

**Attachments to the Comments of Waterkeeper Alliance, et al. on
Public Notice re: the Definition of “Waters of United States”**

**Docket ID No. EPA-HQ-OW-2021–0328 Submitted
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**Volume 1 of 6
Attachment Nos. 1-3**

ATTACHMENT 1



November 28, 2017

VIA Email OW-Docket@epa.gov and Online Submission www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Definition of “Waters of the United States” – Schedule of Public Meetings: Docket ID No. EPA-HQ-OW-2017-0480**

To Whom it May Concern:

Waterkeeper Alliance, Center for Biological Diversity, Center for Food Safety, Turtle Island Restoration Network, and the Waterkeeper Member Organizations and Affiliates identified below (“Organizations”) submit the following “preproposal input” on the United States Environmental Protection Agency (“EPA”) and Department of the Army (“Army”) Federal Register Notice entitled: “Definition of “Waters of the United States” – Schedule of Public Meetings, 82 Federal Register 40742 (August 28, 2017) (hereinafter the “Notice”).

ORGANIZATIONAL INTERESTS

Waterkeeper Alliance (“Waterkeeper”) is a not-for-profit corporation dedicated to protecting and restoring water quality to ensure that the world’s waters are drinkable, fishable and swimmable. Waterkeeper is comprised of 334 Waterkeeper Member Organizations and Affiliates working in 35 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 196 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in and near waterways across the country – many of which are severely

CLEAN WATER  STRONG COMMUNITIES

impaired by pollution.¹ The federal Clean Water Act (“CWA”)² is the bedrock of Waterkeeper Alliance’s and its Member Organizations’ and Affiliates’ work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate Organizations and our respective individual supporting members, as well as to protect the people and communities that depend on clean water for their survival. Our work – in which we have answered the Congressional call for “private attorneys general”³ to enforce the CWA when government entities lack the time, willingness or resources to do so themselves – requires us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand, and have seen firsthand, how important a clear definition of the “waters of the United States” is to the functionality and effectiveness of the CWA. A broad definition of “waters of the United States,” consistent with the language, purpose and intent of the CWA, is critical to our collective work to protect the nation’s waterways.

Center for Biological Diversity (“Center”) is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.5 million members and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life.

Center for Food Safety (“CFS”) is a nonprofit, public interest advocacy organization dedicated to protecting human health and the environment by promoting sustainable agriculture and halting the harmful impacts of industrial agriculture, including impacts to water resources. In furtherance of this mission, CFS uses legal actions, groundbreaking scientific and policy reports, books and other educational materials, and grassroots campaigns on behalf of its 930,000 farmer and consumer members across the country.

Turtle Island Restoration Network (TIRN) is an environmental non-profit, which includes the Salmon Protection and Watershed Network (SPAWN). TIRN and SPAWN’s work is to protect endangered, threatened, and vulnerable marine and anadromous salmonid

¹ See, e.g., U.S. EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, available at: http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last accessed on Sept. 25, 2017).

² 33 U.S.C. §1251 *et seq.*

³ See, e.g., *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 16–17, 1981); *Hudson River Fishermen’s Ass’n v. Westchester County*, 686 F. Supp. 1044, 1050, 1052 (S.D.N.Y. 1988) (“In those instances where, for whatever reasons, the Government fails or declines to take action, the CWA allows citizens acting as private attorneys general to fill the void.”).

and other species. Working on behalf of its members and with volunteers and staff, SPAWN promotes the continued survival and recovery of anadromous salmonid species in the Lagunitas Watershed in Marin County, California, through education, advocacy, and direct action. SPAWN's activities include: conducting spawning surveys and collecting other biological and scientific data; holding workshops, training, and volunteer opportunities for our members where participants learn about salmonid habitat and physiology, and ways that they can promote their survival and recovery; conducting educational programs for children under the direction of our in-house educational specialist; an ongoing initiative to restore salmonid habitat by planting 10,000 redwoods; and partnering with the National Park Service in Point Reyes, to restore salmon habitat in the Lagunitas Watershed. TIRN and SPAWN believe that the "waters of the United States" rule and the CWA are vital components of protection for marine and freshwater-dependent species and their habitats.

The Organizations, and their members, have substantial interests in clean water for drinking, recreation, fishing, economic growth, food production, and other beneficial uses. These interests will be injured if EPA and the Army (the "Agencies") continue to engage in legally deficient administrative processes with a predetermined, but not fully disclosed, outcome – a narrow definition of "waters of the United States" premised on the Agencies' interpretation of Justice Scalia's opinion in *Rapanos v. United States*.⁴ As explained below, the Agencies' actions: (1) Are substantively and procedurally contrary to law, (2) Are intended to reduce jurisdiction over the nation's historically protected waters contrary to the CWA, and (3) Do not comply with numerous federal laws, including the Administrative Procedure Act ("APA"),⁵ the National Environmental Policy Act ("NEPA")⁶ and the Endangered Species Act ("ESA").⁷

INTRODUCTION

On August 28, the Agencies published a brief, unconventional, two-page notice in the Federal Register, which is styled as an "Announcement of public meeting dates" regarding the definition of "waters of the United States" under the CWA (the "Notice").⁸

⁴ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁵ Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

⁶ National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

⁷ Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

⁸ Definition of "Waters of the United States"—Schedule of Public Meetings, 82 Fed. Reg. 40742 (August 28, 2017).

In reality, this Notice was not issued for the purpose of setting up meetings dates with the public. It was issued to generate administrative record material to create the wrongful impression that the Agencies conducted meaningful public outreach on a future rulemaking in which the Agencies will adopt a predetermined, undisclosed definition to reduce the number and types of waterways that can be protected against pollution and destruction under the CWA. The Agencies are aware that the public overwhelmingly supports maintaining broad protections for waterways under the CWA.⁹ Denominating this Notice as an announcement of public meeting dates, providing inadequate information and labeling it as “non-regulatory”¹⁰ are all cynical and deceptive acts intended to reduce public interest and suppress the number and quality of comments the Agencies have to contend with when they ultimately adopt their predetermined outcome.

It has long been apparent that the Agencies have already made a decision to redefine the statutory phrase “waters of the United States” under 33 U.S.C. § 1362(7), in a manner consistent with the legal arguments asserted by Administrator Pruitt in litigation he brought in his capacity as Oklahoma’s Attorney General.¹¹ This decision was made prior to: (1) conducting the review required by Executive Order 13778, (2) consulting with state, tribal and local governments, (3) seeking input from the public, (4) disclosing the text and supporting information for this new definition, and (5) initiating any rulemaking.

The Agencies are pursuing their preordained outcome by employing multiple

⁹ See, e.g., Final Rule, Clean Water Rule: Definition of “Waters of the United States,” 80 Fed.Reg. 37054 (June 29, 2015) (“The agencies proposed a rule clarifying the scope of waters of the United States April 21, 2014 (79 FR 22188), and solicited comments for over 200 days. This final rule reflects the over 1 million public comments on the proposal, **the substantial majority of which supported the proposed rule**, as well as input provided through the agencies’ extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others.”) (emphasis added); see also Comments on Clean Water Rule: Definition of ‘Waters of the United States’ Docket, available at: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-088> and Comments on “Waters of the United States” – Reinstatement of Preexisting Rules Docket, available at: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0203>.

¹⁰ U.S. EPA Docket, Definition of Waters of the United States: Public Meetings, <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0480> (Aug. 28, 2017) (“This docket will be associated with a non-regulatory preproposal notice announcing a series of public webinars and soliciting feedback from the public.”).

¹¹ See 6th Circuit Brief of the States (**Attachment 1**); N.D. Oklahoma (**Attachment 2**); Scott Pruitt & Rand Paul, *EPA water rule is blow to Americans’ private property rights*, <http://thehill.com/opinion/op-ed/234685-epa-water-rule-is-blow-to-americans-private-property-rights> (last accessed Sept. 27, 2017) (**Attachment 3**).

unrecognizable and misleading administrative processes, and providing only superficial opportunities for legitimate governmental consultation and public comment. This is because the Agencies cannot achieve their end and comply with the CWA, APA, NEPA, and the ESA. With this Notice, the Agencies are attempting to generate an administrative record full of skewed public comment they intend to use in support of a future rulemaking that will redefine “waters of the United States” in a narrow and predetermined manner. To avoid providing meaningful notice and opportunity for informed public input, the Agencies (1) deceptively labeled the Notice as an announcement of public meetings, (2) withheld substantive information on the rule that the Agencies intend to adopt, (3) arbitrarily categorized the public into “sectors” that receive different information and variable and unequal opportunities to be heard, (4) grossly misrepresented the directive of Executive Order 13778, and (5) improperly constrained the issues upon which “recommendations” are sought to the Agencies’ predetermined outcome.

These failures are not mere technicalities and, if they are not addressed, will be used to attempt to severely undermine or eliminate fundamental CWA protections across the country – endangering the public and our nation’s water resources. As Administrator Pruitt recently noted in a speech at an international gathering of the energy industry:

There’s a reason why Congress has set up the Administrative Procedures [sic] Act, and the reason it has done so is because as rules are adopted and the Executive Branch, it’s important that we hear from people on how it impacts them at the local level and at the state level, industry, citizens, consumers, and as those, as that information comes in, as you propose rules and comments are offered, the agency’s responsible to evaluate that and make an informed decision before it finalizes the rule.¹²

Obviously, people need to know exactly what is being proposed in a rule before they can tell the Agencies how it impacts them, and the Agencies have not given the public that information. More importantly, the Agencies are legally required to do far more than just solicit information on how their rules impact industry, states and members of the general public when they undertake a rulemaking.

¹² EPA Administrator Scott Pruitt, *CERAWeek Environmental Policy Dialogue with Scott Pruitt*, (March 9, 2017) available at: <http://ondemand.ceraweek.com/detail/videos/featured-videos/video/5358092032001/environmental-policy-dialogue-with-scott-pruitt?autoStart=true> (last accessed on Sept. 24, 2017).

If the Agencies are determined to revise the definition of “waters of the United States,” we urge the Agencies to undertake a review of the Clean Water Rule in accordance with the law, including the CWA, APA, NEPA, and the ESA, as directed by Executive Order 13778, and provide a meaningful opportunity for the public to have input into the Agencies’ review prior to making a decision to undertake any rulemaking to revise, rescind or replace the definition of “waters of the United States” under the CWA. The regulatory definition of “waters of the United States” must ensure broad jurisdiction to control pollution consistent with the intent of Congress and the CWA, and any rulemaking to change the current definition must comply with the CWA, APA, NEPA and the ESA. The Agencies’ current approach to this purported “Two-Step” rulemaking, including this Notice, does not comply with these standards.

I. THE NOTICE IS MISLEADING, VAGUE AND DOES NOT PROVIDE A MEANINGFUL OPPORTUNITY FOR PUBLIC INPUT

Rather than being a simple announcement of Agency meetings, the Notice announced a series of ten two-hour, arbitrarily circumscribed and “sector-specific”¹³ teleconferences. In those teleconferences, a limited number of “stakeholders” thought to fall within the Agencies’ vague categories were chosen, purportedly on a first-come, first-serve basis, to provide their recommendations on “Step 2,” Executive Order 13778, the “opinion of Justice Scalia,” and other sector-specific questions provided only to participants,¹⁴ in three minutes.¹⁵ Leaving aside the obvious problem with providing different questions and presentations to different “sectors” in exclusive sessions, addressing these issues in three minutes is, quite literally, impossible.

Additionally, the Notice seeks written recommendations “to revise the definition of ‘Waters of the United States’ under the Clean Water Act (CWA)” on a “Step 2” rule,

¹³ See 82 Fed. Reg. at 40742. The Agencies announced they would hold nine teleconferences “tailored to a specific sector” and only one that would be open to the public. Participation in the nine “specific sector” teleconferences was limited to membership in the sector as vaguely and arbitrary defined by the Agencies – i.e. agriculture (row crop, livestock, silviculture); conservation (hunters and anglers); small entities (small businesses, small organizations, small jurisdictions); construction and transportation; environment and public advocacy (including health and environmental justice); mining; industry (energy, chemical, oil/gas); scientific organizations and academia; and stormwater, wastewater management, and drinking water agencies.

¹⁴ U.S. EPA, Waters of the United States (WOTUS) Rulemaking, Listening Session Presentations, <https://www.epa.gov/wotus-rule/listening-session-presentations> (last accessed November 21, 2017).

¹⁵ 82 Fed.Reg. at 40742.

which the Agencies indicate they will propose at some undefined date in the future.¹⁶ These “recommendations” from the public are to be submitted to a “non-regulatory” docket “established as a courtesy to the stakeholder community,” that “will be included in the administrative record of the regulation revising the definition of “Waters of the United States” under the Clean Water Act (CWA),” even though the Agency has not initiated, or even disclosed even the most basic information about, that future rulemaking.¹⁷ Lastly, despite the fact that many state, local and tribal government representatives have expressly requested consultation due to the lack of information provided by the Agencies,¹⁸ the Notice inexplicably declares that, in June of 2017, the Agencies “completed consultation processes with tribes as well as state and local governments on the step 2 rulemaking.”¹⁹

A. The Agencies have Not Completed the Required Federalism Consultation Process

As noted above, many state, local and tribal government representatives do not agree that: “the agencies completed consultation processes with tribes as well as state and local governments on the step 2 rulemaking.” Our organizations also disagree. These entities were asked to provide feedback on a preordained outcome with little information available to explain or support it. These types of outreach do not constitute adequate federalism consultation with state, local or tribal governments under Executive Order 13132.²⁰ This is likely the reason the Agencies improperly claimed that that the Proposed “Step 1” Rule withdrawing and replacing the Clean Water Rule “has no federalism implications,” and that no consultation is required because “[i]t will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”²¹ However, according to the July 27, 2017 Federal

¹⁶ 82 Fed.Reg. at 40742. See also U.S. EPA, Waters of the United States (WOTUS) Rulemaking, Rulemaking Process, <https://www.epa.gov/wotus-rule/rulemaking-process> (last accessed Nov. 21, 2017).

¹⁷ *Id.* Notwithstanding the Agencies’ description of this process as “non-regulatory,” the Agencies also represent that they intend to include comments submitted in response to the Notice in the administrative record for the future rulemaking.

¹⁸ See Federalism Letters to EPA and the Corps, available at: <https://www.epa.gov/wotus-rule/federalism-consultation> and <https://www.epa.gov/wotus-rule/tribal-consultation>

¹⁹ *Id.*

²⁰ Federalism Executive Order, 64 Fed. Reg. 43255 (Aug. 4, 1999).

²¹ Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899, 34904 (July 27, 2017).

Register Notice for that rulemaking, the Agencies had yet to consult with the states at that time. That notice states that the Agencies “will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of “waters of the United States.”²² It is beyond dispute that the required federalism consultation was not completed in June of 2017 as asserted in this Notice.

B. The Agencies are Improperly Pursuing a Predetermined Outcome

In addition to trying to make a deceptive record that the Agencies have completed the Federalism Executive Order consultation requirements for a “Step 2” rulemaking they haven’t even initiated, this Notice is also designed to help create a record that the Agencies are meaningfully engaging with the public and providing an opportunity for public input on the “Step 2” rule, prior to making a decision. It is undeniable, however, that the Agencies already made their decision and are now engaged in an effort to provide a post-hoc justification for it.

According to the Notice itself, the Agencies have already decided to implement Executive Order 13778²³ “in two steps,” with the predetermined outcome being the “ultimate replacement” of the Clean Water Rule – a final rule defining “waters of the United States” under the CWA that the Agencies promulgated in 2015.²⁴ In fact, the decision to withdraw the Clean Water Rule and replace it with a definition based on Justice Scalia’s opinion in *Rapanos* was made on February 28, 2017, when the President signed Executive Order 13778 and the Agencies issued their *Notice of Intention to Review and Revise the Clean Water Rule* (“Notice of Intention”)²⁵ – eight minutes after the Executive Order was signed.²⁶ The fact that the Agencies have already predetermined the outcome is also apparent in a May 5, 2017 News Release from the Agencies in which Administrator Pruitt and Douglas Lamont, a senior official performing the duties of the Assistant Secretary of the Army for Civil Works, announced that the Agencies were soliciting input from the states on “a new definition of protected waters that **is in-line with** a Supreme Court Justice Antonin Scalia’s opinion in the 2006

²² *Id.*

²³ Executive Order 13778 – Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12497 (2017).

²⁴ Clean Water Rule: Definition of “Waters of the United States” 80 Fed. Reg. 37054 (June 29, 2015) and docket available at: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-088>.

²⁵ U.S. EPA and U.S. Army Corps, Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (Mar. 6, 2017).

²⁶ See EPA Administrator Scott Pruitt CERAWeek, *supra* note 11.

Rapanos v. United States case.”²⁷ Notably, the Agencies announced their new definition would be “in-line” with Justice Scalia’s opinion simultaneous with announcing the start of the consultation process with the states.

The predetermined outcome is also apparent from the approach the Agencies took in obtaining comment from state regulatory agencies and local governments. For example, on April 19, 2017,²⁸ the Agencies held a “initial” federalism consultation briefing for representatives of state and local government and, prior to consulting, announced that the Agencies had already determined that they intended “to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.”²⁹

Similarly, the EPA’s charge to its Local Government Advisory Committee (“LGAC”), and the opportunity for comment the EPA provided to state Clean Water Agencies, both improperly constrain and limit input to what the Agencies have already decided to do – i.e. withdraw the Clean Water Rule and replace it with a rule based on Justice Scalia’s opinion in *Rapanos*. With regard to the LGAC directive, on May 17, 2017, the EPA informed the advisory group that its role was to provide recommendations on a revised definition of “waters of the United States” that is described as follows:

“[t]he agencies intend to follow an expeditious two-step process to provide certainty with the rule: 1) Establish the legal status quo by re-codifying the regulation that was in place prior to issuance of the CWR now under the U.S. Court of Appeals for the Sixth Circuit’s stay of that rule. 2) Propose a new definition of Waters of the U.S. that would replace the 2015 CWR that reflects the principles outlined by Justice Scalia (*Rapanos* plurality opinion).”³⁰

²⁷ U.S. EPA and U.S. Army News Release, “EPA and U.S. Army Solicit State Input on Redefining ‘Waters of the U.S.’” “EPA is restoring states’ important role in the regulation of water” – Administrator Pruitt” (May 9, 2017) available at: <https://www.epa.gov/newsreleases/epa-and-us-army-solicit-state-input-redefining-waters-us-0> (**Attachment 4**).

²⁸ See U.S. EPA, Waters of the United States (WOTUS) Rulemaking Federalism Consultation, available at: <https://www.epa.gov/wotus-rule/federalism-consultation> and <https://www.epa.gov/wotus-rule/federalism-consultation-materials> (last accessed November 21, 2017).

²⁹ See U.S. EPA and Army Corps, E.O. 13132 Federalism Consultation Meeting The Definition of “Waters of the U.S.” (April 19, 2017) available at: https://www.epa.gov/sites/production/files/2017-09/documents/federalism_meeting.pdf (last accessed November 21, 2017).

³⁰ EPA’s Local Government Advisory Committee (LGAC) Draft Charge On ‘Waters of the U.S.’ (WOTUS), available at: <https://www.epa.gov/sites/production/files/2017-06/documents/lgac-wotus-charge-05-17-17-.pdf> (last accessed Sept. 27, 2017) (**Attachment 5**).

It is clear from the LGAC's Report in response to this charge that the committee understood this approach as the only option available for them to evaluate and provide recommendations upon.³¹ The Association of Clean Water Agencies also understood their opportunity for comment was constrained to the approach the Agencies had already predetermined, stating in their response to EPA that:

"We appreciate the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term "navigable waters" as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006) and as part of EPA's federalism consultation under Executive Order 13132 . . . Unfortunately, states have received limited information in the way of draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule . . ."³²

With limited exception, the comments provided by national organizations composed of state or tribal representatives in June of 2017 raised similar concerns as to the adequacy of the federalism consultation and information provided by the Agencies.³³

³¹ EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE Waters of the United States 2017 Report, (July 14, 2017) available at: <https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf> (**Attachment 6**); EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE Waters of the United States Meeting Summary, (June 29, 2017) available at: <https://www.epa.gov/sites/production/files/2017-07/documents/lgac-meetingsummary-june29-2017.pdf> (last accessed Sept. 27, 2017) (**Attachment 7**).

³² See *Letter from Association of Clean Water Agencies to The Honorable Scott Pruitt re: Federalism Process and WOTUS Rule Development* (June 19, 2017) available at: https://www.epa.gov/sites/production/files/2017-09/documents/us-acwa_2017-06-19.pdf. ("We appreciate the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term "navigable waters" as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006) and as part of EPA's federalism consultation under Executive Order 13132 . . . Unfortunately, states have received limited information in the way of draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule; **therefore, states can only provide similarly broad guidelines and advice at this juncture. ACWA will be considerably more useful as a resource for the agencies, and be able to provide state perspectives crucial to drafting a practically sound and legally defensible rule, if EPA shares proposed regulatory text or more specific regulatory options that are under consideration before EPA begins drafting the anticipated proposed rule of 'step 2'.**") (emphasis added) (**Attachment 8**).

³³ See June 2017 Federalism Letters from National Organizations to EPA and the Corps, available at: <https://www.epa.gov/wotus-rule/national-organizations> and <https://www.epa.gov/wotus-rule/tribal-consultation>. For example, the Environmental Council of the States ("ECOS") commented that "While

C. The Agencies are Improperly Attempting to Avoid Legal Requirements for Agency Rulemaking

The Agencies are also already in the middle of a separate rulemaking to attempt to rescind the Clean Water Rule and replace it with another legal definition without conducting any substantive evaluation and without “soliciting comments on the substance of what the definition of ‘waters of the United States’ should be under the CWA.”³⁴ In that rulemaking, the Agencies state the substantive evaluation of the definition of “waters of the United States” and opportunity for public comment will take place in the second step rulemaking, which they say they will do “as appropriate.”³⁵ That rulemaking, and this Notice, are improper and transparent attempts by the Agencies to avoid complying with bedrock principles of administrative law as they pursue their predetermined objective.³⁶

ECOS will not speak to all of the technical details of this rulemaking in this letter, states thank you for starting out the process with this consultation with governors, and emphasize the importance of ongoing and continuous state involvement – perhaps even through a negotiated rulemaking process in which states and the agencies engage in a dynamic conversation that incorporates diverse views and needs.” The National Association of Conservation Districts (“NACD”) commented that “[t]o ensure local input in the establishment of a new clean water rule, NACD recommends the establishment of a state-based advisory board . . . NACD applauds the early steps the EPA has taken to seek input. In its outreach to local entities, however, the EPA did not directly seek input from conservation districts, which under some states’ law are listed as having special expertise [sic] on natural resources issues.” The National League of Cities commented that “[a]s the agencies move forward with this process, we encourage the agencies to hold additional Federalism briefings, as appropriate, to gather ongoing feedback on the approach, definitions etc. from state and local governments.” The National Conference of State Legislatures (“NCSL”) commented that “[s]pecifically, NCSL encourages the administration to undertake a formal rulemaking process, inclusive of the required federalism consultation process with state and local governments. Additionally, we urge the agency to facilitate both formal and informal meetings with state and local elected officials to ensure that the agency can assess, from numerous viewpoints, various potential impacts of redefining the “waters of the United States” rule and to ensure that the voices and many interests across the nation play a role in the process. As partners in protecting America’s water resources, it is also essential that state governments have a clear understanding of the changes to the definition of “waters of the U.S.” and their impact on all aspects of the CWA. NCSL believes that early and frequent consultation can lead to a more positive outcome with better results, while also strengthening the federal, state and local government partnership.” The National Tribal Water Council (“NTWC”) commented that “[t]he NTWC views EPA and ACOE’s decision to follow a two-step rulemaking approach to repeal and replace the 2015 Clean Water Rule as weakening of the Clean Water Act (CWA) protection to tribal waters and poses an imminent threat to the health and welfare of tribal communities. The NTWC believes that EPA and ACOE have not provided a sound reason for repealing the Clean Water Rule.”

³⁴ Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899, 34903-34904 (July 27, 2017).

³⁵ *Id.* at 34903.

³⁶ See Final Comments Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-13681>,

The Agencies are proceeding as if withdrawal and replacement of the Clean Water Rule is a foregone conclusion mandated by Executive Order 13788. It is not. Executive Order 13778 does not mandate or authorize the withdrawal of the Clean Water Rule, the recodification of the prior definition of “waters of the United States,” or initiation of a two-step process for revising the CWA definition of “waters of the United States.” The Executive Order simply directs the Agencies to “**review**” the Clean Water Rule “for consistency with the policy set forth in section 1 of this order and **publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.**”³⁷

Review of the Clean Water Rule in accordance with Executive Order 13778 is a fundamental prerequisite to any additional rulemaking, yet the Agencies have simply disregarded this requirement in their rush to achieve their predetermined outcome. The Agencies must complete that review and disclose the results to the public prior to making a decision on withdrawing and replacing the Clean Water Rule with a new rule redefining “waters of the United States.” The burden is on the Agencies, not the public, to evaluate and provide valid legal and factual bases for the Agencies’ actions. Consulting with the public is not just a box the Agencies need to check along a predetermined course. The public needs this information for any public comment and input opportunities to be meaningful.

However, as a result of the Agencies’ failure to conduct any review before they made their decision and initiated these actions, the public has never been provided with any factual, technical or legal basis for withdrawing the Clean Water Rule, replacing it with a different definition on an “interim” basis, or replacing it with a different definition based on Justice Scalia’s opinion in *Rapanos* through a future “Step 2” rulemaking. The public has certainly not been provided any opportunities to review or provide substantive comment on either “Step 1” or an actual proposed “Step 2” definition. Despite this, the Agencies are proceeding as if the only issue remaining for the public to weigh in on is how the Agencies should redefine “waters of the United States” in a way that is consistent with their interpretation of Executive Order 13778 and Justice Scalia’s opinion in *Rapanos*. The public is being provided the “courtesy” of doing that in a “non-regulatory” docket, announced via a Federal Register Notice called “Announcement of

which are incorporated by reference herein.

³⁷ 82 Fed. Reg. at 12497 (emphasis added). Additionally, the policy objective set forth in Section 1 of the Executive Order is not consistent with the CWA. See Final Comments Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203, at 26-28, *supra* note 36.

public meeting dates,” and the contents of that docket will be placed in the administrative record for the “Step 2” rule the Agencies have not described or proposed. This bizarre approach to rulemaking is unprecedented, intentionally misleading and blatantly unlawful.

The Agencies also provided different questions to Listening Session participants shortly before the sessions based on their inclusion in agency-defined “sectors.”³⁸ Waterkeeper Alliance was categorized in the “environment and public advocacy” sector, and made an oral presentation during a Listening Session held on September 26, 2017.³⁹ On September 21, 2017, Waterkeeper Alliance received a set of questions representing “some of the questions” on which the Agencies were “inviting input.”⁴⁰ Those questions are as follows:

- For purposes of the Clean Water Act, what waters should be jurisdictional? Why?
- Are there certain waters or features that you recommend the agencies consider excluding from the proposed definition?
- Following *SWANCC* or *Rapanos*, did you or your constituents experience consequences (positive or negative) as a result of reduced assertion of jurisdiction? Can you provide documentation regarding any such changes?
- Do you have recommendations for how the agencies should interpret key terms in Justice Scalia’s opinion, such as “relatively permanent,” and “continuous surface connection”?
- What sources of costs and benefits should the agencies especially consider when considering a change in the definition of “waters of the U.S.” as suggested by the E.O.? Is there any information about costs and benefits the agencies should consider in their economic analysis?
- If particular water resources, such as ephemeral streams, intermittent streams, wetlands that don’t connect to the tributary system, or wetlands that don’t directly touch the tributary system are excluded from federal jurisdiction, how might this affect your constituencies?
- Do you foresee any unintended economic effects on your constituents as a result of a changes to the definition?

³⁸ U.S. EPA, *supra* note 13.

³⁹ See U.S. EPA, Waters of the United States (WOTUS) Rulemaking, Outreach Meetings <https://www.epa.gov/wotus-rule/outreach-meetings> (last accessed November 21, 2017). The oral presentation by Waterkeeper Alliance is hereby incorporated by reference.

⁴⁰ See Sept. 21, 2017 Email from Rose Kwok, U.S. Environmental Protection Agency Oceans, Wetlands, and Communities Division, to Kelly Hunter Foster, (**Attachment 9.**)

- Are there potential variations across states or tribes resulting from a new federal definition that may have an effect on your constituents and their communities?

These questions further illustrate that the Agencies are pursuing a preordained, but not yet disclosed, rule that utilizes Justice Scalia's opinion in *Rapanos* to redefine "waters of the United States" without complying with the APA, CWA, NEPA or the ESA.

For example, the Agencies are not asking whether they should withdraw the Clean Water Rule, how to define key terms from Justice Kennedy's opinion in *Rapanos* or even **if** they should define "relatively permanent" and "continuous surface connection" using Justice Scalia's opinion. All of the questions provided to Listening Session participants are geared toward the ultimate rule the Agencies have already decided to adopt, which intentionally skews public comment in that direction and discourages comments on other options. The Agencies are also asking the public to provide information on issues like the "unintended economic effects," "costs and benefits" and "potential variations across states or tribes" associated with changing the definition in the manner they intend, but have not disclosed. It is impossible for anyone to respond to these questions in a thoughtful, useful, and meaningful manner because the public has not seen the text of the Agency's proposed definition, has no way to know how the definition would change, and the Agencies have not conducted an economic or any other evaluation of that definition.

The Agencies are simply marching toward their predetermined outcome, and trying to change the law along the way, without providing the public (or even state, tribal and local governments) any meaningful notice or opportunity for comment. It should go without saying that the Agencies are legally obligated under the APA, the CWA, the ESA, NEPA, and myriad Executive Orders, including Executive Order 13778, to do much more than this.

At the law's most basic level, the Agencies are required to provide the public adequate, meaningful notice and opportunity for comment, but the Agencies have done neither. Courts at all levels have stressed the importance of public participation in rulemaking, and the D.C. Circuit has determined that notice and comment works: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."⁴¹

⁴¹ *International Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259

The CWA explicitly requires that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter *shall be provided for, encouraged, and assisted* by the Administrator and the States.⁴² Additionally, the APA requires agencies to provide notice of a proposed rule and the opportunity for comment.⁴³ The Agencies must comply with the APA and provide for public participation in all agency actions that create (or eliminate) law, *i.e.* promulgation of legislative or substantive rules.⁴⁴

Additionally, under the APA, the Agencies are required to “provide reasoned explanation” for their action, and “must show that there are good reasons” for withdrawing the Clean Water Rule and replacing it with different definition.⁴⁵ The Agencies must also demonstrate that their action is a “permissible construction,” of the CWA, *i.e.* that the Agency’s action is not “arbitrary, capricious, or manifestly contrary to the statute,”⁴⁶ and must provide a “reasoned explanation” for “disregarding facts and circumstances that underlay or were engendered by” the Clean Water Rule.⁴⁷ Agencies typically accomplish this by providing the public extensive factual, legal and technical bases for their actions with an Advance Notice of Proposed Rulemaking, or issuing a Proposed Rule based on multi-year, open process, and providing an adequate opportunity for review and comment.

By contrast, in this case, the Agencies are attempting to change the law by (1) undertaking one rulemaking without providing any substantive basis or opportunity for comment on the substance of that rule (Step 1), and (2) using a separate two-page announcement of meetings to obtain public comment on an undisclosed rule the Agencies will adopt at some unknown point in the future. The public cannot provide meaningful comments on the substance of the Agencies “Step 2” rule because the public has not been provided the text and supporting information for that rule, and the Agencies are not seeking substantive comments on retention of the Clean Water Rule

(D.C. Cir. 2005).

⁴² 33 U.S.C. § 1251(e) (*emphasis added*).

⁴³ 5 U.S.C. § 553.

⁴⁴ *See, e.g., Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

⁴⁵ *F.C.C. v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009)..

⁴⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

⁴⁷ *Fox*, 556 U.S. at 515-16.

or the prior regulatory definition. All of the input is being channeled through questions and characterizations designed to limit public input and advance the Agencies' "ultimate replacement rule." These actions violate the requirements of the APA, CWA, ESA, and NEPA.

II. THE CWA MANDATES A BROAD DEFINITION OF "WATERS OF THE UNITED STATES" CONSISTENT WITH THE INTENT OF CONGRESS

As a nation, we cannot have clean water unless we control pollution at its source – wherever that source may be. This entails protecting waters throughout the entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are connected to traditionally navigable waterways. With regard to the CWA, "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'⁴⁸ This is precisely why "Congress chose to define the waters covered by the Act broadly."⁴⁹

The breadth of the waters protected under the CWA, and the reasons therefore, were firmly established with the passage of the CWA in 1972 and are reflected in the Agency definitions of "waters of the United States" in 1973 (EPA) and 1977 (Corps), which protected navigable-in-fact waters, interstate waters, the territorial seas, impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and "[a]ll other waters . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce."⁵⁰ If we can ever hope to restore the chemical, physical and biological integrity of our nation's waters – which was the bedrock "objective" of Congress when it passed the CWA – it is essential that the definition of "waters of the United States" under the CWA protect traditionally navigable waters, interstate waters, intrastate waters, tributaries, adjacent waters, wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes, lakes, estuaries, and other waterbodies that either provide important functions themselves or have an influence on downstream waters.

Waterkeeper Alliance, Center for Biological Diversity and many other organizations

⁴⁸ U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-33 (1985) (*citing* H.R.Rep. No. 92-911, p.76 (1972); S.Rep. No. 92-414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742).

⁴⁹ *Id.*

⁵⁰ 40 C.F.R. § 122.3 (1981) (45 Fed. Reg. 33,290, 33,424 (May 19, 1980)); *see also* 33 C.F.R. § 323.2 (1983) (47 Fed. Reg. 31,794, 31,810 (July 22, 1982)).

have previously submitted lengthy comments to the Agencies regarding the proper definition of “waters of the United States” and the severe public health and environmental consequences associated with failing to ensure broad CWA jurisdiction as intended by Congress, including failure to protect ephemeral streams, intermittent streams, wetlands that do not connect to the tributary system, or wetlands that don’t directly touch the tributary system.⁵¹ We urge the Agencies to review and consider those comments prior to deciding if, why and how they will revise the CWA definition of “waters of the United States.” The Agencies must also review the substantial administrative record that already exists regarding this definition, and ensure that the definition, consistent with the intent of Congress, is broad enough “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵²

⁵¹ See, e.g., Final Comments Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-13681>; Comment submitted by Jason Totou, General Counsel, Everglades Law Center and Center for Biological Diversity, available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15545>; Comment submitted by Charles M. Tebbutt and Daniel M. Galpern, Law Offices of Charles M. Tebbutt, P.C. on behalf of Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15233>; and Comments submitted by national environmental organizations on the 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, available at: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0001>, which are a part of the official public docket in 2011 at EPA-HQ-OW-2011-0409-3608, all of which are incorporated by reference herein.

⁵² 33 U.S.C. §1251(a).

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WATERKEEPER® ALLIANCE

**Comments on Proposed Definition of Waters of the United States Under the Clean Water Act
Docket ID No. EPA-HQ-OW-2011-0880**

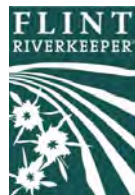


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Los Angeles WATERKEEPER
Orange County COASTKEEPER
Inland Empire WATERKEEPER
San Diego COASTKEEPER



Pamlico-Tar River Foundation







Nov. 14, 2014

VIA Email and Online Submission to ow-docket@epa.gov and www.regulations.gov

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments of Waterkeeper Alliance and Waterkeeper Organizations – Proposed Definition of Waters of the United States Under the Clean Water Act Docket ID No. EPA-HQ-OW-2011-0880

To Whom it May Concern:

Thank you for the opportunity to submit comments on the United States Environmental Protection Agency (“EPA”) and Department of Defense, Department of the Army, Corps of Engineers (“Corps”) proposed Definition of “Waters of the United States” Under the Clean Water Act rulemaking, 79 Federal Register 22188 (April 21, 2014) (hereinafter “Proposed Definition” or “Proposed Rule”).

INTRODUCTION

Waterkeeper Alliance is a global movement uniting more than 225 Waterkeeper Organizations around the world and focusing citizen advocacy on the issues that affect our waterways, from pollution to climate change. Waterkeepers patrol more than 1.5 million square miles of rivers, streams and coastlines in the Americas, Europe, Australia, Asia, and Africa. Part scientist, teacher and legal advocate, Waterkeepers combine firsthand knowledge of their waterways with an unwavering commitment to the rights of their communities and to the rule of law. Whether on the water, in a classroom, or in a courtroom, Waterkeepers

speak for the waters they defend with the backing of their local community and the collective strength of Waterkeeper Alliance.

Waterkeepers are a steadfast and powerful voice for swimmable, fishable, drinkable waters in 136 watersheds across the nation. The federal Clean Water Act (“CWA”) is the bedrock of Waterkeepers’ work to protect rivers, streams, lakes, wetlands, bays, and channels for the benefit of their communities. We use the CWA water quality standards and Section 303(d) List of Impaired Waters to evaluate pollution levels in waterbodies. We work with broad coalitions of government, private, non-profit, and individual partners to restore these waters through the Total Maximum Daily Load (“TMDL”) process, participating in permitting and rulemaking processes, and development of innovative pollution control and cleanup projects. We use the CWA’s citizen suit provisions to enforce CWA permits and regulatory standards against facilities that would otherwise pollute our waterways in violation of the law. In these and in many other ways, Waterkeepers depend on the CWA to protect waterways and the people who depend on clean water for drinking water, recreation, fishing, economic growth, food production, and all of the other water uses that sustain our way of life, health and well-being.

Our work - in which we have answered Congress’s call for “private attorneys general” to enforce the CWA when government entities lack the time or resources to do so themselves - is extremely challenging and resource intensive – requiring us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand and have seen firsthand how important a clear definition of the “waters of the United States” is to the functioning and effectiveness of the CWA. We believe that a strong, clear definition and agency interpretation of “waters of the United States” is critical to our collective work to protect our waterways.

The importance of maintaining a broad definition of “waters of the United States” under the CWA cannot be overstated. In the simplest terms, if a waterbody is not included within the definition, it cannot be protected from pollution or destruction under the CWA, and failure to protect a waterbody from pollution or destruction will adversely impact downstream waters and water users. It has been well known for decades that if we want to control water pollution, we must control pollution at its source. This entails protecting waters throughout the

entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are traditionally navigable. This concept was firmly established with the passage of the CWA in 1972 and in agency definitions of “waters of the United States” in 1973 (EPA) and 1975 (Corps).

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain polluted, and by some indications pollution appears to be increasing. For example, while water quality in a large percentage of our nation’s waters has not been assessed, the most recent available data from EPA shows water pollution in assessed waters has impaired 558,999 river/stream miles, 12,197,097 lake acres, 26,120 sq. miles of estuarine waters, 7,204 miles of coastal waters, and 53, 270 sq. miles of the Great Lakes.¹ By comparison, EPA’s 2004 CWA Section 305b Report showed that there were 246,002 miles of impaired rivers/streams and 10,451,401 acres of impaired lakes as of 2004.² As noted in the 2013 Draft Connectivity Report and the 2014 Science Advisory Board (“SAB”) Review of that Report, there is strong scientific evidence to support the conclusion that ephemeral streams, intermittent streams, perennial streams, flood plain wetlands, non-floodplain wetlands, and other waters are either connected to downstream waters or sustain the physical, chemical, and/or biological integrity of downstream waters.³

Our organizations support the Proposed Rule to the extent that it maintains protections for Traditionally Navigable Waters, Interstate Waters and Territorial Seas. Additionally, we support the agencies’ and the EPA Science Advisory

¹ EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, available at http://ofmpub.epa.gov/waters10/attains_nation.cy.control.

² EPA, Findings on the National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle, available at: http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2009_05_20_305b_2004report_report2004pt3.pdf.

³ U.S. Environmental Protection Agency, Office of Research and Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence - EPA/600/R-11/098B (Sept. 2013) (hereinafter “Connectivity Report”); U.S. Environmental Protection Agency, Science Advisory Board, Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 (Oct. 17, 2014) (hereinafter “SAB Report”). Both available at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report?OpenDocument

Board's ("SAB") work to document the "significant nexus" between these historically regulated waters and tributaries and adjacent waters. We agree that all of these waters (including headwaters, intermittent streams, ephemeral streams, and adjacent waters) are connected to downstream waters that are covered under the CWA, and that they should be categorically protected.

At the same time, we are greatly concerned by, among other things, the agencies' decision to narrow the class of tributaries and impoundments that have been historically given categorical protection, the agencies' removal of the broader interstate commerce grounds for protection of tributaries, adjacent waters and other waters, and the addition of new categorical exclusions for waters that have been covered historically and can have a significant impact on downstream water quality.

In recent years, the EPA and the Corps have implemented guidance documents that have reduced protections for our nation's waters by limiting jurisdiction in a manner that "was not justified by science or law."⁴ If we can ever hope to restore the chemical, physical and biological integrity of our nation's waters as envisioned and required by the CWA, it is essential that the definition of "waters of the United States" under the CWA protect traditionally navigable waters, interstate waters, tributaries, adjacent waters, wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes, lakes, estuaries, and other waterbodies that either provide important functions themselves or have an influence on downstream waters.

It is also essential that the agencies avoid creating definitional limitations and categorical exclusions designed to protect particular sources of pollution from regulation under the CWA. For example, while everyone agrees that agriculture is essential to our way of life, everyone also agrees that clean water is essential to our way of life. Agriculture remains one of the largest unaddressed sources of water pollution in the United States.⁵ As described in the National Enforcement Priorities document for FY 2008-2010:

⁴ Congressional Research Service Report R43455, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States" (June 10, 2014), p. 6.

⁵ Watershed Assessment, *supra* note 1.

States have consistently reported to EPA that agricultural activities, including CAFOs, are leading sources of pollutants such as nutrients (nitrogen and phosphorus), pathogens (bacteria), and organic enrichment (low dissolved oxygen) that are contributing to water quality impairment in U.S. surface waters. Adverse impacts on ecosystems and human health associated with discharges of animal wastes include fish kills, algal blooms, and fish advisories, contamination of drinking water sources, and transmission of disease-causing bacteria and parasites associated with food and waterborne diseases.⁶

Agricultural pollution is a major contributor to well-documented, severe problems in key water resources like Lake Erie, the Chesapeake Bay, the Gulf of Mexico, North Carolina's coastal estuaries, and many other significant water resources across the country.⁷ We believe that it is possible to protect and

⁶ <http://www.epa.gov/compliance/data/planning/priorities/cwacafo.html> [Emphasis added] [Webarchive]; See also, e.g., <http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2008prioritycwacafo.pdf>.

⁷ See, e.g., (Utah) <http://www.deq.utah.gov/FactSheets/docs/handouts/nutrients.pdf>; (Ohio) http://epa.ohio.gov/Portals/35/visioning_workshop/Ohio%20Nutrient%20Fact%20Sheet.pdf; (Univ. of California) <http://anrcatalog.ucdavis.edu/pdf/8055.pdf>; (Illinois) <http://www.epa.state.il.us/water/nutrient/>; (Massachusetts) <http://www.mass.gov/eea/docs/dep/water/drinking/alpha/i-through/manure.pdf>; (North Carolina) <http://www.cals.ncsu.edu/wq/wqp/wqpollutants/nutrients/factsheets/FactsheetNM1.pdf>; (Coastal Waters) <http://moritz.botany.ut.ee/~olli/eutrsem/Howarth02.pdf>; (EPA) http://water.epa.gov/polwaste/nps/agriculture_facts.cfm; (USGS) <http://pubs.usgs.gov/fs/fs218-96/>; (EPA) http://water.epa.gov/type/rsl/monitoring/upload/EPA-MARB-Fact-Sheet-112911_508.pdf; (Gulf) http://midwestadvocates.org/assets/resources/nutrient_pollution_factsheet.pdf; (EPA) <http://www2.epa.gov/nutrientpollution/where-occurs-lakes-and-rivers>; (Iowa) <http://www.iowapolicyproject.org/2010docs/100927-nutrients.pdf>; (Neuse River) http://portal.ncdenr.org/c/document_library/get_file?uuid=e438d6bc-d147-4d7b-8224-08e5a7c74b86&groupId=38364 and http://portal.ncdenr.org/c/document_library/get_file?uuid=48bc46d8-c344-4f07-a656-7a211157c985&groupId=38364; (Tar-Pamlico River) http://portal.ncdenr.org/c/document_library/get_file?uuid=b4f40c70-fc0f-4bd7-b4a1-

support both agricultural production and clean water, but we cannot protect water quality by grafting new exemptions for agriculture into the definition of “waters of the United States” under the CWA.

We urge the agencies to strengthen and clarify the final rule in line with our more detailed comments below, and to revise the preamble and Proposed Definition so that it protects the broadest category of waters allowed under the Commerce Clause, Article 1, Section 8, Clause 3 of the U.S. Constitution, as intended by Congress. Among other things, we urge the agencies to leave in place all portions of the existing definition that have not been invalidated by the Supreme Court, to remove new definitions and other language that limit jurisdiction in a manner not supported by law or science, remove categorical exclusions that are not supported by law or science, and to rely on all valid jurisdictional tests for categorically protecting waters to the full extent allowed under the Commerce Clause. While we agree that waters with a “significant nexus” to Traditional Navigable Waters, Interstate Waters and Territorial Seas should be jurisdictional, we do not agree that these are the only “other” waters that should be protected under the CWA.

I. THE PROPOSED DEFINITION SHOULD PROTECT ALL WATERS TO THE FULLEST EXTENT OF CONGRESS' COMMERCE POWER.

Passed in 1972, the CWA is a “comprehensive water quality statute designed to ‘restore and maintain the chemical, physical, and biological integrity of the

[b34dd7794f99&groupId=38364](http://portal.ncdenr.org/c/document_library/get_file?uuid=b34dd7794f99&groupId=38364) and http://portal.ncdenr.org/c/document_library/get_file?uuid=12436e58-83ba-41bf-bcac-d2fe4aa2b60c&groupId=38364; (Cape Fear River) http://portal.ncdenr.org/c/document_library/get_file?uuid=2eddbd59-b382-4b58-97ed-c4049bf4e8e4&groupId=38364; (California) http://ucanr.edu/sites/UCCE_LR/files/180590.pdf; (New York) <http://www.nnyagdev.org/PDF/NNYPFacts1w.pdf>

Nation's waters.”⁸ Accordingly, Congress provided that it intended for the CWA to apply to all “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362. The Supreme Court, in *United States v. Riverside Bayview Homes, Inc.*, held that Congress took a “broad, systemic view of the goal of maintaining and improving water quality” with the word integrity referring to “a condition in which the natural structure and function of ecosystems [are] maintained” and, the “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’”⁹ To accomplish these goals, the *Bayview* concluded, Congress defined the “waters covered by the Act broadly” to encompass all “waters of the United States.”¹⁰ The intended breadth of the CWA is apparent in the comprehensive goals, programs and directives in the Act, as well as in the legislative history, administrative decisions and case law interpreting the CWA.

Thus, unlike the Rivers and Harbors Act of 1899, the CWA was not focused on the prevention of “navigation-impeding” conduct in navigable waters.¹¹ Instead, as the Supreme Court held in *International Paper Co. v. Ouellette*, the CWA established “an all-encompassing program of water pollution regulation” that “applies to all point sources and virtually all bodies of water.”¹² While it was clear that the Commerce Clause provided adequate authority for regulation of navigable waters as demonstrated by extensive Rivers and Harbors Act precedent, it was equally clear that Congress’ Commerce Clause authority to control pollution was not limited to traditionally navigable waters or traditional tests of navigability.

⁸ *PUD No. 1 of Jefferson County v. Wash. Dep’t. of Ecology*, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).

⁹ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing H.R.Rep. No. 92-911, p. 76 (1972); S.Rep. No. 92-414, p. 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742).

¹⁰ *Id.*

¹¹ See *U.S. v. Holland*, 373 F. Supp. 665, 699-70 (M.D. Fla. 1974).

¹² *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

For example, in invalidating portions of the Corps' 1974 regulations that limited their CWA jurisdiction to waters "which had been, are, or may be, used for interstate or foreign commerce," the U.S. District Court for the District of Columbia held that "when Congress defined the term 'navigable waters' as 'the waters of the United States, including the territorial seas' it "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability."¹³ This holding is consistent with the Conference Committee Report for the final bill which states "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."¹⁴ When Representative John Dingell presented the Conference version of the bill to the House of Representatives, he explained that in defining "navigable waters" broadly for the purposes of the CWA as "waters of the United States, including the territorial seas":

The Conference bill defined the term 'navigable waters' broadly for water quality purposes. It means 'all the waters of the United States' in a geographic sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws. . . . Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.¹⁵

The Supreme Court has explicitly recognized on at least three occasions that "navigable waters" under the CWA include "something more than traditional

¹³ *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975); 39 Fed.Reg. 12119, (April 3, 1974).

¹⁴ Conference Report, Senate Report No. 92-1236, Sept. 28, 1972, page 144, U.S.Code Cong. & Admin. News 1972, p. 3822; Reprinted in Legislative History, Committee on Public Works, Committee Print, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, p. 327 (hereinafter "1972 Legislative History").

¹⁵ 118 Cong. Rec. 33, 756 (1972); 1972 Legislative History, *supra* note 14, at 250-51.

navigable waters.”¹⁶ In *Bayview*, the Supreme Court held that “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. In adopting this definition of “navigable waters, Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed “navigable” under the classical understanding of that term.”¹⁷ The *Bayview* Court also noted that, while “it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional test of navigability, it is another to assert that Congress intended to abandon traditional notions of “waters” and include in that term “wetlands” as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term “waters” to encompass wetlands adjacent to waters as more conventionally defined.”¹⁸

Consistent with Congressional intent, the EPA (1973)¹⁹ and the Corps (1977)²⁰ adopted regulations further defining “waters of the United States” for the purposes of the CWA to include broad categories of waters beyond those protected by traditional navigability tests. When the Corps adopted its definition of “waters of the United States” in 1977, it recognized that “[t]he 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.”²¹ In the Preamble to the Corps’ 1977 rule defining “waters of the United States,” the Corps stated:

Waters that fall within categories 1, 2, and 3 are obvious candidates

¹⁶ *Rapanos v. United States*, 547 U.S. 715, 731 (2006).

¹⁷ *Bayview*, 474 U.S. at 133 (emphasis added).

¹⁸ *Id.*

¹⁹ 38 Fed. Reg. 10834 (1973).

²⁰ 42 Fed. Reg. 37122 (1977).

²¹ 42 Fed. Reg. 37128 (July 19, 1977).

for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have an effect on interstate commerce. The 1975 definition identified certain of these waters. These included waters used:

- By interstate travelers for water-related recreational purposes;
- For the removal of fish that are sold in interstate commerce;
- For industrial purposes by industries in interstate commerce; and
- In the production of agricultural commodities sold or transported in interstate commerce.

We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over 'other waters' such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.²²

Under the 1977 Definition, waters in Categories 1, 2, and 3, over which jurisdiction was "obvious" under the Federal Government's broad powers to regulate interstate commerce, included: (1) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including

²² 42 Fed.Reg. 37127-37128 (*emphasis added*).

adjacent wetlands; (2) Tributaries to navigable waters of the U.S., including adjacent wetlands; and (3) Interstate waters and their tributaries, including adjacent wetlands.²³ Additionally, based on reasoning set forth above, the Corps included “other waters” where the use or destruction of the waters could affect interstate commerce within the definition of “waters of the United States.”²⁴

This basic approach to broadly defining “waters of the United States” has been in place since 1975 and is consistent with the intent of Congress announced in 1972. Accordingly, the current, longstanding definition of “Waters of the United States” includes:²⁵

- A. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- B. All interstate waters, including interstate “wetlands.”
- C. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.
- D. All impoundments of waters otherwise defined as waters of the United States under this definition.
- E. Tributaries of waters identified in paragraphs (a) through (d) of this definition.
- F. The territorial sea.

²³ 42 Fed. Reg. at 37127.

²⁴ *Id.* at 37127-28.

²⁵ See e.g., 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

G. “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition

A. THE SUPREME COURT OPINIONS IN *SWANCC* AND *RAPANOS* DO NOT MANDATE THE NARROWING OF CWA JURISDICTION PROPOSED BY THE EPA AND THE CORPS.

It is important to recognize that this definition of “waters of the United States” has never been overturned by a court. In fact, the courts have fairly uniformly applied this definition to the CWA for several decades. Despite this fact, the Preamble to the Proposed Definition states this longstanding definition must be amended in a manner that will narrow the agencies’ jurisdiction over the nation’s waters in “light of the Supreme Court decisions in *SWANCC* and *Rapanos*” and that the Proposed Definition “retains many of the existing provisions of that definition where revisions are not required in light of Supreme Court decisions and other bases for revisions.”²⁶ The Preamble further states that “[a]s a result of the Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction of the CWA in this proposed rule is narrower than that under the existing regulations.”²⁷

In particular, the agencies assert without explanation or justification that *SWANCC* and *Rapanos* require amendments to the existing definition’s protections for tributaries, adjacent waters, and other waters, as well as new definitions for various terms and new categorical exemptions. Of these changes, perhaps the most alarming is the agencies’ assertion that *SWANCC* and *Rapanos* mandate the removal of protections for “other waters” such as intrastate lakes, rivers, streams (including intermittent streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, where the “use, degradation, or destruction of which could affect interstate or foreign commerce.”²⁸ Based on this change to the existing definition alone, the agencies conclude that “[w]aters in a watershed where there is no connection to a

²⁶ Proposed Definition, 79 Fed.Reg. at 22189, 22192.

²⁷ Proposed Definition, 79 Fed.Reg. at 22192.

²⁸ *Id.*

traditional navigable water, interstate water or the territorial seas would not be 'waters of the United States.'"²⁹

With these changes in the existing regulatory definition, the EPA and the Corps propose to cease protecting waters across the country unless there is a demonstrable "significant nexus" to traditionally navigable waters, interstate waters or territorial seas.³⁰ In other words, waters will no longer be protected under the CWA to the fullest extent allowed by the Commerce Clause thereby nullifying Congressional intent and four decades of precedent to the contrary. This change to the definition is not required by the Supreme Court decisions in *SWANCC* or *Rapanos*, and the EPA and the Corps lack the authority to narrow the scope of CWA jurisdiction in this manner.³¹

With regard to *SWANCC*, in 2003, the EPA and the Corps made a similar proposal to consider, among other things, removing "other waters" and the associated commerce factors from the existing definition of "Waters of the United States" under the CWA in light of *SWANCC*.³² In the 2003 Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," the agencies asserted that *SWANCC* "calls into question whether CWA jurisdiction over isolated, intrastate, nonnavigable waters could now be predicated on the other factors listed in the 'Migratory Bird Rule' or the other rationales of 33 C.F.R. 328.3(a)(3)(i)-(iii) [the other waters interstate commerce factors]." ³³ However, the EPA and the Corps announced that they would not proceed with the proposed rule in December of 2003 after receiving opposition from around 99% of the 133,000 comments received, including numerous states,

²⁹ *Id.*

³⁰ *Id.*

³¹ *Cf. NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (striking down an EPA rule that attempted to exempt certain categories of point sources from the permit requirements of Clean Water Act section 402 where contrary Congressional intent was clear).

³² 68 Fed. Reg 1991 (January 15, 2003).

³³ 68 Fed. Reg at 1993.

nonprofits, individuals, and others.³⁴

What was true then, is true today. *SWANCC* held solely that 33 C.F.R. 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the Migratory Bird Rule, 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA.³⁵ Thus, the *SWANCC* decision was fact specific, related solely to Section 404 jurisdiction under the Migratory Bird Rule, and did not impact or limit the agencies' jurisdiction over any other waters, including tributaries (including non-navigable ones), adjacent wetlands, or "other waters" that could affect interstate or foreign commerce.³⁶ Because the Supreme Court limited its holding to the jurisdictional bases asserted by the Corps, the Migratory Bird Rule, the decision does not require or even imply that the agencies cannot rely on any other provisions of the current definition of "waters of the United States" to assert jurisdiction. The corollary is also true – *SWANCC* does not authorize the EPA and the Corps to delete any protections or jurisdictional bases under the Commerce Clause for tributaries, adjacent waters or other waters provided in the existing regulatory definition.

Similarly, the Supreme Court in *Rapanos*, did not invalidate the existing regulatory definition of "waters of the United States" when it opined on issues presented in the consolidated cases - the extent of CWA jurisdiction over wetlands adjacent to tributaries that are not traditionally navigable under Section 404 of the CWA.³⁷ The *Rapanos* Court issued no majority opinion, however, several differing opinions suggested three different tests for determining whether wetlands adjacent to non-navigable tributaries can be

³⁴ U.S. General Accounting Office. (Feb. 2004). WATERS AND WETLANDS Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction. (GAO Publication No. 04-297) (hereinafter "GAO Report") available at <http://www.gao.gov/new.items/d04297.pdf>.

³⁵ *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

³⁶ In support of our comments, we hereby incorporate by reference the comments submitted by national environmental organizations on the 2003 ANPRM and guidance, which are a part of the official public docket in 2003 at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2002-0050-0001> at HQ-OW-2002-0050-1674 (hereinafter "2003 Comments").

³⁷ *Rapanos*, 547 U.S. at 787.

covered under the CWA.³⁸

- **Relatively Permanent Test** - The four-justice plurality opinion, written by Justice Scalia, recognized that the CWA covers non-navigable waters in addition to traditionally navigable waters but declined to “decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act.”³⁹ Instead, the plurality focused on the meaning of “the waters” in 33 U.S.C. § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”) The plurality concluded that “[o]n this definition, ‘the waters of the United States’ include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in ‘streams,’ ‘oceans,’ ‘rivers,’ ‘lakes,’ and ‘bodies’ of water ‘forming geographical features.’ All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.”⁴⁰ The plurality also noted that “[b]y describing ‘waters’ as ‘relatively permanent,’” it did not “necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances” or “seasonal rivers which contain continuous flow during some months of the year . . .” and, further that it had “no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify a channel as a ‘wate[r] of the United States.’”⁴¹ Upon this opinion, the plurality remanded the cases back for a determination by the lower courts of “whether the ditches or drains near each wetland are “waters” in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.”⁴² Based on this test,

³⁸ *Id.*

³⁹ *Id.* at 731.

⁴⁰ *Id.* at 731-32 (internal citations omitted).

⁴¹ *Id.* at 732-33 (internal citations omitted).

⁴² *Id.* at 757.

wetlands adjacent to “relatively permanent” bodies of water are covered under the CWA as long as they possess as “continuous surface connection” to that water.

- **Significant Nexus Test** – Justice Kennedy issued an opinion concurring that the cases should be remanded, but firmly rejecting the plurality’s reasoning for doing so. Justice Kennedy identified the issue to be decided in the consolidated case as “whether the term ‘navigable waters’ in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact.” According to the opinion of Justice Kennedy, “the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute’s goals and purposes . . . With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters-functions such as pollutant trapping, flood control, and runoff storage . . . Accordingly, wetlands 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.’”⁴³ Justice Kennedy further opined that “[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, 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.”⁴⁴ Notably, Justice Kennedy indicated that the record before the Court contained evidence of a possible

⁴³ *Id.* at 779-80.

⁴⁴ *Id.* at 782.

significant nexus and that the end result of the remand may be that the “Corps assertion of jurisdiction is valid” as suggested by the dissent.⁴⁵

- **Existing Definition Test:** The dissent, written by Justice Stevens, and joined by Justices Souter, Ginsburg, and Breyer, opined that the agencies’ existing regulatory definition is a reasonable interpretation of the statutory term “waters of the United States.” The dissent rejected the rationales of the plurality and Justice Kennedy, but stated that “[g]iven 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.”⁴⁶

In concurring with the plurality opinion, Chief Justice Roberts noted that the *SWANCC* decision issued five years prior to *Rapanos*, “rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act . . .” and that, with regard to the Court’s decision regarding jurisdiction over the wetlands at issue in *Rapanos* that “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act.”⁴⁷ The *SWANCC* decision should be read as standing for the proposition that the Corps cannot rely on the Migratory Bird Rule to assert jurisdiction over a waters under the CWA and the *Rapanos* decision should similarly be applied to evaluate CWA jurisdiction over wetlands adjacent to non-navigable tributaries. However, because no opinion commanded a majority of the court, the agencies should not adopt the reasoning of any of the various opinions in the *Rapanos* decisions as the sole basis for asserting jurisdiction over any waterbody, and the agencies should not amend the existing definition of “waters of the United States” to remove the broad Commerce Clause grounds for covering tributaries, adjacent waters and other waters.

⁴⁵ *Id.* at 784.

⁴⁶ *Id.* at 810.

⁴⁷ *Id.* at 758.

B. THE PROPOSED DEFINITION SHOULD NOT REMOVE LONGSTANDING COMMERCE CLAUSE BASES FOR ASSERTING JURISDICTION OVER WATERS OR BASE JURISDICTION FOR CERTAIN WATERS SOLELY ON THE “SIGNIFICANT NEXUS” TEST.

Guidance issued by the EPA and the Corps in response to these decisions interpreted the *SWANCC* and *Rapanos* opinions more broadly than the decisions allow or require, and imposed limitations on assertions of jurisdiction that were inconsistent with those decisions resulting in less protections for historically protected waters and inconsistent application by the agencies.⁴⁸ For example, the 2008 *Rapanos* Guidance⁴⁹ inappropriately subjected tributary streams to less-than categorical protection although the existing regulatory definition protected, without any limitation, all tributaries to other specified jurisdictional waters and despite the fact that the Supreme Court has not issued any holding limiting the jurisdictional status of tributaries.⁵⁰ The 2003 and 2008 Guidance has left many categories of waters that had previously been protected vulnerable to pollution and destruction, and hindered regulatory and enforcement actions.⁵¹

⁴⁸ In support of our comments, we hereby incorporate by reference the comments submitted by national environmental organizations on the 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0001>, which are a part of the official public docket in 2011 at EPA-HQ-OW-2011-0409-3608 (hereinafter “2011 Comments”).

⁴⁹ U.S. Environmental Protection Agency and Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States* (2008) (hereinafter “Jurisdiction Following *Rapanos v. United States* and *Carabell v. United States*”) available at: http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdicti on_Following_Rapanos120208.pdf (providing for “significant nexus” analysis for “[n]on-navigable tributaries that are not relatively permanent”).

⁵⁰ *Id.* at p. 13-14.

⁵¹ See generally, Earthjustice et al., ABANDON: HOW THE BUSH ADMINISTRATION IS EXPOSING AMERICA’S WATERS TO HARM (2004), available at <http://ocw.tufts.edu/data/32/386826.pdf>. (hereinafter “Reckless Abandon”).

However, neither the Guidance Documents nor the proposed 2011 Guidance Document⁵² asserted that *SWANCC* and *Rapanos* require the agencies to adopt the “significant nexus” test as their sole basis for asserting jurisdiction over tributaries, adjacent waters, and others waters. To the contrary, the EPA, the Corps, and the Department of Justice have applied the existing rule, the “relatively permanent” test, and/or the “significant nexus” test to make CWA jurisdictional determinations depending on the water at issue. While we continue to believe that the “relatively permanent” and “significant nexus” tests only apply to wetlands adjacent to non-navigable tributaries, we understand that it may be wise to employ multiple jurisdictional tests in light of the lack of a majority opinion in *Rapanos*, as well as *dicta* in both Supreme Court decisions and some differences in the lower courts as to how to apply these holdings.⁵³

However, we cannot support the EPA and the Corps’ assertion that the *SWANCC* and *Rapanos* decisions compel the agencies to adopt the “significant nexus” as the sole test for making categorical and case-by-case jurisdictional determinations for tributaries, adjacent waters and other waters. Nor can we support the agencies’ position that they are compelled by these decisions to make many of the other changes to the definition of “waters of the United States” that they are proposing as detailed below, including most importantly the deletion of the existing regulatory provision for other waters, including intrastate waters, where the use, degradation, or destruction of those waters could affect interstate or foreign commerce.⁵⁴

While it is beyond dispute that the CWA applies to waters with a significant nexus to traditionally navigable waters, it equally apparent that Congress intended for the CWA to fully protect the nation’s waters and aquatic ecosystems without regard to whether the waters could satisfy historic navigability tests under the Commerce Clause. It is important to note here that, prior to the enactment of the CWA, both traditionally navigable waters and their non-navigable tributaries

⁵² EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA (2011), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0001>.

⁵³ See, e.g., cases discussed in 2011 Comments, *supra* note 48, at pp. 17-18.

⁵⁴ 40 C.F.R. § 122.2.

were believed to be well within the Commerce Clause powers of the federal government under traditional tests of navigability.⁵⁵ Congress intended to expand the number and nature of the waters covered under the CWA in order to protect water quality and aquatic ecosystems to the fullest extent permitted by the Commerce Clause. In other words, Congress intended to expand coverage under the CWA beyond traditionally navigable waters and their tributaries, and did not premise its expansion of jurisdiction on the manner in which waters were connected to traditionally navigable waters. To the contrary, Congress intended to repudiate the traditional navigability tests and limitations on federal authority and instead utilize the full authority of the federal government to regulate pollution of waters under the Commerce Clause.⁵⁶ *SWANCC* and *Rapanos* do not address, limit or establish the outer bounds of this authority for purposes of the CWA.⁵⁷

It is essential to the continued protection of our nation's waters that the EPA and the Corps continue to assert jurisdiction over waters to the fullest extent permitted by the Commerce Clause. In order to do so, the agencies should retain the following language in the regulatory definitions of "waters of the United States":

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

⁵⁵ The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to traditionally navigable waters and "into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. § 407.

⁵⁶ See e.g., *Bayview*, 474 U.S. at 133.

⁵⁷ In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. See 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court "expressly declined to reach" the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion).

- 1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
- 2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- 3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- 4) All impoundments of waters otherwise defined as waters of the United States under this definition;⁵⁸

There are many significant waterways that provide valuable ecological, recreational, drinking water, and economic services that may lose protections under the CWA if this language is removed. In particular, EPA representatives have identified certain waters that may lose CWA protections, including so-called “closed basins” and other waters that lack a connection to Traditionally Navigable Waters, which have historically been protected under these interstate commerce factors for “other waters.”⁵⁹

“Closed-basins” make up roughly 20% of the land area in New Mexico, and include many rivers, streams and wetlands. These waters provide recreation, fishing and waters supply in a region with scarce water resources and must be protected under the CWA.⁶⁰ Similarly, in southern Idaho, the Lost River drainages contain “numerous creeks and rivers that do not flow on the surface beyond the borders of the state,” but do flow into the Snake River Plain Aquifer,

⁵⁸ See, e.g., 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a)

⁵⁹ See, e.g., Waters of the US Rulemaking: U.S. EPA Briefing on What it Means for Your Watershed Work, Nancy Stoner, Acting Assistant Administrator for Water, US EPA; Donna Downington, US EPA; Damaris Christensen, US EPA (May 13, 2014) <http://www.rivernetwork.org/river-network-webinars#recorded>

⁶⁰ Reckless Abandon, supra Note 51, p. 7, available at <http://vault.sierraclub.org/watersentinels/downloads/RecklessAbandon.pdf>

which supplies water to the Snake River.⁶¹ Some rivers and streams within the Lost River Drainages have been determined to be jurisdictional based on navigability, however, others are jurisdictional solely because they have an impact on interstate commerce, including their use for irrigation water for cropland and the fact that they support “high-quality trout fisheries that attract anglers from all over the United States.”⁶²

Additionally, the EPA and the Corps should maintain the original regulatory language in definition of waters of the United States, particularly the precise language for tributaries, and should expressly retain all Commerce Clause grounds for including all waters within the regulatory definition of “waters of the United States.” As set forth in the 2003 Comments on the ANPRM, “the chemical, physical, and biological integrity of the Nation’s waters cannot be restored and maintained without Clean Water Act regulation of all waters protected by the current regulations – including those identified by the (a)(3) factors [other waters interstate commerce factors].”⁶³ As stated by the court in *U.S. v. Holland*:

It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution. Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms . . . Congress is not limited by the ‘navigable waters’ test in its authority to control pollution under the Commerce Clause.⁶⁴

To the extent that the EPA and the Corps need to clarify the existing definition, they should do so by adding language to the existing definition or making minor

⁶¹ Reckless Abandon, *supra* Note 51, pp. 12-13, available at <http://vault.sierraclub.org/watersentinel/downloads/RecklessAbandon.pdf>

⁶² *Id.*

⁶³ See 2003 Comments, *supra* note 36, at pp. 29-38.

⁶⁴ *Holland*, 373 F. Supp. at 673.

amendments to address the limitations on regulation of non-adjacent wetlands and similar waters raised by *SWANCC* and *Rapanos*. We support the addition of a case-by-case analysis for waters that are not covered by the existing definition or which are called into question by *SWANCC* and *Rapanos* as one such addition to the existing rule but believe that “relatively permanent” waters must also be included. We also support the agencies significant nexus analysis in the Preamble based on the Connectivity Report and the work of the SAB to provide additional jurisdictional grounds for inclusion of tributaries, adjacent water and other waters within the regulatory definition of “waters of the United States.”

II. TRADITIONALLY NAVIGABLE WATERS, INTERSTATE WATERS, TERRITORIAL SEAS, AND IMPOUNDMENTS.

The EPA and the Corps do not propose any changes to the existing definition of “waters of the United States” for: (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters, including interstate wetlands; and (3) The territorial seas. We support the agencies’ decision not to propose any changes to these sections of the definition. It is beyond dispute that these waters are encompassed within the meaning of “waters of the United States.”

However, it is essential that the agencies clarify the meaning of the term traditionally navigable waters in the Preamble consistent with our previous comments on this subject.⁶⁵ One particularly high-profile example of the potential for differing agency interpretations of navigability under the CWA involves the Los Angeles River where, in 2008, the Corps determined that only 4 miles of the 51-mile river was “navigable” and, therefore, subject to the automatic protections of CWA.⁶⁶ While public outcry and action by EPA eventually reversed

⁶⁵ See 2011 Comments, *supra* note 48, at pp. 18-28.

⁶⁶ See Letter from Jared Blumenfeld, Region 9 EPA Administrator, to Colonel Mark Troy, U.S. Army Corps of Engineers District Engineer, Los Angeles District, transmitting SPECIAL CASE EVALUATION REGARDING STATUS OF THE LOS ANGELES RIVER, CALIFORNIA, AS A TRADITIONAL NAVIGABLE WATER (July 6, 2010).

<http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf>.

that decision finding the river to be a Traditionally Navigable Water, the time and resources spent on this exercise would have been better spent in actually protecting the River.⁶⁷ The meaning of “navigability” under the CWA is especially important given the agencies decision to adopt the “significant nexus” test.

With regard to impoundments, although the agencies state in the Preamble that they are not making any substantive changes to this portion of the regulatory definition, the proposed language for impoundments would limit the types of impounded waters that will be subject to CWA protections. The existing regulatory definition includes “[a]ll impoundments of waters otherwise defined as waters of the United States under this definition.” The proposed language only includes impoundments of traditionally navigable waters, interstate waters, the territorial seas, and certain defined tributaries. No scientific or legal basis exists for excluding impoundments of adjacent waters and other waters included on the basis of a significant nexus analysis, and none was provided in the Preamble. As stated in the preamble, “[i]mpoundments are jurisdictional because as a legal matter an impoundment of a ‘water of the United States’ remains a ‘water of the United States’ and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters traditional navigable waters, interstate waters, or the territorial seas.”⁶⁸ There is equally true for adjacent waters and “other waters.”

III. ALL TRIBUTARIES TO ANY OTHER WATER OF THE U.S. MUST CONTINUE TO BE INCLUDED IN THE DEFINITION.

The Proposed Definition improperly narrows jurisdiction over tributaries. First, it limits jurisdiction to tributaries of traditionally navigable waters, interstate waters, territorial seas, and impoundments. Second, it improperly relies on the “significant nexus test” as the sole basis for asserting jurisdiction. Third, it adopts a new definition of tributaries that reduces the types of tributaries covered by the

⁶⁷ Id.

⁶⁸ *S. D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (“[N]or can we agree that one can denationalize national waters by exerting private control over them”), and *U.S. v. Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008) (“[I]t is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.”).

rule in a manner that is not supported by law and science. Fourth, it categorically exempts “ditches” from coverage even if the ditches are otherwise tributaries contrary to law and science.

Under the agencies’ existing regulations, all tributaries to traditionally navigable waters, interstate waters, impoundments, and “other waters” are defined as “waters of the United States.”⁶⁹ All of the tributaries protected under the existing regulation must continue to be covered in the Proposed Definition. As demonstrated previously, the Supreme Court has not issued any opinion that limits the jurisdiction over tributaries. To the contrary, it is well settled that tributaries are jurisdictional waters within the meaning of “waters of the United States.”⁷⁰ Neither *SWANCC* nor *Rapanos* invalidated or limited the scope of jurisdiction provided by the existing definition’s inclusion of tributaries.⁷¹ Additionally, all tributaries to all other “water of the United States” must be included with the definition and given categorical protection. Tributaries are obviously connected, and thus adversely impact, their downstream waters. This is consistent with the findings of the Connectivity Report and the SAB Report, as well as the individual comment of the SAB members.⁷²

⁶⁹ See *e.g.*, 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

⁷⁰ See, *e.g.*, *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 997 (9th Cir. 2007) (“The Supreme Court has since confirmed that regulable waters of the United States include tributaries of traditionally navigable waters and wetlands adjacent to navigable waters and their tributaries. The only question reserved in *Riverside Bayview Homes* was the issue of CWA jurisdiction over truly isolated waters.” citing *Bayview*, 474 U.S. at 106; 33 C.F.R. 328.3(a)(1),(4),(7); and *Rapanos*, 547 U.S. at 792 n. 3); see also *Benjamin v. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210, 1215 & n. 2 (D. Or. 2009) (indicating that jurisdiction over tributaries did not require demonstration of significant nexus); *United States v. Vierstra*, 2011 WL 1064526, at *5 (D. Id. Mar. 18, 2011) (“It is an open question as to whether Justice Kennedy’s concurrence applies in the tributary context.”). But see, *e.g.*, *United States v. Robison*, 505 F.3d 1208 (11th Cir 2007) (applying “significant nexus” analysis to tributary stream).

⁷¹ See 2011 Comments, *supra* note 48, at pp. 9-15; see also 2003 Comments, *supra* note 36 at pp. 4-6.

⁷² Compilation of Preliminary Comments from Individual Panel Members on the Scientific and Technical Basis of the Proposed Rule Title “Definition of ‘Waters of the United States’ Under the Clean Water Act” (August 14, 2014) (hereinafter “Member Comments”).

Further, the agency must clarify in the definition of tributary and/or the Preamble what it intends when it states that in order to be defined as a tributary, the tributary must contribute “flow, either directly or through another water, to a water identified in paragraphs (l)(1)(i) through (iv).” It is unclear from this language whether the agencies will require “another water” to also be a defined “water of the United States.” We urge the agencies to clarify that they mean any body of water whether it is a defined “water of the United States or not.” This would be consistent with the Connectivity Report and the law. While this interpretation is implied by the language in footnote 3 of the Proposed Definition, it requires further clarification.⁷³

Jurisdictional limitations for tributaries under the existing definition arose nearly exclusively from the agencies’ 2003 and 2008 Guidance. This Guidance placed additional requirements on the agencies’ ability to assert CWA jurisdiction over tributaries that were not required or supported by law and science. However, even under the 2008 Guidance, the agencies claimed jurisdiction over non-navigable tributaries that met the “relatively permanent” or the “significant nexus” test.⁷⁴ Although we disagree with the interpretation of the “relatively permanent” and “significant nexus” tests reflected in the 2008 Guidance for the reasons set forth in our comments,⁷⁵ the 2008 Guidance document illustrates that the agencies believed that tributaries could be protected under both of these *Rapanos* jurisdictional tests. Accordingly, it is difficult to understand why the agencies are only applying the “significant nexus” test to determine the extent of jurisdiction over tributaries in the Proposed Definition and Preamble.⁷⁶ We

⁷³ See 79 Fed.Reg. at 22191, fn. 3.

⁷⁴ Jurisdiction Following *Rapanos v. United States* and *Carabell v. United States*, *supra* note 49.

⁷⁵ In support of our comments, we hereby incorporate by reference the comments submitted by national environmental organizations on the 2008 Guidance, which are a part of the official public docket in 2011 at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW--0282-0001> at HQ-OW-2002-0050-1674.

⁷⁶ Proposed Definition, 79 Fed.Reg. at 22189, 22201 (“The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus,

strongly object to the agencies' approach – the EPA and the Corps should be asserting jurisdiction over all tributaries covered under the existing regulations, all tributaries that meet the “relatively permanent” test and all tributaries that meet the “significant nexus” test. There is simply no valid legal or scientific reason to do otherwise.

Although we believe that the EPA and the Corps should not rely solely on the “significant nexus” analysis as the agencies' basis for including tributaries in the definition, we do agree that the inclusion of ephemeral, intermittent and perennial tributaries, as “waters of the United States” is legally and scientifically sound and is supported by the EPA's “significant nexus” analysis, the Connectivity Report, and the SAB Member Comments. We also believe that wetlands, lakes and ponds should be included as tributaries based on the findings of the Connectivity Report and many individual SAB Member Comments.⁷⁷

In addition to the Connectivity Report and SAB Report, numerous scientific reports and government documents from across the country illustrate the importance of protecting these waters. A recent report produced by Trout Unlimited, using USGS National Hydrography Dataset, documents the abundance and importance of intermittent and headwater streams across the country showing, for example, that 48 percent of stream miles with native trout historical range are classified as intermittent or ephemeral, and 58 percent of stream miles are in headwater streams.⁷⁸ The Trout Unlimited Report also states that 64 percent of stream miles with salmon/steelhead range are classified as intermittent or ephemeral, and 57 percent of stream miles are in headwater streams. In North Carolina, research conducted by the North Carolina Department of Natural Resources – Division of Water Quality, concluded that:

alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw.”).

⁷⁷ See e.g., Connectivity Report *supra* note 3, at 1-8 (nutrient removal and cycling); Member Comments, *supra* note 72 Rosi-Marshall at 81 and Sullivan at 85.

⁷⁸ Rising to the Challenge – How Anglers Can Respond to Threats to Fishing in America, *available at*: http://www.tu.org/sites/default/files/TU_Rising_to_the_Challenge_web.pdf.

In summary, staff of the Division of Water Quality have been conducting intensive research on headwater streams and headwater wetlands across the state for the past several years. Headwater streams are very common and provide significant benefits to downstream water quality and aquatic life. Intermittent streams have significant aquatic life even though their flow is not constant throughout the year. Headwater wetlands are often associated with these streams and provide important water quality filtration to protect downstream water quality as well as significant aquatic life habitat. Therefore based on this on-going research, the Division of Water Quality believes that protection of these headwater streams and wetlands is essential to protect downstream water quality.⁷⁹

Further, the agencies should not narrow jurisdiction over tributaries through the adoption of a mandatory requirement for tributaries to possess a bed, bank, and Ordinary High Water Mark (“OHWM”). The existence of an OHWM should not be a requirement for asserting jurisdiction over tributaries, as it is not supported by law and science. As noted in the Connectivity Report and the Member Comments, the requirement of an OHWM improperly limits jurisdiction, and is not consistent with the science regarding how tributaries are affected by pollution or how tributaries impact downstream waters.

The Proposed Definition incorporates the definition of OHWM from existing regulations developed for the CWA Section 404 Program into the definition of tributary. The definition is taken from 33 C.F.R. 328.3(e) which provides:

The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical

⁷⁹ Memo from John Dorney, Wetlands Program Development Unit, NC DWQ. April 5, 2006. Background information on the water quality and aquatic life values of headwater streams and headwater wetlands, available at http://aswm.org/pdf_lib/cover_letter_and_summary_nc.pdf.

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.

While this definition may have some reasonable meaning in the context of determining the boundaries of waters where dredge and fill activities are proposed, it has nothing to do with the extent of “waters of the United States” in the context of regulating and responding to the discharge of pollutants. As the Corps noted in 1977:

Prior to enactment of the FWPCA, the mean tide line or (mean higher tide line on the West Coast) was used to delineate the shoreward extent of jurisdiction over the regulation of most activities in tidal waters under the 1899 Act as well as for mapping, delineation of property boundaries, and other related purposes. In freshwater lakes, rivers and streams that are navigable waters of the United States, the landward limit of Jurisdiction has been traditionally established at the ordinary high water mark. The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. 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.⁸⁰

Thus, the concept of an OHWM or High Water line was utilized in the context of the Rivers and Harbors Act of 1899 and jurisdictional consideration related to traditional navigability where “[t]he need to protect navigable capacity of a waterway above the mean high water line was obviously minimal.”⁸¹ The inapplicability of this limitation to the CWA was addressed in the *Holland* case

⁸⁰ 42 Fed. Reg. 37122, 37128 (July 19, 1977).

⁸¹ *Holland*, 373 F. Supp. at 670-673.

which outlined both the authority and need to regulate waters beyond the reach of the traditional navigability tests and stated that “to recognize this and yet hold that pollution does not affect interstate commerce unless committed in navigable waters below the mean high water line would be contrary to reason.”⁸²

These long-held views as to the inapplicability of the OHWM to the meaning of “waters of the United States” under the CWA are confirmed by the Connectivity Report which further provides that “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associates alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”⁸³ There is nothing in the Connectivity Report to support the idea that these connections are limited to tributaries with OHWMs or that OHWMs are the sole indicator of connectivity. Individual SAB members also expressed disagreement or concern with the addition of a requirement for an OHWM for tributaries. For example, one member stated that:

The definition of the lotic-type tributary is appropriately comprehensive because it inherently includes ephemeral and intermittent streams (as well as perennial) streams. The former types are often overlooked but ecologically important, particularly in arid landscapes with seasonal patterns of precipitation. However, there may be some types of tributaries, such as spring-fed streams, that lack an obvious OHWM because their groundwater sources dominate the water budget, are temporally stable, and so there is no fluctuation in the hydrograph to generate a ‘line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear line on the banks . . .’ Therefore the definition should be ‘bed and bank, and sometimes an OHWM.’⁸⁴

⁸² *Id.*

⁸³ Connectivity Report, *supra* note 3, at 1-3, and related Chapters.

⁸⁴ Member Comments, *supra* note 72, Aldous at 2-3 (internal citations omitted).

Another SAB member similarly commented that the Proposed Definition should allow “flexibility to for [sic] field personnel to define functional tributaries, even where those functional tributaries might lack obvious indicators of bed and bank (e.g., alluvial deposits on the bed of a headwater stream in a humid mountain setting) but have less obvious indicators of tributary flows (e.g., directionally bent herbaceous vegetation and subtle debris lines in swales connecting vernal pools to downstream waters in arid and semi-arid settings).”⁸⁵

In addition to the fact that there is no sound legal or scientific basis for adding the requirement for an OHWM to the jurisdictional requirements, it is important to note there have been extensive problems with interpretation and implementation of the OHWM requirement in the CWA Section 404 Program. This issue also demonstrates why the OHWM requirement should not be included in the definition of tributary. For example, the U.S. General Accounting Office (“GAO”) has noted that the Corps’ definition of OHWM is ambiguous, and may be reasonably interpreted differently by competent staff.⁸⁶ For example:

- The Portland District reported that it was difficult to identify the OHWM, even in portions of the Columbia River and that three different staff would likely make three different jurisdictional determinations.
- The Philadelphia District reported that identifying OHWMs in the upper reaches of watersheds was one of its most difficult challenges, as one progresses upstream, the depth of the bed and bank diminishes, and the key indicators of an ordinary high water mark gradually disappear.

The GAO also noted that “officials from the Chicago District said that because their district was heavily urbanized many channels had been manipulated and contained, often in ways that obscured the ordinary high water mark” and that identifying the OHWM in the arid West was particularly difficult due to intermittent flow and flooding. There is no valid scientific or legal basis for excluding channelized streams, the upper reaches of tributaries, or streams in

⁸⁵ Member Comments, *supra* note 72, *Rains* at 71.

⁸⁶ GAO Report, *supra* note 34.

arid regions that lack an OHWM from the definition of “waters of the United States.” To the contrary, the need to include and protect these waters is well documented through the Connectivity Report and is supported by the SAB Report.

IV. DITCHES SHOULD NOT BE CATEGORICALLY EXCLUDED FROM THE DEFINITION.

The Proposed Definition also provides a categorical exclusion for certain defined ditches and we strongly object to this provision. There is no sound legal or scientific basis for categorically excluding ditches, and this is especially true when those ditches otherwise meet the definition of tributary or any other defined “water of the United States.” The Proposed Rule establishes, for the first time, a categorical exclusion for two types of ditches and states that they are not “waters of the United States” notwithstanding whether they would otherwise meet the requirements for being identified as a traditionally navigable water, interstate water, territorial sea, impoundment, tributary, adjacent water, or other water with a significant nexus.

Although the agencies state in the Preamble that they are simply codifying longstanding exemptions for waters over which the agencies “have generally not asserted CWA jurisdiction,”⁸⁷ with regard to ditches, the proposed categorical exemption is not consistent with any longstanding exemption.⁸⁸ Historically, ditches have commonly been protected under the CWA because they are actually streams that have been altered, transport pollutants to downstream waters, or have begun to serve ecological functions like natural tributaries. Ditches can and are required to be regulated under the CWA if they flow into other “waters of the United States” even when they are man-made.⁸⁹

⁸⁷ 79 Fed. Reg. 22189.

⁸⁸ See 2003 Guidance, 58 Fed. Reg. 1995, 1997; Jurisdiction Following *Rapanos v. United States* and *Carabell v. United States* supra note 49, pp. 1, 8.

⁸⁹ See, e.g., *Holland*, 373 F. Supp. at 673-74; *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F. 3d 526, 533-34 (9th Cir. 2001); *U.S. v. St. Bernard Parish*, 589 F.Supp. 617, 620 (E.D. La. 1984); *U.S. v. Gerke Excavating, Inc.*, 412 F.3d 804, 805-06 (7th Cir. 2005) (“A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It

With regard to tributaries, the Proposed Definition states “[a] tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.” There are compelling legal and scientific reasons for ensuring that man-altered and man-made waters are covered as tributaries, and those reasons apply equally to ditches. As the 11th Circuit stated in the case of *U.S. v. Eidson*, “[t]here is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes.”⁹⁰

We believe that ditches should be categorically included when they otherwise meet the definition of a “water of the United States,” including specifically a tributary. We also believe that ditches should be protected when they meet either the “relatively permanent” or “significant nexus” test without regard to the agencies’ unspecified policy considerations. The agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of “waters of the United States” for policy or any other agency administrative purpose.⁹¹

We are equally concerned that the agencies are proposing to adopt a categorical exemption for ditches, yet they did not define many of the key terms in the exemptions, including “ditches,” “uplands,” “perennial”⁹² or “through another

wouldn't make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart.”), *vacated* 126 S.Ct. 2964 (2006), *on remand* 464 F.3d 723 (7th Cir. 2006) (remanding to district court to apply *Rapanos*), *cert. denied* 128 S.Ct. 45 (2007); *Community Assn. for Restoration of Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954-955 (C.A.9 2002).

⁹⁰ *U.S. v. Eidson*, 108 F.3d 1336, 1342, (11th Cir. 1997) *cert. denied*, 522 U.S. 899 (1997).

⁹¹ 1972 Legislative History, *supra* note 14, p. 327; *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975); *Cf. NRDC v. Costle*, 568 F.2d at 1377.

⁹² See USGS, *Defining Perennial, Intermittent and Ephemeral Channels in Eastern Kentucky; Application to Forestry Best Management Practices* (2001) (“Although the USGS monitors thousands of perennial streams, they seldom monitor intermittent or ephemeral streams. The

water” which are subject to varying interpretations. While as stated previously, we object to any categorical exemption for ditches, we believe it is important to point out that the failure to define these key terms can have significant impacts on the ability of the agencies to protect water quality.

For example, as noted by the plurality in *Rapanos*, a “ditch” can mean different things in different contexts, but when ditches hold water permanently they are typically referred to as “rivers,” “creeks,” “streams,” “moats,” or “canals.”⁹³ While we are not sure that this is always the case, the *Rapanos* Court’s discussion of the issue illustrates the problem with the agencies’ failure to define the term “ditches.” For example, it seems apparent that the agencies would not intend to categorically exempt any water that may be equally referred to as either as ditch or as a ditch or a canal, river, creek, or stream.

Simply adding a common definition of ditches will not resolve the concern with the categorical exemption because it is often difficult or impossible to determine whether a “ditch” is a natural waterway or a man-made waterway, and the answer to the question is legally and scientifically irrelevant in any event because both can have significant impacts on water quality.⁹⁴ Ditches on agricultural lands “result in rapid removal of excess water over a relatively short time period. This water flowing over the land surface has relatively high energy sufficient to detach and transport soil particles and constituents attached to them, such as phosphorus, organic nitrogen, and many pesticides.”⁹⁵ Ditching and

map delineation between perennial-intermittent and intermittent-ephemeral is based on conceptual landscape relationships with very little supportive data, and the accuracy is certainly questionable, especially at the site level.”) *available at* <http://water.usgs.gov/wrri/00grants/KYchannels.html>.

⁹³ *Rapanos*, 547 U.S. at 736, fn. 7.

⁹⁴ USGS, North Carolina Water Science Center, Artificial Drainage, *available at* http://nc.water.usgs.gov/projects/tile_drains/index.html.

⁹⁵ Gilliam, J.W., D.L. Osmond, and R.O.Evans. 1997. Selected Agricultural Best Management Practices to Control Nitrogen in the Neuse River Basin. North Carolina Agricultural Research Service Technical Bulletin 311, North Carolina State University, Raleigh, NC. CONTROLLED

channelization are prevalent in the Chesapeake Bay watershed, and “[d]itching on agricultural lands in the Pocomoke River watershed is an extensive practice that has been used to drain wetlands”, which have been found to be a significant source of sediment loading to the watershed.”⁹⁶ A significant percentage of stream miles within the coastal plain of North Carolina are modified natural stream channels and ditches. According to the North Carolina Department of Environment and Natural Resources, “[i]t may be difficult to differentiate between an artificial feature (e.g. ditch or canal) and a natural stream that has been modified (e.g. straightened or relocated).”⁹⁷ In North Carolina, many swine concentrated animal feed operations (“CAFOs”) are located “in an area of the coastal plain where the groundwater table is high which requires ditching or tile drain in order to allow for crop harvesting and waste application. These are direct conveyances for the highly nutrient laden water to reach surface waters. These operations are having a significant negative impact on the Neuse River water quality.”⁹⁸ Without regulatory oversight over these waters that feed North Carolina’s rivers and coastal estuaries, we are likely to be unable to restore water quality and fisheries that are severely impaired by pathogens, nitrogen and phosphorus.

DRAINAGE: WHAT IS IT and HOW DOES IT WORK?, available at <http://www.soil.ncsu.edu/publications/BMPs/drainage.html>

⁹⁶ A. Gellis, et al., IDENTIFYING SOURCES OF FINE-GRAINED SUSPENDED-SEDIMENT FOR THE POCOMOKE RIVER, AN EASTERN SHORE TRIBUTARY TO THE CHESAPEAKE BAY, PROCEEDINGS of the Eighth Federal Interagency Sedimentation Conference (8thFISC), April 2-6, 2006, Reno, NV, USA, available at http://pubs.usgs.gov/misc/FISC_1947-2006/pdf/1st-7thFISCs-CD/8thFISC/Session%205C-1_Gellis.pdf.

⁹⁷ North Carolina Division of Water Quality, Identification Methods for the Origins of Intermittent and Perennial streams, Version 4.11 (NCDENR 2010), available at http://www.xerces.org/wp-content/uploads/2009/03/NC_2010_Methodology_identification_intermittent_perennial_streams.pdf.

⁹⁸ North Carolina Department of Environment and Natural Resources, Division of Water, Neuse River Basin, Water Quality Plans, Cycle 4 - July 2009, at p. 360, available at <http://portal.ncdenr.org/web/wq/ps/bpu/basin/neuse>; See also, USGS, Scientific Investigations Report 2004-5123, Ionic Composition and Nitrate in Drainage Water From Fields Fertilized with Different Nitrogen Sources, Middle Swamp Watershed, North Carolina, August 2000 - August 2001 (2004), available at <http://pubs.usgs.gov/sir/2004/5123/>.

Additionally, there is no sound scientific reason to categorical exclude upland ditches with less than perennial flow. Upland ditches that contribute flow ephemeral, intermittently or perennially can have substantial impacts on downstream water quality to the same extent as any other tributary. In fact, they can often have a more significant impact if they are very near a discharge point as they often serve to increase water flow downstream. As noted in the Connectivity Report, “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associates alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”⁹⁹ This view is echoed in the comments from many individual SAB members:

- “In response to the query, I suggest that the flow regime in identified ditches should be less than intermittent flow, rather than less than perennial flow as proposed, based on my familiarity with the science associated with the Connectivity Report. This would apply only to those ditches not excluded by the proposed regulation and that meet the proposed definition of tributary as ‘waters of the United States.’”¹⁰⁰
- “It is important to note, however, that even when not jurisdictional waters, these non-wetland swales, gullies, rills and specific types of ditches may still be a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) or for purposes of a significant nexus analysis under paragraph (a)(7). For example, a wetland may be a ‘water of the United States,’ meeting the proposed definition of ‘neighboring’ because it is connected to such a tributary by a non-jurisdictional ditch that does not meet the definition of a ‘tributary.’ The entire concept of water body connectivity is that integrated ecological units comprised of aquatic systems distributed across the landscape are intimately linked through a suite of pathways. How is it consistent with this notion or in the spirit of the CWA that the ditch that connects two

⁹⁹ Connectivity Report, *supra* note 3, pp. 1-3.

¹⁰⁰ Member Comments, *supra* note 72, Dr. Jennifer Tank Comments at 93.

‘waters of the U.S.’ is not jurisdictional? . . . I am not convinced that the science currently exists to summarily exclude certain groups other waters including gullies, swales, artificial lakes and ponds, and ditches that do not contribute flow to a jurisdictional water body. These waters should be assessed along a gradient of connectivity on a case-specific basis until the science is available to make an appropriate determination for the respective class as a whole.”¹⁰¹

- “Exclusion b(3) – ‘ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow’ – together, these three criteria may suffice, but the distinction between perennial and less-than-perennial flow may be a cause for concern. P 22203 states, ‘Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and therefore any such upland ditch would not be subject to regulation.’ In parts of southeast Michigan, Ohio and Indiana, topography is very flat and ditches flow primarily during times of heavy rain. Some ditches are sufficiently deep that they will pond water until the receiving river stage drops enough for water to flow from the ditch to the river. Yet such ditches commonly receive from surrounding lands, and episodically deliver, significant nutrients to downstream waters. In the aggregate, they are the source/conduit for the majority of contaminants reaching downstream waters (‘most of the materials found in rivers originate outside of them.’ P 22247). Indeed, this situation describes much of the drainage into western Lake Erie, where harmful algal blooms due to excessive nutrient loading have caused beach closings, and in August 2014 a three-day ban on drinking water for some 400,000 of the residents in and near Toledo, OH. In short, using the criterion of ‘less-than-perennial’ flow to exclude ditches may not be consistent with addressing nutrient and sediment loading that affects drinking water, beach use, fishing, and other uses.”¹⁰²

¹⁰¹ Member Comments, *supra* note 72, Dr. Mazeika Sullivan at 89-90.

¹⁰² Member Comments, *supra* note 72, Dr. David Allen at 14.

- “On page 2203[sic], the EPA seeks guidance on the appropriate flow requirements for a ditch located wholly in uplands to be jurisdictional. In particular it would appear that ditches with intermittent flow would supply considerable water, sediment, nutrients, metals such as zinc from tire wear, etc. to downstream waters and there would appear to be no reason such features should not be considered jurisdictional.”¹⁰³
- “Each of these types of human alterations affect connectivity and therefore can impact the chemical, physical, and biological integrity of the downgradient waters. As surface water features, ditches and canals function as either perennial or intermittent streams or tributaries and should be legally treated as such. Regardless of source, these ditches convey or store water and chemical/physical/biological sediment and materials spatially on a temporal basis (rate, magnitude, and frequency). The water from ditches can leak to provide groundwater recharge to the sediments or bedrock beneath the ditch, or accumulate groundwater discharge in its flow (serve as a drain) or both. These functions can be temporal (seasonal) and spatial. In all, the ditch impacts many of the hydrologic systems in the vicinity of its location, and is connected Constructed ditches change the hydrologic flow paths of local and subregional hydrologic systems. Ditches are perennial, intermittent, or ephemeral water conveyors, and should be regulated as such.”¹⁰⁴

V. ADJACENT WATERS.

We support the inclusion of “adjacent waters” into the definition of “waters of the United States.” The inclusion of adjacent waters is generally consistent with the science and law,¹⁰⁵ but needs to be modified in accordance with the scientific analysis to ensure that adjacency includes the outer extent of the floodplain and

¹⁰³ Member Comments, *supra* note 72, Dr. Judson Harvey at 22.

¹⁰⁴ Member Comments, *supra* note 72, Dr. Kenneth Kolm at 49-50.

¹⁰⁵ See, e.g., Connectivity Report, *supra* note 3, at 1-9 to 1-10; Member Comments, *supra* note 72, Brooks at 17.

all riparian areas.¹⁰⁶ Similarly, the agencies should amend and clarify their approach to groundwater as it relates to adjacent waters and how it is considered in the Proposed Rule to conform to the extensive comments of the individual SAB members. Further, the agencies need to remove the categorical groundwater exemption from the Proposed Definition. The agencies should incorporate a more robust definition of adjacent that fully considers the four dimensional hydrologic connectivity and effects on downstream waters as discussed extensively in the Connectivity Report.

VI. OTHER WATERS SHOULD BE PROTECTED UNDER ALL OF THE JURISDICTIONAL TESTS.

We fully support the proposal to provide jurisdictional coverage in the Proposed Definition to “other waters” on a case-specific basis, “where those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.”¹⁰⁷ However, as noted previously, we do oppose the removal of other jurisdictional bases for protecting such waters, and urge the agencies to retain the existing “other waters” language in the current definition. The rule should protect waters to the fullest extent permitted by the Commerce Clause and the basis for including waters pursuant to that authority must be included in the Preamble and Response to Comments. We also urge the agencies to include all “relatively permanent” waters, maintain the existing language and jurisdictional bases for tributaries in the current definition, and include all jurisdictional bases in the Preamble. Additionally, the agencies should categorically include all waters for which there is adequate

¹⁰⁶ Members Comments, *supra* note 72, Kolm at 34 (“Distance to water body frequently is not the story”); Rains at 71; Rosi-Marshall at 82 (“River ecologists have known for a *long time* that it is more appropriate to think of rivers as part of a larger landscape or “riverscape” comprised of a river’s mainstem and adjacent floodplain or wetland habitats) (emphasis added); Sullivan at 86 (“...the scientific literature unequivocally supports the finding that floodplains and waters and wetlands in floodplain and riparian setting support the physical, chemical and biological integrity of downstream waters” and “[a]lthough distance can be one measure to help ascertain the degree of hydrological connectivity, biological and chemical connectivity should also be considered”).

¹⁰⁷ 79 Fed.Reg. at 22272.

scientific and legal basis to do so. According to a recent report from the Congressional Research Service, “[s]ince issuing [the 2003 and 2008] guidance documents, the agencies have not found jurisdiction over any ‘other water’ based solely on significant nexus.”¹⁰⁸ The agencies have only found other waters “jurisdictional because they meet another provision of the existing definition of ‘waters of the United States,’ such as a determination that the water as a traditional navigable water.”¹⁰⁹ Because of this, it is essential that the agencies fully use the Connectivity Report, the SAB Report and the Member Comments to categorically include waters.

Additionally, in conducting its “significant nexus” analysis, the agencies need to fully consider all aspects of connectivity,¹¹⁰ ensure that aggregate connections and functions are evaluated,¹¹¹ and evaluate groundwater connections.¹¹² Further, the agencies should make one-time determinations for similarly situated waters and apply the determinations to future decisions.¹¹³ Lastly, the agencies should ensure that geographic proximity not be used in the analysis in a manner that inappropriately minimizes the nexus.

¹⁰⁸ Congressional Research Service Report R43455, EPA and the Army Corps’ Proposed Rule to Define “Waters of the United States” (June 10, 2014). (citing Personal communication, EPA Office of Water, May 23, 2014.) available at <http://fas.org/sgp/crs/misc/R43455.pdf>

¹⁰⁹ *Id.*

¹¹⁰ See e.g. Member Comments, *supra* note 72, Aldous at 4; Kolm at 33 (“The flowpath framework should highlight the four-dimensional nature of connectivity, because four-dimensional connectivity scaled in a habitat-to-catchment context is a foundational aspect of freshwater ecology”) and 34 (noting that “these flowpaths are inherently four-dimensional (*i.e.*, longitudinal, lateral, vertical, and through time”); Rains at 73; Sullivan at 87.

¹¹¹ See Member Comments, *supra* note 72, Kolm at 49; Rosi-Marshall at 81-83; Sullivan at 84 and 88.

¹¹² See Member Comments, *supra* note 72, Kolm generally, especially 41 and 43.

¹¹³ See e.g., Member Comments, *supra* note 72, Rains, at 72 (springs in Western States); Connectivity Report, *supra* note 3 at 1-12 (depressional wetlands in Texas).

VII. THE AGENCIES SHOULD CONFIRM THAT THIS RULEMAKING DOES NOT ALTER EPA'S LONGSTANDING AND CONSISTENT INTERPRETATION REGARDING DISCHARGES VIA HYDROLOGIC CONNECTION. FURTHER, THE AGENCIES SHOULD NOT CATEGORICALLY EXCLUDE GROUNDWATER FROM THE DEFINITION OF WATERS OF THE UNITED STATES.

With respect to groundwater, commenters have two distinct requests:

- First, the agencies should confirm in its response to comments that nothing in this rule alters EPA's longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water.
- Second, EPA should not categorically exclude all groundwater from the definition of waters of the United States. Instead, consistent with the recommendations of the SAB and the conclusions of some courts, EPA should treat groundwater as "other waters" and allow groundwater to be considered a water of the United States on a case-by-case basis where a significant nexus can be established.

A. The Proposed Rule Does Not Alter EPA's Longstanding and Consistent Interpretation that the CWA May Cover Discharges of Pollutants from a Point Source to Surface Water that Occur Via Groundwater that Has a Direct Hydrologic Connection to the Surface Water.

EPA has a longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water. To be sure, in EPA's repeated expressions of that interpretation over the past 24 years, the Agency has *not* said that groundwater is a water of the United States, but rather that discharges to waters of the United States through groundwater may be covered by the CWA if the hydrologic connection is direct. That interpretation was not at issue in any of the Supreme Court decisions or called into question by

those decisions, and EPA is, wisely, *not* undertaking to revisit that interpretation in the current rulemaking.

Indeed, EPA could not revisit that issue in the final rule because it did not propose to do so in the April 21, 2014 Notice of Proposed Rulemaking, and such a change would not be a logical outgrowth of that notice.¹¹⁴ Moreover, the proposed rule provides further scientific support for EPA's longstanding and consistent interpretation concerning discharges via groundwater in that it extensively discusses the critical role that groundwater plays in establishing hydrological, chemical, and biological connections between surface waterbodies.¹¹⁵

To aid in clarity, the agencies should confirm in their response to comments that nothing in this rule alters EPA's longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water. Such confirmation may be useful, for example, to those who might otherwise confuse the issue of discharges to surface waters "via groundwater" with the separate issues of: (1) whether certain surface waters, including wetlands, are waters of the United States due to their subsurface connection to a jurisdictional water; or (2) whether certain groundwaters might themselves be considered waters of the United States under the significant nexus test.

While the EPA is well aware of its own pronouncements in the Federal Register and elsewhere, we review them here for the record, along with federal court decisions on this issue. As EPA explained to Congress in 2012:

The EPA has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a

¹¹⁴ Furthermore, any attempt to revisit that interpretation in the future would face a heavy burden given that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

¹¹⁵ See, e.g., 79 Fed. Reg. at 22196, 22207-08, 22222, 22242, and 22248.

direct hydrologic connection to the surface water.¹¹⁶

EPA has expressed that longstanding and consistent interpretation in final regulations published in the Federal Register following notice-and-comment rulemaking, in individual and general National Pollution Discharge Elimination System (“NPDES”) permits issued by EPA, in a brief filed by the Department of Justice on behalf of EPA in federal district court, and in the memorandum to Congress quoted above. In addition, the vast majority of federal courts that have considered the issue have likewise found that the CWA may cover discharges into directly hydrologically connected groundwater, if such connection can be demonstrated.

1. EPA’s Rulemaking Determinations.

The earliest rulemaking decision of which we are aware came in 1990, in a final stormwater rule, in which EPA responded to a public comment concerning CWA jurisdiction by stating: “. . . discharges to ground waters are not covered by this rulemaking (*unless there is a hydrological connection between the ground water and a nearby surface water body . . .*).”¹¹⁷

The following year, in a final water quality standards regulation for Indian reservations, EPA explained the issue in slightly more detail:

EPA and most courts addressing the issues have recognized two limited instances where, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. First, the Act requires NPDES permits for discharges to groundwater *where there is a direct hydrological connection between groundwaters and surface waters* ... because such discharges are effectively discharges to the directly connected surface waters. Second, it is EPA’s long-established position that

¹¹⁶ Letter from Arvin Ganesan to Hon. John L. Mica, Enclosure at 1, dated Feb. 13, 2012 (internal footnotes omitted).

¹¹⁷ 55 Fed. Reg. 47990, 47997 (col. 3) (Nov. 16, 1990) (citations omitted) (emphasis added).

water quality standards are required for certain underground segments of surface waters. *See Kentucky v. Train*, 9 ERC 1280 (E.D. Kentucky 1972). In such streams, the subterranean component must be sufficiently stream-like so as to possibly allow the passage of fish and other aquatic organisms from a surface segment of the stream into the underground segment.¹¹⁸

In 1998, again in a final stormwater rule, EPA reiterated:

EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection ("hydrologically connected") between the groundwater and the surface water.¹¹⁹

Following those three 1990s rulemakings, EPA articulated its interpretation and legal analysis at considerable length in a 2001 proposed rule for CAFOs. Under the heading "Applicability of the Regulations to Operations That Have a Direct Hydrologic Connection to Ground Water," EPA stated:

Because of its relevance to today's proposal, EPA is restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water.¹²⁰

Under the heading "Legal Basis," in a detailed and extensive analysis, EPA explained its statutory authority to "determin[e] that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act," and why "the Act is best interpreted to cover such discharges."

EPA's extensive legal analysis was comprehensive. First, EPA framed the legal issue. Rather than asking whether groundwater is regulated under the Clean

¹¹⁸ 56 Fed. Reg. 64876, 64892 (col. 3) (Dec. 12, 1991) (emphasis added).

¹¹⁹ 63 Fed. Reg. 7858, 7881 (col. 2) (Feb. 17, 1998).

¹²⁰ 66 Fed. Reg. 2960, 3015 (col. 1) (Jan. 12, 2001).

Water Act (as a point source or as a water of the United States), EPA asked “whether a discharge to surface waters via hydrologically connected ground water is unlawful.” EPA stated that it:

does not argue that the CWA directly regulates ground water quality. . . the question of whether Congress intended the NPDES program to regulate ground water quality . . . is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water.¹²¹

Exercising its authority to “fill gaps in the statutory framework.” EPA reasoned that excluding discharges that occur via groundwater would create a loophole inconsistent with the CWA’s statutory purposes:

[T]he Act is best interpreted to covers such discharges. . . . An interpretation of the CWA which excludes regulation of point source discharges to the waters of the U.S. which occur via groundwater would . . . be inconsistent with the overall Congressional goals expressed in the statute. . . . [T]here is no evidence that Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water.¹²²

To reach this conclusion, EPA “utilized its expertise in environmental science and policy to determine the proper scope of the CWA,” as well as the policymaking authority delegated by Congress.¹²³ “Given the Agency’s knowledge of the hydrologic cycle and aquatic ecosystems, the Agency has determined that when it is reasonably likely that such discharges will reach surface waters, the goals of the CWA can only be fulfilled if those discharges are regulated.”¹²⁴ Applying that

¹²¹ *Id.* at 3015-3016.

¹²² *Id.*

¹²³ *Id.* at 3018 (col. 1).

¹²⁴ *Id.* at 3018 (col. 1-2).

knowledge of hydrology and aquatic ecosystems, EPA further explained that the existence of a hydrologic connection is a question of fact: “The determination of whether a particular discharge to surface waters via ground water which has a direct hydrological connection which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations.”¹²⁵ To assure itself that its reasoning was sound and well-grounded, EPA examined the legislative history and found it consistent with EPA’s interpretation: “Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible discharges which entered the ‘navigable waters.’”¹²⁶ EPA also found that the courts agree: “[T]he majority of courts have determined that CWA jurisdiction may extend to surface water discharges via hydrologic connections. . . . The decisions which did not find authority to regulate such discharges under the CWA may, for the most part, be distinguished.”¹²⁷

In 2003, EPA finalized that CAFO rule, which the U.S. Court of Appeals reviewed in *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*¹²⁸ In that case, the Second Circuit explained that the shift from certain uniform national requirements governing discharges to surface waters via groundwater (in the proposed rule) to fully case-by-case determinations of hydrologic connection (in the final rule) did not alter EPA’s position on the scope of the CWA:

It is thus clear that when the EPA stated, in the Preamble to the Final Rule, that ‘requirements limiting the discharge of pollutants to surface water via groundwater ... are beyond the scope of today’s ELGs,’ Preamble to the Final Rule at 7216, the EPA meant only that uniform national requirements are beyond the scope of today’s ELGs. The EPA did not, in other words, mean to suggest that NPDES authorities lacked the power to impose groundwater-

¹²⁵ *Id.* at 3017 (col. 1).

¹²⁶ *Id.* at 3016 (col. 2).

¹²⁷ *Id.* at 3017 (col. 2-3).

¹²⁸ 399 F.3d 486 (2d Cir. 2005).

related requirements on a case-by-case basis, where necessary.¹²⁹

2. NPDES Permits Issued by EPA.

In 2011, EPA issued a NPDES permit to the Menominee Neopit Wastewater Treatment Facility in Wisconsin, based on data showing that the groundwater beneath the site “has a direct hydrologic connection to the adjacent surface water, the navigable waters of Tourtillotte Creek.”¹³⁰

EPA explained:

Based on the modeling and the porosity of the soil, the first of the new discharge plume would take 3 to 5 years to reach the creek and 13 to 21 years before the entire breadth of the plume reaches the creek. However, since the existing facility had been discharging to the groundwater since the facility began operations in the 1970's, the existing discharge plume is already reaching Tourtillotte Creek.¹³¹

EPA has permitted other facilities on a similar basis.¹³²

3. EPA's 2012 Memorandum to Congress.

As noted above, EPA expressed its position on this issue directly to Congress. In 2012, an EPA Associate Administrator responded to questions posed by U.S. Representative John L. Mica, in a memorandum, which EPA stated:

¹²⁹ *Id.* at 514 n.26.

¹³⁰ EPA Region 5, NPDES Permit No. WI0073059 Fact Sheet (April 2011) at 2.

¹³¹ *Id.*

¹³² *See, e.g.*, EPA Region 6, NPDES Permit No. NM0022306 Fact Sheet for Molycorp Mine (May 2006) at 4-6; *see also id.* at 7 describing NPDES permits issued to U.S. Liquids of Louisiana, Ltd. in 1999, Texas Eastman in 1976, and a CAFO general permit in 1993.

The EPA has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. . . . Whether or not such a hydrological connection exists, and the need for a National Pollutant Discharge Elimination System (NPDES) permit for any given source, is highly dependent on the facts and circumstances surrounding each permitting situation. . . . A number of factors are relevant in evaluating the connection between ground water and surface water, such as geology, flow and slope. A fact-specific evaluation could support a determination that an NPDES permit is required. . . .¹³³

4. EPA's Federal Court Brief.

In 2012, the U.S. Department of Justice, on behalf of EPA, confirmed to a federal district court that:

There can be circumstances where a discharge to groundwater, or even a discharge to soil which eventually leads to groundwater, is so directly and immediately connected hydrologically to surface water that a NPDES permit is required Accordingly, *specific* [discharges] can, under given circumstances, be found to be subject to NPDES permitting requirements.¹³⁴

5. Federal Court Decisions.

In numerous cases, federal courts around the country have reached similar conclusion as EPA and DOJ, upholding CWA jurisdiction over discharges of pollutants to surface waters that occur via groundwater.

¹³³ Letter from Arvin Ganesan to Hon. John L. Mica, Enclosure at 1, dated Feb. 13, 2012 (internal footnotes omitted).

¹³⁴ EPA Mem. in Support of Def.'s Mtn. for Summ. Judgment at 18-19, filed in *Conservation Law Found. v. EPA*, No. 10-cv-11455 (D. Mass., Sept. 21, 2012) (emphasis in original).

As noted above, in *Waterkeeper Alliance, Inc. v. U.S. EPA*, the Second Circuit upheld EPA's requirements for the discharge of pollutants from CAFOs to surface water via groundwater to be regulated, "as necessary, on a case-by-case basis."¹³⁵ The court found "sufficient record support for EPA's determination that groundwater-related requirements are better imposed on a case-by-case basis," given "that variability in topography, climate, distance to surface water, and geologic factors influence whether and how pollutant discharges at a particular site enter surface water via groundwater."¹³⁶

An overwhelming majority of other courts are in accord. At least 18 federal decisions have held that the CWA covers discharges to surface waters via hydrologically connected groundwater. The reasoning behind these decisions is clear: Congress did not intend to exempt from the CWA "the introduction of pollutants into the groundwater [that] adversely affects the adjoining surface waters."¹³⁷ As one court explained:

it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.¹³⁸

Notably after EPA's comprehensive discussion of the issue in its 2001 rulemaking, courts typically have deferred to that interpretation.¹³⁹

¹³⁵ *Waterkeeper Alliance*, 399 F.3d at 514-15 n.26.

¹³⁶ *Id.* at 515.

¹³⁷ *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001).

¹³⁸ *N. Cal. Riverwatch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, *7 (N.D. Cal. Sept. 1, 2005).

¹³⁹ *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009).

The 18 federal court decisions of which we are aware, in addition to *Waterkeeper Alliance v. U.S. EPA*, finding that the CWA may cover discharges of pollutants to surface waters that occur via groundwater having a direct hydrologic connection are:

- *Dague v. City of Burlington*, 935 F.2d 1343, 1347, 1355 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (where a city allowed groundwater to flow through contaminants in its landfill and then to migrate beyond the landfill boundaries into a pond and wetlands that were waters of the United States, court of appeals held that “district court’s conclusion that the city discharged pollutants into navigable waters from a point source properly applied the statute”);
- *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (CWA “authorizes EPA to regulate the disposal of pollutants into deep wells, at least when the regulation is undertaken in conjunction with limitations on the permittee’s discharges into surface waters”), *overruled on other grounds by City of West Chicago v. U.S. Nuclear Regulatory Comm’n*, 701 F.2d 632, 644 (7th Cir. 1983);
- *Hawai’i Wildlife Fund v. County of Maui*, No. 12-00198 SOM/BMK, 2014 U.S. Dist. LEXIS 74256, *35 (D. Hawaii May 30, 2014) (“liability arises even if the groundwater under the [sewage treatment facility] is not itself protected by the Clean Water Act, as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water”);
- *Ass’n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 U.S. Dist. LEXIS 39280, *49 (M.D. Tenn. Apr. 8, 2011) (“groundwater is subject to the CWA provided an impact [*sic*] on federal waters”);
- *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D.

Idaho 2009) (referring to EPA's interpretation and stating "there is little dispute that if the ground water is hydrologically connected to surface water, it can be subject to" the CWA);

- *Northwest Env'tl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 U.S. Dist. LEXIS 101359, *34 (D. Or. Oct. 30, 2009) ("In light of the EPA's regulatory pronouncements, . . . CWA covers discharges to navigable surface waters via hydrologically connected groundwater");
- *Hernandez v. Esso Std. Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States");
- *Coldani v. Hamm*, 2007 U.S. Dist. LEXIS 62644, *25 (E.D. Cal. Aug. 14, 2007) ("because Coldani has alleged that Lima Ranch polluted groundwater that is hydrologically connected to surface waters that constitute navigable waters, he has sufficiently alleged a claim within the purview of the CWA");
- *N. Cal. Riverwatch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, *7 (N.D. Cal. Sept. 1, 2005) ("the regulations of the CWA do encompass the discharge of pollutants from wastewater basins to navigable waters via connecting groundwaters");
- *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States");

- *Mutual Life Ins. Co. of New York v. Mobil Corp.*, No. 96-CV-1781, 1998 U.S. Dist. LEXIS 4513, at *6-*8 (N.D.N.Y. Mar. 31, 1998) (court denied motion to dismiss complaint alleging a hydrological connection, explaining that “plaintiff ultimately will have to prove a link between contaminated ground waters and navigable waters...”);
- *Friends of the Coast Fork v. County of Lane*, No. 95-6105-TC, 1997 U.S. Dist. LEXIS 22705, *8 (D. Or. Jan. 31, 1997) (“Defendant violated the CWA by discharging pollutants . . . into the groundwater which is hydrologically connected to the surface water”);
- *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) (“Because the CWA’s goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater”);
- *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995) (“[T]he Tenth Circuit’s expansive construction of the Clean Water Act’s jurisdictional reach ... foreclose[s] any argument that the CWA does not protect groundwater with some connection to surface waters”);
- *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) (“since 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”);
- *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (“allegations that [defendant] has and continues to discharge

pollutants into the soils and groundwater . . . which then make their way to [a surface water] through the groundwater state a cause of action under the Clean Water Act”);

- *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988) (plaintiff can prevail by showing discharges into “groundwater [that] is naturally connected to surface waters that constitute ‘navigable waters’ under the Clean Water Act”), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995); and
- *New York v. United States*, 620 F. Supp. 374, 380-81 (E.D.N.Y. 1985) (where State of New York asserted a claim under the CWA for an unpermitted discharge to surface water occurring via groundwater, declined to reach defendant’s argument that the CWA does not apply to groundwater, “since it is clear that plaintiff has alleged that the [subsurface discharges] threaten to contaminate . . . navigable waters”).

While a few decisions have found groundwater-related claims to be beyond the reach of the CWA, most of those cases pre-date EPA’s 2001 explanation of the CWA’s authority over hydrologically connected groundwater. Furthermore, the few contrary cases typically arose in situations where a hydrological connection to surface water had not been pled, was remote or entirely unproven, the plaintiff claimed that the CWA applies to *all* discharges to groundwater, or the court construed the issue as such. The most notable pre-2001 case is *Umatilla Waterquality Protective Ass’n, Inc. v. Smith Frozen Foods, Inc.*¹⁴⁰ But the holding in *Umatilla* depended heavily on the absence – at that time – of an authoritative statement from EPA.¹⁴¹ Indeed, in the wake of EPA’s 2001 determination, the

¹⁴⁰ *Umatilla Waterquality Protective Ass’n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1316-20 (D. Or. 1997).

¹⁴¹ *See id.* at 1317, 1319, 1320 (“these considerations ... would not signify if Congress or EPA had clearly spoken to the issue of groundwater coverage.”).

same court (the District of Oregon) disavowed *Umatilla*: “contrary to *Umatilla*, the CWA covers discharges to navigable surface waters via hydrologically connected groundwater.”¹⁴²

The current rulemaking does not alter EPA’s longstanding and consistent interpretation. The agencies should acknowledge that fact in their response to comments on the Proposed Definition.

B. EPA and the Corps Should Not Categorically Exclude All Groundwater from the Definition of Waters of the United States.

The agencies’ proposal to include language in the regulation categorically excluding groundwater from the definition of waters of the United States is scientifically and legal unsound. Many SAB panelists questioned this exclusion.

For example:

- Dr. David Allan questions the exclusion of “Groundwater, including groundwater drained through subsurface drainage systems” because “an important pathway for some nutrients and contaminants is via subsurface drainage systems to ditches that may not have perennial flow, but which may deliver much of the nonpoint runoff to downstream waters.” Dr. Allan concluded that “this exclusion is a concern, and should be recognized as such.”¹⁴³
- Likewise Dr. Robert Brooks stated that this exclusion “seems ill-advised because of the likely connectivity of surface flows into features such as karst sinkholes, with a potential to contaminate groundwater aquifers used for human water supplies, plus the

¹⁴² *Northwest Env'tl. Def. Ctr. v. Grabhorn, Inc.*, 2009 U.S. Dist. LEXIS 101359, *34 (D. Or. Oct. 30, 2009).

¹⁴³ Member Comments, *supra* note 72, compilation of comments of members at 14.

possibility of reconnections to surface water a reasonable distance away.”¹⁴⁴

- And following a lengthy analysis, Dr. Kenneth Kolm concluded: “In no cases should groundwater that is shown to be connected to ‘waters of the US’ be exempt.”¹⁴⁵

Courts have also agreed that groundwater can, and in some circumstances should, itself, be considered waters of the United States. For example, in the *Hawai’i Wildlife Fund v. County of Maui* case cited above, the court held that “liability arises even if the groundwater under the [discharging facility] is not itself protected by the Clean Water Act, as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water.”¹⁴⁶ However, the court went on to note:

That is not to say that groundwater can never be regulated under the *Healdsburg* test [i.e., under the Ninth Circuit’s decision in *N. Cal. River Watch v. City of Healdsburg*, which applied Justice Kennedy’s concurrence in *Rapanos* to find CWA coverage based on a subsurface connection]. An aquifer with a substantial nexus with navigable-in-fact water may itself be protected under the Clean Water Act even if it is not necessarily a conduit for pollutants.¹⁴⁷

The agencies’ proposed categorical exclusion of groundwater will leave ecologically important waters unprotected. The groundwater exclusions are scientifically and legally indefensible. Given that the proposed rule provides that a significant nexus between two surface waters can be demonstrated on the basis of a subsurface hydrologic connection, it makes no sense to categorically exclude

¹⁴⁴ *Id.* at 17.

¹⁴⁵ *Id.* at 49.

¹⁴⁶ *Hawai’i Wildlife Fund v. County of Maui*, 2014 U.S. Dist. LEXIS 74256 *35 (D. Haw. May 30, 2014).

¹⁴⁷ *Id.* at *45.

all groundwater, including the very same groundwater that forms the hydrologic connection between the two surface waters and establishes that significant nexus. Instead, EPA and the Corps should include groundwater as a subcategory of “other waters,” and leave its jurisdictional status to be determined on a case-by-case basis.

VIII. CATEGORICAL INCLUSION OF ADDITIONAL WATERS

The agencies requested comment on whether it should categorically include or exclude prairie potholes, vernal pools, Delmarva and Carolina bays, pocosins and playas, in the definition of “waters of the United States.” These waters should be categorically included within the definition because they either alone or in the aggregate have significant impacts on the quality of the nation’s water as demonstrated by the Connectivity Report and individual SAB member comments.¹⁴⁸

As noted in the Connectivity Report notes, when considered in the aggregate and from a biological perspective, waters that appear isolated on the landscape are not isolated at all from a biological and hydrological perspective.¹⁴⁹ As noted by SAB member Dr. Sullivan, “the science is currently available (partially summarized starting 22250) to demonstrate that sufficient connectivity exists without a case-specific analysis for certain subcategories of “other waters” (22216) (e.g. prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, western vernal pools). However, I do not believe that the science is sufficiently developed to support a determination to exclude any groups of ‘other waters’ (or subcategories thereof, e.g., Great Plains playa lakes) from jurisdictional status at this time in spite of the resource-intensive nature of a case-specific analytical approach.”¹⁵⁰

¹⁴⁸ With the one small exception of playas where the experts conclude that the science is not adequately developed but that it should simply mean that they be decided on a case-by-case basis, not categorically excluded. See Member Comments, *supra* note 72, Sullivan at 88; Connectivity Report *supra* note 3.

¹⁴⁹ Connectivity Report, *supra* note 3, at 1-11 and 1-12.

¹⁵⁰ Member Comments, *supra* note 72, Dr. Mazeika Sullivan at 88.

