

**Attachments to the Comments of Waterkeeper Alliance, et al. on  
Proposed Revised Definition the of “Waters of United States”**

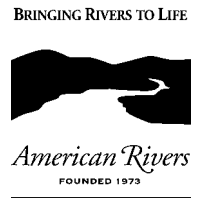
**Docket ID No. EPA-HQ-OW-2021-0328**

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**Volume 4 of 6**

**Attachments 7-10**

# ATTACHMENT 7



Appalachian Center for the  
Economy and the Environment



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ENVIRONMENTAL DEFENSE  
finding the ways that work



## Comments for the EPA Water Docket

OW-2002-0050

# Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States"

April 16, 2003  
(corrected copy – April 22, 2003)

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## **PART ONE – Response to ANPRM**

### **I. INTRODUCTION**

These comments, along with the attached exhibits, represent the views of the National Wildlife Federation, Natural Resources Defense Council, Earthjustice, American Rivers, Sierra Club, Ocean Conservancy, Defenders of Wildlife, Appalachian Center for the Economy and the Environment, National Audubon Society, Environmental Defense, and Clean Water Action in response to the questions and requests for comment contained in the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” (hereafter “ANPRM”), 68 Fed. Reg. 1991, January 15, 2003(c)<sup>1</sup> published by the Environmental Protection Agency and the Department of the Army, Corps of Engineers (hereinafter “the agencies”), ID No. OW–2002–0050.

It is customary when submitting comments in response to an ANPRM or proposed rulemaking to state appreciation for the opportunity to comment on the matter at hand. However, in this instance we think it is important to state at the outset that our organizations do not view this comment process as a welcome “opportunity” but instead as an unwelcome necessity created by the agencies’ unnecessary initiation of a process to rewrite the rules of the Clean Water Act.

Congress passed the Clean Water Act more than 30 years ago to “restore and maintain the chemical, physical and biological integrity of the nation’s waters.” While the law has had many successes, an enormous amount of work remains to be done before our country meets this important and common sense goal. Rather than seizing on the task at hand, the agencies responsible for protecting the nation’s waters have instead presented the American public with the absurd suggestion that the jurisdictional scope of the Clean Water Act should be narrowed by creating a regulatory category of so-called “isolated” waters and leaving those waters outside the protections of the Act.

This proposal is flatly contrary to the letter, purpose and original intent of Congress in 1972 and in subsequent Congresses that amended the Act but reaffirmed its scope. It represents terrible public health, environmental and economic policy, and is scientifically indefensible. It is not justified by the agencies’ legal arguments that cannot withstand honest scrutiny. It would set environmental policy back by decades, as it is the most sweeping effort to restrict Clean Water Act protections made by any administration since the law was passed.

We begin our comments with a discussion debunking the claim made in the January 15 notice that a rulemaking is necessitated by the U.S. Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (hereafter “*SWANCC*”) 531 U.S. 159

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<sup>1</sup> The comment deadline was extended from March 3 to April 16, 2003 by notice in 68 Fed. Reg. 9613 (February 28, 2003).

(2001). In fact, nothing in the *SWANCC* decision compels any change to the longstanding definition of waters of the United States used by both EPA and the Corps, as the U.S. Department of Justice has argued consistently in briefs filed in federal courts in the two years since the *SWANCC* decision. We also seek to correct the skewed presentation of post-*SWANCC* case law that is contained in the January 15 ANPRM and attached Guidance. Our comments make clear that both the ANPRM and Guidance go far beyond any change in law or policy necessitated by the narrow holding in *SWANCC*.

We next provide a short summary of the legislative history of the Clean Water Act illustrating the well-established fact that Congress intended the 1972 amendments to the Federal Water Pollution Control Act to broadly protect waters of the United States, and rejected a proposal to narrow the scope of § 404 of the Act in 1977.

We then provide responses to the questions and requests for information that we have identified in the ANPRM.

Following the responses to those questions and requests for information, we discuss the potential implications of the changes being considered for the effectiveness of several of the key provisions of the Clean Water Act, as well as other statutes including the Safe Drinking Water Act and the Endangered Species Act. We then look at the implications of withdrawing Clean Water Act protection for two important ecological regions – Alaska’s North Slope and the Appalachian highlands.

Finally, in Part Two of these comments, we provide comment on the Guidance for EPA and Corps field staff included as an attachment to the ANPRM.

We hope that EPA and the Corps will consider these comments, as well as the tens of thousands of comments from the public, state agencies, hunters and anglers, scientists and others opposing a rulemaking and will abandon this misguided and monumentally destructive project at the earliest possible date.

## **II. THERE IS NO NEED FOR RULE CHANGES**

### **A. THE ADVANCED NOTICE OF PROPOSED RULEMAKING AND GUIDANCE, NOT *SWANCC*, CREATE UNCERTAINTY IN CWA JURISDICTION**

The central premise of the ANPRM is that although the scope of *SWANCC* is clear on its face, it somehow “calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the ‘Migratory Bird Rule’ or other rationales of 33 C.F.R. § 328.3(a)(3)(i)-(iii).” 68 Fed. Reg. 1993. Contrary to the ANPRM’s assertion, neither *SWANCC* itself, earlier or subsequent judicial decisions, nor EPA’s now longstanding and consistent interpretations of *SWANCC*, create any uncertainty over the scope of the CWA’s jurisdiction. The only uncertainty that has been introduced since the *SWANCC* decision was issued is the issuance of the ANPRM and its accompanying Guidance and a handful of

aberrant judicial decisions, all of which EPA has opposed and/or appealed. Because the ANPRM and the new Guidance do not further the public's interest in clarifying what waters are subject to CWA jurisdiction and instead create uncertainty not projected by *SWANCC*, the environmental commenters request that EPA take no further rulemaking action and that EPA and the Corps withdraw the informal Guidance.

EPA's contention that *SWANCC* invites the agency to reconsider its longstanding definition of "waters of the United States" to include intrastate waters which could affect interstate or foreign commerce is not supported by *SWANCC*'s analysis. In *SWANCC*, the Supreme Court applied the CWA's definition of waters to a specific set of facts. It is clear that, in those specific facts — "isolated," intrastate, non-navigable waters only used by migratory birds — the CWA does not apply. However, it also is clear that the CWA does apply to any waters that fall within EPA's and Corps' published definition of "waters of the United States." Indeed, it remains possible that even the "isolated" ponds in *SWANCC* are waters governed by the CWA. *SWANCC*, 2001 WL 312372\*1 (7<sup>th</sup> Cir. 2001). Thirty years of remarkably consistent case law and administrative decisions create a jurisdictional certainty perhaps unparalleled in environmental law. For EPA to proceed with a rulemaking that turns its back on those many decisions will be the only real source of uncertainty regarding the CWA's jurisdictional scope.

1. *SWANCC* Does Not Call Into Question The CWA's Jurisdiction Over "Isolated," Intrastate, Non-Navigable Waters Based On 33 C.F.R. § 328.3(a)(3)(i)-(iii) Or 40 C.F.R. § 122.2

The Court in *SWANCC* limited its holding to the facts before it: "We hold that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner's baffle site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents [the Army Corps of Engineers] under §404(a) of the CWA." 121 S. Ct. at 684. *SWANCC* does not question in any way CWA jurisdiction if regulatory bases *other than* use by migratory birds are present. *United States v. Krilich*, 152 F. Supp.2d 983, 988 (N.D. Ill. 2001), *aff'd* 209 F.3d 968 (7<sup>th</sup> Cir. 2000). See *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336, 343 (2001). Nor does *SWANCC* necessarily foreclose CWA jurisdiction based upon use by migratory birds where other connections to "navigable waters" may also generally be present. Hence, *SWANCC* does not question any of the published criteria set forth at 33 C.F.R. § 328.3(a)(3)(i)-(iii).

The Supreme Court's concern that the presence of migratory birds on isolated, nonnavigable, intrastate waters was insufficient to fall within "navigable waters" as defined by the CWA does not touch on subparagraphs (i) through (iii) of 33 C.F.R. § 328.3(a)(3)(i)-(iii) or its EPA counterpart at 40 C.F.R. § 122.2 ("waters of the United States")(c). Neither of those provisions define waters of the United States based solely on their use by migratory birds. As discussed below, the reasoning of both *Riverside Bayview* and *SWANCC*, and the underlying CWA, clearly support the Corps' and EPA's inclusion as "waters of the United States" those waters actually or potentially used by interstate and foreign travelers for recreational purposes; by persons engaged in fishing or harvesting shellfish that may be sold outside the state where the harvesting occurred or; by interstate industries for industrial or other purposes. Indeed, there is no indication that any other use besides migratory birds was made of the ponds at issue in *SWANCC*. 121 S. Ct. at 678-



79. Thus, had the Corps produced evidence of actual or potential use of those ponds by out-of-state hunters or anglers, there is nothing in *SWANCC*'s rationale that would preclude CWA jurisdiction. This was recognized by the Seventh Circuit's remand of the decision back down to the district court. *SWANCC*, 2001 WL 312372\*1 (7<sup>th</sup> Cir. 2001) ("If the district court concludes that the Corps' authority in this case rests solely on the Migratory Bird Rule, it must dismiss the action. If it finds another proper basis for jurisdiction, then it shall conduct further proceedings . . ."). As a result, EPA should leave 33 C.F.R. § 328.3(a)(3)(i)-(iii) as is, as currently implemented by existing cases and agency decisions.

2. *SWANCC* Does Not Call Into Question The CWA's Jurisdiction Over Non-Navigable Tributaries To Navigable Waters

Although the ANPRM does not initially suggest that the *SWANCC* decision creates uncertainty regarding CWA jurisdiction over non-navigable tributary waters, the ANPRM subsequently hints at such an impact in the Guidance and by requesting comments on whether to define "isolated waters" and impacts to implementing TMDLs. 68 Fed. Reg. 1994, 1995, 1997. Despite those hints, *SWANCC* does not question CWA jurisdiction over any non-navigable, tributary waters. *SWANCC* does not question 33 C.F.R. § 328.3(a)(5) or the well-settled case law holding that CWA jurisdiction extends to tributaries of navigable waters as well as wetlands adjacent to such tributaries. Indeed, by reconfirming *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Supreme Court remains clear that tributary waters, even if they are non-navigable wetlands, are "waters of the United States."

Since the issuance of the *SWANCC* decision, case law is essentially unanimous in holding that non-navigable tributaries that ultimately flow, albeit for long distances and through natural and man-made channels, are waters of the United States governed by the CWA. See *Headwaters, Inc. v. Talent*, 243 F.3d 526, 533-34 (9<sup>th</sup> Cir. 2001); *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, 209 F. Supp.2d 1059, 1074-76 (2002); *United States v. Buday*, 138 F. Supp.2d 1282, 1295 (D. Mont. 2001); *Idaho Rural Council v. Bosma*, 143 F. Supp.2d 1169, 1178 (D. Idaho 2001); *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 953, 954-55 (9<sup>th</sup> Cir. 2002); *United States v. Interstate Gen'l Co.*, 152 F. Supp.2d 843, 847 (D.Md. 2001), *aff'd* 2002 WL 1421411 (4<sup>th</sup> Cir. July 2, 2002) (unpublished decision) [*on remand from United States v. Wilson*, 133 F.3d 251 (4<sup>th</sup> Cir. 1997)]; *Aiello v. Town of Brookhaven*, 136 F. Supp.2d 81, 119 (E.D.N.Y. 2001); *United States v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652\*5 (N.D.Ill. March 8, 2002); *Fisher v. Chestnut Mountain Resort, Inc.*, 2002 WL 433144 (N.D.Ill. March 19, 2002). These many cases continue the jurisprudence that existed prior to *SWANCC*. See *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10<sup>th</sup> Cir. 1979); *United States v. Eidson*, 108 F.3d 1336 (11<sup>th</sup> Cir. 1997); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6<sup>th</sup> Cir. 1974).

The few district court decisions that have expanded the concept of "adjacent waters" to exclude non-navigable, tributary waters improperly expand the holding in *SWANCC* and fail to appreciate that decision's reading of *Riverside Bayview*. In *Riverside Bayview*, the Supreme Court held that, in addition to other waters, waters that "tend to drain" into navigable waters are adjacent waters. 474 U.S. at 134. By definition, all tributaries not only "tend to drain" into

adjacent navigable waters, they in fact drain into such waters. Nor can it rationally be argued that a tributary is not adjacent to the waters into which it drains. More than “adjacent,” those waters are, in fact, one and the same.

It also is clear from *Riverside Bayview* that such waters need not, in fact, drain pollutants into downstream navigable waters in order for jurisdiction to attach. *Id.* Indeed, the whole purpose of jurisdiction and the issuance of a CWA permit, whether it be a dredge and fill permit or a NPDES permit, is to prevent any such discharge. *See id.* at 134 (“wetlands may serve to filter and purify water draining into adjacent bodies of water”); 133 (quoting S. Rep. No. 92-414, p. 77 (1972) (“it is essential that discharge of pollutants be controlled at the source”).

Hence, the four district court judges who have chosen to read *SWANCC* beyond its actual holding are inconsistent with *Riverside Bayview* and numerous other decisions, as EPA itself has held and argued numerous times to date. *See United States v. Rapanos*, 190 F. Supp.2d 1011 (E.D.Mich. 2002), appeal pending, Case No. 02-1377 (6<sup>th</sup> Cir.); *United States v. Newdunn Assoc.*, 195 F.Supp.2d 751 (E.D.Va. 2002), appeal pending (4<sup>th</sup> Cir.); *In re James Hamilton Needham*, 279 B.R. 515 (W.D.La.Bank.Ct. 2001), *aff’d United States of America v. Needham*, 2002 WL 1162790 (W.D.La. Jan. 22, 2002); *United States v. RGM Corp.*, 222 F.Supp.2d 780 (E.D. Va. 2002); *FD&P Enterprises, Inc. v. United States Army Corps of Engineers*, No. 99-3500 (HAA), slip op. (Jan. 15, 2003). In addition, there is one Circuit Court of Appeals decision misconstruing *SWANCC*. *See Rice v. Harken*, 250 F.3d 264 (5<sup>th</sup> Cir. 2001) (rehearing denied). This aberrant ruling was opposed by the Department of Justice, which sought a rehearing of the decision.

EPA should not alter the course evidenced by its existing administrative rulings and court briefs. EPA should not proceed with any rulemaking reconsidering either 33 C.F.R. § 328.3(a)(5) or the CWA’s jurisdiction in general over all tributary waters.

3. The ANPRM’s Suggestion That *SWANCC* Creates Uncertainty Over The CWA’s Jurisdiction Beyond Its Express Holding Is Contrary To EPA’s Administrative Rulings And Litigation Positions

To date, with the exception of the ANPRM and the ill-considered Guidance, EPA has repeatedly determined through numerous formal adjudications and litigation briefs that no uncertainty regarding the scope of the CWA’s jurisdiction was left in the wake of *SWANCC*. Time and time again, EPA correctly has determined that the Supreme Court’s *SWANCC* decision was limited to the specific facts of that case and did not call into question either the jurisdictional bases identified in EPA’s and the Corps’ regulations or previous court rulings regarding CWA jurisdiction over tributary and other waters. *See, e.g. In the Matter of Bricks Inc.*, 2002 WL 31357038 (Office of the Administrator, Oct.9, 2002); *In the Matter of Wolco, Inc.*, 2002 WL 31264259 (Office of the Administrator, Sept. 9, 2002); *In the Matter of Ray and Jeanette Veldhuis*, 2002 WL 1493840 (Office of the Administrator, June 10, 2002); *In re: Larry Richner/Nancy Sheepbouwer & Richway Farms*, CWA Appeal No. 01-01 (EPA Env’tl Appeals Board, July 22, 2002); *In the Matter of C.L. “Butch” Otter*, 2001 WL 388944 (E.A.B. Apr. 9, 2001); *In the Matter of C.W. Smith et al.*, 2002 WL 257696 (EPA Office of the Administrator,

Feb. 6, 2002); *In the Matter of Crown Central Petroleum Corp.*, 2002 WL 56519 (Office of the Administrator, Jan. 8, 2002). Likewise, each of the outlier district court decisions that have attempted to read a broader ruling into *SWANCC* have done so over the express objection of EPA and/or the Corps. See Government's Briefing in *Rapanos*, *Newdunn Assoc.*, *RGM Corp.*; *FD&P Enterprises, Inc.*

4. Any Rule Attempting To Expand The *SWANCC* Decision Beyond Its Explicit Holding Will Not Clarify CWA Jurisdiction And Will Invite Uncertainty

EPA's ANPRM and Guidance unfortunately embolden dischargers' attorneys into the false belief that *SWANCC* may go beyond its explicit holding. Because it is clear that the Supreme Court's decision is limited to the specific facts of *SWANCC* and the Court's precisely stated ruling, the very act of publishing the ANPRM and Guidance has undermined the goal to which EPA claims to ascribe — regaining purportedly lost clarity on the scope of the CWA's jurisdiction. Although it cannot be denied that *SWANCC* has limited the jurisdiction of the CWA, that limitation only extends to the precise waters and rationales addressed by *SWANCC*. Even while implying uncertainty, EPA obviously understands the limited extent of the *SWANCC* decision. 68 Fed. Reg. 1994. However, by now suggesting that *SWANCC* casts doubt on other jurisdictional bases under the CWA to the extent that a proposed rulemaking may be necessary to "clarify CWA jurisdiction," EPA already is taking a position that will further undermine the clarity that now exists. 68 Fed. Reg. 1994.

As *SWANCC* demonstrates, neither EPA nor the Corps are the final arbiters of the scope of the CWA's jurisdiction. Were the agencies to change their long-settled rulings on CWA jurisdiction that were not addressed by *SWANCC* and that have been upheld by numerous other judicial decisions would simply encourage conflicting decisions amongst the many district courts and perhaps the courts of appeal. Most courts presumably would not defer to EPA's latest interpretation and instead follow existing case law. However, as EPA has seen, such a decision would encourage some district courts to judicial activism in an effort to improperly restrict application of the CWA. In any event, it is certain that, rather than clarity, a course to alter the current regulations would result in even more litigation and more uncertainty over the CWA's jurisdiction for an indefinite period of time. That scenario will be to the great detriment of EPA's ability to enforce the CWA. It also will place much greater burdens on EPA, the Corps and state agencies to implement the CWA. It likely will be even to industry's disadvantage, encouraging costly litigation that may or may not prove successful.

Just as it is improper for a lower court to base its rulings on implicit holdings of higher courts or by drawing "inferences from opinions which did not address the question at issue," it would be equally disingenuous of EPA or the Corps to begin implying hidden meanings in the *SWANCC* decision or proceeding with amendments to long standing rules upheld on numerous occasions by the courts based on perceived inferences in *SWANCC* that did not address those rules. *Texas v. Cobb*, 121 S. Ct. 1335, 1341 (2001). Certainly, such a course of action would create a relative avalanche of uncertainty well beyond the alleged uncertainty over issues not addressed by *SWANCC* that purportedly has been generated by a handful of mistaken district

court decisions and self-serving interpretations of *SWANCC* offered up by the discharger community.

5. EPA's Guidance Creates Uncertainty That is Not Otherwise Present

Unfortunately, EPA and the Corps already have taken a step to promote uncertainty by issuing their new Guidance. Dropping any pretense, the Guidance asserts, contrary to every ruling of EPA and the agency's position in numerous pending lawsuits that "in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) . . . ." 68 Fed. Reg. at 1996. In order to justify this new interpretation of the effect of *SWANCC*, EPA and the Corps appear to rely on the few district court decisions which they themselves have appealed as claimed bases of alleged uncertainty stemming from *SWANCC*. The government's own administrative decisions and court briefs make clear that it does not agree with the main premise of the Guidance, *i.e.*, that *SWANCC* creates uncertainty. The notion that a Guidance would rely on decisions that the guiding agencies are appealing for any rationale, nevermind the *raison d'être* of the Guidance, is entirely inconsistent and arbitrary. The apparent deference afforded by EPA's Guidance to the minority of court rulings attempting to expand *SWANCC*'s analysis is contrary to EPA's administrative rulings and litigation positions, not to mention numerous pre- and post-*SWANCC* court decisions. By undermining its own well-established positions, EPA and the Corps create, rather than limit, uncertainty. As a result, the best way for EPA to promote certainty is to withdraw the "clarifying" Guidance and abandon its consideration of a new rulemaking defining "waters of the United States."

B. THE LEGISLATIVE HISTORY DEMONSTRATES CONGRESS' INTENT THAT THE CWA APPLY FULLY TO ALL TRIBUTARIES TO NAVIGABLE WATER, HEADWATER STREAMS, AND "ISOLATED" WATERS

1. The 1972 Act

The ANPRM suggests revisions to the existing Clean Water Act definition of "waters of the U.S." that are entirely inconsistent with the letter, purpose, and scope of the 1972 Clean Water Act. That law was enacted with the purpose of eliminating pollution of the nation's waters – a purpose that can only be effectuated if the law is comprehensive, as Congress clearly recognized 30 years ago. The existing and long-standing regulations defining the jurisdictional scope of the Act implement this Congressional purpose. Any effort to limit the scope of the Act by administrative action is inconsistent with the law and would leave waters Congress clearly meant to include outside the scope of Clean Water Act protection.

- a. In passing the Clean Water Act in 1972, Congress established broad new authority to restore and protect all waters, and articulated equally broad new jurisdictional authority to do so

The Clean Water Act was adopted in 1972 as the Federal Water Pollution Control Act Amendments of 1972.<sup>2/</sup> With the passage of the Clean Water Act, the United States made a national commitment to comprehensively control water pollution.

Before the Clean Water Act, Congress passed the original Federal Water Pollution Control Act (FWPCA).<sup>3/</sup> Its first efforts were limited to providing technical assistance to states, partial financing of municipal sewage treatment works and authority to bring public nuisance lawsuits to abate interstate water pollution when all other means failed. States were left to establish treatment requirements for pollution sources and to enforce them.

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 1960s that it caught fire on more than one occasion. Lake Erie itself became so polluted from municipal and industrial waste and agricultural runoff that it supported algae blooms forty miles long and was projected to become biologically dead. Spills off the coast of California blanketed hundreds of miles of coastline with oil. Waterways in many cities across the country were reduced to sewage receptacles for industrial and municipal waste. The rate of wetlands loss was approximately 450,000 acres per year.<sup>4/</sup> Leaving the problem to individual states to resolve was not working.

Public outcry demanded a strong response. There was a general – and accurate – perception that past approaches relying on state-by-state water quality standards alone 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.

The 1972 Act, passed as an amendment to the existing FWPCA, was universally described as the first truly comprehensive federal water pollution legislation.<sup>5/</sup> As stated by Senator Randolph, Chairman of the Senate Committee on Public Works: "It is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the

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2 Pub. L. No. 92-500, 86 Stat. 816.

3 Pub. L. No. 80-845, 62 Stat. 1155 (1948).

4 Frayer et.al. Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950sto 1970s," USFWS National Wetlands Inventory (April 1983)

5 S. Rep. Non 92-414, p. 95 (1971).

environment.”<sup>6/</sup> Congressman Blatnik, Chairman of the House Public Works Committee characterized it as a “landmark in the history of environmental legislation.”<sup>7/</sup>

The law’s comprehensive nature was largely in recognition that existing state and federal attempts to address pollution were wholly inadequate. As Senator Edmund Muskie, the floor manager of the bill in the Senate, told the Senate when introducing the bill that was to become the new Clean Water 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.<sup>8/</sup>

b. The Goals and Purposes of the Act Indicate Congressional Intent to Assert Federal Authority to the Full Extent Allowed by the Commerce Clause

With the passage of the Clean Water Act, Congress articulated one of the broadest ecosystem restoration and protection aspirations in all of environmental law. This objective, to reverse the many years of degradation of the nation’s waters and to make them again capable of supporting aquatic life and recreation, is far removed from the limited goal of protecting navigation as in earlier laws like the Rivers and Harbors Act of 1899,<sup>9/</sup> or largely limiting itself to pollution in interstate waters as in the earlier iterations of the Federal Water Pollution Control Act<sup>10/</sup>. 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.”<sup>11/</sup>

“To achieve this objective,”<sup>12/</sup> Congress lists seven goals, each of which indicate concern for values other than navigability. The goals of the law, including “protection and propagation of fish, shellfish, and wildlife,” “recreation in and on the water,” elimination of “the discharge of toxic pollutants in toxic amounts,” and “programs for the control of nonpoint source pollution”

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6 2 Legislative history of the Water Pollution Control Act amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress) Ser. No. 93-1, p. 1269 (1971).

7 *Id.*

8 117 Cong. Rec. 17397 (daily ed. Nov. 2, 1971).

9 Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1994).

10 Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

11 33 U.S.C. 1251.

12 33 U.S.C. 1251(a).

are mentioned.<sup>13/</sup> Moreover, both the House and Senate report evinced their intent to restore aquatic ecosystems as closely as possible to their natural state – an intent which clearly extends beyond the traditional intent to provide for navigation.<sup>14/</sup>

c. The Clean Water Act’s Structure Further Indicates Congressional Intent to Assert Jurisdiction Broadly Over “Waters of the U.S.”

The structure as well as the letter of the law reveals that the drafters of the 1972 Clean Water Act understood that discrete components of aquatic ecosystems cannot be viewed in isolation, and must be more properly viewed as interrelated parts of connected hydrological and ecological systems and cycles.

The Act commands agencies to give “due regard” to “improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife [and] recreational purposes.”<sup>15/</sup> And generally, Congress directed federal agencies in § 102 to “develop comprehensive programs for preventing, reducing or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.”<sup>16/</sup>

In passing the Clean Water Act of 1972, Congress targeted its statutory amendments at the broadest of goals, and the scope of statutory jurisdiction must be read with these purposes and objectives in mind. The purposes for which the Clean Water Act was passed, and the structure of the Act itself clearly indicate that Congress was concerned with protecting all waters of the United States, not merely those used or implicated by navigation. This understanding of the scope of the Act is additionally supported by the legislative history of the definition of the term “navigable waters.”

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13 See CWA 1251.

14 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. Similarly 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).

15 *Id.*

16 33 U.S.C. 1252.

d. The Legislative History of the Term “Navigable Waters” Indicates Congressional Intent to Broadly Cover Waters of the United States, Not Just Traditionally Navigable Waters

Congress chose to broadly define the waters covered by the Act. Congress accomplished this goal by redefining the operative term “navigable waters,” which it borrowed from the Rivers and Harbors Act, in a manner that reached far beyond the limited category of traditionally navigable waters. As both the statute and the legislative history make clear, “navigable waters” was broadly defined by Congress and intended to be interpreted that way in order to achieve the numerous objectives articulated throughout the Act that do not pertain to navigability. Congress accomplished this jurisdictional expansion by deleting the term “navigable” from the existing definition of “navigable waters.”

Both the House and Senate versions of the bills to amend the FWPCA were written to expand federal authority to control and ultimately eliminate discharges of all types of water pollution across the country.<sup>17/</sup> Both the House and Senate sought to restructure the nation’s federal authority to control water pollution while drawing upon much of the structure and language of earlier versions of the FWPCA as well as the Rivers and Harbors Act. Thus, in their respective bills, both bodies borrowed the term “navigable waters” from the RHA, and included a definition that itself used the term “navigable.”<sup>18/</sup> However, in the reports discussing their respective versions of the legislation, both the House and Senate expressed concern about potential narrow interpretations of what waters they intended to be covered by the Act.

The House Public Works Committee stated its concern as follows: “The Committee is reluctant to define the term ‘navigable waters.’ This is based on the fear that any interpretation would be read narrowly. This is not the Committee’s intent. The Committee fully intends 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.”<sup>19/</sup>

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.”<sup>20/</sup>

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<sup>17</sup> H.R. 11896, 92<sup>nd</sup> Cong. (1971); S. 2770 92<sup>nd</sup> Cong (1971).

<sup>18</sup> In the Senate, the 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, 92<sup>nd</sup> Cong. 502(h) (1971). The House bill’s definition read “The term ‘navigable waters’ means the navigable waters of the United States, including the territorial seas.” H.R. 11896, 92<sup>nd</sup> Cong. 502(8)(1971).

<sup>19</sup> *Id.*

<sup>20</sup> S. Rep No. 92-414, 92<sup>nd</sup> Cong. 77 (1971).



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 solely 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 ~~navigable~~ waters of the United States, including the territorial seas."<sup>21/</sup>

The Conference report spoke to this change, using the exact terminology of the earlier House Public Works Committee report in confirming that the term "must be given the broadest 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."<sup>22/</sup>

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 Dingell, who reported the conference committee bill to the House explained the definition in his statement:

The 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.

After reviewing the broad extent of the Commerce Clause authority, Rep. 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."<sup>23/</sup>

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<sup>21</sup> S. Rep. No. 92-1236, 92<sup>nd</sup> Cong.144 (1971).

<sup>22</sup> See S. Rep. No. 92-1236, 92<sup>nd</sup> Cong.144 (1971).

<sup>23</sup> See House consideration of the report of the Conference Committee, Oct. 4, 1972, compiled in Arnold and Porter's Legislative History of the Water Pollution Control Act Amendments of 1972, Serial No. 93-1, 93<sup>rd</sup> Cong. (1973), at 250-251.

Congress expanded the Act's jurisdictional scope in 1972 because of the new ambitious goals of the Act. For this reason, Congress chose not to retain the traditional definition of the jurisdictional term "navigable waters" from the Rivers and Harbors Act or limit its jurisdictional reach as in earlier versions of the FWCPA. Instead, Congress deleted the word "navigable" from the "navigable waters" definition of the 1972 Act, thereby asserting federal jurisdiction over all "waters of the United States."<sup>24/</sup> Congress chose to adopt a new, broader definition to encompass "waters of the United States," as necessary to achieve its stated objectives to rid the nation's waters of pollution.

## 2. The Callaway Case and the Corps' Definition of "Waters of the United States"

Prior to the 1972 amendments to the Federal Water Pollution Control Act, the Army Corps of Engineers had the authority to require permits for discharges into navigable waters and their tributaries under the Rivers and Harbors Act of 1899. After passage of the 1972 amendments, the Corps proposed revisions to its existing permitting regulations to incorporate the new authority and responsibilities it was given under § 404. The Corps proposed revisions on May 10, 1973 and finalized those revisions on April 3, 1974.

The Corps' first regulatory definition of "navigable waters"<sup>25/</sup> for purposes of implementing the 404 program was extremely narrow, applying only to traditionally navigable waters.<sup>26/</sup> On June 19, 1974, EPA Administrator Russell Train wrote to the Corps, objecting to the Corps' narrow interpretation of navigable waters and asserting that it was inconsistent with Congress' intent in the 1972 amendments, stating, "Our interpretation of 'navigable waters' within the meaning of the FWPCA does not conform to the Corps' recently issued regulation. We firmly believe that the Conference Committee deleted 'navigable' from the FWPCA definition of 'navigable waters' in order to free pollution control from jurisdictional restrictions based on 'navigability.'" <sup>27/</sup> On August 16, 1974, NRDC and NWF sued the Corps, arguing that the Corps' regulations failed to broadly protect waters of the United States as Congress intended. The United States District Court for the District of Columbia agreed that the Corps' definition was too narrow and not what Congress intended. The court ordered the Corps to rescind the part of its regulation "which limits the permit (§ 404) jurisdiction of the Corps by definition or otherwise to other than

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<sup>24</sup> The definition of "navigable water" in earlier version of the FWCPA had made express reference to navigability." 211 80 Stat. 1253.

<sup>25</sup> The Corps did not alter its regulatory nomenclature to define the term "waters of the United States" until its final rule in July, 1977. See 42 FR 37127.

<sup>26</sup> "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce (See 33 C.F.R. § 209.260 for a more complete definition of these terms)."

<sup>27</sup> Letter from Russell E. Train to General William G. Gribble, Chief, Army Corps of Engineers. June 19, 1974.

the waters of the United States.” The court also ordered the Corps to expeditiously propose regulations which reflected the broad mandate to protect all waters of the United States, as provided by Congress in 1972. (*NRDC v. Callaway*, 392 F.Supp 685 (D.D.C. 1975))

Pursuant to the court’s order in *Callaway*, the Corps proposed four alternative definitions of “navigable waters” under the 404 program in May 1975, and issued an “interim final regulation” with an expanded definition of “navigable waters” in July 1975.

The interim final regulation defined the term ‘navigable waters’ to include: coastal waters, wetlands, mudflats, swamps, and similar areas, freshwater lakes, rivers, and streams that are used, were used in the past, or are susceptible to use to transport interstate commerce, including all tributaries to these waters; interstate waters, certain specified intrastate waters, the pollution of which would affect interstate commerce; and freshwater wetlands including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to the above described lakes, rivers, and streams, and that are periodically inundated and normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.

The July 1975 rule adopted a plan to regulate these categories of waters in three phases. “Phase one began immediately upon publication of the regulation and included all waters subject to the ebb and flow of the tide and/or waters that are, were, or are susceptible to use for commercial navigation purposes (waters already being regulated by the Corps) plus all adjacent wetlands to these waters.... Phase II became effective on September 1, 1976 (originally scheduled for July 1, 1976, but postponed for 60 days by Presidential action), and included primary tributaries to the Phase I waters and lakes greater than five acres in surface area, plus wetlands adjacent to these waters. Phase III, requiring permits for discharges of dredged or fill material into all waters of the United States, became effective on July 1, 1977.”<sup>28/</sup>

The 1977 final regulations consolidated the nine categories of waters comprising the “navigable waters” in the 1975 rule down to four categories:

Category 1 – Coastal and inland waters, lakes, rivers and streams that are navigable waters of the United States, including adjacent wetlands.

