April 15, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Office of Policy Regulatory Reform
Mail Code 1803A
1200 Pennsylvania Ave NW
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army for Civil Works
Department of the Army
104 Army Pentagon
Washington, DC 20310-0104

RE: Docket ID Number EPA-HQ-OW-2018-0149: Comments on *Revised Definition of "Waters of the United States"* Federal Register, Vol. 84, No. 31 (February 14, 2019)

Dear Administrator Wheeler and Assistant Secretary James:

On behalf of the National Wildlife Federation, our six million members and supporters—including millions of conservation-minded hunters, anglers, and outdoor enthusiasts—and more than fifty state and territorial affiliates, and on behalf of American Rivers, I write in strong opposition to the Environmental Protection Agency's (EPA) and Army Corps of Engineers' (Corps) proposed revised definition of "Waters of the United States." This proposed redefinition, which President Trump initiated by signing Executive Order 13,778 on February 28, 2017, recklessly targets waterways upon which we all rely.

The National Wildlife Federation has championed clean and healthy rivers and streams since our founding in 1936. Conserving our Nation's wetlands, streams, and rivers for fish, wildlife, and communities is at the core of our mission. We worked closely with Senator Muskie to pass the Clean Water Act in 1972 and have worked hard to fulfill its promise of clean water for all Americans ever since. We believed then—and still believe today—that the best way to improve water quality is to prevent pollution at its source, which is much cheaper than trying to remove pollution downstream. Since the *SWANCC* and *Rapanos* U.S. Supreme Court decisions issued in 2001 and 2006, respectively, we have been actively engaged in the effort to clarify the definition of "Waters of the United States" that underpins the 1972 Clean Water Act.

We respectfully request your careful consideration of our comments on this proposed rule, highlighting the strong technical, scientific, legal, and public support for the Clean Water Rule – and the lack of public support and supporting rationale for the proposed redefinition of "waters of the United States" and, effectively, the rollback of the Clean Water Act itself. We urge you to withdraw this proposed redefinition of "waters of the United States" and retain the currently codified and legally and scientifically sound 2015 Clean Water Rule.

Comment Overview

This proposed redefinition of waters of the U.S. would remove from Clean Water Act protections an estimated 20-70% of the tributary system and 50% of the wetlands in the continental U.S., threatening the very heart and soul of the Nation's waters. This rollback of Clean Water Act geographic jurisdiction will upend 47 years of successful federal-state partnerships for point source pollution control, oil spill prevention and clean up, drinking water source water protection, and watershed cleanup plans, and large scale aquatic resource restoration. It threatens the drinking water sources for over 200 million people in the United States.

By their own admission, the agencies propose this drastic Clean Water Act rollback with no analysis of the extent of streams and wetlands that will lose protection, the associated loss of ecosystem services, or the added programmatic pollution control and economic burdens placed on states, tribes, local governments, local drinking water utilities, local economies, and low-income communities, communities of color, and indigenous peoples. Fundamentally, at no point in their proposal do the agencies explain how they can administer the Clean Water Act to meet its goal – to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" – while abandoning federal responsibility to ensure that the Act's minimum water quality standards are met and enforced throughout the Nation's tributary system and associated wetlands.

Our members and supporters expect the EPA and Army Corps to faithfully abide by and enforce the Clean Water Act in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The Clean Water Act cannot achieve its important goals without a clear, inclusive definition of the waters protected by the Act. Since the passage of the Clean Water Act, until now, the EPA, together with the Corps, has used sound science, transparent processes with robust public input, and the law to guide and enforce protective rules that safeguard drinking water, communities, wildlife, and natural resources. EPA Administrators serving Republican Presidents, from Russell Train (1973-1977) to William Reilly (1989-1993), strongly supported broad protections for wetlands and streams. Republican leader Senator Howard Baker of Tennessee echoed these words of support when the Clean Water Act was amended in 1977: "[t]he once seemingly separate types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the *entire resource*."[1] In 1986, the

[1] 123 Cong. Rec. 26,718 (Aug. 4, 1977) (emphasis added).

Reagan administration developed the inclusive definition of waters of the United States[2] and President George H.W. Bush confirmed "no net loss" of wetlands as his administration policy in January 1989.

The Clean Water Act regulatory framework is founded on strong federal-state partnerships (cooperative federalism) and safeguards that apply to protect waters at their source. This framework allows states to avoid having to impose costly, disproportionate, and economically harmful limits on instate pollution sources to waters within their borders, in order to offset upstream discharges that would otherwise go unregulated if the upstream waters are deemed to fall outside the Act's coverage and are not adequately controlled by upstream states. A strong Clean Water Act is the foundation for strong state efforts. Most states require millions of dollars of additional annual investment to achieve the water quality and flood abatement goals, which have been challenging to achieve due to toxic legacy pollution, increased storm water and agricultural runoff pollution, and pollution originating upstream, across state lines.

For many states, the health of the economy and state residents is directly linked to the health of the state's natural resources. To protect the health and welfare of state residents, economic productivity must be fostered while also protecting water supplies and waterways crucial to the health and welfare of all citizens, as well as to businesses that depend on clean water. Agriculture, commercial fisheries, outdoor recreation, and tourism, and manufacturing—all depend upon abundant clean water. Nationwide, consumers spend $887 billion annually on outdoor recreation; over $175 billion on fishing, kayaking, rafting, canoeing, and scuba diving and other water sports alone.[3] In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Nationwide, the craft brewing industry, notably dependent on clean water supplies, contributed $76.2 billion to the U.S. economy in 2017, more than 500,000 jobs. [4] It is for all of these reasons that thirty five states in 2006 urged the Supreme Court to uphold strong federal clean water protections[5] and in 2003 opposed Bush administration efforts to roll back protections for small streams and wetlands.[6]

To further these Clean Water Act goals, a lengthy, deliberate, and inclusive process led to the 2015 Clean Water Rule, a rule protective of vital waterways and based in sound law and sound science. The Clean Water Rule was developed by the EPA and the Army Corps of Engineers after several years of stakeholder engagement and after a state-of-the-art evaluation of the science on the connectivity of wetlands and headwater streams. Sportsmen, conservation groups, and many other stakeholders submitted over one

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[2] *See* Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37054, 37056 (June 29, 2015).

[3] Outdoor Industry Association. 2017. The Outdoor Recreation Economy available at: https://outdoorindustry.org/resource/2017-outdoor-recreation-economy-report/

[4] *See* Brewers Association Economic Impact Statistics at https://www.brewersassociation.org/statistics/economic-impact-data/.

[5] Amicus Curiae Brief of the States in Support of Respondents in *Rapanos et al v. U.S.* (S.Ct. 2006) (attached).

[6] *See* State Agency Comments on the Advanced Notice of Proposed Rulemaking re *SWANCC v. Corps,* Docket No. OW-2002-0050 (April 2003), submitted by NRDC to Docket No. EPA-HQ-OW-2017-0203.

million public comments that helped to shape the final rule, which was broadly celebrated for restoring guaranteed protections to headwater streams and millions of acres of wetlands previously at greater risk of being polluted or destroyed because of legal confusion. We believe the rule that was developed was legally sound, scientifically supported, and represented an appropriate jurisdictional balance consistent with the Clean Water Act.

By comparison, the Administration's scheme to eviscerate the 2015 Clean Water Rule has been hasty and haphazard, ignoring the strong legal and scientific basis for the Rule, disrespecting its broad public support, and providing little opportunity for the many clean water stakeholders to voice their interest in inclusive Clean Water Act coverage to protect the nation's waters. The agencies now propose to replace the well-vetted 2015 Clean Water Rule with a new rule that rolls back Clean Water Act jurisdiction based on a legal test that the majority of the Supreme Court Justices rejected. This proposed rule contradicts the law and science that is the foundation for the Clean Water Act clean up successes of the past 47 years, will remove Clean Water Act protections for millions of wetland acres and stream miles, and will cripple federal and state clean water initiatives for the foreseeable future.

For all these reasons, and as further explained in detail below, the National Wildlife Federation and its affiliates, members, and supporters strongly oppose the proposed redefinition of "waters of the United States" and, effectively, the rollback of the Clean Water Act itself. We urge you to withdraw this proposed redefinition of "waters of the United States" and retain the currently codified and legally and scientifically sound 2015 Clean Water Rule.

Detailed Comments

I. The Agencies' Proposal is Arbitrary and Capricious Because the Agencies Fail to Consider Relevant Factors and Provide a Rational Explanation for Reversing Course on The Waters of The US.

The 2015 revised definition of waters of the United States (2015 Rule) is a final rule that is currently binding law, having been promulgated through rulemaking as required by the Administrative Procedure Act (APA).[7] The agencies' "Step 1" proposed repeal and "Step 2" proposed replacement of the final 2015 Rule are each agency actions that would reverse the policy direction and binding law codified in the 2015 Rule and must undergo rulemaking pursuant to the APA.[8] To comply with the APA in promulgating or rescinding a final rule, an agency must: 1) publish a notice of proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved;" 2) provide the public a meaningful opportunity to comment on the merits of the rulemaking action; and 3) consider and respond to all of the "relevant matter

[7] 5 U.S.C. 553; *White v. Shalala,* 7 F.3d 296, 303-04 (2d Cir. 1993); *Sweet v. Sheahan,* 235 F.3d 80, 91 (2d Cir.2000).
[8] *See* 5 U.S.C. 551(5) ("'rulemaking' means agency process for formulating, amending, or repealing a rule.").

presented" during the rulemaking process.[9] The agencies must "examine the relevant data and articulate a satisfactory explanation for its action including a `rational connection between the facts found and the choice made.'"[10] The agency must examine "all relevant factors and record evidence," and articulate a reasoned explanation for its decision.[11]

Where the agencies propose to reverse course on an agency policy, here the definition of waters of the U.S. by repealing the 2015 Clean Water Rule and then deviating even further from both 2015 and pre-2015 agency policy and practice, based in large part on "factual findings that contradict those which underlay [their] prior policy," the agencies must also provide "a reasoned explanation…for disregarding facts and circumstances that underlay or were engendered by the prior policy."[12] Any final rulemaking action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" violates the APA and must be set aside by the federal courts.[13]

As explained in our 2017 and 2018 2015 Rule repeal comments,[14] the agencies' proposed repeal and supplemental repeal of the Clean Water Rule and codification of the *Rapanos* guidance must be withdrawn or, if finalized, invalidated as arbitrary and capricious and in violation of the APA because the agencies have failed to provide the required notice and meaningful opportunity for comment, refused to consider all relevant information, and offered no reasoned explanation to justify their repeal and replace rulemaking actions.

The agencies' 2019 proposed redefinition of waters of the U.S. must itself be withdrawn or, if finalized, invalidated as arbitrary, capricious, and contrary to law for essentially the same flaws: the agencies have failed to provide the required notice and meaningful opportunity for comment, refused to consider all relevant information, and offered no reasoned explanation to justify their reversal in policy and rationale from the legal and scientific rationale for the 2015 Rule to the "principles and conclusions" that are the basis for the 2019 proposed redefinition of waters of the U.S.[15]

As explained in detail below:

- The basic "legal construct" for the proposed Rule contradicts the Clean Water Act and Supreme Court precedent.

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[9] 5 USC 553 (b) and (c).
[10] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)).
[11] *Id.* at 52.
[12] FCC v. *Fox Television Stations*, Inc., 556 U.S. 502, 515-16. The agencies themselves acknowledge that that their proposed repeal and replace rule must be "based on a reasoned explanation," citing *FCC v. Fox* (2009). *Fox* requires that the agencies provide a rationale for changing its position about what is in the public interest, and specifically states that agencies should provide support for the change where there is "empirical data that can readily be obtained."
[13] *See* 5 U.S.C. §706(2)(A).
[14] *See* NWF Clean Water Rule Repeal Comments (September 26, 2017) ("NWF 2017 Repeal Rule Comments"), and NWF Clean Water Rule Repeal Supplemental Notice Comments (August 13, 2018) attached and incorporated by reference.
[15] *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

- The Agencies falsely elevate their policy choice to preserve State sovereignty over water resources over the overall clean water objective of the Clean Water Act.

- The Agencies misrepresent Supreme Court precedent in an attempt to justify their extremely narrow definition of adjacent wetlands, deviating from the longstanding definition accepted by Congress and the Courts alike.

- The Agencies "Principles and Conclusions" Do Not Provide A Rational Basis For This Drastic Narrowing of the "Waters of the United States."

    - The Agencies fail to justify their unprecedented narrowing of CWA jurisdiction on Commerce Clause grounds.

    - The agencies fail to justify their unprecedented narrowing of CWA jurisdiction on CWA Section 101(b) States rights grounds.

    - The agencies fail to justify their unprecedented narrowing of CWA jurisdiction on regulatory certainty grounds.

- The agencies ignore an essential relevant factor in defining the waters of the U.S.: the connectivity science informing how pollution and degradation upstream impacts the physical, chemical, and biological integrity of traditionally navigable waters, interstate waters, and territorial seas.

- The agencies fail to account for the significant environmental, fiscal, and economic harm associated with their proposal.

- The agencies ignore the relevant benefits of the 2015 Clean Water Rule and the shortcomings of the *Rapanos* guidance, documented in the Clean Water Rule administrative record, including its attendant uncertainty, litigation, and costs.

It is arbitrary and capricious to repeal the Clean Water Rule – which does in fact promote regulatory certainty – without any evidence-based rationale. Where the agencies propose to reverse course on the definition of waters of the U.S. by repealing the Clean Water Rule, and redefine the "waters of the U.S." based in large part on "factual findings that contradict those which underlay [their] prior policy" – here with respect to regulatory certainty -- the agencies must provide "a reasoned explanation…for disregarding facts and circumstances that underlay or were engendered by the prior policy." [16] As a result of these deficiencies in administrative procedure and others, the agencies have failed to give proper notice, failed to consider all relevant information, and failed to "examine the relevant data and articulate a satisfactory explanation for its action including a `rational connection between the facts found and the choice made.'"[17]

[16] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* at 52.
[17] *Id.*

II. The Legal Construct for the Proposed Rule Contradicts the Clean Water Act and Supreme Court Precedent.

By the agencies' own admission, "[*t]he fundamental basis*" the agencies use to justify their revised definition is their re-interpretation of "the text and structure of the CWA, as informed by its legislative history and Supreme Court precedent, *taking into account agency policy choices and other relevant factors."* 84 Fed. Reg. at 4156 (emphasis added). In effect, the agencies diminish, ignore, mischaracterize, and contradict key aspects of the Clean Water Act, its legislative history, and Supreme Court precedent in order to justify policy choices that are inconsistent with the clean water objectives of the Clean Water Act.

What are these policy choices and "other relevant factors" the agencies pursue through this unprecedented roll back of the waters of the United States? First and foremost, "to strike a balance between Federal and State waters" – apparently a different balance than the balance carefully struck by the current "text and structure of the CWA." *Id.* A second explicit policy choice is "to ensure that the agencies are operating within the scope of the Federal government's authority over navigable waters under the CWA and the Commerce Clause of the U.S. Constitution." Here again, the agencies seek to strike a new balance between clean water and constitutional authority by drawing a bright jurisdictional line so narrowly limited to traditionally navigable waters as to ignore the primary objectives and the legislative history of the CWA, as well as Supreme Court precedent carefully balancing the Act's mandate to protection the nation's waters with the limitations of the U.S. Constitution. As explained more fully below, to justify their stated policy choices, the agencies twist the CWA and case law into a "legal construct" that is a legally unsound house of cards.

A. The agencies falsely elevate state sovereignty over the Clean Water Act's overall clean water objective.

The agencies acknowledge that in passing the 1972 Clean Water Act, Congress "performed a 'total restructuring' of the pre-existing statutory framework in direct response to the utter failure of that framework "to address the decline in the quality of the nation's waters." *Id.* They further acknowledge that that restructuring was "designed to prevent, reduce, and eliminate pollution…and to regulate the discharge of pollutants into navigable waters specifically," and that, toward that end, "[t]he objective of the new statutory scheme was 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. 1251(a)." *Id.*

The agencies also acknowledge (though misleadingly quote) that the 1972 CWA *already* properly balances the Act's over-arching objective to protect the Nation's waters with the traditional regulatory power of States within their borders through the Act's stated policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. §1251(b). *See* 84 Fed Reg. at 4156 (misleadingly quoting 33 U.S.C. §1251(b)).

It is clear from the plain language of the Act's over-arching statement of national objectives at §1251(a), and its secondary statement of policy at §1251(b) respecting States' traditional powers, that Congress intended that the federal agencies acting under the CWA would respect and cooperate with the States *in their exercise of their primary rights and responsibilities to reduce pollution and maintain and restore the health of their water resources*. This secondary statement of policy neither mandates nor authorizes the EPA to narrow the scope of waters of the United States in order to expand the rights of States to *increase pollution and development in their waters or otherwise neglect the health of their water resources and the downstream impacts of that neglect.*

The agencies fundamentally misunderstand and misrepresent the cooperative federalism framework as set forth in §1251 (a) and (b) of the Clean Water Act when they assert *as a foundation for their proposed rule* that they must narrowly define the waters of the U.S., compromising the overall objective of maintaining and restoring the health of the nation's waters, in order to recognize the States' rights to reduce pollution and manage their water resources. 84 Fed. Reg. at 4156, 4163-64, 4168.

Congress did preserve important roles for states, giving them the first obligation and authority to develop water quality standards as well as the ability to be delegated CWA permitting authority. However, Congress and the text and structure of the CWA make clear that the states' CWA obligation and authority is always subject to EPA's federal review and backstop and that it is federal law and EPA that set the CWA minimum water quality, effluent limit, and permitting standards in order to address the "race to the bottom" shortcomings of the water pollution framework that preceded the 1972 Clean Water Act. *See e.g.,* 33 U.S.C. §§ 1313, 1314, 1316, and 1342. As the agencies determined in finalizing the 2015 Clean Water Rule, "Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters."[18] The agencies have no legal basis to justify either the Clean Water Rule repeal or this extraordinarily narrow proposed redefinition of waters of the U.S. on CWA §1251(b) grounds.

In fact, it is the Clean Water Rule, through its clear but inclusive definition of waters of the U.S. that "protects the rights of the states to 'prevent, reduce, and eliminate pollution.'" The agencies fail to refute their previous conclusion that the 2015 Clean Water Rule gave due consideration to the States' authority pursuant to CWA §1251(b):

> Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under Section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the scope of the CWA."[19]

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[18] U.S. EPA and U.S. Army Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015) (2015 TSD), at 9.
[19] 2015 TSD, at 9.

The agencies misrepresent Justice Kennedy's opinion in *Rapanos* to suggest that the policies embodied in section §1251(b) should inform the significant nexus analysis. The fact is, they already do. Justice Kennedy's pivotal opinion in *Rapanos* confirms that the Clean Water Rule's reliance on his significant nexus standard for CWA jurisdiction avoids any conflicts with the cooperative federalism policy set forth in CWA §1251(b). Nothing in his opinion supports the argument that §1251(b) states a statutory goal on a par with the §1251(a) water quality goals and objectives. Instead, he dismisses this argument as follows:

> As for States' 'responsibilities and rights,' §1251(b), it is noteworthy that 33 States plus the District of Columbia have filed an *amici* brief in this litigation asserting that the Clean Water Act is important to their own water policies. See Brief for States of New York et al. 1–3. These *amici* note, among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate. *Ibid.*[20] *Id.* at 777.

The agencies' reliance on the Court's statement in *SWANCC,* 531 U.S. at 174 (quoting CWA §1251(b)) is also misplaced. The Court in *SWANCC* reasoned in part that the §1251(b) policy warranted a "significant nexus" to "navigable waters." As Justice Kennedy opined in *Rapanos*, his "significant nexus standard" satisfies that concern and avoids any conflict with §1251(b). The Clean Water Rule closely tracks Kennedy's significant nexus standard and thereby avoids any conflict with §1251(b). The agencies cannot now rely on *SWANCC* to justify a further narrowing (or elimination) of the significant nexus standard and CWA jurisdiction.

Furthermore, the agencies cannot justify their narrowing of waters of the U.S. in support of States' rights on the basis of a suggestion by Justice Scalia when that suggestion was rejected by a majority of the Court. *See* 84 Fed. Reg. at 4169 (citing Scalia plurality opinion at 547 U.S. 755-56). Indeed, Justice Kennedy, while supporting the judgment, rejected the plurality's reading of "waters of the United States" as lacking support "in the language and purposes of the Act or in our cases interpreting it." 547 U.S. at 768. Justice Kennedy concluded that CWA jurisdiction extends to wetlands that, either alone or in combination with "similarly situated lands in the region," have a "significant nexus" to traditional navigable waters, and that "[t]he required nexus must be assessed in terms of the statute's goals and purposes," in particular the objective set forth at 33 U.S.C. §1251(a). *Id.* at 779-780.

The agencies' latest twist on the statutory text further strains credulity. Nothing in the Act's text or legislative history supports the suggestion that Congress had any intention of applying its regulatory prohibition on the discharge of pollutants to a subset of narrowly defined "navigable waters" while applying its non-regulatory federal assistance programs to support State and local efforts to some much broader undefined category of the "nation's waters." *Id. at* 4168-69. One need look no further than the Act's definitions. While

[20] *Rapanos,* 547 U.S. at 777. *See also,* Clean Water Rule Technical Support Document, p. 84.

Congress included a statutory definition of the key jurisdictional term "navigable waters," they made no attempt to include one for the "Nation's waters." Congress understood that pollution must controlled at its source in order to maintain and restore clean water in downstream "navigable waters."[21]

Congress clearly intended to restore and maintain the integrity of the nation's waters through a comprehensive scheme of regulatory and non-regulatory measures. *See, e.g., City of Milwaukee*, 451 U.S. at 318 ("Congress's intent in enacting the [1972 CWA] was clearly to establish an all-encompassing program of water pollution regulation."); *Rapanos* at 547 U.S. at 777 ("the Act protects downstream States from out-of-state pollution that they cannot themselves regulate."). Contrary to the agencies' flawed rationale, construing the CWA to narrowly limit the scope of waters of the U.S. purely for purposes of its regulatory prohibitions on discharges is to ignore the comprehensive framework, text, and legislative history of the Act. *See* 84 Fed. Reg. at 4169. *See also, id.* at 4176, 4181, 4183, 4187, 4195, and 4196).

The agencies provide no legal or other rational basis for their repeal rule proposal to conclude that "the 2015 Rule did not draw the appropriate line, for purposes of CWA jurisdiction, between waters subject to federal and State regulation, on the one hand, and waters subject to state regulation only, on the other." *See* 83 Fed Reg. 32247-48. Nor do they provide a legal or rational basis for further narrowing the waters of the U.S. on this basis.

B. The agencies misrepresent Supreme Court precedent in an attempt to justify their extremely narrow definition of adjacent wetlands, deviating from the longstanding definition accepted by Congress and the Courts alike.[22]

The agencies misinterpret *Riverside Bayview*, *SWANCC,* and *Rapanos* in a failed attempt to justify their policy choice to drastically limit the extent of wetlands covered by the Clean Water Act, deviating from their own longstanding definition of "adjacent" wetlands.

1. *Riverside Bayview unanimously held that "adjacent wetlands" may include neighboring wetlands that do not abut other waters of the U.S.*

In *Riverside Bayview*, 474 U.S. 121, 134-35 (1985), a unanimous Court upheld the agencies' assertion of CWA jurisdiction over wetlands "adjacent" to traditional navigable waters, basing their ruling on the agencies' regulatory definition of the term "adjacent,"

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[21] *See, e.g., United States v. Deaton*, 332 F.3d 698, 707 (4th Cir.2003), *cert. denied*, 124 S.Ct. 1874 (2004) (To limit agency pollution control authority upstream in non-navigable waters that flow to navigable waters would be contrary to the express purposes in the Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and "attain water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(1)-(2).").

[22] NWF's legal comments borrow often from the United States' Brief for Respondents, *In Re EPA,* No. 15–3571 (6th Cir. Jan. 13, 2017) (United States Brief in the Sixth Circuit) (attached and incorporated by reference).

then codified at 33 C.F.R. § 323.2(a) (7) (1985). That core definition remained the same for more than 30 years until revised with respect to the “neighboring” element in the 2015 Clean Water Rule. *See* 33 C.F.R. § 328.3(c) (1987); *compare with* 33 C.F.R. §328.3(c)(1) (2015). Adjacent, as long defined by the agencies for purposes of defining "adjacent wetlands," means, “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’”

It was this broader definition, explicitly including *“[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like….,”* that was the basis for the unanimous holding in *Riverside Bayview* that:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.
> 474 U.S. at 134.

This holding encompasses, but extends well beyond the Agencies’ current extraordinarily narrow characterization of the holding as limited to “a wetland that actually abuts on a navigable waterway.” *See* 84 Fed. Reg. at 4165. Because the reasoning and holding of the unanimous Court in *Riverside Bayview* is so central to the longstanding standard for CWA jurisdiction of adjacent wetlands that the agencies now propose to drastically deviate from, it is important to consider the context of that holding intact:

> ….Following the lead of the Environmental Protection Agency, see 38 Fed. Reg. 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do, as a general matter, play a key role in protecting and enhancing water quality:
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> "The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . , but must focus on all waters that together form the entire aquatic system.
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> “Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system."
>
> "For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." 42 Fed. Reg. 37128 (1977).
>
> We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States -- based as it is on the Corps'

> and EPA's technical expertise -- is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act. This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. *The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water,* see *33 CFR§ 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams, and thus prevent flooding and erosion,* see *§§ 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." § 320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.* Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case. [Footnote 9] 474 U.S. 133-135.

Another critical aspect of the *Riverside Bayview* holding ignored by the agencies in their current characterization of the relevant Supreme Court case law is the Court's conclusion that the Corps may apply this categorical definition of "adjacent wetlands" to protect all adjacent wetlands so long as it reasonably concludes that "in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem." *Id*. at 135 n.9. Thus, the Court held that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135. The Court further found that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133 (citations omitted).

Critical to the Court's upholding of CWA jurisdiction over all "adjacent wetlands" in *Riverside Bayview,* as well as to Justice Kennedy's pivotal concurring opinion in *Rapanos,* is the Corps' longstanding judgment that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water…." *Id.* at 135. *See Rapanos*, 547 U.S. at 779 (Kennedy, J.,

concurring). As Justice Kennedy reasoned in *Rapanos,* "[t]he implication was that wetlands' status as 'integral parts of the aquatic environment'—that is, their significant nexus with navigable waters—was what established the Corps' jurisdiction over them as waters of the United States." *Id*. Following this reasoning, he further concludes, "wetlands' ecological functions vis-á-vis other covered waters are the basis for the Corps' regulation of them[.]" *Id.* at 780.

2. *SWANCC does not support the categorical exclusion of non-adjacent wetlands from CWA jurisdiction where the science demonstrates a significant nexus to downstream waters.*

The agencies mischaracterize the narrow holding in *SWANCC* and seek support for an expansive new interpretation that would justify their proposal to categorically exclude all non-adjacent waters. Relatedly, they seek comment on whether to revoke the agencies' 2003 *SWANCC* guidance as "no longer needed" in the wake of a final rule categorically excluding such waters. We strongly oppose these proposals. *SWANCC* does not support – and should not be misinterpreted to support -- the categorical exclusion of non-adjacent wetlands from CWA jurisdiction where the science demonstrates a significant nexus to downstream waters. To categorically exclude such waters is to ignore and undermine the fundamental goal of the CWA to maintain and restore the chemical, physical, and biological integrity of the Nation's waters.

As the agencies acknowledge, in *SWANCC,* the closely divided Court issued a narrow holding, rejecting the agencies' assertion of CWA jurisdiction over certain "nonnavigable, isolated, intrastate" ponds under 33 C.F.R. § 328.3(a)(3) (1987) (jurisdictional "other waters") based solely on their use by migratory birds.[23] Yet the agencies attempt to conflate the Court's very limited holding in *SWANCC* regarding non-adjacent, "isolated" waters with the Courts' unanimous adjacent wetland holding in *Riverside Bayview* and the Courts' notoriously split opinions on adjacent wetlands in *Rapanos.* SWANCC involved "ponds and mudflats" "unconnected to other waters covered by the Act." 547 U.S. at 766-67 (Kennedy, J., concurring). *See also Sackett*, 132 S. Ct. at 1370 (observing that *SWANCC* involved "an abandoned sand and gravel pit, which 'seasonally ponded' but which was not adjacent to open water"). The agencies recognize as much at 84 Fed. Reg. 4165.

The *SWANCC* decision simply precluded the Corps from asserting jurisdiction over certain ponds based solely on their use by migratory birds. It did not overturn any aspect of the waters of the U.S. regulatory definition, including (a)(3) other waters provision, or any other regulatory provision of the Corps. The Court examined whether the "Migratory Bird Rule,"[24] an administrative interpretation of the "other waters" provision, exceeded the Corps' authority when applied to non-navigable, isolated, and intrastate waters. *SWANCC*, 531 U.S. at 174. The Court explained that although the term "navigable" is of limited import, if migratory bird use *by itself* were a sufficient basis for CWA jurisdiction, the word "navigable" would be rendered meaningless. 531 U.S. at 172. The Court noted that, in *Riverside Bayview*, "[i]t was the significant

[23] Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S.159, 171-172 (2001).
[24] 51 Fed. Reg. at 41,217.

nexus between the wetlands and 'navigable waters' that informed our reading of the CWA." *Id.* at 167. *SWANCC* stands for the proposition that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring) (quoting *SWANCC*, 531 U.S. at 167).

As the agencies acknowledge, the Court in *SWANCC* established this significant nexus limitation on CWA jurisdiction and in doing so "construed the CWA to avoid the significant constitutional questions related to the scope of Federal authority authorized therein." 84 Fed. Reg. at 4165. This narrow but significant holding in *SWANCC* balances the text, legislative history, and overarching clean water goals of the Clean Water Act with the statutory term "navigable waters" and constitutional limitations.

The "significant nexus" to traditionally navigable waters and interstate waters is the core principle that runs through the Supreme Court precedent from *Riverside Bayview* to *SWANCC* to *Rapanos* and has been at the core of federal jurisprudence surrounding the "waters of the united States" since 2001. This line of legal precedent has also led to the research and development of a robust body of scientific papers and federal and state field guidance instructing both case-specific significant nexus determinations that reflect the potential for upstream waters to significantly degrade or improve the integrity of downstream waters to which they are connected.[25]

The agencies offer no compelling rationale for their proposed reinterpretation of *SWANCC* to categorically exclude all non-adjacent (and non-abutting) wetlands and other waters. Instead, they reference in a footnote, but do not explain, the Farm Bureau's "broader interpretation and application of the rationale articulated in [SWANCC]…" 84 Fed. Reg. at 4165 at footnote 23. The Farm Bureau's misleading interpretations and "analyses" on this issue are unsupported and provide no credible basis for such an expansive interpretation of *SWANCC* and exclusion of waters from CWA protections. To do so would be to completely abandon the text, legislative history, and goals of the CWA built on the basic premise that the chemical, physical, and biological integrity of downstream navigable and interstate waters cannot be maintained or restored without controlling pollution upstream at its source. To do so would be contrary to the express purposes in the Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and "attain water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(1)-(2).

3. *Rapanos does not support the categorical exclusion of non-abutting wetlands from CWA jurisdiction since the scientific consensus demonstrates a significant nexus to downstream waters.*

The agencies misinterpret *Riverside Bayview* and *SWANCC in an effort to* twist the current state of the law post-*Rapanos* in a failed attempt to justify their policy choice to

[25] *See, e.g.,* 2015 TSD at 180-84.

drastically limit the extent of wetlands covered by the Clean Water Act, deviating from their own longstanding definition of "adjacent" wetlands.

In 2006 in *Rapanos*, the Supreme Court reviewed an assertion of CWA jurisdiction under the agencies' 1986 definition of adjacency in the context of wetlands adjacent to tributaries of traditional navigable waters. *See* 547 U.S. at 759-62 (Kennedy, J., concurring). The Court issued a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. Importantly, the Court issued five opinions, none of which garnered a majority. The cases were ultimately sent back to the lower courts for further review because a plurality of the Court (Justices Scalia, Alito, Thomas, and Chief Justice Roberts) and Justice Kennedy, concurring separately, agreed that the cases should be remanded.

Importantly, the plurality and Justice Kennedy's concurrence conflicted on almost every major point. Justice Kennedy found the treatment of wetlands adjacent to traditional navigable waters to be valid without the need for any additional or case-specific significant nexus determination, finding that it "rests upon a reasonable inference of ecological interconnection[.]" *Id.* at 780 (citing *Riverside Bayview*). Justice Kennedy explained: "Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of a hydrologic connection … that shows the wetlands' significance for the aquatic system." *Rapanos*, 547 U.S. at 786. *See also id.* at 805-06 (Stevens, J., dissenting) ("This [adjacency] definition is plainly reasonable[.]").

Justice Kennedy's concurring opinion disagreed with the plurality opinion, and concluded that "waters of the U.S." includes wetlands that possess a "significant nexus" with navigable waters. He finds that wetlands possess the requisite significant nexus if they "either alone or in combination with similarly situated [wet] lands in the region, significantly affect the chemical, physical, and biological integrity" of other covered waters more readily understood as navigable. In addition, a four-member dissent, authored by Justice Stevens, argued for broad protection of waters under the Act as prescribed by the current regulations.

Despite more than a decade of litigation since the splintered decision in *Rapanos,* it continues to be the case that no federal appeals court has interpreted *Rapanos* to limit the Agencies' authority to act *only* in accordance with the plurality opinion.[26]

The agencies now seek to adopt Justice Scalia's plurality opinion, or arguably even go beyond it, without even acknowledging the drastic deviation in judicial precedent that they propose in this rulemaking. The agencies now characterize Justice Scalia's plurality opinion as rejecting the Court's *Riverside Bayview* standard for adjacency, apparently relying on the argument that the plurality interpreted *SWANCC, conflating adjacent and isolated wetlands,* as rejecting "the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview …* provided an *independent* basis for including

[26] *See, e.g.,* United States v. Donovan, 661 F.3d 174, 180-81 (3rd Cir. 2011).

entities like ‘wetlands’ (or ‘ephemeral streams’) within the phrase ‘the waters of the United States….” 84 Fed. Reg. at 4166 (quoting the plurality opinion at 741-42).

The agencies further attempt to support their “abutting” standard by relying on the plurality’s argument that, “[b]ecause wetlands with a physically remote hydrological connection do not raise the same boundary-drawing problem presented by actually abutting wetlands, … the ‘inherent ambiguity in defining where water ends and abutting (‘adjacent’) wetlands begin” upon which *Riverside Bayview* rests does not apply to such features.” *Id.* The agencies thus substitute the plurality’s “bright line” standard of “continuous surface connection” -- or as the agencies further distill their proposed bright line, the “abutting nature” of the adjacent wetlands to the navigable water – for the longstanding *Riverside Bayview* standard for adjacency. *Id*.

But the plurality opinion is not a majority opinion; Justice Kennedy and the four dissenting justices explicitly rejected it and it is not the law. In his pivotal concurring opinion, Justice Kennedy explicitly rejected the plurality’s interpretation of *Riverside Bayview* and *SWANCC* as supporting its “continuous surface connection” standard of adjacency, concluding, “In sum the plurality’s opinion is inconsistent with the Act’s text, structure, and purpose.”

Specifically, Justice Kennedy states:

> *Riverside Bayview addressed that question [which wetlands qualify as waters of the U.S.] and its answer is inconsistent with the plurality’s theory.* There, in upholding the Corps’ authority to regulate ‘wetlands adjacent to other bodies of water over which the Corps has jurisdiction,’ the Court deemed it irrelevant whether ‘the moisture creating the wetlands . . . find[s] its source in the adjacent bodies of water.’ 474 U. S., at 135. The Court further observed that adjacency could serve as a valid basis for regulation even as to wetlands that are not significantly intertwined with the ecosystem of adjacent waterways. *Id.*, at 135, n. 9. ‘If it is reasonable,’ the Court explained, ‘for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.’ *Ibid*…..
>
> *Riverside Bayview’s observations about the difficulty of defining the water’s edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond the boundary fall outside the Corps’ jurisdiction*….
>
> *SWANCC, likewise, does not support the plurality’s surface-connection requirement. SWANCC*’s holding that ‘nonnavigable, isolated, intrastate waters,’ 531 U. S., at 171, are not ‘navigable waters’ is not an explicit or implicit overruling of *Riverside Bayview*’s approval of adjacency as a factor in determining the Corps’ jurisdiction. In rejecting the Corps’ claimed authority over the isolated ponds in *SWANCC*, the Court distinguished adjacent nonnavigable waters such as the wetlands addressed in *Riverside Bayview*. 531 U. S., at 167, 170-171.

> As *Riverside Bayview* recognizes, the Corps' adjacency standard is reasonable in some of its applications. Indeed, *the Corps' view draws support from the structure of the Act, while the plurality's surface-water-connection requirement does not*…..
>
> With these concerns in mind, *the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.*"
> *Rapanos* at 772-776 (emphasis added).

4. *Justice Kennedy's widely accepted significant nexus jurisdictional standard properly balances the goals, text, and framework of the Clean Water Act with constitutional concerns and should continue to form the basis for the definition of "waters of the U.S."*

The agencies simply cannot square their proposed definition of waters of the U.S. with Justice Kennedy's well-grounded and widely accepted significant nexus test, and they make no effort to do so. Instead, they seek to undermine, distort, and abandon Justice Kennedy's opinion, "invit[ing] comment on their reliance on Justice Kennedy's opinion, particularly as compared to their treatment of the SWANCC decision." 84 Fed. Reg. at 4167.

