPA requires an EIS to address issues with high quality information and analysis.

After a review of the Proposal, the Organizations vigorously assert there has not been sufficient analysis of numerous issues to satisfy general NEPA planning requirements. This is a serious indication that the Proposal analysis is lacking, even if these requirements are not mandatory. The NEPA regulations clearly state the general standards for analysis of issues in an EIS as follows:

"Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be

⁶ BLM Manual H-1790-1 - NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK – pg 2.

used by Federal officials in conjunction with other relevant material to plan actions and make decisions."⁷

The Proposal and related documents encompass over 1,000 pages but fails to provide any meaningful discussion of economic and planning issues and challenges that may be encountered. The basis and analysis of economic decisions simply is never identified and merely creating a report is insufficient. The Organizations believe this policy is as facially unacceptable as the high-quality analysis mandated by NEPA simply can never be satisfied by simply asserting you complied with that standard. NEPA requires a discussion of how the national standards were applied in the management decisions regarding specific areas, resources concerns and other field office specific management concerns.

3(b)(4). NEPA requires a balance of uses and addressing of cumulative impacts.

As previously noted, NEPA requires a detailed statement of why a decision or alternative was chosen over other alternatives. The detailed statement is required on a wide range of topics, some of which often conflict. One of NEPA's fundamental goals is to:

“promote efforts which will prevent or eliminate damage to the environment and biosphere and **stimulate the health and welfare of man.**”⁸

As more completely addressed later in these comments, the Organizations have serious concerns that the welfare of man, has not been properly addressed in the Proposal process. While there is significant analysis of the legal question of could the Proposal be legal, there is almost no factual basis of why the decision would be made. This would include analysis of why the decision would be made and the benefits to be achieved, basically defining success for the Proposal. NEPA further requires that cumulative impacts be taken into account as follows:

⁷ See, 40 CFR 1502.1

⁸ See, 42 U.S.C. §4321

“Cumulative impacts can result from individually minor but collectively significant actions.”⁹

The Organizations believe these cumulative impacts can take many forms, including not only addressing cumulative impacts to the environment but also addressing the cumulative impacts of the decisions made on a site-specific basis as part of the landscape level planning process. The Organizations also believe cumulative impacts of exclusions in the analysis of specific factors must also be properly addressed. The cumulative impacts of these decisions has not been reviewed, which has resulted in conclusions being reached in the Proposal that are in conflict with research from Federal, state and user group research.

3(b)(5). Relevant Court rulings addressing NEPA standards directly apply the NEPA regulations for actions.

The Organizations believe a brief summary of the standards that are applied by Courts reviewing agency NEPA analysis is relevant to this discussion as the Courts have consistently directly applied the NEPA regulations to review of projects. Relevant court rulings have concluded:

*"an EIS serves two functions. First, it ensures that agencies take a hard look at the environmental effects of proposed projects. Second, it ensures that relevant information regarding proposed projects is available to members of the public so that they may play a role in the decision making process. Robertson, 490 U.S. at 349, 109 S.Ct. at 1845. For an EIS to serve these functions, it is essential that the EIS not be based on misleading economic assumptions."*¹⁰

⁹ See, 40 CFR §1508.7

¹⁰ See, Hughes River Watershed Conservancy v. Glickman; (4th Circ 1996) 81 F.3d 437 at pg. 442; 42 ERC 1594, 26 Env'tl. L. Rep 21276.

As previously addressed in these comments, public involvement simply has not been stimulated and a hard look has not been performed. The Organizations first concern would be the complete lack of discussion around the need for the updating of the WOTUS Proposal.

The Proposal spends a large amount of time discussing the legal basis of why the decision **could** be made but entirely fails to address **should** the decision should be made. The Organizations submit the analysis provided entirely lacks factual basis for the decision. Throughout the documentation provided there is extensive legal history of the interpretations of the Clean Water Act, but at no point is there any factual basis for the benefits that are sought to be achieved with the Proposal. We believe the comparison to a large NEPA type effort is well based as NEPA analysis simply requires a high-quality solid management process and analysis. These are requirements that simply should be applied as best management practices for the discussion. Also providing guidance on these types of issues is also highly relevant as this type of information will be critically necessary in subsequent NEPA that will be undertaken to implement the new rule.