Category 2 – Tributaries to navigable waters of the U.S., including adjacent wetlands.

Category 3 – Interstate waters and their tributaries, including adjacent wetlands.

Category 4 – All other waters of the United States not identified in Categories 1-3, such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

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<sup>28</sup> Quoting the July 19, 1977 preamble’s historical background discussion at 42 FR 37124.

The Corps stated in the preamble to the 1977 final rule:

“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 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.<sup>29/</sup>

Thus, the basic approach to defining waters of the United States broadly, as envisioned by Congress in 1972, was adopted into regulations by mid-1975 and received additional clarification and refinement by mid-1977. As we discuss below, the legislative history makes clear that Congress was well aware of the *Callaway* case and the Corps’ efforts to adopt a rule defining “waters of the United States.” Indeed, the litigation and subsequent rulemaking provide the critical context for understanding the importance and centrality of the Congressional debate over the proper scope of the 404 program during the 1977 amendments to the Clean Water Act.

### 3. The 1977 Amendments

The period during which Congress considered and debated amendments to the Clean Water Act in 1976 and 1977 closely followed the period when the scope and contour of the Corps’ regulations for implementing the 404 program were litigated and revised. During the 1977 reauthorization process, the regulatory battle over the Corps’ rules was mirrored by two competing approaches to amending the 404 program that were considered by the Congress.

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<sup>29</sup> Quoting 42 FR 37127-37128, (July 19, 1977)

The first approach was that taken in the bill reported out of the Senate Environment and Public Works Committee, which sought to address concerns about the implementation of the 404 program by refining and clarifying several elements of the program. The key amendments adopted by the committee included: authorizing the Corps to establish a general permit program for categories of activities involving discharges that would have minimal adverse impact on the environment (individually and cumulatively) (404(e)); clarifying a set of activities whose discharges were exempt from 404 permit requirements including “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating” and other activities (404(f)); creating a provision for delegation of administration of the 404 program, for those waters that were not “traditionally navigable,” to states with adequate programs(404(g)).

During the Senate’s floor debate on the 1977 amendments, Senator Bentsen offered an amendment to the Environment and Public Works Committee’s bill that would have amended the Act to limit the scope of § 404 to only traditionally navigable waters and their adjacent wetlands (essentially those waters that the Corps initially intended to regulate prior to the *Callaway* decision).

The Congressional record contains a long debate held before the full Senate voted whether to accept or reject the Bentsen plan to narrow the scope of the Clean Water Act protections for wetlands and other waters from discharges of dredge and fill material. It is clear from the debate that both sides agreed that the scope of the Act since 1972 had reached all waters of the United States, and that the Environment and Public Committee’s approach would not reduce the scope of protection for all waters of the United States.

As Senator Bentsen himself stated: “The committee has failed to recommend any reduction in the scope of the § 404 permit program...The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies. (Congressional Record, August 4, 1977, page 26711)(emphasis added)

Senator John Tower of Texas, a supporter of the Bentsen amendment, referred to the *Callaway* case and the Corps’ subsequent regulations when he stated: “A court decision, coupled with an administrative decision, is causing us to be faced with a regulatory scheme which covers not just the rivers of the Nation but all surface waters and wetlands of the United States.” (Congressional Record, August 4, 1977, pp. 26721-26722)(emphasis added)

Opponents of Senator Bentsen’s amendment readily acknowledged that the EPW Committee’s bill maintained the broad jurisdiction enacted in 1972, and argued why Senator Bentsen’s amendment to reduce jurisdiction of the Act should be rejected.

Senator Gary Hart of Colorado spoke at length on the shortcomings of the approach advocated by Senator Bentsen:

“The Senator from Texas has a very appealing approach because it is very simple; but, like most simple approaches to difficult problems, it is wrong, and it seeks to limit the treatment available by saying we can only control pollutants if they occur at a certain place, and not another place,

even though all those places are interrelated from an ecological and environmental point of view. The difficulty with the Bentsen amendment is that it takes a meat ax approach; and, like most other amendments that take a meat ax approach, it destroys more than it corrects....

There is a Federal and national interest in the waterways of this country. There is a national and Federal interest in waterways other than those on which a ship can be floated. That is essentially the issue here today....

The Congress can capitulate. The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country and have a tremendous adverse effect on the people of this country and on their welfare, on their crops, on many of their activities. Or we can establish a program of the sort the committee has established, which will protect all of those water systems; which will protect all of the elements of those systems, which will not permit dredge and fill activities to deposit very toxic materials into those waterways.” (Congressional Record, August 4, 1977, page 26713)(emphasis added)

Senator Robert Stafford of Vermont explained how the EPW committee sought to remedy concerns about the 404 program without reducing the broad jurisdiction established in 1972: “The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation’s waters to control pollution. This decision was the result of extensive and careful study and debate. In its report on that legislation, the Senate Public Works committee stated ‘waters move in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’ ...After extensive deliberation, the committee amendment rejects the redefinition of navigable waters. Instead, the committee amendment insures continued protection of the Nation’s waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes and similar areas that lie outside the Corps program in the so-called ‘Phase I waters.’” (Congressional Record, August 4, 1977, page 26714)(emphasis added)

Senator Chafee spoke passionately about the value of wetlands for the whole country and why Senator Bentsen’s proposal for eliminating broad federal protection for intrastate waters should be rejected: “I think it is important to bear in mind that marshes and wetlands are not a parochial responsibility or an asset; they are not a local asset; they are a national asset. They are not just confined within boundaries which happen to exist for any one of our States. The wetlands perform a vital part of the food chain for our wildlife. ... “I should like to stress that these wetlands are not something that belong to Louisiana or Rhode Island or Michigan or Minnesota. They belong to all the citizens. They are much too valuable to be abandoned to some unstable, fragmentary kind of protection. We must bear in mind that these wetlands are part of this larger system. They are not independent. They do not belong only to Minnesota, so that if Minnesota wants to fill them in, it is too bad for the Nation. We have to remember that it affects everything else downstream. There is a linkage between wetlands and streams and estuaries and rivers, and they all must live in harmony, through wise management.” (Congressional Record, August 4, 1977, pp. 26716-26717)(emphasis added)

Senator Howard Baker argued that both the EPW committee and courts recognized and were effectuating the common scientific understanding of hydrological linkage between all types of waters. “The statutory language authorizing the 404 program requires the cooperation of the Corps and EPA to insure that discharges of dredged material and fill material will not have unacceptable adverse effects on municipal water supplies, shellfish beds, fisheries, wildlife, and recreation. A fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes... Comprehensive 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. Thus, artificially limiting the jurisdiction can create a considerable competitive disadvantage for certain discharges....It is important to understand that toxic substances threaten the aquatic environment when discharged into small streams or into major waterways. Similarly, pollutants are available to degrade water and attendant biota when discharged in marshes and swamps, both below and above the mean and ordinary high water marks...Continuation of the comprehensive coverage of this program is essential for the protection for the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.” (Congressional Record, August 4, 1977, page 26718)(emphasis added).

Senator Bentsen’s amendment was defeated by a vote of the full Senate. Although the House had passed legislation amending the Act along the lines of the Bentsen amendment, when the House and Senate met in conference, the Senate approach was accepted and no reduction in the scope of the Act’s jurisdiction was enacted.

Thus, the idea of reducing the scope of the Clean Water Act’s jurisdiction, which EPA and the Corps are contemplating, and numerous industry groups are promoting, was already rejected by Congress more than twenty-five years ago.

### **III. THE FACTORS LISTED IN 33 C.F.R. 328.3(a)(3)(i)-(iii) MUST BE RETAINED AS BASES FOR CLEAN WATER ACT JURISDICTION**

The ANPRM requests comments as to whether, and if so, under what circumstances, the factors listed in 33 C.F.R. 328.3(a)(3)(i)-(iii) (“the (a)(3) factors”) or any other factors provide a basis for determining Clean Water Act jurisdiction over what the ANPRM describes as “isolated, intrastate, non-navigable waters.” 68 Fed. Reg. at 1994.

The language, purpose, and legislative history of the Clean Water Act make it clear that waters meeting the tests described in the (a)(3) factors are covered by the statute. As is discussed in detail above, the Supreme Court’s decision in *SWANCC* does not support any change to these factors or to any other element of the existing regulatory definition of “waters of the United States.”

As a result, any attempt to limit or remove Clean Water Act jurisdiction from waters meeting the tests described by the (a)(3) factors – including from the waters that the ANPRM refers to as “isolated” – would not withstand judicial scrutiny. These and other factors identified in the existing Clean Water Act regulations as providing a basis for establishing jurisdiction must remain in place.<sup>30/</sup>

A. THE CLEAN WATER ACT AND SOUND NATIONAL POLICY REQUIRE THE RETENTION OF THE JURISDICTIONAL TESTS SET FORTH IN THE (A)(3) FACTORS

The purpose and clear language of the Clean Water Act demonstrate that the Act is to be applied to all waters that support recreation, fishing, shellfishing, and commercial uses – the precise uses described by the (a)(3) factors. Protecting waters that the ANPRM describes as “isolated, intrastate, non-navigable” that meet the tests of the (a)(3) factors is essential to achieve the goals of the Clean Water Act and is sound national policy.

1. Retention of the Jurisdictional Tests Set Forth in the (a)(3) Factors is Mandated by the Purpose and Clear Language of the Clean Water Act

Both the purpose and language of the Clean Water Act make clear that Congress intended that protections be developed and provided to all waters protected by the current regulations, including specifically those used for fishing, shellfishing, recreation, and commercial uses.

The purpose – and explicit intent – of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To help achieve this purpose, the Clean Water Act further establishes an interim goal aimed directly at waters used for the purposes described in the (a)(3) factors: “it is the national goal 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.*

The purpose, interim goal, and structure of the Act make it clear that Congress was establishing a comprehensive regulatory scheme that was designed to protect and preserve aquatic

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<sup>30</sup> It is important to note that the factors enumerated in this Question 1 – the use of waters by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, and the use of waters for industrial purposes by industries in interstate commerce – are illustrative only. The long standing regulations being questioned by the ANPRM state clearly that intrastate, nonnavigable waters are protected if “the use, degradation or destruction of [the water] could affect interstate or foreign commerce including any such waters” used for recreation, fish or shellfish, or industry, as described. 33 C.F.R. § 328(a)(3) (emphasis added); see also 40 C.F.R..230.3(s)(3) and substantively similar regulatory definitions at 40 C.F.R. §§110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, Part 300, 302.3 and 401.11. That is, the three specific factors listed in the regulations are illustrative, not exhaustive as implied by the form of this first Question posed by the ANPRM.



ecosystems and their values, including providing habitat for fish, shellfish, and support for recreation.

The Clean Water Act contains numerous additional directives focused on protecting and restoring waters used for recreation, fishing, shellfishing, and commercial use. For example:

- a. Section 102 directs the Administrator of EPA to prepare or develop comprehensive programs for preventing, reducing, or eliminating pollution that give “due regard” to the “improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes.” 33 U.S.C. § 1252.
- b. Section 104 directs the Administrator to “conduct and promote, and encourage contributions to, continuing comprehensive studies of the effects of pollution, including sedimentation, in the estuaries and estuarine zones of the United States on fish and wildlife, on sport and commercial fishing, on recreation, on water supply and water power, and on other beneficial uses.” 33 U.S.C. § 1254(n)(1). Section 104 also authorizes the Administrator to make grants to “conduct basic research into the structure and function of fresh water aquatic ecosystems, and to improve understanding of the ecological characteristics necessary to the maintenance of the chemical, physical, and biological integrity of freshwater aquatic ecosystems.” 33 U.S.C. § 1254®).
- c. Section 119 directs the Administrator (through delegation) to conduct or commission studies necessary for strengthening the implementation of a comprehensive management plan for the Long Island Sound including “water quality requirements to sustain fish, shellfish, and wildlife populations, and the use of indicator species to assess environmental quality.” 33 U.S.C. § 1269(c)(2)(G).
- d. Section 120 directs the development of a pollution prevention, control and restoration plan for Lake Champlain that identifies “corrective actions and compliance schedules addressing point and nonpoint sources of pollution necessary to restore and maintain the chemical, physical, and biological integrity of water quality, a balanced indigenous population of shellfish, fish and wildlife, recreational, and economic activities in and on the lake.” 33 U.S.C. § 1270(e)(2)(A).
- e. Section 303 directs the Administrator to ensure the promulgation of State water quality standards applicable to interstate and intrastate waters. “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 . . . .” 33 U.S.C. § 1313(a) and (c).
- f. Section 303 further directs the Administrator to ensure the promulgation of Total Maximum Daily Loads and Total Maximum Daily Thermal Loads for all waters for which other Clean Water Act controls are “not stringent enough to implement any water

quality standard applicable to such waters.” 33 U.S.C. § 1313(d). Total Maximum Daily Thermal Loads are specifically required to be developed for waters where “controls on thermal dischargers under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.” *Id.* Such Total Maximum Daily Thermal Loads are to be established at levels that will “assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife.” *Id.*

g. Section 304 directs the Administrator to develop, publish, and update “criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants . . . .” 33 U.S.C. § 1314(a). This section also directs the Administrator to develop, publish, and update information on “the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water.” *Id.* Section 304 further directs the Administrator, to “develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife, and to allow recreational activities, in and on the water.” *Id.* at § 1314 (5)(B); see also § 1314(5)(A) (requiring publication of the same factors but excluding the word “indigenous” in connection with shellfish).

h. Section 304 also requires the Administrator to ensure promulgation of a list of waters within the State which, after application of required effluent limitations, “cannot reasonably be anticipated to attain or maintain . . . that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water.” 33 U.S.C. § 1314(l)(A).

i. Section 316 authorizes the Administrator to impose effluent limitations for thermal discharges “that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.” 33 U.S.C. § 1326(a).

j. Section 402 establishes the National Pollutant Discharge Elimination System, a permit program applicable to point source discharges into the Nation’s waters that is specifically designed to reduce the amount of pollution entering the Nation’s waters from, among other things, industrial and commercial enterprises. 33 U.S.C. § 1342. Discharges of pollutants into surface waters are caused primarily by industrial and commercial operations, including manufacturing, construction, resource extraction, land development, agriculture, and waste disposal. See, e.g., 40 C.F.R. Parts 403-610 (EPA effluent guidelines for 73 categories of industrial activities, filling over 1500 pages of the Code of Federal Regulations).

k. Section 404 directs EPA to establish guidelines for the disposal of dredged and fill material that “shall be based upon criteria comparable to the criteria” used in § 403(c). 33 U.S.C. § 1344(b) (emphasis added). The means that the § 403 marine-related criteria quoted below were to be adapted for waters – including intrastate, nonnavigable waters – that could be impacted by the issuance of § 404 permits. The § 403 criteria require the Administrator to promulgate guidelines for determining degradation to marine waters that “shall include”, inter alia:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(c) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

\* \* \*

(G) the effect on alternative uses of the oceans, such as mineral exploitation and scientific study.

33 U.S.C. § 1343(c).

l. Section 404(c) authorizes the Administrator to prohibit specification of a disposal site whenever the Administrator determines that “the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” 33 U.S.C. § 1344(c).

In 1987, Congress further demonstrated its intent to cover waters identified by the (a)(3) factors when it directed the Administrator to “conduct research on the harmful effects on the health and welfare of persons caused by pollutants in water” which research “shall include, and shall place special emphasis on, the effect that bioaccumulation of these pollutants in aquatic species has upon reducing the value of aquatic commercial and sport industries.” 33 U.S.C. § 1254a.

Congress also demonstrated its concerns with the affects of water pollution on fish and other aquatic life, recreational uses, drinking water, public health, agricultural and industrial uses in almost 25 years worth of predecessor legislation to the Clean Water Act. E.g., 1948 Federal Water Pollution Control Act, Pub.L. No. 80-845, 62 Stat. 1155, Chapter 758, June 30, 1948 (authorizing development of federal plans for eliminating or reducing pollution giving due regard to improvements necessary to conserve waters needed for public water supplies, fish and aquatic life propagation, recreational purposes, agricultural purposes, and industrial purposes);

Clean Water Authority Act of 1966, Pub.L. No. 89-753, 62 Stat. 1155 (1966) (authorizing procedures for abating domestic pollution that damages the health or welfare of citizens in foreign countries); Water Quality Improvement Act of 1970, Pub.L. No. 91-224, Part 1 (1970) (authorizing the President to determine the quantities of oil which would be harmful to the public health or welfare of the United States including, but not limited to, fish, shellfish, and wildlife, public and private property, shorelines and beaches).

2. Retention of the Jurisdictional Tests Set Forth in the (a)(3) Factors is Necessary to Achieve the Goals of the Clean Water Act

The Clean Water Act creates a comprehensive regulatory scheme to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). That scheme includes an explicit goal of attaining a level of water quality that “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).

Activities that degrade or destroy waters identified by the (a)(3) factors prevent the attainment of these goals for both the specific waters being harmed, and for the Nation’s waters as a whole. As is discussed in detail below, the hydrological, chemical, and biological interconnectedness of the Nation’s waters makes it clear that the Act’s goals cannot be met without protecting all of the waters covered by the current regulations. These goals certainly cannot be met without protecting the intrastate waters identified by the (a)(3) factors. As a result, the jurisdictional tests set forth in the (a)(3) factors must be retained.

3. Retention of the Jurisdictional Tests Set Forth in the (a)(3) Factors is Mandated by the Clean Water Act’s Assertion of Commerce Clause Jurisdiction Over the Nation’s Waters

On their face, the (a)(3) factors are limited to providing a basis for jurisdiction only where waters are used for purposes that could affect interstate commerce. As discussed in detail below, the activities described in the (a)(3) factors fall squarely within the scope of the Commerce Clause and do not in any way push the limits of Congressional authority or power to regulate. Those activities are well recognized to have, and in fact have, a significant affect on interstate commerce. Because the Clean Water Act has repeatedly been found to assert Commerce Clause jurisdiction over the Nation’s waters, the (a)(3) factors must be retained as a basis for determining jurisdiction, including over those waters described by the ANPRM as “isolated, intrastate, non-navigable.”

Courts have consistently held that through the Act, Congress asserted federal jurisdiction over the Nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution. E.g., United States v. Edison, 108 F.3d 1336, 1341-42 (11th Cir. 1997); Quivira Mining Co. v. EPA, 765 F.2d 126, 129-30 (10th Cir 1985); United States v. Lambert, 695 F.2d 536, 538 (11th Cir. 1983); United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979); United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 744-45 (9th Cir. 1978); United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1325 (6th Cir. 1974); Natural Resources Defense Council v. Callaway, 392 F.

Supp. 685, 685 (D.D.C. 1975); see also United States v. Riverside Bayview Homes Inc, 474 U.S. 121, 133 (1985) (“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.”)

These decisions are based, in part, on the legislative history of the Clean Water Act, which makes it clear that Congress intended that Clean Water Act jurisdiction be asserted to the maximum extent permitted under the Commerce Clause. That legislative history explicitly states that the definition of navigable waters is intended to “be given the broadest possible constitutional interpretation.” S. Rep. No.1236, 96<sup>th</sup> Cong., 2d Sess., 144 (1972), *reprinted in* 1 Leg. Hist. 327. The legislative history of the Act is discussed in detail above.

The *SWANCC* Court’s brief footnote suggesting the possibility of a less expansive reading of the Clean Water Act’s legislative history is mere dictum, and does not alter the Act’s reach. See *SWANCC*, 531 U.S. at 168 n.3. *SWANCC* is based on the Court’s decision that the plain language of Clean Water Act § 404(a) was unambiguous as applied to “petitioner’s balefill site pursuant to the ‘Migratory Bird Rule.’” *SWANCC*, 531 U.S. at 172, 174. It is well settled that where a court finds that the statutory language is clear, the court’s inquiry is at an end, and legislative history will not be considered. E.g., Toibb v. Radloff, 501 U.S. 157, 162 (1991). As a result, the *SWANCC* Court’s statement in footnote 3 concerning the Act’s legislative history is neither essential nor germane to the disposition of any issues in *SWANCC*. Consequently, that statement is dictum, and is not binding. E.g., Toibb, 501 U.S. at 162; Central Green Co. v. United States, 531 U.S. 425, 431 (2001); Tyler v. Cain, 533 U.S. 656, 663 n.4 (2001). That statement also cannot form the basis of a lower court decision, as constitutional issues cannot be defined by “inferences from opinions which did not address the question at issue.” Texas v. Cobb, 532 U.S. 162, 169 (2001). It would be equally improper for EPA and the Corps to revise the long standing rules setting forth the (a)(3) factors – rules upheld on numerous occasions – based on any perceived inferences regarding the *SWANCC* dictum.

4. Retention of the Jurisdictional Tests Set Forth in the (a)(3) Factors is Sound National Policy

Protecting all waters covered by the current regulations, including the waters described by the (a)(3) factors, through the Clean Water Act is sound National policy.

It is well documented that healthy waters are vital for the health, safety, and welfare of the American people. Healthy waters also are essential to the Nation’s economic well-being. Indeed, as EPA reported in May 2000, “the U.S. economy depends on clean water.” U.S. Environmental Protection Agency, *Liquid Assets 2000: America’s Water Resources at a Turning Point*, EPA-840-B-00-01 (May 2000) (“Liquid Assets”) at 2.

Waters that contribute to health, safety, welfare, and a vital National economy are not limited to those that either cross state borders, are traditionally navigable, or are adjacent to traditionally navigable waters. To the contrary, intrastate, non-navigable waters identified by the (a)(3) factors directly and substantially contribute to the Nation's welfare and economic vitality both in their own right and as contributors to the ecological health of all our Nation's waters.

As discussed in detail below, the Nation's waters are hydrologically, chemically, and biologically connected. As a result, failing to protect some of the Nation's waters has an adverse impact on the ecological health of the rest of the Nation's waters. Thus, all waters covered by the current regulations must be protected to achieve the Clean Water Act's goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.

The economic, health, safety, welfare, esthetic, and recreational services provided by the Nation's waters, including intrastate waters protected by the current regulations, include (but are by no means limited to) the following:

- a. Waters of the United States support and are used for numerous activities that affect the Nation's economic well-being, including: (1) as sites for transportation and infrastructure development; and for residential, commercial, and municipal construction and site development; (2) industrial production and the discharge of pollutants for industrial production; (3) agricultural production and irrigation; (4) silviculture; (5) municipal uses; (6) resource extraction; (7) energy production; and (8) fishing and shellfishing.
- b. Waters of the United States provide critical habitat for fish, birds, waterfowl, and other wildlife, and support at least the following recreational activities that are enjoyed by millions of people in the United States: (1) fishing; (2) waterfowl hunting; (3) hunting and trapping; (4) bird watching; (5) boating, canoeing, rafting, and kayaking; (6) hiking; and (7) photography and other graphic arts. These activities, along with associated travel, generate billions of dollars of income each year for the travel, tourism, recreation, and sporting sectors of the economy of the United States.
- c. Waters of the United States support and provide safe and adequate drinking water supplies. Small streams, wetlands and other waters filter water and recharge surface and subsurface drinking water supplies, and filter and remove pollutants from surface run-off before that water is released to groundwater or surface waters or is taken up by plants and animals and widely dispersed throughout the food chain. Millions of people in the United States depend on intrastate waters for these services.
- d. Clean, safe, and ample water supplies promote economic growth and human health. A 2000 *Money* magazine survey found that clean water and clean air are two of the most important factors Americans consider in choosing a place to live. *Liquid Assets* at 2, 16.

e. Degradation of waters of the United States can contaminate drinking water sources, and waters used for recreation. Such contamination increases both risks to human health and health care costs. Contaminated rivers and closed beaches also cause lost revenue for local businesses that serve tourists, anglers, and recreationists. For example, EPA reports that “at least a half-million cases of illness annually can be attributed to microbial contamination in drinking water,” and that in 1998, “2,506 fish consumption advisories or bans were issued in areas where fish were too contaminated to eat.” *Liquid Assets* at 2.

f. Degradation of waters of the United States can increase the risk of floods, threatening lives, homes, and businesses, and increasing flood damages and emergency response costs.

g. Degradation of waters of the United States can decrease the ability of waters to collect, store, and filter surface water run-off. Among other damages, this can significantly increase the amount of sediment entering navigation channels, causing increased costs to federal taxpayers and the navigation industry to maintain navigation.

**B. THE JURISDICTIONAL TESTS DESCRIBED BY THE (A)(3) FACTORS MUST BE RETAINED BECAUSE THEY ARE CLEARLY AUTHORIZED BY THE COMMERCE CLAUSE**

For at least the reasons discussed above, the (a)(3) factors must be retained as a basis for determining jurisdiction over waters, including those described by the ANPRM as “isolated, intrastate, non-navigable.” Retention of these factors is authorized by the broad jurisdictional reach of the Commerce Clause of the U.S. Constitution, which clearly covers the activities set forth in the (a)(3) factors.

Waters identified by the (a)(3) factors are clearly covered by the Commerce Clause because the factors are limited on their face to providing a basis for jurisdiction only where waters are used for purposes that could affect interstate commerce; the activities described in the (a)(3) factors undeniably do have a significant affect on interstate commerce; and applying the Clean Water Act to waters identified by the (a)(3) factors – including to those referred to by the ANPRM as “isolated” – is necessary to effectuate the Clean Water Act’s comprehensive regulatory scheme.

**1. The Commerce Clause Grants Power to Regulate Economic Activities that Pollute or Otherwise Harm the Nation’s Waters, Including Those Described by the (a)(3) Factors**

Article I, § 8 of the Constitution grants the federal government power to “regulate Commerce . . . among the several States.” The regulatory power granted by the Commerce Clause is “plenary” and as such is “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” Hodel v. Virginia Surface Mining Reclamation Ass’n, 452 U.S. 264, 276 (1981) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

The U.S. Supreme Court has made clear that the Commerce Clause empowers Congress to regulate “activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.” Hodel, 452 U.S. at 282. As Justice Stevens noted in his dissent to *SWANCC*, the Clean Water Act “is a paradigm of environmental regulation” that is “an accepted exercise of federal power.” 531 U.S. at 191 (citing Hodel, 452 U.S. at 282).

Pursuant to the Commerce Clause, Congress may regulate (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that “substantially affect” interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995); see *SWANCC*, 514 U.S. at 174. The term “commerce” has long been broadly construed to encompass “every species of commercial intercourse” that “concerns more States than one.” Gibbons, 22 U.S. (9 Wheat.) at 193.

Activities can “substantially affect” interstate commerce even if those activities are conducted wholly within one state. The Supreme Court has ruled repeatedly that even “activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.” Hodel, 452 U.S. at 277 (quoting Fry v. United States, 421 U.S. 542, 547 (1975)).

Since 1937, the U.S. Supreme Court has upheld Congressional regulation of a broad variety of economic activities that are themselves conducted wholly within one state, but that in the aggregate have a substantial affect on interstate commerce. E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (management of a steel plant); Wickard v. Filburn, 317 U.S. 111 (1942) (cultivation of wheat for personal consumption); Katzenbach v. McClung, 379 U.S. 294 (1964) (operation of a small family restaurant); Perez v. United States, 402 U.S. 146 (1971) (participation in extortionate credit transactions); and Hodel, 452 U.S. 264 (coal mining).

Importantly, activities may be regulated under the Commerce Clause even where they may have little or no affect on interstate commerce when considered in isolation. As the Supreme Court recently affirmed, “where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.” United States v. Lopez, 514 U.S. 549, 558 (1995) (citation omitted); see also United States v. Morrison, 529 U.S. 598, 609 (2000) (confirming the Commerce Clause analysis framework described in Lopez); Hodel, 452 U.S. at 277 (permitting regulation of activity which “combined with like conduct by others similarly situated, affects commerce among the several States”) (citation omitted); Wickard, 317 U.S. at 127-28 (regulating personal growth and consumption of wheat). Thus, where a specific activity is one of a class of activities properly regulated under the Commerce Clause, the courts will not exclude the specific activity from regulation because its individual impact is “trivial”. Perez v. United States, 402 U.S. 146, 154 (1971); Maryland v. Wirtz, 392 U.S. 183, 192 (1968); U.S. v. Pozsgai, 999 F.2d 719, 734 (3rd Cir. 1993).

Where economic activities are regulated, it is clear that their impacts may be aggregated to determine whether there is a substantial affect on interstate commerce. United States v. Morrison, 529 U.S. at 610. The Clean Water Act regulates activities that are obviously and



overwhelmingly economic in nature, and these activities both standing on their own and when aggregated, clearly have a substantial affect on interstate commerce.

Discharges of pollutants into surface waters are caused primarily by industrial and commercial operations, including manufacturing, construction, resource extraction, land development, agriculture, and waste disposal. See, e.g., 40 C.F.R. Parts 403-610 (EPA effluent guidelines for 73 categories of industrial activities, filling over 1500 pages of the Code of Federal Regulations). Discharges of dredge or fill material under § 404 of the Clean Water Act also are overwhelmingly economic in nature, as illustrated by Federal cases involving § 404 permits issued by the Corps. E.g., Riverside Bayview Homes, 474 U.S. at 124 (addressing permit to fill 80 acres of wetlands to prepare for construction of a housing development); Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1110 (9th Cir. 2000), cert. denied, 534 U.S. 815 (2001) (addressing permit to develop 1,000 acres that would include residential areas, a marina, hotels, and retail establishments); United States v. Deaton, 209 F.3d 331, 333 (4th Cir. 2000) (addressing permit to develop a residential subdivision); see also V. Albrecht & B. Goode, *Wetland Regulation in the Real World* (1994) (demonstrating, based on a sampling of § 404 permit applications in 1992, that the overwhelming majority of acreage for which § 404 permits are sought is intended for commercial, industrial, or other economic use).

The fact that it may be possible to identify potential instances where the discharge of pollutants or the discharge of dredge and fill material may be done for non-economic reasons has no impact on the proper jurisdictional reach of the Clean Water Act under the Commerce Clause. As discussed above, it is well settled that “where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise as trivial, individual instances of the class.” Perez v. United States, 402 U.S. 146, 154 (1971) (internal quotation marks omitted).

The Supreme Court’s decision in *SWANCC* did not alter any of these long standing Commerce Clause principles. In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. See 531 U.S. at 174; Rancho Viejo, LLC v. Norton, \_\_\_ F.3d. \_\_\_, 2003 WL 1699326 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court “expressly declined to reach” the Commerce Clause question).

2. Regulation of Waters Identified in 33 C.F.R. 328.3(a)(3)(i)-(iii) is Clearly Authorized by the Commerce Clause as Such Regulation is Necessary to Effectuate the Clean Water Act’s Comprehensive Regulatory Scheme

As discussed above, the Clean Water Act establishes a comprehensive regulatory scheme designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Also as discussed throughout this section, that scheme clearly has a very substantial impact on interstate commerce.

Under such circumstances, “Congress has the authority under the Constitution, through the intersection of the *Commerce Clause* and the *Necessary and Proper Clause*, to regulate an intrastate activity that it could not reach standing alone, if the regulation is essential or integral to

the maintenance of a larger regulatory scheme properly governing interstate commerce.” GDF Realty Investments, Ltd. v. Norton, \_\_\_ F.3d \_\_\_, 2003 U.S. App. LEXIS 5818 \*57 (5th Cir. Mar. 26, 2003) (Denis, concurring op.). See, e.g., United States v. Lopez, 514 U.S. 549, 561 (1995) (finding that regulation at issue was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated”); Hodel v. Indiana, 452 U.S. 314, 329 n.17 (finding that a complex regulatory scheme “can survive a Commerce Clause challenge without showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that when considered as a whole satisfies [the substantial effect] test.”); Maryland v. Wirtz, 392 U.S. 183, 192-93 (1968) (refusing to excise as trivial individual instances of regulation because the effect of such an excision would be to undermine the effectiveness of the regulatory program); United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942) (stating that Congress has the power to enact such regulations of intrastate activity as are “necessary and appropriate” to make the regulation of interstate commerce effective).

As discussed in detail below, 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. Because regulation of such waters is essential to the efficacy of (i.e., is necessary and proper to) the Clean Water Act’s comprehensive scheme, Congress can regulate any waters meeting the tests described in the (a)(3) factors, including those identified by the ANPRM as “isolated, intrastate, non-navigable waters.” 68 Fed. Reg. at 1994.

As a result, the (a)(3) factors, and other Commerce Clause factors, must be retained as providing a basis for Clean Water Act jurisdiction over intrastate and other waters.

3. Regulation of Waters Identified in 33 C.F.R. 328.3(a)(3)(i)-(iii) is Clearly Authorized by the Commerce Clause Because the (a)(3) Factor Activities Substantially Affect Interstate Commerce

As discussed above, the waters identified by the (a)(3) factors fall squarely within the scope of the Commerce Clause because: (1) the factors are limited on their face to providing a basis for jurisdiction only where waters are used for purposes that could affect interstate commerce; and (2) the factor activities are well recognized as having a substantial affect on interstate commerce.

The location – or in the case of the Clean Water Act, the character of the water – in which the activities take place has no bearing on whether those activities have a substantial affect on interstate commerce. If economic activities or a class of economic activities, wherever they occur, substantially affect interstate commerce, the Commerce Clause authorizes jurisdiction. As a result, the character of the water has no bearing on the authority to regulate under the Commerce Clause. See, e.g., Ho v. United States, 311 F.3d 589 (5th Cir. 2002) (approving regulation of a single asbestos removal project under the Commerce Clause because such projects affect the interstate market for commercial real estate and asbestos removal); Wickard,

317 U.S. 111 (1942) (approving regulation of subsistence wheat farming under the Commerce Clause because farming substantially affects interstate agricultural markets).