Justice Kennedy rejected the plurality's jurisdictional test as being "without support in the language and purposes of the Act or in our cases interpreting it."[27] Yet, Justice Kennedy found that to support jurisdiction for wetlands adjacent to certain non-navigable tributaries, a showing needed to be made that such waters have a "significant nexus" to traditionally navigable waters for jurisdiction to attach. According to Justice Kennedy:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[28]

The dissent stated Justice Kennedy's test "will probably not do much to diminish the number of wetlands covered by the Act in the long run."[29] An examination of the test helps explain why the dissent reached this conclusion. First, it is important to note how utterly Justice Kennedy rejects the plurality's restrictive test, which is largely unconcerned with the water quality goals of the Act. Unlike the plurality, who see little value in protecting ephemeral waters, dry arroyos, and wet meadows (waters that the plurality characterizes

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[27] *Rapanos*, 547 U.S. at 786.
[28] *Id*. at 779-80.
[29] *Id*. at 806-811 (Stevens, J., dissenting).

in part as "puddles"),[30] Justice Kennedy understands that many of these waters warrant protection.[31] He notes at length that nowhere in the Act is there support for a jurisdictional distinction between waters with continuous flow and waters with intermittent flow.[32] Similarly, he notes that the Act, case law precedent, and ecology fail to support the plurality's insistence on a continuous surface connection between wetlands and nearby water bodies.[33] Justice Kennedy explains that wetlands perform important ecological functions, such as pollutant filtering and flood retention and "it may be the *absence* of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme."[34]

Importantly, in recognition of the vital ecological functions wetlands perform, Justice Kennedy wrote that wetlands that either individually or collectively impact "the chemical, physical or biological integrity" of other navigable waters have the requisite "significant nexus" to be regulated under the Clean Water Act.[35] The ecological functions identified by Justice Kennedy include flood retention, pollutant trapping, and filtration.[36] Justice Kennedy recognized wetlands often perform these important ecological functions even though they may be intermittent or ephemeral, or lack a surface connection to other waters.[37] Justice Kennedy's test allows for the aggregation of impacts of similarly situated wetlands, meaning individually less significant wetlands may be protected if they become significant when viewed collectively within a region. Subsequent case law has indicated that this term can be interpreted broadly.[38]

Justice Kennedy also indicated a significant nexus to navigable waters can be assumed for certain categories of wetlands. For instance, he stated that "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecological interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone."[39] Therefore, wetlands adjacent to traditionally navigable waters (TNWs) are categorically covered under Justice Kennedy's analysis, and a case-by-case determination is not needed.[40] Likewise, Justice Kennedy suggested wetlands next to certain major tributaries

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[30] *Rapanos,* 126 S. Ct. at 2221 (plurality opinion).
[31] 547 U.S. at 768-69 (Kennedy, J., concurring).
[32] *Id.*
[33] *Id.* at 769-770.
[34] *Id.* at 786 (emphasis added).
[35] *Id.* at 779-80.
[36] *Id*. at 786.
[37] *Id*. at 780-786.
[38] *See Precon Development Corp. v United States Army Corps of Engineers*, 633 F.3d 278, 292 (4th Cir. 2011) ("[W]e recognize that Justice Kennedy's instruction – that 'similarly situated lands in the region' can be evaluated together – is a broad one, open for considerable interpretation and requiring some ecological expertise to administer").
[39]*Rapanos*, 547 U.S. at 780. Justice Kennedy reiterates "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."
[40] This has been confirmed by multiple lower court decisions interpreting *Rapanos*. *See United States v. Cundiff*, 555 F.3d 200, 207 (6th Cir. 2009) (finding that under Justice Kennedy's opinion assertion of jurisdiction over wetlands adjacent to navigable-in-fact waters may be met 'by showing adjacency alone); *Northern California River Watch v. Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (finding same); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2007) (finding same).

may also be categorically covered by the CWA.[41]

It is only in regards to wetlands adjacent to minor tributaries that Justice Kennedy refused to allow categorical assertion of jurisdiction under the 1986 definition of waters of the U.S. in place at the time.[42] Justice Kennedy does not assert categorical regulation of tributaries is no longer permissible, or a case-by-case determination of a "significant nexus" to traditionally navigable waters is required to regulate any tributary. On the contrary, he suggests the current definition of tributary "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."[43] As to tributaries, Justice Kennedy only expresses concern about categorically extending jurisdiction to all *wetlands* that are adjacent to any waters that meet the regulatory definition of tributaries. Specifically, he writes:

> [T]he breadth of this standard – which seems to leave wide room for the regulation of drains, ditches, and streams remote from any navigable-in-fact waters and carrying only minor water volumes towards it – precludes its adoption as the determinative measure of whether wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.[44]

The dissent would support jurisdiction in every instance where Justice Kennedy and the plurality would.[45]

Once again, no appeals court has found that only the plurality test applies. The First, Third, and Eighth Circuits have ruled that jurisdiction can be established under either Justice Kennedy's or the plurality's test.[46] The Seventh and the Ninth Circuits found that Justice Kennedy's opinion applied in the case at hand, but did not preclude the use of the

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[41] *Id*. at 780 ("[I]t may well be the case that *Riverside Bayview's* reasoning – supporting jurisdiction without any inquiry beyond adjacency – could apply equally to wetlands adjacent to certain major tributaries.").

[42] *Id*. at 782 ("Absent more specific regulations,. . . the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.").

[43] *Id*. Justice Kennedy never calls into question the significance of major tributaries to traditionally navigable waters.

[44] *Id*.

[45] *Id*. 809-11 ("Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases – and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied – on remand each of the judgments should be reinstated if *either* of those tests is met.") (emphasis in original).

[46] *United States v. Johnson*, 467 F.3d 56, 65-66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); *U.S. v. Donovan*, 661 F. 3d 174, 176 (3rd Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009);

plurality opinion to assert jurisdiction in other instances.[47] The Fifth and Sixth Circuits declined to choose a controlling test because the waters at issue satisfied both tests.[48] The Eleventh Circuit has found that *Rapanos* precludes the government from asserting jurisdiction based on the plurality test and can only do so based on Justice Kennedy's test.[49] The Fourth Circuit has applied whichever test the parties have agreed is controlling.[50]

The agencies offer no compelling basis for their proposed abandonment of the significant nexus jurisdictional standard. There simply is no inherent conflict between the government's longstanding interpretation of Justice Kennedy's significant nexus test as applying to wetlands and tributaries alike, and the government's even more longstanding interpretation of the majority's holding in SWANCC, limiting its application to isolated waters where CWA jurisdiction is based strictly on use by migratory birds. Justice Kennedy's significant nexus test was articulated in direct response to – and in repudiation of -- Justice Scalia's plurality opinion establishing new, broad-brush limits for both adjacent wetlands and tributaries. The majority holding in *SWANCC* speaks for itself.

The agencies' attempt to square the plurality's "continuous surface connection"/ "continuous physical connection"/abutting test with Kennedy's significant nexus test for adjacent wetlands is dishonest. As Justice Kennedy makes clear, while proximity is a factor in determining significant nexus, his significant nexus test does not limit jurisdictional wetlands to those where "the connection between a nonnavigable water or wetland and a navigable water" is "so close, or potentially so close." 84 Fed. Reg. at 4167 (quoting *Rapanos* at 767). Indeed, when Justice Kennedy used those words, he was speaking of the one "high connectivity" extreme of the wetland jurisdictional question that was at issue in *Rapanos* versus the other "lower connectivity" extreme of wetland the wetland jurisdictional question at issue in *SWANCC.* His significant nexus "connectivity" standard answers the adjacent wetlands jurisdictional question between these extremes. The agencies also fail to square the plurality's "relatively permanent waters" jurisdictional tributaries test with Kennedy's significant nexus test. As the agencies, acknowledge, Justice Kennedy's test allows for the Corps to "identify by regulation categories of tributaries based on volume of flow, proximity to navigable waters, or other factors that 'are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." 84 Fed. Reg. at 4168 (quoting *Rapanos* at 780-81).

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[47] *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007), *cert denied*, 552 U.S. 1180 (2008); *United States v Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir 2006), *cert. denied*, 552 U. S. 810 (2007); *see also N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 769 (9th Cir. 2010), amended 2011 (finding that "[i]n *City of Healdsburg* … the court found that Justice Kennedy's concurrence in *Rapanos* 'provides the controlling rule of law for our [c]ase.' We did not, however, foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality's standard.").

[48] *United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008) *cert denied,* 555 U.S. 822 (2008); *United States v. Cundiff*, 555 F.3d 200, 210-213 (6th Cir. 2009), *cert denied,* 558 U.S. 818 (2009).

[49] *United States v. Robison et al.*, 505 F.3d 1208, 1219-23 (11th Cir. 2007), *cert denied sub nom United States v. McWane*, 555 U.S. 1045 (2008).

[50] *Precon Development Corp. v United States Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011) (parties agreed Kennedy test governs).

Justice Kennedy's widely accepted significant nexus jurisdictional standard properly balances the goals, text, and framework of the CWA with constitutional concerns and should continue to form the basis for the definition of "waters of the U.S."

C. The agencies "principles and conclusions" do not provide a rational basis for this drastic narrowing of the "waters of the United States."

The agencies are clear that in proposing this rule, they are making a policy choice to draw more narrowly than ever before the outer bounds of their Clean Water Act authority based on their "reevaluat[ion]" of their legal authority, their re-interpretation of the text, structure, legislative history, and Supreme Court precedent, and their policy choices to elevate the "traditional power" of the States, leaving them "free to manage [their waters] under their independent authorities." 84 Fed. Reg. at 4169.

1. *The agencies fail to justify their unprecedented narrowing of CWA jurisdiction on Commerce Clause grounds.*

"As a threshold matter," the agencies attempt to ground their unprecedented narrowing of CWA jurisdiction on the need to further narrow jurisdiction "to avoid regulatory interpretations of the CWA that raise constitutional questions regarding the scope of their statutory authority." 84 Fed. Reg. at 4168 (citing *SWANCC*).

However, Justice Kennedy's significant nexus standard for determining which waters are – and are not – waters of the U.S. subject to CWA jurisdiction already ensures the exercise of authority consistent the CWA statutory text and avoids both constitutional and federalism concerns. As Justice Kennedy recognizes in *Rapanos,* the requirement set forth in *SWANCC* of a 'significant nexus' to navigable waters avoided constitutional as well as federalism concerns. 547 U.S. 715, 776-777 (2006) (Kennedy, J., concurring). In further support of his significant nexus standard in *Rapanos,* Justice Kennedy cites Supreme Court case law explaining, for example, that regulation of tributaries may be required in order to manage water quality in downstream navigable waters. *Id.* at 782-83.[51]

While the Kennedy significant nexus standard, and the 2015 Clean Water Rule that tracks it, are entirely consistent with the CWA and the Commerce Clause, the agencies' proposal to further limit CWA jurisdiction is not. The Act's legislative history and judicial precedent are clear: to meet the goals of the Act, CWA authority must extend to the full limits of the Commerce Clause. The agencies have no legal or rational basis on which to find that it is more appropriate to draw a jurisdictional line that ensures that the agencies regulate well within our constitutional and statutory bounds. *See* 84 Fed. Reg. at 4169, 4197.

[51] *See also,* United States Brief in the Sixth Circuit at 151-160 and cases cited therein (attached and incorporated by reference).

2. *The agencies fail to justify their unprecedented narrowing of CWA jurisdiction on CWA Section 101(b) States rights grounds.*

As discussed in detail above, the agencies cannot justify their unprecedented narrowing of CWA jurisdiction on CWA Section 101(b), 33 U.S.C. §1251(b), States rights grounds. Justice Kennedy's significant nexus standard for CWA jurisdiction avoids any conflicts with the cooperative federalism policy set forth in CWA §1251(b). And Justice Kennedy dismisses the argument that §1251(b) states a statutory goal on a par with the §1251(a) water quality goals and objectives. *Rapanos,* 547 U.S. at 777.

The agencies' reliance on the Court's statement in *SWANCC,* 531 U.S. at 174 (quoting CWA §1251(b)), is also misplaced. The Court in *SWANCC* reasoned in part that the §1251(b) policy warranted a "significant nexus" to "navigable waters." As Justice Kennedy opined in *Rapanos*, his "significant nexus standard" satisfies that concern and avoids any conflict with §1251(b). The agencies cannot now rely on *SWANCC* to justify a further narrowing (or elimination) of the significant nexus standard and CWA jurisdiction.

Nor can the agencies rely on a suggestion by Justice Scalia when that suggestion was rejected by a majority of the Court. *See* 84 Fed. Reg. at 4169 (citing Scalia plurality opinion at 547 U.S. 755-56). Justice Kennedy rejected the plurality's reading of "waters of the United States" as lacking support "in the language and purposes of the Act or in our cases interpreting it." 547 U.S. at 768. And he emphasized that "[t]he required nexus must be assessed in terms of the statute's goals and purposes," in particular the objective set forth at 33 U.S.C. § 1251(a). *Id.* at 779-780.

Finally, as detailed above, nothing in the Act's text or legislative history supports the suggestion that Congress had any intention of applying its regulatory prohibition on the discharge of pollutants to a subset of narrowly defined "navigable waters" while applying its non-regulatory federal assistance programs to support State and local efforts to some much broader undefined category of the "nation's waters." *Id. at* 4168-69.

Congress clearly intended to restore and maintain the integrity of the nation's waters through a comprehensive scheme of regulatory and non-regulatory measures. *See, e.g., City of Milwaukee*, 451 U.S. at 318 ("Congress's intent in enacting the [1972 CWA] was clearly to establish an all- encompassing program of water pollution regulation."); *Rapanos* at 547 U.S. at 777. Contrary to the agencies' flawed rationale, construing the CWA to narrowly limit the scope of waters of the U.S. purely for purposes of its regulatory prohibitions on discharges is to ignore the comprehensive framework, text, and legislative history of the Act. *Id. at* 4169. *See also, id.* at 4176, 4181, 4183, 4187, 4195, and 4196). The agencies provide no legal or rational basis for further narrowing the waters of the U.S. on this basis.

3. *The agencies fail to justify their unprecedented narrowing of CWA jurisdiction on regulatory certainty grounds.*

The agencies cite regulatory certainty and "fair and predictable notice of the limits of federal jurisdiction" as a guiding principle for their proposed rule, 84 Fed. Reg. at 4169, but, as explained throughout these comments, their proposal falls far short of meeting this

laudable goal. The deliberate and inclusive 2015 Clean Water Rule process was also guided by the principle of increasing regulatory certainty and it made great strides in achieving that certainty relative to the haphazard and burdensome case-specific approach that was required by the 2008 *Rapanos* guidance and that was at issue in *U.S. Army Corps of Engineers v. Hawkes Co*., 136 S.Ct. 1807 (2016), cited by the agencies at 4169.

While the agencies purport to provide regulatory certainty in support of their proposal, they provide no analysis or evidence to defend their unprecedented narrowing of CWA jurisdiction on these grounds. To the contrary, as explained more fully below, the agencies' proposal raises many uncertainties for landowners.

For example, the agencies fail to identify how often a stream needs to flow in order to be protected. The proposed rule would require landowners to answer critical, but difficult to answer questions, like whether a stream is fed by groundwater or what the flow of a stream in a typical year is. Readily accessible stream flow data is essential to assessing whether a stream is jurisdictional, yet the agencies don't even seem to know what percentage of non-perennial streams have flow gauges on them. What about the not uncommon scenario where a stream has a clear ordinary high water mark and bed and banks, and flows both when it rains and often for days after rain, but it also often appears dry? The 2015 Clean Water Rule draws a clear, science-based line including this stream as jurisdictional. In contrast, absent more detailed flow information, this proposed rule provides no certain answer. Similarly, a wetland that is 75 feet from a perennially-flowing tributary to the Mississippi River is clearly protected under the 2015 rule. In contrast, the proposed rule demands additional information regarding the presence or absence of direct surface water connectivity between the wetland and the perennial stream.

If the agencies were genuinely guided by an effort to ensure regulatory certainty consistent with the goals of the CWA, they could analyze whether and to what extent the 2015 Clean Water Rule they would replace produced clear decisions in the hundreds of jurisdictional determinations that have been performed using that rule. That information is readily available to the agencies, as they acknowledge, but they have made no effort to analyze it.[52] The agencies cannot justify their unprecedented narrowing of CWA jurisdiction on regulatory certainty grounds.

4. *The agencies arbitrarily ignore an essential relevant factor in defining the waters of the U.S.: the connectivity science informing how pollution and degradation upstream impacts the physical, chemical, and biological integrity of traditionally navigable waters, interstate waters, and territorial seas.*

While the agencies give lip service to the 2015 Connectivity Science Report,[53] they are clear that their policy decision to exclude ephemeral waters, wetlands, and many open

[52] *See 2018* RPA and discussion *infra.*
[53] U.S. EPA. 2015. Connectivity of streams and wetlands to downstream waters: A review and synthesis of the scientific evidence technical report. EPA/600/R-14/475F. U.S. Environmental Protection Agency, Washington, DC. (2015 Connectivity Science Report) at *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=56176401&CFTOKEN=47329782*

waters is not based on any scientific conclusion that these waters provide only a speculative and insubstantial effect on downstream waters and therefore lack a significant nexus to those waters. Instead, their policy choice prioritizes the rights of States over land use over meeting the environmental goals of the Clean Water Act, and ignores the significant nexus jurisdictional standard and the underlying connectivity science that stems from and advances the goals of the Act. *See e.g.,* 84 Fed. Reg. at 4176, 4187.

Scientist members of the former Science Advisory Board (SAB) panel that reviewed the Connectivity Science Report and the 2015 Clean Water Rule continue to study the connectivity science. They underscore in their 2019 Comments on the revised rule, citing multiple more recent studies, that since the publication of the final Connectivity Report "substantial additional literature has emerged that reaffirms the scientific conclusions and recommendations of the SAB, which broadly supported both the Connectivity Science Report and the resulting CWR." [54]

Below are excerpted and summarized some of the key principles and findings of wetland and stream scientists derived from the Connectivity Science Report that form the scientific foundation for the categorical *inclusion* of ephemeral and intermittent tributaries and wetlands and open waters that have a more than speculative or insubstantial physical, chemical, and/or biological connection to downstream waters:[55]

Rivers are networks, and their downstream navigable portions are inextricably linked to small headwaters just as fine roots are an essential part of the root structure of a tree or our own circulatory system is dependent on the function of healthy capillaries. Longstanding and robust scientific research (like those studies included in EPA's Connectivity Science Report) has demonstrated that ecological processes in navigable rivers reflect what is occurring in their headwaters as well as in associated geographically isolated wetlands, floodplains, and tributaries.

As the SAB concluded from the 2014 *Connectivity Report:*

> There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.[56]

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[54] S.M. Sullivan et al. Scientific Societies Comments on Proposed Rule (April 5, 2019) (2019 SAB Scientists Comments).

[55] *See* 2015 Connectivity Science Report; Letter from David Allen, Chair U.S. Environmental Protection Agency Science Advisory Board to Gina McCarthy, Administrator, U.S. Environmental Protection Agency (September 30, 2014), (2014 SAB Review Letter) *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007%2Bunsigned.pdf, incorporated herein by reference and attached to NWF 2017 Repeal Rule Comments; 2019 SAB Scientists Comments.

[56] 2014 SAB Review Letter.

Streams affect the physical integrity of downstream waters because they are the predominant source of water. This is true even if a stream does not flow seasonally or perennially. 2015 Connectivity Science Report at 3-7 to 3-8. Streams also even out storm water pulses into rivers by dispersing the arrival of high flows over time. 2015 Connectivity Science Report at 3-10. Water also infiltrates into stream channels, especially in ephemeral streams in arid and semiarid regions, which minimizes flooding and recharges the aquifer. 2015 Connectivity Science Report at 3-10 to 3-11.

Because streams function together in a watershed, and the incremental effects of individual streams are cumulative, they must be evaluated in combination with other streams in a watershed. 2015 Connectivity Science Report at ES-5, ES-13. Downstream rivers are, in fact, the integrated result of their contributing streams. 2015 Connectivity Science Report at ES-5.

These stream channels concentrate, mix, transform, and transport water and other materials such as wood, organic matter, nutrients, and organisms. 2015 Connectivity Science Report at ES-2. The evidence of the downstream effects of ephemeral streams is "strong and compelling," particularly due to their channelized flow. *Id*. at ES-7.

Intermittent and ephemeral streams also shape river channels by accumulating and periodically releasing stored sediment and woody debris, which help slow the flow of water and provide habitat for aquatic organisms. Science Report at ES-8.

Large runoff events in ephemeral streams can continue to sustain baseflow in downstream rivers for months. 2015 Connectivity Science Report at B-42. In particular, ephemeral tributaries in the Southwest strongly influence the biological integrity of downstream rivers and their riparian communities by supplying water, sediment, and nutrients. 2015 Connectivity Science Report at B-46 to B-48 and 3-25. In arid and semiarid regions, riparian areas, including those near ephemeral streams, support the vast majority of wildlife species, are the predominant sites of woody vegetation, and provide food and critical habitat. 2015 Connectivity Science Report at B-55.

Small streams and wetlands contribute to the physical integrity of navigable rivers – they help retain water during storms and can decrease the intensity of floods. They also help recharge groundwater and other sources of water for drinking, irrigation, and industry.

Small streams and wetlands also contribute to the chemical integrity of navigable rivers –they help reduce contaminants and help with nutrient removal. For example, Delmarva bay wetlands help protect water quality and improve functions for water that flows through them to the Chesapeake Bay.

Small streams and wetlands contribute to the biological integrity of navigable rivers. They supply food resources to riparian and downstream ecosystems. Small streams are a refuge at critical life history stages or during critical times of the year for many fish species. They also serve as vital spawning and nursery habitats for many fish species including

many prized sport fishes. Small streams and wetlands also provide critical habitat for a number of species.

As the SAB concluded from the 2014 *Connectivity Report:*

> The available science supports the EPA's proposal to include adjacent waters and wetlands as waters of the United States. This is because adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters.[57]

The SAB also advised EPA:

> The available science, however, shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections.[58]

The SAB also concluded:

> The scientific literature has established that "other waters" can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define "other waters" as waters of the United States on a case-by-case basis, either alone or in combination with similarly-situated waters in the same region.[59]

The SAB further concluded:

> There is also adequate scientific evidence to support a determination that certain subcategories and types of "other waters" in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, biological, and chemical integrity of downstream waters and are similarly situated on the landscape) and thus are waters of the United States. [60]

The final Science Report presented clear evidence that wetlands and open waters located in floodplains or riparian areas are "physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter." 2015 Connectivity Science Report at ES-2 to ES-3.

The extensive scientific literature and technical data support the conclusion that waters in floodplains prevent flooding, support river food webs and provide important habitat for river species, and otherwise are chemically, physically, and biologically integrated with

[57] 2014 SAB Connectivity Report Review Letter.
[58] *Id.*
[59] *Id.*
[60] *Id.*

downstream water quality. 2015 Connectivity Science Report at ES-2, ES-3, 2-7. The 2015 Connectivity Report establishes that wetlands that are contiguous, bordering, or neighboring a jurisdictional water within a floodplain *do* flood or have any hydrologic connection regardless of flow volume or surface versus subsurface flow and that these hydrologic connections provide a significant nexus to those jurisdictional waters.[61]

As the formerly SAB scientists now comment, the agencies' proposed rule "ignores or misrepresents" much of the 2015 Connectivity Science Report and subsequent research, including the key findings excerpted and summarized above. "The proposed rule is not based on sound science, nor does it provide any comparable body of peer-reviewed science to support the proposed changes." 2019 SAB Scientists Comments at 1. In particular:

- "The proposed Rule rests on physical, hydrologic connectivity, and ignores chemical and biological connectivity, which is in direct contrast with the intent of the CWA to protect chemical, physical, *and* biological integrity."
- "The proposed Rule misinterprets recommendations made by the SAB, and fails to recognize that even low levels of connectivity can be important relative to impacts on the chemical, physical, and biological integrity of downstream waters."
- "The proposed Rule's grounding in structural connectivity is weak and its treatment of functional connectivity is non-existent."
- "The proposed Rule ignores groundwater connectivity and fails to account for broad watershed processes and cumulative, aggregate effects on waterbodies." *Id.*

The SAB scientists pointedly challenge the agencies' proposed criteria for waters in floodplains requiring a direct surface hydrologic connection to establish adjacency. "[E]ven floodplain wetlands, lakes, and ponds that do not have a direct hydrologic surface connection 'in a typical year,' as stipulated by the proposed Rule, can be functionally important to downstream waters, as highlighted by the SAB."[62]

As the SAB scientists note, the proposed rule ignores the "established and growing scientific evidence" and misrepresents the SAB's connectivity gradient concept in proposing to remove all non-floodplain wetlands and ephemeral streams from CWA jurisdiction "irrespective of their degree of connectivity and the consequences of alterations to that connectivity to the chemical, physical, and biological integrity of downstream waters." 2019 SAB Scientists Comments at 5.

The SAB scientists also emphasize that, by relying entirely on physical, direct hydrologic surface connectivity to establish jurisdiction, the agencies ignore the substantial scientific evidence demonstrating the chemical and biological connectivity between wetlands and

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[61] *See* 2019 SAB Scientists Comments; 2015 Connectivity Science Report; 2014 SAB Connectivity Report Review Letter.

[62] 2019 SAB Scientists Comments at 4-5; U.S. EPA.2014. Letter to Gina McCarthy. October 17, 2014. SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review Connectivity of streams and wetlands to downstream waters: A review and Synthesis of the Scientific Evidence. U.S. Environmental Protection Agency, Washington, DC.

downstream waters. *Id.* at 1, 5. They note, as the SAB did, that non-floodplain wetlands "can act as chemical sinks, protecting downstream waters by retaining compounds through a suite of physico-chemical processes including denitrification, sedimentation, long-term storage in plant detritus, and ammonia volatilization, among others." *Id.* at 5 (citation omitted).

The SAB scientists highlight well-documented evidence of biological connectivity that is entirely ignored by the agencies in their proposed rule. For example, migratory animals, including migratory birds, move between disparate locations at both local and landscape scales, providing functional connectivity between landscapes, including wetlands and other waterbodies. In so doing, they are "serving as critical agents of connectivity and resilience among streams, wetlands, and downstream waters." *Id.*

Finally, the SAB scientists emphasize the agencies' refusal to recognize the pervasive connectivity between surface water and groundwater, despite the irrefutable scientific literature confirming that connectivity. As the scientists conclude,

> To disregard groundwater connectivity – especially over small distances and short time spans – is to disregard the reality of how the Nation's natural waters function….Virtually every 'water' is fundamentally dependent on rates of precipitation, accumulation on the surface, and infiltration into the ground. Those accumulated flows are absolutely essential for formations of 'waters.' *Id.* at 6.

The agencies' radical narrowing of jurisdictional tributaries, adjacent wetlands, and open waters ignores the scientific record that must form the foundation for the definition of waters of the U.S. in order to be consistent with Supreme Court case law as well as the Clean Water Act itself. By failing to incorporate the 2015 Connectivity Science Report and subsequent connectivity science studies into its proposal, the agencies fail to provide for meaningful public notice and comment on their revised definition of waters of the U.S.

They also fail to consider information that is not only relevant but fundamental to their rulemaking decisions. The agencies must explain their deviations from the Clean Water Rule and they must address the scientific record, explaining how the wetlands they exclude have no more than a speculative and insubstantial effect, individually and in the aggregate, on downstream waters. And, fundamentally, how they intend to maintain and restore the physical, chemical, and biological integrity of the Nation's waters when they abandon responsibility for more than half of the Nation's streams and wetlands.

III. The Agencies' Propose an Unprecedented Narrowing of the "Waters of the United States" That Ignores the Goals, Text, Framework, Legislative History, and Judicial Interpretations of the Clean Water Act and Threatens the Nation's Waters.

A. The agencies should retain their longstanding, broad interpretation of traditional navigable waters.

For decades before and since *SWANCC,* "traditional navigable waters" (TNWs) have been a key CWA jurisdictional term, and the agencies' longstanding, broad interpretation of this key term is embodied in the "TNW" guidance provided in the 2008 *Rapanos* guidance and its Appendix D as well as in the 2015 Clean Water Rule. *See* 2015 CWR TSD at 190-196 and Appendix 2 (*Rapanos* guidance, Appendix D); NWF Comments on the CWR (November 14, 2014) (attached and incorporated by reference). NWF strongly opposes any changes to the TNW guidance as these would undermine rather than improve the clarity and predictability of CWA jurisdictional determinations.

We highlight key TNW principles here for emphasis:

- Case law makes clear that TNWs include waters that can be navigated by water craft, waters that are currently used as highways in interstate commerce, waters susceptible to such use, and waters that were historically so used, even if they are not currently so used.[63] These include waters that may have areas difficult to navigate.64 These also include certain intrastate waters.65 Moreover, navigation need not be commercial in nature, but can be recreational or small craft navigation.[66]

- Susceptibility for future use may be based on such factors as physical characteristics and capacity for commercial navigation, including commercial waterborne recreation and potential future use for these purposes. Potential future use for such purposes "can be demonstrated by current boating or canoe trips for recreation or other

[63] *See*, *e.g.*, *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (waters "are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had-whether by steamboats, sailing vessels or flatboats-nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce"); *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) ("When once found to be navigable, a waterway remains so.").
[64] *See Appalachian Elec. Power Co.*, 311 U.S. at 408 (navigability can exist despite "the necessity for reasonable improvements to make an interstate waterway available for traffic").
[65] *Utah v. United States*, 403 U.S. 9 (1971).
[66] *See Appalachian Elec. Power Co.*, 311 U.S. at 416 ("Nor is the lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the streams for similar types of commercial navigation."); *FPL Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157-59 (D.C. Cir. 2002) (upholding navigation based on three canoe trips taken to demonstrate navigability); *Alaska v. Ahtna*, 891 F.2d 1404, 1405 (9th Cir. 1989) (use of river for commercial recreational boating sufficient to show navigability).

purposes." *See, e.g., FPL Energy Marine Hydro L.L.C. v. FERC,* 287 F. 3d 1151, 1157 (D.C. Cir. 2002) and *Alaska v. Ahtna, Inc*., 891 F. 2d 1401, 1405 (9th Cir. 1989).

- Waterborne recreational trips are appropriately considered in determining whether a water body is a TNW. On many rivers the only commerce that will occur in the future is recreational use by paddlers in canoes, kayaks, and rafts. Based on the case law, the question to be asked in determining TNW status is whether this water body ever could be used for commercial recreational boating. If a boating trip can establish that the water is or could be made navigable for small water craft, then the water should be classified a TNW. *See,* 79 Fed. Reg. at 22200, 22253.

- The July 2010 EPA Los Angeles River TNW determination was based on the 2008 TNW definition.[67] Although the determination looked at the current commercial uses of the river, as well as the historic uses of the river, an expedition of kayakers and canoeists down the Los Angeles River played a prominent role in convincing EPA that the river was a TNW, consistent with the case law, because a trip taken for the purpose of demonstrating a water body can be navigated is sufficient.

B. TNW jurisdictional determinations could be improved by improving the quality and accessibility of TNW mapping data.

One reason that TNW jurisdictional determinations are inconsistent is because the Corps does not consistently make these determinations based on the most inclusive information available. In many cases the Corps will turn to the navigability studies that it has completed under the Rivers and Harbors Act (RHA). However, these studies are often outdated. For example, one such study in Georgia set the head of navigation 70 miles downstream of where it should be, because the author of the report did not apply the historic commerce test. The section of river at issue had been in commercial use well into the 1900's. Thus, this already small subset of TNWs is, in some regions, smaller than it should be. Western Resource Advocates reported in 2014, for example, that historically, the Corps had determined that, of Colorado's approximately 100,000 miles of stream, *only 15 miles* (on the main stem Colorado River from Grand Junction to the state line) were TNW.[68]

Excessive reliance on Corps district RHA Section 10 waters for TNW determinations would lead to missing many TNWs and, as a result, likely leaving many wetlands, lakes, and ponds without Clean Water Act protection. It would also increase the time, cost and effort involved in establishing accurate CWA jurisdictional determinations for TNWs and all waters associated with that TNW.

To improve the accuracy and consistency of TNW determinations, the agencies should: 1) require the Corps to consider any relevant and credible information in making

[67] Special Case Evaluation Regarding Status of the Los Angeles River, California, as a Traditionally Navigable Water, EPA Region 9 (July 1, 2010).
[68] Western Resource Advocates 2014 Rule Comments *citing* Hill, John, "The Right to Float in Colorado: Differing Perspectives," 26 Colorado Water 18 (Colorado Water Institute 2009).

traditional navigable determinations, such as information on historic commerce, introduced by the third parties during a permit process; and 2) ensure that such information is given equal weight and that the Corps' navigability reports hold no more sway than any other navigability test. Finally and importantly, the agencies should establish a publicly available spatial database documenting all TNWs as the information supporting TNW status is identified. Readily accessible maps documenting TNWs will improve the efficiency, consistency, and accuracy of TNW, significant nexus, and CWA jurisdictional determinations.

C. The proposed removal of interstate waters from the definition of "waters of the United States" is arbitrary and capricious and undermines the goals of the CWA.

1. *The proposed removal of interstate waters deviates sharply from the CWA and its predecessor water pollution statutes, as well as prior agency rules and practice.*

In proposing, for the first time in the history of the Act, to exclude non-navigable interstate waters from the definition of waters of the U.S., the agencies deviate sharply from the structure, history, and purpose of the Clean Water Act, as well as longstanding agency regulations. 84 Fed. Reg. at 4171. The agencies attempt to justify this policy choice on constitutional and CWA textual grounds, but there is nothing in the Constitution, the CWA, or judicial interpretations of either that mandates or even supports the agencies' proposal.

In contrast, the extensive administrative record for the 2015 Clean Water Rule set forth in detail the legal and policy rationale for continuing to include interstate waters as a separate category in the definition of waters of the U.S.[69] The agencies previous legal analysis is summarized below.

The 1972 Clean Water Act, like its predecessors, clearly protects interstate waters *independent of their navigability*. The United States' 2017 Brief in the Sixth Circuit traces this interstate waters protection from the 1948 statute through the 1977 amendments to the Clean Water Act as follows:

> The 1948 statute declared that the "pollution of interstate waters" and their tributaries is "a public nuisance and subject to abatement...." 33 U.S.C. § 466a(d)(1) (1952) (codifying Pub. L. No. 80-845 § 2(d)(1), 62 Stat. 1156 (1948)). *Interstate waters were defined without reference to navigability:* "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." 33 U.S.C. § 466i(e) (1952) (codifying Pub. L. No. 80-845 § 10(e), 62 Stat. 1161 (1948)). In 1961, Congress broadened the 1948 statute and made the pollution of "interstate or navigable waters" subject to abatement, retaining the definition of "interstate waters." 33 U.S.C. § 466g(a) (1964) (codifying Pub. L. No. 87-88 § 8(a), 75 Stat.

[69] *See* 79 Fed. Reg. 22188, 22200-02 and Appendix B at 22254-22259; Brief for Respondents at 104-110, *In Re EPA,* No. 15–3571 (6th Cir. Jan. 13, 2017) (United States Brief in the Sixth Circuit) (citing 2015 TSD at 197-206).

> 204, 208 (1961)). In 1965, Congress required States to develop water quality standards for "interstate waters or portions thereof within such State." 33 U.S.C. § 1160(c)(1) (1970) (codifying Pub. L. No. 89-234 § 5, 79 Stat. 903, 907 (1965)); *see also* 33 U.S.C. § 1173(e) (1970) (retaining definition of interstate waters).
>
> In 1972, Congress abandoned the "abatement" approach initiated in the 1948 statute in favor of a permitting program for discharges of pollutants, which Congress defined as "any addition of any pollutant to navigable waters . . . ." 33 U.S.C. §§ 1311(a), 1362(12).[70]

While Congress did not explicitly retain the term "interstate waters" in 1972, it signaled its on-going independent protections for these waters by enacting 33 U.S.C. § 1313(a), providing that pre-existing water quality standards for interstate waters remained in effect, unless EPA determined that they were inconsistent with any applicable requirements of the pre-1972 version of the Act. Through section 1313(a), Congress continued to protect the water quality of interstate waters without reference to their navigability. The agencies' argument to the contrary – that the Clean Water Act intentionally narrowed the waters protected under the Act to exclude non-navigable interstate waters -- rings hollow, particularly given that the1972 amendments were a reaction to the shortcomings of the prior versions of the statute and the limitations of the Rivers and Harbors Act, and that the purpose of the 1972 amendments was to restructure and provide for comprehensive federal protections to meet the ambitious clean up goals of the Act.

Further supporting independent CWA protections for interstate waters, in 1981, the Supreme Court in *City of Milwaukee v. Illinois* concluded that the 1972 amendments "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. 304, 317 (1981). Thus, although the 1972 amendments superseded the federal common law of nuisance as a means to protect interstate waters in favor of a statutory "all-encompassing program of water pollution regulation," *id*. at 318, they did not curtail the scope of protected waters.

Beyond the history, structure, and purpose of the CWA, the agencies have long interpreted the Act as independently protecting interstate waters because the effects of water pollution in one state can adversely affect the quality of waters in another, "particularly if the waters involved are interstate." 2015 TSD at 216 (quoting 42 Fed. Reg. 37,122, 37,127/3 (July 19, 1977)). Protecting interstate waters as a separate category of waters of the United States is therefore "consistent with the Federal government's traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries." *See,* Brief for Respondents at 104-110 (citing 2015 CWR TSD at 216). The agencies' disingenuously attempt to dismiss the import of the lineage of independent interstate waters protection, the CWA and its legislative history, the 1981 *Milwaukee* decision, and the Federal government's traditional role in protecting waters that cross state boundaries, suggesting that they somehow rest solely on a "congressional acquiescence"

[70] United States Brief in the Sixth Circuit at 104-110 (citing 2015 TSD at 197-206).

argument limited by *SWANCC*. 84 Fed. Reg. at 4171-72. But this argument simply doesn't hold water.

The agencies proposal to eliminate the separate category of interstate waters is based on a new and excessively narrow interpretation of "navigable waters" that is itself untethered to the text, framework, and history of the CWA as well as relevant Supreme Court precedent. It is a policy choice that, once again, compromises the Act's overall objective of maintaining and restoring the health of the nation's waters, in order to recognize the States' rights to reduce pollution and manage their water resources. *Id.*

2. *The agencies propose to exclude interstate waters from CWA protection without any information on or analysis of the potential harmful impacts of their action.*

The agencies acknowledge that this proposal "likely would reduce the number of interstate waters," but nevertheless propose this drastic departure from CWA protections without any information regarding the potential extent of interstate waters that will lose these protections as a result of their action. 84 Fed. Reg. at 4172.[71] They now seek the information they are woefully lacking during their 60-day comment period, but any such information will not be available to provide for meaningful public notice and comment. *Id. at 4172.*

A good starting point for the agencies' assessment is the information and analysis included in the administrative record for the 2015 Clean Water Rule, as well as the thousands of 2015 Rule jurisdictional determinations the Corps has completed. In the 2014 proposed rule preamble, for example, the agencies identify "stream networks that are not part of the tributary system (*e.g.,* streams in closed basins without an (a)(1) through (a)(3) water or losing streams and other streams that cease to flow before reaching downstream (a)(1) through (a)(3) waters)" as stream systems that may have a significant impact on the chemical, physical, or biological integrity of downstream waters, but will no longer be subject to CWA safeguards if a direct, relatively permanent hydrological connection to a TNW is the only basis for CWA jurisdiction. Retaining the interstate waters category as an independent basis for establishing jurisdiction would not restore protections to all of these waters, but it would ensure protection for those that cross state lines. 79 Fed. Reg. at 22250.