Addressing questions like “why a decision is being made?” is as critical to success as identifying can the decision be made. Identifying the “why” of the decision will also be critical to avoiding unintended impacts of the decision as it is being implemented. This type of analysis will be critical in defining the success or failure of the Proposal in the long run as well.

4(a). Congressional efforts around navigable water management continue to recognize recreation.

The value of unintended consequences to recreation from the Proposal cannot be underestimated as the US Army Corp of Engineers proclaims they are the Nation’s number one Federal provider of outdoor recreation.¹¹ Given that the Army Corp is the number one Federal provider of recreational opportunities, the Organizations would have assumed that a possible

¹¹ See, [Missions -- Headquarters U.S. Army Corps of Engineers](#)

impact to one of the Army Corps primary efforts would have been addressed in a rule co-written by the Army Corp. It is concerning that the rule and analysis does not address issues like this and the public is now having to raise these types of issue at this late stage in the discussion.

Our concerns over possible impacts to recreational activity are compounded by the fact that Army Corp guidance and efforts for decades have identified recreation as a type of use consistent with floodplain and riparian areas that might now need significant additional analysis and are often priority repair areas for flood impacts. Anytime that decades of guidance materials on any issue is changed, there will be impacts and the Organizations vigorously assert these impacts must be addressed and related to the decision being made in order to satisfy NEPA alone. NEPA satisfaction is not enough as often these areas adjacent to riparian areas are highly valued by the public. The value that the public places on these types of resources is exemplified by the fact that these types of facilities are frequently priority repairs after major storms such as hurricanes.¹²

The value of that Congress places on recreation in Army Corp efforts is also reflected by the fact that recreational usage is specifically identified as a concern in just the 2020 Water Resources Development Act 17 times. Congress has specifically identified the recreational value of these lands as recreation is specifically recognized in site specific legislation and has been identified as a concern as a major concern in numerous Executive Orders. Again, given the consistent Congressional and Executive recognition of these activities, the Organizations would have thought recreation would have been addressed and are candidly perplexed why it was not.

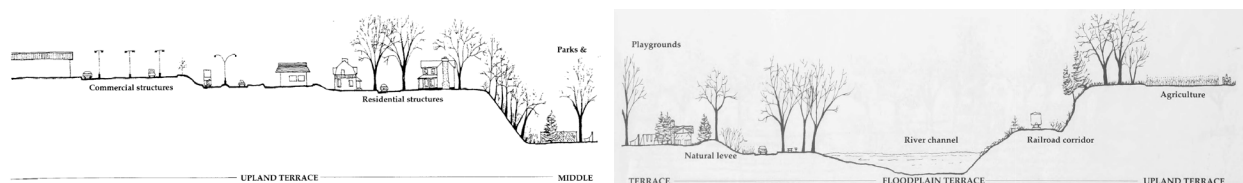
The Organizations believe it is important to recognize and address the significant impacts the revised definition could have on all forms of recreation including a wide range of sports parks, parks, parking facilities and extensive trail networks of all kinds. Many of these opportunities in municipalities are provided by small not-for-profit groups or small communities that simply don't have resources to review the 404 permitting and undertake analysis to even understand possible

¹² An example of the relevance of the relationship and possible impacts of wetlands and recreational opportunities is provided as follows: [FEMA Approves Nearly \\$5.6 Million More for Lynn Haven Parks Recovery | FEMA.gov](#)

impacts from the Proposal. The facilities that are available often take decades to fundraise for and these groups simply don't have funding available to address unforeseen costs such as this. These groups have developed significant goodwill between managers and local communities and this goodwill is critical to the success of any of their projects. These are serious impacts for these communities and Organizations and are not costs that should be overlooked. Costs may be passed through to those that visit the park, if a fee can be charged, or it may simply be absorbed through fundraising efforts behind the scenes. Regardless of how these costs will be applied, the public has a right to know and discuss what these costs are and compare those costs to opportunities that may be lost if these costs are not covered.