Consequently, Clean Water Act regulation is justified for any water meeting the criteria set forth in the (a)(3) factors, regardless of the classification placed on it.

We note that as agencies of the Federal government, EPA and the Corps have ready access to a significant set of data demonstrating that the activities in the (a)(3) factors have a substantial affect on interstate commerce. We request that the agencies explore that data in detail. The affects data presented below is merely illustrative.

### C. DISCUSSION OF COMMERCE CLAUSE FACTORS

#### 1. Use by Interstate or Foreign Travelers for Recreation or Other Purposes

Waters of the United States, including the intrastate waters described in 33 C.F.R. 328.3(a)(3), play an important role in supporting the substantial commerce associated with fishing, hunting, wildlife watching, and recreation. These waters provide areas necessary to recreational activities such as boating, canoeing, kayaking, and swimming; and provide vital habitat and sustenance for fish, waterfowl, birds (including migratory birds), and wildlife (whether at healthy population levels, or threatened or endangered or otherwise of concern).

Numerous courts have found that such activities have a substantial affect on interstate commerce. E.g., National Association of Home Builders v. Babbitt, 130 F.3d 1041, 1052 n.11 (D.C. Cir. 1997) (travel by tourists, students, and scientists to study or observe wildlife and threatened or endangered species has substantial effect on interstate or foreign commerce); Utah v. Marsh, 740 F.2d 799, 803-04 (10th Cir. 1984) (finding that intrastate lake was used for recreation including fishing, hunting, camping, and wildlife observation, with 2% of visitors coming from out of state); Palila v. Hawaii Dep't of Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981) (travel by tourists, students, and scientists to study or observe wildlife and threatened or endangered species has substantial effect on interstate or foreign commerce); United States v. Byrd, 609 F.2d 1024, 1210 (7th Cir. 1979) (finding that the recreational use of inland lakes has a significant impact on interstate commerce, based in part on the number of out-of-state visitors visiting the lake at issue).

The economic value of recreational use of the Nation's waters is significant. For example:

- a. "In 2001 over 80 million Americans 16 years old and older, 39% of the U.S. population, enjoyed some recreational activity relating to fish and wildlife. Expenditures by this group were \$110 billion, which was about 1.1% of the nation's Gross Domestic Product (GDP)." U.S. Fish and Wildlife Service, 2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation National Overview, Preliminary Findings (May 2002) ("FWS 2001 Survey") at 4.

b. “Almost 38 million people fished and hunted in 2001. They spent \$70 billion on their activities, including \$20 billion on trip expenses, nearly \$41 billion on equipment, and \$9 billion on licenses and fees, magazines, membership dues and contributions, and land leasing and ownership. On average, each sportsperson spent \$1,851 in 2001.” FWS 2001 Overview at 4.

c. “Fishing continues to be a favorite pastime in the United States. In 2001, 16% of the U.S. population 16 years old and older, 34 million anglers, spent an average of 16 days fishing. Freshwater fishing was the most popular type of fishing with over 28 million anglers devoting nearly 467 million angler-days to the sport. . . . Anglers spent more than \$35 billion on trips, equipment, licenses, and other items to support their fishing activities in 2001. The average expenditure per angler was \$1,046.” FWS 2001 Overview at 4.

d. “Freshwater fishing was the most popular type of fishing. In 2001, 28.4 million Americans fished 467 million days and took 365 million trips. Their expenditures for trips and equipment totaled \$21.3 billion.” U.S. Department of the Interior, Fish and Wildlife Service and U.S. Department of Commerce, U.S. Census Bureau. *2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* (“FWS 2001 Survey”) at 10.

e. “Observing, feeding, or photographing wildlife was enjoyed by 66.1 million people 16 years old and older in 2001. Among this group, 21.8 million people took trips away from home . . . for the purpose of enjoying wildlife . . . . In 2001, wildlife-watching participants spent \$38.4 billion” on trips, equipment, magazines, membership dues, and contributions made to conservation or wildlife-related organizations.” FWS 2001 Survey at 5.

f. “Of all the wildlife watching in the United States, bird watching attracted the biggest following. Forty-six million people observed birds around the home and on trips in 2001. A large majority, 88 percent (40 million) observed birds around the home while 40 percent, 18 million, took birdwatching trips.” FWS 2001 Survey at 36.

g. In 1996, sales of kayaks and canoes exceeded \$99 million. Liquid Assets at 6.

## 2. Taking of Fish or Shellfish For Sale in Interstate or Foreign Commerce

Waters of the United States, including the intrastate waters described in 33 C.F.R. 328.3(a)(3), play an important role in supporting the substantial commerce associated with the sale of fish and shellfish in interstate or foreign commerce. As EPA has acknowledged, “commercial fishing and shellfishing industries need clean wetlands and coastal waters to stay in business.” Liquid Assets at 2. The

The Supreme Court has ruled that Congress has the power to regulate the taking of fish in state waters that affect interstate commerce. Douglas v. Seacoast Prods. Inc., 431 U.S. 265, 281-82

(1977) (regulation of fishing in state waters); cf. Hughes v. Oklahoma, 441 U.S. 322 (1979) (finding intrastate harvest of minnows within reach of dormant Commerce Clause). Such an affect is quite direct when the fish and shellfish are sold directly in interstate commerce. See, e.g., Wickard, 317 U.S. 111 (approving regulation of wheat farming for personal consumption under the Commerce Clause because wheat farming substantially affects interstate agricultural markets).

The economic value of fish and shellfishing sold in interstate commerce, and of healthy waters that support those activities is substantial. For example:

- a. “Wetlands provide critical habitat during various life cycle phases for about 70 percent of all commercial fish species.” Liquid Assets at 7.
- b. “Every year, the Great Lakes, Gulf of Mexico, and coastal areas produce more than 10 billion pounds of fish and shellfish.” Liquid Assets at 2.
- c. In 1998, degradation of the Nation’s waters resulted in 2,506 fish consumption advisories or bans in areas where fish were too contaminated to eat. Liquid Assets at 2.
- d. “Following a three-year analysis of the salmon decline, the California Legislature recently concluded that rebuilding salmon runs to twice their depressed 1980s levels would provide economic benefits to the state of \$150 million a year. Full implementation of the doubling effort over several years would yield \$6 billion in net profits to the state, \$1 billion in profits to small businesses.” In 1993, Congress appropriated \$70 million towards restoration of just the Northwest salmon watersheds. Kier, W. (1994), *Fisheries, Wetlands, and Jobs, The Value of Wetlands to America’s Fisheries*, Prepared for the Campaign to Save California Wetlands at 6.

### 3. Use for Industrial Purposes by Industries in Interstate Commerce

Waters of the United States, including the intrastate waters described in 33 C.F.R. 328.3(a)(3), play an important role: in industrial production and the discharge of pollutants for industrial production; as sites for commercial construction and site development; in resource extraction; and in energy production.

The significant use of waters for industrial production is perhaps best exemplified by the National Pollutant Discharge Elimination System, a permit program applicable to point source discharges into the Nation’s waters that is specifically designed to reduce the amount of pollution entering the Nation’s waters from, among other things, industrial and commercial enterprises. 33 U.S.C. § 1342. Discharges of pollutants into surface waters are caused primarily by industrial and commercial operations, including manufacturing, construction, resource extraction, land development, agriculture, and waste disposal. See, e.g., 40 C.F.R. Parts 403-610 (EPA effluent guidelines for 73 categories of industrial activities, filling over 1500 pages of the Code of Federal Regulations).

Intrastate waters used to produce goods or products sold in interstate or foreign commerce have been found to be subject to Clean Water Act jurisdiction. See United States v. Earth Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979) (finding Clean Water Act jurisdiction over intrastate stream flowing into reservoir used to irrigate crops sold in interstate commerce); Utah v. Marsh, 740 F.2d 799, 803-04 (10th Cir. 1984) (finding Clean Water Act jurisdiction over waters of intrastate lake used for crop irrigation).

The impact on interstate commerce of industrial uses of the Nation's waters by industries in interstate commerce is significant. For example,

- a. "Manufacturers use about nine trillion gallons of fresh water every year. The soft drink manufacturing industry alone uses more than 12 billion gallons of water annually to produce products valued at almost \$58 billion." Liquid Assets at 2.
- b. While the "size and nature of American industries vary widely . . . nearly all of them share a common need – a reliable source of water to support operations." Liquid Assets at 8.
- c. In 1993, the United States produced 612,000 metric tons of peat with a value of \$16.8 million. Peat is harvested directly from wetlands, and is both exported and sold in interstate commerce. McClaskey, J.A. and S.D. Smith. 1995. Survey Methods and Statistical Summary of Nonfuel Minerals – 1993. U.S. Department of Interior, Bureau of Mines.

D. MANY OTHER FACTORS ESTABLISH CLEAN WATER ACT JURISDICTION, BUT NO RULEMAKING IS REQUIRED TO ENSURE CLEAN WATER ACT JURISDICTION BASED ON THESE FACTORS

Many other Commerce Clause factors support Clean Water Act jurisdiction, but no rulemaking is required to ensure Clean Water Act jurisdiction based on such other factors. Because the Clean Water Act asserts Commerce Clause jurisdiction, any factors that fall within the scope of the Commerce Clause already provide a basis for jurisdiction regardless of whether they are specifically listed in regulation.

Examples of "other" factors that clearly fall within the Commerce Clause include: use as habitat for threatened and endangered species; use for agriculture and silviculture; use for flood control; pollution control; and to ensure and provide clean and safe water, including drinking water. The clear Commerce Clause connections with some of these factors are described below.

1. Use as Habitat for Threatened and Endangered Species

The Commerce Clause authority of Congress to regulate activities that affect threatened and endangered species is well-established.<sup>31/</sup> Waters of the United States, including the waters described in 33 C.F.R. § 328.3(a)(3), provide vital habitat (e.g., use for breeding, rearing, feeding) for numerous threatened and endangered species of birds, fish, amphibians, mammals, reptiles, clams, snails, and plants, to name a few. Thus, healthy waters play an important role in supporting the substantial commerce associated with threatened and endangered species. And measures to regulate activities that affect those waters prevent the disruption of interstate commerce that would flow from species extinctions and by preserving the opportunity for such commerce to continue into the future. “[T]he power to regulate commerce among the several States necessarily includes and properly includes the power to preserve the natural resources that generate such commerce.” Gibbs v. Babbitt, 214 F.3d at 506.

Several courts have sustained federal measures to protect wildlife or its habitat under the Commerce Clause based upon interstate commerce in wildlife-related study and tourism.<sup>32/</sup>

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<sup>31</sup> See Gibbs v. Babbitt, 214 F.3d 483 (4<sup>th</sup> Cir. 2000) (regulation of ‘take’ of red wolves on intrastate federal and private lands is a valid exercise of Commerce Clause power because of potential economic activities that would substantially affect interstate commerce); National Association of Homebuilders (NAHB) v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998) (applying the ESA’s ‘take’ provision to a private company’s development of a city intersection is valid under the Commerce Clause because the “substantially affects” test is met); GDF Realty Investments, Ltd. v. Norton, No. 01-51099, 2003 U.S. App. LEXIS 5818 (5<sup>th</sup> Cir. March 26, 2003) (intrastate takes of listed species may be aggregated with other takes, having a substantial effect on interstate commerce); Rancho Viejo v. Norton, No. 01-5373, 2003 U.S. App. LEXIS 6218 (D.C. Cir. April 1, 2003) (applying NAHB rationale in upholding federal authority under Commerce Clause); Shields v. Babbitt, 229 F. Supp. 2d 638 (W.D. Tex. 2000) (rejecting private landowner’s claim that regulating ‘take’ of an endangered species found exclusively within Texas was beyond the reach of the Commerce Clause power); Bldg. Indus. Ass’n of Superior California v. Babbitt, 979 F. Supp. 893, 906-08 (D.D.C. 1997), appeal dismissed, 161 F.3d 740 (D.C. Cir. 1998) (FWS listing of fairy shrimp species, possibly found exclusively in California, found to be constitutional under the Commerce Clause) (citing NAHB and Palila v. Hawaii Dept. of Land and Natural Resources, 471 F. Supp. 985 (D. Hawaii 1979), aff’d, 639 F.2d 495 (9<sup>th</sup> Cir. 1985)). Cf. United States v. Bramble, 103 F.3d 1475 (9<sup>th</sup> Cir. 1997) ( application of the Bald Eagle Protection Act to purely intrastate activities is valid under the Commerce Clause because the threatened extinction of eagles substantially affects commerce).

<sup>32</sup> See, e.g., Gibbs v. Babbitt, 214 F.3d at 497 ( “The protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities.”); Bramble, 103 F.3d at 1481 (“[E]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of . . . future interstate travel for the purpose of observing or studying eagles.”); Utah v. Marsh, 740 F.2d 799, 803 (10<sup>th</sup> Cir. 1984) (sustaining application of CWA to intrastate lake under

Extinction of such wildlife species would substantially affect interstate commerce by foreclosing the opportunity for continued availability of a wide variety of species to commerce. See National Ass'n of Homebuilders, 130 F.3d at 1054 (“[R]egulation of the ‘taking’ of endangered animals is within [the] Commerce Clause power because such takings, if permitted, would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resources - biodiversity.”). This extends to species both known and unknown to generate interstate commerce. While impossible to quantify the economic impact represented by the loss of any particular species not presently used for commercial purposes, “[i]n the aggregate, however, we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.” Id. at 1053-54. See also GDF Realty Investments, 2003 U.S. App. LEXIS 5818, at \*52 (“the link between species loss and a substantial commercial effect is not attenuated”).

Of course, many diverse species directly provide readily measurable economic benefits. For example:

\*\* Coho salmon “have been targeted in recreational and commercial fisheries since the early 1800s,” 62 Fed. Reg. 24588 (1997), and intermittent streams are important refuge for juvenile coho, Leslie M. Reid and Robert R. Ziemer, *Evaluating the Biological Significance of Intermittent Streams*, USDA Forest Service, Pacific Southwest Research Station (1994), available at <http://www.rsl/psw.fs.fed.us/projects/water/2IntermitStr.htm> .

\*\* In 1996, endangered and threatened species helped to fuel a national wildlife-related recreational industry that generated \$29.2 billion in expenditures from wildlife watching alone. USFWS, 1996 National and State Economic Impacts of Wildlife Watching 2 (1998); see also Michael Milstein, Call of the Wild a Boon to Tiny Town, *Billings Gazette*, July 23, 1995, at D1 (describing economic boom associated with gray wolf reintroduction).

\*\* “[N]ortheastern North Carolina could see an increase of between \$39.61 and \$183.65 million per year in tourism-related activities, and that the Great Smoky Mountains National Park could see an increase of between \$132.09 and \$354.50 million per year.” Gibbs, 214 F. 3d at 493-94.

\*\* “According to some estimates, plant extinctions alone will cause a potential loss to the United States of more than \$3 billion in lost medicines by the year 2000.” at <http://www.defenders.org/pubs/save04.html> (citing Norman R. Farnsworth, *The Role of*

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Commerce Clause based upon interstate movement of travelers “to observe, photograph, and appreciate a variety of bird and animal life”); United States v. Byrd, 609 F.2d 1204, 1210 (7<sup>th</sup> Cir. 1979) (same based upon “number of out-of-state visitors” drawn to lake by the abundance of fish and other wildlife inhabiting them”); Palila v. Hawaii Dept. of Land and Natural Resources, 471 F. Supp. 985, 995 (D. Hawaii 1979), aff’d, 639 F.2d 495 (9<sup>th</sup> Cir. 1985) (“[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of . . . interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.”).



*Ethnopharmacology in Drug Development*, in *Bioactive Compounds from Plants* (Ciba Foundation Symposium, 1990)).

\*\* “Small communities and local economies benefit most from America's passion for wildlife. The annual migration of the sandhill crane and whooping crane brings 80,000 tourists and \$15 million to Nebraska's Platte River region each year. At Tennessee's Reelfoot Lake, bald eagle tours alone earn more than \$2 million annually. Roosting bald eagles draw 50,000 visitors to tiny Sauk City, Wisconsin, pumping more than \$1 million into the county.” *Saving America's Wildlife: Renewing the Endangered Species Act*, Section 1, available at <http://www.defenders.org/pubs/save04.html>.<sup>33/</sup>

\*\* “Salmon and steelhead fishing was once a very valuable industry to the west coast economy. As recently at 1988, according to independent economic studies, salmon and steelhead fishing in Oregon, Washington, Idaho and Northern California brought in \$1.25 billion to the regional economy and supported an estimated 62,750 family wage jobs. Since then, many salmon runs have declined because of a combination of many factors including too many dams and widespread habitat loss.” *Facts About Pesticides, Salmon, and the Endangered Species Act*, available at <http://www.pesticide.org/Salmonfactsheet.html> (quoting "The Economic Imperative of Protecting Riverine Habitat in the Pacific Northwest," Pacific Rivers Council Research Report No. 5 (January, 1992)). “[I]ntermittent channels are important winter refuge for juvenile coho and steelhead.” See Reid and Ziemer, *supra* at 3.

## 2. Flood Control

Intrastate and other wetlands, small streams, and waters play a major role in reducing flood damage. The cumulative loss of wetlands has been found to result in increased runoff and consequent flooding. Wetlands help ameliorate floods by helping to store floodwaters and prevent or reduce run off. When wetlands are destroyed they often are replaced by structures or impermeable paving that increases runoff.

It is well established that the Commerce Clause extends to flood control. United States v. Appalachian Electric Power Co., 311 U.S. 377, 426 (1940); Oklahoma v. Atkinson Co., 313 U.S. 508, 525 (1941) (“There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries.”).

Economic impacts associated with losing flood control capabilities are significant. For example:

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<sup>33</sup> The Sandhills, wetlands and wet meadows in north-central and northwestern Nebraska, are among three major wetland resource areas in Nebraska that provide spring staging areas, breeding areas, migration and wintering habitat for the whooping crane and bald eagle. See Tiner, R.W., H. C. Bergquist, G. P. DeAlessio, and M. J. Starr. 2002. *Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States*. U.S. Department of the Interior, Fish and Wildlife Service, Northeast Region, Hadley, MA, available at < [http://wetlands.fws.gov/Pubs\\_Reports/isolated/report.htm](http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm) >.

a. Flood prone areas of the United States cover approximately 15,000 square miles and put at least 9.6 million homes and \$390 billion in property at risk. Federal Interagency Floodplain Management Task Force. 1994. A Unified National Program for Floodplain Management. Federal Emergency Management Agency at 3.

b. In Fiscal Year 1998, direct flood damages in the United States were estimated at \$8.73 billion and 98 lives were lost. National Oceanic and Atmospheric Administration, National Weather Service, Hydrologic Information Center. 1998. Flood losses: Compilation of Flood Loss Statistics.

### 3. Clean and Safe Water, Including Drinking Water

Small streams, wetlands and other waters – including intrastate waters – filter water and recharge surface and subsurface drinking water supplies, and filter and remove pollutants from surface run-off before that water is released to groundwater or surface waters or is taken up by plants and animals and widely dispersed throughout the food chain. Millions of people in the United States depend on intrastate waters for these services.

Contaminated water has a substantial and significant affect on interstate commerce. For example:

a. “Currently EPA estimates that at least a half-million cases of illness annually can be attributed to microbial contamination in drinking water.” Liquid Assets at 2.

b. “Seventeen states reported 37 recreational water outbreaks caused by microorganisms in the latest (1995-1996) available data from the Centers for Disease Control.” Liquid Assets at 2.

c. “In 1998 about one-third of the 1,062 beaches reporting to the U.S. Environmental Protection Agency (EPA) had at least one health advisory or closing”. Liquid Assets at 2.

d. “In 1998 2,506 fish consumption advisories or bans were issued in areas where fish were too contaminated to eat.” Liquid Assets at 2.

### 4. Use by Migratory Birds

Wetlands and other waters play a critical role in providing habitat for migratory birds and other types of wildlife. According to the U.S. Fish and Wildlife Service (“FWS”), all migratory waterfowl and nearly half of all threatened or endangered species depend on wetlands and associated habitat for their survival. The FWS has also found that the loss of wetland and associated upland habitat is the most significant problem facing North American Migratory bird populations. U.S. Fish and Wildlife Service. 1994. 1994 Update to the North American Waterfowl Management Plan at 20. Washington, D.C.

Protection of migratory birds has been a long-standing concern and obligation of the Federal government. North Dakota v. United States, 460 U.S. 300, 309 (1983). In addition to protections provided by other environmental and wildlife protection statutes, Congress has

passed numerous laws that focus specifically on protecting migratory birds, including but by no means limited to: the Airborne Hunting Act, the Bald Eagle Protection Act, the Migratory Bird Hunting and Conservation Stamp Act, the Migratory Bird Treat Act, and the Migratory Bird Hunting Stamp Act.

The U.S. Supreme Court has recognized that migratory birds and other wildlife are articles of interstate and foreign commerce that can be protected under the Commerce Clause. Andrus v. Allard, 444 U.S. 51, 63 n.19 (1979) (recognizing commerce power to protect migratory wildlife); Missouri v. Holland, 252 U.S. 416, 433 (1920) (“It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could.”). Courts have also found that the “Commerce Clause power, and thus the Clean Water Act, is broad enough to extend . . . jurisdiction to local waters which may provide habitat to migratory birds and endangered species.” Leslie Salt v. United States, 896 F.2d 345, 360 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991) (remanding the case for a factual determination of the sufficiency of the property’s connections to interstate commerce).

The economic value of healthy migratory bird populations is significant. For example:

- In 2001, 3 million Americans hunted migratory birds. “They spent 29 million days hunting birds such as waterfowl and dove. Their trip and equipment expenditures totaled \$1.4 billion.” This is 7 percent of the total hunting expenditures nationwide. FWS 2001 Survey at 22, 23.
- The 3 million migratory bird hunters in 2001 took “24 million trips for hunting birds such as doves, ducks, and geese. Migratory bird hunters spent an average of 10 days hunting for the year.” FWS 2001 Survey at 25.
- Of the \$1.4 billion spent by migratory bird hunters in 2001, “\$657 million was spent on hunting trips, including \$280 million on food and lodging (43 percent of trip related expenses), and \$247 million on transportation (38 percent of all trip costs). Other trip expenses amounted to \$130 million—20 percent of the total trip-related expenditures for migratory bird hunters.” FWS 2001 Survey at 25.
- “Migratory bird hunters purchased nearly \$732 million worth of equipment in 2001. They spent \$534 million on hunting equipment (guns, ammunition, etc.). Another \$68 million was spent by migratory bird hunters on auxiliary equipment (camping equipment, binoculars, etc.), and \$130 million was spent on special equipment (vans, trail bikes, etc.).” FWS 2001 Survey at 25.
- “Among those hunting migratory birds, 1.6 million enthusiasts hunted duck on 18 million days. Nearly 1.5 million participants hunted dove on 9 million days. On 11 million days, 1 million hunters hunted geese in 2001. Other migratory bird species attracted 210 thousand people who hunted on 1.5 million days.” FWS 2001 Survey at 26.

#### **IV. THERE IS NO NEED TO DEFINE THE TERM “ISOLATED WATERS” AS FEW, IF ANY WATERS ARE ACTUALLY “ISOLATED”**

Question #2 asks “Should regulations define “isolated waters,” and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes.”

The long-standing regulatory definition of “waters of the United States” should not be re-written to exclude an undefined, administratively-created category of waters called “isolated” by the EPA and Corps. The questions posed by the ANPRM signal an intent by the agencies to redefine “waters of the United States” to try to remove federal Clean Water Act jurisdiction from so-called “isolated” non-navigable, intrastate waters, including wetlands, natural ponds, ephemeral and intermittent streams, and potentially larger non-navigable tributaries as well.

These waters, protected by the Clean Water Act and its regulations since 1972, serve critical functions in the environment important to public health, drinking supplies, flood prevention and control, habitat for fish and wildlife species, recreation, industrial purposes and many other uses. (See below in this section for further discussion of the connectivity of all waters, as well as the discussion of “Functions and Values,” below).

In addition, few if any of these waters are in fact “isolated.” They are integral parts of the entire hydrologic and biologic environment. Headwater streams, non-navigable tributaries, wetlands and other such waters are not “isolated” from the rest of the environment, and should not be treated as so by the federal agencies charged by law with protecting these vital resources through some regulatory rewrite of definitions that has no basis in science, fact or law.

The following comments summarize the specific ways in which wetlands and small streams, particularly those that are ephemeral and intermittent, may appear to be “isolated,” but are in fact intimately and inextricably connected - hydrologically, chemically, and biologically - with larger streams, rivers, and other waters.

##### **A. HEADWATER STREAMS CANNOT BE SEPARATED FROM DOWNSTREAM WATERS**

Starting with the clearest case, the concept of “isolation” can have no conceivable application to streams. By their nature, streams are not simply individual water courses, but parts of an interconnected and inseparable network. As some of the nation’s leading stream scientists have noted in comments submitted to the docket (Aquatic scientists’ comment letter to the docket, 2003):

“Rivers are networks, and their downstream navigable portions are inextricably linked to small headwaters just as fine roots are an essential part of the root structure of a tree or our own circulatory system is dependent on the function of healthy capillaries. The small ephemeral stream is not isolated from the mighty river.”

The key to understanding stream ecosystems is the “river continuum concept,” first introduced by Vannote and others nearly a quarter-century ago. The basic concept is that a river system, from headwaters to mouth, comprises a continuous gradient of physical factors, formed by the drainage network, that explain much of the biological linkages and other river dynamics (Vannote et al. 1980). Scientists now view stream ecology as a three-dimensional system of energy, material and organisms consisting of: (1) the longitudinal (downstream) dimension, (2) lateral transfers between channel, banks, and floodplain, and (3) vertical transfers between stream and groundwater. Although each of these dimensions is essential to river health, upstream-downstream connections are dominant (Meyer and Wallace 2001). As noted by leading stream and wetland ecologists in a draft publication on headwaters streams:

“Each stream network is part of a watershed, the contributing land area from which waters and other materials collect and flow into streams and larger river channels. Channels are the routes along which water, sediment, organic matter, nutrients, and other solutes are carried out of the watershed; channel size is a continuum, and hence only arbitrary distinctions can be made between very small streams and the network of larger downstream channels (Meyer et al. In preparation).”

Further, because small streams are extensive and inseparably bound up with the entire river system, changes to headwaters streams and their watersheds have an enormous impact on the physical and hydrological, chemical and biological integrity of downstream waters.

#### 1. Streams Have Hydrologic Connections to Other Waters

Streams that under natural conditions run dry periodically or during droughts, or that carry surface water flows only briefly during periods of precipitation (such as some ephemeral streams in arid regions), may appear superficially to be “disconnected” from other perennially flowing reaches of the same system. However, scientific research has revealed essential, consistent hydrologic connections that prove that these systems are rarely, if ever, disconnected even when there is no visible flow at the surface.

##### a. Intermittent and Ephemeral Surface Connections

By well-accepted definition (Alley et al. 1999), the term “stream” includes many waters that do not flow year round. These “intermittent” and “ephemeral” streams are still considered in science and in law to be hydrologically connected - through surface flows during wet periods and sub-surface flows at other times - to downstream waters that flow perennially. Intermittent and ephemeral streams are the vast majority of all streams, both in numbers and stream miles, and they have their own unique and important physical, chemical, and biological properties.

According to an analysis conducted for American Rivers by USGS National Hydrographical Database staff using coarse resolution data (1:100,000 scale), there are approximately 1,594,359 miles of intermittent and 899,347 miles of perennial streams in 49 states, excluding Alaska (Paul Wiese, USGS National Mapping Division, personal communication). In other words, for every mile of perennial stream, there are approximately 1.77 miles of intermittent streams. These

figures significantly understate the true extent of intermittent and ephemeral streams (Meyer and Wallace 2001). In some states, particularly those in the arid West, as much as 96 percent of streams (Arizona) are intermittent. Even in humid, high-rainfall states, such as Georgia, 44,000 of the state's reported 70,000 total stream miles are intermittent (U.S. EPA 2000). Even at times where there may be no visible surface flow, such streams can continue to flow within their beds, moving water, nutrients, biota and other material downstream (Aquatic scientists' comment to the docket 2003).

#### b. Ground-surface Water Connections

Groundwater and surface water are in constant interaction. Some streams gain water from groundwater inflow, some streams lose water outflow to groundwater, many streams do both, gaining in some reaches and losing in other reaches (Alley et al. 1999). As the USGS notes in one of its main reports on groundwater:

“Streams and other surface-water bodies may either gain water from ground water or lose (recharge) water to ground water. Streams commonly are a significant source of recharge to ground water downstream from mountain fronts and steep hillslopes in arid and semiarid areas and in karst terrains (areas underlain by limestone and other soluble rocks)... The top of the subsurface ground-water body, the water table, is a surface, generally below the land surface, that fluctuates seasonally and from year to year in response to changes in recharge from precipitation and surface-water bodies (Alley et al. 1999).”

Because of this interaction, groundwater can contribute a significant proportion of the surface flow in streams and rivers, depending on region, season, and stream characteristics. While groundwater contributions to stream flow vary widely according to these factors, USGS estimates that between 40 to 50 percent of streamflow on average comes from groundwater, with as much as 40 percent of flows in large rivers coming from groundwater nationally (Alley et al. 1999). Small streams are a main source of these groundwater flows, which may be discharging groundwater drawn from vast distances away from the stream channel itself. As USGS describes the process: “Under natural conditions, ground water moves along flow paths from areas of recharge to areas of discharge at springs or along streams, lakes, and wetlands... The areal extent of ground-water-flow systems varies from a few square miles or less to tens of thousands of square miles (Alley et al. 1999).”

In fact, it can be difficult to determine whether a stream is naturally perennial or intermittent, as leading stream ecologists have pointed out in their comments on the ANPRM:

“Groundwater withdrawal for irrigation and other human uses has resulted in significant lowering of the water table in many areas, which can affect headwater streams by making perennial streams ephemeral (Postel 1999). Channels without water can extend far downstream; for example, a channel of the Santa Cruz River near Tucson, Arizona, was dry for several decades because of groundwater pumping (Grimm et al. 1997). As more of the landscape is covered with impervious surface, groundwater recharge is reduced, leading to lower baseflows which can lead to intermittent flow (Paul and Meyer 2001). In contrast,

some intermittent streams have become perennial because of the continuous addition of effluent from municipal wastewater treatment plants (Paul and Meyer 2001). These common situations further illustrate the difficulty and illogic in trying to define some waters as “isolated” based on flows; it will be difficult even to properly determine whether a stream is naturally perennial or intermittent” (Aquatic scientists’ comment to the docket, 2003).

A second type of surface-subsurface exchange occurs in the hyporheic zone, the transition zone between groundwater and the stream itself.<sup>34/</sup> This area has unique properties, performing essential functions for the local stream and downstream ecosystems. In the hyporheic zone, surface and ground waters are virtually indistinguishable, representing “a hydrological continuum, preventing a clear separation.” (Brunke and Gonser 1997) The hyporheic zone can extend a significant distance from the stream channel itself, and the area does not require visible surface water in the river to remain chemically and biologically active. Thus, even without apparent surface flows in a stream at a given time, important ecological functions and ecosystem services are occurring that are based on hidden hydrologic interactions (Brunke and Gonser 1997).

#### c. Small Streams Sustain Natural Flows and Water Supplies

Small streams cannot be separated from downstream waters because they literally provide much of the water balance upon which those systems depend. In the Great Lakes Basin, for example, USGS estimates that over 31 percent of the water entering Lake Michigan comes from indirect groundwater discharges to streams that then flow into the lake (Grannemann *et al.* 2000). For the other Great Lakes, the percentage of indirect ground-water discharge from streams is also quite high, ranging from 22 percent for Lake Erie, 33 percent for Lake Superior, and 42 percent for both Lake Huron and Lake Ontario (Holtschlag and Nicholas 1998). As the USGS comments in its report: “Ground water is a major natural resource in the Great Lakes Region that helps to link the Great Lakes and their watershed (Grannemann *et al.* 2000).” Of course, this would not be the case without the connection provided by small streams between groundwater and the lakes themselves.

In the Chesapeake Bay Basin, nearly 100,000 miles of interconnected streams, rivers, wetlands and their riparian areas serve as a "circulatory system" for the Chesapeake Bay. Collectively, this network of small streams supplies 90 percent of the freshwater flow that drives the health of the nation's largest estuary (CWP and NEETF 2002a). USGS has done extensive research on water quality and quantity of streamflow into the Bay. It estimates that of the 50 billion gallons of water that reaches the Chesapeake Bay each day, nearly 27 billion gallons is from groundwater base flow, i.e, water that infiltrates into the aquifer and discharges as groundwater into small streams (Bachmann *et al.* 1998). Again, without these small streams and wetlands, these

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<sup>34</sup> A general definition of the hyporheic zone proposed by White (1993, as cited in Brunke and Gonser, 1997) is the area of saturated pores beneath the stream bed, and into the stream banks, that contain some proportion of channel water, or that have been altered by surface water infiltration.

groundwater and other flows would not reach the Bay with the timing, amounts, and chemical composition that they do today.