While only scratching the surface of available information, one need look no further than New Mexico to find a state where removal of the interstate waters category will likely have a significant harmful effect on water resource protections. An estimated 96% of New Mexico's streams are classified as ephemeral or intermittent and many run dry before reaching a traditionally navigable water. In addition, many prized playas, wetlands, and streams are part of closed basins that do not run to a TNW, but are critically important for fish, wildlife, outdoor recreation, and other uses.

[71] *See also,* Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States" Appendix (RPA) at 37, 43.

The Gila River is an example of an interstate water that would likely no longer be jurisdictional if the proposed rule were finalized. One of the world's longer desert rivers at 649 miles, the Gila River reaches from Southwestern New Mexico to Yuma, Arizona, where it joins the Colorado River. The Gila River originates in America's first designated wilderness area, the Gila Wilderness, and is rich in biological diversity and cultural history. Though the Gila is one of the longest rivers in the West, it typically goes dry before it gets to the Colorado River due to large irrigation diversions. While the Corps of Engineers has attempted to designate the entire stretch of the Gila River that flows through New Mexico as a TNW, this designation has been challenged and to date remains unresolved. Therefore, without any stretches of the Gila River being designated as a TNW, and the ephemeral nature of the lower segments of the river, without an independent interstate or intrastate water jurisdictional category, the entire Gila River risks losing Clean Water Act protections under the proposed rule.[72]

The Rio Costilla in northern New Mexico may also lose Clean Water Act protections as a result of removing interstate waters from CWA jurisdiction. The Rio Costilla is another iconic river and one of the main fly fishing spots in the north. It is also the main river into which many streams in the Valle Vidal flow. It is a truly spectacular spot, home to the largest elk herds in the state and a prized hunting ground. Hundreds of thousands of dollars have gone into restoration of the high meadow wetlands (including a lot of 319 money). The bottom portion of the river winds back and forth between Colorado and New Mexico and is dry below the town of Costilla, New Mexico. It is unclear whether the river or segments of it would be classified as ephemeral by either New Mexico or Colorado or both. [73]

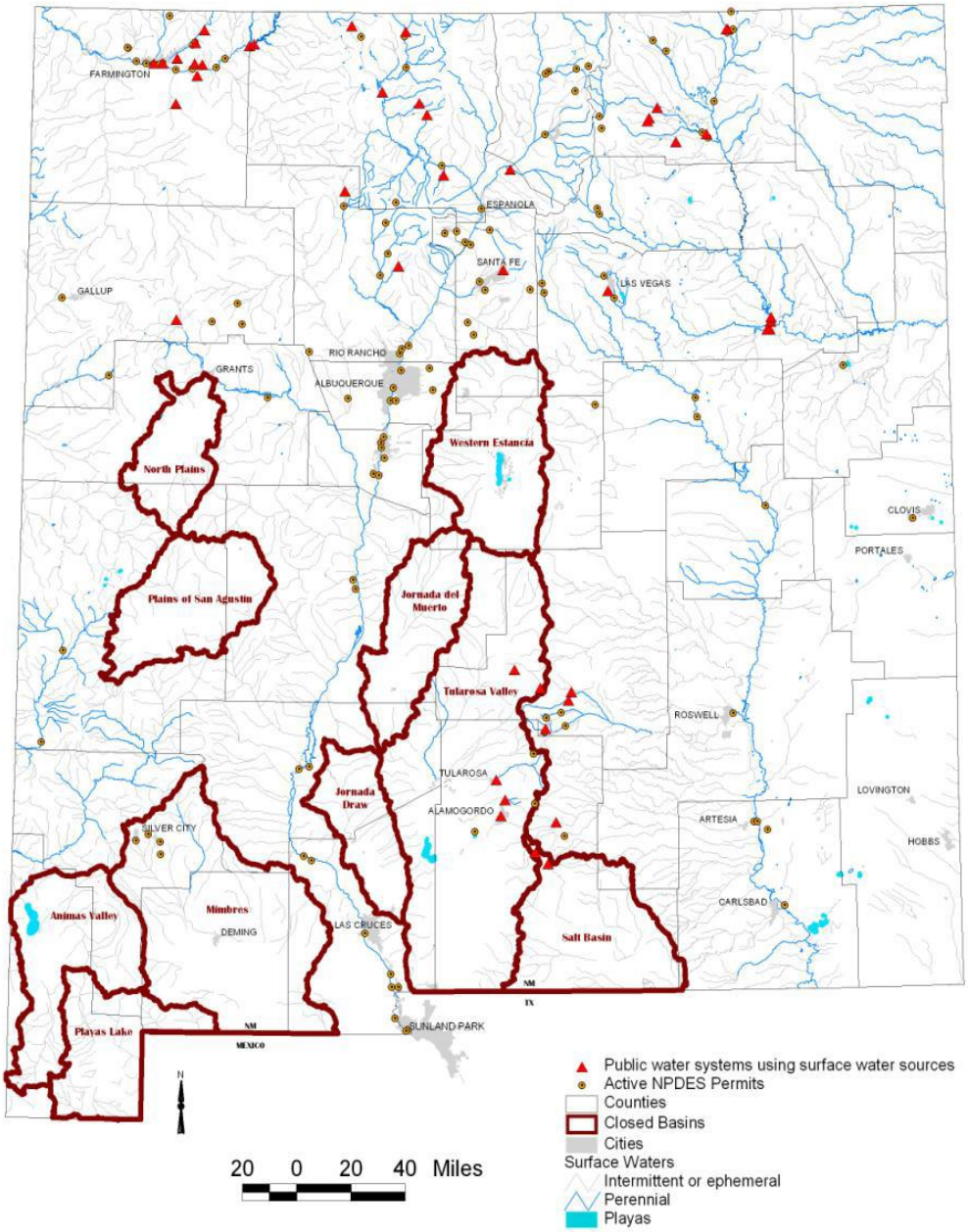
Throughout the arid west, every water resource is important both economically and ecologically, and many of these are part of closed, terminal basins; entire watersheds that are highly productive but where waters flow internally to a lake, dry lake, or wetland rather than flowing externally to a river system that flows to the ocean. Some of these closed basins are interstate water resources shared by more than one state.

Waters within the closed basins in New Mexico (Tularosa, Mimbres, Estancia, San Augustine, Salt, Southwestern and North Plains Basins) cover up to one fifth of New Mexico and include 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands.[74]

The Tularosa and Salt closed basins straddle the Texas line and the Mimbres straddles the Mexican border. The Mescalero Tribe uses drinking water from springs at the headwaters of the Rio Tularosa, and the residents of Nogal and Bent depend on the local

[72] *See* 2019 Amigos Bravos et al Comments on the Proposed Rule, at 5-6 (April 2019).
[73] *Id.*
[74] Written Testimony of Ron Curry, Secretary of the New Mexico Environment Department, before the United States House of Representatives' Transportation and Infrastructure Committee Regarding the Clean Water Restoration Act (HR 2421) (July 17, 2007).

NEW MEXICO CLOSED BASINS



shallow water table associated with the Tularosa for their drinking water. Some residents drink directly from the river.[75]

[75] Letter from Governor Bill Richardson to the EPA (New Mexico comment letter on the 2003 ANPRM), April 7, 2003, at 6.

According to the Texas Water Board,

> "[t]he Salt Basin of West Texas has been a significant source of groundwater to local users in West Texas for most of the last century. In a region of normally low rainfall and high evaporation, groundwater is a vital resource to municipalities, industries, and landowners in the Salt Basin. Because El Paso is facing serious water shortages in the next 20 to 30 years, city and regional planners are looking, in part, to water resources in the Salt Basin. It is therefore important to understand how pumping and drought impact the aquifers of the Salt Basin to maintain its viability for West Texans in the future." [76]

Closed basins are essential to New Mexico's economy and essential to interstate commerce. The Department of Game and Fish has stated that they believe a significant portion of wildlife viewing in New Mexico, which brings in about 550 million annually, is conducted by out of state recreationists in the closed basins of New Mexico.[77]

Finally, consider, as Western Resource Advocates commented in 2014, the headwaters states of the Rockies, where every major river system is the subject of either an interstate compact that allocates its waters or a Supreme Court of the United States decree for an equitable apportionment thereof.[78] According to WRA, the State of Colorado alone is party to nine interstate compacts (two on the Colorado River), one interstate agreement and two equitable apportionment decrees for rivers. Yet, the Corps had formally designated only one of these waterways as a TNW prior to July 2011. Most of Colorado's nearly 100,000 miles of streams are tributary to one of the rivers that is subject to a compact, agreement or decree.

3. *The agencies should retain interstate waters as a separate category consistent with the 2015 Clean Water Rule and longstanding agency practice.*

The agencies seek comment on an alternative approach that would "retain interstate waters as a separate category, reflecting longstanding agency practice." 84 Fed. Reg. at 4172. The answer is a simple one: they should adopt the approach that has already been thoroughly vetted and approved in the 2015 Clean Water Rule, reflecting longstanding agency practice. Not only is the legal analysis and policy rationale the most sound and compelling, but the agencies also have a substantial body of 2015 Clean Water Rule jurisdictional determinations that they could review to begin to assess whether any additional guidance or clarification is warranted.

The agencies have not been able to identify any particular legal or practical problems with

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[76] Texas Water Board, https://www.twdb.texas.gov/publications/reports/numbered_reports/doc/R356/Chapter17.pdf

[77] Letter from Larry Bell, Director of the New Mexico Department of Game and Fish to EPA (NMDGF comment letter on the 2003 ANPRM), April 15, 2003, at 6; *See* Comments of Amigos Bravos, et al to EPA on 2011 Proposed Guidance (July 31, 2011).

[78] Western Resource Advocates 2014 Rule Comments.

retaining interstate waters as a separate category that warrant correction by so drastically deviating from longstanding practice. Indeed, their core rationale for doing so -- to further empower state agencies to manage their own water resources – dictates CWA protections for interstate waters because, as numerous states acknowledge, they are powerless to protect their waters from pollution that flows into them from across state lines. The agencies have no rational basis to exclude interstate waters from the waters of the U.S. They should withdraw this proposal and adopt the approach to interstate waters set forth in the 2015 CWR.

D. The agencies should retain the impoundment category as defined and applied in the 1986 and 2015 Clean Water Rules.

We comment in opposition to excluding certain categories of impoundments, including impounded wetlands that become ponds and impounded waters that release water downstream only infrequently or impeded flow downstream such that the flow is less than intermittent. 84 Fed. Reg. at 4173. Any impoundment of a waterbody is, by its nature, impacting the hydrology of that waterbody and downstream waterbodies, as well as their physical, chemical, and biologically integrity. The agencies offer no rationale for deviating from longstanding practice and, in the interest of both regulatory certainty and meeting the clean water goals of the Act, they should not change longstanding agency practice with respect to impoundments now.

E. The agencies' exclusion of all ephemeral and some intermittent streams from waters of the United States is arbitrary and capricious and will degrade the physical, chemical, and biological integrity of the nation's waters.

The agencies propose to narrowly redefine "tributary" to mean a "naturally occurring surface water channel" that contributes "perennial or intermittent flow" to a TNW in a "typical year." This proposal would, for the first time, and at a minimum, exclude ephemerally flowing streams from CWA jurisdiction. 84 Fed. Reg. at 4173-74. The agencies also seek comment on whether to exclude not only ephemeral streams, but all streams that do not flow year round. *Id.* at 4177. As explained throughout these comments, the agencies' cannot justify their unprecedented narrowing of CWA jurisdiction over ephemeral tributaries on legal, scientific, or regulatory certainty grounds. Going further to limit the definition of "tributary" to perennial waters only would be a stunning and irrational overreach in clear violation of the Clean Water Act that would undo 47 years of water quality restoration.

1. *The agencies' cannot justify their unprecedented narrowing of CWA jurisdiction over ephemeral and/or intermittent tributaries on legal grounds.*

The agencies propose to "set boundaries" narrowing the scope tributaries covered by the CWA in order to satisfy their policy choice to further limit "the role of the Federal government under the Constitution and the CWA." *Id.* at 4174. While the agencies purport to exclude "features that are only episodically wet following precipitation events," the proposed rule is not so limited in effect as written. Again, they prop their argument on a misreading of *SWANCC* and reliance on the plurality opinion in *Rapanos.*

The agencies rest their narrow definition of tributary on the *Rapanos* plurality's concerns that "even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.'" *Id. at 4175* (citing, e.g., *Rapanos* at 728). But here, again, the agencies mischaracterize and dismiss the pivotal Kennedy opinion. Justice Kennedy does not assert that categorical regulation of tributaries is no longer permissible, or that a case-by-case determination of a "significant nexus" to traditionally navigable waters is required to regulate any tributary. On the contrary, he suggests the current definition of tributary "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."[79] As to tributaries, Justice Kennedy only expresses concern about categorically extending jurisdiction to all *wetlands* that are adjacent to any waters that meet the regulatory definition of tributaries. Specifically, he writes:

> [T]he breadth of this standard – which seems to leave wide room for the regulation of drains, ditches, and streams remote from any navigable-in-fact waters and carrying only minor water volumes towards it – precludes its adoption as the determinative measure of whether wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.[80]

The agencies also fail to recognize that they very deliberately addressed this concern in promulgating the 2015 Clean Water Rule. At the time of the *Rapanos* litigation, the agencies had no regulatory definition of tributary, but had long interpreted the term broadly. In response to these concerns, the agencies -- for the first time – provided in the Clean Water Rule a clear regulatory definition of "tributary" that both clarifies and limits Clean Water Act jurisdiction over streams, ditches, and other tributaries. To be guaranteed protection as a tributary, a waterway must have a bed, bank, and ordinary high water mark.[81] To further clarify what is *not* a protected tributary, the final rule expressly excludes – again for the first time – several types of ditches, as well as gullies, rills, non-wetland swales, and lawfully constructed grassed waterways.[82]

The agencies further ignore the Clean Water Rule's legally and scientifically sound conclusion that all tributaries so defined are categorically included in the definition of waters of the U.S. because – as a category – they have a significant nexus to TNWs, interstate waters, and territorial seas. Consequently, it is the Clean Water Rule – not this proposal – that provides "a clear definition of 'tributary' that is easier to implement," removing the need for case-specific significant nexus analyses. 84 Fed. Reg. at 4175.

Tributaries have long been considered to be waters of the United States. *See, e.g.*, 33 C.F.R. § 328.3(a)(5) (1987); 33 C.F.R. § 323.2(a)(3), (4) (1978); 80 Fed. Reg. at 37,058; *see also Ashland Oil*, 504 F.2d at 1329 (in enacting the CWA, "Congress was concerned

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[79] *Id*. at 781. Justice Kennedy never calls into question the significance of major tributaries to traditionally navigable waters.
[80] *Id*.
[81] *See, e.g.,* 80 Fed. Reg. at 37058, 37075-76, 37099, 37105 (codified at 33 C.F.R. 328.3 (c)(3) and (6)).
[82] *Id.* at 37058, 37075-76, 37099, 37105 (codified at 33 C.F.R. 328.3 (b)(3) and (4)).

with pollution of the tributaries of navigable streams as well as with the pollution of the navigable streams"). The 2015 Rule retains jurisdiction over tributaries as a category, based on the significant nexus standard and the uncontroverted scientific evidence that tributaries individually or with other tributaries in a watershed have a significant effect on downstream waters. The Clean Water Rule clarifies that not all streams are tributaries. Under the 2015 Rule, a stream is only a tributary if it contributes flow to a primary water and has two physical indicators of the ordinary high water mark, i.e., a bed and banks and a second physical indicator. 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. at 37,076.

The 2015 Clean Water Rule's definition of tributary reflects the application of extensive agency expertise to a careful and deliberate balancing of the law and the science to identify a threshold where the nexus is sufficiently "significant" to ensure that the definition of "waters of the U.S." covers the waters that Congress intended to protect. Although in *Rapanos* Justice Kennedy focused on whether adjacent wetlands as a category possess a significant nexus to downstream waters, the Agencies concluded that it is reasonable and appropriate to examine whether tributaries, as a category, likewise significantly affect the chemical, physical, or biological integrity of downstream waters.[83] The Agencies found that tributaries, as defined in the Rule, either alone or in combination with other tributaries in a watershed, do significantly affect TNWs, interstate waters, and territorial seas. *Id*.; *see also* 80 Fed. Reg. at 37,068-37,069.

Justice Kennedy clearly rejected the plurality's rationale for excluding ephemeral and some intermittent tributaries from CWA protection, observing that a continuous flow requirement "makes little practical sense" because the "merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not." *Rapanos*, 547 U.S. at 769. In Justice Kennedy's view, an ephemeral water, which "often looks more like a dry roadway than a river," *id*. at 769, can be a water of the United States. *See also id.* at 768-69 (noting that the plurality's exclusion of intermittent and ephemeral streams is a limitation "without support in the language and purposes of the Act or in our cases interpreting it"); *id*. at 769 (Congress could have excluded irregular waterways but did not); *id*. at 770 ("the Corps can reasonably interpret the [CWA] to cover the paths of such impermanent streams").

For all the reasons set forth above and previously in Section II, nothing in the CWA, the Constitution, or judicial precedent requires or even supports this drastic narrowing of CWA jurisdiction.

2. *The agencies' proposal to eliminate the Kennedy significant nexus jurisdictional standard and substitute the Scalia plurality jurisdictional standard is inconsistent with the CWA and judicial precedent, and is not warranted to respect constitutional limitations.*

Recognizing that their proposed exclusion of ephemeral and some or all intermittent tributaries cannot possibly square with the significant nexus jurisdictional standard, the agencies explicitly seek to "craft a new standard established by rule" based on the Scalia

[83] 2015 TSD at 53-55, 272.

opinion in *Rapanos. Id.* at 4177. But, as explained throughout these comments, the agencies lack the authority to craft such a new standard through this rulemaking process, particularly when the new standard deviates so drastically from the text and intent of the Clean Water Act, judicial precedent, and longstanding agency practice, and the agencies pursue it without a compelling rationale for its sharp reversal. The agencies' proposal to substitute the Scalia jurisdictional standard for the significant nexus standard is arbitrary and capricious and inconsistent with the Clean Water Act.

3. *The agencies cannot justify their unprecedented narrowing of CWA jurisdiction over ephemeral and intermittent tributaries on regulatory certainty grounds.*

The agencies also defend their exclusion of ephemeral and at least some intermittent streams as providing "clear and predictable jurisdictional boundaries," but a close reading of their proposal demonstrates that the proposed rule does nothing of the sort. Implementing their proposed definition, in all of its complexities, with any accuracy and predictability is highly dependent upon ready access to flow data and groundwater information that in many cases is non-existent or inaccessible and would require case-specific data collection.

The agencies acknowledge that they lack the necessary flow data to accurately identify and distinguish between ephemeral and intermittent tributaries. For example, they report that "the proposed rule differentiates between intermittent and ephemeral flow for purposes of federal regulatory jurisdiction under the CWA, but the NHD does not differentiate between streams with intermittent or ephemeral flow for most of the country." RPA at 21. Adding to the confusion, they acknowledge that "many ephemeral streams are not mapped" and where they are mapped "many ephemeral streams are included in the 'intermittent' category, particularly those outside of the arid West." Significantly, they acknowledge that "the high resolution NHD data has been demonstrated to under-represent the upstream-downstream extent of channel networks." RPA at 22. "In addition, a designation of perennial, intermittent, or ephemeral in the NHD does not guarantee an accurate depiction of on-the-ground flow conditions." *Id.*[84]

To make matters worse, "[u]nder the proposed rule, the term 'intermittent' does not directly correspond to definition of intermittent used by the NHD. RPA at 26. For example, the proposed rule includes streams that receive intermittent flow from melting snowpack, whereas such streams would likely fall under the NHD's definition of ephemeral, which is based on the source of water flow." *Id.* "…[T]he NHD does not include a flow permanence characterization for features that are classified as canals or ditches in the dataset as it does for stream and river features."

The agencies' propose that a groundwater source of flow is an essential component of intermittent tributaries, yet acknowledge how difficult it is to pinpoint groundwater flows:

> …identifying whether the channel bed intersects the groundwater table may be challenging to accomplish in the field, that gathering relevant data could be time

[84] *See also,* 2019 SAB Scientists Comments at 6-7.

> consuming, and could require new tools and raining of field staff and the regulated public. Some options for identifying whether groundwater is providing a source of water to the tributary may involve the installation of monitoring wells or staff gauges to identify the presence of the water table and/or to estimate the base flow using a hydrograph. Identifying the appropriate depth of installation for a monitoring well can be challenging, especially in the case of intermittent streams that have seasonally fluctuating water tables. Installing these devices in certain substrates, such as rocky substrates, can also be challenging.
>
> 84 Fed. Reg. at 4178.

The agencies are less than certain about even how to define intermittent tributaries as distinct from ephemeral tributaries, as is evident from their many requests for comment on this question. *Id.* at 4178-79. The agencies suggest defining intermittent to require continuous flow for at least one month of the calendar year; or an alternative based on "seasonal flow" versus their proposed intermittent flow approach; or the *Rapanos* guidance practice of requiring "seasonal continuous surface flow" (typically 3 months), presumably on a case-specific basis since that is what is required by the guidance. The agencies ask what should be the jurisdictional status of natural and man-made breaks in flow and the tributary segments upstream and downstream of such breaks.

Given the degree of uncertainty and the sweeping nature of the agencies' exclusions, we object to the agencies' suggestion to further narrow "intermittent" tributaries to include only those where there is proof of flow from melting snowpack or flow from a demonstrated channel bed intersection with the groundwater table.

The agencies acknowledge the additional uncertainty that arises from their proposal to cut off jurisdiction upstream of an ephemeral feature even where the tributary exhibits intermittent or perennial flow upstream: "The agencies recognize that the proposed definition may present a challenge for certain landowners upstream of an ephemeral feature. For example, landowners may find it difficult to determine whether there is a jurisdictional break downstream of a feature on their property." 84 Fed. Reg. at 4177.

Another source of uncertainty arises from the fact that an ephemeral tributary excluded under this proposal may still constitute a "point source" such that discharges to ephemeral streams may still require a CWA permit downstream, at the point where the discharge enters a regulated intermittent or perennial stream. 84 Fed. Reg. at 4176. This approach introduces significant uncertainties for regulated dischargers, regulators, and the public as well. Yet the agencies fail to provide information or address the uncertainties and impacts of this approach. This uncertainty is compounded for the many ditches excluded from waters of the U.S. under this proposed rule as discharges into these excluded ditches would likewise be subject to CWA regulation as point sources. "Ditches not covered by this proposed category …would be subject to CWA permitting if they meet the definition of "point source" in CWA 502(14)." 84 Fed. Reg. at 4179.

By all accounts, the proposed definition of tributary and exclusion of ephemeral and some intermittent streams will add significant regulatory uncertainty and confusion and cannot be justified on regulatory certainty grounds.

4. *The proposed rule will effectively exclude many intermittent streams, as well as ephemeral streams due to the lack of clear definitions, lack of flow data, and the burden of proof required to establish jurisdiction.*

Throughout the proposal, the agencies impose significant evidentiary requirements in order to find a stream to qualify as a jurisdictional tributary. To find jurisdiction and thus require dischargers to comply with the Clean Water Act, agency regulators, resource managers, or concerned citizens must summon the necessary flow data, historic tributary status data, groundwater or snowpack data. In contrast, the discharger or prospective discharger appears to bear no such burden of proof.

For example, "…if the evidence does not demonstrate whether a ditch was constructed in a tributary as defined in the proposed rule, that ditch would be considered to be non-jurisdictional by the agencies under this proposal." 84 Fed. Reg. at 4181. "In general, the burden of proof would be on the agencies to determine the historic status of the ditch construction, and if field and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or adjacent wetland then a determination would be made that the ditch is not jurisdictional under this proposed rule." *Id.*

Coupling this weighty burden of proof on regulators, concerned citizens, and impacted neighbors with the reality that these agencies are resource-strapped and largely dependent on the self-reporting of consultants to the regulated community, it is almost certain that many important ephemeral and intermittent streams will be excluded from CWA protections and at increased threat of pollution and destruction. It may be that by excluding all ephemeral stream miles explicitly and then making it so difficult to establish jurisdiction over intermittently flowing streams that many of them are excluded *de facto* from CWA safeguards.

5. *Retaining the Clean Water Rule definition of tributary addresses many areas of uncertainty raised by the agencies' proposal to exclude ephemeral and many intermittent tributaries.*

The agencies' proposed tributary definition raises more questions than it answers, as is evident from the agencies many requests for comment on even the basic approach to identifying intermittent tributaries and distinguishing them from excluded ephemeral tributaries. 84 Fed. Reg. at 4178-79. Should intermittent be defined to require continuous flow for at least one month of the calendar year? Or should the agencies switch to an alternative based on "seasonal flow" versus their proposed intermittent flow approach? What about the *Rapanos* guidance practice (superseded by the 2015 Clean Water Rule) of requiring "seasonal continuous surface flow" (typically 3 months), presumably on a case-specific basis since that is what is required by the guidance? What should be the jurisdictional status of tributary segments upstream and downstream of natural and man-made breaks in flow? Should the agencies further narrow jurisdiction over "intermittent" tributaries to include only those where there is proof of flow from melting snowpack or flow from a demonstrated channel bed intersection with the groundwater table, recognizing the difficulty in securing groundwater flow data to support such a

requirement? How do we address the additional uncertainty that arises from cutting off jurisdiction upstream of an ephemeral feature even where the tributary exhibits intermittent or perennial flow upstream? How should we treat effluent dependent streams that contribute ephemeral or intermittent flows?

If the agencies were genuinely focused on regulatory certainty, they would adopt the agencies' 2015 Clean Water Rule definition of "tributary" that ties CWA jurisdiction to the confirmed presence of an ordinary high water mark. Doing so would resolve many of the uncertainties and data gaps associated with the agencies' extraordinarily narrow and complex definition. As the agencies in their preamble, at 4178-79, cast about for approaches and easily accessible tools for identifying and distinguishing between ephemeral and intermittent streams, they ignore the most reliable and best understood indicator of stream flow, volume, and frequency of all: the ordinary high water mark (OHWM). The ordinary high water mark is "clear and discernable" and, along with a bed and banks, are well-established features of the historical definition of tributaries under the CWA.

The 2015 Rule's definition of "tributary," which requires two physical indicators of the ordinary high water mark, clarifies and limits the tributaries that are jurisdictional in a manner that is more restrictive than the broader definition at issue in *Rapanos* that Justice Kennedy endorsed. Justice Kennedy observed that a tributary definition that requires an ordinary high water mark and the flow of water into a traditional navigable water (directly or through another tributary) "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." *Rapanos*, 547 U.S. at 781.

The physical indicators of an ordinary high water mark are reliable evidence that a stream has sufficient volume, duration, and frequency of flow to be considered similarly situated with, and therefore considered in combination with, other streams in the watershed of a TNW, interstate water, or territorial sea. The Corps' longstanding definition of "ordinary high water mark," refers to "physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(c)(6). However, identification of any jurisdictional water under the Rule is not based solely on the presence of an ordinary high water mark. For example, to be jurisdictional, a "tributary" must have physical characteristics of an ordinary high water mark and a bed and banks and it also must contribute flow to a primary water. 33 C.F.R. § 328.3(c)(3).

Importantly, the Corps of Engineers has extensive experience and has invested in extensive research in identifying the OHWM and in establishing OHWM as reliable evidence of flow volume, duration, and frequency. As the Corps has explained, "ordinary high water implies streamflow levels that are greater than average but less than extreme, and that occur with some regularity." [85] The Corps has confirmed that potential physical

[85] Matthew K. Mersel et al., U.S. Army Corps of Eng'rs, *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the*

indicators of the ordinary high water mark can be used to establish the regularity of flow in arid regions.[86] In order to promote consistency, the 2006 Study suggested that the boundary of the active floodplain is the most reliable indicator of the ordinary high water mark in arid systems.[87] In 2008 the Corps released a regional manual to identify the boundary of the active floodplain and delineate the ordinary high water mark.[88] This manual confirmed that in arid regions the active floodplain can be reliably used to delineate the position of a non-wetland water's ordinary high water mark.

Corps research and experience further demonstrates that "[e]vidence resulting from extraordinary events, including major flooding and storm surges, is not indicative" of an ordinary high water mark.[89] Instead, the ordinary high water mark should be determined based on "characteristics associated with ordinary high water events, which occur on a regular or frequent basis." *Id*. The administrative record for the 2015 Rule supports the conclusion that these OHWM physical indicators demonstrate flow that is frequent and consistent enough to be considered "ordinary" and not extreme. 2015 TSD at 242 (indicators of the ordinary high water mark demonstrate the duration and frequency of flow). Although a bed and banks can be a useful indicator of flow, the 2015 Rule does not define all features with just a bed and banks as tributaries; another indicator of the ordinary high water mark is also required. 33 C.F.R. § 328.3(c)(3).

The 2015 Rule directs regulators to rely on specific enumerated types of physical characteristics or on other means appropriate to the "surrounding areas," 33 C.F.R. § 328.3(c)(6). Agency guidance further refines what are appropriate means for identifying ordinary high water mark. *See*, *e.g.,* 2005 RGL at 2-3. This allows regulators sufficient flexibility to address different circumstances that may be present in different parts of the country, while providing at least the "minimal guidelines" necessary to comport with due process. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 737 (D.C. Cir. 2016).

The agencies now ignore that these methods for identifying the ordinary high water mark have been the focus of significant efforts across the country and especially in the West for more than a decade. Those efforts have led to the creation of several studies and technical guides that have improved the accuracy and consistency of ordinary high water mark identification while also enhancing the Agencies' familiarity with the various indicators of flow in rivers and streams in the West. 2015 TSD at 56-67, 237, 239-240,

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United States (2014) at 10. This document, along with additional OHWM studies and manuals from 2006, 2008, and 2013 are available at http://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet- Article-View/Article/486085/ordinary-high-water-mark-ohwm-research- development-and-training/.

[86] Robert W. Lichvar et al., U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of "Waters of the United States" in Arid Southwestern Channels* (2006) ("2006 Study") at 1-2.

[87] 2006 Study at 16.

[88] Robert W. Lichvar et al., U.S. Army Corps of Eng'rs, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual* (2008) at 28, 31.

[89] U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark Identification (Dec. 7, 2005) ("2005 RGL") at 3 Available at http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05- 05.pdf.

268. The Agencies also published field guides, subject to extensive internal and external peer review, for identifying ordinary high water marks in regions where physical conditions present challenges. 2015 TSD at 237. These manuals provide guidance to the public and regulators facilitating a consistent approach to ordinary high water mark identification. In sum, the agencies could solve many of the challenges and uncertainties inherent in their complex and unsound exclusion of ephemeral tributaries by adopting the 2015 rule definition of "tributary" with its reliance on physical indicators of the OHWM as well researched, well-understood, and reliable indicators of substantial flow and influence on downstream waters. As demonstrated above, the Corps' substantial research and experience with OHWM indicators in the arid west and other regions provides methods and guidance that can be adapted to distinguish between jurisdictional streams and non-jurisdictional ephemeral features such as dry washes and erosional features.

F. The agencies should retain CWA jurisdiction over all ditches that alter or relocate a natural stream or drain a wetland, lake, or pond.

As the agencies acknowledge, their longstanding policy has been to exclude from waters of the U.S. only those ditches that were excavated in dry land. 84 Fed. Reg. at 4179 (citations omitted). We support defining waters of the U.S. to continue to include ditches that were excavated in natural tributaries and not in dry land, and that do not "alter or relocate a water of the United States." However, contrary to the agencies' assertion, their proposed rule is not consistent with the agencies "longstanding, historic position" excluding only ditches excavated in dry land because the agencies definition of tributary does not only exclude dry land; it excludes ephemeral and at least some intermittent streams. *Id.* at 4180.

Similarly, the agencies deviate from their longstanding historic position on ditches because the agencies' definition of adjacent wetlands does not only exclude dry land; it excludes millions of acres of naturally occurring wetlands that do not immediately abut intermittent and perennially flowing waters. *Id.* Consequently, contrary to the agencies' rationale, absent a return to the agencies' historic inclusion of all adjacent wetlands and many so-called isolated wetlands, this approach does not "align" the proposed rule with the CWA section 404(f) exemption for drainage ditch maintenance or the 404(f)(2) "recapture" clause and legislative history concerned with stopping the use of drainage ditches to drain wetlands. *Id.* Further, if the agencies persist in defining the term "ditch," they must clarify that "artificial channel" means one not constructed in or relocating a natural waterbody. *Id.* at 4181.

NWF is also concerned that burden of proof challenges will lead to exclusion of many tributaries. As the agencies note, "[i]n general, the burden of proof would be on the agencies to determine the historic status of the ditch construction, and if field and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or adjacent wetland then a determination would be made that the ditch is not jurisdictional under this proposed rule." 84 Fed. Reg. at 4181. The agencies acknowledge further that "it may be challenging to identify the historic status of a wetland where a ditch has drained the wetland such that it would no longer meet the definition of "adjacent

wetland" under this proposed rule. *Id*. These challenges are heightened with regard to ditches on agricultural land where most agricultural producers have a veil of privacy that makes this evidence difficult to come by. *See Id.* at 4199.

The agencies should accept all relevant and credible evidence, including historic photos and records as well as aerial photos, LiDar, remote sensing evidence as evidence of a ditch constructed in a tributary or wetland. 84 Fed. Reg. at 4182. Evidence of construction in a natural tributary prior to 1972 should not allow for exclusion. *Id* at 4181.

The proposed rule should follow the 2015 Rule's approach to distinguishing historical tributaries from ditches. Many tools are available to determine the historical presence of tributaries, such as on-site characteristics and "historical maps, historic aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." 80 Fed. Reg. at 37,078-37,079.

Ditches that function as tributaries can be both a jurisdictional "waters of the U.S." and a "point source" requiring a permit to discharge pollutants into a "waters of the U.S." 33 U.S.C. § 1362(12). The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). As the agencies acknowledge, nothing in the text of the CWA indicates that modified and constructed waters, such as ditches, cannot be waters of the United States. *See* 84 Fed. Reg. at 4180.

EPA has long interpreted the law as providing that jurisdictional ditches may meet the definitions of both "waters of the U.S." and "point source." *See* 2015 TSD at 74 (quoting 1975 EPA General Counsel opinion); *see e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canals that derived and diverted water from surface streams were waters of the United States); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs*., 278 F. Supp. 2d 654, 673, 679 (E.D.N.C. 2003) (ditches were both waters of the United States and point sources).

G. The agencies' definition of lakes and ponds excludes many lakes and ponds that have a significant nexus to TNWs, interstate waters, and territorial seas.

The agencies' definition of lakes and ponds excludes many lakes and ponds that have a significant nexus to TNWs, interstate waters, and territorial seas and is therefore inconsistent with the CWA and judicial precedent. The proposed rule excludes all interstate non-navigable lakes and ponds, all lakes and ponds that contribute only ephemeral flow to TNWs, all lakes and ponds with only shallow subsurface connections to TNWs, and all lakes and ponds that may lack an observable hydrologic connection to TNWs but that have a demonstrated biological connection in that wildlife species characteristic of traditionally navigable rivers and tidal waters depend on nearby freshwater lakes and ponds for survival and reproduction. The agencies explicitly rely on the plurality jurisdictional standard and reject the significant nexus standard to justify this exclusion of most of the Nation's lakes

and ponds from CWA jurisdiction. 84 Fed. Reg. at 4183.

The agencies' exclusion of lakes and ponds connected by flooding less frequently than a "typical year" is a clear example of the agencies' reliance on the plurality and rejection of the science-based significant nexus standard for jurisdiction. *Id.* at 4183.[90] So too is the agencies' refusal to recognize "ecological connections between physically separated lakes and ponds and otherwise jurisdictional waters." *Id.* The agencies rely here on an out of context quote from the plurality that *SWANCC* "found such ecological consideration irrelevant to question whether physically isolated waters come within the Corps' jurisdiction." *Id. citing* 547 U.S. at 741-742. Justice Kennedy and the four dissenting justices in *Rapanos* rejected this position. Justice Kennedy explicitly recognized that "ecological interconnection" could provide a basis for finding significant nexus. *See, e.g.*, *Rapanos*, 547 U.S. at 780 ("[W]etlands' ecological functions vis-á-vis other covered waters are the basis for the Corps' regulation of them[.]") (Kennedy, J., concurring).[91]

The agencies should adopt the 2015 CWR definition of tributaries and adjacent waters to include at least those lakes, ponds, and other lentic systems that effectively function as tributaries and adjacent wetlands and have been demonstrated categorically to have a significant nexus to TNWs, interstate waters, and territorial seas. The 2015 Rule's assertion of CWA jurisdiction over adjacent open waters that are not wetlands, i.e., "ponds, lakes, oxbows, impoundments, and similar waters," 33 C.F.R. 328.3(a)(6), is reasonable and consistent with the law.

SWANCC stands for the proposition that "to constitute 'navigable waters' under the Act, a *water or wetland* must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring) (quoting *SWANCC*, 531 U.S. at 167; emphasis added). *See also id.* at 767 ("[T]he connection between a *nonnavigable water* or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the *water* or wetland a 'navigable water' under the Act.") (emphasis added). As the scientific record demonstrates, "adjacent open waters … perform many of the same functions as wetlands that impact downstream waters, including contribution of flow, water retention, and nutrient processing and retention." 2015 2015 TSD at 326. The SAB agreed.[92]

Many lakes, pond, pothole complexes have a significant biological nexus to TNWs and/or interstate waters even without a surface water connection. Any definition of lakes and ponds needs to be broad enough to capture all types of natural standing "lentic" water bodies not explicitly captured as wetlands. What about natural wetlands, lakes, and ponds that have been deepened, widened, and otherwise altered by extractive industries? For example, gravel pits and other mines excavated out of wetlands, lakes and ponds? These should be covered too. See 84 Fed. Reg. at 4184. Any specific parameters for flooding

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[90] *See also,* 2019 SAB Scientist Comments.
[91] *See also,* 2019 SAB Scientist Comments.
[92] *See, e.g.,* 2014 SAB Proposed Rule Review Letter at 2 ("[A]djacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters."); 2019 SAB Scientist Comments.

should be consistent with the connectivity science and should not be limited to flooding in a typical year. *Id*. Ephemeral flow as well as shallow subsurface flow connections to TNWs and interstate waters should be sufficient to establish jurisdiction.