With regard to pocosins, “seventy percent of the nation’s pocosins are found in North Carolina, and they comprise approximately 50 percent of the State's freshwater wetlands . . .” and these pocosins:

- Serve as the last refuge for many upland and floodplain species requiring large blocks of habitat, especially area-sensitive, forest-interior birds and the black bear;
- Provide important habitat for four federally-listed endangered species and one federally-listed threatened species. Two other State-listed endangered species are also found there;
- Stabilize estuaries by controlling the rate of freshwater flow thereby regulating salinity. Much of the State's \$63 million commercial fishery depends on this estuarine regime;
- Contain 6 National Wildlife Refuges, 1 national and 2 State forests, 7 State parks, 5 State game lands, and 2 State natural areas. About 18 percent is owned by Federal and State forestry agencies.¹⁵¹

By 1993, Only 695,000 acres (31 percent) of North Carolina’s original 2.5 million acres of pocosins remained in their natural state resulting in fragmentation of wildlife habitat and removal of pollutant filtering capacity.¹⁵² The U.S. Department of Interior describes the impact of pocosin alteration as follows:

The remaining "islands" support less species diversity in fewer numbers. Thousands of contiguous acres are required for forest interior bird species and the black bear to survive. Drainage systems

¹⁵¹ U.S. Department of Interior, The Impact of Federal Programs on Wetlands, Vol. II, Chapter 16: North Carolina - The Pocosins and Other Freshwater Wetlands, available at: <http://www.doi.gov/pmb/oepec/wetlands2/v2ch16.cfm>.

¹⁵² *Id.*

interrupt the sheetflow that moves slowly across the wetland surface. Under natural conditions the runoff rises slowly after storms, often peaking several days after the rain. This process modulates the flow of water and controls the salinity of receiving waters. Nutrients, pollutants, and silt from agricultural runoff are filtered, as well. Once [agricultural] drainage is installed, peak and annual flows increase, and pulses of freshwater containing increased loads of chemicals and sediments are discharged into streams, marshes, and shallow estuarine nursery areas. Over 90 percent of North Carolina's commercial fish harvest depends on the estuaries. Comparisons show that unaltered areas maintained stable salinity, while areas which received drainage from ditched pocosins and non-alluvial swamp forests had salinity which varied by 100 percent over short periods of time. The altered areas produced fewer shrimp, finfish, and oysters. Other studies have linked agricultural drainage to excessive algal blooms and food chain disruptions. Studies of the Chowan River, which flows into Albemarle Sound, have linked increased nutrient loads from agricultural drainage and point source discharges to excessive algae blooms, subsequent food chain disruptions, and red sore disease problems. In 1976, about 95 percent of the white perch and half of the commercial fish caught in Albemarle Sound was discarded due to lesions.¹⁵³

Pocosins occur in the southeastern Coastal Plain of the U.S. from Virginia to north Florida and

. . . are often found adjacent to estuaries and have surface hydrologic connections that are linked to the regional water quality and salinity gradients found in estuarine areas along the southeastern coast. This hydrologic connection, combine with the vast continuous expanses of pocosins on the landscape, suggests that they are connected to regulated tributary waters of the United States. In addition, a survey of U.S. Army Corps of Engineers personnel in North Carolina indicates that most pocosins are considered hydrologically connected to

¹⁵³ *Id.*

regional water supplies since they are the source of water flow on the landscape where they dominate.¹⁵⁴

IX. WASTE TREATMENT SYSTEMS SHOULD NOT BE CATEGORICALLY EXCLUDED FROM THE DEFINITION

A. History of the Waste Treatment System Exclusion

On May 19, 1980, EPA issued a final rule that made clear that waste treatment systems created by impounding “waters of the United States” are not exempt from regulation under the CWA.¹⁵⁵ Specifically, the rule stated:

[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*¹⁵⁶

In response to industry pressure, however, EPA suspended the final sentence of the regulation, which states that “[t]he exclusion applies only to manmade bodies of water which neither were original created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States,” just a few months later.¹⁵⁷

¹⁵⁴ Richardson, Curtis J. Pocosins: Hydrologically isolated or integrated wetlands on the landscape? *Wetlands* 23(3): 563-576, available at http://nicholas.duke.edu/wetland/ab_Richardson_03.htm

¹⁵⁵ 45 FR 33,290, 33,424 (May 19, 1980)

¹⁵⁶ *Id.* at 33,424 (emphasis added).

¹⁵⁷ 45 Fed. Reg. 48,620, 48,620 (July 21, 1980).

EPA expressly cited the utility industry's concern that they would now have to obtain an NPDES permit to discharge into existing coal ash dumps that were created by impounding "waters of the United States" as part of its justification for suspending this part of the rule.¹⁵⁸ At that time, EPA claimed that this was a temporary suspension and promised to "promptly [] develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA [stated] it w[ould] amend the rule, or terminate the suspension."¹⁵⁹

EPA never followed through on its promise to address this important issue, allow the public an opportunity to provide comments, and finalize a new regulation or terminate the suspension. EPA, along with the Corps, is now proposing to formally codify the waste treatment system exclusion without providing notice and comment.¹⁶⁰ In the current proposed rule, the agencies state that they are not accepting public comment on the waste treatment exclusion because they maintain they have proposed no changes to the waste treatment system exclusion.¹⁶¹ Instead of making good on the promise it made over thirty years ago, EPA is now attempting to evade compliance with the CWA and Administrative Procedures Act by bootstrapping the impermissible exclusion onto the "waters of the United States" rule without notice and comment.

B. Coal Ash Surface Impoundments

This exclusion has had and will continue to have serious consequences for our nation's waters if the agencies finalize the proposed waste treatment exemption. For example, it has been a common practice for the utility industry to impound streams and rivers to create waste dumps for coal ash¹⁶² and other wastes

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See* 79 Fed. Reg. 22,188, 22,189 (Apr. 21, 2014).

¹⁶¹ 79 Fed. Reg. at 22,190.

¹⁶² Coal combustion waste or coal ash are wastes "from the combustion of coal in power plants and captured by pollution control technologies, like scrubbers." U.S. Env'tl. Prot. Agency, Coal

associated with coal-fired power plants. In fact, EPA cited the utility industry's concern about coal ash impoundments as one of the primary reasons EPA suspended the sentence making clear that permits are required for discharges into a waste treatment system created by impounding waters of the United States.¹⁶³ Coal-fired power plants generate millions of gallons of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. This pollution is discharged directly from the power plant; flows from old, unlined surface impoundments or "ponds" that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge; and seeps from unlined ponds and landfills into ground and surface waters. EPA estimates that *at least 5.5 billion pounds* of pollution are released into the environment by coal-burning power plants every year.¹⁶⁴ Coal-burning power plants are responsible for at least 50 to 60 percent of the toxic pollutants discharged into waters of the U.S.—more than the other nine top polluting industries *combined*.¹⁶⁵

Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Due to the bio-accumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems. In short, coal plant water pollution has serious public health consequences and causes lasting harm to the environment. According to EPA, power plant pollution has caused over 160 water bodies not to meet state water quality standards, prompted government agencies to issue fish consumption

Combustion Residuals – Proposed Rule,
<http://www.epa.gov/osw/nonhaz/industrial/special/fossil/ccr-rule/> (last visited Nov. 12, 2014).

¹⁶³ 45 Fed. Reg. at 48,620.

¹⁶⁴ EPA, Environmental Assessment for the Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category 3-14 (Apr. 2013), Docket No. EPA-HQ-OW-2009-0819-2260 [hereinafter EA].

¹⁶⁵ *Id.* at 3-13.

advisories for 185 waters, and degraded 399 water bodies across the country that serve as public drinking water supplies.¹⁶⁶

Utilities in other states have also created coal ash dumps by impounding or burying a waters of the United States. For example, the FirstEnergy Little Blue Run impoundment in Pennsylvania, the nation's largest coal ash impoundment, was created by damming Little Blue Run stream. The Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment and recently ordered a \$169 million dollar cleanup and closure of Little Blue Run.¹⁶⁷

Although EPA claims that the waste treatment exclusion is not a wholesale exemption from compliance with the CWA because they interpret it to apply only to impoundments that had been in existence for many years at the time it first suspended the final sentence of the definition, the plain language of the regulation includes no grandfather provisions or other limiting language related to the age of the impoundment. Further, EPA appears to be backtracking on this interpretation to allow new impoundments to claim the exemption so long as they obtain a § 404 permit. In short, EPA is proposing to codify a regulation that creates a gaping hole in the CWA and authorizes utilities and industrial operators to use our nation's waters as their own private sewers—all while refusing to follow notice and comment requirements of the CWA and the Administrative Procedures Act.

C. EPA is prohibited from codifying the waste treatment exclusion without providing notice and an opportunity for public comment.

EPA may not codify the waste treatment exclusion without following notice and comment requirements. The CWA requires that “[p]ublic participation in the

¹⁶⁶ <http://water.epa.gov/scitech/wastetech/guide/steam-electric/proposed.cfm>.

¹⁶⁷ Pa. Dep't of the Env't, DEP Issues Permit Requiring Closure of FirstEnergy's Little Blue Run Impoundment (Apr. 3, 2014), *available at* <http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=20442&typeid=1>.

development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator any State under this Act *shall be provided for, encouraged, and assisted* by the Administrator and the States.¹⁶⁸ Under the Administrative Procedures Act, EPA must provide for public participation for agency actions that create law (i.e. legislative rules or substantive rules).¹⁶⁹ Courts at all levels have stressed the importance of public participation in rulemaking, and the D.C. Circuit has determined that notice and comment works “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”¹⁷⁰ Yet thirty-four years after promising to promptly publish a proposed rule setting forth a revised definition of “waste treatment system,” EPA and the Corps are attempting to circumvent the Administrative Procedures Act and CWA Act by codifying the illegal waste treatment system exclusion without notice and comment rulemaking.

1. EPA’s proposed waste treatment system exclusion and codification of the suspension is a legislative rule.

There can be no doubt that the proposed waste treatment system exclusion and codification of the suspension is a legislative rule subject to notice and comment under the CWA and the Administrative Procedures Act. “To determine whether a regulatory action constitutes promulgation of a regulation, [courts] look to three factors: (1) the Agency’s own characterization of the action; (2) whether the action was published in the Federal Register . . . ; and (3) whether the action has binding effects on private parties or on the agency.”¹⁷¹

¹⁶⁸ 33 U.S.C. § 1251(e).

¹⁶⁹ See, e.g., *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

¹⁷⁰ *International Union, United Mine Workers of Am. V. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

¹⁷¹ *Iowa League of Cities v. EPA*, 711 F.3d 844, 862 (8th Cir. 2013) (citing *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)).

In the proposed rule, EPA expressly identified the action as a regulation (as opposed to an interpretive rule or general statement of policy).¹⁷² The action was published in the Federal Register.¹⁷³ Finally, the action has had and will continue to have a binding effect on both dischargers and the EPA. Industrial operators will arguably have a right to discharge into waste treatment impoundments created by impounding waters of the United States without a NPDES permit so long as the impoundments are “designed to meet the requirements of the Clean Water Act.”¹⁷⁴ Accordingly, the regulation will confer rights or obligations on private parties and the agency. Thus, the waste treatment system exclusion is subject to public review and comment.

Notably, EPA must follow public notice and comment procedures under the Administrative Procedures Act not only when it enacts a rule, but when it repeals a rule as well.¹⁷⁵ As discussed previously, in spite of its promise, EPA has never provided notice and comment on the suspension even though the suspension of the last sentence alters the definition and is akin to an actual repeal of a portion of the final rule.¹⁷⁶ Thus, EPA must follow public participation requirements for the waste treatment system exclusion.

2. The waste treatment system exclusion is not an interpretative rule or general statement of policy exempt from notice and comment requirements.

¹⁷² 79 Fed. Reg. at 22,217 (“The agencies’ longstanding regulations exclude waste treatment systems designed to meet the requirements of the CWA . . .”).

¹⁷³ *Id.* at 22,188.

¹⁷⁴ *Id.* at 22,268.

¹⁷⁵ *Nat’l Parks Conservation Ass’n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

¹⁷⁶ *See* 45 Fed. Reg. at 48,620.

The proposed regulation is not an interpretative rule or general statement of policy exempt from notice and comment requirements.¹⁷⁷ First, the regulation is not an interpretative rule because it grants substantive rights to private parties.¹⁷⁸ As discussed, the exclusion arguably works to allow persons to discharge into waters of the United States without a permit so long as it is a waste treatment system designed to meet the requirements of the CWA.¹⁷⁹

Further, the mere fact that an agency action amends an existing legislative rule may disqualify it from qualification as an interpretative rule.¹⁸⁰ EPA's suspension of the limits to the waste treatment system exception, whether "temporarily" on July 21, 1980 or again on April 21, 2014, amends the legislative rule finalized on July 18, 1980. Thus, because it amends an existing legislative rule, the waste treatment system exclusion cannot be an interpretative rule.

EPA knows how to classify an action as an interpretative rule when it intends to do so. For example, in the current proposed rule, EPA included a section on "discharges of dredged or fill material associated with certain agricultural conservation practices . . ." and identified it as an interpretative rule.¹⁸¹ EPA is unequivocal that it intends this latter section to be an interpretive rule rather than a substantive rule—mentioning "interpretive rule" five times over the course of a single paragraph. EPA never suggests the waste treatment system exemption is an interpretative rule in the proposal.

Second, the proposed regulation is not a general statement of policy. General statements of policy are "statements issued by an agency to advise the public

¹⁷⁷ See 5 U.S.C. § 553(b)(3)(A) (stating that notice and comment is not required for interpretative rules or a general statement of policy).

¹⁷⁸ See, e.g., *Brown Exp., Inc. v. U.S.*, 607 F.2d 695,700 (5th Cir. 1979) (noting that rules that grant substantive rights are not interpretative rules).

¹⁷⁹ 79 Fed. Reg. at 22,268.

¹⁸⁰ *Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001) ("If a rule is inconsistent with or amends an existing legislative rule, then it cannot be interpretive.").

¹⁸¹ 79 Fed. Reg. at 22,194.

prospectively of the manner in which the agency proposes to exercise a discretionary power.¹⁸² In this case, it is clear the definition of the waste treatment system definition is not a general statement of policy. In conclusion, the waste treatment system exclusion is not an interpretative rule or general statement of policy.

For all of these reasons, EPA must follow the public participation requirements set forth in the CWA and Administrative Procedures Act. EPA cannot bootstrap a procedurally deficient regulation into the current rulemaking and evade public participation requirements.

D. EPA does not have the authority to exempt waters of the United States from coverage under the Clean Water Act.

The waste treatment system exemption is in direct conflict with the CWA and fails Step One and Step Two of the *Chevron* test. The plain language of the proposed waste treatment system exclusion is that a waste treatment system designed to meet the requirements of the Clean Water Act is not a water of the United States even if it is created by impounding waters of the United States.¹⁸³ The proposed regulation states that “notwithstanding whether they meet the terms of paragraphs (a)(1) through (a)(3) of this definition,” “[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.”¹⁸⁴ Without the second part of the waste treatment system definition—“This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.” – the broad exclusion for waste treatment systems from CWA jurisdiction is directly contrary to the CWA and decades of law holding that once a body of water is a waters of the United States, it is always a waters of the United States.

¹⁸² *Brown*, 607 F.2d at 701 (citing U.S. Department of Justice, Attorney General’s Manual on the Administrative Procedure Act 30 n. 3 (1947)).

¹⁸³ See 79 Fed. Reg. at 22,268.

¹⁸⁴ *Id.*

1. It is unambiguous that EPA lacks the authority to exclude “waters of the United States” from coverage under the Clean Water Act.

While “waters of the United States” itself may be an ambiguous term that EPA is charged with promulgating regulations to define, it is clear from legislative history and decades of case law that Congress did not intend for EPA to allow our nation’s rivers, streams, and lakes to be used as private sewers for the utility industry and other polluters. Under *Chevron v. Natural Res. Def. Council*, courts examine “the intent of Congress” in creating the statute.¹⁸⁵ If the intent is clear, a court “gives effect to the unambiguously expressed intent of Congress.”¹⁸⁶ If, however, the statute is ambiguous, a court will defer to an agency’s interpretation of the statute if it is a “permissible construction.”¹⁸⁷

Here, senate reports speak directly to this issue and the general common law rule prior to the enactment of the CWA was that a body of water forever remains a waters of the United States once it has been identified as a waters of the United States.¹⁸⁸ Thus, the waste treatment system exclusion fails Step One.

2. The waste treatment system exclusion is directly contrary to the statute.

There is no doubt that Congress intended the broadest possible reach of the CWA. The original conferees stated that “the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative

¹⁸⁵ 467 U.S. 837, 842 (1984).

¹⁸⁶ *Id.* at 842-43.

¹⁸⁷ *Id.* at 843.

¹⁸⁸ *See, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (“When once found to be navigable, a waterway remains so.”).

purposes.”¹⁸⁹ The Senate Committee on Public Works, in approving the Federal Water Pollution Control Act Amendments of 1971 explicitly found that “[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable.”¹⁹⁰ Several years later, another Senate Report stated that the CWA “stipulated that the Nation’s fresh and marine waters would not be an element of the waste treatment process. That continues to be national policy.”¹⁹¹ There appear to be no contrary statements in the legislative history.

3. The waste treatment system exclusion is directly contrary to decades of judicial decisions reviewing the scope of “waters of the United States.”

In addition to legislative history that makes clear that the waste treatment system exclusion is contrary to Congressional intent, it is settled law that once a body of water is found to be waters of the United States, it always remains waters of the United States.¹⁹²

While some of these decisions examined the term “navigable waters” as opposed to “waters of the United States,” the Clean Water Act defines “navigable waters” as “the waters of the United States”¹⁹³ “[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In

¹⁸⁹ S. Rep. No. 92-1236, at 45 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822.

¹⁹⁰ S. Rep. No. 92-414, at 7 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

¹⁹¹ S. Rep. No. 95-370, at 4 (1977) *reprinted in* 1977 U.S.C.C.A.N. 4326, 4330.

¹⁹² See Scott Snyder, Note, *The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA’s Definition of “Waters of the United States”*, 21 N.Y.U. Env’tl. L.J. 504, 522-23 (2014) (providing overview of federal cases prior to the enactment of the Clean Water Act holding that once a body of water has been classified as a waters of the U.S., it remains a waters of the U.S. forever).

¹⁹³ 33 U.S.C. § 1362(7).

such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.”¹⁹⁴

In this case, there is no evidence Congress intended to depart from well settled law to allow EPA to remove bodies of water that fall squarely within the definition of “waters of the United States” from the reach of the CWA, especially where those “waters of the United States” are impounded to create a private dump for a utility or other industrial operation.¹⁹⁵ Further, it is difficult to justify a claim that navigable waters retain a protected status forever, while waters of the United States – by definition also “navigable waters” – can be excluded from protection when they are impounded for the purposes of creating a dump.¹⁹⁶

E. The waste treatment system exclusion is arbitrary, capricious, and directly contrary to the Clean Water Act.

Even if a court did find that the issue is ambiguous, EPA’s charge to define “waters of the United States” is not without bounds. EPA’s definition of “waters of the United States” is permissible so long as it is not “arbitrary, capricious, or manifestly contrary to the statute.”¹⁹⁷ In this case, the broad waste treatment system exclusion is directly contrary to the statute, and is arbitrary and capricious because the legislative history and decades of common law make clear that EPA cannot carve out “waters of the United States” from the scope of the CWA to create waste disposal sites, which is precisely what the waste treatment system exclusion does.¹⁹⁸

¹⁹⁴ *Carter v. United States*, 530 U.S. 255, 264 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952); See also Scott Snyder, Note, *The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA’s Definition of “Waters of the United States”*, 21 N.Y.U. Env’tl. L.J. 504, 523, 523 n. 95 (2014).

¹⁹⁵ *Id.* at 523.

¹⁹⁶ *Id.* at 522-23.

¹⁹⁷ *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

¹⁹⁸ See discussion *infra*.

F. EPA's interpretation of the proposed waste treatment exclusion does not make it a permissible construction of the Clean Water Act.

EPA has asserted that the waste treatment system exemption is not really as broad as the plain language suggests because it interprets the regulation to exclude only older waste treatment systems constructed from waters of the United States. Generally, an agency's interpretation of its own regulations is subject to judicial deference unless it is "plainly erroneous or inconsistent with the regulation."¹⁹⁹ In this case, the agency's interpretation conflicts with the plain language of the regulation, and EPA has also advanced a second interpretation that does exclude newly created waste treatment systems in some circumstances.

When it first finalized the waste treatment system definition in 1980, EPA stated that Congress did not intend for the CWA to exempt waste treatment systems created by impounding waters of the United States.²⁰⁰ Specifically, EPA said:

[b]ecause CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting interstate or foreign commerce.²⁰¹

Even when the agency suspended the final sentence of the regulation, it reiterated its purposes, noting that "[t]he Agency's purpose in the new last sentence was to ensure that dischargers did not escape treatment requirement by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands."²⁰²

¹⁹⁹ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

²⁰⁰ 45 Fed. Reg. at 33,298.

²⁰¹ *Id.*

²⁰² 45 Fed. Reg. at 48,620.

After promulgating a rule that reflected the intent of Congress that our nation's rivers, lakes, and streams not be used as private dumps and then backtracking, EPA came up with a new spin on how to treat coal ash and other industrial impoundments instead of following through on its promise to revisit the suspension. In a 1986 memorandum, EPA stated that it evaluates what is an exempt waste treatment system on a case-by-case basis, treating "newly created impoundments of waters of the U.S. as 'waters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments as 'wastewater treatment systems designed to meet the requirements of the CWA' and therefore are not 'waters of the U.S.'"²⁰³ EPA states that, in fact, it suspended the last sentence of the waste treatment system in order to allow for such case-by-case decisions.²⁰⁴ EPA has echoed the interpretation articulated in the 1986 memorandum in various scenarios.²⁰⁵

The fact of the matter is that the proposed waste treatment exemption does not include any language limiting the exclusion to treatment systems created by impounding waters of the United States. that have been in existence "for many years" or for any other time period. Further, it is illogical—and courts have held as much—to suggest that a waste impoundment created prior to the CWA has

²⁰³ Memo from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, at 7 (Apr. 2, 1986).

²⁰⁴ *Id.* (noting that EPA suspended the sentence in order to "restor[e] the ambiguity of the earlier regulations, so that each case must be decided on its own facts"). This is, of course, contrary to the purpose EPA provided when it suspended the sentence. 45 Fed. Reg. at 48,620 (noting that EPA would re-examine the waste treatment system definition and "promptly . . . develop a revised definition and to publish it as a proposed rule for public comment").

²⁰⁵ Jon Devine et al., *The Intended Scope of Clean Water Act Jurisdiction*, 41 *Envtl. L. Rep. News & Analysis* 11,118, 11,125 (2011) (citing Letter from Lisa P. Jackson, Administrator, EPA, to Rep. James L. Oberstar at 1 (Apr. 30, 2010)). EPA has taken the same position in litigation. *See W. Va. Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991).

been designed to meet the requirements of the CWA.²⁰⁶ In any event, the plain language of the proposed regulation arguably exempts all waste treatment systems designed to meet the requirements of the CWA created by impounding waters of the United States regardless of when the treatment systems are constructed.²⁰⁷

In fact, EPA and the Corps have attempted to reverse this interpretation in recent years to exclude *newly* created waste treatment systems from “waters of the United States.” *See, e.g.,* Jon Devine et al., *The Intended Scope of the Clean Water Act*, 41 *Envtl. L. Rep. News & Analysis* 11,118, 11,125 (2011) (noting that the agencies have advanced this broader interpretation in a 1998 Federal Register notice, a 2000 guidance document, and by the Corps in recent litigation. “Under the agencies’ revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is covered by a § 404 permit; that way, the system is ‘designed to meet the requirements of the Act,’ as required by the regulation.”²⁰⁸

EPA’s interpretation of the regulation does not make the proposed waste treatment system exemption a permissible construction of the CWA. EPA’s interpretation is inconsistent with the language of the regulation itself, and EPA has advanced a broader interpretation that does exclude newly created impoundments. For all these reasons, the waste treatment system exclusion is illegal and fails Step One and Step Two of the *Chevron* test.

For all of the reasons set forth above, Commenters strongly urge EPA and the Corps to eliminate the exclusion or publish a revised definition of waste treatment system that complies with the CWA. At a minimum, EPA must provide full notice and comment rulemaking for the proposed waste treatment system exclusion.

²⁰⁶ *See, e.g., California Sportfishing Prot. Alliance v. Cal. Ammonia Co.*, 2007 WL 273847, *6 (E.D. Cal 2007) (noting that the fact that a waste treatment impoundment is created prior to the Clean Water Act is evidence that it is not “designed to meet the requirements of the Clean Water Act”).

²⁰⁷ 79 Fed. Reg. at 22,268.

²⁰⁸ *Id.*

Thank you for the opportunity to comment on this important proposal.

Sincerely,

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Natural Resources Defense Council • Southern Environmental Law Center • American Rivers • Sierra Club • Earthjustice • Environment America • Waterkeeper Alliance

August 1, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW.
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2011- 0409

Submitted via www.regulations.gov and via email to ow-docket@epa.gov

To Whom It May Concern:

Please find enclosed comments on the document titled “Draft Guidance on Identifying Waters Protected by the Clean Water Act.” These comments are submitted on behalf of the Natural Resources Defense Council, the Southern Environmental Law Center, American Rivers, the Sierra Club, Earthjustice, Environment America, and the Waterkeeper Alliance.

If you have any questions about this submission, please contact Jon Devine at NRDC at (202) 289-2361. Thank you in advance for considering our views.

Sincerely,

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Natural Resources Defense Council

Bill Sapp
Senior Attorney
Southern Environmental Law Center

Katherine Baer
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Americans depend on and deserve clean water. People should feel safe when they swim that they will not get a water-borne illness. They should have confidence that the streams feeding their drinking water supplies will not be recklessly polluted or destroyed. They should have waters with abundant fish that are safe to eat, and they should be able to boat without fighting through rafts of disgusting, sometimes toxic, algae. The draft document released for public comment, titled “Draft Guidance on Identifying Waters Protected by the Clean Water Act,”¹ will help to improve the condition of the nation’s waters, so the undersigned organizations strongly support your efforts to clarify how to identify protected waters today. We urge you to strengthen these guidelines as you finalize them, and quickly move to revise the regulations that define “waters of the United States” for the agencies’ various programs under the law.

It is difficult to overstate the importance of the issue this guidance addresses. Whereas “waters of the United States” are protected from pollution and destruction by the Clean Water Act’s important programs, aquatic features that are not considered “waters of the U.S.” lack such protection under the federal Act. Virtually every one of the Act’s critical safeguards is linked to the presence of “navigable waters,” which the law defines to mean “waters of the U.S.,”² including:

- The national goal that pollutant discharges “be eliminated by 1985”;³
- The absolute prohibition on discharging “any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste”;⁴
- The core requirement that point sources discharging pollutants into waters must have a permit;⁵
- The obligation that states develop water quality standards protecting designated uses and that EPA review them to ensure they are adequately protective;⁶
- EPA’s review of total maximum daily load cleanup plans to restore impaired waters;⁷

¹ U.S. EPA & U.S. Army Corps of Eng’rs, Draft Guidance on Identifying Waters Protected by the Clean Water Act (hereinafter “Draft Guidance”), available at

http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

² 33 U.S.C. § 1362(7) (defining “navigable waters” to mean “the waters of the United States”). The prior guidance that the agencies issued suggested that the jurisdictional principles articulated only applied to the “dredge and fill” permit program under section 404 of the Act. See U.S. EPA & U.S. Dep’t of the Army, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* 4 n.18 (2008) (hereinafter “2008 Guidance”), available at

http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf. We agree with the agencies’ statement in the Draft Guidance that the jurisdictional principles it contains are in fact applicable to all Clean Water Act programs that are linked to “waters of the United States.”

Draft Guidance at 3. See 43 U.S. Op. Atty. Gen. 197, 200-01 (Sept. 5, 1979) (“The term ‘navigable waters’ ... is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the Act, including the § 402 permit program for point source discharges, the regulation of discharges of oil and hazardous substances in § 311 and the regulation of discharges of vessel sewage in § 312. Its definition is not specific to § 404, but is included among the Act’s general provisions.”)

³ *Id.* § 1251(a)(1).

⁴ *Id.* § 1311(f)

⁵ See *id.* § 1311(a) (generally prohibiting the “discharge of any pollutant” without compliance with other requirements of the Act); *id.* § 1362(12) (defining “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source”).

⁶ *Id.* §§ 1313(c)(2)(A) & (4).

- The requirement to develop water body-specific control strategies to address toxic pollution problems that are not solved by discharge standards applicable to sources of such pollution;⁸
- The obligation that states prepare biennial reports on water quality conditions;⁹
- Protections against the discharge of oil or hazardous substances;¹⁰
- The bar on an a vessel that —is not equipped with an operable marine sanitation device” from operating in protected waters;¹¹
- The directive for states to develop management programs for non-point pollution, and the related directive that EPA provide grants to assist with the implementation of such programs;¹²
- The requirement that applicants for federal permits obtain a state’s certification that the discharge will comply with various provisions of the Act, including state water quality standards;¹³ and
- Restrictions on the disposal of sewage sludge.¹⁴

Put simply, a water body that is denied treatment as a “water of the U.S.” is subject to an assortment of industrial and municipal pollution assaults.

It is likewise hard to overstate the importance of the aquatic resources that are implicated by this guidance document. The three major categories of water bodies that have been thrown into the most doubt by developments in the law include so-called “isolated” waters; non-navigable tributaries, especially ones that do not flow “relatively permanently”; and wetlands adjacent to tributaries that are not considered traditionally navigable. Although the exact extent of these categories is hard to quantify based on currently available information and is subject to interpretation, some statistics will give a rough sense of the scope of the problem. Approximately 20 percent of the roughly 100 million acres of wetlands in the continental U.S. could be considered “isolated.”¹⁵ Nearly two million miles of the nation’s streams outside of

⁷ *Id.* § 1313(e)(3)(c) (“The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include . . . total maximum daily load for pollutants in accordance with subsection (d) of this section”).

⁸ *Id.* § 1314(l)(1).

⁹ *Id.* § 1315(b).

¹⁰ *See, e.g., id.* § 1321(b)(3) (“The discharge of oil or hazardous substances . . . into or upon the navigable waters of the United States in such quantities as may be harmful as determined by the President . . . is prohibited, except . . . where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful.”); *id.* § 1321(j)(5) (providing for the development of facility response plans in the case of “[i]n onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.”).

¹¹ *Id.* § 1322(h)(4).

¹² *Id.* §§ 1329(a), (b) & (h).

¹³ *Id.* § 1341.

¹⁴ *Id.* § 1345.

¹⁵ Eric Pianin, Administration Establishes New Wetlands Guidelines; 20 Million Acres Could Lose Protected Status, Groups Say, *Washington Post*, Jan. 11, 2003, at A05 (“The new regulation would shift 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.”); Solicitor General Resp’t Arg. Tr., *Rapanos v. U.S. & Carabell v. U.S. Army Corps of Eng’rs*, at 41-42 (U.S. Feb. 21, 2006) (“about 20 percent of the Nation’s wetlands are isolated”); Letter from Benjamin H. Grumbles, Acting Assistant Administrator for Water, U.S. EPA, to Anu Mittal, Director,

Alaska are intermittent or ephemeral.¹⁶ An estimated 53 to 59 percent of the streams in the country are either non-perennial or “start reaches,” making them unlikely to be traditionally navigable; these streams have untold acres of wetlands adjacent to them.¹⁷

I. BACKGROUND: CONGRESS INTENDED THE CLEAN WATER ACT TO BE APPLIED BROADLY, AND THE RECENT JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS MAY NOT UNDERMINE THIS STATUTORY PURPOSE.

A. *The Jurisdictional Scope of the Clean Water Act Is Broad*

It is clear from the statutory language and legislative history that the intent of Congress when passing the Clean Water Act was to embrace the broadest possible definition of “navigable waters” when it defined that term as “the waters of the United States.”

The need for this broad scope is well documented. By the 1960s, the deterioration of the Nation’s waters was alarmingly evident. Symbolic of their disastrous state was the Cuyahoga River, running through Cleveland, Ohio into Lake Erie; it became so polluted with industrial waste in the 1950s and 1960s that it caught fire on more than one occasion.¹⁸ Lake Erie itself became so polluted from municipal waste and agricultural runoff that it was projected to become biologically dead. Unchecked water pollution in inland waterways accounted for record fish kills; for example, some 26 million fish died as a result of the contamination of Lake Thonotosassa, Florida.¹⁹ Industry discharged mercury into the Detroit River at a rate of between 10 and 20 pounds per day, causing in-stream water to exceed the Public Health Service limit for mercury six times over.²⁰ Waterways in many cities across the country were reduced to nothing more than sewage receptacles for industrial and municipal waste. The rate of wetlands loss from the 1950s to the 1970s was approximately 450,000 acres per year.²¹

Leaving the problem to individual states coupled with piecemeal federal law was clearly failing. There was a general – and accurate – perception that past approaches relying on state-by-state water quality standards was not cleaning up the waters and, indeed, waters were becoming more polluted. There was clearly a need for a broader federal role to address water pollution. Public outcry demanded a strong response from Congress.

Natural Resources & Environment, General Accounting Office, at 2 (Feb. 4, 2004), *reprinted in* U.S. GENERAL ACCOUNTING OFFICE, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION, appendix IV (Feb. 2004) (“The Continental United States has lost over half of its wetlands since European settlement, with approximately 100 million wetland acres remaining. Of those, some 20% may be wetlands that are less obviously connected to the broader aquatic ecosystem.”).

¹⁶ Letter from Benjamin H. Grumbles, Assistant Administrator for Water, U.S. EPA, to Jeanne Christie, Executive Director, Association of State Wetland Managers, at 2 (Jan. 9, 2006) (mis-dated as Jan. 9, 2005).

¹⁷ *Id.*

¹⁸ U.S. v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1326 (6th Cir. 1974).

¹⁹ ROBERT W. ADLER, ET AL., THE CLEAN WATER ACT: 20 YEARS LATER 5(1993).

²⁰ *Id.*; *see also* Comm. On Pub. Works, Committee Print 93d Cong. 1st Sess., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1253 (1973) (hereinafter “1972 Legislative History”).

²¹ W.E. FRAYER ETAL., U.S. FISH & WILDLIFE SERVICE, STATUS AND TRENDS OF WETLANDS AND DEEPWATER HABITATS IN THE CONTERMINOUS UNITED STATES, 1950S TO 1970S 3 (April 1983).

B. Legislative Language and Legislative History Confirm that Congress Intended a Broad Scope of Protection

And Congress responded. The 1972 Act was hailed as the first truly comprehensive federal water pollution legislation. Congressman Blatnik, Chairman of the House Public Works Committee, characterized it as a ~~h~~landmark in the field of environmental legislation.”²² Senator Randolph, Chairman of the Senate Committee on Public Works said, ~~h~~it is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment.”²³

The law’s comprehensive nature was largely in recognition that existing water pollution laws were a failure. As Senator Edmund Muskie told the Senate when introducing the bill that was to become the new Act: ~~h~~The committee on Public Works, after 2 years of study of the Federal water pollution control program, concludes that the national effort to abate and control water pollution is *inadequate in every vital aspect*.”²⁴

The very first sentence of the 1972 statute states ~~h~~The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁵ To achieve this objective, Congress adopted a general prohibition on discharging pollutants from point sources into ~~h~~navigable waters” without a permit, and gave the fullest effect to this and other provisions of the law by defining that key term as ~~h~~the waters of the United States, including the territorial seas.”²⁶

1. Congress Deliberately Redefined Previous Definitions of “Navigable Waters” to Encompass All “Waters of the United States”

Both the House and Senate versions of the bills to amend the Federal Water Pollution Control Act (FWPCA) were written to expand federal authority to control and ultimately eliminate discharges of water pollution across the country.²⁷ Both the House and Senate sought to radically restructure the nation’s federal authority to control water pollution even though their bills borrowed some language from earlier versions of federal water pollution control law, as

²² 1972 Legislative History at 350.

²³ *Id.* at 1269.

²⁴ *Id.* at 1253 (emphasis added).

²⁵ 33 U.S.C. § 1251(a). The House report explains, ~~h~~The word integrity ‘... is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained.’ H.R. Rep. No. 92-911 at 76-77 (1972), 1972 Legislative History at 763. Similarly, the Senate report stated, ~~h~~Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine waterbody be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original.” 1972 U.S.C.C.A.N. at 3742.

²⁶ 33 U.S.C. §§ 1311(a), 1362(12), 1362(7). Other substantive provisions of the Act also strongly underscore that Congress’ main purposes in enacting the law were water pollution and water quality, not navigation, and that Congress intended that the scope of the law be broad to achieve these purposes. *See, e.g.*, 33 U.S.C. § 1313(c)(2)(A), regarding water quality standards (~~h~~Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, *and also taking into consideration their use and value for navigation.*”) (emphasis added).

²⁷ H.R. 11896, 92nd Cong. (1971); S. 2770 92nd Cong (1971).

well as from the Refuse Act (RA) and the Rivers and Harbors Act (RHA). In their respective bills, both bodies initially borrowed the term “navigable waters” from the RA and RHA, and included a definition that itself used the term “navigable.”²⁸ However, in the reports discussing their respective versions of the legislation, both the House and Senate expressed concern about potential narrow interpretations of which waters they intended to be covered by the new Act. The House Public Works Committee stated its concern as follows:

One term that the Committee was reluctant to define was the term “navigable waters.” The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee’s intent. The Committee fully intends that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.²⁹

The Senate Committee on Public Works stated:

Through a narrow interpretation of the definition of interstate waters the implementation of 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source.³⁰

So while the House report focused upon the need for a broad constitutional interpretation of the Act’s scope, and the Senate report spoke to the scientific reality of waters being interconnected, both bodies signaled their desire not to constrain the reach of the Act to those waters previously protected primarily on the grounds of navigability.

When the House and Senate met in conference committee, they took an additional step to ensure that the definition of “navigable waters” did not result in unduly narrow interpretations. As discussed in the report of the Conference Committee, the House version of the definition was accepted into the final bill, but the word “navigable” was deleted from the definition. Thus, the new definition read as follows: —The term “navigable waters” means the waters of the United States, including the territorial seas.”³¹

The Conference report spoke to this change, using the exact terminology of the earlier House Public Works Committee report confirming that the term “be given the broadest possible constitutional interpretation,” and expressing that the interpretation of this definition must be “unencumbered by agency determinations which have been made or may be made for administrative purposes.”³²

²⁸ In the Senate, the earlier definition read “the term navigable waters means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. S. 2770, 92nd Cong. § 502(h) (1971), 1972 Legislative History at 1698. The House bill’s initial definition read, “The term “navigable waters” means the navigable waters of the United States, including the territorial seas.” H.R. 11896, 92nd Cong. § 502(8) (1971), 1972 Legislative History at 1069.

²⁹ H.R. Rep. No. 92-911 at 131 (1972), 1972 Legislative History at 818.

³⁰ S. Rep. No. 92-414 at 77 (1971), 1972 Legislative History at 1495.

³¹ S. Rep. No. 92-1236 at 144 (1971), 1972 Legislative History at 327.

³² *Id.*

Finally, the debate in Congress on final passage of the Act confirmed the conference report's intent that the law be given broad application. For example, Congressman John D. Dingell Jr. explained the definition in his statement to the House on the conference committee bill:

[T]he conference bill defines the term ~~“navigable waters”~~ broadly for water quality purposes. *It means all “the waters of the United States” in a geographical sense.* It does not mean ~~“navigable waters of the United States”~~ in the technical sense as we sometimes see in some laws.³³

After reviewing the broad extent of the Commerce Clause authority, Representative Dingell went on to state:

Thus, this new definition *clearly encompasses all water bodies*, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144:

~~“The conferees fully intend that the term *navigable waters* be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”~~³⁴

Thus, Congress quite intentionally expanded the Act's jurisdictional scope in 1972 because of the new and ambitious water pollution reduction goals of the Act. For this reason, Congress chose to discard the traditional definition of the term ~~“navigable waters”~~ as it had been used in earlier laws and rejected placing other limits on the new law's jurisdictional reach such as some had proposed in earlier versions of the legislation.³⁵ Instead, Congress deleted the word “navigable” from the “navigable waters” definition of the 1972 Act, thereby asserting federal jurisdiction over all “the waters of the United States” in keeping with its stated objective to rid the Nation's waters of pollution.

2. Historically, the Clean Water Act Was Construed by the Courts to Apply to a Wide Variety of Waters

Long before *Rapanos* and *SWANCC*, the Supreme Court, in *International Paper Co. v. Ouellette*, recognized that the Act was designed to establish ~~“an~~ all-encompassing program of water pollution regulation,” and ~~“a~~ applies to all point sources *and virtually all bodies of water.*”³⁶ Other courts also observed that ~~“i~~it seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce,”³⁷ and that ~~“C~~ongress by defining the term “navigable waters”. . . to mean “the waters of the United States, including the territorial seas,” asserted federal jurisdiction over the

³³ 118 Cong. Rec. 33, 756 (1972), 1972 Legislative History at 250 (emphasis added).

³⁴ 118 Cong. Rec. 33, 767 (1972), 1972 Legislative History at 250-251 (emphasis added).

³⁵ The definition of ~~“navigable water”~~ in earlier version of the bill that became the FWCPA of 1972 had made express reference to ~~“navigability.”~~ Clean Water Restoration Act of 1966; sec. 211 § 2(4), 80 Stat. 1246, 1253.

³⁶ 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

³⁷ *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979)

nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."³⁸

Likewise, when first presented with the question of whether certain aquatic features were "waters of the U.S.," the Supreme Court concluded that the Corps of Engineers could reasonably apply the Act's legal protections to wetlands. In *United States v. Riverside Bayview Homes, Inc.*, the Court said:

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.³⁹

In other words, the Court believed that the precise contours of the law should be determined by the technical agencies charged with implementing it.

3. Additional Evidence That the Scope of the Act Must Be Construed Broadly

As noted above, the Act's core permit program – the § 402 National Pollutant Discharge Elimination System program⁴⁰ – applies to "navigable waters," *i.e.*, to "the waters of the United States," as defined in § 502(7). Accordingly, the evolution of § 402 offers relevant contextual evidence concerning the proper interpretation of the § 502(7) definition.

The § 402 NPDES program was designed to supersede the preexisting permit program under the 1899 Refuse Act. Section 402 provides that permits previously issued under the Refuse Act would thenceforth constitute NPDES permits, and that no further Refuse Act permits would be issued.⁴¹ Tellingly, the Refuse Act does not merely govern discharge into traditionally navigable waters. To the contrary, it encompasses discharge "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water."⁴² Thus, to interpret the Clean Water Act in a way that would cause non-navigable tributaries of traditionally navigable waters to become excluded from the law, one would have to believe that the 1972 Congress cut back the geographic scope of the predecessor statute.⁴³ The notion that Congress intended any such cutback is untenable.

³⁸ NRDC v. Callaway, 392 F.Supp. 685, 686 (D.D.C. 1975)

³⁹ 474 U.S. 121, 134 (1985).

⁴⁰ Section 402 authorizes issuance of permits for "the discharge of any pollutant," 33 U.S.C. § 1342(a)(1), and section 502 defines "discharge of a pollutant" as the addition of a pollutant "to navigable waters." *Id.* § 1362(12).

⁴¹ *Id.* §§ 1342(a)(4) & (5).

⁴² *Id.* § 407 (emphasis added).

⁴³ Indeed, the cutback would be dramatic. See Letter from Benjamin H. Grumbles, Assistant Adm'r for Water, U.S. EPA, available in Brief of Assn. of State Wetlands Managers et al., as Amici Curiae Supporting Respondent in *Rapanos v. United States*, 547 U.S. 715 (2006) (Nos. 04-1034 & 04-1384), 2006 WL 139206 (estimating that over half of all U.S. streams are not traditionally navigable); Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 *Env'tl. L. Rep.* 10187, 10193 n.32 (2004) (in the Missouri River watershed, there are by conservative estimate 559,669 miles of traditional navigable waters plus tributaries, of which traditional navigable waters represent only

The 1977 Amendments to the Act further confirm the inclusive nature of the law's scope. During the deliberations on those amendments, attempts were made to narrow the waters covered by the Clean Water Act. Although the proposed narrowing language was included in the House bill, the Senate rejected it, and this history is extremely instructive.⁴⁴ Under the proposed narrowing language, the dredge-and-fill permitting safeguards would have encompassed only traditionally navigable waters, together with wetlands that were "contiguous or adjacent" to such waters and also "periodically inundated."⁴⁵ Numerous Senators objected to the proposal as a significant weakening of the law and stressed that excising certain waters would undermine the basic structure of the Act. For example, Senator Baker emphasized that

[c]omprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors.⁴⁶

Even strong opponents of comprehensive coverage under the Act acknowledged that the law, as written, covered a wide variety of aquatic resources. Senator Bentsen, who led the charge in the Senate in 1977 to significantly roll back the scope of the Act's restrictions on the discharge of dredged or fill material, objected to an amendment proposed by the Environment and Public Works Committee that exempted certain activities from needing permits, but which did not backtrack on jurisdiction. He complained: "The committee's amendment skirts the fundamental problem: the definition of Federal jurisdiction in the regulation of dredge and fill activities. The program *would still cover* all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies."⁴⁷

Thus, the Supreme Court's rulings in *SWANCC* and *Rapanos* must be understood in context. The broad jurisdiction evinced by the Clean Water Act's legislative language and Congress' intent makes clear that EPA and the Corps should work within the bounds proscribed by the Court, but within those bounds they must exercise their remaining authority to the fullest extent to protect streams, wetlands, and other waters.

3,151 miles—less than 1 percent). Even if only a fraction of these tributaries were to be left out of the scope of the Clean Water Act's protections – such as those lacking "relatively permanent flow" or a demonstrable "significant nexus" to traditional navigable waters – the water pollution impacts would be significant.

⁴⁴ See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136-37 (1985) (discussing the 1977 debate and Congress' ultimate abandonment of any effort to narrow the definition of "waters").

⁴⁵ See, e.g., Comm. on Env't & Pub. Works, Committee Print, 95th Cong., 2d Sess., Legislative History of the Clean Water Act of 1977, at 901 (October 1978).

⁴⁶ *Id.* at 920.

⁴⁷ *Id.* at 903 (emphasis added).

II. THE SUPREME COURT'S DECISIONS IN SWANCC AND RAPANOS DO NOT REQUIRE A WHOLESAL RETREAT FROM BROAD JURISDICTION.

Despite the clear legislative history and purpose of the Clean Water Act, previous Supreme Court precedent in *Riverside Bayview* and *Ouellette*, and numerous lower court cases broadly interpreting the jurisdictional scope of the law, in 2001, the Supreme Court – in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”)⁴⁸ – held that the non-navigable, intrastate, “isolated” waters in that case could not be classified as “waters of the United States” solely based on the government’s so-called “Migratory Bird Rule,” an interpretation of the jurisdictional regulations that protected aquatic habitat used by migrating birds. Likewise, in *Rapanos v. United States*,⁴⁹ the Supreme Court issued several opinions – though no legal rationale commanded a majority of the Court – which have caused strenuous debate over the decision’s implications for the legal scope of the Act.

Guidance documents jointly issued by the Corps and EPA in the wake of each of these decisions have not substantially clarified what resources are protected by the law. Indeed, in many cases, these documents suggest limitations on jurisdiction that are not required by the Supreme Court’s decisions, much less by the statute and its implementing regulations.⁵⁰

A. *The SWANCC Decision*

The holding of *SWANCC* was narrow, and was largely limited to the facts of the case or very similarly situated waters. At issue in that case were waters that had been abandoned gravel pits that, over the years, had filled with water and were used as habitat by migrating waterfowl. In asserting jurisdiction over the waters, the Corps cited the presence of migratory birds as the jurisdictional trigger for the Clean Water Act; they did not cite any of the other bases in their regulations that also allowed them to assert Clean Water Act protections over intrastate waters, whether they appear to be “isolated” or not.⁵¹ Accordingly, the Supreme Court did not invalidate any of the regulatory bases for asserting jurisdiction over such water bodies (such as links to interstate commerce). The Court held that the Corps’ regulations “as clarified and applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule’ . . . exceeds the authority granted to respondents under § 404(a) of the CWA.”⁵²

The five Justice majority decision did contain gratuitous language – dicta – that was read by industry lawyers and others as inviting additional legal attacks on federal protection for waters that are not traditionally navigable. Fortunately, when those arguments were made, the

⁴⁸ 531 U.S. 159 (2001).

⁴⁹ 547 U.S. 715 (2006).

⁵⁰ We hereby incorporate by reference the comments submitted by numerous environmental organizations on the 2003 Advance Notice of Proposed Rulemaking and guidance, as well as the comments submitted by a number of such groups on the 2007 guidance. In addition to being a part of the official public docket, the comments are available at http://cf.nwf.org/nwfwebadmin/binaryvault/cwacommentletter_finaldraft.pdf (April 2003 comments) and <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2007-0282-0227> (January 2008 comments).

⁵¹ The term “isolated” does not currently appear in the Act itself or in EPA or Corps jurisdictional regulations.

⁵² *Id.* at 174 (internal citations omitted). The Migratory Bird Rule was contained in the 1986 preamble to the Corps’ regulations, and is not a rule. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

courts generally did not interpret *SWANCC* broadly, though it still did lead to a cut back on legal protections.⁵³

B. The Rapanos Decision and Its Three Major Opinions

Although the claims of those opposed to Clean Water Act protections who were trying to expand upon the *SWANCC* decision were largely rejected by the lower courts, in October 2005 the Supreme Court took up two other cases – *United States v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers* – that together questioned the extent to which the law protects wetlands adjacent to tributaries that are not traditionally navigable.

In the *Rapanos* and *Carabell* cases, the Bush administration argued that the Clean Water Act and its implementing regulations properly encompass and protect the non-navigable tributaries of “traditionally navigable” waters and the wetlands adjacent to these tributary streams and rivers. This position was supported by briefs filed by more than 30 state Attorneys General and nine members of Congress who helped pass the Clean Water Act in 1972, its amendments in 1977, or both. Also filing briefs in favor of the government’s position were: four former EPA administrators who served under Republican and Democratic administrations; a coalition of hunting and angling groups and businesses; state water pollution control officials, wetland managers, fish and wildlife agencies, and floodplain managers; New York City; numerous western resources councils; Macomb County (MI); and many environmental, public health and conservation groups.

The *Rapanos* petitioners and some supporting organizations argued that the Clean Water Act does not protect non-navigable tributaries and only covers those wetlands directly adjacent to traditionally navigable waters.⁵⁴

In its decision (which addressed the two consolidated cases) the Supreme Court had no majority opinion but split 4-1-4 in its analysis of the Clean Water Act and the extent to which the law covers adjacent wetlands.⁵⁵ The Court did not invalidate the agencies’ existing rules defining the “waters of the U.S.” but the various opinions suggested three different tests for determining whether wetlands adjacent to non-navigable tributaries remain under the scope of the Act.

The four-justice plurality, in an opinion written by Justice Scalia, would significantly limit the law’s scope. Focusing on a 1954 dictionary definition of “waters” more than the language, purpose, or history of the Clean Water Act (a law he characterized as “obscure”), Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, concluded that:

⁵³ See, e.g., *United States v. Rapanos*, 376 F.3d 629, 638 (6th Cir. 2004) (“[T]he majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no connection with navigable waters, it does reach inland waters that share a hydrological connection with navigable waters.”), *vacated*, 547 U.S. 715 (2006).

⁵⁴ The petitioners in the *Carabell* case advanced a more limited argument, claiming that it was impermissible for the Corps to regulate a wetland as “adjacent” to a protected water body – and therefore subject to the CWA – if it lacked a hydrological connection with the water body. Brief for Petitioner at 12-13, *Carabell v. United States Army Corps of Engineers*, at 12-13, 547 U.S. 715 (2006) (No. 04-1384), 2005 WL 3279898, at *12-13.

⁵⁵ *Rapanos v. United States*, 547 U.S. 715 (2006).

[T]he phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] . . . oceans, rivers, [and] lakes.” The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.⁵⁶

The opinion also would require wetlands to have a “continuous surface connection” to jurisdictional waters to be protected.⁵⁷

Justice Kennedy would require the agencies to show a physical, biological, or chemical linkage – a “significant nexus” – between a water body and a traditionally navigable one in order for it to be protected.⁵⁸ For tributaries, Justice Kennedy says that, applied consistently, existing rules “may well provide a reasonable measure of whether specific minor tributaries bear a significant nexus with other regulated waters to constitute “navigable waters” under the Act.”⁵⁹ For wetlands adjacent to such non-navigable tributaries, Justice Kennedy suggested that a “significant nexus” could be shown in different ways, depending on the kind of water to which the wetland is adjacent.⁶⁰

While he concurred that the cases should be remanded, Justice Kennedy completely rejected Justice Scalia's reasoning. Indeed, he stated that Justice Scalia's plurality opinion “is inconsistent with the Act's text, structure, and purpose.”⁶¹

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, said that the existing agency regulations reflect a reasonable interpretation of the statutory phrase “waters of the United States,” especially in light of the Court's unanimous 1985 decision in *Riverside Bayview Homes*, which upheld the application of these very same rules.⁶² While rejecting the rationale of both of the other opinions, these four justices stated that, since they would protect all of the waters that Justice Scalia's test would protect and all of the ones Justice Kennedy's test would protect, the agencies should continue to protect streams and wetlands if they qualify under either test.⁶³

⁵⁶ *Id.* at 739 (plurality opinion) (citation omitted).

⁵⁷ *Id.* at 742.

⁵⁸ *Id.* at 779 (Kennedy, J., concurring).

⁵⁹ *Id.* at 781.

⁶⁰ *Id.* at 782 (“When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, 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.”).

⁶¹ *Id.* at 776.

⁶² *Id.* at 792.

⁶³ *Id.* at 810 & n. 14.

C. Guidance Documents Issued in the Wake of SWANCC and Rapanos Further Undermine Protections

1. The Advanced Notice of Proposed Rulemaking and 2003 Guidance Undermined Protections Far More than SWANCC Required

Following *SWANCC*, on January 15, 2003, the EPA and Army Corps of Engineers published an Advance Notice of Proposed Rulemaking (“ANPRM”) raising a broad array of questions about the jurisdiction of the Clean Water Act and asking the public to comment on whether the agencies should rewrite their longstanding definitions of “waters of the United States.” Simultaneously, they released a guidance memo to their field staff regarding Clean Water Act jurisdiction over certain so-called “isolated,” non-navigable, intrastate waters.

The agencies claimed these actions were responsive to the *SWANCC* case, but both the guidance memo and the ANPRM went far beyond the Court’s holding.⁶⁴

The 2003 guidance took effect right away and had an immediate impact on many of the Nation’s wetlands, creeks, ponds, and streams. The policy directed Corps and EPA staff not to assert jurisdiction over “isolated” waters without first obtaining permission from headquarters.⁶⁵ No similar instructions were issued to get permission before allowing unregulated pollution or destruction of these waters by determining that they were not subject to Clean Water Act jurisdiction. More importantly, in practice, the 2003 guidance led to the loss of resources. Whenever the agencies themselves determined that waters were “isolated,” intrastate, and not traditionally navigable – even where the waters had uses other than as habitat by migratory birds – the waters were found to be non-jurisdictional.⁶⁶

EPA itself estimated that as many as 20 million acres of wetlands – 20 percent of the remaining wetlands in the continental U.S. – were “isolated,” meaning they were placed at risk of losing federal Clean Water Act protections under the 2003 policy.⁶⁷ And even though the 2003 guidance did not itself forswear jurisdiction over all intrastate, non-navigable, “isolated” waters, the fact of the matter is that it led to exactly that; according to EPA’s economic analysis

⁶⁴ *But see* American Petroleum Inst. v. Johnson, 541 F.Supp.2d 165, 183-84 (D.D.C. 2008) (discussing *SWANCC* and concluding that “[w]hile *SWANCC* may not have established hard-and-fast rules for determining which waters qualify as ‘navigable waters,’ it did establish that Clean Water Act jurisdiction is not co-extensive with Congress’ Commerce Clause authority.”)

⁶⁵ Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991, 1997-98 (Jan. 15, 2003) (“[f]ield staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on other factors listed in 33 CFR 328.3(a)(3)(i)–(iii).”)

⁶⁶ See U.S. Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction*, GAO-05-870, at 6 (Sept. 2005) (“In the five districts we reviewed, Corps officials said they generally do not consider seeking jurisdiction over isolated, intrastate, nonnavigable waters on the sole basis of 33 C.F.R. § 328.3(a)(3) because (1) headquarters has not provided detailed guidance on when it is appropriate to use this provision; (2) they believe that headquarters does not want them to use this provision; (3) they were concerned about the amount of time that might be required for a decision from headquarters; or (4) few isolated, intrastate, nonnavigable waters were in their districts whose use, degradation, or destruction could affect interstate commerce.”).

⁶⁷ See Pianin, *supra* note 15.

of the draft new guidance, “[s]ince *SWANCC*, no isolated waters have been declared jurisdictional by a federal agency.”⁶⁸

The ANPRM announced the administration’s intention to consider even broader changes to Clean Water Act coverage through rulemaking. Fortunately, overwhelming opposition to the proposed rulemaking from Congress (including 218 members of the House and more than 40 Senators); state water pollution control, fish and wildlife, and natural resources agencies; hunting and angling groups; environmental organizations; and the public (over 130,000 individual citizens submitted comments, overwhelmingly opposing the rollback) caused EPA’s then-Administrator Michael Leavitt to announce that the administration was dropping the rulemaking idea.⁶⁹

However, the EPA and the Corps left the 2003 guidance in place, along with its biased one-way policy requiring staff to get headquarters permission to protect waters but not to authorize their destruction or degradation. As a result, the 2003 guidance and its “*phone home*” policy were causing widespread destruction of waters that should have remained legally protected even after *SWANCC*.⁷⁰

2. The Guidance Documents Following *Rapanos* Took a Much Narrower View of Protection than the Decision Required.

Even though, as discussed in detail below, the Court in *Rapanos* reached no majority rationale that establishes legally binding requirements, the Bush administration’s post-*Rapanos* guidance does not even follow the various opinions in the case, but rather imposes preconditions on jurisdiction that are less protective than the decision mandates.⁷¹

First, the *Rapanos* guidance inappropriately subjected tributary streams to less-than-categorical protection. As the agencies are aware, their still-applicable regulations include tributaries of other specified regulated “waters of the United States,” without qualification.⁷² By

⁶⁸ U.S. EPA, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction 3 (2011) (hereinafter “Guidance Benefits Analysis”), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf.

⁶⁹ EPA Press Release, EPA and Army Corps Issue Wetlands Decision, Dec. 12, 2003 (“After soliciting public comment to determine if further regulatory clarification was needed, the EPA and the Corps have decided to preserve the federal government’s authority to protect our wetlands.”). See also *Rapanos*, 547 U.S. at 795 n. 4 (Stevens, J., dissenting) (describing agencies’ effort to revise regulations and noting that “almost all of the 43 States to submit comments opposed any significant narrowing of the Corps’ jurisdiction – as did roughly 99% of the 133,000 other comment submitters”).

⁷⁰ See generally Earthjustice et al., RECKLESS ABANDON: HOW THE BUSH ADMINISTRATION IS EXPOSING AMERICA’S WATERS TO HARM (2004), available at <http://ocw.tufts.edu/data/32/386826.pdf>.

⁷¹ See generally Earthjustice et al., COURTING DISASTER: HOW THE SUPREME COURT HAS BROKEN THE CLEAN WATER ACT AND WHY CONGRESS MUST FIX IT (2009), available at

<http://www.environmentamerica.org/uploads/8b/e0/8be0713c66732db56146f9b75a03bd1d/Courting-Disaster.pdf>.

⁷² 40 C.F.R. § 122.2; 33 C.F.R. § 328.3(a)(5). See also *United States v. Cooper*, 482, F.3d 658, 660 (4th Cir. 2007) (citing 40 C.F.R. § 122.2 and stating “[t]here is no dispute that, as a tributary of an interstate water, the small creek into which the lagoon discharges constitutes a water of the United States.”).

contrast, for streams that are less than “relatively permanent,” the guidance requires a case-by-case demonstration of a “significant nexus” with downstream traditional navigable waters.⁷³

- The Supreme Court has not issued a holding limiting the jurisdictional status of tributary streams. The *Rapanos* case involved water bodies that had been deemed jurisdictional under the provision of the Corps’ regulations governing adjacent wetlands and in any event reached no majority rationale on any point.⁷⁴ Likewise, *SWANCC* involved “isolated ponds” and therefore implicated (at most) the propriety of the provision of the rules governing “other waters.”⁷⁵ Neither case ruled on the legality of the separate regulatory provision providing for jurisdiction over tributaries.
- A careful analysis of the various opinions in *Rapanos* reveals that a majority of the Supreme Court did not vote to limit the regulatory protection for tributaries, even though some of the opinions discuss tributaries. The dissent would have upheld the regulations as applied to the adjacent wetlands, to say nothing of the tributaries themselves.⁷⁶ Crucially, Justice Kennedy expressly distinguished between how his “significant nexus” standard would apply to adjacent wetlands and how it might apply to tributaries. After discussing the regulatory concept of “ordinary high water mark” (OHWM) as an indication of the Corps’ jurisdiction, Justice Kennedy said, “[t]his standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, it 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.”⁷⁷ Thus, Justice Kennedy’s opinion cannot be read to upset the regulations’ categorical protection for tributaries to various waters and, as such, there is no majority decision that limits jurisdiction over such tributaries.⁷⁸

⁷³ U.S. EPA & U.S. Dep’t of the Army, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* 1 (2007) (hereinafter “2007 Guidance”), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf (providing for “significant nexus” analysis for “[n]on-navigable tributaries that are not relatively permanent”).

⁷⁴ See *Rapanos*, 547 U.S. at 729-30 (describing lower court decisions as upholding jurisdiction based on adjacency).

⁷⁵ See *SWANCC*, 531 U.S. at 174 (“We hold that 33 CFR § 328.3(a)(3) (1999) [the “other waters” provision], as clarified and applied to petitioner’s balefill site pursuant to the “Migratory Bird Rule,” 51 Fed.Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.”).

⁷⁶ *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting) (“The Corps’ resulting decision to treat these wetlands as encompassed within the term ‘waters of the United States’ is a quintessential example of the Executive’s reasonable interpretation of a statutory provision.”).

⁷⁷ *Id.* at 781 (Kennedy, J., concurring) (emphasis added) (citation omitted); see also *U.S. v. Evans*, 2006 WL 2221629, at *18 (M.D. Fla. Aug. 2, 2006) (noting this aspect of Justice Kennedy’s opinion). By contrast, Justice Kennedy said that the existence of an OHWM in the tributary would not be a basis for finding a nexus for any adjacent wetland: “the breadth of this standard . . . precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system. . . .” *Rapanos*, 547 U.S. at 781.

⁷⁸ See *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 997 (9th Cir. 2007) (“The Supreme Court has since confirmed that regulable waters of the United States include tributaries of traditionally navigable waters and wetlands adjacent to navigable waters and their tributaries. *Riverside Bayview Homes*, 474 U.S. 121, 106 S.Ct. 455 33 C.F.R. 328.3(a)(1),(4),(7). The only question reserved in *Riverside Bayview Homes* was the issue of CWA jurisdiction over truly isolated waters. See *Rapanos*, 126 S.Ct. at 2255 n. 3.”); see also *Benjamin v. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210, 1215 & n. 2 (D. Or. 2009) (indicating that jurisdiction over tributaries did not require demonstration of significant nexus); *United States v. Vierstra*, 2011 WL 1064526, at *5 (D. Id. Mar. 18, 2011) (“It is an open question as to whether Justice Kennedy’s concurrence applies in the tributary context.”). *But*

Second, the Bush administration's post-*Rapanos* guidance restricts the scope of the "significant nexus" analysis to wetlands adjacent to an unnecessarily small area – a particular stream – each." This would mean, for instance, that a wetland adjacent to a first-order stream would only be considered together with other wetlands – if there are any – adjacent to the same small stream. Specifically, with regard to Justice Kennedy's admonition to consider the effects that wetlands have "in combination with similarly situated lands in the region,"⁷⁹ the existing guidance takes an absurdly and untenably narrow approach, saying that the agencies will only consider the wetlands adjacent to the particular stream reach – i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream".⁸⁰ Further, because of this very narrow approach, the cumulative importance of tributary streams is never considered. This myopic framework undercuts effective enforcement of the law in headwater areas.⁸¹

III. THE DIVIDED OPINIONS IN *RAPANOS* CREATE NO OVERARCHING PRECEDENT LIMITING THE CLEAN WATER ACT'S APPLICATION TO WATER BODIES.

Since *Rapanos* and its split opinions, numerous courts and commentators have attempted to determine which opinion (or opinions) contains the controlling rule of law, if any. Much of the debate has centered around a 1977 Supreme Court decision called *Marks v. United States*, which states, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."⁸² As discussed below, our organizations believe that no binding holding results from *Rapanos* because *Marks* cannot be applied to the opinions in *Rapanos*.

We submit that the general rule on split opinions from *Marks* only works in instances where one opinion can meaningfully be regarded as narrower than another – only when one opinion is a logical subset of other, broader opinions.⁸³ Moreover, "[w]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court."⁸⁴ Instead, when one opinion is not a logical subset of another,

see, e.g., *United States v. Robison*, 505 F.3d 1208 (11th Cir 2007) (applying "significant nexus" analysis to tributary stream).

⁷⁹ *Id.* at 780.

⁸⁰ 2008 Guidance at 10.

⁸¹ Guidance Benefits Analysis at 13 ("Because of difficulties establishing 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 are shifting from protecting small streams high in the watershed and instead are moving down river.").

⁸² 430 U.S. 188, 193 (1977) (internal quotation marks omitted).

⁸³ *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)) (internal quotation marks omitted).

⁸⁴ *Alcan Aluminum*, 315 F.3d at 189 (citing *Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3rd Cir. 1994)).

the holding of the case is the one that is most closely limited to the facts of the case, rather than one that announces general rules.⁸⁵

Applying this analysis to *Rapanos*, we believe that Justice Kennedy's reasoning and that of the plurality cannot be considered a logical subset of one another, so the *Marks* analysis is inapplicable. Justice Kennedy underscores his near-complete disagreement with the plurality when he says that ~~the~~ plurality's opinion is inconsistent with the Act's text, structure, and purpose."⁸⁶ Moreover, the two opinions have entirely disparate rationales that cannot be reconciled; indeed, the opinions' reasoning is primarily based on interpreting different statutory terms – the plurality focuses on the term ~~“waters,”~~ whereas Justice Kennedy focuses on the term ~~“navigable.”~~⁸⁷ Accordingly, the specific result of the case (and the only thing that *Rapanos* establishes) is that additional fact-finding is needed to assert jurisdiction over the wetlands at issue in the case. *Rapanos* thus does not demand a change in the general approach to assessing jurisdiction; all that should be required is reference to the agencies' still-applicable regulations.

At worst, if one looks only to the result reached by the plurality and Justice Kennedy to try to identify the ~~“narrowest”~~ approach under the *Marks* framework, the proper read of *Rapanos* is that it should not limit jurisdiction except with regard to those wetlands adjacent to non-navigable tributaries which neither have a ~~“significant nexus”~~ with traditionally navigable waters or interstate waters nor have a ~~“continuous surface connection”~~ with other regulated waters. To the extent that the *Marks* ~~“narrowest”~~ opinion approach can be implemented (which, as noted above, we dispute), one must look closely at the circumstances of a given case to determine which opinion is narrower in application. Given that the status quo prior to *Rapanos* was that wetlands adjacent to tributaries to various regulated waters were categorically protected, the ~~“narrowest”~~ rationale will be the one that changes the status quo the least.⁸⁸

⁸⁵ See *United States v. Martino*, 664 F.2d 860, 872-73 (2nd Cir. 1981) (stating the narrowest grounds is the ~~“ground~~ that is most nearly confined to the precise fact situation before the Court, rather than to a ground that states more general rules”); see also *Alcan Aluminum*, 315 F.3d at 189 (analyzing Supreme Court case in which ~~Justice~~ Kennedy's concurrence is not a logical subset of the plurality's . . . analysis,” finding that ~~“a~~ common denominator“ can be said to exist among the Court's opinions,” and concluding that ~~“t]he~~ only binding aspect of such a splintered decision is its specific result”).

⁸⁶ *Rapanos*, 547 U.S. at 776. See also Brief for the United States in Opposition at 11, *Morrison v. United States*, 549 U.S. 1265 (2007) (No. 06-749), 2007 WL 276148, at *18 (~~“Bt~~ in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a “lesser included” version of the other.”).

⁸⁷ Compare 547 U.S. at 731 (plurality opinion) (~~“We~~ need not decide the precise extent to which the qualifiers “navigable” and “of the United States” restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over “waters.””) with *id.* at 779 (Kennedy, J., concurring) (~~“Cnsistent~~ with *SWANCC* and *Riverside Bayview* and with the need to give the term “navigable” some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”).

⁸⁸ Assuming *arguendo* that *Rapanos* has *stare decisis* effect under *Marks*, the *Marks* Court ruled that the narrowest opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), was the one that constrained the government's regulatory authority the least – not Justices Black and Douglas, who would have precluded regulation of obscenity entirely, nor Justice Stewart, who would have allowed regulation of only so-called “hard-core” obscenity, but the plurality, whose test allowed regulation of a wider range of obscenity. *Marks*, 430 U.S. at 193-94. Similarly here, the narrowest approach would be the one that least constrains EPA's regulation of pollution. Because neither the plurality nor the Kennedy test is a complete subset of the other, the least-constraining opinion may vary depending on the circumstances.

In some factual scenarios, Justice Kennedy's test will limit Clean Water Act protections in the narrowest way, since he would not disqualify wetlands from the Clean Water Act simply because they lack a "continuous surface connection" to the adjacent water, or because the adjacent water is not "relatively permanent." On the other hand, the plurality would not disqualify a wetland that is continuously connected to a "relatively permanent" tributary even if that wetland appears to lack a "significant nexus" to a jurisdictional water; where such facts are present, the plurality test is a narrower constraint on protections. Accordingly, the agencies must maintain – consistent with the still-extant regulations – jurisdiction over adjacent wetlands unless they are disqualified by the narrowest test that can be applied to the specific facts of the case. That means that wetlands satisfying either the plurality's or Justice Kennedy's test will continue to be protected, at a minimum.⁸⁹

In other words, we believe that the agencies do not, because of *Rapanos*, need to vary from the regulations' categorical protection of wetlands adjacent to various jurisdictional waters. At a minimum, however, the agencies are obliged to protect whatever adjacent wetlands would be covered under either the plurality of Justice Kennedy's test. We thus believe that even the agencies' either-or approach is more restrictive than required, and certainly that anything less protective would contradict the Supreme Court's holdings and the extant regulations.

Of course, the agencies must also follow governing precedent, and there have been several decisions since *Rapanos* that dictate how Clean Water Act coverage must be established in those jurisdictions, several of which ultimately rely on one or more of the *Rapanos* opinions as binding. For instance, in the First and Eighth Circuits, a water is protected under the law if it meets either the plurality standard or the "significant nexus" standard.⁹⁰ In the Eleventh Circuit, a water may only be covered consistent with the "significant nexus" standard.⁹¹ The Seventh and Ninth Circuits both have ruled that the "significant nexus" standard is a sufficient basis to uphold jurisdiction, but have not ruled out the use of the plurality standard in appropriate circumstances.⁹² The Second, Fifth, and Sixth Circuits have reached decisions in which they left

⁸⁹ Cf. *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting) ("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."); *id.* at n. 14 ("I assume that Justice KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice KENNEDY's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test."); *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) ("any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in most cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface hydrological connection.").

⁹⁰ *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

⁹¹ *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007); *see also U.S. v. Freedman Farms, Inc.*, 2011 WL 1884000, *7 (E.D.N.C. 2011) (denying reconsideration of jury instruction based exclusively on Justice Kennedy's "significant nexus" standard).

⁹² *Gerke*, 464 F.3d at 724-25 (discussing both standards and concluding that Justice Kennedy's is narrower view except in "rare cases[s]" and concluding that Justice Kennedy's test "must govern the further stages of this litigation"); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (replacing prior

to a later case the resolution of whether one of the standards or both are valid jurisdictional triggers.⁹³

Because of these mixed results, we submit that the agencies' field staff should not rely exclusively on the plurality test – even though doing so may be much easier in many particular instances – with respect to waters outside of the First and Eighth Circuits, where that test has expressly been held to be a valid basis for jurisdiction. Instead, the agencies should establish jurisdiction using both standards, consistent with the interpretations set forth in the draft guidance (subject to comments below). We emphasize that this is not a legal requirement -- waters that the plurality would find jurisdictional should be protected – but rather it is a practical suggestion; unless and until it is clear in a particular place that the plurality standard will support jurisdiction, it would be wise for the agencies to be able to demonstrate jurisdiction under both tests.

IV. Discussion of Draft Guidance's Treatment of Specific Water Body Types

A. Traditional Navigable Waters

Under the Act, the regulations, and the Court's decisions, ~~traditional navigable waters~~" are unquestionably protected by the law, and they also support jurisdiction over waters with specified connections to them. Accordingly, what is meant by the term ~~Traditional Navigable Waters~~" is a key element of the Draft Guidance. Without a clear definition for this term, the Guidance will not succeed in bringing any more clarity to this area of the law. Before providing comments on the Draft TNW definition, the following background section provides a brief history of the origins, usage and scope of the term ~~navigable water,~~" in order to help identify what is included in the traditional notions of that term. The comments then provide specific suggestions on how to make the TNW definition clearer and more useful.

1. Background on Traditional Navigable Waters.

Although the term traditional navigable waters is not used in the cases preceding *SWANCC* and *Rapanos*, the historic scope of the law was centrally important to Senators and House Members in the early 1970s when Congress was debating the proposed amendments to the CWA.⁹⁴ The CWA uses the term ~~navigable waters,~~" a term also used in a number of much

opinion characterizing Justice Kennedy's test as ~~the controlling rule of law~~" with one that says it is ~~the controlling rule of law for our case~~"; *but cf.* *U.S. v. Moses*, 496 F.3d 984, 990 (9th Cir. 2007) (decision issued three days prior to revision of *Healdsburg* opinion cites the initial *Healdsburg* opinion and characterizes Justice Kennedy's test as ~~the controlling rule of law~~").

⁹³ *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 215-16 (2d Cir. 2009); *U.S. v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *U.S. v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008) (concluding that evidence is sufficient for jury to convict under plurality, ~~significant nexus,~~" or dissent tests, but not indicating which standard, if any, controls).

⁹⁴ *See generally* William W. Sapp et al., *From the Fields of Runnymede to the Waters of the United States:*

A Historical Review of the Clean Water Act and the Term "Navigable Waters," 36 *Env'tl. L. Rep. News & Analysis* 10190, 10201 (Mar. 2006), available at <http://www.elr.info/articles/vol36/36.10190.pdf>. Up until 1977, the CWA was called the Federal Water Pollution Control Act. When that Act was amended in 1977, it was officially renamed the Clean Water Act.

older statutes either by itself or in the phrase “navigable waters of the United States.”⁹⁵ Unlike in those older statutes where the term only covered waters that had been, were, or could be used for waterborne commerce, the CWA use of the term was meant to be much broader in scope.

By borrowing a term from older statutes and then assigning a new definition to it, Congress unwittingly allowed opponents of comprehensive CWA protections to argue that Congress intended the Act to have a narrower scope.⁹⁶ Nonetheless, aside from an initial hiccup by the Corps,⁹⁷ the scope of the CWA’s “navigable waters” has been generally accepted to be much broader than that of the traditional navigable waters. The three CWA jurisdiction cases that have reached the Supreme Court—*Riverside Bayview Homes*, *SWANCC*, and *Rapanos*—have each addressed Congress’s intent in crafting the law. As summarized in detail in the background section above, Congress intended the term “navigable waters” to have a much broader scope than similar terms used in other contexts. Accordingly, we submit that, to the extent that “traditional navigable waters” are a touchstone for CWA jurisdiction, that term also must be read as broadly as possible.

In *Rapanos*, Justice Kennedy adopted a test for determining jurisdiction that explicitly uses traditional navigable waters as a reference point for determining CWA jurisdiction. Under this test, jurisdiction exists if there is a significant nexus between the traditional navigable water and the water body in question.

However, the meaning of “traditional navigable waters” itself is not entirely clear. The pre-CWA statutes that include the term navigable waters all have different purposes, and over time lines of cases have developed interpreting each of these strains of authority. Thus, it is not surprising that the case law interpreting navigable water as it is used in these different circumstances is not entirely consistent. To complicate matters, in setting forth his significant nexus test, Justice Kennedy does not make any attempt to specify which lines of cases are appropriate for defining traditional navigable waters.

When the Bush administration issued the Joint Guidance and the Revised Joint Guidance on the *Rapanos* decision, the agencies based their interpretation of the term “traditional navigable waters” on several of the cases discussed below.⁹⁸ The draft guidance follows this basic approach, though is more comprehensive. We agree that the proper approach is to identify all of those waters that historically have been considered “navigable waters” under various laws and judicial decisions, as the Clean Water Act was intended to be as comprehensive as constitutionally permissible (as the discussion above reveals). Generally, there are three different lines of federal navigability cases: (1) those involving the Commerce Clause; (2) those involving

⁹⁵ See, e.g., 33 U.S.C. § 403.

⁹⁶ Despite sowing the seeds for this debate by using the term “navigable waters” in the CWA, Congress did signal its intention to establish a broad scope for CWA jurisdiction by defining “navigable water” in the Act as the “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). This is a much broader definition, for instance, than the term Congress used in the Rivers and Harbors Act of 1899—“navigable waters of the United States.” 33 U.S.C. §§407.

⁹⁷ See *Callaway*, 392 F. Supp. at 686.

⁹⁸ U.S. Army Corps of Eng’rs, Jurisdictional Determination Form Instructional Guidebook App. D (2007); Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision In *Rapanos v. United States & Carabell V. United States*, n. 20 (2008) (hereinafter “Instructional Guidebook”).

admiralty jurisdiction; and (3) those involving determinations over the ownership of the beds of navigable waters. A discussion of each type follows.

a. Commerce Clause Cases

Under the Commerce Clause of the U.S. Constitution, Congress has the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."⁹⁹ All of the cases in this section are tied to the commerce power and fall within one of four categories: (1) regulation of commerce; (2) the Federal Power Act (FPA); (3) the Rivers and Harbors Act (RHA); and (4) the navigational servitude.

i. Regulation of Commerce

The first line of cases involves federal regulation of commerce on navigable waters of the United States. In the 1824 watershed case *Gibbons v. Ogden*,¹⁰⁰ the Supreme Court held that navigation, which had been long recognized as an important part of commerce, was within the power of the federal government to regulate under the Commerce Clause of the Constitution. Thus, the federal government could, among other things, regulate the new steamship trade that was developing on the nation's navigable waters.

One of the regulations that grew out of this power was the requirement that all steamship operators engaging in interstate commerce obtain a federal license. It was this requirement that was at issue in the seminal decision, *The Daniel Ball*.¹⁰¹ In this case the operator of a steamship operating between Grand Haven and Grand Rapids on the Grand River in Michigan argued that he did not have to secure a federal license or subject his steamship to federal inspection because he was operating his steamship solely within the state of Michigan. In deciding the case, the Supreme Court devised a two-part test. The Court set forth the first part of the test as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or *are susceptible of being used*, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.¹⁰²

In other words, a water body is subject to regulation under the Commerce Clause if it is currently being used for commerce, or if it could be used for commerce in the future. The Court then set forth the second part of the test as follows:

And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued

⁹⁹ U.S. CONST. art. 1, §8, cl. 3.

¹⁰⁰ 22 U.S. (9 Wheat.) 1, 190 (1824).

¹⁰¹ 77 U.S. 557 (1870).

¹⁰² *Id.* at 563 (emphasis added).

highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.¹⁰³

This part of the test requires that the goods or passengers that are being transported make it all the way to a state or international border via water.

Four years after it decided *The Daniel Ball*, the Supreme Court expanded its navigability test in *United States v. Steamer Montello (The Montello)*.¹⁰⁴ In this case involving the Fox River in Wisconsin, the Court decided that water could be found navigable, and thus subject to federal regulation, even if commerce was hindered by rapids and small waterfalls. The Court held:

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be *capable in its natural state* of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.¹⁰⁵

The Court found that early fur trading canoes had made it down the Fox River on a regular basis and that this trading use was sufficient to qualify the river as a navigable water of the United States that was "generally and commonly useful to some purpose of trade or agriculture."¹⁰⁶

ii. Rivers and Harbors Act Cases

As commerce grew in, on, and around the navigable waters during the 19th century, it became clear that the federal government would need to take action to keep these waterways clear of obstructions. Wharves, bridges, dams, and weirs had begun to clog some of the busier waters. To complicate matters, whenever the federal government attempted to stop such obstructions, the Supreme Court held that it could not do so until it passed legislation regulating such activities.¹⁰⁷ In response, Congress passed §§9 and 10 of the RHA.¹⁰⁸ From that point on, anyone wishing to build any type of structure in the navigable waters of the United States would have to first secure a permit from the Secretary of War (later the Secretary of the Army).

One of the most important RHA cases is *Economy Light & Power Co. v. United States*.¹⁰⁹ In this case, a power company attempted to build a hydropower dam across the Des Plaines River in Illinois without first securing a §9 permit under the RHA. The company argued that since two previously built canals diverted water out of the river, the river was no longer navigable. The Court held that because the river had been used in the past for fur trading, it was still a navigable water of the United States. In doing so, the Court established the concept of

¹⁰³ *Id.*

¹⁰⁴ 87 U.S. (20 Wall.) 430 (1874).

¹⁰⁵ *Id.* at 441-42 (emphasis added).

¹⁰⁶ *Id.* at 442.

¹⁰⁷ *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888).

¹⁰⁸ 33 U.S.C. §§402 & 403.

¹⁰⁹ 256 U.S. 113 (1921).

"indelible navigability," that is, if a water was ever navigable-in-fact, it will always be at least navigable-in-law and subject to federal regulatory power.¹¹⁰

The Corps has summarized the holdings of the cases that it feels define its jurisdiction under the RHA by regulation as follows:

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce: A determination of navigability, once made, applies laterally over the entire surface of the waterbody and is not extinguished by later actions or events which impede or destroy navigable capacity.

* * *

The several factors which must be examined when making a determination whether a water body is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

- (a) Past, present, or potential presence of interstate or foreign commerce;
- (b) Physical capabilities for use by commerce as in paragraph (a) of this section; and
- (c) Defined geographic limits of the waterbody.¹¹¹

This regulatory definition is based on such cases as *The Daniel Ball*, *The Montello*, and *Economy Light & Power*, as well as such cases as *United States v. Utah*¹¹² and *United States v. Appalachian Electric Power Co.*,¹¹³ which is discussed in the sections below. It is important to note that under this definition, the Corps has not adopted the second part of *The Daniel Ball* test that requires that the commerce be transported all the way to a state or foreign border via water. Instead the Corps relies on the Supreme Court's holding in the Equal Footing Doctrine case, *Utah*, also discussed below, which held that a water can be a navigable water if it can be used to transport commerce even if the water is wholly within a state and the goods being transported must be transported over land to reach a state or foreign border.¹¹⁴

While the Corps maintains this position that the second part of *The Daniel Ball* test does not apply to RHA cases, three appellate court decisions have held to the contrary. For example, in *National Wildlife Federation v. Alexander*,¹¹⁵ the North Dakota State Water Commission commenced work on a channel that would allow floodwaters to flow into the 34,000-acre Devils Lake. The lake is not connected to any other water body that could serve as an interstate or

¹¹⁰ *Id.* at 123.

¹¹¹ 33 C.F.R. §§329.4, 329.5 (2008). Note that in 1976 Congress exempted from the wharf and pier provisions of RHA §10 any body of water located entirely within one state if its classification as a navigable water of the United States rested solely on its historical use. Water Resources Development Act of 1976 §154, 33 U.S.C. §59L.

¹¹² 283 U.S. 64 (1931).

¹¹³ 311 U.S. 377 (1940).

¹¹⁴ See *Utah*, 283 U.S. at 82-83 (holding that portions of the Green and Grand Rivers in Utah, which are separated from other states by non-navigable portions of the rivers, are navigable waters).

¹¹⁵ 613 F.2d 1054 (D.C. Cir. 1979).

international link for waterborne commerce. The commission did not apply for any RHA permit before starting work. The U.S. Court of Appeals for the District of Columbia Circuit decided the case by concluding that the second prong of *The Daniel Ball* does apply in RHA cases. "[W]e conclude that [navigable waters of the United States] requires a body of water to have an interstate connection by water, which Devils Lake lacks."¹¹⁶ In similar cases involving lakes in Minnesota and Virginia, the U.S. Courts of Appeals for the Fourth and Eighth Circuits also concluded that both prongs of *The Daniel Ball* test had to be met for a water to be a navigable water of the United States under the RHA.¹¹⁷

iii. Federal Power Act (FPA) Cases

In the FPA, Congress, acting under its Commerce Clause authority, gave the Federal Power Commission, now the Federal Energy Regulatory Commission, the authority to regulate hydropower facilities located in navigable waters.¹¹⁸ The Act defines navigable waters as:

[T]hose parts of streams or other bodies of waters . . . which either in their natural or *improved condition* notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids¹¹⁹

What is important to note about this definition is that it includes those waters that although they are not presently navigable, are susceptible to being made navigable through reasonable improvements.¹²⁰

Perhaps the most important and oft-cited FPA case is *Appalachian Electric Power*.¹²¹ The case involved regulations promulgated by the Federal Power Commission requiring the licensing of hydroelectric dams located on navigable waters. The Federal Power Commission initially declared the New River, which runs through Virginia and West Virginia, non-navigable. Five years later the commission reversed itself and adopted a resolution declaring the New River navigable. The Supreme Court recognized, as had courts from *The Montello* forward, that different types of commerce could exist to determine navigability.¹²²

The use of commerce, the Court stated, need not be "continuous," explaining that "[e]ven absence of use over long periods of years, because of changed conditions, the coming of the railroad or the improved highways does not affect the navigability of rivers in the constitutional sense."¹²³ The Court proceeded to couple significant historical evidence with contemporary

¹¹⁶ *Id.* at 1055.

¹¹⁷ *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (1979); *State Water Control Bd. v. Hoffman*, 574 F.2d 191 (4th Cir. 1978).

¹¹⁸ 42 U.S.C. §§7171(a), 7172(a).

¹¹⁹ 16 U.S.C. §796(8) (emphasis added).

¹²⁰ *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940).

¹²¹ *Id.* at 377.

¹²² *Id.* at 405-06.

¹²³ *Id.* at 409-10.

studies suggesting the New River could be made navigable with "reasonable" improvements.¹²⁴ The Court accepted surveys and reports published by government agencies as evidence that the river had been improved for navigability in the past.¹²⁵ Additionally, the Court discussed prior appropriations by the Virginia General Assembly made for the improvement of the river.¹²⁶ These official accounts were bolstered by the testimony of elderly residents that private boats and commercial ferries had sailed on the New River "in the days before railways and good roads."¹²⁷

Appalachian Electric Power also explicitly recognized the concept of indelible navigability as it had been expressed in *Economy Light & Power*. In *Appalachian Electric Power*, the Court stated: "[W]hen once found to be navigable, a waterway remains so."¹²⁸ This is true, even if the waterway in its natural state required "reasonable" improvements to be navigable. As the Court explained: "The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic."¹²⁹ The decision thus clarified *Economy Light & Power's* relation on historical use with the latter's low threshold for commercial activity.

iv. Navigational Servitude Cases

As described below, under the Equal Footing Doctrine, states have title to the beds of navigable waters. Nonetheless, the federal government has an easement over those submerged lands. Under that easement or servitude, the federal government has the authority to condemn these submerged lands to make improvements to the waterways for commerce.¹³⁰ When the federal government exercises this power, it does not have to pay compensation to riparian property owners under the Takings Clause of the Fifth Amendment to the Constitution.¹³¹ The navigational servitude extends from the "ordinary high water mark"¹³² on one bank of a navigable water of the United States to the ordinary high water mark on the other bank.¹³³

The right of public access applies to all lands covered by the navigational servitude. Thus, many of the cases that deal with the navigational servitude involve public access to desirable waters. Typically, the definition for establishing the extent of the navigational servitude

¹²⁴ *Id.* at 416-17.

¹²⁵ *Id.* at 411-14.

¹²⁶ *Id.* at 414.

¹²⁷ *Id.* at 414-16.

¹²⁸ *Id.* at 408.

¹²⁹ *Id.*

¹³⁰ *United States v. Rands*, 389 U.S. 121, 123 (1967).

¹³¹ *Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas Cnty. Water & Sewer Auth.*, 981 F. Supp. 1469, 1472 n. 6 (N.D. Ga. 1997).

¹³² A water body's ordinary high water mark is the "line of the shore established by the fluctuations of water . . ." 33 C.F.R. §329.11(a)(1). It is determined by "physical characteristics such as a clear, natural line impressed on the bank, . . . changes in the character of the soil; destruction of terrestrial vegetation; . . . or other appropriate means that consider the characteristics of the surrounding areas." *Id.* See also *Parm v. Shumate*, 513 F.3d 135, 143 (5th Cir. 2007).

¹³³ 33 C.F.R. §329.11(a); see also *Rands*, 389 U.S. at 123.

is the same as the one used for determining federal jurisdiction under the RHA.¹³⁴ One exception to this rule is *Kaiser Aetna v. United States*,¹³⁵ as noted by one court:

Kaiser Aetna v. United States was the first and is the only case which has held that navigability for the purpose of federal regulation under the Commerce Clause is not coterminous with navigability for the purpose of defining the scope of the federal navigational servitude. *Kaiser Aetna*, which should be read along with its companion case, *Vaughn v. Vermillion Corp.*, stands for the proposition that navigable waterways built on private property with private funds, in such a manner that they ultimately join with other navigable waterways, do not create a general right of use in the public.¹³⁶

b. Admiralty Cases

The second line of cases involves the Constitution's admiralty provision. Under Article III of the Constitution, federal courts have original jurisdiction over admiralty cases; specifically, the federal courts have exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction."¹³⁷ The purpose of federal admiralty jurisdiction is to "protect [] commercial shipping" with "uniform rules of conduct."¹³⁸ Admiralty jurisdiction is based on a two-part test. First, did the alleged tort happen on or over navigable waters?¹³⁹ Second, did the cause of the injury have a "substantial relationship to traditional maritime activity such that the incident had a potentially disruptive influence on maritime commerce?"¹⁴⁰

For CWA purposes, the first prong of this test is most relevant. The test for whether a water is navigable in admiralty law is as follows: "[Whether the] waters are navigable if they are currently being used as a highway of commerce or if they are susceptible of being so used."¹⁴¹ This is the test that was set forth by the Supreme Court in *The Daniel Ball* in 1870.

Whereas other tests have broadened in scope over time, the admiralty definition for navigable waters has not. For instance, admiralty jurisdiction does not extend to certain waters that were historically used to transport commerce but are no longer capable of doing so because of obstructions.¹⁴² The rationale for this limitation is that admiralty jurisdiction is supposed to extend only to those waters that enjoy or could enjoy maritime commerce. If a new dam were to prevent maritime commerce from reaching waters upstream of the dam, it would also make sense that admiralty jurisdiction would not reach above the dam, regardless of the historic commerce that may have occurred on the river.¹⁴³

¹³⁴ *Goodman v. City of Crystal River*, 669 F. Supp. 394, 401 (M.D. Fla. 1987).

¹³⁵ 444 U.S. 164 (1979)

¹³⁶ *Goodman v. City of Crystal River*, 669 F.Supp. 394, 400 (M.D.Fla. 1987) (citations omitted).

¹³⁷ U.S. CONST., Art III, § 2; 28 U.S.C. § 1333(1).

¹³⁸ *LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999) (alteration in original) (quoting *Sisson v. Ruby*, 497 U.S. 358, 362 (1990)).

¹³⁹ *Id.* (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)).

¹⁴⁰ *Id.*

¹⁴¹ *Price v. Price*, 929 F.2d 131, 134 (1991).

¹⁴² *LeBlanc*, 198 F.3d at 358-59

¹⁴³ *Id.* at 359.

c. Equal Footing Doctrine Cases

The third line of navigable waters cases arise as a result of the Equal Footing Doctrine, which is also grounded in the Constitution. When the first 13 states became the United States, they retained ownership of the submerged lands beneath their navigable waters.¹⁴⁴ Under the Equal Footing Doctrine, as new states joined the Union, they received the same ownership interests over the submerged lands under their navigable waters as the original states had.¹⁴⁵

Many equal footing cases involve disputes over whether a state or the federal government owns the beds of certain waters. The most important issue in many of these cases is the boundaries of the navigable waters.¹⁴⁶ The definition of whether a water is "navigable" under this line of cases is as follows:

[S]treams or lakes which are navigable in fact must be regarded as navigable in law; they 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.¹⁴⁷

Although this definition sounds very similar to the one for admiralty jurisdiction, it differs in two important respects. First, the equal footing definition includes waters that were historically used for commerce but that can no longer serve that function. Second, it does not require commerce to be waterborne all the way to a state border as does the admiralty definition. Under the equal footing definition, for example, it is enough that commerce takes place on the Great Salt Lake; the lake does not have to be "part of a [waterborne] navigable interstate or international commercial highway."¹⁴⁸

2. Comments on the Definition of Traditional Navigable Waters Included in the Draft Guidance on Identifying Waters Protected by the Clean Water Act.

- a. The TNW Definition Included in the Guidance Must at Least Reference all the Lines of TNW Cases Discussed in the Background Section Above.

Although the definition of TNWs in the Draft Guidance includes language that would appear to cover all of the tests set forth in the previous section, it could be improved by explicitly referencing the distinct lines of cases that comprise traditionally navigable waters. By doing so,

¹⁴⁴ *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

¹⁴⁵ *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845).

¹⁴⁶ *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261 (1997).

¹⁴⁷ *United States v. Utah*, 283 U.S. 64, 76 (1931) (quoting *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926)).

¹⁴⁸ *Utah v. United States*, 403 U.S. 9, 10 (1971).

the Corps and EPA could help field staff, the regulated community, and the public understand that each of those lines of authority serve narrower purposes than the Clean Water Act and, as such, need to be considered together in determining all of the waters that qualify as “traditional navigable” waters. TNW cases are often cited with little regard for the underlying statute or legal basis adhered to in each case, and the guidance can help put the case law in context, consistent with the principles Congress articulated in adopting the Clean Water Act. While the Guidance may not be the place for a lengthy explanation of the term, the definition for TNW in the Guidance should at least set forth a framework for better understanding.

b. The Different Tests Should be Stated Distinctly to Avoid Confusion.

The TNW definition should state clearly that the tests are distinct. If, for instance, a water is found to have supported ~~historic commerce,~~” that is all that is necessary to find that the water is a TNW, even if that commerce only involved a trapper using the creek to get his beaver pelts to market. The ~~“susceptible to being used for future commercial navigation”~~ test need only be applied if there is no evidence of historic commerce. And while a ~~“susceptibility”~~ determination may involve an inquiry into the size, depth, and flow velocity of a creek, that same inquiry has no place in a determination of the presence or absence of evidence of historic commerce. The TNW definition should be written in such a way that those applying the definition do not blend the requirements of each test together.

c. The Draft Guidance Places too Great an Emphasis on Navigability Under the Rivers & Harbors Act.

The agencies’ guidance only specifically references sections 9 and 10 of the Rivers & Harbors Act of 1899 when discussing traditional navigable waters. There is no specific mention of the other lines of cases discussed above. We believe the Rivers & Harbors Act line of TNW cases should not be held out as any more important than any other line of TNW cases – all are relevant. If Justice Kennedy had desired such an outcome, he would have tied his significant nexus test to Section 10 waters rather than TNWs. The danger of placing too much emphasis on Section 10 waters is that it will become the default for determining TNWs. Such a result could be very detrimental because some Corps districts have failed to accurately define their Section 10 waters, due in large measure to the fact that they have not applied the historic commerce test appropriately. For example, one Corps district has failed to bring into Section 10 jurisdiction approximately 75 miles of one river alone.¹⁴⁹ If Section 10 waters were to become the default test, over a hundred river miles in this Corps district alone would end up being classified as non-TNW. This would make it much more difficult to perform significant nexus tests within the watersheds of these misclassified rivers.

¹⁴⁹ See Bill Sapp and Katie Ottenweller, *Back to the Past: Using the Historic Use Test to Protect Wetlands*, Natl. Wetlands Newsletter (July-Aug. 2011) (forthcoming).

d. The Draft TNW Definition Properly Points Out that —Susceptibility” can be Demonstrated by Taking Trips Using Recreational Craft.

Recreational trips, such as the one down the Los Angeles River (discussed below), are precisely the type of examination that should be conducted to determine 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. The Draft Guidance emphasizes this fact. Thus, the question is: could this water body ever 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.

e. The Los Angeles River TNW Determination Demonstrates That the Draft TNW Definition is no More Expansive than the Current TNW Definition.

In July, 2010, EPA Region 9 and EPA Headquarters determined, using the current Bush-era guidance and its approach to identifying TNWs that the Los Angeles River is a TNW.¹⁵⁰ Although the determination looked at the current commercial uses of the rivers, 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 the Agency that the river was a TNW.¹⁵¹ If the EPA were to conduct a similar analysis under the Draft Guidance, it is quite likely that it would reach the same result for the same reasons. The Draft TNW definition thus is no more expansive than the current version.

B. Interstate Waters

The draft guidance states that the EPA and Corps will assert jurisdiction over all interstate waters, consistent with the agencies’ current regulations defining “waters of the United States,” which categorically protect such waters. This includes interstate waters that may not be considered “traditional navigable waters” of the U.S. but any waters that cross state boundaries. For streams and rivers, this includes asserting jurisdiction over their upstream and downstream reaches. In addition, interstate waters can provide the basis for jurisdiction over other features; the agencies will assert Clean Water Act jurisdiction over waters that have a significant nexus to interstate waters, similar to how the agencies will apply Justice Kennedy’s significant nexus test to traditional navigable waters.

This is a proper and required use of the agencies’ authority. The previous *Rapanos* guidance improperly suggested that some so-called “isolated waters” – even those that are interstate ones – are subject to case-by-case approval instead of categorical coverage,¹⁵² despite

¹⁵⁰ See Letter from Jared Blumenfeld, EPA Region 9 Administrator, to Colonel Mark Toy, District Engineer, Los Angeles District, U.S. Army Corps of Engineers & attachment at p. 3 (July 6, 2010), available at <http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf>.

¹⁵¹ *Id.* at 23-26.

¹⁵² Instructional Guidebook at 51 & 59.

the fact that all interstate waters are separately protected by the regulations,¹⁵³ and that the interstate waters provision was not at issue in *Rapanos* or *SWANCC*.

In the *SWANCC* decision, the Court emphasized that the question presented concerned the jurisdiction status of intrastate waters wholly located within Illinois.¹⁵⁴ In *Rapanos*, the properties at issue were located within Michigan.¹⁵⁵ Thus, the Court had no reason to address the text of the Clean Water Act or base its holding with regard to interstate waters or the agencies' regulatory provisions concerning interstate waters.

The 1972 Clean Water Act amendments clearly evidence the intention of Congress to include interstate waters as “waters of the United States”. Indeed, the federal authority over interstate waters even predates the Clean Water Act by decades. For example, Congress passed a law in 1948 giving the U.S. Surgeon General the responsibility, in conjunction with other federal agencies and the States, to limit water pollution in interstate waters.¹⁵⁶ In that law, Congress stated that the term “interstate waters” means “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.”¹⁵⁷ Relevant to the next section of our comments, the provisions of that Public Law applied expressly not only to interstate waters but to their tributaries as well.

For the EPA and Corps to ignore interstate waters and their tributaries, either as waters of the U.S. in their own right or as part of the significant nexus analysis, would be tantamount to assuming that the Clean Water Act was meant to limit the scope of federal water pollution abatement strategies, when clearly the opposite was true. Nothing in the Clean Water Act suggests that protecting interstate waters or their tributaries from pollution was to be limited in any way, based on the 1948 Act or subsequent amendments. In fact, Congress made it clear in 1972 that its intent was to broaden the scope of federal water pollution efforts, not to limit them. For example, the Senate Committee on Public Works stated:

Through a narrow interpretation of the definition of interstate waters the implementation of 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source.¹⁵⁸

In addition, section 303 of the 1972 Clean Water Act specifically references the earlier federal laws protecting interstate waters from pollution. It states that:

In order to carry out the purpose of this Act, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that

¹⁵³ 33 C.F.R. § 328.3(a)(2).

¹⁵⁴ *SWANCC* 531 U.S. at 165-166, 171 (“~~w~~ thus decline [to]... hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties fall under § 404(a)’s definition of ‘navigable waters’...”).

¹⁵⁵ *Rapanos*, 547 U.S. at 762-64

¹⁵⁶ Water Pollution Control Act of 1948, Pub. L. No. 80-845.

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ S. Rep No. 92-414 at 77 (1971).

such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972.¹⁵⁹

And there is no language in either the *SWANCC* or *Rapanos* decisions that limits this authority of the federal agencies or their State partners to limit pollution of interstate waters. Neither of these cases even dealt with the issue of interstate waters. In no way did either of these Supreme Court decisions question the EPA's or Corps ability to regulate pollution over interstate waters.

The legitimacy of federal authority over interstate waters under the U.S. Constitution can hardly be questioned. Long before *Rapanos* and *SWANCC*, the Supreme Court recognized that the Clean Water Act was designed to establish ~~—a~~ an all-encompassing program of water pollution regulation, and ~~—applies to all point sources and virtually all bodies of water.~~¹⁶⁰

As the EPA notes in its attachments to the proposed guidance, in two other key decisions, decisions, the U.S. Supreme Court established that resolving interstate water pollution issues was a matter of federal law and that the Clean Water Act ~~—was~~ the comprehensive regulatory scheme for addressing interstate water pollution. *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).” As EPA states:

In both of these decisions, the Court held that federal law applied to interstate waters. Moreover, these cases analyzed the applicable federal statutory schemes and determined that the provisions of the Federal Water Pollution Control Act and the Clean Water Act regulating water pollution applied generally to interstate waters. EPA and the Corps interpret the holdings of these cases as together recognizing the federal interest in interstate water quality pollution; and, in *City of Milwaukee*, recognizing that CWA jurisdiction extends to interstate waters without regard to navigability.¹⁶¹

Therefore, we support the approach EPA and the Corps have taken with respect to interstate waters in this proposed guidance. It is sensible, logical – and legally correct – for the agencies to treat interstate waters in a manner consistent with the treatment of traditionally navigable waters. There is no legitimate reason to treat these two categories of waters, both long protected and well within the federal government's authority to protect, differently from each other.

¹⁵⁹ 33 U.S.C. § 1313(a) (1) (emphasis added).

¹⁶⁰ *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted); *see also* *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) (~~—It~~ seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce.”); *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975) (~~—C~~ongress by defining the term “navigable waters” . . . to mean “the waters of the United States, including the territorial seas,” asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.”).

¹⁶¹ U.S. EPA & U.S. Army Corps of Eng'rs, *Interstate Waters are “Waters of the United States” Under Section (a)(2) of the Agencies' Regulations*, at 7, *available at* http://www.epa.gov/owow/wetlands/pdf/wous_interstate_waters.pdf.

C. Tributaries

Overall, we support the steps that the Draft Guidance takes to improve the existing approach to identifying protected tributary streams. The Draft Guidance provides more clarity and better corresponds to the robust science linking tributary streams with their downstream rivers.¹⁶² As discussed above, neither *SWANCC* nor *Rapanos* demand that the agencies cease implementing the existing regulations for any type of water body. This is particularly true with respect to tributary streams, as jurisdiction over the waters at issue in those cases did not turn on the relevant regulatory provision governing tributaries. Our organizations encourage the agencies to improve the Draft Guidance to better reflect the limited nature of the Court's decisions; in the meantime, however, the Draft Guidance does reflect the scientific reality that tributary streams will typically have a "significant nexus" to interstate or traditional navigable waters, and thus will be jurisdictional.¹⁶³

Small streams make up a majority of stream miles in the United States, making their impact on the chemical, physical and biological integrity of our waters indisputable. Of those streams, intermittent and ephemeral streams comprise a significant portion of the river network, underscoring the need for their protection. For example, in arid and semi-arid states including Arizona, New Mexico, Nevada, Utah, Colorado and California, over 81% of stream miles have been classified as ephemeral or intermittent.¹⁶⁴ Even in some non-arid states, intermittent streams are predominant as in Alabama where 80% of stream miles in the National Forest are classified as intermittent.¹⁶⁵ The value of these headwater, intermittent, and ephemeral streams for the nation's clean and safe drinking water is well recognized, providing drinking water for 117 million Americans,¹⁶⁶ and yet is currently under threat.¹⁶⁷

¹⁶² See, e.g., Meyer, J. L. and J. B. Wallace. 2001. Lost linkages and lotic ecology: rediscovering small streams. Pages 295-317 in M.C. Press, N.J. Huntly, and S. Levin, editors. *Ecology: achievement and challenge*. Blackwell Science; Patz, M. J., K. Reddy, et al. (2006). Trace elements in coalbed methane produced water interacting with semi-arid ephemeral stream channels. *Water Air and Soil Pollution* 170(1-4): 55-67; Meyer, J.L., L.A. Kaplan, D. Newbold, D.L. Strayer, C.J. Woltemade, J.B. Zedler, R. Beilfuss, Q. Carpenter, R. Semlitsch, M.C. Watzin, and P.H. Zedler. 2007. Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands; *Journal of the American Water Resources Association*. 2007. Featured collection: headwaters hydrology. 43(1):1-133.

¹⁶³ Draft Guidance at 14 ("The presence of a bed and bank and an OHWM are physical indicators of flow and it is likely that flows through all of the tributaries collectively in a watershed with the above characteristics are sufficient to transport pollutants, or other materials downstream to the traditional navigable water or interstate water in amounts that would significantly affect its chemical, physical or biological integrity.").

¹⁶⁴ 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.

¹⁶⁵ J.L. Meyer, et. al. Comments of Professional Aquatic Scientists on Advanced Notice of Proposed Rulemaking for on the Clean Water Act Regulatory Definition of "Waters of the United States" (Docket ID No. OW-2002-0050) (2003).

¹⁶⁶ U.S. EPA Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.

http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm.

¹⁶⁷ Charles Duhigg and Janet Roberts, "Rulings Restrict Clean Water Act, Foiling EPA." *New York Times*, Feb. 28, 2010 (quoting New York State Assistant Commissioner for Water Resources on the gaps left in clean water

Headwater streams -- whether perennial, ephemeral or intermittent -- impact downstream flooding, baseflows, water quality and the entire aquatic (and in many cases, terrestrial) food chain.¹⁶⁸ Headwater streams prevent devastating floods by absorbing significant amounts of rainwater, runoff, and snowmelt. While headwaters comprise the smallest upstream component of a river network, they have the largest surface area of soil in contact with available water, thereby providing the greatest opportunity for groundwater recharge.¹⁶⁹ Physical, chemical, and biological processes of headwaters retain and transform excess nutrients preventing them from entering downstream community water supplies, lakes and eventually estuaries. These headwaters not only provide numerous ecosystem services to humans but also provide vital habitat for numerous species. Most aquatic or semi-aquatic species spend at least some portion of their life cycle in these small perennial, ephemeral and intermittent streams. Preserving headwater streams under the Clean Water Act means cleaner water for larger downstream rivers, estuaries and oceans. It is well known that processes occurring upstream within these small streams affect the entire river network's structure and function.

Given the critical nature of tributary streams, we are pleased to see EPA's reading of current law and science to better protect tributary stream systems. Specifically, we support the presumptive coverage of non-navigable tributaries connected to navigable waters that are relatively permanent under the plurality standard, and the recognition of the cumulative impact of stream systems on downstream waters through application of Justice Kennedy's direction to evaluate wetlands "alone or in combination with similarly situated wetlands in the region" to streams. However, we maintain that even these approaches are too limited; *Rapanos* did not issue a holding limiting the jurisdictional status of tributary streams the still-applicable regulations include tributaries of other specified regulated "waters of the United States," without qualification. We offer the following recommendations to strengthen the Proposed Guidance to better protect tributaries and clean water.

1. Tributaries should be Defined More Accurately

The ordinary high water mark (OHWM) has long been used by the Corps to indicate the lateral boundaries of Clean Water Act jurisdiction over streams, indicating volume and flow.¹⁷⁰ OHWM can help demonstrate that a tributary stream has a continuous channel, providing a clear linkage between a tributary and downstream waters in many places. Accordingly, we certainly agree that the presence of an OHWM should be a sufficient condition to identify tributary streams. And we further agree that tributaries with an OHWM and bed and bank will typically have a significant nexus to interstate or traditional navigable waters. However, we do not agree that finding an OHWM should be a necessary precondition to calling a feature a tributary or to identifying a "significant nexus" for tributaries-- what is important is whether it in fact contributes flow to downstream waters and how it functions in the watershed. It is unclear to us

protections: "There are whole watersheds that feed into New York's drinking water supply that are, as of now, unprotected.")

¹⁶⁸ *Id.*; see also Draft Guidance, appendix § 4.

¹⁶⁹ Meyer, J.L., L.A. Kaplan, D. Newbold, D.L. Strayer, C.J. Woltemade, J.B. Zedler, R. Beilfuss, Q. Carpenter, R. Semlitsch, M.C. Watzin, and P.H. Zedler. 2007. Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands; *Journal of the American Water Resources Association*. 2007. Featured collection: headwaters hydrology. 43(1):1-133.

¹⁷⁰ 33 C.F.R. § 328.4(c)(1).

whether the agencies intend for the presence of an OHWM (and, for that matter, a bed and bank) to be a precondition for jurisdiction; we urge the agencies to clarify in the final guidance that it is not.

However, the traditional approach to measuring OHWM has relied on physical characteristics alone, neglecting hydrologic measures.¹⁷¹ In the arid Southwest, for instance, typical OHWM indicators have not been found to be a reliable determination of a stream given the vast difference in “ordinary” flood patterns, and as a result it is suggested that the floodplain itself be used as the OHWM.¹⁷² EPA already recommends a suite of factors to determine headwater streams, which may be described as “dynamic zones within stream networks.”¹⁷³ While a traditional OHWM is certainly a positive indicator of a tributary, it is not a prerequisite. Moreover, because small headwater streams are the most susceptible to changes in size,¹⁷⁴ the OHWM is more variable and more difficult to ascertain. Thus, we recommend that the Guidance make clear that tributaries can be defined by the presence of an OHWM or more broadly by hydrologic, geomorphic, ecological and physical factors to ensure that tributaries across a range of regional and climatic variations are protected.

2. Defining “Seasonal” Must Take into Account the Full Range of Ephemeral and Intermittent Streams

One major improvement in the proposed Guidance is the revised definition of “seasonal” as applied to the plurality standard for jurisdiction. Whereas in the previous guidance, seasonal was defined as three months of flow and made no accommodation for regional variation, the Proposed guidance recognizes that “seasonal” will vary across the country.¹⁷⁵ We support this change to better reflect the scientific fact that flows and timing vary on an ecoregional basis. However, we urge EPA to make clear that timing is not necessarily sub annual and determining relatively permanent must examine more than one year of record. Some streams may “run continuously for several years, and then go dry, making it difficult to classify the stream as perennial or ephemeral.”¹⁷⁶ Additionally, some streams flow regularly but less than once a year

¹⁷¹ United States, U.S. Army Engineer Research and Development Center, Cold Regions Research and Engineering Laboratory, ERDC TR-04-01: *Review of Ordinary High Water Mark indicators for Delineating Arid Streams in the Southwestern United States* (Hanover, NH: U.S., Army Engineer Research and Development Center, Robert L. Lichvar and James S. Wakeley, 2004).

¹⁷² United States, U.S. Army Engineer Research and Development Center, Cold Regions Research and Engineering Laboratory, ERDC TR-06-05: *Distribution of Ordinary High Water Mark indicators and their Reliability for Delineating the Limits of “Waters of the U.S.” in the Southwestern Arid Channels* (Hanover, NH: U.S., Army Engineer Research and Development Center, Robert L. Lichvar, David C. Finnegan, Michael P. Ericsson and Walter Ochs, 2006).

¹⁷³ U.S. EPA, EPA/600/R-06/126: *Field Operations Manual for Assessing the Hydrologic Permanence and Ecological Condition of Headwater Streams* (Washington, D.C.: U.S. EPA, Ken M. Fritz, Brent R. Johnson, and David M. Walters, 2006).

¹⁷⁴ Stanley, E.H., S.G. Fisher, and N.B. Grimm. 1997. Ecosystem Expansion and Contraction in Streams. *BioScience*, 47(7): 427-435.

¹⁷⁵ Draft Guidance at 13.

¹⁷⁶ 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.

and remain critical for downstream water quality and biological integrity.¹⁷⁷ We recommend that EPA clarify that “relatively permanent” can span over several years when analyzing flows in any region.

3. Significant Nexus Should Apply to All Downstream Waters of Jurisdictional Waters

We support EPA’s proposed analysis for cumulative analysis of similarly situated waters. Watershed networks are inherently connected, and failure to protect small upstream tributaries could result in “alterations [to] downstream hydrology, water quality, biota and geomorphic processes.”¹⁷⁸ Once EPA or the Corps makes a determination that a tributary stream has a significant nexus to any TNW or interstate water, all downstream stream segments by necessity must also be jurisdictional. EPA should make clear that field staff should document the tributary that was found to have a significant nexus with downstream TNWs or interstate waters as well as all waters in between the two to ensure those waters are clearly recognized as jurisdictional. These data should be widely available and be used to create an ongoing database of waters that are jurisdictional for continual development of the category of “similarly situated” waters.

4. Ditches

In contrast to other tributaries, ditches are required to have additional characteristics before even being potentially considered jurisdictional. Ditches must have an OHWM and bed and bank, connect directly or indirectly to a TNW or interstate water and meet one of five other factors, and the Draft Guidance seems to presume that ditches are not tributaries.¹⁷⁹ Historically, ditches commonly have been protected under the CWA. Some so-called ditches have been regulated under the Clean Water Act because they are actually altered streams (i.e., streams that have been dredged out), and because ditches can transport pollutants downstream they may function just like other tributaries. Ditches can also be regulated under the Clean Water Act if they flow into other bodies of water that are protected by the Clean Water Act even if the ditches themselves are artificial.¹⁸⁰ There is no compelling legal or scientific reason to treat ditches that are tributaries differently from other tributaries; like other tributaries to jurisdictional waters, in fact, we believe that they should be categorically protected. But even to be internally consistent, the Draft Guidance should be revised to subject tributary ditches to either the plurality or significant nexus test, without reference to the unnecessary and burdensome additional factors.¹⁸¹

¹⁷⁷ See, e.g., Dodds, W. K., K. Gido, M. R. Whiles, K. M. Fritz, and W. J. Matthews. 2004. Life on the edge: the ecology of Great Plains prairie streams. *BioScience* 54:205-216.

¹⁷⁸ Freeman, M.C., C.M. Pringle and R.J. Jackson. 2007. Hydrologic Connectivity and the Contribution of Stream Headwaters to Ecological Integrity at Regional Scales. *Journal of the American Water Resources Association*. 43(1): 6-14.

¹⁷⁹ Draft Guidance at 12.

¹⁸⁰ *U.S. v. Holland*, 373 F. Supp. 665, 673-74 (M.D. Fla. 1974), *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001).

¹⁸¹ See Answering Brief of Defendants-Appellees, *Natl. Assn. of Home Builders v. U.S. Army Corps of Eng’rs*, No. 10-5169 (D.C. Cir., June 10, 2011) at 42 (“a ditch may be a tributary if it contributes flow to a larger body of water”); see also *id.* at 42-43 (collecting cases “that have upheld regulatory authority pursuant to the Clean Water Act over channels, canals, drains, and ditches”).

D. Adjacent wetlands

As discussed above, because *SWANCC* only addressed a particular application of an interpretation of the agencies' regulations pertaining to "other waters," and because *Rapanos* did not create binding law on the question of what adjacent wetlands are covered by the Clean Water Act, the default legal position ought to be that the unaffected provisions of the regulations continue to govern. With respect to adjacent wetlands, the regulations provide that the Act protects wetlands adjacent to traditionally navigable waters, interstate waters, other jurisdictional waters (which are not themselves wetlands), impoundments of and tributaries to other listed waters, and the territorial seas.¹⁸² Accordingly, we submit that – unless precluded by a judicial decision in the relevant jurisdiction – such adjacent wetlands are categorically covered by the law. In any place where a court has established a test for jurisdiction over such waters, EPA and the Corps must obviously follow it, so we discuss below the application of the "significant nexus" test to such waters as well as the application of the plurality test.

With respect to the application of the "significant nexus" analysis, we strongly support the agencies' more scientifically-based approach to considering the aggregate importance of similar wetlands. As noted above, under the existing guidance the agencies are seeking to revise, similar wetlands are only considered together to the extent that they are adjacent to the same "reach" of a tributary.

This aggregation decision was perhaps the most damaging element of the Bush administration guidance. Moreover, the choice to unnecessarily limit the consideration of the cumulative effect that wetlands have on water quality when evaluating whether a "significant nexus" is present was inconsistent with the opinion from which the test is drawn. Justice Kennedy, in spelling out how the "significant nexus" standard should work in practice, clearly intended for the agencies to have the ability to continue to protect wetlands when they collectively affect water quality, and to apply that protection to all similar water bodies across a significant area. His opinion says:

- "[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.'"¹⁸³
- "Through regulations or adjudication, the Corps may choose to *identify categories of tributaries* that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, 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."¹⁸⁴
- "Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to *presume covered status for other comparable wetlands in the region*."¹⁸⁵

¹⁸² See, e.g., 33 C.F.R. § 328.3(a)(7).

¹⁸³ *Rapanos*, 547 U.S. at 780 (emphasis added).

¹⁸⁴ *Id.* at 780-81 (emphasis added).

¹⁸⁵ *Id.* at 782 (emphasis added).

The natural reading of these passages is that EPA and the Corps, using their expert judgment, can evaluate available information about specific wetlands, establish that a “significant nexus” is present, and then notify the regulated community and the public that wetlands of the same type over a specified geographic area will be considered protected waters. The agencies also can make, consistent with Justice Kennedy’s opinion, similar jurisdictional judgments about wetlands adjacent to categories of tributaries which are important enough, given relevant characteristics (such as flow, position in the watershed, pollution burden, etc.), that the adjacent wetlands will likely have a significant water quality effect (physical, chemical, or biological) on downstream traditionally navigable waters or interstate waters.

Justice Kennedy’s opinion includes strong signals that he intended the “significant nexus” test to use a broad geographic analysis. For one, he says the government should examine similarly situated wetlands “*in the region*.” In this context, there is no reason to believe that Justice Kennedy’s focus on the effects across a “*region*” would be limited to a small area, much less an individual stream segment. To the contrary, the standard dictionary definition of “*region*” includes, among other things, “[a] large, usually continuous segment of a surface or space” and “[a] large, indefinite portion of the earth’s surface.”¹⁸⁶ Second, Justice Kennedy clearly has a broad geographic view of what effects are important for water quality purposes; in rejecting the plurality’s “dismissive” attitude toward the resources at issue in the case, Justice Kennedy gave an example of the importance of wetlands on a huge geographic scale: “Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, “dead zone” in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey.”¹⁸⁷

However, the existing guidance acknowledges virtually none of this, by taking a narrow geographic approach and by failing to provide a mechanism for making categorical or regional jurisdictional assessments (i.e., it does not explain when it is appropriate to “presume covered status” for wetlands of the same kind in an area). This effectively makes Justice Kennedy’s test a far more demanding requirement than *Rapanos* dictates.

The Draft Guidance, however, is far more faithful to these elements of Justice Kennedy’s opinion. In particular, the draft concludes that an inclusive geographic scope is appropriate for the aggregation analysis; it states, “The logical and scientifically valid “region” for determining whether similarly situated waters have a significant nexus is the watershed that drains to the nearest traditional navigable water or interstate water through a single point of entry.”¹⁸⁸ In addition, the draft says, “once the jurisdictional status for a particular water within a watershed has been established, field staff can apply the significant nexus analysis for that water to any subsequent determinations if they establish (and document) that the water at issue is the same

¹⁸⁶ The American Heritage Dictionary of the English Language, (4th ed. 2004.), available at <http://dictionary.reference.com/browse/region>; cf. U.S. EPA, Wadeable Streams Assessment: A Collaborative Survey of the Nation’s Streams, at ES-4 (Dec. 2006) (describing agency’s “assessment of the biological quality of wadeable, perennial streams and rivers across the country, as well as within each of three major climatic and landform *regions* and nine ecological *regions*, or ecoregions.”) (Emphasis added).

¹⁸⁷ 547 U.S. at 777.

¹⁸⁸ Draft Guidance at 8.

type and in the same watershed as the jurisdictional water.”¹⁸⁹ The guidance does not directly take up Justice Kennedy’s suggestion about identifying significant categories of tributaries for which any adjacent wetland will be jurisdictional, however; we urge the agencies to include such an element in final guidance and in revised regulations.

We commend the agencies for including in the draft guidance some additional clarification about how to identify which wetlands are “adjacent” to covered waters, but believe that the draft’s discussion of this issue can be improved further. First, we urge the agencies to clarify how field staff should consider floodplain location when evaluating adjacency. Although the draft indicates that “wetlands located within the riparian area or floodplain of a jurisdictional water will generally be considered neighboring, and thus adjacent,”¹⁹⁰ it does not specify which floodplain this includes. That is, it does not say that field staff should treat as “adjacent” any wetland within the 100-year (or some other period) floodplain of a jurisdictional water. We suggest the agencies provide this specificity, and suggest that the 100-year floodplain is an appropriate metric; it is also a criterion for which information should be readily available, as maps – outdated as many may be – are typically available for those areas.¹⁹¹

Second, our organizations support the consideration of whether resident species move between waters and wetlands as a factor in establishing adjacency between streams and adjacent wetlands.¹⁹² This analysis helps to ascertain the closeness of the relationship between these resources. We disagree with a related element of the draft guidance, however. The draft states: “In accordance with the decision in *SWANCC*, consideration of use by migratory species is not relevant to the significant nexus determination for such waters.”¹⁹³ However, that overstates the holding in *SWANCC*, which ultimately only ruled that the presence of migratory birds could not be the *sole* basis for jurisdiction, as the draft guidance says itself.¹⁹⁴

E. Other Waters

Prior to the Supreme Court’s decision in *SWANCC*, the occurrence of migratory birds was considered enough to establish a link to interstate commerce, and in turn, trigger protections for waters under the regulatory provision that protects “other waters” when their “use, degradation or destruction ... could affect interstate or foreign commerce....”¹⁹⁵ This provision was essential for the protection of inland wetlands, among other things. In *SWANCC*, the Court ruled that the presence of migratory birds is not sufficient for asserting Clean Water Act

¹⁸⁹ *Id.* at 22; *see also id.* at 9 (“the agencies would generally expect that if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus, because under Justice Kennedy’s test, similarly situated waters in the region should be evaluated together”).

¹⁹⁰ *Id.* at 16.

¹⁹¹ *See, e.g.*, Federal Emergency Management Agency, Map Service Center, *available at* <http://www.msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1&userType=G>.

¹⁹² Draft guidance at 17.

¹⁹³ *Id.* at 20.

¹⁹⁴ *See id.* at 2 (“In *SWANCC*, the Court addressed the question of CWA jurisdiction over isolated, non-navigable, intrastate ponds, and concluded that CWA jurisdiction *could not be based solely* on the presence of migratory birds.”) (emphasis added).

¹⁹⁵ 33 C.F.R. § 328.3(a)(3).

jurisdiction over certain water bodies, leaving many of them vulnerable to pollution and destruction.

In the decade leading up to *SWANCC* decision, wetlands were already reaching a crisis point with 53 percent of the wetlands in the U.S. having already been destroyed, degraded or contaminated.¹⁹⁶ The Supreme Court decision added another blow to these already fragile and vital ecosystems by suggesting that certain wetlands and other waters were not covered by the law.

The 2001 *SWANCC* decision focused in part on the fact that the waters at issue in the case were “isolated” from other waters; that is, they had no surface water connections to other water bodies. Since *SWANCC*, wetlands and other non-navigable intrastate waters that are not on or adjacent to “waters of the United States,” – i.e., “isolated” waters -- have not been regulated as waters of the United States and thus have not been protected under the Act.¹⁹⁷ However, so-called isolated wetlands often perform many of the same important environmental functions as all other wetlands, including recharging streams and aquifers, storing flood waters, filtering pollutants from drinking water, and providing habitat for wildlife.¹⁹⁸

The *SWANCC* decision was shortsighted in suggesting that waters with little to no surface water connections to other water bodies are somehow less entitled to protection. Although these water bodies appear to be separated from surface waters, many isolated wetlands are directly linked hydrologically to other wetlands or streams by subsurface flows.¹⁹⁹ Furthermore, the term “isolated” would also imply that there are ecological barriers to these wetlands that would prohibit seed dispersal, animal movements, and wildlife reproductive success, which has shown not to be the case.²⁰⁰

Some of the wetlands most at danger of losing protections are prairie potholes, playa lakes and vernal pools. Prairie potholes are located mostly in the northwestern part of the United

¹⁹⁶ Dahl, T.E. 2000. *Status and trends of wetlands in the conterminous United States 1986 to 1997*. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C., available at http://library.fws.gov/Pubs9/wetlands86-97_lowres.pdf.