4(b). State recognition of recreation in areas possibly impacted by the Proposal.

The Organizations concerns around conflicts with previous guidance and impacts to recreational activity are compounded by the fact that State and local governments have mirrored the historical guidance from the Army Corp on how to manage wetlands. As an example, the State of Minnesota has highly detailed guidance on how to design municipal parks that are in seasonal floodplains in order to minimize risks.¹³



What does this Proposal mean for areas and communities that have applied these historical best management practices such as those specifically outlined above and developed recreational opportunities in these areas? Essentially, these management practices have relied on the position that definitions such as those in the Proposal would remain steady. We are unsure but have to assume that this Proposal will not reduce costs or expand recreational opportunities. We have to believe that the Proposal will result in lost opportunities for communities that applied

¹³ A complete copy of these guidance materials is available here: [mn 2020 AD FO 01213.pdf \(umn.edu\)](https://mn.legislativeservices.org/legislativeservices/legislation/2020/AD/FO/01213.pdf). The graphic is displayed across the bottom of pages 2 & 3 of the document

BMPs and simply don't have the funding available to review the scope of existing permits and planning. These are concerns that simply must be analyzed.

The Organizations are also concerned about impacts to areas that provide more dispersed recreational opportunities, such as those most commonly associated with state or federal parks or lands owned by the USFS or BLM. While we are aware that these types of usages will be outside the scope of a traditional 404 type permit model, the Organizations are also very concerned that this level of restructure of what areas and waters are subject to the heightened analysis of the Clean Water Act would drive a large scale review of NEPA regulations and existing analysis. The Organizations would have to believe that at best issues such as trails in lands now made navigable water for part of the year would be the basis for a programmatic NEPA analysis, such as those previously performed for agricultural concerns. This is concerning as most land managers we work with simply don't have the time, staff or funding to undertake this type of analysis. This means recreational opportunities will be lost. These are the type of indirect impacts from the Proposal that will be hugely economically impactful and are not even addressed in the Proposal. The following pictures reflect situations we commonly encounter on dispersed trails on public lands and continue to strive to repair every year:



The Organizations are very concerned that these types of conditions are commonly seen on all types of trails on federal public lands and these are conditions that we strive to repair or reduce every year by hardening the trail, moving the trail or redirecting water back into existing channels. The Organizations are also aware that these types of areas are also clearly within the new definition of navigable waters of the United States. The Proposal simply provides no discussion at all of how to access these areas for possible challenges or how to mitigate areas to avoid additional layers of administrative review to avoid trail closures. These are also issues that will absolutely create economic impacts from the Proposal and warrant discussion. This discussion simply has not been attempted in the Proposal.

5(a). There are numerous faulty assumptions made prior to addressing economic impacts.

The Organizations are astonished at the lack of discussion and analysis in the Proposal to address incremental costs and benefits from the Proposal in general. Possible impacts to economic benefits from the Proposal are often summarily reviewed, despite the dedicated volume of analysis that has been provided. The Organizations must also note that throughout the economic analysis numerous references are made in the report referring the public to section III.C.6 for a discussion of how uncertainty in the analysis process was addressed. The analysis is off to a shaky start as this section does not exist, making discussion of analytical uncertainty and related assumptions functionally impossible.

The lack of meaningful analysis leads to conclusions that are based on faulty assumptions and conclusions that are not factually defensible. One foundational assumption that was immediately identified as incorrect was the assumption that costs would be uniformly recovered

across households in the region. This simply could not be further from the truth in the recreational community as most recreational costs are not covered by tax revenue but rather by outside fundraising, voluntary taxes on a small portion of users or other taxes remote to the household concept. Efforts to expand the funding sources for recreational activity have largely been unsuccessful.

A second foundational flaw in the economic analysis is the fact researchers sought input about “wetlands”.¹⁴ While the economic analysis identifies that this type of effort can be difficult, the Proposal also fails to even discuss the fact that the new Navigable Water Rule will create significant administrative burdens for the public in areas that have never been associated with a wetland. Rather than asking questions about abstract concepts the public has trouble understanding or valuing, the Organizations have to believe that asking these questions in a manner that provided a clear benefit or cost to the public that they understood would result in significantly different. An example of the type of question that would elicit a very different response might be:

“Would you close the local baseball park your kids use that is located in a seasonal floodplain, in order to obtain water that might be cleaner but might not be used?”