H. The agencies' exclusion of non-abutting adjacent wetlands is arbitrary and capricious and will degrade the physical, chemical, and biological integrity of the nation's waters.

The agencies propose to significantly narrow the longstanding definition of adjacent wetlands to include only those wetlands that abut or have a "direct hydrologic surface connection" to jurisdictional waters in a "typical year." That "direct hydrological surface connection" must be by inundation from a jurisdictional water or via perennial or intermittent surface flow exchange between the wetland and a jurisdictional water in a "typical year." This proposal would, for the first time, exclude from CWA jurisdiction "adjacent wetlands" that are "contiguous, bordering, or neighboring" to jurisdictional waters but that do not abut them or have a perennial or intermittent surface water connection with them. 84 Fed. Reg. at 4184.

The agencies' regulatory definition of the term "adjacent," remained the same for more than 30 years until revised with respect to the "neighboring" element in the 2015 Clean Water Rule. *See* 33 C.F.R. § 323.2(a) (7) (1985); 33 C.F.R. § 328.3(c) (1987); *compare with* 33 C.F.R. § 328.3(c)(1) (2015). Adjacent, as long defined by the agencies for purposes of defining "adjacent wetlands," has meant, "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"

This proposal would exclude, for the first time, "adjacent wetlands" separated "by man-made dikes or barriers, natural river berms, beach dunes and the like," unless there is proof of a "direct hydrologic surface connection" to jurisdictional waters in a "typical year." For the first time, the agencies would exclude non-abutting wetlands that are connected to jurisdictional waters by shallow sub-surface flows, ephemeral flows, or periodic but not "typical" flooding, even though these are well-established hydrologic connections typical of floodplain wetlands that are widely recognized as playing an integral role in the physical, chemical, and biological integrity of associated jurisdictional waters.[93]

To justify their policy choice to exclude non-abutting adjacent wetlands, the agencies ignore the underlying science establishing connectivity between wetlands and jurisdictional waters, mischaracterize these non-abutting wetlands as "isolated," mischaracterize the *Riverside Bayview* and *SWANCC holdings,* substitute the plurality test for the widely accepted significant nexus test in violation of the CWA and judicial precedent, and unlawfully elevate States' rights over land use above the clean water goals of the CWA. As explained throughout these comments, the agencies' cannot justify their unprecedented narrowing of CWA jurisdiction over on legal or scientific grounds.

[93] *See* 2019 SAB Scientist Comments.

1. *The agencies' cannot justify their unprecedented narrowing of CWA jurisdiction over non-abutting adjacent wetlands on legal grounds.*

The agencies base their narrow definition of adjacent wetlands on their "legal construct" misreading *Riverside Bayview*, *SWANCC*, and *Rapanos*; a "legal construct" rejected by a majority of the Court in *Rapanos* and inconsistent with the Clean Water Act, longstanding agency practice, and post-*Rapanos* case law adopting the significant nexus standard for jurisdiction. *See* discussion *supra*. They explicitly ground their narrow definition in the non-controlling *Rapanos* plurality opinion, stating, for example, that "[t]he concepts of 'abutting' and a 'direct hydrologic surface connection' in this proposal are consistent with the *Rapanos* plurality's continuous surface connection requirement." *Id.* at 4185. The agencies recognize that this redefinition of adjacent wetlands, and their defense of it based on substituting the plurality opinion for the significant nexus jurisdictional standard, is a sharp deviation from agency interpretation, rules, and past practice. 84 Fed. Reg. at 4186.

Contrary to the agencies' misleading assertions at 4185, this proposed definition of adjacent wetlands goes far beyond the limited holding in *SWANCC* and far beyond excluding "isolated wetlands with only physically remote hydrologic connections to jurisdictional waters." *SWANCC* involved "ponds and mudflats" "unconnected to other waters covered by the Act." 547 U.S. at 766-67 (Kennedy, J., concurring). *See also Sackett*, 132 S. Ct. at 1370 (observing that *SWANCC* involved "an abandoned sand and gravel pit, which 'seasonally ponded' but which was not adjacent to open water"). And *SWANCC* rejected only the sole reliance on migratory bird use, not all "ecological considerations," to provide jurisdiction over "physically isolated wetlands." The agencies stretches these case holdings beyond the breaking point in rejecting all ecological connections as the basis for finding jurisdiction over wetlands that are adjacent – bordering, contiguous, or neighboring – to TNWs and interstate waters.

The agencies' suggestion that substituting 'abutting" for the agencies' longstanding definition of 'adjacent' (as contiguous, bordering, or neighboring) is consistent with Justice Kennedy's view of "wetlands' significance for the aquatic system" is disingenuous. Justice Kennedy had a broader view of physical, chemical, and biological connectivity in mind when he said, "[g]iven the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system." 547 U.S. at 786.

The agencies' reliance on Kennedy's skepticism about "possible flooding" as a jurisdictional connection is also misplaced. 84 Fed. Reg. at 4186. Kennedy's significant nexus standard requires documentation of a significant nexus that is more than speculative or insubstantial. And evidence that non-navigable tributaries "are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 781. The 2015 Rule's Technical Support Document supports the 2015 Rule with respect to adjacent waters, summarizing the key points made in the Connectivity Science Report and explaining the technical basis for the agencies' findings that adjacent waters, similarly situated in a given watershed, significantly affect the physical integrity, 2015 TSD at 306-

11, the chemical integrity, *id.* at 311-15, and the biological integrity, *id.* at 315-21, of TNWs, interstate waters, and territorial seas. *See also id.* at 321-26.

For all the reasons set forth above and previously, nothing in the CWA, the Constitution, or judicial precedent requires or even supports this drastic narrowing of CWA jurisdiction over floodplain and non-floodplain wetlands.

2. *The agencies' proposal to eliminate the Kennedy significant nexus jurisdictional standard and substitute the Scalia plurality jurisdictional standard is inconsistent with the CWA and judicial precedent, and is not warranted to respect constitutional limitations.*

Recognizing that their proposed exclusion of all non-abutting adjacent wetlands cannot possibly square with the significant nexus jurisdictional standard, the agencies explicitly seek to substitute the plurality standard despite the fact that it is not the accepted jurisdictional standard in the jurisprudence of the Supreme Court or any federal circuit. As explained throughout these comments, the agencies lack the authority to craft such a new jurisdictional standard through this rulemaking process, particularly when the new standard deviates so drastically from the text and intent of the Clean Water Act, judicial precedent, and longstanding agency practice, and the agencies pursue it without a compelling rationale for its sharp reversal. The agencies' proposal to substitute a Scalia jurisdictional standard for the significant nexus standard is arbitrary and capricious and inconsistent with the Clean Water Act.

3. *The agencies should adopt the 2015 definition of adjacent waters on legal, scientific, and regulatory certainty grounds.*

The agencies seek comment on various approaches to the treatment of adjacent wetlands as waters of the U.S. 84 Fed. Reg. at 4189. We urge the agencies to withdraw their proposed definition of "adjacent wetlands" and adopt instead the 2015 Rule's definition of "adjacent waters." The 2015 Rule is legally sound because it is closely tracks the significant nexus jurisdictional standard, it is consistent with the text and legislative intent of the Clean Water Act, and it furthers the goals of the Clean Water Act. The 2015 Rule's extensive record supports the inclusion of waters even if they do not physically abut jurisdictional waters because such waters have a significant nexus with primary waters regardless of any physical separation. *See, e.g.,* 80 Fed. Reg. at 37,057 ("Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters."). In addition, the Rule's definition of "neighboring" gives due accord to proximity and is backed by a robust record of aquatic interconnectedness.

The 2015 Rule's adjacency definition is also more practical to implement and provides more regulatory certainty. By the agencies own admission, it is often difficult to assess whether roads, berms, and other barriers sever wetlands jurisdiction: "The agencies note that identifying remotely whether wetlands abut a jurisdictional water can be challenging, especially with 2-D aerial imagery and the resolution of remote tools." 84 Fed. Reg. at

4189.[94] Determining the existence of a direct hydrologic surface connection and whether the flow is more than ephemeral can also be challenging. The agencies are unsure what indicators to use to implement their complex provision.

At a bare minimum, the agencies should restore the agencies' longstanding definition of "adjacent" and extend that definition beyond wetlands to "adjacent waters" as the 2015 Rule does. In doing so, *any* hydrologic connection between a wetland/water and a jurisdictional water should establish adjacency, regardless of flow, frequency of inundation, or surface versus shallow sub-surface hydrologic connection. Regulators should be directed to accept all evidence of connectivity to establish adjacency.

We strongly oppose further exclusion of wetlands from jurisdiction by broadening the definition of upland to include man-made dikes barriers, and similar structures, by adding distance limitations in addition to the narrow definition of adjacent wetlands, or by tampering with the agencies' longstanding definition of wetland or its guidance with respect to normal circumstances. The agencies should maintain the Corps' 1987 manual and existing guidance. *See* 84 Fed. Reg. at 4189.

I. The agencies' extensive additional exclusions of natural water bodies from waters of the United States is arbitrary and capricious and will degrade the physical, chemical, and biological integrity of the nation's waters.

1. *The agencies' sweeping exclusion of all waterbodies that do not meet their narrow criteria will remove many important waterbodies from CWA protection.*

The agencies' sweeping (b)(1) exclusion from waters of the U.S. for any and all water bodies that do not meet the precise definitional requirements of the specific water types enumerated in paragraph (a) (1)-(6) of the definition is arbitrary and capricious. By the agencies own admission, they propose this sweeping exclusion without any ability to even qualitatively – much less quantitatively -- estimate the scope of natural water bodies potentially excluded from CWA protections by this proposal.

This mega-exclusion will result in the exclusion of many important waterbodies that have a significant nexus to TNWs and interstate waters because: 1) the categories identified as jurisdictional in (a)(1)-(6) are so narrowly defined and have so many jurisdictional requirements that must be proven to establish jurisdiction; and 2) as the agencies themselves acknowledge, "[d]ifferent features are called different names in different parts of the country…." 84 Fed. Reg. at 4190. This catch all exclusion will ensure that millions of acres of wetlands and open waters, including many lakes, ponds, bogs, vernal pools, prairie potholes, Carolina and Delmarva bays, and other important natural waterbodies will no longer be subject to CWA protections, even upon a case-specific significant nexus determination.

The agencies' only justification for this radical proposal is that it may help "eliminate the risk of confusion" and provide certainty for the regulated community that waterbodies are

[94] *See also,* RPA at 21 and 24.

excluded from CWA protection, but this sweeping exclusion dramatically increases the potential harm to the physical, chemical and biological integrity of waters upstream and downstream, and to the communities that depend on those waters.

2. *The agencies should retain the 2015 groundwater exclusion and it should not be expanded, including to apply to "diffuse or shallow subsurface flow".*

We support the groundwater exclusion as limited in the 2015 Rule. Important to this limited exclusion is the 2015 Rule's clarification that shallow subsurface connections are distinct from deeper groundwater connections in that "the former exhibit a direct connection to the water found on the surface in wetlands and open waters …. and "[w]hile they may provide the connection establishing jurisdiction, these shallow subsurface flows are not 'waters of the U.S.'" *See* 79 Fed. Reg. at 22208.

This is a scientifically sound principle in relation to the purposes of the CWA that must be respected in defining the waters of the U.S. [95] As the SAB advised EPA with respect to the 2015 Rule:

> The available science, however, shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections.[96]

While we support retaining this limited exclusion for groundwater, we oppose expanding this exclusion as suggested at 84 Fed. Reg. 4195. We oppose extending this exclusion to surface expressions of groundwater. *See also* 80 Fed. Reg. 37099-100. Nor do we support the agencies vague suggestion to exclude "diffuse subsurface flow." 84 Fed. Reg.

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[95] *See*, *Healdsburg*, 496 F.3d at 1000 (citing to underground hydrologic connections as a basis for establishing a significance nexus between two bodies under Justice Kennedy's standard); *United States v. Banks*, 115 F.3d 916, 921 (11th Cir. 1997) (finding that wetlands that were at least one half mile from navigable waters were jurisdictional due to a hydrologic connection that "was primarily through groundwater, but also occurred through surface water during storms"); *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983) (finding that wetlands with rare surface water connections, but demonstrated ecological and subsurface hydrological connections, were jurisdictional); *see also*, *Idaho Rural Council v. Bosma, supra, note 164Quivira v. EPA*, 765 F.2d 126 (10th Cir. 1985) (arroyo with continuous groundwater connection and occasional surface water connection to downstream jurisdictional waters protected under the Act); *Washington Wilderness Coalition v. Hecla*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("[S]ince the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit."); *Sierra Club v. Colorado Refining Company*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (where the Judge stated that, "I conclude that the Clean Water Act's preclusion of the discharge of any pollutant into 'navigable waters' *includes such discharge which reaches 'navigable waters' through groundwater*.") (emphasis added) (citations omitted); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D.Ca. 1988), *vacated and remanded on other grounds*, *M.E.S.S. v. Perry*, 47 F.3d 325 (9th Cir. 1995), *cert. denied*, 516 U.S. 807 (1995) (where the Court found that discharges to groundwater could be regulated under the Act if "discharges from the waste pits have an effect on surface waters of the United States" and it could be established that the groundwater was "naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act").

[96] 2014 SAB Rule Review Letter.

4195. The agencies make no effort to define or explain this term. As the SAB notes, "groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections."[97] Allowing the unregulated manipulation and pollution of such waters would like have significant adverse effects on wetlands and other waters with a significant nexus to TNWs and interstate waters.

3. *The exclusion for artificially irrigated areas should not be expanded to aquaculture without additional analysis and clarification.*

We support this exclusion as limited in the 2015 Rule. *See* 84 Fed. Reg. at 4194-95; 80 Fed. Reg. at 37099-100. We do not object to this limited exclusion as long as the exclusion is limited to truly upland areas and the exclusion is removed if irrigation ceases. *Id*. We do object to expanding this exclusion to include aquaculture absent further analysis and explanation. We are concerned about the potential for unchecked pollution and degradation associated with aquaculture without more information and potentially additional limiting conditions.

4. *The agencies' definition of upland is too broad and must explicitly exclude all tributaries, including those with ephemeral flow, and all natural lakes, ponds, and wetlands.*

While many of the agencies proposed exclusions retain the basic text of the 2015 exclusions, they effectively exclude many more natural water bodies because the agencies have tied these exclusions to a very broad definition of "upland." Specifically, the exclusions for ditches, prior converted cropland, artificially irrigated areas, artificial lakes and ponds, water-filled depressions, storm water control features, and wastewater recycling structures are all limited to those excavated or constructed in upland or that would revert to upland.

While the agencies elected not to define this term in the 2015 Rule, 80 Fed. Reg. 37097, the agencies now propose to do so. The agencies define the term upland to mean *any* land area that does not satisfy all of the elements of the definition of wetland and does not lie below the ordinary high water mark of a jurisdictional TNW, tributary, ditch, impoundment, lake, pond, or wetland. Of particular concern is that this definition of upland includes all ephemeral streams and many other waterbodies, opening them up to ditching, draining, mining, and other excluded practices.

For example, the agencies acknowledge that, "[a]s proposed this exclusion [for artificial lakes and ponds] would also apply to artificial lakes and ponds created as a result of impounding non-jurisdictional waters or features." This proposed definition of upland would declare "open season" on millions of miles of ephemeral streams nationwide, not only for impounding them to create artificial lakes, ponds, and pits, but channelizing them for ditches water distribution, irrigation, and other uses. 84 Fed. Reg. at 4194.

[97] *Id. See also,* 2019 SAB Scientists Comments.

The agencies seek comment on whether the artificial lakes and ponds, water-filled depressions and pits, storm water control features, and wastewater recycling structures "must be constructed *wholly* in upland, not just in upland as provided in the proposed regulatory text, in order for the exclusion to apply." *Id. at 4195.* Our response is YES. Upland should mean upland, as in dry land, as in not wetlands, streams, or other natural water bodies. In addition, according to the RPA at 50, the proposed rule will exclude additional waters relative to pre-2015 because the 1986 preamble language says that for water-filled depressions, once construction or excavation operation is abandoned, and if the resulting body of water meets the definition of waters of the U.S., that water body returns to jurisdictional status. These exclusions need to be clarified and limited.

We also seek clarification and/or limiting language regarding the (b)(9) storm water control feature exclusion in light of the agencies' statement that it is "intended to exclude the diverse range of storm water control features that are currently in place and may be developed in the future." While we support flexibility to incentivize sustainable, ecologically responsible green infrastructure and nature-based solutions, we ask for clarifications to ensure safeguards for natural tributaries, lakes, and ponds.

For both regulatory clarity and water quality purposes, the agencies should define upland consistent with longstanding practice as explicitly excluding all tributaries, including ephemeral tributaries, all open waters, and all wetlands that meet the longstanding definition of wetland.

5. *The agencies should exclude only ditches excavated in upland that do not flow perennially.*

We recognize that providing clarity with respect to long standing exclusions for certain ditches is what many stakeholders have asked for. 84 Fed. Reg. at 4190. As the agencies acknowledge, their longstanding policy has been to exclude from waters of the US only those ditches that were excavated in dry land. 84 Fed. Reg. at 4179. The "bright line" that would provide regulatory clarity, consistent with the Act's water quality goals, is to exclude from waters of the U.S. only those ditches that are excavated *wholly in true upland – dry* land.

We support defining waters of the US to continue to include ditches that were excavated in natural tributaries and not in dry land, and that do not "alter or relocate a water of the United States." However, contrary to the agencies' assertion, their proposed rule is not consistent with the agencies "longstanding, historic position" excluding only ditches excavated in dry land because the agencies definition of tributary does not only exclude dry land; it excludes ephemeral and at least some intermittent streams. *Id.* at 4180. The agencies should include as waters of the U.S. ditches that modify any natural tributary, and should retain the 2015 Rule definition of tributary that includes natural ephemeral streams that contribute flow to TNWs and interstate waters, and exhibit a bed and bank and OHWM.

Similarly, the agencies deviate from their longstanding historic position on ditches because the agencies' definition of adjacent wetlands does not only exclude dry land; it excludes millions of acres of naturally occurring wetlands that do not immediately abut intermittent and perennially flowing waters. *Id.* Consequently, contrary to the agencies' rationale, absent a return to the agencies' historic inclusion of all adjacent wetlands and many so-called isolated wetlands, this approach does not "align" the proposed rule with the CWA section 404(f) exemption for drainage ditch maintenance or the 404(f)(2) "recapture" clause and legislative history concerned with stopping the use of drainage ditches to drain wetlands. *Id.*

The agencies acknowledge that considerable uncertainty results from excluding ditches constructed in ephemeral streams, in part because the agencies propose to determine the jurisdictional status of a ditch on a reach-by-reach basis. 84 Fed. Reg. at 4193. "For example, a ditch that is constructed in a tributary would not be an excluded ditch under proposed paragraph (b)(4) so long as it satisfies the conditions of the tributary definition." So, it would be jurisdictional in reaches with intermittent or perennial flow, but not where flow is ephemeral. "The jurisdictional status of other reaches of the same ditch would have to be assessed based on the specific facts and under the terms of the proposed rule to determine the jurisdictional status of the ditch."

For similar reasons, the proposed rule's new definition of ditch as an "artificial channel used to convey water" must be clarified to mean a channel constructed wholly in upland that is not constructed in or relocating a natural waterbody. *See* 84 Fed. Reg. at 4181. Evidence of construction in a natural tributary prior to 1972 should not allow for exclusion. *Id.* at 4182.

As the agencies note, "[i]n general, the burden of proof would be on the agencies to determine the historic status of the ditch construction, and if field and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or adjacent wetland then a determination would be made that the ditch is not jurisdictional under this proposed rule." *Id.* The agencies further acknowledge that "it may be challenging to identify the historic status of a wetland where a ditch has drained the wetland such that it would no longer meet the definition of "adjacent wetland" under this proposed rule. *Id.* The challenge of establishing jurisdictional status for ditches is even greater on agricultural lands where, as the agencies note, agricultural producers have a unique veil of privacy that makes this evidence difficult to come by.

Given these challenges, agency guidance should require agency consideration of all relevant and credible evidence, including historic photos and records as well as aerial photos, LiDar, and remote sensing evidence as evidence of a ditch constructed in a tributary or wetland. 84 Fed. Reg. at 4182. The proposed rule should follow the 2015 Rule guidance encouraging use of the any tools available to determine the historical presence of tributaries, such as on-site characteristics and "historical maps, historic aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." 80 Fed. Reg. at 37,078-37,079.

Broadening the exclusion for ditches to include those constructed in ephemeral streams also increases regulatory uncertainty and water pollution because each excluded ditch would still serve as a point source at the point downstream where it conveys pollutants to a water of the US. Dischargers to that excluded ditch would have to meet their NPDES permit limits, but not at the point of entry to the ditch; instead at the point at which the ditch discharges to a water of the U.S. downstream. While discharges *into* an excluded ditch will not be subject to CWA requirements, discharges of pollutants *from* an excluded ditch into a jurisdictional water would be regulated.

The agencies seek comment on whether perennially flowing ditches should be included as waters of the U.S. We support the agencies including perennially flowing ditches as waters of the U.S. as continuing longstanding practice and the approach codified in the 2015 Rule. We understand this approach to be consistent with the CWA and judicial precedent and past Corps practice. Such perennial channels often convey water within and between natural water systems like those of the Everglades, the Great Lakes, and major river systems. If these perennially flowing channels connect natural waterbodies, the waters, organisms, and pollutants flowing through them must be subject to CWA regulation. This challenge of controlling the pollutants of multiple point source dischargers – as well as non-point discharges -- to each excluded perennially flowing ditch warrants including as waters of the U.S. all ditches that flow perennially, even if they are constructed wholly in upland. *See* 84 Fed. Reg. at 4182.

6. *The agencies should retain the "change in use" standard and ensure the exclusion only applies to on-going agricultural use.*

While we recognize the value in clarifying the definition of prior converted cropland and the implementation of this exclusion through this rulemaking, we do not believe the agencies have done so in a manner that ensures this exclusion is limited to on-going agricultural use as it was intended for purposes of both Farm Bill wetland conservation compliance and Clean Water Act compliance. 84 Fed. Reg. at 4191.

As the agencies recognize, the prior converted croplands exclusion was added to the definition of waters of the U.S. in 1993 in large part to ensure consistency in interpreting and implementing this exclusion between Farm Bill and Clean Water Act compliance programs. It is important that this rule's clarifications maintain that consistency where possible, while ensuring consistency with the Clean Water Act itself. To do so, we believe the agencies must modify their proposed definition and implementation of the prior converted cropland exclusion such that it only applies to on-going agricultural use.

Of particular concern is the agencies' proposal to eliminate the "change in use" standard and rely entirely on the "abandonment standard" as the basis for finding that an area is no longer in agricultural use. *Id.* The agencies fail to provide a rational explanation for this proposed change, despite acknowledging (only deep into the RPA) that this proposed change would result in fewer wetlands being found jurisdictional than under either pre-2015 practice or the 2015 Rule:

> Since the agencies would no longer apply the change in use provision as used under both baselines to prior converted cropland, fewer wetlands may be identified as jurisdictional under the proposed rule compared to both baselines…. Under both baselines, 'change in use' did not require that the area not be used for agricultural purposes at least once in the immediately preceding five years (this time requirement was only in place for the abandonment provision); change from an agricultural to a non-agricultural use could occur immediately. RPA at 50.

Specifically, the agencies recognize that the "change in use" standard has been the effective standard for Farm Bill purposes since the 1996 Farm Bill and that the "change in use standard" was adopted for both Farm Bill and CWA purposes through the 2005 Memorandum to the Field. This consistency in use of the "change in use" standard over time and across programs suggests that the agencies should use this rulemaking process to clarify and reinforce the "change in use" standard rather than eliminate it. The only reason the agencies give for not doing so is that the "change in use" standard "was declared unlawful by one district court *because it effectively modified the 1993 preamble language without any formal rulemaking process.*" 84 Fed. Reg. at 4191 (emphasis added). But this is the very rulemaking process that would correct the procedural deficiency of concern to that one district court.

The agencies' over-reliance on the abandonment standard also raises many questions and concerns regarding whether implementation will in fact ensure the prior converted cropland exclusion only applies to on-going agricultural use. In particular, the abandonment standard requires that the area not be used for agricultural purposes even once in the immediately preceding five years. This standard seems to create a loophole in which a landowner clearly intends a change in use, but conducts an activity in support of an agricultural use once in a five year period before seeking a Corps jurisdictional determination in preparation for a non-agricultural use. *See id.* at 4193.

This potential loophole is compounded by additional uncertainties. A primary concern, acknowledged elsewhere in the agencies proposal, is that agricultural producers enjoy an extraordinary veil of privacy that makes it very difficult to ensure the availability of accurate evidence regarding agricultural use as well as the return of wetland conditions. *See id.* at 4195 (seeking comment regarding necessary landowner evidence to establish on-going prior converted cropland exclusion).

These concerns are heightened by the agencies' suggestion that the "normal circumstances" of prior converted cropland is always based on past agricultural practice despite abandonment. *See id.* at 4194. While this is the position advanced by the Farm Bureau Federation, it is not the reality on the ground in many cases. The "normal circumstances" of abandoned PCCs are not the same as the normal circumstances of actively farmed PCCs. For example, the abandonment of an agricultural drainage system often leads naturally to the restoration of wetland conditions if left alone. This is why abandoned prior converted cropland offers prime wetland mitigation and restoration opportunities for mitigation bankers and conservation organizations like Ducks Unlimited and The Nature Conservancy. The agencies cannot rationally presume that "once a PCC

always a PCC" based on past agricultural practices now abandoned. The Corps must conduct objective jurisdictional determinations and where wetland conditions have returned and agricultural operations have ceased, the PCC status must be withdrawn and a permit required where the wetland is a "water of the U.S."

In addition, how is the prior converted cropland abandonment provision affected by the agencies' proposal that "a proposed excluded feature that develops wetland characteristics within the confines of the water/feature would remain excluded from the definition of waters" of the United States"? *Id.* at 4192. The proposal also raises questions regarding when and under what circumstances the agencies propose to recognize USDA prior converted cropland determinations and how those will relate to Corps CWA jurisdictional determinations.

Another important concern is the agencies' failure to clarify and limit the definition of "agricultural purposes" for purposes of both the abandonment standard and the change in use standard. Absent clarification, we are concerned that "agricultural purposes" can be read broadly to include a wide range of land management and development activities that would allow for misuse of this limited prior converted cropland exclusion.

In the interest of regulatory certainty, consistency, and the practicalities and efficiency of agency implementation, the "change in use" standard seems far preferable to the abandonment approach. The agency should reconsider this proposal.

7. *The agencies' waste treatment system exclusion is unlawful because it fails to ensure protections for natural tributaries, lakes, and wetlands.*

A primary concern with the agencies' waste treatment system exclusion is that it does not foreclose the potential to construct these systems in natural waterbodies. Nowhere does the Act empower the agencies simply to remove waters of the United States from the Act's protections.[98] Yet that is precisely what the waste treatment system exclusion does, contravening the clear intent of Congress. The exclusion cannot be reconciled with the Act's purpose of controlling and eventually eliminating pollution discharges into our Nation's waters.[99]

IV. The Agencies Fail to Provide a Clear and Objective Comparison of the Proposed Rule, the 2015 Rule and the pre-2015 *Rapanos* Guidance.

An obvious first step in providing for meaningful notice and comment is to provide a clear and objective comparison of the waters covered – and not covered – by the Clean Water

[98] *Cf. Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 600 (D.C. Cir. 1998) ("There is, of course, no such 'except' clause in the statute [at issue in that case], and we are without authority to insert one."); *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (invalidating a rule on the basis that, under the Clean Water Act, EPA lacked discretion to exempt entire categories of point sources from certain permitting requirements).
[99] *See* 33 U.S.C. § 1251(a)(1).

Act pursuant to the agencies' proposed definition of waters of the U.S. as compared to the 2015 Rule presently codified in the U.S. Code of Federal Regulations, and the pre-2015 *Rapanos* guidance and *SWANCC* guidance interpreting the 1986 definition of waters of the U.S. Rather than provide such an informative comparison in their proposed rule, the agencies provide a subjective and misleading justification for their own proposal. 84 Fed. Reg. at 4195-98. "The agencies propose to replace the 2015 Rule for reasons discussed in the Step 1 proposal and supplemental notice of proposed rulemaking (SNPRM)." 84 Fed. Reg. at 4196. Yet the rationales presented in response to those proposals have been widely debunked.[100] The agencies' primary rationale for this rule is embodied in their "legal construct," addressed *supra* at II, and again in their "Summary of Proposed Rule as Compared to the 1986 and 2015 Regulations." *Id.* at 4195-98.

The agencies mischaracterize the 2015 Rule as defining the significant nexus terms "in the region" and "similarly situated" in a manner that allows for " 'all' waters in a region" to be aggregated to find significant nexus. *Id.* at 4196. But that is not the case. The 2015 Rule applied the significant nexus to those waters "similarly situated' in terms of similar aquatic function within the watershed, an approach informed and approved by the Science Advisory Board, applying the Connectivity Science Report and the Board's expertise to that interpretation. [101]

The agencies reject the 2015 Rule's approach to significant nexus because, in their current view, it "relies too heavily on considerations that Justice Kennedy expresses regarding the interconnected nature of waters but fails to balance those 'environmental concerns' with the 'limits in the statutory text' the agencies cannot disregard." But the 2015 Rule tracks Justice Kennedy's significant nexus precisely to ensure that, in fact, the balance is struck in accordance with the law. Suffice it to say, the agencies at present simply do not like Justice Kennedy's opinion or his significant nexus standard. They do not like his "approach that relies on potentially subjective case-by-case application that reduces regulatory certainty for the regulated community and hinders straightforward implementation by regulatory agencies." In fact, it is the 2015 Rule, not the present proposed rule, which provides for science-based categorical findings of jurisdiction that reduce case-by-case applications and increase regulatory certainty and straightforward, efficient implementation by regulatory agencies.

The agencies reject the 2015 Rule's allowances for limited case-specific findings of significant nexus for waters and wetlands in located in wetlands up to 4000 feet from a jurisdictional waterway as "in tension" with Kennedy's significant nexus standard. 84 Fed. Reg. at 4197. The agencies reject the 2015 Rule definition of adjacent wetlands, with a particular focus on the Rule's definition of neighboring as finding categorically jurisdictional all waters located within the 100-year floodplain and not more than 1500 feet from the OHWM. *Id.* However, the agencies fail to grapple with the strong body of connectivity science that, tracking Justice Kennedy's significant nexus test, confirms that this approach is consistent with both. The agencies reject this science-based approach and substitute their own much narrower definition of adjacency based not on the science and not on

[100] *See,* 2017 and 2018 NWF Repeal Rule Comments, attached and incorporated herein by reference.
[101] *See* SAB Connectivity Report Review Letter; SAB 2014 Proposed Rule Review Letter.

controlling Supreme Court precedent but on the 4-justice plurality opinion in *Rapanos.*

The agencies misleadingly credit the proposed rule with eliminating the need for "the case-specific significant nexus test" required by the *Rapanos* guidance, but they fail to acknowledge that: 1) the 2015 Rule did the same in a manner consistent with the law and the science; and 2) their approach does not eliminate, but actually expands the need for site specific data collection to make "plurality test" determinations. Their approach will not provide the regulatory clarity they claim.

The agencies fail to acknowledge the wide distance between the pre-2015 1986 Rule/Rapanos guidance and their radical new proposal. By, among other things, respecting and incorporating the significant nexus test, including consideration of ecological factors, and applying essentially the same definitions of "adjacent" (including connectivity through subsurface flows and without regard to barriers) and "tributary," (linked to the bed and bank and OHWM physical indicators), the pre-2015 practice has more in common with the 2015 Rule than with the proposed rule. The biggest difference between the pre-2015 practice and the 2015 Rule is that the latter applies the SAB peer-reviewed Connectivity Science Report to establish categorical significant nexus for adjacent waters and tributaries, as prescribed by Justice Kennedy and approved at least by the four dissenting justices in *Rapanos.* In fact, the 2015 Rule's categorical findings of significant nexus and explicit exclusions provide for clearer, less burdensome, and more consistent jurisdictional determinations and the Approved Jurisdictional Determinations (AJDs) do not differ widely.[102]

It is only in the parsing of the agencies' RPA Appendix baseline discussion do the agencies even begin to acknowledge the extent to which the proposed rule deviates from both pre-2015 practice and the 2015 Rule. For example, with respect to "interstate waters," the agencies acknowledge, RPA at 31, that "[t]he 1980s regulations define 'waters of the United States' to include interstate waters, including interstate wetlands. Under pre-2015 practice interstate waters are therefore 'waters of the United States' even if they are not navigable for purposes of Federal regulation under (a)(1) and do not connect to such waters."

With respect to "tributaries," the agencies acknowledge, RPA footnote 5, that the pre-2015 practice that is, in effect, current practice in many states at the present time, recognizes that "ephemeral tributaries" are jurisdictional subject to meeting the significant nexus standard. In addition, pre-2015 practice and the 2015 Rule distinguish between jurisdictional "ephemeral tributaries" and excluded "small washes characterized by low volume, infrequent, or short duration flow." *Rapanos* Guidance at 1.

Also with respect to "tributaries," the agencies acknowledge, RPA at 30-31 and footnotes 47 and 48, that: 1) under the pre-2015 *Rapanos* Guidance, "a tributary includes natural,

[102] *See* Letter from Jon Devine, NRDC & Jan Goldman-Carter, NWF, to Docket EPA-HQ-OW-2017-0203 (Dec. 19, 2018) (included in Appendix A of NRDC's 2019 comments). Notably, the analysis contradicts the agencies' suggestion in the supplemental repeal – and, by extension, this proposal – that the Clean Water Rule extended protections to many waters previously unprotected.

man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water;" 2) under the pre-2015 practice, the agencies assert jurisdiction *categorically* over "non-navigable tributaries of TNWs that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months);" 3) under the pre-2015 practice, "[t]he agencies have further clarified that three months for seasonal flow was provided as an example in the guidance, and the agencies have flexibility under the guidance to determine what seasonally means in a specific case. The agencies have found that two months of continuous flow was seasonal at a particular site in a particular region of the country; and 4) "Consistent with the Rapanos Guidance, a significant nexus analysis assesses the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary, *including consideration of hydrologic and ecologic factors,* to determine if they significantly affect the chemical, physical, and biological integrity of downstream TNWs."

With respect to "adjacent," the agencies acknowledge (RPA at 29) that "[t]he 2015 Rule carries forward the 1980s regulations' definition of "adjacent" – waters that are bordering, contiguous, or neighboring the aforementioned waters – and it also defined 'neighboring' and included open waters such as lakes and ponds as adjacent." They further acknowledge that, in distinct contrast to the proposed rule, the pre-2015 practice and the 2015 Rule definitions of "adjacent wetlands" also align in the following respects:

In the Rapanos Guidance, the agencies clarified that they consider wetlands adjacent if they meet one of three criteria: 1) there is an unbroken surface or shallow sub-surface connection to jurisdictional waters; 2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or 3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Non-jurisdictional ditches and other features like swales can contribute to a surface hydrologic connection between a wetland and the water to which it is adjacent.

Armed with a clear and objective comparison of the proposed rule with the pre-2015 practice and the 2015 Rule, the full range of clean water stakeholders would be better able to assess the agencies latest proposal and provide meaningful public comment.

V. The Agencies Fail to Objectively Present the Range of State and Tribal Rulemaking Recommendations Submitted for the Record.

The agencies conducted a separate state and tribal consultation and public comment process in 2017 to gather state, tribal, and public recommendations regarding their "step 2" revision to the definition of "waters of the U.S." States and tribes also commented in opposition to the closely related 2015 Clean Water Rule repeal rulemakings. Yet the agencies fail to incorporate those recommendations into this administrative record. More importantly, they fail to portray those recommendations objectively to inform public opinion. Instead, the preamble to the proposed rule arbitrarily cherry picks and mischaracterizes feedback to support their policy choices and "legal construct" to drastically shrink the

"waters of the U.S." and the federal government's role in protecting them.

Nowhere in the proposed rule or even the RPA do the agencies acknowledge, for example, that:

- Many states urged stability and certainty, opposing any shift away from the significant nexus standard for CWA jurisdiction;[103] and

- The majority of tribes oppose further narrowing of CWA jurisdiction beyond the scope of waters of the U.S. prescribed in the 2015 Rule.[104]

For example, the Colorado Departments of Agriculture, Natural Resources, and Public Health and Environment urge retaining the significant nexus jurisdictional standard and taking cumulative impacts into account:

> Colorado has concerns that a definition based solely upon Justice Scalia's opinion in *Rapanos v. United States* , 547 U.S. 715 (2006) may not be consistent with the Supreme Court's direction and not able to withstand legal challenge as the majority opinion. While we understand EPA's need to revise the existing definition, Colorado believes that the most defensible definition will still be consistent with Kennedy's test in *Rapanos.*[105]
>
> As a headwaters state, it is a high priority for Colorado that in considering how to define "relatively permanent" and "continuous surface connection," that the definition include an assessment of whether waters alone or in combination with other similarly situated waters have a significant nexus. For example, in Colorado there are many state or federal conservation priority fish species that depend on seasonal waterways or wetlands." [106]

In its consultation comments dated June 19, 2017, Colorado commented:

> …Colorado has many ephemeral waters which flow only in response to storm events, some of which may have measurable and significant impact on downstream navigable waters. Colorado expects that EPA will involve states in meaningful and substantive dialogue as it evaluates how ephemeral streams will be treated under a new proposed definition.