¹⁹⁷ *The SWANCC Decision: Implications for Wetlands and Waterfowl*, Ducks Unlimited (September 2001).

¹⁹⁸ *Wetlands in Washington - Volume 1: A Synthesis of the Science* (March 2005, Publication #05-06-006), available at http://www.ecy.wa.gov/programs/sea/wetlands/bas/vol1final/Chapter%205_Volume%201_.pdf. See also *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008) (“The Government presented evidence that the BHA wetlands control flooding in the area and prevent pollution in downstream navigable waters, evidence supporting the significant nexus standard of the Rapanos concurrence.”); *United States v. Cundiff*, 480 F.Supp.2d 940, 945 (W.D. Ky. 2007) (finding “significant nexus” based on evidence presented, including expert opinion that “the wetlands on the Cundiff site serve several important ecological functions including both temporary and long term water storage, the filtering of acid mine drainage and sediment, and habitat support for plant and wildlife species that are endemic to wetland ecosystems”), *aff’d* 555 F.3d 200 (6th Cir. 2009).

¹⁹⁹ *Importance of Small Isolated Wetlands*, Allen E. Plocher, Ph. D.; Geoffrey A. Levin, Ph. D., Illinois Natural History Survey, Michael V. Miller, Ph. D., Illinois State Geological Survey Champaign, Illinois (March 2003), available at http://illinois.sierraclub.org/take_action/inhs.pdf.

²⁰⁰ Tiner, R. 1998. *In Search of Swampland: A Wetland Sourcebook and Field Guide*. Rutgers University Press, New Brunswick, NJ.

States and were made from retreating glaciers. Prairie potholes are extremely productive habitats for breeding waterfowl, such as ducks. The Prairie Pothole Region of the United States and Canada is vital to the production of many North American ducks. This area may only contain only 10 percent of the continental breeding range but it produces about 50 percent of the ducks.²⁰¹ Playa lakes, found mostly in the southwestern United States, are filled by rainfall and have periods of dry throughout the year. This wet and dry cycle makes these wetlands unique in their species populations. In particular, the playa lakes region provides habitat for wintering waterfowl; ducks such as mallards and northern pintails rely on these lakes.²⁰² Vernal pools are wetlands that are only wet part of the year and usually are dry in the summer months. According to EPA, these wetlands are vital to support local and regional biodiversity by serving as important breeding, nursery, and feeding grounds for wildlife, including amphibians, invertebrates, turtles, snakes, mammals, and birds.²⁰³

Isolated wetlands, like vernal pools, playa lakes and prairie potholes, are ecologically diverse ecosystems. The loss of isolated wetland habitats could have a serious impact on the survival of the species that depend on them. 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 isolated wetlands, 35 percent of them species are not known to be supported by any other type of habitat. Also, 86 plant and animal species listed as “threatened,” “endangered” or “candidate” under the Endangered Species Act are found in isolated wetland habitats.²⁰⁴

Wetlands ecosystems provide outdoor enthusiasts many recreational activities. Fishing, bird-watching, hunting, hiking and camping around wetland habitats accounted for a \$59 million dollar industry in 1991.²⁰⁵

In addition to being diverse ecosystems, so-called isolated wetlands also protect our communities from the increase in severe storms and floods. A single acre of wetland can store approximately 1 million gallons of flood water.²⁰⁶ 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.²⁰⁷ Executive Order 11988, issued by President Carter, directed federal agencies to avoid, to the extent possible, the long- and short-term adverse impacts associated modification of floodplains and to avoid direct and indirect support of floodplain

²⁰¹ Wildlife Damage Management, Internet Center for USGS Northern Prairie Wildlife Research Center. University of Nebraska – 1988. *Duck Nest Success in the Prairie Pothole Region*, available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1218&context=usgsnpwrc&sei-redir=1#search=%22ducks+and+prairie+potholes%22>.

²⁰² U.S. Fish and Wildlife Service. Waterfowl Management Handbook, 13.3.7. *Ecology of Playa Lakes*. David A. Haukos, available at http://www.nwrc.usgs.gov/wdb/pub/wmh/13_3_7.pdf.

²⁰³ U.S. EPA Vernal Pools, available at <http://water.epa.gov/type/wetlands/vernal.cfm>.

²⁰⁴ 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, available at http://www.natureserve.org/library/isolated_wetlands_05/isolated_wetlands.pdf.

²⁰⁵ R. Jan Stevenson, *Protection of Small, Isolated Wetlands in Michigan* (November 30, 2003), available at <https://www.msu.edu/~bakerbe4/portfolio/writing/wetlandpaper.pdf>.

²⁰⁶ U.S. EPA Wetlands: Protecting Life and Property from Flooding. EPA843-F-06-001 at 1 (May 2006).

²⁰⁷ U.S. EPA Wetlands Fact Sheet, EPA842-F-95-001 (Feb. 1995).

development wherever there is a practicable alternative.²⁰⁸ Healthy wetlands have proven to be effective and natural ways to control floods. One study credits wetlands with \$7.7 – 31 billion in flood control per year.²⁰⁹

As wetlands act as sponges, absorbing flood water, run-off and rain, they filter pesticides, excess nutrients and other pollutants; protect downstream tributaries, rivers and wetlands.²¹⁰ From a water quality perspective, so-called isolated wetlands are rarely completely isolated. They are at times connected by groundwater connections or ephemeral and intermittent streams.²¹¹ The loss of isolated wetlands would potentially have negative impacts on the water quality in other waters, impacting human health in communities that rely on interconnected water sources.

Wetlands have multiple functions -- not only do they provide habitat for plants and animals in the watershed, they help to absorb, slow floodwaters and filter pollution. Their flood control function can alleviate property damage and can even save lives.²¹² At the same time, wetlands also filter excess nutrients, sediment and other pollutants before they reach rivers, lakes, streams and other water bodies. In the end, wetlands provide habitat for wildlife, recreation for communities around them and clean water for future generations.

As noted above, the Court's decisions in *SWANCC* and *Rapanos* did not overturn protections for so-called (a)(3) waters where factors other than use as habitat for migratory birds are relevant. Accordingly, the agencies must maintain – consistent with the still-extant regulations defining “waters of the U.S.” – jurisdiction over “other” waters including lakes, ponds, streams and wetlands consistent with the regulations.²¹³ At a bare minimum, we agree with the agencies that “other waters” can still be protected under the approaches outlined in the Court's opinions, but we disagree with the limited nature of the analysis that the Draft Guidance proposes for these waters.

The Draft Guidance instead imposes a new case-by-case test in determining the jurisdiction of “other waters” covered by the law. Rather than continuing to cover such waters

²⁰⁸ Executive Order 11,988, 42 FR 26,951(May 24, 1977). *See also* 40 CFR § 230.1(d) (“From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.”).

²⁰⁹ R. Jan Stevenson, *Protection of Small, Isolated Wetlands in Michigan* (November 30, 2003), available at <https://www.msu.edu/~bakerbe4/portfolio/writing/wetlandpaper.pdf>.

²¹⁰ Society of Wetland Scientist letter to Donna Downing, U.S. Environmental protection Agency, Office of Wetlands, Oceans and Watersheds on Advance Notice of Proposed Rulemaking EPA Docket # OW-2002-0050; (April 16, 2003), available at <http://www.sws.org/regional/northcentral/documents/swscommentsisolatedwetlands.pdf>.

²¹¹ Dennis F. Whigham and Thomas E. Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS 541 (Sept. 2003), available at <http://users.ipfw.edu/isiorho/WETIsolatedwetland2.pdf>.

²¹² EPA, *Wetland Overview Fact Sheet* (Dec. 2004), available at <http://water.epa.gov/type/wetlands/outreach/upload/overview.pdf>.

²¹³ Specifically, those “other waters” whose use, degradation or destruction . . . could affect interstate or foreign commerce,” *e.g.*, 33 C.F.R. § 328.3(a)(3), must be protected, irrespective of whether a “significant nexus” can be established in a particular case.

categorically when they have specified connections to interstate commerce, or even when they have links to TNWs or interstate waters, as described in the Court's decisions the 2011 Draft Guidance states that the agencies have deemed it appropriate to divide the "other waters" category into two classes: —those that are physically proximate to traditional navigable or interstate waters or their tributaries, and those that are not."²¹⁴ For those the agencies deem physically proximate, the draft guidance states the EPA and Corps will treat them in the same manner as adjacent wetlands because they perform many of the same functions.²¹⁵ In other words, the agencies will apply the significant nexus test and consider those waters' importance collectively. Non-proximate waters will not be aggregated, however, except in extraordinary circumstances.²¹⁶

There is no logical, scientific, or legal rationale for dividing the "other waters" into these distinct categories and treating them differently, especially when it comes to looking at the functions they provide. The guidance states that the reason "proximate" waters' effects should be considered cumulatively is that they perform similar functions to one another — they retain floodwaters, recharge groundwater, provide habitat for waterfowl, and so on. What the agencies neglect, however, is that wetlands, streams and other waters provide those same ecological functions whether they are "proximate" or not.

As a legal issue, the guidance itself notes that while proximity was one factor considered by Justice Kennedy in his opinion, it was not the only one.²¹⁷ "Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, 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."²¹⁸

Therefore, we urge the agencies to reconsider the physically proximate/non-proximate distinction. The draft guidance and related scientific studies amply to show how these "other" wetlands and water resources have similar functions. They should all be considered "similarly situated" and as such they should be aggregated for the purpose of the Clean Water Act jurisdictional analysis.

F. Generally non-jurisdictional waters

For the most part, our organizations do not object to the description of several features as non-jurisdictional. Indeed, it is silly and distracting to even suggest that many of these areas and structures — such as irrigated fields, swimming pools, and ornamental waters — could ever be considered "waters of the United States." Likewise, because the Clean Water Act in several instances distinguishes between groundwater and "waters of the United States," we would not

²¹⁴ Draft guidance at 32.

²¹⁵ *Id.* at 32-33.

²¹⁶ Draft Guidance at 20 & 33 (requiring a "compelling scientific basis" to aggregate such waters).

²¹⁷ *See id.* at 33.

²¹⁸ 547 U.S. at 780 (emphasis added).

expect to have groundwater considered to be protected in the same way as ~~w~~aters of the United States.”²¹⁹

However, we are concerned by the apparent catch-all item, which ~~g~~enerally” excludes ~~[w]~~et areas that are not tributaries or open waters and do not meet the regulatory definition of wetlands.”²²⁰ First, we do not know how the term ~~g~~enerally” is intended to be applied; are there circumstances under which field staff can designate these (or, for that matter, other features listed in this section) as ~~w~~aters of the United States” and, if so, what are they? Second, the category introduces a new term – ~~o~~pen waters” – which the current ~~w~~aters of the United States” regulations do not include, and which is not otherwise defined in the draft guidance. Third, because of these ambiguities, we are uncertain what kinds of waters might be swept into this category and how the existing regulations would otherwise treat them. For example, would this category include closed or terminal basins, even if the stream in question is ~~u~~sed by interstate or foreign travelers for recreational or other purposes,” contains ~~f~~ish or shellfish [that] are or could be taken and sold in interstate or foreign commerce,” or ~~a~~re used or could be used for industrial purpose[s] by industries in interstate commerce”?²²¹ We strongly hope not; as discussed above, neither *SWANCC* nor *Rapanos* commands such a result.

Our organizations also, as discussed in detail above, object to the differential treatment of tributary ditches.

Finally, although those features ~~e~~xcluded from coverage under the CWA by existing regulations” are properly not considered ~~w~~aters of the United States,” we have considerable concern with the agencies’ current practice with regard to one category of regulatory exemptions -- ~~w~~aste treatment systems”. The agencies excluded ~~w~~aste treatment systems” from being considered ~~w~~aters of the United States” by regulation, but since have attempted to expand this exemption to cover waters for which it was plainly not intended. In 1980, EPA amended its regulations to provide that

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act ... are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.²²²

Clearly, the exclusion was limited; in view of the fact that the Act ~~w~~as not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States.”²²³ Although the second sentence of the regulatory exclusion was suspended in order to dispel concerns that pre-existing treatment systems would be improperly

²¹⁹ See, e.g., 33 U.S.C. § 1252(a).

²²⁰ Draft Guidance at 20.

²²¹ See 33 C.F.R. § 328.3(a)(3).

²²² *W.Va. Coal Ass’n v. Reilly*, 728 F. Supp. 1276, 1289 (S.D. W. Va. 1989) (quoting 40 C.F.R. § 122.3 (1980)).

²²³ *Id.* (quoting 45 Fed. Reg. 33,298 (May 19, 1980)).

brought into the regulatory system,²²⁴ the exemption was not meant to be a wholesale authorization of anything described as a “waste treatment system.” To the contrary, EPA’s initial implementation of the rules rejected a sweeping interpretation; the agency argued in litigation that in-stream disposal of coal mining waste did not qualify for the exemption.²²⁵

Unfortunately, over time, EPA and the Corps have reversed this interpretation, and now allow sources use the regulatory exemption to treat new waste treatment facilities in protected waters as excluded from the Clean Water Act. Under the agencies’ revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is established via a section 404 permit.²²⁶ This position was upheld in recent litigation.²²⁷

Our organizations strongly oppose this approach – nothing is more inconsistent with the basic premise of the Clean Water Act than allowing polluters to convert the nation’s waters into waste dumps. We recognize, however, that the best mechanism for reinstating the original intent of the “waste treatment system” exclusion is an agency rulemaking, not through this guidance.

G. Documentation

Over the past decade, it has been exceedingly frustrating to obtain information about jurisdictional and non-jurisdictional determinations. Such decisions are posted, some only temporarily, on dozens of individual Corps district websites (EPA and state NPDES authorities typically do not produce formal jurisdictional determinations). The decisions are not searchable in any kind of thorough manner, as often several determinations are lumped together into single files, and many times those files are not even word-searchable. As a consequence, it is virtually impossible for one to know for certain whether there have been any determinations within a given watershed, what they each concluded (if there were any), and what impacts – both individually and cumulatively – have occurred to aquatic resources.

We respectfully suggest that the agencies should develop a more transparent, centralized, and permanently-available database of jurisdictional and non-jurisdictional determinations. This database should include previously-made decisions. The principles articulated in the draft

²²⁴ *Id.* (citing 45 Fed.Reg. 48,620 (July 21, 1980)).

²²⁵ *Id.* at 1289-90 (deferring to EPA’s interpretation that treatment ponds were regulated “impoundments” not excluded “waste treatment systems”). *See also* Memorandum from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarbrough, EPA Region IV Residuals Management Branch Chief, attachment B (Apr. 2, 1986) (“EPA applies a standard which treats newly created impoundments of waters of the U.S. as ‘waters of the U.S.’, not as ‘waste treatment systems designed to meet the requirements of the CWA,’ whereas impoundments of ‘waters of the U.S.’ that have existed for many years and had been issued NPDES permits for discharges from such impoundments are ‘wastewater treatment systems designed to meet the requirements of the CWA’ and therefore are not ‘waters of the U.S.’”), *available at*

<http://yosemite.epa.gov/osw/rcra.nsf/documents/4BD7508AD59EA15F852565DA006F0A63>.

²²⁶ Memorandum from LaJuana S. Wilcher, EPA Assistant Administrator, to Charles E. Findley, Director, Water Div., Region X, U.S. Army Corps of Eng’rs, on Clean Water Act Regulation of Mine Tailings Disposal (Oct. 2, 1992); *see also* State Program Requirements; Approval of Application to Administer the NPDES Program; Texas, 63 Fed. Reg. 51,164, 51,183-84 (Sept. 24, 1998); U.S. EPA, *Guiding Principles for Constructed Treatment Wetlands* at 16 (Oct. 2000), *available at* <http://www.epa.gov/owow/wetlands/pdf/constructed.pdf>.

²²⁷ *See Ohio Valley Env’tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 211-16 (4th Cir. 2009) (upholding the agencies’ interpretation).

guidance make this documentation especially important; as the draft guidance indicates, a jurisdictional determination for an adjacent wetland or tributary stream in a watershed that drains to a traditionally navigable water or interstate water should, under Justice Kennedy’s test, establish jurisdiction for all such wetlands or streams within the same watershed.²²⁸

H. Need for Subsequent Rulemaking

As significant as we believe the agencies’ guidance to be, the agencies must complete this initiative, by conducting a rulemaking to permanently change the various “waters of the United States” regulations. A guidance document, by its very nature, cannot create binding rules that have to be followed in future cases; the draft guidance acknowledges this expressly, and we expect that Clean Water Act enforcement personnel around the country would strongly prefer to have a reliable set of rules on which they can rely in administrative and judicial proceedings.²²⁹ A rulemaking will allow the agencies to make categorical determinations based on scientific evidence of the role that certain kinds of waters typically perform in the watersheds in which they are located.²³⁰ And, guidance documents – even those like this one that have been subjected to intense public scrutiny and comment – may not be given the same deference by courts in cases raising “waters of the U.S.” issues as a regulation that has been issued after notice-and-comment rulemaking.²³¹

Consistent with the legal principles discussed above, the historically comprehensive scope of the law, and the critical public health and environmental need to protect as much of the nation’s aquatic resources as possible, our organizations insist that revised regulations must be stronger than the draft guidance. For instance, if the agencies do not follow our recommendation that the final guidance eliminate the artificial distinction between “proximate” and “non-proximate” other waters, we expect the agencies’ rulemaking to make good on the promise the draft includes: “As a part of [the planned rulemaking] process, we will further consider, based on a review of the scientific literature, how a significant nexus analysis should be conducted for non-physically proximate other waters.”²³²

²²⁸ See Draft Guidance at 22 (“once the jurisdictional status for a particular water within a watershed has been established, field staff can apply the significant nexus analysis for that water to any subsequent determinations if they establish (and document) that the water at issue is the same type and in the same watershed as the jurisdictional water”); see also *Rapanos*, 547 U.S. at 782 (“Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.”).

²²⁹ Draft Guidance at 1 (“This draft guidance document is intended to describe for agency field staff the agencies’ current understandings; it is not a rule, and hence it is not binding and lacks the force of law.”).

²³⁰ Cf. *Rapanos*, 547 U.S. at 780-81 (“Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, 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.”).

²³¹ *Precon Development Corp., Inc. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 290 n. 10 (4th Cir. 2011) (refusing to extend *Chevron* deference to Corps/EPA guidance document “because—although it could—the Corps has not adopted an interpretation of ‘navigable waters’ that incorporates [the ‘significant nexus’] concept through notice-and-comment rulemaking, but instead has interpreted the term only in a non-binding guidance document”).

²³² Draft Guidance at 20.

**NATURAL RESOURCES DEFENSE COUNCIL ▪ EARTHJUSTICE ▪
SIERRA CLUB ▪ WATERKEEPER ALLIANCE ▪
AMERICAN RIVERS ▪ ENVIRONMENT AMERICA ▪ SOUTHERN
ENVIRONMENTAL LAW CENTER ▪ DEFENDERS OF WILDLIFE ▪
AMIGOS BRAVOS ▪ FRIENDS OF THE EARTH ▪
CLEAN WATER ACTION ▪ GULF RESTORATION NETWORK ▪
TENNESSEE CLEAN WATER NETWORK ▪ APPALACHIAN CENTER
FOR THE ECONOMY & THE ENVIRONMENT**

January 21, 2008

Water Docket
Environmental Protection Agency
Mailcode 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460
E-mail: OW-Docket@epa.gov

Re: EPA–HQ–OW–2007–0282 Clean Water Act Jurisdiction

To Whom It May Concern:

Thank you for the opportunity to provide comments on the joint guidance issued by the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Corps”) this past summer.¹ The guidance ostensibly implements the Supreme Court’s decision in *Rapanos v. United States*,² and deals with a fundamental environmental issue – whether water bodies across the country are subject to the Nation’s core law protecting water quality. These comments are submitted on behalf of the Natural Resources Defense Council, Earthjustice, Waterkeeper Alliance, Sierra Club, Environment America, American Rivers, Clean Water Action, Southern Environmental Law Center, Amigos Bravos, Friends of the Earth, Defenders of Wildlife, Gulf Restoration Network, Appalachian Center for the Economy and the Environment, and Tennessee Clean Water Network. Our organizations collectively represent millions of Americans who strongly support the continued effective implementation of the federal Clean Water Act (“CWA” or “the Act”).

The federal Clean Water Act is one of the Nation’s most important, effective, and popular environmental laws. The law’s public support is not surprising, as most Americans expect to have safe drinking water, clean beaches, flood protection, fish and wildlife habitat, economic development, and overall community health – all values that the Clean Water Act safeguards. While it has not yet achieved Congress’s goal of making all of the Nation’s waters safe for

¹ U.S. EPA & Army Corps of Eng’rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007) (hereinafter “Guidance”).

² 126 S.Ct. 2208 (2006).

swimming, fishing, and other purposes, the Act has made tremendous progress towards this end over the last three decades. That progress is being significantly undermined by the new guidance and the EPA's and Corps' fundamentally flawed implementation and enforcement of the Act's jurisdictional scope.

It is hard to overstate the importance of the aquatic resources that are implicated by this guidance document. As discussed below, the three major categories of water bodies that are most directly affected by the guidance are "isolated" waters, tributaries that do not flow "relatively permanently," and wetlands adjacent to tributaries that are not considered traditionally navigable. Although the exact extent of these categories is hard to quantify based on currently available information and is subject to interpretation, some statistics will give a rough sense of the scope of the problem. There are approximately 20 million acres of "isolated" wetlands in the continental U.S.³ Nearly two million miles of the nation's streams outside of Alaska are intermittent or ephemeral.⁴ An estimated 53 to 59 percent of the streams in the country are either non-perennial or "start reaches," making them unlikely to be traditionally navigable; these streams have untold acres of wetlands adjacent to them.⁵

After the *Rapanos* decision, EPA and the Corps made a promise to the American public – the agencies would use their legal authority to the maximum extent they could to protect water bodies. Ann Klee, who was EPA General Counsel at the time of the decision, stated that "[t]he Bush Administration remains committed to protecting wetlands to the maximum extent allowable under the law."⁶ Similarly, EPA and the Corps submitted joint testimony to the Subcommittee on Fisheries, Wildlife, and Water of the Senate Environment and Public Works Committee stating, "[t]he agencies remain fully committed to protecting all CWA jurisdictional waters as was intended by Congress."⁷ The agencies reaffirmed this promise in issuing the

³ Eric Pianin, Administration Establishes New Wetlands Guidelines; 20 Million Acres Could Lose Protected Status, Groups Say, *Washington Post*, at A.5 (Jan. 11, 2003) ("The new regulation would shift 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."); Transcript of Oral Argument, *Rapanos v. U.S. & Carabell v. U.S. Army Corps of Eng'rs*, Nos. 04-1034 & 04-1384, at 41-42 (U.S. Feb. 21, 2006) (argument by Solicitor General Clement) ("about 20 percent of the Nation's wetlands are isolated"); Letter from Benjamin H. Grumbles, Acting Assistant Administrator for Water, U.S. EPA, to Anu Mittal, Director, Natural Resources & Environment, General Accounting Office, at 2 (Feb. 4, 2004), *reprinted in* General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, appendix IV (Feb. 2004) ("The Continental United States has lost over half of its wetlands since European settlement, with approximately 100 million wetland acres remaining. Of those, some 20% may be wetlands that are less obviously connected to the broader aquatic ecosystem.").

⁴ Letter from Benjamin H. Grumbles, EPA Assistant Administrator for Water, to Jeanne Christie, Executive Director, Association of State Wetland Managers, at 2 (Jan. 9, 2006) (mis-dated as Jan. 9, 2005).

⁵ *Id.*

⁶ Washington State Water Resources Association, *Carabell and Rapanos Rulings: How Will They Change the CWA?* (July 26, 2006) (interview transcript with Ann Klee), available online at http://www.wswra.org/files_for_news_archives/carabell_rapanos_rulings.html.

⁷ Statement of Benjamin H. Grumbles, EPA Assistant Administrator for Water & John Paul Woodley, Jr., Assistant Sec'y of Army for Civil Works, Before the Subcommittee on Fisheries, Wildlife, & Water of the Senate Environment & Public Works Committee, at 4 (Aug. 1, 2006).

guidance this summer, saying that they would “assert CWA protections to the maximum extent allowed under the *Rapanos* decision.”⁸

However, as discussed in detail below, the guidance issued by EPA and the Corps repeatedly and egregiously breaks this promise, leaving numerous waters unprotected or inadequately protected. The agencies are not compelled to take this weak posture by the Supreme Court’s decision; rather, the opinions leave the agencies with significant residual authority to broadly protect waters. Unfortunately, the guidance fails to use this authority at almost every turn. It seems as though the agencies took nearly every opportunity to misinterpret the Court’s opinions in a way that constrained, rather than maintained, protective jurisdiction. It is simply unacceptable that today, over 35 years after the passage of one of the country’s most important environmental laws, the agencies responsible for implementing the law are leaving many previously protected streams and wetlands without Clean Water Act safeguards even when they retain the legal authority, and responsibility, to do so. The failure of the agencies to adopt a more categorical and comprehensive approach in the guidance, instead opting for more case-by-case determinations, has created a regime in which many agency staff cannot themselves state clearly what resources they believe the law still protects.

In light of the myriad flaws discussed in these comments, our organizations strongly urge the agencies to withdraw the guidance, and re-dedicate themselves to fully protecting the Nation’s waters consistent with the Supreme Court’s interpretation of the law.

I. CONGRESS INTENDED THE CLEAN WATER ACT TO BE APPLIED BROADLY, AND THE RECENT JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS MAY NOT UNDERMINE THIS STATUTORY PURPOSE.

A. The Jurisdictional Scope of the Clean Water Act Is Broad

It is clear from the statutory language and legislative history that the intent of Congress when passing the Clean Water Act was to embrace the broadest possible definition of “navigable waters” when it defined that term as “the waters of the United States.”

The need for this broad scope is well documented. By the 1960s, the deterioration of the Nation’s waters was alarmingly evident. Symbolic of their disastrous state was the Cuyahoga River, running through Cleveland, Ohio into Lake Erie; it became so polluted with industrial waste in the 1950s and 1960s that it caught fire on more than one occasion.⁹ Lake Erie itself became so polluted from municipal waste and agricultural runoff that it was projected to become biologically dead. Unchecked water pollution in inland waterways accounted for record fish kills; for example, some 26 million fish died as a result of the contamination of Lake

⁸ U.S. EPA & U.S. Army Corps of Eng’rs, Corps and EPA Responses to the *Rapanos* Decision: Key Questions for Guidance Release, at 2, available at <http://www.epa.gov/owow/wetlands/pdf/13RapanosQ&As.pdf>.

⁹ *U.S. v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

Thonotosassa, Florida.¹⁰ Industry discharged mercury into the Detroit River at a rate of between 10 and 20 pounds per day, causing in-stream water to exceed the Public Health Service limit for mercury six times over.¹¹ Waterways in many cities across the country were reduced to nothing more than sewage receptacles for industrial and municipal waste. The rate of wetlands loss from the 1950s to the 1970s was approximately 450,000 acres per year.¹²

Leaving the problem to individual states coupled with piecemeal federal law was clearly failing. There was a general – and accurate – perception that past approaches relying on state-by-state water quality standards was not cleaning up the waters and, indeed, waters were becoming more polluted. There was clearly a need for a broader federal role to address water pollution. Public outcry demanded a strong response from Congress.

B. Legislative Language and Legislative History Confirm that Congress Intended a Broad Scope of Protection

And Congress responded. The 1972 Act was hailed as the first truly comprehensive federal water pollution legislation. Congressman Blatnik, Chairman of the House Public Works Committee, characterized it as a “landmark in the field of environmental legislation.”¹³ Senator Randolph, Chairman of the Senate Committee on Public Works said, “[i]t is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment.”¹⁴

The law’s comprehensive nature was largely in recognition that existing water pollution laws were a failure. As Senator Edmund Muskie told the Senate when introducing the bill that was to become the new Act: “The committee on Public Works, after 2 years of study of the Federal water pollution control program, concludes that the national effort to abate and control water pollution is *inadequate in every vital aspect*.”¹⁵

The very first sentence of the 1972 statute states “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁶ To achieve this objective, Congress adopted a general prohibition on discharging pollutants from point sources into “navigable waters” without a permit, and gave the fullest effect to this and

¹⁰ R. Adler, et al, *The Clean Water Act: 20 Years Later*, at 5-6 (1993).

¹¹ *Id.*; see also U.S. Government Printing Office, 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, 1253 (1973).

¹² Frayer et.al. “Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950s to 1970s,” at 3 (April 1983).

¹³ Committee on Public Works, Committee Print, 93d Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, Ser. No. 93-1, at 350 (1973) (hereinafter “1972 Legislative History”).

¹⁴ *Id.* at 1269.

¹⁵ *Id.* at 1253.

¹⁶ 33 U.S.C. § 1251(a). The House report explains, “The word ‘integrity’... is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained.” H.R. Rep. No. 92-911 at 76-77 (1972), 1972 Legislative History at 763. Similarly, the Senate report stated, “Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine waterbody be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original.” 1972 U.S.C.C.A.N. at 3742.

other provisions of the law by defining that key term as “the waters of the United States, including the territorial seas.”¹⁷

1. Congress Deliberately Redefined Previous Definitions of “Navigable Waters” to Encompass All “Waters of the United States”

Both the House and Senate versions of the bills to amend the Federal Water Pollution Control Act (FWPCA) were written to expand federal authority to control and ultimately eliminate discharges of water pollution across the country.¹⁸ Both the House and Senate sought to radically restructure the nation’s federal authority to control water pollution even though their bills borrowed some language from earlier versions of federal water pollution control law, as well as from the Refuse Act (RA) and the Rivers and Harbors Act (RHA). In their respective bills, both bodies initially borrowed the term “navigable waters” from the RA and RHA, and included a definition that itself used the term “navigable.”¹⁹ However, in the reports discussing their respective versions of the legislation, both the House and Senate expressed concern about potential narrow interpretations of which waters they intended to be covered by the new Act.

The House Public Works Committee stated its concern as follows:

One term that the Committee was reluctant to define was the term “navigable waters.” The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee’s intent. The Committee fully intends that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.²⁰

The Senate Committee on Public Works stated:

Through a narrow interpretation of the definition of interstate waters the implementation of 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source.²¹

¹⁷ 33 U.S.C. §§ 1311(a), 1362(12), 1362(7). Other substantive provisions of the Act also strongly underscore that Congress’ main purposes in enacting the law were water pollution and water quality, not navigation, and that Congress intended that the scope of the law be broad to achieve these purposes. *See, e.g.*, 33 U.S.C.

§ 1311(c)(2)(A), regarding water quality standards (“Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”)

¹⁸ H.R. 11896, 92nd Cong. (1971); S. 2770 92nd Cong (1971).

¹⁹ In the Senate, the earlier definition read “the term navigable waters means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. S. 2770, 92nd Cong. § 502(h) (1971), 1972 Legislative History at 1698. The House bill’s initial definition read, “The term ‘navigable waters’ means the navigable waters of the United States, including the territorial seas.” H.R. 11896, 92nd Cong. § 502(8) (1971), 1972 Legislative History at 1069.

²⁰ H.R. Rep. No. 92-911 at 131 (1972), 1972 Legislative History at 818.

²¹ S. Rep No. 92-414 at 77 (1971) 1972 Legislative History at 1495.

So while the House report focused upon the need for a broad constitutional interpretation of the Act's scope, and the Senate report spoke to the scientific reality of waters being interconnected, both bodies signaled their desire not to constrain the reach of the Act to those waters previously protected primarily on the grounds of navigability.

When the House and Senate met in conference committee, they took an additional step to ensure that the definition of "navigable waters" did not result in unduly narrow interpretations. As discussed in the report of the Conference Committee, the House version of the definition was accepted into the final bill, but the word "navigable" was deleted from the definition. Thus, the new definition read as follows: "The term 'navigable waters' means the waters of the United States, including the territorial seas."²²

The Conference report spoke to this change, using the exact terminology of the earlier House Public Works Committee report confirming that the term "be given the broadest possible constitutional interpretation," and expressing that the interpretation of this definition must be "unencumbered by agency determinations which have been made or may be made for administrative purposes."²³

Finally, the debate in Congress on final passage of the Act confirmed the conference report's intent that the law be given broad application. For example, Congressman John D. Dingell Jr. explained the definition in his statement to the House on the conference committee bill:

[T]he conference bill defines the term "navigable waters" broadly for water quality purposes. *It means all "the waters of the United States" in a geographical sense.* It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.²⁴

After reviewing the broad extent of the Commerce Clause authority, Representative Dingell went on to state:

Thus, this new definition *clearly encompasses all water bodies*, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144:

"The conferees fully intend that the term *navigable waters* be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes."²⁵

²² S. Rep. No. 92-1236 at 144 (1971) 1972 Legislative History at 327.

²³ *Id.*

²⁴ 118 Cong. Rec. 33 at 756-57 (Oct. 4, 1972) (emphasis added) 1972 Legislative History at 250.

²⁵ *See id.* at 250-251 (emphasis added).

Thus, Congress quite intentionally expanded the Act’s jurisdictional scope in 1972 because of the new and ambitious water pollution reduction goals of the Act. For this reason, Congress chose to discard the traditional definition of the term “navigable waters” as it had been used in earlier laws and rejected placing other limits on the new law’s jurisdictional reach such as some had proposed in earlier versions of the legislation.²⁶ Instead, Congress deleted the word “navigable” from the “navigable waters” definition of the 1972 Act, thereby asserting federal jurisdiction over all “the waters of the United States” in keeping with its stated objective to rid the Nation’s waters of pollution.

2. Historically, the Clean Water Act Has Been Construed by the Courts to Apply to a Wide Variety of Waters

Long before *Rapanos* and *SWANCC*, the Supreme Court recognized that the Act was designed to establish “an all-encompassing program of water pollution regulation,” and “applies to all point sources *and virtually all bodies of water.*”²⁷ Other courts also observed that “[i]t seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce,”²⁸ and that “Congress by defining the term ‘navigable waters’ . . . to mean ‘the waters of the United States, including the territorial seas,’ asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.”²⁹

3. Additional Evidence that the Scope of the Act Must Be Construed Broadly, Post-SWANCC and Rapanos

Many of the protections built into the Clean Water Act – including the requirement that point sources discharging pollutants into waters must have a permit – are triggered only when the body of water in question is a “water of the United States.”³⁰ Likewise, the Act’s core permit program – the § 402 National Pollutant Discharge Elimination System program³¹ – applies to “navigable waters,” *i.e.*, to “the waters of the United States,” as defined in § 502(7). Accordingly, the evolution of § 402 offers relevant contextual evidence concerning the proper interpretation of the § 502(7) definition.

The § 402 NPDES program was designed to supersede the preexisting permit program under the 1899 Refuse Act. Section 402 provides that permits previously issued under the Refuse Act would thenceforth constitute NPDES permits, and that no further Refuse Act permits would

²⁶ The definition of “navigable water” in earlier version of the bill that became the FWCPA of 1972 had made express reference to “navigability.” 211 80 Stat. 1253.

²⁷ *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

²⁸ *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979)

²⁹ *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975)

³⁰ See 33 U.S.C. § 1311(a) (generally prohibiting the “discharge of any pollutant” without compliance with other requirements of the Act); *id.* § 1362(12) (defining “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source”); *id.* § 1362(7) (defining “navigable waters” to mean “the waters of the United States”).

³¹ Section 402 authorizes issuance of permits for “the discharge of any pollutant,” 33 U.S.C. § 1342(a)(1), and § 502 defines “discharge of a pollutant” as the addition of a pollutant “to navigable waters.” *Id.* § 1362(12).

be issued.³² Tellingly, the Refuse Act does not merely govern discharge into traditionally navigable waters. To the contrary, it encompasses discharge “into any navigable water of the United States, *or into any tributary* of any navigable water from which the same shall float or be washed into such navigable water.”³³

Thus, to interpret the Clean Water Act in a way that would cause non-navigable tributaries of traditionally navigable waters to become excluded from the law, one would have to believe that the 1972 Congress cut back the geographic scope of the predecessor statute.³⁴ The notion that Congress intended any such cutback is untenable. To the contrary, faced with rivers literally catching fire due to pollution,³⁵ the 1972 Congress concluded that “the previous legislation was ‘inadequate in every vital aspect’” – and responded by enacting a “comprehensive” statute whose intent “was clearly to establish *an all-encompassing program* of water pollution regulation.”³⁶ In direct contradiction to this approach, exclusion of certain smaller or more remote tributaries (which we believe has and will result under the present guidance) will dramatically shrink the scope of the federal water pollution control law.

The 1977 Amendments to the Act further confirm the inclusive nature of the law’s scope. During the deliberations on those amendments, attempts were made to narrow the waters covered by the Clean Water Act (and by the Refuse Act). Under the proposed narrowing language, the permitting safeguards of those statutes would have encompassed only traditionally navigable waters, together with wetlands that were both “contiguous or adjacent” to such waters and “periodically inundated.”³⁷ Numerous Senators objected to the proposal as a significant weakening of the law and stressed that excising certain waters would undermine the basic structure of the Act. For example, Senator Baker emphasized that

[c]omprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors.³⁸

³² 33 U.S.C. §§ 1342(a)(4) & (5).

³³ 33 U.S.C. § 407 (emphasis added).

³⁴ Indeed, the cutback would be dramatic. *See* Letter of Jan 9, 2006 from Benjamin Grumbles, Assistant Administrator of EPA, *attached as appendix to Brief Amicus Curiae* of Assn. of State Wetlands Managers in *Rapanos*, 2006 WL 139206 (Jan. 13, 2006) (estimating that over half of all U.S. streams are not traditionally navigable); Lance D. Wood, Don’t Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 *Envtl. L. Rptr.* 10187, 10193 n.32 (2004) (in the Missouri River watershed, there are by conservative estimate 559,669 miles of traditional navigable waters plus tributaries, of which traditional navigable waters represent only 3,151 miles—less than 1%). Even if only a fraction of these tributaries were to be left out of the scope of the Clean Water Act’s protections – such as those lacking “relatively permanent flow” or a demonstrable “significant nexus” to traditional navigable waters – the water pollution impacts would be significant.

³⁵ *See U.S. v. Ashland Oil & Transp. Co.*, 504 F.2d at 1326.

³⁶ *Milwaukee v. Illinois*, 451 U.S. 304, 318 & 319 n. 10 (1981) (emphasis added).

³⁷ *See, e.g.*, Committee on Environment & Pub. Works, Committee Print, 95th Cong., 2d Sess., Legislative History of the Clean Water Act of 1977, at 901 (October 1978).

³⁸ *Id.* at 920.

Although the proposed narrowing language was included in the House bill, the Senate – and ultimately Congress as a whole – rejected it.³⁹

Thus, the Supreme Court’s rulings in *SWANCC* and *Rapanos* must be understood in context. The broad jurisdiction evinced by the Clean Water Act’s legislative language and Congress’ intent makes clear that EPA and the Corps should work within the bounds proscribed by the Court, but within those bounds they must exercise their remaining authority to the fullest extent to protect streams, wetlands, and other waters. Yet, as more fully discussed below, the 2007 guidance takes the exact opposite approach, and leaves waters not ruled non-jurisdictional by either *SWANCC* or *Rapanos* without legal protection nonetheless.

C. The Supreme Court’s Decision in SWANCC, the Agencies’ Response, then Comes Rapanos

Despite the clear legislative history and purpose of the Clean Water Act, previous Supreme Court precedent in *Riverside Bayview* and *Oulette*, and numerous lower court cases broadly interpreting the jurisdictional scope of the law, in 2001, the Supreme Court – in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs* (“*SWANCC*”)⁴⁰ – held that the non-navigable, intrastate, “isolated” waters in that case could not be classified as “waters of the United States” solely based on the government’s so-called “Migratory Bird Rule,” an interpretation of the jurisdictional regulations which protected aquatic habitat used by migrating birds.

1. The *SWANCC* Decision Began the Unraveling of Three Decades of Well-Settled Law

The holding of *SWANCC* was narrow, and was largely limited to the facts of the case or very similarly situated waters. At issue in that case were waters that had been abandoned gravel pits that, over the years, had filled with water and were used as habitat by migrating waterfowl. In asserting jurisdiction over the waters, the Corps cited the presence of migratory birds as the jurisdictional trigger for the Clean Water Act; they did not cite any of the other bases in their regulations that also allowed them to assert Clean Water Act protections over intrastate waters, whether they appear to be “isolated” or not.⁴¹ Accordingly, the Supreme Court did not invalidate any of the regulatory bases for asserting jurisdiction over such water bodies (such as links to interstate commerce). The Court held that the Corps’ regulations “as clarified and applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule’ . . . exceeds the authority granted to respondents under § 404(a) of the CWA.”⁴²

The five Justice majority decision did contain gratuitous language – dicta – that was read by industry lawyers and others as inviting additional legal attacks on federal protection for

³⁹ See *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136-37 (1985) (discussing the 1977 debate and Congress’ ultimate abandonment of any effort to narrow the definition of “waters”).

⁴⁰ 531 U.S. 159 (2001).

⁴¹ The term “isolated” does not appear in the Act itself or in EPA or Corps jurisdictional regulations.

⁴² *Id.* at 174 (internal citations omitted). The Migratory Bird Rule was contained in the 1986 preamble to the Corps’ regulations, and is not a rule. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

waters that are not traditionally navigable. Fortunately, when those arguments were made, the courts generally did not interpret *SWANCC* broadly, though it still did lead to a cut back on legal protections.⁴³

2. The Advanced Notice of Proposed Rulemaking and 2003 Guidance Went Far Beyond *SWANCC*

Following *SWANCC*, on January 15, 2003, the EPA and Army Corps of Engineers published an Advance Notice of Proposed Rulemaking (“ANPRM”) raising a broad array of questions about the jurisdiction of the Clean Water Act and asking the public to comment on whether the agencies should rewrite their longstanding definitions of “waters of the United States.” Simultaneously, they released a guidance memo to their field staff regarding Clean Water Act jurisdiction over certain so-called “isolated,” non-navigable, intrastate waters.

The agencies claimed these actions were responsive to the *SWANCC* case, but both the guidance memo and the ANPRM went far beyond the Court’s holding.

The 2003 guidance took effect right away and had an immediate impact on many of the Nation’s wetlands, creeks, ponds, and streams. The policy directed Corps and EPA staff not to assert jurisdiction over “isolated” waters without first obtaining permission from headquarters.⁴⁴ No similar instructions were issued to get permission before allowing unregulated pollution or destruction of these waters by determining that they were not subject to Clean Water Act jurisdiction. More importantly, in practice, the 2003 guidance led to the loss of resources. Whenever the agencies themselves determined that waters were “isolated,” intrastate, and not traditionally navigable – even where the waters had uses other than as habitat by migratory birds – the waters were found to be non-jurisdictional.

The EPA itself estimated that as many as 20 million acres of wetlands – 20 percent of the remaining wetlands in the continental U.S. – were “isolated,” meaning they were placed at risk of losing federal Clean Water Act protections under the 2003 policy.⁴⁵

The ANPRM announced the administration’s intention to consider even broader changes to Clean Water Act coverage through rulemaking. Fortunately, overwhelming opposition to the proposed rulemaking from Congress (including 218 members of the House and more than 40 Senators); state water pollution control, fish and wildlife, and natural resources agencies; hunting and angling groups; environmental organizations;⁴⁶ and the public (over 130,000 individual

⁴³ See, e.g., *U.S. v. Rapanos*, 376 F.3d 629, 638 (6th Cir. 2004) (“the majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no connection with navigable waters, it does reach inland waters that share a hydrological connection with navigable waters”), *vacated*, 126 S.Ct. 2208 (2006).

⁴⁴ 68 Fed. Reg. 1991, 1997-98 (Jan. 15, 2003) (“field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on other factors listed in 33 CFR 328.3(a)(3)(i)–(iii)”).

⁴⁵ See Pianin, *Administration Establishes New Wetlands Guidelines; 20 Million Acres Could Lose Protected Status, Groups Say*, *supra*.

⁴⁶ We hereby incorporate by reference the comments submitted by national environmental organizations on the 2003 ANPRM and guidance. In addition to being a part of the official public docket in 2003, the comments are available at http://www.earthjustice.org/library/policy_factsheets/comments-from-earthjustice.pdf.

citizens submitted comments, overwhelmingly opposing the rollback) caused EPA's then-Administrator Michael Leavitt to announce that the administration was dropping the rulemaking idea.⁴⁷

However, the EPA left the 2003 guidance in place, along with its biased one-way policy requiring staff to get headquarters permission to protect waters but not to authorize their destruction or degradation. As a result, the 2003 guidance and its "phone home" policy were causing widespread destruction of waters that should have remained legally protected even after *SWANCC*.⁴⁸

D. The Rapanos Decision and Its Three Major Opinions

Although the claims of those opposed to Clean Water Act protections that were trying to expand upon the *SWANCC* decision were largely rejected by the lower courts, in October 2005 the Supreme Court took up two other cases – *United States v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers* – that together questioned the extent to which the law protects tributaries that are not traditionally navigable and their adjacent wetlands.

In the *Rapanos* and *Carabell* cases, the Bush administration argued that the Clean Water Act and its implementing regulations properly encompass and protect the non-navigable tributaries of "traditionally navigable" waters and the wetlands adjacent to these tributary streams and rivers. This position was supported by briefs filed by more than 30 state Attorneys General and nine members of Congress who helped pass the Clean Water Act in 1972, its amendments in 1977, or both. Also filing briefs in favor of the government's position were: four former EPA administrators who served under Republican and Democratic administrations; a coalition of hunting and angling groups and businesses; state water pollution control officials, wetland managers, fish and wildlife agencies, and floodplain managers; New York City; numerous western resources councils; Macomb County (MI); and many environmental, public health and conservation groups.

The *Rapanos* petitioners and some supporting organizations argued that the Clean Water Act does not protect non-navigable tributaries and only covers those wetlands directly adjacent to traditionally navigable waters.⁴⁹

⁴⁷ EPA Press Release, EPA and Army Corps Issue Wetlands Decision, Dec. 12, 2003 ("After soliciting public comment to determine if further regulatory clarification was needed, the EPA and the Corps have decided to preserve the federal government's authority to protect our wetlands."). *Also see Rapanos*, 126 S.Ct. at 2256 n. 4 (Stevens, J., dissenting) (describing agencies' effort to revise regulations and noting that "almost all of the 43 States to submit comments opposed any significant narrowing of the Corps' jurisdiction – as did roughly 99% of the 133,000 other comment submitters").

⁴⁸ We recognize and appreciate that the 2007 Guidance and agency coordination memo, discussed below in section IX, replaced the one-way "phone home" policy.

⁴⁹ The petitioners in the *Carabell* advanced a more limited argument, claiming that it was impermissible for the Corps to regulate a wetland as "adjacent" to a protected water body – and therefore subject to the CWA – if it lacked a hydrological connection with the water body. Brief of Petitioners, *Carabell v. U.S. Army Corps of Eng'rs*, at 12-13 (Dec. 2, 2005).

In its decision (which addressed the two consolidated cases) the Supreme Court had no majority opinion but split 4-1-4 in its analysis of the Clean Water Act and the extent to which the law covers tributaries and wetlands.⁵⁰ The Court did not invalidate the agencies' existing rules defining the "waters of the U.S." but the various opinions suggested three different tests for determining whether streams and other tributaries and wetlands adjacent to those waters remain under the scope of the Act.

The four-justice plurality, in an opinion written by Justice Scalia, would significantly limit the law's scope. Focusing on a 1954 dictionary definition of "waters" more than the language, purpose, or history of the Clean Water Act (a law he characterized as "tedious"), Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, concluded that:

[T]he phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as "streams[,] ... oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.⁵¹

The opinion also would require wetlands to have a "continuous surface connection" to such waters to be protected.⁵² The opinion even seems to indicate that the plurality might believe that water bodies must be interstate (or connected to interstate waters) in order to be "waters of the United States."⁵³

Justice Kennedy would require the agencies to show a physical, biological, or chemical linkage – a "significant nexus" – between a water body and a traditionally navigable one in order for it to be protected.⁵⁴ For tributaries, Justice Kennedy says that, applied consistently, existing rules "may well provide a reasonable measure of whether specific minor tributaries bear a significant nexus with other regulated waters to constitute 'navigable waters' under the Act."⁵⁵ For wetlands adjacent to such non-navigable tributaries, Justice Kennedy suggested that a "significant nexus" could be shown in different ways, depending on the kind of water to which the wetland is adjacent.⁵⁶

While he concurred that the cases should be remanded, Justice Kennedy completely rejected Justice Scalia's reasoning. Indeed, he stated that Justice Scalia's plurality opinion "is inconsistent with the Act's text, structure, and purpose."⁵⁷

⁵⁰ *Rapanos v. U.S.*, 126 S.Ct. 2208 (2006).

⁵¹ *Id.* at 2225 (plurality opinion) (citation omitted).

⁵² *Id.* at 2226.

⁵³ *Id.* at 2220 n.3 (stating that the phrase "of the United States" traditionally "excludes intrastate waters, whether navigable or not" and suggesting that the Clean Water Act's use of the phrase "retains some of its traditional meaning").

⁵⁴ *Id.* at 2248 (Kennedy, J., concurring).

⁵⁵ *Id.* at 2249.

⁵⁶ *Id.* ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, 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.").

⁵⁷ *Id.* at 2246.

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, said that the existing agency regulations reflect a reasonable interpretation of the statutory phrase “waters of the United States,” especially in light of the Court's unanimous 1985 decision in *US v. Riverside Bayview Homes*, which upheld the application of these very same rules.⁵⁸ While rejecting the rationale of both of the other opinions, these four justices stated that, since they would protect all of the waters that Justice Scalia's test would protect and all of the ones Justice Kennedy's test would protect, the agencies should continue to protect streams and wetlands if they qualify under either test.⁵⁹

II. THE DIVIDED OPINIONS IN *RAPANOS* CREATE NO OVERARCHING PRECEDENT LIMITING THE CLEAN WATER ACT'S APPLICATION TO WATER BODIES.

Since *Rapanos* and its split opinions, numerous courts and commentators have attempted to determine which opinion (or opinions) contains the controlling rule of law, if any. Much of the debate has centered around a 1977 Supreme Court decision called *Marks v. United States*, which states, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁶⁰

We submit that the general rule on split opinions from *Marks* “only works in instances where one opinion can meaningfully be regarded as narrower than another – only when one opinion is a logical subset of other, broader opinions.”⁶¹ Moreover, “[w]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court.”⁶² Instead, when one opinion is not a logical subset of another, the holding of the case is the one that is most closely limited to the facts of the case, rather than one that announces general rules.⁶³

Applying this analysis to *Rapanos*, we believe that Justice Kennedy's reasoning and that of the plurality cannot be considered a logical subset of one another, so the *Marks* analysis is inapplicable. Justice Kennedy underscores his near-complete disagreement with the plurality when he says that “the plurality's opinion is inconsistent with the Act's text, structure, and

⁵⁸ *Id.* at 2255.

⁵⁹ *Id.* at 2265 & n. 14.

⁶⁰ 430 U.S. 188, 193 (1977) (internal quotation and punctuation omitted).

⁶¹ *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (citing *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*)) (internal quotation marks omitted), *cert. denied*, 540 U.S. 1103 (2004).

⁶² *Alcan Aluminum*, 315 F.3d at 189 (citing *Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3rd Cir. 1994)).

⁶³ See *United States v. Martino*, 664 F.2d 860, 872-73 (2d Cir. 1981) (stating the narrowest grounds is the “ground that is most nearly confined to the precise fact situation before the Court, rather than to a ground that states more general rules”); see also *Alcan Aluminum*, 315 F.3d at 189 (analyzing Supreme Court case in which “Justice Kennedy's concurrence is not a logical subset of the plurality's . . . analysis,” finding that “no ‘common denominator’ can be said to exist among the Court's opinions,” and concluding that “[t]he only binding aspect of such a splintered decision is its specific result”).

purpose.”⁶⁴ Moreover, the two opinions have entirely disparate rationales that cannot be reconciled; indeed, the opinions’ reasoning is primarily based on interpreting different statutory terms.⁶⁵ Accordingly, the specific result of the case (and the only thing that *Rapanos* establishes) is that additional fact-finding is needed to assert jurisdiction over the wetlands at issue in the case.

At worst, if one looks only to the result reached by the plurality and Justice Kennedy to try to identify the “narrowest” approach under the *Marks* framework, the proper read of *Rapanos* is that it should not limit jurisdiction except with regard to those wetlands adjacent to non-navigable tributaries which neither have a “significant nexus” with traditionally navigable waters nor have a “continuous surface connection” with other regulated waters. To the extent that the *Marks* “narrowest” opinion approach can be implemented (which, as noted above, we dispute), one must look closely at the circumstances of a given case to determine which opinion is narrower in application. Given that the status quo prior to *Rapanos* was that wetlands adjacent to tributaries to various regulated waters were categorically protected, the “narrowest” rationale will be the one that changes the status quo the least.⁶⁶

In some factual scenarios, Justice Kennedy’s test will limit Clean Water Act protections in the narrowest way, since he would not disqualify wetlands from the Clean Water Act simply because they lack a “continuous surface connection” to the adjacent water, or because the adjacent water is not “relatively permanent.” On the other hand, the Scalia plurality would not disqualify a wetland that is continuously connected to a “relatively permanent” tributary even if that wetland appears to lack a “significant nexus” to some traditionally navigable water; where such facts are present, the plurality test is a narrower constraint on protections. Accordingly, the agencies must maintain – consistent with the still-extant regulations – jurisdiction over adjacent wetlands unless they are disqualified by the narrowest test that can be applied to the specific facts of the case. That means that wetlands satisfying either the plurality’s or Justice Kennedy’s test will continue to be protected.⁶⁷

⁶⁴ *Rapanos*, 126 S.Ct. at 2246. See also Circuit Rule 54 Position Statement of the Appellee United States of America, *U.S. v. Gerke Excavating*, No. 04-3941, at 4 (7th Cir. Aug. 18, 2006) (“in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a ‘lesser included’ version of the other”).

⁶⁵ Compare 126 S.Ct. at 2220 (plurality opinion) (“We need not decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over ‘waters.’”) with *id.* at 2248 (Kennedy, J., concurring) (“Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term ‘navigable’ some meaning, the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”).

⁶⁶ Assuming *arguendo* that *Rapanos* has *stare decisis* effect under *Marks*, the *Marks* Court ruled that the narrowest opinion in *Memoirs v. Massachusetts* was the one that constrained the government’s regulatory authority the least – not Justices Black and Douglas, who would have precluded regulation of obscenity entirely, nor Justice Stewart, who would have allowed regulation of only so-called “hard-core” obscenity, but the plurality, whose test allowed regulation of a wider range of obscenity. *Marks* at 193-94. Similarly here, the narrowest approach would be the one that least constrains EPA’s regulation of pollution. Because neither the plurality nor the Kennedy test is a complete subset of the other, the least-constraining opinion may vary depending on the circumstances.

⁶⁷ Cf. *Rapanos*, 126 S.Ct. at 2265 (Stevens, J., dissenting) (“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.”); *id.* at 2265 n. 14 (“I assume that Justice KENNEDY’s approach will be controlling in most cases because it

Of course, when implementing the Act and the *Rapanos* decision, the agencies must follow the prevailing law in the relevant jurisdiction. Some courts have already decided which *Rapanos* opinion controls, and how broadly:

- In the First Circuit (covering Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island), “[t]he federal government can establish jurisdiction . . . if it can meet either the plurality’s or Justice Kennedy’s standard as laid out in *Rapanos*.”⁶⁸ The decision concluded that the *Marks* framework was inapplicable to the *Rapanos* opinions.⁶⁹ The court came to its conclusion in a case involving wetlands connected via non-navigable tributaries to a traditionally navigable water body.
- In the Seventh Circuit (covering Illinois, Indiana, and Wisconsin), Justice Kennedy’s test at least is applicable, because the court applied *Marks* and found that “as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).”⁷⁰ The court concluded that it would be “a rare case” that the plurality’s opinion would protect waters that Justice Kennedy would not.⁷¹ Although the court did not explicitly preclude the possibility of applying the plurality test in a future case, it remanded for the application of Justice Kennedy’s test alone.⁷² This case also involved wetlands adjacent to a non-navigable tributary.
- In the Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands), the court has stated that “the controlling opinion is that of Justice Kennedy,” applying *Marks*, albeit in a case where it was not necessary to look beyond Justice Kennedy’s test to establish jurisdiction.⁷³ The court applied this test to wetlands adjacent to a navigable water, but

treats more of the Nation’s waters as within the Corps’ jurisdiction, but in the unlikely event that the plurality’s test is met but Justice KENNEDY’s is not, courts should also uphold the Corps’ jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.”); *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (“any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in most cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface hydrological connection.”), *cert. denied*, 128 S.Ct. 45 (2007).

⁶⁸ *U.S. v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 128 S.Ct. 375 (2007).

⁶⁹ *Id.* at 64.

⁷⁰ *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).

⁷¹ *Id.*

⁷² *Id.* (“Justice Kennedy’s proposed standard, which we conclude must govern the further stages of this litigation, requires factfinding not yet undertaken by the district court. We therefore remand the case to that court for such further proceedings as may be necessary to apply the standard.”)

⁷³ *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007), *petition for cert. filed*, 76 USLW 3260, No. 07-625 (Nov. 5, 2007); *id.* at 999-1000 (Justice Kennedy’s “concurrence is the narrowest ground to which a majority of the justices would assent if forced to choose in almost all cases. Thus, as the Seventh Circuit extensively explained in *Gerke*, Justice Kennedy’s concurrence provides the controlling rule of law for our case.” (citations omitted)).

has also applied it to a “seasonally intermittent stream which ultimately empties into a river that is a water of the United States. . . .”⁷⁴

- In the Eleventh Circuit (covering Alabama, Florida, and Georgia), the court “adopt[ed] Justice Kennedy’s ‘significant nexus’ test as the governing definition of ‘navigable waters’ under *Rapanos*.”⁷⁵ The court specifically rejected the government’s argument that jurisdiction could also be shown under the plurality’s test.⁷⁶ This case involved a perennial tributary to traditionally navigable water.⁷⁷

This case law suggests that the agencies should take a pragmatic approach to jurisdictional decisions today. Even though the legally correct approach would at worst constrain jurisdiction for wetlands adjacent to tributaries not traditionally navigable (and even then only when they are non-jurisdictional under both tests), fully protecting waters consistent with the cases may require the agencies to undertake additional analyses.

For one, in the Seventh, Ninth, and Eleventh Circuits at least, the agencies should – in every jurisdictional determination they perform for wetlands adjacent to non-navigable tributaries – analyze the waters under Justice Kennedy’s “significant nexus” test, and not rest exclusively on the plurality test. In addition, in the Ninth and Eleventh Circuits, field staff should confirm that the kinds of tributary streams to which the courts have applied *Rapanos* (i.e., “seasonally intermittent” tributaries in the Ninth and all non-navigable tributaries in the Eleventh) are jurisdictional. In doing so, the agencies should encourage field staff to consider the collective role such tributaries play in the broad geographic region (see the discussion of “significant nexus” below). Having reviewed numerous jurisdictional determinations made after the issuance of the guidance, we have observed that the Corps’ staff commonly will: (1) determine that a tributary is relatively permanent and, in cases involving adjacent wetlands, that they physically abut the tributary; (2) conclude that the features are jurisdictional based on the plurality opinion; and (3) not determine whether the features have a “significant nexus” to other protected waters. Although this approach is often simpler, we are concerned that such determinations are on a collision course with the direction that several courts have taken the law; this conflict quite possibly could undercut the basis for a great number of determinations.

One interpretative suggestion that EPA and the Corps should continue to reject is the claim, made by the Pacific Legal Foundation (PLF), that the plurality test – and only that test – governs. In late September 2006, PLF announced that it had petitioned the EPA and Corps to dramatically rewrite the regulatory definition of “waters of the United States” so that only those water bodies that could satisfy Justice Scalia’s plurality opinion would be protected. Specifically, the petition claimed:

⁷⁴ *U.S. v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007); *see also id.* at 990 (explaining split opinions in *Rapanos*, and stating, “[t]hat left Justice Kennedy in the middle so to speak, or to put it more legally accurately, that left his opinion as the controlling rule of law”).

⁷⁵ *U.S. v. Robison*, 505 F.3d 1208, 1221-22 (11th Cir. Oct. 24, 2007).

⁷⁶ *Id.* at 1222-24

⁷⁷ *Id.* at 1223.

The Scalia opinion provides a common denominator such that when its jurisdictional test is met, it would garner a unanimous Supreme Court vote. Additionally, it is the only definition of “waters of the United States” that is readily determinable by both the public and regulatory officials. It also hews more closely to the plain statutory language and the government’s original interpretation of the Act in 1974 when it concluded that “waters of the United States” meant navigable-in-fact waters. More importantly, the Scalia approach is the most likely to produce consistent and predictable enforcement standards that satisfy constitutional safeguards for fairness and justice.⁷⁸

In other words, PLF argues that, because the plurality’s test would clearly regulate many fewer waters, and because the Supreme Court could at least agree on protecting those (even though a majority of Justices would hold that the Act applies much more broadly), the agencies should adopt the most restrictive (and least protective) standard articulated in the case.

This approach is absolutely wrong for one simple reason: five is more than four. A five-justice majority (the dissent and Justice Kennedy) of the Court refused to join an opinion constraining Clean Water Act jurisdiction based on the plurality’s misreading of the Act. PLF’s approach would convert the plurality’s failure to get a majority of the Court to embrace its dramatic re-interpretation of the law into a successful restriction on the Act’s scope. The Supreme Court, whatever it decided in *Rapanos*, distinctly did not decide that the plurality’s limitations on jurisdiction were threshold conditions for protecting water bodies.

III. TRIBUTARY STREAMS ARE INAPPROPRIATELY INCLUDED IN THE GUIDANCE.

One of the critical errors the agencies made in this guidance was to decide that the *Rapanos* decision placed any limits at all on Clean Water Act protections for tributary streams. As the agencies are aware, their still-applicable regulations include tributaries of other specified regulated “waters of the United States,” without qualification.⁷⁹ By contrast, the guidance does not categorically protect tributaries. In the case of streams that are less than “relatively permanent” the guidance requires a case-by-case demonstration of a “significant nexus” with downstream traditional navigable waters.⁸⁰ Accordingly, the only possible basis for varying from the clear direction of the rules in this guidance is that *Rapanos* commands such a result. It does not.

First, the Supreme Court has not issued a holding limiting the jurisdictional status of tributary streams. The *Rapanos* case involved water bodies that had been deemed jurisdictional under the provision of the Corps’ regulations governing adjacent wetlands.⁸¹ Likewise,

⁷⁸ Pacific Legal Foundation, Petition for Rulemaking under Administrative Procedure Act to amend regulatory definition of “waters of the United States” as found in 33 C.F.R. § 328.3, at 2 (Sept. 25, 2006) (citation omitted).

⁷⁹ 40 C.F.R. § 122.2; 33 C.F.R. § 328.3(a)(5).

⁸⁰ Guidance at 1 (providing for “significant nexus” analysis for “[n]on-navigable tributaries that are not relatively permanent”).

⁸¹ See *Rapanos*, 126 S.Ct. at 2219 (describing lower court decisions as upholding jurisdiction based on adjacency).

SWANCC involved “isolated ponds”⁸² and therefore the propriety of the provision of the rules governing “other waters.”⁸³ Neither case ruled on the legality of the separate regulatory provision providing for jurisdiction over tributaries.

Second, a careful analysis of the various opinions in *Rapanos* reveals that a majority of the Supreme Court did not vote to limit the regulatory protection for tributaries. The dissent would have upheld the regulations as applied to the adjacent wetlands, to say nothing of the tributaries themselves.⁸⁴ Crucially, Justice Kennedy expressly distinguished between how his “significant nexus” standard would apply to adjacent wetlands and how it might apply to tributaries. After discussing the regulatory concept of “ordinary high water mark” (OHWM) as an indication of the Corps’ jurisdiction, Justice Kennedy stated:

This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, it 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.⁸⁵

By contrast, Justice Kennedy said that the existence of an OHWM in the tributary would not be a basis for finding a nexus for any adjacent wetland: “the breadth of this standard . . . precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system. . . .”⁸⁶ Thus, Justice Kennedy cannot be viewed as a vote to upset the regulations’ categorical protection for tributaries to various waters and, as such, there is no majority decision that limits jurisdiction over such tributaries.

Third, had Justice Kennedy intended to limit jurisdiction over tributaries, he almost certainly would have attempted to explain how his “significant nexus” test should be applied to individual cases, as he did with adjacent wetlands.⁸⁷ More to the point, he likely would have stated whether the Bush Administration’s claim that such waters categorically have a “significant nexus” was correct or not. Justice Kennedy did not, however, take issue with the statements in the government brief to the Supreme Court claiming that “the text, history, and purposes of the Clean Water Act amply support the expert agencies’ decision to define the term ‘waters of the United States’ to include all tributaries of traditional navigable waters,”⁸⁸ and specifically

⁸² *SWANCC*, 531 U.S. at 171.

⁸³ *See id.* at 174 (“We hold that 33 CFR § 328.3(a)(3) (1999) [the “other waters” provision], as clarified and applied to petitioner’s balefill site pursuant to the “Migratory Bird Rule,” 51 Fed.Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.”).

⁸⁴ *Rapanos*, 126 S.Ct. at 2252 (Stevens, J., dissenting) (“The Corps’ resulting decision to treat these wetlands as encompassed within the term ‘waters of the United States’ is a quintessential example of the Executive’s reasonable interpretation of a statutory provision.”).

⁸⁵ *Id.* at 2249 (Kennedy, J., concurring) (citation omitted); *see also U.S. v. Evans*, 2006 WL 2221629, *18 (M.D. Fla. Aug. 2, 2006) (noting this aspect of Justice Kennedy’s opinion).

⁸⁶ *Id.* (emphasis added).

⁸⁷ 126 S.Ct. at 2248-50.

⁸⁸ Brief for the United States, *Rapanos v. United States*, 126 S.Ct. 2208 (2006), at 18 (Jan. 2006), available at <http://www.eswr.com/1105/rapanos/rapgovmerits1.pdf>; *see also id.* (“Indeed, the coverage of such tributary waters would appear to be more obvious than the coverage of adjacent wetlands upheld in *Riverside Bayview*.”)

arguing that “[a]s a practical, common-sense matter, a ‘significant nexus’ clearly exists between traditional navigable waters and their tributaries.”⁸⁹

The guidance document seems to take the view that *Rapanos* does in fact mandate a new approach for tributaries; the guidance stresses that Justice Kennedy indicates that his “significant nexus” standard applies to any non-navigable “water or wetland”⁹⁰ and states, “[w]hile Justice Kennedy’s opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries, his opinion also addresses Clean Water Act jurisdiction over tributaries themselves.”⁹¹ Even assuming that Justice Kennedy’s use of the inclusive phrase “water or wetland” constitutes a holding from *Rapanos* that streams must have a “significant nexus” to be protected, however, simply finding that the “significant nexus” test applies to a kind of water body does not say anything about whether such waters might be categorically protected. For instance, Justice Kennedy makes clear that the entire category of wetlands adjacent to traditionally navigable waters has a significant nexus with such waters.⁹² This is no less true of non-navigable tributaries after *Rapanos*. As discussed above, Justice Kennedy indicates that the jurisdictional regulations, if consistently applied, “may well” provide the necessary nexus between such tributaries and traditionally navigable waters.

Therefore, when considering reasons to revoke the guidance, or perhaps to revise it, the EPA and the Corps must completely reconsider and revise their approach to making jurisdictional determinations with respect to tributary streams and rivers. The regulations’ protections for these waters should not be constrained by any agency guidance or other policies.

IV. THE GUIDANCE’S APPROACH TO APPLYING THE “SIGNIFICANT NEXUS” ANALYSIS CONFLICTS WITH THE CLEAN WATER ACT, THE REGULATIONS, AND *RAPANOS*.

The next major flaw with the guidance is, frankly, inexcusable. Even though it immediately was clear to virtually anyone who read the *Rapanos* decision that significant effort would have to be put into understanding and implementing the “significant nexus” standard, the guidance, for the most part, is devoid of meaningful instruction on how field staff should identify aquatic features that have such a nexus, and in fact makes it difficult to do so in key ways.

Even though the Supreme Court was unanimously of the view that Justice Kennedy’s “significant nexus” test should be able to be met in many, if not all, cases (some justices disdainfully so),⁹³ the agencies have turned the implementation of that standard into an

⁸⁹ *Id.* at 19.

⁹⁰ Guidance at 8, citing 126 S.Ct. at 2241.

⁹¹ *Id.* (citation omitted).

⁹² See 126 S.Ct. at 2248 (Kennedy, J., concurring) (“As applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.”).

⁹³ See *id.* at 2235 n. 15 (plurality opinion) (“Justice KENNEDY tips a wink at the agency, inviting it to try its same expansive reading again”); *id.* at 2250 (Kennedy, J., concurring) (“the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps’ assertion of

unnecessarily high hurdle to overcome before asserting jurisdiction. Moreover, despite the hope and expectation after *Rapanos* that the guidance would flesh out what Justice Kennedy’s “significant nexus” standard meant and how it could be implemented in practice, the agencies have provided very little actual direction to their field staff with regard to identifying a “significant nexus” in a particular factual situation.

A. The guidance ignores important aspects to the “significant nexus” analysis that would enable the agencies to protect more resources more efficiently

Perhaps the most damaging decision made by the agencies in the guidance was the choice to unnecessarily limit the consideration of the cumulative effect that wetlands⁹⁴ have on water quality when evaluating whether a “significant nexus” is present. Justice Kennedy, in spelling out how the “significant nexus” standard should work in practice, clearly intended for the agencies to have the ability to continue to protect wetlands when they collectively affect water quality, and to apply that protection to all similar water bodies across a significant area. His opinion says:

- “[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.’”⁹⁵
- “Through regulations or adjudication, the Corps may choose to *identify categories of tributaries* that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, 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.”⁹⁶
- “Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to *presume covered status for other comparable wetlands in the region*.”⁹⁷

jurisdiction is valid”); *id.* at 2264 (Stevens, J., dissenting) (“it seems likely that evidence would support similar [“significant nexus”] findings as to most (if not all) wetlands adjacent to tributaries of navigable waters”).

⁹⁴ We discuss wetlands in this section because, as discussed in the previous section, we believe that *Rapanos* does not affect the regulation of tributaries to protected waters. However, assuming *arguendo* that tributaries also should be assessed under a case-by-case “significant nexus” analysis, there is no reason to presume that Justice Kennedy would not also allow tributaries’ effect on navigable waters to be evaluated collectively across a region, and allow the agencies to presume covered status for tributaries of a certain type or across a certain region.

⁹⁵ *Id.* at 2248 (emphasis added).

⁹⁶ *Id.* (emphasis added).

⁹⁷ *Id.* at 2249 (emphasis added).

The natural reading of these passages is that EPA and the Corps, using their expert judgment, can evaluate available information about specific wetlands, establish that a “significant nexus” is present, and then notify the regulated community and the public that wetlands of the same type over a specified geographic area will be considered protected waters. The agencies also can make, consistent with Justice Kennedy’s opinion, similar jurisdictional judgments about wetlands adjacent to categories of tributaries which are important enough, given relevant characteristics (such as flow, position in the watershed, pollution burden, etc.), that the adjacent wetlands will likely have a significant water quality effect (physical, chemical, or biological) on downstream traditionally navigable waters.

However, the guidance acknowledges virtually none of this and does not provide a mechanism for making categorical or regional jurisdictional assessments, effectively making Justice Kennedy’s test a far more demanding requirement than *Rapanos* dictates. In particular, the guidance entirely ignores Justice Kennedy’s suggestion about identifying significant categories of tributaries for which any adjacent wetland will be jurisdictional, and it also ignores Justice Kennedy’s invitation to take individual determinations and “presume covered status” for wetlands of the same kind in an area. Even with regard to Justice Kennedy’s admonition to consider the effects that wetlands have “in combination with similarly situated lands in the region,” the guidance takes an absurdly and untenably narrow approach, saying that the agencies will only consider the wetlands adjacent to the particular stream reach – “i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream”.⁹⁸

The agencies suggest that they are compelled by *Rapanos* to limit the consideration of cumulative effects to the particular stream reach. The guidance states that the “approach reflects the agencies’ interpretation of Justice Kennedy’s term ‘similarly situated’”⁹⁹ This is plainly wrong.

First, the term “similarly situated” does not limit the geographic scope of Justice Kennedy’s analysis. Rather, the term simply indicates that when the analysis is performed, wetlands that are alike in kind should be considered together. The relevant geographical term in Justice Kennedy’s opinion is the phrase that follows “similarly situated” – namely, “*in the region.*” In this context, there is no reason to believe that Justice Kennedy’s focus on the effects across a “region” would be limited to a small area, much less an individual stream segment. To the contrary, the standard dictionary definition of “region” includes, *inter alia*, “[a] large, usually continuous segment of a surface or space” and “[a] large, indefinite portion of the earth’s surface.”¹⁰⁰

⁹⁸ Guidance at 9. Indeed, in practice, we expect that the agencies may not even examine all of the adjacent wetlands for an entire stream length adequately, as the Corps’ Guidebook only directs field staff to document detailed information about *onsite* wetlands, and only general information about *offsite* wetlands. See U.S. Army Corps of Eng’rs, Jurisdictional Determination Form Instructional Guidebook, at 53 (requiring completion of Section III.B.2 of jurisdictional determination form for wetlands on the property in question, but only Section III.B.3 for wetlands not on the property but adjacent to the relevant tributary) (hereinafter “Instructional Guidebook”).

⁹⁹ Guidance at 9.

¹⁰⁰ The American Heritage Dictionary of the English Language, (4th ed. 2004.), available at <http://dictionary.reference.com/browse/region>; cf. U.S. EPA, Wadeable Streams Assessment: A Collaborative Survey of the Nation’s Streams, at ES-4 (Dec. 2006) (describing agency’s “assessment of the biological quality of

Second, Justice Kennedy clearly has a broad geographic view of what effects are important for water quality purposes; in rejecting the plurality's "dismissive" attitude toward the resources at issue in the case, Justice Kennedy gave an example of the importance of wetlands on a huge geographic scale: "Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, "dead zone" in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey."¹⁰¹

B. The day-to-day implementation of the guidance's instruction on "significant nexus" is likely to be problematic

The guidance gives very little helpful direction in how to apply the "significant nexus" standard in practice. There are numerous problems of this nature.

First, the guidance inexplicably elevates physical factors (flow rate, e.g.) over biological and chemical ones in the "significant nexus" analysis.¹⁰² This conclusion is not explained and, thus, is arbitrary and capricious. Nor is it required by the *Rapanos* decision, in which Justice Kennedy treated physical, biological, and chemical factors as equally relevant to the "significant nexus" inquiry: "wetlands possess the requisite nexus . . . 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.'"¹⁰³ Moreover, elevating physical traits over others is inconsistent with the fundamental purpose of the Act, which treats physical, chemical, and biological integrity as equivalent goals.¹⁰⁴

Second, although the Instructional Guidebook makes a point of distinguishing between river miles and aerial miles,¹⁰⁵ and though the jurisdictional form asks for both distances,¹⁰⁶ it is unclear which of these, or both, is relevant. What should happen, for instance, if a long, intermittent tributary flows for many river miles before joining a relatively permanent water or a traditionally navigable water, but it is quite close in aerial miles to protected water?

Third, the guidance gives virtually no direction about how to decide whether a "significant nexus" is present when some effect on downstream waters can be identified, but different factors point in different directions. For example, it is unclear what field staff are to do

wadeable, perennial streams and rivers across the country, as well as within each of three major climatic and landform *regions* and nine ecological *regions*, or ecoregions.") (Emphasis added).

¹⁰¹ 126 S.Ct. at 2246-47.

¹⁰² Guidance at 9 ("Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water.").

¹⁰³ 126 S.Ct. at 2248.

¹⁰⁴ See 33 U.S.C. § 1251(a) (declaring that it is the objective of the law "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters").

¹⁰⁵ Instructional Guidebook at 53.

¹⁰⁶ *Id.* at Appendix B.

if the water is distant from a traditionally navigable one, and has minimal flow, but there are biological and chemical factors that indicate the presence of a nexus, such as nutrient uptake or pollution assimilation by the small water body.

Fourth, although Justice Kennedy twice indicates that physical separation from regulated waters can be ecologically important,¹⁰⁷ the guidance does not indicate whether and how such separation should be taken into account. Indeed, given the guidance's focus (with regard to tributaries) on the "volume, duration, and frequency of flow," one might be led to believe that a wetland without flow to an adjacent water has less of a nexus, when Justice Kennedy concluded the opposite can be true.

Fifth, the guidance places illegal and destructive limits on jurisdiction of tributary streams by directing staff to only consider individual stream segments when making significant nexus determinations.¹⁰⁸ We make clear, above, that the status of tributaries is unaffected by *Rapanos*, and therefore their status should not even be a subject for this agency guidance. But to the extent that the agencies may continue to wrongly and illegally subject tributaries to the "significant nexus" test, they must consider all similarly situated tributaries in a region when making those determinations. The current approach makes it very difficult to protect many upper reach portions of tributary systems, as the Guidance requires field officials to analyze stream segments in isolation, without regard for the collective impacts of tributaries that are not traditionally navigable.¹⁰⁹ There is no indication that if Justice Kennedy meant to apply the significant nexus test on a case-by-case basis to tributaries (which he did not) that he would have found that collective impacts to streams to be irrelevant. Indeed, given his stress on ecological factors, region-wide impacts, and the importance of viewing pollution affects in the aggregate, there is no basis for the assumptions and approach towards tributaries contained in the guidance. In addition to having no support in law, the guidance's approach has no support in science¹¹⁰ and will leave many ecologically significant headwater streams open for unpermitted Friends of the Earth, pollution and destruction, leading to their loss and the degradation of downstream waters.

¹⁰⁷ *Rapanos*, 126 S.Ct. at 2245-46 (Kennedy, J., concurring) ("In many cases, . . . filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. 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."); *id.* at 2251 ("Given 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.").

¹⁰⁸ Guidance at 9 ("Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters.").

¹⁰⁹ This seems to be the exact result desired by lawyers for developers and other polluting industries. *See, e.g.*, Fax from Hunton & Williams to Greg (last name not identified), at 3 (Sept. 21, 2006) (produced in response to Freedom of Information Act by Council on Environmental Quality) (attached) (arguing that the guidance should not apply the "similarly situated" aspect of the significant nexus test to tributaries or other waters, but exclusively to wetlands.)

¹¹⁰ *See, e.g.*, Downing, Donna, Tracie-Lynn Nadeau, and Rose Kwok, Technical and Scientific Challenges in Implementing *Rapanos*' "Water of the United States," American Bar Association, NATURAL RESOURCES AND ENVIRONMENT, 42, Vol. 22, No. 1, (Summer 2007) at 43 (stating, "The small size of headwater streams means that, in such waters, more water is in direct contact with the streambed and its associated subsurface flows (hyporheic zone), where most processing [to remove pollutants] takes place. Thus, headwaters as a category can have a disproportionate positive effect on the integrity of downstream waters.").

Sixth, the guidance's myopic consideration of individual stream segments would seem to complicate jurisdictional determinations pursuant to other parts of the jurisdictional regulations not under review in *Rapanos*. For instance, a smaller segment of an interstate tributary should qualify for protection under the provisions protecting interstate waters. In addition, a segment of a stream that itself is not traditionally navigable in fact may be part of a larger stream that would qualify as a traditionally navigable water.

Seventh, the guidance's direction to evaluate flow conditions at "farthest downstream limit" of a tributary for the purposes of the jurisdictional analysis¹¹¹ is neither required by *Rapanos* nor certain to be an accurate representation of the particular stream conditions. Depending on the facts of a given case, it may be that a stream's flow at its confluence with a higher-order tributary is less than at other locations. Industrial withdrawals, for instance, may affect the downstream flow.

This lack of guidance is leading to poor decision-making and almost certainly leaving many waters that can and must remain under the scope of the law open to unpermitted pollution and destruction. Despite the guidance's requirement that the "record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination,"¹¹² our experience is that jurisdictional determinations in which "significant nexus" is analyzed are difficult to follow. Often a series of factors are listed and the form then simply states that these add up to a "significant nexus" or do not.

Perhaps that is because the field personnel really do not know what evidence is enough to establish a "significant nexus." One Corps employee described the problem in very troubling terms:

[W]hen considering whether the wetlands and waters themselves possess a significant nexus, no one knows. We might as well come into work, sleep for 8 hours, flip a coin, pick heads or tails, and base our significant nexus evaluation off of that. The time spent and results from both methods would likely be very similar.¹¹³

The Corps' Instructional Guidebook is further evidence of this uncertainty. Though it presents numerous photos of water bodies to which the agencies believe the "significant nexus" test applies,¹¹⁴ it does not specify whether any single one of them actually has a significant nexus with a traditional navigable water.

We recognize that some of this difficulty derives from the "significant nexus" standard itself. However, despite the fact that the Supreme Court may have made the agencies' job

¹¹¹ Guidance at 5 n. 21.

¹¹² Guidance at 11-12.

¹¹³ E-mail from Matt R. Rabbe to Docket ID No. EPA-HQ-OW-2007-0282 (Nov. 9, 2007) (comment #29), available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=EPA-HQ-OW-2007-0282-0029>.

¹¹⁴ Instructional Guidebook at 23-25 (non-relatively permanent waters), 28 (wetlands adjacent to, but not directly abutting, relatively permanent waters), 29-30 (wetlands adjacent to non-relatively permanent waters).

harder, the fact of the matter is that the Clean Water Act directs the agencies to protect the Nation's waters, and it is up to the agencies to ensure that water bodies are not simply written off because ensuring their protection is more complicated today than it was before. Moreover, much of the complication could be avoided if the agencies were to take Justice Kennedy's suggestions about broadly considering aggregate effects and about presuming covered status for similar wetlands and other waters in the region and for wetlands adjacent to certain kinds of streams.

V. THE GUIDANCE INAPPROPRIATELY RETAINS THE AGENCIES' PRE-RAPANOS PRACTICE WITH RESPECT TO SO-CALLED "ISOLATED" WATERS.

The agencies' 2007 guidance inappropriately leaves in place the 2003 EPA and Corps policy guidance that significantly undermined protections for water bodies that are geographically "isolated" and other intrastate waters.¹¹⁵ This means that the various new tests for Clean Water Act jurisdiction under the *Rapanos* decision – the "relatively permanently flowing" test and the "significant nexus test" – is being piled *on top of* the fundamentally flawed "isolated waters" test from the 2003 policy. Not only is this adding layers of complication to the law, the 2003 policy is being used to illegally disregard legal bases still valid for asserting jurisdiction over intrastate waters, whether "isolated" or not.¹¹⁶ The agencies are using the 2003 guidance to this day to vastly expand upon the narrow holding in *SWANCC* and even ignoring language in Justice Kennedy's *Rapanos* significant nexus opinion that created additional legal grounds for protecting some waters that might be considered by the agencies to be "isolated".

Reports from governmental and non-governmental entities have demonstrated that the 2003 guidance has led to the agencies' failure to assert their legal authority to the fullest extent to protect all waters covered by the Act. Even information provided in documents accompanying the 2007 guidance document this failure, and recent Congressional testimony further confirms this unacceptable state of affairs.

This is a significant abdication of the responsibility of both agencies, but especially the EPA, which has the plenary authority and obligation under the law to see that the Clean Water Act is fully enforced. Nothing in the statute gives the EPA the discretion to ignore that responsibility for any reason, including that it might take more work to establish the factors to apply the law's safeguards to certain wetlands, ponds, streams, rivers, or other waters, or that the agency just doesn't feel like doing its job any longer.

¹¹⁵ Guidance at 4 n. 18.

¹¹⁶ As noted in section VII.B of these comments, below, some materials released with the 2007 guidance indicate that the agencies now may also be questioning the continuing jurisdiction of the Act over interstate "isolated" waters as well. If so, this is also contrary to law, as well as inexplicable, as interstate waters, whether "isolated" or not, are covered by a completely separate category under the agencies' regulations, and the intent (and ability) of Congress to assert jurisdiction over all interstate waters was not even questioned by the Supreme Court in *SWANCC* or *Rapanos*.

A. The 2003 Guidance Has Led the Corps and EPA to Leave Many Legally Protected Waters Unprotected

At the request of Senator Joseph Lieberman, then the Ranking Minority Member of the Senate Environment and Public Works Committee's subcommittee with jurisdiction over the Clean Water Act, as well as the Ranking Minority Member, Committee on Homeland Security and Governmental Affairs of the U.S. Senate, in September of 2005 the U.S. Government Accountability Office (GAO) issued a report that found, among other things, that the Corps was not adequately documenting its rationale for deciding that certain wetlands, streams, and other waters were no longer covered by the Clean Water Act.¹¹⁷

In the five Corps' districts covered by the GAO investigation, the report found that only five percent or less of the files in four of the five districts contained a detailed rationale to justify a decision that had been made to decline jurisdiction, and that even in the best district, only 31 percent of the files contained such a rationale.¹¹⁸ The GAO further found that "[t]he percentage of files that contained *no rationale whatsoever* as to why the Corps did not assert jurisdiction ranged from a low of 12 percent to a high of 49 percent in the five districts. The remaining files contained partial rationales."¹¹⁹ In contrast, the GAO report found that the Corps' did more thoroughly document cases in which jurisdiction was asserted.¹²⁰

More importantly, the GAO confirmed that the Corps was not using its legal authority to protect intrastate, "isolated" waters under the statute and its still-valid regulations. The report states that:

In the five districts we reviewed, Corps officials said they generally do not consider seeking jurisdiction over isolated, intrastate, nonnavigable waters on the sole basis of 33 C.F.R. § 328.3(a)(3) because (1) headquarters has not provided detailed guidance on when it is appropriate to use this provision; (2) they believe that headquarters does not want them to use this provision; (3) they were concerned about the amount of time that might be required for a decision from headquarters; or (4) few isolated, intrastate, nonnavigable waters were in their districts whose use, degradation, or destruction could affect interstate commerce.¹²¹

In its conclusions, GAO recommended that the Secretary of the Army, through the Corps, and the Administrator of EPA jointly develop procedures that would provide "greater clarity" to the districts "when using 33 C.F.R. § 328.3(a)(3) as the sole basis for asserting jurisdiction."¹²²

¹¹⁷ U.S. Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction*, Sept. 2005.

¹¹⁸ *Id.* at 5. The five Corps districts included in the GAO study are Galveston, St. Paul, Jacksonville, Chicago, and Omaha. *See id.* at 9.

¹¹⁹ *Id.* at 5 (emphasis added).

¹²⁰ *Id.* at 4. This section of the Corps' regulations includes in the definition of "waters of the U.S." those waters described as "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3).

¹²¹ *Id.* at 6.

¹²² *Id.* at 41.

The GAO findings are consistent with a report completed by several national environmental organizations the previous year that had also concluded that the EPA and Corps were not fulfilling their obligation under the Act, its regulations, and judicial precedent to use their full legal responsibility to protect all of the waters that they can, leaving unprotected many waters that were, as a matter of law, still covered by the Clean Water Act. The report, issued in August 2004 by Earthjustice, the National Wildlife Federation, Natural Resources Defense Council, and Sierra Club was based upon Corps of Engineers' records and revealed numerous examples of the Corps using the *SWANCC* decision and the 2003 guidance to improperly decline jurisdiction over waters. The case studies in the report indicated that Corps districts around the country refused to assert jurisdiction over obviously significant waters including an 86-acre lake, a 150-mile-long river, a 4000-acre tract of wetlands, and a 69-mile-long canal – leaving these waters and many others across the nation vulnerable to pollution and destruction.¹²³

The fact that, under the 2003 guidance, a finding of isolation effectively means that a water body is being treated as non-jurisdictional is a point that even the agencies now concede. For example, the Question and Answers document that was released by the Corps when the guidance was made public in June 2007 states that:

All jurisdictional determinations based on commerce (§ 328.3(a)(3)) must be approved by HQ. Since the [2003] guidance has been in place, we have received 11 requests. Of these 11 requests, 3 cases were determined to be jurisdictional under other parts of the CWA [i.e., (a)(1) waters], 4 cases were determined to be not jurisdictional and 3 cases were withdrawn, and 1 is under review.”¹²⁴

In other words, between January 2003 and June 2007, only 11 requests to assert jurisdiction over “isolated” waters based on commerce went to HQ, and *none of them* were approved. Ten of them were either approved using other parts of the regulations, were withdrawn, or were disapproved. One was still pending when this document was written.

The failure to ever once assert jurisdiction, during a four and a half year period, over *any* intrastate water listed in category (a)(3) of the Corps' regulations – not “just” those that are “isolated” – is an even greater outrage when one compares the few number of times when the

¹²³ See Earthjustice, NWF, NRDC, and Sierra Club, *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm* (Aug. 2004), available at http://www.earthjustice.org/library/reports/CWA_Jurisdiction_8-12-04.pdf.

¹²⁴ U.S. Army Corps of Eng'rs, Questions & Answers for *Rapanos & Carabell* Decision at 83 (undated), available at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/qa_ig_06-05-07.pdf. It is worth noting that the above figure may not be entirely accurate, as it seems slightly inconsistent with a separate estimate. See General Accounting Office, *Waters & Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, at 14 n. 14 (Feb. 2004) (“Since January 2003, there have been eight cases in which districts sought headquarters' approval to assert jurisdiction over isolated, intrastate, nonnavigable waters, based upon 33 C.F.R. § 328.3(a)(3). In six of these cases, Corps headquarters ultimately determined that the water in question was navigable-in-fact. In one case, headquarters determined the water in question was not jurisdictional; and, in another, the district withdrew its request for headquarters' approval.”). Nevertheless, we understand that one bottom line fact remains true – the agencies have not asserted jurisdiction over any water body using their “(a)(3)” authority since the guidance was issued.

agencies even contemplated properly enforcing the law to the number of non-jurisdictional determinations made by the Corps' districts during the same period.

Using data provided by the agencies for one quarter of fiscal year 2004, it can be estimated that the Corps has been making approximately 1500 to 1600 written SWANCC-related "no jurisdiction" rulings each year.¹²⁵ If that is a fair annual average, the Corps would have made well over 6000 judgments and decisions between January 2003 and June 2007 that waters previously protected by the Act are no longer protected without ever once asserting their remaining legal authority, post-SWANCC, to do so.

Even more galling, the agencies themselves were and are well aware of this situation, yet have done nothing about it and, apparently, feel no shame in telling Congress that they are no longer enforcing the law as written, even while acknowledging that they have the legal authority to do so. At an October 18, 2007 hearing before the House Transportation and Infrastructure Committee hearing – ironically enough, a hearing to mark the 35th anniversary of the Clean Water Act – the EPA Assistant Administrator for Water testified:

Well, there are two guidances that we are working under, the 2003 SWANCC guidance – and the basic point there is in the guidance we held open the possibility that there could be circumstances under . . . our regulations where there could be an assertion of jurisdiction over isolated intrastate non-navigable waters without relying on the migratory bird rule provisions. As a legal matter, that is still possible, but as a practical matter, we had not asserted jurisdiction over those types of wetlands based on that guidance, which is still in place."¹²⁶

It is still in place, and the agencies continue today to decline to protect "isolated" waters based on any of the commerce clause factors listed in their still valid regulations. Since the 2007 guidance, at least one request has been made to headquarters to protect an "isolated" water based on (a)(3) – Long Lake in the Klamath Basin – and it was rejected like all the others.¹²⁷

Effectively, by continuing to follow (and, in practice even expand upon) the 2003 guidance, the EPA and the Corps have *de facto* rewritten their own regulations defining the waters of the United States without ever going through a rulemaking or being ordered by a Court or told by Congress to do so. We do not believe that either the EPA or the Corps possess discretion under the Clean Water Act to ignore discharges of pollution into waters that are covered by the law; that is, if the agencies have the "legal authority" to assert jurisdiction over these "isolated waters – or any waters – they must do so.

¹²⁵ See document prepared by EPA staff, "No Jurisdiction Determinations Resulting from SWANCC Jan. – Mar. 2004" (attached).

¹²⁶ Testimony of Benjamin H. Grumbles, EPA Assistant Administrator for Water, Hearing of House Transportation & Infrastructure Committee: "The 35th Anniversary of the Clean Water Act: Successes and Future Challenges" (Oct. 18, 2007).

¹²⁷ See discussion *infra*.

B. The U.S. House of Representatives Has Already Rejected the 2003 Guidance as Inconsistent with the Clean Water Act

When Congress has spoken on the 2003 guidance, it has told EPA, the Corps, and the Bush administration that it should do the opposite of what they are doing; that is, Congress is telling them they must and should continue to protect all waters. As noted above, over 218 Members of the U.S. House of Representatives sent President Bush a letter in 2003 opposing the proposal for a rulemaking to redefine and limit the scope of the regulatory scope of “waters of the United States;” that letter also asked the President to direct the agencies to withdraw this guidance.¹²⁸

Then again, on May 18, 2006, the U.S. House of Representatives voted 222-198 to approve an amendment to the bill providing EPA’s appropriations that would block the use of federal funds to implement the illegal 2003 policy.¹²⁹ However, the Senate did not pass an EPA-Interior appropriations bill in 2006, so the House amendment did not become law, and the EPA and Corps have continued to follow this policy, despite the overwhelming, bipartisan opposition to it – and despite the harm that it has already caused.

Clearly, one of the top priorities for the agencies when considering how to revise the 2007 guidance must be to reconsider the permanent damage unnecessarily and illegally being done to the nation’s waters under the 2003 guidance. The 2003 guidance must be replaced by a policy that is strictly limited to the narrow legal holding in *SWANCC* regarding waters that are not traditionally navigable, intrastate, and isolated (that is, all three traits must be present) where the only potential link to interstate commerce is migratory birds. Where there is any other Commerce Clause basis for protecting such waters, pursuant to the agencies’ regulations, then they must protect them. And even for those non-navigable, intrastate, and isolated waters where the only potential link to interstate commerce is migratory birds, to the extent the agencies continue to purport to follow other parts of the Kennedy test in *Rapanos*, they must take advantage of the language in that opinion that provides a basis for finding a “significant nexus” where the lack of a hydrological connection exists between the water at issue and a traditionally navigable water.¹³⁰

¹²⁸ See Letter to President George W. Bush from U.S. Representatives James L. Oberstar, James Leach, James Saxton, and John D. Dingell, *et al.*, at 1 (Nov. 24, 2003) (“We are writing to urge you not to pursue any policy or regulatory changes that would reduce the scope of waters protected Under the Clean Water Act. In particular, we ask that you not amend the long-standing definition of waters as suggested by the January 15, 2003 Advance Notice of Proposed Rulemaking (ANPRM) and that you *rescind the policy guidance that was issued at the same time.*”) (Emphasis added).

¹²⁹ H.R. 5386, H. Amend. 854, 109th Cong., 2d Sess. (May 18, 2006) (Roll Call No. 169).

¹³⁰ Justice Kennedy explained that the *absence* of a hydrological connection between a wetland and a covered water body may provide a “significant nexus” between the two. See 126 S.Ct. at 2251 (Kennedy, J., concurring) (“Given 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”). Yet, the 2007 policy suggests that staff cannot demonstrate jurisdiction over so-called “isolated” waters by demonstrating a “significant nexus.”

VI. EXPERIENCE WITH THE 2007 GUIDANCE INDICATES THAT IT IS LEADING TO THE LOSS OF AQUATIC RESOURCES AND TO CONFUSION IN THE FIELD.

The problems discussed above are not mere academic criticisms of the agency's guidance. To the contrary, as summarized below, the evidence suggests that these interpretations are in fact resulting in the loss of aquatic resources.

A. Requiring a demonstration of "significant nexus" for tributaries that are not relatively permanent is endangering headwater streams

The agencies' decision to not assert jurisdiction over streams that are not "relatively permanent" unless a "significant nexus" can be shown was fateful. We have seen a number of examples that indicate this choice is causing problems in the field.

The most troubling indication of the problems this interpretation could cause is a comment in the docket of this guidance document. A Corps' regulatory program employee of 10 years made the following observation with regard to the "significant nexus" test as applied to streams:

The guidance also describes various factors we should consider in determining if an individual non-RPW stream reach and its adjacent and isolated wetlands would have a significant nexus with and effect on the physical, chemical, or biological integrity of a TNW. The significant nexus description is not too bad and the Corps and EPA are nearly in agreement except with very poorly defined swales. However, the guidance does nothing to define when a stream reach would have a significant effect, only factors to consider. No wonder the various Corps districts and EPA regions are all over the board on this issue. You asked, *so our district has determined that we can not defensibly say that most individual first order/ephemeral stream reaches have a significant effect on a TNW.*¹³¹

This commenter goes on to say: "Not until several first or second order streams merge into a higher order stream can we defensibly argue that a stream has a significant effect."¹³² Our organizations vehemently deny that first- and second- order tributaries and ephemeral streams do not commonly have a significant role in the "physical, chemical, and biological integrity" of traditionally navigable waters.¹³³ Quite to the contrary, these smaller headwater streams are

¹³¹ E-mail from Cody Wheeler to Docket ID No. EPA-HQ-OW-2007-0282, at 1 (Nov. 16, 2007) (comment #33) (emphasis added), available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=EPA-HQ-OW-2007-0282-0033>.

¹³² *Id.*

¹³³ *See generally* Judy L. Meyer et al., *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands* (Feb. 2007), available at <http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf?docID=182>.

absolutely essential to maintaining the “physical, chemical, and biological integrity” of traditionally navigable waters.¹³⁴ The fact that at least one Corps district¹³⁵ apparently is of the view that such waters will generally not qualify for Clean Water Act protection is extremely troubling.¹³⁶ Have other districts reached similar conclusions? What resources have been declared non-jurisdictional as a consequence?

While troubling, it is not that surprising that at least some agency staff are questioning the continued jurisdictional coverage of some streams because, as discussed above in section IV.B., the guidance sets up an analytical process that is decidedly biased against finding that headwater streams – which, again, are vital to the health and ecological integrity of the nation’s waters – are jurisdictional under the Clean Water Act. Under the guidance, jurisdictional assessments must be made separately for each reach of a stream that is of a different stream order, the volume of flow and the proximity of the tributary to the traditional navigable water are important determiners, and the importance of documenting the significant nexus increases as Corps employees evaluate tributaries (and their adjacent wetlands) that are a farther distance from a traditionally navigable water. All these requirements make it much less likely that a Corps employee, already weighed down under a significant workload, will make the appropriate findings of jurisdiction with respect to headwater streams.

Even in the absence of general rules requiring such results, the record to date indicates that a number of individual tributary streams have been declared non-jurisdictional. In the months since the guidance was issued, we have identified several examples, including the following:

- The Omaha District found an ephemeral stream to be unprotected based on lack of significant nexus, where the flow of the tributary was unlikely to reach a traditionally navigable water as a result of the intervening presence of “a water-supply reservoir with all impounded water piped to municipal water treatment plants or for re-injection into local bedrock aquifers.”¹³⁷ This seems completely at odds with the Corps’ Instructional Guidebook’s observation that “[g]enerally, impoundment of a water of the U.S. does not affect the water’s jurisdictional status,”¹³⁸ but is likely attributable to the focus in the guidance on the degree of flow to downstream waters.

¹³⁴ *Id.*

¹³⁵ It appears, based on an online search, that the district in question is the Kansas City District. *See* http://www.nwk.usace.army.mil/regulatory/branch_directory.htm (listing commenter as a Regulatory Project Manager).

¹³⁶ In fairness, it is unclear how strongly this view applies in this district. For instance, we were able to identify a recent jurisdictional determination in the Kansas City District for a first-order, ephemeral, stream based on the presence of a “significant nexus.” *See* U.S. Army Corps of Eng’rs, Kansas City District, Approved Jurisdictional Determination: Coffey County RWD 3, NWK-2007-02080-2, at 5 (Dec. 6, 2007) (describing multiple effects of stream), available at <http://www.nwk.usace.army.mil/regulatory/Rapanos%20JD%20Decision-5%20Jun%202007/2007-2080-JD%20Site%202.pdf>.

¹³⁷ U.S. Army Corps of Eng’rs, Omaha District, Approved Jurisdictional Determination: Channel Work in the North Tributary of Newlin Gulch at Lagae Ranch, NWO-2007-2195-DEN, at 3 (Nov. 1, 2007), available at <https://www.nwo.usace.army.mil/html/od-tl/jur/NWO20072195DEN.doc>.

¹³⁸ Instructional Guidebook at 31.

- The Nashville District rejected Clean Water Act protections for three ephemeral streams, despite acknowledging the potential importance of such waters. In each case, the district based its assessment of the likelihood of a downstream effect on nothing more than distance and its unsubstantiated conclusion that such distance would attenuate the impact. As the district said in each case: “It is possible during a heavy precipitation event that the unnamed tributary to Horn Springs Branch could carry pollutants and flood waters to TNW along with transferring nutrients and oranic [sic] carbon. However, due to the fact that the water has to travel through two tributaries and between 5-10 river miles to the TNW, the impacts, if any would be very minor.”¹³⁹
- The Jacksonville District declared an ephemeral tributary draining a sub-basin approximately 7 acres in size to be non-jurisdictional, with hardly any analysis; rather, the determination states, in a conclusory fashion, that “[t]he frequency and amount of flow in the ditch is not significant enough to provide notable physical, chemical, or biological benefits to downstream waters or a TNW.”¹⁴⁰
- The Huntington District made what appear to us to be conflicting non-jurisdictional and jurisdictional determinations for ephemeral and intermittent tributaries in Ohio. Two determinations found that there was no “significant nexus.”¹⁴¹ On the other hand, the district concluded in a contemporaneous jurisdictional determination that an ephemeral stream was protected because the stream would carry stormwater to the tributary system and “serve to dissipate energy” to the tributary system, things that the other streams presumably would do as well.¹⁴²
- The Buffalo District found three separate ephemeral tributaries to the Cuyahoga River to be non-jurisdictional based on a lack of “significant nexus,” without considering the tributaries collectively (much less similar tributaries in the region).¹⁴³

¹³⁹ U.S. Army Corps of Eng’rs, Nashville District, Approved Jurisdictional Determinations: Horn Springs Group, 200701845, 200701844, and 200701843, at 6 (Sept. 5, 2007), available at <http://www.lrn.usace.army.mil/cof/Jurisdictional%20forms/Oct%201.pdf> (determinations begin on p. 36, p. 46, and p. 56 of .pdf file).

¹⁴⁰ U.S. Army Corps of Eng’rs, Jacksonville District, Approved Jurisdictional Determination: SAJ-2007-4563, at 5 (Aug. 31, 2007), available at http://www.saj.usace.army.mil/regulatory/jdwebshare/Florida_Significant_Nexus/111307_JD_saj-2007-4563.PDF.

¹⁴¹ U.S. Army Corps of Eng’rs, Huntington District, Approved Jurisdictional Determination: Good Samaritan Hospital, LRH-2007-449-GMR, at 7 (Oct. 4, 2007) (finding that significant nexus was absent because, *inter alia*, stream was of low quality, lacked adjacent wetlands, was contained in a culvert over 40% of its length and does not have a developed floodplain), available at

http://www.lrh.usace.army.mil/_kd/Items/actions.cfm?action=Show&item_id=12496&destination=ShowItem; U.S. Army Corps of Eng’rs, Huntington District, Approved Jurisdictional Determination: North Clayton Development, LRH-2006-518-GMR, at 7 (Oct. 5, 2007) (finding lack of significant nexus because it conveys a small amount of stormwater and does not provide habitat or have significant floodplain), available at http://www.lrh.usace.army.mil/_kd/Items/actions.cfm?action=Show&item_id=12495&destination=ShowItem.

¹⁴² Army Corps of Eng’rs, Huntington District, Approved Jurisdictional Determination: North Clayton Development, LRH-2006-518-GMR, at 7 (Oct. 5, 2007), available at http://www.lrh.usace.army.mil/_kd/Items/actions.cfm?action=Show&item_id=12494&destination=ShowItem

¹⁴³ Army Corps of Eng’rs, Buffalo District, Approved Jurisdictional Determination: City of Independence, 2006-00191, Ephemeral Stream 1, at 5 (Nov. 1, 2007), available at <http://www.lrb.usace.army.mil/regulatory/jd/FY08/Jan/2006-00191.pdf> (p. 5 of .pdf file); *see also* Army Corps of

Similarly, we are aware of at least one example where an ephemeral tributary that seems to have an obvious “significant nexus” was apparently the subject of internal squabbling among the agencies. In a December memorandum, EPA and the Corps headquarters asserted jurisdiction (indicating to us that there was a dispute in the field) over an ephemeral tributary to Canyon Lake, in California, a traditional navigable water that is listed as impaired for nitrogen, phosphorus, and pathogens.¹⁴⁴ There was evidence that, “particularly under wet conditions,” sources in the watershed in which the segment is located “contribute significant amounts of nutrients” to the lake.¹⁴⁵ In addition, modeling and analysis showed that “it is reasonable to expect pathogens . . . to be present in runoff from the land uses in the . . . sub-watershed,” and that “even if the pathogen loads from [the segment] were diluted by unpolluted flows from the rest of the watershed flowing to Canyon Lake, the resulting concentration of fecal coliform at the point of entry to Canyon Lake would likely exceed applicable state water quality standards for pathogens.”¹⁴⁶ Although the agencies ultimately reached the right result in this particular case, we are left to wonder why on Earth such an obvious decision required headquarters intervention to come out the right way, and how many similar cases have not been elevated.

B. The limited interpretation of the “significant nexus” analysis has made it more difficult to demonstrate that particular adjacent wetlands are jurisdictional

As noted above, the agencies have interpreted *Rapanos* in a way that would substantially constrain the kind of analysis that should be undertaken in determining whether wetlands adjacent to tributaries not traditionally navigable have a “significant nexus” with traditionally navigable waters. In particular, the guidance indicates that it is only appropriate to consider the cumulative effects of those wetlands that are adjacent to the same reach of a single individual tributary, rather than looking more broadly at the effects of similar wetlands over a larger geographic area (e.g., a watershed). Doing so has real practical consequences.

Long before the guidance was issued, opponents of comprehensive Clean Water Act protections recognized that the degree to which wetlands’ effects were aggregated would make an important difference in whether water bodies are protected. In urging staff of the White House Council on Environmental Quality not to read *Rapanos* in a way that would preserve broad wetlands protections, an attorney from the law firm Hunton & Williams, which has led the

Eng’rs, Buffalo District, Approved Jurisdictional Determination: City of Independence, 2006-00191, Ephemeral Stream 2, at 5 (Nov. 1, 2007) <http://www.lrb.usace.army.mil/regulatory/jd/FY08/Jan/2006-00191.pdf> (p. 13 of .pdf file); Army Corps of Eng’rs, Buffalo District, Approved Jurisdictional Determination: City of Independence, 2006-00191, Ephemeral Stream 3, at 5 (Nov. 1, 2007), available at <http://www.lrb.usace.army.mil/regulatory/jd/FY08/Jan/2006-00191.pdf> (p. 21 of .pdf file).

¹⁴⁴ Memorandum from Brian Frazer, Wetlands & Aquatic Resources Regulatory Branch, U.S. EPA & Russell L. Kaiser, Regulatory Community of Practice, U.S. Army Corps of Eng’rs, Assertion of Jurisdiction for Jurisdictional Determination SPL-261-FBV (Dec. 6, 2007), available at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/Kennedy_N-RPW_SPL-2007-261.pdf.

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.* at 4.

advocacy work of the industry coalition opposing legislation aimed at restoring Clean Water Act jurisdiction,¹⁴⁷ pushed for a limited approach to aggregation:

The idea is NOT that you add up all the wetlands in the region and see if cumulatively they have a significant effect on traditional navigable waters. (That approach would vitiate Kennedy's case-by-case requirement and the answer to that question will probably always be "yes.")¹⁴⁸

It is telling that even those urging the government to read *Rapanos* broadly and the scope of Clean Water Act protections more narrowly recognize the premise that wetlands, considered on a regional basis, will significantly impact water quality. Choosing not to look at such impacts therefore can be expected to limit the wetlands found to be significant enough to qualify for protection by EPA and the Corps.

We have found some evidence that the agencies' guidance, which unfortunately adopts a very similar approach to that advocated by Hunton & Williams, is leading to the loss of previously protected wetland resources. In a determination by the New York District of the Corps, a wetland directly abutting an intermittent tributary that flows directly to a traditionally navigable water was found to lack a "significant nexus," despite concluding that "[t]he wetlands are located alongside . . . landfill areas and may retain, convert, and cycle the potential runoff pollutants that would otherwise directly enter the tributary system," and that they "may serve as flood storage areas, retaining flood waters and precluding them from potentially flooding the surrounding commercial development."¹⁴⁹ The determination found that the small size and proximity of the wetland to the navigable water made it less likely that the wetland would provide significant pollution attenuation, and found that the site had only one commercial building on the property and that other onsite wetlands might "better serve" the flood control purposes for the property.¹⁵⁰ The determination also found that the wetland would not be particularly good habitat for aquatic species.¹⁵¹ In other words, the district looked exclusively at the functions performed by the single wetland under consideration, without looking more broadly at similar wetlands in the region.

C. So-Called "Isolated" Waters Are Being Left Unprotected Even When There Is Evidence That They Would Be Jurisdictional Without Regard to Their Use by Migratory Birds

¹⁴⁷ See, e.g., Waters Advocacy Coalition, Congress Should Not Rush to Change the Jurisdictional Reach of the Clean Water Act (listing Hunton and Williams lawyers as contacts), available at <http://www.protectmywater.org/documents/314450.PDF>. Determination: 9 Corporate Drive Peekskill Development, LLC, NAN-2007-264-EJE-G, at 7 (Oct. 17, 2007), available at

¹⁴⁸ Fax from Hunton & Williams to Greg (last name not identified), at 3 (Sept. 21, 2006) (produced in response to Freedom of Information Act by Council on Environmental Quality) (attached).

¹⁴⁹ Army Corps of Eng'rs, New York District, Approved Jurisdictional <http://www.nan.usace.army.mil/business/buslinks/regulat/jurisdet/West/Oct07/pdf/2007-264-EJE.pdf> (p. 49 of .pdf file).

¹⁵⁰ *Id.* Using a separate wetland's aquatic function to *diminish* the jurisdictional status of a wetland strikes us as exactly the opposite of the kind of cumulative analysis that Justice Kennedy thought the agencies should undertake.

¹⁵¹ *Id.*

As noted above, when the agencies' staff have found that a water body is "isolated" and does not qualify for protection under some other provision of the jurisdictional regulations (e.g., it is not itself traditionally navigable), that determination amounts to a jurisdictional death sentence for the water. We estimate that this practice has led the agencies to write off literally thousands of water bodies since *SWANCC*. In just the months since the new guidance came out, we have identified a number of examples of waters that were declared unprotected because they were found to be "isolated" despite the fact that there appear to be sound reasons to conclude that "the use, degradation or destruction of [the waters] could affect interstate or foreign commerce," thereby making them jurisdictional under the applicable regulations.¹⁵² In some cases, no explanation was given detailing why this standard was not met.

- In a non-jurisdictional determination for a five-acre lake in Sedalia, Missouri, the Corps undertook absolutely no analysis of the potential effects of using, degrading, or destroying the water body, instead concluding that the water lacks protection solely because it is an "[u]pland lake, man-made, not connection [sic] to any jurisdictional [sic] waters or wetlands."¹⁵³
- The Corps found a 15-acre "isolated" lake in Greeley, Colorado to be non-jurisdictional. The lake, according to the determination, is a "private waterskiing lake for use by residents who live adjacent to the lake," but yet the Corps concluded that, among other things, "[t]here is no information available to show that this Ski Lake . . . is or could be used by interstate or foreign travelers [sic] for recreational or other purposes. . . ."¹⁵⁴ The fact of recreational use by local people, a reasonable person would think, is *per se* evidence that interstate or foreign travelers (e.g., guests of the nearby residents) *could* use the water body.¹⁵⁵
- The Corps determined a wetland in Peekskill, New York to be "isolated" and non-jurisdictional, despite the fact that it is located only 50 feet from a traditionally navigable water (Annsville Creek), "is situated on top of a former landfill site and may be contributing to the pollution of Annsville Creek," because of its hydrologic connection (albeit by a "non-jurisdictional swale feature") to the creek.¹⁵⁶ The determination finds it to be significant that water only flows from the wetland to the creek, not the other

¹⁵² 33 C.F.R. § 328.3(a)(3).

¹⁵³ Army Corps of Eng'rs, Kansas City District, Approved Jurisdictional Determination: Menard Inc., 2007-02074, at 1 (Nov. 27, 2007), available at <http://www.nwk.usace.army.mil/regulatory/Rapanos%20JD%20Decision-5%20Jun%202007/2007-2074-JD.pdf>. The fact of recreational use by local people, a reasonable person would think, is *per se* evidence that interstate or foreign travelers (e.g., guests of the nearby residents) *could* use the water body as well.

¹⁵⁴ Army Corps of Eng'rs, Omaha District, Approved Jurisdictional Determination: Terra Ceia Estates, NWO-2007-2810-DEN, at 7 (Nov. 2, 2007), available at <https://www.nwo.usace.army.mil/html/od-tl/jur/NWO20072810DEN%20Jackson%20Inlet%20Ditch%20and%20ski%20lake.doc>.

¹⁵⁵ In addition, given its use for waterskiing, one would think that the water body would qualify as a "traditionally navigable water." See Instructional Guidebook, Appendix D (stating that the "traditional navigable waters" qualify as protected under 33 C.F.R. § 328.3(a)(1), and include "all . . . waters that are navigable-in-fact").

¹⁵⁶ Army Corps of Eng'rs, New York District, Approved Jurisdictional Determination: 9 Corporate Drive Peekskill Development, LLC, NAN-2007-264-EJE-C, at 2-3 (Oct. 17, 2007), available at <http://www.nan.usace.army.mil/business/buslinks/regulat/jurisdet/West/Oct07/pdf/2007-264-EJE.pdf> (pp. 17-18 of .pdf file).

direction. The Corps' analysis of whether the use, degradation, or destruction of the feature could affect interstate commerce is perfunctory.

- The Corps declared a 10-acre wetland in Clay County, Arkansas to be unprotected based entirely on its conclusion that the feature was “isolated.” The determination states: “These 10.0 acres of wooded wetland do not have a hydrologic connection to other waters of the US. The area is not within the 100-year floodplain and there is no tributary connection to the TNW.”¹⁵⁷ The Corps did not examine what effect the use, degradation, or destruction of the wetland could have.
- The Corps found a small wetland in Burlington, Kentucky to be non-jurisdictional based on its “isolation,” and in the process seemed to conflate the “significant nexus” test with the regulatory provisions about use, degradation, and destruction, and then seemed to use isolation as proxy for both.¹⁵⁸
- EPA and the Corps jointly refused to approve a request by the Portland District to assert jurisdiction over Long Lake in Klamath Falls, Oregon, using the agencies' residual regulatory authority to protect waters.¹⁵⁹ The agencies reached this conclusion despite a suggestion that the area was used to support cattle and perhaps also for bird watching.¹⁶⁰ Moreover, the agencies did not appear to consider the role that Long Lake might play in an issue obviously related to interstate commerce – water storage in the Klamath Basin. Long Lake reportedly is under consideration to be used as a water storage and potential supply site by the Bureau of Reclamation.¹⁶¹

¹⁵⁷ Army Corps of Eng'rs, Little Rock District, Approved Jurisdictional Determination: Weston, Steve, #2007-00430, at 1 (Oct. 12, 2007), available at <http://www.swl.usace.army.mil/regulatory/jurisdeter/2007-00430.pdf>.

¹⁵⁸ Army Corps of Eng'rs, Louisville District, Approved Jurisdictional Determination: No. KY. Sanitation District #1, LRL-2007-783-mdh, Wetland 9, Site 3, at 8 (Nov. 26, 2007) (“The wetland in question does not possess a significant nexus to a traditional navigable water and therefore is not susceptible to use in interstate or foreign commerce.”), available at <http://www.lrl.usace.army.mil/orf/article.asp?id=651&MyCategory=235>; *id.* at 9 (“The wetland in question is located outside of any known floodplains and is far removed from any other ‘waters of the U.S.’, thus the wetland is not used nor is it susceptible to use in interstate or foreign commerce. As such, this wetland is not considered to be a ‘waters of the U.S.’”).

¹⁵⁹ Memorandum from Brian Frazer, Wetlands & Aquatic Resources Regulatory Branch, U.S. EPA & Russell L. Kaiser, Regulatory Community of Practice, U.S. Army Corps of Eng'rs, Declination of Jurisdiction for Jurisdictional Determination NWP-2007-369 (Nov. 15, 2007), available at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/IW_Memo_NWK-2007-369.pdf.

¹⁶⁰ Army Corps of Eng'rs, Portland District, Approved Jurisdictional Determination: NWP-2007-369, at 8 (Nov. 15, 2007) (“A review of the lake being potentially jurisdictional under the commerce connection as defined in 33 CFR 328.3(a)(3) with cattle and bird watching activities are not sufficient commerce to support jurisdiction.”), available at <https://www.nwp.usace.army.mil/op/g/docs/jd/NWP-2007-369.pdf>.

¹⁶¹ See Herald & News: Viewpoints, “Long Lake part of the answer to water problems,” (July 23, 2007), available at <http://www.heraldandnews.com/articles/2007/07/23/viewpoints/viewpoints/views.txt>. Strangely, the Corps' determination reports that “[t]he proposed project by the bureau of reclamation will create a direct chemical, physical, biological and hydrological connection to Klamath Lake a TNW,” but does not seem to consider whether this connection is indicative that the use, degradation, or destruction of the resource could have interstate commerce effects. See Portland District, Approved Jurisdictional Determination: NWP-2007-369, at 8.

Thus, the agencies appear to be keeping in place not only the 2003 policy for “isolated” waters; they also seem to have retained their practice of denying Clean Water Act protections to any such waters.

VII. IT IS PLAINLY CONTRARY TO THE STATUTE TO TRY TO LIMIT THE INTERPRETATION OF THE CLEAN WATER ACT’S JURISDICTIONAL SCOPE TO § 404.

The Clean Water Act’s definition of “navigable waters” to mean “the waters of the United States” is the same for all of the Act’s provisions.¹⁶² Yet, in the 2007 guidance, the agencies assert that the document and its interpretation of the Act’s jurisdictional scope in the wake of *Rapanos* apply only to the “dredge-and-fill” program of § 404.¹⁶³ While we would strongly oppose the adoption of this extremely flawed guidance for any other Clean Water Act programs (just as we oppose its application to the § 404 program), at the same time it is almost nonsensical for the agencies – EPA in particular – to fail to acknowledge and address the fact that the *Rapanos* and *SWANCC* decisions clearly affect other Clean Water Act programs. Essentially, the scope and reach of the entire law are implicated.¹⁶⁴

Clean Water Act section 301(a) broadly prohibits “the discharge of any pollutant” to “navigable waters” (defined in section 502(7) as “waters of the United States, including the territorial seas”) from any “point source” without a permit.¹⁶⁵ The permitting programs of § 402, the National Pollutant Discharge Elimination System (NPDES) program, and § 404, the “dredge-and-fill” program, are the primary exceptions to the section 301 prohibition – neither permitting

¹⁶² 33 U.S.C. § 1362(7); *also see, e.g.*, Brief of the U.S. Gov’t in *Rapanos* at 20 (stating that the term “waters of the United States” “defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA.”).

¹⁶³ *See* Guidance at 4 n. 17.

¹⁶⁴ The very first Clean Water Act guidance, issued immediately after the *SWANCC* decision, forthrightly acknowledged this reality. *See* Memorandum of Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency and Robert M. Andersen, Chief Counsel, U. S. Army Corps of Engineers, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters, at 1 (Jan. 19, 2001) (“Although the SWANCC case itself specifically involved section 404 of the CWA, the Court’s decision affects the scope of regulatory jurisdiction under other provisions of the CWA as well, including the section 402 NPDES program and the section 311 oil spill program. Under each of these sections, the Agencies have jurisdiction over ‘waters of the United States.’ CWA § 502(7). Accordingly, the following discussion applies to any program that involves ‘waters of the United States’ as that term is used in the CWA, and will be relevant to any federal, state, or tribal staff involved in implementing sections 402, 404, 311, and any other provision of the CWA which applies the definition of ‘waters of the United States.’”). *See also* 43 U.S. Op. Atty. Gen. 197 (Sept. 5, 1979) (“The term ‘navigable waters,’ moreover, is a linchpin of the Act in other respects. It is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the Act, including the § 402 permit program for point source discharges, the regulation of discharges of oil and hazardous substances in § 311 and the regulation of discharges of vessel sewage in § 312. Its definition is not specific to § 404, but is included among the Act’s general provisions. It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether-and to what extent-any particular water body comes within the jurisdictional reach of the Federal Government’s pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged and fill permits under § 404 and a different set for purposes of the other pollution control measures in the Act. On this point I believe there can be no serious disagreement.”) (citations omitted) (emphasis added).

¹⁶⁵ *See* 33 U.S.C. §§ 1311(a).

program applies to any discharges into waters that are not first otherwise prohibited by section 301. In other words, § 404 does not *prohibit* the discharge of dredged and fill material into “waters of the U.S.” – it *allows* it as an exception to the no-discharge provisions of § 301. Section 404 authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into waters of the United States at specified disposal sites in accordance with guidelines developed by the EPA in conjunction with the Secretary of the Army. The very language and structure of the Act itself makes it undeniable that the definition of “waters of the U.S.” – and the agencies’ interpretation of that term after the Supreme Court’s decisions – applies equally to the entire law.¹⁶⁶

In addition to the permitting program of § 402, the NPDES program, many other of the Clean Water Act’s key water protection and pollution control provisions rely upon the same definition of “waters.” And industrial polluters are actively pursuing a narrowing of the scope of the law based on *Rapanos* and *SWANCC* in the courts and before the agencies with respect to these programs as well. For example, in their continuing quest for loopholes that would allow them to spill oil into our Nation’s waters, American Petroleum Institute (API) and Marathon Oil Company have mounted a facial attack on a 2002 Environmental Protection Agency regulation defining which waters are subject to Clean Water Act § 311 – the Act’s principal safeguard against oil spills.¹⁶⁷ The statutory term “navigable waters” and its definition as “waters of the United States” govern the scope of this program as well.

Other provisions of the law that will be affected by the Supreme Court’s decisions and the agencies’ subsequent interpretations include, but are not limited to: the ability of states and tribes to evaluate whether federal permits comply with water quality standards under § 401; water quality standards, antidegradation requirements, and the TMDL watershed clean-up program under § 303; and various other sections of the law.¹⁶⁸

It is worth noting that, despite the agencies’ ostrich-like approach in this guidance of sticking their heads in the sand in an attempt to ignore the broader implications of their interpretation of *Rapanos* and *SWANCC*, several lower courts are being forced to address the implications of that decision for Clean Water Act programs outside the confines of § 404. In fact, three of the earliest post-*Rapanos* lower federal court decisions involved other parts of the Act. In the first, *United States v. Chevron Pipeline Company*, the district court held that an oil

¹⁶⁶ See also 33 U.S.C. § 1362(12) (“[t]he term ‘discharge of a pollutant’ . . . means . . . any addition of any pollutant to navigable waters from any point source”); and Oral Argument Transcript, *Rapanos v. U.S.*, at 57 (Feb. 21, 2006) (statement of Solicitor General Clement) (“whatever this Court decides for purposes of the 404 jurisdiction, it’s necessarily deciding for purposes of the 402 jurisdiction of the EPA.”).

¹⁶⁷ Ironically, in their briefs in this case, API cites to Congressman Dingell’s famous floor statement – explaining how the conferees gave broad meaning to the term “navigable waters” – to try to claim that the 1972 legislation meant the exact opposite, that is, that Congress was primarily concerned with navigability. Congressman Dingell submitted an amicus brief in that case to dispel that argument.