The Organizations believe the baseball park in our example question could easily be substituted for many other things, like motocross parks, greenway trails, parks or other recreational resources. The response to this type of cost would probably bring far more balance into the discussion as this is a loss the public generally understands and can relate to. Merely recognizing a problem is difficult is not sufficient analysis to support any decision. Far more analysis of impacts of the Proposal must be undertaken.

5(a)(2). The Proposal will absolutely have a negative effects on funding sources.

¹⁴ See, Proposal at pg. ix.

The failure to meaningfully address costs and benefits starts from the fact that the economic analysis is keyed on the concept of Willingness to Pay (“WTP”) as a primary driver of costs being analyzed. WTP is a hugely subjective analysis tool, and best available science consistently requires a detailed analysis of the assumptions that were made in the analysis.¹⁵ There are literally dozens of models for the WTP concept and the application of the WTP concept has been fraught with diverse opinions and conflict and one of the more common applications of the WTP concept is in the resolution of large class action lawsuits. Often Plaintiffs assert an almost unlimited willingness to pay but Defendants, who are actually paying the bill, place a much lower value on the issue.¹⁶ The clash of these competing values has been on full display in the US for the last several years around health care.

The Organizations are intimately familiar with this type of distinction in the WTP concept as often we hear these recreational opportunities on public lands are “priceless”. It has been our experience that there is a huge amount of difference between willingness to pay and actually paying. While opportunities may be priceless if you are not paying the bill, often these costs are very difficult to cover and if there are funds available, they are HIGHLY competitive in nature. Many of us have developed grants to develop these priceless opportunities and have found acquiring letters of support stating the project is priceless to an interest group or community is relatively easy but acquiring a letter of support and a check for the project is FAR more difficult.

Our experiences around WTP are in stark contrast to the conclusion of the Proposal around the WTP is outlined as follows:

“C. What are the incremental costs and benefits of this action?”

Because the agencies are not currently implementing the NWPR, the proposed rule would provide protections that are generally comparable to current practice;

¹⁵ See, [Willingness to Pay: What is it and how to measure WTP? \(valueships.com\)](http://valueships.com)

¹⁶ See, [Conjoint Analysis | Cornerstone Research](http://Cornerstone Research)

as such, the agencies find that there would be no appreciable cost or benefit difference”¹⁷

The offhand nature of this analysis is simply astonishing and directly contradicts the requirements of NEPA. Merely asking an open-ended question of the public on an issue they don’t understand does not create legal support any Proposal. If supported, this lack of analysis would gut the entire NEPA process as by definition NEPA must be completed prior to ANY project starting implementation. By definition, no regulation can be implemented until NEPA review is complete. Here we are lead to believe that the current rule could be implemented without NEPA or similar analysis. As more extensively addressed in these comments, the Organizations submit there would be extensive costs from the Proposal on a wide range of recreational actions, many of which are uses that are recognized by Congressional action and numerous Executive Orders.

5(b). Sample size for economic analysis fails to meet requirements of best available science.

Our concerns are not just limited to the poorly structured research process with the public but also to many of the sampling efforts of research and efforts that are available. The Organizations were simply astonished by the comically small sampling size that the economic analysis is based on. The report clearly identifies this small group as follows:

“In their study, the researchers limited the meta-data to U.S. based studies focused on valuation of freshwater wetlands, resulting in 21 observations taken from 11 studies.”¹⁸

The Organizations would note that 21 studies is simply insufficient to represent the possible impacts of a national regulation. The Organizations would also express serious concern about any decision that limited an investigation to parties that merely have a 404 permit as many groups

¹⁷ See, Proposal at pg. 14.