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[103] *See, e.g.,* Comments of Colorado Departments of Ag, Natural Resources, Public Health and Environment to EPA dated August 18, 2018; June 19, 2017; September 27, 2017.
[104] The agencies make it extraordinarily difficult to find tribal comments on line. *See* https://www.epa.gov/wotus-rule/tribal-consultation-letters-national-tribal-organization; but they do post the National Tribal Counsel's June 16, 2017 letter, which gives some indication of the tribes' position opposing the proposed rule's radical rollback of CWA protections: https://www.epa.gov/sites/production/files/2017-09/documents/nationaltribalwatercouncil_2017-06-16.pdf
[105] State of Colorado Comments dated August 18, 2018; *See also* Colorado Comments dated June 19, 2017; Colorado Comments dated September 27, 2017.
[106] *Id.*

> EPA has suggested limiting its interpretation of 'relatively permanent' to perennial waters only on one end of the spectrum, or perennial waters and waters that flow for at least 3 months of the year on the other end of the spectrum. Colorado has many waters that would not fall into either of those proposed definitions, and yet those waters can have measurable and significant impact on downstream navigable waters. When addressing these issues, Colorado is urging EPA to develop criteria that clarify the protections previously afforded these waters under prior jurisdiction determinations. Because waters that may have a significant impact on downstream navigable waters will vary by state, it is important that Colorado and all states be given a seat at the table to consider the most appropriate way to establish objective criteria.[107]

And with regard to the Federal-State partnership in implementing the Clean Water Act, Colorado commented:

> [W]hile Colorado believes that EPA and the Corps must engage in dialogue with states and tribes to understand the differing implications of a definition in the various circumstances that exist in this vast and diverse country, it is important for EPA and the Corps to retain a federal definition of jurisdictional waters and not defer the responsibility for protection of waters in the United States to the states alone. ***While states may choose to protect these waters under their own programs, a shift away from federal protections would significantly increase the burden on the states. EPA and the Corps should not unduly shift the additional and substantial burden onto the states to protect waters in the United States.*** EPA and the Corps must give careful thought to a revised definition to ensure it is both protective and reasonable across the nation.[108]

The Association of Clean Water Administrators (ACWA) urged a regulatory definition that is "regionally practical, as well as easily implemented and justified by good science (such as the EPA report "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence")."[109]

The National Association of Clean Water Agencies (NACWA) cautioned that:

> [N]arrowing of the WOTUS jurisdiction could increase the burden for downstream dischargers, like NACWA's members, where unregulated, upstream discharges to tributaries deemed no longer jurisdictional under the federal Clean Water Act (CWA) contribute to the pollution load of the receiving water. **EPA and the Corps must consider these potential impacts on downstream dischargers…. [S]trong federal protection is essential to providing safe and sustainable drinking water supplies into the future. Any significant narrowing of the WOTUS jurisdiction could threaten this protection** and NACWA encourages

[107] Colorado Comments dated June 19, 2017.
[108] Colorado Comments dated August 18, 2018; Comments dated September 27, 2017.
[109] ACWA federalism consultation comment letter (June 19, 2017)

> EPA and the Corps to consult with clean water utilities and drinking water utilities during the rulemaking on the importance of protecting source water supplies.[110]

The Attorneys General of New York, California, Maine, Maryland, Massachusetts, Oregon, Vermont, Washington and the District of Columbia commented that they:

> [A]re situated on or near the shores of the Atlantic and Pacific Oceans and the Great Lakes, and are downstream from, or otherwise hydrologically connected with, many of the Nation's waters. As such, the States are recipients of water pollution generated not only within their borders but also from sources outside their borders over which they lack jurisdiction. The States support a protective, clear, practical, and science-based definition of "waters of the United States" under the CWA in order to maintain a strong federal foundation for water pollution control that preserves the integrity of their waters. Not only does the definition of "waters of the United States" implicate the water quality and economic interests of the States and their citizens, it also affects the administrative burdens the States would need to bear in operating water quality programs should there be inadequate or ineffective protection of waters under the Act.[111]

The Washington State Department of Ecology opposes the agencies' removal of CWA protections for waters critical to Washington State's fisheries, commenting that, "Ecology believes that protections under the CWA should not be removed from intermittent and ephemeral waters, headwater and floodplain wetlands, and interdunal wetlands." The Department explained that:

> Washington's rivers are the breeding and rearing habitat for the most abundant and diverse wild Pacific salmon populations remaining south of Canada. Headwater and ephemeral streams contribute the raw materials for the food those fish rely on to grow and develop sufficiently to survive when they move from the rivers into marine waters.

And that spending on fishing, birding, and other recreating exceeded $4.6 billion and supported 60,000 jobs between 2013 and 2016.[112]

Even the RPA appendix to the rule only briefly references the state and tribal pre-proposal comments and recommendations, but fails to present those recommendations and concerns objectively or in any detail. The agencies acknowledge that "most states were generally unsure of the potential impacts to their programs" and "some states…express[] concerns about the potential effects to their programs and would have to re-evaluate their programs to consider addressing waters in their state should they no longer be regulated under the CWA." RPA at 61.

The agencies' downplaying of tribal concerns is particularly noteworthy. The agencies don't even attempt to summarize their concerns, but buried in the RPA are vague references to a few of them. For example:

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[110] NACWA federalism consultation comment letter (June 19, 2017).

[111] State Attorneys General Comment Letter (September 27, 2017).

[112] Washington State Department of Ecology Comments (June 19, 2017).

- “During tribal engagement at the pre-proposal stage of this proposed rule, many tribes provided feedback that a revised definition of ‘waters of the United States’ could potentially affect tribal interests and that the federal government has a trust responsibility to tribes.” RPA at 63.

- Some tribes “expressed concerns that they face economic and resource challenges that could limit their ability to enforce tribally-adopted water quality protections, and many tribes, due to similar resource constraints, have not yet developed an aquatic resource program.” RPA at 63.

- The tribally-adopted water quality protections that may go unenforced include “water quality-based effluent limitations and TMDLs”. “To date, no tribes have obtained TAS authority to administer the section 303(d) listing and TMDL program.” RPA at 72.

- “[T]he OSLTF [Oil Spill Liability Trust Fund] is available to reimburse costs of assessing and responding to oil spills in ‘waters of the United States.’ …. Quick response is critical for minimizing impacts of a spill. If a water is not jurisdictional, costs incurred by states or tribes to clean up the spill and costs related to business impacts associated with spills into that water would not be reimbursed by the OSLTF.” RPA at 81; *See also* RPA at 83.

- “The agencies did not conduct an analysis of tribal statutory authority similar to the OPA [Oil Pollution Act] that would provide for cost recovery, civil penalties, and trust funds.” (RPA at 83)

- “Many states and tribes rely on section 401 certification as their primary tool for ensuring that federal permits or licenses do not cause unacceptable water quality impacts and sufficiently protect aquatic resources including wetlands.” (RPA at 85). “[A]t present, most of the 60 tribes that have TAS for WQS are also authorized to administer a section 401 certification program.” (RPA at 84). The proposed reduction in the scope of jurisdictional waters would reduce the “availability of section 401 as a water quality tool.” RPA at 86.

- “Tribes have raised concerns during pre-proposal consultation and engagement about the potential for decreased section 404 permitting upstream of tribal lands and on ceded lands where they have treaty protected rights but no responsibility for implementing permitting programs.” RPA at 67.

- “Many states, territories, and tribes rely heavily on the CWA section 401 certification program for ensuring WQS are met when the Corps issues dredged and fill permits under the CWA on state, territorial, or reservation lands. Tribes in particular often draw on the support of EPA regional offices for completing the 401 certification process under the CWA when the Corps issues such federal permits.” RPA at 96.

- “Several tribes have raised concerns throughout the pre-proposal consultation and

engagement process about the potential impacts to the applicability of the NHPA [National Historic Preservation Act] as a result of a revised definition of 'waters of the United States.' Tribes note that a change in the scope of CWA jurisdiction … could results in fewer opportunities for tribes to be involved in the section 106 consultation process." RPA at 68.

- "A change in the scope of the CWA could result in fewer opportunities for tribes to be involved in the section 106 consultation process" for historic properties that "may include prehistoric or historic districts, sites, buildings, structures, objects, sacred sites, and traditional cultural places, that are included in, or eligible for inclusion in, the National Register of Historic Places." RPA at 114.

VI. The Agencies Arbitrarily Fail to Analyze and Account for the Significant Environmental Harm Associated with Removing from CWA Jurisdiction Millions of Wetland Acres and Stream Miles Across the Country.

Remarkably, the agencies propose an unprecedented rollback of Clean Water Act safeguards while by their own admission flying almost completely blind with respect to the actual environmental impact of their policy choices. "[T]he agencies are not aware of any means to quantify changes in CWA jurisdiction with any precision that may or may not occur as a result of this proposed rule." 84 Fed. Reg. at 4200. Nowhere in the agencies' proposed rule do they consider, analyze, account for, or inform the public of these potential impacts, or explain how they will effectively maintain and restore the physical, chemical, and biological integrity of the nation's waters in the absence of a definition of waters of the U.S. that controls point source pollution throughout the tributary system and associated wetlands.

Even the agencies' RPA fails to conduct any meaningful analysis of these potential impacts and how the proposed rule can effectively meet the goals of the Clean Water Act. What the RPA does confirm, though, is that the agencies' proposal will have very significant harmful impacts on the nation's waters, but the agencies are either unwilling or unable to estimate these impacts or explore alternative approaches to address them.

Below is a summary of illustrative RPA statements confirming the likely loss of aquatic resources of their proposal relative to pre-2015 practice and the 2015 Rule:

Overall, "the agencies assume that the most significant changes the proposed rule makes from pre-2015 practice and the 2015 Rule are that 'waters of the United States' would not encompass any ephemeral features and would reduce the scope of wetlands subject to federal regulation under the CWA. The proposed rule would also remove interstate waters as an independent category of jurisdiction, including tributaries of interstate waters, impoundments of interstate waters, and wetlands adjacent to the above waters." RPA at 10.

With respect to tributaries, the agencies acknowledge, RPA at 11, that they are unable to quantify the proposed change in CWA jurisdiction for tributaries on a national scale due to 1) insufficient information on the extent of ephemeral streams – though in portions

of the country ephemeral streams are more prevalent and better mapped in the NHD (e.g., the arid West) – and 2) the fact that ephemeral features, including ephemeral streams, are not categorically jurisdictional under pre-2015 practice. Because ephemeral streams represent a larger percent of waters in the arid West, any change in jurisdiction related to ephemeral features may be greater there than in other portions of the country, assuming those features would have been found to have a significant nexus with a TNW per the *Rapanos* Guidance."

"As compared to the 2015 Rule, the proposed rule would not find any ephemeral features jurisdictional, including those ephemeral streams meeting the 2015 Rule's definition of tributary. In addition, some perennial and intermittent streams would not be considered jurisdictional under the proposed rule that may be jurisdictional under the 2015 Rule if such waters do not convey perennial or intermittent flow to a TNW in a typical year." RPA at 38.

By way of example, "streams may be perennial or intermittent at the headwaters but become ephemeral downstream due to natural conditions (e.g., losing streams) or due to anthropogenic alternations (e.g., water withdrawals). Such perennial or intermittent waters would not be jurisdictional under the proposed rule but would be jurisdictional under the 2015 Rule so long as they are characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark and contribute flow to a TNW at some unspecified time." *Id.*

"As compared to pre-2015 practice, the proposed rule would not regulate any of the ephemeral streams found to be jurisdictional based on a case-specific significant nexus evaluation." *Id.*

"In addition, the proposed rule would not regulate perennial or intermittent streams that flow into ephemeral features before flowing to a TNW, whereas such waters would be jurisdictional under pre-2015 practice if they are RPWs or are non-RPWs that have a significant nexus." *Id.*

"[T]he agencies expect that portions of the country where ephemeral streams are more prevalent (e.g., the arid West), the change might be greater relative to other parts of the country. The agencies are also unable to quantify how many perennial or intermittent streams have ephemeral reaches that would render such waters non-jurisdictional under the proposed rule." RPA at 39.

"In the NHD at high resolution, 30 percent of streams are mapped as perennial, 52% are mapped as intermittent, and 18 percent are mapped as ephemeral. However, the actual percentage of ephemeral streams across the country is likely higher than 18 percent since many are not mapped or are mapped as intermittent. In the arid West (Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming), 13 percent of streams (by stream length) are mapped as perennial, 48 percent are mapped as intermittent, and 39% are mapped as ephemeral." *Id.* at 40.

These estimates are vastly understated here. According to Trout Unlimited's geospatial analysis, discussed *infra* at VII, the percentage of ephemeral streams that would lose CWA jurisdiction is closer to 57 percent nationwide, and 86 percent in Arizona. Even the agencies' own Economic Analysis Appendix A-1 provides state by state data that can be summed to estimate that there are at least 2 million miles of ephemeral streams nationwide that would lose CWA protection.

The proposed rule will exclude some ditches that would have been found jurisdictional under both the 2015 Rule and pre-2015 guidance: interstate ditches, ditches that flow to interstate waters, ditches that drain wetlands that would have been jurisdictional under baselines, but not under the proposed rule, where ditches do not satisfy the tributary definition. However, the agency acknowledges that it cannot quantify any of these potential changes. RPA at 41.

"[T]he proposed rule would include fewer lakes and ponds as jurisdictional than the 2015 Rule, but this change cannot be quantified." RPA at 42. Some ephemeral lakes and ponds are tributaries under pre-2015 practice, but would be non-jurisdictional under the proposed rule. RPA at 43.

With respect to interstate waters, the agencies are unable to estimate whether this will represent a significant change in jurisdictional waters. *See* RPA at 11, 36.

The agencies "lack the analytical ability to perform a comparative analysis with precision." The agencies ignore the database of Approved JDs that apply the 2015 Rule. This database does include a category for interstate waters. See RPA footnote 6.

"The proposed rule would reduce the number of waters considered to be jurisdictional as interstate waters as compared to both baselines. This proposed change would also result in potential changes in jurisdiction for wetlands adjacent to interstate waters, tributaries to interstate waters and their adjacent wetlands, and impoundments of the above waters and any adjacent wetlands to those impoundments, where such waters do not otherwise meet the proposed definition of 'waters of the United States.'" RPA at 36.

"[N]o data currently exists that indicates the extent of these waters (including any interstate wetlands or interstate ephemeral waters). RPA at 36.

With respect to impoundments, "[t]he agencies are unable to quantify the number or extent of impoundments of waters that would no longer be considered jurisdictional under the proposal." RPA at 11.

The agencies acknowledge that a number of impounded waters would no longer be jurisdictional because: 1) impoundments of ephemeral streams would have been jurisdictional under both the 2015 Rule and pre-2015 Rule, but not under the proposed rule; 2) impoundments of certain interstate waters would have been jurisdictional under both the 2015 Rule and pre-2015 Rule, but not under the proposed rule, as well as their tributaries, and wetlands adjacent to them; and 3) impoundments of certain wetlands that were jurisdictional under 2015 and pre-2015 would no longer be jurisdictional. RPA

at 37.

With respect to wetlands, "[t]he agencies anticipate that the types of wetlands most likely to change jurisdictional status following a revised definition are wetlands that no longer meet the proposed definition of "adjacent wetlands" and wetlands that were considered adjacent to waters that are no longer considered jurisdictional (e.g., ephemeral streams found to have a significant nexus with TNWs and certain ditches)." RPA at 11.

"The proposed rule would exclude most wetlands that are 'neighboring' per the 2015 Rule and most that are not directly abutting per pre-2015 practice." RPA at 43.

"The proposed rule differs from both baselines by defining the term 'adjacent wetlands,' while the 2015 Rule and the pre-2015 regulation both define the term 'adjacent.'" *Id.* at 44.

"Many" wetlands considered neighboring under the 2015 Rule "would not have a direct hydrologic surface connection as defined in the proposed rule." *Id.*

The proposed rule also excludes many adjacent wetlands separated by dikes, berms, and other barriers that were jurisdiction under the pre-2015 practice and the 2015 rule.

"Thus, the proposed rule would include fewer wetlands as 'waters of the United States' than the 2015 Rule." *Id.*

"Under pre-2015 practice, the agencies' data indicate that most wetlands that are adjacent to but that do not directly abut RPWs are found to be jurisdictional following a significant nexus analysis." RPA at 46.

"…approximately 97 percent of such wetlands [non-abutting adjacent wetlands] were determined to be jurisdictional under pre-2015 practice." *Id.*

"Thus, compared to both baselines, fewer wetlands would be jurisdictional under the proposed rule for this category of wetlands where they do not abut the RPW and lack a direct hydrologic surface connection to the RPW in a typical year." *Id.*

From AJD analysis, under pre-2015 practice, most wetlands adjacent to non-RPWs have been determined to be jurisdictional. "…92 percent of wetlands adjacent to non-RPWs were determined to be jurisdictional." *Id.*

"Thus, compared to both baselines, fewer wetlands would be considered jurisdictional under the proposed rule for this category of wetlands." *Id.*

"[T]he agencies anticipate that there would be fewer wetlands subject to the CWA as 'waters of the United States' under the proposed rule compared to both baselines." RPA at 47.

With respect to the exclusion for the estimated 53 million acres of prior converted croplands, "[s]ince the agencies would no longer apply the change in use provision as used under both baselines to prior converted cropland, **fewer wetlands may be identified as jurisdictional** under the proposed rule compared to both baselines." RPA at 50.

"Under both baselines, 'change in use' did not require that the area not be used for agricultural purposes at least once in the immediately preceding five years (this time requirement was only in place for the abandonment provision); change from an agricultural to a non-agricultural use could occur immediately." *Id.*

With respect to the revised exclusions for artificial irrigated areas, artificial lakes and ponds, and water filled depressions and mining pits, additional waters will be excluded relative to pre-2015 practice because the 1986 preamble language says that for water filled depressions, once construction or excavation operation is abandoned and if the resulting body of water meets the definition of waters of the U.S., those waters return to jurisdictional status. *Id.*

The agencies conclude that the proposed rule will remove from CWA jurisdiction many streams, wetlands, lakes, and ponds: "[T]he agencies anticipate that the largest potential effects associated with the proposed rule policies would be to ephemeral streams and to wetlands….Some intermittent and perennial streams may also no longer be jurisdictional under the proposed rule that may be jurisdictional under the 2015 Rule and pre-2015 practice, if such streams do not convey perennial or intermittent flow to a TNW in a typical year. In addition, there could be a subset of interstate waters, their tributaries, their adjacent wetlands, and impoundments of the above waters that were jurisdictional under both baselines that would not be jurisdictional under the proposed rule due to the proposed elimination of interstate waters as a separate category of jurisdictional waters." *Id.* at 52.

"[T]he agencies anticipate that the proposed rule would decrease the number of jurisdictional wetlands and impoundments, and the scope of lakes and ponds that are jurisdictional would likely be smaller when compared with either baseline." *Id.*

Below is a summary of illustrative RPA statements confirming that the likely loss of CWA jurisdiction over interstate waters, ephemeral and many intermittent streams, wetlands, lakes, and ponds will make it more difficult for states and tribes to protect and manage their water resources:

Overall, the proposed rule will most adversely affect tribes that generally lack regulatory authority and program capacity, and states that lack independent state authority and resources. *See* RPA at 11.

Buried in the RPA at 73-74 is a damning assessment of the impact of the proposed rule on CWA 303 (d) impaired waters and TMDL cleanup plans. **The agencies conclude, in essence, that the proposed rule's changes in CWA jurisdiction would hamstring and upend the more than 73,000 completed TMDLs nationwide and would make**

future TMDL cleanup plans even more difficult to develop, defend, and implement, directly undermining the cleanup goals of the Clean Water Act itself.

As the agencies note, for example,

> Changes in jurisdiction could prompt questions regarding the validity of WLAs [waste load allocations] and load allocations in existing TMDLs, as well as water quality-based effluent limitations in existing NPDES permits that are based on a current TMDL WLA. This has the potential to prompt requests for TMDL revisions that could shift additional pollutant reduction responsibility to those sources discharging to jurisdictional waters downstream. In addition, some states and NPDES permittees may request review and revision of existing permits and TMDLs to account for these jurisdictional changes, with a corresponding increase in both state and EPA workload from revisions and approval/disapproval actions. As there are currently more than 73,000 completed TMDLs nationwide, requests to revise even a small percentage of them would require significant resources to complete. RPA at 74.

The agencies also bury in the RPA the fact that **CWA and Oil Pollution Act spill prevention, preparedness, response, and recovery requirements are limited** to potential and actual spills into "waters of the U.S.":

- "If a water that could be impacted by an oil spill from the facility would no longer be jurisdictional under the proposed rule, federal spill prevention and preparedness plans may no longer be required." The same holds true for pipelines and railcars. RPA at 81.

- "[T]he OSLTF [Oil Spill Liability Trust Fund] is available to reimburse costs of assessing and responding to oil spills in 'waters of the United States.' …. Quick response is critical for minimizing impacts of a spill. **If a water is not jurisdictional, costs incurred by states or tribes to clean up the spill and costs related to business impacts associated with spills into that water would not be reimbursed** by the OSLTF." RPA at 81; *See also* RPA at 83.

With respect to state CWA section 401 water quality certification authority, "[m]any states and tribes rely on section 401 certification as their primary tool for ensuring that federal permits or licenses do not cause unacceptable water quality impacts and sufficiently protect aquatic resources including wetlands." (RPA at 85). "[A]t present, most of the 60 tribes that have TAS for WQS are also authorized to administer a section 401 certification program." RPA at 84. **The proposed reduction in the scope of jurisdictional waters would reduce the "availability of section 401 as a water quality tool."** RPA at 86.

"Many states, territories, and tribes rely heavily on the CWA section 401 certification program for ensuring WQS are met when the Corps issues dredged and fill permits under the CWA on state, territorial, or reservation lands. Tribes in particular often draw on the

support of EPA regional offices for completing the 401 certification process under the CWA when the Corps issues such federal permits." RPA at 96.

"Tribes have raised concerns during pre-proposal consultation and engagement about the potential for decreased section 404 permitting upstream of tribal lands and on ceded lands where they have treaty protected rights but no responsibility for implementing permitting programs." RPA at 67.

With respect to CWA 404 dredge and fill permitting authority, "[w]here CWA jurisdiction does not apply or would no longer apply for certain waters or features under a revised definition, there would be no section 404 permits required for dredged or fill activities in those waters or features." RPA at 14.

"Evaluating a section 404 permit application typically takes into account the environmental and public interest implications of the proposed project, such as potential for flooding or impacts to drinking water supplies. Where no federal permit is required such evaluation would not occur" unless state, tribal, or local laws require comparable reviews and regulation. "Where no federal permit under section 404 is required because impacts occur to non-jurisdictional waters under a new rule, compensatory mitigation under federal regulation would not be required for unavoidable impacts to such waters." RPA at 98.

The agencies acknowledge that they really do not know the extent of waters likely to be impacted by dredge and fill discharges as a result of the proposed narrowing of CWA jurisdiction. However, based on the agencies' review of its 2011-2015 404 permits, they acknowledge that **Florida, Louisiana, South Carolina, Indiana, and Texas – states with the largest mitigation requirements imposed for authorized permanent impacts on non-tidal wetlands and waters – "would likely experience significant impacts from 'waters of the United States' definitional changes** in the event that the states do not require similar mitigation following the change." RPA at 96-97.

With respect to the CWA 402 National Pollution Discharge Elimination System permitting authority, the agencies acknowledge that "[i]n practice, a change in the definition of 'waters of the United States' may result in situations where the jurisdictional water receiving a discharge would now be identified further downstream from the NPDES-permitting facility. This in turn may result in changes to water quality-based requirements in NPDES permits at the facility." *Id.* at 14.

"[T]hose states with authorized CWA section 402 programs may choose to continue issuing permits as they have been for 'waters of the state.' Alternatively, if the discharge is no longer into a 'water of the United States,' states may rewrite permits to recognize that the discharge requiring an NPDES permit is farther from the pollutant source. In addition, **the EPA, on its own, would not enforce permits issued for discharges to 'waters of the state,' if beyond the scope of the CWA.**" *Id*.

"The agencies are not aware of any tribes with independent tribal pollutant discharge regulatory programs." *Id.*

The agencies dismiss: 1) the fact that dischargers will be able to use these ephemeral tributaries and non-jurisdictional ditches as common dumping and treatment waters; 2) enforcing for discharge limits and violations will be much more difficult; and 3) that these additional burdens of monitoring, permit writing, enforcement, and/or increased pollution in jurisdictional waters will all fall to the state or tribe – and downstream states and communities. *See id.*

Buried misleadingly in a discussion of the Safe Drinking Water Act are statements demonstrating that the proposed rule will threaten public drinking water source waters across the country. *See* RPA at 11-15, 108-110. In effect, the EPA that is supposed to be protecting public health – especially drinking water – basically recognizes the critical role CWA programs play in supporting clean surface drinking water supplies, but abandons its environmental protection role, concluding that the states and locals will just have to step in and fill this gap – in addition to the rest of the source protection responsibilities they have. This EPA proposal reflects a balancing of priorities that prioritizes easing water pollution control burdens on the regulated community over providing the base level water quality protections for drinking water for all:

> "Protection focused on surface water sources of drinking water occurs primarily through voluntary coordination efforts at the local or watershed scale and includes other federal and state regulatory programs, *especially the CWA.* Ultimately, protection of drinking water sources relies on implementation of unique state and tribal programs, as well as CWA programs such as WQS, section 311 oil spill prevention and response, section 402 permits, section 404 permits, TMDL development and implementation, and non-point source management. **Potential effects on drinking water facilities associated with a change in the scope of CWA jurisdiction likely would depend on state and local or tribal regulations and programs that go beyond CWA requirements**." RPA at 15.

The agencies recognize that "[o]ver 65 percent of Americans who are served by PWSs [Public Water Systems] rely on systems which primarily draw their water from rivers, streams, lakes, and reservoirs." RPA at 109.

The also recognize that "...the need for source water protection often is greater than the available funds and the costs of DWSRF financing is often passed along to ratepayers. Overall, **the potential effects of a change in CWA jurisdiction on drinking water quality will depend on whether there are activities impacting source waters; whether there are state or tribal protections in place, including local source water protection facilities, that will cover areas that would not be subject to CWA jurisdiction; and how well an individual drinking water utility is prepared to respond to a potential change in source water quality that may impact its operations and ability to meet SDWA requirements**." RPA at 110.

In addition, the agencies note the impacts to utilities and ratepayers:

"Utilities recognize that changes in source water quality play a significant role in their operations. Because wetlands and streams in the source watershed can play a role in reducing sediment loading to the waterbodies insource water protection areas, CWA regulation of jurisdictional waters and controls under state authorities may help address high turbidity events." *Id.* at 108.

As the agencies note in a footnote, "[H]igh turbidity water may compromise treatment processes reducing the efficacy of disinfection and increasing the risk that disinfection processes will create harmful byproducts." *Id.*

"Therefore, a change in the scope of CWA jurisdiction may affect sediment loading within source water protection areas and could require some PWS to add treatment."…. "Small water systems, serving fewer than 10,000 people, may be less prepared than larger systems to respond to any change in source water quality." *Id.*

The agencies also recognize that the proposal will limit EPA CWA enforcement support for states and tribes. EPA has administrative and judicial tools to enforce compliance with the CWA section 301, 311, 402, and 404 limitations on discharges from point sources into waters of the U.S. RPA at 103.

"The proposed changes to the definition of 'waters of the United States' would decrease the scope of CWA jurisdiction compared to the 2015 Rule and pre-2015 practice, and **"some waters over which the EPA and the Corps have asserted jurisdiction would no longer be subject to the EPA (or the Corps for section 404; or the USCG for section 311) enforcement authority**." *Id.* at 105.

The proposed rule will result in a drastic rollback of EPA CWA enforcement throughout much of the tributary system, removing the deterrent effect on pollution discharges, as well as the water quality improvements associated with treatment, compliance, and mitigation. Post-*Rapanos*, the uncertainty regarding which waters are "waters of the United States" as well as what evidence was required to prove jurisdiction compromised CWA enforcement activities. The proposed rule will only exacerbate those impacts on CWA enforcement. The staff of EPA's Office of Enforcement and Compliance Assurance, Wetlands Enforcement Division summarized these effects in the 2009 Office of Inspector General Report:

> Overall, CWA enforcement activities [for violations on the prohibition against oil spills and limits on other pollutants like industrial waste, sewage plant effluent and filling waters] have decreased since *Rapanos* ruling. An estimated 489 enforcement cases (Sections 311, 402, and 404 combined) have been affected such that formal enforcement was not pursued as a result of jurisdictional uncertainty, case priority was lowered because of jurisdictional uncertainty, or

> lack of jurisdiction was asserted as an affirmative defense to the enforcement action. [113]

In 2014, in the agencies' Economic Analysis of the proposed Clean Water Rule, EPA considered these harmful impacts of the pre-2015 2008 guidance, and the benefits associated with clearly restoring CWA protections to ephemeral and intermittent streams. Their narrative is compelling and supports the withdrawal of this proposed rule:

> Because it can be difficult to establish where the CWA applies after the Supreme Court's decisions in *SWANCC* in 2001 and *Rapanos* in 2006, EPA enforcement managers have indicated that enforcement efforts have shifted away from small streams high in the watershed where jurisdiction is a potential issue. In short, EPA is focusing efforts on larger streams and rivers, where there is more certainty of establishing jurisdiction. *A rule that more clearly protects small streams may lead to more comprehensive enforcement and therefore greater compliance with CWA program regulations. This, in turn, could ultimately save the costs of additional drinking water filtration, stream restoration, and other costs of repairing damage caused by pollution*.[114]

What the agencies acknowledge in the RPA that the proposed rule will have significant harmful impacts on the nation's waters, they fail to conduct any meaningful analysis of these potential impacts and how the proposed rule can effectively meet the goals of the Clean Water Act.

VII. The Proposed Rule Would Lead to the Significant Degradation of the Physical, Chemical, and Biological Integrity of the Nation's Waters.

A. The proposed rule would remove Clean Water Act protections from 20-75% of the nation's tributary system.

The agencies have vastly underestimated the impacts of their proposal on the tributary system that is the heart and soul of the nation's waters. According to a 2008 EPA research report,[115] *ephemeral and intermittent streams provide the same ecological and hydrological functions as perennial streams*, and while a higher percentage of intermittent and ephemeral streams appear in the arid and semi-arid southwest, they are also a significant portion of stream miles in other states (e.g. South Dakota, where 86% of streams are intermittent or ephemeral, and Kansas where 81% are intermittent or

[113] 2009 Office of Inspector General Report, Report No. 09-N-0149 (April 30, 2009) at 1, at http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf.
[114] Economic Analysis of the Proposed Revised Waters of the U.S. Definition (March 2014) at 10 (2014 EPA Economic Analysis).
[115] Levick, L., J. Fonseca, D. Goodrich, M. Hernandez, D. Semmens, J. Stromberg, R. Leidy, M. Scianni, D. P. Guertin, M. Tluczek, and W. Kepner. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.

ephemeral). The impacts of the proposed rule's exclusion of these waters will be devastating nationwide, but particularly crippling in the Arid West.

The National Hydrography Dataset (NHD) maps 6.5 million stream miles nationwide, 20% of which are identified as ephemeral. In their RPA at 40, the agencies take a stab at summarizing the NHD stream data as follows:

> In the NHD at high resolution, 30 percent of streams are mapped as perennial, 52% are mapped as intermittent, and 18 percent are mapped as ephemeral. However, the **actual percentage of ephemeral streams across the country is likely higher than 18 percent** since many are not mapped or are mapped as intermittent. **In the arid West** (Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming), 13 percent of streams (by stream length) are mapped as perennial, 48 percent are mapped as intermittent, and **39% are mapped as ephemeral**." *Id.* at 40.

The agencies' Economic Analysis Appendix A-1 includes a state-by-state chart with NHD stream figures that, when summed, indicate that there are at least 2 million miles of ephemeral streams nationwide, all of which would lose CWA protection under the proposed rule.[116]

However, these estimates still vastly underestimate the number and percent of stream miles that will lose CWA protections if the proposed rule in finalized. Trout Unlimited estimates that the NHD dataset misses approximately 5.5 million miles of unmapped ephemeral streams nationwide and that, when these are included, ephemeral streams comprise closer to 57% of the nation's stream miles. Trout Unlimited has used a publicly available U.S. Geological Survey dataset and peer-reviewed scientific studies to estimate the extent of these unmapped ephemeral streams in a conservative manner.[117]

Applying this mapping exercise at the state level, 84% of Arizona's streams are ephemeral and would lose CWA protections. In Colorado, 56% are ephemeral and would lose CWA protections. In Maine, which houses 57,107 mapped stream miles, but where ephemeral stream mapping has not been completed, Trout Unlimited estimates that 1.6 miles of ephemeral streams exist for every mapped stream mile – meaning that approximately 61% of Maine stream miles are ephemeral and would lose CWA protection. *Id.*

These analytical shortcomings are exacerbated in this proposal by the fact that the

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[116] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Economic Analysis for the Proposed Revised Definition of "Waters of the United States," at 219-221 (Dec. 14, 2018), http://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf.

[117] Kurt Fesenmyer, GIS Director, Trout Unlimited. 2019. Trout Unlimited PowerPoint Presentation, "What it all means: waters of the U.S. on the ground." April 4, 2019. (2019 Trout Unlimited Mapping PowerPoint) (attached and incorporated by reference); Ariel Wittenberg, *Where EPA saw no data, Trout Unlimited crunched the numbers.* Greenwire (April 1, 2019) at https://www.eenews.net/stories/1060134013.

agencies ignore considerations in the 2015 Rule rulemaking record that, particularly in the West, some rivers and streams that are ephemeral today used to flow with greater frequency because of water supply infrastructure that has diverted the natural flows of these rivers and streams elsewhere.[118] While the South Platte River in Colorado once flowed year round, today there are reaches of the South Platte where the flow in the river can be composed entirely of effluent from point source permitted discharges.[119]

B. The proposed rule would remove Clean Water Act protections from half of the nation's remaining wetlands.

As the agencies' RPA concludes, "there would be fewer wetlands subject to the CWA as 'waters of the United States' under the proposed rule" compared to either pre-2015 practice or the 2015 Rule. RPA at 47. *See also* RPA at 46. "The agencies anticipate that the types of wetlands most likely to change jurisdictional status following a revised definition are wetlands that no longer meet the proposed definition of "**adjacent wetlands" and wetlands that were considered adjacent to waters that are no longer considered jurisdictional** (e.g., ephemeral streams found to have a significant nexus with TNWs and certain ditches)." RPA at 11. The proposed rule also excludes many adjacent wetlands separated by dikes, berms, and other barriers that were jurisdiction under the pre-2015 practice and the 2015 rule. RPA at 46.[120]

While the agencies did not disclose their internal analysis in their proposed rule package, an analysis of the NHD and National Wetlands Inventory (NWI) databases demonstrate that nationally, 50.9% of wetlands mapped by the NWI do not intersect a stream mapped on the NHD. An additional 0.5% intersect only ephemeral streams mapped on NHD (based on mapping of ephemeral streams being concentrated in the arid and semi-arid west). Therefore, given the requirement of a "continuous surface water connection", approximately 51% of the NWI mapped wetland acreage in the U.S. would not be considered adjacent. Additional non-floodplain, so-called "isolated" wetlands that are currently regulated would also be deregulated under the proposed rule.

Particularly given the NHD and NWI *gaps* in mapping, these national databases demonstrate that ***at a minimum,*** the proposed rule would exclude 51% of the wetlands in the conterminous U.S. from CWA protection. The 51% national wetlands estimate is also consistent with a recent study that estimates non-floodplain wetlands alone (including vernal pools, prairie potholes, and similar so-called "isolated" wetlands) occupy

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[118] *See, e.g.,* 79 Fed. Reg. at 22201 *citing U.S.* v. *Moses*, 496 F. 3d 984 (9th Cir. 2007), *cert. denied,* 554 U.S. 918 (2008); SAB Connectivity Peer Review Report at 31-32, 57-58; Western Resource Advocates 2014 Rule Comments at 9, 16.

[119] Western Resource Advocates 2014 Rule Comments *citing* USGS, Water Quality in the South Platte River: Colorado, Nebraska & Wyoming 1992-1995, Circular 1167 at 18 (1998).

[120] Economic Analysis for the Proposed Revised Definition of "Waters of the United States," at 219-221 (Dec. 14, 2018) (2018 Economic Analysis), http://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf

16.9 million acres (Lane and D'Amico 2016), at least 15% of the 110 million wetland acres estimated to remain in the contiguous United States.[121]

The 51% nationwide estimate also seems reasonable in light of the case study results of a 2019 in-depth geospatial analysis modeling three different CWA jurisdictional scenarios, ranging from least restrictive to most restrictive.[122] The "Most Restrictive Scenario" limits protection of wetlands to those directly adjacent to perennial (permanent) streams/rivers only. The "Very Restrictive Scenario" limits protection of wetlands to those adjacent to protected perennial (permanent) and intermittent (seasonal) streams/rivers. The "Less Restrictive Scenario" limits protection of wetlands to those adjacent to protected perennial, intermittent and ephemeral (temporary) streams, and ditched or channelized streams.

Relative to the least restrictive scenario, comparable to the 2015 Rule, the spatial analysis shows that the proposed rule – with parameters similar to the very restrictive scenario, but lying between the very restrictive and most restrictive scenarios due to the continuous surface connection requirement -- would remove CWA protections from a significant percentage of wetlands in all three case study watersheds, in terms of both acreage and function.

In the Cottonwood River watershed of Southern Minnesota, of the 57,371 wetland acres in the watershed, 22-36% of the 57,371 wetland acres in the watershed would no longer be jurisdictional as a result of the proposed rule. Meyer and Robertson 2019, Table 4 at 23. Moreover, "the most restrictive scenario removed CWA protections for more than 50% of the wetland acres in the watershed with high or moderate water quality function." [123] The proposed rule would remove from jurisdiction 25-39% of wetland acres for the flood protection function and 34-57% for the water quality function. *Id.* at Figure 14 at 28.

Of the 67,597 wetland acres in the South Platte Headwaters watershed of Colorado, 15-55% would no longer be jurisdictional as a result of the proposed rule. *Id.* at Table 5 at 25. Of enormous significance is the finding that in the South Platte Headwaters watershed of Colorado, 40-45% of the wetland acres removed from protection exhibited moderate to high function for each of the wetland functions examined – flood protection, water quality, fish habitat, and wildlife habitat. The proposed rule would remove from jurisdiction 10-42% of wetland acres for the flood protection function; 13-45% for the water quality function; and 8-42% for fish habitat and for wildlife habitat. *Id.* at Figure. 15 at 29.