¹⁶⁸ Even some of the opponents of the historic and broad Clean Water Act jurisdiction concede that the definition of waters of the United States” applies to Clean Water Act programs beyond the § 404 dredge and fill permit program. See Waters Advocacy Coalition, *Reasons To Oppose the “Clean Water Restoration Act of 2007,” H.R. 2421* (noting that the definition of “waters of the U.S.” affects waters subject to water quality standards, effluent limitation guidelines (which are relevant to the Act’s § 402 NPDES permit program) and, the setting of Total Maximum Daily Loads (TMDLs)); see also Brief of *Amici Curiae* Croplife America et al., *Rapanos v. U.S.*, at 4 (Dec. 2005).

spill into an intermittent stream did not trigger the Clean Water Act because the stream was neither navigable-in-fact nor adjacent to such a water.¹⁶⁹ In *United States v. Evans*, an enforcement action involving the discharge of untreated human sewage into a perennial stream, the district court said that the “allegations [in connection with warrant applications] are sufficient to support a finding that there was probable cause to believe the creek fell within the definition of ‘waters of the United States’ regardless of whether one applies the plurality’s test or the broad parameters suggested by Justice Kennedy.” Accordingly, the court found that a warrant issued on the basis of alleged Clean Water Act violations was sound, even though the defense tried to characterize the stream as an unprotected “ditch.”¹⁷⁰ And in *Northern California River Watch v. City of Healdsburg*, a case involving treated sewage discharge into pond and wetlands, the Ninth Circuit held that the waters at issue were protected by the Act because of adjacency to traditionally navigable water and because of the existence of a significant nexus.¹⁷¹ But whether the courts in these or other non-404 cases found that the Clean Water Act still does or does not apply after *Rapanos* and *SWANCC*, it is clear that the courts are applying the Supreme Courts’ decisions outside the § 404 program.

Rather than pretend that the agencies’ 2007 (and 2003) guidance only applies to § 404 permitting context, the EPA needs to address this issue directly and explain how it plans to implement and enforce the entire Clean Water Act in light of the *Rapanos* and *SWANCC* decisions. The EPA’s failure to date to address this issue forthrightly has and will continue to give polluters and others opportunities to suggest that they are no longer subject to Clean Water Act permitting or enforcement provisions for point source discharges into those waters subject to this guidance. For example, comments submitted in this docket from a local official representing county in Arizona also take the position that, because the same definition of “waters” in the Act is used for the purposes of §§ 301, 402, and 404, the jurisdictional scope for all of these provisions must be the same.¹⁷² This commenter than suggests that at least three wastewater treatment facilities in the county that discharge treated sewage into normally dry tributaries of the Gila River and San Pedro River, which are tributaries of the Colorado River, should no longer be required to have NPDES permits.¹⁷³ We certainly do not agree that wastewater treatment systems that discharge into ephemeral and intermittent streams no are no longer regulated by the Act, but if EPA does not clearly state how it will interpret and implement the *Rapanos* and *SWANCC* decisions outside of the § 404 context, problems in the Act’s other programs will be unleashed.

¹⁶⁹ 437 F. Supp.2d 605, 614 (N.D. Tex. 2006); the court in this case claimed that it was not following *Rapanos* because of the confusing nature of the decision and the lack of a majority opinion, but did refer in its ruling to the plurality’s rationale as support for its conclusions. *Id.* at 613-14.

¹⁷⁰ 2006 WL 2221629, *22 (M.D. Fla. Aug. 2, 2006).

¹⁷¹ 496 F.3d 993, 1000-01 (9th Cir. 2007), *petition for cert. filed*, 76 USLW 3260, No. 07-625 (Nov. 5, 2007).

¹⁷² Comments of Pima County, Arizona on Clean Water Act Guidance to Implement the U.S. Supreme Court Decision for *Rapanos* and *Carabell* Cases, January 16, 2008 at 7-8.

¹⁷³ *Id.* at 11-13.

VIII. THE GUIDANCE CREATES NUMEROUS OTHER PROBLEMS FOR THE ANALYSIS OF WATER BODIES' STATUS AND FOR THE DOCUMENTATION OF SUCH DETERMINATIONS.

A. The Attempt To Distinguish Between Waters That Are “Generally” Non-Jurisdictional and Similar Waters That Remain Protected Does Not Show How the Categories Are Meaningfully Distinct

The guidance announces, and then partially retracts, a presumption that certain kinds of geographic features are not “waters of the United States,” without providing useful directions on how to tell the difference between features that are protected and those that are not. In particular, the guidance states that “[s]wales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.”¹⁷⁴ This is contrary to previous agency interpretations and court decisions saying that these aquatic features, can be “waters of the United States.” For example, one U.S. brief in the *Borden Ranch* case stated: “Swales are sloped wetlands that allow the movement of vernal pool plants and animals to other aquatic features, slow peak water flows, filter water flows to maintain water quality, and minimize erosion and sedimentation.”¹⁷⁵

But in describing similar-sounding waters in the arid west that remain jurisdictional, the agencies say that “[c]ertain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters.”¹⁷⁶

This distinction is unclear, at best. If the significant nexus test for swales, washes, and ephemeral streams, in the west and east involves a determination of whether or not they are tributaries of other waters of the U.S. and have sufficient flow and duration – these seems to be the same factors on both sides of the Mississippi. The attempt here to make a categorical presumption that, outside the arid west, such waters are not jurisdictional is not supported by law and will lead the EPA and Corps staff to not even look for jurisdictional hooks for such waters even in those cases when this presumption is not true.

Similarly, the guidance is unnecessarily dismissive of the category of waters described as “ditches.”¹⁷⁷ Clearly, at a minimum, those man-made or altered waters that do function as

¹⁷⁴ Guidance at 11; *see also id.*, Appendix B, Approved JD form, at section III.E (suggesting that interstate isolated waters must have link to interstate commerce to be jurisdictional).

¹⁷⁵ Brief of the United States in Opposition to the Petition for a Writ of Certiorari to the U.S. Supreme Court, *Borden Ranch Partnership v. Army Corps of Engineers*, 537 U. S. 99 (2002) (per curiam) (available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-1243.resp.html>).

¹⁷⁶ Guidance at 11.

¹⁷⁷ *Id.* (“ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.”).

tributaries (and those not dug wholly in uplands) must be protected consistent with the regulations. It appears that this was the view of the EPA, even quite early in the Act's implementation. The agency's General Counsel concluded in 1977 that the Arlington Canal, in Buckeye, Arizona, was a "water of the United States," despite describing the Canal as:

[A]n earthen irrigation ditch which flows roughly parallel to the Gila River [, which has flow that] consists primarily of groundwater pumped from wells, irrigation return flows and treated sewage effluent [and which] takes in water from the main Gila River channel only during periods of heavy flow when upstream users are not diverting all of the flow of the River.¹⁷⁸

The opinion states that the "facts clearly support the Regional Administrator's finding that the Arlington Canal is a tributary of the Gila River, which is navigable water."¹⁷⁹ And this conclusion was not an aberration; a separate opinion from the General Counsel two years earlier was consistent with this view.¹⁸⁰

Several federal courts have concluded that man-made channels can properly be considered "waters of the United States." For instance, in a case involving the discharge of raw sewage during the 1970s into a Louisiana canal that was adjacent to (and from which water was periodically pumped into) wetlands that were considered to be "waters of the United States," the court found that the canal could be protected either as a water linked to interstate commerce or as a tributary to the wetlands.¹⁸¹

In the last decade – both before and after *SWANCC* – numerous federal courts of appeal have found that ditches and canals properly could be protected "waters of the United States." Specifically, the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits found that such features were properly protected by the Clean Water Act.¹⁸² Similarly, the Second Circuit rejected an

¹⁷⁸ U.S. EPA, Office of General Counsel, In re: Town of Buckeye, Arizona, 1977 WL 28254, at * 1 (Nov. 11, 1977).

¹⁷⁹ *Id.* (citation omitted).

¹⁸⁰ U.S. EPA, Office of General Counsel, In re: Riverside Irrigation Dist., Ltd. & 17 Others, 1975 WL 23864, at *3-4 (June 27, 1975) (discussing objection about irrigation return canals, EPA's regulations defining "waters of the United States" and a judicial interpretation which noted that tributaries to navigable waters were protected, and concluding, "[i]t thus appears that the waters that are the subject of these permits may well be determined by the finder of fact, applying the statutory and regulatory test to the facts of these cases, to be navigable waters within the definition in the Act.").

¹⁸¹ *U.S. v. St. Bernard Parish*, 589 F.Supp. 617, 620 (E.D. La. 1984).

¹⁸² *See, e.g., U.S. v. Deaton*, 332 F.3d at 712 (considering effect of pollution into non-navigable tributaries, noting Corps' interpretation that whole tributary system is protected under applicable rules, and holding, "[t]he Act thus reaches to the roadside ditch and its adjacent wetlands"); *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704, 708 (6th Cir. 2004) (finding that both ends of ditch along border of the property are connected to tributaries of "waters of the United States," making it a tributary, and thus a protected water), *vacated sub nom, Rapanos v. U.S.*, 126 S.Ct. 2208 (2006); *U.S. v. Gerke Excavating, Inc.*, 412 F.3d 804, 805-06 (7th Cir. 2005) ("A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart."), *vacated* 126 S.Ct. 2964 (2006), *on remand* 464 F.3d 723 (7th Cir. 2006) (remanding to district court to apply *Rapanos*), *cert. denied* 128 S.Ct. 45 (2007); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (holding that irrigation canals were "tributaries" protected as "waters of the United States"); *U.S. v. Eidson*, 108 F.3d 1336, 1342 (11th Cir.) ("There is no reason to suspect that Congress intended to regulate only the natural tributaries of

attempt to limit jurisdiction over a natural tributary that had been “channeled in some places . . . into underground pipes to make room for development. . . .”¹⁸³

In keeping with this approach, the Bush Administration staunchly defended the protection of the entire tributary system, ditches included, before the Supreme Court. Solicitor General Clement explained “the definition of a tributary is basically any channelized body of water that takes water in a flow down to the traditional navigable water.”¹⁸⁴ Specifically, he noted that “[t]he Corps has not drawn a distinction between man-made channels or ditches and natural channels or ditches. And, of course, it would be very absurd for the Corps to do that since the Erie Canal is a ditch.”¹⁸⁵

Even at least one opponent of the continued broad scope of the Act observed (in an email about the draft guidance sent to staff at the Council on Environmental Quality (“CEQ”)) that ditches had “long been covered under [the] CWA,” and wondered whether excluding such “artificial” waters from coverage would create legal vulnerabilities.¹⁸⁶

Any guidance from the EPA and Corps to the field must not assume that any category of waters which legally remains under the scope of the law should not be treated as jurisdiction; rather, the agencies must assume that previously protected categories of water remain so, and must look for legally valid jurisdictional attributes that keep those waters protected.

B. All Interstate Waters, Including Wetlands, Are Still Categorically Protected by the Clean Water Act

The 2007 guidance suggests that all jurisdictional determinations for “isolated” waters, even interstate ones, are subject to the headquarters approval process.¹⁸⁷ But interstate waters are separately protected by the regulations.¹⁸⁸ That provision was not at issue in *Rapanos* or *SWANCC*. In fact, interstate waters were subject to federal law long before the Clean Water Act was adopted in 1972.¹⁸⁹ It is inexplicable that the agencies would find such waters non-jurisdictional, even where they may appear to be hydrologically “isolated,” when there is a completely independent legal basis for protecting interstate waters. Why such jurisdictional determinations would ever be questioned – or require HQ review – is mystifying at best. The

navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes.”), *cert. denied*, 522 U.S. 899 (1997).

¹⁸³ *U.S. v. TGR Corp.*, 171 F.3d 762, 765 (2d Cir. 1999).

¹⁸⁴ Transcript of Oral Argument, *Rapanos v. United States*, 126 S.Ct. 2208 (2006), at 39 (Feb. 21, 2006), available at http://www.supremecourtus.gov/oral_arguments/arguments/transcripts/04-1034.pdf.

¹⁸⁵ *Id.*

¹⁸⁶ Email from Jeff Eisenberg, National Cattleman's Beef Ass'n, to Greg Schildwachter, CEQ, Sept. 13, 2006, at 1 (produced in response to Freedom of Information Act by Council on Environmental Quality). The message went on to convey that, despite their legal concerns, “[w]e of course are happy to have ditches excluded.”

¹⁸⁷ Instructional Guidebook at 51 & 59.

¹⁸⁸ See 33 C.F.R. § 328.3(a)(2).

¹⁸⁹ See, e.g., Federal Water Pollution Control Act of 1948, P.L. 845, June 30, 1948; 62 Stat. 1155 (authorizing the Surgeon General of the Public Health Service to prepare comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries and improving the sanitary condition of surface and underground waters).

more troubling implication is that, like for the other categories of “isolated” waters for which the agencies retain legal authority to protect, the EPA and Corps are simply abdicating responsibility for regulating discharges into interstate “isolated” waters as well.

C. The Agencies Must Do a Better Job at Documenting JDs and NJDs and Making that Information Readily Available to Ensure Transparency and Accountability

It is critically important, especially given the subjective, opaque, and confused “guidance” provided to EPA and Corps officials in the guidance, that the federal agencies, interested groups, and the public have ready access to as much information as possible and practicable about jurisdictional determinations (both those asserting and those declining to assert jurisdiction). Unfortunately, there are numerous problems in this regard under the present system. Some of those that deal directly with coordination between EPA and the Corps are addressed later in section IX. of these comments. Deficiencies in the system for logging and posting information about JDs/NJDs that prevent interested groups and the public from being able to track how the agencies are implementing and enforcing the Clean Water Act are discussed immediately below.

1. Some Corps Districts Are Not Posting JD/NJD Forms on Their Websites in a Timely or Consistent Manner

Key to the ability of the public to watchdog and understand the actions of the EPA and Corps is the regular posting by the Corps districts of the jurisdictional determination forms. RGL 07-01 specifies that completed jurisdictional forms “shall be posted within 30-days of completion,”¹⁹⁰ but in our experience this appears to be regularly disregarded. Some Corps districts do post the forms monthly; others seem to post them as soon as they are final. Other districts, however, have posted few forms, and have not updated their sites for months. The Charleston district, for example, says on its website that “The Charleston District issues *thousands* of (JDs) annually. As a service to the public, the District will report on a *weekly* basis (JDs) issued, including the standardized reporting forms used for making the determinations, on this website.”¹⁹¹ Despite this proclamation, the district currently has posted a total of 20 JD and NJD determinations since June 2007, and the most recent is dated August 10.¹⁹²

It is critically important that Corps and EPA headquarters police the posting of the JD forms and take steps necessary to ensure that the forms are made available in a timely way. All

¹⁹⁰ U.S. Army Corps of Eng’rs, Regulatory Guidance Letter No. 07-01, Practices for Documenting Jurisdiction under Sections 9 & 10 of the Rivers & Harbors Act (RHA) of 1899 and Section 404 of the Clean Water Act (CWA), at 7 (June 5, 2007).

¹⁹¹ U.S. Army Corps of Eng’rs, Charleston District, Jurisdictional Determinations (emphasis added), available at http://www.sac.usace.army.mil/?action=jurisdictional_determination_home (visited Jan. 17, 2008).

¹⁹² http://www.sac.usace.army.mil/?action=jurisdictional_determination_jurisdiction (visited Jan. 17, 2008). The Savannah district appears to have only started posting post-*Rapanos* JDs in the past week, and only has one week’s forms posted on their site. U.S. Army Corps of Eng’rs, Savannah district, Jurisdictional Determinations <https://sasweb.sas.usace.army.mil/JD/>, (visited Jan. 20, 2008).

districts should be required to post all completed forms at least once a week; there is no point – and little or no workload savings – to posting only monthly compared to weekly.¹⁹³

2. The Corps Should Keep Jurisdictional Determinations Available On-Line for Five Years

It is bad policy and irresponsible of the agencies to allow jurisdictional determinations – which are good for up to five years – to be removed from Corps’ websites after only 3 months. Not all districts follow this practice. Some districts today continue to make available not only new forms, but those going back to when the Corps first starting using standardized forms in 2004. Other districts, however, regularly remove from their websites jurisdictional forms after some period – 3 months, 6 months – a period of time far shorter than the period in which they are in effect. At a minimum, forms should remain available on Corps websites for the period of time in which these determinations are in effect.

3. The Corps Needs a System to Track Which Waterbodies Have Been the Subject of an Approved JD

It is unclear whether the agencies have any system for tracking which water bodies have had determinations made. This is likely to lead to duplication of effort and potentially inconsistent results. Corps districts should post not only the individual JD/NJD forms but also a list of those waters – by name, type, and description – that have been declared jurisdictional and non-jurisdictional. Such a list, regularly updated, would also contribute greatly to the public’s understanding of the on-the-ground effects of the 2007 and 2003 guidances.

Compiling, maintaining, and making public a list of waters that have been found to be jurisdictional would also help the agencies to make categorical or regional jurisdictional assessments for “similarly-situated” waters, in answer to Justice Kennedy’s invitation to take individual determinations and “presume covered status” for wetlands of the same kind in a region.¹⁹⁴

4. The “Approved Jurisdictional Form” Must Be Revised to Include Relevant Information About the Waters at Issue and the Proposed Dredge and Fill Activity

While the new jurisdiction¹⁹⁵ form is an improvement over the forms used by the Corps from 2004 to June 2007, there is still much room for improvement, both on the form itself and

¹⁹³ Some districts seem to have no problem posting JD forms weekly. *See, e.g.* U.S. Army Corps of Eng’rs, Seattle District, Jurisdictional Determinations, available at <http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=KaiserHomePage> (visited Jan. 20, 2008) (updates posted every Friday).

¹⁹⁴ *See* 126 S.Ct. at 2249 (Kennedy, J., concurring). The Instructional Guidebook does direct Corps district offices to maintain a list of determinations of navigability, but not other JDs, and there are no provisions directing the offices to post these lists on their websites. *See also* Instructional Guidebook at 50.

¹⁹⁵ Form available at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/app_b_approved_jd_form.pdf.

with respect to how the Corps and EPA ensure the forms are properly and completely filled out. The forms do not clearly require field staff to specifically identify, by name, the actual water for which the determination is being made or to give a written description of the water.¹⁹⁶ While the “check boxes” are supposed to describe the waters at issue, it would be more helpful to have a short written identification and brief description of the water that is the subject of the instant determination right at the top of the form. In addition, where the water at issue is part of a permit application or is at issue because of a proposed project known to field staff, it would be helpful for the public to have that information, and it should be listed on the form as well.

We have found many instances in which forms that have been posted as “Approved Jurisdictional Determinations” where it is impossible to even tell what type of water was at issue, or whether any decision was made that the water was or was not jurisdictional.¹⁹⁷ Whether postings of these almost blank forms and others that are substantially incomplete are mistakes or not, overall we have found a high degree of inconsistency between Corps districts in the quality of information and detail provided on the JD forms. The Corps and EPA must take additional steps – including better training and oversight – to ensure the forms are properly and entirely filled out.

5. Preliminary JDs Should Be Made Available on the Districts’ Websites

Corps districts are permitted to make preliminary jurisdictional determinations under certain circumstances, although “as a general rule” such determinations should not be used to respond to requests for approved JDs.¹⁹⁸ But the guidance directs that these “PJDs” not be posted on the web. No reason is given. Where such determinations are made, they should also be posted on the districts’ websites.

IX. THE EPA AND CORPS MUST CONTINUE TO COLLABORATE WHEN MAKING JURISDICTIONAL DETERMINATIONS, AND THE COORDINATION PROCESS SHOULD BE IMPROVED.

Simultaneous with the release of the 2007 guidance, the EPA and Corps released a joint memorandum describing the procedures that the Corps districts, EPA regional offices, and both agencies’ headquarters will follow to “establish an efficient and effective process for determining Clean Water Act Section 404 jurisdiction.”¹⁹⁹ This coordination memo applies to both *Rapanos-*

¹⁹⁶ See *id.* at 1. The top of the form asks field staff to identify the nearest waterbody, as well as the nearest traditional navigable water, but it is not clear that this includes the identification of the water that is the subject of the jurisdictional determination.

¹⁹⁷ For just one of many examples, see [http://www.mvk.usace.army.mil/offices/od/odf/JD/Active/JD%20Form-2007-1171%20\(Site%201\).doc](http://www.mvk.usace.army.mil/offices/od/odf/JD/Active/JD%20Form-2007-1171%20(Site%201).doc).

¹⁹⁸ Regulatory Guidance Letter No. 07-01 at 6.

¹⁹⁹ Memorandum from Benjamin H. Grumbles, Assistant Administrator for Water, U. S. Environmental Protection Agency and John Paul Woodley, Jr., Assistant Secretary of the Army (Civil Works), *U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Coordination on Jurisdictional Determinations (JDs)*

related “significant nexus” determinations and SWANCC related “isolated waters” determinations. In that regard, it represents a substitute for the very problematic, one-way “phone home” policy that the agencies followed from 2003 until June 2007. In this respect, it is an improvement.

The January 2003 SWANCC guidance only required the districts to request permission from Corps HQ for those actions where they would protect traditionally non-navigable, intrastate, isolated waters, including wetlands. The 2007 coordination memo now requires that decisions not to protect such waters also be transmitted to the appropriate EPA regional office and Corps HQ; the memo says the districts must provide the completed JD form and “and supporting documentation.”²⁰⁰ The EPA regional offices are responsible for transmitting all of this information to EPA headquarters. Either agency’s headquarters can initiate a joint review of a particular JD involving an intrastate, non-navigable, isolated water within 21 days.

For determinations that are based on a finding of a “significant nexus” with traditional navigable waters, the process is somewhat different. The EPA regional office reviews those form and related materials, and then makes an initial judgment about whether they will comment on the Corps’ determination.²⁰¹ The agencies are to resolve any issues at this level within 15 calendar days after EPA’s receipt of the form. Within these 15 days, the EPA regional office may elect to elevate the review to their Regional Administrator (RA); if it does so, it must notify the Corps in writing, briefly explain the rationale for EPA’s position. If EPA provides no notification within the 15-day window, the Corps district may finalize the JD.

When a JD is elevated to the RA, the RA and the district engineer have 10 days to resolve the issue. If the issue is not resolved, the RA must elevate the disputed determination to EPA headquarters, again informing the Corps district in writing.²⁰² If a mutual decision is reached on the assertion or declination of jurisdiction, a joint decision memo discussing the rationale of the decision will be provided to both agencies’ field offices; if a mutual decision is not reached, a decision memo prepared by EPA explaining EPA’s rationale in support of a final determination is sent to both agencies’ field offices.²⁰³

The coordination on jurisdictional determinations (JDs and NJDs) with EPA must continue on a permanent basis. This will assist the Corps to assure consistency, not only between districts within each EPA region, but between the regions as well. Also, even within the § 404 program, it is EPA, not the Corps, that is ultimately responsible for defining the Act’s jurisdictional reach.²⁰⁴ In addition, as noted above, judgments made about the scope of the Clean Water Act in the § 404 context will almost necessarily spill over to other Clean Water Act programs, and be viewed by polluters, the courts, and the public as having implications for the

under Clean Water Act (CWA) Section 404 in Light of the SWANCC and Rapanos Supreme Court Decisions, at 1 (June 5, 2007).

²⁰⁰ *Id.* at 2.

²⁰¹ *Id.* at 3.

²⁰² *Id.*

²⁰³ *Id.* at 3-4.

²⁰⁴ See 33 U.S.C. § 1311(a); see also U.S. Attorney General, Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att’y General 197, 1979 WL 16529 (Sept. 5, 1979).

entire law. There is no way the Corps can be left with the sole discretion and authority under the Act to determine for itself and by itself which waters are in and which are out.

Undoubtedly, the coordination process, in addition to the workload burden of documenting and reviewing jurisdictional calls, will continue to be somewhat time consuming. As discussed elsewhere in the comments, much of that is the fault of the agencies themselves, for at each opportunity where the EPA and Corps could have lightened their own workload (as well as better protected streams and wetlands) by using the more categorical approaches available to them, instead the agencies chose to make almost every determination – especially those based on a “significant nexus” – a start-from-scratch, case-by-case proposition. Nonetheless, EPA and the Corps must continue to coordinate on new jurisdictional determinations and must ensure that all waters that remain legally protected are, in fact, actually protected by the agencies.

X. CONCLUSION.

The 2007 and 2003 guidance policies are inconsistent with the Clean Water Act’s text, structure, and purpose. While the EPA and Corps cannot ignore the Supreme Court’s decisions in *Rapanos* and *SWANCC*, the agencies have significantly gone beyond the narrow holdings of those cases and, effectively, set forth new rules on jurisdiction without a basis in science or the statute. This is ironic, given that this administration and the previous one argued against this very result in both Supreme Court cases. Worse, the agencies’ guidance memoranda have already left many thousands of streams, wetlands, lakes and rivers without protection and will – until withdrawn or substantially revised – continue to degrade important water resources the public and wildlife need.

Until Congress rejects the Supreme Court’s misinterpretation in *Rapanos* and *SWANCC* and restores full protection to the Nation’s water bodies, the EPA and Corps have no excuse for shirking their responsibility under the Clean Water Act, its implementing regulations, and prior judicial precedent to protect all the tributaries, wetlands and waters still within the scope of the law.

Again, in light of the myriad flaws discussed in these comments, our organizations strongly urge the EPA and the Corps to withdraw the 2007 and 2003 guidance policies, and re-dedicate themselves to fully protecting the Nation’s waters consistent with the law.

Sincerely,

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Natural Resources Defense Council

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Friends of the Earth

Paul Schwartz
National Policy Coordinator
Clean Water Action



August 13, 2018

Via email to OW-Docket@epa.gov and online submission to www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Definition of Waters of United States - Recodification of Pre-Existing Rules (Docket ID No. EPA-HQ-OW-2017-0203; FRL-9980-52-OW)

Dear Acting Administrator Wheeler and Assistant Secretary James:

Waterkeeper Alliance, Center for Biological Diversity, Center for Food Safety, Turtle Island Restoration Network, and the Waterkeeper Member Organizations and Affiliates identified below (“Commenters”) submit the following comments on the United States Environmental Protection Agency (“EPA”) and Department of Defense, Department of the Army, Corps of Engineers (“Corps”) (jointly the “Agencies”) Supplemental Notice of Proposed Rulemaking entitled “Definition of Waters of United States - Recodification of Pre-Existing Rules,” 83 Federal Register 32227 (July 12, 2018) (hereinafter “Supplemental Notice”).

Commenters are adamantly opposed to the Agencies’ contorted attempts to eliminate Clean Water Act (“CWA”)¹ protections for our nation’s waters through multiple illegal and discretion-abusing administrative actions,² and we hereby incorporate previous comments on these actions by reference herein.³ The Agencies’ current rulemaking, and the entirety of this administration’s

¹ 33 U.S.C. §1251 *et seq.*

² U.S. EPA and U.S. Army Corps, Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532, (Mar. 6, 2017); Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (July 27, 2017); Definition of Waters of the United States: Public Meetings, 82 Federal Register 40742 (August 28, 2017); Definition of “Waters of the United States” - Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55542 (Nov. 22, 2017); U.S. EPA, Waters of the United States (WOTUS) Rulemaking, Listening Session Presentations, <https://www.epa.gov/wotus-rule/listening-session-presentations> (last accessed Aug. 8, 2018); U.S. EPA, Waters of the United States (WOTUS) Rulemaking Process, <https://www.epa.gov/wotus-rule/rulemaking-process> (last accessed Aug. 8, 2018).

³ Natural Resource Defense Council et al. Comments on 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, Docket ID No. EPA-HQ-OW-2011-0409 (Aug. 1, 2011) (Attachment 1); Final Waterkeeper Comments on EPA-HQ-OW-2011-0880 (Nov. 14, 2014) (available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-13681> as an Attachment);

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effort to dismantle the Clean Water Act, is antithetical to the rule of law and due process, as well as to the standards of fundamental fairness embedded in the CWA and the Administrative Procedure Act (“APA”).⁴

The Agencies’ Supplemental Notice exemplifies the illegal and arbitrary methods being employed by this administration to repeal and replace the 2015 Clean Water Rule. Rather than follow a normal rulemaking process – *i.e.* leaving the current rule in place until the administration’s preferred approach is ready – the Agencies created a convoluted process that has denied the public a fair opportunity to understand what is being proposed and provide comment at every turn.

More than a year after the Agencies announced their decision to repeal the 2015 Clean Water Rule,⁵ and almost a year after the Agencies published a wholly inadequate and illegal Proposed Rule⁶ to effectuate that decision, the Agencies have now provided the public with just 30 days⁷ to comment on this complex, discursive 26-page Supplemental Notice and 112-page Supporting Document that purports to “clarify, supplement and give interested parties an opportunity to comment on certain important considerations and reasons for” the Agencies’ July 27, 2017 11-page Proposed Rule - a rule upon which the Agencies have already received 685,000 comments.⁸

Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-13681>; Comments of Waterkeeper Alliance et al. on Definition of “Waters of the United States” – Schedule of Public Meetings: Docket ID No. EPA-HQ-OW-2017-0480 (Nov. 28, 2017) (Attachment 2) and available with attachments at <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0480-0750>; and Waterkeeper Alliance et al. Comments on Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA–HQ–OW–2017–0644 (Dec. 13. 2017) (Attachment 3) (collectively hereinafter “Previous Comments”).

⁴ Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

⁵ U.S. EPA and U.S. Army Corps, Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (Mar. 6, 2017) (“Notice of Intention”).

⁶ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (July 27, 2017) (“Proposed Rule or Proposed Rule Notice”).

⁷ The 30-day period allowed for comment falls far short of even the bare minimum 60-day comment period set forth in Executive Order 12866, 58 Fed. Reg. 51735 (Oct. 1993) (“[e]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”). Given the length and complexity of the Supplemental Notice, many of the Commenters submitted a Request for Extension of Time to provide comments on the Supplemental Notice seeking at least 90 days to provide meaningful amount of time for stakeholders to evaluate the notice and provide comments. *See* Request for Extension to Comment on Docket ID No. EPA–HQ–OW–2017–0203: “Definition of ‘Waters of the United States’ – Recodification of Preexisting Rule,” (July 17, 2018), available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-15135>. The Agencies unreasonably denied the request for extension on August 3, 2018, 10 days prior to the deadline, without explanation. (Attachment 4).

⁸ Supplemental Notice, 83 Fed. Reg. at 32227.

Rather than clarifying the Agencies’ basis and reasoning or providing a meaningful opportunity for the public to understand such purported rationales and to comment upon them, the ill-conceived Supplemental Notice lays out “potential deficiencies”⁹ with the Clean Water Rule and the Agencies’ concerns about “litigation risk”¹⁰ based on their new “potential” interpretations of the Commerce Clause, the Clean Water Act and Justice Kennedy’s opinion in *Rapanos*,¹¹ their new “potential” views of certain legal issues in complex litigation pending in multiple jurisdictions; some of the 685,000 comments they selected to summarize and discuss; their partial and ongoing evaluation of jurisdictional determinations; and myriad other issues. The Agencies also identify a large number of unresolved issues and questions regarding the basis for the Proposed Rule that they still claim to be in the process of considering and evaluating, despite the fact that the Proposed Rule repealing and replacing the Clean Water Rule was issued in July 2017.

Although this Supplemental Notice is indisputably a post-hoc attempt to cure the Proposed Rule’s extensive legal deficiencies,¹² which include the Agencies’ failure to articulate a valid legal basis for the proposed action and unlawful constraints on public comment, the notice falls far short of providing what is legally required to address the Proposed Rule’s deficiencies and comply with the federal CWA, APA, National Environmental Policy Act (“NEPA”)¹³ and the Endangered Species Act (“ESA”).¹⁴ In essence, what emerges from a review of the Agencies’ mishmash of roving, error-filled legal theories, factual inquiries and indeterminate “findings,” is the distinct impression that the Agencies still have not found, let alone provided the public with, a valid legal and factual basis for their long-ago predetermined outcome of repealing and replacing the 2015 Clean Water Rule.

With this Supplemental Notice, the Agencies have changed tack from the earlier Proposed Rule Notice, which simply announced the action and declined substantive public comment.¹⁵ Here, the Agencies are attempting to create the appearance that they are engaging the public in a wide-

⁹ Supplemental Notice, 83 Fed. Reg. at 32249

¹⁰ *Id.*

¹¹ *Rapanos v. United States*, 547 U.S. 715 (2006).

¹² See *Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203* (Sept. 27, 2017), *supra* note 3, which are incorporated by reference herein. The Supplemental Notice does not address the legal and other deficiencies identified in these comments.

¹³ National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

¹⁴ Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

¹⁵ Proposed Rule, 82 Fed. Reg. at 34903.

ranging fact-finding mission to evaluate “potential deficiencies” with the 2015 Clean Water Rule. But the opportunity for the public to weigh in on this Proposed Rule is illusory given the limited time and nature of the information provided. It is beyond unreasonable to provide the public with only 30 days to try to decipher and comment on the lengthy, compound theories and questions posed here by the Agencies. It is even more unreasonable to attempt to cure the Agencies’ blatant APA deficiencies by simply requesting comment “on any other issues that may be relevant to the agencies’ consideration of whether to repeal the 2015 Rule,”¹⁶ as it is the Agencies’ duty to identify the bases for their proposed action.

This purported fact-finding is taking place, not as part of an effort to decide whether to repeal the Clean Water Rule, but nearly a year after the Agencies issued a Proposed Rule to do so. It is contrary to the CWA and the APA for the Agencies to proceed with this Proposed Rule prior to the Agencies determining and clearly articulating exactly why, and on what reasonable basis, they are proposing the action in the first place. If the Agencies proceed with the Proposed Rule as contemplated in the Supplemental Notice, the public will be denied a meaningful opportunity to comment because the Agencies will not articulate the basis for their rulemaking - which depends on the Agencies’ future resolution of the questions and theories discussed in the Supplemental Notice - until the Proposed Rule becomes final. This twisted, bizarre approach to rulemaking is blatantly unlawful.

The APA requires the Agencies to “provide reasoned explanation” for their action, and to “show that there are good reasons” for withdrawing the 2015 Clean Water Rule and for replacing it with the previous definition of “waters of the United States.”¹⁷ The Agencies must demonstrate that their action is a “permissible construction” of the CWA, *i.e.* that the Agencies’ action is not “arbitrary, capricious, or manifestly contrary to the statute.”¹⁸ The Agencies are also required provide a “reasoned explanation” for “disregarding facts and circumstances that underlay or were engendered by” the 2015 Clean Water Rule.¹⁹ The Agencies have utterly failed to meet these requirements in the Proposed Rule and in the Supplemental Notice.

None of the material, analysis or “concerns” expressed in the Supplemental Notice provide a reasoned explanation for repealing the 2015 Clean Water Rule, nor does the notice demonstrate that the Agencies’ action constitutes a permissible construction of the CWA.²⁰ To the contrary,

¹⁶ Supplemental Notice, at 32249.

¹⁷ *FCC v. Fox Television Stations, Inc.* 556 U.S.502, 516 (2009).

¹⁸ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

¹⁹ *Fox*, 556 U.S. at 516.

²⁰ Commenters note that the Agencies only included the bulk of this material after Office of Management and Budget (“OMB”) review of the Supplemental Notice Under Executive Order 12866. When the Agencies submitted

the Supplemental Notice demonstrates the arbitrary and capricious nature of the Proposed Rule, and the Agencies’ desperation to find some way to develop a rational legal justification for eliminating CWA protections despite more than 40 years of precedent to the contrary.

The Agencies’ Legal Analysis of the CWA, Regulations and Case Law is Erroneous and Does Not Provide Adequate Justification to Repeal or Replace the Clean Water Rule

Many of the issues, questions and statements that may “potentially” form the basis for this Proposed Rule are premised on the Agencies’ flawed legal analysis of the CWA and selected case law. Notably, even the Agencies are not convinced that their legal analyses are correct. When discussing the basis for the Proposed Rule, the best the Agencies can muster are equivocal statements to the effect that they are “concerned” that the 2015 Clean Water Rule may exceed the Agencies authority under the CWA, may affect the state-federal balance, and may be supported by erroneous findings and assumptions.²¹ All of these “potential” concerns are premised on the Agencies’ new erroneous interpretations of the CWA, implementing regulations and case law.²²

Without providing any explanation for the Agencies’ extreme departure from their longstanding agency interpretations and positions, including some that have endured at the Agencies and with the courts since the inception of the CWA, the Supplemental Notice set forth erroneous and often misleading descriptions of (1) the legal basis for the Clean Water Rule,²³ (2) the issues and

their original Supplemental Notice to OMB it was only 29 pdf pages long. After the review, the Supplemental Notice ballooned to 93 pdf pages and included extensive substantive changes - many of which are the subject of Commenters’ objections herein. Compare: Pre-publication Version Supplemental Notice (Attachment 5); Document submitted to initiate E.O. 12866 review - WOTUS Proposed Repeal SNPRM FRN, <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-15105>; and Documentation of Changes Made During OMB Review under E.O. 12866 WOTUS Proposed Repeal SNPRM FRN <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-15106>

²¹ Supplemental Notice, at 32240 - 32250.

²² See Previous Comments incorporated by reference herein, *supra* note 3. Additionally, the Agencies severely misconstrue the plurality and Justice Kennedy’s Opinions in *Rapanos*, particularly with regard to the Agencies’ positions regarding wetlands and tributaries, and, through partial citation of a quote, the Supreme Court’s holding *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 385 (2006). The Agencies also erroneously conclude that the plurality and Justice Kennedy in *Rapanos* “agree in principle that the determination must be made using a two-part test that considers: (1) the proximity of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality and Justice Kennedy also agree that the proximity between the wetland and the tributary must be close.” The plurality and Justice Kennedy did not establish a two-part test, and the portion of the Supplemental Notice that rely on and evaluate the “second part of the two-part tests established by the plurality and Justice Kennedy” to support this action are arbitrary, capricious and contrary to law.

²³ For example, the Agencies state that they “now believe that they previously placed too much emphasis on the information and conclusions of the Connectivity Report when setting jurisdictional lines in the 2015 Rule, relying on its environmental conclusions in place of interpreting the statutory text and other indicia of Congressional intent to ensure that the agencies’ regulations comport with their statutory authority to regulate.” Supplemental Notice, at

positions of the some litigants in cases challenging the Clean Water Rule, (3) the historic scope of and bases for CWA jurisdiction, (4) the purpose and meaning of provisions in the CWA itself, (5) selected case law interpreting the CWA, and (6) Congressional intent regarding the scope and functioning of the CWA. In each of these contexts, the Agencies appear to be signaling a willingness to adopt the legal positions of industry and some states that oppose the 2015 Clean Water Rule in pending litigation, and the Agencies appear to be seeking information and argument through this rulemaking process to justify that extreme and unreasonable shift in the Agencies’ position. The previous, and longstanding, views of the Agencies, and the positions of other interested parties are not discussed, considered or evaluated in the Supplemental Notice in any meaningful way.

While it is acceptable in certain circumstances for agencies to make policy shifts,²⁴ it is not permissible for Agencies to reinterpret an entire statute and attempt to narrow its scope contrary to longstanding interpretations in order to achieve extraneous policy goals that are contrary to the objective and goals of that statute. Yet it is apparent from the Proposed Rule and this Supplemental Notice that the Agencies are attempting to find some way to reinterpret the CWA and case law to justify repealing and replacing the Clean Water Rule based on the Agencies’ erroneous view of the directives of Executive Order 13778.²⁵

First, the policy set forth in Section 1 of Executive Order 13778 is that “[i]t is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.”²⁶ As explained in detail in the previous comments on the Proposed Rule,²⁷ this policy is not consistent with the objective and policies set forth in the CWA. The Agencies’ attempt to reinterpret the CWA to achieve the policy outcome articulated in Executive Order 13778 is contrary to law.

32241. However, the Agencies do not meaningfully explain why they now believe that, what part of the statute or indicia of Congressional intent would cause the to deemphasize the science or exactly how that would change their view of the Clean Water Rule.

²⁴ See Waterkeeper Alliance et al. Comments on Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA–HQ–OW–2017–0644 (Dec. 13, 2017) and Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), *supra* note 3.

²⁵ Executive Order 13778 – Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12497 (2017).

²⁶ *Id.* at sections 1 and 2.

²⁷ Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), *supra* note 3.

To summarize, in 1972 Congress adopted lengthy and complex amendments to the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). This is the central objective Congress established for the CWA that should drive the Agencies’ review and rulemaking process. Accordingly, Congress provided that the CWA applies to all “waters of the United States, including the territorial seas.”²⁸ The Conference Report accompanying the CWA confirms that Congress intended the phrase “waters of the United States” to be given the broadest possible constitutional interpretation.²⁹ The intended breadth of the CWA is also apparent in the comprehensive goals, programs and directives in the Act, as well as in the legislative history, administrative decisions and case law interpreting the CWA.³⁰ In contrast to the policy in Section 1 of Executive Order 13778, the policy Congress established in the CWA is not focused on promoting economic growth, minimizing “regulatory uncertainty” or pushing a particular ideology regarding states’ rights.

Second, Commenters have already provided detailed comments on the scope, goals and relevant provisions of the CWA, case law interpreting the CWA, historic jurisdictional waters, the scope of the 2015 Clean Water Rule, and the proper definition of “water of the United States” on many previous occasions. Previously submitted comments also address the Agencies’ request for comment “on whether the 2015 Rule is consistent with the statutory text of the CWA and relevant Supreme Court precedent, the limits of federal power under the Commerce Clause as specifically exercised by Congress in enacting the CWA, and any applicable legal requirements that pertain to the scope of the agencies’ authority to define the term ‘waters of the United States.’” We therefore urge the Agencies to review and consider those comments, and to revise their view of the law in a manner that is consistent with those comments, which are incorporated by reference herein.³¹

In summary, and contrary to the Agencies’ assertion in the Supplemental Notice, as the Supreme Court held in *International Paper Co. v. Ouellette*, the CWA established “an all-encompassing program of water pollution regulation” that “applies to all point sources and virtually all bodies of water.”³² The Supreme Court, in *United States v. Riverside Bayview Homes, Inc.*, held that

²⁸ 33 U.S.C. § 1362(7).

²⁹ S. Rep. No. 92-1236, at 144 (1972).

³⁰ See also, *Quarles Petroleum Co. v. United States*, 551 F.2d 1201, 1206 (Ct. Cl. 1977) (“In addition, the overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States.”).

³¹ See Previous Comments incorporated by reference herein, *supra* note 3.

³² *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted). By contrast, the Agencies here appear to wrongly assert that protecting the vast majority of waters in the United States would be contrary to the CWA. See Supplemental Notice, at 32229 and 32248.

Congress took a “broad, systemic view of the goal of maintaining and improving water quality” with the word integrity referring to “a condition in which the natural structure and function of ecosystems [are] maintained”; furthermore, the “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’”³³ To accomplish these goals, the Supreme Court in *Bayview* concluded, Congress defined the “waters covered by the Act broadly” to encompass all “waters of the United States.”³⁴

Neither *SWANCC* nor *Rapanos* limit or establish the outer bounds of this Commerce Clause authority for purposes of the CWA and the Agencies’ statements to the contrary in the Supplemental Notice are erroneous.³⁵ Consistent with Congressional intent, EPA (1973)³⁶ and the Corps (1977)³⁷ adopted regulations further defining “waters of the United States” for the purposes of the CWA to include broad categories of waters, including ‘other waters’ such as intrastate rivers, (perennial, intermittent, and ephemeral) streams and wetlands the use or destruction of which could affect interstate commerce, in order to protect the entire aquatic system as opposed to focusing on solely on those waters protected by traditional navigability tests. Those regulations have never been invalidated by any court, which demonstrates the fallacy of the Agencies’ new narrow “potential” view of the law.³⁸

³³ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing H.R.Rep. No. 92–911, p. 76 (1972); S.Rep. No. 92–414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742). The Agencies’ Proposed Rule Notice misconstrues *Bayview* by describing the Opinion as simply one that “deferred to the Corps’ ecological judgment that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34900 (July 27, 2017). The unanimous Supreme Court Opinion in *Bayview* is far more significant in determining the definition of “waters of the United States” than indicated by the Agencies’ description.

³⁴ *Id.*

³⁵ In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. *See* 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court “expressly declined to reach” the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court “on precisely how to read Congress’ limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, “in *Rapanos* it appears five justices had no constitutional concerns in any event ... [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause ...” *Am. Farm Bureau Fed’n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), cert. denied sub nom., *Am. Farm Bureau Fed’n v. E.P.A.*, 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016) (citing *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring).

³⁶ 38 Fed. Reg. 10834 (1973).

³⁷ 42 Fed. Reg. 37122 (1977).

³⁸ The Agencies “concern” that the definitions of “tributary” and “adjacent” were too broad and may not have given sufficient effect to the term “navigable” are without support in the law or science. *See* Supplemental Notice, at 32241.

Third, contrary to Congressional intent, the plain language of the CWA,³⁹ regulatory history, and case law, the Agencies intend to elevate and transform the significance of a single provision of one subsection of the CWA, Section 101(b), and somehow balance it against another subsection, Section 101(a), in order to define “waters of the United States” under the CWA. For example, the Agencies assert “[t]o maintain that balance, the agencies must determine what Congress had in mind when it defined “navigable waters” in 1972 as simply “the waters of the United States”—and must do so in light of, inter alia, the policy directive to preserve and protect the states’ rights and responsibilities.”⁴⁰ This position is so out of line with the CWA that, in an feeble attempt to support this legally invalid view, the Agencies actually selectively and misleadingly quote part of another subsection of a single provision of the CWA, 33 U.S.C. §1370 as follows: that “nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”⁴¹ In actuality, Section 1370 states: Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”⁴² Additionally, the Agencies are taking this portion of Section 1370 out of context and interpreting it without regard for its well-established meaning in the overall context of the CWA, and without regard to or evaluation of many other provisions of the CWA that are actually relevant to the intended scope of the CWA.⁴³

The CWA has many policies, programs, standards, and goals⁴⁴ and a single expressed overall objective - “to restore and maintain the chemical, physical, and biological integrity of the

³⁹ The Agencies acknowledge that: “Congress established several key policies that direct the work of the agencies to effectuate those goals” but then proceed to disregard all of those policies in favor of their view of Section 101(b). Other provisions and policies are not even discussed in relation to the determining the definition of “waters of the United States.” Supplemental Notice, at 32232.

⁴⁰ Supplemental Notice, at 32233.

⁴¹ Supplemental Notice, at 32232.

⁴² 33 U.S.C. §1370.

⁴³ The Agencies similarly selectively quote and mischaracterize the meaning and intent behind CWA Sections 1255, 1256, 1258, and 1268 for the erroneous proposition that Congress created a “non-regulatory statutory framework to provide technical and financial assistance to the states to prevent, reduce, and eliminate pollution in the broader set of the nation’s waters.” Supplemental Notice, at 32232. The Great Lakes, Long Island Sound, Chesapeake Bay, as well as other waters, and their watersheds are protected as “waters of the United States” under the CWA to which regulatory programs apply. The CWA makes technical assistance and grants available to assist states and others in achieving the requirements and goals of the CWA – the grants and technical assistance are not independent non-regulatory programs for non-jurisdictional waters.

⁴⁴ Inexplicably, the Agencies also state in the Proposed Rule Notice that “[t]he objectives, goals, and policies of the statute are detailed in sections 101(a)-(g) of the statute, and guide the agencies’ interpretation and application of the

Nation’s waters.” 33 U.S.C. §1251(a). The CWA does not authorize the Agencies to give equal weight to the central objective of the Act expressed in Section 101(a) and a single policy statement in Section 101(b), and then somehow “balance” them as a basis for redefining “waters of the United States.” Furthermore, the intent of Congress as to which waters are protected under the CWA cannot be gleaned by balancing the national objective to restore and maintain water quality in the Nation’s waters against state’s responsibilities and rights to prevent, reduce, and eliminate pollution. That is nonsensical. Having due regard for the role of the states is not the same thing as defining “waters of the United States” in a manner that reduces federal, and increases state, jurisdiction – which is plainly the Agencies’ intent in elevating and contorting the meaning of CWA Section 101(b). It is patently obvious that the states can take a primary role in eliminating pollution in waters that are protected by the federal CWA.⁴⁵ This is the system of cooperative federalism under the CWA that has been in place since 1972.⁴⁶

Fourth, if the Agencies corrected the legal errors in the Supplemental Notice, many of the questions and issues identified by the Agencies for comment would be resolved in a manner that would eliminate them as a basis for withdrawing the Clean Water Rule. For example:

EPA Question: The agencies are concerned and seek comment on whether the 2015 Rule significantly expanded jurisdiction over the preexisting regulatory program, as implemented by the agencies, and whether the expansion altered State, tribal, and local government relationships in implementing CWA programs.

Clean Water Act,” but immediately thereafter, the Agencies focus their analysis solely on portions of Sections 101(a) and 101(b). Proposed Rule, at 34902.

⁴⁵ This fact is expressly acknowledged in the Supplemental Notice: “Congress envisioned a major role for the states in implementing the CWA . . . Under this statutory scheme, the states are responsible for developing water quality standards for waters of the United States within their borders and reporting on the condition of those waters to EPA every two years. Id. at 1313, 1315. States are also responsible for developing total maximum daily loads (TMDLs) for waters that are not meeting established water quality standards and must submit those TMDLs to EPA for approval. Id. at 1313(d). States also have authority to issue water quality certifications or waive certification for every federal permit or license issued within their borders that may result in a discharge to navigable waters. Id. at 1341. A change to the interpretation of “waters of the United States” may change the scope of waters subject to CWA jurisdiction and thus may change the scope of waters for which states may assume these responsibilities under the Act . . . Forty-seven states administer the CWA section 402 permit program for those waters of the United States within their boundaries, and two administer the section 404 permit program.” Supplemental Notice, at 32232-33.

⁴⁶ See e.g., *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 129 (D.C. Cir. 1976) (“Thus, without the national standards required by s 301, the fifty states would be free to set widely varying pollution limitations. These might arguably be different for every permit issued . . . The plainly expressed purpose of Congress to require nationally uniform interim limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.”)

Commenters Response: The 2015 Clean Water Rule did not significantly expand jurisdiction over the preexisting regulatory program, nor did it alter State, tribal, and local government relationships. In fact, as set forth in previous comments incorporated herein, the Clean Water Rule reduced or eliminated jurisdiction over many types of waters. The Agencies’ “concern” is based on an erroneous view of the law, inadequate factual information to evaluate historic jurisdiction in comparison to jurisdiction under the Clean Water Rule, and an undisclosed narrow interpretation of the pre-existing regulatory definition. Additionally, the “concern” about whether the Clean Water Rule expanded jurisdiction should not be determinative of whether it should be withdrawn and replaced.

EPA Question: The agencies solicit comment on whether the 2015 Rule is flawed in the same manner as the Migratory Bird Rule, including whether the 2015 Rule raises significant constitutional questions similar to the questions raised by the Migratory Bird Rule as discussed by the Supreme Court in SWANCC.

Commenters Response: No. This question misapprehends the issues and rulings in SWANCC in fundamental ways that are fully explained in our Previous Comments.⁴⁷

EPA Question: The agencies request comment on whether the examples illustrate the concerns expressed by the recent court decisions discussed above that the 2015 Rule may have exceeded the significant nexus standard articulated by Justice Kennedy in the *Rapanos* opinion and concerns expressed by certain commenters that the 2015 Rule may have created additional regulatory uncertainty over waters that were previously thought beyond the scope of CWA jurisdiction.

Commenters Response: The Agencies do not possess and/or have not disclosed adequate information to make this determination. The Agencies expressly acknowledge in the Supplemental Notice that the examples they provide “are intended to be illustrative, and are not intended to attempt to quantify or reassess previous estimates of CWA jurisdiction, as the agencies are not aware of any map or dataset that accurately or with any precision portrays CWA jurisdiction at any point in the history of this complex regulatory program.”⁴⁸ Similarly, it is not technically sound to use a comparison of Section 305b Report estimates and draft NHD maps to support an evaluation of jurisdictional coverage before and after the Clean Water Rule. The Agencies expressly acknowledge that they “are not aware of any national, regional, or state-level map that identifies all ‘waters of the United States’ and acknowledge that there are limitations

⁴⁷ See Previous Comments, *supra* note 3.

⁴⁸ Supplemental Notice, at 32244.

associated with existing datasets.”⁴⁹ Additionally, the agency guidance and other means used to reduce the number and types of waters protected by the pre-existing regulations are inconsistent with the CWA and Supreme Court precedent. Furthermore, the supposition that the Clean Water Rule may have expanded jurisdiction over some types of waters is not a valid legal basis for withdrawing it. Lastly, contrary to the statements in the Supplemental Notice, the Clean Water Rule actually illegally reduced jurisdiction over tributaries and streams.⁵⁰ This response applies to all of the other questions relating to jurisdictional comparisons.

EPA Question: The agencies are concerned that because the 2015 Rule may assert jurisdiction over 100 percent of streams as the agencies assumed in the 2015 Rule Economic analysis, certain states, particularly those in the arid West, would see significant expansion of federal jurisdiction over streams. The agencies solicit comment on whether such expansions conflict with the assumptions underlying and statements justifying the 2015 Rule, and if such expansions were consistent with the policy goals of section 101(b) of the CWA.

Commenters Response: The fact that the Agencies may have made that assumption for the purposes of the Economic Analysis does not mean that 100 percent of streams in the United States are protected under the Clean Water Rule. To the contrary, the Clean Water Rule reduced jurisdiction over streams.⁵¹ Additionally, expanding federal jurisdiction over streams for the purpose of achieving the goals of the CWA – i.e. protecting water quality in the Nation’s waters – supports rather than conflicts with the purpose of Section 101(b).

EPA Question: The agencies are requesting comment on whether these responses to these issues [related to scope of jurisdiction and ephemeral streams] are adequate. While some ephemeral streams may have been jurisdictional after a case-specific analysis pursuant to the *Rapanos* Guidance, and while challenges to some of those determinations have been rejected by the courts, the agencies are requesting public comment on whether these prior conclusions and assertions were correct.

Commenters Response: It is accurate to say that ephemeral streams have historically been protected under the federal CWA. We cannot comment on whether portions of the Agencies’ characterizations to the Court in pending litigation are accurate, and do not believe that is a relevant or appropriate inquiry.

⁴⁹ Supplemental Notice, at 32246.

⁵⁰ See Final Waterkeeper Comments on EPA-HQ-OW-2011-0880, *supra* note 3.

⁵¹ See Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), *supra* note 3.

EPA Question: The agencies request comment, including additional information, on whether the water features at issue in SWANCC or other similar water features could be deemed jurisdictional under the 2015 Rule, and whether such a determination is consistent with or otherwise well-within the agencies’ statutory authority, would be unreasonable or go beyond the scope of the CWA

Commenters Response: Only one type of “water feature” was at issue in SWANCC – an abandoned sand and gravel pit – and it is unclear what the Agencies mean by a similar water feature. The holding in SWANCC is limited to the Corps’ assertion of jurisdiction over that feature under the Migratory Bird Rule for the purposes of Section 404(a) of the CWA. The decision did not invalidate other grounds for asserting jurisdiction under the CWA. It is certainly possible and appropriate that an abandoned sand and gravel pit, depending on its location, functions and/or connectivity to other waters, could be protected under the CWA either with or without the Clean Water Rule.

EPA Question: Interested parties are encouraged to provide comment on whether the 2015 Rule is consistent with the statutory text of the CWA and relevant Supreme Court precedent, the limits of federal power under the Commerce Clause as specifically exercised by Congress in enacting the CWA, and any applicable legal requirements that pertain to the scope of the agencies’ authority to define the term “waters of the United States.”

Commenters Response: Commenters covered this question extensively in previous comments that are incorporated by reference herein. The Agencies were obligated to articulate their own rationale and views on these issues in the Supplemental Notice if these issues will form the basis of the Agencies’ Final Rule, however, the Agencies have failed to do so.

EPA Question: The agencies are considering whether the 2015 Rule’s coverage of waters based, in part, on their location within the 100-year floodplain of a jurisdictional water is consistent with the policy articulated in CWA section 101(b) that States should maintain primary responsibility over land and water resources Given these concerns, the agencies request comment on whether the 2015 Rule’s use of the 100-year floodplain as a factor to establish jurisdiction over adjacent waters and case-specific waters interferes with States’ primary responsibilities over the planning and development of land and water resources in conflict with CWA section 101(b).

Commenters Response: This is not a valid inquiry given the meaning of Section 101(b) and the goals and purposes of the CWA. However, protecting waters located within the 100 year floodplain under the CWA will not interfere with states’ responsibilities and rights in any way. Additionally, the Agencies should have completed this evaluation and articulated their position

prior to issuing the Proposed Rule and prior to issuing the Supplemental Notice nearly a year later so the public could evaluate and comment on it.

EPA Question: The agencies also seek comment on to what extent the 100-year floodplain component of the 2015 Rule conflicts with other federal regulatory programs, and whether such a conflict impacts State and local governments.”

Commenters Response: More explanation and information is required in order to fully comment in response to this question. However, protecting waters located in the 100-year floodplain under the CWA does not conflict with other federal regulatory programs. To the extent the Agencies believe there is a conflict or impact they consider relevant to this action, it should have been identified and evaluated by the Agencies prior to issuing the Proposed Rule, and prior to issuing the Supplemental Notice nearly a year later, so the public could evaluate and comment on it.

EPA Question: The agencies seek comment on that analysis and whether the 2015 Rule readjusts the federal-state balance in a manner contrary to the congressionally determined policy in CWA section 101(b).”

Commenters Response: This question is vague and, because it is unclear what analysis the Agencies are referencing in this question, it is impossible to comment on it. However, the Clean Water Rule is not contrary to CWA Section 101(b).

EPA Question: The agencies thus solicit comment on whether the definitions in the 2015 Rule would subject wholly intrastate or physically remote waters or wetlands to CWA jurisdiction, either categorically or on a case-by-case basis, and request information about the number and scope of such waters of which commenters may be aware.

Commenters Response: The Agencies should know better than anyone what waters are covered under the 2015 Clean Water Rule, as it is the Agencies’ own rule. The Agencies also possess extensive information regarding the existence of intrastate and “remote” waters. It would be impossible to characterize all of them by “number and scope,” but protection of many types of intrastate waters and waters characterized by some as “remote” is required under the CWA. To the extent this question is relevant to the Agencies’ determination on the Proposed Rule, the Agencies must provide information on the issue to the public and articulate how the information informs their decision about the rule to allow for comment prior to adopting the Proposed Rule.

EPA Question: Further, the agencies solicit comment about whether these, or any other, aspects of the 2015 Rule as finalized would, as either a de facto or de jure matter, alter federal-state relationships in the implementation of CWA programs and State regulation of State waters, and

whether the 2015 Rule appropriately implements the Congressional policy of recognizing, preserving, and protecting the primary rights of states to plan the development and use of land and water resources.

Commenters Response: This question is vague and misconstrues the meaning and importance of Section 101(b). Altering the definition of “waters of the United States” can impact state regulation of waters by eliminating or adding authority to protect water quality under the CWA – depending on whether jurisdiction is expanded or reduced. Reduction in jurisdiction can cause great harm to states, as they are often dependent on federal funding and support to protect waterways against pollution and destruction.

Lastly, the Agencies have failed to provide adequate explanation and support for their proposed findings, many of which depend on answers to these or other questions/evaluations (which have not been resolved by the Agencies in the Supplemental Notice) and/or erroneous interpretations of the CWA, regulations and case law. These problems are clearly demonstrated by the fact that Agencies repeatedly characterize their statements throughout the Supplemental Notice in equivocal terms such that the public cannot discern the Agencies’ position or reasoning. Such statements do not constitute legally adequate reasoned bases for this Proposed Rule. For example, the Agencies state in the Supplemental Notice:

- The agencies are proposing to repeal the 2015 Rule in part because the 2015 Rule may have impermissibly and materially affected the states and the distribution of power and responsibilities among the various levels of government and therefore likely should have been characterized as having federalism implications when promulgated in 2015.⁵²
- Because such findings would, if adopted by the agencies, negate a key finding underpinning the 2015 Rule, the agencies request comment on whether to repeal the 2015 Rule on this basis.⁵³
- Though the agencies have previously said that the 2015 Rule is consistent with the Commerce Clause and the CWA, the agencies are in the process of considering whether it is more appropriate to draw a jurisdictional line that ensures that the agencies regulate well within our constitutional and statutory bounds.⁵⁴
- The agencies are concerned that certain findings and assumptions supporting adoption of the 2015 Rule were not correct, and that these conclusions, if erroneous, may separately

⁵² Supplemental Notice, at 32251.

⁵³ Supplemental Notice, at 32248.

⁵⁴ Supplemental Notice, at 32249, note 74.

- justify repeal of the 2015 Rule.⁵⁵
- The agencies are concerned and seek comment on whether the 2015 Rule significantly expanded jurisdiction over the preexisting regulatory program, as implemented by the agencies, and whether that expansion altered State, tribal, and local government relationships in implementing CWA programs. The agencies therefore propose to repeal the 2015 Rule . . .⁵⁶
 - [A]s a result of the agencies’ review and reconsideration of their statutory authority and in light of the court rulings against the 2015 Rule that have suggested that the agencies’ interpretation of the “significant nexus” standard as applied in the 2015 Rule was expansive and does not comport with and accurately implement the limits on jurisdiction reflected in the CWA and decisions of the Supreme Court, the agencies are also concerned that the 2015 Rule lacks sufficient statutory basis.⁵⁷
 - The agencies are concerned that this important change in the interpretation of “similarly situated waters” from the proposed 2015 Rule and the 2008 Rapanos Guidance may not be explainable by the scientific literature, including the Connectivity Report cited throughout the preamble to the 2015 Rule, in light of the agencies’ view at the time that “[t]he scientific literature does not use the term ‘significant’ as it is defined in a legal context.” 80 FR 37062.⁵⁸
 - [T]he agencies are now considering whether the definitional changes in the 2015 Rule would have a more substantial impact on the scope of jurisdictional determinations made pursuant to the CWA than acknowledged in the analysis for the rule and would thus impact the balance between federal, state, tribal, and local government in a way that gives inadequate consideration to the overarching Congressional policy to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources” 33 U.S.C. 1251(b).⁵⁹

⁵⁵ Supplemental Notice, at 32238. The Agencies are seeking comment on a slew of findings and assumptions in the Supplemental Notice to help them answer this “concern.” Unfortunately, the public will not have any opportunity to weigh in on the validity of any conclusions the Agencies reach that may form the basis for repealing the Clean Water Rule given the Agencies unlawful and arbitrary approach to this Proposed Rule.

⁵⁶ Supplemental Notice, at 32238.

⁵⁷ Supplemental Notice, at 32238. The Agencies do not provide any reasoned explanation for why their review and reconsideration of their statutory authority leads them to their “concern” about lack of statutory authority for the Clean Water Rule or why it would lead them to “proposing to conclude in the alternative that, at a minimum the interpretation of the statute adopted in the 2015 Rule is not compelled, and a different policy balance can be appropriate.” *Id.* Accordingly, this is arbitrary, capricious and contrary to law.

⁵⁸ Supplemental Notice, at 32240.

⁵⁹ Supplemental Notice, at 32242. To support the Agencies ongoing consideration and evaluation of this potential shift in the Agencies view of jurisdictional changes, the Agencies are soliciting comments from the public on a host of questions and selected jurisdictional determinations. Obviously, the public will be illegally precluded from

The Agencies are required to provide the public with a reasoned explanation for why they are proposing to reverse course with regard to the Clean Water Rule, but have failed to do so. Their burden is not satisfied by the articulation of questions, potential concerns and potential findings that may be made in the future based on information the Agencies may receive as result of this Supplemental Notice. The public has a right to know and comment on the Agencies’ bases, positions and explanation for this action, and this information must be provided to the public for comment prior to proceeding with this Proposed Rule.

The Supplemental Notice is Misleading, Vague and Lacks Adequate Information to Evaluate or Provide Meaningful Comments on the Definition the Agency is Actually Adopting

Contrary to the Agencies’ stated primary basis for this rulemaking, establishing “regulatory certainty,”⁶⁰ the Proposed Rule would create unbounded uncertainty as it does not identify or evaluate what waters would be protected under the “re-codified” definition (as informed by undisclosed interpretations) after the rule becomes final. Additionally, even with this Supplemental Notice, the Agencies are continuing to avoid comments on the substance of what the definition of “waters of the United States” should be under the CWA after proposed repeal of the Clean Water Rule. The Agencies simply assert, without any factual or legal basis whatsoever, that the regulatory framework (not simply the regulation) “is more familiar to and better-understood by the agencies, states, tribes, local governments, regulated entities, and the public.” They make this assertion despite the fact that Agencies have never explained what that “regulatory framework” is or what waters will be protected under it. In sum, the Agencies are still attempting to change the legal definition of “waters of the United States” without engaging in adequate substantive evaluation of it, in violation of the CWA and the APA.⁶¹

As noted in previous comments incorporated herein by reference, the Agencies do not intend to implement the pre-2015 regulatory definitions of “waters of the United States” as written and interpreted by the courts over the last several decades. Instead, the Agencies state in the Proposed Rule Notice that they will “implement those prior regulatory definitions) [sic], informed by applicable agency guidance documents and consistent with Supreme Court

reviewing and commenting on the results of the Agencies’ evaluation since the Agencies inappropriately failed to complete it before providing the public with an opportunity for review and comment.

⁶⁰ The Agencies have also utterly failed to articulate a reasonable basis for asserting the Clean Water Rule created regulatory uncertainty. In essence, the Agencies are simply adopting the positions of litigants opposing the rule and ignoring the substantial record of contrary opinion.

⁶¹ See *Waterkeeper Alliance et al. Comments on Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule*, Docket ID No: EPA–HQ–OW–2017–0644, *supra* note 3.

decisions and longstanding agency practice.”⁶² Although the meaning of this statement is impermissibly vague given the history of these definitions, the Agencies manage to make their intentions even more opaque later in the Notice by adding additional interpretative materials to the list and indicating that they are only examples of what the Agencies will use to implement the Proposed Rule after it is finalized. This second list includes “applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the SWANCC and Rapanos Supreme Court decisions, applicable case law, and longstanding agency practice.”⁶³

The Supplemental Notice only serves to further reduce regulatory certainty in the event the Proposed Rule is adopted as it states that the Agencies will “interpret the statutory term ‘waters of the United States’ to mean the waters covered by those regulations, as the agencies are currently implementing those regulations consistent with Supreme Court decisions and longstanding practice, as informed by applicable guidance documents, training, and experience.”

With the addition of all these vague and wide-ranging provisos, it is quite literally impossible to determine how the Agencies will define and interpret “waters of the United States” if the Proposed Rule is finalized. As a result, the public has not had an opportunity to comment on that definition, and the Agencies have failed to demonstrate that their rule, as implemented, would be a permissible construction of the CWA – i.e. that the action is not “arbitrary, capricious, or manifestly contrary to the statute.”⁶⁴

The Supplemental Notice states that “[g]iven the significant civil and criminal penalties associated with the CWA, it is important for the agencies to promote regulatory certainty while striving to provide fair and predictable notice of the limits of federal jurisdiction. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-25 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (characterizing fair notice as possibly the most fundamental of the protections provided by the Constitution’s guarantee of due process, and stating that vague laws are an exercise of ‘arbitrary power . . . leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up’).” After withdrawal and replacement of the Clean Water Rule with pre-2015 regulatory definition, the public will be in the dark about what the CWA demands due to the Agencies’ determination to modify the actual text of the law with vague and undisclosed standards based on documents, guidance, legal

⁶² Proposed Rule, 82 Fed. Reg. at 34900.

⁶³ *Id.* at 34902.

⁶⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

interpretations, practice, training, and education. Accordingly, the Proposed Rule is the epitome of an agency exercise of arbitrary power.

Commenters Request Withdrawal of the Proposed Rule

The Commenters urge the Agencies to withdraw the Proposed Rule and meaningfully engage the public and states in a robust and meaningful process to evaluate, among other things, the questions and unresolved issues identified by the Agencies in this Supplemental Notice prior to proceeding with rescinding, replacing or revising the definition of “waters of the United States” under the Clean Water Act.

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U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

U.S. Army Corps of Engineers
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Washington, DC 20314

VIA Email OW-Docket@epa.gov and Online Submission www.regulations.gov

RE: Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule (Docket #: EPA-HQ-OW-2017-0644)

The Center for Biological Diversity, Waterkeeper Alliance, Center for Food Safety, and the Waterkeeper Member Organizations and Affiliates identified below offer the following comments in opposition to the Environmental Protection Agency’s (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) proposed rule that would extend the applicability date for the Clean Water Rule by two years (hereafter “Delay Rule”).¹ This proposed rule is the latest step in a long line of attacks on the Clean Water Act (“CWA”)² and the Clean Water Rule³ that are being taken in violation of the CWA and Administrative Procedure Act (“APA”).⁴ There is no legal basis for EPA and the Corps (the “Agencies”) to retroactively delay the effective date of the 2015 Clean Water Rule, which defines “waters of the United States” under the CWA. Additionally, because the two-year delay would cause environmental harm by failing to protect certain categories of wetlands and other waters, the Agencies must comply with the Endangered Species Act (“ESA”)⁵ and the National Environmental Policy Act (“NEPA”)⁶ prior to undertaking any rulemaking.

¹ *Definition of “Waters of the United States” - Addition of an Applicability Date to 2015 Clean Water Rule*, 82 Fed. Reg. 55542 (Nov. 22, 2017) (hereinafter “Delay Rule”), <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0644-0001>.

² 33 U.S.C. §1251 *et seq.*

³ *Clean Water Rule: Definition of ‘Waters of the United States,’* 80 Fed. Reg. 37054 (June 29, 2015) and docket available at: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-088>.

⁴ Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

⁵ Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

⁶ National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

The Center for Biological Diversity (“Center”) is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.5 million members and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life.

Waterkeeper Alliance (“Waterkeeper”) is a not-for-profit corporation dedicated to protecting and restoring water quality to ensure that the world’s waters are drinkable, fishable and swimmable. Waterkeeper is comprised of 334 Waterkeeper Member Organizations and Affiliates working in 35 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 176 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in and near waterways across the country – many of which are severely impaired by pollution.⁷

As the D.C. Circuit Court of Appeals recently held in *Clean Air Council v. Pruitt*, agencies have no inherent authority to stay the effectiveness of regulations, and they may only act if the authority has been granted to them by statute.⁸ At the outset, the Agencies have not provided any legal authority or analysis to explain or support this proposed rule delaying the effective date of the Clean Water Rule, which is a final rule. The notice merely states that “[t]he authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251, et seq., including sections 301, 304, 311, 401, 402, 404 and 501.”⁹ None of these CWA provisions provide the Agencies with legal authority to delay the Clean Water Rule, and the Agencies do not even attempt explain how they believe the provisions provide any such authority. Vague citations to core sections the CWA provide no justification for the Delay Rule. In fact, by citing to these sections of the statute, the Agencies are merely illustrating that they lack the legal authority to take this action. Neither the CWA nor the APA contain any provision that authorizes the Agencies to retroactively extend, i.e. stay, the effective date, of a final regulation. Because the Agencies lack statutory authority, this action is ultra vires, and the Agencies must withdraw this proposed rule.

The Agencies’ factual bases for the Delay Rule are equally unconvincing and demonstrate the arbitrary and capricious nature of this rulemaking. Like every other EPA action under Administrator Pruitt regarding the definition of “waters of the United States” to date, the sole express basis for this proposed rule is to purportedly “provide continuity and certainty for regulated entities, the States and Tribes, agency staff, and the public.” However, the Agencies have not explained why they believe their proposals would make anything more certain for anyone. To the contrary, given the Agencies’ description of how they intend to define “waters of the United States” in the absence of the Clean Water Rule with reference to undisclosed Agency

⁷ See, e.g., U.S. EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, available at: http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last accessed on Sept. 25, 2017).

⁸ *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).

⁹ Delay Rule, 82 Fed. Reg. at 55544.

guidance, interpretations, memos, letters, and policies,¹⁰ there is substantial evidence that this action will result in more, not less, uncertainty. With the addition of these vague and wide-ranging provisos to the actual text of the pre-2015 definition, it is quite literally impossible to determine how the Agencies will define and interpret “waters of the United States” if the Delay Rule is finalized.¹¹

One of the most notable and inadvertent admissions regarding the illegality of the Delay Rule is the Agencies’ continued, incorrect characterization of the “legal status quo.” In both the Delay Rule and the Repeal Rule, the Agencies have consistently and incorrectly characterized the *current* factual status quo – that the Agencies are purportedly implementing the prior regulations in light of their undisclosed interpretation of *Rapanos*, guidance, policies and other material – as the legal status quo. The Agencies claim that they would merely be maintaining the “legal status quo” by adopting the Delay Rule, but this legal fallacy is betrayed by their admission that “[i]f, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 Rule, the Sixth Circuit case would be dismissed and its nationwide stay would expire.”¹²

In reality, the current legal status quo is the 2015 Clean Water Rule, which is a final rule codified in the Code of Federal Regulations that has been temporarily stayed by the 6th Circuit.¹³ If, for example, the 6th Circuit stay were to be dissolved, the Agencies would not be maintaining the legal status quo by delaying the effective date of the 2015 Clean Water Rule. Rather, the Agencies would be attempting to change the legal status quo by replacing the Clean Water Rule with some other undisclosed definition. Indeed, the Agencies’ cursory, three-page economic analysis¹⁴ in the docket for the Delay Rule illustrates the fallacy of the Agencies’ position:

¹⁰ The Agencies have provided vague and conflicting descriptions of how they are currently implementing the pre-2015 definition of “waters of the United States, as well as how they intend to implement the pre-2015 definition upon finalizing the Delay Rule and/or the Step One Rule. For example, in this notice, the Agencies state that, under the Delay Rule, they would “administer the regulations as they are currently being implemented, consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents.” *See* Delay Rule, 82 Fed. Reg. at 55542. The Agencies also state that their current implementation of the pre-2015 regulatory definition “is informed by applicable guidance documents (e.g., 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with Supreme Court decisions and longstanding agency practice.” *Id.* at 55543. The same inconsistencies and vague descriptions of how the Agencies are currently defining, and intend to define, “water of the United States” under the pre-2015 definition are present in the Step One rulemaking notice. *See* Definition of “Waters of the United States” – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (July 27, 2017).

¹¹ *See* Final Comments Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-13681>, which are incorporated by reference herein.

¹² Delay Rule, 82 Fed. Reg. at 55543.

¹³ *In re E.P.A.*, 803 F.3d 804, 808 (6th Cir. 2015).

¹⁴ *See* Consideration of Potential Economic Impacts for the Proposed Rule: Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule, available at: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0644>.

The first approach to the baseline is based on the current legal landscape. Currently, the pre-2015 rule regulatory regime is in effect as a result of the Sixth Circuit's nationwide stay of the 2015 rule, which followed a partial stay, affecting 13 states, that was issued by a district court the day before the rule's original effective date. Although this regulatory regime could change at any time (depending on court decisions and actions), to incorporate that in the baseline would require predicting these decisions and actions, and when they might occur.

The true motivation for this action is wrest "control" of the definition away from the courts, where the state, industry and public are currently being heard on the issue, in order to prevent resolution from occurring "outside of the agencies" while they "engage in substantive rulemaking."¹⁵ This is despite the fact that the Agencies are simultaneously claiming they are not yet engaged in substantive rulemaking.

In sum, the Agencies have already made a substantive determination outside of the rulemaking process to repeal and replace the Clean Water Rule, and they want to adopt the Delay Rule to prevent the courts from allowing it to go into effect – an outcome they have been unable to achieve through direct appeal to the Supreme Court¹⁶ or through any legitimate administrative process. The Agencies made that determination on February 28, 2017, prior to any public engagement, federalism consultation¹⁷ or rulemaking. All of the administrative actions undertaken by the Agencies to date have been intended to prevent meaningful public input and maximize Agency control to effectuate their predetermined outcome of eliminating the Clean Water Rule, replacing it with a vague definition to provide maximum flexibility for narrow interpretations, and ultimately adoption of an undisclosed, narrow definition that will eliminate CWA protections for waters across the country at some unknown point in the future. By contrast, there is nothing "uncertain" about the 2015 Clean Water Rule, and the courts, whether that be the 6th Circuit or the federal district courts, are the proper entities to determine whether it is appropriate to continue to stay its implementation.¹⁸ Determinations as to whether to stay the Clean Water Rule by the courts will ensure far greater certainty than the practical and legal morass that the Agencies are wreaking by undertaking multiple illegal administrative processes that will most certainly be the subject of multiple, lengthy legal challenges.

The D.C. Circuit has already ruled that agencies cannot legally suspend a rule in order to avoid the justification that would be required if they were to modify or revoke it altogether. In *Public Citizen v. Steed*, the Court held that the temporary suspension of a rule has the same effect, and is

¹⁵ Delay Rule, 82 Fed. Reg. at 55544.

¹⁶ *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 137 S. Ct. 1452, 197 L. Ed. 2d 646 (2017) ("Motion of federal respondents to hold briefing schedule in abeyance denied.").

¹⁷ Employing the fallacy that this action will merely maintain the status quo, the Agencies also wrongly claim there are no federalism or tribal implications associated with the Delay Rule. Delay Rule, 82 Fed. Reg. at 55545.

¹⁸ See *In re U.S. Dep't of Def. & U.S. Env'tl. Prot. Agency Final Rule: Clean Water Rule: Definition of "Waters of United States,"* 817 F.3d 261 (6th Cir. 2016); cert. granted sub nom., *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 137 S. Ct. 811, 196 L. Ed. 2d 595 (2017).

reviewed under the same standard, as a revocation of the rule.¹⁹ Thus, the agency must provide a reasoned explanation for why it has reversed course with regard to the rule.²⁰ The Agencies have not provided any reasoned legal or factual basis for the Delay Rule, and cannot avoid the requirement to do so by mischaracterizing this action as an merely adding an effective date. The Agencies' pursuit of a separate rulemaking to repeal the Clean Water Rule and replace it with a vague definition modified by undisclosed agency interpretations and policies (hereinafter "Repeal Rule"), while simultaneously avoiding all substantive evaluation and comment on the definition until a "second step" they say they intend to take someday in the future (hereafter the "Future Rule"), makes the Delay Rule even more arbitrary and unlawful.

In each of the current administrative actions, the Agencies have refused substantive input from the public and provided only sparse, vague information to support the actions.²¹ With the Delay Rule, the Agencies claim that their "request for comment is on such a narrow topic" that not only is an extremely short comment period reasonable, but substantive evaluation or public comment on the definition of "waters of the United States" are both unnecessary and will not be considered by the Agencies. This is not how the APA works.²² To change the law, as is proposed here, the Agencies must engage in substantive evaluation and analysis of their action, provide a reasoned explanation for their action, and engage in formal rulemaking based on this information while providing the public with a meaningful opportunity for substantive input. Here, the unreasonably short timeline for comment,²³ lack of pre-proposal input opportunities,²⁴ failure to provide any legal or factual basis, and refusal to engage in substantive evaluation or consideration of alternatives all demonstrate the illegality of the Agencies' action. Further, it is apparent that the Agencies are illegally attempting to avoid, not just defer, ever having to conduct any type of evaluation of the Clean Water Rule and its extensive supporting scientific and technical record. For example, the Agencies state in a memorandum to the record that they

¹⁹ *Public Citizen v. Steed*, 733 F.2d 93 (D.C. Cir. 1984).

²⁰ *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) ("It is a fundamental principle of administrative law that federal 'administrative agencies are required to engage in reasoned decisionmaking.'").

²¹ See, e.g., *Definition of "Waters of the United States" – Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34899, (July 27, 2017) (hereinafter "Repeal Rule") ("The agencies do not intend to engage in substantive reevaluation of the definition of 'waters of the United States' until the second step of the rulemaking.").

²² The Agencies approach to this rulemaking is also inconsistent with EPA's own regulations. See e.g. 40 C.F.R. §25.3 ("Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.").

²³ See e.g. Executive Order 12866 – Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 4, 1993) ("Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.").

²⁴ *Id.*

are evaluating the potential change in jurisdiction that would result from “Step 2” by comparing their undisclosed Future Rule to the pre-2015 definition (as currently implemented) rather than by comparing it to the Clean Water Rule.²⁵

The Agencies seem to expect members of the public to simply bide their time until the proposed Future Rule is released someday. The Agencies have indicated that they may, in the future, repeal the Clean Water Rule and/or replace it with a different definition is not a sufficient, nor a reasonable basis, on which to unilaterally suspend the Clean Water Rule in the meantime.²⁶ In essence, the Agencies are playing a shell game by failing to provide basic information about their intended changes to the law and denying the public any opportunity to provide meaningful comments on the consequences of both the Repeal Rule and the Delay Rule, while only to accepting substantive comments on this entire regulatory morass they have created if and when a Future Rule is proposed. The fact that a Supreme Court jurisdictional ruling “could come at any time”²⁷ does not in any way justify the Agencies’ complete disregard for CWA, APA, NEPA, and ESA requirements that apply to this rulemaking. To the contrary, the fact that ruling may be imminent suggests that the Agencies would benefit from a substantive evaluation of the issues, rather than engaging in another attempt to pull a fast one on the public by changing the law without complying with even the most basic requirements for doing so.

A delay in the effective date of the 2015 Clean Water Rule would have significant, real world consequences on human health and the environment that the Agencies have not evaluated. The evaluation of those issues, which would require a great deal of work and time to properly complete, are deferred to some unknown point in the future.²⁸ Even assuming the Agencies had legally authority to adopt the Delay Rule and/or the Repeal Rule, they must provide a reasoned basis for their actions that evaluates their advantages and disadvantages.²⁹ Delaying the effective

²⁵ *Memorandum for the Record: Rulemaking Process for Proposed Rule: Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule*, available at: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0644>.

²⁶ *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) (“If an agency could engage in rescission by concession, the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter.”)

²⁷ Delay Rule, 82 Fed. Reg. at 55544.

²⁸ Compare *Memorandum for the Record: Rulemaking Process for Proposed Rule: Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule* (Outlining “a series of analyses to evaluate the potential change in jurisdictional scope of the CWA associated with a new policy; how that change in jurisdictional scope could affect the various CWA programs to which the definition applies as well as other programs potentially affected; how states and tribes might respond to a change in scope; potential effects on environmental justice and disadvantaged communities; and the potential costs and benefits associated with a jurisdictional scope change” that will be undertaken at some later time), *supra* fn. 25, to *Consideration of Potential Economic Impacts for the Proposed Rule: Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule* (a three-page document discussing “economic impacts” of delaying the Clean Water Rule that does not identify jurisdictional changes or quantify any cost or benefits. It simply, and dubiously, concludes that there will be no economic costs or benefits associated with the Delay Rule.), *supra* fn. 14.

²⁹ See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“[R]easonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”).

date for the Clean Water Rule would have the practical effect of suspending the compliance requirements under CWA Sections 402 and 404 for any waters that would have been protected under the Clean Water Rule, but will not be protected under whatever definitional approach the Agencies take instead. Yet, in this rulemaking, the Agencies do not: (1) describe any purported deficiencies with the Clean Water Rule that need to be addressed, (2) explain why the Clean Water Rule should not or could not remain in effect if the Supreme Court finds judicial review jurisdiction in the district courts, (3) explain in any meaningful way how the Agencies will define “waters of the United States” during the “extension” and how that approach would be consistent with the CWA, (4) describe how their approach will impact jurisdictional determinations, or (5) explain why no other options to achieve “certainty” are available besides entirely suspending the Clean Water Rule.

Additionally, and also in violation of the APA, the Agencies have completely failed to consider the costs or benefits of the Clean Water Rule that will inevitably arise from delaying its implementation.³⁰ Here, and in the Repeal Rule, the Agencies have offered contradictory, baffling and vague explanations to the public. While assessing the impacts of delaying, withdrawing and/or replacing the Clean Water Rule would be a complex task, that complexity only reinforces why the Agencies need to conduct an evaluation of costs and benefits, as well as the legal and factual bases for their plan, prior to taking action. Finalizing the Delay Rule without fully considering the costs and benefits would be arbitrary and capricious because the Agencies would have “entirely failed to consider an important aspect of the problem.”³¹

The Agencies failure to do so is not justified by the excuse that “that the impact of this proposed rule is limited to a relatively short period of time (i.e., the agencies are proposing two years)” or by the Agencies belief that the Clean Water Rule **may not** be in effect “for an extended period of time, if at all.”³² Two years of uncontrolled pollutant discharges can cause a great deal of damage to a waterway, and the people who depend upon it, yet pollution impacts are not even mentioned let alone evaluated. Extreme damage can occur in some instances from a single day of uncontrolled pollutant discharges. Further, the fact the Agencies believe, at least for the purpose of their economic analysis, that the Clean Water Rule may never go into effect undercuts, rather than supports, the Agencies’ already insubstantial justification for this action.³³ Any remaining legitimacy is obliterated by the fact that the Agencies also admit that they are unable to articulate any avoided costs associated with the adopting the Delay Rule because (1) they do not know if or how jurisdiction will be impacted by future court decisions and actions, and (2) they lack the “great deal more data” they would need to evaluate how “various land developers, facility

³⁰ See, e.g., *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30-33 (D.D.C. 2012) (rejecting effort to delay rule’s effective date where EPA failed to consider relevant factors).

³¹ *Motor Vehicle Mfrs.’ Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

³² See *Consideration of Potential Economic Impacts for the Proposed Rule: Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule*, *supra* fn. 14.

³³ The Agencies also state that they believe it is “reasonable and appropriate for the purpose of considering economic impacts” for [the Delay Rule] to presume that the legal status quo is likely to remain the same.” Delay Rule, 82 Fed. Reg. at 55544. The Agencies cannot make one presumption to attempt to provide a basis for the rule and contrary presumptions to avoid conducting a legitimate economic evaluation of it.

owner/operators, and other regulated entities” would be impacted by it if it occurs.³⁴ In other words the Agencies simply do not know whether their fears of regulatory uncertainty will occur or whether this rule would benefit or harm regulated entities in the event that the purported regulatory uncertainty emerges in the future.

It is clear, however, that this Delay Rule will alter CWA jurisdiction and that the Agencies have not evaluated the changes or provided any legitimate basis for them. Even if the Agencies faithfully returned to every practice and policy from the years immediately preceding the Clean Water Rule – and there is every indication that this is not what the Agencies intend to do³⁵ – there would still be significant changes in what specific waters would, and would not, be protected if the Agencies adopt this Delay Rule. For example, in perhaps one of the most unhelpful and unclear statements in the proposed Repeal Rule, the Agencies state that “the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations.”³⁶ Although this statement is extremely vague and confusing, it is clear that the Agencies acknowledge that the scope of covered waters will differ under the Clean Water Rule, under the pre-2015 definition and under the pre-2015 definition “as currently implemented.” However, it is impossible for anyone to know how any particular type of waterway may be impacted because the Agencies have not explained how they will define “waters of the United States” with or without the Delay Rule and/or Repeal Rule, analyzed how the definitional change will affect jurisdictional determinations, or even shared even the most basic information about how waters will be impacted with the public. This problem is magnified by the Agencies’ failure to disclose what they mean by “prior regulations as currently implemented.”

If the Delay Rule will result in increases or decreases of jurisdictional determinations for particular types of waters as compared to the Clean Water Rule, the Agencies must explain the legal and factual bases for the change to the public, including where those jurisdictional determinations would likely occur and the impacts, positive or negative, that would occur in, or downstream from, any newly jurisdictional or non-jurisdictional waters.³⁷ The Agencies must also adequately describe and explain the definition they intend to adopt in lieu of the Clean

³⁴ *Id.*

³⁵ See Final Comments Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203, *supra* fn. 11.

³⁶ Repeal Rule, 82 Fed. Reg. at 34903.

³⁷ Because the Clean Water Rule is final, delaying the benefits associated with that rule represents costs to the public. See *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 36 (D.D.C. 2012) (noting the “significant deleterious effects on the environment” that a delay can cause); see also *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997) (describing the impact of substantial emissions resulting from vacating EPA’s emissions limits). Forgone benefits are a cost that the Agencies must consider. See, e.g., *State of N.Y. v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding rule where agency failed to explain how economic benefits of failing to finalize a proposed Clean Air Act standard would justify foregoing its projected air quality benefits); see also Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-4, Regulatory Analysis (Sept. 17, 2003), 2003 WL 24011971, at *18 (instructing agencies to monetize “forgone benefits” when calculating the costs and benefits of the alternatives under consideration).

Water Rule, including which types of waters would continue to receive protection and which would not. It is not sufficient to simply state the definition will be the prior regulatory definition as “currently implemented.” The Delay Rule offers absolutely no information on these issues, which are central to the functioning of the CWA. The Agencies do not even attempt to cross-reference any explanations in the Repeal Rule because this information has not been provided in that rulemaking either.³⁸

The protection of our nation’s waters is not a simplistic zero-sum game where the only relevant factor is the nationwide, aggregate-area protected under the CWA. The Agencies’ simplistic statements do constitute or, even lend support to, acceptable or reasoned decision-making. For example, the Clean Water Rule extended protections to vernal pools in California, prairie potholes, pocosins and other unique hydrological features. Many of these ecosystems contain endangered species. The loss of CWA protections for these waters would not be offset by the hypothetical jurisdictional increase over wetlands or other waters elsewhere in the United States if the Agencies were to replace it with some other definition. The Agencies must evaluate areas that will receive more protection and those that will receive less in relation to both impacts and the intent of Congress in enacting the CWA.

The Agencies Must Fully Comply with the ESA and NEPA in Promulgating the Delay Rule

Section 7 of the ESA requires each agency to engage in consultation with Fish and Wildlife Service and/or National Marine Fisheries Service (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 habitat of such species... determined... to be critical....”³⁹ Section 7 “consultation” is required for “any action [that] may affect listed species or critical habitat.”⁴⁰ 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.”⁴¹

Because the CWA does not command EPA or the Corps to promulgate a particular set of regulations defining which “waters of the United States” are protectable under the law, the Agencies’ decision to do so in the 2015 Clean Water Rule, the Repeal Rule, and the Delay Rule are all discretionary actions of the Agencies. As a result, just like every other agency, EPA and the Corps must consult when they develop these regulations, if they cross the “may affect” threshold of the ESA. Case law reinforces the proposition that a regulation that may affect

³⁸ See Final Comments Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 *supra* fn. 11; and Final Comments of Waterkeeper Alliance et al Comment on Docket ID No. EPA-HQ-OW-2017-0480, available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0480-0750>, which are incorporated by reference herein.

³⁹ 16 U.S.C. § 1536(a)(2).

⁴⁰ 50 C.F.R. § 402.14.

⁴¹ *Id.* § 402.02 (emphasis added).

endangered species must be the subject of consultation.⁴² Because the Delay Rule will have effects on endangered species and their critical habitats as it is implemented in the future, consultations with the Services are required before the Agencies can proceed.

Under the joint regulations implementing the ESA, if an impact on a listed species is predicted to occur, then the Agencies must complete consultations with the Services.⁴³ If the Agencies elect to first complete an informal consultation, it must first determine whether its action is “not likely to adversely affect” (NLAA) a listed species or is “likely to adversely affect” (LAA) a listed species.⁴⁴ The Services define “NLAA” determination to encompass those situations where effects on listed species are expected to be “discountable, insignificant, or completely beneficial.”⁴⁵ Discountable effects are limited to situations where it is not possible to “meaningfully measure, detect, or evaluate” harmful impacts.⁴⁶ Discountable and insignificant impacts are very rare.

Under the informal consultation process, if the agency reaches an NLAA determination, and the Services concur in that determination, then no further consultation is required. In contrast, if the action agency determines that its activities are likely to adversely affect listed species, then formal consultations must occur. The Agencies may, of course, skip the informal consultation process and move directly to the formal consultation process.

During the formal consultation process, the Services assess the environmental baseline – “the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process”⁴⁷ – in addition to cumulative effects to the species – “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation” – and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.⁴⁸ Here, the environmental baseline is the 2015 Clean Water Rule, and all effects of the Delay Rule must thus be assessed in light of the 2015 rule. The

⁴² See, e.g., *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat’l Parks Conservation Ass’n v. Jewell*, 62 F.Supp.3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep’t of Agriculture.*, 481 F.Supp.2d 1059 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep’t of Interior*, 457 F.Supp.2d 1158 (W.D. Was. 2006).

⁴³ U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act at xv.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at xiv.

⁴⁸ *Id.* at xiii.

Agencies' failure to consult on the Repeal Rule and the Delay Rule represent clear and egregious violations of the ESA.

For example, delaying protections for some wetlands will directly, indirectly, and cumulatively impact endangered species. California vernal pool wetlands that support vernal pool fairy shrimp (*Branchinecta lynchi*) – a federally listed species – that would have received protection under the 2015 Clean Water Rule. Those wetlands may not receive protection for two years if the Delay Rule is finalized, meaning that they could be destroyed as no section 404 permit would be required to conduct dredge and fill activities in those waters. Vernal pool fairy shrimp may, therefore, be harmed by the Delay Rule. Consequently, the EPA's action here easily crosses the "may affect" threshold requiring consultations under the ESA

In the same vein, the EPA and Army Corps must comply with NEPA with regard to the Delay Rule. Whatever benefits from the Clean Water Rule are lost must be accounted for and evaluated through the NEPA process. Likewise, whatever benefits are gained must be fully accounted for and evaluated through the NEPA Process. NEPA is designed to ensure that Agencies take a required "hard look" at the consequences of their actions. Proceeding with the Delay Rule without complying with NEPA would not only be unlawful, but would also clearly demonstrate that the Agencies are simply not interested in engaging in informed decision-making as required by law.

For all of these reasons, including the violations of the CWA, APA, ESA and NEPA detailed in this comment letter, we respectfully request that the Agencies withdraw – and not finalize – the Delay Rule.

Sincerely,



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John Cassani
Calusa Waterkeeper
Calusa Waterkeeper, Inc.
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Kemp Burdette
Cape Fear Riverkeeper
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Jason Ulseth
Riverkeeper
Chattahoochee Riverkeeper
Atlanta, Georgia

Michael Mullen
Riverkeeper
Choctawhatchee Riverkeeper
Troy, Alabama

Bill Stangler
Riverkeeper
Congaree Riverkeeper
Columbia, South Carolina

Jesse Demonbreun-Chapman
Executive Director & Riverkeeper
Coosa River Basin Initiative - Upper Coosa Riverkeeper
Rome, Georgia

Frank Chitwood
Riverkeeper
Coosa Riverkeeper
Mt Laurel, Alabama

Larry Baldwin, Waterkeeper
Crystal Coast Waterkeeper,
Coastal Carolina Riverwatch
Morehead City, North Carolina

Meg Adams,
Riverkeeper & Executive Director
Edisto Riverkeeper
South Carolina

Laurie Murphy
Executive Director
Emerald Coastkeeper, Inc.
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Ivy Frignoca
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Friends of Casco Bay
South Portland, Maine

Dawn Buehler
Kansas Riverkeeper
Friends of the Kaw
Lawrence, Kansas

Heather Smith
Grand Traverse Baykeeper
Grand Traverse Baykeeper
Traverse City, Michigan

Theaux M. Le Gardeur
RIVERKEEPER
Gunpowder RIVERKEEPER
Parkton, Maryland

Captain Bill Sheehan
Riverkeeper & Executive Director
Hackensack Riverkeeper
Hackensack, New Jersey

Emily Sutton
Haw Riverkeeper
Haw River Assembly
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Youghiogheny Riverkeeper
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Chauncey J. Moran
Yellowdog Riverkeeper
Yellow Dog Watershed Preserve
Big Bay, Michigan

Melinda Booth
Executive Director
Yuba River Waterkeeper
Nevada City, California



September 27, 2017

Via email to ow-docket@epa.gov and online submission to www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Definition of Waters of United States - Recodification of Pre-Existing Rules: Docket ID No. EPA-HQ-OW-2017-0203

To Whom it May Concern:

Waterkeeper Alliance, Center for Biological Diversity, Center for Food Safety, Turtle Island Restoration Network, and the Waterkeeper Member Organizations and Affiliates identified below (“Commenters”) submit the following comments on the United States Environmental Protection Agency (“EPA”) and Department of Defense, Department of the Army, Corps of Engineers (“Corps”) proposed rule entitled “Definition of Waters of United States - Recodification of Pre-Existing Rules,” 82 Federal Register 34899 (July 27, 2017) (hereinafter “Proposed Rule”).

INTERESTS OF THE COMMENTING ORGANIZATIONS

Waterkeeper Alliance (“Waterkeeper”) is a not-for-profit corporation dedicated to protecting and restoring water quality to ensure that the world’s waters are drinkable, fishable and swimmable. Waterkeeper comprises 328 Waterkeeper Member Organizations and Affiliates that are working in 35 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 174 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in waterways across the country – many of which are severely impaired by pollution. The federal Clean Water Act (“CWA”)¹ is the bedrock of Waterkeeper Alliance’s and its Member Organizations’ and Affiliates’, work to protect rivers,

¹ 33 U.S.C. §1251 *et seq.*

streams, lakes, wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate Organizations and our respective individual supporting members, as well as to protect the people and communities that depend on clean water for their survival. Our work – in which we have answered Congress’s call for “private attorneys general” to enforce the CWA when government entities lack the time, willingness or resources to do so themselves – requires us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand and have seen firsthand how important a clear definition of the “waters of the United States” is to the functionality and effectiveness of the CWA. A broad definition of “waters of the United States,” consistent with the language, purpose and intent of the CWA, is critical to our collective work to protect the nation’s waterways.

The Center for Biological Diversity (“Center”) is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.5 million members and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life.

Turtle Island Restoration Network (TIRN) is an environmental non-profit, which includes the Salmon Protection and Watershed Network (SPAWN). TIRN and SPAWN’s work is to protect endangered, threatened, and vulnerable marine and anadromous salmonid and other species. Working on behalf of its members and with volunteers and staff, SPAWN promotes the continued survival and recovery of anadromous salmonid species in the Lagunitas Watershed in Marin County, California, through education, advocacy, and direct action. SPAWN’s activities include: conducting spawning surveys and collecting other biological and scientific data; holding workshops, training, and volunteer opportunities for our members where participants learn about salmonid habitat and physiology, and ways that they can promote their survival and recovery; conducting educational programs for children under the direction of our in-house educational specialist; an ongoing initiative to restore salmonid habitat by planting 10,000 redwoods; and partnering with the National Park Service in Point Reyes, to restore salmon habitat in the Lagunitas Watershed. TIRN and SPAWN believe that the “waters of the United States” rule and the CWA are vital components of protection for marine and freshwater-dependent species and their habitats.

The Commenters and their members have substantial interests in clean water for drinking, recreation, fishing, economic growth, food production, and other

beneficial uses. These interests will be injured if EPA and the Corps adopt this Proposed Rule redefining “waters of the United States” under the CWA because, as explained below, the regulation: (1) Is substantively and procedurally contrary to law, (2) Reduces jurisdiction over the nation’s historically protected waters contrary to the CWA, and (3) Does not comply with the federal Administrative Procedure Act (“APA”),² National Environmental Policy Act (“NEPA”) ³ and the Endangered Species Act (“ESA”).⁴

INTRODUCTION

This Proposed Rule constitutes the latest effort by EPA and the Corps (the “Agencies”) to define the statutory phrase “waters of the United States,” as set forth in 33 U.S.C. § 1362(7), for the purpose of identifying the waters subject to federal CWA jurisdiction. The Federal Register Notice (the “Notice”) for this Proposed Rule attempts to avoid compliance with the CWA, APA, NEPA, and ESA by characterizing this Proposed Rule as a non-substantive “temporary, interim measure,” that is simply codifying the “current legal status quo” as “[t]he first step in a comprehensive, two-step process intended to review and revise” this definition.⁵

Contrary to the Agencies’ specious characterizations of this action, however, the Proposed Rule is indisputably a legislative rulemaking that, if finalized, will substantively revise federal law by (1) formally withdrawing the Agencies’ 2015 regulatory definition of “waters of the United States,” dubbed the Clean Water Rule (“CWR”)⁶ and (2) replacing it with different regulatory definitions that will be codified in the Code of Federal Regulations (“Re-Codified Definitions”). Accordingly, the Agencies actions must fully comply with the CWA and all of the federal laws that govern formal rulemaking by the Agencies. As explained in detail below, the Agencies have neither provided for meaningful public participation under the CWA nor followed the APA in the development and revision of this Proposed Rule. The Proposed Rule is also contrary to the CWA and violates the requirements of the ESA, NEPA and Executive Order 13778.

² Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

³ National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

⁴ Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

⁵ Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899, 34899 and 34903 (July 27, 2017).

⁶ Clean Water Rule: Definition of ‘Waters of the United States’ 80 Fed. Reg. 37054 (June 29, 2015).

These failures are not mere technicalities and, if unaddressed, will severely undermine or eliminate fundamental CWA protections across the country – endangering our nation’s water resources.

In this action, using a severely inadequate administrative process, the Agencies propose to revoke a clear, if imperfect,⁷ regulation defining “waters of the United States” under the CWA and replace it with what amounts to a vague, moving target subject to nearly unlimited agency discretion. Under the guise of a simple “return to the status quo,” the Proposed Rule would have far-reaching effects that have not been disclosed by the Agencies and cannot be discerned from the information provided. The Proposed Rule is the epitome of the illegal and arbitrary, discretion-abusing agency practices that Administrator Pruitt so often decries, including accusations against the EPA itself under the previous administration. In March of this year, Administrator Pruitt addressed this very issue in a speech at an international conference for energy interests in Houston, Texas stating:

Process matters. I think over the last several years the way that agencies at the federal level have conducted themselves, there’s been a disregard, kind of a, a lack of commitment to process. I’m gonna give you a couple examples. In the environment and energy space, we’ve seen litigation actually drive the regulatory agenda in a way of regulations occurring outside of the Administrative Procedures Act where you take comment and you take information, the sue and settle practice through consent decrees has been something that the EPA and other agencies have used, I think to the detriment of the people that we serve. There’s a reason why Congress has set up the Administrative Procedures Act, and the reason it has done so is because as rules are adopted and the Executive Branch, it’s important that we hear from people on how it impacts them at the local level and state level, industry, citizens, consumers. And as those, as that information comes in, as you propose rules and comments are offered, the agency’s responsible to evaluate that and make an informed decision before it finalizes the rule. That’s a process that matters to having good, effective rules at the end. That’s been abused over the last several years, and will need, will change under our administration . . . And then

⁷ Several of the Commenters are petitioners in litigation challenging several provisions of the Clean Water Rule. See *In re U.S. Dep’t of Def. & U.S. Env’tl. Prot. Agency Final Rule: Clean Water Rule: Definition of “Waters of United States”*, 817 F.3d 261 (6th Cir. 2016); *cert. granted sub nom. Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 137 S. Ct. 811, 196 L. Ed. 2d 595 (2017).

secondly, and many of you know this in the room, agencies whether it's the EPA or other agencies in the finance sector, healthcare sector, have used guidance documents to engage in substantive rulemaking because you don't have to take comment. You don't have to respond to the comment and go through an elongated process. That's something, again, that is abusive of the process that Congress has set up.⁸

The Commenters urge the Agencies to consider the Administrator's remarks in relation to the Proposed Rule, which would (1) grant regulatory relief identical to that currently sought by certain parties opposing the CWR in litigation (2) employ a deficient administrative process with a clearly evident pre-determined outcome and severely limited public comment and (3) result in a rule that will be substantively interpreted based on agency guidance documents and other inadequately disclosed Agency views. We are confident that, if the Agencies do so in good faith, they will determine that the Proposed Rule must be withdrawn.

It would be difficult to overstate the critical importance of the CWA regulatory definition of "waters of the United States," and thus this Proposed Rule, to the protection of human health, the wellbeing of communities, the success of local, state and national economies, and the functioning of our nation's vast, interconnected aquatic ecosystems, as well as the many threatened and endangered species that depend upon those resources. If a stream, river, lake, or wetland is not included in the definition of "waters of the United States," untreated toxic, biological, chemical, and radiological pollution can be discharged directly into those waters without meeting any of the CWA's permitting and treatment requirements.⁹ Excluded waterways could be dredged, filled and polluted with impunity because the CWA's most fundamental human health and environmental safeguard – the prohibition on unauthorized discharges in 33 U.S.C. § 1311(a) – would no longer apply. Because "isolated" waterways do not exist in reality but are merely a legal fiction of recent vintage, unregulated pollution discharged into waterways that fall outside the Agencies' definition will not only harm those receiving waters, but will often travel through well-known

⁸ EPA Administrator Scott Pruitt, *CERAWeek Environmental Policy Dialogue with Scott Pruitt*, (March 9, 2017) available at: <http://ondemand.ceraweek.com/detail/videos/featured-videos/video/5358092032001/environmental-policy-dialogue-with-scott-pruitt?autoStart=true> (last accessed on Sept. 24, 2017).

⁹ For example, the CWA contains the following core water quality protections: point sources discharging pollutants into waters must have a permit, 33 U.S.C. §§ 1311(a) & 1342; the absolute prohibition against discharging "any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste," *id.* § 1311(f); protections against the discharge of oil or hazardous substances, *id.* § 1321; and restrictions on the disposal of sewage sludge, *id.* § 1345.

hydrologic processes before harming other water resources, drinking water supplies, recreational waters, fisheries, industries, agriculture, and, ultimately, human beings.

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain severely polluted, and by some indications, pollution appears to be increasing. For example, while water quality in a large percentage of our nation's waters has not been assessed, the most recent available data from EPA shows water pollution in assessed waters has impaired 581,305 river/stream miles, 12,917,748 lake acres, 44,618 sq. miles of estuarine waters, 3,311 square miles of coastal waters, 665,494 wetland acres, and 39,230 sq. miles of the Great Lakes Open Water.¹⁰ By comparison, EPA's 2004 CWA Section 305b Report showed that there were 246,002 miles of impaired rivers/streams and 10,451,401 acres of impaired lakes as of 2004.¹¹ As noted in the 2013 Draft Connectivity Report and the 2014 Science Advisory Board ("SAB") Review of that Report for the CWR, there is strong scientific evidence to support the conclusion that ephemeral streams, intermittent streams, perennial streams, floodplain wetlands, non-floodplain wetlands, and other waters are either connected to downstream waters or sustain the physical, chemical, and/or biological integrity of downstream waters.¹² Thus, it is imperative that these waters remain protected under the CWA.

Clean water is important to nearly every aspect of our lives and livelihoods but most importantly is it essential to life itself. As a nation, we cannot have clean water unless we control pollution at its source – wherever that source may be. This entails protecting waters throughout the entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are connected to traditionally navigable waterways. With regard to the CWA, "[p]rotection of

¹⁰ EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, *available at* http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last accessed on Sept. 25, 2017). (**Attachment 1**).

¹¹ EPA, Findings on the National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle, *available at*: https://www.epa.gov/sites/production/files/2015-09/documents/2009_01_22_305b_2004report_2004_305breport.pdf (last accessed on Sept. 25, 2017) (**Attachment 2**).

¹² U.S. Environmental Protection Agency, Office of Research and Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence - External Review Draft - EPA/600/R-11/098B (Sept. 2013) (hereinafter "Connectivity Report"); U.S. Environmental Protection Agency, Science Advisory Board, Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 (Oct. 17, 2014) (hereinafter "SAB Report"). Both available at: [https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf) (last accessed on Sept. 25, 2017). (**Attachment 3**).

aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” This is precisely why “Congress chose to define the waters covered by the Act broadly.”¹³ The breadth of the waters protected under the CWA, and the reasons therefore, were firmly established with the passage of the CWA in 1972 and are reflected in the Agency definitions of “waters of the United States” in 1973 (EPA) and 1977 (Corps), which protected navigable-in-fact waters, interstate waters, the territorial seas, impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and “[a]ll other waters ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.¹⁴ If we can ever hope to restore the chemical, physical and biological integrity of our nation’s waters – which was the bedrock objective of Congress with it passed the CWA – it is essential that the definition of “waters of the United States” under the CWA protect traditionally navigable waters, interstate waters, tributaries, adjacent waters, wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes, lakes, estuaries, and other waterbodies that either provide important functions themselves or have an influence on downstream waters.

In the Proposed Rule, the Agencies requested comment on “whether it is desirable and appropriate to re-codify in regulation the status quo as an interim first step pending a substantive rulemaking to reconsider the definition of ‘waters of the United States’ and the best way to accomplish it.”¹⁵ However, the Agencies also state that the Re-codified Definition will be “implemented” based on “applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the SWANCC and Rapanos Supreme Court decisions, applicable case law, and longstanding agency practice.”¹⁶ Although we do not restrict our comments to this narrow issue, the Commenters do oppose the Agencies’ proposal, “as an interim first step,” to adopt the pre-2015 CWR regulatory definitions, as modified by the Agencies’ undisclosed interpretations of guidance documents, Supreme Court precedent, relevant caselaw, and agency

¹³ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985); see also H.R.Rep. No. 92-911, p. 76 (1972); S.Rep. No. 92-414, p. 77 (1972); U.S.Code Cong. & Admin. News 1972, pp. 3668, 3742).

¹⁴ 40 C.F.R. § 122.3 (1981) (45 Fed. Reg. 33,290, 33,424 (May 19, 1980)); see also 33 C.F.R. § 323.2 (1983) (47 Fed. Reg. 31,794, 31,810 (July 22, 1982)).

¹⁵ Proposed Rule Notice, 82 Fed. Reg. at 34903.

¹⁶ *Id.* at 34902.

memoranda. The Agencies are neither codifying the legal status quo nor taking a temporary, “interim step.” Instead, by adopting the Proposed Rule, the Agencies are adopting a substantive rule in violation of the CWA, APA, NEPA, the ESA, and Executive Order 13778. The Commenters urge the Agencies to withdraw the Proposed Rule, and provide a meaningful opportunity for the public to have input into the Agencies’ review of the definition of “waters of the United States” under the CWA – prior to determining whether to proceed to withdraw the CWR and replace it with a different definition. Any definition of “waters of the United States” must ensure broad jurisdiction to control pollution consistent with the intent of Congress when it enacted the CWA. The Proposed Rule does not meet this standard.

I. THE PROPOSED RULE VIOLATES THE CLEAN WATER ACT AND THE ADMINISTRATIVE PROCEDURE ACT

Courts at all levels have stressed the importance of public participation in rulemaking, and the D.C. Circuit has determined that notice and comment works “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”¹⁷ These considerations are especially pressing in the context of redefining “waters of the United States” for the purposes of the CWA, yet the Agencies have failed to provide even basic information about this Proposed Rule and the bases for the Agencies’ decision-making that would allow the public to meaningfully participate. Accordingly, the Proposed Rule constitutes an abuse of agency discretion and is arbitrary, capricious and contrary to law.

The CWA requires that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act *shall be provided for, encouraged, and assisted* by the Administrator and the States.¹⁸ Additionally, the APA requires agencies to provide notice of a proposed rule and the opportunity for comment.¹⁹ These requirements apply to both the CWR withdrawal and the

¹⁷ *International Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

¹⁸ 33 U.S.C. § 1251(e) (*emphasis added*).

¹⁹ 5 U.S.C. § 553.

recodification of the previous definition.²⁰ The Agencies must comply with the APA and provide for public participation in all agency actions that create (or eliminate) law, *i.e.* promulgation of legislative or substantive rules.²¹

It is beyond dispute that the Agencies are developing and revising substantive legislative regulations in this Proposed Rule and, thus, the Agencies must comply with the CWA and APA requirements for agency rulemaking. “To determine whether a regulatory action constitutes promulgation of a regulation, [courts] look to three factors: (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.”²² In the Proposed Rule, the Agencies expressly identify this action as a proposed rule, and the rulemaking action was published in the Federal Register.²³ The Proposed Rule will have a binding effect on dischargers, the broader regulated community, the public, the states, and the Agencies because it will withdraw and redefine the scope of federal jurisdiction over waters under the CWA.

The Proposed Rule will also have significant impacts on the Agencies and the public. For example, it will determine which point source water pollution discharges require an NPDES permit under CWA Section 402,²⁴ which bodies of water may be destroyed through dredging or filling without a permit issued under Section 404, and whether citizens or the EPA can bring an enforcement action to address unpermitted pollution discharges to a particular water body.²⁵ The withdrawal and replacement of the CWR with different regulatory definitions will necessarily alter CWA jurisdiction by either increasing or reducing jurisdiction over different types of water bodies. Thus, the Proposed Rule will confer rights or obligations on private parties and the Agencies, and both the withdrawal of the CWR and the “re-codification” of the prior definition of WOTUS are subject to the CWA and APA requirements. Accordingly, the Agencies cannot withdraw the

²⁰ See *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009); *Pub. Citizen v. Steed*, 733 F.2d 93, 97–98 (D.C. Cir. 1984) (citing *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 430 U.S., 29, 41, (1983)).

²¹ See, e.g., *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

²² *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999).

²³ Proposed Rule Notice, 82 Fed. Reg. at 34899.

²⁴ 33 U.S.C. § 1342.

²⁵ 33 U.S.C. §§ 1319 & 1369.

CWR and “recodify” the previous definitions of “waters of the United States” without allowing for full public participation under the CWA, and without complying with the APA.

A. The Agencies Failed to Engage in a Substantive Evaluation of this Proposed Rule, Do Not Articulate a Reasoned Basis for these Actions and Are Improperly Denying the Public an Adequate Notice and Opportunity to Comment.

Despite the significance of this regulatory action and its impacts on the public,²⁶ the Notice for the Proposed Rule is a mere eleven pages long, including the actual text of the CWR and Re-codified Definitions. The Notice does not contain meaningful information regarding the Agencies’ rationale and legal justification for withdrawing the CWR or replacing the CWR with different definitions of ‘waters of the United States. Other than citing to *FCC v. Fox Television Stations, Inc.* (“Fox”)²⁷ and *Nat’l Ass’n of Home Builders v. EPA* (“Home Builders”),²⁸ which articulate some of the applicable legal standards for rescinding agency regulations, the Notice provides virtually no information regarding the legal or factual bases for the Agencies actions or even how Proposed Rule complies with the standards articulated in *Fox* or *Home Builders*.

Under the APA, the Agencies are required to “provide reasoned explanation” for their action, and “must show that there are good reasons” for withdrawing the CWR and replacing it with the previous definition of “waters of the United States.”²⁹ The Agencies must also demonstrate that their action is a “permissible construction,” of the CWA, *i.e.* that the Agencies’ action is not “arbitrary, capricious, or manifestly contrary to the statute.”³⁰ The Agencies are also required provide a “reasoned explanation” for “disregarding facts and circumstances that underlay or were engendered by” the CWR.³¹ The Agencies utterly failed to meet these requirements in the Proposed Rule.

²⁶ The Agencies acknowledge that the Proposed Rule is a “significant regulatory action” in their Economic Analysis for this rulemaking. See Economic Analysis for the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules, at p. 1 (June 2017). *available at:* <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0002> (last accessed Sept. 27, 2017).

²⁷ 556 U.S. 502, 515 (2009).

²⁸ 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012).

²⁹ *Fox*, 556 U.S. at 516.

³⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

³¹ *Fox*, 556 U.S. at 516.

In essence, the Agencies state, with varying degrees of clarity, three justifications or explanations for this action: (1) The Proposed Rule is “the first step in a two-step response to [Executive Order 13778], intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to engage in the second step: A substantive review of the appropriate scope of “waters of the United States,”³² (2) “In the two-step rulemaking process commencing with today’s notice, the agencies will more fully consider the policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction,”³³ and (3) To meet the Agencies perceived need to withdraw the CWR and recodify the prior definition “as an interim step for regulatory continuity and clarity” given the possibility that “the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order.”³⁴

However, when closely evaluated, these tautological statements are not reasoned explanations for why the Agencies have proposed this rulemaking. The statements do little more than restate the fact that the Agencies are taking this two-step action to implement their interpretation of Executive Order 13878³⁵ – a foregone conclusion upon which the Agencies seek no input from the public. Because the Agencies have already decided upon taking this two-step action, they simply presume without explanation that they must withdraw the CWR and consider replacing it with the prior definition for the purpose of ensuring “continuity and clarity” and avoiding “inconsistencies, uncertainty, and confusion.” This is truly no explanation or justification at all, and worse, this Proposed Rule will only engender, rather than resolve, inconsistencies, uncertainty, and confusion.

Additionally, the Agencies do not articulate how CWA Section 101(b)³⁶ figures into the basis for this Proposed Rule, but the Notice does discuss the subsection

³² Proposed Rule Notice, 82 Fed. Reg. at 34901.

³³ *Id.* at 34902.

³⁴ *Id.*

³⁵ Executive Order 13778 – Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12497 (2017).

³⁶ 33 U.S.C. §1251(b).

in a manner that indicates the Agencies believe it to be of central importance to “the scope of the definition of ‘waters of the United States’.” However, because “the scope of the definition of ‘waters of the United States’ is an issue the Agencies have declined to evaluate, explain or accept public comment on, and because the agencies do not explain why Section 101(b) would lead them to the conclusion that the CWR should be withdrawn and replaced by the prior regulatory definitions, the agencies discussion of Section 101(b) does not provide any justification for the Proposed Rule.

The Agencies’ entire justification for this Proposed Rule hinges on the assertion that their actions are mandated by Executive Order 13778, however as explained in detail below, the Executive Order does not mandate, or even authorize, this action. The Agencies do not explain why they believe Executive Order 13778 requires any action at all, let alone why it requires the two-step process they decided upon outside of any rulemaking process. The Agencies do not explain why they are withdrawing the CWR, other than it may go into effect if the Sixth Circuit Court of Appeals lifts the current stay - but the mere existence of litigation and the potential for lifting of a stay is not a legitimate reason to revoke a final rule.³⁷ Similarly, the Agencies do not explain why the CWR becoming operable would be contrary to the CWA or even why it would be a better policy³⁸ to avoid that, nor do they explain why the CWR should be replaced with an interim definition, or ultimately a permanent definition based on Justice Scalia’s opinion in *Rapanos v. United States*.³⁹ The Agencies simply proceed as if their two-step process is only choice available, and since they are going to conduct their two-step process, the Agencies are withdrawing the CWR leaving only one issue on the table for evaluation under the APA – “whether it is desirable and appropriate to re-codify in regulation the status quo as an interim first step pending a

³⁷ See e.g., *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1015 (9th Cir. 2009).

³⁸ See e.g., *American Petroleum Institute v. EPA*, No. 09-1038 (D.C. Cir. 2017); *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009); *Cement Kiln Recycling Coal. v. E.P.A.*, 493 F.3d 207, 224–25 (D.C. Cir. 2007).

³⁹ *Rapanos v. United States*, 547 U.S. 715 (2006). The Agencies actually misconstrue the Justice Scalia’s Opinion in *Rapanos* in the Notice for the Proposed Rule. The Notice states “a four-Justice plurality opinion in *Rapanos*, authored by Justice Scalia, interpreted the term ‘waters of the United States’ as covering ‘relatively permanent, standing or continuously flowing bodies of water ...,’ *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a ‘continuous surface connection ...’ to such water bodies, *id.* (Scalia, J., plurality opinion).” Proposed Rule, 82 Fed. Reg. 34900. In the Proposed Rule Notice, the Agencies’ mischaracterize Justice Scalia’s test by including selective quotations from Scalia’s opinion and inserting their own language in between, distorting and oversimplifying what Scalia actually wrote. Justice Scalia’s Opinion is far more complex and nuanced than the Agencies’ description would indicate. The Agencies also misconstrue the Justice Kennedy’s and the four dissenting Justices’ Opinions in the Notice for this Proposed Rule. *Id.*

substantive rulemaking to reconsider the definition of ‘waters of the United States’ and the best way to accomplish it.”⁴⁰

However, the Agencies have not articulated any meaningful substantive bases for withdrawing the CWR or codifying a different definition. In fact the Notice specifically states that the Agencies are not soliciting comments on the substance of what the definition of “waters of the United States” should be under the CWA.⁴¹ Despite the fact that the Agencies are withdrawing one definition and replacing it with several different definitions of a term that is fundamental to the functioning of the CWA, the Agencies did not engage in a substantive evaluation of the CWR, which they propose to withdraw, or the prior definition, which they propose to “re-codify.” In fact, the Notice actually contains an admission that the Agencies are withdrawing the CWR before they have even re-evaluated the definition of “water of the United States,” which they say they will do in the future “as appropriate.”⁴² In so doing, the Agencies are attempting to avoid meaningful public notice and opportunity for comment on the substance of the action they are taking by providing the public with inadequate information about the bases for their action and by discouraging comment on the substance of the definition of “waters of the United States.” This is also in violation of the CWA and APA.

The part of this action that is important to the public, i.e. what the definition should be and why, is deferred to some unknown point in the future despite the fact the Agencies are actually changing the definition now, in this Proposed Rulemaking. Specifically, the Agencies state that they:

[A]re not at this time soliciting comment on the scope of the definition of “waters of the United States” that the agencies should ultimately adopt in the second step of this two-step process, as the agencies will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking to adopt a revised definition of “waters of the United States” in light of the February 28, 2017, Executive Order. The agencies do not intend to engage in substantive reevaluation of the definition of “waters of the United States” until the second step of the

⁴⁰ *Id.* at 34903.

⁴¹ Proposed Rule Notice, 82 Fed. Reg. at 34903-34904.

⁴² *Id.* at 34903 (“A stable regulatory foundation for the status quo would facilitate the agencies’ considered re-evaluation, as appropriate, of the definition of ‘waters of the United States’ that best effectuates the language, structure, and purposes of the Clean Water Act.”)

rulemaking. See P&V, 516 F.3d at 1025–26.⁴³

Thus, the Agencies are actually attempting to withdraw the CWR, a final rule, without conducting (or disclosing as the case may be) any substantive evaluation of their action and without allowing the public to have any substantive input into their decision. Despite the misleading characterization in the Notice, as a legal matter, withdrawing the CWR is making a substantive evaluation and decision on the definition of “waters of the United States.” The Notice, however, states that the Agencies will be considering substantive issues “related to the 2015 rule” in a different rulemaking that they have not yet initiated and give no timeline for initiating. This plainly violates the CWA and the APA, and it is extremely disingenuous because the decision would be final before the justification and opportunity for public input is provided – rendering any future justification and comment opportunity meaningless from a legal perspective. Even worse, there is no guarantee that justification and opportunity for comment will ever materialize and, even if it does, the burden for justifying the legal basis for the CWR would be shifted to the public as opposed to the Agencies having to justify the repeal as required by law. In other words, the Agencies cannot avoid complying with the APA by simply advising the public about plans they may have for the future.

The Agencies are also attempting to adopt different definitions of “waters of the United States” as final rules to replace with CWR without providing any substantive justification for why those definitions are consistent with the CWA, and without allowing the public to have any input into the substance of those definitions. The Agencies explicitly state that they do not want any comment from the public on “the specific content” of those definitions – definitions that will have the force of law if adopted pursuant to this rulemaking. Instead, the Agencies seek comment only as to “whether it is desirable and appropriate to re-codify in regulation the status quo as an interim first step pending a substantive rulemaking to reconsider the definition of ‘waters of the United States’ and the best way to accomplish it.” Yet, what basis would one have for deciding whether it is “desirable and appropriate” without considering the “specific content” of those rules? This action violates the APA and CWA.

The Agencies’ are also attempting to lessen their obligations under the CWA and the APA and avoid substantive public input by falsely characterizing this Proposed Rule as codifying the “current legal status quo” and codification of a

⁴³ Proposed Rule Notice, 82 Fed. Reg. at 34903.

“interim, temporary measure, pending substantive rulemaking.”⁴⁴ The framing is clever perhaps, but it is not legally accurate. It is indisputable that this action would be unnecessary and duplicative if it already constituted the legal status quo. And this Proposed Rule is not temporary, interim, non-substantive, or even a “measure.” While there are procedures for adoption of interim rules that are available in limited circumstances not present here,⁴⁵ the Agencies in this rulemaking have elected to adopt a permanent, rather than an interim, rule.⁴⁶ If the Agencies adopt the Proposed Rule, it will result in the promulgation of a final, permanent substantive rule. Period. The Agencies’ characterization of the proposed Re-codified Definitions as “interim” and “temporary,” and the assertion in the Notice that another rulemaking may take place at some point in the future, does not change this fact. Neither these misleading labels nor Executive Order 13778 exempts the Agencies from fully complying with the legal requirements for rulemaking under the CWA or APA. Additionally, the terms of the Executive Order under which the Agencies purport to be operating explicitly require that the “order shall be implemented consistent with applicable law,” which of course includes the CWA and APA.⁴⁷

In sum, the Agencies propose to change the law now without evaluating, or letting the public have input into, whether that change is a good idea and consistent with the CWA. The Agencies want the evaluation of their action to take place at some unknown point in the future – after the law has already been changed. This is plainly prohibited under the APA and the CWA. And as explained below, these violations are especially egregious and injurious to the public here because it is apparent that the Agencies have already made a substantive decision on the CWR, which is based on Supreme Court Justice Anthony Kennedy’s opinion in *Rapanos v. United States*.⁴⁸ The Agencies intend to ultimately replace the CWR with a definition based on Supreme Court Justice Antonin Scalia’s opinion in *Rapanos v. United States*.⁴⁹ The withdrawal of the CWR from the Code of Federal Regulations without the burden of justifying it or

⁴⁴ Proposed Rule Notice, 82 Fed. Reg. at 34903.

⁴⁵ See, eg., *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 95 (D.C. Cir. 2012).

⁴⁶ See 82 Fed. Reg. 34899 (denominating this action as a “Proposed Rule”); 34900

⁴⁷ Executive Order 13778, 82 Fed. Reg. at 12497.

⁴⁸ 547 U.S. at 759-87 (Kennedy, J. concurring).