Even the contribution of low-flow streams, such as those with annual average flows of five cubic feet per second (cfs) or less, is essential to downstream flows and water supplies. In the Chesapeake Bay watershed, for example, as much as 65 percent of first, second, and third order streams may fall below a 5 cfs threshold (Thomas Schueler, Center for Watershed Protection, personal communication). In Kansas, the U.S. Geological Survey (USGS) determined that 40 percent of the 2,232 stream segments on the Kansas surface water register had median flows less than 1 cfs over the available hydrologic record (Perry et al. 2002).

As ecologist Bruce Wallace commented at a U.S. Fish and Wildlife Service symposium on the value of headwater streams:

“Another myth is that only flows greater than 5 cfs are streams. Only a lawyer would debate this question. How much is 5 cfs? -- over 1 billion gallons of water per year. The average city in the US uses 100/gal/day/per capita for personal use. In other words, if you looked at this in terms of how many people's water needs this could supply in a year, it's 32,300 people. Or, it would supply the personal and industrial needs of 16,000 people (U.S. FWS 2000).”

The value of these small freshwater flows is enormous. One study calculated the average value of freshwater for navigation alone to be \$146 per acre-foot for the entire U.S. (Frederick, et al. 1996, as cited in VA Dept. of Conservation and Recreation 2001). A small stream flowing as little as 1 cfs per day carries a volume of two acre-feet of water (CWP and NEETF 2002b). Thus, for the Chesapeake Bay, where 100,000 streams produce 90 percent of the fresh water flowing into the Bay, small streams are producing an annual value of \$9.5 billion in flows for navigation *alone*.<sup>35/</sup>

#### d. Small Streams Provide Natural Protection Against Downstream Flooding

The process of natural flood storage and attenuation is often described as temporary storage of flood water on wide floodplains associated with higher-order streams. However, the geomorphology of small headwater channels can be an important influence on smaller, more frequent floods. Five-year to 50-year flood discharges are strongly influenced by channel size and shape. During floods, small streams transfer water into storage through infiltration into the channel bed and banks, recharging the hyporheic zone and surrounding groundwater, and diminishing peak discharges (Meyer et al. In preparation).

When small headwater channels are lost, flood frequency in the basin increases, with the stream equaling or exceeding bankfull at 10-20 times its previous frequency. Impervious surfaces and storm drains together deliver water from the basin to downstream channels much more rapidly

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<sup>35</sup> Assumes: 100,000 streams producing 90% of fresh water flow, at 2 acre-ft. per stream per day flowing an average of 1cfs, at a value of \$146 per acre-foot.



than intact headwater streams (Meyer and Wallace, 2001). As Poff et al. (1997) note in their landmark article on the “natural flow regime” of rivers, small stream networks provide natural flood attenuation:

“As one proceeds downstream within a watershed, river flow reflects the sum of flow generation and routing processes operating in multiple small tributary watersheds. The travel time of flow down the river system, combined with nonsynchronous tributary inputs and larger downstream channel and floodplain storage capacities, act to attenuate and to dampen flow peaks.”

## 2. Streams Have Chemical Connections to Other Waters

### a. Sediment Retention and Capture

While the greatest volume of sediment in any particular location is on large floodplains of higher-order streams, the *cumulative* sediment storage in headwaters channels and vegetated riparian zones is significant, due to the total stream length and watershed area represented by headwater streams (Meyer et al. In preparation). Many small headwater streams are easily obstructed by woody debris, and such features increase the potential for storage of sediment as well as organic matter and nutrients (Meyer and Wallace 2001). In small headwater streams, even relatively small woody debris jams can be important to sediment retention (Gomi et al. 2002).

A study in Corvallis, Oregon showed that even ephemeral streams were effective in removing from the water column suspended sediment generated from forest roads over a 80-yard headwaters stream reach (Dieterich and Anderson 1998, as cited in Meyer et al. In preparation). The filtration efficiency of ephemeral headwater streams results from the shallow water column combined with the large number of retentive structures – both organic debris and living plants – and, more importantly, from the pattern of lateral and longitudinal expansion and contraction in response to rainfall. In small headwaters, stream levels peak shortly after the heaviest rain and lasts only briefly before receding. During expansion, water movement is mostly into the soil. Therefore, much of the sediment in the stream water is actually filtered through the soil rather than flushed downstream (Dieterich and Anderson 1998, as cited in Meyer et al. In preparation).

As headwater areas are subjected to commercial and residential development, impervious surfaces replace natural lands that once absorbed and infiltrated precipitation, and natural stream channels are often replaced with storm sewers. These hard surfaces and artificial channels increase runoff rates and volumes, causing downstream stream channels to enlarge and become incised in response to the increased energy of the urban runoff. This begins a chain reaction in which downstream natural water attenuation and storage capacity is also degraded, causing higher, more rapid flood peaks. Sediments that might otherwise have been trapped by debris and leaf litter in small streams and vegetated riparian zones are now mobilized and transported downstream. Higher velocity discharges exacerbate the problem, scouring stream channels and adding still more to downstream sediment loads (Meyer et al. In preparation).

These sediment loads can be substantial. In San Diego, extensive channel erosion contributed two-thirds of the in-stream sediment load and resulted in loss of valuable urban land (Trimble 1997). A Pennsylvania study showed that in just a one-quarter mile stream reach in a 160-acre urbanizing watershed, channel erosion can generate 50,000 cubic feet (2,500 tons) of sediment, equivalent to five years sediment production in a non-urban watershed of the same size (Leopold 1968).

Sediments no longer held by headwaters streams and additional sediment scoured out of stream channels by increased flow peaks are carried downstream where they harm navigation, reservoir capacity, commercial and sport fishing, water recreation, and aquatic habitats and organisms. Dredging of commercial waters is extremely expensive; for example, it costs \$10 to \$11.5 million annually to dredge and dispose of sediments deposited into Baltimore Harbor to keep it navigable (Chesapeake Bay Program 1998, as cited in Virginia Department of Conservation and Recreation 2001). It would cost an estimated \$333,000 to remove the 50,000 cubic feet of sediments produced by the small watershed Leopold studied, based on an estimated cost of \$20 per cubic yard to dredge, transport, and dispose of such sediments (Virginia Department of Conservation and Recreation 2001).

Suspended sediments and contaminants that may attach to soil particles are also a significant cost to water filtration plants. A study of treatment costs associated with turbidity in Texas water filtration plants found that every one percent reduction in a unit of turbidity (NTU, or nephelometric turbidity unit) resulted in a 0.27 percent reduction in treatment chemical costs (Dearmont et al. 1998, cited in USEPA 2002b).

The release into the water column of suspended sediments and mobilized contaminants can devastate the aquatic ecosystem at all trophic levels. Suspended sediments reduce light penetration through the water column, reducing photosynthesis and primary production. Reduced photosynthesis weakens and can eliminate submerged aquatic vegetation, rendering the vegetation unable to contribute to sediment stabilization, to dissolved oxygen levels, and to primary productivity. (See, e.g., 40 C.F.R. §230.21).

When sediment disrupts production of the periphyton and aquatic macrophytes that form the base of the food chain, benthic and other invertebrates decline. Sediment resuspension and deposition also directly reduce productivity and species diversity among macroinvertebrates. Sediment suspension and deposition smother critical benthic habitat and reduce the availability of food and oxygen to benthic organisms. When suspended sediments settle on attached or buried eggs, the eggs are smothered because they lose access to oxygenated water. (See, e.g. 40 C.F.R. 230.31). Macroinvertebrates, in turn, are a key food source for fish. Macroinvertebrate declines stress fish populations.

In addition to reducing their food supplies, suspended sediments harm fish and crustacea, smothering spawning and nursery habitat, and directly cutting off oxygen to eggs and fry. Resuspended sediments also harm sight-feeding fish, shellfish, and wildlife by reducing water clarity and reducing feeding ability. Reduced food levels and lower feeding rates limit growth

and lower disease resistance. High suspended sediment levels can also cause fish kills (Newcombe and MacDonald 1991).

#### b. Nutrient Recycling

The basic chemical composition of unpolluted streams draining a landscape is largely established in headwater streams. Headwater streams are also sites of efficient retention and transformation of nutrients. Just as human capillaries are the vessels in most intimate contact with metabolizing tissues, headwater streams are the channels of the drainage network in closest contact with the soil and are the sites of extensive chemical and biological activity that impact water quality downstream (Meyer et al. In preparation).

Recent research has demonstrated that small streams in the network are the sites of the most active uptake, transformation, and retention of nutrients. Small streams are shallow, and water spends a longer time in contact with biologically and chemically reactive substrates in small, shallow channels than in large deep rivers. The average distance traveled by a molecule before being removed from the water column is called its uptake length (Newbold et al. 1981). As stream size (and discharge) increases, so does nutrient uptake length (Alexander et al. 2000, Peterson et al. 2001). Uptake lengths have been measured for nutrients in many streams, and the shortest measures of uptake length are for small headwater streams (Stream Solute Workshop 1990, as cited in Meyer et al. In preparation). Peterson et al. (2001) studied the regulation of water chemistry by stream systems and found small streams to be far more efficient in recycling nutrients. In a study of the Mississippi River's nitrogen loads to the Gulf of Mexico and attendant hypoxia problems, Alexander et al (2000) found that small streams throughout the Basin were most efficient at recycling nitrogen:

“Headwater streams retain and transform important amounts of inorganic nitrogen, frequently more than 50% of the inputs from their watersheds...Despite the long travel times, many watersheds located on large rivers more than 2,500 kilometres [1,500 miles] from the Gulf deliver significantly larger fractions of their exported nitrogen (some more than 90%) to coastal waters than watersheds located on smaller streams less than a few hundred kilometers from the Gulf.”

Uptake length for both phosphorus and ammonium are less than 65 feet in headwater streams in the Southern Appalachians (Webster et al. 2000, as cited in Meyer et al. In preparation). Thus, an average nutrient molecule travels less than 65 feet downstream before being removed from the water column in a small shallow stream, where there is extensive contact between the water column and benthic algae and microbes in surface sediments and the hyporheic zone. Meyer and Wallace (2001) modeled the practical effect of loss of small streams on downstream nutrient loading of soluble reactive phosphorus (S.P.) using data from field experiments at the Coweeta Hydrologic Laboratory in Western North Carolina. When phosphorus loads are modeled with first-order streams intact, 63 percent of phosphorus entering the streams is retained. When first-order streams are replaced with pipes (i.e., no S.P. removed through natural processes), the total amount of phosphorus exported downstream increases 179 percent.

In addition to the nutrient removal that occurs in headwater streams, the chemical and biological transformations that occur there (e.g. denitrification, microbial uptake, transformation to organic nitrogen) reduce the biological availability of nutrients that are exported downstream. Biofilms in small headwater channels are also sites of active uptake of inorganic (e.g. heavy metals) and organic (e.g. PCBs) pollutants (Schorer and Symader 1998, as cited in Meyer et al. In preparation).

Hence the presence of small streams in the network results in less downstream transport of nutrients and contaminants. If, due to a redefinition of “waters of the U.S.,” headwater streams were compromised or eliminated from the network, more of the nutrients being applied to farm fields or lawns would be delivered to receiving systems downstream, which are less efficient at retaining and transforming them. Downstream waterways, such as navigable rivers, lakes, estuaries, and coastal waters, may respond to the resulting high nutrient concentrations with eutrophication, and potential nuisance algal blooms, deoxygenation of the water column, and fish kills (Meyer et al. 2003). Federal, state, and local agencies are spending considerable sums of money implementing best management practices to reduce non-point source inputs of nutrients because these are a major threat to water quality. Maintaining the nutrient removal capacity of small headwater streams is an essential component of these efforts to reduce the impacts of non-point source nutrient loading to downstream ecosystems.

#### c. Other Organic Material

Plants and other organic material within the stream channel, including leaf litter and woody debris from riparian vegetation, are the origin of substantial energy inputs into river systems. Among other inputs to headwater streams are dissolved organic carbon (DOC) from groundwater. While groundwater tends to have low DOC concentrations, a two- to three-fold increase in DOC over distances ranging from 33 to 330 feet has been reported for spring seeps as the groundwater flows over accumulated detritus and living organisms (Kaplan et al. 1980, Meyer et al. 1998, as cited in Meyer et al. In preparation). The dramatic increases in DOC concentrations reflect the highly productive nature of spring seeps. These broad, shallow aquatic environments that are depressions in the forest floor have immediate and obvious terrestrial and benthic connections.

Headwater streams tend to be highly retentive of the large amounts of organic matter they receive. There are three primary reasons: (1) the inputs to headwater streams consist disproportionately of leaves and woody debris, neither of which are readily transported; (2) the flows are small and therefore do not easily suspend particles and (3) as a result of the previous two factors, headwater streams accumulate debris dams, which trap other organic matter and hence further enhance the retention (Webster et al. 1999, Fetherston et al. 1995, Webster et al. 1994, Bilby and Likens 1980, Bilby 1981, Speaker et al. 1984, Swanson et al. 1982, as cited in Meyer et al. in preparation). Webster and Meyer (1997) found that concentrations of benthic organic matter in eight headwater forested streams to be over four times greater than in 14 higher order streams.

By intensively processing organic matter, and ultimately converting much of it to carbon dioxide, the headwater streams perform their second major ecosystem service. The accumulations of organic matter in the form of debris dams and leaf packs provide habitat for benthic macroinvertebrates (Reice 1978, Dobson and Hildrew 1992, Dobson et al. 1992, Richardson 1992, as cited in Meyer et al. In preparation), while the processing of leaves and woody debris by fungi and bacteria convert these inputs to high quality, more nitrogen-rich, food for macroinvertebrates and higher trophic levels (Kaushik and Hynes 1971, Triska and Sedell 1976, Ward and Cummins 1979, Elwood et al. 1981, as cited in Meyer et al. In preparation). If headwater streams were unable to retain and process these organic inputs, the resulting organic loading would represent a significant stress on the downstream ecosystems and water quality (Meyer et al. In preparation). Meyer and Wallace (2001) estimated an average turnover length of 10 miles for all of the streams in a forested fifth-order basin in North Carolina. They then estimated that if one third of total first-order stream length were removed, the average turnover length would double to 20 miles.

Although much of the organic inputs to headwater stream are oxidized before reaching downstream ecosystems, the organic carbon that is delivered to higher order streams and rivers plays a vital role in support of downstream metabolism, representing a third major ecosystem service provided by headwaters. In this respect, the headwater ecosystems not only moderate the quantity of organic carbon delivered downstream but also—and just as importantly—control its form, quality, and timing. Inputs consisting of large particles (leaves and woody debris) are reduced in size to fine, easily suspended organic particles and to dissolved organic matter. Inputs of relatively low nutritional value (high carbon to nitrogen ratios) are converted via microbial processing to more nutritious forms. Inputs that arrive in the headwaters in pulses (autumn leaf drop, storm-delivered inputs) are processed and slowly released over long periods of time (Meyer et al. In preparation).

### 3. Streams have Biological Connections to Other Waters

Freshwater species are among the most threatened on Earth, with projected extinction rates for North American freshwater species in the same range as that projected for tropical rainforests (Ricciardi and Rasmussen 1999). We discuss in greater detail later in these comments the functions and values of headwaters streams in sustaining the biological diversity of plants and animals, including for permanent habitat, spawning and breeding, and movement corridors.

Biological connectivity associated with headwater streams occurs in many ways. Headwater streams provide water, nutrients, organic material, habitat structure, and food sources downstream, and are essential to the survival of individual species and entire biological systems. Small streams are linked with other waters in the watershed as species move from one habitat to another. This biological connectivity role occurs in obvious as well as subtle ways. As Reid and Ziemer (1994) note:

“Intermittent channels and associated riparian zones provide an important source of food and water for hillslope ecosystems, they may function as travel corridors, and they provide a microclimatic refuge for hillslope animals during times of moisture and temperature stress.

The distinctive vegetation and higher moisture content of these sites can modify fire behavior, so their distribution might affect the patchiness of large burns. In addition, microclimatic differences provided by intermittent channels may contribute to genetic diversity by maintaining a variety of site types. For example, Campbell (1979) demonstrates genetic differences between Douglas firs growing in different microhabitats near to one another.”

Small headwaters streams, including intermittent and ephemeral streams, are abundant with life, including microbes, algae, plants, aquatic insects, mollusks, crustaceans, other invertebrates, amphibians, reptiles, fish, birds, and mammals. A typical headwater stream supports hundreds to thousands of species across these plant and animal groups (Meyer et al. In preparation). This diversity and abundance of aquatic life is particularly notable in arid areas. The National Academy of Sciences (Committee on Riparian Zone Functioning and Strategies for Management 2002) states that in the Pacific Coast ecoregion a large proportion of wildlife species are riparian “obligates” requiring access to riparian habitat to complete all or a portion of their life cycle, including 60 percent of amphibians and 34 percent of birds. Headwaters are essential to the health of biological communities, even those far distant from the headwater stream itself.

**Insects** – Aquatic insects are the dominant macroinvertebrates in most headwater streams, often occurring at densities greater than 10,000 per square yard (Meyer et al. in preparation). Dieterich and Anderson (2000) found surprisingly diverse and abundant macroinvertebrates in summer-dry streams in western Oregon. They concluded that these organisms preferred intermittent over perennial streams because (1) the proximity to refugia prevented wash-out during rain events, (2) reduced predator pressure, and (3) lack of competition by snails and other dominant competitors. Muchow and Richardson (1999) found twice the number of individuals in intermittent streams than perennial stream sites in British Columbia. They also observed that “Even in the smallest streams with intermittent flow, true aquatic insects with 1-year life cycles were found emerging, even in periods when no flow was perceptible.”

Not only do insects perform many of the important functions of organic matter processing in headwaters, but they export that energy as a valuable food source for amphibians, fish, birds, and other animals downstream. Wipfli and Gregovich (2002) found that forested, fishless headwaters in Alaska provided abundant food sources for salmon populations, and “may be important food conduits for downstream food webs, potentially subsidising several trophic levels and in turn aquatic production of larger streams.”

**Amphibians** – Reid and Ziemer (1994) note that amphibians, while often requiring open water to breed, are heavily dependent on intermittent and ephemeral streams:

“Intermittent streams may be particularly important as nursery areas for amphibians because these sites support fewer predators than perennial channels. Young salamanders may rear in the intermittent channels and then move downstream when they grow large enough to protect themselves (H. Welsh, USDA Forest Service Pacific Southwest Research Station, unpublished data). Some amphibians, such as the Pacific tree frog (*Hyla regilla*), may rear in ephemeral pools and then move away from the channels when pools dry up. Juvenile black

salamanders (*Aneides flavipunctatus*) may remain for several years in moist sites, such as those commonly found near intermittent channels, moving away to the forest floor only as they mature.”

**Fish** – Headwater streams provide important spawning sites for salmonids and other fish species. Staff with Washington Trout observed 95 adult Coho salmon in 200 lineal feet of a small-order tributary of Cherry Creek in December 2002. Neither the perennial, spring-fed stream, nor the tributary streams feeding to it, are shown on USGS 1:24,000 scale topographic maps (Kurt Beardslee, Washington Trout, personal communication). Reid and Ziemer (1994) note that intermittent channels are important to fish as seasonal sources of water, nutrients, sediment, and wood delivered downstream to preferred habitats, noting that “Productivity of perennial channels depends on delivery of materials from intermittent channels during at least part of the season.”

Intermittent streams also serve as feeding and spawning grounds for many migratory minnows, salmonids, and other fish, particularly in arid regions. Erman and Hawthorne (1976) observed extensive spawning by rainbow trout in intermittent tributaries of streams, with three times as many fish spawning in an intermittent stream than in nearby permanently flowing tributaries. They also found that one-third to one-half the trout production in some Sierra Nevada systems is from intermittent channels. They hypothesize that these waters were more attractive to the fish due to their abundant food source and lack of competition with brook trout.

**Birds** – Reid and Ziemer (1994) note that both perennial and intermittent streams are important to bird species: “A few birds, such as dippers (*Cinclus mexicanus*) and willow flycatchers (*Empidonax traillii*), are aquatic or riparian specialists. Others use the riparian zone primarily during the breeding season or immediately after. Riparian areas along both perennial and intermittent channels are particularly rich in insects and fruit, so these areas are important food sources. Many species thus include a patch of riparian vegetation as a part of their territory, even if they do not depend fully upon it.”

**Mammals** – Reid and Ziemer (1994) also note that riparian areas are important movement, feeding, and resting areas for many mammals: “Forest mammals use riparian areas for food sources and denning, and they may also use them as travel corridors within and between watersheds...Bats are even more closely associated with riparian areas because they require pools of water to drink from, they eat insects associated with aquatic and riparian environments, and they usually roost near their foraging sites.”

#### 4. Man-made Conveyances Do Not Eliminate Connectivity of Streams

There has been some suggestion by EPA, the Corps, and industry that streams flowing through man-made conveyances, such as pipes, culverts, ditches, canals, and other man-made structures as well as waters above these points, should no longer be considered “waters of the U.S.” (Izzo and Fabricant 2002). This notion is appalling. First, it would create a perverse incentive to force as many streams into such structures as possible to avoid regulation of the altered reach or the natural stream above it. Excluding waters flowing through man-made conveyances is of

particular concern because under the Corps' 404 Nationwide 43 general permit, no special permission is required for discharges that cause the loss of less than 300 linear feet of an intermittent stream bed, such as putting streams underground in pipes, culverts, or concrete channels (U.S. Army Corps of Engineers 2002).

Second, while the physical and biological damage caused by such extreme alterations to natural streams are severe, having a portion of a stream altered in this fashion does not eliminate all functions and values provided by the entire connected stream system. Water flow, organic material, and organisms all continue to pass through these conveyances downstream, and in some instances, upstream. (Note: in some cases culverts, pipes and ditches make passage impossible for fish and other organisms, or exposed them to altered temperature, oxygen and other chemical states, and higher-than-normal predation.)

Numerous courts have held that manmade waterways are waters of the United States subject to the Clean Water Act. *See, e.g., Community Association For Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 953 (9<sup>th</sup> Cir. 2002) (holding that ditches carrying liquid waste from a CAFO constitute a point source); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 534 (9<sup>th</sup> Cir. 2001) (irrigation district required to secure permit coverage to discharge pollutants to its irrigation canals). In *Talent Irrigation*, the Ninth Circuit explained that the canal was a water of the United States despite the fact that the defendant apparently had the ability to isolate the canal in question, and that it flowed only periodically to other waterways. 243 F.3d at 534. Other circuits are in accord. *See United States v. Eidson*, 108 F.3d 1336, 1342 (11<sup>th</sup> Cir. 1997) (holding that a drainage ditch connected to a sewer drain and running into a canal eventually leading to Tampa Bay was a "water of the United States"); *United States v. Texas Pipe Line Co.*, 611 F.2d. 345, 347 (10<sup>th</sup> Cir, 1979) (oil spill into tributary involved "waters of the United States," "even though there was no evidence that streams that connected the tributary with navigable waters were running at time of spill"); *United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1329 (6<sup>th</sup> Cir. 1974) (to establish a violation of the Clean Water Act it is enough to show that defendant discharged pollutants into a tributary that is "water of the United States;" there is no threshold requirement to prove "that, in fact, the [pollutant] reached and polluted the navigable river.").

## B. WETLANDS ARE NOT ISOLATED FROM OTHER WATERS

Wetlands perform their myriad of beneficial functions in ways that are functionally inseparable from all of the other chemical, physical and biological processes that take place within watersheds. Meyer et al. (In preparation) provide a useful description of the connectivity of wetlands:

“Wetlands are arrayed along a continuum of hydrologic connectivity, and distinctions amongst degree of isolation of wetlands are similarly arbitrary...Whether considering riparian wetlands adjacent to a river or depressional wetlands connected to other water bodies only via underground pathways, their roles of recharging groundwater, improving water quality, and providing critical habitat are essential to the physical, chemical and biotic integrity of our nation's waters.”



1. Wetlands Are Connected to Other Waters Through Hydrology and Chemical Processes

a. Surface and groundwater interaction

Surface water in wetlands interacts with groundwater flowing near and through the wetland. Chemical transformation of water flowing through wetlands is partially a function of the amount of contact time in the surface and groundwater interaction. As noted by Winter et al. (1998):

“Ground-water chemistry and surface-water chemistry cannot be dealt with separately where surface and subsurface flow systems interact. The movement of water provides a major pathway for chemical transfer between terrestrial and aquatic systems. This transfer of chemicals affects the supply of carbon, oxygen, nutrients such as nitrogen and phosphorus, and other chemical constituents that enhance biogeochemical processes on both sides of the interface. This transfer can ultimately affect the biological and chemical characteristics of aquatic systems downstream.”

Examples of Surface and Groundwater Interactions in Certain Wetland Types

Fens - The interaction of surface and groundwater is substantial and immediate and relatively constant in wetlands such as fens, as these systems are defined by the characteristic of groundwater discharging at or near the surface and seeping continuously through the root zone of the vegetation. A comprehensive analysis of the abundance, distribution, and ecological characteristics and significance of these unique systems by Bedford and Godwin (In press), "Fens of the United States: Distribution, Characteristics, and Scientific Connection versus Legal Isolation," provides an important contribution to the understanding of these wetlands. As the authors demonstrate, "the hydrogeologic settings in which fens occur, always where groundwater discharges to the surface, guarantee their strong influence on the physical and chemical properties of surface water." Fens occur in diverse topographic and geologic settings where climate allows the soil surface to remain saturated by groundwater discharge. Fens are nutrient-poor, with high concentrations of calcium, iron or aluminum in the soil and water, elements which provide the capacity for adsorption of phosphorus from groundwater inflows. And the high carbon content in the soil creates the potential for denitrification. Bedford and Godwin (In press) cite one study (Drexler et al. 1999a) of a New York fen which showed significant nitrate removal from groundwater entering the fen below adjacent cropland.

Fens also modulate the temperature of groundwater as it discharges, cooling subsurface flows to streams in summer and warming them in winter. Where the groundwater discharge from fens is persistent and strong, it serves an important water quality function by contributing inflows to cold-water, low-nutrient streams, required by trout species (Meyer et al. In preparation).

The physical and chemical properties of fens allow them to support a uniquely high biological diversity, especially of plant species. Bedford and Godwin (In press) note that the degree of hydrologic connectivity of fens strikes a delicate balance:

“In a landscape context, the functional characteristics and significance of fens depend oddly on both their isolation from and connection to other waters. While their biological diversity is controlled in large part by their connection to ground water flows and to the chemistry of ground water (Almendinger and Leete 1998b, Drexler et al. 1999b), it also depends in part on a kind of isolation from other surface waters, i.e. on an environment that is usually saturated by ground water but seldom flooded by nearby surface waters (Stewart et al. 1993, Amon et al. 2002). Nutrient loads would be higher, thus promoting production of higher biomass and probably reducing species diversity (Grace 1999). Regular flooding also would eliminate many plant species intolerant of such conditions, thus further reducing species diversity.”

Bogs - The montane bogs and depressional wetlands and associated ephemeral streams of Hawaii's volcanic islands are another example of more immediate groundwater-surface water connectivity. Surface water infiltrates readily through these systems and is discharged down-gradient into springs and streams, in turn discharging to ocean waters (U.S. FWS 2003).

Potholes - Prairie potholes vary widely in their hydrologic processes, depending on topographic as well as other factors. The tendency for up-gradient potholes to provide subsurface discharge to lower-gradient potholes has been well-documented. Surface water interaction with groundwater has also been shown to involve flows in both directions concurrently.

Subsurface connection can occur on a periodic basis when groundwater tables are high as a result of seasonally high precipitation. Depressional wetlands of South Carolina's Coastal Plain, including Pocosins, Carolina bays, cypress and gum ponds, and bottomland hardwoods, are all hydrologically linked for some periods of the year when the groundwater table reaches to a foot below the soil surface (Rob Mikell, South Carolina Coastal Program, personal communication, April 2003).

#### b. Surface overflow

All wetlands interact with the surrounding landscape and other waters, to some degree, as a result of surface overflow from precipitation and stormwater runoff. As Winter et al. (1998) observe, the chemical composition of water exchanged by wetlands with their surroundings is in part a function of the frequency and magnitude of the exchange, which is in turn determined by the presence or absence of a direct stream connection.

“The magnitude of surface-water inflow and outflow also affects the retention of nutrients in wetlands. If lakes or wetlands have no stream outflow, retention of chemicals is high. The tendency to retain nutrients usually is less in wetlands that are flushed substantially by through-flow of surface water. In general, as surface-water inputs increase, wetlands vary from those that strongly retain nutrients to those that both import and export large amounts of nutrients. Furthermore, wetlands commonly have a significant role in altering the chemical form of dissolved constituents. For example, wetlands that have throughflow of surface water tend to retain the chemically oxidized forms and release the chemically reduced forms of metals and nutrients.”

The frequency and magnitude of surface overflows varies according to wetland type, but also as a function of landscape position. As Meyer et al. (in preparation) note, depressional wetlands, even in close proximity, can have distinctly different hydrologic conditions. The frequency and magnitude of overflows from prairie potholes are intimately related to their individual landscape positioning. While prairie potholes normally store some portion of inflows from precipitation and groundwater, at some their storage capacity is exceeded and they overflow. When overflows occur, potholes connect with each other and with nearby streams during flood events. Intermittent surface-water connections between prairie potholes during flooding events have been documented, as summarized in a recent study by Leibowitz and Vining (2003), which explores the connectivity of prairie potholes within a complex by analyzing the evidence of intermittent spillover from one to another. The authors note that intermittent overflows from potholes are an indication that wetter conditions are exceeding the normal storage capacity of the pothole. The study used the testing of conductance in nearby pothole wetlands to measure the dynamics and timing of the flooding-induced spillover from the higher-gradient pothole to the lower one within a pothole complex. The authors also conducted a spatial analysis showing that an estimated 28 percent of the pothole wetlands within the study region in central North Dakota were intermittently hydrologically connected by surface-water to at least one other pothole during a period of flooding in the subsequent year. The connectivity the authors observed is associated with wetter conditions in a 20-year wet-dry cycle in the region. As a result, surface-water connections between potholes should be considered a probability event occurring over time and space. In addition, Leibowitz and Vining (2003) suggest that temporary, infrequent connectivity could provide a mechanism for the dispersal of organisms, potentially supporting metapopulations.

Overflows connecting waters of depressional wetlands to other surface waters occur in a wide variety of wetland systems, landscape positions and ecoregional contexts. The oxbows of many river systems, such as the Southern Platte River in Colorado and Nebraska and Alaska's Yukon River, are periodically linked directly to the river system by floodwaters.

The pocosins and Carolina bays of the southeastern Coastal Plain, while apparently "isolated" wetlands, are hydrologically connected by surface overflows and higher groundwater tables during precipitation events. In a recent summary of findings regarding the ecosystem functions of pocosins, Richardson (In press) describes them as "the headwaters of large areas of Coastal Plain and are a source of sheet flow for the region." Pocosins are connected also by groundwater linkages, and form part of a wetland-lake-stream-coastal estuary system (Richardson In press, citing Daniels, 1981).

Hydrologically, headwater wetlands behave differently from depressional systems. Headwater wetlands are the temporarily or seasonally flooded wetlands occurring where groundwater surfaces to form the head of a stream. Headwater wetlands, unlike depressional wetlands, are open, hydrologically, which results in chemical transformation processes that are more influenced by minerals in the subsoil than by organic matter, and that generally involve less retention of chemical inputs such as nutrients.

2. Wetlands Are Connected to Other Waters Through Biological Connectivity and The Metapopulation Dynamics of Various Species

Temporary wetlands, whether or not they have a surface connection to other flowing waters, provide critical support for the biodiversity of the nation's birds, fish, wildlife and plant species.

In many instances, and on different scales, the role of small, temporary wetlands in providing biodiversity support must be considered as part of a highly productive complex of wetlands distributed in close proximity at a high density. The large and highly productive wetlands complexes of the Central Flyway -- most prominently, the Prairie Pothole Region, the Playa Lakes Region and the Rainwater Basin -- can themselves be seen as biologically connected, supporting different life stages of migrating birds.

Many apparently "isolated" wetlands function on a smaller scale as components of "wetland mosaics" which, as a system, sustain multiple local populations, or metapopulations, of wetland-dependent species. Research on metapopulations of amphibian, herpetofaunal and other species, by Semlitsch and Bodie (1998) and Gibbs (2000), and others has demonstrated how the regional survival of a metapopulation of a wetland-dependent species depends on the abundance and proximity of small wetlands, rather than on any size threshold of the wetlands. Viability of metapopulations is related to the ability to repopulate an area and to recruit juveniles into the breeding population.

Studies have also shown that a diversity of hydrologic conditions within a complex of wetlands positively influences the biological diversity of wetland dependent species. A recent study by Whiles (1998) of amphibian communities within a network of sloughs near a portion of Nebraska's central Platte River found smaller species of frogs more successful in the more intermittent and fishless of the sites, but recruitment did not occur to these sloughs in a drier year.

Significant research in recent years has documented the metapopulation dynamics of specific species. The following species profiles of the Copperbelly watersnake, the Blanding's turtle, the Spotted turtle, and bird species provide examples of the biological connection of temporary wetlands with each other and other surface waters in supporting populations of these organisms.

*Examples of Biological Connectivity and  
Metapopulation Dynamics for Specific Wetland Species*

Copperbelly Water Snake, *Nerodia erythrogaster neglectar*

The Copperbelly Water Snake is a highly vagile species with a life history requiring frequent among-wetland movements, use of multiple wetlands, and a reliance on surrounding upland habitats for significant portions of the year:

Movements to multiple wetlands are an important component of the biology of this species. Movements are important for meeting the more immediate needs of feeding, mating, and refugia. Movements or dispersal to other wetlands allows the copperbelly to respond to changing environmental conditions such as changing water levels, shifts in prey abundance associated with drying wetlands, predation, desiccation, and heat stress.