Of the 20,445 wetland acres in the Cimarron River of New Mexico watershed, 18-69% would no longer be jurisdictional as a result of the proposed rule. *Id.*, Table 6 at 26. "Impacts on wetland function for the Cimarron River watershed in New Mexico were more

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[121] U.S. Fish and Wildlife Service, "Status and Trends of Wetlands in the Conterminous United States 2004-2009," at 37 (2009), https://protect-us.mimecast.com/s/TFOJCG6Y2ji1x8rpFBQLtB?domain=fws.gov.

[122] Meyer, R. and A. Robertson.2019. Clean Water Rule spatial analysis: A GIS-based scenario model for comparative analysis of the potential spatial extent of jurisdictional and non-jurisdictional wetlands. Saint Mary's University of Minnesota, Winona, Minnesota (Meyer and Robertson 2019) (attached for the record and incorporated by reference).

[123] Meyer and Robertson 2019 at x.

significant, with greater than 50% of wetland acres for each evaluated wetland function removed from protection." *Id.* The proposed rule would remove from jurisdiction 26-67% of wetland acres for the flood protection function; 21-80% for the water quality function, 9-51% for fish habitat and 18-69% for wildlife habitat. *Id.*, Fig 16 at 30.

Significant loss of wetland acreage and function was also found in a similar case study adapted to more closely model the parameters of the published proposed rule with a revised "very restrictive scenario" for the Nanticoke River watershed that overlaps Delaware and Maryland and flows to the Chesapeake Bay.[124] This analysis found that the proposed rule would likely exclude an estimated 20% (21,266 acres) of the 106,449 wetland acres in the watershed, and up to 31% (almost 33,000 acres) if the final rule is even less protective. The proposed rule would remove from CWA regulation over 15,000 wetland acres with surface water detention function, over 16,000 with wildlife habitat function, and an estimated 9,187 wetland acres with moderate to high nutrient transformation function.

C. The proposed rule would upend and undermine Clean Water Act-related federal and state programs to prevent pollution, protect drinking water, clean up oil spills, reduce flood risks, and restore iconic waters.

The agencies acknowledge in the proposal that Clean Water Act jurisdiction would be reduced, which would result in many adverse environmental and economic impacts. These include harmful dredging or filling of streams; reduced wetland habitat; greater pollutant loads; increased oil spill risk; increased flood risk; degraded aquatic habitats; greater waterbody impairments; sediment concentrations and depositions; reduced ecosystem values; downstream inundation damages; greater restoration costs; greater drinking water treatment costs; greater dredging costs; and greater spill response cost and spill damage.[125]

To ground the agencies' euphemisms, consider Arizona's 2007 Guidance Comments on a less draconian rollback than what the agencies now propose. The State had recently estimated that 97% of its permitted point source discharges were to headwaters, intermittent and ephemeral streams.[126] In its comments on the 2007 *Rapanos* Guidance, the Arizona Department of Environmental Quality (ADEQ) acknowledged that without Clean Water Act jurisdiction over its intermittent and ephemeral streams, it "will be unable to assure the general public that these discharges of effluent in the desert are not harmful to the environment, and we will be unable to achieve our overall mission to enhance and protect Arizona's environment."[127]

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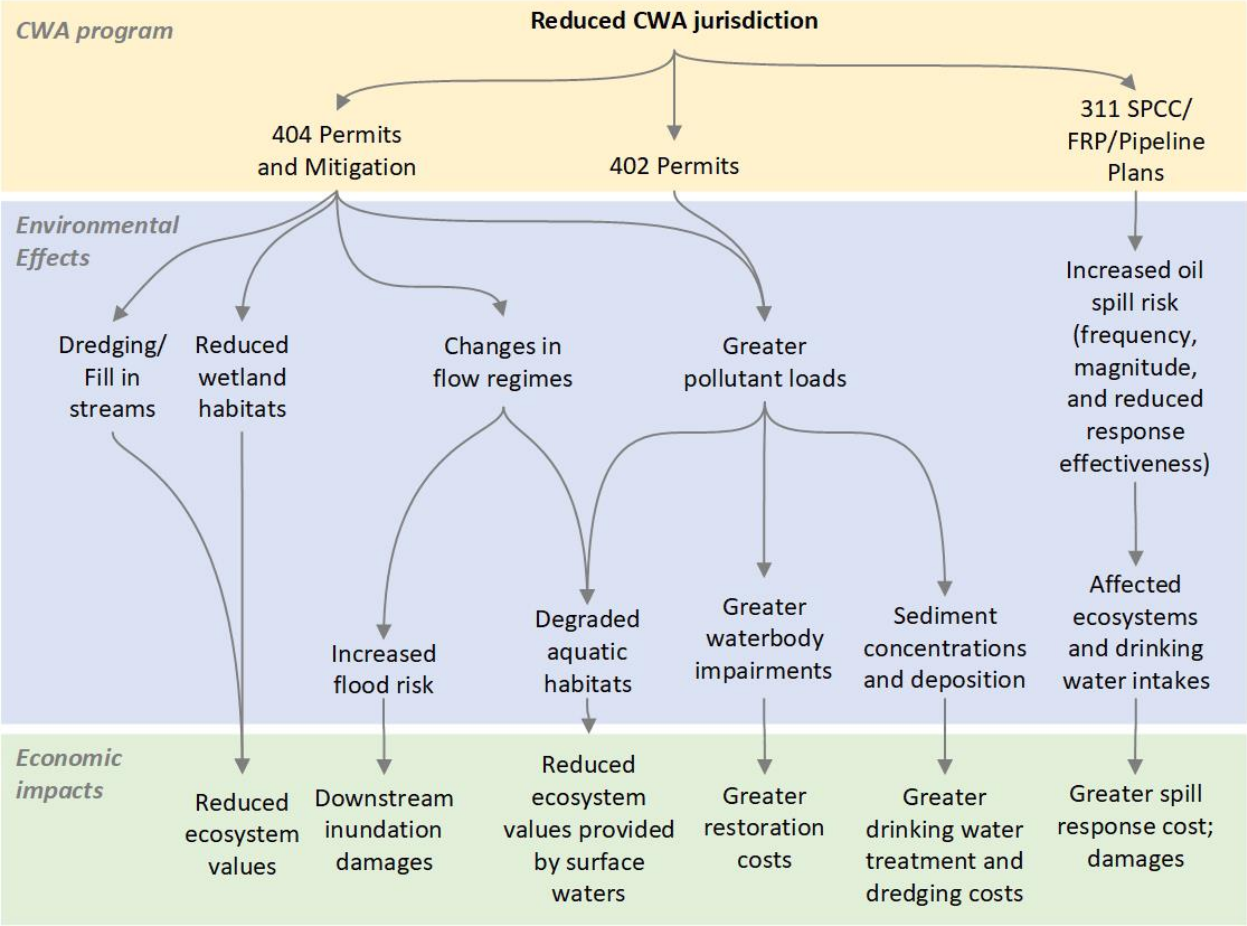
[124] Meyer, R., and A. Robertson. 2019. Clean Water Rule Spatial Modeling and Quantitative Analysis of Jurisdictional Wetlands in the Nanticoke Watershed (2019 Nanticoke Analysis), Maryland. Saint Mary's University of Minnesota, Winona, Minnesota (attached for the record and incorporated by reference).
[125] 2018 Economic Analysis at 133 and Figure IV-9: https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf
[126] 2007 ADEQ Comments on Rapanos Guidance.
[127] *Id.*

Figure IV-9: Overview of potential environmental impacts to selected CWA programs from proposed changes in CWA jurisdiction for certain waters.



D. The proposed rule will put drinking water supplies at increased risk.

As several commenters note, if the EPA were to eliminate Clean Water Act protections as this proposal outlines, the drinking water sources for over 200 million people in the United States could be harmed.[128] Nationwide, rural and low-income communities and communities of color are already disproportionately exposed to toxins in their drinking water, and also have disproportionately few resources with which to manage that danger.[129]

Small, rural systems are especially vulnerable to drinking water standard violations, having less capacity and fewer resources with which to manage harmful situations when

[128] Calculations from U.S. Environmental Protection Agency Safe Drinking Water Information System (SDWIS). 2017, https://ofmpub.epa.gov/apex/sfdw/f?p=108:1:::NO AND U.S. Census Bureau (USCB). 2017. National and State Population Estimates, https://www.census.gov/newsroom/press-kits/2017/estimates-demographics.html.

[129] Clean Water for All, "Water Health and Equity: The Infrastructure Crisis Facing Low-income Communities and Communities of Color – and How to Solve It," AT 8-10 (October 2018), http://protectcleanwater.org/wp-content/uploads/2017/09/CWFA-Infrastructure-Health-Equity-White-Paper-Oct-2018.pdf.

they occur.[130] Economically depressed small-to-midsized cities and rural areas are facing particular problems as declining tax bases make it difficult for all residents, but especially low-income residents, to afford water service.[131]

And consider the plight of small utilities in the West, where ephemeral streams predominate. As WRA explained in their 2014 Comments,[132] natural and artificial ephemeral streams, even if they carry only storm water (or effluent from point source discharges), eventually flow downstream. In an effort to keep its drinking water source watershed as clean as possible, the Pagosa Area Water and Sanitation District has published a page on its website cautioning loggers to "avoid poor logging practices" that cause excessive sediment contributions to the larger system.[133] Voluntary compliance with best management practices is ideal, but access to safe drinking water should not depend entirely on neighborly behavior.

Remarkably, the agencies themselves acknowledge that their proposed rule will increase pollutant loads,[134] and that reduced Clean Water Act coverage would likely result in greater drinking water treatment costs.[135] Yet they fail to inform the public about or examine the costs that their proposed rule imposes on downstream states and communities, and the unjust burden that it would place on vulnerable communities. Buried misleadingly in a discussion of the Safe Drinking Water Act are statements demonstrating that the proposed rule will threaten public drinking water source waters across the country. *See* RPA at 11-15, 108-110.

The agencies recognize that "[o]ver 65 percent of Americans who are served by PWSs [Public Water Systems] rely on systems which primarily draw their water from rivers, streams, lakes, and reservoirs." RPA at 109. They also recognize that "...the need for source water protection often is greater than the available funds and the costs of DWSRF financing is often passed along to ratepayers." RPA at 110.

Clearly shifting the burden of ensuring clean drinking water to state and local governments, the agencies state:

> Overall, the potential effects of a change in CWA jurisdiction on drinking water quality will depend on whether there are activities impacting source waters;

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[130] Maura Allaire, Haowei Wu, and Upmanu Lall, Proceedings of the National Academy of Sciences of the United States of America (PNAS), "National Trends in Drinking Water Quality," (February 2018), https://www.pnas.org/content/pnas/115/9/2078.full.pdf; Joseph Kane and Lynn Broaddus, The Brookings Institution, "Striking a Better Balance between Water Investment and Affordability," (Sept. 12, 2016), https://www.brookings.edu/blog/the-avenue/2016/09/12/striking-a-better-balance-between-water-investment-and-affordability/

[131] Rep. Brenda Lawrence, *The Hill*, "Environmental Injustice: Access and Affordability of Clean Water," (May 17, 2018), https://thehill.com/blogs/congress-blog/politics/388154-environmental-injustice-access-and-affordability-of-clean-water

[132] WRA 2014 Comments at 10.

[133] *Id. citing* Watersheds, http://www.pawsd.org/watershed-protection.html (last visited Oct. 3, 2014).

[134] 2018 Economic Analysis at 133.

[135] *Id.* at 125, 133-34.

> whether there are state or tribal protections in place, including local source water protection facilities, that will cover areas that would not be subject to CWA jurisdiction; and how well an individual drinking water utility is prepared to respond to a potential change in source water quality that may impact its operations and ability to meet SDWA requirements." RPA at 110.

The agencies explicitly outline the impacts of their rule on drinking water utilities and ratepayers, acknowledging that "[u]tilities recognize that changes in source water quality play a significant role in their operations," that "wetlands and streams in the source watershed can play a role in reducing sediment loading to the waterbodies in source water protection areas," and that "CWA regulation of jurisdictional waters and controls under state authorities may help address high turbidity events." *Id.* As the agencies note in a footnote, "high turbidity water may compromise treatment processes reducing the efficacy of disinfection and increasing the risk that disinfection processes will create harmful byproducts." *Id.* **The agencies conclude that "a change in the scope of CWA jurisdiction may affect sediment loading within source water protection areas and could require some PWSs to add treatment." They acknowledge further that "[s]mall water systems, serving fewer than 10,000 people, may be less prepared than larger systems to respond to any change in source water quality."** ***Id.***

The agencies' failure to alert the public and decision-makers to these threats to drinking water supplies and the very real costs and burdens they impose on state and local governments and vulnerable communities in arbitrary and capricious.

E. The proposed rule would put communities at increased risk of flooding.

The agencies acknowledge that wetlands play a critical role in reducing both the frequency and intensity of floods, noting that a single acre of wetlands can store approximately 1 million gallons of floodwater.[136] The agencies further acknowledge that due to the loss of wetland protections, the proposed rule will result in increased flood risk to communities.[137] They acknowledge, for example, that the loss of wetland and stream mitigation in the Pecos River/Rio Grande watersheds could increase "the potential for and magnitude of floods." EA at 194. The agencies acknowledge, EA at 211-212, that the reduction in CWA jurisdiction over wetlands and streams will result in increased flood risk and that "loss of wetlands can increase the risk of property damage due to flooding."

What the agencies fail to fully acknowledge and inform the public and decision-makers about is the significant economic harm to communities and fiscal harm to federal, state, and local governments associated with this increased flood risk. Nor do they even begin to acknowledge that low-income and vulnerable communities are disproportionately

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[136] Environmental Protection Agency, "Economic Benefits of Wetlands," (May 2006), https://www.epa.gov/sites/production/files/2016-02/documents/economicbenefits.pdf.

[137] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, "Economic Analysis for the Proposed Revised Definition of 'Waters of the United States,'" at 133-134 (Dec. 14, 2018).

impacted by this increased flooding, since these communities are more likely to be located in flood-prone areas.[138]

The EPA has reported that it would cost $1.5 million annually to replace the natural flood-control functions of a 5,000 acre tract of drained Minnesota wetlands alone.[139] The Midwest's flood risks have risen in recent years, including not only more catastrophic floods, but more floods.[140]

Studies by Brody et al confirm that alteration of naturally-occurring wetlands in two flood-prone states—Texas and Florida—was found to "significantly increase flooding events and associated property damage." In 2011, Brody et al looked at more than $13 billion in insured property losses across 144 coastal counties in all five Gulf coast states (plus several counties in extreme southwest Georgia) over the 2001-2005 period. They found that wetland alteration was a significant factor in explaining flood damages.[141] Again in 2014, Brody et al found that the presence of wetlands in and around Houston Texas was the second-most important land-use-land-cover factor related to flood damages totaling $356 million over 11 years. Of all variables, being surrounded by wetlands had the strongest influence on reducing flood damages.[142]

Another 2014 study of the recent loss of Texas coastal prairie wetlands in the Greater Houston area confirms the economic value of wetlands, including non-floodplain wetlands, for flood storage and the economic cost of unregulated dredging and filling of those wetlands. According to the study, between 1992 and 2010, 30 percent of Harris County (which includes the city of Houston) freshwater wetlands were developed primarily for commercial and residential purposes. These are wetlands that would be better protected under the 2015 Clean Water Rule than without it. This wetland loss translates to an estimated loss of 4 billion gallons of storm water detention capacity. The authors estimated that, at an average cost of $50,000 per acre-foot of storm water detention (based on the cost of Harris County flood control figures), this wetland loss in the Houston area comes at a cost of $600 million for storm water detention benefits alone. Counting water filtration and other benefits of these wetlands, the authors estimate the cost of this wetland loss to be "clearly in the billions."[143]

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[138] Dalbyul Lee and Juchul Jung, *KSCE Journal of Civil Engineering*, "The Growth of Low-Income Population in Floodplains: A Case study in Austin, TX," at 684 (2014), https://link.springer.com/article/10.1007/s12205-014-0205-z; Jonathan Katz, *The Washington Post*, "Who suffers when disasters strike? The poorest and most vulnerable," (September 1, 2017), https://www.washingtonpost.com/outlook/who-suffers-when-disasters-strike-the-poorest-and-most-vulnerable/2017/09/01/0efab8a2-8e65-11e7-84c0-02cc069f2c37_story.html

[139] U.S. ENVIRONMENTAL PROTECTION AGENCY, WETLANDS: PROTECTING LIFE AND PROPERTY FROM Flooding (May 2006).

[140] Mallakpour, I. and Villarini, G. 2015. *The changing nature of flooding across the central United States*. 5 Nature Climate Change 250–254 (2015).

[141] Brody, S.D. et al. 2011. *Examining the influence of development patterns on flood damages along the Gulf of Mexico.* Journal of Planning and Education Research: 31:438-448.

[142] Brody, S.D. et al. 2014. *Examining the impact of land use/land cover characteristics on flood losses.* Journal of Environmental Planning and Management 57: 1252-1265.

[143] Jacob, John S., et al, *Houston-Area Freshwater Wetland Loss, 1992-2010* (2014) at http://tcwp.tamu.edu/files/2015/06/WetlandLossPub.pdf.

The proposed rule will significantly increase the risk of flooding both because it removes the important deterrent to dredging and filling wetlands that the CWA 404 permit program provides, and it removes the economic incentive for wetland mitigation and restoration – key tools for flood mitigation.[144]

F. The proposed rule will undermine efforts to restore iconic waters such as the Everglades, the Chesapeake Bay, and the Great Lakes.

The people of the Great Lakes have not forgotten that it was the failure of the state-driven water pollution laws of the 1950s and 60s that resulted in the death of Lake Erie and the fires on the Cuyahoga River that inspired the 1972 Clean Water Act. And it was the result of 47 years of hard work implementing the Act that led to Lakes' revival. As they write in opposition to this proposed rule, they highlight the very significant threats this rule poses for the Great Lakes and the communities that depend on them and thrive because of them:

- The proposed rule puts 56 percent of the waterways critical to surface drinking water systems in the Great Lakes region at risk of losing Clean Water Act protections. Over a third of the 85 million people that call Great Lakes states home are dependent on public drinking water systems that rely on intermittent, ephemeral, and headwater streams.[145]

- According to the U.S. Fish and Wildlife Service, the rate of wetlands loss accelerated nationally by 140 percent from 2004 to 2009—the years immediately after the Supreme Court rulings.[146] The Great Lakes region has already lost 66 percent of their historic wetlands, making it all the more urgent that clean water protections include the wetlands and streams that feed drinking water supplies for people.[147]

- The proposed rollback of Clean Water Act safeguards applicable to the wetlands and small tributaries in the Maumee River watershed imperil the Toledo drinking water supply and Lake Erie downstream. As an example, excess phosphorus and other pollutants washing off the land and impervious urban surfaces during heavy rains flow into the Maumee River, which empties into Lake Erie. Excess phosphorus mixes with a complicated brew of threats in the lake driving the re-emergence of harmful algal blooms. In 2014, the harmful algal outbreaks that blanketed Western Lake Erie produced deadly toxins harmful to human health

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[144] See, for example, Hey, D. et al. 2004. "Flood Damage Reduction in the Upper Mississippi River Basin: An Ecological Alternative." (examined potential for reducing flood peaks and damage costs by restoring impaired wetlands and floodplain habitat in the Upper Mississippi River Basin available at: https://static1.squarespace.com/static/567070822399a343227dd9c4/t/568d6213c647ad1e518d2b07/1452106259180/flood_damage_reduction_in_umrb.pdf

[145] U.S. Environmental Protection Agency. 2009. "Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S."

[146] Dahl, T.E. 2011. "Status and trends of wetlands in the conterminous United States 2004 to 2009." U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. P. 45.

[147] Dahl, T.E. 1990. "Wetlands Losses in the United States 1780's to 1980's." U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. P. 6.

requiring city officials to issue a "do not drink" advisory. To protect drinking water systems like Toledo's, it is vital to protect the source of drinking water upstream.

- The proposed rule also threatens the federal government's $3.1 billion investment over 10 years to restore the Great Lakes. Recognizing the important role wetlands and streams play in the overall health of the Great Lakes, the region's business, environmental, and government leaders endorsed a plan that calls for the restoration of more than 1 million acres of wetlands.[148] As a result, in addition to other water quality improvements, more than 250,000 acres of wetlands and other habitat have been restored in the Great Lakes as of 2017.[149]

- By eliminating protections to upstream waterways (whether ephemeral or intermittent) the rollback would threaten the goals established under the Great Lakes regional plan. It limits the federal government's ability to monitor and enforce the pollution controls and programs critical to reducing non-point source pollution and its impact on the growing threat of harmful algal outbreaks, and protect the water we drink and recreate in.

Similarly, the Everglades Coalition catalogues in their comments opposing this rule how a less-protective Clean Water Act threatens the health of the iconic Everglades – the "River of Grass" – a vital source of Florida's tourism, commercial and recreational fishing, outdoor recreation, biodiversity, and the drinking water supply of nearly 8 million Floridians:

- The Everglades depends on the slow flow of clean water south through the state from upstream tributaries and wetlands. A strong Clean Water Act is critical to larger efforts underway to restore the Everglades. Without adequately protecting upstream waters at the headwaters of the Everglades, polluted water will further impair water quality downstream in Lake Okeechobee, Everglades National Park, Big Cypress National Preserve, and Florida Bay. This would directly contradict the fundamental goals of the Comprehensive Everglades Restoration Plan (CERP) and the extensive state and federal investments made to restore America's Everglades.

- Much of the Greater Everglades Ecosystem has lost its shallow, seasonal wetlands and vital watershed functions such as flood protection, nutrient and pollution cleansing, aquifer recharge and water supply, wildfire threat reduction, and critical habitat for many imperiled species. For example, the Audubon Corkscrew Swamp Sanctuary in Naples is critical nesting habitat for wading birds like the threatened

[148] Great Lakes Regional Collaboration. 2005. "Strategy to Restore and Protect the Great Lakes." Found at: http://www.glrc.us/documents/strategy/GLRC_Strategy.pdf

[149] U.S. Environmental Protection Agency. 2015. "Great Lakes Restoration Initiative Report to Congress and the President: Fiscal Years 2010-2014." P. 22. Found at: https://www.glri.us/sites/default/files/fy2014-glri-report-to-congress-20150720-50pp.pdf; U.S. Environmental Protection Agency. 2018. "Great Lakes Restoration Initiative Report to Congress and the President: Fiscal Year 2017." P. 29. Found at: https://www.glri.us/sites/default/files/fy2017-glri-report-to-congress-201902-36pp.pdf

Wood Stork. This sanctuary was once the largest Wood Stork rookery in the nation, and requires further protection and restoration of shallow, seasonal wetlands and scarce wet prairies to fully recover. However, most wet prairies are threatened by the rule because they are inundated less than six months a year. Hundreds of thousands of acres of Florida's shallow, seasonal wetlands – including wet prairies, hydric pine flatwoods, and hydric hammock – are particularly vulnerable to losing Clean Water Act safeguards.

- Additionally, half of Florida's almost 52,000 miles of rivers and streams considered ditches or canals, including many in the Greater Everglades Ecosystem, are also at risk of losing protection despite their prominence and their obvious benefits to the quality of Florida waters. Hundreds of thousands of acres of wetlands associated with these and other streams, creeks, and canals that are proximal to, but that do not directly abut them could lose protection as well.

- The proposed rule will remove critical clean water protections for wetlands that filter and clean up pollution – Florida has already lost almost half of its historic wetland acreage and has lost more wetland acreage than any other state in the continental United States. Urban development runoff and agricultural nutrient and pesticide pollution currently impair waters that flow into Everglades National Park and the resulting harmful algal blooms have plagued Florida's waters, including the St. Johns River, Caloosahatchee and St. Lucie Rivers and Estuaries, and Lake Okeechobee. For nearly two years, recurring toxic blue-green algae outbreaks coupled with the worst red tide in over a decade, have severely impacted Florida's wildlife, economy, and public health. The Sanibel and Captiva Chamber of Commerce and Fort Myers Beach Chamber of Commerce reported combined losses of $87 million between July-December 2018; an estimated 4.4 million pounds of dead marine life were removed from Lee County beaches between June-September 2018; and as recently as August 23, 2018, blue-green algae discharged into the St. Lucie River from Lake Okeechobee was nearly 50 times too toxic for human contact. Wetland protection and restoration are essential components of addressing these major harmful algal blooms, because wetlands help filter out the nutrient pollution which feeds these toxic outbreaks.

Chesapeake Bay groups also recognize the threat the proposed rule poses to the health of the Bay watershed and its citizens:

- The proposal's plan to remove all Clean Water Act protections for many of the watershed's 56,689 miles of intermittent and ephemeral streams in their headwater areas threatens the drinking water source waters of approximately 11 million people (nearly two out of three) in the Chesapeake Bay watershed.

- Removing protections for intermittent and headwater streams throughout our region also threatens key habitat for shrinking populations of eastern brook trout.

- Protections would also be removed from valuable wetlands throughout our region that are critical for mitigating flooding and providing habitat for numerous species of fish and waterfowl. These wetlands are the primary reason that the Chesapeake is home to more than 1 million migratory geese, ducks and swans every winter. This great and critical part of the Atlantic Flyway would collapse if these critical wetland areas are lost.
- The Chesapeake Bay Program partnership, coordinated by EPA, came together in 1983 to work to restore clean water to the 64,000 square mile watershed in Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia. Promulgating this rule to weaken the Clean Water Act and rollback protections would be a blow for the progress made in the Chesapeake Bay watershed in recent years.

The agencies acknowledge the critical role that the CWA 404 program plays in conserving wetlands and incentivizing wetland mitigation and restoration, the critical role that the NPDES program plays in controlling point source pollutants at their source, and the critical role that CWA 303 (d) impaired waters and TMDL cleanup plans play in limiting both point source and non-point pollution in order to clean up and restore the health of the nation's waters. RPA at 73-75. And they acknowledge, in essence, that the proposed rule's changes in CWA jurisdiction would hamstring and upend the more than 73,000 completed TMDLs nationwide and would make future TMDL cleanup plans even more difficult to develop, defend, and implement, directly undermining the cleanup goals of the Clean Water Act itself. However, they utterly fail to recognize or account for how this abandonment of CWA safeguards will severely undermine regional efforts to restore iconic waters like the Great Lakes, the Everglades, and the Chesapeake Bay.

G. The proposed rule will lead to the significant degradation of fish and wildlife habitat and fisheries.

Headwater streams and wetlands are where rivers are born.[150] Headwaters include non-floodplain wetlands and small stream tributaries with perennial, intermittent, or ephemeral flow.[151] Headwater streams compromise 79% of U.S. stream networks, and non-floodplain wetlands are estimated to comprise at least 16.9 million acres,[152] depending on how these wetlands are defined and measured. In 2003, post-*SWANCC,* EPA estimated that as many as 20 million wetland acres could be considered "isolated."[153]

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[150] Meyer, J.L., L.A. Kaplan, J.D. Newbold, D.L. Strayer, C.J. Woltemade, J.B. Zedler, R. Beilfuss, Q. Carpenter, R. Semlitsch, M.C. Watzin, and P.H. Zedler. 2003. Where rivers are born: the scientific imperative for defending small streams and wetlands. Sierra Club and American Rivers, D.C. at https://www.americanrivers.org/conservation-resource/small-streams-wetlands/

[151] Colvin, S. A. R., S. M. P. Sullivan, P. D. Shirey, R. W. Colvin, K. O. Winemiller, R. M. Hughes, K. D. Fausch, D. M. Infante, J. D. Olden, K. R. Bestgen, R. J. Danehy, and L. Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services, at 74 Fisheries **44**:73-91.

[152] *Id*.

[153] *See* Pianin, Eric, *Administration Establishes New Wetlands Guidelines: 20 Million Acres Could Lose Protected Status, Groups Say*, WASHINGTON POST, pg. A5 (Jan. 11, 2003) (in discussing the 2003 agency guidance concerning *SWANCC* and so-called isolated wetlands, it states, "The new [guidance] would shift

As the starting point of every river system, the pollution and degradation of headwaters streams and wetlands impacts flow rates, water quality, and fish and wildlife habitat all the way downstream. These headwater streams and wetlands provide critical habitat to fish and wildlife[154] – and many of them will lose Clean Water Act protections if this proposed rule is finalized. By causing the loss of small streams and wetlands, and triggering an increase in pollution, the proposed rule would also hurt U.S. subsistence fishing, sport fishing, and commercial fisheries.[155]

Headwaters threatened by this proposed rule provide vital spawning and rearing habitat for migratory fishes, including commercial fish species, which are key components of the biological integrity of traditionally navigable waters and interstate waters.[156] Similarly, they provide dispersal corridors and habitat for fish, as well as aquatic and semi-aquatic invertebrates, amphibians, and birds. *Id.* Consequently, headwater systems, including ephemeral headwater streams have a clear significant physical, chemical, and biological nexus to navigable waters and rightly should continue to be subject to CWA protections.

Unpolluted headwaters are essential for maintenance of coldwater fish stocks, including Chinook and Coho Salmon, Steelhead, Cutthroat Trout, Bull Trout, Apache Trout, Gila Trout, Golden Trout, Redband Trout, Brook Trout, Brown Trout, and Atlantic Salmon. *Id.* at 78. Intermittent streams are important spawning and refuge habitats for imperiled salmon, trout, darters, minnows, suckers and other fishes. The juveniles of the federally listed Coho Salmon and Chinook Salmon, occupy headwater tributaries and seasonal floodplain wetlands during winter. *Id.* at 81 (citations omitted). Coho Salmon smolts inhabit pools in intermittent headwater streams in Oregon. The loss of this intermittent stream habitat could be detrimental to salmon populations in coastal drainages. *Id.* The remaining intermittent temporary streams and ditches in the upper Willamette River in Oregon provide flood refuge, rearing habitats, and separation from invasive alien fish species, all of which are essential for recovering and maintaining valuable sport and commercial fisheries and endangered species. *Id.* In their native range, Brook Trout are highly reliant on cool headwaters and face declines due to impacts from dams, water diversion, channelization and sedimentation. *Id.*

In Maine, federally endangered Atlantic Salmon eggs, larvae, and juveniles require clean gravel and cool, oxygenated water to ensure adequate growth and survival in headwaters until returning to marine habitat to mature. A narrower rule that excludes intermittent headwaters in the Pacific Northwest and New England would allow pollution and destruction of significant salmon habitat and further risk the extirpation of salmon. *Id.* Protecting headwater habitats is critical for the recovery and delisting of several endangered fishes.

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responsibility from the federal government to the states for protecting as much as 20 percent of the 100 million acres of wetlands in the Lower 48 states, according to official estimates.”).

[154] Colvin, S. A. R., S. M. P. Sullivan, P. D. Shirey, R. W. Colvin, K. O. Winemiller, R. M. Hughes, K. D. Fausch, D. M. Infante, J. D. Olden, K. R. Bestgen, R. J. Danehy, and L. Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services, at 74, 77 Fisheries **44**:73-91.

[155] *Id.* at 84-85.

[156] *Id.* at 76-77 (citations omitted).

In the intermountain west several imperiled minnow species use ephemeral or intermittent backwaters in floodplain wetlands adjacent to stream channels for spawning and rearing. *Id.* If protection of temporary headwaters were to be rescinded, significant amounts of this essential fish habitat would be at risk from changes in headwater source flows or pollution resulting from fill and contaminated discharges. *Id.* at 82.

Because the watersheds in the West have a high concentration of ephemeral streams, the contribution of these streams to the larger tributaries is critical to maintain tributary function, including the function of providing habitat to native species that even ephemeral streams provide. As WRA noted in their 2014 Comments, for example, one set of three small warm/cool water fishes – the bluehead sucker, the flannelmouth sucker and the roundtail chub – that is the subject of a conservation plan among Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming.[157] These fish occupy primarily headwaters tributaries, many of which are intermittent or ephemeral. In one study, the fish were found in deep pools above ephemeral reaches, indicating that both adult and juvenile fish move throughout their headwaters habitat, including along ephemeral channels.[158]
Headwater tributaries in the West are visited annually by thousands of anglers. Nationally, trout anglers spent $3.5 billion and had $10 billion economic impact.[159] Among the most valuable commercial fisheries depending on headwaters are the salmon fisheries of Alaska and the Pacific Northwest. *Id.* at 85. Headwaters are important rearing habitat for American Eel, and stream restoration is an important strategy for recovery.

The proposed rule's impact on fishing and fisheries will not only harm the economy and cost industry jobs, it will also harm low-income communities and communities of color who rely more heavily on subsistence fishing.[160] And for many Native Americans, the survival of cultural identity is strongly linked to fishing and indigenous fish species, including Bull Trout and other species that rely on headwaters.[161]

The proposed rollback of Clean Water Act protections will increase pollution of headwaters, including runoff of excess nutrients, sediments, and other pollutants, channel alterations, and losses of flows in headwater streams. The resulting deterioration of water quality in downstream systems will harm fish and fisheries in the process. *Id.* at 78 (citations omitted).

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[157] 2014 WRA Comments at 10*, citing* White Water Park at Rock Park, http://www.cityofsparks.us/residents/parks-and-facilities/whitewater-park-rock-park (last visited Oct. 3, 2014).
[158] Michael R. Bower, et al., *Habitat Features Affect Bluehead Sucker, Flannelmouth Sucker, and Roundtail Chub Across a Headwater Tributary System in the Colo. River Basin*, 23 J. FRESHWATER ECO. 3, pp. 347-58 (Sept. 2008), *available at* http://www.uwyo.edu/frahel/pdfs/bower-2008-1.pdf.
[159] Colvin, S. A. R., S. M. P. Sullivan, P. D. Shirey, R. W. Colvin, K. O. Winemiller, R. M. Hughes, K. D. Fausch, D. M. Infante, J. D. Olden, K. R. Bestgen, R. J. Danehy, and L. Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services, at 84 Fisheries **44**:73-91.
[160] Ralph B. Brown and John F. Toth Jr., 17 *Southern Rural Sociology*, "Natural Resource Access and Interracial Associations: Black and White Subsistence Fishing in the Mississippi Delta," at 81, 104 (2001), https://protect-us.mimecast.com/s/JUu-CERZ25H3rqwJsKMXqI?domain=journalofruralsocialsciences.org.
[161] Colvin, S. A. R., S. M. P. Sullivan, P. D. Shirey, R. W. Colvin, K. O. Winemiller, R. M. Hughes, K. D. Fausch, D. M. Infante, J. D. Olden, K. R. Bestgen, R. J. Danehy, and L. Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services, at 74 Fisheries **44**:73-91.

Pipeline construction is an example of a polluting activity that occurs in headwater systems, degrades water quality, harms fish habitat and fisheries, and would likely be subject to much weaker pollution and clean up safeguards in the wake of the proposed rule. New pipelines often intersect with forested headwater streams and important trout populations and habitat. Erosion and sedimentation can degrade water quality and fish habitat during construction, and water quality in streams and wetlands can be degraded by runoff from access roads, and by contamination from gas leaks and other chemicals.

Buildouts of pipelines in Pennsylvania, West Virginia, and Virginia threaten important brook trout habitat, especially habitat such as areas with dense stream buffers to shade the stream and protect its banks to cool the water, as well as intact tributary systems that allow fish movement. Specifically, as Trout Unlimited reports,[162] 80 miles of the proposed Atlantic Coast Pipeline will cross brook trout habitats in the mountains of Virginia and West Virginia. Of the 105 steam crossings in watersheds containing brook trout, 58% occur on ephemeral and intermittent streams.

Similar damage to headwater streams can be caused by transmission line development. In Maine, 53 miles of new powerline corridor, the New England Clean Energy Connect transmission line, would be constructed from the Canadian border, through prime brook trout habitat, to coastal Maine. One of TU's biggest projects in Maine, establishment of easements to protect the Cold Stream watershed, would be adversely affected. Field surveys have identified 181 stream crossings along this transmission line, 87 of which are in intermittent streams and 32 in ephemeral streams. Combined, over 65% of the streams to be crossed are in danger of losing protection under the 2019 proposed rule. *Id.*

As noted previously, it is not just headwaters and their associated fish and wildlife that are threatened by this proposed rule. The loss of 51% of the nation's remaining wetlands means that millions of acres of floodplain wetlands and so-called isolated wetlands that are critical to fish and wildlife will lose the critical protections from wanton and unmitigated dredging, draining, and filling that the CWA section 404 program provides. According to the 2009 national wetlands status and trends report, between 2004 and 2009 – the first trends report post-*SWANCC* and *Rapanos* -- the rate of wetland loss increased by 140% over the previous report period. This was the first acceleration of wetland loss over a 50-year period, and the first since the passage of the 1972 Clean Water Act. This was the first study period occurring entirely post-*SWANCC*, and the U.S. Fish and Wildlife Service notes that the acceleration of wetland loss is likely at least partially explained by the jurisdictional confusion and the withdrawal of CWA protections by the agencies in the wake of the *SWANCC* and *Rapanos* cases.[163]

The proposed rule will cede wetlands protection for millions more wetland acres and the resulting impacts on fish and wildlife will be devastating. EPA's 2015 Connectivity Science Report summarizes voluminous studies demonstrating the critical importance of these

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[162] Kurt Fesenmyer, GIS Director, Trout Unlimited. 2019. Trout Unlimited PowerPoint Presentation, "What it all means: waters of the U.S. on the ground." April 4, 2019. (2019 Trout Unlimited Mapping PowerPoint) (attached and incorporated by reference).

[163] DAHL, T.E. 2011. Status and trends of wetlands in the conterminous United States 2004 to 2009, at 16 U.S. Department of the Interior; Fish and Wildlife Service, Washington, D.C. 108 pp.

freshwater wetlands to fish and wildlife.[164] In addition, in our comments in support of the Clean Water Rule NWF and Ducks Unlimited both submitted extensive comments for the Clean Water Rule record on the importance of freshwater wetlands, particularly non-floodplain freshwater wetlands, to fish and wildlife.[165] These are attached and incorporated for the administrative record on this proposed rule. Briefly summarized below are some examples of the wetland-dependent wildlife that will be harmed by the unprecedented rollback of CWA wetland protections currently proposed.