⁴⁹ See *Rapanos v. United States*, 547 U.S. at 719-57 (Scalia, J. et al plurality opinion); Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (Mar. 6, 2017).

allowing substantive public input into that decision is an improper and transparent attempt to pave the way for them to do that without complying with the CWA and the APA.

Lastly, the Supreme Court in *Fox* held that a more detailed justification is required when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy" and that "[i]t would be arbitrary or capricious to ignore such matters ... [because] a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."⁵⁰ This Proposed Rule is an abuse of discretion, arbitrary, capricious and contrary to law because the Agencies have not provided even a basic justification for the Proposed Rule, let alone a detailed justification for withdrawing and replacing the CWR, which is based on findings derived from years of legal and scientific evaluation, and extensive public input.⁵¹ Although some Commenters have identified legal shortcomings with several distinct provisions of the 2015 CWR,⁵² it is a critically important regulation codified in the Code of Federal Regulations, and the Agencies cannot simply withdraw and replace it without engaging in full notice and comment rulemaking under the APA. By electing to avoid any substantive discussion of the CWR and the associated factual findings, limiting public comment and failing to set of a reasoned explanation for the CWR withdrawal and Re-codified Definitions in the Notice, the Agencies have violated the APA and the CWA. Accordingly, if the Agencies wish to proceed, they must publish another Proposed Rule that meets these requirements.

B. The Notice is Misleading, Vague and Lacks Adequate Information to Evaluate or Provide Meaningful Comments on the Definition the Agency is Actually Adopting

The Agencies state in the Notice that they are proposing to "re-codify the regulatory definitions (at 33 CFR part 328 and 40 CFR parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401) in the Code of Federal Regulations (CFR) as

⁵⁰ 556 U.S. at 515-16 (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, (1996)).

⁵¹ See e.g., Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37056 (June 29, 2015); Definition of "Waters of the United States" Under the Clean Water Act and Supporting Documents, Docket Id. No. EPA-HQ-OW-2011-0880, available at: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>

⁵² See Final Waterkeeper Comments on EPA-HQ-OW-2011-0880 (Nov. 14, 2014) (**Attachment 4**); Opening Brief of Petitioners Waterkeeper Alliance, et al., 6th Circuit Court of Appeals (Nov. 1, 2016) (**Attachment 5**).

they existed prior to the promulgation of the stayed 2015 CWR definition.”⁵³ Prior to the 2015 CWR, these definitions had remained in place largely unchanged since the 1970s, broadly encompassed jurisdiction over the nation’s waters consistent with the CWA⁵⁴ and had never been overturned by a court.⁵⁵

However, the Agencies do not intend to implement those regulatory definitions of “waters of the United States” as written and interpreted by the courts over the last several decades. Instead the Agencies state that they will “implement those prior regulatory definitions) [sic], informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.”⁵⁶ Although the meaning of this statement is incredibly vague given the history of these definitions, the Agencies manage to make their intentions even more opaque later in the Notice by adding additional interpretative materials to the list and indicating that they are only examples of what the Agencies will use to implement the Proposed Rule after it is finalized. This second list includes “applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the SWANCC and Rapanos Supreme Court decisions, applicable case law, and longstanding agency practice.”⁵⁷

With the addition of these vague and wide-ranging provisos, it is quite literally impossible to determine how the Agencies will define and interpret “waters of the United States” if the Proposed Rule is finalized. What do the Agencies understand the practice, guidance and Supreme Court decisions to mean about these definitions of “waters of the United States?” There are certainly widely divergent views on those topics, but the Agencies do not explain theirs. Further,

⁵³ 82 Fed. Reg. at 34900.

⁵⁴ This is true with the exception of the illegal waste treatment exclusion described elsewhere in these comments.

⁵⁵ Neither the Supreme Court’s decision in *SWANCC* nor its decision in *Rapanos* invalidated any provision in the Agencies’ regulatory definitions of “waters of the United States” under the CWA. As the Agencies acknowledge in the Notice, in *SWANCC*, the “Supreme Court held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA.” 82 Fed. Reg. at 34900. *SWANCC* dealt only with an administrative interpretation of 33 C.F.R. § 328.3(a)(3) (1999), dubbed the “Migratory Bird Rule,” that purported to assert jurisdiction based on the mere fact that particular waters were or could be used by migratory birds, and the Court did not vacate 33 C.F.R. § 328.3(a)(3). Nothing in *Rapanos* is to the contrary. See 80 Fed. Reg. at 37,061 (recognizing that nothing in *Rapanos* “invalidated any of the current regulatory provisions defining ‘waters of the United States’”).

⁵⁶ Notice, 82 Fed. Reg. at 34900.

⁵⁷ *Id.* at 34902.

it is impossible to understand what the Agencies mean when they say the definitions will be “informed” by agency practice, “relevant memoranda and regulatory guidance letters,” guidance documents, and Supreme Court decisions. Does this mean they will strictly follow them or does it mean they will just consider them? Which other Supreme Court decisions and case law do the Agencies believe are “applicable” and which will they disregard? How will they deal with split jurisdictions? What are the “relevant memoranda and regulatory guidance letters,” and what criteria did the Agencies employ to determine their relevance? And what does it mean to be informed by an agency’s longstanding practice, especially in the context of these specific definitions, which have been subjected to varying agency practices over time depending on any number of factors? These questions reflect only a few of the uncertainties associated with the Agencies’ decision to modify the meaning of the Re-codified Definitions’ plain language through these vaguely described, external materials.

Perhaps most importantly, anyone that has even a passing familiarity with the definition of “waters of the United States” under the CWA understands that there is a long-history of disagreement regarding the meaning of and applicability of the Agencies’ guidance documents, and that there is a wide range of opinion on the meaning of the Supreme Court’s decisions in *SWANCC* and *Rapanos*. The Agencies’ addition of the provisos to the Notice only further underscores that this Proposed Rule would not simply codify the legal status quo.

For example, the Sixth Circuit Court of Appeals recognized in *United States v. Cundiff* that extracting law from the *Rapanos* decision is problematic because “there is quite little common ground between Justice Kennedy’s and the plurality’s [Scalia’s] conceptions of jurisdiction under the Act, and both flatly reject the other’s view.”⁵⁸ This interpretive struggle is not confined to the Sixth Circuit. Every other Circuit to consider the question has determined that CWA jurisdiction exists at least whenever Justice Kennedy’s test is met – but with some applying both the Scalia and Kennedy tests and others finding that only Justice Kennedy’s

⁵⁸ 555 F.3d 200, 210 (6th Cir. 2009).

test applies.⁵⁹ Importantly, none of these Circuits has determined that Justice Scalia's test alone should be employed to determine CWA jurisdiction as the Agencies indicated they intend to do in the as-yet-to-be-undertaken "second step" of this rulemaking. As to the Agencies' interpretations of Supreme Court precedent, the Agencies provided only general and incomplete summaries of *Bayview*, *SWANCC* and *Rapanos* in the Notice, and those summaries do nothing to illuminate if or how the Agencies view those decisions as altering the plain language of the definitions they proposed to adopt (assuming these are the Supreme Court decisions they are referencing). However, the Agencies do not even attempt to explain how those Supreme Court decisions will "inform" their implementation of the definitions.

The 2003 and 2008 Guidance Documents referenced and briefly described in the Notice certainly do not make the Agencies' intentions any more transparent. Additionally, those Guidance Documents are inconsistent with the CWA, the Supreme Court precedent cited by the Agencies and the plain language of the very definitions that Agencies are proposing to adopt. In years preceding the 2015 CWR, the 2003 and 2008 Guidance Documents implemented by the Agencies reduced protections for our nation's waters by limiting jurisdiction in a manner that was not justified by science or law.⁶⁰ The Guidance Documents were issued by the Agencies in response to the *SWANCC* and *Rapanos* opinions, but interpreted those decisions more broadly than the decisions allow or require. The Guidance Documents also imposed limitations on assertions of jurisdiction that were inconsistent with those decisions resulting in decreased jurisdiction over historically protected waters and inconsistent application by the

⁵⁹ Compare *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) ("The federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*."), *United States v. Donovan*, 661 F.3d 174, 184 (3d Cir. 2011) ("We hold that federal jurisdiction to regulate wetlands under the CWA exists if the wetlands meet either the plurality's test or Justice Kennedy's test from *Rapanos*."), ; and *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) ("[W]e join the First Circuit in holding that the Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy's test."); with *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) ("Justice Kennedy's proposed standard ... must govern the further stages of this litigation); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) ("Justice Kennedy's concurrence provides the controlling rule of law for our case"); and *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("we join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's "significant nexus" test provides the governing rule of *Rapanos*.").

⁶⁰ See *Summary of Objections to Guidance in: Congressional Research Service Report R43455, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States" at 6* (June 10, 2014) (**Attachment 6**)

Agencies.⁶¹ For example, the 2008 Rapanos Guidance⁶² inappropriately provided tributary stream less-than categorical protection although the existing regulatory definition protected, without any limitation, all tributaries to other specified jurisdictional waters and despite the fact that the Supreme Court has not issued any holding limiting the jurisdictional status of tributaries.⁶³ The 2003 and 2008 Guidance has left many categories of waters that had previously been protected vulnerable to pollution and destruction, and hindered regulatory and enforcement actions.⁶⁴

Lastly, it appears the Agencies do not intend to approach implementation and enforcement of the Re-codified Definitions in a manner consistent with Justice Kennedy's significant nexus test or a combination of both tests consistent with every Circuit Court that has considered the issue, but instead intend to approach implementation and enforcement of the Re-codified Definitions based solely on the Scalia plurality interpretation.⁶⁵ This would be a substantial departure from long-standing agency practice, and is contrary to the case law interpreting the *Rapanos* decision. Further, because no opinion commanded a majority of the court in *Rapanos*, the Agencies should not adopt the reasoning of any of the various opinions in the *Rapanos* decisions as the sole basis for asserting or relinquishing jurisdiction over any waterbody, and the Agencies should not implement or promulgate a definition of "waters of the United States" in a manner that removes the broad Commerce Clause grounds for covering tributaries, wetlands, adjacent waters, or other waters.

⁶¹ In support of our comments, we hereby incorporate by reference the comments submitted by national environmental organizations on the 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0001>, which are a part of the official public docket in 2011 at EPA-HQ-OW-2011-0409-3608 (hereinafter "2011 Comments").

⁶² U.S. Environmental Protection Agency and Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (2008) (hereinafter "Jurisdiction Following *Rapanos v. United States* and *Carabell v. United States*") available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (providing for "significant nexus" analysis for "[n]on-navigable tributaries that are not relatively permanent").

⁶³ *Id.* at p. 13-14.

⁶⁴ See generally, Earthjustice et al., ABANDON: HOW THE BUSH ADMINISTRATION IS EXPOSING AMERICA'S WATERS TO HARM (2004), available at <http://ocw.tufts.edu/data/32/386826.pdf>. (hereinafter "Reckless Abandon").

⁶⁵ InsideEPA, April 5, 2017. EPA May End CWA Enforcement Using Kennedy Test Ahead Of New Rule, <https://insideepa.com/daily-news/epa-may-end-cwa-enforcement-using-kennedy-test-ahead-new-rule> (last accessed September 22, 2017) (Attachment 7).

II. THE PROPOSED RULE IS INCONSISTENT WITH EXECUTIVE ORDER 13778

The Notice for this Proposed Rule relies on Executive Order 13778⁶⁶ as the impetus and basis for this rulemaking. However, Executive Order 13778 does not mandate the withdrawal of the CWR, the recodification of the prior definition of “waters of the United States or initiation of a two-step process for revising the CWA definition of “waters of the United States.” The Executive Order simply directs the Agencies to “**review**” the CWR “for consistency with the policy set forth in section 1 of this order and **publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.**”⁶⁷

Thus, the Agencies were directed to review CWR for consistent with the policy set forth in the Executive Order and rescind or revise it only if was appropriate and consistent with law. The CWA and APA are chief among the laws the Agencies are required to consider in determining whether rescission and revision of the CWR would be appropriate and consistent with law. However, despite this direction to review the rule based on a policy articulated for the first time in the Executive Order, and to revise it as appropriate and consistent with the law, EPA Administrator Pruitt signed a one-page *Notice of Intention to Review and Revise the Clean Water Rule* (“Notice of Intention”) – eight minutes after the Executive Order was signed⁶⁸ – citing concerns raised by opponents of the CWR in the pending litigation and the policy articulated in the Executive Order.⁶⁹ Notably, Mr. Pruitt was one of the opponents asserting the views cited in the Notice of Intention in opposition to the CWR in his role as Attorney General of the State of Oklahoma.⁷⁰

⁶⁶ 82 Fed. Reg. 12497.

⁶⁷ 82 Fed. Reg. at 12497 [emphasis added].

⁶⁸ See EPA Administrator Scott Pruitt, *CERAWeek Environmental Policy Dialogue with Scott Pruitt*, (March 9, 2017) available at: <http://ondemand.ceraweek.com/detail/videos/featured-videos/video/5358092032001/environmental-policy-dialogue-with-scott-pruitt?autoStart=true> (last accessed on Sept. 24, 2017).

⁶⁹ U.S. EPA and U.S. Army Corps, Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (Mar. 6, 2017).

⁷⁰ See 6th Circuit Brief of the States (**Attachment 8**); N.D. Oklahoma (**Attachment 9**); Scott Pruitt & Rand Paul, *EPA water rule is blow to Americans’ private property rights*, <http://thehill.com/opinion/op-ed/234685-epa-water-rule-is-blow-to-americans-private-property-rights> (last accessed Sept. 27, 2017) (**Attachment 10**).

Perhaps even more concerning is the fact that the Notice of Intention does not indicate that the Agencies intended to evaluate the definition in relation to the CWA or the APA, let alone consider public input in their review. To the contrary, it is clear from the Notice of Intention that the Agencies had already determined their course of action when they informed the public of the review, which for Administrator Pruitt was almost simultaneous with the signing of the Executive Order directing the Agency to consider the issue.

Administrator Pruitt has also made this clear in a speech he gave on March 9, 2017 at CERAWeek Conference – “the premier annual international gathering of energy industry leaders, experts, government officials and policymakers, as well as top executives from the technology and financial sectors.”⁷¹ After decrying litigation driving the regulatory agenda, emphasizing the importance of following the administrative process to prevent abuse, discussing the lawsuit he filed against EPA over the CWR, and vowing not to utilize guidance documents to establish substantive regulations, Administrator Pruitt stated that the CWR:

[L]iterally regulated puddles and dry creek beds across the country ... to the point that thirty-one states, Democrat and Republican states, sued the EPA to say what you’ve done is create a problem as far as what constitutes a ‘water of the United States’ and not provide clarity. And so the President last week did something very important. The President issued an Executive Order directing the EPA to fix that. And within eight minutes of that Executive Order being signed by the President, we started the rulemaking process to do just that. And at the end of that process, we’re gonna have a rule that provides clarity, objective criteria so that we know when federal and state jurisdiction starts and ends.”⁷²

Putting aside the fact that the CWR explicitly exempts “puddles” from regulation, and the importance of regulating the pollution discharges into creeks whether they have water in them at the time or not, Administrator Pruitt’s statement makes clear that the Agencies had decided to withdraw the CWR before conducting any review. The Notice of Intention, which is the “start of the rulemaking process” referenced by Administrator Pruitt, does not describe the Agencies’ review as an effort to determine whether a rulemaking should be undertaken to rescind or

⁷¹ <https://ceraweek.com/>

⁷² EPA Administrator Scott Pruitt, *CERAWeek Environmental Policy Dialogue with Scott Pruitt*, (March 9, 2017) available at: <http://ondemand.ceraweek.com/detail/videos/featured-videos/video/5358092032001/environmental-policy-dialogue-with-scott-pruitt?autoStart=true> (last accessed on Sept. 24, 2017).

revise the CWR consistent with the CWA and APA.

But, as EPA Administrator, Mr. Pruitt has an obligation to evaluate this issue objectively from the perspective of his role in implementing what Congress intended in the CWA – not from the perspective of an advocate for “state’s rights” or the State of Oklahoma – and to allow the public to have actual, meaningful input into the decision-making process rather than pursuing a pre-determined outcome. However, the Notice of Intention explicitly states “[t]hrough new rulemaking, the EPA and the Army seek to provide greater clarity and regulatory certainty concerning the definition of ‘waters of the United States,’ consistent with the principles outlined in the Executive Order and the agencies’ legal authority.”⁷³ It describes the Agencies’ intention to review the CWR in accordance with the Executive Order and undertake a rulemaking that “will consider interpreting the term ‘navigable waters,’ as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos*.” The Notice of Intention does not identify anything else that Agencies intended to consider in the rulemaking they already decided to undertake.

The fact that the Agencies, several months ago, had already predetermined the outcome of this rulemaking, as well as a separate “second-step” rulemaking at some unknown point in the future, is apparent in a May 5, 2017 News Release from the Agencies. Prior to any publicly announced end of their “review,” and prior to the present rulemaking to withdraw and replace the CWR, Administrator Pruitt and Douglas Lamont, a senior official performing the duties of the Assistant Secretary of the Army for Civil Works, announced that the Agencies were soliciting input from the states on “a new definition of protected waters that is in-line with a Supreme Court Justice Antonin Scalia’s opinion in the 2006 *Rapanos v. United States* case.”⁷⁴ In keeping with the litigation position of certain states, but prior to actually consulting with the states to obtain their views on the definition of “waters of the United States,” the News Release also contained this telling quote from Administrator Pruitt:

EPA is restoring states’ important role in the regulation of water,” said EPA Administrator Scott Pruitt. “Like President Trump, I believe that we need to work with our state governments to

⁷³ See Notice of Intention, 82 Fed. Reg. at 12532.

⁷⁴ U.S. EPA and U.S. Army News Release, “EPA and U.S. Army Solicit State Input on Redefining ‘Waters of the U.S.’ “EPA is restoring states’ important role in the regulation of water” – Administrator Pruitt” (May 9, 2017) *available at* <https://www.epa.gov/newsreleases/epa-and-us-army-solicit-state-input-redefining-waters-us-0> (**Attachment 11**).

understand what they think is the best way to protect their waters, and what actions they are already taking to do so. We want to return to a regulatory partnership, rather than regulate by executive fiat.⁷⁵

However, determining what the Agencies will do before soliciting input from the states actually usurps the states' roles, and is more closely resembles "executive fiat" than anything factually associated with the CWR.

The Agencies took the same approach to obtaining comment from state regulatory agencies and local governments. For example, the EPA's charge to its Local Government Advisory Committee ("LGAC"), and the opportunity for comment the EPA provided to state Clean Water Agencies, both improperly constrain input to what the Agencies have already decided to do – i.e. withdraw the CWR and replace it with a rule based on Justice Scalia's opinion in *Rapanos*. With regard to the LGAC directive, on May 17, 2017, the EPA informed the advisory group that its role was to provide recommendations on a revised definition of "waters of the United States" that is described as follows:

"[t]he agencies intend to follow an expeditious two-step process to provide certainty with the rule: 1) Establish the legal status quo by re-codifying the regulation that was in place prior to issuance of the CWR now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule. 2) Propose a new definition of Waters of the U.S. that would replace the 2015 CWR that reflects the principles outlined by Justice Scalia (*Rapanos* plurality opinion)."⁷⁶

It is apparent from the LGAC's Report in response to this charge that the committee understood this approach as the only option available for them to evaluate and provide recommendations upon.⁷⁷

The Association of Clean Water Agencies also understood their opportunity for comment was constrained to approach the Agencies had already determined,

⁷⁵ *Id.*

⁷⁶ EPA's Local Government Advisory Committee (LGAC) Draft Charge On 'Waters of the U.S.' (WOTUS), available at: <https://www.epa.gov/sites/production/files/2017-06/documents/lgac-wotus-charge-05-17-17-.pdf> (last accessed Sept. 27, 2017) (**Attachment 12**).

⁷⁷ EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE Waters of the United States 2017 Report, (July 14, 2017) available at: <https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf> (**Attachment 13**); EPA'S Local Government Advisory Committee, Waters of the United States 2017 Report, (June 29, 2017) available at <https://www.epa.gov/sites/production/files/2017-07/documents/lgac-meetingsummary-june29-2017.pdf> (last accessed Sept. 27, 2017) (**Attachment 14**).

stating in their response to EPA that:

“We appreciate the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term “navigable waters” as defined in 33 U.S.C. 1362(7), *in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006) and as part of EPA’s federalism consultation under Executive Order 13132 ... Unfortunately, states have received limited information in the way of draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule ...*”⁷⁸

These state regulatory agencies, like the public in this Proposed Rule, were asked to comment without adequate information about the Agencies intentions. These types of outreach do not constitute adequate federalism consultation with state and local governments under Executive Order 13132,⁷⁹ which is perhaps why the Agencies improperly claim the Notice that this Proposed Rule “has no federalism implications” and that no consultation is required because “[i]t will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”⁸⁰ According to the Notice, the Agencies “will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of “waters of the United States.”⁸¹

⁷⁸ See Letter from Association of Clean Water Agencies to The Honorable Scott Pruitt re: Federalism Process and WOTUS Rule Development (June 19, 2017) available at https://www.epa.gov/sites/production/files/2017-09/documents/us-acwa_2017-06-19.pdf. (“We appreciate the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term “navigable waters” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006) and as part of EPA’s federalism consultation under Executive Order 13132 ... Unfortunately, states have received limited information in the way of draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule; **therefore, states can only provide similarly broad guidelines and advice at this juncture. ACWA will be considerably more useful as a resource for the agencies, and be able to provide state perspectives crucial to drafting a practically sound and legally defensible rule, if EPA shares proposed regulatory text or more specific regulatory options that are under consideration before EPA begins drafting the anticipated proposed rule of ‘step 2’.**”) (emphasis added) (Attachment 15).

⁷⁹ Federalism Executive Order, 64 Fed. Reg. 43255 (Aug. 4, 1999).

⁸⁰ Proposed Rule Notice, 82 Fed. Reg. 34904.

⁸¹ *Id.*

By contrast, the CWR was adopted after a four-year administrative process that included an extensive scientific review and multiple opportunities for formal and informal input from the states and the public.⁸² But almost simultaneously with Executive Order 13778, and prior to any consultation with or comment from the states and the public, the Agencies had already decided to withdraw the CWR and replace it with a definition based on Supreme Court Justice Antonin Scalia's opinion in the 2006 *Rapanos v. United States*. This action is not mandated by the Executive Order, which again only directs the Agencies to consider Justice Scalia's opinion during the Agencies' review and during any future notice and comment rulemaking process taken "as appropriate and consistent with law."⁸³ The Agencies were directed to employ agency expertise to evaluate the issue and determine what was appropriate and consistent with law, not blindly follow marching orders on a predetermined course of events. But even if Executive Order 13778 had mandated such an outcome, it would have violated myriad other laws, including the CWA and the APA.

On its face, Executive Order 13778 did not prejudge the result of the review of the CWR, but it is clear that the Agencies did. If the Agencies have a valid basis consistent with the CWA for withdrawing the CWR and re-codifying the previous definitions, the APA requires that they articulate those reasons during this rulemaking and provide the public with an opportunity to comment on them. Here, the Notice for the Proposed Rule is devoid of any cogent explanation for withdrawal of the CWR and re-codification of the prior regulatory definitions, and the public has not been provided a meaningful opportunity for input on whether to rescind or revise the CWR and what, if anything to replace it with. This is not consistent with the direction of the Executive Order 13778, let alone the APA or the CWA.

Additionally, while Executive Order 13778 directs the Agencies to review the CWR "for consistency with the policy" set forth in Section 1 of Executive Order, it also makes clear that they should only undertake rulemaking to rescind and revise "as appropriate and consistent with law."⁸⁴ This is a key provision in the Executive Order because policy set forth in an Executive Order cannot override

⁸² See Definition of "Waters of the United States" under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) and Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015).

⁸³ See Executive Order, 82 Fed. Reg. at 12497 sections 2 and 4.

⁸⁴ *Id.* at sections 1 and 2.

the policy that Congress established in the CWA or any other law.⁸⁵

The policy set forth in Section 1 of Executive Order 13778 states “[i]t is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.”⁸⁶ Based on the Notice for the Proposed Rule, it appears the Agencies rely on this policy as the primary, if not sole, basis for this Proposed Rule. For example, based on *Fox and Nat’l Ass’n of Home Builders v. EPA*,⁸⁷ the Agencies argue that “[a] revised rulemaking based ‘on a reevaluation of which policy would be better in light of the facts’ is ‘well within an agency’s discretion.’”⁸⁸

The policy set forth in Section 1 of Executive Order 13778 is not, however consistent with the policy set forth in the CWA. In 1972 Congress adopted lengthy and complex amendments to the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). This is the central policy Congress established for the CWA that should drive the Agencies’ review and rulemaking process. In contrast to the policy in Section 1 of Executive Order 13778, the policy Congress established in the CWA does not promote economic growth, minimize regulatory uncertainty or push a particular ideology regarding states’ rights. Instead, Congress focused on, among other things, a national goal “of eliminating all discharges of pollutants into navigable waters by 1985” and an “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water ... by 1983.”⁸⁹

Thus, rather than attempting to minimize industry’s burden to stop polluting our

⁸⁵ To the extent any provision of Executive Order 13778 would require a regulatory action that is inconsistent with or prohibited by a federal law, EPA must follow the law and comply with its requirements rather than follow the dictate of the Executive Order. See, e.g., *Building & Construction Trades Dept., AFL-CIO, et al. v. Allbaugh*, 295 F.3d 28, 32-33 (D.C. Cir. 2002); *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *21 (N.D. Cal. Apr. 25, 2017) (“[The President] cannot ‘repeal[] or amend[] parts of duly enacted statutes’ after they become law.” citing *City of New York*, 524 U.S. at 438, 439 (1998)); *United States v. Rhode Island Dep’t of Corr.*, 81 F. Supp. 3d 182, 188 (D.R.I. 2015) (“Meanwhile, if an executive order conflicts with an existing statute, the executive order must fall. See *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1332–34 (D.C.Cir.1996”).

⁸⁶ *Id.* at sections 1 and 2.

⁸⁷ *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012).

⁸⁸ Proposed Rule Notice, 82 Fed. Reg. at 34901.

⁸⁹ 33 U.S.C. §1251(a).

nation's waterways or promoting economic growth, Congress intentionally imposed "on American industry (and the American public through passed-on product costs) the economic burden of ending all discharges of pollutants by the year 1985."⁹⁰ The policy of promoting "economic growth" and "minimizing regulatory uncertainty" announced in Executive Order 13778 does not, and cannot, supersede or modify any of the Congressional statements of policy and associated legal requirements set forth in the CWA. Similarly, as explained in detail below, Congress did not intend for CWA Section 101(b) to be a limitation on the jurisdictional reach of the CWA and, thus, should not be used as basis for doing so. These are irrelevant and impermissible considerations with regard to defining "waters of the United States" for the purpose of the CWA. Withdrawing the CWR and re-codifying the previous definition on the basis that it would achieve the policy objective in Section 1 of Executive Order 13778 is, thus, contrary to law.

III. The Agencies' Proposal to "Re-codify" the Waste Treatment Exclusion Violates the APA

In the Preamble to the Proposed Rule, the Agencies state "that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations."⁹¹ Perhaps the Agencies (wrongly) believe it is permissible to not accept comments on the substance of the pre-2015 regulatory text because the previously existing regulatory text was adopted in the 1970s and 1980s pursuant to full notice-and-comment rulemaking process required by the APA.⁹² While it is indisputable that the Agencies need to comply with the APA for the entire Proposed Rule, it is important to note that at least one substantial provision of the old rule – the so-called "waste treatment exclusion" – has never been subjected to notice-and-comment rulemaking. The provision authorizes indiscriminate pollution of certain "waters of the United States" wherever the discharger can assert that the water is being used to treat the waste before it is discharged into another "water of the United States." As detailed below, this provision was illegally inserted into the previously existing text in 1980, with no opportunity for public comment. The Agencies may not now

⁹⁰ *Am. Frozen Food Inst. v. Train*, 539 F.2d 107,113 (D.C. Cir. 1976); 33 U.S.C. §1251(a)).

⁹¹ 82 Fed. Reg. 34899, 34900; 34903 (July 27, 2017).

⁹² See, e.g., 45 Fed. Reg. 33290, 33,424 (May 19, 1980) (revising and consolidating permit regulations for various EPA programs, including Clean Water Act programs, at 40 C.F.R. § 122.2).

perpetuate the illegal waste-treatment system exclusion by re-adopting it and refusing to accept public comment.

On May 19, 1980, EPA issued a final rule that made clear that waste treatment systems created by impounding “waters of the United States” are not exempt from regulation under the CWA.⁹³ Specifically, the 1980 rule stated:

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*⁹⁴

However, just two months after this definition was finalized and published in the Federal Register, EPA announced it had made a unilateral decision to suspend the final sentence of the regulation, which states that “[t]he exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States”.⁹⁵ By suspending this sentence, EPA purported to strip away CWA protections from waterways that were impounded and used as private waste dumps. EPA effectuated the suspension by inserting a post-hoc footnote at the end of the duly promulgated regulation, without affording the public an opportunity to comment on the significant revision to the final definition.

As part of its justification for creating this so-called waste treatment exclusion, EPA expressly cited the electric utility industry’s concern that the duly-promulgated 1980 rule would require facilities to obtain a NPDES permit to discharge into existing coal ash dumps that were created by impounding “waters of the United States.”⁹⁶ At that time, EPA claimed that this was a temporary suspension and promised to “promptly [] develop a revised definition and to

⁹³ *Id.* at 33,424; *continued at* 48 Fed. Reg. 14153, 14157 (Apr. 1, 1983).

⁹⁴ *Id.* (emphasis added).

⁹⁵ See e.g. 45 Fed. Reg. 48620 (July 21, 1980); Memo from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, attach. B at 7 (Apr. 2, 1986).

⁹⁶ *Id.*

publish it as a proposed rule for public comment,” and, “[a]t the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension.”⁹⁷

EPA never followed through on its promise to address this important issue, allow the public an opportunity to provide comments, and finalize a new regulation or terminate the suspension. In fact, EPA, along with the Corps, both lifted and re-incorporated the same suspension into the CWR, without allowing the public an opportunity for comment on the provision or adopting a new or amended language addressing the issue.⁹⁸ Even worse, despite the historic interpretation that the exclusion only applied to impoundments in “waters of the United States” constructed prior to the suspension,⁹⁹ the Agencies used the CWR to adopt an expansive interpretation of the exclusion that authorizes new impoundments of natural waterways, like rivers, lakes, streams and wetlands, for conversion by industry into private waste dumps.¹⁰⁰

Now, 37 years after the initial “temporary” suspension of the language protecting waters of the United States against impoundment for the purpose of waste disposal, the Agencies again propose to formally codify the exemption and suspension language without providing the public an opportunity to make substantive comments.¹⁰¹ Thus, instead of making good on the promise to address EPA’s unlawful “temporary suspension” nearly four decades ago, the Agencies again attempt to evade compliance with the CWA and APA by claiming this is simply a temporary, interim measure – bootstrapping the illegal exemption and suspension language onto the definition of “waters of the United States” without substantive evaluation, and without allowing public comment on it. This is unacceptable. There is nothing temporary or interim about re-codifying an illegal exemption that has been in place, and shielded from substantive review and public comment, for nearly four decades.

⁹⁷ *Id.*

⁹⁸ Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37114 (June 29, 2015) (simultaneously lifting suspension and suspending the same language).

⁹⁹ Consol. Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA Nat’l Pollutant Discharge Elimination Sys.; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration; 45 Fed. Reg. 33298 (May 19, 1980).

¹⁰⁰ Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37097 (June 29, 2015) (discussing waste treatment systems “built in a ‘water of the United States’”)

¹⁰¹ See *Definition of “Waters of the United States”— Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34902 (July 27, 2017). (“The proposal retains exclusions from the definition of ‘waters of the United States’ for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued.”)

In sum, as detailed below, the waste treatment exclusion violates the plain language of the CWA, endangers the public and the nation's water resources, lacks a reasoned basis in the record, and perpetuates a longstanding dereliction of the Agencies' duty to protect all "waters of the United States" under the Act, all without following the required public notice-and-comment process for rulemaking under the APA.

A. Continuation of the Waste Treatment Exclusion and Suspension will have Severe Consequences for the Public and the Nation's Water Resources

This exclusion has had, and will continue to have, serious consequences for our nation's waters if the agencies finalize the proposed waste treatment exclusion and suspension. The Agencies will perpetuate a slight of hand that has left a gaping hole in the CWA by authorizing utilities and industrial operators to use our nation's waters as their own private waste dumps.

For example, it has been a common practice for the utility industry to impound streams and rivers to create waste dumps for coal combustion residuals and other wastes associated with coal-fired power plants. In fact, EPA specifically cited the utility industry's concern about coal ash impoundments as one of the primary reasons EPA suspended the sentence that made clear that permits are required for discharges into a waste treatment system created by impounding waters of the United States.¹⁰²

Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Coal-fired power plants generate billions of gallons of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. Due to the bio-accumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems. In short, coal plant water pollution has serious public health consequences and causes lasting harm to the environment.

This pollution is often discharged directly from the power plant into old, unlined surface impoundments or "ponds" that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge. It then seeps from these unlined ponds and landfills into groundwater and surface waters. Many of these ponds

¹⁰² 45 Fed. Reg. 48620 (July 21, 1980).

were created by impounding tributary streams that would otherwise clearly meet the definition of “waters of the United States.” EPA estimates that *at least 2.2 billion pounds* of pollution are released into American waterways by coal-burning power plants every year.¹⁰³ Coal-burning power plants are responsible for 30 percent of the toxic pollutants discharged into waters of the United States.¹⁰⁴ These numbers would be even greater had EPA included pollution dumped into waters of the United States that fall under the waste treatment exclusion.

Utilities have effectively been allowed to appropriate our nation’s waters to create these toxic lagoons in many cases. For example, a survey comparing locations of coal ash dumps in North Carolina with historical USGS topographic maps demonstrates that 31 blue-line streams in that state alone had been converted into, or buried beneath, industrial waste dumps.¹⁰⁵ Utilities in other states have also created coal ash dumps by impounding or burying “waters of the United States.” For example, the nation’s largest coal ash impoundment, at FirstEnergy’s Bruce Mansfield Plant in Pennsylvania, was created by damming a stream called Little Blue Run. As a result, the Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment, and recently ordered a \$169 million dollar cleanup and closure of Little Blue Run.¹⁰⁶

B. The Agencies are Required to Substantively Evaluate and Provide the Public with an Opportunity for Comment Prior to Promulgating the Waste Treatment Exclusion and Suspension

In this proposed rulemaking, roughly 37 years after illegally inserting the waste treatment exclusion into the regulatory definition of “waters of the United States” and promising to “promptly develop a revised definition and to publish it as a proposed rule for public comment,”¹⁰⁷ the Agencies once again attempt to

¹⁰³ EPA, Environmental Assessment for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Doc. No. EPA-821- R-15-006, Docket ID No. EPA-HQ-OW-2009-0819-6427, at 3-13. [hereinafter EA].

¹⁰⁴ *Id.* at 3-15.

¹⁰⁵ See Southern Environmental Law Center, *Buried Streams at Coal Ash Ponds in North Carolina*, available at <https://www.southernenvironment.org/buried-streams-at-coal-ash-ponds-in-north-carolina> (last accessed on Sept. 27, 2017) (**Attachment 16**).

¹⁰⁶ Pa. Dep’t of the Env’t, DEP Issues Permit Requiring Closure of FirstEnergy’s Little Blue Run Impoundment (Apr. 3, 2014), available at http://files.dep.state.pa.us/RegionalResources/SWRO/SWROPortalFiles/FinalClosurePlanPermitModification_LBR.pdf (last accessed on Sept. 22, 2017).

¹⁰⁷ Consol. Permit Regulations, 45 Fed. Reg. 48620 (July 21, 1980).

circumvent the APA and CWA by codifying the illegal waste treatment exclusion and suspension without substantively reviewing or allowing public comment on these provisions. Rather than comply with these requirements, the Agencies state “[b]ecause the agencies propose to simply codify the legal status quo and because it is a temporary, interim measure pending substantive rulemaking, the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 ‘waters of the United States’ definition nor are the agencies soliciting comment on the specific content of those longstanding regulations.”¹⁰⁸ With regard to the waste treatment exclusion and suspension, the rulemaking notice simply states “[t]he proposal retains exclusions from the definition of ‘waters of the United States’ for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued.”¹⁰⁹

It is beyond dispute that the proposed waste treatment exclusion and codification of the “temporary” suspension is a legislative rule subject to notice-and-comment under the CWA and the APA. For example, if the rule stands, industrial operators will have a right to discharge into waste treatment impoundments created by impounding “waters of the United States” without a NPDES permit, so long as the impoundments are “designed to meet the requirements of the Clean Water Act.”¹¹⁰ Accordingly, the Proposed Rule will confer rights or obligations on private parties and the Agencies, and is a legislative rule that requires full notice and opportunity for public comment.

With regard to the waste treatment exclusion, the Agencies have utterly failed to comply with the APA’s notice-and-comment requirements despite having nearly 40 years to do so. The public was not provided that opportunity to comment in 1980, when EPA initially suspended the final rule language that limited the waste treatment exclusion to man-made systems – claiming then, as now, that the language was temporary. The public was not provided an opportunity to comment on the exclusion in the 2015 CWR. And in this Proposed Rule, two years later, the Agencies are again denying the public the opportunity to comment on the withdrawal of the 2015 CWR version of the waste treatment exclusion, the recodification of the 1980 version of the waste treatment exclusion, and the inclusion of the 37-year-old “temporary” exclusion footnote in the

¹⁰⁸ See Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34903 (July 27, 2017).

¹⁰⁹ See *id.* at 34902.

¹¹⁰ Consol. Permit Regulations, 45 Fed. Reg. 48620 (July 21, 1980).

Proposed Rule. This action violates the APA and the CWA, and is being taken “without observance of procedure required by law.”¹¹¹

C. EPA Lacks Authority to Allow Conversion of “waters of the United States” into Waste Treatment Systems

It is clear from legislative history and decades of case law that Congress did not intend for EPA to allow our nation’s rivers, streams, and lakes to be used as private sewers for the utility industry and other polluters. The fundamental objective of the CWA is to protect the “chemical, physical, and biological integrity” of all waters of the United States.¹¹² There is no exception in the CWA for industries or anyone else that may wish to appropriate and convert a water of the United States into a waste or wastewater impoundment, and the Agencies lack authority to eliminate “waters of the United States” from the protections of the CWA.¹¹³ Rather, ending the practice of using rivers, lakes, streams or other waters as waste treatment systems was one of the primary reasons that Congress enacted the CWA.¹¹⁴ That continues to be the national policy.¹¹⁵

In addition to legislative history that makes it clear that the waste treatment exclusion is contrary to Congressional intent, it is settled law that once a body of water is found to be “waters of the United States,” it always remains “waters of the United States.”¹¹⁶ With regard to the waste treatment exclusion, there is no evidence Congress intended to depart from well settled law to allow EPA to remove bodies of water that fall squarely within the definition of “waters of the United States” from the reach of the CWA, especially where those “waters of the

¹¹¹ 5 U.S.C. § 706(2)(D) (giving reviewing courts authority to hold unlawful and set aside agency action “without observance of procedure required by law”).

¹¹² 33 U.S.C. § 1251; see also *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C 1975).

¹¹³ 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).

¹¹⁴ See e.g. S. Rep. No. 92-414, at 7 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3674 (“The use of any river, lake, stream or ocean as a waste treatment system is unacceptable.”).

¹¹⁵ S. Rep. No. 95-370, at 4 (1977) reprinted in 1977 U.S.C.C.A.N. 4326, 4330.

¹¹⁶ See Scott Snyder, Note, *The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA’s Definition of “Waters of the United States”*, 21 N.Y.U. Envtl. L.J. 504, 522-23 (2014) (providing overview of federal cases prior to the enactment of the Clean Water Act holding that once a body of water has been classified as a waters of the U.S., it remains a waters of the U.S. forever).

United States” are impounded to create a private dump for a utility or other industrial operation.¹¹⁷

Further, even if the CWA was ambiguous, the Agencies’ ability to define “waters of the United States” is not without bounds. Leaving aside the problems with the Agencies’ withdrawal of the CWR and re-codification addressed elsewhere in these Comments, the Agencies definition of “waters of the United States” would only be permissible if it is not “arbitrary, capricious, or manifestly contrary to the statute.”¹¹⁸ In this case, the broad waste treatment exclusion is arbitrary and capricious and contrary to law because the legislative history and decades of common law make clear that the Agencies cannot carve out “waters of the United States” from the scope of the CWA to create waste disposal sites, which is precisely what the waste treatment exclusion does. Further, the Agencies have failed to explain their interpretation of the exclusion and have effectively transformed what was originally adopted as a temporary measure into a permanent exclusion without providing the public any explanation or opportunity for substantive input.

EPA cannot legitimately dispute that Congress intended the CWA to prohibit conversion of “waters of the United States” into waste treatment systems. When it first finalized the definition of waters of the United States in May of 1980, after full notice-and-comment rulemaking, EPA found that Congress did not intend for the CWA to exempt waste treatment systems created by impounding waters of the United States.¹¹⁹ Specifically, EPA said:

Because [the] CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting interstate or foreign commerce.¹²⁰

¹¹⁷ *Id.* at 523.

¹¹⁸ *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

¹¹⁹ Consol. Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA Nat’l Pollutant Discharge Elimination Sys.; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration; 45 Fed. Reg. 33298 (May 19, 1980).

¹²⁰ *Id.*

Even when the EPA suspended the final sentence of the regulation two months later, without notice-and-comment, the Agency reiterated this, noting that “[t]he Agency’s purpose in the new last sentence was to ensure that dischargers did not escape treatment requirement by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands.”¹²¹

Additionally, rather than amending the rule through notice-and-comment rulemaking or removing the suspension, EPA issued a memorandum in 1986 stating that it evaluates what is an exempt waste treatment system on a case-by-case basis, treating “newly created impoundments of waters of the U.S. as ‘waters of the U.S.’, not as ‘waste treatment systems designed to meet the requirements of the CWA,’ whereas impoundments of ‘waters of the U.S.’ that have existed for many years and had been issued NPDES permits for discharges from such impoundments as ‘wastewater treatment systems designed to meet the requirements of the CWA’ and therefore are not ‘waters of the U.S.’”¹²² EPA further stated that, in fact, it suspended the last sentence of the waste treatment system in order to allow for such case-by-case decisions.¹²³ EPA has also echoed the interpretation articulated in the 1986 memorandum in various other scenarios.¹²⁴

However, the proposed waste treatment exemption and suspension language in the pre-2015 definition does not include any language limiting the exclusion to treatment systems created by impounding waters of the United States that have been in existence “for many years” or for any other time period. Further, it is illogical – and courts have held as much – to suggest that a waste impoundment created prior to the CWA has been designed to meet the requirements of the

¹²¹ Consol. Permit Regulations, 45 Fed. Reg. 45 Fed. Reg. 48620 (July 21, 1980).

¹²² Memorandum from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, attach. B at 7 (Apr. 2, 1986) (**Attachment 17**).

¹²³ *Id.* (noting that EPA suspended the sentence in order to “restor[e] the ambiguity of the earlier regulations, so that each case must be decided on its own facts”). This is, of course, contrary to the purpose EPA provided when it suspended the sentence. Consol. Permit Regulations, 45 Fed. Reg. 45 Fed. Reg. 48620 (July 21, 1980) (noting that EPA would re-examine the waste treatment system definition and “promptly ... develop a revised definition and to publish it as a proposed rule for public comment”).

¹²⁴ Jon Devine et al., *The Intended Scope of Clean Water Act Jurisdiction*, 41 *Envtl. L. Rep. News & Analysis* 11,118, 11,125 (2011) (citing Letter from Lisa P. Jackson, Administrator, EPA, to Rep. James L. Oberstar at 1 (Apr. 30, 2010)). EPA has taken the same position in litigation. See *W. Va. Coal Ass’n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), *aff’d*, 932 F.2d 964 (4th Cir. 1991).

CWA.¹²⁵ The plain language of the Proposed Rule would arguably exempt all waste treatment systems designed to meet the requirements of the CWA created by impounding “waters of the United States” regardless of when the treatment systems are constructed, and this is prohibited by the plain terms of the CWA.¹²⁶

The Agencies’ decision to withdraw the CWR and “recodify” the waste treatment exclusion and suspension language that existed prior to that rule is highly likely to be used to allow construction of new waste treatment systems in “waters of the United States.” In recent years, the Agencies have attempted to reverse their long-standing interpretation to exclude such *newly* created waste treatment systems from “waters of the United States.”¹²⁷ Given the vagueness of the Notice with regard to how the Agencies will interpret the Re-codified Definition of “waters of the United States,” i.e. as “informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice,” it is impossible to know how the Agencies will proceed. This renders the Proposed Rule impermissibly vague and in direct contravention of unambiguous CWA requirements. Complying with the APA requirements for rulemaking by providing a reasoned explanation for the Agencies’ Proposed Rule, and a public notice and opportunity for comment, is the only way to address this concern and allow for meaningful public input on this Proposed Rule.

For all of these reasons, Commenters strongly urge the Agencies to eliminate the exclusion or to publish a revised definition of waste treatment system that complies with the CWA. At a minimum, the Agencies must provide a reasoned explanation for their action, as well as full notice-and-comment rulemaking for the proposed waste treatment exclusion.

¹²⁵ See, e.g., *California Sportfishing Prot. Alliance v. Cal. Ammonia Co.*, 2007 WL 273847, *6 (E.D. Cal 2007) (noting that the fact that a waste treatment impoundment is created prior to the Clean Water Act is evidence that it is not “designed to meet the requirements of the Clean Water Act”).

¹²⁶ Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34907 (July 27, 2017).

¹²⁷ See, e.g., Jon Devine et al., *The Intended Scope of the Clean Water Act* (noting that the agencies have advanced this broader interpretation in a 1998 Federal Register notice, a 2000 guidance document, and by the Corps in recent litigation.)

IV. The Agencies Violated the National Environmental Policy Act and Endangered Species Act in the Promulgation of the Proposed Rule

A. The Agencies Must Comply with the Endangered Species Act's Consultation Requirements

The Agencies make a fundamental conceptual error in describing the Proposed Rule as a codification of the “legal status quo.”¹²⁸ The Agencies’ reversion to the old regulatory definitions that preceded the CWR is not a mere codification of the legal status quo, but is instead an attempt to codify the existing *factual* status quo. Regardless, the codification of the status quo does not represent a sufficient justification to advance a rulemaking that is so consequential to which waters are protected under the Clean Water Act.

Additionally, the characterization by the Agencies that the Proposed Rule will not “change current practice” is not accurate, or even legally relevant.¹²⁹ As an initial matter, it is apparent that the Agencies do not intend to apply the Re-codified Definitions as written, but rather in some other vaguely described manner in which the Agencies’ implementation will be “informed” by agency practice, Supreme Court decisions and two Agency Guidance Documents. And there are also clear indications that Agencies actually intend to implement the Re-codified Definitions based solely on their undisclosed interpretation of Justice Scalia’s opinion in *Rapanos*.¹³⁰ This would be a severe departure from long-standing agency practice, and would result in a significant reduction in covered waters. Thus, as soon as the Proposed Rule is finalized, it appears that there may be changes in actual protections for covered waters almost immediately as a practical, real-world matter. As a result, the entire purported rationale for this Proposed Rule is disingenuous at best, and fraudulent at worst.

Contrary to the APA, however, the Agencies make no legitimate effort to inform the public about the impact of their future interpretations on jurisdictional determinations in this rulemaking. Accordingly, there is no information available on the numbers or types of waterways that will be impacted by this Proposed Rule, as amended by the vague factors that will “inform” the Agencies

¹²⁸ Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34900 (July 27, 2017).

¹²⁹ *Id.* at 34903.

¹³⁰ See InsideEPA, *EPA May End CWA Enforcement Using Kennedy Test Ahead Of New Rule* (April 5, 2017) <https://insideepa.com/daily-news/epa-may-end-cwa-enforcement-using-kennedy-test-ahead-new-rule>.

implementation. For example, will the Agencies continue to protect wetlands that have a significant nexus to other covered waters, non-navigable, intrastate tributaries and other waters that may or may not have been protected under the CWR? These waters provide habitat for numerous endangered species across the nation, and the gain or loss of CWA jurisdiction under this Proposed Rule will have an impact on those species that has not been quantified or evaluated in this rulemaking. A loss of CWA jurisdiction means that a waterway can be subjected to unregulated pollution and even total destruction as a matter of federal law. Given the Proposed Rule's far-reaching impacts for these aquatic ecosystems, and the many threatened or endangered species that depend upon them, the Agencies are required to ensure that the Proposed Rule will not jeopardize the continued existence of any such species and to engage in interagency consultation under section 7(a)(2) of the ESA.

Even if the Agencies faithfully returned to every practice and policy from the years immediately preceding the CWR – and there is no indication that this will occur – it is apparent that there will still be significant changes to which specific waters are, and are not, protected under the CWA. In perhaps one of the most unhelpful and unclear statements in the Proposed Rule, the Agencies summarily state that “the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations.”¹³¹ This is a completely nonsensical assessment that is especially alarming given the scope and importance of both the CWR and the Proposed Rule.¹³² The Agencies also state that “[t]here are no avoided costs or forgone benefits [to the changes in jurisdiction under the Proposed Rule] if similar state regulations exist and

¹³¹ Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34903 (July 27, 2017).

¹³² See also Economic Analysis for the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules, at p. 1 (June 2017). available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0002> (last accessed Sept. 27, 2017). The Agencies' Economic Analysis for the Proposed Rule is wholly inadequate to evaluate the costs and benefits of this rulemaking for the same reasons articulated in these comments. Because the Agencies haven't identified which waters will be protected under the Proposed Definition, it would be impossible for them to reliably evaluate the costs and benefits of it. The Agencies statement that “the consequence of a water being deemed non-jurisdictional is simply that CWA provisions no longer apply to that water. There are no avoided costs or forgone benefits if similar state regulations exist and continue to apply to that water” does not add anything meaningful to their analysis, or excuse their failure to do such an analysis, because this issue to be evaluated is the costs and benefits of losing or gaining federal CWA jurisdiction. The Agencies Economic Analysis is also flawed because it relies on the flawed analysis of associated with the CWR (**Attachment 18**).

continue to apply to that water.”¹³³ However, it is completely irrelevant to this Proposed Rule that similar state laws may continue to apply to a waterbody, and no effort is made by the Agencies to analyze or inform the public whether, and in which states, such “similar” regulatory programs exist. The issue in the Proposed Rule that the Agencies are required to evaluate relates solely to jurisdiction under the federal CWA.

These statements illustrate precisely why it is imperative that the Agencies comply with their mandatory legal obligations under the APA and the ESA prior to proceeding with the Proposed Rule. If the Proposed Rule will result in a decrease in positive jurisdictional determinations, the Agencies must explain to the public where those determinations would occur. For example, what types of wetlands would have continued to receive protection under the CWR but will no longer under the Proposed Rule? In what parts of the country will or would those positive jurisdictional findings have been made? What impacts, positive or negative, will or would have occurred in waters downstream of such wetlands? The Proposed Rule offers no answers to these questions. It would be impossible for the Agencies to have provided a more opaque explanation of how this Proposed Rule will impact CWA jurisdictional determinations.

Even if the Proposed Rule would result in the inclusion of a slightly larger number of waters within the scope of the CWA overall – which, again, is not supported by the Agencies with any data or explanation – the protection of waterways is not a simplistic zero-sum game where the only factor that is relevant is the nationwide aggregate area protected under the CWA. Such a simplistic assessment does not evaluate the actual impacts of changes to CWA jurisdiction and, thus, does not represent reasoned decision-making by the Agencies. For example, the CWR categorically extended protections to vernal pools in California, prairie potholes, pocosins, Carolina and Delmarva bays, and Texas coastal prairie wetlands. Many of these unique ecosystems contain endangered species. The loss of CWA protections in these important ecosystems is not offset by the hypothetical addition of wetland or stream jurisdiction elsewhere in the country.

If the Proposed Rule eliminates protections for some wetlands and gives additional protections for other water bodies (or vice versa), the Proposed Rule, which is nationwide in its scope, will directly, indirectly, and cumulatively impact endangered species. As an obvious example, California vernal pool wetlands that support vernal pool fairy shrimp (*Branchinecta lynchi*) were clearly protected under the CWR. Will those same wetlands be protected under the Proposed

¹³³ *Id.*

Rule as informed by the Agencies practical decision to only implement the rule for wetlands that meet the plurality test or as “informed” by other factors? It seems highly unlikely. If so, vernal pool fairy shrimp will be harmed by the Proposed Rule.

Consequently, the Agencies’ action here easily crosses the “may affect” threshold requiring consultations under the Endangered Species Act. Section 7 of the Act requires each agency to engage in consultation with FWS and/or NMFS 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 habitat of such species... determined... to be critical....”¹³⁴ ESA Section 7 “consultation” is required for “any action [that] may affect listed species or critical habitat.”¹³⁵ 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.”¹³⁶

The CWA does not command EPA or the Army Corps to promulgate regulations setting forth either the general limits or specific exemptions to define which “waters of the United States” are protectable under the law. As a result, just like every other agency, EPA and the Army Corps must consult when they embark upon the discretionary task of developing regulations, if and when the effects of those regulations cross the “may affect” threshold set forth in the ESA. Indeed, case law is clear that when a regulation may affect endangered species it must be the subject of consultation.¹³⁷ Because the Proposed Rule will affect endangered species and their critical habitats as it is implemented in the future, consultations must occur before the Proposed Rule is finalized.

¹³⁴ 16 U.S.C. § 1536(a)(2).

¹³⁵ 50 C.F.R. § 402.14.

¹³⁶ *Id.* § 402.02 (emphasis added).

¹³⁷ See, e.g., *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat’l Parks Conservation Ass’n v. Jewell*, 62 F.Supp.3d 7, 12 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep’t of Agriculture*, 481 F.Supp.2d 1059, 1095-97 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep’t of Interior*, 457 F.Supp.2d 1158, 1182-95 (W.D. Was. 2006).

B. The Agencies Must Comply With NEPA

Under NEPA, the Agencies must prepare a “detailed statement” assessing the environmental impacts of all “major Federal actions significantly affecting the quality of the human environment.”¹³⁸ Promulgation of a rule is a “Federal action” under NEPA,¹³⁹ and there little doubt that this Proposed Rule will significantly affect the quality of the human environment. However, the Agencies have not prepared either an Environmental Assessment or an Environmental Impact Statement for this action as required by NEPA.¹⁴⁰

All losses and benefits associated with the withdrawal of the CWR and recodification of the prior regulatory definitions resulting from this Proposed Rule must be accounted for and evaluated in the NEPA process.¹⁴¹ NEPA is designed to ensure that Agencies take a required “hard look” at the environmental consequences of their actions,¹⁴² and there is no indication in the Notice that the Agencies conducted any NEPA analysis or engaged in reasoned decision-making regarding the environmental impacts as required by law.¹⁴³

V. THE CWA MANDATES A BROAD DEFINITION OF “WATERS OF THE UNITED STATES” CONSISTENT WITH THE INTENT OF CONGRESS

The objective of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and the Act is a comprehensive water quality statute designed” to achieve that objective.¹⁴⁴ Accordingly, Congress provided that the CWA applies to all “waters of the United States, including the territorial seas.”¹⁴⁵ The Conference Report accompanying the CWA confirms that Congress intended that the phrase “waters of the United States” to be given the

¹³⁸ 42 U.S.C. § 4332(2)(C).

¹³⁹ 40 C.F.R. § 1508.18(b)(1).

¹⁴⁰ See 40 C.F.R. § 1508.9(a) and (b); 33 C.F.R. § 230.10(a); 40 C.F.R. § 1508.13.

¹⁴¹ See 33 C.F.R. § 230.10(a).

¹⁴² *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 350-54 (1989).

¹⁴³ See *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotations omitted).

¹⁴⁴ 33 U.S.C. § 1251(a); *PUD No. 1 of Jefferson County v. Wash. Dep’t. of Ecology*, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).

¹⁴⁵ 33 U.S.C. § 1362(7).

broadest possible constitutional interpretation.”¹⁴⁶

The Supreme Court, in *United States v. Riverside Bayview Homes, Inc.*, held that Congress took a “broad, systemic view of the goal of maintaining and improving water quality” with the word integrity referring to “a condition in which the natural structure and function of ecosystems [are] maintained” and, the “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for [w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”¹⁴⁷ To accomplish these goals, the Supreme Court in *Bayview* concluded, Congress defined the “waters covered by the Act broadly” to encompass all “waters of the United States.”¹⁴⁸ The intended breadth of the CWA is apparent in the comprehensive goals, programs and directives in the Act, as well as in the legislative history, administrative decisions and case law interpreting the CWA.¹⁴⁹

Thus, unlike the Rivers and Harbors Act of 1899, the CWA was not focused on the prevention of “navigation-impeding” conduct in navigable waters.¹⁵⁰ Instead, as the Supreme Court held in *International Paper Co. v. Ouellette*, the CWA established “an all-encompassing program of water pollution regulation” that “applies to all point sources and virtually all bodies of water.”¹⁵¹ While it was clear that the Commerce Clause provided adequate authority for regulation of navigable waters as demonstrated by extensive Rivers and Harbors Act precedent, it was equally clear that Congress’ Commerce Clause authority to control pollution was not limited to traditionally navigable waters or traditional

¹⁴⁶ S. Rep. No. 92-1236, at 144 (1972).

¹⁴⁷ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing H.R.Rep. No. 92-911, p. 76 (1972); S.Rep. No. 92-414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742). The Agencies’ Notice for this Proposed Rule misconstrues *Bayview* by describing the Opinion as simply one that “deferred to the Corps’ ecological judgment that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34900 (July 27, 2017). The unanimous Supreme Court Opinion in *Bayview* is far more significant in determining the definition of “waters of the United States” than indicated by the Agencies’ description.

¹⁴⁸ *Id.*

¹⁴⁹ See also, *Quarles Petroleum Co. v. United States*, 551 F.2d 1201, 1206 (Ct. Cl. 1977) (“In addition, the overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States.”).

¹⁵⁰ See *U.S. v. Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974).

¹⁵¹ *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

tests of navigability.

For example, in invalidating portions of the Corps' 1974 regulations that limited their CWA jurisdiction to waters "which had been, are, or may be, used for interstate or foreign commerce," the U.S. District Court for the District of Columbia held that when Congress defined the term 'navigable waters' as 'the waters of the United States, including the territorial seas' it "*asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution*. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability."¹⁵² This holding is consistent with the Conference Committee Report for the final bill which states "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation *unencumbered by agency determinations which have been made or may be made for administrative purposes*."¹⁵³

When Representative John Dingell presented the Conference version of the bill to the House of Representatives, he explained that in defining "navigable waters" broadly for the purposes of the CWA as "waters of the United States, including the territorial seas":

The Conference bill defined the term 'navigable waters' broadly for water quality purposes. It means 'all the waters of the United States' in a geographic sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws.... Thus, this new definition clearly encompasses *all water bodies, including main streams and their tributaries, for water quality purposes*. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.¹⁵⁴

The Supreme Court has explicitly recognized on at least three occasions that "navigable waters" under the CWA include "something more than traditional navigable waters."¹⁵⁵ In *Bayview*, the Supreme Court held that the "Act's

¹⁵² *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975); 39 Fed.Reg. 12119 (April 3, 1974).

¹⁵³ Conference Report, Senate Report No. 92-1236, Sept. 28, 1972 at 144, U.S.Code Cong. & Admin. News 1972, p. 3822; Reprinted in Legislative History, Committee on Public Works, Committee Print, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 327 (hereinafter "1972 Legislative History").

¹⁵⁴ 118 Cong. Rec. 33, 756 (1972); *id.* at 250-51.

¹⁵⁵ *Rapanos v. United States*, 547 U.S. 715, 731 (2006).

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. In adopting this definition of “navigable waters, Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed “navigable” under the classical understanding of that term.”¹⁵⁶ The *Bayview* Court also noted that, while “it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional test of navigability, it is another to assert that Congress intended to abandon traditional notions of “waters” and include in that term “wetlands” as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term “waters” to encompass wetlands adjacent to waters as more conventionally defined.”¹⁵⁷

Consistent with Congressional intent, the EPA (1973)¹⁵⁸ and the Corps (1977)¹⁵⁹ adopted regulations further defining “waters of the United States” for the purposes of the CWA to include broad categories of waters beyond those protected by traditional navigability tests. When the Corps adopted its definition of “waters of the United States” in 1977, it recognized that “[t]he 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.”¹⁶⁰ In the Preamble to the Corps’ 1977 rule defining “waters of the United States,” the Corps stated:

Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government’s broad powers to regulate interstate commerce. *Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have*

¹⁵⁶ *Bayview*, 474 U.S. at 133 (emphasis added).

¹⁵⁷ *Id.*

¹⁵⁸ 38 Fed. Reg. 10834 (1973).

¹⁵⁹ 42 Fed. Reg. 37122 (1977).

¹⁶⁰ 42 Fed. Reg. 37128 (July 19, 1977).

an effect on interstate commerce. The 1975 definition identified certain of these waters. These included waters used:

- By interstate travelers for water-related recreational purposes;
- For the removal of fish that are sold in interstate commerce;
- For industrial purposes by industries in interstate commerce; and
- In the production of agricultural commodities sold or transported in interstate commerce.

We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over ‘other waters’ such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.¹⁶¹

Under the 1977 Definition, waters in Categories 1, 2, and 3, over which jurisdiction was “obvious” under the Federal Government’s broad powers to regulate interstate commerce, included: (1) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands; (2) Tributaries to navigable waters of the U.S., including adjacent wetlands; and (3) Interstate waters and their tributaries, including adjacent wetlands.¹⁶² Additionally, based on reasoning set forth above, the Corps included “other waters” where the use or destruction of the waters could affect interstate commerce within the definition of “waters of the United States.”¹⁶³

Prior to the 2015 CWR, this basic approach to broadly defining “waters of the United States” had been in place since the mid-1970s, and is consistent with the intent of Congress announced in 1972. Accordingly, the longstanding definition

¹⁶¹ 42 Fed. Reg. 37127-37128 (1977) (emphasis added).

¹⁶² 42 Fed. Reg. 37122 (1977).

¹⁶³ *Id.*

of “Waters of the United States” includes:¹⁶⁴

- A. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- B. All interstate waters, including interstate “wetlands.”
- C. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.
- D. All impoundments of waters otherwise defined as waters of the United States under this definition.
- E. Tributaries of waters identified in paragraphs (a) through (d) of this definition.
- F. The territorial sea.
- G. “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition

It is beyond dispute that Congress intended for the CWA to fully protect the nation’s waters and aquatic ecosystems without regard to whether the waters could satisfy historic navigability tests under the Commerce Clause.

It is notable that, prior to the enactment of the CWA, both traditionally navigable waters and their non-navigable tributaries were believed to be well within the Commerce Clause powers of the federal government under traditional tests of navigability.¹⁶⁵ Congress intended to expand the number and nature of the waters covered under the CWA in order to protect water quality and aquatic ecosystems to the fullest extent permitted by the Commerce Clause. In other words, Congress intended to expand coverage under the CWA beyond traditionally navigable waters and their tributaries, and did not premise its expansion of jurisdiction on the manner in which waters were connected to

¹⁶⁴ See e.g., 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

¹⁶⁵ The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to traditionally navigable waters and “into any tributary of any navigable water from which the same shall float or be washed into such navigable water.” 33 U.S.C. § 407.

traditionally navigable waters. To the contrary, Congress intended to repudiate the traditional navigability tests and limitations on federal authority and instead utilize the full authority of the federal government to regulate water pollution under the Commerce Clause.¹⁶⁶

SWANCC and *Rapanos* do not limit or establish the outer bounds of this authority for purposes of the CWA, and neither of these decisions invalidated the definitions in effect prior to the 2015 CWR.¹⁶⁷ It is essential to the continued protection of our nation's waters that the Agencies continue to assert jurisdiction over waters to the fullest extent permitted by the Commerce Clause. As stated by the court in *U.S. v. Holland*:

It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution. Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms ... Congress is not limited by the 'navigable waters' test in its authority to control pollution under the Commerce Clause.¹⁶⁸

Contrary to all of this regulatory history and caselaw, in this Proposed Rule, the Agencies have evidenced an intention to elevate the significance of a single provision of the CWA, Section 101(b), in defining "waters of the United States" under the CWA. Specifically, the Agencies assert that "[t]he statute's introductory purpose section ... commands the Environmental Protection Agency (EPA) to pursue two policy goals simultaneously: (a) To restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility and right to prevent,

¹⁶⁶ See e.g., *Bayview*, 474 U.S. at 133.

¹⁶⁷ In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. See 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court "expressly declined to reach" the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, "in *Rapanos* it appears five justices had no constitutional concerns in any event ... [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause ..." *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), cert. denied sub nom., *Am. Farm Bureau Fed'n v. E.P.A.*, 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016) (citing *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring)).

¹⁶⁸ *Holland*, 373 F. Supp. at 673.

reduce, and eliminate pollution.”¹⁶⁹ Section 101 of the CWA does no such thing and, even if it did, this would have no bearing on the meaning of “waters of the United States.”¹⁷⁰

Additionally, the Agencies assert that “[r]e-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated to the agencies under the CWA.”¹⁷¹ Although Executive Order 13778 identifies “showing due regard for the roles of the Congress and the States under the Constitution” as one of the Administration’s policy goals to be evaluated during the Agencies review of the CWR, it does not call upon or authorize the Agencies to balance the “goals” of Section 101(a) and 101(b) in withdrawing the CWR or in promulgating a different definition of “waters of the United States” under the CWA. Further, having due regard for the role of the states is not the same thing as defining “waters of the United States” in a manner that reduces federal, and increases state, jurisdiction – which is plainly the Agencies goal in elevating and contorting the meaning of CWA Section 101(b). The Agencies do not elaborate on their assertion that defining “waters of the United States” based on “balancing” Sections 101(a) and 101(b) is well “within the scope of authority that Congress has delegated to the agencies under the CWA.” It is not. The CWA has many policy goals and objectives¹⁷² – not just two – and the intent of Congress as to which waters would be protected under the CWA cannot be gleaned by balancing the national need for clean water against state’s role in eliminating pollution. That is nonsensical. It is patently obvious that the states can take a primary role in eliminating pollution in waters that are protected by the federal CWA.¹⁷³ This is the system

¹⁶⁹ Proposed Rule Notice, 82 Fed. Reg. at 34900.

¹⁷⁰ See e.g., *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring).

¹⁷¹ Proposed Rule Notice, 82 Fed. Reg. at 34901.

¹⁷² Inexplicably, the Agencies also state in the Notice that “[t]he objectives, goals, and policies of the statute are detailed in sections 101(a)-(g) of the statute, and guide the agencies’ interpretation and application of the Clean Water Act,” but immediately thereafter, the Agencies focus their analysis solely on portions of Sections 101(a) and 101(b). *Id.* at 34902.

¹⁷³ Notably, the Agencies state that the Proposed Rule will not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34904 (July 27, 2017). This is despite the fact that the Agencies also acknowledge in the Notice that the Proposed Rule is changing the legal definition of “waters of the United States” in a manner that will alter federal jurisdiction. *Id.* at 34,903.

of cooperative federalism under the CWA that has been in place since 1972.¹⁷⁴

The Agencies appear to be searching for a statutory basis to justify Administrator Pruitt's pre-determined mission to eliminate CWA protections, which he tries to characterize as "restoring states' important role in the regulation of water."¹⁷⁵ But the states' have never lost their important role in regulating water quality under the CWA, and even the most inclusive definition of "waters of the United States" would not usurp the state's roles in any event. Section 101(b) simply cannot, after roughly 40 years of dormancy on this issue, emerge now to bear the weight of the Agencies' determination to eliminate CWA protections for the nation's waters.

CONCLUSION

For the foregoing reasons, the Commenters urge the Agencies to withdraw the Proposed Rule and meaningfully engage the public and states in any process to review, rescind or revise the definition of "waters of the United States" prior to reaching any conclusions or taking any action.

¹⁷⁴ See e.g., *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 129 (D.C. Cir. 1976) ("Thus, without the national standards required by s 301, the fifty states would be free to set widely varying pollution limitations. These might arguably be different for every permit issued ... The plainly expressed purpose of Congress to require nationally uniform interim limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.")

¹⁷⁵ See U.S. EPA and U.S. Army News Release, "EPA and U.S. Army Solicit State Input on Redefining 'Waters of the U.S.'" "EPA is restoring states' important role in the regulation of water" (May 9, 2017).

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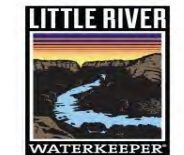
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April 15, 2019

Via email to ow-docket@epa.gov and online submission to www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Revised Definition of Waters of United States: Docket ID No. EPA-HQ-OW-2018-0149

To Whom it May Concern:

Waterkeeper Alliance, Center for Biological Diversity, Center for Food Safety, and the Waterkeeper Member Organizations and Affiliates identified below (“Commenters”) submit the following comments on the United States Environmental Protection Agency (“EPA”) and Department of Defense, Department of the Army, Corps of Engineers (“Corps”) (collectively, the “Agencies”) proposed rule entitled “Revised Definition of Waters of United States,” 84 Federal Register 4154-4201 (February 14, 2019) (hereinafter “Proposed Rule”).

The Proposed Rule seeks to overturn 40 years of legal precedent that has ensured broad protections for the Nation’s waters under the Clean Water Act (“CWA”).¹ It is a radical proposal that would strip protections against uncontrolled industrial, municipal, agricultural, and other pollution discharges into many, and in some parts of the country most, rivers, streams, lakes, ponds, wetlands, and other waters. The Agencies improperly created their entire faulty legal basis for the Proposed Rule from whole cloth solely to achieve the ideological objectives announced in Executive Order 13778² – i.e., to purportedly promote economic growth, minimize regulatory uncertainty, and show due regard

¹ 33 U.S.C. §1251 *et seq.*

² Executive Order 13778 of February 28, 2017, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12497 (March 3, 2017) (Hereinafter “Executive Order 13778”).

CLEAN WATER  STRONG COMMUNITIES

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for the roles of the Congress and the States under the Constitution.”³ The Proposed Rule, and the entirety of this administration’s effort to dismantle the CWA, is antithetical to the rule of law and due process, as well as to the standards of fundamental fairness embedded in the CWA and the Administrative Procedure Act (“APA”).⁴

Commenters are adamantly opposed to the Proposed Rule and the Agencies’ contorted attempts to eliminate CWA protections for our Nation’s waters through multiple illegal and discretion-abusing administrative actions.⁵ We submit these comments on the Proposed Rule, including previous comments on these actions which we hereby adopt and incorporate by reference herein.⁶

INTERESTS OF THE COMMENTING ORGANIZATIONS

Waterkeeper Alliance (“Waterkeeper”) is a not-for-profit organization dedicated to protecting and restoring water quality to ensure that the world’s waters are drinkable, fishable and swimmable. Waterkeeper is comprised of more than 340 Waterkeeper Member Organizations and Affiliates based in 44 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 177 U.S. Waterkeeper Member

³ *Id.* at sections 1 and 2.

⁴ Administrative Procedure Act, 5 U.S.C. §500 *et seq.*

⁵ U.S. EPA and U.S. Army Corps, Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532, (Mar. 6, 2017); Definition of “Waters of the United States” - Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (July 27, 2017); Definition of Waters of the United States: Public Meetings, 82 Federal Register 40742 (August 28, 2017); Definition of “Waters of the United States” - Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55542 (Nov. 22, 2017); “Definition of Waters of United States - Recodification of Pre-Existing Rules,” 83 Fed. Reg. 32227 (July 12, 2018); U.S. EPA, Waters of the United States (WOTUS) Rulemaking, Listening Session Presentations, <https://www.epa.gov/wotus-rule/listening-session-presentations> (last accessed April 12, 2019); U.S. EPA, Waters of the United States (WOTUS) Rulemaking Process, <https://www.epa.gov/wotus-rule/rulemaking-process> (last accessed April 12, 2019).

⁶ Natural Resource Defense Council et al. Comments on Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007), Docket ID No. EPA-HQ-OW-2007-0282 (Jan. 21, 2008) (“2008 Comments”); Natural Resource Defense Council et al. Comments on 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, Docket ID No. EPA-HQ-OW-2011-0409, (Aug. 1, 2011) (“2011 Comments”), available at: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0001>; Final Waterkeeper Comments on EPA-HQ-OW-2011-0880 (Nov. 14, 2014) (“2014 Comments”)(available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-16413>); Waterkeeper Alliance, et al., Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017) (“Repeal Comments”), available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-13681>; Comments of Waterkeeper Alliance et al. on Definition of “Waters of the United States” – Schedule of Public Meetings: Docket ID No. EPA-HQ-OW-2017-0480 (Nov. 28, 2017), (“Step 2 Comments”) available with attachments at <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0480-0750>; Waterkeeper Alliance et al. Comments on Definition of “Waters of the United States”— Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA-HQ-OW-2017-0644 (Dec. 13, 2017), (“Delay Comments”) available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0644-0401> and Waterkeeper Alliance et al. Comments on Definition of Waters of United States - Recodification of Pre-Existing Rules (“Supplemental Notice Comments”), Docket ID No. EPA-HQ-OW-2017-0203, (“Repeal Supplemental Comments”)available with attachments at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-15360>; (collectively hereinafter “Previous Comments”), all of which are attached hereto as (**Attachment 1**).

Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in waterways across the country – many of which are severely impaired by pollution. The CWA is the bedrock of our work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of our Member Organizations, Affiliate Organizations and our respective individual supporting members, as well as to protect the people and communities that depend on clean water for their survival. Our work – in which we have answered Congress’ call for “private attorneys general” to enforce the CWA when government entities lack the time, willingness or resources to do so themselves – requires us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand and have seen first-hand how important a clear definition of the “waters of the United States” is to the functionality and effectiveness of the CWA. A broad definition of “waters of the United States,” consistent with the language, purpose and intent of the CWA, is critical to our collective work to protect the nation’s waters.

The Center for Biological Diversity (“Center”) is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.5 million members and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life.

Center for Food Safety (“CFS”) is a nonprofit, public interest advocacy organization dedicated to protecting human health and the environment by promoting sustainable agriculture and halting the harmful impacts of industrial agriculture, including impacts to water resources. In furtherance of this mission, CFS uses legal actions, groundbreaking scientific and policy reports, books and other educational materials, and grassroots campaigns on behalf of its 930,000 farmer and consumer members across the country.

Commenters and their members have substantial interests in clean water for drinking, recreation, fishing, economic growth, food production, and other beneficial uses. These interests will be injured if the Agencies adopt this Proposed Rule narrowly redefining “waters of the United States” under the CWA because, as explained below, the definition: (1) Is substantively and procedurally arbitrary, capricious and contrary to law, (2) Would unlawfully reduce jurisdiction over the nation’s historically protected waters contrary to the CWA, and (3) Would also violate the APA, the National Environmental Policy Act (“NEPA”) ⁷ and the Endangered Species Act (“ESA”).⁸

⁷ National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*

⁸ Endangered Species Act, 16 U.S.C. §1531 *et seq.*

INTRODUCTION

The Proposed Rule constitutes the latest effort by the Agencies to define the statutory phrase “waters of the United States,” as set forth in 33 U.S.C. § 1362(7), for the purpose of identifying the waters subject to federal CWA jurisdiction. As explained in detail below, and in previous comments on the Agencies’ regulatory proposals, the Agencies have neither provided for meaningful public participation under the CWA nor complied with the APA in the development and publication of this Proposed Rule. The Proposed Rule is also contrary to the CWA and violates the requirements of the ESA, NEPA and Executive Order 13778. These failures, if unaddressed, will severely undermine or eliminate fundamental CWA protections across the country – endangering our nation’s water resources.

It would be virtually impossible to overstate the critical importance of the CWA regulatory definition of “waters of the United States,” and thus of this Proposed Rule, to the protection of human health, the well-being of communities, the success of local, state and national economies, and the functioning of our nation’s vast, interconnected aquatic ecosystems, as well as the many threatened and endangered species that depend upon those resources. If a stream, river, lake, or wetland is not included in the definition of “waters of the United States,” untreated toxic, biological, chemical, and radiological pollution can be discharged directly into those waters without meeting any of the CWA’s permitting and treatment requirements.⁹ Excluded waters could be dredged, filled and polluted with impunity because the CWA’s most fundamental human health and environmental safeguard – the prohibition of unauthorized discharges in 33 U.S.C. § 1311(a) – would no longer apply. Because “isolated” waterways do not exist in reality, but are merely a legal fiction of recent vintage, unregulated pollution discharged into waters that fall outside the Agencies’ definition will not only harm those receiving waters, but will often travel through well-known hydrologic processes before harming other water resources, drinking water supplies, recreational waters, fisheries, industries, agriculture, and, ultimately, human beings.

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain severely polluted, and by some indications, pollution appears to be increasing. For example, while not all waters across the country have been assessed for impairments, data from EPA show that water pollution in assessed waters has impaired 588,173 river/stream miles (approximately 53% impaired), 13,208,917 lake acres (≈71% impaired), 44,625 square miles of estuarine waters (≈79% impaired), 3,329 miles of coastal shoreline (≈72% impaired), 6,218 square

⁹ For example, the CWA contains the following core water quality protections: point source additions of pollutants to waters must have a permit, 33 U.S.C. §§1311(a) & 1342; the absolute prohibition against discharging “any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste,” *id.* §1311(f); protections against the discharge of oil or hazardous substances, *id.* § 1321; and restrictions on the disposal of sewage sludge, *id.* §1345.

miles of ocean and near-coastal waters (~89% impaired), 672,924 wetland acres (~54% impaired), and 4,354 miles of Great Lakes shoreline (~98% impaired), and 39,230 square miles of Great Lakes open water (~100% impaired):¹⁰

	Size of Water							
	Rivers and Streams (Miles)	Lakes, Reservoirs, and Ponds (Acres)	Bays and Estuaries (Square Miles)	Coastal Shoreline (Miles)	Ocean and Near Coastal (Square Miles)	Wetlands (Acres)	Great Lakes Shoreline (Miles)	Great Lakes Open Water (Square Miles)
Good Waters	518,293	5,390,570	11,516	1,298	726	569,328	106	1
Threatened Waters	4,495	30,309						
Impaired Waters	588,173	13,208,917	44,625	3,329	6,218	672,924	4,354	39,230
Total Assessed Waters	1,110,961	18,629,795	56,141	4,627	6,944	1,242,252	4,460	39,231
Total Waters	3,533,205	41,666,049	87,791	58,618	54,120	107,700,000	5,202	196,343
Percent of Waters Assessed	31.4	44.7	63.9	7.9	12.8	1.2	85.7	20.0

By comparison, EPA’s 2004 CWA Section 305(b) Report showed that there were 246,002 miles of impaired rivers/streams and 10,451,401 acres of impaired lakes as of 2004¹¹. As noted in the 2013 Draft Connectivity Report and the 2014 Science Advisory Board (“SAB”) Review of that Report for the 2015 Clean Water Rule (“CWR”), there is strong scientific evidence to support the conclusion that ephemeral streams, intermittent streams, perennial streams, floodplain wetlands, non-floodplain wetlands, and other waters are either connected to downstream waters or sustain the physical, chemical, and/or biological integrity of downstream waters.¹² It is thus imperative that these waters remain protected under the CWA.

Clean water is important to nearly every aspect of our lives and livelihoods, but most importantly, it is essential to life itself. As a nation, we cannot have clean water unless we control pollution at its source – wherever that source may be. This entails protecting waters throughout the entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are connected to traditionally navigable waterways. With regard to the CWA, as the Supreme Court has observed, “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal

¹⁰ EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, available at http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last accessed on April 12, 2019) (hereinafter “Watershed Assessment”) (**Attachment 2**).

¹¹ EPA, Findings on the National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle, available at: https://www.epa.gov/sites/production/files/2015-09/documents/2009_01_22_305b_2004report_2004_305breport.pdf (last accessed on April 12, 2019) (**Attachment 3**).

¹² U.S. Environmental Protection Agency, Office of Research and Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence - External Review Draft - EPA/600/R-11/098B (Sept. 2013) (hereinafter “Connectivity Report”); U.S. Environmental Protection Agency, Science Advisory Board, Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 (Oct. 17, 2014) (hereinafter “SAB Report”). Both available at: [https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/\\$File/WO_US_ERD2_Sep2013.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WO_US_ERD2_Sep2013.pdf) (last accessed on April 12, 2019). (**Attachment 4**).

authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' This is precisely why "Congress chose to define the waters covered by the Act broadly."¹³

The breadth of the waters protected under the CWA, and the reasons therefore, were firmly established with the passage of the CWA in 1972 and are reflected in the Agency definitions of "waters of the United States" in 1973 (EPA) and 1977 (Corps), which protected navigable-in-fact waters, interstate waters, the territorial seas, impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and "[a]ll other waters ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce."¹⁴ If we can ever hope to restore the chemical, physical and biological integrity of our nation's waters – which was and remains the bedrock "objective" of Congress when it passed the CWA – it is essential that the definition of "waters of the United States" under the CWA continue to protect traditionally navigable waters, interstate waters, tributaries, adjacent waters, wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes, lakes, estuaries, and other waters that either provide important functions themselves or have an influence on downstream waters.

Any revised definition of "waters of the United States" must continue to ensure broad jurisdiction to control pollution consistent with the intent of Congress when it enacted the CWA. The Proposed Rule does not come close to meeting this standard. Based on a legally and factually unsound analysis, the Agencies propose to dramatically reframe the entire CWA to only protect "relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific connection to traditional navigable waters, as well as wetlands abutting or having a direct hydrologic surface connection to those waters." This proposed definition is devoid of scientific or legal justification, is directly contrary to plain Congressional intent, and violates the CWA.

I. THE CWA MANDATES A BROAD DEFINITION OF "WATERS OF THE UNITED STATES" CONSISTENT WITH CONGRESSIONAL INTENT TO RESTORE AND MAINTAIN THE NATION'S WATERS.

The Agencies state that they developed the Proposed Rule for the purpose of "defining the scope of waters *subject to federal regulation* under the Clean Water Act ("CWA"), *in light of* the U.S. Supreme Court cases in *United States v. Riverside Bayview Homes (Riverside Bayview)*, *Solid Waste*

¹³ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing S.Rep. No. 92414, p. 77 (1972); H.R.Rep. No. 92911, p. 76 (1972); U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742).

¹⁴ 40 C.F.R. §122.3 (1981) (45 Fed. Reg. 33,290, 33,424 (May 19, 1980)); *see also* 33 C.F.R. §323.2 (1983) (47 Fed. Reg. 31,794, 31,810 (July 22, 1982)).

Agency of Northern Cook County v. United States (SWANCC), and Rapanos v. United States (Rapanos), and consistent with EO 13778, signed on February 28, 2017, entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”¹⁵ This statement perfectly illustrates a fundamental flaw in the Agencies’ basis for the Proposed Rule.

The objective of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁶ The Act is a water quality statute carefully designed by Congress to achieve that objective.¹⁷ Accordingly, Congress provided that the CWA applies to all “waters of the United States, including the territorial seas.”¹⁸ The Conference Report accompanying the CWA confirms that Congress intended that the phrase “waters of the United States” to be given “the broadest possible constitutional interpretation.”¹⁹

Although it is well-settled that the CWA is a comprehensive regulatory statute for the Nation’s waters under which cooperative federalism was employed by Congress to balance state and federal interests,²⁰ the Agencies have creatively reimagined it as one where only a subset of the Nation’s waters – “waters of United States” – are regulated, and in which Congress empowered the Agencies to make policy choices to achieve the proper balance of federal and state interests for that subset. In order to reach that point, the Agencies ignore, misinterpret and misquote the plain text of the CWA, Supreme Court and lower court precedent, and their own regulations. It is extremely unfortunate that the Agencies would employ such an obvious artifice to justify their reliance on

¹⁵ Proposed Rule, at 4155 (Executive Summary).

¹⁶ 33 U.S.C. §1251(a).

¹⁷ *PUD No. 1 of Jefferson County v. Wash. Dep’t. of Ecology*, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).

¹⁸ 33 U.S.C. §1362(7).

¹⁹ S. Rep. No. 92-1236, at 144 (1972).

²⁰ See e.g., *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 and fn. 30 (1981) (cooperative federalism . . . allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs. See *In re Permanent Surface Mining Regulation Litigation*, 199 U.S.App.D.C. 225, 226, 617 F.2d 807, 808 (1980). In this respect, the Act resembles a number of other federal statutes that have survived Tenth Amendment challenges in the lower federal courts,” noting that the CWA is one of those statutes citing to “*Sierra Club v. EPA*, 176 U.S.App.D.C. 335, 359, 540 F.2d 1114, 1140 (1976) (upholding the Clean Water Act, 33 U.S.C. § 1251 *et seq.*), cert. denied, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977).); See also *New York v. United States*, 505 U.S. 144, 167 (1992) (“Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, 452 U.S., at 288, 101 S.Ct., at 2366. See also *FERC v. Mississippi*, *supra*, 456 U.S., at 764–765, 102 S.Ct., at 2140. This arrangement, which has been termed “a program of cooperative federalism,” *Hodel*, *supra*, 452 U.S., at 289, 101 S.Ct., at 2366, is replicated in numerous federal statutory schemes. These include the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.*, see *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S.Ct. 1046, 1054, 117 L.Ed.2d 239 (1992) (Clean Water Act “anticipates a partnership between the States and the Federal Government, animated by a shared objective”) . . .”).

undisclosed “policy choices and other relevant factors,” and to ultimately propose a capriciously narrow, arbitrary and hopelessly vague definition of “waters of the United States.”

The Agencies claim that “[t]he fundamental basis used by the agencies for the revised definition proposed today is 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.”²¹ But, in reality, the Agencies only considered the portions of the CWA, legislative history and case law that could be used to support their long-ago predetermined outcome of adopting a narrow definition of “waters of the United States” and, thus, eliminate CWA protections for waterways across the country. Contrary to law, the Agencies do not identify the “agency policy choices and other relevant factors” that they relied on as a fundamental basis for the Proposed Rule that ultimately formed their basis for the definition.

In the Proposed Rule, the Agencies also disregard vast portions of the CWA, as well as legislative history and legal precedent, which powerfully demonstrate Congress’ intention to establish “***an all-encompassing program of water pollution regulation***” that “applies to all point sources and ***virtually all bodies of water***.”²² Instead of protecting the Nation’s waters by defining “waters of the United States” to the maximum extent permitted under the Commerce Clause as intended by Congress,²³ the Agencies have attempted to craft a legal justification for protecting as few waters as possible consistent with the legal positions of polluting industries and some states that oppose the CWR in pending litigation. The Agencies also purport to seek information and argument through this rulemaking process to justify the extreme and unreasonable shift in their legal interpretations and obligations.

By contrast, the previous longstanding views of the Agencies, and the positions of other interested parties, are not discussed, considered or evaluated in the Proposed Rule in any meaningful way. While it is acceptable in certain circumstances for agencies to make policy shifts,²⁴ it is not permissible for Agencies to reinterpret an entire statute and attempt to narrow its scope contrary to longstanding interpretations in order to achieve extraneous policy goals that are contrary to the objective and goals of a statute. Yet, it is apparent from the Proposed Rule that the Agencies are attempting to manufacture a way to reinterpret the CWA and case law to justify replacing the pre-

²¹ Proposed Rule, at 4156.

²² *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

²³ *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); 39 Fed. Reg. 12119 (April 3, 1974).

²⁴ See, e.g., Waterkeeper Alliance, et al., Comments on Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA-HQ-OW-2017-0644 (Dec. 13, 2017) and Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), *supra* note 6.

2015 definition and the CWR with a narrow definition of “waters of the United States” based on the Agencies’ erroneous reading of Executive Order 13778.

Additionally, although there is extensive Supreme Court precedent relevant to the meaning of “waters of the United States,” and even more abundant precedent from the courts of appeals and federal district courts, the Agencies have chosen for unexplained reasons to interpret the phrase only “in light of the U.S. Supreme Court cases in *United States v. Riverside Bayview Homes* (*Riverside Bayview*), *Solid Waste Agency of Northern Cook County v. United States* (*SWANCC*), and *Rapanos v. United States* (*Rapanos*) . . .”²⁵ Their choice of words here is important. There is a meaningful difference in interpreting a phrase “in light of” precedent and interpreting a phrase to ensure the interpretation is “consistent with” such precedent, the latter being what is required of administrative agencies.

Here, the Agencies certainly evaluated the listed cases but, as explained in detail below, the proposed definition is in no way consistent with them. To the contrary, it is consistent with the policy goal of a February 2017 Executive Order. This is the improper predetermined outcome that has been apparent from the beginning,²⁶ and is reflected in a single statement in this Notice. While the rule was interpreted “in light of” three Supreme Court Cases, the Agencies state that it is “consistent with Executive Order 13778, signed on February 28, 2017, entitled ‘Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.’”²⁷ This is plainly improper.²⁸

II. THE AGENCIES’ PROFFERED INTERPRETATION OF THE TEXT AND INTENT OF THE CWA IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

The CWA is a “comprehensive water quality statute designed to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’”²⁹ The Congressionally-intended breadth of the CWA is indisputably apparent in the comprehensive and interrelated goals, policies, definitions, programs, and directives set forth in text of the Act itself, as well as in Congress’ direction that the entire Act applies broadly to protect the “waters of the United States, including

²⁵ Proposed Rule, at 4155.

²⁶ See, e.g., Previous Comments, including: Comments of Waterkeeper Alliance et. al., Docket ID No. EPA-HQ-OW-2017-0480, pp. 8-16; Final Comments Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203; Final 12.13.17 CBD et al Comments WOTUS Addition of Applicability Date EPA-HQ-OW-2017-0644.

²⁷ Proposed Rule, 4155.

²⁸ These Comments attempt to track the organizational structure of the Agencies’ Proposed Rule Notice as closely as possible in response to the Agencies’ request. Proposed Rule, at 4155.

²⁹ *PUD No. 1 of Jefferson County v. Wash. Dep’t. of Ecology*, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).

the territorial seas.”³⁰ The intended breadth is further illuminated and confirmed by (1) the history of the legislative acts that preceded, and formed the basis of, the CWA, (2) more than four decades of judicial precedent confirming it, (3) the longstanding federal and state regulations, programs, permits, standards, and enforcement actions implementing it, and (4) the continuing Congressional efforts to broaden its application and fund these actions. The Agencies’ failure to consider all this evidence is arbitrary, capricious and contrary to law. While the Agencies do acknowledge that some of this exists and that a subset of the items are relevant,³¹ the entire rulemaking is based on the wholly novel and erroneous premise that the “Nation’s waters” has a different meaning than “waters of the United States.”

Under the Agencies’ contrived view, the CWA has an undefined set of provisions the Agencies deem “non-regulatory” that were intended to apply to the “Nation’s waters” defined broadly, and a separate, unidentified, set of “regulatory” provisions that were only intended to apply to the “waters of the United States” defined narrowly. It is on this basis that the Agencies announce that they are proposing a regulation “defining the scope of waters **subject to federal regulation** under the Clean Water Act (CWA).”³²

Despite an utter dearth of precedent for this view of the CWA, or any analysis of the extensive precedent to the contrary,³³ the Agencies thus proceed to: (1) create a new undefined category of waters called the “Nation’s waters,” (2) decree that some unidentified “non-regulatory” portions of the CWA apply to the “Nation’s waters,” (3) create a new definition of “waters of the United States” that does not include many historically protected waters, and (4) decree that some unidentified subject of “regulatory programs” only apply to this new narrow definition of “waters of the United States.”³⁴ No court or prior administration has ever interpreted the CWA in this manner, and there is no support for it in the text of the Act, case law or its legislative history. It is plainly contrary to law and is arbitrary and capricious.

³⁰ 33 U.S.C. §1362; *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing H.R.Rep. No. 92-911, p. 76 (1972); S.Rep. No. 92-414, p. 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742) (“To accomplish these goals, the Court in *Bayview* concluded, Congress defined the “waters covered by the Act broadly” to encompass all “waters of the United States.”).

³¹ See Proposed Rule, at 4156-4162.

³² *Id.* at 4155(emphasis added)

³³ See, e.g., *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 310-11 (1981) (emphasis added) (“The [Federal Water Pollution Control Act Amendments of 1972] established a **new system of regulation** under which it is **illegal for anyone to discharge pollutants into the Nation's waters** except pursuant to a permit.”)

³⁴ The Agencies erroneously state: “In addition to the Act’s non-regulatory measures to control pollution of the nation’s waters generally, Congress created a federal regulatory permitting program designed to address the discharge of pollutants into a subset of those waters identified as “navigable waters” or “the waters of the United States,” *id.* at 1362(7). Section 301 contains the key regulatory mechanism: “Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.” *Id.* at 1311(a).” Proposed Rule at 4157.

Relatedly, the Agencies misquote and cite text from the CWA out of context to advance their theory that Congress called on the Agencies to define “waters of the United States” in a narrow manner that somehow balances state’s rights with the overall objective of the CWA. The truth is that Congress itself established that balance in the text of the CWA through a system of cooperative federalism. As explained in detail below, Congress did not intend for CWA Section 101(b) to limit the jurisdictional reach of the CWA. These are irrelevant and impermissible considerations for defining “waters of the United States.”

In service of their mission to create a post-hoc legal justification for protecting the fewest waters possible, the Agencies attempt to rewrite the history, the meaning and purpose of the CWA, as well as the history of our nation’s water pollution control laws over the last century. For example:

- **The Agencies assert: “Prior to 1972, the ability to control and redress water pollution in the nation’s waters largely fell to the U.S. Army Corps of Engineers (“Corps”) under the Rivers and Harbors Act of 1899 (“RHA”).”**³⁵ This is inaccurate.³⁶ The Agencies do acknowledge that Section 13 of the RHA, the Refuse Act³⁷ made it unlawful to discharge refuse “into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.” But they then fail to explain how they could take the position in the Proposed Rule that Congress did not intend in 1972 for the CWA, which indisputably *expanded* federal jurisdiction to address the nation’s pollution problems, to cover all tributaries to all navigable waters of the United States.
- **The Agencies assert: The Water Pollution Control Act of 1948, as amended in 1948, 1961 and 1965 was focused on interstate water pollution.**³⁸ To the contrary, as the Supreme Court explained in *Illinois v. City of Milwaukee*, “the Federal Water Pollution Control Act, 62 Stat. 1155,

³⁵ Proposed Rule, at 4156.

³⁶ See N. William Hines, History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform, 4 J. Energy & Env’tl L 80, 82-94 (2013), <https://gwuieel.files.wordpress.com/2013/10/4-2-hines.pdf> (hereinafter “Hines”) Describing pollution control effort under the 1948 Federal Water Pollution Control Act and subsequent amendments. (“Of vital importance to the modern history of U.S. water pollution control, the 1899 amendments to the Rivers and Harbors Act also gave the Corps the authority to regulate all discharges of wastes to the affected waters, except liquid wastes flowing from municipal sanitary sewers and storm sewers. Interestingly, this potentially powerful federal tool to control and prevent water pollution nationwide remained dormant for over seventy years until revitalized by a Supreme Court decision in 1966. (citing *United States v. Standard Oil*, 384 U.S. 224 (1966)). (Attachment 5).

³⁷ 33 U.S.C. §407.

³⁸ Proposed Rule, at 4156. These are not all of the relevant major amendments. See Claudia Copeland, Congressional Research Report for Congress, RL30030, Clean Water Act: A Summary of the Law, p. 1 (Oct. 30, 2014), available at: <https://www.hsdl.org/?abstract&did=759368> (Attachment 6).

as amended, 33 U.S.C. s 1151, tightens control over discharges into navigable waters so as not to lower applicable water quality standards.”³⁹ Further, the Act “in s 1(b) declares that it is federal policy ‘to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution.’ But the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters. While the States are given time to establish water quality standards, s 10(c)(1), if a State fails to do so the federal administrator promulgates one. s 10(c)(2). Section 10(a) makes pollution of **interstate or navigable waters** subject ‘to abatement’ when it ‘endangers the health or welfare of any persons.’”⁴⁰ In addition to the pollution abatement, water quality standards and enforcement provisions mentioned by the Agencies, the 1965 Act also contained provisions for grants, funding for research and development, and many other topics, like the CWA does.

- **The Agencies assert:** “These early statutory efforts, however, proved inadequate to address the decline in the quality of the nation’s waters, see *City of Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981), so Congress performed a “total restructuring” and “complete rewriting” of the existing statutory framework in 1972, id. at 317 (quoting legislative history of 1972 amendments).”⁴¹ The key context for this quoted language in the Court’s opinion is missing, and the more relevant language is omitted by the Agencies. When the context and relevant language is considered, it becomes apparent that the CWA built upon and expanded prior water pollution laws to such a great extent that it supplanted federal common law. The Court explained that the CWA is a comprehensive regulatory program, and that Congress intended it cover more water than previous legislation:

Congress’ intent in enacting the Amendments was clearly to establish **an all-encompassing program of water pollution regulation**. Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The “major purpose” of the Amendments was “**to establish a comprehensive long-range policy for the elimination of water pollution.**” S.Rep.No.92-414, at 95, 2 Leg.Hist. 1511 (emphasis supplied). No Congressman’s remarks on the legislation were complete without reference to the “comprehensive” nature of the Amendments. A House sponsor described the bill as “**the most comprehensive and far-reaching water pollution bill we have ever drafted,**” 1 Leg. Hist. 369 (Rep. Mizell), and Senator Randolph, Chairman of the responsible Committee in the Senate, stated: “It is perhaps the most comprehensive legislation ever developed in its field. It is perhaps the most comprehensive legislation that the Congress of the United States has ever

³⁹ *Illinois v. City of Milwaukee*, 406 U.S. 91, 101 (1972).

⁴⁰ *Id.* at 102 (emphasis added, footnotes omitted).

⁴¹ Proposed Rule, at 4156.

developed in this particular field of the environment.” 2 id., at 1269.12. This Court was obviously correct when it described the 1972 Amendments as establishing “a comprehensive program for controlling and abating water pollution.” *Train v. City of New York*, 420 U.S. 35, 37, 95 S.Ct. 839, 841, 43 L.Ed.2d 1 (1975). The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law. See *Texas v. Pankey*, 441 F.2d, at 241.⁴²

- **The Agencies assert:** “That restructuring resulted in the enactment of a comprehensive scheme (including voluntary as well as regulatory programs) designed to prevent, reduce, and eliminate pollution in the nation’s waters generally, and to regulate the discharge of pollutants into navigable waters specifically. See, e.g., *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 385 (2006) (noting that “the Act does not stop at controlling the ‘addition of pollutants,’ but deals with ‘pollution’ generally”).”⁴³ Here, the Agencies add their own unsupported views that (1) the CWA includes voluntary as well as regulatory programs and (2) the Act controls pollution in the “nation’s waters” through non-regulatory programs, but discharges of pollution are only regulated if they are into a narrower category of “navigable waters.” Contrary to the Agencies’ theory, the Supreme Court in *City of Milwaukee v. Illinois* described the CWA as both a “comprehensive regulatory program” and “a new system of regulation under which it is illegal for anyone to discharge pollutants *into the Nation’s waters* except pursuant to a permit.”⁴⁴ The Agencies also misconstrue *S.D. Warren Co. v. Maine Bd. of Environmental Protection* as supporting their theory, when in actuality the Supreme Court in that case concluded that the regulatory provisions of the CWA extended beyond just the discharge of pollutants to include controlling all pollution of the Nation’s waters generally – meaning the “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water” – through state-issued Clean Water Act Section 401 water quality certifications for federal licenses.⁴⁵ *S.D. Warren*, rather than supporting the Agencies’ views on the need for a narrow definition of “waters of the United States” to protect states’ rights preserved in 101(b), stands for the proposition that Congress

⁴² *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318–19 (1981) (internal footnotes omitted).

⁴³ Proposed Rule, at 4156.

⁴⁴ *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 310–11, 317 (1981).

⁴⁵ *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 385 (2006) (“Congress passed the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a); see also *PUD No. 1*, 511 U.S., at 714, the “national goal” being to achieve “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)(2). To do this, the Act does not stop at controlling the “addition of pollutants,” but deals with “pollution” generally, see § 1251(b), which Congress defined to mean “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,” § 1362(19).”)

protected those interests by broadly protecting the nation's waters and providing mechanisms for the states to protect their own interests articulated in 101(b) through the CWA itself. This is known as Cooperative Federalism. As the *S.D. Warren* Court stated:

Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns. See 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"); § 1256(a) (federal funds for state efforts to prevent pollution); see also § 1370 (States may impose standards on the discharge of pollutants that are stricter than federal ones). State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a *fait accompli* by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970). These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge.⁴⁶

- **The Agencies assert: The 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). In order to meet that objective, Congress declared two national goals: (1) "that the discharge of pollutants into the navigable waters be eliminated by 1985;" and (2) "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983" Id. at 1251(a)(1)-(2). Congress also established several key policies that direct the work of the agencies to effectuate those goals.⁴⁷ Section 101 of the CWA establishes the objective of the Act, and everything that follows is intended to aid in the achievement of that objective. The Agencies claim, without any basis whatsoever, that the policies in Section 101(a)(3)-(7) are solely intended to aid in the achievement of the two goals focused on discharges set forth in Section 101(a)(1) and (2). This is an obvious attempt to provide textual support for their newfangled theory of a narrower class of waters – waters of the United States – for all of the CWA's "regulatory programs" to control**

⁴⁶ *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006).

⁴⁷ Proposed Rule, at 4156.

discharges. It is notable that, when quoting these policies, the Agencies chose not to quote the policy in 101(a)(6), which describes many of the grant and financial assistance programs that they later characterize as the “non-regulatory” programs of the CWA to which the broader “Nation’s waters” supposedly applies.⁴⁸ This is disingenuous and makes clear the extreme contortions of the CWA the Agencies had to undertake in order to try to find an interpretation that would provide some basis for the Proposed Rule.

- **The Agencies selectively cite to provisions in Section 101(b) and Section 510 to support their unfounded theories regarding their authority to “balance” states’ rights and the objective of the CWA when they define “waters of the United States.”**⁴⁹ The CWA, as reflected in the full text of these sections, establishes a system of cooperative federalism “that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”⁵⁰ For example, Section 510, rather than just preserving state’s rights and jurisdiction over water as asserted by the Agencies, actually states:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or

⁴⁸ *Id.* (The Agencies selective cite portions of Section 101(a)(3-7), leaving out 101(a)(6) as follows: “. . . “that the discharge of toxic pollutants in toxic amounts be prohibited; . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.” *Id.* at 1251(a)(3)–(7).

⁴⁹ Proposed Rule, at 4156.

⁵⁰ *Hodel v. Virginia Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264, 289 (1981); *New York v. United States*, 505 U.S. 144, 167 (1992) [internal citations omitted] (“This arrangement, which has been termed ‘a program of cooperative federalism,’ *Hodel*, supra, is replicated in numerous federal statutory schemes. These include the Clean Water Act, see *Arkansas v. Oklahoma*, (Clean Water Act “anticipates a partnership between the States and the Federal Government, animated by a shared objective”).”

in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.⁵¹

When this full text is evaluated, a different conclusion that that proffered by the Agencies regarding its meaning becomes apparent.⁵² Nothing in this section, or any other section of the Act, authorizes the Agencies to narrowly define “waters of the United States” by purporting to balance states’ rights against the objective of the CWA. Congress considered and resolved these issues in the Act itself,⁵³ and it is not within the authority of the Agencies to insert their own judgment in a manner that would deprive the Agencies of the regulatory authority and the accompanying obligations that Congress expressly granted to them in the text of the Act.

- **The Agencies assert: Congress defined pollution broadly to parallel the objective of the CWA, and “Congress then crafted a non-regulatory statutory framework to provide technical and financial assistance to the States to prevent, reduce, and eliminate pollution in the nation’s waters generally. For example, section 105 of the Act, ‘Grants for research and development,’ authorized EPA ‘to make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into any waters of pollutants from sewers which carry storm water or both storm water and pollutants.’ 33 U.S.C. 1255(a)(1) (emphasis added).”⁵⁴** No court or prior administration has ever characterized the CWA this manner, and for good reason, as it is utterly contrary to Congressional intent and the plain language of the CWA. It is also contrary to the Agencies’ own regulations implementing the Act. Congress simply did not set up a regulatory scheme for a narrow class of waters it called “waters of the United States,” then define pollution broadly to protect a broader class of waters it called the “Nation’s waters,” and then create a non-regulatory system of technical and financial assistance to help the states control pollution of that broader class. For example, the Agencies’ position on Section 105 here, as noted above, is in direct contravention to their assertion that the policies of Section 101(a)(3)-(7) were solely to achieve the regulatory goals in Section 101(b)(2)-(3). 101(a)(6) states “[I]t is

⁵¹ 33 U.S.C. §1370. (emphasis added)

⁵² See *Arkansas v. Oklahoma*, 503 U.S. 91, 98–100 (1992) (“On remand, Illinois argued that § 510 of the Clean Water Act, 33 U.S.C. § 1370, expressly preserved the State’s right to adopt and enforce rules that are more stringent than federal standards.⁵ The Court of Appeals accepted Illinois’ reading of § 510, but held that that section did “no more than to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters.” *Illinois v. Milwaukee*, 731 F.2d 403, 413 (CA7 1984), cert. denied, 469 U.S. 1196, 105 S.Ct. 979, 83 L.Ed.2d 981 (1985). This Court subsequently endorsed that analysis in *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987).”

⁵³ See Hines, *supra* note 36 at pp. 92-105..

⁵⁴ Proposed Rule, at 4157.

the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.”⁵⁵ Section 105 establishes grants for research and development to prevent, reduce and eliminate the discharge into any waters of pollutants “from sewers which carry storm water or both storm water and pollutants.”⁵⁶ Such discharges are regulated under the CWA. The use of the phrase “any waters” in this section simply confirms Congress’ intent to regulate all discharges into the Nation’s waters. Providing financial assistance to states to help accomplish this is perfectly consistent with the Act’s system of cooperative federalism under Sections 101(b) and 510. There is no sound basis for the Agencies’ position that this, or any of the other sections cited in the Proposed Rule, creates an alternative non-regulatory framework for the Nation’s waters “generally.”

It is likely that the Agencies consciously chose not to provide full quotes or representative excerpts of the actual text of the sections of the CWA upon which they rely to advance this erroneous theory. For example, regarding “Section 105(b)-(c)”, the Notice indicates that these provisions relate to grants to States or Interstate Agencies for pollution by any source of “any waters,” but they are in fact two different provisions with very different purposes.

- Section 105(b) authorizes the Administrator to make grants to any State or States or interstate agency to demonstrate, in river basins or portions thereof, advanced treatment and environmental enhancement techniques to control pollution from all sources, within such basins or portions thereof, including nonpoint sources, together with in stream water quality improvement techniques.⁵⁷
- Section 105(c) authorizes the Administrator, for the purpose of developing effluent limitations for industry discharges under Section 301, “to (1) conduct in the Environmental Protection Agency, (2) make grants to persons, and (3) enter into contracts with persons, for research and demonstration projects for prevention of pollution of any waters by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants. No grant shall be made for any project under this subsection unless the Administrator determines that such project will develop or demonstrate a new or improved method of treating industrial wastes or otherwise prevent pollution by industry, which method shall have industrywide application.”⁵⁸ Clearly, this is an integral

⁵⁵ 33 U.S.C. §1251(a)(6).

⁵⁶ 33 U.S.C. §1255.

⁵⁷ 33 U.S.C. §1255(b).

⁵⁸ 33 U.S.C. §1255(c).

part of the CWA regulatory system for developing Technology-Based Effluent Limitations for Section 402 permits and preventing pollution of “any waters.”

None of the other sections the Agencies cite demonstrate the existence of the purported “non-regulatory framework” discussed and relied on in the Notice. To the contrary, Section 106 provides grants for the state’s delegated pollution control programs⁵⁹ and the other sections relate to pollution control programs for navigable and/or interstate waters like the Chesapeake Bay, the Great Lakes, Long Island Sound, Lake Champlain, and the Columbia River.⁶⁰

In sum, the Agencies are simply wrong - the CWA is ***an all-encompassing program of water pollution regulation*** that applies to the Nation’s waters - i.e., the “waters of the United States.”⁶¹

III. THE AGENCIES’ LONG-STANDING REGULATORY DEFINITION BROADLY PROTECTS ‘WATERS OF THE UNITED STATES’ CONSISTENT WITH THE CWA.

Prior to the CWR, the definition of “waters of the United States” under the CWA had remained in place largely unchanged since the 1970s.⁶² The definition broadly encompassed jurisdiction over the nation’s waters consistent with the CWA,⁶³ and had never been overturned by a court.⁶⁴ This

⁵⁹ According to EPA, Section 106 grants can support a wide variety of water pollution prevention and control programs and activities, including: (1) Monitoring and assessing water quality; (2) Developing water quality standards; (3) Identifying impaired waters and total maximum daily loads; (4) Managing national pollutant discharge elimination system permits; (5) Ensuring compliance; (6) Implementing enforcement actions; (6) Protecting source water; and (6) Managing outreach and education programs. See <https://www.epa.gov/water-pollution-control-section-106-grants/learn-about-water-pollution-control-section-106-grant> (**Attachment 7**).

⁶⁰ See, e.g., 33 U.S.C. §§1267, 1268, 1269, 1270 and 1275.

⁶¹ *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318–19 (1981). See also Comments of Environmental Organizations on Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States” (April 16, 2003), (hereinafter “2003 Comments”) which are incorporated by reference herein (**Attachment 8**); Hines *supra* note 36 at pp. 92-195; and 33 U.S. C §. 1313 (applying water quality standard to “interstate waters,” “intrastate waters,” “navigable waters” and simply “waters.”).

⁶² See regulatory definitions at 33 CFR part 328 and 40 CFR parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401

⁶³ This is true with the exception of the illegal waste treatment exclusion described in Section VIII of these comments.

⁶⁴ Neither the Supreme Court’s decision in *SWANCC* nor its decision in *Rapanos* invalidated any provision in the Agencies’ regulatory definitions of “waters of the United States” under the CWA. As the Agencies acknowledge in the Notice, in *SWANCC*, the “Supreme Court held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA.” 82 Fed. Reg. at 34900. *SWANCC* dealt only with an administrative interpretation of 33 C.F.R. §328.3(a)(3) (1999), dubbed the “Migratory Bird Rule,” that purported to assert jurisdiction based on the mere fact that particular waters were or could be used by migratory birds, and the Court did not vacate 33 C.F.R. §328.3(a)(3). Nothing in *Rapanos* is to the contrary. See 80 Fed. Reg. at 37,061 (recognizing that nothing in *Rapanos* “invalidated any of the current regulatory provisions defining ‘waters of the United States’”).

definition currently remains in place in 28 States.⁶⁵

Consistent with Congressional intent, the EPA (1973)⁶⁶ and the Corps (1977)⁶⁷ adopted regulations further defining “waters of the United States” for the purposes of the CWA to include broad categories of waters beyond those protected by traditional navigability tests. When the Corps adopted its definition of “waters of the United States” in 1977, it recognized that “[t]he 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.”⁶⁸ In the Preamble to the Corps’ 1977 rule defining “waters of the United States,” the Corps stated:

Waters that fall within categories 1, 2, and 3 are ***obvious candidates for inclusion*** as waters to be protected under the Federal government’s broad powers to regulate interstate commerce. ***Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have an effect on interstate commerce.*** The Corps’ earlier 1975 definition identified certain of these waters. These included waters used:

- By interstate travelers for water-related recreational purposes;
- For the removal of fish that are sold in interstate commerce;
- For industrial purposes by industries in interstate commerce; and
- In the production of agricultural commodities sold or transported in interstate commerce.

We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over ‘other waters’ such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some

⁶⁵ Proposed Rule, at 4162.

⁶⁶ 38 Fed. Reg. 10834 (1973).

⁶⁷ 42 Fed. Reg. 37122 (1977).

⁶⁸ 42 Fed. Reg. 37128 (July 19, 1977).

connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.⁶⁹

Under the 1977 Definition, waters in Categories 1, 2, and 3, over which jurisdiction was “obvious” under the federal government’s broad powers to regulate interstate commerce, included: (1) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands; (2) Tributaries to navigable waters of the U.S., including adjacent wetlands; and (3) Interstate waters and their tributaries, including adjacent wetlands.⁷⁰ Additionally, based on reasoning set forth above, the Corps included “other waters” where the use or destruction of the waters could affect interstate commerce within the definition of “waters of the United States.”⁷¹

Prior to the CWR, this basic approach to broadly defining “waters of the United States” had been in place since 1975, and remains consistent with the intent of Congress announced in 1972. Accordingly, the longstanding definition of “waters of the United States” for the purposes of the CWA includes:⁷²

- A. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- B. All interstate waters, including interstate “wetlands.”
- C. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.
- D. All impoundments of waters otherwise defined as waters of the United States under this definition.
- E. Tributaries of waters identified in paragraphs (a) through (d) of this definition.
- F. The territorial seas.
- G. “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Under the APA, the Agencies are required to “provide reasoned explanation” for their proposal to replace this definition with the Proposed Rule definition, and “must show that there are good

⁶⁹ 42 Fed. Reg. 37127-37128.

⁷⁰ *Id.*

⁷¹ 42 Fed. Reg. 37122 (1977).

⁷² *See e.g.*, 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

reasons” for doing so.⁷³ As the Supreme Court explained in *FCC v. Fox Television Stations, Inc.* (“*Fox*”),⁷⁴ a more detailed justification is required when an agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy” and “[i]t would be arbitrary or capricious to ignore such matters ... [because] a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁷⁵ The Agencies have completely failed to explain their basis for replacing this definition with the much narrower one announced in the Proposed Rule. This action is arbitrary and capricious, in addition to being contrary to law on the basis that the Proposed Rule is inconsistent with the CWA.

Additionally, the Agencies must evaluate the Proposed Rule in relation to the prior definition text, as well as the 2015 CWR, to determine the impacts of the Proposed Rule on water resources, programs, and economic effect. The Agencies have failed to properly undertake that analysis. Instead, they purported to compare the Proposed Rule to their vaguely described interpretation of the pre-2015 regulatory definition in light of guidance documents and the CWR. However, those 2003 and 2008 Guidance Documents, and the Agencies’ interpretation of them, are not the law that the Agencies seek to replace with the Proposed Rule. Further, the Guidance Documents are inconsistent with the CWA and Supreme Court precedent.

In the years preceding the CWR, the 2003 SWANCC⁷⁶ and 2008 Rapanos⁷⁷ Guidance Documents implemented by the Agencies reduced protections for the Nation’s waters by limiting jurisdiction in a manner that was not justified by science or law.⁷⁸ The Guidance Documents were issued by the Agencies in response to the *SWANCC* and *Rapanos* opinions, but interpreted those decisions more broadly than the decisions allow or require. The Guidance Documents also imposed limitations on assertions of jurisdiction that were inconsistent with those decisions resulting in decreased jurisdiction over historically protected waters and inconsistent application by the Agencies.⁷⁹ For

⁷³ *Fox*, 556 U.S. at 516.

⁷⁴ 556 U.S. 502, 515 (2009).

⁷⁵ 556 U.S. at 515-16 (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, (1996)).

⁷⁶ See Legal Memoranda Regarding Solid Waste Agency of Northern Cook County (SWANCC) v. United States (Jan. 15, 2003), (hereinafter 2003 Guidance), available at: https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf.

⁷⁷ U.S. Environmental Protection Agency and Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States* (2008) (hereinafter “2008 Rapanos Guidance”) available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (providing for “significant nexus” analysis for “[n]on- navigable tributaries that are not relatively permanent”).

⁷⁸ See *Summary of Objections to Guidance in: Congressional Research Service Report R43455, EPA and the Army Corps’ Proposed Rule to Define “Waters of the United States”* at p. 6, (June 10, 2014) (**Attachment 9**)

⁷⁹ See 2011 Comments, *supra* note 6.

example, the 2008 Rapanos Guidance⁸⁰ inappropriately provided tributary streams less-than categorical protection although the existing regulatory definition protected, without any limitation, all tributaries to other specified jurisdictional waters, and despite the fact that the Supreme Court has not issued any holding limiting the jurisdictional status of tributaries.⁸¹ The 2003 and 2008 Guidance has left many categories of waters that had previously been protected vulnerable to pollution and destruction, and hindered regulatory and enforcement actions contrary to law.⁸² The Agencies cannot lawfully rely on them to support their justification for the Proposed Rule.

IV. THE AGENCIES MISCHARACTERIZE AND DISREGARD SUPREME COURT AND OTHER BINDING LEGAL PRECEDENT, AS WELL AS LEGISLATIVE HISTORY, DEMONSTRATING THAT THE CWA BROADLY PROTECTS THE NATION'S WATERS.

As noted above, although there is extensive Supreme Court precedent relevant to the meaning of “waters of the United States” and the intended jurisdictional coverage of the CWA, and even more abundant precedent from the courts of appeals and federal district courts,⁸³ the Agencies purport to define “waters of the United States” “in light of” only three Supreme Court cases, *Riverside Bayview*, *SWANCC* and *Rapanos*. Somewhat inexplicably, however, the definition in the Proposed Rule is not consistent with those three cases, or even with the Agencies’ novel interpretations of them in the Proposed Rule. The Agencies even admit that they are merely using these three cases as “guideposts” for their new interpretation of “waters of the United States.”⁸⁴ The Agencies’ failure to carefully evaluate and follow legal precedent and legislative history in the development of the Proposed Rule is contrary to law. The Agencies do not possess unbridled discretion to pick and choose the portions of the law they prefer in furtherance of “agency policy choices and other relevant factors,” and completely ignore the parts of the law that don’t suit their purposes (including shunning off the bedrock “objective” of the Act), as they attempt to do here.⁸⁵

As an initial matter, Commenters strongly disagree with the Agencies’ assertion that:

⁸⁰ See 2008 Rapanos Guidance.

⁸¹ *Id.* at p. 13-14.

⁸² See generally, Earthjustice et al., ABANDON: HOW THE BUSH ADMINISTRATION IS EXPOSING AMERICA’S WATERS TO HARM (2004), available at <http://ocw.tufts.edu/data/32/386826.pdf>. (hereinafter “Reckless Abandon”) (**Attachment 10**).

⁸³ See 2008 Comments, 2011 Comments and 2014 Comments, *supra* note 6.

⁸⁴ Proposed Rule, at 4159.

⁸⁵ Proposed Rule, at 4156.

[f]rom the earliest rulemaking efforts following adoption of the 1972 CWA amendments, to the agencies most recent attempt to define “waters of the United States” in 2015, the sparse statutory definition has spurred substantial litigation testing the meaning of the phrase. Hundreds of cases and dozens of courts have attempted to discern the intent of Congress when crafting the phrase. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (Scalia, J., plurality) (briefly summarizing case history).⁸⁶

First, nothing on page 739 of *Rapanos* (or elsewhere in the Opinion) summarizes a case history that supports the Agencies’ inaccurate premise. Moreover, the meaning of the Agencies’ pre-2015 regulatory definitions of “waters of the United States” has been well-settled and has not been the subject of inordinate litigation challenging it since its adoption in the 1970s.⁸⁷ In fact, the definition has never been overturned or limited in any way by any court. The exception to this is, of course, the confusion and litigation that arose after the *SWANCC* and *Rapanos* opinions, primarily disputes related to jurisdiction over wetlands,⁸⁸ and the ongoing litigation regarding the CWR. But there is a plethora of precedent, including Supreme Court opinions, confirming the intended breadth of the phrase “waters of the United States,” and consistently applying the Agencies’ long-standing interpretation of that phrase set forth in the Agencies’ pre-2015 definition. Not a single court has interpreted “waters of the United States” in a manner consistent with the narrow interpretation that the Agencies proffer in the Proposed Rule.

The Agencies also attempt in the Proposed Rule to minimize the significance of the Supreme Court’s opinion in *Riverside Bayview*. The Court in that case held that Congress took a “broad, systemic view of the goal of maintaining and improving water quality” with the word “integrity,” contained in the Act’s “objective,” referring to “a condition in which the natural structure and function of ecosystems [are] maintained.” The “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’”⁸⁹ To accomplish these goals, the Supreme Court in *Riverside Bayview* concluded, Congress defined the “waters covered by the Act broadly” to

⁸⁶ Proposed Rule, at 4159.

⁸⁷ See 2008 Comments, 2011 Comments and 2014 Comments, *supra* note 6.

⁸⁸ See, e.g., *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807, 1812 (2016) (wetlands); *Sackett v. EPA*, 566 U.S. 120, 124 (2012) (wetlands).

⁸⁹ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing H.R.Rep. No. 92-911, p. 76 (1972); S.Rep. No. 92-414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742). The Agencies’ Notice for this Proposed Rule misconstrues *Bayview* by describing the Opinion as simply one that “deferred to the Corps’ ecological judgment that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34900 (July 27, 2017).

encompass all “waters of the United States.”⁹⁰ The unanimous *Riverside Bayview* opinion, which remains good law, is far more significant than the Agencies appear to suggest, and should be given far more weight as they endeavor to redefine “waters of the United States.” Based solely upon the Agencies’ treatment of the case in the Proposed Rule, one might think *Riverside Bayview* supports the Agencies’ narrow interpretation, when in truth it plainly demonstrates that the Proposed Rule would contravene Congress’ plain intent.

The intended breadth of the CWA is apparent in the comprehensive goals, programs and directives in the Act, as well as in the legislative history, administrative decisions and case law interpreting the Act.⁹¹ Thus, unlike the RHA of 1899, the CWA was not focused on the prevention of “navigation-impeding” conduct in navigable waters.⁹² Instead, as the Supreme Court taught in *International Paper Co. v. Ouellette*, the CWA established “an all-encompassing program of water pollution regulation” that “**applies to all point sources and virtually all bodies of water.**”⁹³ While extensive RHA precedent demonstrated that the Commerce Clause provided adequate authority for regulation of navigable waters and their tributaries, it was equally clear that Congress’ Commerce Clause authority to control pollution was not limited to traditionally navigable waters or traditional tests of navigability.

For example, when it invalidated portions of the Corps’ 1974 regulations that limited CWA jurisdiction to waters “which had been, are, or may be, used for interstate or foreign commerce,” the U.S. District Court for the District of Columbia held that when Congress defined the term “navigable waters” as “the waters of the United States, including the territorial seas” it “**asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.**” Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability.”⁹⁴ This holding is consistent with the Conference Committee Report for the final bill which states “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation **unencumbered by agency determinations which have been made or may be made for administrative purposes.**”⁹⁵

⁹⁰ *Id.*

⁹¹ See also *Quarles Petroleum Co. v. United States*, 551 F.2d 1201, 1206 (Ct. Cl. 1977) (“In addition, the overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States.”).

⁹² See *U.S. v. Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974).

⁹³ *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

⁹⁴ *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); 39 Fed. Reg. 12119 (April 3, 1974).

⁹⁵ Conference Report, Senate Report No. 92-1236, Sept. 28, 1972 at 144, U.S.Code Cong. & Admin. News 1972, p. 3822; Reprinted in Legislative History, Committee on Public Works, Committee Print, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 327 (emphasis added) (hereinafter “1972 Legislative History”).

When Representative John Dingell presented the Conference version of the bill to the House of Representatives, he explained that in defining “navigable waters” broadly for the purposes of the CWA as “waters of the United States, including the territorial seas”:

The Conference bill defined the term ‘navigable waters’ broadly for water quality purposes. It means ‘all the waters of the United States’ in a geographic sense. It does not mean ‘navigable waters of the United States’ in the technical sense as we sometimes see in some laws.... Thus, this new definition clearly encompasses **all water bodies, including main streams and their tributaries, for water quality purposes**. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.⁹⁶

The Supreme Court has also explicitly recognized on at least three occasions that “navigable waters” under the CWA include “something more than traditional navigable waters.”⁹⁷

Additionally, in *Riverside Bayview*, the Supreme Court held 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. In adopting this definition of ‘navigable waters,’ **Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes** and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed “navigable” under the classical understanding of that term.”⁹⁸ The *Bayview* Court also noted that, while:

[I]t is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional test of navigability, it is another to assert that Congress intended to abandon **traditional notions of “waters”** and include in that term “wetlands” as well. Nonetheless, the **evident breadth of congressional concern for protection of water quality and aquatic ecosystems** suggests that it is reasonable for the Corps to interpret the term “waters” to encompass wetlands adjacent to waters as more conventionally defined.⁹⁹

Contrary to the Agencies’ characterizations, *SWANCC* held solely that 33 C.F.R. 328.3(a)(3) (1999), as clarified and applied to petitioner’s balefill site pursuant to the Migratory Bird Rule, 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA.”¹⁰⁰

⁹⁶ 118 Cong. Rec. 33, 756 (1972); *id.* at 250-51.

⁹⁷ See *Rapanos v. United States*, 547 U.S. 715, 731 (2006).

⁹⁸ *Bayview*, 474 U.S. at 133 (emphasis added).