Small wetlands are important to copperbellies as foraging sites. Copperbellies tend to predominantly eat amphibians, especially frogs. Fish-free wetlands such as “isolated” and ephemeral wetlands are where most species of frog experience their greatest reproductive success. The fact that they dry down over time makes them attractive foraging sites for the snakes.

Small wetlands are also important as stopovers for travel to more distant wetlands. In recent study by Roe et. al. (2002), 80% of all wetland movements by copperbellies in their study were to wetlands less than one ha in size. Also, nearly 70% of their study animals used four or more wetlands, and approximately 50% used five or more wetlands. Loss of small wetlands would reduce the number of wetlands available to the copperbelly, thus reducing available resources, and would consequently reduce population densities.

Since copperbellies rely on movements among wetlands, they would be less likely to persist in remnant low-wetland density landscapes. Loss of wetlands would increase distances between remaining wetlands. This would result in a decrease in the likelihood of successful dispersal or migration due to the increasing distance between resources.

Movement between “isolated” and navigable waters is routine. In both river floodplain habitats and in more upland environments involving “perched” depressional wetlands, copperbellies regularly travel between different types of wetlands. By their day-to-day activities, they link wetlands biologically that may or may not have navigable connectivity.

The copperbelly’s propensity to use multiple wetlands and to frequently move between them leads to a susceptibility to changes in the spatial distribution of wetlands. Individual copperbellies may be either forced to confine movements to fewer wetlands and smaller areas if neighboring wetlands become too distant. Also, they may attempt to continue movement among wetlands at considerable costs. Continuing to move among multiple wetlands after wetland losses would likely require snakes to move more extensive distances and enlarge their area use (e. g. Home Range), both of which may increase individuals susceptibility to predation, increase energy expenditure, decrease time for other activities, such as feeding, thermoregulating, and mating, all of which may directly or indirectly influence the individual’s survival and fitness as well as long-term persistence of the population. Restricting to smaller sites may come with exclusion from important resources such as foraging sites, or alteration of metapopulation dynamics through isolation.

Blanding's Turtle, *Emydoidea Blandingii*

The Blanding's turtle utilizes a wide variety of habitats throughout its range, but has an affinity for wetland (marshes and shallow ponds) complexes and their surrounding upland habitats. These wetlands may be isolated areas, dependent on seasonal precipitation, or they may be directly supported from nearby river and stream systems:

Utilization of multiple wetlands is an important component of Blanding's Turtle biology and has been documented in many studies (Rowe 1987, Ross 1989, Rowe and Moll 1991, Pappas and Brecke 1992, Graham and Butler 1993, Hermann et al. 1994, Dorff 1995, Joyal 1996, Linck and Moriarty 1997, Barlow 1999, Kingsbury 1999, Piepgras and Lang 2000, Joyal et al. 2001). Multiple wetlands are utilized by Blanding's Turtles to fulfill basic requirements such as basking, feeding, aestivation, breeding, and overwintering (Graham and Butler 1993, Joyal 1996, Pappas and Brecke 1992, Dorff 1995, Linck and Moriarty 1997, Herman et al 1994).

Blanding's turtles are a highly vagile turtle species, perhaps the most vagile in North America. Blanding's Turtles appear to move longer distances and more frequently than other species (Congdon et al. 1983, Piepgras and Lang 2000). Extensive terrestrial movements in turtles have been attributed to reproductive tactics (Morreale et al. 1984, Congdon et al. 1983, Link et al. 1989, Rowe and Moll 1991, Butler and Graham 1995, Joyal 1996, Linck and Moriarty 1997, Piepgras and Lang 2000), thermoregulation (Sajwaj and Lang 2000), aestivation (Joyal 1996, Rowe 1987), searching for nesting sites (Congdon et al. 1983) or hibernation sites (Sexton 1959), responses to droughts (Gibbons et al 1983), and to an increase in foraging opportunities (Pluto and Bellis 1988).

Shallow, stable wetlands are integral to the survival of Blanding's Turtles, especially amongst the juvenile age class. Juveniles are most closely associated with extremely shallow water, typically less than 10 cm (4"), such as wet meadows. This has been documented for Blanding's turtles and other turtle species as well (Pappas and Brecke 1992, Hammer 1969, Waters 1974, Moll and Legler 1971, Congdon et al. 1992).

Over the season, and over their lifetimes, Blanding's turtles use a variety of water depths, thus to sustain the species, an area must have diverse wetlands. In their day-to-day activities, adult Blanding's turtles display flexibility in wetland utilization, using a variety of types, with varying associated depths. However, overall, wetland use is largely dependent on age class. As just mentioned, the smallest turtles use extremely shallow water. However, there is a positive correlation between turtle size and average foraging depth, such that the largest individuals use water that averages about 50 cm in depth, like shallow ponds and streams (Kingsbury 1999, Barlow 1999). All age classes are also dependent on shallow areas for hibernation.

Blanding's turtles utilize "isolated" wetlands. Several studies have noted the importance of widely spaced vernal pools, and both small ephemeral wetlands and permanent wetlands as basking, feeding, aestivating and overwintering sites (Graham and Butler 1993, Joyal 1996, Pappas and Brecke 1992, Dorff 1995, Linck and Moriarty 1997, Herman et al 1994). Joyal et al.

(2001) noted that the Blanding's turtles in her study frequently used small wetlands, often less than 0.04ha in size, as foraging and thermoregulation sites.

Due to the Blanding's turtle's reliance on multiple wetlands, their frequent movements between them, and their high degree of site fidelity, changes to the spatial distribution of wetlands utilized by Blanding's Turtles may threaten existing populations. A single population of Blanding's Turtles is frequently spread over multiple wetlands of many different types, and movements between these wetlands are common (Ross 1989, Rowe and Moll 1991, Joyal 1996, Joyal et al 2001). Blanding's Turtles also display site fidelity (Gibbons 1968, Rowe 1987, Barlow 1999). This means that they often follow the same patterns of movement year after year and they may also return to the same wetlands to hibernate, and to the same nesting areas (Congdon et al 1983, Barlow 1999, Standing et al 1999, Lang 2002). Disruptions to hibernation, and nesting areas would seriously impact a population. Physical barriers, such as large tracts of land between wetlands, which may come about after smaller connecting wetlands are removed, may inhibit the movements of turtles (Rowe 1987). Movements may then be restricted to smaller areas, with fewer resources, or they may be continued with higher costs and risks. Decreased movements may also impede gene flow between adjacent populations (Kiestler et al 1982).

#### Spotted Turtle, *Clemmys guttata*

Spotted turtles display a high affinity for shallow wetland complexes and surrounding upland habitats throughout its range:

Multiple wetland use is common. Numerous studies have documented the movements of spotted turtles between multiple wetlands (eg. Ernst 1976, Lovich 1990, Graham 1995, Joyal 1996, Barlow 1999). These movements can be both aquatic and/or overland and can be quite extensive. Such movements in turtles have been documented to be important for reproductive tactics (Morreale et al 1984), searching for nesting sites (Congdon et al 1983) or hibernation sites (Sexton 1959), responses to droughts (Gibbons et al 1983), and to increase foraging opportunities (Pluto and Bellis 1988). Kiestler et al (1982) has also suggested that large movements by male turtles would promote gene flow between adjacent populations.

Shallow heterogenous wetland complexes, as well as small "isolated" wetlands are important habitat for spotted turtles. Across part of their range, spotted turtles utilize shallow, heterogenous wetland complexes (Capler and Moll 1988, McGee et al 1989, Barlow 1999), which may exist in close association with river or stream systems (Ernst 1976, Barlow 1999). In other parts of their range, spotted turtles utilize small "isolated" wetlands such as vernal pools, and ponds (Creighton and Graham 1993, Graham 1995, Joyal 1996). Regardless of their range, spotted turtles require shallow wetlands (<50cm deep) for all or part of their lives (Barlow 1999).

Small "isolated" wetlands and non-"isolated" wetlands are frequently used. Seasonal movements between "isolated" and non-"isolated" wetlands have been documented by Ward et al. (1976), Graham (1995), and Joyal (1996). These seasonal movements are important behavioral adaptations for thermoregulation, foraging, and the avoidance of desiccation and predators.

During these seasonal movements spotted turtles may utilize flooded areas in fields and woods, marshes, decaying vegetation in wooded areas, as well as shallow wetlands and vernal pools.

Upland habitats are vitally important. Spotted turtles aestivate in terrestrial locations, often well away from wetlands (Creighton and Graham 1995, Graham 1995, Barlow 1999). They also frequently use these upland habitats as movement corridors, and nesting sites.

### Bird Species

Wetlands are important for numerous bird species. Numerous species, notably migratory species, provide excellent examples of the interconnectivity of wetlands, both within complexes, and those distant from one another in the landscape. Numerous and diverse wetlands, both interconnected and otherwise, are important for bird diversity:

Many species, including the shorebirds, wading birds, and waterfowl like ducks and geese, make use of multiple wetlands, which may be quite spatially dispersed (Haig et al. 1998, Naugle et al. 2001). Wetlands are used as foraging sites, resting areas during migration, and in some cases nesting sites (Skagen and Knopf 1994, Naugle et al. 2000, Naugle et al. 2001). For example, black terns are documented to nest and forage in prairie wetlands (Naugle et al. 2000).

Heterogenous wetland complexes, that support multiple wetlands of various sizes, provide more suitable habitat, both for nesting and foraging (Gibbs 1991, Naugle et al. 2000, Naugle et al. 2001), when compared to “isolated” wetlands. Because wetlands, and wetland complexes in particular are so variable (both in structure and in vegetative components), they are attractive for many different species of birds (Naugle et al. 2000, Naugle et al. 2001), and generally support greater species richness (Brown and Dinsmore 1986). Birds are able to exploit the available habitat and capitalize on the multiple foraging opportunities, while reducing energy expenditure (Naugle et al. 2001).

Heterogenous wetland landscapes provide alternative habitat when adverse conditions arise at one site, for example during periods of flooding, or drought (Skagen and Knopf 1994, Haig et al. 1998). Plissner and Haig (1997, discussed in Haig et al 1998) provide an excellent example to highlight this point in which populations of Piping plovers were observed to relocate to more suitable habitat provided by nearby wetlands after flooding occurred on habitats they were utilizing along the Missouri River.

Small seasonal wetlands within areas that support high wetland densities are also important. These temporary wetlands provide foraging, as well as nesting habitat for many highly vagile migrating species. For example, Northern Pintails are particularly at risk from the loss of small seasonal wetlands as they depend on these habitats for breeding before moving their broods to more permanent, larger wetland habitats (Naugle et. al 2001). Interestingly, Naugle et al. (2001) also found that the suitability of larger wetlands (for providing suitable habitat, especially for species such as the Northern Pintail) decreased when the smaller wetlands surrounding them were removed.



Connectivity between wetland habitats is paramount. Within-season movements among numerous sites are important, especially for many species of waterbirds (Haig et al. 1998). Movements among breeding areas have been documented to enhance reproductive success by providing an opportunity to assess nesting territory and feeding-area quality in current and future years (Haig et al. 1998). Maintaining connectivity between wetland complexes will also provide vital linkages between breeding areas and breeding populations. Wetland availability in the greater landscape context will also determine its “usability,” with less isolated complexes being more likely to be used than more isolated complexes (Naugle et al. 2001).

Additional families or pathways -- In their recent article on intermittent hydrologic connectivity among prairie potholes, Leibowitz and Vining comment on the fact that research into metapopulation dynamics has, thus far, tended to address movements of species between wetlands either over land or in flight. The authors suggest that flooding-induced, intermittent surface-water connections between potholes, and between other depressional wetlands, may serve as a mechanism for individuals of a species to migrate. They cite a recent study of wetlands in Florida (Babbitt and Tanner 2000, cited in Leibowitz and Vining) which found that temporary, surface-water connections between wetlands and drainage ditches, resulting from flooding conditions, caused an increase in the relative abundance of amphibians adapted to fish predation.

## **V. FUNCTIONS AND VALUES OF HEADWATER STREAMS AND THEIR ADJACENT WETLANDS AND NON-ADJACENT WETLANDS**

Above, we describe the many linkages between headwater streams and so-called “isolated” wetlands to other waters. However, the waters described also have inherent value in the unique functions they provide – functions that establish such waters as integral and inseparable features of the landscape. An examination of these functions will not only further establish the connectivity of these waters to other waters, but also provide a compelling case for continuing to protect them under the Clean Water Act.

The major ecological functions of headwater streams and small, apparently “isolated” wetlands and other waters, are described below. The following discussion responds to the invitation in the ANPR to address “the functions and values of wetlands and other waters;” it summarizes the critically important services provided by these waters, and concludes by outlining the serious potential consequences of narrowing federal protection for them.

### **A. THE INTRINSIC VALUE OF HEADWATER STREAMS**

Headwater streams make up the vast majority of the entire stream network, and are inseparably bound up with other waters in the surrounding watershed and downstream. They provide essential functions and values themselves, and are critical to the hydrological, chemical, and biological health and integrity of downstream waters. As U.S. EPA’s own recently-released research and literature review on headwaters streams states emphatically:

Headwater streams make up the majority of our stream resource. Although it is difficult to get reliable estimates of perennial, intermittent and ephemeral stream lengths, the case studies that are available indicate the proportion of the total stream length that could be intermittent, even in more humid regions, is significant (a range of 17 to 34%). The extent of ephemeral headwater streams is even larger (a range of 22 to 55%). We should be very wary of any attempt to downgrade the value or importance of headwater streams, especially as they relate to the aquatic life use in these streams and the role these headwater streams play in the overall stream network. Doing so would put the majority of our freshwater aquatic stream resource at risk, as well as severely limiting our ability to protect downstream waters (U.S. EPA 2003).

#### 1. Streams Can Be Defined in Several Ways

There are generally accepted definitions for small streams, and some measurements of their extent, although no single definitive or accurate data set exists of headwaters streams (Meyer and Wallace 2001). Generally accepted definitions of the term *headwaters* refer to the smallest streams in the network and, in particular, the source(s) of a river. They may include ephemeral streams, those that flow at the surface only periodically and usually in response to a specific rainfall event. Headwaters may also include intermittent streams, those that have flow several months in an average year. Such streams are distinguished from perennial streams, which flow at all times of the year (Meyer et al. In preparation). Some hydrologists use the term zero-order streams to refer to swales or unchannelized hollows. These waters are important conduits of water, sediment, nutrients and other materials during rain and snowmelt events, but are not considered to be stream channels because they lack distinct stream banks (Meyer et al. In preparation). Other states employ various definitions for ephemeral, intermittent, and perennial streams that include parameters other than hydrology. For example, Pennsylvania considers a stream “perennial” if it supports two aquatic macroinvertebrate taxa, regardless of whether there is continuous surface flow (U.S. EPA 2003).

Stream order is another way of classifying streams by relative size of channels in the stream network. In the stream order system, first order streams are the smallest identifiable channels having no tributary branches. Second order streams are formed where two first-order channels merge, third order streams are formed by the combination of second-order streams, and so on (Horton 1945, as cited in Meyer et al. In preparation). Scientists generally agree with these definitions, however, some resource management agencies have developed their own definitions. For example, Ohio EPA considers headwaters streams to be “the very small swales, creeks, and streams that are the origin of most rivers.” And it defines “primary headwater” streams as those with watersheds of less than one square mile (Ohio EPA 2001).

#### 2. Headwater Streams Perform Ecosystem Functions

Headwaters streams provide a wide array of functions and environmental services whose value, though estimated to be enormous, to date cannot even be fully calculated. The Ohio Environmental Protection Agency’s (2001) fact sheet on headwaters streams notes the value of these small systems:

Because of their small size, headwater streams in some locations have been treated as mere water “conveyances” and have been ditched, channelized, moved or even buried in pipes. Historically they have not been appreciated for their contribution to water quality. By their sheer numbers, however, they have important ecological and economic functions. They affect the ecological and economic viability of downstream rivers through the regulation of flood waters, the maintenance of safe and high quality drinking water, pollution prevention, and numerous other ecosystem services.

The major ecosystem functions of headwater streams are described briefly below. This discussion augments the characterization of the processes, characteristics and functions of headwater streams described above.

a. Flood control and maintenance of water supplies

During heavy precipitation and floods, water soaks into floodplains, stream channel beds and banks, and into groundwater tables. This transfer of water into “storage” significantly delays and diminishes flood peaks. During dry periods, release of this stored water along with groundwater seepage ensures a steady flow of water, or “baseflow,” in the channel and downstream. (Meyer et al. In preparation) Streams receive, on average, 50 percent of their flow from groundwater (Alley et al. 1999), and headwater streams are a primary point of groundwater discharge into surface waters, particularly during dry and other low flow periods. (Cohen 2003)

b. Sediment storage

Headwater streams provide the connection between sediment production from hill slopes and sediment transport to larger streams, rivers, lakes, ponds, and coastal waters. Thus, they are the first line of defense against high sediment loads in large streams and rivers. These excess sediment loads damage aquatic wildlife habitat and degrade human uses of water – for drinking water supplies, fishing, and recreation. Headwaters are highly effective in capturing and filtering out sediments, as well as organic material and excess nutrients. (Meyer et al. In preparation)

c. Maintaining water quality through nutrient uptake and transformation

The basic chemical composition of unpolluted streams and rivers is largely established in headwater streams. Recent research has demonstrated that small streams are the sites of the most active uptake, transformation, and retention of nutrients. In addition to the nutrient removal that occurs in headwater streams, the chemical and biological transformations that occur there (e.g. denitrification, microbial uptake, transformation to organic nitrogen) reduce the biological availability of nutrients that are exported downstream. This capacity for nutrient retention and transformation reduces the loading of nutrients to downstream ecosystems. Riparian forests and wetlands associated with headwater streams can also be efficient in nutrient removal. (Meyer et al. In preparation)

### 3. Streams Provide Wildlife Habitat and Help Maintain Biodiversity

Headwater streams and their riparian zones are regions of high species diversity. Individual headwater streams support hundreds of species from a wide range of biological groups from bacteria to bats. Headwaters serve as the primary habitat for some fish species, but also provide essential support in the form of spawning, nursery, feeding, and thermal refuge areas for fish living in larger streams, rivers, and lakes. Small headwater streams provide essential nutrients to salmon species spawning and nesting downstream; salmonid reproduction occurs even in ephemeral portions of streams in the Pacific Northwest. (Poff et al. 1997) Many headwater fish species are rare, declining, or extinct. Amphibians are common in intermittent as well as perennial streams, and are usually more abundant in streams too small or remote to support large predatory fish. Only a few species of birds actually live in small streams, but many depend on headwaters for food, water, habitat, or movement corridors. Headwaters are important habitats for many mammals, which use headwater habitats for shelter, food, drinking water, or movement corridors. (Meyer et al. In preparation)

#### B. INTRINSIC VALUE OF HEADWATER AND "ISOLATED" WETLANDS

##### 1. Headwater and So-called "Isolated" Wetlands Are Important on an Ecosystem Scale

In 1995, National Research Council (NRC) addressed the question of whether headwater and "isolated" wetlands should receive less protection, and found the scientific basis for doing so to be "weak" (NRC 1995). The NRC's conclusion was based on ample evidence that headwater and so-called "isolated" wetlands provide essential ecosystem services to the water environment. The term "isolated," itself, has a weak scientific basis. As noted by Tiner et. al. in the recent USFWS study, *Geographically Isolated Wetlands*, "There is no single, ecologically or scientifically accepted definition of isolated wetland, because this issue is more a matter of perspective than scientific fact." (Tiner et al. 2002) Not only are headwater and so-called "isolated" wetlands intrinsically of critical ecological importance, but, as noted above, they function integrally with the chemical, physical and biological processes within watersheds. A full consideration of how headwater and so-called "isolated" wetlands function in the environment underscores the inapplicability of the "isolated" characterization. In addition, contributions to the understanding of the complex functioning of headwater and so-called "isolated" wetlands since the NRC study was published underscore the NRC's conclusion regarding their relative importance for conservation.

The ecosystem services provided by wetlands, including headwater and so-called "isolated" wetlands, are essentially grouped as hydrologic, biogeochemical, and habitat functions.

## 2. Headwater and So-called "Isolated" Wetlands Perform Specific Functions

### a. Hydrology

Irrespective of their landscape position or degree of connectivity to other surface waters, wetlands perform hydrologic and water quality functions by "modifying or controlling the quality and quantity of water moving through the wetland," as described by Carter (1996). The hydrologic and water quality functions of wetlands, including headwater and so-called "isolated" wetlands, are complex and varied, and are dependent on a range of factors, including:

- Landscape position
- Topographic location
- Presence or absence of vegetation
- Type of vegetation
- Type of soil
- The relative amounts of water flowing in and out of the wetland
- Local climate
- The hydrogeologic framework
- The geochemistry of surface and ground water

The hydrologic functions performed by wetlands to varying degrees according to the above factors, include: flood storage and moderation of storm flows; groundwater recharge and discharge, including discharge to stream flows; alterations of precipitation and evaporation; maintenance of water quality and estuarine balance; and reduction in erosion.

The complexity of differentiating between different types of freshwater wetland systems according to their ecological functions and regimes is addressed by Misch and Gosselink (1993). In categorizing the ecosystem functions of freshwater, non-forested wetlands, the authors differentiate between peat-forming systems, such as bogs and fens, and freshwater marshes which are non-peat-forming. Included in the category of freshwater marshes are smaller systems such as riverine marshes in floodplain and headwater areas, prairie potholes and sandhill marshes, vernal pools and playa lakes, along with larger systems including the marshes fringing the Great Lakes and the Everglades. Misch and Gosselink note that "[T]he critical factors that determine the character of these wetlands are the presence of excess water and sources of water other than direct precipitation." Marshes, the authors note, are like fens, in that "they generally have a water source in addition to precipitation," those potential sources being groundwater and surface flows. In addition, because all water sources to freshwater marshes are dependent on precipitation, their water regimes can vary greatly over time. In their landmark study of the pothole region, Stewart and Kantrud (1971) showed that precipitation patterns can alter prairie potholes from ephemeral to seasonally ponded to permanently ponded conditions over a period of years (cited, e.g., in Hubbard 1988).

The degree to which wetlands perform the above-mentioned hydrologic functions varies from wetland to wetland, especially in the case of depressional wetlands, which show a high degree of beta diversity, or variation from one to another. For example, as described by Meyer et. al.

(2003), two prairie pothole wetlands in central Wisconsin, located 400 m apart, are distinctly different hydrologically as well as biologically.

Depressional wetlands generally, and particularly those lacking "natural outlets," or surface connections to other waters, typically intercept and store runoff, and moderate the velocity and volume of floodwaters. (Carter 1996) As noted by Tiner et. al. (2002), in areas where "isolated" wetlands are present in the thousands, the capacity to store surface water can be "enormous."

The strong correlation between the size of flood peaks and the amount of storage capacity provided by wetlands and lakes is well documented. (Carter 1996) The classic study of the Devil's Lake basin in North Dakota, by Ludden et. al. (1983) found that prairie potholes can store as much as 72 percent of the total runoff from a 2-year storm event and 41 percent of the runoff from a storm that occurs once every 100 years (cited in Tiner et al. 2002) Similarly, an Illinois study found that increasing the amount of wetland storage area in a basin by 1 percent decreased both peak and total flood flows and increased low flows. (Demissie, 1993 cited in Levin 2002) Additional studies have shown the critical floodwater collection and storage function played by the playa lakes of the Southern High Plains. (Haukos. In preparation) Pocosins are also recognized as "significant water storage systems," which receive and slowly release precipitation and stormwater runoff to downstream freshwater and estuarine waters. (Richardson. In preparation)

Water stored temporarily, seasonally and permanently in wetlands provides an important source of water to bird, fish and wildlife (Tiner et al. 2002).

Some portion of the water collected and stored by freshwater wetlands, including marshes and bogs, is typically discharged to groundwater where it replenishes aquifers and maintains instream flows. A significant proportion of recharge flows to groundwater can be provided by infiltration from depressional wetlands. Weller (1981), for example, showed that small wetlands contribute significantly to regional groundwater recharge. (cited in Misch and Gosselink 1993)

Groundwater recharge by small wetlands is important to replenishment of regional aquifers in the semi-arid northern prairie region (van der Kamp and Hayashi 1998). Much of the recharge of water to the Ogallala aquifer is provided by the 20,000 to 30,000 playa lakes of the Southern High Plains of West Texas and New Mexico. As Loren Smith describes in a forthcoming publication, *Playas of the Great Plains*, significant scientific debate, now resolved, surrounded the question of whether the impermeable clay soils lining playas, and the underlying layer of caliche, a dense geological formation, could allow infiltration. Subsequent research by Nativ and Riggio (1989) and Zartman et. al. (1994, 1996) has established conclusively not only that focused recharge from the playa lakes, rather than more diffuse infiltration from the surrounding landscape, recharges to the groundwater, but also that in the Southern High Plains, playas represent the sole source of recharge to the Ogallala. More recent studies of other depressional systems have shown that infiltration of surface waters occurs primarily through the permeable soils around the edges of depressional wetlands and that the ratio of the edge to the wetland volume tends to determine the amount of infiltration. (Misch and Gosselink 1993) Contributions to recharge have been documented in several other regions. The cypress domes of Florida have

also been shown to contribute to aquifer recharge. (Carter 1996) Phillips and Shedlock (1993) documented the role of Delmarva bays in collecting and storing water from precipitation during the winter and spring, as well as stormflows from surrounding uplands, and recharging it to the aquifer. (cited in USFWS comments to DOI 2003) The Montane bogs and other depressional wetlands of Hawaii are also recognized as providing aquifer recharge. (USFWS comments to DOI 2003)

In addition to recharging aquifers, water infiltrating to groundwater through depressional wetlands flows down-gradient to streams. Headwater and so-called "isolated" wetlands can play a significant role in maintaining baseflows in streams. Delmarva bays, for example, help to maintain baseflows through recharging groundwater. Drainage or filling of wetlands that provide groundwater recharge can result in reductions in baseflow of streams, with additional impacts to downstream ecosystems. (Winter 1999)

#### b. Water quality

Wetlands, including headwater and so-called "isolated" wetlands, perform important water purifying functions that benefit the ecosystem overall. The transformation of chemicals in water inflows is a function of four principle components of the wetland: the substrate or wetland soil, water, vegetation, and microbes (Carter 1996). These components are common to all wetlands.

As noted earlier, wetlands trap, transform, and recycle the chemical constituents in water inflows through biological and chemical processes (Winter 1998). Many wetlands serve as nutrient sinks, removing nutrients, from inflows and recycling them through plant uptake or biological processing. Misch and Gosselink (1993) provide a review of findings over the 1970-1992 period concerning various wetland types and their roles as sources and sinks of nutrients. They note that inadequate measurement techniques may have affected some of the findings, and observe that the results varied according to whether the study addressed inorganic or organic nutrients. They conclude, with certainty, that "many wetlands act as sinks for particular inorganic nutrients and many are sources of organic material to downstream or adjacent ecosystems."

The National Research Council recognized the value of headwater riparian wetlands in protecting water quality, in their recent study of the effectiveness of wetlands mitigation, *Compensating for Wetland Losses under the Clean Water Act* (2002), noting their effectiveness in buffering streams from influxes of nutrients and sediments. The NRC found that headwater riparian wetlands, to varying degrees depending on morphology and other factors, also remove nutrients from groundwater flows to streams. They cited the characterization by Gilliam et al. (1996) of headwater riparian wetlands as "the most important factor controlling nonpoint source pollution in humid areas." The relative importance of riparian wetlands associated with low order streams in removing phosphorus was demonstrated in a 1996 study of eight watersheds. The authors modeled the nutrient load reduction performed by riparian areas, and found that the riparian wetlands of first- through fourth-order streams contributed significantly to phosphorus removal, and the wetlands associated with the first-order streams accounted for most of the total load reduction attributed to wetlands. (Weller 1996, cited in Meyer et al. In preparation)

Depressional wetlands, including so-called "isolated" wetlands, have been shown to effectively remove pollutants from waters overflowing the wetland or discharging to groundwater. A study by Davis et. al. (1981) measured the levels of nitrogen and phosphorus in influent and effluent to a prairie marsh, and found that all runoff was retained in three dry years, while in the wet year, more than 75% of the inorganic nitrogen was removed from water flowing out of the marsh (cited in Hubbard 1988).

The role of wetlands in trapping sediments and serving as sinks for heavy metals and other chemical constituents is also well established in the literature.<sup>36/</sup>

c. Maintain Biodiversity and species populations and distributions

Tiner et.al. (2002) have noted recently, "From an ecological standpoint, isolated wetlands are among the country's most significant biological resources." The biological significance of ephemeral and other apparently "isolated" wetlands is their role in providing the habitat and energy sources that are critical to supporting the abundance and biodiversity of the nation's birds, fish, wildlife and plant populations. In some instances, ephemeral wetlands complement non-"isolated" systems in providing habitat for wetland-dependent species. In other instances, they provide specialized habitat conditions that are required to support regional biodiversity. In certain instances, as Meyer et. al. (In preparation) have described, "ephemeral wetlands contribute to global biodiversity and the disappearance of ephemeral wetlands would mean the loss of highly specialized taxa."

Characterizing the ecological role of apparently "isolated" wetlands, Tiner (2002) observed:

"In some areas, isolation has led to the evolution of endemic species vital for the conservation of biodiversity. In other cases, their isolation and sheer numbers in a given locality have made these wetlands crucial habitats for amphibian breeding and survival (e.g., woodland vernal pools and cypress domes) or for waterfowl and waterbird breeding (e.g., potholes). In arid and semi-arid regions, many isolated wetlands are veritable oases -- watering places and habitats vital to many wildlife that use them for breeding, feeding and resting, or for their primary residence. Many of these wetlands may be small in size, but their value to wildlife is far greater than their size alone would suggest."

Tiner et al. (2002), as well as a recent report by the National Wildlife Federation and the Natural Resources Defense Council *Wetlands at Risk*, profiling wetland types and their wildlife contributions by region, detail the wide diversity and richness of wetlands sometimes classified as "isolated." These systems sustain many species populations, and their distribution, safeguard biodiversity locally, regionally or globally, and serve as the sole line of defense against extinction in a large number of instances.

(1) Maintenance of populations and regional abundance

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<sup>36/</sup> See, e.g. Hubbard, Daniel E., *Glaciated Prairie Wetland Functions and Values: A Synthesis of the Literature*, U.S. Fish and Wildlife Service Biological Report 88(43), p. 19.



The roles of some wetland types in supporting wildlife populations, for example duck production of the Prairie Pothole Region and the role of the Rainwater basin and Playa Lakes Region as critical wintering and stopover grounds for a wide range of migratory birds, are well understood and documented.

Other systems have received relatively little research attention to date, and in some instances, species populations are being identified even as development threats bear down on the remaining wetlands of the type. An example is the Citronelle Ponds of the Gulf Coast reported in *Wetlands at Risk*. Since that publication, additional species of copepods and fairy shrimp have been identified, along with a potentially unnamed *Streptocephalus* (George Folkerts, personal communication, April, 2003).

Many wetland-dependent species are non-specializing, relying on diverse wetland habitat. For such species, apparently "isolated" wetlands may help to sustain their regional abundance. For example, the Illinois Natural History Survey study conducted in 2002 showed that a sizeable proportion of the wildlife in Illinois is dependent on, or closely associated with wetlands, and that "isolated" wetlands make up 60 percent of the total number of remaining wetlands (Levin et al., 2002). The following are the reported number and percentages of wetland-dependent and associated native species reported:

<u>Group of organisms</u>	<u>Number</u>	<u>% of native species</u>	<u>% threatened /endangered</u>
Plants	862	42	18
Birds	105	38	29
Amphibians	37	90	19
Reptiles	13	22	46
Mammals	6	10	33

The study also reported that amphibians are especially, and in some instances exclusively, dependent on "fish-free isolated wetlands" for survival.

## (2) Biodiversity support for specialized species

Biodiversity support by vernal pools, and other seasonal wetlands that may be considered "isolated," occurs on local, regional and global levels.

Ephemeral wetlands provide global biodiversity support to a number of highly specialized families of organisms. (Meyer et al., In preparation) provide a listing of ancient vascular plant and crustacean species, associated with ephemeral wetlands since at least the Tertiary period, that are found on most or all continents. These groups have local species but generally also some individual species that have very wide distributions.

The playa lakes of the Southern High Plains provide regional biodiversity support to a number of families of wildlife species in addition to waterfowl, including mammals, other birds, invertebrates and flora (Haukos, In preparation).

A study by Zedler et al. (1993) of plant species found in vernal pools in San Diego County, California illustrates local biodiversity support. Of the 78 vascular plant species found in the study site, 25 are common to the vernal pools and surrounding chaparral, while 25 of the species are unique to vernal pools, and some of those latter are endemic to the region. As a result, loss of vernal pools in the area would threaten local biodiversity (cited in Meyer et al. In preparation). Meyer et al. (In preparation) also report that 44, or nearly one-tenth, of the plant species found in California vernal pools are found only in vernal pools and only in California.

Another example of specializing organisms are the very small land snails found in fens. Although not well-studied, about 42 different species of land snails have been found in fens in Iowa, Wisconsin, Minnesota and New York. One of the rarest species is limited to fens, and has been found at only about two dozen sites (Bedford In press).