Wetlands are widely renowned and prized as habitat for waterfowl and other water birds. It is important to note that these birds depend on freshwater wetlands not only as stopover habitat during migration (frowned upon in *SWANCC* as the sole basis for CWA jurisdiction), but also as breeding, foraging, shelter, and other basic life cycle requirements closer home. It is these waterfowl habitat needs that are highlighted below. In the Prairie Pothole Region (PPR) of the Dakotas and Western Minnesota, several waterfowl species require or use both saline lakes and freshwater wetlands and rivers in North Dakota (Windingstad et al. 1987; Swanson et al. 1984), with the freshwater wetlands being necessary for purposes of osmoregulation. In addition, the cumulative impacts of pothole drainage to downstream waters, including increased pesticide levels (Donald et al 1999) and increased turbidity and sedimentation (Gleason et al 2003; Schottler et al 2013), would clearly impact the biological integrity of downstream waters. The increased flows in downstream waters resulting from drainage or filling of potholes would also affect the capability of those waters to sustain populations of organisms more suited to the lower flows, decreased concentrations of nutrients and other solutes, and lower sedimentation rates of waters less impacted by drainage.

Gulf of Mexico Coastal Prairie wetlands provide critical wintering habitat to redheads and lesser scaup. Approximately 80% of the entire North American population of redheads winters in estuaries of the Gulf of Mexico, mostly in the Laguna Madre of Texas and Tamaulipas, Mexico (Adair et al. 1996; Ballard et al. 2010). They forage almost exclusively on shoalgrass (*Halodule wrightii*) in the hypersaline lagoon, which is a traditionally navigable waterway (Ballard et al. 2010). Large numbers of lesser scaup also winter in the Gulf Coast region, and generally forage on invertebrates in the saline and brackish marshes and offshore habitats of Texas and Louisiana (McMahan 1970). Large concentrations of diving ducks in the region, including these two species, must also make daily use of inland, coastal freshwater ponds in order to dilute and excrete the salt loads that are ingested while feeding in the saline habitats (Adair et al. 1996; Ballard et al. 2010; Mitchell et al 1992). Activity budgets documented that redheads and scaup spent approximately 37% and 25% of their time, respectively, on the freshwater wetlands actively drinking (Adair et al. 1996). While both studies found that redheads and scaup tended to make greater use of wetlands that were in closer proximity to the coast when

[164] EPA (U.S. Environmental Protection Agency) 2015. Connectivity of streams & wetlands to downstream waters: A review & synthesis of the scientific evidence. EPA/600/R-14/475F | January 2015 | epa.gov/research. Downloaded from https://www.tucson.ars.ag.gov/unit/publications/PDFfiles/2302.pdf 27 January 2019.

[165] 2014 NWF Comments, with Ducks Unlimited science summarized, attached and incorporated by reference.

they were available, they flew farther inland when necessary during dry conditions to acquire freshwater because they require the freshwater to survive. Therefore, if the inland freshwater wetland habitats, i.e., non-adjacent "other waters," are adversely impacted because of a lack of CWA jurisdiction, the region's ability to support redhead, scaup and other diving duck populations is degraded, and the biological integrity of the traditionally navigable water of the Gulf of Mexico's Laguna Madre is therefore impacted.

Pocosins and Carolina bays in the Atlantic Coastal Plain, are biologically diverse ecosystems. The loss of such wetland habitats could have a serious impact on the survival of the species that depend on them. By protecting these wetlands, the Clean Water Act provided one of the few federal safeguards for the protection of these biodiversity resources. Out of the total of 274 at-risk plant and animal species supported by geographically isolated wetlands, 35 percent of species are not known to be supported by any other type of habitat. [166] Additionally, 86 plant and animal species listed as "threatened," "endangered," or "candidate" under the Endangered Species Act are found in geographically isolated wetland habitats.[167]

Numerous species are dependent on geographically isolated wetlands in the southeast. Importantly, because all of these species travel between wetlands, they serve to link wetlands to one another and to other waters. The following are examples of studies that document the presence and movements of species of ducks, frogs, turtles, salamanders, fish, newts, and snakes in southeastern wetlands:

- Wood ducks living in the riverine wetlands of the Tennessee-Tombigbee Rivers and Waterway in Alabama and at Noxubee National Wildlife Refuge (NNWR) in Mississippi traveled to geographically isolated wetlands from these TNWs to geographically isolated scrub-shrub wetlands to breed.[168]

- Green tree frogs, which typically occur in permanent lakes, ponds, swamps and occasionally temporary ponds, were shown to interbreed with barking frogs, which dwell entirely in geographically isolated wetlands. Their hybrids will return to these geographically isolated wetlands to breed.[169]

- The semi-aquatic Eastern Mud Turtle is a bottom-dweller of shallow, slow-moving water bodies and geographically isolated wetlands, but during the late summer and fall, individuals leave their aquatic habitat for extended periods to overwinter on land. Movement between aquatic water bodies is common.[170]

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[166] Comer, P., K. Goodin, A. Tomaino, G. Hammerson, G. Kittel, S. Menard, C. Nordman, M. Pyne, M. Reid, L. Sneddon, and K. Snow. 2005. *Biodiversity Values of Geographically Isolated Wetlands in the United States.* Nature Serve, Arlington, VA. http://www.natureserve.org/library/isolated_wetlands_05/isolated_wetlands.pdf (Last viewed June 2011).
[167] *Id.*
[168] Davis, Brian, Cox, Robert R.Jr., Kaminski, Richard M, Leopold, Bruce D. 2007. *Survival of Wood Duck Ducklings and Broods in Mississippi and Alabam*a. JOURNAL OF WILDLIFE MANAGEMENT, **7**1(2): 507-517.
[169] Gunzburger, Margaret S. 2005. *Differential Predation on Tadpoles Influences the Potential Effects of Hybridization between Hyla cinerea and Hyla gratiosa*. JOURNAL OF HERPETOLOGY, 39(4): 682-87.
[170] Harden, Leigh Anne, Price, Steven J., Dorcas, Michael E. 2009. *Terrestrial Activity and Habitat Selection of Eastern Mud Turtles (Kinosternon subrubrum) in a Fragmented Landscape: Implications for Habitat Management of Golf Courses and Other Suburban Environments.* COPEIA, (1) 78-84.

- Chicken turtles, which are found primarily in shallow and seasonally fluctuating wetlands in the southeastern United States but are rare in permanent wetlands, have been documented to move distances of several hundred meters between geographically isolated wetlands.[171]

- Sirens and Amphiumas (salamanders) in the Savannah River Site in South Carolina colonize geographically isolated wetlands through temporary aquatic connections to other bodies of water.[172]

- Fish found in geographically isolated Carolina bay wetlands in the Savannah River Site confirm surface water connections between the wetlands and the Savannah River during times of wetland overflow flooding.[173]

- Red-spotted newts in a series of mountain ponds in the Shenandoah Mountains of Virginia were documented to migrate "en masse" every August and September, moving to and from ponds to breed.[174]

- Several species of aquatic and semi-aquatic worm snakes, found primarily in geographically isolated wetlands formed metapopulations in the Lower Atlantic Coastal Plain of South Carolina during periods of inundation when wetland boundaries expanded and the wetland system became more interconnected.[175]

- Alligators in southern Georgia were shown to form a functional connectivity among the seasonal wetland, terrestrial, and creek–river systems, and that this connectivity is a consequence of the ontogenetic niche shift in habitat use and results in significant movement of energy and biomass. As alligators progress from juvenile life stages to adulthood, they shift from using wetland habitat to using riverine habitat. Females also return to wetlands to breed.[176]

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[171] Buhlmann, Kurt A., Congdon, Justin D., Gibbons, J. Whitfield, Greene, Judith L. 2009. *Ecology of Chicken Turtles (Deirochelys Reticularia) in a Seasonal Wetland Ecosystem: Exploiting Resource and Refuge Environments*. Herpetologica, 65(1): 39-53.
[172] Snodgrass, Joel W, Ackerman, Jerry W., Bryan Jr., A. Lawrence, Burger, Joanna.1999. *Influence of Hydroperiod, Isolation, and Heterospecifics on the Distribution of Aquatic Salamanders (Siren and Amphiuma) among Depression Wetlands.* COPEIA, (1): 107-113.
[173] Snodgrass, Joel W., et al. 1996. *Factors Affecting the Occurrence and Structure of Fish Assemblages in Isolated Wetlands of the Upper Coastal Plain, U.S.A.*. CAN. J. FISH. AQUATIC. SCIENCE, 53(2): 443-454.
[174] Gill, Douglas E. 1978. *The Metapopulation Ecology of the Red-spotted Newt, Notophtalmus viridescens (Rafinesque).* ECOLOGICAL MONOGRAPHS, 48(2): 145-166.
[175] Russell, Kevin R. 1999. *Aspects of the Ecology of Worm Snakes (Carphophis amoenus) Associated with Small Isolated Wetlands in South Carolina*. JOURNAL OF HERPETOLOGY. 33(2): 339-344.
[176] Subalusky, Amanda L., Fitzgerald, Lee A., Smith, Lora L. 2008. *Ontogenetic Niche Shifts in the American Alligator Establish Functional Connectivity Between Aquatic Systems.* BIOLOGICAL CONSERVATION, 142: 1507-1514.

Decreasing the amount of geographically isolated wetlands has been shown to reduce the population of species in larger wetlands.[177] The loss or alteration of any wetland, large or small, reduces the total number of sites at which pond-breeding individuals can reproduce and successfully recruit juveniles into the breeding population.[178] Decreasing the amounts of geographically isolated wetlands reduces the number of individuals dispersing and increases the distance individuals must travel between wetlands, decreasing the species' ability to maintain larger and more viable meta-populations.[179]

For all the reasons stated immediately above, the scientific evidence exists to establish the requisite significant nexus between Carolina and Delmarva Bays, Pocosins[180] and other similar coastal depressional wetlands[181] and downstream traditional navigable waters allowing these waters to be defined as waters of the United States.

Folk and Tacha (1990) documented patterns of use of the North Platte River and the region's temporary and semi-permanent palustrine wetlands by sandhill cranes. The North and central Platte River valley provides the primary spring staging habitat for about 80% of the entire midcontinent population of the species (Pearse et al 2010), and the cranes typically roost in the river channel or nearby wetlands for safety during the night. They found that the cranes were collectively interdependent upon the shallow navigable river and the region's wetlands, providing a biological nexus between the two types of waters. Taken together, these and other studies (Bishop et al 2010; Gersib et al 1989; Pearse et al 2011; Tacha et al 1994) indicate that the Platte River and the wetlands of the Rainwater Basin and surrounding landscape function as a complex of aquatic habitats for a diversity of species, and as the "non-adjacent," "other waters" of the region are negatively impacted, so too is the integrity of the navigable Platte River.

H. The proposed rule will threaten local economies, including the outdoor recreation economy, and millions of jobs.

By withdrawing CWA protections from so many of the nation's wetlands and streams, the proposed rule will result in degraded water quality, increased drinking water treatment costs, degraded outdoor recreation and tourism opportunities, reduced property values and other adverse impacts to local economies and to jobs. Headwater streams and wetlands are worth trillions of dollars and their increased degradation and destruction threatens commercial and recreational fisheries:[182]

- On an annual basis, headwater streams provide $15.7 trillion USD and wetlands outside of floodplains/geographically isolated wetlands provide $673 billion USD in ecosystem services for conterminous US and Hawaii (Creed 2017).

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[177] Semlitsch, Raymond D., Bodie, J. Russell.1998. *Are Small, Isolated Wetlands Expendable?* CONSERVATION BIOLOGY, 12(5): 1129-33.
[178] *Id.*
[179] *Id*.
[180] *Id.*
[181] *Id*.
[182] Colvin, S. A. R., S. M. P. Sullivan, P. D. Shirey, R. W. Colvin, K. O. Winemiller, R. M. Hughes, K. D. Fausch, D. M. Infante, J. D. Olden, K. R. Bestgen, R. J. Danehy, and L. Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services, at 74 Fisheries **44**:73-91.

- Commercial and recreational fisheries contributed over $208 billion in economic impact and 1.62 million jobs in 2015 (NMFS 2015). Headwaters have both direct and indirect impacts on the health of fisheries.

- Nationally, trout anglers spent $3.5 billion on their pursuits, supported over 100,000 jobs, and had a $10 billion economic impact, including $1.3 billion in federal and state tax revenues in 2006 (USFWS 2014) and 30.1 million freshwater anglers spent $29.9 billion on freshwater fishing trips in 2016 (USFWS 2016).

A recent Outdoor Industry Association report shows that consumers spend $887 billion annually on outdoor recreation; over $175 billion on fishing, kayaking, rafting, canoeing, and scuba diving and other water sports alone.[183] As WRA commented in 2014, in some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represent billions of dollars in commerce.[184] In the Colorado River Basin portion of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, 2.26 million people participated in water sports in 2011, spending $1.7 billion that generated $2.5 billion in total economic output.[185]

In 2006, more than 1.3 million waterfowl hunters expended approximately $900 million with a total related industry output of $2.3 billion (Carver 2008).[186] This analysis also calculated that waterfowl hunting created approximately 28,000 jobs in 2006. Birding, much of it also water-related as evidence by waterfowl accounting for the type of bird observed by 77% of away-from-home birders, supported total trip-related and equipment expenditures of $36 billion in 2006 (Carver 2009). These direct expenditures resulted in a total industry output of $82 billion and created 671,000 jobs (with an average annual salary of $41,000; Carver 2009).[187]

Nationwide, the craft brewing industry, notably dependent on clean water supplies, contributed $76.2 billion to the U.S. economy in 2017, more than 500,000 jobs.[188]

Among the industries that stand to lose from the proposed rule is the restoration industry that has grown following the 2008 mitigation rule. The Economic Analysis briefly

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[183] Outdoor Industry Association. 2017. The Outdoor Recreation Economy available at: https://outdoorindustry.org/resource/2017-outdoor-recreation-economy-report/
[184] Western Resource Advocates 2014 Rule Comments.
[185] Southwick Assoc., Economic Contributions of Outdoor Recreation on the Colorado River and its Tributaries (May 3, 2012) (Table E-3), *available at* http://protectflows.com/wp-content/uploads/2013/09/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf.
[186] Carver, E. 2008. *Economic impact of waterfowl hunting in the United States. Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.* U.S. Fish and Wildlife Service, Report 2006-2, 13 pp.
[187] Carver, E. 2009. *Birding in the United States. Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.* U.S. Fish and Wildlife Service, Report 2006-4, 15 pp.
[188] *See* Brewers Association Economic Impact Statistics at https://www.brewersassociation.org/statistics/economic-impact-data/

acknowledges the harm to this industry, but fails to account for these economic costs or inform the public and decision-makers of this impact:

> Because fewer waters would be subject to CWA jurisdiction under the proposed rule than are subject to regulation under the 2015 Rule or current practice, there would be a reduction in demand for mitigation and restoration services, under the section 404 permitting program and a corresponding reduction in revenue for the businesses.[189]

In fact, as we commented in 2017, the private sector mitigation banking industry with its jobs and other fiscal contributions to local economies survives and thrives on a broad, strong, and strictly enforced Clean Water Act.[190] BenDor et al (2015), cited by the agencies in their EA, confirms that the restoration industry depends on the existing regulatory structure and protection of streams and wetlands that would be lost under this proposal.[191] The BenDor study finds that this industry provides significantly more jobs per $1 million than the oil and gas industry, school construction, or pipeline construction.[192] In a survey of restoration providers, nearly a third primarily worked in wetland restoration or aquatic and riparian restoration, reflecting "the role of the Clean Water Act's section 404 compensatory mitigation requirements in inducing restoration work."[193]

The BenDor study shows that the restoration industry directly provides 126,111 jobs a year in a variety of sectors, from engineers and construction firms to greenhouses and nurseries.[194] Including indirect and induced effects, the restoration industry has a total effect of adding 221,398 jobs each year which have a gross economic impact of nearly $25 billion each year.[195] The agencies cite to the study that summarizes these values, yet dismisses them and fails to evaluate the effect of the proposed rule's reduction in mitigation demand on the restoration industry. EA at 212-213.

As noted above, the streams and wetlands that will lose CWA protection as a result of the proposed rule also help filter out pollution that fuels hazardous algae outbreaks. These algal outbreaks can cause health problems and inflict high economic costs. For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was $2.2 billion. This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity. Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between $50 and $100 million.

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[189] EA at 212-213.
[190] *See e.g., National Environmental Banking Association at https://environmentalbanking.org/about/* (last visited April 11, 2019).
[191] Todd BenDor et al, Estimating the Size and Impact of the Ecological Restoration Economy, PLoS One, 3 (2015).
[192] Id.
[193] BenDor at 7.
[194] BenDor at 7.
[195] BenDor at 9.

Increased wetland loss will also result in increased storm-related flooding, harming property values and increasing property damage. In a 2016 study, The Nature Conservancy, in partnership with Risk Management Solutions, a global leading risk modeler for the insurance industry, Guy Carpenter & Company, and others showed that marsh wetlands saved over $650 million in property damages during Hurricane Sandy and reduced annual property losses by nearly 20 percent in Ocean County, New Jersey.[196]

VIII. The Agencies' Economic Analysis Arbitrarily Ignores and Fails to Analyze Many of the Costs of the Proposed Rule.

In 2017, in an attempt to justify the repeal of the 2015 Rule, the agencies relied on the 2015 Clean Water Rule economic analysis in an attempt to comply with the regulatory review dictates of Executive Orders 12866 and 13563, and Office of Management and Budget (OMB) Circular A-4 – with one very significant omission. The 2017 Clean Water Rule Repeal economic analysis literally zeroed out $313 to $513 million dollars in annual wetland benefits foregone by repealing the Clean Water Rule.[197] As we commented for the record at the time,[198] had the agencies accounted for the annual benefits of conserved and restored wetlands, the *repeal* of the 2015 Clean Water Rule alone comes at an estimated cost of $110-$185 million annually. In the 2017 Economic Analysis, the agencies also attempted to justify their omission of wetland benefits based on the unsupported claim that, without the 2015 Clean Water Rule, states might step in to protect wetlands through state regulatory programs. As NWF and many others, including the Association of State Wetland Managers, commented in 2017, none these flawed rationales support zeroing out all wetland benefits to support the repeal of the Clean Water Rule.

Yet, undeterred, the agencies double down on both fronts in an attempt to go far beyond the repeal of the 2015 Rule to roll back Clean Water Act protections for about half the nation's stream miles and wetlands. As explained more fully below, the agencies' economic analysis is seriously flawed because it systematically discounts the benefits of streams and wetlands that will be lost without CWA protections and fails to fully consider the many additional costs associated with this drastic narrowing of the waters of the U.S.

A. The agencies' discounting of costs based on speculative state responses is arbitrary and should be discarded.

As noted, the agencies attempted this ruse in 2017, arbitrarily proposing to write off the estimated wetland benefits based on the completely unsubstantiated possibility of independent state wetland protections. At the time, they claimed that because they "were

[196] Narayan, S., Beck, M.W., Wilson, P., Thomas, C., Guerrero, A., Shepard, C., Reguero, B.G., Franco, G., Ingram, C.J., Trespalacios, D., 2016b. Coastal Wetlands and Flood Damage Reduction: Using Risk Industry-based Models to Assess Natural Defenses in the Northeastern USA. London.
[197] 2017 Waters of the U.S. Economic Analysis at pp. 8-11 (Compare Tables 1 and 2 with Tables A-3 and A-4).
[198] NWF Comments in Opposition to the Repeal of the 2015 Clean Water Rule at 18-26 (September 28, 2017).

unable to factor the magnitude of this effect," the "cumulative uncertainty in this context is too large to include quantitative estimates in the main analysis for this proposed rule."[199] This basis for zeroing out wetland benefits is arbitrary and capricious on its face.

Now, in the 2018 Economic Analysis for the 2018 redefinition, the agencies seem undeterred by their inability to "factor the magnitude of this effect," and instead confirm "several significant changes to the 2015 Rule analysis have been made in the Stage I analysis to account for existing State laws and programs that regulated water and potential State governance responses…"

As we commented in 2017, NWF 2017 Comments at 18-26, there is a good deal less uncertainty around how the states will respond to the Clean Water Rule repeal (and this redefinition) than to many other assumptions in the economic analysis. The agencies even cited to substantial evidence that most states *will not* respond to their Clean Water Rule repeal "by continuing to regulate as waters of the state those waters that are no longer considered 'waters of the United States.'" 2017 EA at 22. The agencies concluded that "such a response is less likely" in the two-thirds of all the states that have legal limits on the ability of state and local governments to adopt aquatic resource protections more stringent than the CWA definition of "waters of the U.S." The Association of State Wetland Managers 2017 comments left no doubt that the states will not respond in a manner that avoids the costs of reduced federal CWA protections for wetlands and small streams.

As we noted in 2017, the agencies need only look to the states' track record since the Clean Water Act passed in 1972. Over the last 47 years, while 46 states have sought – and obtained – delegation of the §402 point source discharge program, only two states have assumed the CWA §404 permit program. It has been 19 years since the U.S. Supreme Court issued its *SWANCC* decision and over a decade since the *Rapanos* decision, yet very few states have moved proactively to fill the gaps in wetlands and stream protections in the wake of those two decisions. In the few that did, many of those programs were subsequently weakened by lack of resources and/or industry pressure.

As we noted in 2017, cost is a primary obstacle for states considering assuming responsibility for the § 404 program. Absent more robust federal funding and technical support, states are not likely to start regulating wetlands and the repeal of the Clean Water Rule will indeed come at the cost of millions of dollars in wetland benefits lost each year. Coupling the Clean Water Rule repeal and drastic rollback of waters of the U.S. now proposed, with significant cuts in federal Clean Water Act funding to states makes the agencies reliance on the possibility of enhanced state wetland protections unsound.

The 2018 Economic Analysis dresses up this argument in a highly speculative "Federalism Analysis" that attempts to predict state response to the proposed regulatory rollback. In his 2019 analysis attached to the 2019 Southern Environmental Law Center Comments and included in the administrative record, Dr. John Whitehead dismisses this Federalism Analysis as "inappropriate for this benefit-cost analysis":

[199] 2017 Repeal Rule Economic Analysis at 9.

> First, there is no empirical evidence provided that this sort of state response will be forthcoming. On the other hand, there is historical evidence that the state response will be weaker than the Federal response for a variety of reasons (e.g., see Stanton and Whitehead, 1994). There is nothing in the EPA Guidelines for Economic Analysis (NCEE 2014) that suggests that this analysis is appropriate. The Federalism scenario analysis is a highly speculative and not a defensible component of this economic analysis. If there is precedent for this sort of Federalism analysis in Federal benefit- cost analysis then it should be cited. If not, the Federalism scenarios should be discarded.

B. The agencies' economic analysis systematically underestimates the benefits of stream and wetland protections and the costs of losing them.

The 2018 Economic Analysis systematically underestimates the benefits of protecting streams and wetlands by consistently employing assumptions that discount these benefits. According the 2019 Whitehead Report[200] a particularly significant flaw in the EA is the agencies' very limited approach to its "willing to pay" calculation of wetland mitigation benefits. Dr. John Whitehead describes in detail in the attached analysis that "willingness to pay for natural resources is not constrained by political jurisdiction."[201] As SELC explains in their comments,

> "[w]illingness to pay declines as distance from the natural resource increases, but that benefit can extend thousands of miles.[202] One study that evaluated willingness to pay for dam removals in Washington State found that the mean willingness to pay declined from $78 in the state to $58 two thousand miles away.[203] As a result, 97% of the benefits from dam removal were out of state.

Dr. Whitehead concludes from his analysis that:

> [T]he state level aggregation rule used by EPA- Army (2018) leads to an underestimate of the aggregate benefits. The state level aggregation rule is, at best, a lower bound on the aggregate benefits. Presentation of the lower bound as the preferred aggregate benefit point estimate is inappropriate and cannot serve as the basis for a proper benefit-cost analysis.

As Dr. Whitehead notes, the agencies recognize, EA at 67, that the state-level approach is "overly conservative," yet still apply these estimates from the state-level aggregation rule as their preferred point estimate of aggregate wetland benefits:

> In effect, EPA-Army (2018) is solely conducting a worst case scenario analysis by comparing what may be the most conservative willingness to pay per acre estimates aggregated over the smallest number of households (i.e., the state-

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[200] SELC Comments on Revised Definition (April 15, 2019), Exhibit C, John. C. Whitehead, Comments on "Economic Analysis for the Proposed Revised Definition of 'Waters of the United States'" (EPA-Army 2018) (Apr. 9, 2019 ("Whitehead Report"), attached to SELC Comments as Ex. C.
[201] Whitehead Report at 3.
[202] *Id.* at 3-4.
[203] *Id.* at 4.

level aggregation rule) which they acknowledge is too conservative (EPA-Army 2015, pp. 49-50 quoted above). The conduct of a worst case analysis, in isolation, is inappropriate in a benefit-cost analysis under uncertainty.

According to additional analysis from SELC's 2019 comments, including neighboring states in the willingness-to-pay analysis significantly increases the estimated benefits provided by wetland mitigation. According to the SELC analysis, this adjustment to the agencies' willingness to pay analysis alone "increases the benefits under every scenario analyzed by the agencies—so much so that the foregone benefits of the proposal, even if limited to wetland mitigation, outweigh the cost savings." *See* 2019 SELC Comments at XX. According to the SELC analysis, there are additional unexplained assumptions in the agencies' willingness to pay analysis that seem likely to further drive down the estimated foregone benefits of wetlands mitigation.

The agencies' proposed CWA rollback rule, like their 2017 proposed repeal, are arbitrary and must be withdrawn because the agencies have failed to account for – and advise the public and decision makers of -- the irrefutable economic benefits of conserved wetlands. The economic literature, the 2015 economic analysis, and the administrative record for the 2015 Clean Water Rule are all replete with studies demonstrating the economic benefits and avoided costs of conserving wetlands. These studies must be accounted for in any agency action to repeal and replace the 2015 definition of waters of the U.S. As in our 2017 Comments, below we summarize a sampling of these studies, many of which are documented in the administrative record for the 2015 Clean Water Rule:

- In a 2016 study, The Nature Conservancy, in partnership with Risk Management Solutions, a global leading risk modeler for the insurance industry, Guy Carpenter & Company, and others showed that marsh wetlands saved over $650 million in property damages during Hurricane Sandy and reduced annual property losses by nearly 20 percent in Ocean County, New Jersey.[204]

- BenDor et al.[205] measures the economic output and employment resulting from environmental restoration, restoration-related conservation, and mitigation actions. For instance, they found that wetland restoration and aquatic and riparian restoration were the most common types of restoration work conducted, likely indicating the role of the Clean Water Act's 404 compensatory mitigation requirements in inducing this type of economic activity.

[204] Narayan, S., Beck, M.W., Wilson, P., Thomas, C., Guerrero, A., Shepard, C., Reguero, B.G., Franco, G., Ingram, C.J., Trespalacios, D., 2016b. Coastal Wetlands and Flood Damage Reduction: Using Risk Industry-based Models to Assess Natural Defenses in the Northeastern USA. London.
[205] BenDor T, Lester TW, Livengood A, Davis A, Yonavjak L (2015) Estimating the Size and Impact of the Ecological Restoration Economy. PLoS ONE 10(6): e0128339. doi:10.1371/journal.pone.0128339

- Costanza et al.[206] provides an estimate of the global value of ecosystem services between 1997 and 2011. Terrestrial wetlands increase in value over that period from $20,404 per hectare per year to $140,174 per hectare per year—providing far greater value than any other ecosystem. The agencies can use the underlying data and models from this study to estimate wetlands benefits in the specific case of the proposed rule. In addition, the trend of increasing value of wetlands indicates that the agencies 2015 estimate of the economic benefit is likely a conservative estimate of their current value.

- In the Prairie Pothole region, the estimated net benefit of artificially storing water in the Red River valley as described by exceeded $800 million over 50 years in some scenarios as a result of reduced flood stages in the Red River and avoided damages and other benefits.[207]

- Hey and Phillipi (1995) documented that mean annual flood damage in the Upper Mississippi River basin had increased 140% over the previous 90 years (in adjusted dollars). Given the extent of increasingly frequent damaging floods along rivers in and flowing out of the Prairie Pothole region (as well as in other areas around the country), the economics associated with avoided damages through wetland protection and maintenance of flood water storage functions should also be an important component of economic analysis.[208]

- Brody et al (2014) looked at an individual watershed in this ecoregion near Houston, and found that the presence of wetlands was the second-most important land-use-land-cover factor related to flood damages totaling $356 million over 11 years. Of all variables, being surrounded by wetlands had the strongest influence on reducing flood damages.[209]

- Brody et al (2011) looked at more than $13 billion in insured property losses across 144 coastal counties in all five Gulf coast states (plus several counties in extreme southwest Georgia) over the 2001-2005 period. They again found that wetland alteration was a significant factor in explaining flood damages.[210]

- In 2006, more than 1.3 million waterfowl hunters expended approximately $900 million

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[206] Costanza, R., R. de Groot, P. Sutton, S. van der Ploeg, S. Anderson, I. Kubiszewski, S. Farber, and R. K. Turner. 2014. Changes in the global value of ecosystem services. Global Environmental Change 26:152–158.
[207] Kurz et al. 2007. *An evaluation of basinwide, distributed storage in the Red River Basin: The Waffle Concept. Energy & Environmental* Research Center.
[208] Hey, D.L. and N.S. Phillipi. 1995. Flood Reduction through wetland restoration: The Upper Mississippi River basin as a case study. Restoration Ecology 3:4-17.
[209] Brody, S.D. et al. 2014. *Examining the impact of land use/land cover characteristics on flood losses.* Journal of Environmental Planning and Management 57: 1252-1265.
[210] Brody, S.D. et al. 2011. *Examining the influence of development patterns on flood damages along the Gulf of Mexico.* Journal of Planning and Education Research: 31:438-448.

with a total related industry output of $2.3 billion (Carver 2008).[211] This analysis also calculated that waterfowl hunting created approximately 28,000 jobs in 2006. Birding, much of it also water-related as evidence by waterfowl accounting for the type of bird observed by 77% of away-from-home birders, supported total trip-related and equipment expenditures of $36 billion in 2006 (Carver 2009). These direct expenditures resulted in a total industry output of $82 billion and created 671,000 jobs (with an average annual salary of $41,000; Carver 2009).[212]

- Another indication of the economic implications of protecting the Nation's water resources is revealed in the example of the actions taken by New York City to initiate a $250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskill Mountains (Daily et al. 1999). The city viewed this as a way to protect the quality of its water supply as an alternative to constructing water treatment plants which could cost as much as $6-8 billion.[213]

- The algal blooms that cause health problems also come at high economic costs. For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was $2.2 billion. This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity.[214]

- Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between $50 and $100 million.[215]

- Southwick Associates (2006) estimated that the present value of Saginaw Bay coastal marshes for active recreational use was $239 million, or approximately $10,000 per acre.[216]

A timely 2014 study of the recent loss of Texas coastal prairie wetlands in the Greater Houston area confirms the economic value of wetlands for flood storage and the economic cost of unregulated dredging and filling of those wetlands. According to the study, between 1992 and 2010, 30 percent of Harris County (which includes the city of

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[211] Carver, E. 2008. *Economic impact of waterfowl hunting in the United States. Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.* U.S. Fish and Wildlife Service, Report 2006-2, 13 pp.
[212] Carver, E. 2009. *Birding in the United States. Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.* U.S. Fish and Wildlife Service, Report 2006-4, 15 pp.
[213] Daily. G.C. et al. 1999. *Ecosystem Services: benefits supplied to human societies by natural ecosystems.* Issues in Ecology. Ecological Society of America *available at* http://www.hillcountryalliance.org/uploads/HCA/Ecosystem_Services_Daily.pdf.
[214] Dodds, W.F., et al. 2009. *Eutrophication of U.S. freshwaters: Analysis of potential economic damages.* Environmental Science and Technology 43:12-19.
[215] Polasky, S. and B. Ren. 2010. *Minnesota water sustainability framework water valuation technical work team report.*
[216] Southwick Associates, Inc. 2006. *Economic values of Saginaw Bay Coastal Marshes with a focus on recreational values.* Report to USEPA Great Lakes and Ducks Unlimited. 65 pp.

Houston) freshwater wetlands were developed primarily for commercial and residential purposes. These are wetlands that would be better protected under the 2015 Clean Water Rule than without it. This wetland loss translates to an estimated loss of 4 billion gallons of storm water detention capacity. The authors estimated that, at an average cost of $50,000 per acre-foot of storm water detention (based on the cost of Harris County flood control figures), this wetland loss in the Houston area comes at a cost of $600 million for storm water detention benefits alone. Counting water filtration and other benefits of these wetlands, the authors estimate the cost of this wetland loss to be "clearly in the billions."[217]

As the Association of State Wetland Managers noted in their 2017 comments on the proposed repeal rule,

> Under multiple scenarios, the narrowing of jurisdiction would have negative consequences for local, state/tribal, and federal governments in terms of increased costs for water quality enhancements and associated costs….
>
> In short, the economic losses that would arise from a reduction in federal protection of water resources is enormous, and it is both incorrect and a disservice to the public to exclude consideration of these factors from the cost-benefit analysis. Potential economic losses include those arising from a reduction in the supply of safe, clean, useable water for drinking and domestic use, industrial use, agricultural use, recreation, and fish and wildlife habitat. Each of these uses is important to a healthy economy and the increased cost of treatment over time should be carefully evaluated in an economic analysis of lost federal protection arising from a change in federal CWA jurisdiction….
>
> The potential loss of federal protection of wetlands and small and mid-sized streams is likely to result in an increase in unregulated dredge and fill activities which would in turn lead to future increased costs at the federal, state, and local level for engineered infrastructure to store flood waters, purify nonpoint source runoff, treat drinking water, sustain recreation opportunities and stabilize shorelines. The loss of protection for wetlands and small streams would likely lead to cumulative impacts reflected in human health threats, as well as increased property damage from natural hazards including intense storms, drought, and flooding.[218]

C. The economic analysis fails to account for the full range of impacts and associated costs of the proposed rule.

The agencies acknowledge in the 2018 EA that the proposed rule will reduce ecosystem values for streams and wetlands, increase downstream inundation damage, increase restoration costs, increase costs for drinking water providers, and increase the frequency

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[217] Jacob, John S., et al, *Houston-Area Freshwater Wetland Loss, 1992-2010* (2014) at http://tcwp.tamu.edu/files/2015/06/WetlandLossPub.pdf.

[218] 2017 Association of State Wetland Managers Comments at 8.

and damage caused by oil spills.[219] Yet the analysis does not quantify any of those foregone benefits of existing protections.

The agencies acknowledge that they do have datasets that could be used, as the agencies did in 2015, to estimate the impacts and foregone benefits of their proposal. Both the Economic Analysis and Resource and Programmatic Assessment identify stream and wetland types likely to lose jurisdiction.[220] The agencies fail to evaluate the full range of potential impacts of the proposal.

For example, the prospect of permitting and mitigation is a deterrent to filling streams and wetlands, yet neither the Economic Analysis (nor any other aspect of the proposal) evaluates the loss of that deterrent. In reality, impacts to abandoned waters will likely be much greater than past-permitted impacts due to the loss of the requirement that applicants avoid and minimize impacts to the maximum extent practicable.

As one indication of the potential extent of this oversight, Dr. Whitehead notes in his report that the benefits of four policy categories (CWA 301 Compliance, CWA 401 Administration, CWA 402 Pesticide General Permit Implementation and CWA 404 Mitigation – Streams) are unquantified, in effect placing a value of zero on these benefits. As Dr. Whitehead notes, "the naive policy maker will look to the bottom line estimates of benefits and costs and assume that the unquantified benefits are equal to zero. In the current compilation of benefits and costs, this will bias the decision towards less protection of wetlands." [221]

IX. The Agencies Proposed Rule Ignores Environmental Justice Concerns.

Given the laundry list of ways outlined in these comments in which this proposed rule discounts the likely disproportionate harm to low income communities, communities of color, and indigenous peoples, it is remarkable that the agencies dispense with their Executive Order 12898 responsibilities with the cavalier statement that, "there is no significant evidence of disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898." 84 Fed. Reg. at 4203. The Executive Order mandates that federal agencies ensure their programs do not disproportionately impact, or limit the participation of, communities because of their race, color, national origin, or socio-economic status.[222]

As noted above, the agencies acknowledge that their proposed rule will increase pollutant loads and decrease clean up and enforcement resources, and that these effects will threaten drinking water supplies. However, the agencies fail to analyze how these

[219] *See* 2018 EA at 133.
[220] EA at 131-32 (R4, R6, RPWWN); RPA at 38-47 (Isolated, NRPW, NRPWW, TNWRPW, TNWW, RPW Int/Eph).
[221] Whitehead Report, 2019 SELC Comments, Exhibit C.
[222] Exec. Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, 59 Fed. Reg. 32 (Feb. 11, 1994).

increased drinking water treatment challenges will likely unjustly burden low income, rural, and communities of color.

Low-income, rural and communities of color also already disproportionately face unaffordable rates for drinking water and water sanitation. According to EPA's own economic analysis for the proposed rule, reduced Clean Water Act coverage for waterways would likely result in greater drinking water treatment costs,[223] a cost that is usually passed on to consumers. Water bills are already one of the highest utility costs for families -- water prices have more than doubled since 2000, far exceeding the price of other utilities.[224]

Small, rural systems are especially vulnerable to drinking water violations and have less capacity and resources to manage harmful situations when they happen. For example, one study found that in 2015, 21 million people relied on community water systems that violated health-based Drinking Water Quality standards, with rural areas facing the most health violations when compared to urban areas.[225] However, urban areas are also facing problems. Small-to-midsized cities across the country that are economically depressed are also facing problems as fewer residents and a declining tax base make it difficult for low-income residents to afford higher water rates.[226]

As noted above, the proposed rule will result in degraded subsistence and well as sport and commercial fisheries.[227] Low-income communities and communities of color rely more heavily on subsistence fishing, which is threatened by this rule.[228] For many Native Americans, their cultural identity is strongly linked to fishing and they view their tribes' very existence as tied to the continued survival of indigenous fish species.[229] Yet the administration did not look into the impacts their rule would have on fisheries and the way it would affect Native American communities and other communities that rely on fish.