⁹⁹ *Id.*

¹⁰⁰ *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

Thus, the *SWANCC* decision was particularly fact-specific, related solely to Section 404 jurisdiction under the Migratory Bird Rule, and did not impact or limit the agencies' jurisdiction over any other waters, including non-navigable tributaries, adjacent wetlands, or "other waters" that could affect interstate or foreign commerce.¹⁰¹ Because the Supreme Court limited its holding to the jurisdictional basis asserted by the Corps, i.e., the Migratory Bird Rule, the decision did not require, or even imply, that the Agencies could not continue to rely on any other provisions of the pre-2015 definition of "waters of the United States" to assert CWA jurisdiction. The corollary is also true – *SWANCC* does not authorize or provide any basis for the Agencies to remove any protections or jurisdictional bases under the Commerce Clause for tributaries, adjacent waters or any other waters provided in the pre-2015 regulatory definition.

Similarly, the Supreme Court in *Rapanos*, did not invalidate the existing regulatory definition of "waters of the United States" when it opined on issues presented in the consolidated cases - the extent of CWA jurisdiction over wetlands adjacent to tributaries that are not traditionally navigable under Section 404 of the CWA.¹⁰² The *Rapanos* Court issued no majority opinion. However, several differing opinions suggested three different tests for determining whether wetlands adjacent to non-navigable tributaries can be covered under the CWA.¹⁰³

- **Relatively Permanent Test:** The four-justice plurality opinion, written by Justice Scalia, recognized that the CWA covers non-navigable waters in addition to traditionally navigable waters, but declined to "decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act."¹⁰⁴ Instead, the plurality focused on the meaning of "the waters" in 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.") The plurality concluded that "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in '*streams, oceans, rivers, lakes, and bodies of water forming geographical features.*' All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."¹⁰⁵ The plurality also noted that "[b]y describing 'waters' as 'relatively permanent,'" it did not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances" or "seasonal rivers which contain continuous flow during some months of the year . . ." and, further, that it had "no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify a

¹⁰¹ See 2003 Comments, *supra* note 61.

¹⁰² *Rapanos*, 547 U.S. at 787.

¹⁰³ *Id.* at 715.

¹⁰⁴ *Id.* at 731.

¹⁰⁵ *Id.* at 731-32 (internal citations omitted).

channel as a ‘wate[r] of the United States.’”¹⁰⁶ Upon this opinion, the plurality sought remand of the cases for a determination by the lower courts “**whether the ditches or drains near each wetland are “waters” in the ordinary sense of containing a relatively permanent flow**; and (if they are) whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.”¹⁰⁷ Based on this test, wetlands adjacent to “relatively permanent” bodies of water are covered under the CWA as long as they possess a “continuous surface connection” to that water.

- **Significant Nexus Test:** Justice Kennedy concurred with the plurality that the cases should be remanded, but firmly rejected the plurality’s reasoning for doing so. Justice Kennedy identified the issue to be decided in the consolidated case as “whether the term ‘navigable waters’ in the Clean Water Act extends **to wetlands that do not contain and are not adjacent to waters that are navigable in fact.**”¹⁰⁸ According to the opinion of Justice Kennedy:

[T]he Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute’s goals and purposes . . . With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters – functions such as pollutant trapping, flood control, and runoff storage . . . Accordingly, wetlands 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.’¹⁰⁹

Justice Kennedy further opined that “[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries.”¹¹⁰

¹⁰⁶ *Id.* (internal citations omitted).

¹⁰⁷ *Id.* at 757.

¹⁰⁸ *Id.* at 759,

¹⁰⁹ *Id.* at 779-80.

¹¹⁰ *Id.* at 782.

Notably, Justice Kennedy indicated that the record before the Court contained evidence of a possible significant nexus and that the end result of the remand might well be that the “Corps assertion of jurisdiction is valid,” as suggested by the dissent.¹¹¹

- **Existing Definition Test:** The dissent, written by Justice Stevens, and joined by Justices Souter, Ginsburg, and Breyer, opined that the agencies’ existing regulatory definition is a reasonable interpretation of the statutory term “waters of the United States.” The dissent rejected the rationales of the plurality and Justice Kennedy, but stated that “[g]iven 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.”¹¹²

In concurring with the plurality opinion, Chief Justice Roberts noted that the *SWANCC* decision issued five years prior to *Rapanos*, “rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act . . .” and that, with regard to the Court’s decision regarding jurisdiction over the wetlands at issue in *Rapanos*, “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act.”¹¹³

In the Proposed Rule, the Agencies selectively quote from two of the *Rapanos* opinions and, ultimately, inexplicably combine portions of the plurality’s opinion with portions of Justice Kennedy’s opinion without regard to the fact these opinions are opposed to one another in every key respect.¹¹⁴

The Sixth Circuit recognized in *United States v. Cundiff* that extracting law from the *Rapanos* decision is problematic because “there is quite little common ground between Justice Kennedy’s and the plurality’s [Scalia’s] conceptions of jurisdiction under the Act, and both flatly reject the other’s view.”¹¹⁵ This belief is not confined to the Sixth Circuit. Every other court of appeals that has

¹¹¹ *Id.* at 784.

¹¹² *Id.* at 810.

¹¹³ *Id.* at 758.

¹¹⁴ See e.g., Proposed Rule, at 4167 (“In summary, although the standards that the plurality and Justice Kennedy established are not identical, and each standard excludes some waters that the other standard does not, the standards contain substantial similarities. The plurality and Justice Kennedy agree in principle that the determination must be made using a basic two-step approach that considers: (1) The connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality and Justice Kennedy also agree that the connection between the wetland and the tributary must be close. The plurality refers to that connection as a “continuous surface connection” or “continuous physical connection,” as demonstrated in *Riverside Bayview*.”).

¹¹⁵ 555 F.3d 200, 210 (6th Cir. 2009).

considered the question has determined that CWA jurisdiction exists at least whenever Justice Kennedy's test is met – but with some applying both the Scalia and Kennedy tests, and others finding that only Justice Kennedy's test applies.¹¹⁶ Importantly, none of these Circuits have combined the opinions into a single test, or even determined that Justice Scalia's test alone should be employed to determine CWA jurisdiction, and no court has ever employed a hybrid approach that relies on pieces of the plurality and pieces of Justice Kennedy's test as the Agencies have attempted in the Proposed Rule.¹¹⁷

In sum, *SWANCC* should be read as standing for the narrow proposition that the Corps cannot rely on the Migratory Bird Rule to assert jurisdiction over isolated, intrastate waters under the CWA. *Rapanos* should similarly be narrowly applied solely to evaluate CWA jurisdiction over wetlands adjacent to non-navigable tributaries. However, because no opinion commanded a majority of the Court, the Agencies should not attempt to cherry-pick portions of the *Rapanos* opinions that serve their policy goals as they have tried to do in the Proposed Rule. *SWANCC* and *Rapanos* do not mandate, or even support, the dangerously narrow definition of “waters of the United States” that the Agencies have proposed.

V. THE REGULATORY DEFINITION OF “WATERS OF THE UNITED STATES” MUST PROTECT ALL WATERS TO THE FULLEST EXTENT OF CONGRESS' COMMERCE POWER.

It is beyond dispute that Congress intended the CWA to fully protect the nation's waters and aquatic ecosystems without regard to whether the waters could satisfy historic navigability tests under the Commerce Clause. It is vital to understand that, prior to the enactment of the CWA, both traditionally navigable waters and their non-navigable tributaries were believed to be well within the Commerce Clause powers of the federal government under traditional tests of navigability.¹¹⁸

¹¹⁶ Compare *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (“The federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*.”); *United States v. Donovan*, 661 F.3d 174, 184 (3d Cir. 2011) (“We hold that federal jurisdiction to regulate wetlands under the CWA exists if the wetlands meet either the plurality's test or Justice Kennedy's test from *Rapanos*.”); and *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 200) (“[W]e join the First Circuit in holding that the Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy's test.”), with *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (“Justice Kennedy's proposed standard ... must govern the further stages of this litigation); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (“Justice Kennedy's concurrence provides the controlling rule [*1000] of law for our case”); and *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (“we join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's “significant nexus” test provides the governing rule of *Rapanos*.”).

¹¹⁷ Proposed Rule, at 4167.

¹¹⁸ The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to traditionally navigable waters and “into any tributary of any navigable water from which the same shall float or be washed into such navigable water...” 33 U.S.C. § 407.

Congress intended to expand the number and nature of the waters covered under the CWA in order to protect water quality and aquatic ecosystems to the fullest extent permitted by the Commerce Clause. *SWANCC* and *Rapanos* do not address, limit or establish the outer limits of this Constitutional authority. In other words, Congress intended to expand coverage under the CWA beyond interstate waters, traditionally navigable waters and their tributaries, and did not premise such expansion of jurisdiction on the extent to which waters were connected to traditionally navigable waters. To the contrary, Congress intended to repudiate the traditional navigability tests and limitations on federal authority, and to instead utilize the full authority of the federal government to regulate water pollution under the Commerce Clause.¹¹⁹

It is essential to the continued protection of the Nation's waters that the Agencies' definition of "waters of the United States" protect all waters to the fullest extent permitted by the Commerce Clause. In order to do so, the agencies should retain the following language in the regulatory definition of "waters of the United States":

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

- 1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
- 2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- 3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- 4) All impoundments of waters otherwise defined as waters of the United States under this definition;¹²⁰

There are many significant waterways that provide valuable ecological, recreational, drinking water, and economic services that could lose protections under the CWA if this language is removed.¹²¹ In particular, so-called "closed basins" and other waters that lack a connection to Traditional Navigable Waters, which have historically been protected under these interstate

¹¹⁹ See e.g., *Riverside Bayview*, 474 U.S. at 133.

¹²⁰ See, e.g., 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a)

¹²¹ See Waterkeeper Alliance Fact Sheets on the Impacts to Twelve Watersheds across the United States, attached hereto as: (**Attachment 11**).

commerce factors for “other waters,” such as Idaho’s Upper Snake River Closed Basin, Oregon’s Crater Lake and New Mexico’s Central Closed Basins.¹²²

“Closed-basins” make up roughly 20% of the land area in New Mexico, and include many rivers, streams and wetlands. These waters provide recreation, fishing and water supply in a region with scarce water resources and must be protected under the CWA.¹²³ Similarly, in southern Idaho, the Upper Snake Closed Basin contains “numerous creeks and rivers that do not flow on the surface beyond the borders of the state,” but do flow into the Snake River Plain Aquifer, which supplies water to the Snake River.¹²⁴ Some rivers and streams within the Upper Snake Closed Basin have been determined to be jurisdictional based on navigability; however, others are jurisdictional solely because they have an impact on interstate commerce, including their use for irrigation water for cropland and the fact that they support “high-quality trout fisheries that attract anglers from all over the United States.”¹²⁵ Retention of this regulatory language is critical for protecting these types of waters.

Additionally, the Agencies should maintain the original regulatory language in the definition of “waters of the United States,” particularly the precise language for tributaries, and should expressly retain all Commerce Clause grounds for including all waters within the regulatory definition of “waters of the United States.” As set forth in the 2003 Comments on the ANPRM, “the chemical, physical, and biological integrity of the Nation’s waters cannot be restored and maintained without Clean Water Act regulation of all waters protected by the current regulations – including those identified by the (a)(3) factors [other waters interstate commerce factors].”¹²⁶ As stated by the court in *U.S. v. Holland*:

¹²² See e.g., Waterkeeper Alliance Fact Sheets, *supra* note 120 (**Snake River Fact Sheet**: In the Snake River watershed, at least five percent of the watershed (about 5,185 sq. miles or 3,318,400 acres) is considered a “closed basin” because the waterways are only connected to the Snake River via subsurface connections. Called the “Upper Snake Closed Basin,” in east-central Idaho, it includes the drainages of five watersheds, the Big Lost, Little Lost, Birch, Medicine Lodge, and Beaver-Camas., which play an important economic and ecological role that is already being impacted by pollution. For example, Medicine Lodge Creek and its tributaries contain rainbow trout, brook trout, and Yellowstone cutthroat trout, and Little Lost Creek includes critical habitat for bull trout, listed as threatened under the Endangered Species Act; **Rogue River and Cater Lake Fact Sheet**: Crater Lake is a national treasure known for its iconic blue waters, which is considered by scientist to be the cleanest and clearest body of water in the world. Crater Lake could lose protection because it is a considered a closed basin that may lack surface connections to the Rogue River. **Rio Grande Fact Sheet**: In the Rio Grande Basin, there is a roughly 14,605 square mile area known as the Central Closed Basins with water resources that are essential to communities and wildlife that could lose protection under the Proposed Rule. For example, based on NHD data, there are more than 33,933 miles of streams that could lose protection because they may not be connected to the Rio Grande via surface connections.)

¹²³ See Waterkeeper Alliance Fact Sheet for Rio Grande, *supra* note 120; Reckless Abandon, *supra* Note 62, p. 7.

¹²⁴ Waterkeeper Alliance Fact Sheet for Snake River, *supra* note 120; Reckless Abandon, *supra* Note 62, pp. 12-13.

¹²⁵ *Id.*

¹²⁶ See 2003 Comments, *supra* note 61, at pp. 29-38.

It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution. Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms ... Congress is not limited by the 'navigable waters' test in its authority to control pollution under the Commerce Clause.¹²⁷

The Third Circuit recently confirmed this view in a case involving challenges to a CWA Total Maximum Daily Load to control pollution within the watershed of the Chesapeake Bay, when it stated:

Our experience in state regulation of water pollution gave environmentalists poster material in the 1969 burning of the Cuyahoga River, the consequence of a classic “tragedy of the commons,” which occurs when society fails to create incentives to use a common resource responsibly. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 1244 (1968). Producers of industrial waste used the Cuyahoga River to diffuse oil and other chemicals—and thus the river “ooze[d] rather than flow[ed]” and a person who fell in would “not drown but decay”—until the waste caught fire. *Time*, *America's Sewage System and the Price of Optimism* (Aug. 1, 1969). In response to that fire and to the general degradation of American water that followed the post-war industrial boom, Congress determined that the EPA should have a leadership role in coordinating among states to restore the Nation's waters to something approaching their natural state. *See* 33 U.S.C. § 1251 . . . [and] “[a]s the Supreme Court has admonished in the water-pollution context, ‘We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.’ *E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 132, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 777, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968)).”¹²⁸

The Agencies lack authority to narrow the definition of “waters of the United States” based on their erroneous legal theories regarding navigability,¹²⁹ nor may the Agencies eliminate the broad Commerce Clause bases for covering rivers, streams, lakes, adjacent waters, and other waters. Accordingly, the definition should be amended to ensure protection of these vital waters, which of course also protects downstream Traditionally Navigable Waters. Neither *SWANCC* nor *Rapanos*,

¹²⁷ *Holland*, 373 F. Supp. at 673.

¹²⁸ *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 309 (3d Cir. 2015).

¹²⁹ *See, e.g.*, Proposed Rule, at 4168-4169.

nor any other judicial precedent, limits or establishes the outer bounds of Congress' Commerce Clause authority for purposes of the CWA, and the Agencies' statements to the contrary in the Proposed Rule are erroneous.¹³⁰

VI. THE AGENCIES CANNOT RELY ON EXECUTIVE ORDER 13778 AS A BASIS FOR THE PROPOSED RULE.

While the Agencies attempt to use the Supreme Court's opinions in *Riverside Bayview*, *SWANCC* and *Rapanos* as mere "guideposts" for crafting their capriciously narrow definition of "waters of the United States," they assert that they have ensured their definition is "**consistent with** Executive Order 13778."¹³¹ The title of that Executive Order, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," spotlights the Agencies' true motivation for attempting to cast aside more than 40 years of legal precedent and agency practice. It also illuminates the mysterious "agency policy choices and other relevant factors" that form the Agencies' actual legal basis for the Proposed Rule, and explains the obvious disconnect between the Agencies' interpretation of the CWA text, regulatory history, legislative history, Supreme Court precedent and the definition of "waters of the United States" that they now propose to adopt.

Notably, however, despite the Agencies' assurances, the Proposed Rule is actually not "consistent" with the Executive Order. While Executive Order 13778 directs the Agencies to review the 2015 Clean Water Rule "for consistency with the policy" set forth in Section 1, it also directs that the Agencies should only undertake rulemaking to rescind and revise the CWR "as appropriate and consistent with law."¹³² This is a key provision in the Executive Order because the Agencies have not even completed their review of the CWR,¹³³ and in fact recently sought public input on a range of issues relating to unresolved legal questions as part of their decision-making process for doing so.¹³⁴

¹³⁰ In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. See 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court "expressly declined to reach" the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, "in *Rapanos* it appears five justices had no constitutional concerns in any event ... [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause" *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), cert. denied sub nom., *Am. Farm Bureau Fed'n v. E.P.A.*, 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016) (citing *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring)).

¹³¹ Proposed Rule, at 4155 (emphasis added).

¹³² Executive Order 13778, §§ 1 & 2.

¹³³ See Definition of Waters of United States - Recodification of Pre-Existing Rules (Docket ID No. EPA-HQ-OW-2017-0203) 83 Fed. Reg. 32227 (July 12, 2018)

¹³⁴ See Supplement Repeal Comments, *supra* note 6.

Further, it is axiomatic that the President cannot override statutes by executive fiat, and the policy set forth in an Executive Order thus cannot override the policy that Congress established in the CWA or any other law.¹³⁵ The policy set forth in Section 1 of Executive Order 13778 states “[i]t is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.”¹³⁶ Based on the Proposed Rule, it appears the Agencies rely on heavily on this policy as the primary basis for their effort to redefine waters of the United States, the key jurisdictional trigger in the Act. For example, the Agencies state: “[t]he Supreme Court has recognized that new administrations may reconsider the policies of their predecessors so long as they provide a reasonable basis for the change in approach. Nat’l Ass’n of Home Builders v. EPA, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012), citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514-15 (2009) (Rehnquist, J., concurring in part and dissenting in part).”¹³⁷ The Agencies further state:

The agencies interpret their authority to include promulgation of a new regulatory definition of “waters of the United States,” consistent with the guidance in Executive Order 13778, so long as the new definition is authorized under the law and based on a reasoned explanation. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (“Fox”). A revised rulemaking based on a desired change in policy is well within an agency’s discretion and “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal” of its regulations and programs. Nat’l Ass’n of Home Builders v. EPA, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing Fox, 556 U.S. at 514-15 (Rehnquist, J., concurring in part and dissenting in part)). In developing this proposed rule, the agencies have re-evaluated their legal authority and those policies that they deem most important in shaping the jurisdiction of the CWA: Prioritizing the text of the statute, adherence to constitutional limitations, including the autonomy of States, and providing clarity for the regulated community.”¹³⁸

¹³⁵ To the extent any provision of Executive Order 13778 would require a regulatory action that is inconsistent with or prohibited by a federal law, EPA must follow the law and comply with its requirements rather than follow the dictate of the Executive Order. See, e.g., Building & Construction Trades Dept., AFL-CIO, et al. v. Allbaugh, 295 F.3d 28, 32-33 (D.C. Cir. 2002); Cty. of Santa Clara v. Trump, No. 17-CV-00485-WHO, 2017 WL 1459081, at *21 (N.D. Cal. Apr. 25, 2017) (“[The President] cannot ‘repeal[] or amend[] parts of duly enacted statutes’ after they become law.” (citing City of New York, 524 U.S. at 438, 439 (1998)); United States v. Rhode Island Dep’t of Corr., 81 F. Supp. 3d 182, 188 (D.R.I. 2015) (“Meanwhile, if an executive order conflicts with an existing statute, the executive order must fall. See Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1332-34 (D.C. Cir. 1996”).

¹³⁶ *Id.* at sections 1 and 2.

¹³⁷ Proposed Rule, at 4195.

¹³⁸ Proposed Rule, at 4169.

The policy set forth in Section 1 of Executive Order 13778 is not, however, consistent with the CWA. As noted, the objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” This is the central policy Congress established for the CWA that should drive the Agencies’ review and rulemaking process. In contrast to the policy in Section 1 of Executive Order 13778, the policies Congress established in the CWA were plainly not intended to promote economic growth, minimize regulatory uncertainty or push this administration’s particular ideology regarding states’ rights. Instead, Congress focused on, among other things, a national goal “of eliminating all discharges of pollutants into navigable waters by 1985” and an “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water ... by 1983.”¹³⁹

Thus, rather than attempting to minimize industry’s burden or promote economic growth, Congress intentionally tasked the government with a single, unambiguous “objective” – “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” – and imposed “on American industry (and the American public through passed-on product costs) the economic burden of ending all discharges of pollutants by the year 1985.”¹⁴⁰ The policies of promoting “economic growth” and “minimizing regulatory uncertainty” announced in Executive Order 13778 do not, and cannot, supersede or modify any of the Congressional statements of policy and associated legal requirements in the CWA. But that is exactly what this administration, through the Executive Order, and the Agencies through the Proposed Rule, are attempting to accomplish.

It could not be more apparent that the Agencies created their entire legal basis for the Proposed Rule from whole cloth solely to achieve the policies set forth in Section 1 of Executive Order 13778. This explains why the Agencies are completely ignoring the objective and other plain statutory requirements set forth in the Act and fail to articulate how their proposed definition is consistent with a plethora of Supreme Court and other judicial authority. The Agencies admit this when they state they are:

[D]efining the scope of waters subject to federal regulation under the Clean Water Act (CWA), **in light of** the U.S. Supreme Court cases in *United States v. Riverside Bayview Homes (Riverside Bayview)*, *Solid Waste Agency of Northern Cook County v. United States (SWANCC)*, and *Rapanos v. United States (Rapanos)*, **and consistent with Executive Order 13778**, signed on February 28, 2017, entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”¹⁴¹

¹³⁹ 33 U.S.C. §1251(a).

¹⁴⁰ *Am. Frozen Food Inst. v. Train*, 539 F.2d 107,113 (D.C. Cir. 1976); 33 U.S.C. §1251(a)).

¹⁴¹ Proposed Rule, at 4155 (emphasis added).

The Agencies go on to state “[t]he fundamental basis used by the agencies for the revised definition proposed today **is 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.**”¹⁴² Following this, the Agencies state:¹⁴³

- “This proposed definition revision is intended to [s]trike a balance between Federal and State waters and would carry out Congress’ overall objective to restore and maintain the integrity of the nation’s waters in a manner that preserves the traditional sovereignty of States over their own land and water resources.” [i.e. show due regard for the roles of Congress and the States under the Constitution]
- “The agencies believe the proposed definition would also ensure clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public.” [i.e. Minimizing Regulatory Uncertainty]
- “This proposed rule is intended 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.” [i.e. Promote Economic Growth]

It is impossible to determine how the Agencies translated these policies to into the actual text of the proposed definition. It appears the Agencies have simply attempted to make the definition as narrow as they thought they could get away with without appearing to completely disregard the CWA and legal precedent in their entirety. For example, even assuming spurring economic growth was a permissible policy consideration for defining which waters are protected by the CWA, the Agencies could not possibly create a rational basis for using it to establish minimum flow frequencies for tributaries or any other jurisdictional limit in the Proposed Rule. The Agencies’ use of the policy in the Executive Order to limit CWA jurisdiction is blatantly arbitrary, capricious and contrary to law.

VII. THE AGENCIES HAVE NOT COMPLIED WITH CWA, THE APA OR FEDERALISM REQUIREMENTS FOR PUBLIC NOTICE, COMMENT AND CONSULTATION.

The Agencies unsuccessfully attempt to create the appearance of a record of extensive opportunity for public input and consultation with state, tribal and local governments on the definition of “waters of the United States” since March 2017 in the Proposed Rule Notice. This is not an accurate characterization of the Agencies’ actions. In each of the administrative actions the Agencies have undertaken over the past two years relating to the definition of “waters of the United States,”

¹⁴² Proposed Rule, at 4156 (emphasis added).

¹⁴³ *Id.*

including this one, the Agencies have (1) refused substantive input from the public on key issues, (2) arbitrarily constrained the issues upon which comment is allowed, (3) provided woefully inadequate time for comment, and/or (4) provided only sparse, vague information explaining their proposed actions.¹⁴⁴

Nothing in the Proposed Rule Notice cures, or could cure, those previous blatant legal violations, and indeed they have only been compounded by gross defects the present rulemaking process. The Agencies' wide-ranging failures to engage the public, conduct mandatory federalism consultations,¹⁴⁵ and provide the public with notice and meaningful opportunity for comment are detailed in Commenters' four previous comments submitted since Executive Order 13778, which are each incorporated by reference herein.¹⁴⁶ As Commenters explain again below, the Agencies received their "marching orders" from the White House, and have been advancing toward a predetermined outcome, set by executive fiat, since February 28, 2017. Every action they have taken since the Executive Order has been designed to achieve that end, including minimizing opportunities for the public and for states and local and tribal governments to provide meaningful input that might in any way hinder or delay their misguided and unlawful scheme to gut the CWA.¹⁴⁷

For example, in the Proposed Rule Notice, the Agencies claim to have initiated the required consultation process starting on April 19, 2017.¹⁴⁸ This is simply untrue. The July 17, 2017 Federal Register Notice for "Step One" stated that no federalism consultation was required, and that the Agencies "will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of "waters of the United States."¹⁴⁹ From the beginning, it has been clear that the Agencies were only seeking input in a perfunctory manner which was actually designed to limit meaningful input from the states on their predetermined outcome. For example, in a June 19, 2017 letter from the Association of Clean Water Agencies regarding the "federalism consultation," the group stated:

¹⁴⁴ See, e.g., *Definition of "Waters of the United States" – Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34899, (July 27, 2017) (hereinafter "Repeal Rule") ("The agencies do not intend to engage in substantive reevaluation of the definition of 'waters of the United States' until the second step of the rulemaking.")[Add comments]

¹⁴⁵ See Executive Order 13132 (64 FR 43255, August 10, 1999).

¹⁴⁶ See Repeal Comments, Step 2 Comments, Delay Comments, and Supplement Notice Comments, *supra* note 6.

¹⁴⁷ See U.S. EPA and U.S. Army Corps, *Intention to Review and Rescind or Revise the Clean Water Rule*, 82 Fed. Reg. 12532 (Mar. 6, 2017). This Notice of Intention was signed eight minutes after the Executive Order was signed. See EPA Administrator Scott Pruitt, CERAWeek Environmental Policy Dialogue with Scott Pruitt, (March 9, 2017), available at <https://site-905649.bcvp0rtal.com/detail/videos/most-viewed/video/5358092032001/environmental-policy-dialogue-with-scott-pruitt?autoStart=true> (last accessed on April 13, 2019).

¹⁴⁸ Proposed Rule, at 4163.

¹⁴⁹ *Definition of Waters of United States - Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34899, at 34904 (July 27, 2017) (hereinafter "Proposed Repeal Rule").

We appreciate the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term “navigable waters” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006) and as part of EPA’s federalism consultation under Executive Order 13132 ... Unfortunately, states have received limited information in the way of draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule; therefore, states can only provide similarly broad guidelines and advice at this juncture. ACWA will be considerably more useful as a resource for the agencies, and be able to provide state perspectives crucial to drafting a practically sound and legally defensible rule, if EPA shares proposed regulatory text or more specific regulatory options that are under consideration before EPA begins drafting the anticipated proposed rule of ‘step 2’.”¹⁵⁰

Additionally, the “consultations” were constrained to seeking input only on Justice Scalia’s opinion in *Rapanos*, and the information provided by the Agencies was inadequate to allow state, tribal and local governments to have an opportunity for meaningful input. The Agencies’ approach to obtaining recommendations from the Local Government Advisory Committee (“LGAC”) was the same.¹⁵¹ None of the “outreach” or consultations the Agencies discuss in this Notice address these failures, which continued throughout the Agencies’ processes. The first time the Agencies released text of a proposed definition or any supporting analysis for it was December 11, 2018.

While the above-referenced consultations were perfunctory and defective, the Agencies’ engagement of the public on this hodge-podge of “waters of the United States”-related rulemakings and other administrative actions that now culminate in this Proposed Rule has been far worse. For example, with the “Step One” Proposed Rule seeking to withdraw the CWR, the Agencies provided the public with only an eleven page Notice that lacked any meaningful information about the Agencies’ bases for the proposed action and expressly stated they would not consider any comments on how the Agencies should ultimately define ‘waters of the United States’ under the CWA.¹⁵² With the Applicability Date Rule, widely known as the “Delay Rule,” the Agencies claimed in their “request for comment is on such a narrow topic” that not only is an extremely short comment period reasonable, but substantive evaluation or public comment on the definition of “waters of the United States” are both unnecessary and will not be considered by the Agencies.¹⁵³

¹⁵⁰ See Letter from Association of Clean Water Agencies to The Honorable Scott Pruitt re: Federalism Process and WOTUS Rule Development (June 19, 2017), available at: https://www.epa.gov/sites/production/files/2017-09/documents/us-acwa_2017-06-19.pdf. (emphasis added).

¹⁵¹ Repeal Rule Comments, *supra* note 6.

¹⁵² *Id.*

¹⁵³ Delay Rule Comments, *supra* note 6.

These examples are merely illustrative of the manner in which the Agencies have failed to earnestly engage the public on this issue – the full picture is horrendous.

Yet here, as repeatedly predicted in our previous comments, the Agencies attempt to rely on their prior defective “stakeholder engagement” and “federalism consultations” to create the misimpression that the public and state, tribal and local governments have had a meaningful opportunity for input that has been considered by the Agencies, and to justify the draconian and unreasonably short 60-day comment period for the Proposed Rule. This is not how the APA works.¹⁵⁴ To change the law, as is proposed here, the Agencies must engage in substantive evaluation and careful analysis of their action, provide a reasoned explanation for it, and engage in formal rulemaking based on this information while providing the public with meaningful opportunities for substantive input. With this Proposed Rule, the unreasonably short timeline for comment,¹⁵⁵ lack of meaningful pre-proposal input opportunities,¹⁵⁶ and failure to provide any adequate legal or factual bases, all demonstrate the illegality of the Agencies’ action.

The CWA requires that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act **shall be provided for, encouraged, and assisted** by the Administrator and the States.¹⁵⁷ Additionally, the APA requires agencies to provide notice of a proposed rule and the opportunity for comment.¹⁵⁸ The Agencies must comply with the APA and provide for public participation in all agency actions that create (or eliminate) law, *i.e.* promulgation of legislative or substantive rules.¹⁵⁹

Courts at all levels have stressed the importance of public participation in rulemaking, and the D.C.

¹⁵⁴ The Agencies approach to this rulemaking is also inconsistent with EPA’s own regulations. *See, e.g.*, 40 C.F.R. §25.3 (“Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.”).

¹⁵⁵ *See, e.g.*, Executive Order 12866 – Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 4, 1993) (emphasis added) (“Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). ***In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.***”).

¹⁵⁶ *Id.*

¹⁵⁷ 33 U.S.C. §1251(e) (*emphasis added*).

¹⁵⁸ 5 U.S.C. §553.

¹⁵⁹ *See, e.g., Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

Circuit has determined that notice and comment works “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”¹⁶⁰ These considerations are especially pressing in the context of redefining “waters of the United States” for the purposes of the CWA, yet the Agencies have utterly failed to provide the public with any meaningful opportunity for input with this Proposed Rule.

The Proposed Rule will have significant impacts on dischargers, the broader regulated community, the public, the states, and tribal governments because it represents an extreme departure from the Agencies’, the courts’, and the states’ understanding of the scope of federal jurisdiction over waters under the CWA. For example, it will determine which point source water pollution discharges require an National Pollutant Discharge Elimination System (“NPDES”) permit under CWA Section 402,¹⁶¹ which bodies of water may be destroyed through dredging or filling without a permit issued under Section 404, and whether citizens or the EPA can bring an enforcement action to address unpermitted pollutant discharges to a particular water body.¹⁶² The Proposed Rule will necessarily and dramatically alter CWA jurisdiction by directly reducing jurisdiction over several different types of waters, yet the Agencies admit that they cannot adequately assess the impacts of the proposed definition on waters and CWA Programs.¹⁶³ Commenters submit that this is due, in part, to the fact that the Agencies have failed to seek meaningful input and consultation and, in separate part, due to the fact that the proposed definition is not based on the law or sound science.¹⁶⁴

The Federal Register Notice for the Proposed Rule is 67 pages long, and contains lengthy previously undisclosed, and wholly novel, legal and factual matter the Agencies purport to rely on as they work to ram through their proposed redefinition. The Docket contains 130 supporting documents, many of which are technical and also have additional lengthy attachments and spreadsheets attached to them.¹⁶⁵ For example, the main text of the Agencies’ Economic Analysis for the Proposed Revised

¹⁶⁰ *International Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

¹⁶¹ 33 U.S.C. §1342.

¹⁶² 33 U.S.C. §§1319, 1369.

¹⁶³ See, e.g., Proposed Rule, at 4200 (Describing inadequacies of the data and approach, and stating: “[b]ecause of these limitations and the uncertainties in the way in which States or Tribes might respond following a change in the definition of “waters of the United States,” many of the potential effects of the proposed rule are discussed qualitatively, and some are discussed quantitatively where possible.”); Resource and Programmatic Analysis, (Noting inadequacies of their data throughout resulting in inconclusive, vague statements about impacts on resources and programs throughout.)

¹⁶⁴ See Waterkeeper Fact Sheets, *supra* note 121.

¹⁶⁵ The Agencies denied all of the requests for extension of time to comment. See, e.g., (**Attachment 14**). Numerous supporting documents in the Docket for the Proposed Rule contain only titles but are themselves blank with no reference to any document or information source. This further undermines the public’s ability to meaningfully

Definition of “Waters of the United States” (“Economic Analysis”) is 315 pages long with multiple supporting memos and spreadsheets, and the main text of the Agencies’ Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States” (Resource and Programmatic Assessment”) is 116 pages long with a 216 page Appendix and multiple spreadsheets. Despite this, and despite the Agencies’ knowledge that they intended to take this action since February 28, 2017, the Agencies provided the public with only 60 days to comment on the Proposed Rule¹⁶⁶ and held a single public hearing in Kansas City, Kansas on February 27-28, 2019. The Agencies published notice of this meeting on February 7, 2019, thus giving the entire country only 20 days advance notice to make plans to travel to Kansas.¹⁶⁷ This is a wholly inadequate public process for any formal federal rulemaking, and is an inexcusable abomination for a rulemaking of such momentous import for public health and the environment across the Nation.

For the above reasons, if the Agencies intend to proceed with this Rulemaking and issue a final rule that will redefine “waters of the United States” (which they should not; the Proposed Rule should be withdrawn and abandoned), they must first provide the public with additional time for comment, and additional opportunities for public hearings due to the national importance of these issues.

As this rulemaking currently stands, the opportunity for meaningful public input and comment on this Proposed Rule is illusory given the limited time and nature of the information provided. It is beyond unreasonable to provide the public with only 60 days to try to decipher and comment on the lengthy, compound theories and questions posed by the Agencies in the Proposed Rule Notice, as well as the ones improperly buried within the Economic Analysis and Resource and Programmatic Assessment.¹⁶⁸ It is even more unreasonable to attempt to cure the Agencies’ blatant APA deficiencies, as detailed in these and our previous comments, by simply (1) requesting comment on “all aspects of the proposed definition” and (2) seeking comment on wide ranging issues that the Agencies have failed to resolve prior to publishing their Notice, such as how the rule

comment on the Proposed Rule. (**Attachment 12**); See also Spreadsheet Downloaded from regulations.gov for all Supporting Documents (**Attachment 13**).

¹⁶⁶ The Agencies denied all of the requests for extension of time to comment. See e.g., (**Attachment 14**).

¹⁶⁷ Public Hearings: Revised Definition of “Waters of the United States,” 84 Fed. Reg. 2483 (Feb. 7, 2019).

¹⁶⁸ For example, in the Economic Analysis, the Agencies seek comment on “(1)More specifically, given the “Temporarily Flooded” category includes streams where surface water may be present for “a few weeks,” and the “Temporarily Flooded” definition implies there may be times when the water table is above the ground surface, the agencies seek comment whether waters identified as “Temporarily Flooded” would more appropriately be classified as intermittent rather than ephemeral for purposes of the agencies’ analyses,” (2) “The agencies discuss these limitations further in the Resource and Programmatic Assessment (RPA) for the Proposed Rule and solicit comment on what other datasets may be utilized to quantify the potential change in jurisdiction between the proposed rule and the two baselines for this analysis,” and (3) “These [state program] summaries were shared with state and territorial agencies for corrections and the agencies welcome further comments to ensure the accuracy of the information.” Burying core issues and requests for comment inside lengthy technical support documents violates the APA. The issues and requests for comment must be contained within the Federal Register Notice.

will impact waters and programs or methods for determining which waters the Agencies' proposed definition will and will not protect. It is the Agencies' duty to identify the bases for their proposed action, as well as to determine the meaning and impact of their proposed action, in advance of proposing a regulation. The Agencies' failure to do so in the Proposed Rule has denied Commenters and the entire public of their rights to notice and meaningful opportunities to comment under the CWA and the APA.

VII. THE AGENCIES' "LEGAL CONSTRUCT" FOR THE PROPOSED RULE IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

A. Statutory Framework

As detailed above, the Agencies' interpretation of the CWA's "statutory framework" is inconsistent with the plain text and legislative history of the CWA, case law interpreting the CWA, the Agencies' own long-standing interpretations of the CWA, and even the Agencies' own regulations implementing the CWA. In outlining their "legal construct" for the proposed definition of "waters of the United States," the Agencies improperly rely on these erroneous and misleading interpretations, as well as shameful misrepresentations of the law.

Building on these errors, in order to balance the objective of the CWA with one of its policy statements, the Agencies next state that they must determine "what Congress had in mind when it defined "navigable waters" in 1972 as simply "the waters of the United States." This is obviously a difficult line of reasoning to follow and decipher, as the answer to the question should end the inquiry and prevent any such "balancing." The erroneous evaluation of Commerce Clause jurisprudence and its relation to the CWA that follows does not help demonstrate any logic behind the Agencies' approach.

First, the Agencies erroneously¹⁶⁹ assert that "Congress' authority to regulate navigable waters derives from its power to regulate the "channels of interstate commerce" under the Commerce Clause.¹⁷⁰

Next, the Agencies erroneously state that *SWANCC* stands for the proposition that Congress only intended to exercise its "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made" and the proposition that Congress was relying solely on

¹⁶⁹ See 2003 Comments, *supra* note 36, pp. 26-30,

¹⁷⁰ Proposed Rule, at 4164 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) and *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (describing the "channels of interstate commerce" as one of three areas of congressional authority under the Commerce Clause).

its “commerce power over navigation,”¹⁷¹ while also inexplicably acknowledging *SWANCC* and *Riverside Bayview* expressly conclude that Congress intended to regulate more waters than traditionally navigable ones.

Next, the Agencies erroneously¹⁷² analyze only a subset of the relevant case law relating to waters that constitute traditionally navigable waters without any apparent consideration of the fact that navigability is defined differently for the purpose of different statutes, but also seemingly acknowledge that the meaning of the term has evolved over time to encompass more waters than would meet the standard articulated in *The Daniel Ball*.¹⁷³

Next, the Agencies selectively cite CWA legislative history they claim supports their view that Congress intended to limit the scope of the CWA to the channels of transportation,¹⁷⁴ but also acknowledge there is some limited legislative history that also included tributaries and, of course, the 1977 Amendments to the CWA that plainly demonstrate Congressional intent to cover more than traditional navigable waters.¹⁷⁵

From this cascading erroneous legal analysis, the Agencies simply and wrongly conclude: [t]hus, Congress intended to assert federal authority over more than just waters traditionally understood as navigable, and Congress rooted that authority in “its commerce power over navigation.”¹⁷⁶ The first point is a rather unremarkable conclusion – it is beyond dispute that Congress intended for the CWA to protect more than traditionally navigable waters. The Supreme Court has made this clear on multiple occasions, and it is apparent from the text of the CWA and the legislative history. It is unclear why the Agencies went to such lengths, and made so many erroneous statements about the law, to get there. The second part, however, it just flatly wrong – Congress did not root its authority

¹⁷¹ Proposed Rule, at 4164. Here the Agencies improperly rely on, and take out of context, dicta in *SWANCC* as their sole support for the primary legal theory underlying the Proposed Rule, see footnote 128 *supra*. As to the second part of the Agencies’ statement here, *SWANCC* actually states: “Respondents refer us to portions of the legislative history that they believe indicate Congress’ intent to expand the definition of “navigable waters.” Although the Conference Report includes the statement that the conferees “intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation,” S. Conf. Rep. No. 92–1236, p. 144 (1972), U.S.Code Cong. & Admin.News 1972 pp. 3668, 3822, neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous. See Brief for Federal Respondents.” *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 (2001) (emphasis added).

¹⁷² All the tests for navigability described the 2011 Comments, *supra* note 6, are relevant for determining what constitutes traditional navigable waters.

¹⁷³ 77 U.S. 557(1870).

¹⁷⁴ This is clearly erroneous, see 2003 Comments, *supra* note 36, pp. 26-30,

¹⁷⁵ Proposed Rule, at 4174.

¹⁷⁶ Proposed Rule, at 4164 (citing *SWANCC*, 531 U.S. at 168 n.3.).

for the CWA solely in its power over navigation, and the Agencies gravely err when they rely on *SWANCC* to so conclude.

The Agencies then compound that error by next proceeding to determine the limits of Congressional power over navigation, and by looking solely to *Riverside Bayview*, *SWANCC* and *Rapanos* cases “for instructional guidance” on how to make that determination. This is not a legally sound basis for determining the meaning of “waters of the United States” under the CWA and it violates fundamental rules of statutory construction.

The first problem with this part of the Agencies’ legal basis for the Proposed Rule is that those three Supreme Court cases do not even attempt to define the limits of Congress’ commerce power over navigation, or even its commerce powers generally.¹⁷⁷ Nor are the cases appropriate for “instructional guidance” on this question because they simply do not address that issue. Further, in addition to being the wrong question to resolve in defining “waters of the United States,” the Agencies are not charged with answering it under the CWA. Lastly, as noted in Section IV, above, the Agencies misconstrue or misrepresent these Supreme Court holdings cases and ignore a multitude of other case law, legislative history, and statutory text that is contrary to their unfounded legal interpretation.

The Agencies also never explain how their lengthy analysis of *Riverside Bayview*, *SWANCC* and *Rapanos*, relates to their improper attempt to “to determine the limits of Congressional power over navigation” under the CWA. To the contrary, it appears the Agencies simply attempt to present a view of those cases upon which they can attempt to lean in their effort to eliminate jurisdiction over non-adjacent wetlands in the proposed definition.

¹⁷⁷ See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133. “In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into ‘navigable waters,’ see CWA §§ 301(a), 404(a), 502(12), 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), 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. In adopting this definition of ‘navigable waters,’ Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term. See S.Conf.Rep. No. 92–1236, p. 144 (1972); 118 Cong.Rec. 33756–33757 (1972) (statement of Rep. Dingell).” In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. See 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court “expressly declined to reach” the Commerce Clause question.). Similarly, none of the *Rapanos* opinions commanded a majority of the Court “on precisely how to read Congress’ limits on the reach of the Clean Water Act.” *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, “in *Rapanos* it appears five justices had no constitutional concerns in any event ... [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause” *Am. Farm Bureau Fed’n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), cert. denied sub nom., *Am. Farm Bureau Fed’n v. E.P.A.*, 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016) (citing *Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring)).

B. Wetlands

Despite the significance of the Supreme Court's opinion regarding the breadth of CWA jurisdiction over the Nation's waters in *Riverside Bayview*, the Agencies chose to ignore that aspect of the decision and to use the opinion only as: "a basic principle for adjacent wetlands: The limits of jurisdiction lie within the "continuum" or "transition" "between open waters and dry land." The Agencies then conflate the Court's use of the phrase "open waters" with traditionally navigable waters, and the term "adjacent" with abut, to further limit the import and meaning of this case.¹⁷⁸ This disingenuous treatment of *Riverside Bayview* is arbitrary, capricious and contrary to law.

The Court in *Riverside Bayview* resolved this question: "whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'"¹⁷⁹ In the language on which the Agencies chose to focus, the Court was merely explaining challenges involved in determining the boundary between land and protected water. The court was plainly not evaluating adjacency to "traditionally navigable waters" as the Agencies assert, but rather adjacency to the broader category of "other waters" protected by the CWA. Contrary to and disproving the Agencies' premise, the Court stated:

[o]f course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined . . . 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.¹⁸⁰

¹⁷⁸ Proposed Rule, at 4165.

¹⁷⁹ *Riverside Bayview*, 474 U.S. at 131.

¹⁸⁰ *Id.* at 133.

The Agencies have provided no reasoned explanation for departing from their long-held view regarding the importance of broadly protecting adjacent wetlands under the CWA. This view, noted by the Court in *Riverside Bayview*, was as follows:

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. 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.¹⁸¹

Regarding *SWANCC*, the Agencies again conflate the Court's use of the phrase "navigable waters" in the Court's opinion with "traditional navigable waters." The Court simply was not evaluating the Corps' jurisdiction over a water that was not adjacent to a traditional navigable water. Rather, the Court was evaluating the Corps' assertion of jurisdiction to regulate an abandoned sand gravel pit that was isolated from any "navigable water" – meaning something more than traditional navigable waters - pursuant to the "Migratory Bird Rule," 51 Fed. Reg. 41217 (1986).¹⁸² Further, the Court did not, as the Agencies assert, resolve this question based on the Commerce Clause,¹⁸³ but rather on the text of the CWA.¹⁸⁴

The Agencies acknowledge that their new interpretation of *SWANCC* is a departure from their long-held interpretation of that case, noting "the Federal government has interpreted and applied the *SWANCC* decision narrowly, focusing on the specific holding in the case as rejecting federal jurisdiction over the isolated ponds and mudflats at issue in that case based on their use by

¹⁸¹ *Id.*, citing 42 Fed. Reg. 37128 (1977).

¹⁸² *SWANCC*, 531 U.S. at 171 and 174.

¹⁸³ This language and conclusions cited by the Agencies relates to the Migratory Bird Rule and not to the Agencies' definition "waters of the United States." "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose [in the CWA] to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .'" *Id.* at 174 (quoting 33 U.S.C. 1251(b)). The Court found no clear statement from Congress that it had intended to permit federal encroachment on traditional State power and construed the CWA to avoid the significant constitutional questions related to the scope of Federal authority authorized therein." *SWANCC*, 531 U.S. at 174.

¹⁸⁴ *Id.* at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.").

migratory birds.”¹⁸⁵ The Agencies don’t provide a reasoned basis or explanation for their departure from this long-held interpretation, but instead simply note that:

[m]embers of the regulated community, certain states and other interested stakeholders have argued that the case stands for a broader proposition based on key federalism and separation of powers principles. They argue that the case should be read as restricting federal jurisdiction over all “nonnavigable, isolated, intrastate waters” and argue for a broader interpretation and application of the rationale articulated in the decision.¹⁸⁶

It is clearly improper for the Agencies to change their long-held legal interpretation of a Supreme m Court opinion based on this acknowledged request from polluting industries. The Agencies then state:

[a]s the agencies revisit the definition of “waters of the United States” in this rulemaking, the agencies solicit comment on the proper reading of SWANCC. In addition, the agencies solicit comment on whether to revoke their 2003 guidance on the subject should the agencies finalize this proposal because existence of the final rule may mean that guidance on SWANCC may no longer be needed.¹⁸⁷

Commenters have repeatedly reminded the Agencies of the correct interpretation of *SWANCC*, articulated how the Agencies new interpretation is contrary to law, and pointed out that the Agencies have not met their burden of providing a reasoned basis and explanation for changing their long-held interpretation of the case. The Agencies should not alter their interpretation based on advocacy efforts from agribusiness and other industry groups that have a pecuniary interest in reducing CWA protections for the Nation’s waters at the expense of human health and the environment.

¹⁸⁵ Proposed Rule, at 4165.

¹⁸⁶ Apparently, the proponents of this interpretation include a host of large agribusiness and industrial interests, including the American Farm Bureau Federation, National Association of Manufacturers and several other groups challenging the 2015 Clean Water Rule. *See* Proposed Rule, footnote 23, citing letter from American Farm Bureau Federation et al. to Hon. Andrew Wheeler and Hon. R.D. James, August 13, 2018, Docket ID: EPA-HQ-OW-2017-0203-15275). It is notable, however, that the text of that letter doesn’t exactly say what the Agencies suggest, but rather simply concludes: In short, any attempt to reassert jurisdiction over the *SWANCC* ponds and comparable water features would violate the plain text of the CWA, be contrary to Supreme Court jurisprudence construing the Act, impermissibly intrude on the states’ traditional and primary authority over land and water use, and raise serious constitutional and federalism questions.

¹⁸⁷ Proposed Rule, at 4165.

Regarding *Rapanos*, the Agencies summarize their views of the Plurality and Justice Kennedy Concurrence only. They do not consider the opinion of the dissent, which is necessary to fully consider the import of this case since there is no majority opinion. Commenters' interpretation of the *Rapanos* case and views on the 2008 *Rapanos* Guidance are set forth fully in Section III above.¹⁸⁸ Additionally, Commenters strongly disagree with this characterization of the *Rapanos* decision set forth in the Proposed Rule preamble:

The plurality and Justice Kennedy agree in principle that the determination must be made using a basic two-step approach that considers: (1) The connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality and Justice Kennedy also agree that the connection between the wetland and the tributary must be close. The plurality refers to that connection as a "continuous surface connection" or "continuous physical connection," as demonstrated in *Riverside Bayview*. Id. at 742, 751 n.13. Justice Kennedy recognizes that "the 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." Id. at 767. The second part of their common analytical framework is addressed in the next section.

First, Justice Kennedy and the plurality do not share a common analytical framework for determining whether wetlands, adjacent or otherwise, are protected by the CWA as "waters of the United States." The opinions do not even share a common understanding of the CWA, *Riverside Bayview* or *SWANCC*. For example, the plurality refers to Justice Kennedy's approach as a "gimmick," and Justice Kennedy says the plurality's approach, among other things, is "without support in the language and purposes of the Act or in our cases interpreting it."¹⁸⁹ It is also inaccurate to say that both Justice Kennedy and the plurality agree that the connection between the wetland and the tributary must be "close." There is no support for this odd and incorrect conclusion in the *Rapanos* opinions.

C. Tributaries

Once again failing to acknowledge that *Rapanos* did not culminate in a majority opinion, and once again ignoring the extensive prior administrative interpretations, case law, legislative history and court precedent that address the protection of tributaries under the CWA, the Agencies look to

¹⁸⁸ See also 2014 Comments, *supra* note 6, for additional disagreement with the Agencies' views of the meaning of *Rapanos* and the improper limits the Agencies have placed on "waters of the United States" based on those views.

¹⁸⁹ *Rapanos v. United States*, 547 U.S. 715, 768 (2006)

Rapanos to purportedly “guide” their views in determining the limits of Congressional power over navigation. This is an issue *Rapanos* most certainly does not address. Additionally, Commenters disagree with the Agencies’ characterization of the *Rapanos* case, as set forth in Section IV above. For example, the Agencies erroneously state “both the plurality and Justice Kennedy focus in part on a tributary’s contribution of flow to, and connection with, traditional navigable waters.”¹⁹⁰ The Agencies also erroneously state that Justice Kennedy concluded the Corps’ existing treatment of tributaries raised significant jurisdictional concerns. To the contrary, it is clear that Justice Kennedy’s statements related solely to the Corp’s categorical assertion of jurisdiction over wetlands based solely on their proximity to tributaries.¹⁹¹ And most inexplicably and vaguely, the Agencies state: “while the plurality and Justice Kennedy viewed the question of federal CWA jurisdiction differently, there are sufficient commonalities between these opinions to help instruct the agencies on where to draw the line between Federal and State waters.”¹⁹² There are simply no commonalities between Justice Kennedy’s and the plurality opinions as they relate to tributaries, and the Agencies do not explain how the commonalities they say they perceive help draw the line between jurisdictional and non-jurisdictional tributaries they seek to adopt in the Proposed Rule.¹⁹³

D. Agency Principles and Considerations

Based on the preceding severely erroneous, deficient and defective analysis, the Agencies conclude:

As a threshold matter, the power conferred on the agencies under the CWA to regulate the “waters of the United States” is grounded in Congress’ commerce power over navigation. The agencies can choose to regulate beyond waters more traditionally understood as navigable, including some tributaries to those traditional navigable waters, but must provide a reasonable basis grounded in the language and structure of the Act for determining the extent of jurisdiction. The agencies can also choose to regulate wetlands adjacent to the traditional navigable waters and some tributaries, if the wetlands are closely connected to the tributaries, such as in the transitional zone between open waters and dry land. The Supreme Court’s opinion in *SWANCC*, however, calls into question the agencies’ authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters, and suggests that the agencies should avoid regulatory

¹⁹⁰ Proposed Rule, at 4168.

¹⁹¹ *Rapanos*, 547 U.S. at 781 (2006).

¹⁹² Proposed Rule, at 4168.

¹⁹³ For example, Justice Kennedy states: “The plurality’s first requirement—permanent standing water or continuous flow, at least for a period of “some months,” ante, at 2220–2222, and n. 5—makes little practical sense in a statute concerned with downstream water quality.” *Rapanos* 547 U.S. at 769 (2006).

interpretations of the CWA that raise constitutional questions regarding the scope of their statutory authority. Finally, the agencies can regulate certain waters by category, which could improve regulatory predictability and certainty and ease administrative burden while still effectuating the purposes of the Act.¹⁹⁴

This entire conclusion is arbitrary, capricious and contrary to law. It is also all unrelated to any limits on Congress' power over navigation, and thus is certainly unrelated to Congress's broader authority under the Commerce Clause. The flaws with these statements have largely been addressed in the preceding comments; however, there are a few new concepts included here that the Agencies had not previously discussed (thus there is no explanation for them provided in the Proposed Rule). The Agencies apparently believe that they can choose whether to regulate beyond traditional navigable waters. They cannot. Congress requires the Agencies to regulate the nation's waters broadly to achieve the objective of the CWA. While there is an outer extent of what Congress intended, there is also a minimum extent and that minimum extent is very broad. *Riverside Bayview's* holding is not limited to adjacency to *traditional navigable waters*. It relates to adjacency to any navigable water, defined broadly in the Act as any "water of the United States." *SWANCC* similarly discussed the relation between the sand and gravel pits and navigable waters, as opposed to traditional navigable waters.

From their wrongheaded and perplexing set of conclusions, the Agencies next make the illogical jump to their 101(b) theory, grounded in states' rights. Previously in the Proposed Rule Notice, however, the Agencies, perhaps unwittingly, acknowledge indirectly that 101(b) does not in any way authorize them to narrow the definition of "waters of the United States." The Agencies state: "Congress also envisioned a major role for the States in implementing the CWA, carefully balancing the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation." This is true! Congress analyzed this issue and carefully crafted a regulatory system built into the CWA itself based on cooperative federalism that respects the role of the states. There is no need or authority for the Agencies to attempt to strike a different balance by misusing Congress's respect for state's important role in implementing the CWA to narrow the scope of "waters of the United States" and of the CWA itself.

But unfortunately, contrary to Congressional intent, the plain language of the CWA,¹⁹⁵ regulatory history, and case law, the Agencies are proposing to do exactly that, by elevating and transforming the significance of a single provision of one subsection of the CWA – Section 101(b) – and somehow

¹⁹⁴ Proposed Rule, at 4168.

¹⁹⁵ The Agencies acknowledge that: "Congress established several key policies that direct the work of the agencies to effectuate those goals" but then proceed to disregard all of those policies in favor of their view of Section 101(b). Proposed Rule, at 4156. Other provisions and policies are not even discussed in relation to determining the definition of "waters of the United States."

balancing it against the objective of the CWA in Section 101(a), in order to define “waters of the United States” narrowly under the CWA. This position is so out of line with the CWA and judicial precedent that, in a feeble attempt to support it, the Agencies resort to selectively and misleadingly citing to portion of another subsection of a single provision of the CWA, 33 U.S.C. §1370.¹⁹⁶ The Agencies take this portion of Section 1370 completely out of context and interpret it without regard for its well-established meaning in the overall context of the CWA, and without regard to, or evaluation of, many other provisions of the CWA that are actually relevant to the intended scope of the CWA.¹⁹⁷ As set forth in more detail in Section II above, when this section is read in the context of the CWA, it is apparent that it is describing a system of cooperative federalism “that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”¹⁹⁸

The CWA has many policies, programs, standards, and goals, and just one single expressed overall objective - “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). The CWA does not authorize the Agencies to give equal weight to the central objective of the Act expressed in Section 101(a), and a single policy statement in Section 101(b), and then somehow “balance” them as a basis for redefining the jurisdictional reach of the Act. Furthermore, the intent of Congress as to which waters are protected under the CWA cannot be gleaned by balancing the national objective to restore and maintain water quality in the Nation’s waters against state’s responsibilities and rights to prevent, reduce, and eliminate pollution. That is nonsensical. Having due regard for the role of the states is not the same thing as defining “waters of the United States” in a manner that reduces federal, and increases state, jurisdiction¹⁹⁹ – which is

¹⁹⁶ 33 U.S.C. §1370 (emphasis added).

¹⁹⁷ The Agencies similarly selectively quote and mischaracterize the meaning and intent behind CWA Sections 1255, 1256, 1258, and 1268 for the erroneous proposition that Congress created a “non-regulatory statutory framework to provide technical and financial assistance to the states to prevent, reduce, and eliminate pollution in the broader set of the nation’s waters.” Proposed Rule, at 4157. The Great Lakes, Long Island Sound, Chesapeake Bay, as well as other waters, and their watersheds are protected as “waters of the United States” under the CWA to which regulatory programs apply. The CWA makes technical assistance and grants available to assist states and others in achieving the requirements and goals of the CWA – the grants and technical assistance are not independent non-regulatory programs for non-jurisdictional waters.

¹⁹⁸ *Hodel v. Virginia Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264, 289 (1981); *New York v. United States*, 505 U.S. 144, 167 (1992) [internal citations omitted] (“This arrangement, which has been termed ‘a program of cooperative federalism,’ *Hodel*, supra, is replicated in numerous federal statutory schemes. These include the Clean Water Act, see *Arkansas v. Oklahoma*, (Clean Water Act “anticipates a partnership between the States and the Federal Government, animated by a shared objective”).”

¹⁹⁹ For example, Justice Kennedy states in *Rapanos* that: “[e]ven assuming, then, that federal regulation of remote wetlands and nonnavigable waterways would raise a difficult Commerce Clause issue notwithstanding those waters’ aggregate effects on national water quality, but cf. *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); see also *infra*, at 2249–2250, the plurality’s reading is not responsive to this concern. 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 State of New York et

plainly the Agencies' intent in elevating and contorting the meaning of CWA Section 101(b). It is patently obvious that the states can take a primary role in eliminating pollution in waters that are protected by the federal CWA.²⁰⁰ This is the system of cooperative federalism under the CWA that has been in place since 1972, and it is essential to achieving the objective of the CWA.²⁰¹

Even more concerning is that it is entirely unclear how the Agencies actually applied their "balancing act" to narrow the definition of "waters of the United States," and why they cite to *The Daniel Ball* decision from 1870 to justify it, despite previously acknowledging the law regarding navigability has evolved substantially since that time. As the plurality stated in *Rapanos*:

The *Rapanos* petitioners contend that the terms "navigable waters" and "waters of the United States" in the Act must be limited to the traditional definition of *The Daniel Ball*, which required that the "waters" be navigable in fact, or susceptible of being rendered so. See 10 Wall., at 563, 19 L.Ed. 999. But this definition cannot be applied wholesale to the CWA. The Act uses the phrase "navigable waters" as a *defined* term, and the definition is simply "the waters of the United States." 33 U.S.C. § 1362(7). Moreover, the Act provides, in certain circumstances, for the substitution of state for federal jurisdiction over "navigable waters ... *other than* those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce ... including wetlands adjacent thereto." § 1344(g)(1) (emphasis added). This provision shows that

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." *Rapanos v. United States*, 547 U.S. 715, 777 (2006).

²⁰⁰ This fact is expressly acknowledged in the Supplemental Notice for Definition of Waters of United States - Recodification of Pre-Existing Rules (Docket ID No. EPA-HQ-OW-2017-0203: "Congress envisioned a major role for the states in implementing the CWA . . . Under this statutory scheme, the states are responsible for developing water quality standards for waters of the United States within their borders and reporting on the condition of those waters to EPA every two years. *Id.* at 1313, 1315. States are also responsible for developing total maximum daily loads (TMDLs) for waters that are not meeting established water quality standards and must submit those TMDLs to EPA for approval. *Id.* at 1313(d). States also have authority to issue water quality certifications or waive certification for every federal permit or license issued within their borders that may result in a discharge to navigable waters. *Id.* at 1341. A change to the interpretation of "waters of the United States" may change the scope of waters subject to CWA jurisdiction and thus may change the scope of waters for which states may assume these responsibilities under the Act . . . Forty-seven states administer the CWA section 402 permit program for those waters of the United States within their boundaries, and two administer the section 404 permit program." Supplemental Notice, 83 Fed. Reg. 32227, at 32232-33 (July 12, 2018).

²⁰¹ See *e.g., Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 129 (D.C. Cir. 1976) ("Thus, without the national standards required by s 301, the fifty states would be free to set widely varying pollution limitations. These might arguably be different for every permit issued ... The plainly expressed purpose of Congress to require nationally uniform interim limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.")

the Act's term “navigable waters” includes something more than traditional navigable waters. We have twice stated that the meaning of “navigable waters” in the Act is broader than the traditional understanding of that term, SWANCC, 531 U.S., at 167, 121 S.Ct. 675; Riverside Bayview, 474 U.S., at 133, 106 S.Ct. 455.²⁰²

The Agencies’ failure to identify how they employed their 101(b) theory and *The Daniel Ball* to redefine “waters of the United States” is also arbitrary, capricious and contrary to law.²⁰³

The Proposed Rule further states “[g]iven the significant civil and criminal penalties associated with the CWA, it is important for the agencies to promote regulatory certainty while striving to provide fair and predictable notice of the limits of federal jurisdiction. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-25 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (characterizing fair notice as possibly the most fundamental of the protections provided by the Constitution’s guarantee of due process, and stating that vague laws are an exercise of ‘arbitrary power . . . leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up’).”²⁰⁴ Promoting “regulatory certainty,” is not a valid legal basis, or even a meaningful phrase, to dramatically redefine “waters of the United States.” To the extent it means anything more than making sure the definition is clear and understandable, it is an impermissible substantive consideration. As described in detail below, however, the new definition proffered in the Proposed Rule is so hopelessly vague, confusing and unbound to any cognizable method for determining its application that the Agencies are completely unable to apply it to the real world and determine its actual expected impact on the Nation’s waters and CWA programs. Accordingly, the Proposed Rule is the epitome of agency exercise of arbitrary and capricious action.

As previously noted, the APA requires the Agencies to “provide reasoned explanation” for their action, and to “show that there are good reasons” for replacing the CWR and the pre-2015 regulatory definition of “waters of the United States.”²⁰⁵ The Agencies must demonstrate that they have proffered a “permissible construction” of the CWA, *i.e.* that the Agencies’ action is not “arbitrary, capricious, or manifestly contrary to the statute.”²⁰⁶ The Agencies are also required provide a “reasoned explanation” for “disregarding facts and circumstances that underlay or were engendered by” the pre-2015 Definition and the CWR.²⁰⁷ The Agencies have utterly failed to meet

²⁰² *Rapanos*, 547 U.S. at 730-31 (2006).

²⁰³ The Agencies could have balanced this in myriad ways, but they do not explain how they did so.

²⁰⁴ Proposed Rule, at 4169.

²⁰⁵ *FCC v. Fox Television Stations, Inc.* 556 U.S.502, 516 (2009).

²⁰⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

²⁰⁷ *Fox*, 556 U.S. at 516.

these requirements in the Proposed Rule, most fundamentally, by failing to explain how any of their new legal theories and policies were employed in developing the language of the Proposed Rule.

The Agencies solicit comment on all aspects of the proposed definition and whether it would strike the proper balance between the regulatory authority of the Federal government and States, meets its obligation to provide fair notice to members of the regulated community, and adheres to the overall structure and function of the CWA by ensuring the protection of the nation's waters. The answer to these inquiries, based on all of our comments is: (1) No, and the Agencies' attempt to do this is contrary to law; (2) No, the agency has not complied with its obligations under the APA or the required federalism consultations or public notice requirements, and the proposed definition is not clear, understandable, certain, technically supportable, or capable of being applied in using modern science and available information; and (3) No, the proposed definition is inconsistent with the most fundamental requirements of the CWA, and directly contrary to the Act's objective, as it would undoubtedly fail to preserve and protect the physical, chemical and biological integrity of the Nation's waters.

VIII. THE PROPOSED DEFINITION IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

Based on the Agencies' analysis of the law and some vague, impermissible policy choices, which are deeply flawed in nearly every respect, the Agencies are proposing an unprecedentedly narrow definition of "waters of the United States" that is centered on the protection of "relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right." The Agencies' definition also includes very narrow categories of waters that have a "specific connection" to those relatively permanent traditional navigable waters, as well as wetlands abutting or having a direct hydrologic surface connection to those waters. The definition also excludes interstate waters and "ephemeral" tributaries.²⁰⁸

Because this definition would not even protect all of the waters that were protected under federal water pollution laws in effect prior to the 1972 CWA,²⁰⁹ it would transform the CWA from the federal "all-encompassing program of water pollution regulation" the Supreme Court described in *City of Milwaukee v. Illinois*, *International Paper Co. v. Ouellette*, and *Arkansas v. Oklahoma*, into the type of supplemental pollution control program and state regulatory systems that "gave us the 1969

²⁰⁸ The Agencies claim this definition adheres "to the basic principles articulated in the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions while respecting the overall structure and function of the CWA." Proposed Rule, at 4170. As explained throughout these comments, it does not. And it is nonsensical to say that it adheres to the widely divergent and oppositional opinions in *Rapanos*.

²⁰⁹ See Hines, *supra* note 36 (Overview of waters protected under prior statutes). See also Waterkeeper Fact Sheets, *supra* note 121.

burning of the Cuyahoga River, the consequence of a classic “tragedy of the commons,” which occurs when society fails to create incentives to use a common resource responsibly.”²¹⁰ This is clearly contrary to Congressional intent and endangers the Nation’s waters.

Adding insult to injury for the Nations water’s and all who depend upon and enjoy them, as detailed below, the Agencies have limited the definition even further through a series of complex definitional limitations and exclusions that have no basis in the law or science. For most waters, the definition is quite literally impossible to decipher and apply to determine which waters will remain protected by the CWA with any certainty. The Agencies’ Resource and Programmatic Assessment, Economic Analysis and requests for recommendations on developing scientific methods to apply the proposed definition in jurisdiction determinations aptly, and decisively, illustrate this fact. It is disingenuous at best for the Agencies to claim that this definition provides “clarity and predictability” and eliminates case-by-case evaluations.²¹¹

A. Traditional Navigable Waters and Territorial Seas

The Agencies state that they will “interpret traditional navigable waters as all waters that are currently defined in 33 C.F.R. part 329, which implements sections 9 and 10 of the Rivers and Harbors Act, and by numerous decisions of the federal courts, as well as all other waters that are navigable-in-fact.”²¹² This is impermissibly vague, as well as inconsistent with the Appendix D Guidance,²¹³ and there is good reason to believe that the Agencies intend to interpret even this category of protected waters more narrowly than its historic meaning. That good reason, specifically, includes the Agencies’ erroneous legal interpretation of Commerce Clause jurisprudence, their unfounded assertion that Congress only exercised “its commerce power over navigation,” and their strange focus on *The Daniel Ball* in relation to determining navigability and balancing state’s rights with the objective of the CWA. All of this is contrary to law, and to the extent that the Agencies intend to narrowly define traditional navigable waters, they have utterly failed to disclose their alternative approach or provide a reasoned basis for doing so.

Additionally, the Agencies discuss, but do not cite to, pre-proposal comments from “several Commenters” they received “about what constitutes navigability for purposes of that term and what

²¹⁰ *Am. Farm Bureau Fed’n v. U.S. E.P.A.*, 792 F.3d 281, 309 (3d Cir. 2015). (“In response to that fire and to the general degradation of American water that followed the post-war industrial boom, Congress determined that the EPA should have a leadership role in coordinating among states to restore the Nation’s waters to something approaching their natural state. See 33 U.S.C. § 1251.”)

²¹¹ See Waterkeeper Fact Sheets, *supra* note 121. The Fact Sheets illustrate the extensive and complex case by case analyses that must be undertaken to attempt to apply the vague and non-scientific definitions in the Proposed Rule to a waterbody.

²¹² Proposed Rule, at 4170.

²¹³ Appendix D: Legal Definition of “Traditional Navigable Waters,” (**Attachment 15**).

it means to be “susceptible to use” in commerce.” They provide as an “example” of such comments vague assertions that determinations made by the agencies using the Rapanos Guidance, and in particular Appendix D to that guidance, may have allowed for the regulation of waters that are not navigable-in-fact within the legal construct established for such waters by the courts.”²¹⁴ These comments, which are clearly under consideration by the Agencies, should have been fully disclosed to the public in the Proposed Rule. As it stands, the public cannot determine what positions and/or interpretations the unidentified Commenters are advancing. Rather than vaguely indicating that they may take regulatory action in response to these comments in the Final Rule, the Agencies are obligated to provide an explanation and reasoned basis for the action in this Proposed Rule Notice so that the public can understand the Agencies’ thought process and provide comment on it.

Instead, the Agencies say they that because they are considering “whether Appendix D is sufficiently clear regarding the regulation of these foundational waters, the agencies solicit comment on whether the existing guidance regarding the scope of traditional navigable waters should be updated to help improve clarity and predictability of the agencies’ regulatory program. The agencies also solicit comment on whether the regulation of this category of waters has been or can be clarified through existing, modified, or new exclusions to the term “waters of the United States,” or other regulatory changes.”²¹⁵

It is apparent from such solicitations of public comment on matters that, if codified, could result in foundational shifts in the application and administration of the CWA, that the Proposed Rule is simply not “ready for prime time” and must be withdrawn. The Agencies clearly should have completed their consideration of Appendix D prior to issuing this Proposed Rule, and if they intend to alter their longstanding interpretation in Appendix D, they must provide the public with a reasoned basis for making that change and an explanation of how the Agencies intend to change it.²¹⁶ Additionally, the Agencies’ second request for comment – i.e., “whether the regulation of this category of waters has been or can be clarified through existing, modified, or new exclusions to the term ‘waters of the United States,’ or other regulatory changes.” – is indecipherable and impossible for the public to provide meaningful comment upon.

Perhaps even more alarming is the fact that the Agencies are proposing this category – traditional navigable waters – as the hub through which they intend to define all other jurisdictional waters,

²¹⁴ Proposed Rule, at 4170-71

²¹⁵ *Id.*

²¹⁶ See, e.g., *FCC v. Fox Television Stations, Inc.* 556 U.S.502, 516 (2009); *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (“The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency’s proposals.”).

but the Agencies do not even know which waters in the United States are included in this category. When the Agencies attempted to evaluate the impacts of this Proposed Rule on the nation's waters and CWA Programs, they admit they were unable do so for traditional navigable waters because the Agencies say (1) they make case-by-case determinations for this category of waters that they claim cannot be relied upon in future determinations; (2) the USGS National Hydrography Dataset does not identify these waters; and (3) there is no national map of traditional navigable waters.²¹⁷ Because the Agencies limited this definition in such a narrow manner contrary to the CWA, if the Agencies do not know whether a water is a traditional navigable water, they cannot know whether waters connected to it are jurisdictional. For this reason alone, the Proposed Rule is arbitrary, capricious, and contrary to law. Rather than providing clarity, the Agencies have created an insurmountable barrier to protection of the Nation's waters contrary to the intent of Congress.

It is beyond dispute that these "traditional navigable waters" are encompassed within the meaning of "waters of the United States." However, the meaning of the "traditional navigable waters" must be defined consistent with our previous comments on this subject.²¹⁸

B. Interstate Waters

In a Proposed Rule that is full of shocking and inexplicable statements, conclusions and proposals, the Agencies' determination to eliminate interstate waters as a category of "waters of the United States" likely takes the top prize. In sum, the Agencies propose to eliminate federal protections for interstate waters based on the circular argument that the CWA only protects "navigable waters." It is as if the Agencies don't realize that navigable waters are defined in the statute as "waters of the United States," or that this is the phrase they purport to be defining. The Agencies rely on their erroneous theory that Congress only intended to exert its commerce power over navigation in the CWA, based on *SWANCC*, which again, does not stand for that proposition. The Agencies recognize that this view is a departure from its long-held views to the contrary, but they have failed to provide any reasoned basis for the departure.²¹⁹ These theories do not provide a reasoned basis for overturning a longstanding agency interpretation and, as a result, they cannot be relied upon to eliminate protections for interstate waters that have been in place in some form since 1948.

Standing in contrast to the Agencies' purported legal basis for this action is the text of the CWA,

²¹⁷ See Resource and Programmatic Assessment, at p. 35.

²¹⁸ See 2011 Comments, *supra* note 6, at pp. 18-28.

²¹⁹ See *e.g.* U.S. EPA and U.S. Army Corps of Engineers. Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 2015) (Docket ID: EPA-HQ-OW-2011-0880-20869), available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869> (**Attachment 16**) U.S. EPA & U.S. Army Corps of Eng'rs, Interstate Waters are "Waters of the United States" Under Section (a)(2) of the Agencies' Regulations, at 7, available at http://www.epa.gov/owow/wetlands/pdf/wous_interstate_waters.pdf. (**Attachment 17**).

multiple Supreme Court Cases, legislative history, agency practice, and common sense.²²⁰ As the Agencies acknowledge, interstate waters have been protected against pollution pursuant to federal water quality statutes since the passage of the 1948 Water Pollution Control Act (“WPCA”).²²¹ This category of waters includes all rivers, lakes, and other waters that flow across, or form a part of, state boundaries without regard to navigability.²²² The 1948 WPCA also declared federal jurisdiction over “the waterways of the Nation,” and left the primary responsibility for pollution control in the hands of the states.²²³

Federal jurisdiction was expanded to navigable or interstate waters in the 1961 Amendments, and the 1965 Amendments provided for the creation of water quality standards for interstate waters to be developed by the states, or the Secretary of Health, Education, and Welfare if the state failed to act.²²⁴ In language that is nearly identical to the 1972 CWA, the 1966 Amendments directed that water quality standards for interstate waters “shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. In establishing such standards, the Secretary, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses.”²²⁵

Due to the failure of this approach to address the nation’s serious pollution problems, in part because of narrowly defined categories of protected waters and limited federal authority,²²⁶ Congress passed the 1972 CWA recognizing that solving the nation’s water quality problems required “broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’”²²⁷ To accomplish these goals,

²²⁰ See e.g. *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 304 (3d Cir. 2015) (“At the same time, federal power over interstate waterways, ‘from the commencement of the [federal] government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.’ *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 190, 6 L.Ed. 23 (1824). And for at least a century, federal common law has governed disputes over interstate water pollution. *Arkansas v. Oklahoma*, 503 U.S. at 98, 112 S.Ct. 1046 (citing *Missouri v. Illinois*, 200 U.S. 496, 26 S.Ct. 268, 50 L.Ed. 572 (1906), and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 27 S.Ct. 618, 51 L.Ed. 1038 (1907)”).

²²¹ Water Pollution Control Act of 1948, Pub. L. No. 80-845, 2(d)(1), (4), 62 Stat. 1156-57.

²²² *Id.* at 10, 62 Stat. 1161.

²²³ *Id.* §7, 62 Stat. 1169; See also Hines, *supra* note 36.

²²⁴ See Public Law 89-234, § 5(a), 79 Stat. 908 (1965).

²²⁵ *Id.* §5(a)(3).

²²⁶ See Hines, *supra* note 36.

²²⁷ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing H.R.Rep. No. 92-911, p. 76 (1972); S.Rep. No. 92-414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742). The Agencies’ Notice for this Proposed Rule misconstrues *Riverside Bayview* by describing the Opinion as simply one that “deferred to the Corps’ ecological judgment that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” Definition of “Waters of the United States” — Recodification of Pre-Existing Rules, 82 Fed. Reg. 34900 (July 27, 2017). The unanimous Supreme

the Supreme Court in *Riverside Bayview* concluded, Congress defined the “waters covered by the Act broadly” to encompass all “waters of the United States.”²²⁸

Congress clearly did not intend to make the CWA less protective of the nation’s waters than its predecessor laws.²²⁹ To the contrary, the CWA’s coverage of, and regulatory programs for, interstate waters are so broad and comprehensive that it eliminated alternative remedies in interstate pollution cases according to the Supreme Court in *City of Milwaukee v. Illinois* (displaced federal common law),²³⁰ *International Paper Co. v. Ouellette*²³¹ (preempted downstream state’s common law) and *Arkansas v. Oklahoma*²³² (a downstream state’s remedy is to enforce its water quality standard against an upstream state through the CWA’s NPDES permitting process). Eliminating CWA jurisdiction and programs for interstate waters by removing them from the definition of “waters of the United States” would leave states in a worse position to address interstate water pollution than they were for the century preceding the CWA, since they have been held by the Supreme Court to have lost the common law remedies that were available to them prior to the Act.²³³ Contrary to historical fact and everything we know about Congress’ intent when it passed the CWA, the Agencies outrageously assert that “interstate waters without any connection to traditional navigable waters would be more appropriately regulated by the States and Tribes under their sovereign authorities.”²³⁴ This is clearly not consistent with intent of Congress or the plain language of the CWA, which makes clear that the Act applies to interstate waters. For example, CWA Section 303, like the 1966 Amendments, requires states to adopt water quality standards consistent with federal requirements for interstate waters, which are also like the 1966

Court Opinion in *Riverside Bayview* is far more significant in determining the definition of “waters of the United States” than indicated by the Agencies’ description.

²²⁸ *Id.*

²²⁹ See, e.g., S. Rep. No. 92-1236, at 144 (1972); See also 2011 Comments, *supra* note 6, pp. 28-30.

²³⁰ *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

²³¹ *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

²³² *Arkansas v. Oklahoma*, 503 U.S. 91, 98–100 (1992).

²³³ See e.g. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 325–26 (1981) (“It is also significant that Congress addressed in the 1972 Amendments one of the major concerns underlying the recognition of federal common law in *Illinois v. Milwaukee*. We were concerned in that case that Illinois did not have any forum in which to protect its interests unless federal common law were created. See 406 U.S., at 104, 107, 92 S.Ct., at 1393, 1394. In the 1972 Amendments Congress provided ample opportunity for a State affected by decisions of a neighboring State’s permit-granting agency to seek redress.”)

²³⁴ Proposed Rule, at 4172.

standards.²³⁵ Once approved, these water quality standards become the federal standards for implementing the CWA.²³⁶

Additionally, as noted above, the Agencies freely admit that they do not know how many waters will lose CWA protections under this Proposed Rule, as they claim they do not have any data or maps that identify them.²³⁷ They do acknowledge in the Regulatory and Programmatic Assessment, however, that the Proposed Rule would reduce the number of waters considered to be jurisdictional as interstate waters as compared to both of the previous definitions.²³⁸ The Agencies also acknowledge that the Proposed Rule would result in potential changes in jurisdiction for wetlands adjacent to interstate waters, tributaries of interstate waters and their adjacent wetlands, and impoundments of the above waters and any adjacent wetlands to those impoundments.²³⁹ The agencies, however, claim they are not aware of any “resource that would identify these waters and therefore lack the analytical ability to perform a comparative analysis with precision.”²⁴⁰ Thus, it is unreasonable and arbitrary for the Agencies to disingenuously say they “anticipate that most waters that would be deemed jurisdictional under the existing regulatory definition from the 1980s would likely remain jurisdictional under this proposal as they would likely fall within the proposed traditional navigable waters category or one of the other proposed categories, such as tributaries or lakes and ponds.”²⁴¹ The public and courts obviously owe no deference to agency beliefs when agencies wear blinders to avoid having to carefully consider important aspects of a problem, and then make intentionally uninformed guesses about the likely impact of their proposed actions.

²³⁵ 33 U.S.C. §1313(a)(1) (This section also provides “any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.”)

²³⁶ See *Arkansas v. Oklahoma*, 503 U.S. 91, 110(1992) (“In such a situation, then, state water quality standards promulgated by the States with substantial guidance from the EPA and approved by the Agency are part of the federal law of water pollution control.”) (footnote omitted).

²³⁷ Resource and Programmatic Assessment, at p. 36.

²³⁸ *Id.* It is important to note that the Agencies are not actually assessing the loss of jurisdiction for any category of water in relation to the Pre-2015 definition. Instead, they are comparing the Proposed Rule to waters they assert would be protected under their interpretation of the 2003 and 2008 Guidance documents. This is not a sound approach to evaluating the impacts of the Proposed Rule, and is arbitrary, capricious and contrary to law.

²³⁹ Resource and Programmatic Assessment, at p. 36.

²⁴⁰ Proposed Rule, at 4172.

²⁴¹ *Id.*

With regard to the Agencies' specific requests for comment on retention of jurisdiction over interstate waters, Commenters maintain that the Agencies are legally required to include all interstate waters, including rivers, streams, lakes, wetlands, and any other waters that flow across, or form a part of, state boundaries, without regard to navigability. The impact of not protecting interstate waters could be devastating to the Nation's waters.²⁴² In addition to the waters already mentioned, the removal of interstate waters could lead to an expansion of the number of "closed basins" with rivers, streams, lakes, and wetlands that are currently protected only because of their connection to an interstate water.²⁴³

C. Impoundments

Although the Agencies state in the Preamble that they are not making any substantive changes to this portion of the regulatory definition, the proposed language in the definition would dramatically reduce the types of impounded waters that will remain subject to CWA protections.²⁴⁴ The pre-2015 regulatory definition includes "[a]ll impoundments of waters otherwise defined as waters of the United States under this definition," which is a broad definition that covers most types of waters. The Proposed Rule includes only impoundments of the narrow categories of waters that would be protected by the proposed definition, contrary to law. As a result, the Proposed Rule would protect many fewer impoundments than either the pre-2015 definition or the CWR. No scientific or legal basis exists for excluding impoundments of any water protected by these definitions, and none was provided in the Proposed Rule Notice.

Agency Requests for Comment

The agencies seek comment on "whether impoundments are needed as a separate category of "waters of the United States," or whether the other categories of waters in this proposed rule effectively incorporate the impoundment of other jurisdictional waters, such as the lakes and ponds category." It is of the utmost importance that impoundments of any "waters of the United States," including those protected by the current definitions, continue to be protected as a separate category in the definition of "waters of the United States." As stated in the preamble to the CWR, "[i]mpoundments are jurisdictional because as a legal matter an impoundment of a 'water of the United States' remains a 'water of the United States' and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or

²⁴² See e.g. Waterkeeper Alliance Fact Sheets, *supra* note 120, including the Rio Grande, Upper Missouri, Missouri Confluence, Snake River, and Upper Potomac Fact Sheets.

²⁴³ *Id.*

²⁴⁴ See Resources and Programmatic Analysis, at 37.

biological integrity of downstream waters traditional navigable waters, interstate waters, or the territorial seas.”²⁴⁵ No other category proposed by the Agencies covers impoundments.

The agencies also seek comment on “whether there are existing jurisdictional impoundments that would not be found jurisdictional under an alternate approach that would remove impoundments as a separate category of ‘waters of the United States.’” The answer to this question is undoubtedly yes because the Agencies’ proposed definition improperly eliminates protections for broad classes of currently protected waters, and there are no other categories in the Proposed Definition that would protect them.²⁴⁶ However, because not even the Agencies are able to apply their proposed definition to identify which waters will and which waters will not be protected due to fatal flaws in that definition, it is impossible to fully characterize the magnitude of the loss.²⁴⁷

The agencies also welcome comment on whether certain categories of impoundments should not be jurisdictional, such as certain types of impoundments that release water downstream only very infrequently or impede flow downstream such that the flow is less than intermittent. An impounded wetland frequently becomes a pond, and the agencies solicit comment as to whether that pond should remain jurisdictional even if, for example, it does not meet the elements of the lakes and ponds category under paragraph (a)(4) in this proposed rule, such as contributing perennial or intermittent flow to an (a)(1) water. Impoundments of all currently protected “waters of the United States” should remain protected by the definition.²⁴⁸ It would be arbitrary, capricious and contrary to law for the Agencies to eliminate impoundments based some arbitrary measure of their contributions to downstream flow. Impeding and controlling downstream flow are often the primary purposes for creating an impoundment, but that does not transform the water into a non-jurisdictional water, nor does it mean the impoundment does not have beneficial uses to protect, and downstream impacts must be addressed under the CWA.²⁴⁹

²⁴⁵ *S. D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (“[N]or can we agree that one can denationalize national waters by exerting private control over them”), and *U.S. v. Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008) (“[I]t is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.”).

²⁴⁶ See e.g. Waterkeeper Alliance Fact Sheets, *supra* note 120.

²⁴⁷ See Resources and Programmatic Analysis, at 37.

²⁴⁸ See Technical Support Document for the CWR, a p. 230. (“The Supreme Court has confirmed that damming or impounding a ‘water of the United States’ does not make the water non-jurisdictional. See *S. D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (“[N]or can we agree that one can denationalize national waters by exerting private control over them.”). (**Attachment 16**).

²⁴⁹ *Id.*; See also, e.g., *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 717 (1994); Connectivity Report, *supra* note 12, at p 3-48 (For example, “[t]he United States has more than 80,000 dams, over 6,000 of which exceed 15 m in height (USACE, 2009). Numerous studies have shown that dams impede biotic movements, reduce biological connectivity between upstream and downstream locations (e.g., Greathouse et al., 2006; Hall et al., 2011),

D. Tributaries

As demonstrated in detail above, the Agencies' fundamental basis for narrowly defining the types of tributaries protected under the CWA is arbitrary, capricious and contrary to law. Further, the Agencies are basing the definitional limitations for tributaries on impermissible and vague policy choices, as well as erroneous legal theories. It is not possible, however, to connect those policies and legal theories to the actual the choices the Agencies made that have resulted in the vague, arbitrary and non-scientific approach to tributaries in the Proposed Rule.

Nothing in the law or science supports the definitional limitations the Agencies are proposing, and as a result, neither the Agencies nor the public can discern which tributaries will be protected under this proposed definition.²⁵⁰ The obvious corollary to this fact is that the Agencies cannot evaluate the impact of their own narrow definition on the Nation's' waters and CWA programs, which means the Agencies cannot determine or demonstrate that their definition is consistent with the CWA. In fact, they have not even taken meaningful steps to do so. To the contrary, the Agencies simply looked at two datasets they claim are not adequate to evaluate the effects and/or impacts of their proposed action and conclude that they don't know how the loss of jurisdiction over tributaries will impact waters and CWA Programs.²⁵¹ Commenters, on the other hand, have evaluated how this Proposed

and form a discontinuity in the normal stream-order related progression in stream ecosystem structure and function (Stanford and Ward, 1982). Upstream of large dams, riparian areas are permanently inundated, increasing lateral hydrologic connectivity. Downstream, dams decrease peak stream volumes during the normal high runoff seasons, while increasing minimum flows during normal low-flow seasons—an overall dampening of stream-flow variability (Poff et al., 2007). Because many riverine organisms are adapted (life history, behavioral, and morphological) to the seasonality of natural flow regimes, dampening flow variability can have deleterious effects on species persistence where dams have been built (Lytle and Poff, 2004). This reduction in high flows also decreases the connectivity of riparian wetlands with the stream by reducing the potential for overbank lateral flow. This can affect downstream water quality, because overbank flow deposits sediment and nutrients that would otherwise remain entrained in the river (Hupp et al., 2009).”

²⁵⁰ Resource and Programmatic Assessment, at pp. 38-40

²⁵¹ Resource and Programmatic Assessment, pp. 38-40 (Evaluating NHD and ORM-2 Data and finding it inadequate). Many other relevant datasets exist that the Agencies could have used to attempt to evaluate the impact of this definition and determine if it will achieve the objective of the CWA. In fact, the Agencies mention several examples in the Notice itself, but they do not explain why the data were not utilized in the Resource and Programmatic Assessment. *See, e.g.*, Proposed Rule, at pp. 4176-77. Even more information is available from the states that was not evaluated and considered. But the Agencies failure to consider the data and information means we cannot know how it may have helped evaluate the impacts of this proposed definition. The Agencies' reliance on admittedly inadequate data and failure to explain why they did not use other reliable, readily available data sources is arbitrary and capricious. Further, the Agencies' failure to identify and evaluate the impacts of “the potential implementation methods” they describe in the Proposed Rule violates the APA by failing to give the public notice of, and meaningful opportunity to comment on, how the Agency will interpret and apply the propose definition. *See, e.g.*, Proposed Rule, at 4176.

Rule could affect twelve major watersheds across the country, and it appears the impacts could be devastating, with the most extreme impacts being readily apparent in the arid West.²⁵²

In short, the Agencies' narrow approach to determining jurisdiction of tributaries in the Proposed Rule is contrary to more than 40 years of legal precedent and longstanding Agency interpretations of the CWA. The Agencies have failed to "provide reasoned explanation" for their action, and have failed to "show that there are good reasons" for replacing the CWR and/or the pre-2015 definition of "waters of the United States" with the definition in the Proposed Rule.²⁵³ The Agencies have also failed to demonstrate that their action is a "permissible construction" of the CWA, *i.e.* why it would not be "arbitrary, capricious, or manifestly contrary to the statute."²⁵⁴ The Agencies are also required to provide a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" the Pre-2015 Regulatory Definition and the CWR.²⁵⁵

As a result of these errors, the Proposed Definition improperly narrows jurisdiction over tributaries in many ways, including but not limited to: (1) Limiting CWA jurisdiction to tributaries of an undefined subset of "traditional navigable waters," and the territorial seas; (2) Only including tributaries the Agencies deem "perennial"²⁵⁶ and "intermittent"²⁵⁷ using arbitrary, non-scientific

²⁵² Waterkeeper Alliance Fact Sheets, *supra* note 120.

²⁵³ *FCC v. Fox Television Stations, Inc.* 556 U.S.502, 516 (2009).

²⁵⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

²⁵⁵ *Fox*, 556 U.S. at 516. See also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change," and that an agency's change in practice without explaining a prior inconsistent finding – such as the plethora of technical conclusions in the Connectivity Report, which the Agencies relied upon to support their interpretations in the CWR – is arbitrary and capricious).

²⁵⁶ The agencies propose to define the term "perennial" to mean surface water flowing continuously year-round during a typical year. This definition is extreme, unjustified, non-scientific and arbitrary. Only a small percentage of the Nation's waters are monitored with stream gages or through other methods that could provide information to satisfy this standard. See USGS Surface Water for the Nation, available at: <https://waterdata.usgs.gov/nwis/rt> and <https://waterdata.usgs.gov/nwis/rt> (USGS currently maintains 10,313 gaging sites for the entire country, down from 16,913 in October 1, 2007 - leaving large numbers of waterways unmonitored for flow) (**Attachment 17(a)**). Further, flow in many of the nation's waters, including large lakes and rivers, are impacted by diversions, withdrawals, groundwater pumping, drought, climate change and other flow restrictions that can have extreme local and regional impacts on the availability of flow in "typical year." See Waterkeeper Fact Sheets, *supra* note 120, including Rio Grande, Snake River and Rogue River Fact Sheets. The Agencies lack a rational, science-based approach to evaluating a "typical year" and this concept is arbitrary and capricious in any event. Congress did not intend for jurisdiction over the nation's waters to come and go based on the continuity of water flow.

²⁵⁷ The proposed definition of "intermittent" is surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts. This definition suffers from the same shortcomings as the definition for "perennial" above. Additionally, there is no rational basis for requiring that the flow arise from groundwater flow or melting snowpack, as opposed to snow fall or precipitation. This is arbitrary, capricious and contrary to law. The sources of the water flowing in a river or stream are irrelevant to whether it is a "waters of the United States." Many important rivers and streams contribute substantial flow to traditional navigable waters and the territorial seas in only in response to

definitions²⁵⁸ and requiring that level of flow to continue all the way to a “traditional navigable waters,” and the territorial seas; (3) Expressly excluding tributaries the Agencies deem “ephemeral” using an arbitrary, non-scientific definition;²⁵⁹ (4) Establishing an arbitrary requirement that “perennial” and “intermittent” tributaries flowing through non-jurisdictional waters are only jurisdictional if the non-jurisdictional waters also convey perennial or intermittent flow to a tributary or other jurisdictional water;²⁶⁰ (5) Failing to identify reasonable methods for identifying and differentiating between “perennial” and “intermittent” tributaries; (6) Requiring that tributaries be a river, stream or other natural surface water channel; and (7) Protecting tributaries

precipitation. See U.S. EPA, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest (Nov. 2008), available at https://www.epa.gov/sites/production/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf (Attachment 17(b)). Further, as the Agencies appear to acknowledge, they have created an impossible burden they do not know how to resolve or evaluate with their approach; “the agencies note that identifying whether the channel bed intersects the groundwater table may be challenging to accomplish in the field, that gathering the relevant data could be time consuming, and could require new tools and training 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. There may be other methods which could be researched and developed by the agencies over time, including the identification of field indicators, which could be regionalized, as well as the development of modeling tools. However, both of these methods (field indicators and modeling tools) would only provide an indication of groundwater generated base flow and would not directly measure its presence.” Proposed Rule, at 4178. This approach is the precise opposite of providing clarity and regulatory certainty.

²⁵⁸ The Agencies state that: “[though “perennial,” “intermittent,” and “ephemeral” are commonly used scientific terms, the agencies are proposing to provide definitions of these terms for purposes of CWA jurisdiction to ensure that the regulation is clear.” Proposed Rule, at 4173. The non-scientific definitions (and other limitations) the Agencies adopt for clarity create massive uncertainty about which waters are included, as there is no science or established methodology for evaluating them. The definitions make it virtually impossible for a landowner or the public generally to determine if a river or stream is covered by the Act. Even the Agencies were unable to evaluate their own definition and determine the impact of it on waters, CWA Programs and Cost/Benefits. See Resource and Programmatic Assessment and Economic Analysis.

²⁵⁹ *Id.* The definition arbitrarily excludes rivers, streams and other waters that flow only in response to precipitation. Many important rivers and streams contribute substantial flow to traditional navigable waters and the territorial seas in only in response to precipitation. See fn. 258 *supra* and Waterkeeper Alliance Fact Sheets, *supra* note 120.

²⁶⁰ This means “perennial” and “intermittent” tributaries with an “ephemeral” or a losing section, or that flow into “ephemeral” or losing streams would not be tributaries, without regard to whether the “ephemeral” or losing stream feeds into the watershed of a traditional navigable water or territorial sea. In the Resources and Programmatic Assessment at pg. 38, the Agencies state: “[f]or example, in some parts of the country, 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 alterations (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.” The Agencies have provided no reasoned explanation for this, and it is arbitrary, capricious and contrary to law. The could have devastating impacts to waterways, see Waterkeeper Alliance Fact Sheets, *supra* note 120, including Missouri Confluence Fact Sheet.

that flow because of groundwater and snowmelt, but not tributaries that flow in response to “precipitation” and “snow fall.”

Taken together, these improper, unscientific, limitations on CWA jurisdiction over tributaries undermine the entire CWA by creating many unsupported and vaguely defined barriers to controlling pollution in historically protected rivers, streams and other waters. The Agencies’ use of non-scientific definitions and arbitrary requirements for jurisdictional tributaries will result in the loss of CWA protections for waters that are commonly understood as perennial, intermittent and ephemeral using scientific terms. This could have devastating impacts on our Nation’s waters.²⁶¹ In addition to the harm caused by simply eliminating long-standing protections for large numbers of rivers, streams and other waters, the uncertainty flowing from the Agencies’ non-scientific and unreasonable definitions will result in confusion and uncertainty that ensures fewer pollution discharges being controlled, contrary to the objective of the CWA and the intent of Congress. The Agencies state that they will have the burden to prove a water is jurisdictional, but they propose to establish standards of proof in this definition that often will not be able to be met for many waters across the country. This hardly seems accidental.

Under the Agencies’ pre-2015 definition, all tributaries to traditionally navigable waters, interstate waters, impoundments, and “other waters” are defined as “waters of the United States.”²⁶² In order to preserve and protect the physical, chemical and biological integrity of the Nation’s waters, all of the tributaries protected under that regulation must continue to be included in the definition of “waters of the United States.” As demonstrated previously, the Supreme Court has not issued a single opinion that has limited CWA jurisdiction over tributaries to these waters. To the contrary, it is well settled that tributaries to other “waters of the United States” are jurisdictional waters within the meaning of “waters of the United States.”²⁶³ Neither *SWANCC* nor *Rapanos* invalidated or limited the scope of jurisdiction provided by the pre-2015 definition’s inclusion of tributaries.²⁶⁴ Tributaries are obviously connected to, and thus adversely impact, the downstream waters to which

²⁶¹ See e.g., 2011 Comments, *supra* note 6; Connectivity Report, *supra* note 12; and Waterkeeper Alliance Fact Sheets, *supra* note 120.

²⁶² See e.g., 40 C.F.R. §122.2; 33 C.F.R. §328.3(a).

²⁶³ See, e.g., *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 997 (9th Cir. 2007) (“The Supreme Court has since confirmed that regulable waters of the United States include tributaries of traditionally navigable waters and wetlands adjacent to navigable waters and their tributaries. The only question reserved in *Riverside Bayview Homes* was the issue of CWA jurisdiction over truly isolated waters.” citing *Bayview*, 474 U.S. at 106; 33 C.F.R. 328.3(a)(1),(4),(7); and *Rapanos*, 547 U.S. at 792 n. 3); see also *Benjamin v. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210, 1215 & n. 2 (D. Or. 2009) (indicating that jurisdiction over tributaries did not require demonstration of significant nexus); *United States v. Vierstra*, 2011 WL 1064526, at *5 (D. Id. Mar. 18, 2011) (“It is an open question as to whether Justice Kennedy’s concurrence applies in the tributary context.”). But see, e.g., *United States v. Robison*, 505 F.3d 1208 (11th Cir 2007) (applying “significant nexus” analysis to tributary stream).

²⁶⁴ See 2011 Comments, *supra* note 6, at pp. 9-15; see also 2003 Comments, *supra* note 61, at pp. 4-6.

they flow without regard to whether the water flowing in them is from rainfall, groundwater, snowfall, or snowmelt. This conclusion is consistent with the findings of the Connectivity Report and the SAB Report,²⁶⁵ as well as the individual comment of the SAB members.²⁶⁶

All ephemeral, intermittent and perennial tributaries, as those terms are defined by science, must be included as “waters of the United States.”²⁶⁷ Their inclusion is necessary to achieve the objective of the CWA, which requires controlling water pollution at its source. Wetlands, lakes and ponds should be included as tributaries based on the findings of the Connectivity Report and many individual SAB Member Comments.²⁶⁸

In addition to the Connectivity Report and the SAB Report, numerous scientific reports and government documents from across the country illustrate the importance of protecting these waters. Several of these reports are summarized and discuss in a report produced by the American Fisheries Society which states:

Headwater streams and wetlands are integral components of watersheds that are critical for biodiversity, fisheries, ecosystem functions, natural resource-based economies, and human society and culture. These and other ecosystem services provided by intact and clean headwater streams and wetlands are critical for a sustainable future. Headwater streams comprise 79% of U.S. stream networks; wetlands outside of floodplains comprise 6.59 million ha in the conterminous United States. Loss of legal protections for these vulnerable ecosystems would create a cascade of consequences, including reduced water quality, impaired ecosystem functioning, and loss of fish habitat for commercial and recreational fish species. Many fish species currently listed as threatened or endangered would face increased risks, and other taxa would become more vulnerable. In most regions of the USA, increased pollution and other impacts to headwaters would have negative economic

²⁶⁵ Connectivity Report and SAB Report, *supra* note 12.

²⁶⁶ Compilation of Preliminary Comments from Individual Panel Members on the Scientific and Technical Basis of the Proposed Rule Title “Definition of ‘Waters of the United States’ Under the Clean Water Act” (August 14, 2014) (hereinafter “Member Comments”) (**Attachment 18**).

²⁶⁷ See e.g. United States v. Hercules, Inc., Sunflower Army Ammunition Plant, Lawrence, Kan., 335 F. Supp. 102, 106 (D. Kan. 1971) (The defendant next makes a motion to dismiss on the ground that, if any ammonia was dumped into a watercourse, it was dumped into a tributary of a tributary of a navigable water and not the “tributary of a navigable water” as stated in the statute. This contention borders on the frivolous. Defendant argues that the words of the statute should be interpreted in the ordinary every day sense. This Court agrees. A tributary is defined in Bouvier, Dictionary of Law Vol. II, p. 384 (5th ed.); Black’s Law Dictionary p. 1677 (4th ed.), as “all streams flowing directly or indirectly into a river.”).

²⁶⁸ See e.g., Connectivity Report *supra* note 12, at 1-8 (nutrient removal and cycling); Member Comments, *supra* note 261, Rosi-Marshall at 81 and Sullivan at 85.

consequences. Headwaters and the fishes they sustain have major cultural importance for many segments of American society. Native peoples, in particular, have intimate relationships with fish and the streams that support them. Headwaters ecosystems and the natural, socio-cultural, and economic services they provide would face severe threat under the Waters of the United States rule recently proposed by the Trump administration.²⁶⁹

The report goes on to describe some of the consequences of failing to protect headwater streams under the CWA, as follow:

P]ollution of headwaters, including runoff of excess nutrients and other pollutants, degrades water quality affecting downstream ecosystems. Two striking U.S. examples are discharge effluent from mining (Woody et al. 2010; Daniel et al. 2015; Giam et al. 2018) and nutrient loading in the Mississippi River causing the Gulf of Mexico’s “dead zone”, a vast area of hypoxia that reduces biodiversity and commercial fisheries, with major economic and social costs (Rabalais et al. 1995; Rabotyagov et al. 2014). Similarly, polluted headwaters contribute to harmful algal blooms that result in toxic water, fish kills, domestic animal and human morbidity, and economic damage (Tango 2008; Staletovich 2018; Zimmer 2018).²⁷⁰

In North Carolina, research conducted by the North Carolina Department of Natural Resources – Division of Water Quality, concluded that:

In summary, staff of the Division of Water Quality have been conducting intensive research on headwater streams and headwater wetlands across the state for the past several years. Headwater streams are very common and provide significant benefits to downstream water quality and aquatic life. Intermittent streams have significant aquatic life even though their flow is not constant throughout the year. Headwater wetlands are often associated with these streams and provide important water quality filtration to protect downstream water quality as well as significant aquatic life habitat. Therefore based on this on-going research, the Division of Water Quality

²⁶⁹ American Fisheries Society, Headwater Streams and Wetlands are Critical for Sustaining Fish, Fisheries, and Ecosystem Services (Dec. 2018). (**Attachment 19**); See also Thibault Datry, Núria Bonada, Andrew J. Boulton, Intermittent Rivers and Ephemeral Streams (Academic Press 2017), available at: <http://www.sciencedirect.com/science/article/pii/B9780128038352000012> and Email from Stacy Jensen, Army Corps, to John Goodin, EPA, Subject: RE Two Action (Sept. 5 2017) analyzing impacts to rivers and streams under the Proposed Definition. (**Attachment 19(b)**).

²⁷⁰ *Id.* at p.6.

believes that protection of these headwater streams and wetlands is essential to protect downstream water quality.²⁷¹

The importance of maintaining broad protections for tributaries, and the impacts of failing to do so, are discussed in more detail in the Waterkeeper Fact Sheets.²⁷²

Agency Requests for Comment

The agencies are soliciting comment on those approaches which may be useful for application in this proposed rule. The agencies also solicit comment on other implementation tools available to determine the flow regime of a river or stream and its contribution of flow to a traditional navigable water.

There are myriad ways to evaluate watersheds, including employing data sets and activities referenced in the Proposed Rule Notice. There are also many other methods and datasets that are not mentioned. The problem here is that the Agencies have proposed a definition that is not based on science. As a result, science can't answer the questions posed by the proposed definition. Since the U.S. has robust programs for evaluating water resources and water quality impacts, the fact that the Agencies do not know how to evaluate the effects and impacts of their own proposed definition using the massive amounts of science and methods that are available should demonstrate to the Agencies that there is a very serious problem with the rule. Identification and protection of tributaries should not require the creation of new, complex research and development as the Agencies are contemplating. Our nation has been analyzing and categorizing watersheds and waters for more than 40 years relatively seamlessly based on sound science and without much controversy. In any event, the Agencies are required to identify how they will implement their proposed definition in the Proposed Rule Notice. "Crowdsourcing" ideas from the public based on "potential" approaches after they propose a new, untested, highly controversial definition is not a viable or lawful solution. The Agencies' failure to perform these analyses before proposing the rule, and to inform the public in their proposal of how they intend to implement their new definition and the likely adverse impacts of their actions, violates the APA.

The agencies solicit comment on their interpretation of the Rapanos opinions and whether the significant nexus standard, articulated by a single justice, must be a mandatory component of any future definition of "waters of the United States." Or, may the agencies

²⁷¹ Memo from John Dorney, Wetlands Program Development Unit, NC DWQ. April 5, 2006. Background information on the water quality and aquatic life values of headwater streams and headwater wetlands, available at http://aswm.org/pdf/lib/cover_letter_and_summary_nc.pdf. (Attachment 20).

²⁷² Waterkeeper Fact Sheets, *supra* note 120.

apply the principles and rationale of the plurality and concurring opinions to craft a new standard established by rule?

Commenters have answered this question above in great detail. The Agencies' legal basis and approach to this rulemaking is fundamentally flawed, arbitrary, and contrary to law.

The agencies also solicit comment on whether the definition of “tributary” should be limited to perennial waters only. The agencies also request comment whether the definition of “tributary” as proposed should indicate that the flow originate from a particular source, such as a requirement for groundwater interface, snowpack, or lower stream orders that contribute flow. The agencies also solicit comment on how effluent-dependent streams (e.g., streams that flow year-round based on wastewater treatment plant discharges) should be treated under the tributary definition. As proposed, effluent-dependent streams would be included in the definition of “tributary” as long as they contribute perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year.

No, the Agencies must not limit the definition of tributary to perennial waters only. There is no sound legal basis for doing so. The Agencies' definition already eliminates jurisdiction over important tributaries, contrary to established science and law. As demonstrated throughout these comments, the CWA requires broad federal jurisdiction over all tributaries to historically protected “waters of the United States.” The Agencies lack the authority to overrule plainly expressed Congressional intent by creating arbitrary definitional limitations on tributaries. Regarding “effluent-dependent streams,” the Agencies must ensure that their definition protects all tributaries and the importance of ensuring that for “effluent-dependent streams” is beyond dispute. The fact that the Agencies even feel the need to ask this question illustrates the fundamental problem with their scheme to determine jurisdiction based on the presence, absence or frequency of flow in a tributary. Pollution discharged into any kind of tributary will be transported downstream and impact water quality, and Section 402 dischargers change the “natural” condition of streams, often becoming a source of constant flow. Congress intended for all point source discharges of pollution to waters to be controlled, and in fact eliminated, under the CWA.

The agencies also solicit comment on whether the tributary definition should include streams that contribute less than intermittent flow to a traditional navigable water or territorial sea in a typical year. Additionally, the agencies request comment on whether less than intermittent flow in a channel breaks jurisdiction of upstream perennial or intermittent flow and under what conditions that may happen. 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. The agencies therefore solicit comment on this issue. The agencies also seek comment on the proposed treatment of

natural and man-made breaks regarding the jurisdictional status of upstream waters, including whether these features can convey perennial or intermittent flow to downstream jurisdictional waters. The agencies also seek comment on the jurisdictional status of the breaks themselves.

Yes, the tributary definition should certainly include any kind of tributary (as that term has historically been defined by the agencies) to interstate waters and other historically protected “waters of the United States.” As demonstrated throughout these comments, the CWA requires broad federal jurisdiction over all tributaries to historically protected “waters of the United States.” Breaks in flow should not impact the jurisdictional status of a tributary. Commenters agree that the Agencies’ definition will present challenges for landowners and submit those challenges will be significant. This is apparent from the Agencies’ unsuccessful attempts to use relatively complex data and analysis to apply this definition to waterways. The burden on a landowner, and any other member of the public, seeking to determine whether a headwater stream is a protected tributary in an average size watershed will face an the unreasonably complex task of understanding how their stream flows on their property, as well as what happens to that flow as it moves through the watershed down to what the Agencies would deem a traditionally navigable water. This is no simple task, and it will often be an insurmountable one. If clarity is really one of the Agencies’ goals, the Proposed Rule, if finalized, would flatly fail to accomplish it.

The agencies are also soliciting comment on an alternate definition that would change the focus of the proposed definition from intermittent flow occurring during certain times of the year to “seasonal flow.” Under this alternative definition, a tributary would be a river, stream, or similar naturally occurring surface water channel that contributes flow at least seasonally to a traditional navigable water or territorial sea in a typical year. The alternate definition could add that “seasonal flow is predictable, continuous surface flow that generally occurs at the same time in a typical year.” The agencies welcome comments on the concept of a “seasonal” flow regime, what that term may include, and how it may be implemented, including tools to identify “seasonal” flow.

Commenters require much more information about what the Agencies are proposing here to be able to provide meaningful comment. Based on the limited information provided, it appears to have the same flaws already described for the Agencies’ proposed approach to tributaries. If the Agencies pursue this new approach, they would obviously need to propose it with more detail, including rule text and an evaluation of consistency with the CWA, in a new Proposed Rule Notice so the public has a genuine opportunity to understand and analyze it and provide meaningful comment.

As an alternative to the proposed definition of “intermittent,” the agencies are soliciting comment on whether the term could instead mean “water flowing continuously during certain times of a typical year as a result of melting snowpack or when the channel bed

intersects the groundwater table.” Although the identification of groundwater input is found in most definitions for intermittent flow,[FN30] the agencies note that identifying whether the channel bed intersects the groundwater table may be challenging to accomplish in the field, that gathering the relevant data could be time consuming, and could require new tools and training 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. There may be other methods which could be researched and developed by the agencies over time, including the identification of field indicators, which could be regionalized, as well as the development of modeling tools. However, both of these methods (field indicators and modeling tools) would only provide an indication of groundwater generated base flow and would not directly measure its presence. The agencies are soliciting comment on whether these or other methods may be most appropriately used to identify groundwater in the field.

This request for comment further illustrates that the Agencies’ proposed rule does not promote clarity and certainty, or avoid case-by-case analyses, which were among the core justifications for the Agencies’ proposed reduction of jurisdiction over tributaries. Clearly, the processes described in this question are outside the capabilities of most members of the public. Even the Agencies are not sure how they might accomplish this and acknowledge here that what they are considering will not be adequate for making jurisdictional determinations for tributaries under this Proposed Rule. The Agencies must not adopt a definition under which CWA jurisdiction depends on whether the water flowing in a tributary came from groundwater, snow melt, precipitation, snowfall or effluent. The definition of “waters of the United States” should protect all tributaries without regard to the most recent location of the precipitation that is contributing to its flow.

The agencies are also soliciting comment on whether the definition of “intermittent” should contain the requirement of continuous flow for a specific duration, such as “at least one month of the calendar year,” instead of the phrase “during certain times of a typical year.” See, e.g., 30 CFR 710.5 (definition of “intermittent” used in a U.S. Department of the Interior regulation). The agencies note that such an approach would provide for national consistency but may not offer a more regionalized implementation of intermittent tributaries as some States recommended (i.e., intermittent would be viewed the same across the country, from the arid West to the Southeast). Some pre-proposal commenters recommended this approach to provide certainty for determining flow regime. The agencies are also soliciting comment on whether the seasonal continuous surface flow consideration (e.g., typically three months) from the Rapanos Guidance could be used as a definitional flow regime in the

regulation. Rapanos Guidance at 6. Several commenters recommended this approach be used to define tributaries. The seasonal “typically three month” approach is current practice, subject to case-by-case analysis, and is therefore familiar to agency staff and the regulated public, but like a one-month limitation, it may not provide for regional variation in the implementation of flow regime.

The Agencies should not pursue any of these approaches. They are arbitrary, capricious and contrary to law. If the Agencies intend to pursue any of the approaches vaguely “floated” in these questions, they must issue a supplemental notice for this Rulemaking and fully comply with the APA so that the public has a meaningful opportunity to consider an actual proposal, including the particular language proposed to be codified in the Agencies’ regulations, and to comment upon it.

The agencies therefore seek comment as to whether the tributary definition should include specific flow characteristics (e.g., timing, duration, frequency, or magnitude), and if so, what flow values or ranges of values (including supporting rationale) would satisfy the tributary definition and what methods, tools, or data could be used to determine such values. Certain flow requirements might include, for example, an average annual flow volume of five or more cubic feet per second in a typical year and/or that a river or stream flow continuously for a certain number of days (e.g., 30, 60, or 90 days) in a typical year.

No, the Agencies should not pursue any of these approaches. They are arbitrary, capricious and contrary to law. If the Agencies intend to pursue any of the approaches vaguely described in these questions, they must issue a supplemental notice for this Rulemaking and fully comply with the APA so that the public has a meaningful opportunity to comment on them.

The agencies are also soliciting comment on whether the concepts of bed and banks and ordinary high water mark should be added to the definition of tributary, and if so, how. Several commenters recommended including these characteristics in the proposed definition of “tributary,” similar to the definition of tributary in the 2015 Rule, while others opposed the addition, stating that it would inappropriately result in regulation over certain waters that should not be jurisdictional under the CWA, such as ephemeral features.

The Agencies should not narrow jurisdiction over tributaries through the adoption of a mandatory requirement for tributaries to possess a bed, bank, and Ordinary High Water Mark (“OHWM”). The existence of an OHWM should not be a requirement for asserting jurisdiction over tributaries, as it is not supported by law and science. As noted in the Connectivity Report and the Member Comments, the requirement of an OHWM improperly limits jurisdiction and is not consistent with the science regarding how tributaries are affected by pollution or how tributaries impact downstream waters.

The CWR incorporates the definition of OHWM from existing regulations developed for the CWA Section 404 Program into the definition of tributary. The definition is currently found in 33 C.F.R. 328.3(c)(6), which provides:

The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by 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.²⁷³

While this definition may have some reasonable meaning in the context of determining the boundaries of waters where dredge and fill activities are proposed, it has nothing to do with the extent of “waters of the United States” in the context of regulating and responding to the discharge of pollutants. As the Corps noted in 1977:

Prior to enactment of the FWPCA, the mean tide line or (mean higher tide line on the West Coast) was used to delineate the shoreward extent of jurisdiction over the regulation of most activities in tidal waters under the 1899 Act as well as for mapping, delineation of property boundaries, and other related purposes. In freshwater lakes, rivers and streams that are navigable waters of the United States, the landward limit of Jurisdiction has been traditionally established at the ordinary high water mark. The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. 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.²⁷⁴

Thus, the concept of an OHWM or High Water line was utilized in the context of the Rivers and Harbors Act of 1899 and jurisdictional consideration related to traditional navigability where “[t]he need to protect navigable capacity of a waterway above the mean high water line was obviously minimal.”²⁷⁵ The inapplicability of this limitation to the CWA was addressed in the *Holland* case, which outlined both the authority and need to regulate waters beyond the reach of the traditional navigability tests and stated that “to recognize this and yet hold that pollution does not affect

²⁷³ 33 C.F.R. §328(c)(6) (2018).

²⁷⁴ 42 Fed. Reg. 37122, 37128 (July 19, 1977).

²⁷⁵ *Holland*, 373 F. Supp. at 670-673.

interstate commerce unless committed in navigable waters below the mean high water line would be contrary to reason.”²⁷⁶

These long-held views as to the inapplicability of the OHWM to the meaning of “waters of the United States” under the CWA are confirmed by the Connectivity Report, which states: “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”²⁷⁷ There is nothing in the Connectivity Report to support the idea that these connections are limited to tributaries with OHWMs, or that OHWMs are the sole indicator of connectivity. Individual SAB members also expressed disagreement or concern with the addition of a requirement for an OHWM for tributaries. For example, one member stated that:

The definition of the lotic-type tributary is appropriately comprehensive because it inherently includes ephemeral and intermittent streams (as well as perennial) streams. The former types are often overlooked but ecologically important, particularly in arid landscapes with seasonal patterns of precipitation. However, there may be some types of tributaries, such as spring-fed streams, that lack an obvious OHWM because their groundwater sources dominate the water budget, are temporally stable, and so there is no fluctuation in the hydrograph to generate a ‘line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear line on the banks . . .’ Therefore the definition should be ‘bed and bank, and sometimes an OHWM.’²⁷⁸

Another SAB member similarly commented that the Proposed Definition should allow “flexibility to for [sic] field personnel to define functional tributaries, even where those functional tributaries might lack obvious indicators of bed and bank (e.g., alluvial deposits on the bed of a headwater stream in a humid mountain setting) but have less obvious indicators of tributary flows (e.g., directionally bent herbaceous vegetation and subtle debris lines in swales connecting vernal pools to downstream waters in arid and semi-arid settings).”²⁷⁹

In addition to there being no sound legal or scientific basis for adding the requirement for an OHWM to the jurisdictional requirements, it is important to note there have been extensive problems with interpretation and implementation of the OHWM requirement in the CWA Section 404 Program.

²⁷⁶ *Id.*

²⁷⁷ Connectivity Report, *supra* note 12, at 1-3, and related Chapters.

²⁷⁸ Member Comments, *supra* note 261, Aldous at 2-3 (internal citations omitted).

²⁷⁹ Member Comments, *supra* note 261, Rains at 71.

This issue also demonstrates why the OHWM requirement should not be included in the definition of a tributary. For example, the U.S. General Accounting Office (“GAO”) has noted that the Corps’ definition of OHWM is ambiguous and may be reasonably interpreted differently by competent staff.²⁸⁰ For example:²⁸¹

- The Portland District reported that it was difficult to identify the OHWM, even in portions of the Columbia River and that three different staff would likely make three different jurisdictional determinations.
- The Philadelphia District reported that identifying OHWMs in the upper reaches of watersheds was one of its most difficult challenges, as one progresses upstream, the depth of the bed and bank diminishes, and the key indicators of an ordinary high water mark gradually disappear.

The GAO also noted that “officials from the Chicago District said that because their district was heavily urbanized *many channels had been manipulated* and contained, often in ways that obscured the ordinary high water mark” and that identifying the OHWM in the arid West was particularly difficult due *to intermittent flow and flooding*. There is no valid scientific or legal basis for excluding channelized streams, the upper reaches of tributaries, or streams in arid regions that lack an OHWM from the definition of “waters of the United States.”²⁸² To the contrary, the need to include and protect these waters is well documented through the Connectivity Report and is supported by the SAB Report.

The lateral jurisdictional limit of a tributary currently is established by a tributary’s ordinary high water mark. The agencies solicit comment on the usefulness of incorporating into the tributary definition the following sentence: “the lateral extent of a tributary is established by its ordinary high water mark.” The agencies note that the Corps has existing regulations at 33 CFR 328.4 regarding the limits of jurisdiction for categories of “waters of the United States.” The agencies solicit comment on including these Corps regulations in the EPA’s regulations or simply cross-referencing the Corps regulations in EPA’s to apply to the definition of “waters of the United States.”

Commenters disagree with the Agencies’ characterization of this issue. This issue is addressed in the preceding comment.

²⁸⁰ U.S. General Accounting Office. (Feb. 2004). WATERS AND WETLANDS Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction. (GAO Publication No. 04--297) (hereinafter “GAO Report”) available at <http://www.gao.gov/new.items/d04297.pdf>. (Attachment 21).

²⁸¹ *Id.*

²⁸² *Id.* (emphasis added).

The agencies are proposing to define a typical year as “within the normal range of precipitation over a rolling 30-year period for a particular geographic area.” The agencies solicit comment on whether it is necessary to define “typical year” given the agencies’ understanding that it is a commonly understood term in field application. Alternatively, the agencies seek comment on whether they should provide additional details in the rule text about what constitutes a typical year or provide further guidance in a final preamble about appropriate tools for determining whether a year is “typical.” Finally, the agencies solicit comment on alternative approaches in the rule text to convey that times of drought or extreme floods would not be a factor when determining if a river or stream meets the conditions of the definition of “tributary.”

The Agencies should not define jurisdictional tributaries based on flow in a “typical year. as doing so would be arbitrary, capricious and contrary to law. Additionally, the Agencies’ approach is not commonly understood anywhere as it is a wholly novel, non-scientific approach based on vaguely described policy choices and misinterpretations of the CWA. If the Agencies change their approach as described, they need to issue a supplemental notice under the APA.

The agencies are also soliciting comment on implementation methods and tools that could be used to identify and distinguish perennial and intermittent flow regimes from ephemeral flow regimes as defined in this proposal. As mentioned above, such tools could include field-based tools, such as visual observations, or remote desktop tools, such as aerial photos. The agencies are also soliciting comment on the appropriate watershed scale for use in the geographic area as defined in a “typical year” of the proposed rule, for example, hydrologic units at the level of Hydrological Unit Code (HUC)-8s, HUC-10s, or HUC-12s could be used. A broad geographic area may include multiple micro-climates and may not be representative of precipitation conditions on the ground for the subject tributary. The agencies are soliciting comment on other approaches to determine the geographic area.

The Agencies are required to have resolved these questions and issues prior to proposing this rule. The fact that the Agencies are seeking advice about how they could develop these complex analyses in order to apply their rule in the real world demonstrates the proposed definition is unreasonably complex and does not provide clarity or regulatory certainty. Surely the Agencies do not expect the public to be able to help them design or utilize such complex concepts and/or tools to attempt to determine whether a tributary is protected by the CWA. The fact that the Agencies do not already know which waters will, and will not, be protected under this definition itself demonstrates that the Proposed Rule is arbitrary and capricious.

E. Ditches and Canals

As demonstrated in detail above, the Agencies' fundamental basis for narrowly defining the types of waters, including ditches and canals, are protected under the CWA is arbitrary, capricious and contrary to law. Further, the Agencies base their proposed definitional limitations for ditches and canals on impermissible and vague policy choices, as well as erroneous legal theories. It is not possible, however, to connect those policies and legal theories to the choices the Agencies made that have resulted in the vague, arbitrary and non-scientific approach to ditches and canals in the definition.

Nothing in the law or science supports the definitional limitations the Agencies propose, and as a result, neither the Agencies nor the public can discern which ditches and canals will be protected under this proposed definition and which will not.²⁸³ The obvious corollary to this fact is that the Agencies cannot evaluate the impact of their narrow definition on the Nation's waters and CWA programs, which means the Agencies cannot determine or demonstrate that their definition is consistent with the CWA. In fact, they have not even taken meaningful steps to do so.

The Agencies claim they are proposing this approach to the regulation of ditches to provide regulatory clarity and predictability because "[t]he regulatory status of ditches has long created confusion for farmers, ranchers, irrigation districts, municipalities, water supply and stormwater management agencies, and the transportation sector, among others. In an effort to reduce that confusion, the agencies propose to delineate the categories of ditches that would be "waters of the United States," and are proposing to exclude all other ditches from that definition."²⁸⁴ However, the Agencies have not provided any evidence to support the existence of such rampant confusion and, in any event, providing regulatory clarity and predictability is not a valid legal basis for determining a water is not a "waters of the United States" under the CWA. But it is on this basis that the Agencies propose to include ditches as "waters of the United States" only if they:

- Satisfy any of the conditions identified in paragraph (a)(1) of this proposed rule;
- Are ditches constructed in a tributary as defined in paragraph (c)(11) of the proposal as long as those ditches also satisfy the conditions of the tributary definition; or
- Are ditches constructed in an adjacent wetland as defined in paragraph (c)(1) of the proposal as long as those ditches also satisfy the conditions of the tributary definition.

The Agencies propose to exclude all other ditches from the definition of "waters of the United States."

²⁸³ Resource and Programmatic Assessment, at pp. 40-42.

²⁸⁴ Proposed Rule, at 4179.

The Agencies attempt to portray this dramatic departure from long-standing agency interpretations and practice as clarifying “the regulatory status of ditches in a manner that would be more consistent with the Corps’ regulations following the 1972 and 1977 CWA amendments, with some modifications to provide a clear definition that also falls within scope of the agencies’ authority under the CWA.”²⁸⁵ The problem with the Agencies’ characterization, and with the Agencies’ approach to ditches and canals in the Proposed Rule is threefold:

1. The Corps’ approach to determining the regulatory status of the nation’s waters, including ditches, following the 1972 CWA was found by the District Court for the District of Columbia to be an unlawful attempt “to amend or change the statutory definition of navigable waters” in a manner that was “inconsistent with Congress’ intent to assert federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution,” rather by the traditional tests of navigability employed by the Corps.²⁸⁶
2. With this Proposed Rule, the Agencies are dramatically reducing the types of waters that would be protected by the CWA such that, for example, a ditch constructed in a tributary or adjacent wetland means something very different than it would in the absence of this Proposed Rule.²⁸⁷ As a corollary to this, the Proposed Rule defines upland to include any historically protected waters that are not included in this Proposed Rule so that “constructed in upland” also means something very different than simply “dry land.” As a result, the Proposed Rule would dramatically reduce the number of ditches and canals included in the definition of “waters of the United States.”
3. The Agencies’ approach to ditches and canals in the Proposed Rule does not provide clarity,²⁸⁸ and is arbitrary, capricious and contrary to law. For example, under the Proposed Rule, a ditch is defined as an artificial channel, but ditches constructed in a tributary are only “waters of the United States” if they can also meet the definition of a tributary, which is defined as a naturally occurring channel.