### (3). Profiles of Amphibian Species

The habitat functions of depressional wetlands and their importance for assuring continued survival of dependent species are well-illustrated by amphibians. The following are profiles of amphibians and their use of wetland habitat:

Amphibians are generally slow moving and small-bodied with a physiology that requires them to remain near moist refugia (documented by Larson et al. 1984, cited in Gibbs 1998). A majority of them must also use wetlands for breeding. As a result, destruction of wetland habitats have the potential to seriously impact amphibian populations.

Many adult amphibians use aquatic habitats for reproduction, i.e., mating and egg laying. These habitats are also important for the recruitment of juveniles into the adult population. Not only does breeding and egg-laying occur there, but larval (tadpole) development until metamorphosis also typically takes place in these aquatic environs (Duellman and Trueb 1986, Dodd and Cade 1998, Semlitsch 1998). Aquatic habitats may also be very important in affording protection from extreme physical conditions, such as desiccation (Gill 1978).

Breeding habitats are frequently highly specific - breeding will only be successful in aquatic habitats with suitable physical and biological conditions. For example, studies conducted by Karns (1992) on the Blue-spotted Salamander (*Ambystoma laterale*), and by Sadinski and Dunson (1992) on Jefferson Salamanders (*Ambystoma jeffersonianum*) documented that embryonic development was significantly extended and in some cases failed under low pH conditions. Also, many species of salamanders, especially those that are small bodied or have small clutch sizes, will only breed in aquatic areas that are devoid of fish (Hecnar and M'Closkey 1997, Petranka 1998). Avoidance of ponds containing fish has also been documented with Wood Frogs (*Rana sylvatica*) (Hopey and Petranka 1994). Adult salamanders may also show site fidelity, returning to the same breeding ponds year after year (Gill 1978, Semlitsch et al. 1996).

Temporary ponds are important breeding sites for many amphibians and these sites may support a rich diversity of species. Studies supporting these findings include Hecnar and M'Closkey (1996) and Snodgrass et al. (2000). Dodd and Cade (1998) also report that there are a number of

amphibian species of critical conservation concern that only breed in temporary wetlands: *Ambystoma cingulatum* (Flatwoods Salamander), *Notophthalmus perstriatus* (Striped Newt), *Rana capito* (Gopher Frog). There are also many other species that are dependent on small wetlands. For example, in a study conducted by Gill (1978) on the Red-spotted Newt (*Notophthalmus viridescens*) he found that breeding adults used numerous, small, isolated, woodland ponds whose hydrology was solely dependent on precipitation.

Diversity in the hydroperiod of wetlands within complexes is required to buffer unpredictable environmental variation. Because many amphibian species utilize aquatic habitats with varying hydroperiods, they are greatly influenced by stochastic events, such as droughts. For many species of amphibians, especially those that rely on seasonally ephemeral wetlands, years of drought may result in a reduction of recruitment into the adult population as larvae are unable to complete metamorphosis, or in extreme cases, it may result in an absence of breeding. A long-term study, conducted over 16 years, by Semlitsch et al. (1996), found that years with short hydroperiods resulted in complete, or near complete amphibian reproductive failure. Their study highlighted the vulnerability of some amphibian species that may be unable to survive multiple years of conditions unfavorable for reproduction. For these species, the authors note that, barring rescue from immigration, they would probably become locally extinct as a direct result of mortality exceeding reproduction.

Terrestrial habitats surrounding breeding sites are important areas for foraging and hibernation. During the non-breeding season, many amphibian species live in the terrestrial habitats that surround breeding sites (Hecnar & M'Closkey 1996, Semlitsch 1998). This surrounding terrestrial habitat provides dispersal corridors for the movement of amphibians between sites. Dispersal between sites is important for many amphibian populations as it provides for genetic exchange, as well as for the recolonization of populations that may have become extinct at distant sites (Semlitsch 1998). Another important point to note is that amphibians have been found to utilize terrestrial habitat at considerable distance from wetlands. For example, Semlitsch (1998) summarized movement data from numerous studies on salamanders and found that of the six species he included in his analysis, adults were found an average of 125.3m from the edge of aquatic habitats, and they may be found up to 625m from wetland edges.

Due to the filling of many vernal pools across the US, many populations of pond-breeding salamanders are becoming ever more "isolated." Petranka (1998, p. 16) speculates that in many areas, salamander populations "...are at the point at which recolonization of ponds following local extinction is becoming increasingly unlikely."

Examples of salamander species that are dependent on aquatic wetland habitats in the US include (the following information is loosely paraphrased from Petranka, 1998):

Ringed Salamander (*Ambystoma annulatum*). This species breeds in fish-free habitats such as woodland pools, and seasonally ephemeral ponds adjoining forests (Brussock and Brown 1982; McMillian and Wilkinson 1972; Peterson et al 1991; Spotila and Beumer 1970; Trapp 1956). The species also uses pools in low-lying areas as well as along ridge tops, where the hydrology is mostly precipitation dependent.

California Tiger Salamander (*Ambystoma californiense*). Generally breeds in fish-free seasonally ephemeral ponds. During years of drought, ponds may not form, and populations may not breed (Barry & Shaffer 1994).

Flatwoods salamander (*Ambystoma cingulatum*). Documented to breed in seasonally ephemeral habitats such as marshy pasture ponds, swamps, and cypress and black gum swamps (Anderson and Williamson 1976, Mecham and Hellman 1952). This species has been identified as an amphibian species of critical conservation concern.

Northwestern Salamander (*Ambystoma gracile*). Observed breeding in both permanent and semi-permanent habitats, for example, small shallow ponds to large, deep lakes.

Jefferson Salamander (*Ambystoma jeffersonianum*). This species typically breeds in seasonally ephemeral woodland pools and farm ponds, but may also use permanent habitats (Bishop 1941a; Douglas and Monroe 1981). They may also breed in upland ponds on ridges.

Blue-spotted Salamander (*Ambystoma laterale*). Blue-spotted salamanders breed in variety of habitats devoid of fish, including pools along lakeshores, springs in pastures, quarry ponds, marshes, both seasonally ephemeral and permanent woodland pools (Anderson and Giacosisie 1967; Bleakney 1957; Piersol 1910a; Stille 1954; Van Buskirk and Smith 1991; Weller et al 1978).

Mabee's Salamander (*Ambystoma mabeei*). Prefer habitats devoid of fish including semi-permanent farm ponds, vernal ponds in river bottomlands, Carolina bays and cypress-tupelo ponds in pinewoods.

Long-toed Salamander (*Ambystoma macrodactylum*). This species is known to breed in seasonally ephemeral and permanent lakes, ponds, and flooded meadows. A small percentage of individuals may also breed in slowly-moving streams (Beneski et al. 1986).

Spotted Salamander (*Ambystoma maculatum*). Spotted Salamanders normally breed in seasonally ephemeral habitats devoid of fish such as vernal ponds, swamps, roadside ditches, and they may occasionally use permanent ponds (Figiel & Semlitsch 1990; Harris 1984; Husting 1965). Petranka (1998) discusses that woodland vernal pools are the primary breeding sites of spotted salamanders.

Marbled Salamander (*Ambystoma opacum*). Although the Marbled Salamander is a terrestrial breeder, it nests in dried beds of temporary ponds or along the margins of reduced ponds, and the eggs do not hatch until the pond is flooded.

Mole Salamander (*Ambystoma talpoideum*). This species breeds in a wide variety of temporary and permanent habitats, but avoids ponds with large predatory fish. Many local populations have been lost as forests and the seasonally ephemeral wetlands they contain have been destroyed.

Small-mouthed Salamander (*Ambystoma texanum*). Small-mouthed Salamanders are found in bottomland forests and associated wetlands in or adjoining floodplains. They are known to breed in seasonally ephemeral lentic habitats, including woodland ponds, oxbow ponds, flooded field, prairie ponds, and swamps (Bailey 1943; Petranka 1982a; Ramsey & Forsyth 1950). The species may also occasionally breed in sluggish streams or pools in headwater tributaries. They show a strong affinity for fish-free breeding sites. Many populations have been eliminated and reduced as floodplain forests have been cleared for agriculture.

Tiger salamander (*Ambystoma tigrinum*). Tiger Salamanders breed in temporary and permanent ponds (Bishop 1941a; Collins 1981). Populations in southeastern US have been declining due to loss of wetland and surrounding forest habitats.

Three-lined Salamander (*Eurycea guttolineata*). The Three-lined Salamander breeds in cypress bays, vernal bogs, and bogs, as well as sluggish streams, and seeps (Petranka 1998).

Dwarf Salamander (*Eurycea quadridigitata*). The Dwarf Salamander is found in coastal plain habitats of the southeastern US. Breeding occurs in woodland pools, seepages, roadside ditches, Carolina bays, as well as other standing bodies of water (Petranka 1998).

Four-toed Salamander (*Hemidactylium scutatum*). Four-toed Salamanders breed in swamps, bogs, marshes, vernal ponds and other fish-free habitats within forested areas.

Many-lined Salamander (*Stereochilus marginatus*). This species breeds in woodland ponds, as well as sluggish streams.

Black-spotted Newts (*Notophthalmus meridionalis*). Black-spotted Newts inhabit both seasonally ephemeral and permanent habitats across their range.

Striped Newt (*Notophthalmus perstriatus*). This species has been observed to breed in the following habitats: small ponds, drainage ditches, and other bodies of standing or sluggish water. Striped Newts may also be found in habitats that exist in close association with rivers and streams (Dodd & LaClaire 1995).

Eastern Newt (*Notophthalmus viridescens*). Eastern Newts are known to breed in permanent and semi-permanent bodies of water, such as lakes, reservoirs, marshes, ditches, and sluggish streams (Bishop 1941a; Gates & Thompson 1982).

Rough-skinned Newt (*Taricha granulosa*). This species has been documented to breed in seasonally ephemeral ponds as well as permanent habitats, such as lakes, ditches, sluggish streams (Evenden 1948; Garber and Garber 1978; Stebbins 1951).

Two-toed Amphiuma (*Amphiuma means*). Two-toed amphiumas are found in coastal plain habitats. They occur in or near swamps, cypress bays, ditches, temporary ponds, sloughs, and sluggish streams. Petranka (1998) states that widespread loss of wetlands across the southeastern US has undoubtedly eliminated many local populations.

One-toed Amphiuma (*Amphiuma pholeter*). This species inhabits floodplain swampy terrace streams and swamps of streams.

Three-toed Amphiuma (*Amphiuma tridacylum*). The Three-toed Amphiuma also inhabits coastal plain habitats, and prefers semi-permanent or permanent habitats across this range. Habitats include: swamps, sloughs, sluggish streams, as well as permanent ponds (Baker 1945; Cagle 1948; Chaney 1951).

Southern Dwarf Siren (*Pseudobranchus axanthus*). Southern Dwarf Sirens can be found in cypress ponds, swamps, ditches, marshes, and other permanent and semi-permanent aquatic habitats in peninsular Florida (Moler & Kezer 1993). While little information currently exists on this species, Petranka (1998) notes that populations have undoubtedly been eliminated as a result of wetland destruction.

Northern Dwarf Siren (*Pseudobranchus striatus*). This Siren species has been documented to live in cypress swamps, flooded ditches, marshes, and other permanent and semi-permanent aquatic habitats (Harper 1935; Martof 1972).

Lesser Siren (*Pseudobranchus intermedia*). Lesser Sirens inhabit a variety of permanent and semipermanent habitats. These habitats may include: marshes, swamps, farm ponds, ditches, canals, sloughs, sluggish creeks. Many local populations have been destroyed by loss of wetlands (eg. Bury et al 1980).

Greater Siren (*Pseudobranchus lacertia*). This species inhabits a variety of permanent and semi-permanent aquatic habitats, including ditches, canals, marshes, farm ponds, rice fields, lakes, as well as sluggish streams and rivers which may often be choked with aquatic plants (Duellman and Schwartz 1958; Martof 1973).

C. THE ENVIRONMENTAL REPERCUSSIONS OF WITHDRAWING FEDERAL PROTECTION FROM HEADWATER STREAMS AND OTHER SO-CALLED "ISOLATED" WATERS WOULD BE SEVERE

1. The Scope of Streams at Risk

As described above, the ecosystem value of headwaters streams is enormous. These streams are the vast majority of all streams, measured either in numbers or length in miles. No comprehensive study of headwaters streams exists for the U.S., but Leopold et al. (1964) estimated that 95 percent of the stream channels and 73 percent of the total stream channel length is composed of first- and second-order streams. Leopold based this classic estimate on the best source available, USGS 1:24,000 scale topographic maps, yet he knew at the time that these maps were notoriously inaccurate and underestimated the actual extent of small streams networks.

Ohio EPA found in a survey of its own waters that only 21,048 miles of streams were shown on USGS 7.5-minute (1:24,000 scale) maps, yet 115,206 miles were identified and classified by Ohio EPA as primary headwater streams. Furthermore, a large number of streams shown as

intermittent on topographic maps were found to be high-quality perennial cold spring-fed streams (OH EPA 2002). This points not only to the inadequacy of existing maps and surveys of streams, but also to the difficulty in accurately drawing distinctions among streams based on parameters like flow frequency.

A detailed long-term study of the Coweeta Creek watershed in western North Carolina also shows the extent of headwaters streams that are often not captured on existing maps. Less than 15 miles of streams are indicated on a 1:24,000 scale map, while 33.6 miles appear on 1:7200 scale maps. Similarly, in the Chattanooga River basin, ground surveys revealed that 1:24,000 scale maps identify only 21 percent of the existing stream channel length (Meyer and Wallace 2001).

Widely accepted scientific models in use today that estimate the proportion of small streams within a particular river network show that, for example, in a 5th-order basin, first and second order headwater streams should account for approximately 95% of the total number of streams, 75% of the total stream length, and 40% of the total streambed area (Meyer et al. In preparation).

Further, given well-documented inadequacies in accurately mapping stream lengths, as discussed above, many intermittent and ephemeral stream reaches are never even identified. In a February 2003 literature review conducted by U.S. EPA at its Wheeling Lab the following example of this problem was noted:

Hansen (2001) explored the scale issue and tried to categorize stream types when he surveyed streams within the Chattanooga River watershed in the Blue Ridge Mountains of Georgia, South Carolina and North Carolina...A computer based mapping exercise that used contour crenulations with field verification estimated 1300 km [kilometers] of perennial streams. Of the 1300 km identified, the topographic maps indicated only 50-75 % of the total perennial length, depending on scale. Approximately 59% of the total stream length was made up of first-order streams...Of the total 4666 km of total streams identified, only 28% were considered perennial based on the presence of a defined channel and certain indicator macroinvertebrate taxa. The remainder of the stream length was intermittent (17%) or ephemeral (55%).

American Rivers and Earthjustice also investigated streams data published by U.S. EPA in its *1998 National Water Quality Inventory* (305(b) report), the last biennial report for which this data is compiled and published in one place for all states. EPA reports a total of 3,662,255 total miles of streams, and 1,298,134 miles of perennial streams, or 35 percent of total streams. Simple arithmetic would suggest that the remainder, 65 percent are non-perennial, however, EPA reports 1,594,672 miles of non-perennial streams, or 44 percent of total stream miles (U.S. EPA 2000). We assume that this discrepancy is due to deficiencies in state data reported, as many states did not report non-perennial streams and instead EPA estimated them based on very

coarse resolution map data.<sup>37/</sup> For the reasons outlined above this number vastly underestimates the actual extent of intermittent and ephemeral streams.

EPA's national stream network characterization analysis shows that in every one of the 19 ecoregions studied, all first and second order streams are intermittent, and in numerous regions, third and fourth order streams also are intermittent. Further, the analysis shows that the vast majority of first-to fourth order streams miles are intermittent in all ecoregions, with some regions having no perennial streams in their average fourth-order stream watersheds (U.S. EPA 2002a).

Two maps for Wisconsin and New Mexico visually depict the extent of intermittent streams in river networks, developed based on seamless GIS-based layers (see Exhibits 1 and 2, attached). Though these maps are based on hydrography data at different scales, both clearly show how integral non-perennial waters are to the entire river network. In short, it is not possible to "disconnect" non-perennial streams from the downstream waters into which they flow without making artificial distinctions that have no basis in science.

Headwater streams dominate the drainage network of most river networks. For example, headwaters in the Chesapeake Bay comprise more than 65 percent of the total mileage of streams and rivers that drain to the Bay, supplying 90 percent of the freshwater flow, as well as nutrients, sediments, and pollutant loads that drives the health of the nation's largest estuary. However, many of these streams are inadequately protected and are being degraded or completely obliterated. Despite their importance, nearly 20 percent of all streams in the Chesapeake Bay watershed have been ditched, channelized, or enclosed in pipes, concrete channels and culverts to accommodate development (CWP and NEETF 2002a).

Rock Creek in Maryland provides a classic study of the loss of headwaters to urbanization. Surveys showed the creek lost 58 percent its drainage density (stream length in a square kilometer) between 1913 and 1968 (Meyer and Wallace 2001). Studies in the Upper Chattahoochee River watershed show that one-third of stream length has been lost, primarily small headwater streams, and is undoubtedly an underestimate because the study estimated stream loss using 1:24,000 maps, which do not adequately display the smallest streams (Meyer and Wallace 2001). Similar examples can be found throughout the country. Other activities, such as mountain-top removal and valley fill mining techniques practiced in Appalachia, buried nearly 870 miles of streams between 1986 and 1998, with over 450 miles of streams buried in West Virginia alone (Meyer and Wallace 2001).

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<sup>37</sup> Note: where state data was unavailable or insufficient, EPA reported data for states based on its Reach File V.3, or RF3, database that uses 1:100,000 scale information. EPA itself admits that: "Direct evaluation using only EPA's RF1 and RF3 hydrologic stream coverages would grossly undercount the number of streams..." (U.S. Environmental Protection Agency, Appendix B: Inventorying of Streams Potentially Impacted By Construction Activities, *Environmental Assessment for Proposed Effluent Guidelines and Standards for the Construction and Development Category*, EPA-821-R-02-009, June 2002, p. B-6)



Using data on acres developed, distribution of perennial and intermittent streams, and stream length by ecoregion, EPA estimated that roughly 10,000 perennial stream miles and 36,000 intermittent stream miles *annually* are potentially affected by construction site runoff across the nation, based on national data on average acres developed annually, distribution of perennial and intermittent streams, and stream length by ecoregion (U.S. EPA 2002). This gives a sobering picture of impacts of development to small streams.

As the nation's leading aquatic ecologists note in their comment letter to the docket:

The loss of headwater streams has profoundly altered the structure and function of stream networks. Elimination of small tributaries from Clean Water Act jurisdiction would lead to further loss and degradation of these systems to the detriment of the physical, chemical and biotic integrity of ecosystems downstream.

## 2. Nature of Environmental Threats

The removal of protections from filling, ditching and draining, and discharging pollutants into supposedly "isolated" wetlands, ponds and streams would likely result in losses and degradation of many of these waters. The intrinsic values of many of these waters would be compromised, and their important ecosystem services to downstream waters would be reduced or eliminated.

### a. Loss of Flood Storage, and Aggravated Flooding Conditions

Several prominent studies have linked increased flooding conditions or frequency with losses of wetlands and their flood storage capacity. Additional evidence is available from Minnesota, where the more stable flows of the Rainy River basin are attributed to the existence of more ponds and wetlands upstream. In their primer on Minnesota rivers, Renwick and Eden (1999) compare the stability of the Rainy River basin with the Red River basin, which is more flood-prone due to the channelization of streams and draining of upland areas and prairie marshes. The costs of flood damage in the Red River basin in 1997 totaled over \$830 million. ([www.shorelandmanagement.org/depth/rivers/10.html](http://www.shorelandmanagement.org/depth/rivers/10.html)).

Removing protections from depressional wetlands that store floodwaters could result in higher flood peaks. Few studies are available which explore this relationship, however, a 1987 Soil Conservation Service report on the Indian Creek and the Butterfield Creek watersheds in the vicinity of Chicago, Illinois addresses the link directly (Bartels 1987). The existing flood storage capacity of the depressional wetlands in the two watersheds is estimated, and the effects of future development on future flood peaks are estimated, assuming different rates of stormwater detention, calculated with and without loss of the natural storage. Projected future flood peaks are substantially higher than existing levels when natural storage is removed.

### b. Loss of Groundwater Recharge

The comments of the Director of USFWS to the Department of the Interior regarding the ANPRM note concern over the potential loss of wetlands and streams that are critical to

replenishing groundwater aquifers and sustaining baseflows in streams. The sedimentation that has already occurred from disturbances to some playa lakes has resulted in reduced recharge capacity (Haukos In preparation).

c. Groundwater Contamination

Discharges of waste from Confined Animal Feeding Lots has already resulted in contamination of water infiltrating to groundwater from playas. (Haukos In preparation)

d. Streambank Erosion and Sedimentation

As previously discussed, headwater streams and wetlands store and release flood flows, limiting erosion of streambanks and the resulting sedimentation. Removal of protection from these waters would promote increased ditching, channelization and filling-in of headwater streams and wetlands, leading to increased channel instability, degraded water quality and aquatic habitat.

e. Surface Water Quality Degradation

Filling or draining of depressional wetlands such as pocosins eliminates their runoff filtering role in the watershed, resulting in degraded water quality in freshwater and estuarine receiving waters (Richardson 2003). The impacts of gravel mining and nearby development have resulted in degraded water quality and altered hydrology of fens (Bedford 2003).

f. Loss of habitat

Reduced protection for small wetlands and headwater streams would seriously impact a wide range of species. Specialized species populations that rely on these waters for essential life stage needs would be especially vulnerable, and increased endangerment would be likely (USFWS comments to DOI 2003).

**VI. NO OTHER CHANGES ARE NEEDED TO THE DEFINITION OF "WATERS OF THE U.S."**

The ANPRM specifically invites commenters' views "as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the CWA." 68 FR 1994. This open-ended invitation is troubling, as it indicates that the EPA and Corps may consider changes to the existing regulations even beyond those covered by the specific questions in the Federal Register notice.

Industry groups and those who represent them (or are funded by them) are already contending that the jurisdictional regulations should be changed to exclude all but traditionally navigable waters and wetlands directly adjacent to traditionally navigable waters from the protections afforded by the Clean Water Act. For example, in its comments submitted to the docket, the Pacific Legal Foundation claims: "Waters of the United States should be confined to those that

are navigable, could be made so through reasonable efforts, or those that are inseparably bound up with and immediately abut navigable waters.” This is preposterous and completely at odds with the Clean Water Act.

Any effort to limit the jurisdictional reach of the Clean Water Act by amending the definition of “waters” should be rejected, including those suggested by the EPA and Corps in the questions about the (a)(3) factors and defining so-called “isolated” waters as well as any other revisions recommended by commenters in response to this open-ended question. No changes are needed to the existing definition of waters of the United States.

The existing regulations are consistent with the Clean Water Act and, indeed, are necessary if the goals of the Act are to be met. The Act’s central goals are “to restore and maintain the chemical, physical, and biological integrity of our Nation’s waters” and make all surface waters safe for fishing, swimming and other uses. Congress intended to achieve these goals by enacting a comprehensive regulatory program to control and eliminate the discharge of pollutants be controlled at the source.<sup>38/</sup> The current regulations on jurisdiction effectuate the scope and purposes of the Act.

Arguments that revisions to the definition of “waters” must be made to respond to the Court’s decision in *SWANCC* are fully refuted above. In addition, the Department of Justice has now filed dozens of briefs in federal court about the validity of the existing jurisdictional regulations post-*SWANCC* on behalf of the EPA and the Corps of Engineers.

Rather than finding that the definition of waters of the U.S. needs to be changed by a new rulemaking, as the ANPRM suggests, the DOJ has consistently argued that the agencies’ existing definition of waters of the United States remains sound and, indeed, is required to achieve the purposes of the Clean Water Act. The DOJ’s arguments make the suggestions by EPA, the Corps, and other administration officials that *SWANCC* somehow requires or justifies changes in the existing jurisdictional regulations even more transparently false.

The Department of Justice has consistently argued that the *SWANCC* decision was limited to invalidating the policy of using migratory bird habitat as the sole basis for asserting Clean Water Act jurisdiction over so-called “isolated,” non-navigable, intrastate waters.

The only question addressed in *SWANCC* was whether the Corps could exercise regulatory jurisdiction over *hydrologically isolated*, nonnavigable, intrastate ponds under 33 C.F.R. 328.3 (a)(3), based solely on the use of those ponds as habitat for migratory birds....The Court did not ... opine on the Corps’ authority under subsection (a)(5) or any of the other subsections of the regulatory definition of ‘waters of the United States.’<sup>39/</sup>

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38 See S. Rep. No. 92-414, at 77 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3742.

39 *Rice v. Harken*, Supplemental Amicus Curiae Brief of United States, U.S. Department of Justice, May 2001 at 7-8. (emphasis in brief).

In the brief for the United States in *U.S. v. Newdunn* before the Fourth Circuit the Justice Department argues that “federal regulations reasonably construe the [Clean Water Act] term “waters of the United States” to include wetlands adjacent to all tributaries, not just primary tributaries, to traditional navigable waters.”<sup>40/</sup>

Seeking to overturn the district court’s holding, the DOJ’s *Newdunn* brief argues that a narrower construction of jurisdiction would be inconsistent with the Act itself. The DOJ points out that the lower court:

. . . fails to explain why or how Congress could have intended to regulate discharges into all primary tributaries but not secondary tributaries, regardless of their significance to the traditional navigable waters into which they flow, directly or indirectly. In contrast, the agencies have made a persuasive and compelling determination that if the CWA is to achieve its goal, it is essential to include all tributaries of traditional navigable waters and their adjacent wetlands in the permitting system.<sup>41/</sup>

The regulations have consistently construed the Act to encompass wetlands adjacent to tributaries to traditional navigable waters – be they primary, secondary, tertiary, etc. – since 1975, a construction that comports with Congress’s intent to control pollution at its source and broadly protect the integrity of the aquatic environment.<sup>42/</sup>

According to the Department of Justice (DOJ), interpreting *SWANCC* as limiting Clean Water Act jurisdiction to wetlands adjacent only to traditional navigable waters and their primary tributaries would effect a “radical contraction of CWA jurisdiction.”<sup>43/</sup>

The brief for the United States in *U.S. v. Rapanos* before the Court of Appeals for the Sixth Circuit emphasizes the limits of the *SWANCC* decision.

*SWANCC* does not limit the coverage of the CWA to navigable-in-fact waters and wetlands adjacent thereto. To the contrary, the *SWANCC* Court specifically characterized as ‘plausible’ the argument made by the petitioners that “Congress simply wanted to include all waters adjacent to ‘navigable waters,’ such as non-navigable tributaries and stream,” with the Act’s scope. The Court also quoted with approval its prior holding that “Congress’ concern for the protection of water quality and aquatic

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40 *United States v. Newdunn*, Opening Brief of United States, August 2002, at 28.

41 *Id.* at 48 (emphasis added).

42 *Id.* at 29(emphasis added).

43 *Id.* at 26.

ecosystems indicated its intent to regulate wetlands ‘inseparably bound up with ‘waters’ of the United States.’<sup>44/</sup>

The Department of Justice has described in detail in many briefs how limiting the jurisdiction of the Act to only navigable waters and waters directly adjacent thereto would disserve the purposes and goals of the Clean Water Act. For example, in *Rapanos* the brief for the United States says that:

To exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would disserve the recognized policies underlying the Act, since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters.<sup>45/</sup>

In *United States v. Interstate General Co.*, the Department argues that the “logical result” of treating certain waters as unprotected by the Clean Water Act:

. . . could be that oil, hazardous substances, or other pollutants could be discharged without a CWA permit into any stream, creek or river, so long as it was not traditionally navigable, and those pollutants could reach and foul traditional navigable waters without the United States being able to take action under the CWA to prevent it. Likewise, entities currently discharging into traditional navigable waters under NPDES permits could change their outfall points to non-navigable creeks in an effort to avoid treatment requirements under the CWA. Had the Supreme Court in *SWANCC* intended to work such a change in the Clean Water Act, it would doubtless have stated that purpose explicitly.<sup>46/</sup>

These briefs provide additional strong evidence that no changes to the Clean Water Act regulations are required and that such changes would radically rewrite the longstanding interpretation of the law, contradict the purposes of the Act, and threaten communities and wildlife that depend on clean water for survival.

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44 *United States v. Rapanos*, Opening Brief of United States, July 2002 at 23 (internal citations omitted).

45 *Id.* (emphasis added.)

46 *United States v. Interstate General Co.*, Brief of United States, U.S. Department of Justice, October 2001 at 43.

**VII. STATE AND OTHER FEDERAL REGULATORY PROGRAMS ARE INSUFFICIENT TO “BACKSTOP” FEDERAL CLEAN WATER ACT PROTECTIONS FOR OUR NATION’S WATERS.**

A. INTRODUCTION AND BACKGROUND

The ANPRM solicits “information and data...on the availability and effectiveness of other Federal and State programs for the protection of aquatic resources and practical experience with their implementation.” As noted in the register notice, various other federal and state regulatory, acquisition, and restoration programs offer some level of protection to some types of waters. However, these programs are clearly inadequate to “backstop” protections provided waters under the CWA. Furthermore, it is highly unlikely that sufficient new efforts, or expansions of existing efforts, could ever fill the gaps left by withdrawal of federal CWA protection over some categories of waters.

The majority of Federal and State efforts to protect or restore waters have been developed over the past 30 years to compliment, not replace, the Clean Water Act. As a result, even with the array of federal, state and private efforts available, large gaps in protection from pollution and physical modification exist for many types of waters. Indeed, despite 30 years of broad Clean Water Act jurisdiction and the supplemental protection provided by other federal, state, local and private efforts, 40 percent of the nation’s waters are still too polluted to support fishing or swimming. Despite numerous programs dedicated to restoring wetlands, the National Wetlands Inventory still reported net losses of nearly 58,000 acres per year between 1987 and 1997, estimates widely considered to be overly optimistic. Additionally, the Status and Trends report noted a decline in wetland functioning. Similarly, “the available scientific evidence clearly demonstrates that the length of headwater streams in the landscape has been significantly reduced....” (Meyer, Wallace, et. al. 2001).

B. STATE LEVEL BACKSTOPS ARE INSUFFICIENT

The very premise that states have the capability and desire to independently protect wetlands and headwaters is a flawed one. The reality is that states serious about protecting these waters almost invariably prefer to do so in partnership with the Corps and EPA enforcing the CWA. Withdrawal of CWA jurisdiction will mean, in reality, elimination of all regulation of so-called "isolated" wetlands and headwaters.

1. The CWA's Federal-State Partnership Framework Offers States Ample Opportunity to Independently Protect Wetlands and Headwaters, Yet Only Two States Have Chosen to "Go It Alone."

The CWA is structured and administered as a partnership between the EPA and the States. Because water pollution and aquatic habitat impacts do not recognize state boundaries, the CWA and EPA establish minimum standards -- a federal floor -- that ensure a base level of protection from the harmful effects that the pollution and wetland destruction in one state may have on the water quality, flood control, and wildlife in another state. Efforts to clean up the Chesapeake

Bay offer but one graphic example. Four states and the District of Columbia share the Bay watershed and all of them must work to control wetland losses and restrict chemical pollution if water quality degradation in the Bay is to be reversed. Uniform federal standards and active federal involvement are prerequisites to any chances of clean up success.

Uniform federal standards also protect the interests of federal taxpayers in each state from the fiscal impacts of poor water resource decisions in other states because "their federal taxes help pay the bill when federal assistance is required through increased public healthcare costs, flood protection, emergency relief and environmental cleanups when wetlands are not allowed to do their job." *SWANCC*, supra, Amicus Curiae Brief of the States of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington, at 21 ("States' *SWANCC* Brief"). The CWA's federal floor also "levels the playing field" and prevents the proverbial "race to the bottom" so that states that do act to protect their waters from pollution and destruction are not placed at a competitive disadvantage by those states who choose not to do so. The CWA and its federal enforcement thus provide both a prod and a safety net to undergird the efforts of states that want to be good stewards of the environment. Testimony of Patrick Parenteau, Professor of Law, Vermont Law School (House of Representatives Committee on Government Reform, September 19, 2002, "Hearing Regarding Implications of the Supreme Court's *SWANCC* Decision").

While the CWA and federal oversight and enforcement provide the federal floor, the CWA partnership framework acknowledges that the specific means and priorities and pollution threats are likely to differ state by state and drainage basin by drainage basin, and that state governments are best positioned to identify and implement water pollution controls at the state level that will achieve the CWA goals and standards. So, for example, the CWA requires states to adopt state water quality standards consistent with federal CWA water quality criteria and guidance. State water quality standards can be tailored to provide additional protection to outstanding resource waters and to water resources of particular concern, including wetlands.

Among all the other reasons why reinterpreting "waters of the U.S." as applying only to navigable-in-fact waters and adjacent wetlands (as industry proponents suggest) is illegal and environmentally irresponsible, it would directly conflict with the requirements of the CWA. Several of the Act's provision give rights to downstream states to protect their waters from upstream discharges that violate state water quality standards. For example, § 402(b) gives the downstream state notice, the opportunity for comment, and the opportunity for a hearing on the upstream state's permit application. 33 U.S.C. 1342(b). Such rights would, of course, become meaningless if the upstream state were no longer required to obtain a permit. *See generally*, *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) (EPA has the statutory authority to require an upstream discharger to meet the water quality standards of the downstream state.). See also 40 C.F.R. § 122.4(d) (prohibiting permit issuance when imposition of conditions cannot ensure compliance with applicable water quality requirements of all affected States).