The proposal will also increase flood risk in low-lying communities due to significant additional wetland loss.[230] Low-income and disenfranchised communities are more vulnerable to increased flooding as they are more likely to live in areas that are more likely

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[223] 2018 Economics Analysis at 125, 133-34 (Dec. 14, 2018).
[224] Joseph W. Kane & Lynn E. Broaddus, *Striking a better balance between water investment and affordability*, BROOKINGS (Sept. 12, 2016), https://www.brookings.edu/blog/the-avenue/2016/09/12/striking-a-better-balance-between-water-investment-and-affordability/ (last visited Apr. 8, 2019).
[225]Maura Allaire et al, National trends in drinking water quality violations, Proceedings of the National Academy of Sciences (FEB. 27, 2018), https://www.pnas.org/content/115/9/2078.short?rss=1 (las visited Apr. 8, 2019)
[226] Rep. Brenda Lawrence, *Environmental Injustice: Access and Affordability of Clean Water*, THE Hill (May 17, 2018), https://thehill.com/blogs/congress-blog/politics/388154-environmental-injustice-access-and-affordability-of-clean-water.
[227] Colvin, S. A. R., S. M. P. Sullivan, P. D. Shirey, R. W. Colvin, K. O. Winemiller, R. M. Hughes, K. D. Fausch, D. M. Infante, J. D. Olden, K. R. Bestgen, R. J. Danehy, and L. Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services, at 74 Fisheries **44**:73-91.
[228] Ralph B. Brown and John F. Toth Jr., *Natural Resource Access and Interracial Associations: Black and White Subsistence Fishing in the Mississippi Delta*, 17 SOUTHERN RURAL SOCIOLOGY 81, 104 (2001).
[229] Colvin, S. A. R., S. M. P. Sullivan, P. D. Shirey, R. W. Colvin, K. O. Winemiller, R. M. Hughes, K. D. Fausch, D. M. Infante, J. D. Olden, K. R. Bestgen, R. J. Danehy, and L. Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services, at 74 Fisheries **44**:73-91.
[230] ENVIRONMENTAL PROTECTION AGENCY, ECONOMIC BENEFITS OF WETLANDS (May 2006).

to flood.[231] Due to the loss of wetland protections, the agencies acknowledge increased flood risk is a result of their proposed rule,[232] but turn a blind eye to the disproportional impact on low-income communities and communities of color despite the evidence of those disparate impacts in so many recent storms.

The proposed rule does nothing to evaluate whether its acknowledged adverse environmental and economic impacts would be disproportionately borne by some communities and cannot claim compliance with Executive Order 12898. EPA describes "environmental justice" as the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[233] By that standard, this proposed rule is environmentally unjust and should be withdrawn.

X. The Agencies Have Not Complied with Section 7 of the Endangered Species Act.

The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) have failed to comply with the requirements of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq*. Section 7 of the ESA requires EPA and the Corps to consult with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively the Services) to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat."[234] Agency "action" is broadly defined in the ESA's implementing regulations to include "(b) *the promulgation of regulations . . .*"[235] Once the consultation duty is triggered, agencies must use the "best scientific and commercial data available" in completing the consultation process.[236]

Any agency action that may affect a listed species or its critical habitat triggers the consultation requirement. The threshold for a finding of "may affect" is extremely low: "any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement."[237]

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[231] Dalbyul Lee and Juchul Jung, Th*e Growth of Low-Income Population in Floodplains: A Case study in Austin, TX* KSCE JOURNAL OF CIVIL ENGINEERING (2014) at 684; Jonathan M. Katz, *Who suffers when disasters strike? The poorest and most vulnerable*, WASHINGTON POST (September 1, 2017).
[232] 2018 Economics Analysis at 133.
[233] ENVIRONMENTAL PROTECTION AGENCY, LEARN ABOUT ENVIRONMENTAL JUSTICE, https://www.epa.gov/environmentaljustice (last visited April 8, 2019).
[234] 16 U.S.C. § 1536(a)(2).
[235] 50 C.F.R. § 402.02 (emphasis added).
[236] 16 U.S.C. § 1536(a)(2).
[237] Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 FR 19,926, 19,949 (June 3, 1986); U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook (March 1998) at xvi (defining "may affect" as "the appropriate conclusion when a proposed action may pose any effects on listed species ….").

As stated herein, the proposed rule would remove Clean Water Act protections from several categories of waters that have historically been protected under the CWA and that are protected or may be protected under the 2015 Clean Water Rule, as they should be pursuant to the CWA and case law interpreting the jurisdiction of the CWA, including *SWANCC* and *Rapanos*. Waters that will lose federal protections from destruction and degradation under the proposed rules include waters and aquatic habitat that are depended on or used by several species listed as threatened and endangered under the ESA, primarily geographically isolated wetlands, ephemeral waters, and many headwater streams. The effect the proposed rule will have on ESA listed species is conceded by the EPA and the Corps. In their Economic Analysis, they admit that, "Ephemeral waterbodies [which will not be protected under the proposed rule] … provide habitat to threatened and endangered species."[238] This is indeed the case. In fact, 86 plant and animal species that have been identified as "threatened," "endangered," or are candidates for listing under the Endangered Species Act are found in non-floodplain wetland habitats. [239]

The following waters provide a sample of the vital aquatic habitats federally listed species rely on that would or may be removed from the CWA's protections because they are wetlands that do not physically abut other jurisdictional waters or do not have the flow requirements necessary for jurisdiction pursuant to the proposed rule:

- Prairie potholes are depressional, glacially formed, geographically isolated, often times seasonal wetlands the Great Plains and Upper Midwest which provide important stop-over habitat for endangered whooping cranes during their spring and fall migrations and summer breeding habitat for Northern Great Plains piping plovers.[240]

- Vernal pools are seasonal, depressional wetlands on the West Coast, Midwest, and Northeast that are often in woodlands and can completely dry most of the year.

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[238] Economic Analysis for the Proposed Revised Definition of "Waters of the United States," U.S. Environmental Protection Agency and Department of the Army (Dec. 14, 2018), *available at* https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf.

[239] P. Comer et al., *Biodiversity Values of Geographically Isolated Wetlands in the United States.* NATURE SERVE, Arlington, VA. (2005), *available at* http://www.natureserve.org/library/isolated_wetlands_05/isolated_wetlands.pdf (Submitted by NRDC to EPA Docket Center, August 11, 2017).

[240] E.g., USFWS, Next Steps for a Healthy Gulf of Mexico Watershed, Prairie Potholes, Landscape at a Glance, *available at* https://www.fws.gov/southeast/gulf-restoration/next-steps/focal-area/prairie-potholes/ (last visited Apr. 11, 2019) ("Prairie wetlands along North and South Dakota's Missouri Coteau (plateau) provide valuable spring and fall stopover habitat for a majority of the endangered whooping cranes in the Wood-Buffalo/Aransas population."); L. A. McCauley, M. J. Anteau, M. P. van der Burg, Consolidation Drainage and Climate Change May Reduce Piping Plover Habitat in the Great Plains, Journal of Fish and Wildlife Management, Vol. 7, Issue 1, at 4 (June 2016), *available at* https://www.fwspubs.org/doi/pdf/10.3996/072015-JFWM-068.; https://pubs.er.usgs.gov/publication/70159570 (describing negative impacts of prairie pothole drainage on piping plover breeding habitat).

In California, they are critical for the survival and recovery of five species of fairy shrimp.[241]

- Headwater streams, which only flow for parts of the years, and flood plain wetlands serve as habitat and food sources for several species of listed salmonids.[242]

By purposefully narrowing the scope of CWA protections and eliminating safeguards for waters properly covered by 2015 Clean Water Rule, the proposed rule clearly "may affect" several species listed as threatened or endangered pursuant to the ESA. The above waters and habitats would be at risk of being completely destroyed, degraded, or polluted without the protections of federal permitting or enforcement under the Clean Water Act. These impacts clear the low "may affect" bar that triggers ESA consultation duties.

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[241] USFWS, Environmental Conservation Online System, Conservancy fairy shrimp (*Branchinecta conservatio*), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03D (last visited Apr. 11, 2019) (listing Conservancy fairy shrimp as endangered);USFWS, Environmental Conservation Online System, San Diego fairy shrimp (Branchinecta sandiegonensis), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K049 (last visited Apr. 11, 2019) (listing San Diego fairy shrimp as endangered); USFWS, Environmental Conservation Online System, Longhorn fairy shrimp (*Branchinecta longiantenna*), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03Fhttps://ecos.fws.gov/ecp0/profile/speciesProfile?sId=4294 (last visited Apr. 11, 2019) (listing Longhorn fairy shrimp as endangered); USFWS, Environmental Conservation Online System, Riverside fairy shrimp (*Streptocephalus woottoni*), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03F (last visited Apr. 11, 2019) (listing Riverside fairy shrimp as endangered); USFWS, Environmental Conservation Online System, Vernal pool fairy shrimp (Branchinecta lynchi), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03G (last visited Apr. 11, 2019)(listing Vernal pool fairy shrimp as threatened).

[242] E.g., Ebersole, J.L., P.J. Wigington, J.P. Baker, M.A. Cairns, and M. Robbins Church, 2006. Juvenile Coho salmon growth and survival across stream network seasonal habitats. Transactions of the American Fisheries Society 135:1681–1697, *available a*t https://andrewsforest.oregonstate.edu/sites/default/files/lter/pubs/pdf/pub3859.pdf; P.J. Wigington Jr, J.L. Ebersole, M.E. Colvin, S.G. Leibowitz, B. Miller, B. Hansen, H.R Lavigne, D. White, J.P. Baker, M.R. Church, J.R. Brooks, M.A. Cairns and J.E. Compton, 2006. Coho salmon dependence on intermittent streams. Frontiers in Ecology and the Environment 4(10): 513-518, *available at* https://esajournals.onlinelibrary.wiley.com/doi/abs/10.1890/1540-9295%282006%294%5B513%3ACSDOIS%5D2.0.CO%3B2; Maslin, P., J. Kindopp, and M. Lennox and C. Storm, 1998. Intermittent streams as rearing habitat for Sacramento River Chinook salmon (Oncorhynchus tshawytscha), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj7yavmkMnhAhUKnFkKHTxvA-MQFjAAegQIABAB&url=http%3A%2F%2Fwww.sacramentoriver.org%2Fforum%2Fscripts%2Flibrary%2Ffile.php%3Ffile_id%3D312&usg=AOvVaw2eOFflOgO3NEoJPqA8owgN.; *See also*, U.S. Environmental Protection Agency Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report (Oct. 17, 2014), at 43, *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf ("[F]loodplain wetlands and off-channel waters play an important role as spawning grounds and fish nurseries during high-water seasons for species (including several endangered fishes) that ultimately populate downstream fisheries.").

A. The Endangered Species Act imposes both substantive and procedural obligations on federal agencies.

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[243] The ESA's "language, history and structure" convinced the Supreme Court "beyond doubt" that "Congress intended endangered species to be afforded the highest of priorities."[244] "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction…"[245] In light of these lofty objectives, the Supreme Court declared that "endangered species [have] priority over the 'primary missions' of federal agencies."[246]

The ESA imposes both substantive and procedural obligations on federal agencies. Substantively, the ESA mandates that each federal agency "shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species ...."[247] In order to assist federal agencies in complying with their no-jeopardy obligation, the ESA establishes a mandatory consultation procedure.[248] This process takes place through the following four general phases:

- *Initial Request for Information.* Whenever an agency is considering undertaking or approving an action with the potential to harm species, the agency must take the initiative to "request ... information" from the Services to determine "whether any species which is listed or proposed to be listed may be present in the area of such proposed action."[249] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[250]

- *Biological Assessment.* If USFWS or NMFS advise the action agency during Phase 1 that "such species may be present," then the action agency "shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action."[251]

- *Formal Consultation.* If the biological assessment shows that the proposed action "may affect" threatened and endangered species, the action agency must undergo

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[243] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).
[244] *Id*. at 174.
[245] *Id*. at 184 (emphasis added).
[246] *Id*. at 185.
[247] 16 U.S.C. § 1536(a)(2).
[248] *Id*. § 1536(a)(2).
[249] *Id*. § 1536(c)(1).
[250] 50 C.F.R. § 402.02 (emphasis added).
[251] *Id.*

formal consultation with USFWS or NMFS.[252] The purpose of the formal consultation process is to ensure that the agency's action is "not likely to jeopardize the continued existence of any endangered or threatened species."[253]

- *Biological Opinion.* The formal consultation process concludes when the appropriate expert agency (USFWS or NMFS) issues a biological opinion "detailing how the agency action affects the species or its critical habitat."[254] If the expert agency makes a "jeopardy" or "adverse modification" finding, the action is prohibited from going proceeding, as this would violate the action agency's substantive obligation to ensure "no jeopardy" to endangered or threatened species.[255] If after further consultation, however, the action agency agrees to implement "reasonable and prudent alternatives" that the expert agency deems sufficient to eliminate the risk of jeopardy or adverse modification, then the action may go forward.[256] The Services may also "suggest modifications" to the action (called Reasonable and Prudent Measures) during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy.[257]

Pursuant to ESA Section 7(d), throughout the consultation process, the action agency is forbidden from making any "irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures."[258] The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

The ESA separately obligates federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed" under the Act.[259] Like the duty to avoid jeopardy, the conservation duty is discharged in part through consultation with USFWS or NMFS, as appropriate.[260]

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[252] 50 C.F.R. § 402.14(a); *see Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667-68 (2007) (hereafter "*NAHB*"). "Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat…[i]ndirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02.
[253] 42 U.S.C. § 1536(a)(2).
[254] *See* 16 U.S.C. § 1536(b)(3)(A); *NAHB*, 551 U.S. at 652; *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).
[255] *See* 16 U.S.C. § 1536(b)(3)(A).
[256] *Id*. § 1536(b)(3)-(4).
[257] 50 C.F.R. § 402.13.
[258] *Id*. § 1536(d). *See Thomas*, 753 F.2d at 764 ("If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.").
[259] 16 U.S.C. § 1536(a)(1).
[260] *Id*.

B. The agencies have failed to meet their section 7 consultation obligations.

Restricting the definition of "waters of the United States" to remove waters depended upon by myriad ESA listed species from the protections of the Clean Water Act without consulting the Services fails to follow the procedural and substantive requirements of the ESA. It is a clear violation of the law. The proposed rule will – in fact is intended to – reduce the numbers of waters that receive federal protections against pollution and destruction. This may affect ESA listed species that will be harmed when many of the waters losing protection are destroyed or degraded without the safeguards of the Clean Water Act. As such, ESA consultation with the FWS or NMFS must take place. It has not.

EPA and the Corps readily concede that fewer waters will be protected under the proposed rule and that activities impacting these waters will likely affect ESA listed species. For instance, they state that:

Under the proposed rule, *fewer waters would be jurisdictional than under pre-2015 practice or the 2015 Rule*, thereby reducing instances of a federal nexus through a CWA permit or other CWA action for the ESA.[261]

They then acknowledge the significance of wetlands to ESA listed species:

[M]ore than one-third of the United States' threatened and endangered species live only in wetlands, and nearly half use wetlands at some point in their lifecycle (U.S. EPA, 2017).[262]

Furthermore, they point out that with CWA protections removed, ESA take provisions under Section 9 would still apply to individual projects, conceding impacts to species will likely occur from activities that degrade or destroy waters that will lose protections:

Wetlands and other aquatic resources designated as critical habitats will remain subject to the Endangered Species Act (ESA) Section 9(a)(1)(B) which makes it unlawful for any person to "take" any fish or wildlife species listed under the ESA. Therefore, activities in wetlands and other aquatic resources may require engagement with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, which could lead to project modification or mitigation requirements.[263]

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[261] U.S. Environmental Protection Agency and Department of the Army, Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States" (Dec. 11, 2018) at 113, *available at* https://www.epa.gov/sites/production/files/2018-12/documents/wotus_proposed_step_2_rpa_for_clearance_12-7-18_508c.pdf.

[262] U.S. Environmental Protection Agency and Department of the Army, Economic Analysis for the Proposed Revised Definition of "Waters of the United States" (Dec. 14, 2018) at 49-50, *available at* https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf.

[263] *Id*.

However, EPA and the Corps do not state that they will consult under Section 7. With the loss of protection for important waters, both individually and cumulatively, due to the proposed rule admittedly resulting in impacts to ESA listed species, the proposed rule is the precise type discretionary action that is subject to the ESA's Section 7(a)(2) consultation requirement. In short, the proposed rule, which will impact waters nationwide, will directly, indirectly, and cumulatively affect endangered species. Thus, it undoubtedly triggers the "may affect" threshold for consultation. It will also almost certainly adversely affect endangered aquatic species, requiring a biological opinion.

C. ESA listed species depend on waters that will lose CWA protections under the proposed rule.

It is well-documented that the type of geographically isolated wetlands and headwater streams that will lose protections as a result of the proposed rule are depended upon by ESA listed species for all or part of their life-cycle. EPA and the Corps documented these impacts in promulgating the 2015 Clean Water Rule. For instance, the agencies found that "wetlands dominated by grass-like vegetation that occur in depressional areas between sand dunes or beach ridges along the territorial seas and the Great Lakes shoreline … support a diverse mix of wetland vegetation and many endangered and threatened species."[264] Similarly, the 2015 rule points to the role headwater streams – many of which would be excluded from CWA protections under this rule – have in supporting life stages of anadromous salmon, several species of which are threatened or endangered: "many organisms, such as anadromous salmon, have complex life-cycles which involve migration through the river network, from headwaters to downstream rivers and oceans and back, over the course of their lives."[265]

Likewise, when the Clean Water Rule was proposed in 2014, EPA and the Corps described the importance of headwater streams to species like many ESA listed salmonids:

Headwaters provide critical habitat during one or more life cycle stages of many organisms capable of moving throughout river networks…. Use of headwater streams as habitat is especially obvious for the many species that migrate between small streams and marine environments during their life cycles (e.g., Pacific and Atlantic salmon, American eels, certain lamprey species), and the presence of these species within river networks provides robust evidence of biological connections between headwaters and larger rivers. …. Small streams also provide refuge habitat for riverine organisms seeking protection from temperature extremes, flow extremes, low dissolved oxygen, high sediment levels, or the presence of predators, parasites, and competitors.[266]

Healthy headwater steams provide refuge, food, proper water temperature, dissolved oxygen, protection from parasites or predation, and other important functions that affect

[264] 80 FR 37,054, 37,086 (June 29, 2015).
[265] *Id*. at 37,069.
[266] 79 FR 22,188, 22,224 (Apr. 21, 2014).

threatened and endangered salmon need through many stages of their lifecycle.[267] Similarly, the 2014 also discussed studies showing that ephemeral wetlands – which would not receive protection under the proposed rule – can provide refuge, feeding, and rearing habitat for juvenile federally endangered (or threatened depending on the population) Chinook salmon.[268] Even if threatened or endangered salmonid and other fish species do directly use wetlands that will no longer receive protection if the proposed rule is promulgated, the loss of these wetlands may affect these species as geographically isolated wetlands can provide flow, sediment and nutrient retention, temperature, and other water quality benefits that impact salmon.[269]

Below are further examples where removal of CWA protections of waters may affect ESA listed species:

- *Vernal pools.* Vernal pools are seasonal depressions that generally fill up with water in spring often after snow melt. Since they are generally geographically removed from other waters, they do not "abut" other jurisdictional waters and would not be protected as adjacent wetlands or otherwise under the proposed rule. These wetlands were historically protected as "(a)(3)" waters prior to the 2015 Clean Water Rule. Vernal pools having a "significant nexus" to other waters would be protected under the Clean Water Rule. The proposed rule would eliminate their CWA protections. Vernal pools provide habitat for up to five different species of ESA listed fairy shrimp – Conservancy Fairy Shrimp (*Branchinecta conservatio*), Longhorn Fairy Shrimp (*Branchinecta longiantenna*), Riverside Fairy Shrimp (*Streptocephalus woottoni*), San Diego Fairy Shrimp (*Branchinecta sandiegonensis*), and Vernal Pool Fairy Shrimp (*Branchinecta lynchi*) — as well as listed amphibians like the California tiger salamander (*Ambystoma californiense*).[270] The loss of Clean Water Act protections will mean that

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[267] *See id*. at 22,228-31 (describing the many functions of headwater tributaries for species).
[268] *Id*. at 22,240.
[269] *See id*. at 22,250.
[270] *See* USFWS, Environmental Conservation Online System, Conservancy fairy shrimp (*Branchinecta conservatio*), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03D (last visited Apr. 11, 2019) (listing Conservancy fairy shrimp as endangered with recovery and other information regarding the importance of vernal pools to the species);USFWS, Environmental Conservation Online System, San Diego fairy shrimp (Branchinecta sandiegonensis), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K049 (last visited Apr. 11, 2019) (listing San Diego fairy shrimp as endangered with recovery and other information regarding the importance of vernal pools to the species); USFWS, Environmental Conservation Online System, Longhorn fairy shrimp (*Branchinecta longiantenna*), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03Fhttps://ecos.fws.gov/ecp0/profile/speciesProfile?sId=4294 (last visited Apr. 11, 2019) (listing Longhorn fairy shrimp as endangered with recovery and other information regarding the importance of vernal pools to the species); USFWS, Environmental Conservation Online System, Riverside fairy shrimp (*Streptocephalus woottoni*), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03F (last visited Apr. 11, 2019) (listing Riverside fairy shrimp as endangered with recovery and other information regarding the importance of vernal pools to the species); USFWS, Environmental Conservation Online System, Vernal pool fairy shrimp (Branchinecta lynchi), *available at* https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03G (last visited Apr. 11, 2019)(listing Vernal pool fairy shrimp as threatened with recovery and other information regarding the importance of vernal pools to the species); USFWS, Environmental Conservation Online System, California tiger salamander (*Ambystoma californiense*), *available at*

more vernal pools could be destroyed without complying with the 404 permitting process under the Clean Water Act, cumulatively degrading habitat of these species.

- *Prairie Potholes.* Prairie potholes are often seasonal depressions in the Great Plains that are used by multiple listed species. The critically endangered Whooping Crane, which migrates over the Prairie Pothole region on its way from Texas to Canada, uses potholes during its migration as important stopover areas, as does the endangered piping plover.[271] These important stopover and breeding habitats would be under increased threat of destruction and degradation as a result of the proposed rule.

- *Carolina Bays and pocosins.* These biological diverse depressional and geographically isolated wetlands in the Southeast are used by wood storks, the endangered red wolf, listed plant species like Boykin's lobelia (*Lobelia boykiniil*), Canby's dropwort (*Oxypolis canbyi*). [272] Further loss of these wetlands would put these species at increased risk.

- *Bogs.* Bogs provide habitat for several ESA listed species, including Bog Turtles *(Glyptemys Bmuhlenbergii)* (federally threatened) in in both the Southeast, Mid-Atlantic and Southern New England. Bog turtles, the smallest North American turtle, live in the mud, grass, and sphagnum moss of bogs, swamps, and marshy meadows. These species are very sensitive and the cool springs feeding bogs create the wet, muddy soil they need. Habitat loss, such as destruction of bogs and other habitat areas, is of concern for this species. Bogs and other so-called isolated wetlands provide habitat for ESA listed pitcher plants. For instance, the Green Pitcher plant (*Sarracenia oreophila*) (federally endangered), grows in mountain bogs, seeps, as well as boggy streamsides. This plant is found in parts of Alabama, Georgia, and North Carolina. Among other threats, the plant is threatened by development and wetland drainage.[273] Similarly, Mountain Sweet Pitcher Plant *(Sarracenia rubra ssp. Jonesii)* (federally endangered) is a species that is more specifically dependent upon bogs for suitable habitat. It exists in a just a handful of counties in the Carolinas. The most

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https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=D01T (listing California tiger salamander as endangered and threatened with recovery and other information regarding the importance of vernal pools to the species).

[271] E.g., USFWS, Next Steps for a Healthy Gulf of Mexico Watershed, Prairie Potholes, Landscape at a Glance, *available at* https://www.fws.gov/southeast/gulf-restoration/next-steps/focal-area/prairie-potholes/ (last visited Apr. 11, 2019) ("Prairie wetlands along North and South Dakota's Missouri Coteau (plateau) provide valuable spring and fall stopover habitat for a majority of the endangered whooping cranes in the Wood-Buffalo/Aransas population."); L. A. McCauley, M. J. Anteau, M. P. van der Burg, Consolidation Drainage and Climate Change May Reduce Piping Plover Habitat in the Great Plains, Journal of Fish and Wildlife Management, Vol. 7, Issue 1, 4 (June 2016), *available at* https://www.fwspubs.org/doi/pdf/10.3996/072015-JFWM-068.; https://pubs.er.usgs.gov/publication/70159570 (describing negative impacts of prairie pothole drainage on piping plover breeding habitat).

[272] Stephen H. Bennett and John B. Nelson, South Carolina Wildlife and Marine Resources Department, Distribution and Status of Carolina Bays in South Carolina, 1991, http://www.dnr.sc.gov/wildlife/docs/CarolinaBaysStudy.pdf

[273] USFWS, Green pitcher plant, *Sarracenia oreophila* (Dec. 2011), *available at*, https://www.fws.gov/southeast/pdf/fact-sheet/green-pitcher-plant.pdf.

serious threat to mountain sweet pitcher plant is the destruction or degradation of its small wetland habitat.[274] Loss of CWA protections for these waters would risk additional loss and degradation of important bog habitat for these listed species.

- *Other Species Affected by the Proposed Rule*.

  - Northeastern bulrush (*Scirpus ancistrochaetus)* (federally endangered). Northeastern bulrush is found in Maryland, Massachusetts, New Hampshire, Pennsylvania, Vermont, Virginia and West Virginia. Like other sedges, northeastern bulrush grows in wet areas – small wetlands, sinkhole ponds or wet depressions with seasonally fluctuating water levels. The plant is threatened by habitat destruction and deterioration, risks that will increase as a result of the proposed rule.[275]

  - Cooley's meadowrue *(Thalictrum cooleyi)* (federally endangered). This plant occurs on circumneutral soils in grass-sedge bogs and wet pine savannahs and savannah like areas. It may also grow along fire plow lines, in roadside ditches, woodland clearings, and powerline rights-of-way, and needs some type of disturbance such as fire or mowing to maintain its open habitat. It is known to be distributed in North Carolina, Georgia and Florida. Among of threats, Cooley's meadowrue is threatened by loss of habitat, ecological succession, clearing for agriculture, forestry, and development, and road maintenance and construction projects.[276] Loss of CWA protections will heighten these risks.

  - Pondberry *(Lindera melissifolia)* (federally endangered) Pondberry (*Lindera melissifolia*). This plant is associated with wetland habitats such as bottomland and hardwoods in the interior areas, and the margins of sinks, ponds, and other depressions in the more coastal sites. Populations are known in South Carolina, North Carolina, Georgia, Alabama, Mississippi, Arkansas and Missouri. It is threatened by drainage ditching and subsequent conversion of its wetlands habitat to other uses.[277] The proposed rule will make both drainage and conversion of these habitats more likely.

  - Bunched arrowhead *(Sagittaria fasciculata)* (federally endangered). Bunched arrowhead is usually found in undisturbed sites that are typically located just below the origin of slow, clean, continuous seeps on gently sloping terrain in deciduous woodlands. The plant is found in the Carolinas. The seepage habitat in which bunched arrowhead occurs is extremely threatened and remaining bunched arrowhead populations are threatened by residential and industrial development, conversion to

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[274] USFWS, Mountain sweet pitcher plant, *Sarracenia rubra ssp. Jonesii* (Dec. 2011), *available at*, https://www.fws.gov/asheville/pdfs/MtSweetPitcherPlant_factsheet.pdf.
[275] USFWS, Northeastern Bulrush, *Scirpus ancistrochaetus* (Aug. 2006), *available at*, https://www.fws.gov/northeast/pdf/bulrush.pdf.
[276] USFWS, Raleigh Ecological Services Field Office, Cooley's Meadowrue (*Thalictrum cooleyi*) https://www.fws.gov/raleigh/species/es_cooleys_meadowrue.html (last visited Apr. 11, 2019).
[277] USFWS, Raleigh Ecological Services Field Office, Pondberry (*Lindera melissifolia)* https://www.fws.gov/raleigh/species/es_pondberry.html (last visited Apr. 11, 2019).

pasture, and invasive exotic species.[278] Again, these threats will increase if the proposed rule is finalized.

Given these potential impacts, a biological assessment for the proposed rule will almost certainly show it "may affect" endangered and threatened species, including those described above. Again, the threshold for a "may affect" determination is low and the impacts above trigger the ESA's consultation requirements. Yet, the EPA and Corps have failed to prepare any biological assessment concerning the impacts of the proposed rule on listed species, failed to engage in any formal consultation with USFWS or NMFS, and failed to utilize their authority to promote the conservation of listed species. Each of these failures constitutes a violation of the procedural mandates of Section 7 of the ESA.

D. Promulgating the proposed rule without consulting would illegally result in the irreversible or irretrievable commitment of resources.

Section 7(d) of the ESA prohibits a federal agency from "mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[279] By changing the definition of "waters of the United States" and failing to consult with the Services, EPA and the Army Corps would have ensured that some, and likely many, wetlands, streams, and other waters will be degraded or destroyed that would not otherwise be degraded or destroyed under current law. Accordingly, the Agencies will be in violation of Section 7(d) of the ESA should they promulgate the proposed rule without required consultation under the ESA.

XI. The Agencies Fail to Provide the Required Notice and Meaningful Opportunity to Comment on the Substance of Their Revised Definition of "Waters of the United States."

The APA public notice and comment requirements "serve important purposes of agency accountability and reasoned decision-making."[280] The process helps to ensure that agencies keep "an open-minded attitude" toward their rulemaking.[281] Here, however, EPA has failed to meet these basic APA procedural requirements by: 1) failing to provide even the minimum required environmental and economic impact information for agency accountability, reasoned decision making and meaningful public comment; and 2) failing to provide an adequate comment period to allow for meaningful opportunity to understand and comment on the substance of the proposed rule, particularly in light of the proposal's bread, complexity, and radical departures from longstanding past practice and precedent,

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[278] USFWS, Bunched arrowhead, *Sagittaria fasciculate* (Dec. 2011), *available at,* https://www.fws.gov/southeast/pdf/fact-sheet/bunched-arrowhead.pdf.
[279] 16 U.S.C. § 1536(d).
[280] *Am. Med. Ass'n v. Reno,* 57 F. 3d 1129, 1132 (D.C. Cir. 1995).
[281] *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012) (internal citations omitted).

and the agencies' failure to conduct and provide in advance for meaningful review key analytical analyses, results of interagency consultations, and specific and effective answers to important jurisdictional determination and pollution control implementation questions.

Substantive information and comments on the content of the Clean Water Rule, the 1986 rule, and the *Rapanos* guidance, including which waters are covered and not covered by the Clean Water Act under each, the rationale for each, and the implications of each, is all clearly relevant information essential to determining whether both the repeal of the 2015 Clean Water Rule and its replacement with this drastically divergent redefinition of waters of the U.S. has any rational basis. The agencies refusal to consider such information[282] is contrary to the APA. The repeal and replacement of the Clean Water Rule must not proceed unless and until the public is provided the opportunity to engage in "robust deliberations" on the substance of both and those comments are considered and addressed *before* the agencies make a final rulemaking decision.[283]

XII. The Agencies Should Retain the 2015 Rule's Definition of Waters of the U.S. with Any Targeted Clarifications of Specific Exclusions Necessary to Increase Regulatory Certainty While Maintaining Essential Clean Water Act Protections.

Our detailed analysis of the agencies' proposed "step 2" redefinition of "waters of the United States" captured above only reinforces our 2017 and 2018 comments urging the agencies to retain and implement the 2015 Clean Water Rule in order to provide for predictability and regulatory certainty in concert with maintaining essential Clean Water Act protections.[284] Throughout these comments, we point out with specificity the aspects of the 2015 Rule that are more predictable, more practical, and more protective in accordance with the Clean Water Act than the hasty and haphazard proposal the agencies now propose. The agencies should withdraw their 2017 and 2018 Clean Water Rule repeal proposals and this 2019 redefinition proposal. They should retain the 2015 Rule and, if necessary, propose revisions to any specific elements of the 2015 Rule that warrant clarification based on an objective assessment of the final rule. And they should once again apply their CWA expertise to develop updated implementation guidance and manuals to support the 2015 Rule.

Our examination in these comments of the agencies proposed rule only reinforce our consistent recommendations that:

- EPA and the Corps should use the 2015 Clean Water Rule, its robust public process, and its extensive administrative record as the basis for defining the "waters of the U.S."

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[282] *See Motor Vehicle Mfrs. Ass'n* at footnote 12, *supra.*
[283] *Consumer Energy Council of Am.* v. *FERC*, 673 F. 2d 425, 446 (D.D.Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.,* 463 U.S. 1216 (1983).
[284] *See* NWF 2017 Waters of the U.S. Definition Recommendations, Docket ID Number EPA-HQ-OW-2017-0480 (August 28, 2017).

- Any revision of the Clean Water Rule must be subject to a rulemaking process at least as robust, transparent, and deliberate as the process for promulgating the 2015 Clean Water Rule.

- Any revision of the Clean Water Rule definition of “waters of the U.S.” must rely on the widely accepted significant nexus test for Clean Water Act jurisdiction.

- Any revision of the Clean Water Rule definition of “waters of the U.S.” must be grounded in sound science, including the scientific record supporting the Clean Water Rule.

- Any revision of the Clean Water Rule should be based on the science-based, professional judgment of water resource experts; not on political ideology.

- Any revision of the Clean Water Rule should focus on any necessary and constructive clarifications; not expanded exclusions from the definition of “waters of the U.S.”

- The Clean Water Rule’s definition of traditional navigable waters and treatment of interstate waters should form the basis for any revised definition of the “waters of the United States.”

- The Clean Water Rule’s definition and treatment of tributaries is scientifically and legally sound and should form the basis for any revised definition of the “waters of the United States.”

- The Clean Water Rule’s definition and treatment of adjacent waters is scientifically and legally sound and should form the basis for any revised definition of the “waters of the United States.”

- The Clean Water Rule’s definition of categories of non-adjacent waters as “waters of the United States” where the scientific evidence of connectivity satisfies the significant nexus test is scientifically and legally sound and should form the basis for any revised definition of the “waters of the United States.”

- Any revision of the Clean Water Rule must account for the fact that the Rule’s clarifying and restoring of Clean Water Act protections fosters strong local economies and millions of jobs.

Conclusion

Increasingly, Americans face toxic algal outbreaks, chemical spills, and other threats to their drinking water supplies. We face increasingly intense and damaging storms and floods that threaten communities upstream and down. We are continually reminded of just how important bedrock Clean Water Act safeguards are for communities, fish and

wildlife, and the outdoor recreation economy. Rule changes interpreting the scope of the Clean Water Act's safeguards must therefore not be taken lightly.

The agencies' proposal to redefine "waters of the United States" will roll back Clean Water Act protections for an estimated 20-75% of the Nation's tributary system and more than half of its wetlands. In so doing, it will upend 47 years of successful federal-state partnerships for point source pollution control, oil spill prevention and clean up, drinking water source water protection, watershed cleanup plans, and large scale aquatic resource restoration. It threatens the drinking water supplies of an estimated 200 million Americans, threatens low-lying and vulnerable communities with increased flooding, threatens fish and wildlife populations, and threatens local economies across the country that depend on clean and healthy waterways.

The agencies cavalierly propose this drastic Clean Water Act rollback – with a woefully inadequate 60 day comment period -- with no analysis of the extent of streams and wetlands that will lose protection, no analysis of the associated loss of ecosystem services, and no analysis of the added programmatic pollution control and economic burdens placed on states, tribes, local governments, local drinking water utilities, local economies, low-income communities, communities of color, and indigenous peoples. Fundamentally, at no point in their proposal do the agencies explain how they can administer the Clean Water Act to meet its goal – to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" – while abandoning federal responsibility to ensure that the Act's minimum water quality standards are met and enforced throughout the Nation's tributary system and associated wetlands.

In contrast, the EPA and the Corps developed the 2015 Clean Water Rule over a period of several years, providing ample opportunities for stakeholders to evaluate the technical and legal basis for the rule and express their views. The agencies held open the comment period for more than 200 days, receiving more than 1.1 million comments, more than 80% of which were supportive of the rule. During that same time period, the rule was informed by an extensively peer-reviewed scientific report, including a peer review by the independent Science Advisory Board, during which the agency received more than 130,000 comments. During the comment period on the proposed rule, EPA met with more than 400 stakeholders. The agencies then developed a rule that relied on the public input, on a strong scientific record, and on the Supreme Court's direction about the kinds of waters the Clean Water Act protects.

The agencies' proposal to redefine the "waters of the United States" is arbitrary, capricious, and contrary to law because the agencies fail to provide meaningful opportunity for public comment, fail to consider all relevant information, and fail to provide a rational explanation for reversing course in defining Waters of the U.S. We oppose this proposal to redefine "waters of the United States" and to strip the protections that have prevented harmful pollution of the nation's waterways for decades. We urge the Administration to withdraw its proposal immediately and retain the science-based and legally sound 2015 Clean Water Rule in its stead.

Respectfully Submitted,

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National Wildlife Federation

ATTACHMENTS:

Meyer, R. and A. Robertson.2019. Clean Water Rule spatial analysis: A GIS-based scenario model for comparative analysis of the potential spatial extent of jurisdictional and non-jurisdictional wetlands. Saint Mary's University of Minnesota, Winona, Minnesota

Meyer, R., and A. Robertson. 2019. Clean Water Rule Spatial Modeling and Quantitative Analysis of Jurisdictional Wetlands in the Nanticoke Watershed (2019 Nanticoke Analysis), Maryland. Saint Mary's University of Minnesota, Winona, Minnesota

Kurt Fesenmyer, GIS Director, Trout Unlimited. 2019. Trout Unlimited Powerpoint Presentation, "What it all means: waters of the U.S. on the ground." April 4, 2019.

NWF Clean Water Rule Repeal Supplemental Notice Comments (August 13, 2018)

NWF Comments in Opposition to the Repeal of the Clean Water Rule (September 26, 2017)

NWF Comments in Support of the Clean Water Rule (November 14, 2014)

National Tribal Council Consultation Comments dated June 16, 2017.

United States' Brief for Respondents, *In Re EPA,* No. 15–3571 (6th Cir. Jan. 13, 2017) (United States Brief in the Sixth Circuit) (attached and incorporated by reference).

Amicus Curiae Brief of the States in Support of Respondents in *Rapanos et al v. U.S.* (S.Ct. 2006).