Historically, under the pre-2015 definition, ditches have commonly been protected as “waters of the United States” under the CWA because they are actually streams that have been altered,

²⁸⁵ *Id.*

²⁸⁶ The Corps regulations interpreting “waters of the United States” under the CWA were overturned, however, in *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); 39 Fed. Reg. 12119, (April 3, 1974).

²⁸⁷ *See, e.g.*, Resource and Programmatic Assessment, p. 41 (“Under the proposed rule, interstate ditches would not be jurisdictional unless they meet one of the proposal’s three criteria for jurisdictional ditches. Interstate ditches under both baselines would be jurisdictional . . . [neither would] wetlands do not meet the criteria to be adjacent under the proposal and/or where those ditches do not satisfy the conditions of the proposal’s tributary definition . . . [and] no ephemeral ditches would be jurisdictional, which is a change from both baselines.”).

²⁸⁸ *See, e.g.*, Resource and Programmatic Assessment, p. 41 (“The agencies are unable to estimate the potential change in jurisdiction for ditches using either the ORM2 data or the NHD and NWI data.”); *See also* Proposed Rule, at 4181

transport pollutants to downstream waters, or have begun to serve ecological functions like natural tributaries. Ditches can and are required to be regulated under the CWA if they flow into other “waters of the United States,” even when they are man-made.²⁸⁹

There are compelling legal and scientific reasons for ensuring that man-altered and man-made waters are covered as tributaries, and those reasons apply equally to ditches. As the 11th Circuit stated in the case of *U.S. v. Eidson*, “[t]here is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country’s water quality whether they travel along man-made or natural routes.”²⁹⁰ Ditches should be categorically included in the definition of “waters of the United States” when they otherwise meet the definition of a “water of the United States,” including specifically a tributary, under the pre-2015 definition. The Agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of “waters of the United States” for policy or any other administrative purpose.²⁹¹

It is often difficult or impossible to determine whether a “ditch” is a natural waterway or a man-made waterway, and the answer to the question is legally and scientifically irrelevant in any event because both can have significant impacts on water quality.²⁹² Ditches on agricultural lands “result in rapid removal of excess water over a relatively short time period. This water flowing over the land surface has relatively high energy sufficient to detach and transport soil particles and constituents attached to them, such as phosphorus, organic nitrogen, and many pesticides.”²⁹³ Ditching and channelization are prevalent in the Chesapeake Bay watershed, and “[d]itching on agricultural lands in the Pocomoke River watershed is an extensive practice that has been used to drain wetlands,” and ditches have been found to be a significant source of sediment loading to the

²⁸⁹ See, e.g., *Holland*, 373 F. Supp. at 673-74; *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001); *U.S. v. St. Bernard Parish*, 589 F. Supp. 617, 620 (E.D. La. 1984); *U.S. v. Gerke Excavating, Inc.*, 412 F.3d 804, 805-06 (7th Cir. 2005) (“A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart.”), *vacated*, 126 S. Ct. 2964 (2006), *on remand* 464 F.3d 723 (7th Cir. 2006) (remanding to district court to apply *Rapanos*), *cert. denied* 128 S.Ct. 45 (2007); *Community Assn. for Restoration of Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954-955 (9th Cir. 2002).

²⁹⁰ *U.S. v. Eidson*, 108 F.3d 1336, 1342, (11th Cir. 1997) *cert. denied*, 522 U.S. 899 (1997).

²⁹¹ 1972 Legislative History, *supra* note 95, p. 327; *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975); *Cf. NRDC v. Costle*, 568 F.2d at 1377.

²⁹² USGS, North Carolina Water Science Center, Artificial Drainage, available at http://nc.water.usgs.gov/projects/tile_drains/index.html. (Attachment 22).

²⁹³ Gilliam, J.W., D.L. Osmond, and R.O.Evans. 1997. Selected Agricultural Best Management Practices to Control Nitrogen in the Neuse River Basin. North Carolina Agricultural Research Service Technical Bulletin 311, North Carolina State University, Raleigh, NC. CONTROLLED DRAINAGE: WHAT IS IT and HOW DOES IT WORK?, available at <http://www.soil.ncsu.edu/publications/BMPs/drainage.html>. (Attachment 23).

watershed.²⁹⁴ A significant percentage of stream miles within the coastal plain of North Carolina are modified natural stream channels and ditches. According to the North Carolina Department of Environment and Natural Resources, “[i]t may be difficult to differentiate between an artificial feature (e.g. ditch or canal) and a natural stream that has been modified (e.g. straightened or relocated).”²⁹⁵ In North Carolina, many swine concentrated animal feed operations (“CAFOs”) are located “in an area of the coastal plain where the groundwater table is high which requires ditching or tile drain in order to allow for crop harvesting and waste application. **These are direct conveyances for the highly nutrient laden water to reach surface waters.** These operations are having a significant negative impact on the Neuse River water quality.”²⁹⁶ Without regulatory oversight over these waters that feed North Carolina’s rivers and coastal estuaries, we are likely to be unable to restore water quality and fisheries that are severely impaired by pathogens, nitrogen and phosphorus.

Additionally, there is no sound scientific reason to categorically exclude “upland” ditches as defined in the Proposed Rule. Upland ditches, especially those that are constructed in historically protected tributaries that would lose protection under the Proposed Rule, that contribute flow ephemeral, intermittently or perennially can have substantial impacts on downstream water quality to the same extent as any other tributary. In fact, they can often have a more significant impact if they are very near a discharge point as they often serve to increase water flow downstream.

This importance of maintaining jurisdiction over ditches and canals is illustrated Waterkeeper Fact Sheets, including the Boulder Creek, Cape Fear, Puget Sound, and Rio Grande Fact Sheets.²⁹⁷ As noted in the Connectivity Report, “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”²⁹⁸ This view is echoed in the comments from many individual SAB members:

²⁹⁴ A. Gellis, et al., IDENTIFYING SOURCES OF FINE-GRAINED SUSPENDED-SEDIMENT FOR THE POCOMOKE RIVER, AN EASTERN SHORE TRIBUTARY TO THE CHESAPEAKE BAY, Proceedings of the Eighth Federal Interagency Sedimentation Conference (8thFISC), April 2-6, 2006, Reno, NV, USA, available at http://pubs.usgs.gov/misc/FISC_1947-2006/pdf/1st-7thFISCs-CD/8thFISC/Session%205C-1_Gellis.pdf. (Attachment 24).

²⁹⁵ North Carolina Division of Water Quality, Identification Methods for the Origins of Intermittent and Perennial streams, Version 4.11 (NCDENR 2010), available at http://www.xerces.org/wp-content/uploads/2009/03/NC_2010_Methodology_identification_intermittent_perennial_streams.pdf. (Attachment 25).

²⁹⁶ North Carolina Department of Environment and Natural Resources, Division of Water, Neuse River Basin, Water Quality Plans, Cycle 4 - July 2009, at p. 360, available at <http://portal.ncdenr.org/web/wq/ps/bpu/basin/neuse>; (Attachment 26)

²⁹⁷ Waterkeeper Alliance Fact Sheets, *supra* note 120.

²⁹⁸ Connectivity Report, *supra* note 12, pp. 1-3.

- “In response to the query, I suggest that the flow regime in identified ditches should be less than intermittent flow, rather than less than perennial flow as proposed, based on my familiarity with the science associated with the Connectivity Report. This would apply only to those ditches not excluded by the proposed regulation and that meet the proposed definition of tributary as ‘waters of the United States.’”²⁹⁹
- “It is important to note, however, that even when not jurisdictional waters, these non-wetland swales, gullies, rills and specific types of ditches may still be a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) or for purposes of a significant nexus analysis under paragraph (a)(7). For example, a wetland may be a ‘water of the United States,’ meeting the proposed definition of ‘neighboring’ because it is connected to such a tributary by a non-jurisdictional ditch that does not meet the definition of a ‘tributary.’ The entire concept of water body connectivity is that integrated ecological units comprised of aquatic systems distributed across the landscape are intimately linked through a suite of pathways. How is it consistent with this notion or in the spirit of the CWA that the ditch that connects two ‘waters of the U.S.’ is not jurisdictional? . . . I am not convinced that the science currently exists to summarily exclude certain groups other waters including gullies, swales, artificial lakes and ponds, and ditches that do not contribute flow to a jurisdictional water body. These waters should be assessed along a gradient of connectivity on a case-specific basis until the science is available to make an appropriate determination for the respective class as a whole.”³⁰⁰
- “Exclusion b(3) – ‘ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow’ – together, these three criteria may suffice, but the distinction between perennial and less-than-perennial flow may be a cause for concern. P 22203 states, ‘Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and therefore any such upland ditch would not be subject to regulation.’ In parts of southeast Michigan, Ohio and Indiana, topography is very flat and ditches flow primarily during times of heavy rain. Some ditches are sufficiently deep that they will pond water until the receiving river stage drops enough for water to flow from the ditch to the river. Yet such ditches commonly receive from surrounding lands, and episodically deliver, significant nutrients to downstream waters. In the aggregate, they are the source/conduit for the majority of contaminants reaching downstream waters (‘most of the materials found in rivers originate outside of them.’ P 22247). Indeed, this situation describes much of the drainage into western Lake Erie, where harmful algal blooms due to excessive nutrient loading have caused beach closings, and in August 2014 a three-day ban on drinking water for some 400,000 of the residents in and near Toledo, OH. In short, using the criterion of

²⁹⁹ Member Comments, *supra* note 261, Dr. Jennifer Tank Comments at 93.

³⁰⁰ Member Comments, *supra* note 261, Dr. Mazeika Sullivan at 89-90.

'less-than-perennial' flow to exclude ditches may not be consistent with addressing nutrient and sediment loading that affects drinking water, beach use, fishing, and other uses."³⁰¹

- "On page 2203[sic], the EPA seeks guidance on the appropriate flow requirements for a ditch located wholly in uplands to be jurisdictional. In particular it would appear that ditches with intermittent flow would supply considerable water, sediment, nutrients, metals such as zinc from tire wear, etc. to downstream waters and there would appear to be no reason such features should not be considered jurisdictional."³⁰²
- "Each of these types of human alterations affect connectivity and therefore can impact the chemical, physical, and biological integrity of the downgradient waters. As surface water features, ditches and canals function as either perennial or intermittent streams or tributaries and should be legally treated as such. Regardless of source, these ditches convey or store water and chemical/physical/biological sediment and materials spatially on a temporal basis (rate, magnitude, and frequency). The water from ditches can leak to provide groundwater recharge to the sediments or bedrock beneath the ditch, or accumulate groundwater discharge in its flow (serve as a drain) or both. These functions can be temporal (seasonal) and spatial. In all, the ditch impacts many of the hydrologic systems in the vicinity of its location, and is connected . . . Constructed ditches change the hydrologic flow paths of local and subregional hydrologic systems. Ditches are perennial, intermittent, or ephemeral water conveyors, and should be regulated as such."³⁰³

Agency Requests for Comment

The agencies seek comment on the utility and clarity of proposing a separate category of jurisdictional ditches and how the agencies have delineated those ditches that would be "waters of the United States" and those that would be excluded. In the alternative, the agencies seek public comment on whether the agencies should retain the historical treatment of jurisdictional ditches within the definition of "tributary" and not in a separate category. The agencies also seek comment on their proposed definition of "ditch."

See the comments above. The definition of "waters of the United States" must protect ditches and canals consistent with the text of the pre-2015 definition. The Proposed Rule approach is arbitrary, capricious and contrary to law. The Agencies should not refer to canals as ditches.

As the agencies consider how to implement this provision, the agencies seek comment on whether they should add a temporal component to distinguish jurisdictional ditches when evaluating ditches that may have been constructed in tributaries or adjacent wetlands. For

³⁰¹ Member Comments, *supra* note 261, Dr. David Allen at 14.

³⁰² Member Comments, *supra* note 261, Dr. Judson Harvey at 22.

³⁰³ Member Comments, *supra* note 261, Dr. Kenneth Kolm at 49-50.

example, the agencies could consider a ditch that appears to have been constructed in upland to be non-jurisdictional unless there is evidence that the ditch was in fact constructed in a natural waterway prior to the adoption of the 1972 CWA amendments. The agencies also solicit comment as to what tools can be used to help identify whether a ditch is constructed in upland or whether it was constructed in a tributary or adjacent wetland that meets the respective proposed definitions, and in particular what sort of showing would constitute evidence that a ditch was constructed in upland or in a jurisdictional tributary or adjacent wetland. The agencies seek comment as to whether there are other approaches for addressing the evidentiary concerns that may arise in a permitting context for historic ditches. For example, the agencies solicit comment on the role of historic photographs and records, in determining whether a ditch was built in a tributary and more generally what constitutes evidence that a ditch was constructed in a tributary or an adjacent wetland.

These issues are fully addressed in the above comments. The Agencies should avoid these issues altogether and should not treat any ditch or canal as non-jurisdictional simply because the Agency lacks evidence to demonstrate the ditch was constructed in a tributary.

In addition, the agencies solicit comment on the exclusion of all ditches constructed in upland, regardless of flow regime, and whether that is consistent with the plurality and concurring opinions in *Rapanos*. For example, ditches constructed in upland that flow perennially would be presumed non-jurisdictional under this proposal, even if they would also satisfy the conditions of the proposed tributary definition. Finally, the agencies solicit comment on whether a ditch can be both a point source and a “water of the United States,” or whether these two categories as established by Congress are mutually exclusive.

Ditches constructed in “upland” as defined by the Proposed Rule encompasses ditches constructed in waters that have long been protected as “waters of the United States” under the CWA. Removing them from protection under the CWA would be unlawful. It is not possible to unify the three separate opinions in *Rapanos*. The answer to this question about point sources depends on the facts, however, it is possible to conceive of a ditch that is a point source for one industrial discharger (i.e. a ditch “from which pollutants are discharged,”) which many miles downstream is a receiving water for an industrial discharger that is releasing pollutants into it from a pipe.

F. Lakes and Ponds

As demonstrated in detail above, the Agencies’ fundamental basis for narrowly defining the types of lakes and ponds protected under the CWA is arbitrary, capricious and contrary to law. Further, the Agencies are basing the definitional limitations for lakes and ponds on impermissible and vague policy choices, as well as erroneous legal theories. It is not possible, however, to connect those

policies and legal theories to the choices the Agencies made that result in the vague, arbitrary and non-scientific approach to lakes and ponds in the definition.

Nothing in the law or science supports the definitional limitations the Agencies are proposing, and as a result, neither the Agencies nor the public can discern which lakes and ponds will be protected under this proposed definition.³⁰⁴ The obvious corollary to this fact is that the Agencies cannot evaluate the impact of their narrow definition on the Nation's waters and CWA programs, which means the Agencies cannot determine or demonstrate that their definition is consistent with the CWA. In fact, they have not taken meaningful steps to do so. To the contrary, the Agencies simply looked at two datasets they claim are not adequate to evaluate impacts and conclude that they don't know how the loss of jurisdiction over lakes and ponds will impact waters and CWA Programs.³⁰⁵

In short, the Agencies narrow approach to determining jurisdiction lakes and ponds in the Proposed Rule is contrary to more than 40 years of legal precedent and longstanding Agency interpretations of the CWA. The Agencies have failed to "provide reasoned explanation" for their action, and have failed to "show that there are good reasons" for replacing the CWR and the pre-2015 definition of "waters of the United States" with the definition in the Proposed Rule.³⁰⁶ The Agencies have also failed to demonstrate that their action is a "permissible construction" of the CWA, *i.e.* that the Agencies' action is not "arbitrary, capricious, or manifestly contrary to the statute."³⁰⁷ The Agencies are also required provide a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" the Pre-2015 Regulatory Definition and the CWR.³⁰⁸

The Proposed Rule provisions for lakes and ponds are arbitrary, capricious and contrary to law for the same reasons as the provisions for tributaries. Additionally, the proper scope of jurisdiction over lakes and ponds cannot be validly determined based on excerpts from the plurality opinion in *Rapanos*. The adverse impacts of the Agencies' Proposed Definition with regard to lakes and ponds are illustrated in the Waterkeeper Alliance Fact Sheets, including the Rogue River and Crater Lake, Cape Fear, Rio Grande, and Boulder Creek Fact Sheets.³⁰⁹

The agencies welcome comment on the proposal to establish a distinct jurisdictional category for lakes and ponds and whether this provides additional clarity and regulatory

³⁰⁴ Resource and Programmatic Assessment, at pp. 42-42.

³⁰⁵ Resource and Programmatic Assessment, pp. 38-40 (Evaluating NHD and ORM-2 Data and finding it inadequate). ("... the proposed rule would include fewer lakes and ponds as jurisdictional than the 2015 Rule, but this change cannot be quantified" ... [and] As discussed in Appendix A, the agencies are unable to use NHD or NWI to estimate the potential change in CWA jurisdiction for lakes and ponds under the proposed rule, as compared to either baseline.")

³⁰⁶ *FCC v. Fox Television Stations, Inc.* 556 U.S.502, 516 (2009).

³⁰⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

³⁰⁸ *Fox*, 556 U.S. at 516.

³⁰⁹ Waterkeeper Alliance Fact Sheets, *supra* note 120.

certainty. In the alternative, the agencies solicit comment on incorporating jurisdictional lakes and ponds into another category, such as tributaries . . . The agencies solicit comment on whether more specific parameters should be included for the type of flooding that should be included for lakes and ponds when flooded by an (a)(1)-(5) water in a typical year. For example, the agencies request comment as to whether to establish a specific flooding periodicity or magnitude or frequency. The agencies also solicit comment on other implementation tools available to determine the presence of a contribution of perennial or intermittent flow from the lake or pond in a typical year. Additionally, the agencies request comment on whether less than intermittent flow from lakes and ponds to an (a)(1) water in a typical year could be sufficient to extend jurisdiction to such lakes and ponds.

The Agencies must maintain broad jurisdiction over lakes and ponds consistent with the pre-2015 definition, including the interstate lakes/ponds, TNW lakes/ponds, tributary lakes/ponds, adjacent lakes/ponds and (a)(3) commerce factors to protect lakes and ponds that do not flow into traditional waters or interstate waters. The Agencies should not limit jurisdiction to lakes and ponds on the bases set forth in the Proposed Rule, including the arbitrary flow requirements. Lakes and ponds could be listed be a separate category in a definition of “waters of the United States,” or not, so long as the definition ensures that all lakes and ponds protected under the pre-2015 regulatory definition remain jurisdictional.

G. Wetlands

As demonstrated in detail above, the Agencies’ fundamental basis for narrowly defining the types of wetlands protected under the CWA is arbitrary, capricious and contrary to law. Further, the Agencies are basing the definitional limitations for wetlands on impermissible and vague policy choices, as well as erroneous legal theories. It is not possible, however, to connect those policies and legal theories to the actual the choices the Agencies made that resulted in the vague, arbitrary and non-scientific approach to wetlands in the definition.

Nothing in the law or science supports the definitional limitations the Agencies are proposing, and as a result, neither the Agencies nor the public can discern which wetlands will be protected under this proposed definition.³¹⁰ The obvious corollary to this fact is that the Agencies cannot evaluate the impact of their narrow definition on the Nation’s’ waters and CWA programs, which means the Agencies cannot determine or demonstrate that their definition is consistent with the CWA. In fact, they have not taken meaningful steps to do so. To the contrary, the Agencies simply looked at two datasets they claim are not adequate to evaluate impacts and conclude that they don’t know how the loss of jurisdiction over wetlands will impact waters and CWA Programs.³¹¹

³¹⁰ Resource and Programmatic Assessment, at pp. 43-47.

³¹¹ *Id.*

In short, the Agencies' narrow approach to determining jurisdiction over wetlands in the Proposed Rule is contrary to more than 40 years of legal precedent and longstanding Agency interpretations of the CWA. The Agencies have failed to "provide reasoned explanation" for their action, and have failed to "show that there are good reasons" for replacing the CWR and the pre-2015 definition of "waters of the United States" with the definition in the Proposed Rule.³¹² The Agencies have also failed to demonstrate that their action is a "permissible construction" of the CWA, *i.e.* that the Agencies' action is not "arbitrary, capricious, or manifestly contrary to the statute."³¹³ The Agencies are also required to provide a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" the Pre-2015 Regulatory Definition and the CWR.³¹⁴

As a result of these errors, the Proposed Definition improperly narrows jurisdiction over wetlands in many ways, including but not limited to: (1) Improperly narrowing the waters in the definition such that wetlands will be adjacent to fewer kinds of waters; (2) Requiring wetlands to have a direct surface hydrologic connection with perennial or intermittent flow, or actually abut that narrower class or waters; and (3) Defining upland in a way that encompasses waters that have historically been protected "waters of the United States."

The adverse impacts of the Agencies' Proposed Definition with regard on wetlands are illustrated in the Waterkeeper Alliance Fact Sheets, including the Bayou City, Cape Fear, Niagara, Rio Grande, Rogue and Upper Missouri Fact Sheets.³¹⁵

As demonstrated above, these limitations are contrary to the CWA and the Supreme Court precedent the Agencies are relying on as their legal basis for the definition. The limitations are also contrary the science reflected in to the Connectivity Report. For all of these reasons, they are arbitrary, capricious and contrary to law.

H. Waters and Features that are Not Excluded from Waters of the United States

As demonstrated in detail above, the Agencies' fundamental basis for narrowly defining the types of waters that are protected under the CWA is arbitrary, capricious and contrary to law. This includes the Agencies' creation of broad categories of excluded waters in the Proposed Rule. Further, the Agencies are impermissibly basing these categorical exclusions on impermissible and vague policy choices, as well as erroneous legal theories. It is not possible, however, to connect

³¹² *FCC v. Fox Television Stations, Inc.* 556 U.S.502, 516 (2009).

³¹³ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

³¹⁴ *Fox*, 556 U.S. at 516.

³¹⁵ Waterkeeper Alliance Fact Sheets, *supra* note 120.

those policies and legal theories to the choices the Agencies made that resulted in the vague, arbitrary and non-scientific approach to excluding broad categories of waters in the Proposed Rule.

The Agencies have failed to provide a detailed, reasoned explanation of their legal and factual bases for these exclusions. Additionally, the Agencies lack statutory authority to create definitional limitations and exclusions of waters that are plainly intended to protect particular industries or sources of pollution from regulation under the CWA, as they attempt to do in the Proposed Rule. The sources the Agencies attempt to shield from compliance with the CWA can have significant adverse impacts on the Nation's waters. For example, agriculture remains one of the largest unaddressed sources of water pollution in the United States.³¹⁶ As described in the EPA National Enforcement Priorities document for FY 2008-2010:

States have consistently reported to EPA that agricultural activities, including CAFOs, are leading sources of pollutants such as nutrients (nitrogen and phosphorus), pathogens (bacteria), and organic enrichment (low dissolved oxygen) that are contributing to water quality impairment in U.S. surface waters. Adverse impacts on ecosystems and human health associated with discharges of animal wastes include fish kills, algal blooms, and fish advisories, contamination of drinking water sources, and transmission of disease-causing bacteria and parasites associated with food and waterborne diseases.³¹⁷

Agricultural pollution is a major contributor to well-documented, severe pollution problems in key water resources like Lake Erie, the Chesapeake Bay, the Gulf of Mexico, the North Carolina's coastal estuaries, and many other significant water resources across the country.³¹⁸ It is certainly possible

³¹⁶ Watershed Assessment, *supra* note 10.

³¹⁷ See National Enforcement Initiatives for Fiscal Years 2008 - 2010: Clean Water Act: Concentrated Animal Feeding Operations (**Attachment 27**).

³¹⁸ See, e.g., (Utah) <http://www.deq.utah.gov/FactSheets/docs/handouts/nutrients.pdf>; (Ohio) http://epa.ohio.gov/Portals/35/visioning_workshop/Ohio%20Nutrient%20Fact%20Sheet.pdf; (Univ. of California) <http://anrcatalog.ucdavis.edu/pdf/8055.pdf>; (Illinois) <http://www.epa.state.il.us/water/nutrient/>; (Massachusetts) <http://www.mass.gov/eea/docs/dep/water/drinking/alpha/i-thru-z/manure.pdf>; (North Carolina) <http://www.cals.ncsu.edu/wq/wqp/wqpollutants/nutrients/factsheets/FactsheetNM1.pdf>; (Coastal Waters) <http://moritz.botany.ut.ee/~olli/eutrsem/Howarth02.pdf>; (EPA) http://water.epa.gov/polwaste/nps/agriculture_facts.cfm; (USGS) <http://pubs.usgs.gov/fs/fs218-96/>; (EPA) http://water.epa.gov/type/rsl/monitoring/upload/EPA-MARB-Fact-Sheet-112911_508.pdf; (Gulf) http://midwestadvocates.org/assets/resources/nutrient_pollution_factsheet.pdf; (EPA) <http://www2.epa.gov/nutrientpollution/where-occurs-lakes-and-rivers>; (Iowa) <http://www.iowapolicyproject.org/2010docs/100927-nutrients.pdf>; (Neuse River) http://portal.ncdenr.org/c/document_library/get_file?uuid=e438d6bc-d147-4d7b-8224-08e5a7c74b86&groupId=38364 and http://portal.ncdenr.org/c/document_library/get_file?uuid=48bc46d8-c344-4f07-a656-7a211157c985&groupId=38364; (Tar-Pamlico River) http://portal.ncdenr.org/c/document_library/get_file?uuid=b4f40c70-fc0f-4bd7-b4a1-b34dd7794f99&groupId=38364 and http://portal.ncdenr.org/c/document_library/get_file?uuid=12436e58-83ba-

to support agricultural production and achieve the objective of the CWA, but the Agencies cannot accomplish either of those goals by grafting new exemptions for agriculture into the definition of “waters of the United States.”

Commenters have addressed the flaws in the Agencies’ legal and factual bases for these exclusions in the preceding sections of these comments, including providing detailed reasons why the Agencies’ attempt to categorically exclude ephemeral features and ditches is arbitrary, capricious and contrary to law. Commenters also incorporate by reference and reassert their objections to the categorical exclusion of groundwater set forth in the attached comments on the 2015 Clean Water Rule.³¹⁹

The Agencies’ proposed exclusion of “water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel,” is arbitrary, capricious and contrary to law for the same reasons. Because the Agencies have narrowly defined jurisdictional waters in the Proposed Rule, and have also defined “upland” in a manner that could include waters that have historically been protected as “waters of the United States,” this exclusion could allow for mining and construction activity to take place in, discharge pollutants to, or destroy streams, rivers, lakes, wetlands and other waters contrary to the CWA.³²⁰ The Agencies have not provided an adequate explanation of their bases for this exclusions, stating only that “this is consistent with the exclusion in the 2015 Rule and with the agencies’ 1986 and 1988 preambles,³²¹ which generally excluded pits excavated for obtaining fill, sand or gravel, and the Agencies believe there is no need to distinguish between features based on whether they are created by construction or mining activity.”³²² This exclusion is not consistent with the CWR or with

[41bf-bcac-d2fe4aa2b60c&groupId=38364](http://portal.ncdenr.org/c/document_library/get_file?uuid=2eddbd59-b382-4b58-97ed-c4049bf4e8e4&groupId=38364); (Cape Fear River) http://portal.ncdenr.org/c/document_library/get_file?uuid=2eddbd59-b382-4b58-97ed-c4049bf4e8e4&groupId=38364; (California) http://ucanr.edu/sites/UCCE_LR/files/180590.pdf; (New York) <http://www.nnyagdev.org/PDF/NNYPFacts1w.pdf>

³¹⁹ 2014 Comments, *supra* note 6.

³²⁰ See, e.g., USGS, Instream Gravel Mining and Related Issues in Southern Missouri, Fact Sheet 012-02 (2002) (**Attachment 28**); River Network, Impacts of Mining on Rivers (2005) (**Attachment 29**); NOAA, Final National Marine Fisheries Service (NMFS) National Gravel Extraction Guidance (2005) (**Attachment 30**); US DOI, Stream Protection Rule Draft Environmental Impact Statement, available at: <https://www.osmre.gov/programs/RCM/docs/sprDEIS.pdf> (July 2015); (USGS, Bibliography of Hard Rock Mining Contamination, available at: <https://toxics.usgs.gov/bib/bib-Mining.html> (**Attachment 31**) and USGS Mine Drainage Activities, available at: <https://archive.usgs.gov/archive/sites/mine-drainage.usgs.gov/> (**Attachment 32**).

³²¹ The Agencies to not further identify what they are referencing when they vaguely cite to 1986 and 1988 preambles.

³²² Proposed Rule, at p. 4192

the Agencies' 1986 and 1988 preambles³²³ but, even it was, that does not provide an adequate basis for the creation of such a categorical exclusion in this Proposed Rule.³²⁴

1. Waste Treatment Systems Cannot Be Excluded from the Definition

The Agencies misleadingly assert that the waste treatment system exclusion included in their Proposed Rule “has existed since 1979, and the agencies are continuing such exclusion under this proposal.”³²⁵ This is false for a number of reasons, including most obviously the fact that the Agencies are “adding settling basins and cooling ponds to the definition of ‘waste treatment system’ in paragraph (c)(14).”³²⁶ Further, the proposed exclusion for waste treatment systems is very different from the Agencies' approach to them in 1979 and thereafter. The Agencies have completely failed to justify or explain the basis for this exclusion in the Proposed Rule.

(a) History of the Waste Treatment System Exclusion

On May 19, 1980, EPA issued a final rule clarifying that waste treatment systems created by impounding “waters of the United States” are not exempt from regulation under the CWA.³²⁷ Specifically, the rule stated:

[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*³²⁸

³²³ In addition to the reasons previously, stated the Agencies admit the Proposed Rule includes “several refinements to the existing 1986 and 1988 preamble language related to the exclusion for water-filled depressions created in upland as a result of certain activities.” Proposed Rule, at 4192. These refinements improperly include the major change of adding mining activity, which can have devastating impacts on the Nation's waters, into the exclusion without providing any legal or factual basis for doing so. This is arbitrary, capricious and contrary to law.

³²⁴ The Agencies have rejected the reasons, bases and approaches to determining CWA jurisdiction under pre-2015 definition and 2015 CWR so it is unclear why the Agencies are claiming those prior administrative determinations support this or any other exclusions in the Proposed Rule.

³²⁵ Proposed Rule, at p. 4193.

³²⁶ *Id.*

³²⁷ 45 Fed. Reg. 33,290, 33,424 (May 19, 1980)

³²⁸ *Id.* at 33,424 (emphasis added).

In response to industry pressure, however, EPA suspended the final sentence of the regulation, which states that “[t]he exclusion applies only to manmade bodies of water which neither were original created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States,” just a few months later.³²⁹

EPA expressly cited the utility industry’s concern that they would now have to obtain an NPDES permit to discharge into existing coal ash dumps that were created by impounding “waters of the United States” as part of its justification for suspending this part of the rule.³³⁰ At that time, EPA claimed that this was a temporary suspension and promised to “promptly [] develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA [stated] it w[ould] amend the rule, or terminate the suspension.”³³¹

EPA never followed through on its promise to address this important issue, allow the public an opportunity to provide comments, and finalize a new regulation or terminate the suspension. The Agencies now propose to formally codify the waste treatment system exclusion without providing adequate notice and comment. This is similar to how the Agencies improperly proceeded in the CWR, where they stated that they would not accept public comment on the waste treatment exclusion because they maintained they had proposed no changes to the waste treatment system exclusion.³³² Instead of keeping the promise EPA made over thirty years ago, the Agencies now attempt to evade compliance with the CWA and APA by bootstrapping the impermissible exclusion onto a new “waters of the United States” definition without ever having provided an adequate legal or factual basis for doing so as required under the CWA and APA.

(b) Coal Ash Surface Impoundments

This exclusion has had, and will continue to have, serious consequences for our nation’s waters if the Agencies finalize the proposed waste treatment exemption. For example, it has been a common practice for the utility industry to impound streams and rivers to create waste dumps for coal ash³³³ and other wastes associated with coal-fired power plants. In fact, EPA cited the utility industry’s concern about coal ash impoundments as one of the primary reasons EPA suspended the sentence making clear that permits are required for discharges into a waste treatment system created by

³²⁹ 45 Fed. Reg. 48,620, 48,620 (July 21, 1980).

³³⁰ *Id.*

³³¹ *Id.*

³³² 79 Fed. Reg. at 22,190.

³³³ Coal combustion waste or coal ash are wastes “from the combustion of coal in power plants and captured by pollution control technologies, like scrubbers.” U.S. Env’tl. Prot. Agency, Coal Combustion Residuals – Proposed Rule, <http://www.epa.gov/osw/nonhaz/industrial/special/fossil/ccr-rule/> (last visited Nov. 12, 2014).

impounding waters of the United States.³³⁴ Coal-fired power plants generate millions of gallons of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. This pollution is discharged directly from the power plant; flows from old, unlined surface impoundments or “ponds” that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge; and seeps from unlined ponds and landfills into ground and surface waters. These coal ash “[i]mpoundments, EPA tells us, have been ‘largely ineffective at controlling discharges of toxic pollutants and nutrients.’”³³⁵ EPA estimates that *at least 5.5 billion pounds* of pollution are released into the environment by coal-burning power plants every year.³³⁶ Coal-burning power plants are responsible for at least 50 to 60 percent of the toxic pollutants discharged into waters of the U.S—more than the other nine top polluting industries *combined*.³³⁷

Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Due to the bio-accumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems. In short, coal plant water pollution has serious public health consequences and causes lasting harm to the environment. According to EPA, power plant pollution has caused over 160 water bodies not to meet state water quality standards, prompted government agencies to issue fish consumption advisories for 185 waters, and degraded 399 water bodies across the country that serve as public drinking water supplies.³³⁸

Yet utilities have effectively been allowed to steal our nation’s waters to create these toxic lagoons in some cases. For example, an analysis of coal ash disposal units in seven southeastern states by Waterkeeper Alliance³³⁹ shows that *113 dumps* of 405 dumps were created by impounding or burying a waters of the United States.³⁴⁰ Of those 113 dumps, 85 are currently classified as surface

³³⁴ 45 Fed. Reg. at 48,620.

³³⁵ *Southwestern Electric Power Co. v. EPA*, No. 15-60821, at 2 (5th Cir. April 12, 2019) (internal citation omitted).

³³⁶ EPA, Environmental Assessment for the Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category 3-14 (Apr. 2013), Docket No. EPA-HQ-OW-2009-0819-2260 [hereinafter EA].

³³⁷ *Id.* at 3-13.

³³⁸ U.S. EPA, Proposed Effluent Guidelines for the Steam Electric Power Generating Category, available at: <http://water.epa.gov/scitech/wastetech/guide/steam-electric/proposed.cfm>. (**Attachment 33**)

³³⁹ Waterkeeper Alliance performed a geospatial analysis by overlaying coal ash disposal sites on historical topographical maps published by the U.S. Geological Survey, allowing the identification of coal ash ponds and landfills that were constructed by impounding or burying one or more preexisting blue-line streams. The analysis examined known coal ash sites in Alabama, Georgia, Florida, North Carolina, South Carolina, Tennessee, and Virginia. (**Attachment 34**).

³⁴⁰ *Id.*

impoundments, 26 as landfills, and 2 as Flue Gas Desulfurization (FGD) waste disposal units.³⁴¹ A Waterkeeper Alliance analysis identified more than 140 stream segments that have been impounded or otherwise obstructed by coal ash disposal units, with a combined length of 113 miles. The estimated volume of toxic coal ash in the dumps built on top or in a “water of the United States” in these eight states alone is 132 billion gallons.³⁴²

Utilities in other states have also created coal ash dumps by impounding or burying a “water of the United States.” For example, the FirstEnergy Little Blue Run impoundment in Pennsylvania, the nation’s largest coal ash impoundment, was created by damming Little Blue Run stream. In 2014, the Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment and ordered a \$169 million dollar cleanup and closure of Little Blue Run.³⁴³

Although the Agencies claim that the waste treatment exclusion is not a wholesale exemption from compliance with the CWA because they interpret it to apply only to impoundments that had been in existence for many years at the time it first suspended the final sentence of the definition, the plain language of the regulation includes no grandfather provisions or other limiting language related to the age of the impoundment. Further, the Agencies appear to be backtracking on this interpretation to allow new impoundments to claim the exemption so long as they obtain a § 404 permit.³⁴⁴ In short, the Agencies are proposing to codify a regulation that creates a gaping hole in the CWA and authorizes utilities and industrial operators to use our nation’s waters as their own private sewer while failing to comply with the CWA and APA.

(c) The Agencies are prohibited from codifying the waste treatment exclusion without complying with the CWA and APA

The Agencies may not codify the waste treatment exclusion without following notice and comment requirements. The CWA requires that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator any State under this Act ***shall be provided for, encouraged, and assisted*** by the Administrator and the States.³⁴⁵ Under the APA, the Agencies must provide for public participation

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Pa. Dep’t of the Env’t, DEP Issues Permit Requiring Closure of FirstEnergy’s Little Blue Run Impoundment (Apr. 3, 2014), *available at* <http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=20442&typeid=1>.

³⁴⁴ Proposed Rule, at pp. 4192-93.

³⁴⁵ 33 U.S.C. § 1251(e) (emphasis added).

for agency actions that create law (i.e. legislative rules or substantive rules).³⁴⁶ Courts at all levels have stressed the importance of public participation in rulemaking, and the D.C. Circuit has determined that notice and comment works “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”³⁴⁷ Yet 34 years after promising to promptly publish a proposed rule setting forth a revised definition of “waste treatment system,” EPA and the Corps here attempt to circumvent the CWA and APA by codifying the illegal waste treatment system exclusion without ever fully complying with the legal requirements for notice and comment rulemaking.

There can be no doubt that the proposed waste treatment system exclusion and codification of the suspension is a legislative rule subject to notice and comment under the CWA and APA. “To determine whether a regulatory action constitutes promulgation of a regulation, [courts] look to three factors: (1) the Agency’s own characterization of the action; (2) whether the action was published in the Federal Register . . . ; and (3) whether the action has binding effects on private parties or on the agency.”³⁴⁸

In the Proposed Rule, the Agencies expressly identified the action as a regulation (as opposed to an interpretive rule or general statement of policy). The action was published in the Federal Register. Finally, the action has had and will continue to have a binding effect on both dischargers and the Agencies. Industrial operators will arguably have a right to discharge into waste treatment impoundments created by impounding “waters of the United States” without a NPDES permit. Accordingly, the regulation will confer rights or obligations on private parties and the agency. Thus, the waste treatment system exclusion is subject to the full requirements for public review and comment under the CWA and APA. Notably, the Agencies must follow public notice and comment requirements under the APA not only when they enact a rule, but when the Agencies repeal a rule as well.³⁴⁹

³⁴⁶ See, e.g., *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

³⁴⁷ *International Union, United Mine Workers of Am. V. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

³⁴⁸ *Iowa League of Cities v. EPA*, 711 F.3d 844, 862 (8th Cir. 2013) (citing *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)).

³⁴⁹ *Nat’l Parks Conservation Ass’n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

(d) The Agencies do not have the authority to exempt “waters of the United States” from coverage under the CWA

The waste treatment system exclusion is in direct conflict with the CWA and fails both steps of the *Chevron* test. The plain language of the proposed waste treatment system exclusion, contrary to historic interpretation, simply excludes waste treatment systems from the definition of “waters of the United States” even if they are created by impounding waters of the United States.³⁵⁰ This is contrary to prior regulatory interpretation limiting a far narrow exclusion to “manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.”³⁵¹ The broad exclusion for waste treatment systems from CWA jurisdiction in the Proposed Rule is directly contrary to the CWA and decades of law holding that once a body of water is a water of the United States, it is always a water of the United States.

While “waters of the United States” itself may be a term that Agencies are charged with promulgating regulations to define, it is clear from legislative history and decades of case law that Congress did not intend for EPA to allow our nation’s rivers, streams, and lakes to be used as private sewers for the utility industry and other polluters. Under *Chevron v. Natural Res. Def. Council*, courts examine “the intent of Congress” in creating the statute.³⁵² If the intent is clear, a court “gives effect to the unambiguously expressed intent of Congress.”³⁵³ If, however, the statute is ambiguous, a court will defer to an agency’s interpretation of the statute if it is a “permissible construction.”³⁵⁴

Here, legislative history speaks directly to this issue and the general common law rule prior to the enactment of the CWA was that a body of water forever remains a waters of the United States once it has been identified as a waters of the United States.³⁵⁵ Thus, the waste treatment system exclusion fails *Chevron* Step One. There is no doubt that Congress intended the broadest possible reach of the CWA. The original conferees stated that “the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”³⁵⁶ The Senate Committee on Public Works, in approving the Federal Water Pollution Control Act Amendments of 1971 explicitly found that “[t]he use of any

³⁵⁰ Proposed Rule, at 4190, 4193.

³⁵¹ 40 C.F.R. § 122.2.

³⁵² 467 U.S. 837, 842 (1984).

³⁵³ *Id.* at 842-43.

³⁵⁴ *Id.* at 843.

³⁵⁵ See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (“When once found to be navigable, a waterway remains so.”).

³⁵⁶ S. Rep. No. 92-1236, at 45 (1972) (Conf. Rep.), reprinted in 1972 U.S.C.C.A.N. 3776, 3822.

river, lake, stream or ocean as a waste treatment system is unacceptable.”³⁵⁷ Several years later, another Senate Report stated that the CWA “stipulated that the Nation’s fresh and marine waters would not be an element of the waste treatment process. That continues to be national policy.”³⁵⁸ There appear to be no contrary statements in the legislative history.

The waste treatment system exclusion is also directly contrary to decades of judicial decisions reviewing the scope of “waters of the United States.” It is settled law that once a body of water is found to be waters of the United States, it always remains waters of the United States.³⁵⁹ While some of these decisions examined the term “navigable waters” as opposed to “waters of the United States,” the CWA most certainly encompasses the narrower category of “navigable water.”³⁶⁰ There is no evidence Congress intended to depart from this well settled law to allow the Agencies to remove bodies of water that fall squarely within the definition of “waters of the United States,” especially where those “waters of the United States” are impounded to create a private dump for a utility or other industrial operation.³⁶¹

The Agencies’ broad waste treatment system exclusion in the Proposed Rule is directly contrary to the statute, and is arbitrary and capricious because the legislative history and decades of common law make clear that EPA cannot carve out “waters of the United States” from the scope of the CWA to create waste disposal sites, which is precisely what the waste treatment system exclusion does.³⁶²

(e) EPA’s interpretation of the proposed waste treatment exclusion does not make it a permissible construction of the CWA

EPA has asserted that the waste treatment system exemption is not really as broad as the plain language suggests because it interprets the regulation to exclude only older waste treatment systems constructed from waters of the United States. Generally, an agency’s interpretation of its own regulations is subject to judicial deference unless it is “plainly erroneous or inconsistent with the regulation.”³⁶³ In this case, the agency’s interpretation conflicts with the plain language of the

³⁵⁷ S. Rep. No. 92-414, at 7 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

³⁵⁸ S. Rep. No. 95-370, at 4 (1977) *reprinted in* 1977 U.S.C.C.A.N. 4326, 4330.

³⁵⁹ See Scott Snyder, Note, *The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA’s Definition of “Waters of the United States”*, 21 N.Y.U. Envtl. L.J. 504, 522-23 (2014) (providing overview of federal cases prior to the enactment of the Clean Water Act holding that once a body of water has been classified as a waters of the U.S., it remains a waters of the U.S. forever).

³⁶⁰ 33 U.S.C. § 1362(7).

³⁶¹ *Id.* at 523.

³⁶² See discussion *infra*.

³⁶³ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Proposed Rule, and the Agencies have advanced a second interpretation that would exclude newly created waste treatment systems for CWA jurisdiction in some circumstances.

When it first finalized the waste treatment system definition in 1980, EPA stated that Congress did not intend for the CWA to exempt waste treatment systems created by impounding waters of the United States.³⁶⁴ Specifically, EPA said:

[b]ecause CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting interstate or foreign commerce.³⁶⁵

Even when the agency suspended the final sentence of the regulation, it reiterated its purposes, noting that “[t]he Agency’s purpose in the new last sentence was to ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands.”³⁶⁶

The fact of the matter is that the proposed waste treatment exemption does not include any language limiting the exclusion to treatment systems created by impounding waters of the United States that have been in existence “for many years” or for any other time period. Further, it is illogical—and courts have held as much—to suggest that a waste impoundment created prior to the CWA has been designed to meet the requirements of the CWA.³⁶⁷ In any event, the plain language of the Proposed Rule illegally exempts all waste treatment systems regardless of when the treatment systems are constructed.³⁶⁸

After promulgating a rule that reflected the intent of Congress that our nation’s rivers, lakes, and streams not be used as private dumps and then backtracking, EPA came up with a new spin on how to treat coal ash and other industrial impoundments instead of following through on its promise to revisit the suspension. In a 1986 memorandum, EPA stated that it evaluates what is an exempt

³⁶⁴ 45 Fed. Reg. at 33,298.

³⁶⁵ *Id.*

³⁶⁶ 45 Fed. Reg. at 48,620.

³⁶⁷ See, e.g., *California Sportfishing Prot. Alliance v. Cal. Ammonia Co.*, 2007 WL 273847, *6 (E.D. Cal 2007) (noting that the fact that a waste treatment impoundment is created prior to the Clean Water Act is evidence that it is not “designed to meet the requirements of the Clean Water Act”).

³⁶⁸ Proposed Rule, at 4190, 4193.

waste treatment system on a case-by-case basis, treating “newly created impoundments of waters of the U.S. as ‘waters of the U.S.,’ not as ‘waste treatment systems designed to meet the requirements of the CWA,’ whereas impoundments of ‘waters of the U.S.’ that have existed for many years and had been issued NPDES permits for discharges from such impoundments as ‘wastewater treatment systems designed to meet the requirements of the CWA’ and therefore are not ‘waters of the U.S.’”³⁶⁹ EPA states that, in fact, it suspended the last sentence of the waste treatment system in order to allow for such case-by-case decisions.³⁷⁰ EPA has echoed the interpretation articulated in the 1986 memorandum in various scenarios.³⁷¹

EPA and the Corps have attempted to reverse this interpretation in recent years to exclude *newly* created waste treatment systems from “waters of the United States.”³⁷² It appears the Agencies are attempting to rely on such interpretations as a basis for the exclusion in the Proposed Rule.³⁷³ However, EPA’s non-regulatory and evolving interpretations of the regulation do not transform the Proposed Rule’s waste treatment system exemption into a permissible construction of the CWA.

For all these reasons, the waste treatment system exclusion is unlawful and fails Step One and Step Two of the *Chevron* test. Commenters strongly urge the Agencies to eliminate the exclusion or publish a revised definition of waste treatment system that complies with the CWA. At a minimum, EPA must provide full notice and comment rulemaking through a supplemental notice that includes providing a detailed explanation of the proposed exclusion for waste treatment systems and the Agencies’ legal and factual basis for it.

³⁶⁹ Memo from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, attach. B at 7 (Apr. 2, 1986).

³⁷⁰ *Id.* (noting that EPA suspended the sentence in order to “restor[e] the ambiguity of the earlier regulations, so that each case must be decided on its own facts”). This is, of course, contrary to the purpose EPA provided when it suspended the sentence. 45 Fed. Reg. at 48,620 (noting that EPA would re-examine the waste treatment system definition and “promptly . . . develop a revised definition and to publish it as a proposed rule for public comment”).

³⁷¹ Jon Devine et al., *The Intended Scope of Clean Water Act Jurisdiction*, 41 *Env’tl. L. Rep. News & Analysis* 11,118, 11,125 (2011) (citing Letter from Lisa P. Jackson, Administrator, EPA, to Rep. James L. Oberstar at 1 (Apr. 30, 2010)). EPA has taken the same position in litigation. See *W. Va. Coal Ass’n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), *aff’d*, 932 F.2d 964 (4th Cir. 1991).

³⁷² *Id.* (noting that the agencies have advanced this broader interpretation in a 1998 Federal Register notice, a 2000 guidance document, and by the Corps in recent litigation. “Under the agencies’ revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is covered by a § 404 permit; that way, the system is ‘designed to meet the requirements of the Act,’ as required by the regulation.”).

³⁷³ Proposed Rule, at 4193.

IX. THE AGENCIES' RESOURCE AND PROGRAMMATIC ASSESSMENT AND ECONOMIC ANALYSIS ARE INADEQUATE IN EVERY MATERIAL RESPECT.

The Agencies Resource and Programmatic Assessment (“RPA”)³⁷⁴ is an incredibly lengthy document with voluminous attachments and supporting spreadsheets that, along with the Agencies’ Economic Analysis, purports to describe “the agencies’ assessment of the potential effects of the proposed definition on the federal regulation of aquatic resources across the country, as well as the potential effects on CWA programs and certain other programs under other federal statutes. The RPA also provides snapshots of the applicable regulatory and legal framework currently in place in states and some tribes to provide context for how aquatic resources are regulated. The two documents together present a comprehensive assessment of this proposed rule’s potential impacts.”³⁷⁵

These two documents do no such thing. The RPA conducts an analysis of some of the waters impacted by this Proposed Rule using only a subset of relevant, available data³⁷⁶ that the Agencies repeatedly admit is inadequate to the task:

1. “Data records in the U.S. Army Corps of Engineers’ (Corps) Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database that documents Corps decisions regarding the jurisdictional status of various aquatic resource types (*i.e.*, jurisdictional determinations, or JDs) The aquatic resource types used in ORM2 generally track the *Rapanos* Guidance (*Rapanos v. United States*, 547 U.S. 715 (2006)) but do not directly correlate to the terms used in the proposed rule.” (Inexplicably, the Agencies only looked at data on JDs from 2013 to 2017), and
2. Publicly-available data from two national datasets (the National Hydrography Dataset at High Resolution and the National Wetlands Inventory), which both “have technical limitations that present significant challenges for the purpose of determining potential effects of the proposed rule with regard to both baselines.”

³⁷⁴ Proposed Rule, Resource and Programmatic Assessment Docket ID No. EPA-HQ-OW-2018-0149-0005 (“RPA”).

³⁷⁵ *Id.*, at p. 8.

³⁷⁶ For example, the Agencies could have sought state, tribal and local government data, which is often extensive and detailed. The Agencies could also have evaluated data from the sources referenced in their Notice, as well as (1) massive datasets possessed by the Agencies themselves but not mentioned in the Proposed Rule, (2) data from other government agencies like USGS Elevation Derivatives for National Applications, <https://edna.usgs.gov/watersheds/index.htm>, the National Streamflow Statistics Program, <https://water.usgs.gov/osw/programs/nss/summary.html> and likely thousands of other datasets; Natural Resource Conservation Service Data; National Oceanic and Atmospheric Administration data; U.S. Department of Interior data; and many other federal agencies and (3) data from Universities and researchers across the country. Much of this data is readily available for access through the internet.

The result of this lengthy analysis, not surprisingly, is a series of assumptions about the impacts because the Agencies were unable use these admittedly inadequate data to “estimate the specific aquatic resource jurisdictional changes that would occur as a result of the proposed rule.”³⁷⁷ The Agencies indicate that adequate data is not available, but then take the opposite position in the Proposed Rule Preamble by describing how they will use various existing datasets to implement the rule.³⁷⁸

In other words, the Agencies did not determine what waters were protected previously or how those waters will be protected under this Proposed Rule, and accordingly cannot say what the impacts of losing jurisdiction will be in any meaningful way.³⁷⁹ The Agencies also compared the Proposed Rule to erroneous interpretations of the previous regulations. Similarly, the Agencies evaluated only a subset of CWA Programs, and proceeded to make “assumptions” about how states may or may not step in to fill the massive gaps the Proposed Rule will create in the CWA to determine how the Proposed Rule will impact CWA Programs.³⁸⁰ It is highly improper for the Agencies to attempt to justify this Proposed Rule in this manner, as the question is how the Proposed Rule will impact federal CWA Programs, not whether there might be some other state laws that could potentially be used. The Agencies’ purported inquiry is irrelevant and amounts to nothing more than the Agencies saying something akin to “Don’t worry about it. Some of the states might step in and regulate water pollution.”

The RPA is arbitrary, capricious and contrary to law, and provides no meaningful support for the Agencies’ Proposed Rule. Further, it is apparent that the Agencies are illegally attempting to avoid ever having to conduct any type of evaluation of the CWR and its extensive supporting scientific and technical record. For example, the Agencies state in a memorandum to the record for the Applicability Date (Delay Rule) Rulemaking that they are evaluating the potential change in

³⁷⁷ RPA, at p. 10.

³⁷⁸ Proposed Rule, at 4198-4200.

³⁷⁹ *See, e.g.*, Agency statements referenced in the Proposed Definition section of these Comments, Section VIII *supra*.

³⁸⁰ *See e.g.*, Economic Analysis, at p. 30 (“Doing so requires data and well-informed assumptions regarding the current characterization of waters nationwide, the potential changes in “waters of the United States” across the country, and the potential response of state and tribal governments and the regulated entities across the various CWA programs and regulated waters. In addition, such a quantitative analysis faces the usual challenges of trying to model, quantify, and monetize the potential costs and benefits. For these reasons, the agencies pursue qualitative analyses organized around each of the key layers of uncertainty (as discussed through the remainder of Section II) and around key CWA programs where the agencies would expect to see potential effects (see Section IV.A).”)

jurisdiction that would result from “Step 2” by comparing their undisclosed Future Rule to the pre-2015 definition (as currently implemented) rather than by comparing it to the CWR.³⁸¹

The Agencies’ Economic Analysis³⁸² is no better, in large part because it relies on the RPA for its basis and is plagued by unresolved and pervasive uncertainty. Additionally, the Agencies once again use their crystal-ball approach to predict how states may step with state laws in the future to increase the estimated benefits and decrease the estimated costs of the Proposed Rule. For example, the Agencies assume there will be no costs or benefits of the Proposed Rule with states stepping in to regulate pollution, and they do this without evaluating whether state programs are or will be at least as stringent as and as comprehensive as the CWA. Commenters are unaware of a single state law water pollution program that is comparable to the CWA. This “analysis” is irrational and irrelevant, and amounts to meaningless hand-waiving designed to create an appearance that the Agencies have carefully analyzed and explained the impacts of their actions. They plainly have not.

To support the Agencies’ approach to their Economic Analysis, the Agencies state without citing any source: “[t]he federalism literature illustrates that states may actually be in a better position than the federal government to regulate local environmental public goods (*e.g.*, water quality). When given more flexibility over which waters to regulate, states may be able to direct resources toward their high priority waters and limit expenditures on their low priority waters, thereby maximizing the net benefits derived from their waters.”³⁸³ This statement again illustrates a fundamental problem with the Proposed Rule. It plainly contravenes what Congress intended under the CWA, which was enacted precisely because the states had been unable to adequately control pollution and their failure was harming national interest.³⁸⁴

Additionally, the Agencies employed an unrepresentative and unreliable methodology. For example, the Agencies:

- Explored only the two national datasets they used for the RPA and rejected both of them as unreliable. Instead the Agencies used an “updated version of the 2015 Rule analysis for the Stage 1 analysis of this rule, and to rely on qualitative discussions and three quantitative case

³⁸¹ Memorandum for the Record: Rulemaking Process for Proposed Rule: Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule, *available at*: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0644>.

³⁸² Economic Analysis for the Proposed Revised Definition of “Waters of the United States” EPA-HQ-OW-2018-0149-0004.pdf

³⁸³ Economic Analysis, at p. xii.

³⁸⁴ See *e.g.* *Am. Paper Inst. v. Train*, 543 F.2d 328 (D.C. Cir. 1976); *Envtl. Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976); *Am. Farm Bureau Fed’n v. U.S. E.P.A.*, 792 F.3d 281, 309 (3d Cir. 2015); *see also* See Hines, *supra* note 36.

studies, and a national analysis of the estimated avoided costs and forgone benefits of the proposed change to the CWA 404 program for the Stage 2 analysis of this rule.³⁸⁵ This is clearly inadequate to evaluate the full costs and benefits of the Proposed Rule across the entire country. The Agencies do not explain why they did not consider using other available, reliable datasets.

- In Stage 1, they compare the CWR to the Pre-2015 “practice,” not the Pre-2015 regulation. They then modified the CWR analysis in several inappropriate ways, including inserting their unreliable and irrelevant predictions about how states may or may not fill the gap created by the loss of the CWA. The Agencies also, without explanation, inappropriately excluded any benefits (but kept the costs) associated with Section 311 Compliance, Section 401 Administration, Section 402 Pesticide Implementation and Section 404 Mitigation - Streams.
- Stage 2 Case Studies - The Agencies also attempted to conduct a quantitative analysis in three subwatersheds looking only at Section 311, Section 402 and Section 404 of the CWA and using flawed methodologies (including the NHD/NWI data they reject for all other analyses) that the Agencies extrapolate from to conclude the effects of the Proposed Rule will be “modest.” The subwatersheds, however, are not representative of the diverse watersheds across the country. For example, the Agencies reported that there are 250,400 NPDES permits across the country whereas the subwatersheds the Agencies selected had a combined total of less than 800 NPDES Permits. The subwatersheds the Agencies selected were also the less populated, more rural portions of the watersheds. For example, the Agencies selected a sparsely populated subwatershed in the Rio Grande basin that had 22 NPDES permits³⁸⁶ and an average of 9 Section 404 permits per year. This subwatershed is not even representative of the Rio Grande Basin, let alone the entire country.³⁸⁷ The same is true for the portion of the Lower Missouri Basin the Agencies elected to focus on, which stops before the River flows through Kansas City and St. Louis.³⁸⁸ The Agencies further assume that industries may voluntarily comply with their permits, States may adopt their own CWA, and the impacts will not be as severe in the rest of the country as they will be in the arid West. These are all unreasonable assumptions. This analysis also shows two important things: (1) The Agencies can do a more detailed analysis using better data, and (2) The Proposed Rule is so complex, vague and flawed that, even when they do, the Agencies are unable to reliably determine which waters are protected or the impacts of jurisdictional losses.³⁸⁹

³⁸⁵ Economic Analysis, at p. xiv.

³⁸⁶ Economic Analysis, at p. 184.

³⁸⁷ See Waterkeeper Alliance Fact Sheet for Rio Grande, *supra* note 120.

³⁸⁸ See Waterkeeper Alliance Fact Sheet for Missouri Confluence, *supra* note 120.

³⁸⁹ “The results of the case studies demonstrate that only the avoided costs and forgone benefits of the CWA 404 program can be estimated reliably nationwide with the available data.” Economic Analysis, at p. xvii.

- Stage 2 National - The Agencies national analysis only looked at the 404 program for ephemeral streams and wetlands, and the changes between the CWR and the Proposed Rule, so it does not provide a national estimate of total costs and benefits.

There are many other flaws in the Economic Analysis making it unreliable for the purposes of this rulemaking. The Agencies acknowledge these defects when they state:

These data issues limit the agencies' ability to conduct a national-level analysis to evaluate 1) waters potentially changing jurisdictional status; 2) relationship between these waters and facilities and activities covered under the CWA; and 3) potential impacts of changes in the level of regulation of jurisdictional and non-jurisdictional waters. With hundreds of thousands of facilities or permitted activities covered under CWA programs, it is not possible to review and analyze characteristics of individual facilities or activities contained in permits to assess how their particular requirements may change under a revised "waters of the United States" definition. For these reasons, the agencies relied on updating the 2015 Rule economic analysis for Stage 1 and on qualitative descriptions, case studies, and a national analysis of the CWA 404 program in Stage 2. The agencies solicit comment on this approach to evaluating the costs and benefits of the proposed rule and if there are alternative approaches that would be appropriate for use in this type of economic analysis.³⁹⁰

X. STATES CANNOT AND WILL NOT FILL THE ENORMOUS REGULATORY GAP THAT WOULD RESULT FROM THE PROPOSED RULE.

The Agencies have apparently forgotten, or are purposefully ignoring, the adage, "Those who fail to learn from history are doomed to repeat it." The statements throughout the Proposed Rule asserting and suggesting that the redefinition and draconian narrowing of "waters of the United States" will merely shift regulatory and enforcement authority from the federal government back to the states flies directly in the face of many decades of history and empirical data.³⁹¹

As the Agencies are well-aware, the passage of the CWA and a host of other federal laws in the 1970s occurred as a direct result of public outcry regarding dangerous pollution problems that resulted from failures by states to protect people and public trust resources from pollution.³⁹² The Agencies certainly also know how extremely unlikely it is that most states will be able or willing to sufficiently

³⁹⁰ Economic Analysis, at p. 51.

³⁹¹ See Hines, *supra* note 36.

³⁹² *Id.*

regulate dangerous pollution on newly deregulated rivers, streams and wetlands utilizing state law alone, and without the federal regulatory “floor” established by Congress in the CWA.

Moreover, the very concept encapsulated in the Agencies’ rationale for the Proposed Rule of simply “shifting” regulatory responsibility from the federal government to the states is irrational and nonsensical. As Cynthia Giles, the former head of EPA’s Office of Enforcement and Compliance Assurance astutely observed just a few months after President Trump’s inauguration:

Don’t be fooled by the suggestion that if the EPA walks away, everything will still be fine because states will step to the plate and enforce the law. The EPA’s retreat will only embolden industry and weaken states. If the EPA is not there to enforce laws, then in many cases no one will.³⁹³

Ms. Giles continued in her op-ed to provide several specific and noteworthy reasons why proposals to shift regulatory and enforcement responsibility to states (such as the Proposed Rule) are anathema to good public policy. These reasons were so clearly spelled out by Ms. Giles that we will repeat portions of her article verbatim:

- First, states often don’t enforce the laws within their own borders when the people primarily harmed live downwind or downriver in another state. States don’t want to spend their money or their political capital to benefit other states....
- Second, many significant violators are national companies that operate in many states. Individual states can’t effectively take on nationwide operations. Filing cases one state at a time is inefficient and leads to inconsistent results. The EPA enforces against national and multinational companies, and, through a single case, can secure an agreement that cuts pollution at all of a company’s facilities nationwide. States frequently join the EPA in these national cases....
- Third, many states don’t take action to enforce criminal environmental laws. Environmental crimes have real victims, who are injured and sometimes killed by companies that cut corners on toxic pollution control. The EPA’s criminal enforcement, especially against individual managers, sends a powerful deterrent message: Company managers who are considering cheating on drinking-water tests or turning off air-pollution controls better think twice before making choices that could land them in jail.
- Fourth, states don’t always have the political will to take on powerful companies. When the EPA sued Southern Coal Corporation for long-standing

³⁹³ Cynthia Giles, *Why We Can’t Just Leave Environmental Protection to the States*, *Grist*, April 26, 2017, <https://grist.org/opinion/why-we-cant-just-leave-environmental-protection-to-the-states/>

and serious water-pollution violations across Appalachia, four states — Alabama, Kentucky, Tennessee, and Virginia — joined the EPA in that case. West Virginia did not sign on, even though many of the violations occurred there. Why? The owner of the company was influential in the state, and now serves as its governor. The EPA is far less likely to be held hostage to companies with local political clout.

- Fifth, companies that play by the rules need protection from companies that cheat. Weak enforcement gives an unfair competitive advantage to companies that violate the law. The EPA helps to ensure a level playing field and prevent a race to the bottom by providing backup for states that don't have the resources or the will to insist on compliance....
- Sixth, sidelining the EPA won't empower states, it will weaken them. Companies have known that if they don't resolve their enforcement problems at the state level, they may have to face the EPA instead. Announcing that the EPA is no longer a threat will change that dynamic. A diminished EPA will encourage companies to push back against state enforcers. The proposal that Trump claims will help states will instead make their jobs harder.³⁹⁴

Of course, none of this should come as a surprise to the Agencies, and they should be ashamed for pretending to be so naive. And it is insulting that they apparently think the public will be so easily fooled by their attempted shell game. It is plainly arbitrary and capricious for the Agencies to ignore history and reality in their pernicious, dangerous and irrational effort to eviscerate modern federal water pollution regulation.

A. Water Pollution Regulation and Enforcement by States is Currently Insufficient to Protect Water Quality.

The CWA and many other federal environmental statutes provide for, encourage and in some cases even require federal delegation of regulatory programs to states. For example, only three states have *not* been delegated NPDES permitting authority under Section 402 of the Act.³⁹⁵

EPA provides significant grant funding to states that carry out regulatory programs to implement federal law. Notwithstanding this substantial federal investment, however, many states are currently failing to adequately protect communities, waterways and ecosystems from dangerous water pollution. EPA's Solicitor General has made this observation, noting that state enforcement

³⁹⁴ *Id.*

³⁹⁵ The three states are Massachusetts, New Hampshire and New Mexico. Notably, only two states (Michigan and New Jersey) have received full delegation to administer CWA dredge and fill permit programs under CWA Section 404.

efforts are “incomplete and inconsistent.”³⁹⁶ These ongoing challenges are borne out in EPA’s own water quality assessment data as well. The most recent nationally representative water quality assessment estimates that of those waters that have been assessed, around 53 percent of U.S. river and stream miles, 71% of lake acreage, and 80% of estuary and bay square mileage are not safe for fishing, swimming, or other beneficial uses.³⁹⁷ As much of 75% of the U.S. population lives within 10 miles of an “impaired” waterway.

Given the water quality challenges our nation continues to face 47 years after the passage of the CWA, it is obvious that the Act’s requirements and enforcement desperately need to be supported and strengthened, not diminished. Weakening the Act by reducing the scope of federal jurisdictional waters, and blindly assuming in the face of strong evidence to the contrary that states will have the desire, political will, and capacity to pick up the slack, stretches credulity well beyond the breaking point and is a classic example of arbitrary and capricious decision-making.

B. State Regulation and Enforcement Will Further Diminish Under the Proposed “Waters of the United States” Redefinition.

There can be no serious question that removing millions of miles of waterways and millions of acres of wetlands from federal water pollution regulation and enforcement will make matters significantly worse for water quality across the country. Yet, at the very same time the Agencies are endeavoring to dramatically reduce the scope of federal water pollution regulation and enforcement under the CWA, the Trump administration also proposes to slash funding to EPA and the states.

In its 2020 budget released last month, which proposes to cut funding to EPA by approximately 32 percent, one of the administration’s “major savings and reforms” planned for EPA is to cut grants to states:

Many States have been delegated authority to implement and enforce Federal environmental laws including the Clean Air Act, Clean Water Act, and Safe Drinking Water Act. ***The Budget proposes to reduce many of these grants and eliminate others to better focus and prioritize environmental activities on core functions required by Federal environmental laws.***³⁹⁸

³⁹⁶ Irreplaceable: Why States Can’t and Won’t Make Up for Inadequate Federal Enforcement of Environmental Laws, Institute for Policy Integrity, New York University School of Law (June 2017) (citing U.S. EPA Office of the Inspector General, 12-P-0113, EPA Must Improve Oversight of State Enforcement 8 (2011)).

³⁹⁷ Watershed Assessment, *supra* note 10.

³⁹⁸ Office of Mgmt. & Budget, Major Savings and Reforms, Budget of the U.S. Government, Fiscal Year 2020, at p. 83 (2019), <https://www.govinfo.gov/content/pkg/BUDGET-2020-MSV/pdf/BUDGET-2020-MSV.pdf> (emphasis added).

The administration's purported "justification" for its planned reduction and elimination of grants was explained as follows:

EPA categorical grant funding is intended to help States meet Federal environmental law requirements and standards. ***The Budget proposes to eliminate or substantially reduce Federal investment in State environmental activities that go beyond EPA's statutory requirements.*** States could adjust to reduced funding levels by reducing or eliminating additional activities not required under Federal law, prioritizing programs, and seeking other funding sources...³⁹⁹

Thus, at the same time EPA is making this enormous effort to dramatically reduce the scope of "EPA's statutory requirements," such as by dramatically narrowing the definition of WOTUS, it also promises to "eliminate or substantially reduce" funding for activities that are not required under federal law, such as protection of waters that no longer meet the Proposed Rule's new definition of "waters of the United States!" Indeed, when the Proposed Rule and the fiscal year 2020 Budget are read in close proximity, it is immediately apparent that what the agencies are essentially saying to states and the public is, "these rivers, streams, lakes, and wetlands will no longer be protected under federal law, and the result is that the United States will no longer provide grants for states to help protect those newly deregulated waters." The Agencies might consider adding a "Good Luck!" for good measure.

C. The Agencies' Reliance on Summaries of State Regulatory Information is Insufficient to Overcome the Enormous Weight of Evidence that States Won't Fill the Regulatory Gap.

As noted above in our comments about the insufficiency of the Agencies' RPA and Economic Analysis to support their actions,⁴⁰⁰ in an attempt to manufacture evidentiary support for their arbitrary, capricious and factually erroneous assertions regarding state capacity and willingness to protect waters that would lose protection under this proposal, the Agencies shamelessly "cherry pick" information from a few utterly unrepresentative watersheds. They then (1) exaggerate these purported examples and (2) arbitrarily and capriciously attempt to apply this small number of samples to the entire country:

Similar cuts to EPA, enforcement, and state grants were also proposed in each of the previous two federal budgets (2018 and 2019) (**Attachment 35**).

³⁹⁹ *Id.* (emphasis added).

⁴⁰⁰ *See supra*, Section IX.

This Resource and Programmatic Assessment (RPA) complements the Economic Analysis for the proposed rule and describes the agencies' assessment of the potential effects of the proposed definition on the federal regulation of aquatic resources across the country, as well as the potential effects on CWA programs and certain other programs under other federal statutes. The RPA also provides snapshots of the applicable regulatory and legal framework currently in place in states and some tribes to provide context for how aquatic resources are regulated. ***The two documents together present a comprehensive assessment of this proposed rule's potential impacts.***⁴⁰¹

As explained more fully above, these useless and embarrassing efforts by the Agencies to create an appearance of compliance with law to justify their planned dereliction of duty do not pass the "straight-face test." A lengthy compilation summarizing state programs and funding is not the equivalent of a "comprehensive assessment of this proposed rule's potential impacts." A careful review of these lengthy documents reveals no meaningful evidence to support the Agencies' suggestion or belief that states have the financial capacity and/or the political will to protect federally deregulated waters from dangerous pollution. Moreover, as previously noted, the Agencies have not even identified, via mapping or otherwise, which waters would, and which would not, be considered water of the United States under the Proposed Rule. Such analysis would clearly be required in order to present to the public with a "comprehensive assessment" of impacts and to accurately predict whether states will be ready, willing and able to rise to the task of filling the enormous gap in regulation of water pollution across the United States.

XI. THE AGENCIES VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT AND ENDANGERED SPECIES ACT IN THE PROMULGATION OF THE PROPOSED RULE.

A. The Agencies Must Comply with the Endangered Species Act's Consultation Requirements.

In violation of the APA, the Agencies provide no meaningful information on the numbers or types of waterways that will be impacted by this Proposed Rule, but it is indisputable that fewer waters will be protected under the Proposed Rule than under the pre-2015 regulatory definition and under the CWR, including wetlands, streams, lakes, rivers and other waters. These waters provide habitat for numerous endangered species across the nation, and the gain or loss of CWA jurisdiction under this Proposed Rule will have an adverse impact on those species that has not been quantified or evaluated in this rulemaking. A loss of CWA jurisdiction means that a waterway can be subjected to unregulated pollution and even total destruction as a matter of federal law. Given the Proposed Rule's far-reaching impacts for these aquatic ecosystems, and the many threatened or endangered

⁴⁰¹ RPA, *supra* note 365.

species that depend upon them, the Agencies are required to ensure that the Proposed Rule will not jeopardize the continued existence of any such species and to engage in interagency consultation under section 7(a)(2) of the ESA. The Agencies' failure to consult represents a clear and egregious violation of the ESA.

Section 7 of the ESA requires each agency to engage in consultation with Fish and Wildlife Service and/or National Marine Fisheries Service (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 habitat of such species ... determined ... to be critical..."⁴⁰² Section 7 "consultation" is required for "any action [that] may affect listed species or critical habitat."⁴⁰³ 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."⁴⁰⁴

Because the CWA does not command EPA or the Corps to promulgate a particular set of regulations defining which "waters of the United States" are protectable under the law, the Agencies' decision to do so in this Proposed Rule is a discretionary action. As a result, just like every other agency, the Agencies must consult when they develop the Proposed Rule if it crosses the "may affect" threshold of the ESA. Case law reinforces the proposition that a regulation that may affect endangered species must be the subject of consultation.⁴⁰⁵ Because the Proposed Rule will plainly have effects on many endangered species and their critical habitats, consultations with the Services are absolutely required before the Agencies can proceed.

Under the joint regulations implementing the ESA, if an impact on a listed species is predicted to occur, then the Agencies must complete consultations with the Services.⁴⁰⁶ If the Agencies elect to first complete an informal consultation, they must first determine whether their action is "not likely to adversely affect" (NLAA) a listed species or is "likely to adversely affect" (LAA) a listed species.⁴⁰⁷

⁴⁰² 16 U.S.C. §1536(a)(2).

⁴⁰³ 50 C.F.R. §402.14.

⁴⁰⁴ *Id.* §402.02 (emphasis added).

⁴⁰⁵ See, e.g., *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F.Supp.3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F.Supp.2d 1059 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F.Supp.2d 1158 (W.D. Was. 2006).

⁴⁰⁶ U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act at xv.

⁴⁰⁷ *Id.*

The Services define a “NLAA” determination to encompass those situations where effects on listed species are expected to be “discountable, insignificant, or completely beneficial.”⁴⁰⁸ Discountable effects are limited to situations where it is not possible to “meaningfully measure, detect, or evaluate” harmful impacts.⁴⁰⁹ Discountable and insignificant impacts are very rare.

Under the informal consultation process, if the agency reaches an NLAA determination, and the Services concur in that determination, then no further consultation is required. In contrast, if the action agency determines that its activities are likely to adversely affect listed species, then formal consultations must occur. The Agencies may elect to skip the informal consultation process and move directly to formal consultation.

During the formal consultation process, the Services assess the environmental baseline – “the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process”⁴¹⁰ – in addition to cumulative effects to the species – “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation” – and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.⁴¹¹ Here, there are two environmental baselines - the Agencies’ Pre-2015 Regulatory Definition and the CWR, and all effects of the Proposed Rule must thus be assessed in light of these rules.

For example, eliminating protections for some wetlands will directly, indirectly, and cumulatively impact endangered species. California vernal pool wetlands that support vernal pool fairy shrimp (*Branchinecta lynchi*) – a federally listed species – that would be protected under the CWR. Those wetlands may not receive protection if the Proposed Rule is finalized, meaning that they could be destroyed as no section 404 permit would be required to conduct dredge and fill activities in those waters. Vernal pool fairy shrimp may, therefore, be harmed by the Proposed Rule. Consequently, the EPA’s action here easily crosses the “may affect” threshold requiring consultations under the ESA for this single species alone.⁴¹² Many other species are also likely to be adversely affected if the Proposed Rule is adopted.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at xiv.

⁴¹¹ *Id.* at xiii.

⁴¹² Waterkeeper Alliance Fact Sheets, *supra* note 120.

The Agencies cannot avoid their obligation to consult by claiming that states may step in to address waters no longer protected by the CWA. The issue in the Proposed Rule that the Agencies are required to evaluate relates solely to jurisdiction under the federal CWA. It is completely irrelevant to this Proposed Rule that similar state laws may apply to a waterbody, and in any event, the Agencies' own analysis demonstrates that there are not similar laws in all 50 states, tribal jurisdictions and territories, and the Agencies cannot predict how the states, tribal governments or others will or will not respond to the loss of CWA protections contemplated by the Proposed Rule.⁴¹³

The CWA does not command EPA or the Army Corps to promulgate regulations setting forth either the general limits or specific exemptions to define which "waters of the United States" are protectable under the law. As a result, just like every other agency, EPA and the Army Corps must consult when they embark upon the discretionary task of developing regulations, if and when the effects of those regulations cross the "may affect" threshold set forth in the ESA. Indeed, case law is clear that when a regulation may affect endangered species it must be the subject of consultation.⁴¹⁴ Because the Proposed Rule will affect endangered species and their critical habitats as it is implemented in the future, ESA consultations must occur before the Proposed Rule is finalized.

B. The Agencies Must Comply With NEPA.

Under NEPA, the Agencies must prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment."⁴¹⁵ Promulgation of a rule is a "Federal action" under NEPA,⁴¹⁶ and there is little doubt that this Proposed Rule will significantly affect the quality of the human environment. However, the Agencies have not prepared either an Environmental Assessment or an Environmental Impact Statement for this action as required by NEPA.⁴¹⁷

All losses and benefits resulting from this Proposed Rule must be accounted for and evaluated in the NEPA process.⁴¹⁸ NEPA is designed to ensure that Agencies take a required "hard look" at the environmental consequences of their actions,⁴¹⁹ and there is no indication in the Notice that the

⁴¹³ RPA, *supra* note 365; Economic Analysis, at p. 30-52.

⁴¹⁴ See, e.g., *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F.Supp.3d 7, 12 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F.Supp.2d 1059, 1095-97 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F.Supp.2d 1158, 1182-95 (W.D. Was. 2006).

⁴¹⁵ 42 U.S.C. §4332(2)(C).

⁴¹⁶ 40 C.F.R. §1508.18(b)(1).

⁴¹⁷ See 40 C.F.R. §1508.9(a) and (b); 33 C.F.R. §230.10(a); 40 C.F.R. §1508.13.

⁴¹⁸ See 33 C.F.R. §230.10(a).

⁴¹⁹ *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 350-54 (1989).

Agencies conducted any NEPA analysis or engaged in reasoned decision-making regarding the environmental impacts as plainly required by law.⁴²⁰

CONCLUSION

For all of the reasons set forth herein, Commenters request that the Agencies withdraw the Proposed Rule and abandon all of their efforts to eliminate CWA protections for the Nation's waters. Instead of continuing to pursue deregulatory actions that are contrary to law and endanger the public, Commenters request that the Agencies redirect their energy and focus to fully implementing the CWA in partnership with state, tribal, interstate, and local governments, as intended by Congress and as is necessary to restore and maintain the chemical, physical and biological integrity of the Nation's waters.

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⁴²⁰ See *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotations omitted).

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Baltimore Harbor Waterkeeper
Blue Water Baltimore - Baltimore Harbor
Waterkeeper
Baltimore, MD

Kathy Phillips
Executive Director &
Assateague Coastkeeper
Assateague Coastal Trust
Berlin, MD

Matt Pluta
Choptank Riverkeeper
ShoreRivers
Easton, MD

Jesse Iliff
South Riverkeeper
Arundel Rivers Federation, Inc.
Edgewater, MD

Theaux M. Le Gardeur
Riverkeeper
Gunpowder Riverkeeper
Parkton, MD

Betsy Nicholas
Executive Director
Waterkeepers Chesapeake
Takoma Park, MD

Frederick Tutman
CEO & Riverkeeper
Patuxent Riverkeeper
Upper Marlboro, MD

Brent Walls
Upper Potomac Riverkeeper
Potomac Riverkeeper Network
Williamsport, MD

Ron Huber
Executive Director
Friends of Penobscot Bay
Rockland, ME

Ivy Frignoca
Casco Baykeeper
Friends of Casco Bay
South Portland, ME

Robert Burns
Riverkeeper
Detroit Riverkeeper
Grosse Ile, MI

Heather Smith
Grand Traverse Baykeeper
The Watershed Center Grand Traverse
Bay
Traverse City, MI

Rachel Bartels
Waterkeeper
Missouri Confluence Waterkeeper
Saint Louis, MO

Abby Braman
Executive Director
Pearl Riverkeeper
Madison, MS

Guy Alsentzer
Executive Director
Upper Missouri Waterkeeper
Bozeman, MT

Jerry O'Connell
Executive Director
Big Blackfoot Riverkeeper, Inc.
Greenough, MT

Hartwell Carson
French Broad Riverkeeper
MountainTrue
Asheville, NC

Emily Sutton
Haw Riverkeeper
Haw River Assembly
Bynum, NC

Brandon Jones
Riverkeeper
Catawba Riverkeeper Foundation
Charlotte, NC

Gray Jernigan
Green Riverkeeper
MountainTrue
Hendersonville, NC

David Caldwell
Coordinator
Broad River Alliance, a Waterkeeper
Affiliate
Lawndale, NC

Jefferson Currie II
Riverkeeper
Winyah Rivers Alliance
Lumber Riverkeeper
Middlesex, NC

Larry Baldwin
Crystal Coast Waterkeeper
Coastal Carolina Riverwatch
Morehead City, NC

Katy Hunt
Lower Neuse Riverkeeper
Sound Rivers
New Bern, NC

Forrest English
Pamlico-Tar Riverkeeper
Sound Rivers
Washington, NC

Kemp Burdette
Cape Fear Riverkeeper
Cape Fear River Watch
Wilmington, NC

Edgar Miller
Executive Director
Yadkin Riverkeeper
Winston-Salem, NC

Captain Bill Sheehan
Riverkeeper and Executive Director
Hackensack Riverkeeper
Hackensack, NJ

Greg Remaud
Baykeeper & CEO
NY/NJ Baykeeper
Matawan, NJ

Jill Jedlicka
Executive Director and Waterkeeper
Buffalo Niagara Waterkeeper
Buffalo, NY

John Peach
Executive Director, Save The River
Upper St. Lawrence Riverkeeper
Clayton, NY

Peter Topping
Baykeeper
Peconic Baykeeper
Hampton Bays, NY

Chris Navitsky
Waterkeeper
Lake George Waterkeeper
Lake George, NY

Joseph Campbell
President
Seneca Lake Guardian, a Waterkeeper
Alliance Affiliate
Watkins Glen, NY

Richard Webster
Legal Program Director
Riverkeeper, Inc.
Ossining, NY

Earl Hatley
Grand Riverkeeper
LEAD Agency, Inc.
Vinita, OK

Rebecca Jim
Tar Creekkeeper
LEAD Agency, Inc.
Vinita, OK

Robyn Janssen
Director
Rogue Riverkeeper
Ashland, OR

Lauren Goldberg
Legal & Program Director
Columbia Riverkeeper
Hood River, OR

Travis Williams
Riverkeeper & Executive Director
Willamette Riverkeeper
Portland, OR

Ashley Short
Advocacy and Public Policy Coordinator
Tualatin Riverkeepers
Tualatin, OR

Pam Digel
Director
Upper Allegheny River Project, a
Waterkeeper Alliance Affiliate
Bradford, PA

Eric Harder
Youghiogheny Riverkeeper
Mountain Watershed Association
Ohiopyle, PA

Bryce Aaronson
Acting Co-Director
Three Rivers Waterkeeper
Pittsburgh, PA

Carol Parenzan
Riverkeeper & Executive Director
Middle Susquehanna Riverkeeper
Association, Inc.
Sunbury, PA

Ted Evgeniadis
Riverkeeper
Lower Susquehanna Riverkeeper
Association
Wrightsville, PA

Kate McPherson
Riverkeeper
Narragansett Bay Riverkeeper
Providence, RI

Michael Jarbeau
Baykeeper
Narragansett Baykeeper
Providence, RI

David Prescott
South County Coastkeeper
Save The Bay
Westerly, RI

Andrew Wunderley
Waterkeeper
Charleston Waterkeeper
Charleston, SC

Bill Stangler
Riverkeeper
Congaree Riverkeeper
Columbia, SC

Cara Schildtknecht
Waccamaw Riverkeeper
Winyah Rivers Alliance - Waccamaw
Riverkeeper Program
Conway, SC

Steve Box
Executive Director
Environmental Stewardship
Bastrop, TX

Cynthia Seale
Interim Executive Director
Trinity Waters, a Waterkeeper Alliance
Affiliate
Dallas, TX

Jordan Macha
Executive Director & Waterkeeper
Bayou City Waterkeeper
Houston, TX

Diane Wilson
Executive Director
San Antonio Bay Estuarine Waterkeeper
Seadrift, TX

John Weisheit
Conservation Director
Colorado Riverkeeper
Moab, UT

Lee First
Waterkeeper
Twin Harbors Waterkeeper
Aberdeen, WA

Shannon Wright
Executive Director
RE Sources - North Sound Baykeeper
Bellingham, WA

Jerry White, Jr
Riverkeeper
Spokane Riverkeeper
Spokane, WA

Cheryl Nenn
Riverkeeper
Milwaukee Riverkeeper
Milwaukee, WI

Angie Rosser
Executive Director & Waterkeeper
West Virginia Rivers Coalition - West
Virginia Headwaters Waterkeeper
Charleston, WV

Matt O'Malley
Executive Director
San Diego Coastkeeper
San Diego, CA

Damon Mullis
Executive Director
Ogeechee Riverkeeper
Savannah, GA

Jen Pelz
Waterkeeper
Rio Grande Waterkeeper
Santa Fe, NM

Andy Hill
Riverkeeper
Watauga Riverkeeper
Boone, NC

Pat Banks
Director
Kentucky Riverkeeper
Richmond, KY

ATTACHMENT 2

This web report uses old data from a legacy database that has not been updated since 2017. This web report is outdated and will eventually be removed.

For the latest surface water quality assessment decision data, please visit How's My Waterway, or visit the ATTAINS website.

National Summary of State Information

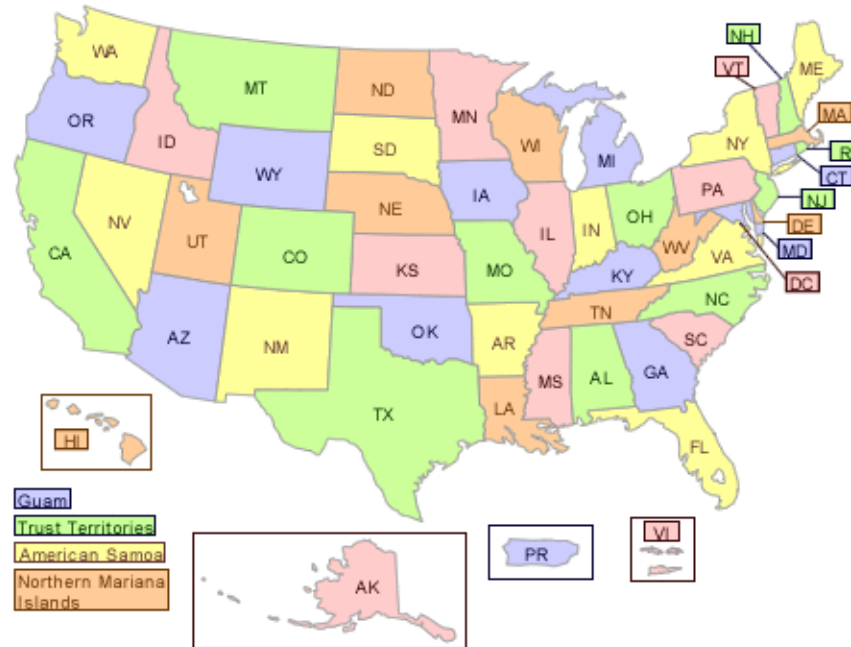
[Return to home page](#)

Choose a state or territory from the map below or the list to the right.

Alabama

On This Page

- Assessment Summary
- Water Quality by Waterbody Type
 - Rivers and Streams
 - Lakes, Reservoirs, and Ponds
 - Bays and Estuaries
 - Coastal Shoreline
 - Ocean and Near Coastal
 - Wetlands
 - Great Lakes Shoreline
 - Great Lakes Open Water
- Causes of Impairment
- Probable Sources Contributing to Impairments
- Previously Impaired Waters Now Attaining All Uses
- Impaired Waters Listed by State
- Cumulative TMDLs by Pollutant
- Approved TMDLs by State
- Cumulative Number of TMDLs
- Status of Available Data Used in This Report



Depicted below are national summary tables and charts for available water quality data reported by the States to EPA under Section 305(b) and 303(d) of the Clean Water Act.

This report displays the most current available reporting year data.
Check the Status of Available Data for more information.

For More Information:

Download Excel compatible information

Download GIS Information:

- ATTAINS National Downloads
- EPA Clip N Ship

Assessed Waters of United States

Incomplete state reported information may lead to discrepancies and/or missing information in these reports.

Description of this table

	Size of Water							
	Rivers and Streams (Miles)	Lakes, Reservoirs, and Ponds (Acres)	Bays and Estuaries (Square Miles)	Coastal Shoreline (Miles)	Ocean and Near Coastal (Square Miles)	Wetlands (Acres)	Great Lakes Shoreline (Miles)	Great Lakes Open Water (Square Miles)
Good Waters	518,293	5,390,570	11,516	1,298	726	569,328	106	1
Threatened Waters	4,495	30,309						
Impaired Waters	588,173	13,208,917	44,625	3,329	6,218	672,924	4,354	39,230
Total Assessed Waters	1,110,961	18,629,795	56,141	4,627	6,944	1,242,252	4,460	39,231
Total Waters	3,533,205	41,666,049	87,791	58,618	54,120	107,700,000	5,202	196,343
Percent of Waters Assessed	31.4	44.7	63.9	7.9	12.8	1.2	85.7	20.0

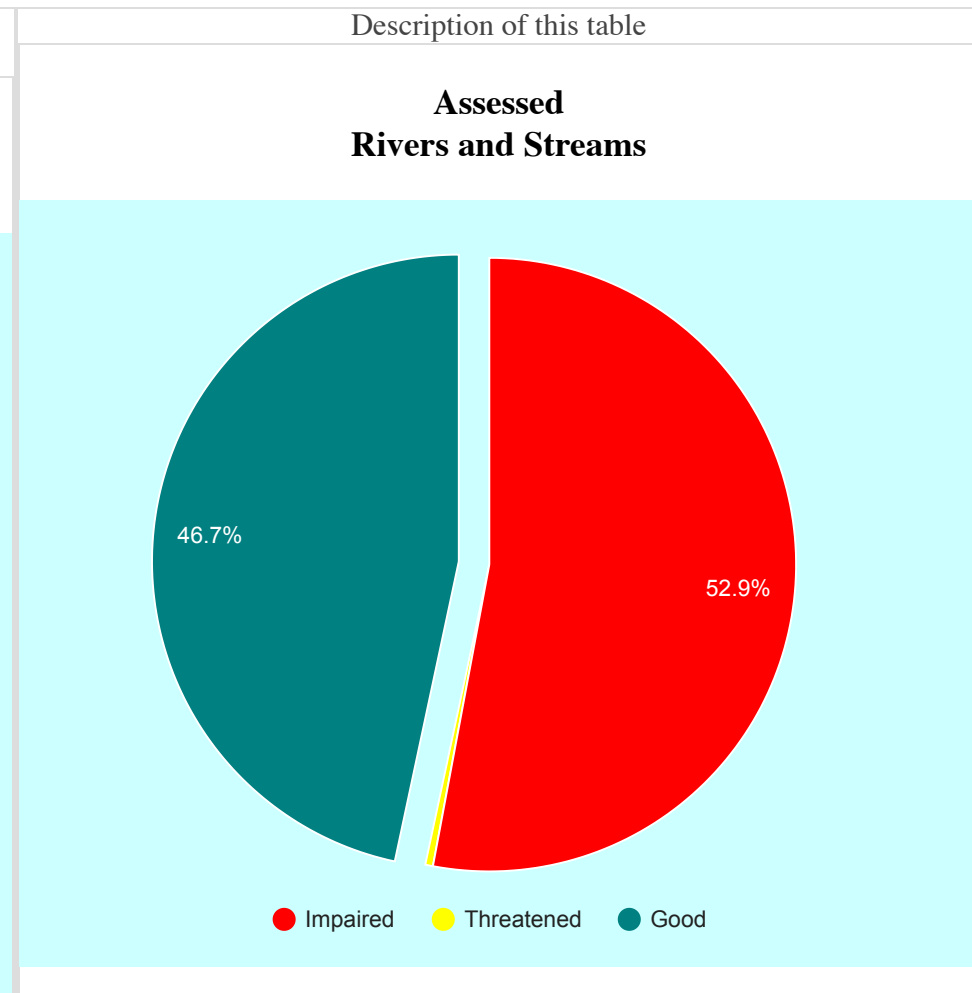
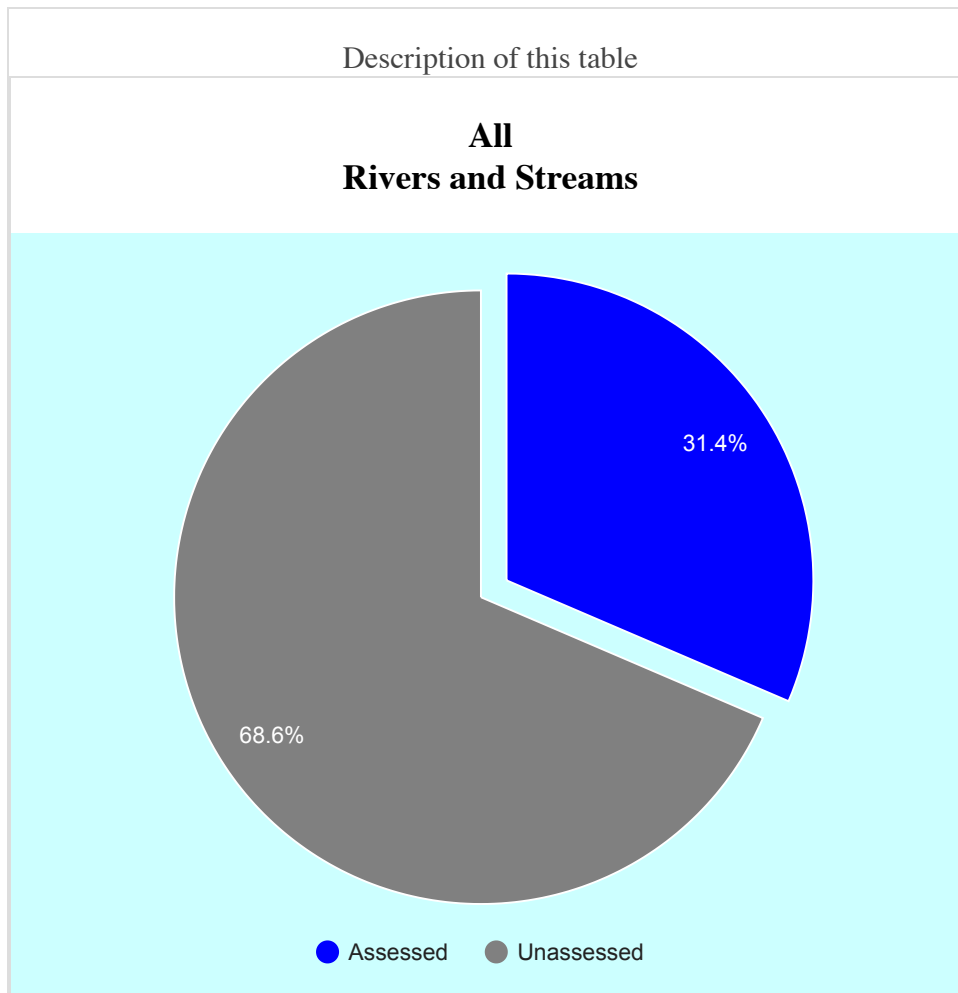
States Using a Statewide Statistical Survey

Some states submit statewide statistical survey data, which use representative random samples to characterize the condition of an entire waterbody type. Statewide statistical survey data is not currently included in these summary tables.

Number of States			
Rivers and Streams	Lakes, Reservoirs, and Ponds	Number of Lakes	Bays and Estuaries
14	6	1	2

Summary of Water Quality Assessments for Each Waterbody Type

National Summary Water Quality Attainment in Assessed Rivers and Streams





















Assessed Status	Miles
Assessed	1,110,961
Unassessed	2,422,244
Total Miles	3,533,205

Attainment Status	Miles
Good	518,293
Threatened	4,495
Impaired	588,173
Total Miles Assessed	1,110,961

National Summary Designated Use Support in Assessed Rivers and Streams*

* Waters assessed for more than one designated use are included in multiple designated use groups below.

Description of this table

Designated Use Group	Miles Assessed	Percent Good	Percent Threatened	Percent Impaired	% Good % Threatened % Impaired		
 Fish, Shellfish, And Wildlife Protection And Propagation	896,133	55.2	.3	44.5			
 Recreation	448,462	55.2	.8	44.1			
 Agricultural	375,900	95.6	.0	4.4			
 Aquatic Life Harvesting	313,932	45.6	.0	54.4			
 Public Water Supply	290,107	74.9	.1	25.1			
 Industrial	192,108	98.2	.0	1.8			
 Other	87,916	97.9	.0	2.1			
 Aesthetic Value	42,783	93.6	.0	6.4			
 Exceptional Recreational Or Ecological Significance	5,233	82.0	.0	18.0			

National Summary Causes of Impairment in Assessed Rivers and Streams

Description of this table

Cause of Impairment Group	Miles Threatened or Impaired
Pathogens	 187,872
Sediment	 138,874
Nutrients	 118,831
Organic Enrichment/Oxygen Depletion	 98,037
Temperature	 94,488
Metals (other than Mercury)	 94,384
Polychlorinated Biphenyls (PCBs)	 82,311
Mercury	 72,554

Habitat Alterations	63,019
Turbidity	47,750
Cause Unknown	45,318
Cause Unknown - Impaired Biota	44,900
Flow Alteration(s)	41,329
Salinity/Total Dissolved Solids/Chlorides/Sulfates	38,072
pH/Acidity/Caustic Conditions	33,740
Pesticides	18,069
Ammonia	12,160
Total Toxics	11,174
Other Cause	9,273
Biotoxins	6,450
Algal Growth	5,823
Dioxins	5,061
Toxic Inorganics	4,706
Toxic Organics	4,677
Oil and Grease	2,725
Nuisance Exotic Species	1,229
Trash	1,219
Radiation	1,101
Taste, Color and Odor	990
Chlorine	585
Noxious Aquatic Plants	318
Fish Consumption Advisory	303
Cause Unknown - Fish Kills	89
Nuisance Native Species	56

National Summary Probable Sources of Impairments in Assessed Rivers and Streams

Description of this table

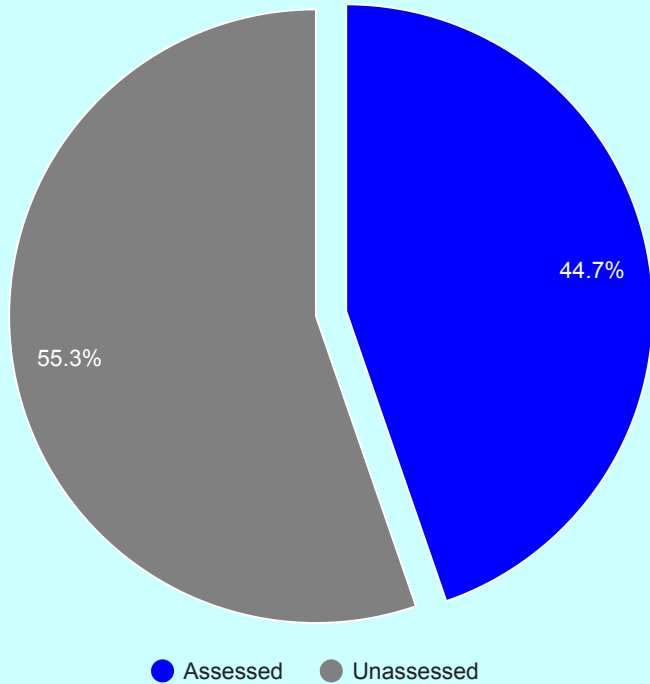
Probable Source Group	Miles Threatened or Impaired
Unknown	144,971
Agriculture	135,855
Hydromodification	88,634

Atmospheric Deposition	85,922
Habitat Alterations (Not Directly Related To Hydromodification)	65,633
Unspecified Nonpoint Source	60,807
Municipal Discharges/Sewage	57,237
Natural/Wildlife	50,702
Urban-Related Runoff/Stormwater	49,330
Silviculture (Forestry)	40,942
Resource Extraction	32,975
Construction	21,583
Industrial	11,388
Other	9,277
Land Application/Waste Sites/Tanks	8,587
Legacy/Historical Pollutants	5,771
Spills/Dumping	3,781
Recreation And Tourism (Non-Boating)	1,534
Groundwater Loadings/Withdrawals	249
Aquaculture	165
Recreational Boating And Marinas	132
Military Bases	21

**National Summary
Water Quality Attainment in Assessed Lakes, Reservoirs, and Ponds**

Description of this table	Description of this table
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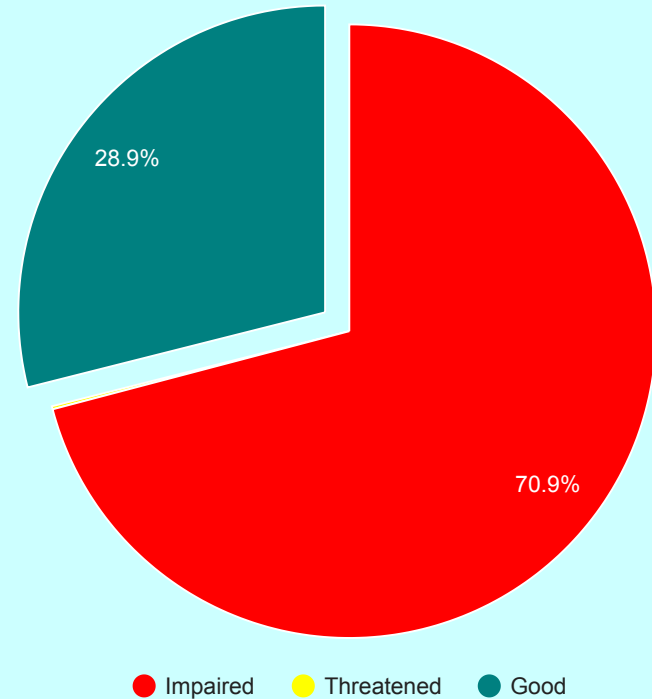
All Lakes, Reservoirs, and Ponds



41,666,049.0 Acres of Lakes, Reservoirs, and Ponds

Assessed Status	Acres
Assessed	18,629,795
Unassessed	23,036,254
Total Acres	41,666,049

Assessed Lakes, Reservoirs, and Ponds





















18,629,795.1 Acres of Assessed Lakes, Reservoirs, and Ponds

Attainment Status	Acres
Good	5,390,570
Threatened	30,309
Impaired	13,208,917
Total Acres Assessed	18,629,795

National Summary Designated Use Support in Assessed Lakes, Reservoirs, and Ponds*


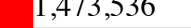
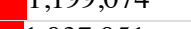
* Waters assessed for more than one designated use are included in multiple designated use groups below.

Description of this table

Designated Use Group	Acres Assessed	Percent Good	Percent Threatened	Percent Impaired	% Good % Threatened % Impaired		
 Fish, Shellfish, And Wildlife Protection And Propagation	11,419,186	55.0	.1	44.9			
 Aquatic Life Harvesting	10,961,893	26.3	.0	73.7			
 Recreation	9,002,606	74.4	.3	25.3			
 Public Water Supply	7,138,083	78.1	.0	21.9			
 Agricultural	5,673,087	95.7	.0	4.3			
 Industrial	3,236,639	99.9	.0	.1			
 Other	2,477,864	87.2	.0	12.8			
 Aesthetic Value	1,215,569	62.6	.0	37.4			
 Exceptional Recreational Or Ecological Significance	942	92.1	.0	7.9			

National Summary Causes of Impairment in Assessed Lakes, Reservoirs, and Ponds

Description of this table

Cause of Impairment Group	Acres Threatened or Impaired
Mercury	 8,507,712
Nutrients	 3,943,395
Polychlorinated Biphenyls (PCBs)	 3,222,935
Turbidity	 1,473,536
Organic Enrichment/Oxygen Depletion	 1,445,959
Metals (other than Mercury)	 1,199,074
pH/Acidity/Caustic Conditions	 1,037,051
Salinity/Total Dissolved Solids/Chlorides/Sulfates	 859,642
Algal Growth	 719,287

Nuisance Exotic Species	600,546
Pathogens	503,071
Sediment	502,200
Pesticides	412,672
Total Toxics	243,628
Temperature	236,014
Ammonia	214,345
Flow Alteration(s)	185,227
Dioxins	130,016
Habitat Alterations	95,219
Cause Unknown - Impaired Biota	88,037
Biotoxins	66,131
Other Cause	54,637
Fish Consumption Advisory	44,881
Oil and Grease	44,285
Noxious Aquatic Plants	42,249
Taste, Color and Odor	39,764
Toxic Organics	25,441
Cause Unknown	21,930
Nuisance Native Species	7,563
Toxic Inorganics	5,800
Trash	2,150
Chlorine	50
Radiation	48

National Summary Probable Sources of Impairments in Assessed Lakes, Reservoirs, and Ponds

Description of this table

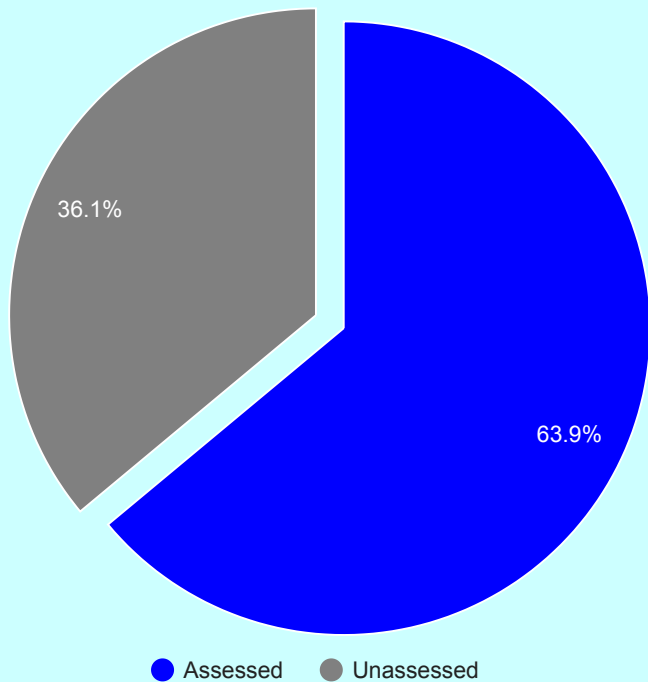
Probable Source Group	Acres Threatened or Impaired
Atmospheric Deposition	4,215,980
Unknown	3,849,855
Agriculture	1,112,048
Natural/Wildlife	1,083,193
Unspecified Nonpoint Source	1,070,339

Other	834,283
Urban-Related Runoff/Stormwater	759,483
Legacy/Historical Pollutants	749,611
Municipal Discharges/Sewage	686,322
Hydromodification	569,138
Resource Extraction	356,891
Habitat Alterations (Not Directly Related To Hydromodification)	288,233
Construction	219,578
Industrial	217,323
Spills/Dumping	173,186
Recreation And Tourism (Non-Boating)	169,391
Silviculture (Forestry)	166,631
Land Application/Waste Sites/Tanks	27,644
Recreational Boating And Marinas	24,616
Groundwater Loadings/Withdrawals	6,726
Military Bases	204
Aquaculture	130

**National Summary
Water Quality Attainment in Assessed Bays and Estuaries**

Description of this table	Description of this table
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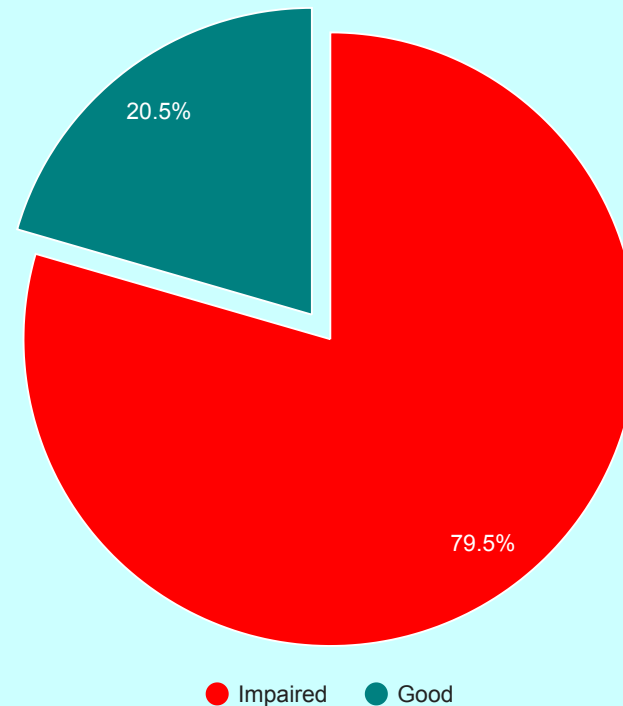
All Bays and Estuaries



87,790.6 Square Miles of Bays and Estuaries

Assessed Status	Square Miles
Assessed	56,141
Unassessed	31,649
Total Square Miles	87,791

Assessed Bays and Estuaries



















56,141.1 Square Miles of Assessed Bays and Estuaries

Attainment Status	Square Miles
Good	11,516
Threatened	0
Impaired	44,625
Total Square Miles Assessed	56,141

National Summary Designated Use Support in Assessed Bays and Estuaries*

* Waters assessed for more than one designated use are included in multiple designated use groups below.

Description of this table

Designated Use Group	Square Miles Assessed	Percent Good	Percent Threatened	Percent Impaired	% Good % Threatened % Impaired		
 Aquatic Life Harvesting	46,471	21.6	.0	78.4			
 Fish, Shellfish, And Wildlife Protection And Propagation	41,742	23.1	.0	76.9			
 Recreation	15,965	78.2	.0	21.8			
 Public Water Supply	7,632	10.6	.0	89.4			
 Agricultural	3,839	96.7	.0	3.3			
 Other	3,485	100.0	.0	.0			
 Industrial	3,166	100.0	.0	.0			
 Aesthetic Value	72	71.1	.0	28.9			

National Summary Causes of Impairment in Assessed Bays and Estuaries

Description of this table

Cause of Impairment Group	Square Miles Threatened or Impaired
Polychlorinated Biphenyls (PCBs)	 28,219
Nutrients	 18,279
Mercury	 17,014
Turbidity	 15,321
Dioxins	 10,253
Toxic Organics	 9,174
Metals (other than Mercury)	 8,380
Pesticides	 7,543
Pathogens	 5,940
Organic Enrichment/Oxygen Depletion	 5,444
Cause Unknown	 1,838

Algal Growth	1,710
Noxious Aquatic Plants	1,668
Cause Unknown - Impaired Biota	914
pH/Acidity/Caustic Conditions	829
Nuisance Exotic Species	656
Trash	493
Sediment	400
Total Toxics	113
Other Cause	110
Salinity/Total Dissolved Solids/Chlorides/Sulfates	38
Ammonia	27
Temperature	22
Oil and Grease	17
Taste, Color and Odor	6
Toxic Inorganics	3
Habitat Alterations	2
Flow Alteration(s)	1

National Summary Probable Sources of Impairments in Assessed Bays and Estuaries

Description of this table

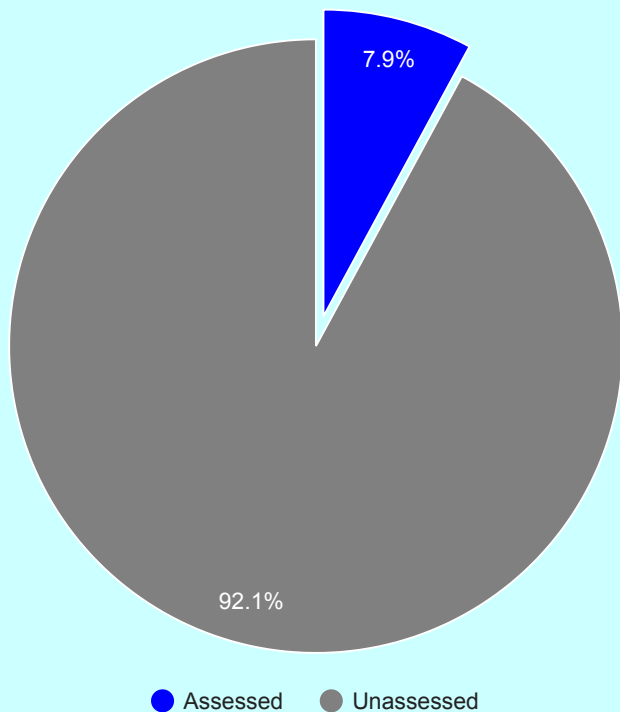
Probable Source Group	Square Miles Threatened or Impaired
Legacy/Historical Pollutants	21,894
Urban-Related Runoff/Stormwater	16,773
Unknown	16,638
Atmospheric Deposition	13,931
Municipal Discharges/Sewage	5,917
Unspecified Nonpoint Source	4,089
Other	3,921
Natural/Wildlife	3,637
Agriculture	3,510
Industrial	3,462
Hydromodification	2,299
Habitat Alterations (Not Directly Related To Hydromodification)	2,229

Construction	729
Recreational Boating And Marinas	262
Resource Extraction	180
Spills/Dumping	89
Land Application/Waste Sites/Tanks	63
Recreation And Tourism (Non-Boating)	7
Groundwater Loadings/Withdrawals	3
Land Application/Waste Sites	1
Aquaculture	1
Commercial Harbor And Port Activities	0
Silviculture (Forestry)	0

**National Summary
Water Quality Attainment in Assessed Coastal Shoreline**

Description of this table	Description of this table
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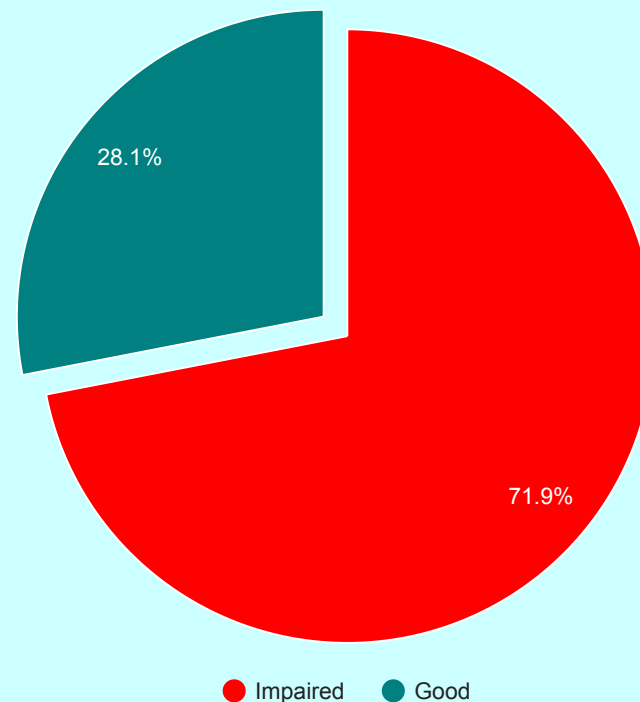
All Coastal Shoreline



58,618.0 Miles of Coastal Shoreline

Assessed Status	Miles
Assessed	4,627
Unassessed	53,991
Total Miles	58,618

Assessed Coastal Shoreline

















4,626.7 Miles of Assessed Coastal Shoreline

Attainment Status	Miles
Good	1,298
Threatened	0
Impaired	3,329
Total Miles Assessed	4,627

National Summary Designated Use Support in Assessed Coastal Shoreline*














* Waters assessed for more than one designated use are included in multiple designated use groups below.

Description of this table

Designated Use Group	Miles Assessed	Percent Good	Percent Threatened	Percent Impaired	% Good		
					% Threatened		
					% Impaired		
 Aquatic Life Harvesting	3,467	24.6	.0	75.4			
 Recreation	1,744	77.6	.0	22.4			
 Fish, Shellfish, And Wildlife Protection And Propagation	841	22.3	.0	77.7			
 Aesthetic Value	235	100.0	.0	.0			
 Public Water Supply	118	91.4	.0	8.6			
 Industrial	25	100.0	.0	.0			
 Other	4	.0	.0	100.0			

National Summary Causes of Impairment in Assessed Coastal Shoreline

Description of this table

Cause of Impairment Group	Miles Threatened or Impaired
Mercury	 2,349
Pathogens	 789
Turbidity	 490
Organic Enrichment/Oxygen Depletion	 385
pH/Acidity/Caustic Conditions	 211
Nutrients	 135
Oil and Grease	 100
Temperature	 100
Cause Unknown - Impaired Biota	 98
Algal Growth	 92
Polychlorinated Biphenyls (PCBs)	 50
Pesticides	 36
Ammonia	 22

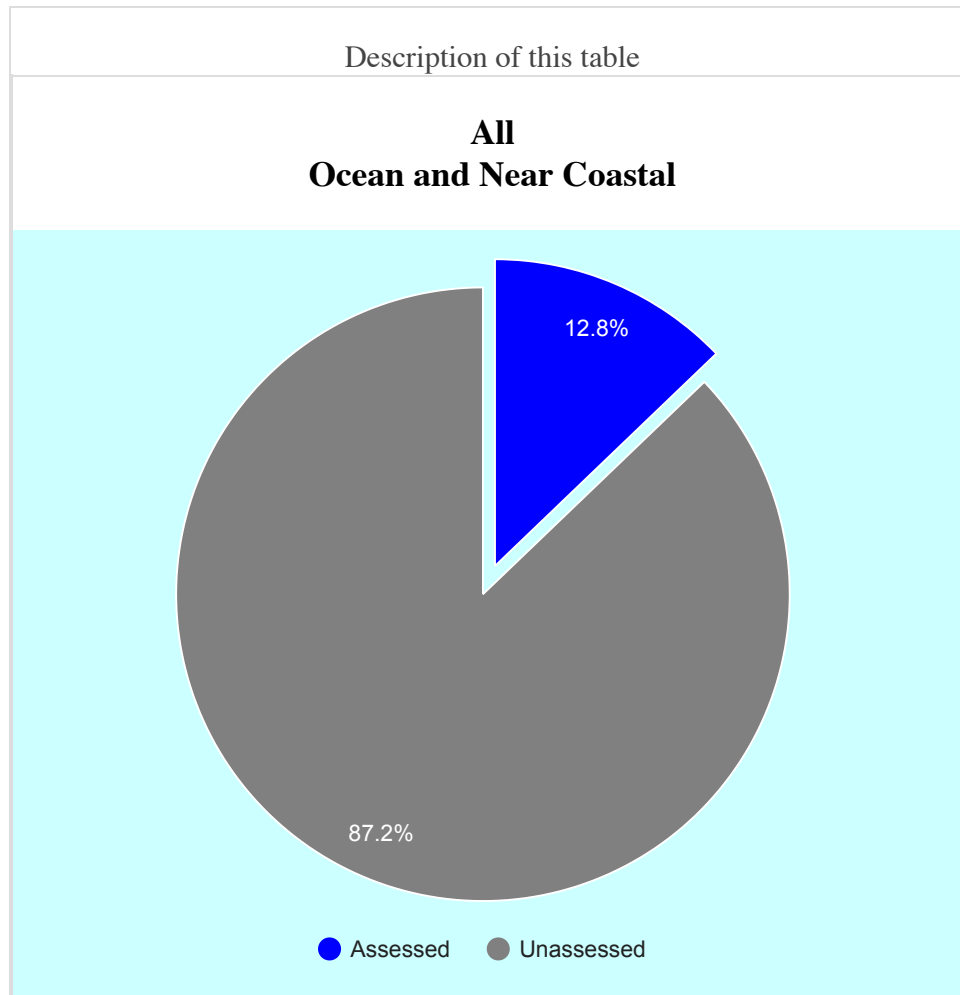
Metals (other than Mercury)	12
Total Toxics	4
Trash	2

National Summary Probable Sources of Impairments in Assessed Coastal Shoreline

Description of this table

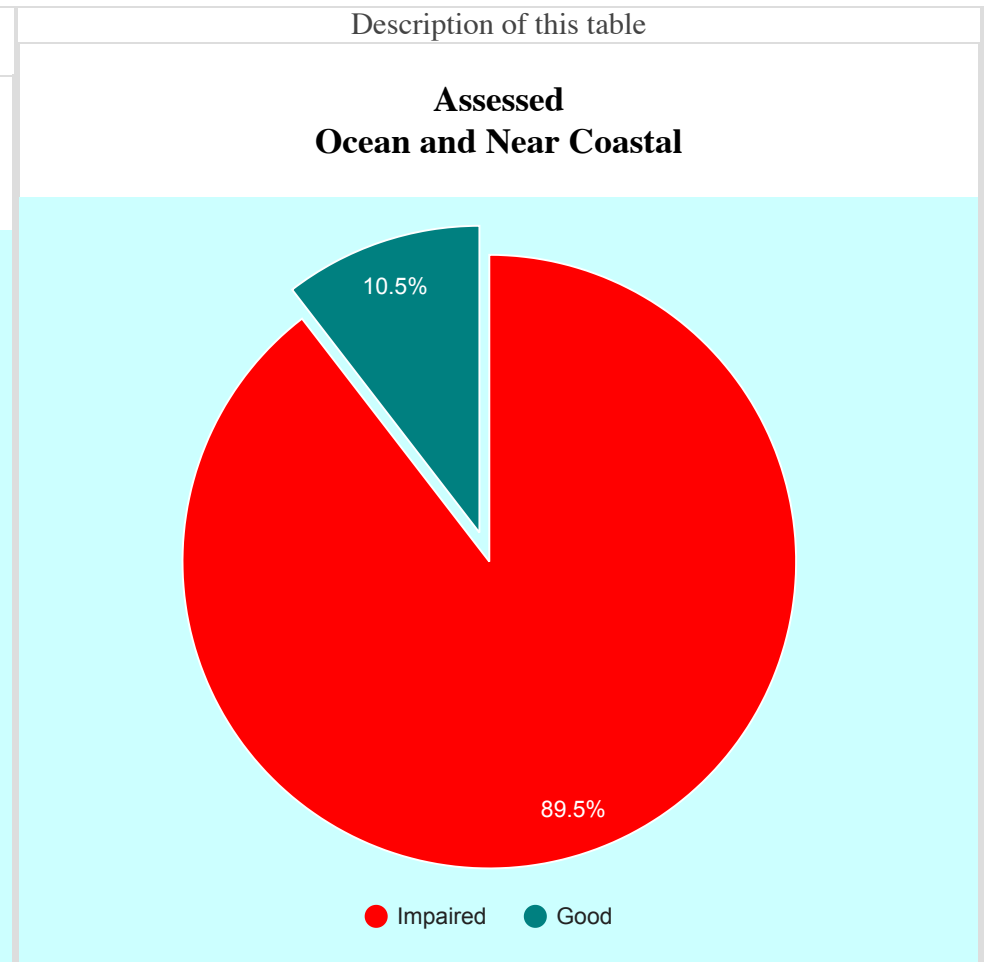
Probable Source Group	Miles Threatened or Impaired
Municipal Discharges/Sewage	405
Urban-Related Runoff/Stormwater	316
Unknown	153
Recreational Boating And Marinas	140
Hydromodification	138
Industrial	107
Unspecified Nonpoint Source	72
Agriculture	63
Legacy/Historical Pollutants	41
Land Application/Waste Sites/Tanks	40
Spills/Dumping	17
Resource Extraction	8
Construction	4
Military Bases	2
Natural/Wildlife	1
Other	1
Recreation And Tourism (Non-Boating)	0

National Summary Water Quality Attainment in Assessed Ocean and Near Coastal



54,120.0 Square Miles of Ocean and Near Coastal

Assessed Status	Square Miles
Assessed	6,944
Unassessed	47,176
Total Square Miles	54,120



6,944.1 Square Miles of
Assessed Ocean and Near Coastal

Attainment Status	Square Miles
Good	726
Threatened	0
Impaired	6,218
Total Square Miles Assessed	6,944

**National Summary
Designated Use Support in Assessed Ocean and Near Coastal***

* Waters assessed for more than one designated use are included in multiple designated use groups below.