In addition, § 401(a)(2) prohibits the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured. 33 U.S.C. 1341(a)(2); *Arkansas v. Oklahoma*, 503 U.S. at 103. This right would

also be lost with respect not only to NPDES permits, but also every other federal license or permit authorizing a discharge into waters whose protection had been abandoned.

One of the most important aquatic resource protection tools the CWA provides the States is the States' water quality standards certification authority under §401, 33 U.S.C. §1341. This authority allows states to condition or, if necessary, bar federal permits, including CWA §404 dredge and fill permits, to ensure that federally permitted activities comply with the State's water quality standards. Since 1972, most states have relied exclusively on their CWA §401 certification authority to protect their wetlands, lakes, streams, and other surface waters from activities that involve discharges of dredged or fill material into those waters. A rollback of CWA jurisdiction from so-called "isolated" wetlands and headwaters will mean that federal CWA permits will no longer be issued in these waters and most states will thus be stripped of their only avenue for restricting discharges of dredged and fill material in these waters.

The CWA partnership framework also offers states the opportunity to assume control of federal CWA §402 (National Pollution Elimination Discharge System (NPDES)) and §404 permitting programs. To assume these permitting programs and effectively step into the permitting shoes of the EPA (and the Corps for §404), states must enact state statutes and rules, and provide the necessary program resources, to establish standards and programs as stringent as the federal CWA standards and programs. EPA provides continuing financial and technical resources to states that assume these programs, as well as providing continuing oversight to ensure compliance with CWA standards.

Forty-five of the 50 states have now assumed most or all of the NPDES program from EPA, and are now applying their own state laws and regulations to restrict pollution discharges from point sources into state waters. It is telling, though, that only two of the 50 states, Michigan and New Jersey, have elected to assume the CWA §404 permitting program.

Numerous states, including Florida, Maryland, Pennsylvania, Minnesota, and Wisconsin, have considered and rejected state assumption of §404. Many states concluded that the financial and technical resources, and the political capital, required to effectively administer their own comprehensive dredge and fill permitting program without the under-girding of the federal CWA program were simply prohibitive. Instead of assuming the CWA §404 program, these states have elected to protect their waters from dredge and fill discharge activities through state-federal partnerships through which they share with EPA and the Corps the considerable permitting and enforcement responsibilities, resources, and expertise required to effectively protect wetlands and other non-navigable waters from dredge and fill activity.

As state and federal permitting programs have evolved over the last twenty years, in particular, many states have developed efficient and effective means of combining tools such as CWA §401 certification, CWA §404 state programmatic general permits (SPGPs), and Corps-state joint permit applications and review procedures that streamline federal and state permitting while efficiently leveraging Corps and EPA financial and technical resources made available through the CWA permitting program. See, States' *SWANCC* Brief at 25-26. A CWA rollback from so-called "isolated" wetlands and headwaters will remove the federal CWA under-girding for these



state efforts and, in most cases, remove protection from these waters from dredge and fill activities completely. As the States remarked in their *SWANCC* Brief, "If they are to be 'laboratories for experimentation,' the States' freedom to innovate should include the opportunity to coordinate the management of their natural resources with the federal government." *Id.* at 26-27.

2. Thirty-Two States Have No Independent State Permitting Program to Protect So-Called "Isolated" Wetlands from Drainage, Dredging, and Filling Activities.

At most, 18 states now have programs regulating wetland alterations in at least some "isolated" wetlands and other waters. Thirty-two states -- about two thirds of the United States -- currently lack regulatory programs to fill the gap that would be left by a CWA rollback from so-called "isolated" wetlands. A CWA rollback from so-called "isolated" waters will leave these waters completely vulnerable to uncontrolled dredging, drainage, and filling in these 32 states. Little or no state protection is provided in the states with some of the largest seasonal wetland acreages, including Alaska, Louisiana, Texas, North Dakota, South Dakota, South Carolina, Georgia, Kansas, and Mississippi. See, Kusler, Jon, The *SWANCC* Decision and State Regulation of Wetlands (2001) (<http://aswm.org/fwp/SWANCC/aswm-int.pdf>) at 9. The 32 states lacking "isolated" wetlands protection are listed below by region. Selected state-by-state summaries demonstrate the inability of the vast majority of states to fill the regulatory gap left by a rollback of CWA jurisdiction.

a. Mid-Atlantic Region

Delaware

While Delaware has an independent state tidal wetlands permitting program, its jurisdiction extends only to tidal wetlands and very large (400 or more acres) freshwater wetland systems. To the extent Delaware is regulating freshwater wetland drainage, dredging, and filling it is doing so through its CWA §401 certification authority. Withdrawal of federal CWA jurisdiction will likely leave many Delaware freshwater wetlands and headwater tributaries unprotected. The removal of federal CWA authority over so-called "isolated" wetlands and other waters, and "upstream" tributaries such as ditches, ephemeral streams and intermittent streams, will remove state 401 certification authority over CWA §404 dredge and fill activities in these waters.

Delaware's Department of Natural Resources and Environmental Control (DNREC) appears to have some legal authority under state law to enforce its water quality standards in broadly defined waters of the State, including wetlands, and to require permits for discharges in state waters and on submerged lands. However, these authorities are not actively applied through a state permitting program, and establishing such a program would require additional rulemaking and scarce resources. Wetland-specific water quality standards would likely be one important rulemaking addition necessary to effectively fill the regulatory gap left by federal withdrawal of CWA §404 permit authority. Like most states, Delaware is struggling with a significant budget shortfall, making regulatory program expansion highly unlikely. Governing Magazine (May 2002).

Even if these administrative and financial obstacles could be overcome to launch such a regulatory initiative, serious regulatory gaps would likely remain due to existing state exemptions from regulation for channelized streams and drainage ditches. The majority of Delaware's 2,600 miles of natural and ditched streams would likely be exempt from regulation if CWA jurisdiction is withdrawn from these waters. At risk wetlands in South New Castle County may enjoy some protection by county ordinance, but no other counties have such protections in place, nor does it appear that they will in the foreseeable future. Absent either a state or federal regulatory floor, even the South New Castle County ordinance would seem to be politically vulnerable.

In response to *SWANCC*, a bill was introduced in the legislature's 2002 session (HB 340 and HS 1 amendment) to protect up to 30,000 acres of identified and mapped "isolated" freshwater wetlands eliminated from CWA jurisdiction after *SWANCC*. This bill was opposed by "pro-growth" groups including the Delaware Homebuilders and failed to pass.

An estimated 33% of Delaware's freshwater wetlands may be in jeopardy due to withdrawal of CWA jurisdiction. The percentage of wetlands at risk could be even higher if drainage ditch connections fail to qualify wetlands as tributary or adjacent to regulated waters.

b. Southeastern Region

Alabama

Alabama has no independent state permitting program that regulates discharges of dredged or fill material into freshwater wetlands or headwaters. Alabama's only wetland protection program is for wetlands located in designated coastal areas. Alabama does regulate certain more geographically-isolated wetlands within these designated coastal areas (Mobile or Baldwin County) under the Alabama Coastal Area Management Program (ACAMP). In Alabama, "isolated" wetlands in coastal areas include "grady" ponds and "depressional" wetlands (typically found in relic beach and dune systems). Furthermore, Alabama does not appear to actively use its CWA §401 certification tool to restrict dredge and fill activities in the state's freshwater wetlands.

Alabama probably could enforce its water quality standards in many of the state's freshwater wetlands and streams under state law. However, Alabama's "waters of the state" excludes waters that are "entirely confined and retained completely" on a single owner's property "unless such waters are used in interstate commerce." This exclusion would likely leave some more "isolated" waters unprotected under state law, particularly if groundwater connections and uses in interstate commerce are not recognized.

In addition, Alabama's water quality standards and NPDES program rules seems to both preclude their application to "dredged or fill material which is subject to regulation under FWPCA [Federal Water Pollution Control Act]." Alabama's water quality standards also lack designated uses or narrative standards specific to wetlands or to dredge and fill discharges into waters of the State.

Consequently, any initiative to create a state freshwater wetlands permitting program would require, at a minimum, wetland water quality standards, additional rulemaking, and additional resources. Alabama is also struggling with a significant budget shortfall, making regulatory program expansion highly unlikely. Governing Magazine (May 2002).

### Georgia

Georgia has no independent state permitting program that regulates discharges of dredged or fill material into freshwater wetlands or headwaters. Georgia's only wetland protection program is for tidal wetlands. Furthermore, Georgia does not appear to actively use its CWA §401 certification tool to restrict dredge and fill activities in state freshwater wetlands. Like Alabama, Georgia's water quality standards probably could be enforced to protect many of the state's freshwater wetlands and streams, including so-called "isolated" wetlands and ponds, except where those waters are entirely confined to a single owner's private property. This exception would likely leave some more "isolated" waters unprotected under state law, particularly if groundwater connections are not recognized. In addition, Georgia's water quality standards do not include designated uses or narrative standards specific to wetlands or to dredge and fill discharges into waters of the State.

Any initiative to create a state freshwater wetlands permitting program would require, at a minimum, wetland water quality standards, additional rulemaking, and additional resources. Georgia is struggling with at least a \$500 million budget shortfall, making regulatory program expansion highly unlikely. Governing Magazine (May 2002).

#### c. Eastern Central and Great Lakes

### Illinois

Illinois has no independent state permitting program to regulate dredge and fill activities in its wetlands and headwaters. To the extent Illinois is regulating freshwater wetland drainage, dredging, and filling it is doing so through its CWA §401 certification authority. Withdrawal of federal CWA jurisdiction will likely leave many Illinois wetlands and headwaters unprotected. The removal of federal CWA authority over so-called "isolated" wetlands and other waters, and "upstream" tributaries such as ditches, ephemeral streams and intermittent streams, will remove state 401 certification authority over CWA §404 dredge and fill activities in these waters.

Illinois' Pollution Control Board (Board) and Environmental Protection Agency (EPA) appear to have legal authority to enforce state water quality standards -- including antidegradation standards -- in broadly defined waters of the State, including wetlands. However, these authorities are not actively applied through a state permitting program, and establishing such a program would require additional rulemaking and scarce resources. Wetland-specific water quality standards would likely be one important rulemaking addition necessary to effectively fill a regulatory gap left by federal withdrawal of CWA §404 permit authority. Thus far, neither the Board nor the EPA have taken steps to establish any such permitting program. Illinois is

struggling with at least a \$250 million budget shortfall, making regulatory program expansion highly unlikely. Governing Magazine (May 2002).

In response to *SWANCC*, Illinois conservation groups tried to pass legislation in 2002 to put a state permitting program in place that would cover all activities affecting wetlands for which no federal or other state permit had been obtained. The bill failed after intense lobbying efforts from homebuilders, realtors, farm bureaus, chamber of commerce and others shut it down. Filling the regulatory gaps left by *SWANCC* -- and any additional post-*SWANCC* CWA rollback -- is now a matter of debate at legislative study meetings in Illinois. In the absence of state action, three Illinois counties have adopted wetland protection ordinances, and a fourth county may do so soon.

In 2001, the Illinois Department of Natural Resources estimated that about 150,000 acres of Illinois wetlands have lost CWA protection as a result of *SWANCC*. Corps figures from 2002 showed that the Corps was issuing on average at least one "no jurisdiction" call per working day in the Chicago area since the *SWANCC* decision in early 2001.

### Indiana

Indiana has historically relied heavily on its CWA §401 certification authority to protect state wetlands, including so-called "isolated" wetlands, from draining, dredging, and filling. Absent CWA jurisdiction covering "isolated" waters and headwaters, Indiana will lose the §401 regulatory tool with respect to these at risk waters, and many of them will lose both state and federal protection.

On paper, the Indiana Water Pollution Control Board (Board) has statutory authority to adopt rules and require permits to enforce its water quality standards and otherwise control and prevent pollution in "*any of the streams or waters of Indiana*," including *all* accumulations of water, surface and underground, natural and artificial, public and private, with the exception of certain "private ponds." The Board and the Indiana Department of Environmental Management (IDEM) have been in the process of promulgating new wetland water quality standards toward this end. After *SWANCC*, the Board and IDEM proposed to extend this permitting authority to the "isolated" waters the Corps was no longer regulating, relying on existing state permitting authority.

Importantly, though, these attempts to fill the post-*SWANCC* regulatory gap were immediately challenged both in court and in the legislature. The legal challenge is still pending in the Indiana Supreme Court. Indiana Department of Environmental Management v. Twin Eagle, Civ. No. 49S00-0204-CV-00237 (Notice of Appeal filed February 15, 2002). Now, in the 2003 legislative session, the Indiana Homebuilders and other regulated community interests are pressing for legislation that, like Ohio's, will likely exempt most "isolated" wetlands. In addition, Indiana has a huge budget deficit and is highly unlikely to support regulatory program expansion in the current fiscal environment. Governing Magazine (May 2002). For both political and budgetary reasons, it will be very difficult for Indiana to fill the regulatory gap left by a CWA rollback.

IDEM has conducted a relatively detailed GIS study of its wetlands and determined that more than 30% could be considered "isolated" and in jeopardy due to withdrawal of CWA jurisdiction. The percentage of wetlands at risk could be even higher if drainage ditch connections and intermittent streams fail to qualify wetlands as tributary or adjacent to regulated waters.

d. Southwest Region

Arizona

Arizona's only wetland/dredge and fill permitting program is its CWA §401 water quality certification program. The contemplated rollback of CWA jurisdiction over so-called "isolated" wetlands and other waters, and headwater tributaries such as ditches, ephemeral streams and intermittent streams, will also remove the state §401 certification authority over these waters. As there is no analogous protection under state law, these waters will be unprotected from dredge and fill activity at both the federal and state levels.

The Arizona Department of Environmental Quality (ADEQ) has the legal authority to adopt state water quality standards and enforce them through the Arizona Pollution Discharge Elimination System (AZPDES) permitting and §401 certification programs. These water quality standards include antidegradation standards and a requirement to protect designated uses in "surface waters," including wetlands and intermittent and ephemeral streams. However, both the water quality standards and the AZPDES permitting rules apply only to "surface waters" or "navigable waters," defined in state law as coextensive with "waters of the United States." Consequently, it is likely that a withdrawal of federal CWA jurisdiction over certain wetlands and headwater tributaries will be followed by a similar withdrawal of state jurisdiction.

The AZPDES program was authorized and established under state law in 2002 in order to allow state assumption of the federal CWA NPDES/§402 program, and the authorizing statute expressly precludes "any requirement that is more stringent than" those mandated by the CWA. See Section 6. Consequently, any rollback in CWA jurisdiction will lead automatically to a commensurate reduction in state-level regulatory protections.

Even if Arizona could overcome these statutory and rulemaking limitations, Arizona is struggling with a budget deficit of over \$1 billion and is, for this reason alone, clearly incapable of taking on additional regulatory responsibilities at this time. Governing Magazine (May 2002).

Texas

Texas' only wetland regulatory program is its CWA §401 water quality certification program. Any rollback of CWA jurisdiction over so-called "isolated" wetlands and other waters will also remove the state §401 certification authority over activities in these waters. These waters will thus be unprotected at both the federal and state levels.

The Texas Commission on Environmental Quality (TCEQ) appears to have legal authority to enforce water quality standards in broadly defined waters of the state, expressly including

wetlands. The water quality standards expressly require the protection of existing uses of all state waters and, in particular, wetland water quality functions. However, Texas has no existing permitting program to enforce its water quality standards. The Texas Pollution Discharge Elimination System (TPDES) program may be weakened in at risk waters in the absence of federal CWA oversight and assistance.

In addition, the TCEQ permitting programs do not apply to oil and gas industry discharges. Oil and gas industry discharges are regulated by the Texas Railroad Commission and its pollution permitting program may also be weakened in at risk waters in the absence of federal CWA oversight and assistance.

e. Pacific Western Region

Washington

Washington State has historically relied primarily on its CWA §401 certification program to protect most of its freshwater wetlands, including "isolated" wetlands and headwaters, from drainage, dredging, and filling. A CWA rollback of authority over so-called "isolated" wetlands and ephemeral and intermittent streams would remove Washington's 401 certification authority and would leave these waters largely unregulated at both the federal and state level. However, both the Washington Department of Ecology and the Department of Fish and Wildlife have some independent state authority to protect these at risk waters, and these agencies could fill the regulatory gap if they could successfully build an effective permitting and enforcement program based on their existing regulatory authority. Unfortunately, there are considerable programmatic, budgetary, and political obstacles to their doing so.

The Department of Ecology has signaled that it may attempt to use its authority to protect so-called "isolated" wetlands, but there are several obstacles to its success. First, Washington's water quality standards are generally viewed as weak, and while they apply to wetlands, they do not include specific wetland standards. The primary means for the protection of wetlands is through the antidegradation requirements, but the antidegradation provisions simply prohibit further degradation that would interfere with beneficial uses, without any specific reference to beneficial uses for wetlands. A generic statement notes that "in addition to designated uses [of which there appear to be none], wetlands may have existing beneficial uses that are to be protected that include ground water exchange, shoreline stabilization, and storm water attenuation." This lack of clearly designated beneficial uses for wetlands makes enforcement of water quality standards in wetlands more difficult.

Second, in the absence of CWA §401 authority, the Department of Ecology lacks a clear permitting vehicle and instead issues "orders" that notify the applicant that the proposed wetland fill will violate state law by violating state water quality standards, and that they can resolve the potential violation by providing specified mitigation. This approach seems to at best mitigate for wetland loss, not prevent it. Moreover, the Department of Ecology has virtually no resources devoted to enforcement. Thus, if a developer fails to notify the Department of its intent to fill an "isolated" wetland, it is highly unlikely that they will take any action on it. Absent CWA

jurisdiction, the Ecology Department is not likely to be informed of many wetland fills, and so even the requirements for mitigation are not likely to be enforced. There is simply no mechanism by which the Department can look for or follow up on potential violations. The Department of Ecology also seems to have sufficient legal authority to extend its state regulatory program into ephemeral and intermittent streams, but it is unlikely to do because of lack of resources.

The Department of Fish and Wildlife can also protect so-called "isolated" wetlands and waters and ephemeral and intermittent streams using its permitting authority for any work that will "use, divert, obstruct, or change" the natural flow or bed of any waters in the state, presumably including these at risk waters. However, the WDFW has not historically used its permit authority aggressively, and when it was recently convinced to do so, the state legislature immediately took up consideration of bills to limit its authority under the code.

In addition, Washington has a \$2 billion budget shortfall. The Department of Ecology is already strained by budget cuts and coming budget cuts will strain it further. Washington simply will not have the resources to expand its wetlands and headwater regulatory programs. In sum, political and funding constraints make it highly unlikely that Washington State will be able to fill the regulatory gap left by a CWA rollback.

In Washington State, 60%-80% of the wetland acreage in the Spokane area would be defined as "isolated" and redefined out of existence under this proposed rule; 30%-60% of all eastern Washington wetlands and 10%-20% of all western Washington wetlands would be "isolated" and unprotected. In Washington, approximately 80% of all duck production occurs in seasonal and "isolated" wetlands like those in the Columbia basin.

### California

California has no independent wetland permitting or dredge and fill permitting program. California does not even have a standard definition or inventory of state wetlands. California also lacks state wetland water quality standards that designate wetland beneficial uses to protect wetland functions. California relies on the federal CWA §401 water quality certification authority as its primary wetlands protection tool. Without §401 authority, California will be unable to protect its wetlands and headwaters from draining, dredging, and filling. See, State Water Resources Control Board, Comment on Advanced Notice of Proposed Rulemaking on Definition of "Waters of the United States" (March 13, 2003; Docket ID No. OW-2002-0050) at 9 ("California ANPR Comment Letter").

In fact, California actually does have statutory authority to require permits for activities in wetlands, but state agencies have never developed a permitting program to enforce this law. California recognizes that many of its unique and biologically diverse "isolated" wetland areas are now at risk, and that it needs to take action to protect these vital resources. Nevertheless, California recognizes that expanding its existing programs in the foreseeable future is unlikely because of the state's budget crisis. California is struggling with a budget deficit exceeding \$1 billion. Governing Magazine (May 2002). Even with funding, California states that "preparing

environmental documentation for and adopting regulations and policy to establish a State wetland program would take several years because of the controversial nature of this issue." California ANPR Comment Letter at 9-10.

In the 2002 legislative session, an attempt was made to amend the California Environmental Quality Act (CEQA) to explicitly require review of activities proposed in "isolated" wetlands. This attempt failed and the legislature is currently forming a committee to study a potential *SWANCC* fix for California waters.

### Alaska

Generally speaking, Alaska has neither a functioning dredge and fill permitting program nor an NPDES permitting program. Alaska has not assumed the federal NPDES program. The state defines waters broadly to include the "at risk" waters that may be exempted by the Corps and EPA, but has no point source permitting program to protect these waters.

Certain types of activities, such as the discharge of domestic and non-domestic wastewater and dewatering of excavations, are subject to some state permitting requirements. Those requirements do not generally intersect with CWA requirements. Fills in fish-bearing streams are regulated, as are fills within the Alaska coastal management zone (under the Alaska Coastal Management Program). However, the criteria for fills in both programs are less stringent than those found in the CWA §404 program, and it is unlikely either will encompass many, if any, "at risk" waters. In addition, the current Alaska administration and legislature are actively hostile to wetlands protection. The legislature has consistently narrowed the range of plaintiffs able to challenge Alaska Coastal Management Program decisions. Protection for "at risk" waters in Alaska will be dramatically weakened by withdrawal of CWA jurisdiction.

### f. Mountain States

#### Wyoming

Wyoming does not currently have an independent state permitting program that will protect "at risk" wetlands and waters from dredge and fill discharges. Instead, it has relied on its CWA §401 certification authority to do so. Absent CWA jurisdiction over so-called "isolated" wetlands, headwaters and their adjacent wetlands, and intermittent and ephemeral streams, these waters will likely be left unregulated at both the state and federal level.

Wyoming has sufficient legal authority under state law to enforce its water quality standards -- including antidegradation standards -- in broadly defined waters of the state. Wyoming's broad definition of state waters expressly encompasses "at risk" waters such as "isolated" wetlands, headwaters, and intermittent and ephemeral streams. The water quality standards also expressly require compensatory mitigation for the fill of natural wetlands. Fills of all wetlands must be done in accordance with Wyoming's best management practices for non-point sources. However, Wyoming does not presently have a permitting process independent of CWA §401



certification for enforcing these wetland water quality standards. Even if it did, Wyoming's wetland water quality standards fail to require the more protective impact avoidance and minimization standards employed by the §404(b)(1) guidelines. At best, the Wyoming standards require only compensatory mitigation. In addition, unlike federal law, the Wyoming standards distinguish between "natural" and "man-made" wetlands and do not require mitigation for the latter.

The Wyoming Department of Environmental Quality states that it is drafting a general NPDES permit or permits to regulate fill discharges in most "at risk" waters currently regulated by the Corps. These general permits, if adopted, would likely apply to all "at risk" natural wetlands and "at risk" man-made wetlands which provide compensation for other wetland fills. The prospective general permit(s) should provide a mechanism for requiring compensatory mitigation as required by state law.

Establishing such a general permit program will require additional rulemaking and scarce resources that may not be available in the current fiscal environment. Moreover, even if a general permit is adopted, it is unlikely to provide even adequate compensatory mitigation for affected wetlands and other waters because a general permit scheme does not require site-specific environmental review.

#### Idaho

Idaho does not have an independent state permitting program regulating discharges of dredged and fill material. Moreover, its water pollution control laws expressly forbid extending protection to Idaho waters beyond that provided by the federal Clean Water Act. If "at risk" waters are not regulated under the CWA, they will not be regulated by the state of Idaho.

#### Utah

Utah has no state wetland/dredge and fill permitting program and does not use its CWA §401 water quality certification program to protect wetlands or streams from dredging and filling. The removal of federal CWA §404 authority over so-called "isolated" wetlands and other waters, and headwater tributaries such as ditches, ephemeral streams and intermittent streams, will leave these waters unprotected from dredge and fill activity at both the federal and state levels.

The Utah Department of Environmental Quality (UDEQ) and the Utah Water Quality Board have the legal authority to enforce water quality standards -- including antidegradation standards and protection of designated uses -- in waters of the state, including wetlands. Utah could use its Utah Pollution Discharge Elimination System (UPDES) permitting program to enforce its water quality standards in wetlands. However, Utah has indicated no intention to do so. In addition, Utah's water programs are already considered under-funded and Utah is currently struggling with a budget deficit. Program expansion to fill regulatory gaps left by a CWA rollback seem highly unlikely at this time.

In addition, Utah's definition of waters of the State excludes "bodies of water confined to and retained within the limits of private property." This exclusion seems to preclude state regulation of discharges of dredged and fill material into many smaller and seasonal wetlands and waters located on private property. The UPDES program regulating pollutant discharges still applies to these confined waters as long as they are "waters of the United States" under the CWA. However, the UPDES program may not apply to these waters if CWA jurisdiction is rolled back.

3. Only A Few of These 32 States Have Any Independent State Coverage for Adjacent Wetlands and Headwaters

Only a few of the 32 states identified above as lacking "isolated" wetlands permitting programs have any independent state authority to regulate dredge and fill activity in tributaries and adjacent wetlands. Such authority is found in various state zoning, land use, drainage, and water pollution control laws, and is generally not comprehensive in scope. California, Delaware, Hawaii, Indiana, Nebraska, North Dakota, South Carolina, and Washington may have some limited regulatory authority to protect some tributaries and their adjacent wetlands. See, Kusler, Jon, The SWANCC Decision and State Regulation of Wetlands (2001) (<http://aswm.org/fwp/SWANCC/aswm-int.pdf>) at 9; Delaware, Indiana and Washington summaries, supra.

A CWA rollback will leave many adjacent wetlands and headwater tributaries, as well as "isolated" wetlands, vulnerable to drainage, dredging, channelization, and filling, even in these states with limited permitting authority. The EPA estimate of headwater stream miles, supra at IV-C-1, demonstrates that, on average, 54% of the Nation's stream miles are 1<sup>st</sup> order streams, and 80% are 1<sup>st</sup> and 2<sup>nd</sup> order streams. All of these streams and their adjacent wetlands are placed at risk by the ANPRM proposal to roll back CWA jurisdiction.

4. Even States that Have Independent Dredge and Fill Permitting Programs that Cover "Isolated" Wetlands and Headwaters Are Not Capable of Protecting All Wetlands and Waters Removed from CWA Jurisdiction.

Most of the 18 states with independent permitting programs that ostensibly include "isolated" waters and headwaters within their scope of regulation still lack the authority and/or the capability to fully protect many of the wetlands and waters they would be put at risk by a CWA jurisdictional rollback. These states are: Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, Florida, Michigan, Minnesota, Oregon, Wisconsin, North Carolina, and Ohio.

Many of these state permitting programs are limited in scope because of statutory and regulatory exemptions that exclude certain waters and/or certain activities in those waters from regulation. For example, New York generally only protects wetlands larger than 12.4 acres in size, leaving many smaller, seasonal wetlands at risk. Michigan dredge and fill laws generally exempt lakes and ponds with a surface area less than 5 acres, exempt virtually all noncontiguous wetlands located in counties with populations less than 100,000, and exempt virtually all noncontiguous wetlands that are 5 acres in size or less. Minnesota exempts certain agricultural dredge and fill

activities and fills to certain seasonal and shallow water wetlands, depending upon the federal program to regulate these discharges.

A second critical limitation is the vulnerability of both existing and emerging state permitting programs to political and legal attack by development interests, including road builders, home builders, agriculture, and mining interests, in the absence of a CWA federal floor. Ohio's new wetlands law was rendered largely ineffective during the legislative process that led to its enactment. North Carolina's wetlands program has been under attack in the courts ever since it was promulgated. Remarkably, a bill has been introduced in the current legislative session to eliminate the positions of the two most experienced regulators in the North Carolina permitting program. Virginia's new wetlands law was immediately challenged in court.

A related limitation is "no more stringent than" provisions in state law or policies that preclude the state from promulgating regulatory controls that are more stringent than those required by the CWA. Even though these provisions generally should not preclude regulation in waters of the state that are no longer considered "waters of the United States," these provisions will be used as a political tool for a state rollback of regulatory authority that mirrors the CWA rollback. See Section 6, below. In Michigan, one of two states that have assumed the federal CWA §404 program, a CWA jurisdictional rollback based on SWANCC has already limited the federal leverage that existed pre-SWANCC to convince Michigan to close its "isolated" waters loophole in order to make its assumed program fully consistent with the CWA.

Perhaps the most significant limitation on the effectiveness of all these programs, particularly in the current economic environment, is a lack of financial and technical resources to mount effective permit review, monitoring, and enforcement. In Minnesota, for example, severe budget cuts to eliminate a very sizable state budget deficit have resulted in extreme cuts in state wetlands regulatory program resources. The withdrawal of Corps and EPA funding and staffing from these states will only exacerbate the resource scarcity in these programs. Ohio's new wetlands program was inadequately funded from the outset due to budget constraints and will almost surely lose additional resources because the program is funded from general funds and the state is facing a huge budget deficit.

The selected state-by-state summaries presented below demonstrate that many of the 18 states with independent wetlands regulatory programs are unlikely to be able to fully fill the regulatory gap left by a CWA rollback.

a. Northeast Region

New York

While many of New York's wetlands and streams will not be left completely unprotected, many of the state's smaller wetlands, the wetlands most likely to be left out of federal protection, are at high risk of being developed. The state of New York generally protects only wetlands that are larger than 12.4 acres and some smaller wetlands of unusual local importance. Wetlands greater than one acre in size are protected within the Adirondack State Park. Agricultural drainage is

generally exempt from New York's wetland protection law. Many New York State wetlands previously regulated under the CWA will be left vulnerable to development and pollution if CWA jurisdiction is rolled back. A CWA rollback will also remove the federal "floor" that supports New York's wetlands protection program and expose that program to political attempts to weaken state protections.

New York law requires a permit for dredge, fill, and other bed and bank disturbances in its "protected streams," i.e., those with higher use classifications. However, New York law appears to leave some streams without protection from dredge, fill, and other bed and bank disturbances. Moreover, state dredge and fill protections for certain streams are not aggressively enforced. Absent the CWA §404 permitting requirement, which alerts project proponents to the need for a state permit, many of these dredge and fill activities would likely go unregulated.

Though New York has programs in place to protect certain wetlands and streams, the state budget is limited already and New York is grappling with a budget deficit of at least \$1 billion. Governing Magazine (May 2002). Taking on additional regulatory responsibilities to protect those wetlands and headwaters left vulnerable by a CWA rollback is not likely. In fact, the state of New York will lose 50 of its 350 regulatory staff in the next year due to budget cuts.

### Pennsylvania

Pennsylvania's Clean Streams Law and Dam Safety and Encroachments Act, and accompanying regulations, provide broad authority to the Pennsylvania Department of Environmental Protection (DEP) to regulate discharges of pollutants, including dredge and fill material, as well as other activities, in all waters of the Commonwealth, including "isolated" wetlands, ponds, springs, ditches, and ephemeral and intermittent streams. The Dam Safety and Waterways Management program incorporates wetland water quality standards, and the water quality standards incorporate the permitting standards from the Dam Safety and Waterways Management program. Those permitting standards are similar to those required by the CWA.

Weaknesses in Pennsylvania's wetlands and waterways protection program lie in the implementation of permitting standards. One particular concern is DEP's reliance on the state-sponsored Wetland Replacement Fund (Fund) to compensate for wetland losses from smaller projects. The Fund collects an average of \$10,939 per wetland acre impacted, where the average mitigation design and installation cost is an estimated \$58,000 per acre, and is roughly \$85,000 per acre for forested wetlands. The fees charged by the Fund are not sufficient to provide for land acquisition, in particular, which limits the ability of DEP to provide for proper siting and design of mitigation projects. In addition, DEP subsidizes the Fund, creating a strong disincentive for project proponents to either avoid wetland impacts altogether, or undertake more costly, but more ecologically beneficial, project-specific compensatory mitigation. While the individual impacts of these smaller projects may be small, the cumulative loss of wetlands and wetlands function is considerable, and these losses are not being adequately compensated for through the Fund.

Pennsylvania's water programs are also weakened by exemptions ("waivers") and general permits for certain activities. In particular, "waiver 2" in the Dam Safety and Waterways regulations exempts stream encroachment activities in streams and floodways with a drainage area of 100 acres or less. These unregulated activities have resulted in significant damage to headwater streams, particularly in areas of the Commonwealth experiencing intense development pressures. Developers expand the buildable area of land parcels by burying segments of streams. Stream channelization and culverting is being done under this waiver to build road and bridge crossings. Similarly, the Dam Safety and Waterways regulations relax permitting procedures and standards for private residential construction in wetlands through general permit 15.

Another weakness in the Pennsylvania state program is its delegation of responsibility to county conservation districts (CCDs) without sufficient funding and support to ensure adequate CCD resources and expertise to effectively protect Pennsylvania's at risk waters. While DEP presently limits its CCD delegation to general permit activities, it could expand its delegation in the future.