¹⁸ See, US EPA; *Economic analysis for the Proposed “revised definition of the waters of the United States report*; Nov 17, 2021 at pg. 120.

have worked hard to avoid the need for an EPA review of possible impacts from their project by simply altering the location of their project. With the revised scope of analysis from the new definition, these groups will absolutely incur new costs that they may or may not be able or willing to absorb.

5(c). Economic analysis appears to be based on merely asking what would people pay?

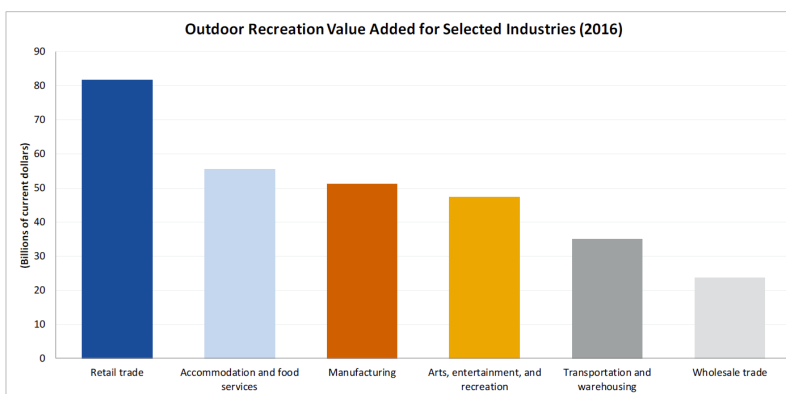
Faulty start as it has been our experience that when people are asked in a vacuum what would they pay for a particular benefit their answers in no way relate to reality and there is often a major disconnect between answers that are provided in the vacuum and what the willingness to pay is when cash outlay becomes necessary. At some point any effort requires funding and while this funding may not be important to most, it is critically important to those that are funding the project and without this funding the project will not move forward. These indirect impacts are absolutely part of an economic analysis and must be addressed.

We are also concerned about the regional nature of any question about water. While some states see water as a critical resource that is in growingly short supply, such as exhibited in Southern California drought conditions, other states see water as a management concern that must be addressed to protect other resources, such as the levy system around New Orleans. Cleaner water will be highly valuable in California but of little value as the true management issue in New Orleans is keeping water out of the city rather than utilizing the resources.

5(d). Economic contributions of all forms of recreation must be recognized in the Proposal.

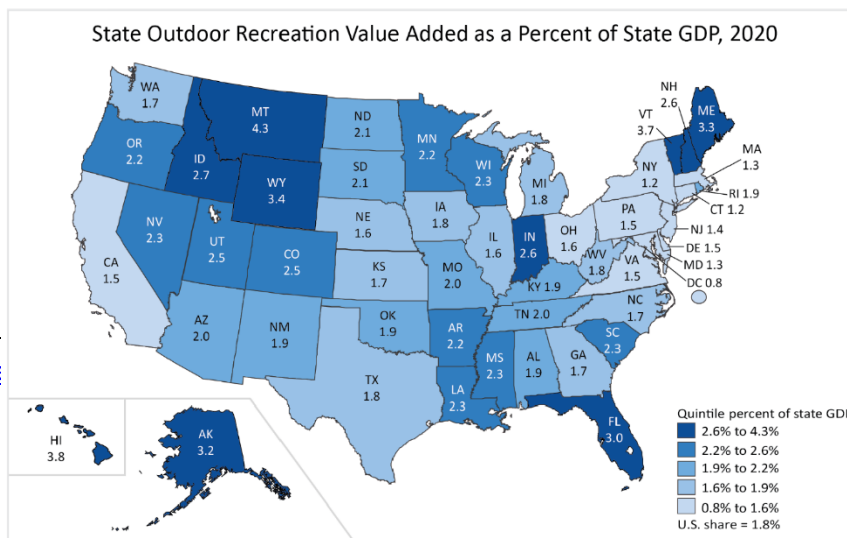
As the Organizations have specifically addressed in these comments previously, the Army Corp is heavily involved in providing recreational opportunities to the public on federal lands. This alone should warrant discussion of possible impacts of a joint Army Corp Rule on a primary action of the Corp. This possible impact expands when other public lands are brought into the analysis

and the Organizations believe it is important to recognize the scope of this possible impacts, especially given the current economic climate in the country. The Dept of Commerce Bureau of Economic Analysis concluded that recreational activity contributed more than \$788 Billion in economy activity (or 2.1% of the US Gross Domestic Product) to the US economy which results in 5.2 million jobs.¹⁹ In 2018 the BEA provided the following breakdown of the recreational spending impacts to the national economy when compared to several other large economic sectors:



Given that recreational spending was larger than transportation and wholesale trade and comparable to manufacturing and food service industries, the Organizations have to believe the fact that recreation is one of the largest sectors in the American economy probably warrants some discussion of possible impacts from the Proposal.

Huge contributions to many communities that have no other sources of revenue, so even small changes in the revenue streams are going to have impacts on those communities. The 2020 BEA report provided the following comparison of recreational spending as a percentage of the GDP of the states:



¹⁹ [Outdoor Recr](#)

[Analysis \(BEA\)](#)

The Organizations vigorously assert that the above graphic is further evidence of the importance of recreational activity to state economies. Clearly, if a proposal could impact over 4% of a States GDP, it is important to those residents of the state and warrants discussion. Given that huge portions of these opportunities are provided on areas that could be impacted by the revised definition of navigable waters, the Organizations again assert this is an impact that must be addressed and simply has not been.

5(e). Impacts of Proposal could be massive on recreation that are not commonly associated with water in its traditional form.

The Organizations are concerned with the impacts of the revised definition on activities that are directly impacting the water but are not managed as navigable waters, such as water-skiing on an isolated pond or lake, which is commonly done in the water-skiing training areas to reduce waves on the water from other boats. These are somewhat easy concerns to understand. The Organizations are more worried about possible indirect impacts to usages that frequently are not thought of as occurring on water. An example of this indirect impact could occur to the snowmobile community, as snowmobiles use frozen water to traverse terrain, such as the activity in the photos below:



In the promulgation of the new Winter Travel Rule by the USFS in 2014, the USFS specifically stated as follows:

“When properly operated and managed, OSVs do not make direct contact with soil, water, and vegetation; whereas most other types of motor vehicles operate directly on the ground. Unlike other types of motor vehicles traveling cross-country, OSVs generally do not create a permanent trail or have a direct impact on soil and ground vegetation. In some areas of the country, OSV use is therefore not always confined to roads and trails.”

Clearly landscape level conclusions such as that above would have to be reviewed if there was a definition alteration of navigable waters. While we vigorously assert there are libraries full of documentation about the lack of impact of these recreational activities on water quality, the Organizations are also very concerned that simply reopening this discussion could cost millions of dollars. These are again costs that have to be borne by someone and that person has the right to know and understand these costs and right now those costs are not even discussed.

The Organizations concerns about possible indirect impacts of the altered definition are not limited to just recreational usage on the snow but also the maintenance operations that support these industries. These grooming operations support tens of thousands of miles of trail throughout the country and these routes are the primary source of access for most backcountry winter recreation in all forms. These groomed networks are also activities that have relied heavily on the avoidance guidance provided by managers historically. Grooming was allowed to occur after detailed site specific analysis but many grooming operations are not permitted to groom in areas that could be a wetland. If this definition of what could be a navigable water changes this could have massive impacts on snowmobile grooming activity across the country. Each of these permits would have to be reviewed on a site-specific basis and we are aware of many areas that simply could not groom due to the large number of seasonal streams that connect the wetlands that they are not allowed to cross. While some of this could be resolved with trail reroutes, some of it would not be able to be resolved. This will result in trail closure or massive effort from the

volunteers that operate these programs. They would disagree that their efforts are economic neutral in nature.

Snowmobile recreation in the United States and Canada is a major economic driver, as it is estimated to provide more than \$9 billion in economic contribution.²⁰ Given the direct relationship of the Proposal and the more than \$9 billion in economic impacts from snowmobile recreation, the Organizations emphasize this type of direct and indirect impact warrants detailed discussion in the Proposal and clarity in the proposal to ensure that the new rule is consistently applied and understood.