Description of this table

Designated Use Group	Square Miles Assessed	Percent Good	Percent Threatened	Percent Impaired	% Good		
Aquatic Life Harvesting	6,031	8.8	.0	91.2			
Recreation	1,493	86.1	.0	13.9			
Fish, Shellfish, And Wildlife Protection And Propagation	1,327	61.0	.0	39.0			
Other	376	46.7	.0	53.3			
Agricultural	201	100.0	.0	.0			

National Summary Causes of Impairment in Assessed Ocean and Near Coastal

Description of this table

Cause of Impairment Group	Square Miles Threatened or Impaired
Mercury	5,470
Organic Enrichment/Oxygen Depletion	640
Pathogens	374
Metals (other than Mercury)	110
Pesticides	52
Turbidity	36
Nuisance Exotic Species	35
Total Toxics	29
pH/Acidity/Caustic Conditions	18
Polychlorinated Biphenyls (PCBs)	16
Toxic Organics	14
Habitat Alterations	10
Dioxins	9
Nutrients	8
Temperature	1
Ammonia	1

Oil and Grease	1
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National Summary Probable Sources of Impairments in Assessed Ocean and Near Coastal

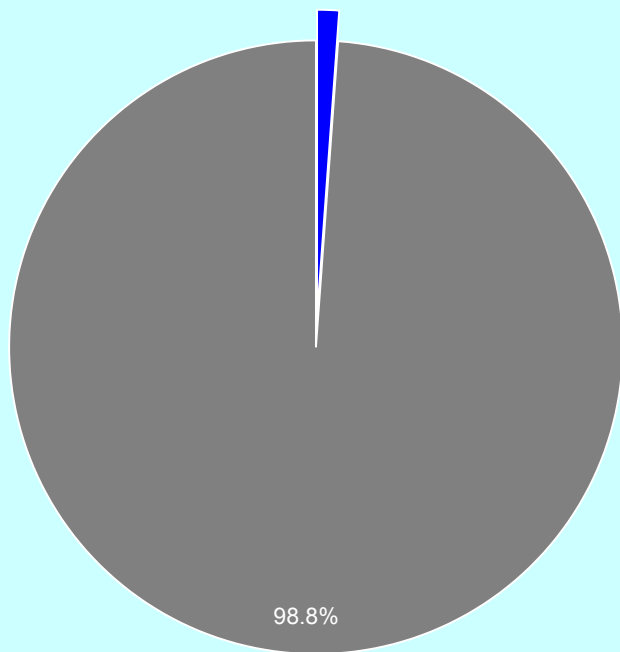
Description of this table

Probable Source Group	Square Miles Threatened or Impaired
Atmospheric Deposition	1,485
Unknown	1,340
Unspecified Nonpoint Source	71
Other	67
Recreation And Tourism (Non-Boating)	15
Recreational Boating And Marinas	10
Urban-Related Runoff/Stormwater	9
Hydromodification	7
Municipal Discharges/Sewage	6
Construction	4
Industrial	4
Spills/Dumping	2
Natural/Wildlife	1
Commercial Harbor And Port Activities	0

National Summary Water Quality Attainment in Assessed Wetlands

Description of this table	Description of this table
---------------------------	---------------------------

All Wetlands

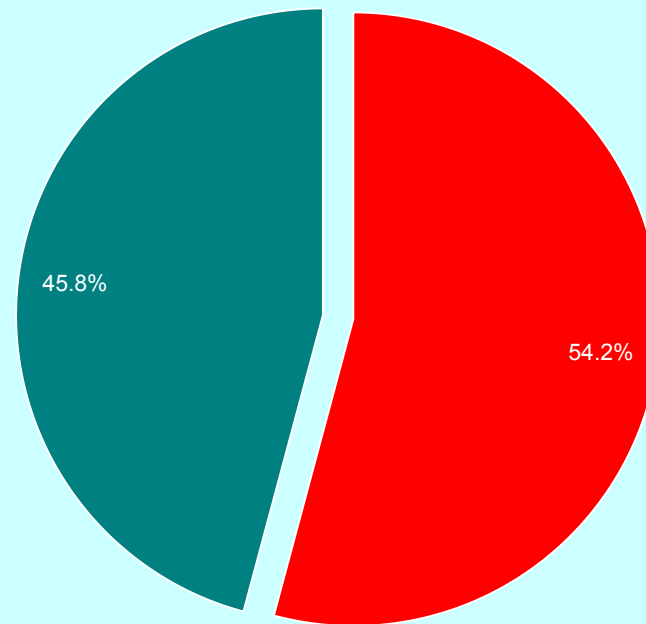


● Assessed ● Unassessed

107,700,000.0 Acres of Wetlands

Assessed Status	Acres
Assessed	1,242,252
Unassessed	106,457,748
Total Acres	107,700,000

Assessed Wetlands



● Impaired ● Good
















1,242,251.8 Acres of Assessed Wetlands

Attainment Status	Acres
Good	569,328
Threatened	0
Impaired	672,924
Total Acres Assessed	1,242,252

National Summary Designated Use Support in Assessed Wetlands*














* Waters assessed for more than one designated use are included in multiple designated use groups below.

Description of this table

Designated Use Group	Acres Assessed	Percent Good	Percent Threatened	Percent Impaired	
 Fish, Shellfish, And Wildlife Protection And Propagation	1,238,932	51.8	.0	48.2	
 Recreation	1,045,475	99.8	.0	.2	
 Public Water Supply	480,668	100.0	.0	.0	
 Aquatic Life Harvesting	121,763	.3	.0	99.7	
 Agricultural	55,831	35.5	.0	64.5	
 Industrial	18,890	100.0	.0	.0	
 Other	1,415	100.0	.0	.0	

National Summary Causes of Impairment in Assessed Wetlands

Description of this table

Cause of Impairment Group	Acres Threatened or Impaired
Organic Enrichment/Oxygen Depletion	 469,222
Mercury	 315,458
Metals (other than Mercury)	 94,630
Salinity/Total Dissolved Solids/Chlorides/Sulfates	 82,219
Pathogens	 72,495
Nutrients	 67,849
Toxic Inorganics	 28,053
Temperature	 14,900
pH/Acidity/Caustic Conditions	 7,814
Turbidity	 5,551
Algal Growth	 4,271
Flow Alteration(s)	 2,086
Polychlorinated Biphenyls (PCBs)	 1,363

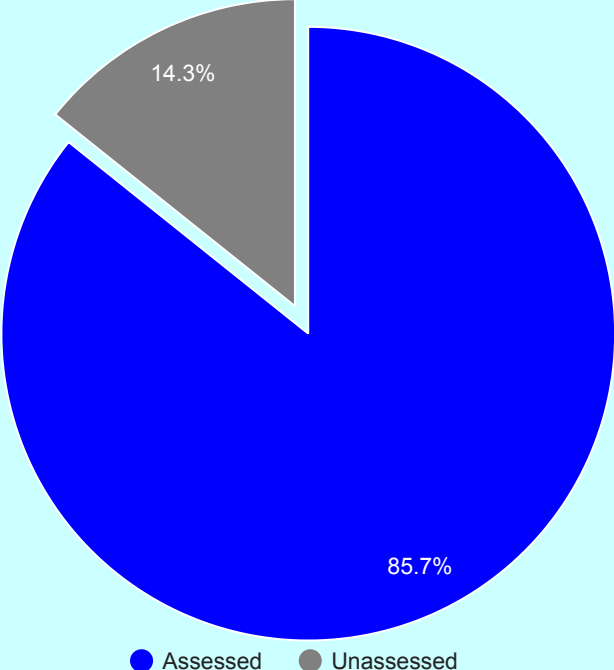
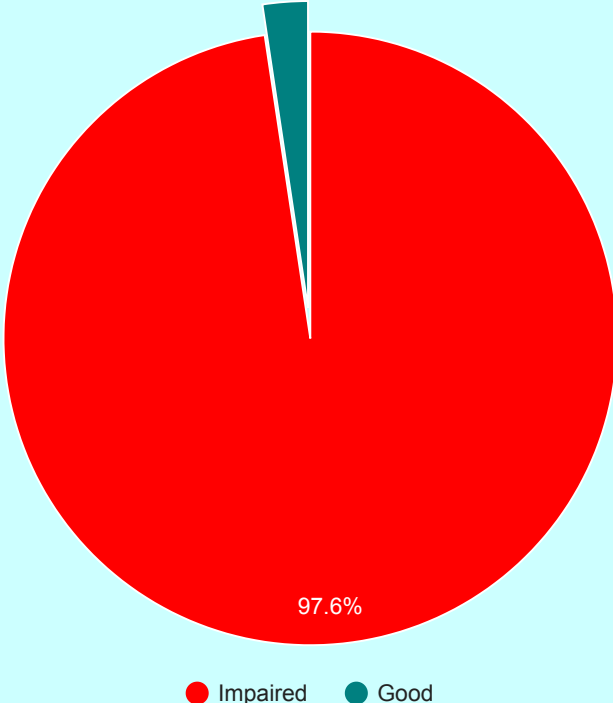
Cause Unknown - Impaired Biota	1,288
Sediment	1,237
Nuisance Exotic Species	1,142
Habitat Alterations	1,104
Toxic Organics	474
Trash	419
Dioxins	212
Pesticides	202
Ammonia	171
Total Toxics	13

National Summary Probable Sources of Impairments in Assessed Wetlands

Description of this table

Probable Source Group	Acres Threatened or Impaired
Unknown	390,041
Natural/Wildlife	288,473
Agriculture	203,199
Atmospheric Deposition	200,171
Resource Extraction	32,112
Hydromodification	4,565
Unspecified Nonpoint Source	2,040
Other	888
Land Application/Waste Sites/Tanks	680
Groundwater Loadings/Withdrawals	430
Industrial	352
Urban-Related Runoff/Stormwater	130
Habitat Alterations (Not Directly Related To Hydromodification)	33
Municipal Discharges/Sewage	21
Legacy/Historical Pollutants	21
Spills/Dumping	6


















National Summary Water Quality Attainment in Assessed Great Lakes Shoreline

Description of this table	Description of this table																		
<p>All Great Lakes Shoreline</p>  <p style="text-align: center;">5,202.2 Miles of Great Lakes Shoreline</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th>Assessed Status</th> <th>Miles</th> </tr> </thead> <tbody> <tr> <td>Assessed</td> <td>4,460</td> </tr> <tr> <td>Unassessed</td> <td>742</td> </tr> <tr> <td>Total Miles</td> <td>5,202</td> </tr> </tbody> </table>	Assessed Status	Miles	Assessed	4,460	Unassessed	742	Total Miles	5,202	<p>Assessed Great Lakes Shoreline</p>  <p style="text-align: center;">4,460.0 Miles of Assessed Great Lakes Shoreline</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th>Attainment Status</th> <th>Miles</th> </tr> </thead> <tbody> <tr> <td>Good</td> <td>106</td> </tr> <tr> <td>Threatened</td> <td>0</td> </tr> <tr> <td>Impaired</td> <td>4,354</td> </tr> <tr> <td>Total Miles Assessed</td> <td>4,460</td> </tr> </tbody> </table>	Attainment Status	Miles	Good	106	Threatened	0	Impaired	4,354	Total Miles Assessed	4,460
Assessed Status	Miles																		
Assessed	4,460																		
Unassessed	742																		
Total Miles	5,202																		
Attainment Status	Miles																		
Good	106																		
Threatened	0																		
Impaired	4,354																		
Total Miles Assessed	4,460																		

National Summary Designated Use Support in Assessed Great Lakes Shoreline*








* Waters assessed for more than one designated use are included in multiple designated use groups below.

Description of this table

Designated Use Group	Miles Assessed	Percent Good	Percent Threatened	Percent Impaired	Legend		
					 % Good	 % Threatened	 % Impaired
 Aquatic Life Harvesting	4,330	.0	.0	100.0			
 Agricultural	3,131	100.0	.0	.0			
 Other	3,131	100.0	.0	.0			
 Industrial	3,131	100.0	.0	.0			
 Recreation	1,129	12.4	.0	87.6			
 Fish, Shellfish, And Wildlife Protection And Propagation	996	7.2	.0	92.8			
 Public Water Supply	916	35.4	.0	64.6			

National Summary Causes of Impairment in Assessed Great Lakes Shoreline

Description of this table

Cause of Impairment Group	Miles Threatened or Impaired
Polychlorinated Biphenyls (PCBs)	 4,330
Dioxins	 3,454
Mercury	 3,388
Pesticides	 2,483
Toxic Organics	 1,992
Pathogens	 523
Nutrients	 418

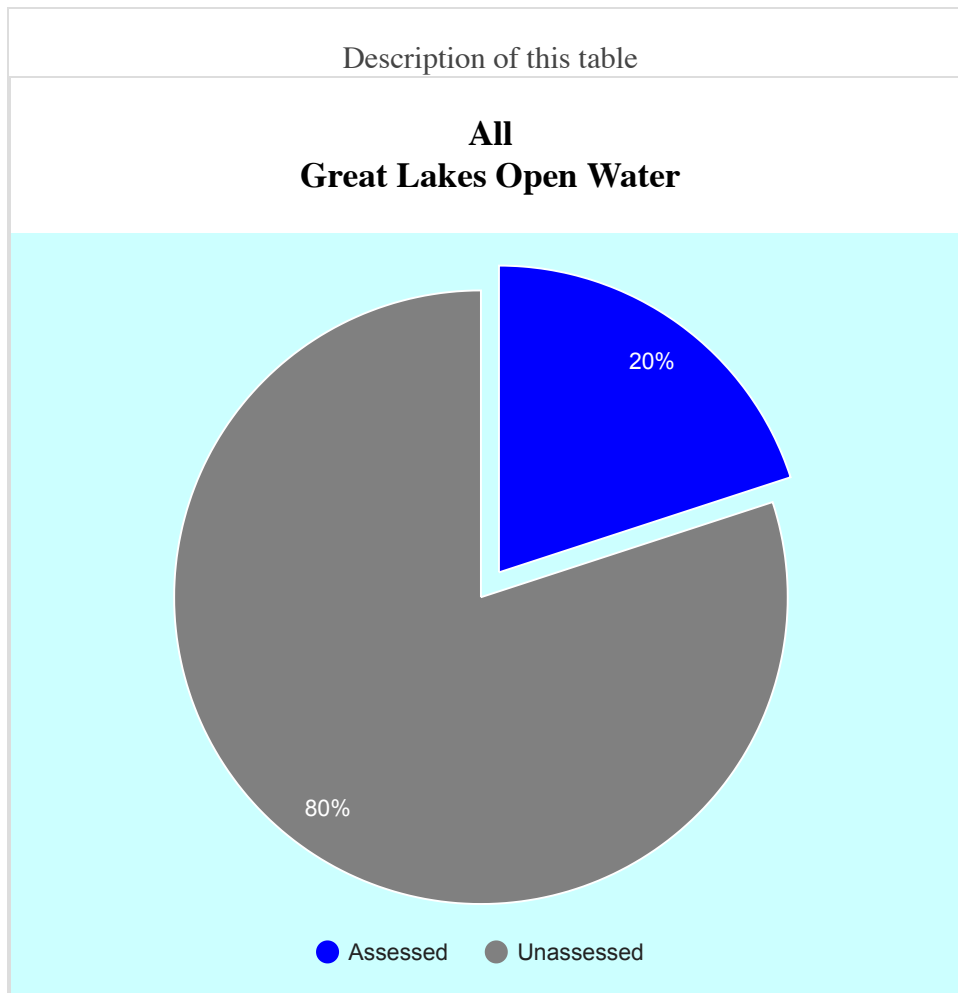
Nuisance Exotic Species	380
Sediment	290
Habitat Alterations	170
Organic Enrichment/Oxygen Depletion	120
Toxic Inorganics	5

National Summary Probable Sources of Impairments in Assessed Great Lakes Shoreline

Description of this table

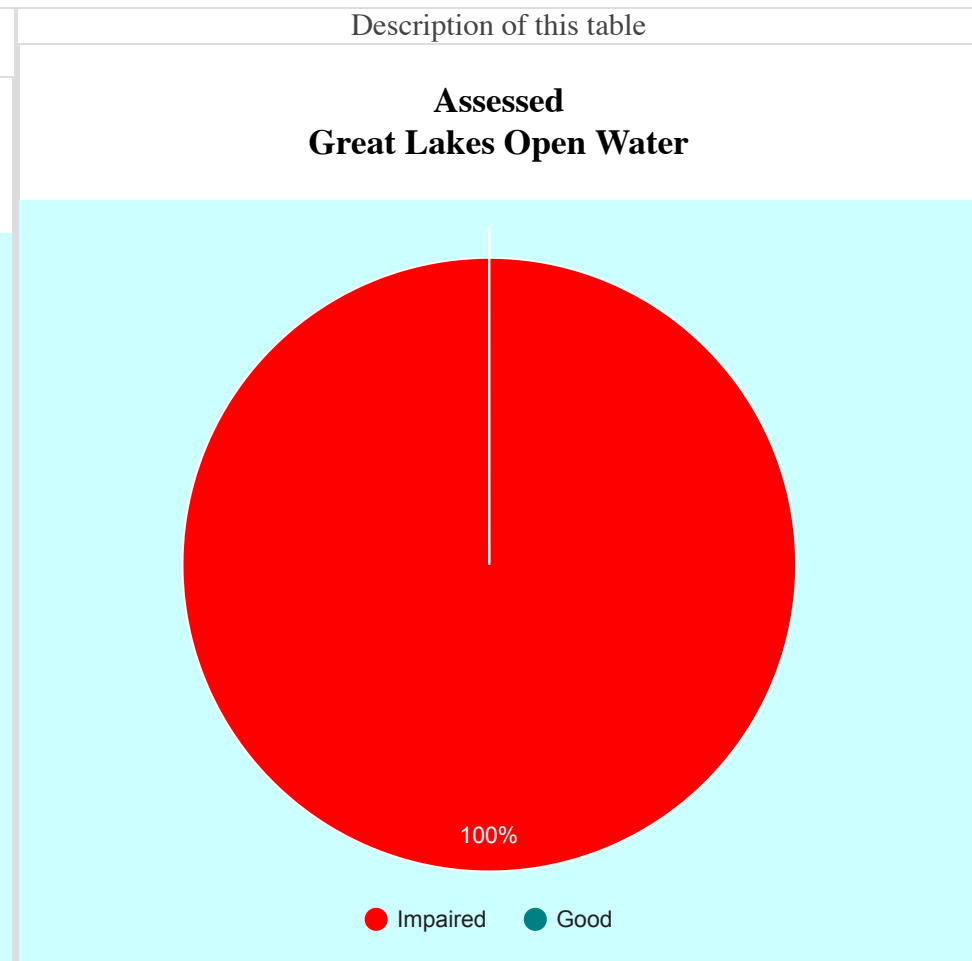
Probable Source Group	Miles Threatened or Impaired
Atmospheric Deposition	3,280
Unknown	1,070
Legacy/Historical Pollutants	851
Agriculture	657
Municipal Discharges/Sewage	342
Hydromodification	240
Urban-Related Runoff/Stormwater	98
Habitat Alterations (Not Directly Related To Hydromodification)	98
Industrial	72
Unspecified Nonpoint Source	47
Land Application/Waste Sites/Tanks	11
Spills/Dumping	3
Natural/Wildlife	1
Recreation And Tourism (Non-Boating)	1

National Summary Water Quality Attainment in Assessed Great Lakes Open Water



196,343.0 Square Miles of Great Lakes Open Water

Assessed Status	Square Miles
Assessed	39,231
Unassessed	157,112
Total Square Miles	196,343




















39,231.3 Square Miles of Assessed Great Lakes Open Water

Attainment Status	Square Miles
Good	1
Threatened	0
Impaired	39,230
Total Square Miles Assessed	39,231

National Summary Designated Use Support in Assessed Great Lakes Open Water*




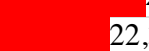

* Waters assessed for more than one designated use are included in multiple designated use groups below.

Description of this table

Designated Use Group	Square Miles Assessed	Percent Good	Percent Threatened	Percent Impaired	% Good		
							
 Aquatic Life Harvesting	39,230	.0	.0	100.0			
 Agricultural	39,031	100.0	.0	.0			
 Other	39,031	100.0	.0	.0			
 Industrial	39,031	100.0	.0	.0			
 Fish, Shellfish, And Wildlife Protection And Propagation	315	63.5	.0	36.5			
 Public Water Supply	201	100.0	.0	.0			
 Aesthetic Value	196	.1	.0	99.9			
 Recreation	196	100.0	.0	.0			

National Summary Causes of Impairment in Assessed Great Lakes Open Water

Description of this table

Cause of Impairment Group	Square Miles Threatened or Impaired
Polychlorinated Biphenyls (PCBs)	 39,230
Mercury	 39,102
Dioxins	 38,862
Pesticides	 29,661
Toxic Organics	 22,349
Nutrients	311
Metals (other than Mercury)	0
Sediment	0

National Summary

Probable Sources of Impairments in Assessed Great Lakes Open Water

Description of this table

Probable Source Group	Square Miles Threatened or Impaired
Atmospheric Deposition	39,230
Unknown	9,297
Agriculture	4,488
Municipal Discharges/Sewage	115
Unspecified Nonpoint Source	115
Industrial	0
Urban-Related Runoff/Stormwater	0
Legacy/Historical Pollutants	0

National Causes of Impairment

Description of this table

NOTE: Click on a cause of impairment (e.g. algal growth) to see the specific state-reported causes that are grouped to make up this category. See also Pollution categories summary document (PDF) (20 pp, 557 K, About PDF) for brief, non-technical descriptions of general cause categories.

Cause of Impairment Group	Size of Assessed Waters with Listed Causes of Impairment							
	Rivers and Streams (Miles)	Lakes, Reservoirs, and Ponds (Acres)	Bays and Estuaries (Square Miles)	Coastal Shoreline (Miles)	Ocean and Near Coastal (Square Miles)	Wetlands (Acres)	Great Lakes Shoreline (Miles)	Great Lakes Open Water (Square Miles)
Algal Growth	5,823	719,287	1,710	92	0	4,271		
Ammonia	12,160	214,345	27	22	1	171		
Biotoxins	6,450	66,131						
Cause Unknown	45,318	21,930	1,838					
Cause Unknown - Fish Kills	89							
Cause Unknown - Impaired Biota	44,900	88,037	914	98		1,288		
Chlorine	585	50						
Dioxins	5,061	130,016	10,253		9	212	3,454	38,862
Fish Consumption Advisory	303	44,881						
Flow Alteration(s)	41,329	185,227	1			2,086		

Habitat Alterations	63,019	95,219	2		10	1,104	170	
Mercury	72,554	8,507,712	17,014	2,349	5,470	315,458	3,388	39,102
Metals (other than Mercury)	94,384	1,199,074	8,380	12	110	94,630		0
Noxious Aquatic Plants	318	42,249	1,668					
Nuisance Exotic Species	1,229	600,546	656		35	1,142	380	
Nuisance Native Species	56	7,563						
Nutrients	118,831	3,943,395	18,279	135	8	67,849	418	311
Oil and Grease	2,725	44,285	17	100	1			
Organic Enrichment/Oxygen Depletion	98,037	1,445,959	5,444	385	640	469,222	120	
Other Cause	9,273	54,637	110					
Pathogens	187,872	503,071	5,940	789	374	72,495	523	
Pesticides	18,069	412,672	7,543	36	52	202	2,483	29,661
pH/Acidity/Caustic Conditions	33,740	1,037,051	829	211	18	7,814		
Polychlorinated Biphenyls (PCBs)	82,311	3,222,935	28,219	50	16	1,363	4,330	39,230
Radiation	1,101	48						
Salinity/Total Dissolved Solids/Chlorides/Sulfates	38,072	859,642	38			82,219		
Sediment	138,874	502,200	400			1,237	290	0
Taste, Color and Odor	990	39,764	6					
Temperature	94,488	236,014	22	100	1	14,900		
Total Toxics	11,174	243,628	113	4	29	13		
Toxic Inorganics	4,706	5,800	3			28,053	5	
Toxic Organics	4,677	25,441	9,174		14	474	1,992	22,349
Trash	1,219	2,150	493	2		419		
Turbidity	47,750	1,473,536	15,321	490	36	5,551		

National Probable Sources Contributing to Impairments

Description of this table

NOTE: Click on a source of impairment (e.g. agriculture) to see the specific state-reported sources that are grouped to make up this category.

Probable Source Group	Size of Assessed Waters with Probable Sources of Impairments							
	Rivers and Streams (Miles)	Lakes, Reservoirs, and Ponds (Acres)	Bays and Estuaries (Square Miles)	Coastal Shoreline (Miles)	Ocean and Near Coastal (Square Miles)	Wetlands (Acres)	Great Lakes Shoreline (Miles)	Great Lakes Open Water (Square Miles)
Agriculture	135,855	1,112,048	3,510	63		203,199	657	4,488
Aquaculture	165	130	1					

Atmospheric Deposition	85,922	4,215,980	13,931		1,485	200,171	3,280	39,230
Commercial Harbor And Port Activities			0		0			
Construction	21,583	219,578	729	4	4			
Groundwater Loadings/Withdrawals	249	6,726	3			430		
Habitat Alterations (Not Directly Related To Hydromodification)	65,633	288,233	2,229			33	98	
Hydromodification	88,634	569,138	2,299	138	7	4,565	240	
Industrial	11,388	217,323	3,462	107	4	352	72	0
Land Application/Waste Sites			1					
Land Application/Waste Sites/Tanks	8,587	27,644	63	40		680	11	
Legacy/Historical Pollutants	5,771	749,611	21,894	41		21	851	0
Military Bases	21	204		2				
Municipal Discharges/Sewage	57,237	686,322	5,917	405	6	21	342	115
Natural/Wildlife	50,702	1,083,193	3,637	1	1	288,473	1	
Other	9,277	834,283	3,921	1	67	888		
Recreation And Tourism (Non-Boating)	1,534	169,391	7	0	15		1	
Recreational Boating And Marinas	132	24,616	262	140	10			
Resource Extraction	32,975	356,891	180	8		32,112		
Silviculture (Forestry)	40,942	166,631	0					
Spills/Dumping	3,781	173,186	89	17	2	6	3	
Unknown	144,971	3,849,855	16,638	153	1,340	390,041	1,070	9,297
Unspecified Nonpoint Source	60,807	1,070,339	4,089	72	71	2,040	47	115
Urban-Related Runoff/Stormwater	49,330	759,483	16,773	316	9	130	98	0

National Previously Impaired Waters Now Attaining All Uses

Description of this table

NOTE: Click on the underlined "Number of Waters Attaining" value for a detailed list of those waters now attaining all uses.

Cycle Attaining	Number of Waters Attaining	Number of Causes of Impairment Addressed
2002	<u>25</u>	26
2003	<u>4</u>	7
2004	<u>159</u>	219
2005	<u>107</u>	241
2006	<u>85</u>	103

2007	245	458
2008	357	524
2009	361	594
2010	351	457
2011	340	455
2012	303	465
2013	389	488
2014	367	557
2015	110	188
2016	249	289
2017	127	160

Impaired Waters Listed By State

Description of this table

State Name	Number of Waters on 303(d) List
Alabama	282
Alaska	35
American Samoa	28
Arizona	68
Arkansas	225
California	1,095
Colorado	425
Connecticut	287
Delaware	101
District Of Columbia	36
Florida	2,292
Georgia	271
Guam	22
Hawaii	352
Idaho	604
Illinois	1,057

Indiana	1,836
Iowa	571
Kansas	1,264
Kentucky	1,456
Louisiana	256
Maine	356
Maryland	337
Massachusetts	695
Michigan	2,705
Minnesota	1,820
Mississippi	279
Missouri	307
Montana	382
N. Mariana Islands	28
Nebraska	411
Nevada	208
New Hampshire	1,466
New Jersey	763
New Mexico	255
New York	611
North Carolina	1,155
North Dakota	225
Ohio	267
Oklahoma	635
Oregon	1,397
Pennsylvania	6,957
Puerto Rico	229
Rhode Island	121
South Carolina	964
South Dakota	143
Tennessee	1,083
Texas	666
Utah	268
Vermont	122
Virgin Islands	98
Virginia	1,391

Washington		2,420
West Virginia		1,163
Wisconsin		663
Wyoming		76

Total: 43,229 impaired waters

National Cumulative TMDLs by Pollutant

This chart includes TMDLs since October 1, 1995.

Description of this table

NOTE: Click on the underlined "Pollutant Group" value to see a detailed list of pollutants. Click on the underlined "Number of TMDLs" value to see a listing of those TMDLs for the pollutant Group.

Pollutant Group	Number of TMDLs	Number of Causes of Impairment Addressed
Mercury	21,649	21,679
Pathogens	14,168	14,483
Metals (other than Mercury)	10,387	10,590
Nutrients	6,685	8,237
Sediment	4,031	4,689
Polychlorinated Biphenyls (PCBs)	2,626	3,557
Temperature	2,454	2,464
Organic Enrichment/Oxygen Depletion	2,230	2,366
pH/Acidity/Caustic Conditions	2,033	2,092
Turbidity	1,819	2,083
Salinity/Total Dissolved Solids/Chlorides/Sulfates	1,762	1,821
Pesticides	1,395	1,558
Ammonia	1,149	1,260
Chlorine	341	347
Other Cause	269	324

Toxic Inorganics	219	223
Toxic Organics	162	204
Cause Unknown - Impaired Biota	128	132
Total Toxics	120	130
Algal Growth	104	112
Trash	92	92
Habitat Alterations	83	84
Dioxins	27	28
Noxious Aquatic Plants	21	22
Radiation	21	24
Oil and Grease	14	14
Cause Unknown	7	7
Nuisance Exotic Species	3	6
Fish Consumption Advisory	2	2

Total: 74,001 TMDLs; 78,630 Causes of Impairment Addressed

Approved TMDLs By State

This chart includes TMDLs since October 1, 1995.

Description of this table

NOTE: Click on the state name to see a state report. Click on the Number of TMDLs to see a detailed list of the TMDLs.

State Name	Number of TMDLs
Alabama	310
Alaska	68
American Samoa	44
Arizona	99
Arkansas	327
California	2,194
Colorado	1,021
Connecticut	407
Delaware	581
District Of Columbia	434
Florida	2,299

Georgia	1,875
Guam	43
Hawaii	65
Idaho	2,322
Illinois	451
Indiana	1,490
Iowa	219
Kansas	3,357
Kentucky	411
Louisiana	761
Maine	404
Maryland	840
Massachusetts	634
Michigan	2,345
Minnesota	2,283
Mississippi	1,445
Missouri	293
Montana	1,445
Nebraska	178
Nevada	67
New Hampshire	6,057
New Jersey	665
New Mexico	372
New York	724
North Carolina	13,523
North Dakota	146
Ohio	1,761
Oklahoma	723
Oregon	1,241
Pennsylvania	7,157
Puerto Rico	321
Rhode Island	217
South Carolina	597
South Dakota	406
Tennessee	1,430
Texas	293

Utah	325
Vermont	132
Virgin Islands	66
Virginia	1,566
Washington	1,578
West Virginia	5,344
Wisconsin	247
Wyoming	398

Total: 74,001 TMDLs

National Cumulative Number of TMDLs

EPA Fiscal Year starts October 1 and ends September 30.

Description of this table

NOTE: Click on the underlined "Number of TMDLs Completed" value for a detailed list of the TMDLs for the fiscal year.

Fiscal Year	Number of TMDLs	Number of Causes of Impairment Addressed
1996	165	166
1997	394	418
1998	408	414
1999	331	374
2000	1,564	1,591
2001	2,584	2,622
2002	2,739	2,819
2003	3,001	3,273
2004	3,409	3,667
2005	4,269	4,586
2006	4,209	4,560
2007	4,323	4,653
2008	9,270	9,552
2009	4,403	4,627

2010	2,574	2,710
2011	2,849	3,132
2012	2,905	3,173
2013	15,536	15,626
2014	3,340	3,514
2015	968	1,092
2016	1,362	1,540
2017	3,348	4,471
2018	50	50

Total: 74,001 TMDLs; 78,630 Causes of Impairment Addressed

Status of Available Data Used in This Report

Description of this table

State Name	Assessed Waters Report Year	Impaired Waters Report Year
Alabama	2016	2016
Alaska	2012	2010
American Samoa	2016	2016
Arizona	2014	2014
Arkansas	2008	2008
California	2016	2016
Colorado	2016	2016
Connecticut	2016	2016
Delaware	2006	2006
District Of Columbia	2016	2016
Florida	2012	2010
Georgia	2014	2014
Guam	2016	2016
Hawaii	2014	2014
Idaho	2014	2014
Illinois	2016	2006
Indiana	2010	2008
Iowa	2014	2014
Kansas	2016	2016
Kentucky	2014	2014
Louisiana	2016	2016
Maine	2014	2014

Maryland	2012	2012
Massachusetts	2014	2014
Michigan	2016	2016
Minnesota	2016	2016
Mississippi	2016	2016
Missouri	2016	2016
Montana	2016	2016
N. Mariana Islands	2016	2016
Nebraska	2016	2016
Nevada	2014	2014
New Hampshire	2012	2012
New Jersey	2014	2014
New Mexico	2016	2016
New York	2014	2014
North Carolina	2016	2014
North Dakota	2016	2016
Ohio	2010	2008
Oklahoma	2014	2014
Oregon	2006	2006
Pennsylvania	2006	2004
Puerto Rico	2016	2016
Rhode Island	2014	2014
South Carolina	2016	2016
South Dakota	2016	2016
Tennessee	2016	2014
Texas	2012	2012
Utah	2016	2014
Vermont	2016	2016
Virgin Islands	2016	2016
Virginia	2014	2014
Washington	2008	2008
West Virginia	2014	2014
Wisconsin	2016	2008
Wyoming	2014	2014

TMDL Document Search

Full Text Search of TMDL Documents

September 03, 2021

ATTACHMENT 3

National Water Quality Inventory: Report to Congress

2004 Reporting Cycle

January 2009

United States Environmental Protection Agency
Office of Water
Washington, DC 20460

EPA 841-R-08-001

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List of Acronyms

ATTAINS	Assessment TMDL Tracking And Implementation System (Water Quality Assessment and TMDL Information)
BEACH Act	Beaches Environmental Assessment and Coastal Health Act of 2000
DIN	dissolved inorganic nitrogen
DIP	dissolved inorganic phosphorus
EPA	U.S. Environmental Protection Agency
FWS	U.S. Fish and Wildlife Service
IBI	Index of Biotic Integrity
NOAA	National Oceanic and Atmospheric Administration
NPS	National Park Service
PAHs	polycyclic aromatic hydrocarbons
PCBs	polychlorinated biphenyls
TMDL	total maximum daily load
USGS	U.S. Geological Survey

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Executive Summary

This *National Water Quality Inventory: 2004 Report to Congress*, prepared under section 305(b) of the Clean Water Act, summarizes water quality reports submitted electronically by 44 states, 2 territories, and the District of Columbia to the U.S. Environmental Protection Agency (EPA) for the 2004 reporting cycle. These state water quality assessment findings are contained in EPA's Water Quality Assessment and Total Maximum Daily Load (TMDL) Information database and website, known as ATTAINS (Assessment TMDL Tracking And Implementation System), for the 2004 reporting cycle. The ATTAINS database is available online at the website <http://www.epa.gov/waters/ir>.

Summary findings of the 2004 state water quality reports are presented below. It is important to note that this information is for a relatively small subset of the nation's total waters which may not be representative of the waters that were not assessed. Because many states target their limited monitoring resources to waters that they suspect are impaired, there may be a lower percentage of impaired waters among the non-assessed (and total) waters than among the assessed waters. Information about specific sources and causes of impairment is incomplete because the states do not always report the cause or source of pollution affecting every impaired waterbody. In some cases, states may recognize that water quality does not fully support a designated use; however, they may not have adequate data to document the specific pollutant or source responsible for the impairment. EPA also made changes in how specific causes and sources are categorized for 2004, and these changes in some cases affect how the findings of causes and sources of impairment compare to findings of previous years. Readers are urged to consult the ATTAINS website for detailed listings of the causes and sources of impairment reported by states.

EPA developed the **Assessment TMDL Tracking And Implementation System (ATTAINS)** database and website to combine two formerly separate sites — the National Assessment Database (for 305(b) water quality assessment information) and the National Total Maximum Daily Loads (TMDL) Tracking System (for 303(d) impaired waters information). The ATTAINS database/website includes state-reported assessment decisions on the support of designated uses (such as recreation) in assessed waters; the waters that are impaired; the causes of impairment (such as pathogens); the sources of impairment (such as agriculture); and the status of actions (TMDLs) to help restore impaired waters.

ATTAINS contains this information for each waterbody assessed by the states and summarizes key waterbody information by state, by region, and nationally. If a state did not provide waterbody-specific information electronically to EPA by the reporting deadline, it was not included in this report. EPA worked extensively with the states to assist in data submittal.

Rivers and Streams

This report includes states' assessments of 16% of the nation's 3.5 million miles of rivers and streams for the 2004 reporting cycle. Of these waterbodies, 44% were reported as impaired or not clean enough to support their designated uses, such as fishing and swimming. States found the remaining 56% to be fully supporting all assessed uses. Pathogens, habitat alterations, and organic enrichment/oxygen depletion were cited as the leading causes of impairment in rivers and streams, and top sources of impairment included agricultural activities, hydrologic modifications (such as water diversions and channelization), and unknown/unspecified sources.

Lakes and Reservoirs

This report includes states' assessments of 39% of the nation's 41.7 million acres of lakes, ponds, and reservoirs during the 2004 reporting cycle. Of these waterbodies, 64% were reported as impaired and 36% were fully supporting all assessed uses. Mercury, polychlorinated biphenyls (PCBs), and nutrients were cited as the leading causes of impairment in lakes. Top sources of pollutants to lakes, ponds, and reservoirs included atmospheric deposition, unknown/unspecified sources, and agriculture.

Bays and Estuaries

This report includes states' assessments of 29% of the nation's 87,791 square miles of bays and estuaries for the 2004 reporting cycle. Of these assessed waterbodies, 30% were reported as impaired, and the remaining 70% fully supported all assessed uses. Pathogens, organic enrichment/oxygen depletion, and mercury were reported as the leading causes of impairment in bays and estuaries. Top sources of impairment to bays and estuaries included atmospheric deposition, unknown/unspecified sources, and municipal discharges/sewage.

Probability Studies of Water Quality

EPA and states have embarked on a series of probability-based surveys that are discussed later in this report. Probability-based surveys complement more traditional targeted monitoring and assessment programs and add substantially to our understanding of state, regional, and national water quality conditions. These studies select sites at random to provide estimates of the condition of a population of waters throughout a state, region, or the nation. They describe the percent of waters in a state or region supporting Clean Water Act goals and the percent of waters affected by the stressors that are included in the study design, which can inform protection and restoration priorities. Probabilistic surveys are a cost-effective approach for tracking changes in condition and stressors across the population of waters of the United States. As more states adopt probabilistic monitoring, EPA will be able to more accurately report on water quality trends. This effort will also help inform water quality policy and ensure resources are appropriately targeted. As of 2008, 30 states were participating in probabilistic water quality surveys, and EPA has set a goal of having participation by all 50 states by 2011. To date, EPA has provided \$65 million in additional section 106 grant monitoring funds to help states improve water quality monitoring programs and implement probabilistic survey designs.

Future Reporting

States are working to strengthen their water monitoring and assessment programs by developing long-term monitoring strategies that identify the specific actions needed to move toward more comprehensive and consistent reporting of water quality conditions. These actions include implementing probability-based surveys in combination with more traditional monitoring targeted to waters of interest. In addition, states and EPA have streamlined water quality assessment and reporting by integrating various Clean Water Act reporting requirements and facilitating and improving electronic reporting of water data. The results of these efforts will be

more comprehensive and valid information that can be easily accessed by water quality managers and the public in a timely fashion and used to describe water quality on a state, regional, or national scale.

I. Background

Under section 305(b)(1)(A) of the Clean Water Act, states, territories, and other jurisdictions of the United States are required to submit reports on the quality of their waters to the U.S. Environmental Protection Agency (EPA) every 2 years. Historically, states submitted these reports in hardcopy format, and EPA prepared a national hardcopy report that summarized their findings (see <http://www.epa.gov/305b/>). Under section 303(d) of the Clean Water Act, states also biennially provide a separate prioritized list of those waters that are impaired and require the development of pollution controls (to learn more about section 303(d) reporting, visit <http://www.epa.gov/owow/tmdl/>).

Beginning with the 2002 reporting cycle, EPA urged states to combine sections 305(b) and 303(d) reporting requirements into one integrated report and to submit these reports electronically. EPA has encouraged states to combine these reports for several reasons. Integrating these reports merges environmental data from a variety of water quality programs, increases the consistency of this information, benefits the public by providing a more informed summary of the quality of assessed state waters, and provides decision makers with better information on the actions necessary to protect and restore these waterbodies. The integrated report also streamlines state reporting burdens by eliminating the need for two separate reports.

For the 2004 reporting cycle, 16 of the 44 water quality reports submitted by the states were fully integrated. Progress toward full integration is expected in coming years. Data for both integrated and non-integrated state reports are available on EPA's new Water Quality Assessment and Total Maximum Daily Load (TMDL) Information database and website, known as ATTAINS (Assessment TMDL Tracking and ImplementatioN System). To facilitate the states' efforts to improve integrated reporting, EPA published reporting guidance in 2005 and a series of clarifying memoranda in subsequent years. For more information on integrated reporting, visit <http://www.epa.gov/owow/tmdl/guidance.html#tmdl>.

About the Water Quality Assessment and TMDL Information Database (ATTAINS)

The Water Quality Assessment and TMDL Information database, known as ATTAINS (for Assessment TMDL Tracking and ImplementatioN System), presents electronic water quality information submitted since 2002 by the states, territories, and the District of Columbia. ATTAINS allows the user to view, via the Internet, dynamic tables and charts that summarize state-reported data for the nation as a whole, for individual states, for individual waters, and for the ten EPA regions. It shows which waters have been assessed, which are impaired, and which have plans (e.g., TMDLs) completed to help restore them. By displaying data in one location, ATTAINS allows for a more informed summary of the quality of state waters that have been assessed and provides decision makers with better information on the actions necessary to protect and restore assessed waters of the U.S.

To view ATTAINS, go to <http://www.epa.gov/waters/ir> and click on the map to find summary information and assessment results for specific states, EPA regions, watersheds, and waterbodies of interest. You can select information for a specific biennial reporting cycle (e.g., 2002, 2004, etc) or the most recent available information across multiple cycles. A series of tables and charts also summarize the status of assessed waters across the nation.

For this report, EPA has included ATTAINS data from 44 states, the District of Columbia, the U.S. Virgin Islands and Puerto Rico. Pennsylvania, Maryland, Florida, Oregon, Idaho, Hawaii, the tribal nations, and the island territories of the Pacific did not provide data electronically that could be used for the 2004 reporting cycle. Although Pennsylvania, Florida, and Oregon did publish hard copy section 305(b) water quality reports, EPA relies on the electronic submittal by states of assessment information as the source of the water quality findings in this report. Maryland and Hawaii submitted only impaired waters lists under section 303(d) in 2004 and did not provide information on assessed waters that were not impaired. Idaho is submitting a combined 2004/2006/2008 integrated report in 2008. Although only 2004 reporting cycle data were used for this report, it is important to note that the ATTAINS database contains all available waterbody-specific data reported by the states and territories from 2002 on.

About half the states conduct their own probability-based surveys (based on statistical random sampling design) to complement this information and to draw state-wide conclusions about the state's water resources. EPA fully supports these state efforts to provide more complete assessments of their waters and to increase their percentage of assessed waters. Because state-level probabilistic monitoring efforts are in their initial stages in many states, the results of these state-scale probability surveys for the most part are not included in the 2004 ATTAINS database. We expect that the 2008 version of the database will begin to do so, and that we will be able to move toward water quality reports that assess all the states' waters, providing a valuable complement to current knowledge on the subset of waters with targeted monitoring.

Comparability of Water Quality Data

Although the information in ATTAINS provides a picture of state assessment results, these data should not be used to compare water quality conditions between states, identify trends in statewide or national water quality, or compare the impacts of specific causes or sources of impairment over time. The following are reasons for this lack of comparability:

- The methods states use to monitor and assess their waters, including what and how they monitor and how they report their findings to EPA, vary from state to state and within individual states over time. Many states target their limited monitoring resources to waters they suspect are impaired, or to address local priorities and concerns; therefore, the small percentage of waters assessed may not reflect statewide conditions. States may monitor a different set of waters from one reporting cycle to another, or may monitor fewer waters when state budgets are limited. It is also important to note that six states did not provide electronic data for the 2004 reporting cycle, and that the lack of data from these states affects the summary statistics.
- The science of monitoring and assessment varies over time, and many states are better able to identify problems as their monitoring and analytical methods improve. For example, states are conducting more fish tissue sampling than in previous years. The use of improved assessment methods to collect better information may result in more extensive and protective fish consumption advisories, even though water quality conditions themselves may not have changed.
- For the 2004 reporting cycle, EPA re-evaluated how it grouped sources and causes reported by the states into larger overall categories (such as municipal discharges/sewage or metals other than mercury) for national reporting purposes. The purpose of this re-evaluation was to more accurately categorize the source and cause information reported by the states. Some overall source and cause categories were renamed, and some state-reported sub-categories were moved into different overall categories compared to the 2002 reporting cycle. (See the section *Sources of Impairment* in this report for more information.)
- Under the Clean Water Act, each state has the authority to set its own water quality standards; therefore, a state's definition of its designated uses (for example, Warm Water Fishery or Livestock Watering) may differ from definitions used by other states, along with the criteria against which states determine impairments. (See the section *Assessing Water Quality*, below, for more information.)

Assessing Water Quality

States assess the quality of their waters based on water quality standards they develop in accordance with the Clean Water Act. Water quality standards may differ from state to state, but must meet minimum requirements. EPA must approve these standards before they become effective under the Clean Water Act.

Designated Use Categories in this Report

The states have different names for the various uses they have designated for their waters. For example, one state might designate as Class A those waters that are capable of supporting fish species of commercial and recreational value (e.g., salmon, trout), whereas another state might classify similar waters as Cold Water Fishery waters. The ATTAINS database groups state-reported uses according to the following overall categories:

- **Fish, Shellfish, and Wildlife Protection and Propagation** – Is water quality good enough to support a healthy, balanced community of aquatic organisms?
- **Recreation** – Can people safely swim or enjoy other recreational activities in and on the water?
- **Public Water Supply** – Does the waterbody safely supply water for drinking after standard treatment?
- **Aquatic Life Harvesting** – Can people safely eat fish caught in the waterbody?
- **Agricultural** – Can the waterbody be used for irrigating fields and watering livestock?
- **Industrial** – Can the water be used for industrial processes?
- **Aesthetic Value** – Is the waterbody aesthetically appealing?
- **Exceptional Recreational or Ecological Significance** – Does the waterbody qualify as an outstanding natural resource or support rare or endangered species?

You can find out which state classifications fit under each of these categories by clicking on the individual use category name in the ATTAINS database.

Water quality standards consist of three elements: the **designated uses** assigned to waters (e.g., recreation, public water supply, the protection and propagation of aquatic life); the **criteria** or thresholds (expressed as numeric pollutant concentrations or narrative requirements) that are necessary to protect the designated uses; and the **anti-degradation** policy intended to prevent waters from deteriorating from their current condition. Waters may be designated for more than one use. To learn more about water quality standards, visit <http://www.epa.gov/waterscience/standards/>.

After setting water quality standards, states assess their waters to determine the degree to which the standards are being met. State water quality assessments are normally based on six broad types of monitoring data: biological integrity, chemical, physical, microbiological, habitat, and toxicity. (Examples of the different types of data used to determine a state's water quality are shown in the box below.) Each type of monitoring data yields an assessment that must be integrated with other data types for an overall assessment. Depending on the designated use, one data type may be more informative than others for making the final assessment.

Types of Monitoring Data

- **Biological integrity data:** Objective measurements of aquatic biological communities (usually aquatic insects, fish, or algae) used to evaluate the condition of an aquatic ecosystem. Biological data are best used when deciding whether waters support aquatic life uses.
- **Chemical data:** Measurements of key chemical constituents in water, sediments, and fish tissue. Examples of these constituents include metals, oils, pesticides, and nutrients such as nitrogen and phosphorus. Monitoring for specific chemicals helps states assess waters against numerical criteria, as well as identify and trace the source of the impairment.
- **Physical data:** Characteristics of water, such as temperature, flow, suspended solids, sediment, dissolved oxygen, and pH. These physical attributes are often useful indicators of potential problems and can have an effect on the impacts of pollution.
- **Microbiological data:** Measurements of pathogen indicators such as fecal and total coliform bacteria, *E.coli* and *Enterococci*. Monitoring of these indicators helps determine possible contamination by such things as untreated sewage, septic systems, and livestock or pet wastes, and is often used to determine if waters are safe for recreation and shellfish harvesting.
- **Habitat assessments:** Descriptions of sites and surrounding land uses; condition of streamside vegetation; and measurement of features, such as stream width, depth, flow, and substrate. These assessments are used to supplement and interpret other kinds of data.
- **Toxicity testing:** Measurements of mortality of a test population of selected organisms, such as fathead minnows or *Daphnia* (“water fleas”). These organisms are exposed to known dilutions of water taken from the sampling location. The resulting toxicity data indicate whether an aquatic life use is being attained. These tests can help determine whether poor water quality results from toxins or from habitat degradation.

States, tribes, and other jurisdictions monitor for a variety of pollutants, or causes of impairment. Table 1 provides a list of major causes of impairment cited in this report.

Table 1. Major Impairment Cause Categories Used in this Report

Category	Examples
Cause Unknown – Impaired Biota	Impairment or degradation of the biological community (e.g. fish, macroinvertebrates) due to unknown/unidentified cause
Dioxins	Highly toxic, carcinogenic, petroleum-derived chemicals that are persistent in the environment and may be found in fish tissue, water column, or sediments
Flow Alterations	Changes in stream flow due to human activity; includes water diversions for purposes such as irrigation
Habitat Alterations	Modifications to substrate, streambanks, fish habitat; barriers
Metals	Substances identified only as “metals;” also, selenium, lead, copper, arsenic, manganese, others (Note: may, in some cases, include mercury)
Mercury	A toxic metal with neurological and developmental impacts; found in fish tissue, water column, or sediments
Nuisance Exotic Species	Non-native fish, animals, or plants such as Eurasian milfoil, <i>Hydrilla</i> , or zebra mussels, which choke out native species and alter the ecological balance of waters
Nutrients	Primarily nitrogen and phosphorus; in excess amounts, these nutrients overstimulate the growth of weeds and algae and can lead to oxygen depletion
Organic Enrichment/ Oxygen Depletion	Low levels of dissolved oxygen; high levels of biochemical oxygen demanding substances (e.g., organic materials such as plant matter, food processing waste, sewage) that use up dissolved oxygen in water when they degrade

Category	Examples
Pathogens	Bacteria and pathogen indicators <i>E.coli</i> , total coliforms, fecal coliforms, <i>Enterococci</i> ; used as indicators of possible contamination by sewage, livestock runoff, and septic tanks
Polychlorinated biphenyls (PCBs)	A toxic mixture of chlorinated chemicals that are no longer used, but are persistent in the environment; used originally in industry and electrical equipment; primarily found in fish tissue or sediments
Pesticides	Substances identified only as “pesticides;” also, chlordane, atrazine, carbofuran, and others; many older pesticides are persistent in the environment
Sediment	Excess sediments, siltation; affects aquatic communities by altering and suffocating habitat and clogging fish gills
Toxic Organics	Chemicals identified only as “toxic organics;” also, priority organic compounds, non-priority organic compounds, polycyclic aromatic hydrocarbons (PAH), and others; often persistent in the environment

Where possible, states, tribes, and other jurisdictions identify the sources of those pollutants associated with water quality impairment. **Point sources** discharge pollutants directly into surface waters from a conveyance, such as a pipe. Point sources include industrial facilities, municipal sewage treatment plants, combined sewer overflows, and storm sewers. **Nonpoint sources** deliver pollutants to surface waters from diffuse origins, such as fields and streets. Nonpoint sources include urban runoff that is not captured in a storm sewer; agricultural runoff from cropland and grazing areas; leaking septic tanks; and deposition of contaminants in the atmosphere due to air pollution. Habitat alterations, dams, channelization, dredging, and stream bank destabilization are also significant sources of water quality degradation. See Table 2 for more information on source categories used in this report.

For 2004 reporting, EPA reorganized many source categories compared to previous reporting cycles; therefore, apparent significant increases or decreases in individual categories (e.g., Municipal Discharges/Sewage) may be attributable to these reporting changes rather than to actual changes in the impact of an individual source category.

Table 2. Major Pollutant Source Categories Used in this Report

Category	Examples
Agriculture	Crop production, feedlots (including concentrated animal feeding operations), grazing, manure runoff
Atmospheric Deposition	Airborne pollution from many diverse sources (such as factory and automobile emissions and pesticide applications) that settles to land or water
Construction	Residential development, bridge and road construction, land development
Habitat Alterations (Not Directly Related to Hydromodification)	Riparian and in-stream habitat modification and loss, filling and draining of wetlands, removal of riparian vegetation, streambank erosion
Hydromodification	Pond construction, channelization, dam construction, dredging, flow alterations from water diversions, flow regulation, hydropower generation, streambank destabilization and modification, upstream impoundments
Industrial	Factories, industrial and commercial areas, cooling water intake structures, mill tailings

Category	Examples
Land Application/Waste Sites/Tanks	Salt storage piles, land application of biosolids, land disposal, landfills, leaking underground storage tanks
Legacy/Historical Pollutants	Brownfield sites, contaminated sediments, in-place contaminants
Municipal Discharges/Sewage	Septic systems, sewage treatment plants, domestic sewage lagoons, sanitary sewer overflows, municipal dry and wet weather discharges, unpermitted discharges of domestic wastes, combined sewer overflows, septage disposal
Natural/Wildlife	Flooding, drought-related impacts, waterfowl
Recreation and Tourism	Golf courses, marinas, turf management, boat maintenance
Resource Extraction	Abandoned mining, acid mine drainage, coal mining, dredge mining, mountaintop mining, petroleum/natural gas activities, surface mining
Silviculture (Forestry)	Forest management, forest fire suppression, forest roads, reforestation, woodlot site clearance
Spills/Dumping	Accidental releases/spills, pipeline breaks
Unknown	Source of impairment is unknown
Unspecified Nonpoint Source	Source of impairment is identified as nonpoint, but no further information available
Urban-Related Runoff/Stormwater	Discharges from municipal separate storm sewers (MS4), parking lot and impervious surfaces runoff, highway and road runoff, storm sewers, urban runoff, permitted stormwater discharges

Hundreds of organizations in the United States conduct water quality monitoring. Monitoring organizations include state, interstate, tribal, and local water quality agencies; research organizations such as universities; industries and sewage and water treatment plants; and citizen volunteer programs. EPA, the U.S. Geological Survey (USGS), the National Park Service (NPS), and the National Oceanic and Atmospheric Administration (NOAA) are among the many federal agencies that collect water quality monitoring data. Monitoring organizations collect water quality data for their specific purposes, and many share their data with other users, including government decision makers. States evaluate and use much of these data when preparing their water quality reports.

The states, territories, and tribes maintain monitoring programs to support several objectives, including assessing whether water is safe for drinking, swimming, and fishing. States also use monitoring data to review and revise water quality standards, identify impaired and threatened waters under Clean Water Act section 303(d), develop pollutant-specific TMDLs, determine the effectiveness of control programs, adjust drinking water treatment requirements, measure progress toward clean-water goals, and respond to citizen complaints or events such as spills and fish kills.

Nationally consistent probability surveys are an efficient way to get a good understanding of national water quality conditions and trends. Probability surveys are scientifically based studies designed to sample water quality conditions at randomly selected sites that are statistically representative of the population of waters across the United States. EPA and its monitoring partners have used this methodology to develop a series of *National Coastal Condition Reports* (<http://www.epa.gov/nccr/>). These reports summarize the findings of the National Coastal Assessment, a probability-based study. Another probability-based project

currently underway is the National Study of Chemical Residues in Lake Fish Tissue (www.epa.gov/waterscience/fishstudy), which is the first national freshwater fish contamination survey to have statistically selected sampling sites. EPA also partnered with states to conduct a probability-based Wadeable Streams Assessment (www.epa.gov/owow/streamsurvey) to determine the biological condition of small streams in the United States. The Wadeable Streams Assessment was completed in 2006.

To learn more about the water quality monitoring, assessment, and reporting practices of a specific state, visit the state's water quality Internet site and read the explanatory and programmatic information included in most reports.

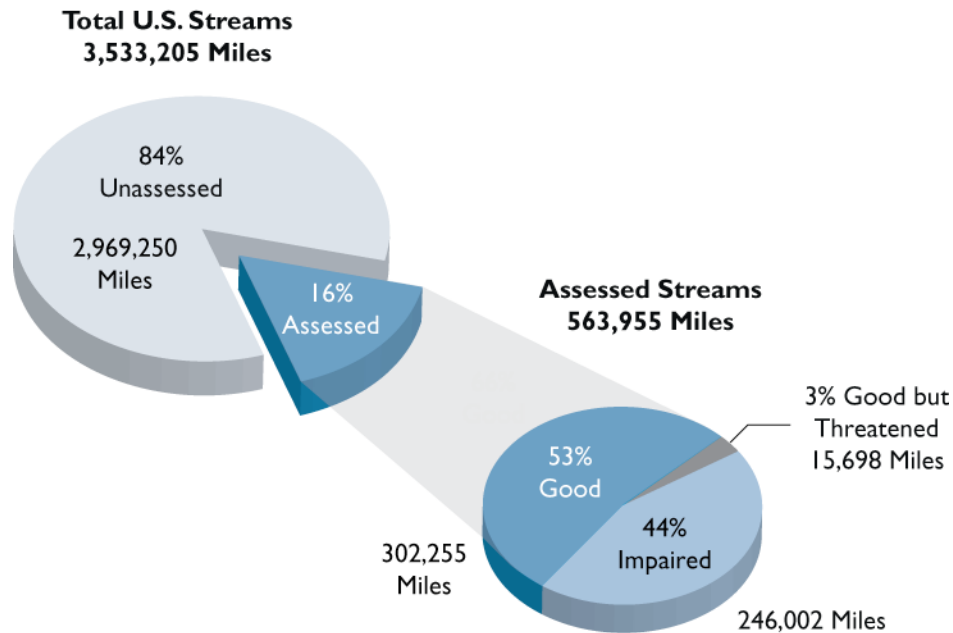
II. Findings

Rivers and Streams

The 2004 ATTAINS database summarizes river and stream designated use support information reported by the states by overall use support and by individual categories of uses. Waters are rated for overall use support as follows:

- Good if they fully support all their designated uses
- Threatened if they fully support all uses, but exhibit a deteriorating trend
- Impaired if they are not supporting one or more designated uses.

This report includes states' 2004 assessments of 563,955 miles of rivers and streams, or 16% of the nation's 3.5 million stream miles (Figure 1). Because six states did not provide specific waterbody data electronically in 2004, the findings of this report address about 130,000 fewer stream miles than were reported in 2002. States identified 44% of the assessed miles as being impaired, or not supporting one or more of their designated uses. The remaining 56% of assessed miles fully supported all uses, and of these, 3% were considered threatened (i.e., water quality supported uses, but exhibited a deteriorating trend).



*Total U.S. river and stream miles based on state 2004 Integrated Reports. Percents may not add up to 100 because of rounding.

Figure 1. Water quality in assessed river and stream miles.

Individual use support assessments also provide important details about the nature of water quality problems in rivers and streams. Table 3 shows the top five assessed uses in rivers and streams. States evaluated support of the Fish, Shellfish, and Wildlife Protection and Propagation use most frequently, assessing a total of 466,617 stream miles (or 13% of U.S.

stream miles) and reporting that 36% of assessed stream miles were impaired for this use. States assessed 303,317 stream miles for Recreation uses (primary and secondary contact) and found recreation to be impaired in 28% of these waters.

Table 3. Individual Use Support in Assessed River and Stream Miles^a

Designated Use	Miles Assessed	Percentage of Total U.S. River Miles	Percentage of Waters Assessed		
			Good	Threatened	Impaired
Fish, Shellfish, and Wildlife Protection/Propagation	466,617	13	61	3	36
Recreation	303,317	9	69	3	28
Agricultural	200,817	6	90	<1	10
Aquatic Life Harvesting	154,746	4	56	4	40
Public Water Supply	144,245	4	79	3	18

^a Waterbodies can have multiple designated uses, resulting in an overlap of river and stream miles assessed.

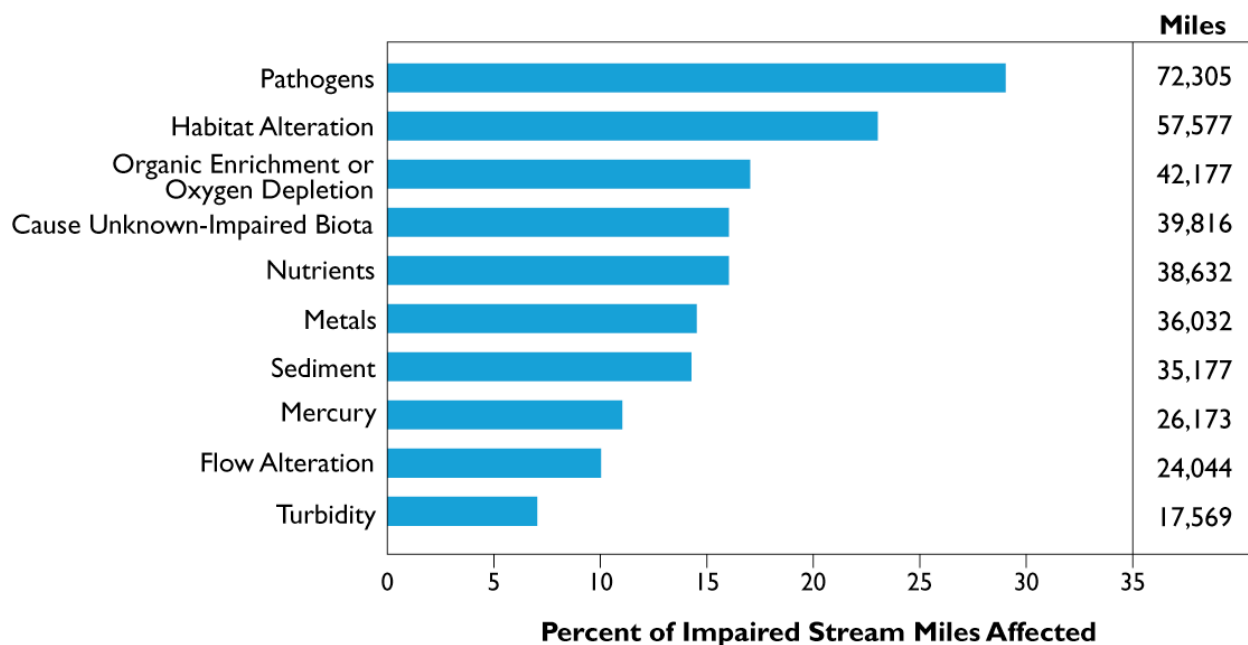
The ATTAINS database provides more detailed information about the sources and causes of impairments in rivers and streams, but it is important to note that the information about specific sources and causes of impairment is incomplete. States do not always report the pollutant or source of pollutants affecting every impaired river and stream. Although states may recognize that water quality does not fully support a designated use, they may not have adequate data in some cases to document the specific pollutant or source responsible for the impairment.

It is also important to note that—in an effort to provide clearer and more specific information—the actual categories of causes of impairment have changed since previous reporting cycles. For example, the cause of impairment category previously identified as Metals has now been divided into two cause categories: Metals and Mercury; however, some states may continue to report mercury under the Metals category.

Similar changes have occurred to the source categories used in this report. For example, a new source category—Unspecified Nonpoint Source—was created in 2004 to capture sources previously part of the Unspecified/Unknown category, but for which *some* information (i.e., their nonpoint source origins) had been identified; therefore, the Unknown/Unspecified category is somewhat smaller in 2004 than it was in 2002. Similarly, the 2002 source category Municipal Permitted Discharges has been renamed Municipal Discharges/Sewage and now captures combined and sanitary sewer overflows; therefore, it is larger than it was in 2002.

Figure 2 shows the top 10 reported causes of impairment in assessed rivers and streams. According to the states, the top causes of river and stream impairment regardless of designated use were the following:

- **Pathogens (bacteria)**, which indicate possible fecal contamination that may cause illness in people;
- **Habitat alteration**, such as disruption of stream beds and riparian areas; and
- **Organic enrichment/oxygen depletion**, or low levels of dissolved oxygen, often due to the decomposition of organic materials.



Note: Percents do not add up to 100% because more than one cause may impair a waterbody.

Figure 2. Top 10 causes of impairment in assessed rivers and streams.

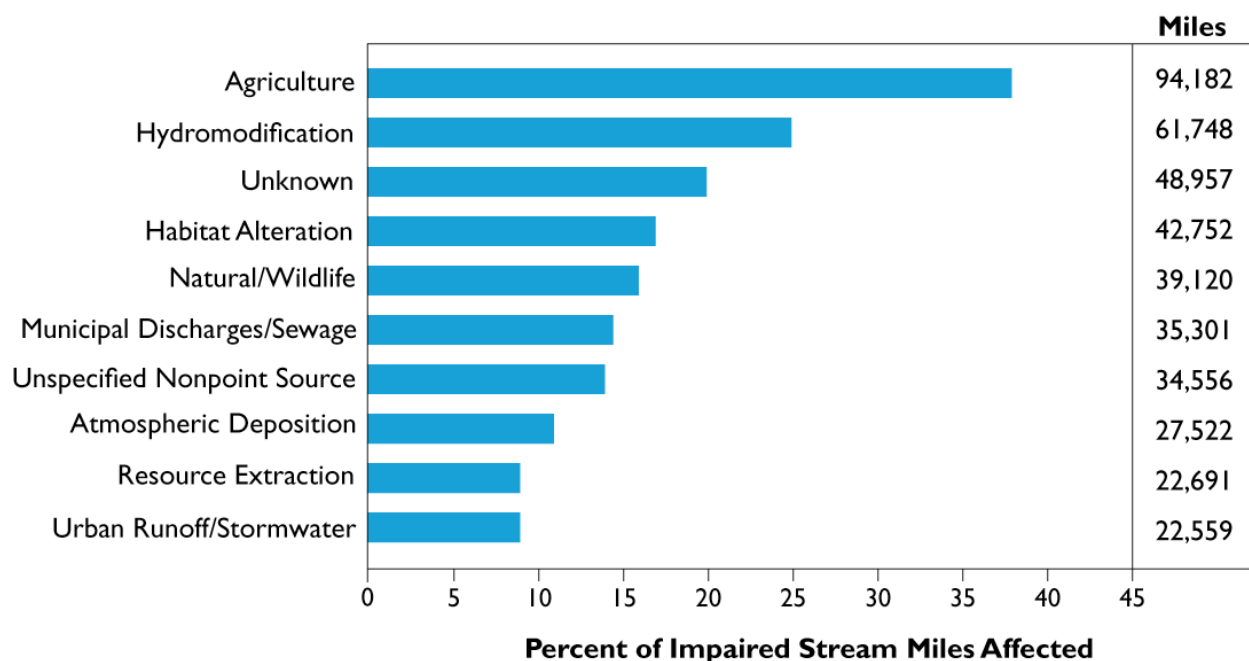
The listed top 10 causes of impairment (above) differ from those reported in 2002. This difference is more likely attributable to reporting changes (e.g., fewer river and stream miles assessed; improved reporting of the results of fish tissue monitoring; and administrative changes in cause category definitions, described above) than to actual changes in water quality.

More detailed information on state-reported causes and sources of impairment is available from the ATTAINS Water Quality Assessment and TMDL Information database at <http://www.epa.gov/ir>.

Figure 3 shows the top reported sources of impairment in assessed rivers and streams. According to the states, the top sources of river and stream impairment included the following:

- **Agricultural activities**, such as crop production, grazing, and animal feeding operations;
- **Hydromodifications**, such as water diversions, channelization, and dam construction; and
- **Unknown or unspecified sources** (i.e., the states could not identify specific sources).

Other leading sources of impairment in streams included habitat alteration (e.g., loss of streamside habitat), natural sources (e.g., floods, droughts, wildlife), municipal discharges/sewage (which includes sewage treatment plant discharges and combined sewer overflows), and unspecified nonpoint sources.



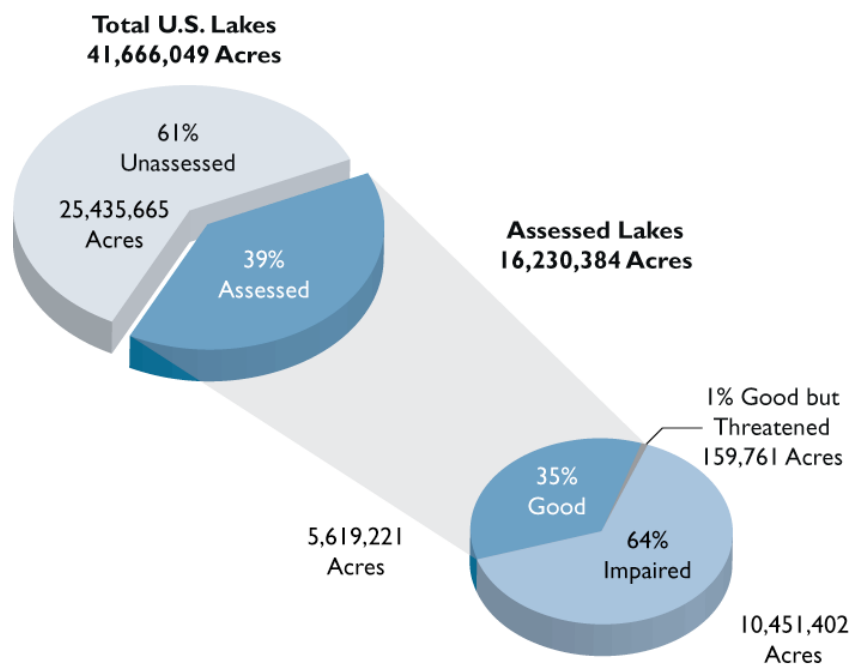
Note: Percents do not add up to 100% because more than one source may impair a waterbody.

Figure 3. Top 10 sources of impairment in assessed rivers and streams.

Lakes, Ponds, and Reservoirs

The 2004 ATTAINS Water Quality Assessment and TMDL Information database summarizes designated use support information reported by the states for lakes, ponds, and reservoirs (referred to hereafter as lakes) by overall use support and by individual categories of uses.

This report includes states' assessments of 16.2 million acres of lakes (excluding the Great Lakes), or 39% of the nation's total 41.7 million lake acres, for the 2004 reporting cycle (Figure 4). States identified 64% of assessed acres as impaired, or not supporting one or more of their designated uses (such as fishing or swimming). The remaining 36% of assessed acres fully supported all uses, and of these, 1% were considered threatened. It should be noted that 3.7 million impaired lake acres—about a third of all impaired lake acres—were reported by one state, Minnesota, due to increased fish tissue and water monitoring activities addressing mercury.



*Total U.S. lake acreage estimate based on 2004 state Integrated Reports.

Figure 4. Water quality in assessed lake acres.

Individual use support assessments provide important details about the nature of water quality problems in lakes and reservoirs. Table 4 shows the top five uses assessed in lakes, ponds, and reservoirs. States assessed 11.8 million lake acres for support of the Fish, Shellfish, and Wildlife Protection and Propagation use, of which 30% were found to be impaired. The Aquatic Life Harvesting use (primarily fish consumption) was assessed in 9.4 million acres; of these, 73% were impaired and 1% were considered threatened (i.e., water quality is deteriorating). This high percentage of lake, pond, and reservoir waters impaired for fish consumption is most likely related to changes in how states report on waters with statewide fish consumption advisories. For example, in previous cycles, some states may not have reported waters with fishing advisories as impaired. Recreational use (e.g., swimming, boating) was assessed in 8.1 million acres of lakes and found to be impaired in 26%.

Table 4. Individual Use Support in Assessed Lake, Reservoir, and Pond Acres^a

Designated Use	Acres Assessed	Percentage of Total U.S. Lake Acres	Percentage of Waters Assessed		
			Good	Threatened	Impaired
Fish, Shellfish, and Wildlife Protection/Propagation	11,770,370	28%	66%	4%	30%
Aquatic Life Harvesting	9,390,396	23%	26%	1%	73%
Recreation	8,069,018	19%	70%	4%	26%
Public Water Supply	6,427,687	15%	78%	1%	20%
Industrial	2,848,335	7%	82%	<1%	17%

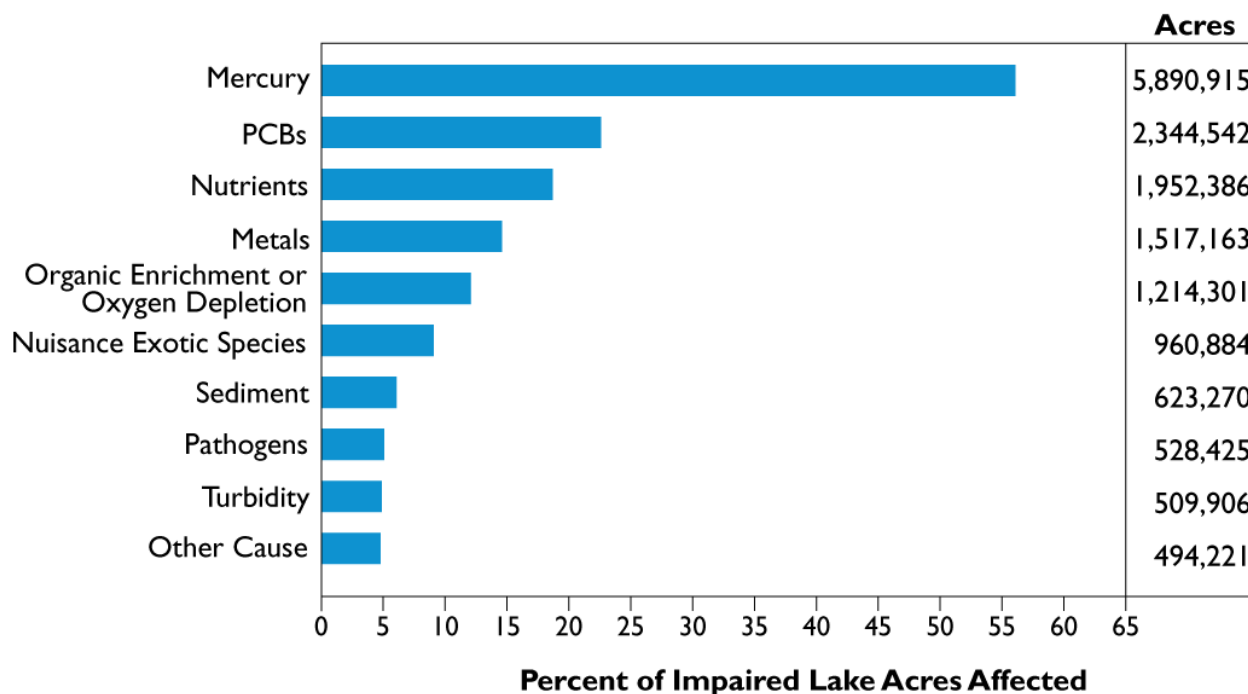
^a Waterbodies can have multiple designated uses, resulting in an overlap of acres assessed.

The ATTAINS database provides more detailed information on the sources and causes of impairments in lakes, but it is important to note that the information about specific sources and causes of impairment is incomplete. The states do not always report the pollutant or source of pollutants affecting every impaired lake, pond, and reservoir. In some cases, states may recognize that water quality does not fully support a designated use; however, they may not have adequate data to document the specific pollutant or source responsible for the impairment. The states may then simply report the cause or source of impairment as “unknown” or “unspecified.”

It is also important to note that, in some cases, groupings of causes and sources may have changed since previous reporting cycles. These changes were made to more accurately categorize the source and cause information reported by the states.

Figure 5 shows the top causes of impairment in assessed lakes, ponds, and reservoirs. According to the states, the top causes of lake impairment were the following:

- **Mercury**, which has been widely detected in fish tissue, where it may pose a health risk to people and animals who eat fish;
- **PCBs**, which are hazardous chemicals released via industrial and municipal waste disposal, spills, and leaks; and
- **Nutrients**, such as phosphorus and nitrogen, which disrupt lake ecosystems by stimulating growth of undesirable algae and aquatic weeds.



Note: Percents do not add up to 100% because more than one cause may impair a waterbody.

Figure 5. Top 10 causes of impairment in assessed lakes, ponds, and reservoirs.

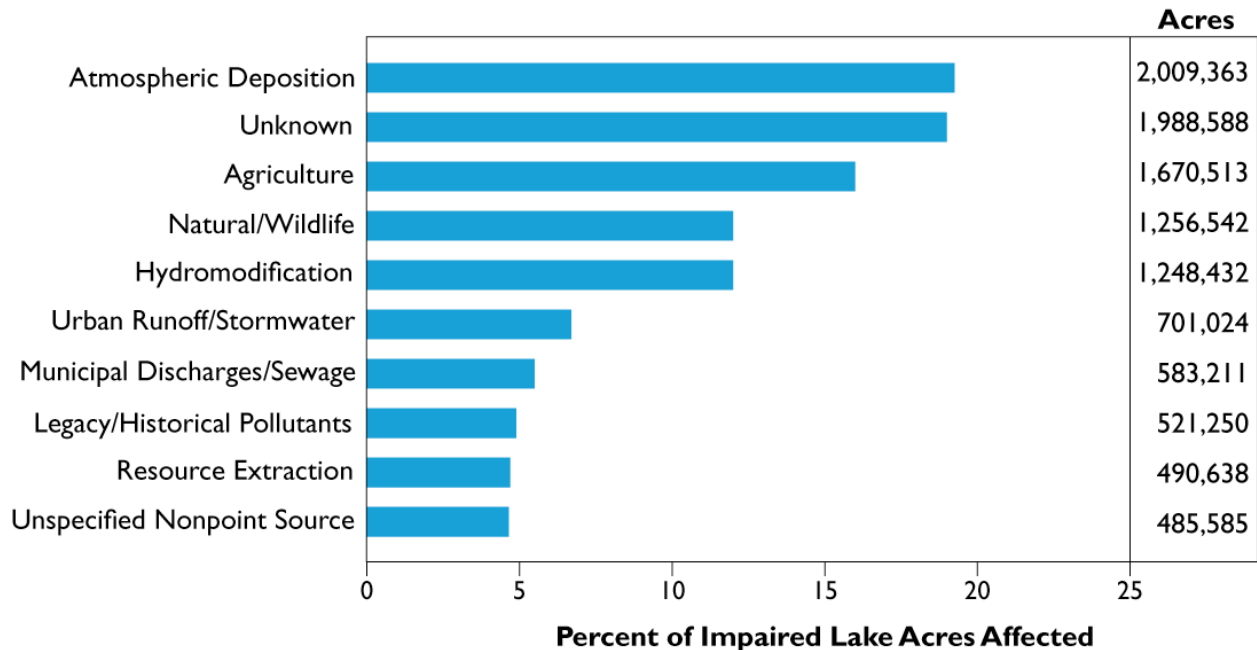
Heightened reporting of mercury, PCBs, and metals is largely the result of the reporting of broad-based fish consumption advisories due to these substances in fish tissue; some states have begun reporting the extent of waters affected by such advisories and bans. For example,

Minnesota reported 3.7 million acres impaired by mercury (representing 63% of the lake acres impaired by mercury in the United States) and 1.6 million acres impaired by PCBs (representing 70% of the lake acres impaired by PCBs in the United States). Other leading causes of impairments in lakes include organic enrichment/low dissolved oxygen, fish consumption advisory/pollutant unspecified, nuisance exotic species, sediment, turbidity, and pathogens.

More information on state-reported causes and sources of impairment is available from the ATTAINS Water Quality Assessment and TMDL Information database at <http://www.epa.gov/waters/ir>.

Figure 6 shows the top sources of impairment in assessed lakes, ponds, and reservoirs. According to the states, the top sources of lake impairment were the following:

- **Atmospheric (or air) deposition**, primarily of toxic substances such as mercury, PCBs, and other metals, from both local and long-range sources;
- **Unknown or unspecified sources** (i.e., the states could not identify specific sources); and
- **Agricultural activities**, such as crop production and grazing.



Note: Percents do not add up to 100% because more than one source may impair a waterbody.

Figure 6. Top 10 sources of impairment in assessed lakes, ponds, and reservoirs.

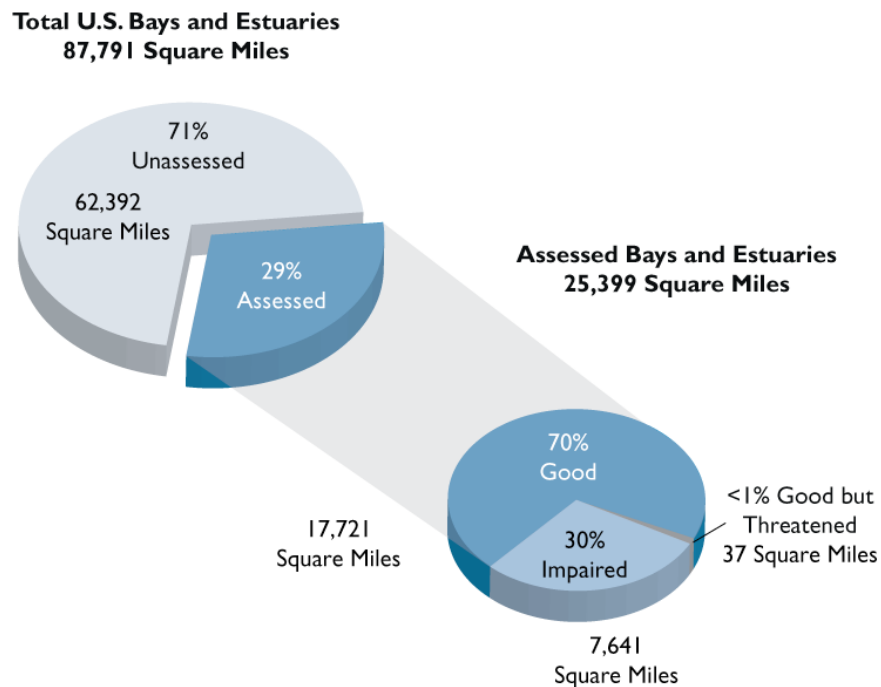
It should be noted that about one fourth (485,376 acres) of lake acres impaired by atmospheric deposition were reported by one state, Wisconsin. This is because Wisconsin reported that all its lake acres are under a fish consumption advisory due to mercury from atmospheric deposition sources. However, the total does not include lake acres that may be impaired by atmospheric deposition in Minnesota, which reported the largest number of impaired lake acres for mercury and PCBs, because Minnesota did not identify the source of these

impairments. It is likely that the majority of impairment by mercury and PCBs in Minnesota is from atmospheric deposition. Other leading sources of impairment include natural/wildlife sources (e.g., droughts, flooding, waterfowl), hydromodification, urban-related runoff/stormwater, municipal discharges/sewage, and legacy/historical pollutants (primarily in sediments).

Bays and Estuaries

The ATTAINS database summarizes state-reported designated use support information for bays and estuaries by overall use support and by individual categories of uses.

This report includes states' assessments of 25,399 square miles of bays and estuaries, or 29% of the nation's total estimated 87,791 square miles, for the 2004 reporting cycle (Figure 7). About 5,000 fewer estuarine square miles were assessed in 2004 than in 2002, at least in part because several coastal states did not provide electronic data in 2004. States identified 30% of assessed square miles as impaired, or not supporting one or more of their designated uses (e.g., swimming, fishing, shellfishing). The remaining 70% of assessed estuarine square miles were fully supporting all uses.



*Total U.S. estuarine square miles estimate based on 2004 state Integrated Reports.

Figure 7. Water quality in assessed bay and estuary square miles

Individual use support assessments provide important details about the nature of water quality problems in bays and estuaries. Table 5 shows the top three uses assessed in bays and estuaries. States assessed 24,338 estuarine square miles for support of the Fish, Shellfish, and Wildlife Protection and Propagation use and found that 27% were impaired; the Aquatic Life Harvesting use was assessed in 11,004 square miles and found to be impaired in 19% of assessed

waters; and 13% of the 9,322 square miles assessed for Recreation uses (e.g., swimming, boating) were reported as impaired.

Table 5. Individual Use Support in Assessed Bay and Estuary Square Miles ^a

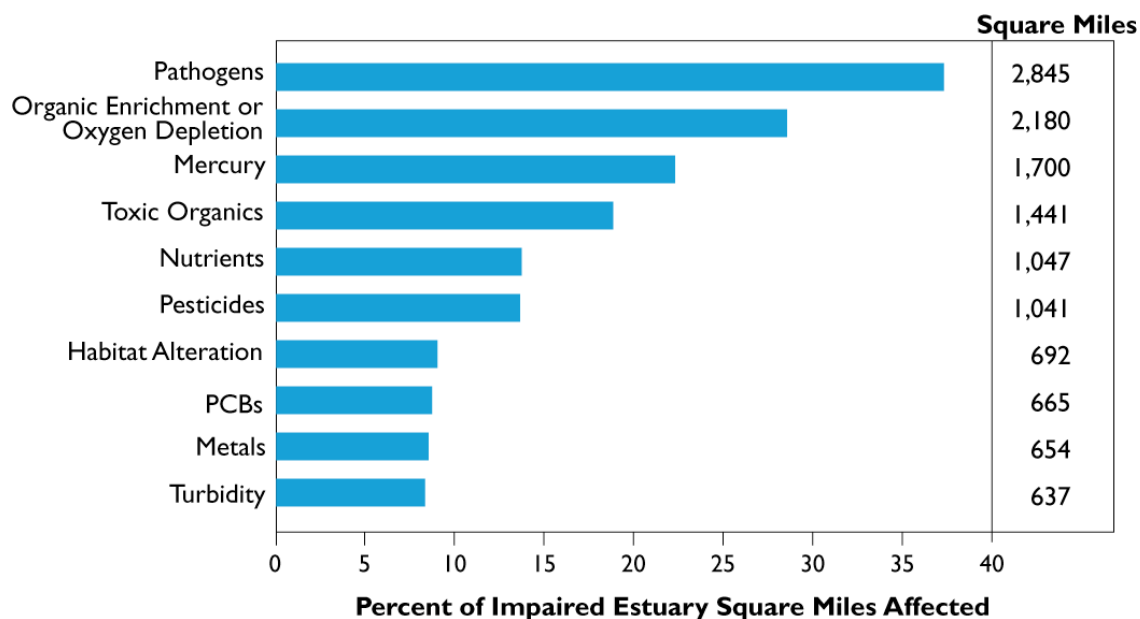
Designated Use	Square Miles Assessed	Percentage of Total U.S. Estuarine Miles	Percentage of Waters Assessed		
			Good	Threatened	Impaired
Fish, Shellfish, and Wildlife Protection/Propagation	24,338	28%	73%	<1%	27%
Aquatic Life Harvesting	11,004	13%	81%	<1%	19%
Recreation	9,322	11%	87%	<1%	13%

^a Waterbodies can have multiple designated uses, resulting in an overlap of square miles assessed.

State-reported information about specific sources and causes of impairment may be incomplete because the states do not always report the pollutant or source of pollutants affecting every impaired bay and estuary. In some cases, states may recognize that water quality does not fully support a designated use; however, they may not have adequate data to document the specific pollutant or source responsible for the impairment and report the cause or source as “unknown.”

Figure 8 shows the top causes of impairment in assessed bays and estuaries. According to the states, the top causes of estuarine impairment were the following:

- **Pathogens**, i.e., bacteria used as indicators of possible contamination by sewage, livestock runoff, and other sources;
- **Organic enrichment/oxygen depletion**, i.e., low levels of dissolved oxygen and/or high levels of oxygen-demanding substances such as organic waste; and
- **Mercury**, a toxic metal found in fish tissue, and, to a lesser extent, in the water column, often entering the aquatic environment via atmospheric deposition.



Note: Percents do not add up to 100% because more than one cause may affect a waterbody.

Figure 8. Top 10 causes of impairment in assessed bays and estuaries.

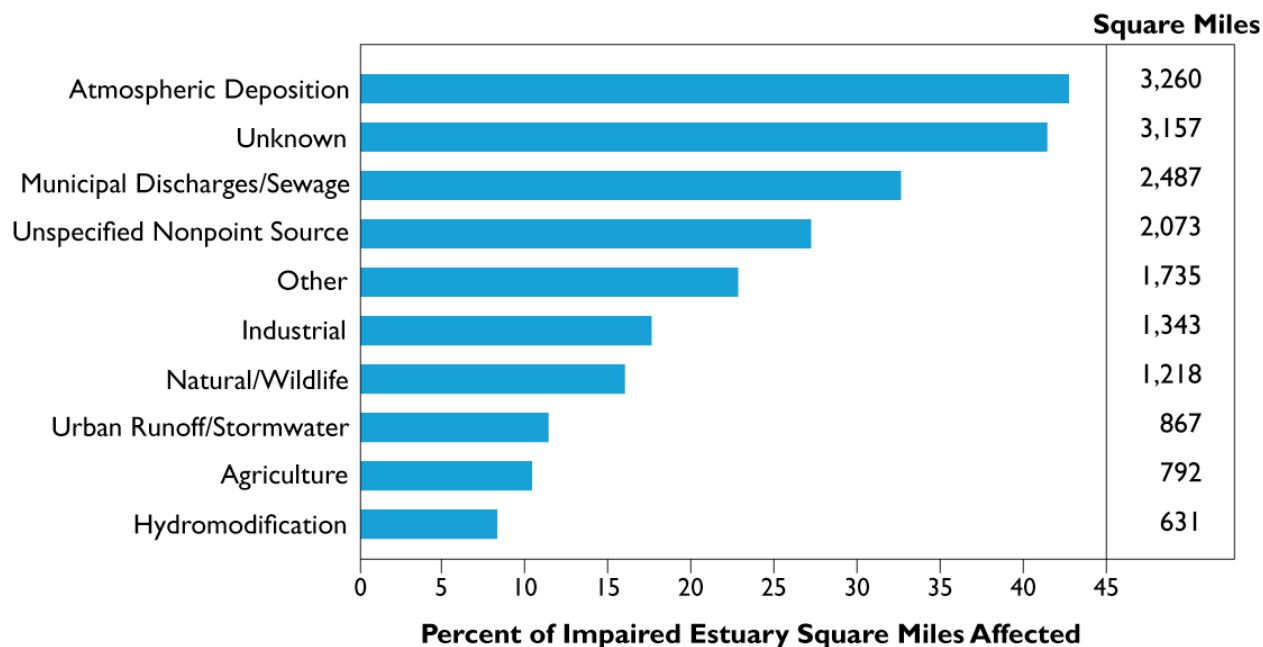
Toxic organics, nutrients, pesticides, and metals are also reported as top causes of impairment for estuarine waters.

Figure 9 shows the top sources of impairment in assessed bays and estuaries. According to the states, the top sources of estuarine impairment included the following:

- **Atmospheric (or air) deposition**, which can bring pollutants such as mercury from distant locations such as industrial centers;
- **Unknown/unspecified sources**, or sources that cannot be further identified by the states; and
- **Municipal discharges/sewage**, which includes septic systems, sewage treatment plants, and sanitary and combined sewer overflows.

More information on state-reported causes and sources of impairment is available from the ATTAINS Water Quality Assessment and TMDL Information database at <http://www.epa.gov/waters/ir>.

Other leading sources of impairment in bays and estuaries were unspecified nonpoint sources, other sources (such as sources outside state waters), and industrial sources.



Note: Percents do not add up to 100% because more than one source may impair a waterbody.

Figure 9. Top 10 sources of impairment in assessed bays and estuaries.

Other Waters

The 2004 ATAINS database also contains state-reported information on conditions in coastal shoreline waters, ocean waters, Great Lakes, and wetlands, although, in some cases, only a small percentage of these resources were assessed in the 2004 reporting cycle. These waters are discussed below.

Coastal Resources

Coastal resources are identified in the ATAINS database in two categories: coastal shorelines (the water immediately offshore, reported in miles) and ocean/near-coastal waters (i.e., the area of water extending into the ocean or gulf, range not specified, in square miles). Eight states assessed 1,859 miles of coastal shorelines, or about 3% of the nation's total 58,618 shoreline miles. The majority of assessed shoreline miles (68%) fully support their designated uses, with 12% of these miles classified as supporting uses, but threatened (i.e., water quality is deteriorating). In the 32% of shoreline miles not fully supporting their uses, metals (which could in some cases include mercury) and pathogens were the leading causes of impairment, and municipal discharges/sewage and industrial sources were listed as top sources of impairment.

To help protect the public at coastal recreation waters, Congress passed the Beaches Environmental Assessment and Coastal Health Act of 2000 (BEACH Act), requiring that coastal and Great Lakes states and territories report to EPA on beach monitoring and notifications to the public of potential health risks. Public notification may include issuing a beach advisory, warning people of possible risks of swimming due to water quality problems, or closing a beach to the public. The BEACH Act also requires EPA to maintain an electronic monitoring and notification database of those data.

For the 2004 swimming season, 28 of 30 coastal states and Puerto Rico reported public notification actions to EPA. Of the 3,574 beaches that were monitored in 2004, 942 (26%) had at least one advisory or closing. A total of 4,907 beach notification actions were reported. EPA calculates “beach days” (number of beaches multiplied by number of days in the swimming season) to get a better sense of the extent of the advisory and closure information. For the 2004 season, EPA determined that there were 584,150 beach days for all of the monitored beaches, and actions were reported about 4% of the time. EPA is continuing to work to improve the delivery of its beach advisory information to the public. Visit <http://www.epa.gov/beaches/> for more information on beach monitoring and notification.

A total of 5,544 square miles of oceans and near-coastal waters, or 10% of approximately 54,120 square miles of oceans and near-coastal waters in the United States, were assessed by 5 states in 2004. Of the assessed square miles, 88% were identified as impaired. Mercury was by far the most commonly reported cause of impairment, followed by organic enrichment/oxygen depletion. Atmospheric deposition was the predominant reported source of impairment in oceans and near-coastal waters. (It is important to note that Texas alone assessed nearly 3,879 square miles of oceans and near-coastal waters and reported that 100% of its assessed square miles are impaired due to mercury in fish tissue from atmospheric deposition.)

More information on state-reported causes and sources of impairment is available from the ATTAINS database information website at <http://www.epa.gov/waters/ir..>

Detailed information on U.S. coastal condition trends is available in the EPA’s *National Coastal Condition Report* series, which presents the findings of a collaborative effort between the states, EPA, and other federal agencies to characterize the condition of 100% of the nation’s coastal resources. Section III of this report summarizes key findings of the draft *National Coastal Condition Report III*.

Great Lakes

The Great Lakes—Superior, Michigan, Huron, Erie, and Ontario—are freshwater inland seas of vast importance for water consumption, recreation, fisheries, power, transportation, and many other uses. Of the eight states bordering the Great Lakes, six reported on the condition of their Great Lakes shoreline miles.

About 1,070 of 5,521 total Great Lakes shoreline miles were assessed in 2004, and of these, 93% were reported as impaired. The leading causes of impairment included PCBs, toxic organics, pesticides, and dioxins. Legacy or historical pollution—primarily contaminated sediment—were the leading source of shoreline impairment reported by the states, followed by municipal discharges/sewage.

Wetlands

Wetlands occur where water and land come together for a prolonged period of time and where saturation of the land with water is the dominant factor determining soil types and the plant and animal communities living in the soil and on the surface. Wetlands vary widely

because of regional and local differences in soils, topography, climate, hydrology, water chemistry, vegetation, and other factors, including human disturbance. Included among the many types of U.S. wetlands are marshes, bogs, swamps, wet meadows, vernal pools, playas, pocosins, sloughs, peat lands, prairie potholes, and fens.

Wetlands are a critically important resource due to the many benefits they provide to humans, aquatic life, wildlife, and the environment. Wetlands produce great quantities of food that attract a huge variety of animal species. They serve as nurseries and habitat for many game and commercial fish and wildlife species, and they help improve water quality by intercepting surface runoff and removing, retaining, or filtering out a broad range of substances (e.g., nutrients, sediments, organic wastes). By storing and slowly releasing water, wetlands help reduce the impacts of floods and erosion, as well as help replenish groundwater and stream flow during dry periods. Wetlands are also of great recreational value to bird watchers, hunters, fishermen, and nature lovers.

Only 10 states provided information on the support of designated uses for 1.8 million acres of wetlands assessed in their 2004 reports—a tiny portion of the nation's estimated 107 million acres. States identified 30% of these assessed acres as impaired. Organic enrichment/oxygen depletion, sediment, and turbidity were the leading causes of wetland degradation in these six states. Agriculture, unknown/unspecified sources, and atmospheric deposition were listed by the states as top contributors to impairment.

Section III of this report discusses plans for an upcoming National Wetland Condition Assessment.

III. Probability Surveys of Water Quality

EPA, other federal agencies, and the states have embarked on a cost-effective approach to assess status and track trends in the quality of the nation's waters: probability-based surveys that complement existing monitoring and assessment programs and add to our understanding of national, regional, and local water quality conditions. Probability surveys are designed to yield unbiased estimates of the condition of a whole resource (such as lakes or rivers and streams) based on a representative sample of waters. These surveys are designed to answer key questions asked by Congress, the public, and decision makers, such as

- Is water quality improving?
- What is the extent of waters that support healthy ecosystems, recreation, and fish consumption?
- How widespread are the most significant water quality problems?
- Are we investing in restoration and protection wisely?

Several national probability-based studies have already been completed, and several more are underway.

Understanding the Value of Probability-based Surveys and the National 305(b) Report

Although some of the findings of the national 305(b) report appear similar to the findings of the national, probability-based coastal and streams surveys, there are many differences in the scope of these reports and how they are best used to inform water quality management.

Probability surveys provide consistent environmental indicators of the condition of the nation's water resources, much as economic indicators report on the health of the nation's economy. Their design ensures that results represent the population of all waters of a certain type across the United States, and their consistent sampling methods ensure that results can be aggregated into regional and national indicators of the health of the resource. The survey results quantify, with documented confidence, how widespread water quality problems are across the country and estimate the extent of waters affected by key stressors. This helps set priorities for water resource protection and restoration. Nationally consistent surveys provide a standardized measure for tracking changes in the condition of the nation's waters over time and for evaluating, at a broad scale, progress in investments to protect and restore water quality.

In contrast to the probability surveys, this national 305(b) report summarizes information reported by states for only a portion of waters (approximately 16% of U.S. river and stream miles, 39% of lake acres, and 29% of bay and estuarine square miles). It tallies state findings based on data collected using a variety of sampling methods and parameters; water quality standards and interpretation methods; extrapolation methods; and time periods. The strength of the 305(b) report is that it provides useful information on the nature of water quality problems identified by state monitoring programs; documents the amount of waters assessed and unassessed; and supports the identification of specific waters not meeting water quality standards; therefore, it helps states set priorities for these waters.

National Coastal Assessment

The National Coastal Assessment surveys the condition of the nation's coastal resources. The results of these surveys have been compiled into the *National Coastal Condition Report*

series. The states, EPA, and partner agencies — NOAA, USGS, and the U.S. Fish and Wildlife Service (FWS) — issued the first three reports of the *National Coastal Condition Report* series in 2001, 2005, and 2008. These reports include evaluations of 100% of the nation’s estuaries in the contiguous 48 states and Puerto Rico. Federal, state, and local agencies collected samples using nationally consistent methods and a probability-based design to assess five key indices of coastal water health.

The *National Coastal Condition Report III* finds that the overall condition of the nation’s coastal waters is generally fair and has improved slightly since the 1990s. This rating is based on five indices of ecological condition: a water quality index (calculated based on ratings for dissolved oxygen, chlorophyll *a*, dissolved inorganic nitrogen, dissolved inorganic phosphorus, and water clarity), a sediment quality index (calculated based on ratings for sediment toxicity, sediment contaminants, and sediment total organic carbon), a benthic index, a coastal habitat index, and a fish tissue contaminants index. For each of these indicators, a score of good, fair, or poor was assigned to each coastal region of the United States. Ratings were then averaged to create the overall regional and national scores illustrated in Figure 10, which uses “traffic light” color scoring. Based on the findings of this survey, fifty-seven percent of the area of the nation’s estuaries and coastal embayments are in good condition for the water quality index, 6% are in poor condition, and 35% are in fair condition.

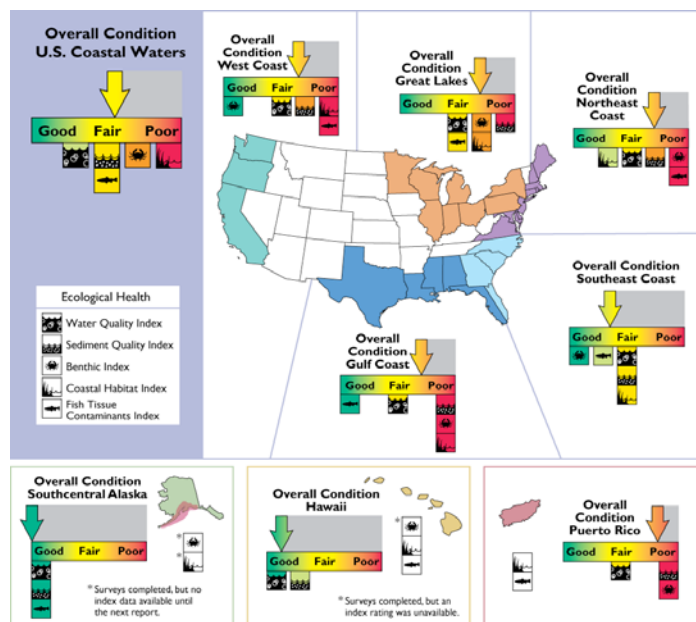


Figure 10. Findings of the *National Coastal Condition Report III* (U.S. EPA, 2008).

The indices that show the poorest condition are coastal habitat and benthic condition. Two of the individual component indicators of the water quality index generally show the best condition —dissolved oxygen and dissolved inorganic nitrogen.

In 2010, EPA and its partners expect to undertake a new survey of coastal waters and expect to report survey results in 2012. For more information on the *National Coastal Condition Report* series, go to <http://www.epa.gov/nccr/>.

The Wadeable Streams Assessment

The Wadeable Streams Assessment, a survey of the biological health of the nation’s wadeable streams, was launched by EPA and the states to provide a national baseline of stream water quality based on conditions at approximately 1,300 randomly selected sites across the conterminous United States. With support from EPA, state water quality agencies sampled

streams using the same methods at all sites. Crews collected macroinvertebrates to determine the biological condition of streams. They also measured key chemical and physical indicators that reveal stress or degradation of streams. The Wadeable Streams Assessment reports on four chemical indicators (i.e., phosphorus, nitrogen, salinity, and acidity) and four physical condition indicators (i.e., streambed sediments, in-stream fish habitat, riparian vegetative cover, and riparian disturbance).

The Wadeable Streams Assessment found that 42% of U.S. stream miles are in poor biological condition compared to best-available reference sites in their ecological regions, 25% are in fair condition, and 28% are in good condition (Figure 11). The confidence level for these key findings of biological quality is $\pm 2.8\%$. Five percent of U.S. stream miles were not assessed because the New England states did not include first order streams in the sample design.

The study was designed to examine eight key stressors. The most widespread stressors observed across the country and in each of the three major regions are nitrogen, phosphorus, riparian disturbance, and streambed sediments (Figure 12).

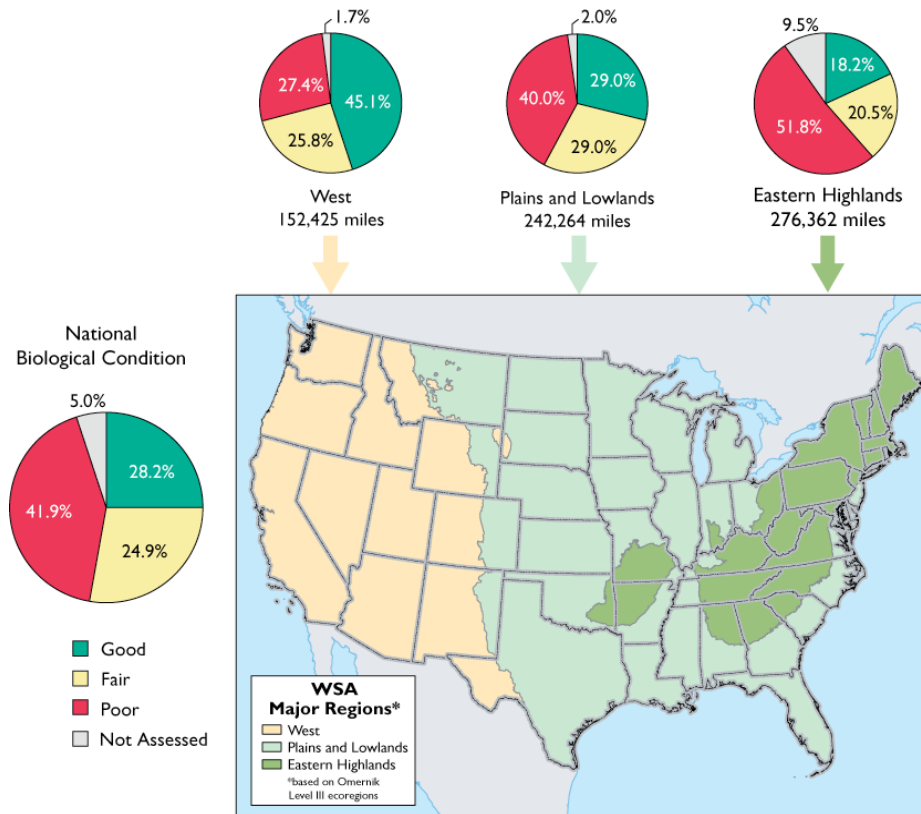


Figure 11. Biological quality of the nation's streams (U.S. EPA, 2006).

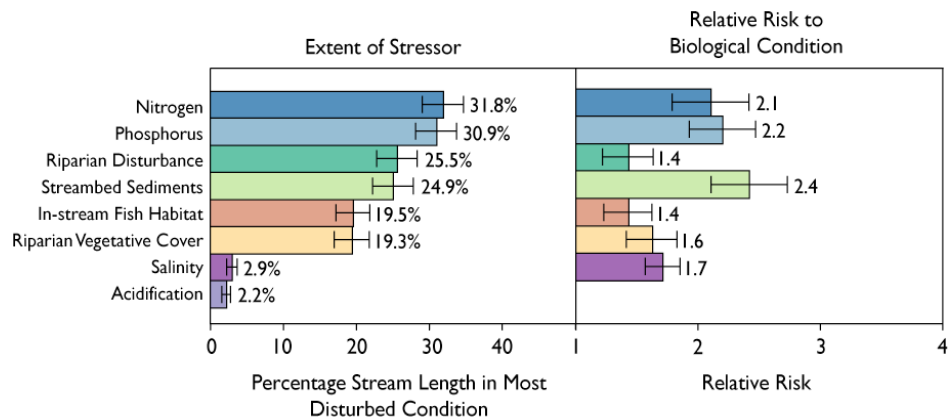


Figure 12. Extent of streams rated poor for aquatic stressors, and increase in risk of poor biology in streams rated poor over streams rated good for each stressor (U.S. EPA, 2006).

These stressors can degrade stream conditions for fish and other aquatic life. Nitrogen and phosphorus are nutrients that, when present in excess amounts, can increase the growth of algae, decrease levels of dissolved oxygen and water clarity, and degrade stream habitat. Excess streambed sediments can smother habitat for aquatic organisms. Riparian disturbance is evidence of human activity alongside streams, such as pipes, pavement, and pastures. The survey found that increases in nutrients and streambed sediments have the highest impact on biological condition, i.e., streams scoring poor for these stressors are twice as likely to have poor biological condition as streams that score in the good range for the same stressors. For more information on the Wadeable Streams Assessment, go to <http://www.epa.gov/owow/streamsurvey>.

Survey of the Nation's Lakes

In 2007, EPA and its state partners completed the field sampling season for the Survey of the Nation's Lakes, a baseline assessment of the condition of the nation's lakes, ponds, and reservoirs. More than 900 lakes were sampled over the course of a summer for this survey (see Figure 13). The population of lakes to be sampled was comprised of natural and man-made freshwater lakes, ponds, and reservoirs that were greater than 10 acres, at least one meter in depth, and located in the conterminous United States. The survey does not include the Great Lakes, the Great Salt Lake, natural saline systems, or treatment and disposal ponds. In order to examine potential trends in water quality, a representative subset of lakes from EPA's 1972 National Eutrophication Survey was included.

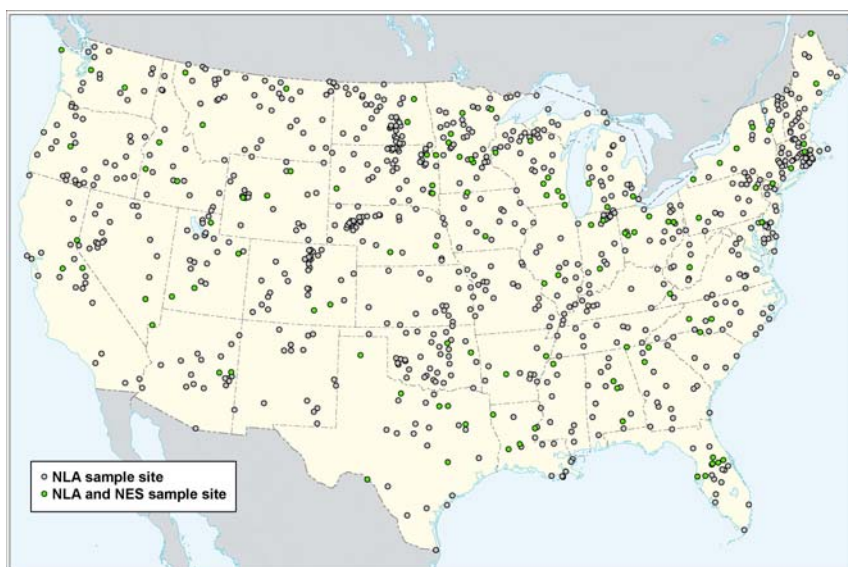


Figure 13. Sampling locations for the survey of the nation's lakes.

Key indicators sampled for the Survey of the Nation's Lakes included the following:

- Trophic indicators, such as *in situ* temperature and dissolved oxygen profiles, water chemical quality, nutrient concentrations, chlorophyll *a* levels, transparency measured by Secchi disk, turbidity, and color
- Ecological integrity indicators, such as sediment diatom abundance, diversity, and trends; phytoplankton abundance and diversity; zooplankton abundance and diversity; shoreline physical habitat conditions; and benthic macroinvertebrate abundance and diversity

- Recreational indicators, such as pathogen (*Enterococci*) concentrations, algal toxin (microcystins) levels, and sediment mercury concentrations.

Analysis of the survey's data is underway in 2008, and a report on the condition of the nation's lakes is planned for 2009.

National Rivers and Streams Assessment

EPA is undertaking a survey of the nation's rivers—including the “Great Rivers” of the United States—and intends to combine it with a second Wadeable Streams Assessment.

In 2008 and 2009, field crews expect to collect data on indicators of the following:

- Ecological condition, such as the abundance and diversity of periphyton, phytoplankton, benthic macroinvertebrates, and fish
- Recreational value, such, as fecal contaminant concentrations in water and contaminant residue in fish tissue
- Physical habitat condition, such as bank stability, channel alterations, and invasive species
- Water quality, such as basic water chemistry.

The focus will be on wadeable streams in the first year of monitoring and non-wadeable systems (e.g., rivers) in the second. Figure 14 shows the locations of the 1,350 new sites that will be sampled and the 450 sites from the 2006 Wadeable Streams Assessment will be re-sampled for this survey. A national report on rivers and streams is scheduled for 2011.

For more information on the National River and Streams Assessment, visit

<http://www.epa.gov/owow/riverssurvey/index.html>.

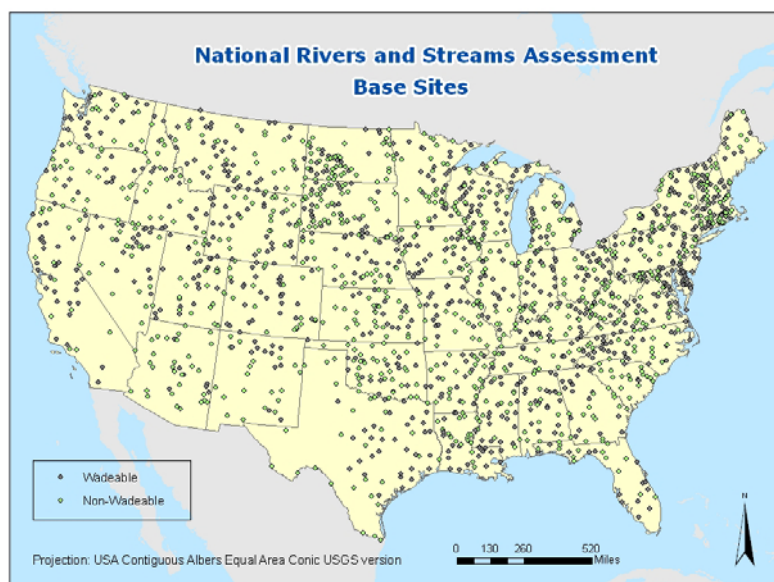


Figure 14. Sampling locations for the national rivers and streams assessment.

National Wetland Condition Assessment

In 2011, EPA and the states plan to conduct a survey (National Wetlands Condition Assessment) of the condition of the nation's wetlands, with a report planned for 2013. EPA and the states are working with the FWS to design the wetland assessment to ensure that it effectively

complements the FWS *Status and Trends* reports, which focus on the distribution of wetlands rather than their condition.

EPA is currently in the research phase of the National Wetland Condition Assessment and has identified several significant challenges to designing and implementing a wetland assessment on a national scale. These include designing the best sample frame and methods to support a national report; selecting efficient, scientifically valid indicators; ensuring that adequate resources are available; maintaining the resultant data; and building partnerships to most effectively use the information gleaned from the National Wetlands Condition Assessment.

EPA is coordinating a number of regional pilot projects with states, academics, and other federal agencies to test design approaches, field protocols, and indicators. EPA anticipates that in 2009, the project team will be making initial decisions on condition indicators and assessment methods that can apply across the nation's wide range of wetland types. For more information on the National Wetland Condition Assessment, visit <http://www.epa.gov/owow/wetlands/survey>.

Through the institution of regular probability surveys of all waterbody types, EPA and its partners in the states and other federal agencies expect to be able to cost-effectively assess 100% of the water resources of the United States and track trends in water quality over time. This scientifically based data will assist in the evaluation of the effectiveness of pollution-control activities and will greatly improve our ability to manage the nation's water resources.

State-Scale Statistical Surveys

More than half of the states have begun to implement state-scale statistical or probabilistic surveys to characterize the full population of a water resource type (e.g., streams, lakes). The majority of these surveys are of streams and rivers, although lakes, coastal waters, and wetlands are also surveyed.

States use probabilistic monitoring designs to develop estimates of water quality across the entire state, based on a representative sample, and to examine trends in water quality over time statewide. Probability surveys can eliminate the risk of generating a biased picture of water quality conditions; they provide information on changes in water quality over time statewide, and serve as a cost-effective benchmark of the effectiveness of the state's water quality program. Also as part of the probability assessment, a state can produce an estimate of the accuracy of its assessment results. The results also provide information on whether it would be useful to target certain waters for further assessment, or if limited resources for water quality assessment can be used more effectively in other ways.

States use targeted monitoring, on the other hand, to meet state management objectives such as identifying specific waters that are not meeting water quality standards, setting priorities for impaired waters, and tracking the restoration of individual waters. The two approaches are not expected to provide the same results because they are designed to achieve different objectives.

Comparing the results of the two monitoring designs is a useful evaluation tool for the state. For example, the statistical survey's overall description of the full population of waters

provides a useful benchmark for comparing the results of targeted monitoring activities and can help the state identify potential gaps in its targeted monitoring program.

The following are examples of how some states use probability assessments for water quality assessment reporting in 2004. It is important to note that for the 2004 reporting cycle, statewide probability assessments are still a fairly new development, and most states are only beginning to report their findings.

South Carolina

South Carolina's monitoring program includes a probability-based component to complement its targeted monitoring activities. Probability-based monitoring is conducted for streams, lakes/reservoirs, and estuaries. Each year, a new statewide set of probability-based random sites is selected for each waterbody type. These random sites are sampled on a monthly basis for one year. South Carolina's *2004 Integrated Report* (South Carolina DHEC, 2004) includes details on site selection.

South Carolina provides tables comparing assessment results from its traditional monitoring program and its probability-based assessment results for rivers and streams and for estuaries, including a discussion of the findings.

For rivers and streams, the traditional approach included data from 630 monitoring stations strategically located around the state, many of which include biological (macroinvertebrate) and chemistry data. Approximately 15,300 stream miles—or about half the state's total 29,794 stream miles—were assessed using the traditional 305(b) assessment approach.

South Carolina summarized data from a total of 58 randomly located stream sites for the probability-based assessment conclusions, 29 of which were sampled in 2001 and 29 of which were sampled in 2002 (Table 6). These sites represent the total stream miles in the state, weighted by stream size (i.e., based on the relative proportion of small headwater streams, second order or intermediate streams, and larger streams to the stream resource as a whole).

Table 6. Traditional vs. Probability-based Assessment Results for Rivers and Streams in South Carolina (South Carolina DHEC, 2004)

Use Support Category	Degree of Use Support	Percent of assessed miles in category -- traditional 305(b) approach	Estimated percent of total resource in category -- probability-based approach
Aquatic Life Use	Fully supporting	65.3%	79.0%
	Partially supporting	12.1%	5.9%
	Not supporting	22.5%	15.0%
Recreational Use	Fully supporting	59.3%	49.9%
	Partially supporting	21.5%	14.6%
	Not supporting	19.2%	35.5%

For its probability-based estuarine condition conclusions, the State summarized data from 60 randomly located estuary sites—30 sampled in 2001 and 30 sampled in 2002. These sites represent the total estuarine area in the state. Probability-based approach results were compared to the traditional approach, under which 221 square miles of South Carolina's total 401 square miles of estuaries were assessed (Table 7).

Table 7. Traditional vs. Probability-based Assessment Results for Estuaries in South Carolina (South Carolina DHEC, 2004)

Use Support Category	Degree of Use Support	Percent of assessed square miles in category -- traditional 305(b) approach	Estimated percent of total resource in category -- probability-based approach
Aquatic Life Use	Fully supporting	68.0%	75.3%
	Partially supporting	14.4%	3.0%
	Not supporting	17.6%	21.7%
Recreational Use	Fully supporting	94.1%	100%
	Partially supporting	4.5%	--
	Not supporting	1.4%	--

Indiana

In Indiana, probability-based representative samples are used to determine overall aquatic life use support, as part of the state's rotating basin approach (i.e., a plan for monitoring a subset of the state's watersheds on a rotating 5-year cycle, such that in 5 years, all watersheds have been cumulatively monitored). A stratified random sampling design is used to generate sampling sites and provide a representative sample set for each basin. A fish community Index of Biotic Integrity (IBI) is determined for each sampling location, and the results of each year's sample data are analyzed to estimate the percentage of stream miles supporting aquatic life use for each basin. This approach allows the state to make statistically valid estimates of aquatic life use support for a large geographic area (e.g., a basin) with a relatively small number of representative samples. For its 2004 *Integrated Report* (Indiana DEM, 2004), Indiana's probability-based program found that 22,157 stream miles in the state's major river basins

supported aquatic life and 13,168 miles did not support uses, for a total of 35,325 river and stream miles covered by the probabilistic assessment.

Indiana’s probability-based sampling design, known as the Watershed Monitoring Program, allows the state to predict with reasonable certainty what percentage of its rivers and streams are impaired. An individual stream or stream reach is considered assessed only when sufficiently detailed monitoring data representative of that stream are available. According to the state, the principal advantage of the probabilistic monitoring approach is that it allows the agency to meet the goals of assessing all the waters of the state (in terms of the overall quality of each basin) while providing data that can also be used to make waterbody-specific assessments.

Florida

Florida uses a three-tiered approach to monitor surface water quality, ranging from the general to the specific. Tier 1, or probability monitoring, addresses statewide and regional questions and is used to develop statistical estimates of statewide water quality based on a representative sample. It allows the state to assess 100% of the waters of the state over a 5-year period. Tier 2 addresses basin-specific and stream-specific questions (e.g., to verify waterbody impairment), and Tier 3 addresses site-specific questions, such as those associated with permits and the development of TMDLs.

The first cycle of the statewide probability assessment through the Integrated Water Resource Monitoring Network began in 2000 and was completed in 2003. The results for each basin are aggregated by waterbody type and assessed against water quality targets to assess the overall health of that type of water in the basin. Florida assessed rivers and streams, large lakes, and small lakes using this approach (see Figure 15).

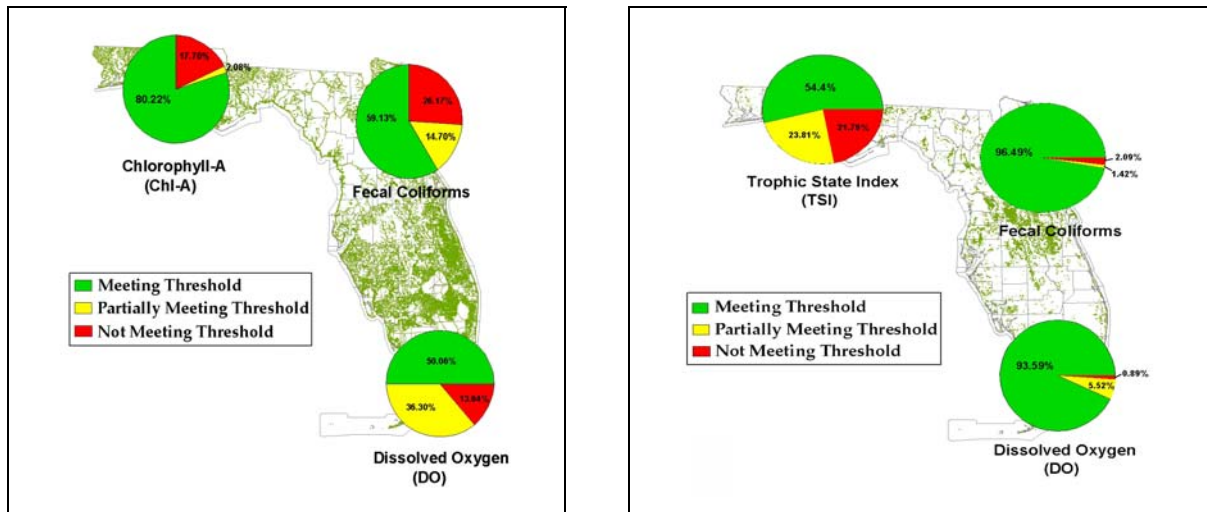


Figure 15. Summary of statewide condition for Florida rivers and streams (left) and large lakes (right) (Florida DEP, 2004).

Although the report (Florida DEP, 2004) presents preliminary results for the statewide probability assessment, it also notes the fundamental differences between this approach and the basin and stream assessments of Tier 2. Assessment targets, parameters monitored, and sample

sizes are different between the two types of assessments. The results of the probability network should be more representative of statewide conditions and may be able to shed light on any biases in the basin and stream assessments due to, for example, the location of monitoring stations. The State plans to make comparisons between both types of monitoring approaches as its probability network continues to evolve.

IV. Future Reporting

In March 2003, EPA issued guidance describing the basic elements of a state monitoring and assessment program. In response to this guidance, states have prepared long-term strategies that address comprehensive monitoring of all water types, including those for which little data currently exist. Along with the traditional, targeted monitoring approach, which describes the condition of individual waters of concern, probability surveys are an important component of comprehensive water monitoring programs, providing a cost-effective means of assessing and reporting on status and trends in overall populations of waters (e.g., streams and rivers, lakes). In the future, 305(b) reports will be able to provide statistically valid water quality data that is comparable across states.

The states and EPA are taking steps toward streamlining and improving water quality monitoring and assessment by integrating monitoring and reporting requirements under sections 305(b) and 303(d) of the Clean Water Act (see the section *Background, Integrated Water Quality Reporting* of this report). EPA has issued guidance to the states to clarify reporting requirements for the 2008 reporting cycle and has established a goal that all 50 states and 6 territories and jurisdictions use the integrated reporting format by 2008. EPA continues to promote this comprehensive assessment approach to improve the states' ability to track both programmatic and environmental goals of the Clean Water Act, and ideally, to increase the pace of achieving these important environmental goals. (See <http://www.epa.gov/owow/tmdl/> for more information on EPA's national water quality reporting guidance.)

Electronic reporting of water quality information is a continuing EPA priority and involves a significant commitment at the state and national levels. EPA and the states are working to ensure that each assessed watershed and waterbody is identified using a consistent national surface water locational system, the National Hydrography Dataset (see <http://nhd.usgs.gov/> for more information), and that electronic reporting continues to improve. EPA intends to continually adapt and improve the ATTAINS database to reflect new reporting requirements and the full range of state monitoring activities, including state-scale probability-based surveys, and will continue to fully support state efforts to adopt electronic reporting. This commitment to providing more comprehensive, easily shared water quality information will help managers and the public make more informed decisions about the future of our waters.

V. References

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