It is also worth noting that a revised definition of Navigable Water could impact many other recreational activities such as creating ice roads for the use of recreational fishing opportunities.²¹ As noted in the coverage, the facilitation of this ice road for access provides a critical economic benefit to the local communities in the area, that have seen massive increases in visitation in the winter as a result of this opportunity.

6. Conclusions.

While the Organizations vigorously support the concept of clean water for a too many reasons to list, this support is not limitless and we need to understand how the proposal achieves this goal. Right now the path forward is not clear. We are also very concerned that the Proposal fails to comply with basic NEPA requirements for the development of a new regulation of this scale. A NEPA regulatory review would provide analysis of the economic impacts, fails to provide guidance on how the new rule may be applied on the ground and fails to address basic norms of sampling and good management decision making in the Proposal.

²⁰ See, [Economic Impact of the Snowmobiling Industry-American Council of Snowmobile Associations \(ACSA\) Uniting the Snowmobile Community \(snowmobilers.org\)](#)

²¹ See, [Minnesota's Ice Highway opens for a second year \(yahoo.com\)](#)

These systemic failures in analysis have led to conclusions that simply make no sense such as: “There is no economic impacts from the Proposal”. This conclusion simply defies logic, as there will definitely be additional costs and these must be borne by someone. Understanding what these costs are and who will absorb these costs is critical to the long-term success of the Proposal. Structuring the analysis around investigation of existing wetlands areas fails to reflect the scope of the Proposal as the Proposal would manage areas not generally associated with a wetland designation as wetlands. While these costs being deferred to other people may be acceptable to some, it should be analyzed for the people that are going to incur these additional costs.

The Organizations are very concerned about the economic impacts that the Proposal will have on a huge amount of recreational activities, both from the perspective of larger amounts of management costs that will need to be covered but also from the perspective that opportunities could be lost if costs cannot be covered. Our concerns and these possible impacts are multi-faceted as many recreational opportunities occur on public lands and we have to believe that this revision of the definition of navigable waters will cause some type of review of existing recreational opportunities.

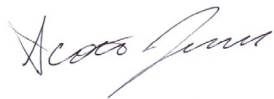
There can be no argument made that the Proposal will not be a significant immediate monetary cost to those in the recreation community, especially given the years of wetlands avoidance guidance that has been provided by all levels of professionals for projects. Existing guidance allows significant recreational opportunities to be developed in flood plains that would have to be subject to review and revision under the new definition. Clearly projects in areas that would have thought to avoid possible wetland issues would now be subject to wetland analysis and mitigation despite the fact they may be nowhere near navigable water. The second phase of these monetary costs would be remedying any deficiencies in analysis or existing management due to larger areas now having to be managed. This could not be exemplified more than by those in the snowmobile or skiing community who recreate on frozen water. Some guidance on the application of the new definition in a situation such as this would be highly valuable but has not been provided. The final cost that would have to be addressed would the lost revenues to

communities if the recreational activity was lost or restricted. This could be hugely impactful to communities that are now overly reliant on recreational revenue to provide their citizens with even basic services.

Our concerns around the Proposal extend far beyond costs that can be reflected in monetary costs and benefits as additional impacts could also result from lost goodwill between communities and partners, or between various levels of government. This goodwill is often more valuable than the monetary costs of a project and warrants discussion as often recreational goodwill translates to how effectively an area or project can develop and maintain volunteers. These volunteers are critical to the success of any project and are often valued far in excess of cash funding that could be available for a project. The Organizations would have serious concerns about volunteer engagement on a project that had just completed its planning stage only to find out extensive new planning is needed after the new definition.

The Organizations would welcome discussions with EPA/Army Corp regarding the management and sustainability of water resources in a manner that does not impact recreational activities. If you have questions, please feel free to contact Scott Jones, Esq. His phone is (518)281-5810 and his email is scott.jones46@yahoo.com or Chad Hixon at (719)221-8329 or his email is chad@coloradotpa.org.

Respectfully Submitted,



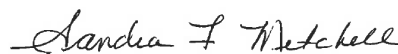
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