Finally, Pennsylvania has at least a \$500 million budget deficit that make it unlikely that the state will fund additional resources that would allow the DEP to effectively compensate for the loss of Corps and EPA resources attendant to a CWA rollback. Governing Magazine (May 2002).

b. Great Lakes Region

Ohio

Ohio's wetlands regulatory program has historically been based on its CWA §401 water quality certification program. State water quality standards recognized all waters, including all wetlands. In the wake of *SWANCC*, the Ohio Environmental Protection Agency (OEPA) attempted to assert independent state jurisdiction over so-called "isolated" wetlands. The agency found that the state had the legal authority to issue rules that would create a permitting program for "isolated" wetlands impacts independent of its CWA §401 authority, and that until such rules were in place, no impacts could occur to "isolated" waters. Rather than support state wetlands jurisdiction, the regulated community challenged OEPA's authority and sought the help of the state legislature. The state legislature quickly passed an "isolated" wetlands bill which weakened existing protection for "isolated" wetlands in July 2001.

The new "isolated" wetlands law, heavily influenced in the legislature by the regulated community, ostensibly creates an independent state permitting program for "isolated" wetlands where a CWA §404 permit and a §401 certification are not required, but actually weakens the previously existing CWA protections for "isolated" wetlands by requiring the approval of most "isolated" wetland fills of ½ acre or less through a general permit. The law also categorizes wetlands according to ecological significance and requires significantly weaker permit review and permit criteria for many wetlands based on ecological category and size. The methodology being used to categorize wetlands tends to give low value scores (and therefore almost no real protection) to so-called "isolated" wetlands based on their typically smaller size and the very fact

that they lack an obvious surface water connection. Consequently, while on paper Ohio has a wetlands program that regulates discharges in so-called "isolated" wetlands, in reality Ohio offers very minimal protection for these at risk waters.

Even if Ohio were inclined to fill the regulatory gap left by a CWA rollback, its wetlands and waters programs are inadequately funded to do so. OEPA believed it needed seven full time equivalent (FTE) positions to adequately staff this program in fiscal year 2002, yet it only had funding for four FTE's. In its first annual report on its "isolated" wetlands permitting program, OEPA reported that, "with only four FTEs available to conduct reviews, work efforts within the program are being hampered and review times for projects are increasing." The agency also reported that, "due to staffing levels, budget constraints and statutory review time requirements, the program was unable to follow up on the majority of these [thirty-eight illegal fill] complaints. A limited number of complaints regarding isolated wetlands were investigated."

The report notes that 60 percent of the cost of the program comes from the General Revenue Fund (GRF), leaving the wetlands program highly dependent on state tax revenues that have declined in FY 2002 and 2003, and highly vulnerable to GRF funding cuts. Prospects for FY 2004 are even worse. Ohio is facing a budget deficit that exceeds \$500 million. Governing Magazine (May 2002). OEPA does not currently have adequate resources to staff its permitting program for "isolated" wetlands and all indications point to cuts in this program in SFY 2004 and SFY 2005.

### Michigan

Michigan is one of only two states to assume the CWA §404 dredge and fill permitting program from the Corps of Engineers and EPA. Consequently, Michigan has an independent state dredge and fill permitting program that generally covers wetlands, lakes, and streams. However, the Michigan dredge and fill laws generally exempt lakes and ponds with a surface area less than 5 acres, exempt virtually all noncontiguous wetlands located in counties with populations less than 100,000, and exempt virtually all noncontiguous wetlands that are 5 acres in size or less.

In addition to these exemptions of certain wetlands, lakes, and ponds, Michigan law includes exemptions for agriculture, silviculture, ranching, iron and copper processing, drainage ditches, utility lines, and oil and gas pipelines that are broader than exemptions provided for under §404 of the CWA. These exemptions leave many smaller Michigan wetlands, lakes, and ponds vulnerable to dredging and filling.

Withdrawal of federal CWA §404 jurisdiction will remove the federal "floor" supporting the current Michigan dredge and fill program and will likely expose it to attempts to further weaken state dredge and fill protections. Indeed, in the process of reviewing Michigan's assumed §404 program before the *SWANCC* decision, EPA was urging Michigan to close its existing "isolated" waters loophole to make the program more fully consistent with the CWA. *SWANCC* weakened the federal leverage to urge these program improvements; a broader CWA rollback would eliminate it altogether. See, 68 Fed. Reg. 772 (January 7, 2003).

In addition, Michigan's dredge and fill program has suffered in the past from staff reductions and reduced enforcement and is unlikely to fully recover from those cut backs now when the state is struggling with a budget deficit in excess of \$1 billion. Governing Magazine (May 2002).

### Wisconsin

Wisconsin has had for some time a strong wetlands permitting program based on state water quality standards for wetlands and the state's CWA §401 water quality certification authority. Recognizing that *SWANCC* would severely limit its §401 authority over so-called "isolated" wetlands, Wisconsin responded quickly to *SWANCC*, enacting new legislation in May 2001 extending its pre-existing water quality certification program to "non-federal" wetlands. Wisconsin's new law essentially maintains the wetland protection status quo in the state, extending the state's certification authority only to those "non-federal wetlands" over which the Corps no longer takes §404 jurisdiction based on the *SWANCC* decision.

While Wisconsin seems to have a relatively effective program for protecting its wetlands now, it is unclear whether Wisconsin will have the resources and commitment to further expand its state program if CWA jurisdiction is withdrawn from additional waters. Wisconsin is dealing with a budget deficit in excess of \$250 million and may not be able to fund further regulatory program expansion. Governing Magazine (May 2002).

### Minnesota

Minnesota has its own state wetlands law independent of its CWA §401 certification authority. Ostensibly, Minnesota's Wetlands Conservation Act (WCA) regulates the full range of wetlands in the state, including "isolated" wetlands. However, WCA and its regulations exempt a number of activities that often occur in so-called "isolated" wetlands. These exemptions were put in place at least in part because the Corps was requiring a CWA §404 permit for these activities in wetlands, including "isolated" wetlands. After *SWANCC*, the Corps is no longer regulating these activities in "isolated" wetlands, and Minnesota cannot, leaving a gap in regulation of so-called "isolated" wetlands.

Minnesota's Board of Soil and Water Resources (BWSR), which administers WCA, has conducted its own analysis of post-*SWANCC* regulatory gaps and concluded that absent federal CWA jurisdiction, many of Minnesota's small, seasonal wetlands will be left unregulated, particularly in the Prairie Pothole Region and other regions of the state with the greatest historical wetland losses. These wetland losses will be even more pronounced if intermittent streams and their adjacent wetlands are assumed to no longer qualify as waters of the United States. In 2001, BWSR presented an informal proposal to modify its exemptions and close this regulatory gap. The proposal was tabled in light of resistance from regulated interests.

In addition to WCA's exemptions, WCA program effectiveness is limited by political and resource constraints. First, WCA is administered by local government units with state agency oversight. Many of these local governmental units lack the staff expertise and resources to conduct careful permit review and impose sufficiently protective permit conditions. Second, the

state's budget crisis has severely cut funding for wetland and stream permitting programs at both the state and the local level. Minnesota is currently cutting BWSR funding to address a budget deficit in excess of \$25 million. Governing Magazine (May 2002).

c. Pacific Northwest

Oregon

Oregon has a strong statutory and regulatory regime that should allow it to protect "isolated" wetlands and smaller streams in the absence of federal regulation. Under the 1989 state wetlands law, local governments are encouraged to prepare local wetlands conservation plans, plans which are approved by the state Division of State Lands under specified statutory criteria. Permits are required from the state for the removal or fill of wetlands in any area subject to such a plan. The statute requires that such proposals must be consistent with applicable wetlands conservation plans, be designed to minimize impacts, and fully replace impacted resources through mitigation. There appears to be no minimum size threshold for regulated wetlands, so even small seasonal wetlands appear to be regulated. Oregon's permitting program requires compensatory mitigation for any wetlands impacts and includes permitting standards that are similar to CWA §404. Oregon is considering assumption of the CWA §404 program from EPA and the Corps. In addition, the Corps and EPA are delegating to Oregon responsibility for dealing with wetlands under 2 acres in size under a programmatic general permit.

However, regular hostile legislative initiatives, barriers to citizen enforcement, and a state budget crisis raise questions about the effectiveness of Oregon's permitting program in the absence of a federal regulatory floor. While there is currently no law in Oregon that caps state standards to the limit of federal law, such bills are regularly introduced in the state legislature. In addition, Oregon is in an economic crisis and there is significant pressure to loosen environmental regulations that are seen as constraining job growth. For example, the state cattlemen's associations have been promoting a bill to repeal all state regulation over wetlands. Another pending bill would remove state jurisdiction over any wetland smaller than one acre.

While Oregon does provide for citizen enforcement of many of its wetlands and waters provisions, the law now makes unsuccessful citizen groups liable for the attorneys' fees of the defendants. This single act has significantly curtailed citizen enforcement of state water resources law. The state Attorney General's office has also begun to take the position in litigation that only those entities with a direct economic interest in a permit have standing to enforce it, which would preclude most enforcement actions from conservation groups or concerned citizens.

Finally, enforcement at the state agency level is typically under-funded and a low priority. Unless a development activity poses a very serious environmental problem, or there are numerous citizen complaints, enforcement of permit violations is said to be rare. Oregon is also facing a budget deficit in excess of \$500 million and seemingly unlikely to expand its state programs to regulate additional waters left unregulated by the Corps and EPA. Governing Magazine (May 2002).



Much of Eastern Oregon is high desert, and hence virtually all of the water resources in the Eastern part of the state could be classified as “isolated” or “intermittent.” Such streams and wetlands are of great ecological importance in a desert environment. Despite what seems to be an strong state regulatory program, the CWA federal floor is needed to ensure protection of these valuable water resources.

d. Southeast Region

Virginia

Virginia has historically relied on its CWA §401 certification program to regulate discharges to its non-tidal wetlands. In 2000, the Virginia General Assembly removed the dependence of the state nontidal wetlands program on its CWA authority, enabling the Department of Environmental Quality (DEQ) to independently regulate activities in wetlands, including "isolated" wetlands, even when the Corps does not regulate them under CWA §404. The regulations implementing this new law came into full effect October 1, 2001.

However, the effectiveness of the Virginia regulatory program is limited by court challenges, political controversy, and limited resources. The new state law was almost immediately challenged in both state and federal court. Despite the unambiguous legislative approval of independent state wetlands regulation with broader jurisdiction than that afforded by the CWA after *SWANCC*, the U.S. District Court for the Eastern District of Virginia effectively negated the intent of the Virginia law by erroneously concluding that it is limited to "coextensive jurisdiction" with federal law. This conclusion is completely contrary to the language, goals, and history of the 2000 legislation, and is currently on appeal in the Fourth Circuit U.S. Court of Appeals. United States v. Newdunn Associates, 195 F. Supp. 2d 751 (E.D. Va. 2002), *appeal pending*, No. 02-1594 and 02-1480 (4<sup>th</sup> Cir.). Meanwhile, conservation groups are concerned that DEQ is not requiring the avoidance and minimization of wetland impacts, but simply requiring mitigation.

Budget constraints are also a concern, since Virginia is grappling with a budget deficit in excess of \$1 billion. Governing Magazine (May 2002). Even if Virginia's wetland program can overcome its legal and political hurdles, it is unlikely that Virginia will fund an expansion of program resources to address a CWA rollback beyond the minimum dictated by *SWANCC*.

North Carolina

North Carolina now appears to have an independent state wetlands regulatory program that protects so-called “isolated” wetlands, though its regulatory authority and effectiveness are by no means a foregone conclusion. In 1996, North Carolina promulgated wetland water quality standards and procedures applicable to its CWA §401 water quality certifications, especially for Corps §404 permits. The state attorney general determined that North Carolina’s Environmental Management Commission (EMC) has independent authority to enforce its wetland water quality standards where CWA §401 water quality certifications are not required. North Carolina's wetlands rules were immediately challenged by development and farming interests, who took

their challenge all the way to the North Carolina Supreme Court. The North Carolina Court of Appeals rejected the rules challenge in late 2002 and the North Carolina Supreme Court followed suit in late March 2003.

Following *SWANCC*, the EMC expressly extended the state wetlands rules to “isolated” wetlands by promulgating temporary “isolated” wetland rules that became effective in October 2001. The EMC made these “isolated” wetlands and waters rules permanent in the fall of 2002, subject to legislative approval in early 2003. Until then, the temporary “isolated” wetlands and waters rules remain in effect.

Most recently, a North Carolina legislator introduced a bill targeting by name two of the most experienced regulators in the North Carolina wetlands permitting program, requiring the elimination of their jobs. Bruce Henderson, Charlotte Observer (April 10, 2003). The North Carolina wetlands program can hardly be effective in the face of such attacks. A CWA federal floor helps to shield state programs from such political vulnerability. A CWA rollback from so-called “isolated” wetlands and headwaters will result in increasing state program vulnerability to this type of legislative attack.

In addition to legal and legislative challenges, North Carolina's wetlands permitting program is hampered by limited resources. North Carolina is dealing with a budget deficit in excess of \$500 million. Governing Magazine (May 2002). Already understaffed state environmental agencies are being asked now for up to 3 percent additional cuts for the current budget year. Even in a state like North Carolina where some legal jurisdiction over so-called “isolated” waters and headwaters has been upheld, the resources to enforce that jurisdiction is sorely lacking.

### Florida

Florida retains considerable state statutory authority to implement wetland permitting programs to protect "at risk" waters. Florida's Department of Environmental Protection (DEP) has considerable legal authority to enforce water quality standards -- including antidegradation standards -- in broadly defined waters of the state, expressly including wetlands and “isolated” wetlands. Florida also has independent state authority to require permits for pollution discharges in state waters and on its submerged lands.

Weaknesses in Florida's permitting programs include a broad exemption from wetland regulation in the Florida Panhandle counties. In response to *SWANCC*, Escambia County in the Florida Panhandle acted on its own to close the Panhandle wetlands exemption, adopting an ordinance requiring additional county review of building plans in wetlands, including “isolated” wetlands. Florida law also exempts various agriculture, silviculture, and horticulture activities, as well as certain activities deemed to be minimal in individual and cumulative environmental impact.

The effectiveness of Florida's permitting programs is further reduced by the delegation of permitting authority to Florida's five water management districts, which have their own permitting rules and which vary in program implementation. While the St. Johns River Water Management District (WMD) is viewed as implementing a relatively comprehensive and

protective program applicable to virtually all wetlands and streams, including intermittent streams, the same is not said for the other water management districts. Florida law also permits delegation of permitting authority to local governments.

Florida's mitigation requirements, as applied by several of the WMDs, are also viewed as less protective than those required by the Corps and EPA under the CWA. In particular, unlike the Corps and EPA, Florida's WMDs typically do not require permit applicants to pursue practicable alternatives to site development in wetlands. Florida permitting rules also provide little protection for uplands surrounding wetlands habitat used by threatened and endangered species.

The weaknesses in Florida's permitting programs are exacerbated by a daunting budget deficit in excess of \$1 billion. Governing Magazine (May 2002).

5. States Are Unlikely to Effectively Harness Existing Authority Or Enact New Authority to Protect Wetlands and Headwaters In the Wake of a Federal CWA Rollback.

The 32 states that currently lack any independent state permitting programs protecting "isolated" waters are highly unlikely to launch effective programs in the wake of the *SWANCC* decision and the ANPRM. While many states have latent authority to enforce water quality standards or other state water pollution control statutes, most of them have relied exclusively on the CWA-based §401 certification and §402 NPDES permitting programs to enforce these underlying state laws. Without CWA §401 jurisdiction, few states will be able to establish a permitting program to limit dredge and fill activity in waters withdrawn from CWA jurisdiction.

States that attempt to launch independent state permitting programs to enforce their existing water quality standards and other state water pollution control laws are being challenged legally and politically at every turn in attempts to ensure that any CWA rollback constitutes a state rollback as well. There is every indication that this trend will continue when and if additional states chart this course. Efforts to thwart regulatory gap-filling efforts in both Indiana and North Carolina illustrate this trend. See, pages \_\_ and \_\_, *supra*. [jd check]

States are finding it even more difficult to enact entirely new wetlands and waters permitting statutes to fill the regulatory gaps left by *SWANCC* and likely to be left by any new Corps and EPA rulemaking. As discussed above, wetlands bills introduced to fill regulatory gaps in the aftermath of *SWANCC* have already failed in several states, including California, Illinois, and Delaware.

As discussed in state summaries above, budget constraints are another key reason why it is highly unlikely that states will fill the regulatory gap left by a CWA rollback.

6. State Capability to Protect Wetlands, Headwaters, and Downstream Waters from Pollutant Discharges Will Be Substantially Weakened If CWA Jurisdiction is Removed from Wetlands and Headwaters.

Most state surface water pollution permitting programs are closely linked to the CWA NPDES/402 authority. While they are based on independent state statutes and regulations, those statutes and regulations were in many cases enacted or amended to ensure that they met CWA NPDES standards. In some states, such as Arizona and Idaho discussed above, the waters to be regulated under the state program are expressly limited to federal "waters of the United States." Any withdrawal of CWA jurisdiction will almost certainly be followed immediately by a withdrawal of state PDES regulation as well. Additional state PDES permitting programs are subject to "no more stringent than federal law" provisions that arguably could limit the waters protected under the state program. See Section 6, below.

Even where independent state authority to regulate broader waters of the State is clear, the absence of a federal CWA "floor" exposes state pollution control standards to attacks from pollutant dischargers seeking to limit state regulation to those waters still regulated as "waters of the United States" under the CWA.

7. "No More Stringent" Laws Turn Federal Baselines Into State Ceilings, Further Limiting States' Capacity to Fill the Regulatory Gaps Left By a CWA Rollback.

In addition to the other limitations on state regulatory authority and resources described above, many states have statutes or regulations that either prevent or limit the ability of state resource protection agencies from adopting environmental standards more stringent than the minimum required by federal environmental statutes and regulations. Such provisions could, in some instances, be used to limit the waters protected under the state program, turning what was intended under the Clean Water Act to be the federal "floor" of protection into the "ceiling."

Examples of many of these "No More Stringent" laws are provided below.<sup>47/</sup> In many cases, these state laws are not retroactive (or not appear to be so), or they otherwise not result in an automatic restriction in the waters protected by state law and regulations even if EPA and the Corps attempt to limit the waters covered by federal regulations.

But even where independent state authority to regulate broader waters of the state is clear, polluters and development interests will almost certainly renew their attacks on states' regulatory authority and seek to limit state regulation to those waters still defined as "waters of the United States" under federal regulations. This would likely restart the "race to the bottom" among states that the Clean Water Act itself was meant to end when it came to protection of the country's water resources.

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<sup>47</sup> For another discussion of state "no more stringent" laws, see Environmental Law Institute "Enforceable State Mechanisms for the Control of Nonpoint Source Water Pollution," 1997, Appendix A (available at <http://www.epa.gov/nps/elistudy/>).

### Broad “No More Stringent” Laws

Although some state “No More Stringent” laws are media- or resource-specific (e.g., restricting enactment of more stringent hazardous air pollutant standards than the federal standards), the laws in several states generally prohibit their state environmental agencies from enacting any regulation more stringent than the federal laws or regulations.<sup>48/</sup>

Some states have enacted legislation unconditionally restricting their agencies from promulgating any environmental regulations more stringent than federally required. South Dakota’s law prohibits the state from enacting rules that are either more stringent than federal required or that cover “an essentially similar subject or issue.”<sup>49/</sup> This law not only covers all areas of federal environmental regulation, but it is so broad that it could be read to try to block any state regulation in an area where a federal program exists on an issue even if it is entirely voluntary. Alaska law provides that state regulations addressing areas governed by federal laws or regulations may not be more stringent than most federal laws and regulations.<sup>50/</sup> Kentucky limits agency authority to promulgate regulations to only when such regulations are “required by federal law” and any then “shall be no more stringent than the federal law or regulations.”<sup>51/</sup> Tennessee invalidated all environmental requirements placed upon municipalities or counties that are more stringent than federal rules.<sup>52/</sup>

### Water-Pollution Related “No More Stringent” Laws

Arizona Rev. Stat. Ann. § 49-255.01, which establishes the state’s pollutant discharge elimination system program, prohibits the director from promulgating rules more stringent than those found either in that statute itself or in the Clean Water Act. Virginia prohibits its state water pollution rules from being more stringent than federal regulations under the Clean Water Act.<sup>53/</sup> Florida has a similar provision, but includes a procedure for granting exceptions.<sup>54/</sup> In addition to its more general prohibition on state regulations more stringent than federal, Kentucky law specifically prohibits “any effluent limitation, monitoring requirement, or other condition which is more stringent than” federally required.<sup>55/</sup>

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<sup>48</sup> Jerome M. Organ, Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems, 54 Md. L. Rev. 1373, 1376 (1995).

<sup>49</sup> South Dakota Cod. Laws. Ann. 1-40-4.1.

<sup>50</sup> AK Stat. Ann. §46.03.365.

<sup>51</sup> Ky Rev. Stat. Ann. § 13A.120(1) (Baldwin 1988 & Supp. 1994).

<sup>52</sup> Tenn. Code Ann. § 4-5-225.

<sup>53</sup> Va. Code Ann. s 62.1-44.15:1 (Michie 1993).

<sup>54</sup> Fla. Stat. Ann. s 403.804(2) (West 1993).

<sup>55</sup> Ky. Rev. Stat. § 224.16-050.

North Carolina prohibits effluent standards applicable to animal or poultry feeding operations from exceeding federal minimums.<sup>56/</sup> While Iowa prohibits state effluent standards from being more stringent than a federal effluent standard, the state allows agencies to establish standards for sources that the EPA has not.<sup>57/</sup> Oregon bars its agencies from restricting effluent limitations upon nonpoint sources of pollutant discharge resulting from forest operations unless mandated under the federal Clean Water Act.<sup>58/</sup> Idaho restricts its agencies from creating water pollution regulations more stringent than the Clean Water Act.<sup>59/</sup>

Both Arkansas<sup>60/</sup> and Iowa<sup>61/</sup> authorize their state agencies to impose more stringent source-specific standards than the Clean Water Act, but only to the extent necessary to assure compliance with the Act's water quality standards. Nebraska has a "no more stringent" statute regarding the Safe Drinking Water Act<sup>62/</sup> and Alabama restricts state regulations regarding wellhead protection areas from being more stringent than EPA standards.<sup>63/</sup>

#### Exceptions to the State's Own "No More Stringent" Law

Some states only allow their agencies to promulgate or adopt environmental regulations more stringent than those federally required if they meet heightened evidentiary burdens or special procedures.

Montana provides an exception to its "no more stringent" restrictions if there is a finding after public hearing and detailed study that such rules are necessary.<sup>64/</sup> Maine requires a more detailed and complex set of justifications and more procedural review if the state intends to adopt more stringent regulations than the federal requirements.<sup>65/</sup> Florida has a similar provision, and further requires approval by the governor and cabinet after review of a cost/benefit analysis.<sup>66/</sup>

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<sup>56/</sup> N.C. Gen. Stat. 143-215,

<sup>57/</sup> Ia. Code Ann. 455B.173.

<sup>58/</sup> Ore. Rev. Stat. 468B.110(2).

<sup>59/</sup> Id. Code 39-3601,

<sup>60/</sup> Ark. Code Ann. § 8-4-207(1)(A) (1989).

<sup>61/</sup> Iowa Code Ann. § 455B.173.2 (1993).

<sup>62/</sup> Neb. Rev. St. § 81-1505 (22).

<sup>63/</sup> Ala. Code § 22-36-7 (1993).

<sup>64/</sup> Mont. Code Ann. 75-5-203, -309, 80-15-110.

<sup>65/</sup> 38 Maine Rev. Stat. Ann. 341-D.

<sup>66/</sup> Fla. Stat. 403.061(7)(31), 403.804(2) (1993).

Oklahoma requires an economic impact analysis for environmental rules more stringent than corresponding federal requirements.<sup>67/</sup> Ohio requires more disclosure and review for restrictions above the federal minimums.<sup>68/</sup> Pennsylvania and Maryland have Executive Orders requiring a compelling state interest or an independent legislative justification to support any deviation from federal standards.<sup>69/</sup> Wisconsin has a similar policy promulgated by its Natural Resources Board and Utah has a similar legislative requirement.<sup>70/</sup>

North Dakota prohibits agencies from adopting rules more “stringent than corresponding federal regulations or adopt rules where there are no corresponding federal regulations” unless there is a written finding after public comment and hearing based upon evidence in the record, that corresponding federal regulations are not adequate to protect public health and the environment of the state.”<sup>71/</sup>

Mississippi has a “no more stringent” rule relating to water quality and discharge guidance, but allows a state agency to promulgate regulations in the absence of federal standards when “necessary to protect human health, welfare or the environment.”<sup>72/</sup> West Virginia allows for the Division of Environmental Protection to promulgate more stringent rules than the counterpart federal rule or program “reasonably necessary to protect, preserve or enhance the quality of West Virginia's environment or human health or safety.”<sup>73/</sup> However, “[i]n the absence of a federal rule, the adoption of a state rule shall not be construed to be more stringent than a federal rule, unless the absence of a federal rule is the result of a specific federal exemption.”<sup>74/</sup>

Utah has several media-specific statutes prohibiting promulgation of regulations “more stringent than the corresponding federal regulations” absent “a written finding after public comment and hearing, . . . that the corresponding federal regulation is not adequate to protect public safety and the environment.”<sup>75/</sup> The Tennessee Government Operations Committee has the authority to invalidate rules that impose “environmental requirements or restrictions on municipalities or counties that are more stringent than federal statutes or rules on the same subject, and that result in increased expenditure requirements on municipalities or counties beyond those required to

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<sup>67/</sup> Okla. Stat. Tit. 27A, s 1-1-206

<sup>68/</sup> Ohio Rev. Stat. 121.39.

<sup>69/</sup> Penn. Exec. Order 1996-1.

<sup>70/</sup> Wis. Board Pol. 1.52(3) and Utah Code Ann. 19-5-195.

<sup>71/</sup> N.D. Code § 23-01-04.1.1; see 54 Md. L. Rev. 1373, 1386.

<sup>72/</sup> Mississippi Code 49-17-34(2).

<sup>73/</sup> W. Va. Code § 22-1-31 (1994).

<sup>74/</sup> Id.

<sup>75/</sup> Utah Code Ann. § 19-5- 105(1), (2) (1993).

meet federal requirements unless” funds have been appropriated to cover the increased expenditures.<sup>76/</sup>

Colorado allows water quality controls to be more stringent than the “corresponding enforceable federal requirements” only if it is demonstrated at a public hearing resulting and there is a written finding with scientific or technical evidence showing that more stringent state rules are necessary to protect the public health, beneficial use of water, or the environment of the state.<sup>77/</sup> Iowa only places limitations on the state agency's authority to promulgate more stringent water quality controls when the EPA has promulgated “an effluent or pretreatment standard pursuant to § 301, 306 or 307 of the federal Water Pollution Control Act.”<sup>78/</sup>

C. OTHER FEDERAL REGULATORY AND INCENTIVE-BASED PROGRAMS OFFER LITTLE PROTECTION TO FILL GAPS LEFT BY LOSS OF CWA JURISDICTION.

While there are numerous incentive-based programs on the national level that promote the acquisition, protection, restoration, or enhancement of certain types of waters, these programs were never contemplated as replacements to broad, federal regulatory protection. As a result, the programs are insufficiently funded, usually limited to certain types of waters, and not comprehensive in their protections.

1. Swampbuster

One Federal program that prevents a significant amount of wetland conversion (though it does nothing to halt point source discharges of pollutants and does little to protect streams) is Swampbuster. A “disincentive” provision included in the Food Security Act of 1985, and re-authorized as part of every Farm Bill since, Swampbuster requires producers who receive farm subsidies, loans, or certain other benefits to refrain from continued drainage of wetlands on farms they own or operate. Violators risk the loss of their program benefits. Since the Food Security Act contains its own definition of “wetlands,” the *SWANCC* decision has had no effect on Swampbuster implementation. However, there are many limitations to the effectiveness of Swampbuster as a “backstop” to loss of Clean Water Act protections. These are discussed below.

*Applies Only to Agricultural Activities*

One of the major limits to Swampbuster as a backstop to loss of Federal, Clean Water Act protections is that, even if it were completely successful at halting conversion of wetlands to agriculture (which it isn't), it would still only apply to agricultural conversions of wetlands. The most recent U.S. Fish and Wildlife Service publication, “Status and Trends of Wetlands in the Conterminous United States 1986 to 1997,” estimates that only 26 percent of freshwater wetland

<sup>76</sup> Tenn. Code Ann. § 4-5-225 (1994).

<sup>77</sup> Colo. Rev. Stat. Ann. § 25-8-202(8)(a) (1994).

<sup>78</sup> Iowa Code Ann. s 455B.173.2 (1990).



losses were due to agriculture, while 51 percent were due to urban or rural development (Dahl, 2000). Swampbuster can do nothing to halt the 74 percent of wetland losses that are not caused by agricultural activities.

#### *Applies Only to Wetland Conversion*

Swampbuster does little to halt the destruction of non-wetland waters for agricultural purposes. Producers are free to channelize, pipe and/or armor streams or ditches without incurring violations of Swampbuster. Further, as a wetland conservation program, Swampbuster does not address point source discharges of pollutants or oil spill liability in any type of waters.

#### *Many Loopholes*

Pressure from producers for “flexibility” in implementation of Swampbuster led to amendments in the 1990 and 1996 farm bills to allow producers to drain wetlands under certain “minimal effects” and “minimal effects with mitigation” exemptions. These special exemptions were designed to allow producers to drain so-called “nuisance” wetlands -- wetlands that were preventing them from turning their tractor around, entering certain fields, etc. However, as implemented, the minimal effects exemptions are quite broad. Reliance on “mitigation” of wetland impacts through restoration of wetlands elsewhere is likely resulting in a significant net loss of wetlands as NRCS has little experience with wetland mitigation and anecdotal evidence seems to indicate that mitigation projects mostly involve creation of ponds in upland areas.

#### *Lack of Enforcement*

Very few producers have lost federal benefits for violations of Swampbuster. That does not mean to imply that violations do not occur. In fact one of the biggest complaints associated with the Swampbuster program is that it is not well enforced, leaving “cheaters” to benefit and those who abide by the restriction at a competitive disadvantage. The penalties for violating the provision are not severe enough to serve as a disincentive to many producers. Since 1990, if a producer converts a wetland for the purpose of crop production, they may lose USDA program benefits only until the wetland functions are “restored.” If the Farm Service Agency determines that the violation was made unintentionally, they may grant a “good faith” exemption. If such an exemption is granted, then the NRCS will help the landowner develop an acceptable mitigation plan to restore the wetland functions, which must be completed within one year. If correctly implemented and all conditions are met, the landowner will not lose program benefits. A soon to be released study by the General Accounting Office will examine the effectiveness of Swampbuster. It is widely expected to reveal a dismal record of compliance and enforcement.

#### *Is Not Tied to All Federal Benefits*

A damaging legislative precedent was set in 1999, when Congress passed a four-year, more than \$ 6 billion crop insurance subsidy bill which did not require recipients to comply with Swampbuster. This de-coupling of Swampbuster compliance from crop insurance subsidies created a perverse incentive for producers to convert wetlands to production -- even wetlands

which would otherwise not prove economically viable to convert. The desire by many in Congress and the Administration to move producers away from direct subsidies to agricultural producers puts in question the future of Swampbuster, as crop insurance and potentially other de-linked programs become the major delivery mechanisms for assistance to producers.

## 2. Wetlands Reserve Program

The Wetland Reserve Program (WRP), offers landowners the means and the opportunity to protect, restore and enhance wetlands on their property through a voluntary program administered by the USDA Natural Resource Conservation Agency.

The WRP was mandated by § 1237 of the Food Security Act of 1985(PL99-198) and amended by subsequent farm bills in 1990, 1996 and 2002. Since its enactment, the program has made a major contribution toward restoring wetlands and contributing to the goal of “no net loss” of wetlands. At the close of FY 2002 1,276,619 acres, involving 6,791 projects were under easement. However, actual wetland acres protected may be significantly less because program rules permit up to 6 acres of non-wetland buffer area for each acre of wetland.

We are fully supportive of WRP and urge continued increases in program levels. However, despite WRP’s value in allowing restoration of formerly drained wetlands, we take exception to the suggestion that the program will provide significant protection to those “isolated” wetlands under the threat of destruction. We offer the following points:

The majority of acres enrolled in WRP were areas that were not previously subject to 404 permit requirements. They are areas that had been significantly manipulated for agricultural production prior to 1985, have lost much of their wetland values, and, in fact, are no longer classified as wetlands. On balance WRP has become a wetland restoration program rather than one that protects current wetlands needing no restoration or enhancement. WRP acres and 404 permit acres in the majority of cases are different areas. Consequently, WRP has little impact on protecting “isolated” wetlands.

Funding levels are inadequate. The Administration’s proposed budget for FY 2004 caps the enrollment acres at 178,000. This is 72,000 acres less that authorized in the 2002 farm bill. In FY 2002, 4 eligible acres were offered for every acre enrolled, amounting to over 700,000 acres of potential easements that went unfunded. Interest in the program is high but limited funds and a low probability of getting acres enrolled is discouraging program participation.

Land offered for WRP tend only to be areas that are limited in their economic value. They tend to be marginal farming areas producing limited income. They are not those wetland that are most threatened by development. WRP cannot compete in the market where land values significantly exceed agricultural values.

The average WRP contract exceeded 180 acres in FY 2002. Larger areas are given preference in order to control administrative and future oversight demands to assure proper operation and maintenance. It is understood that some of these large areas may include several small wetland

strung together in a single contract. The fact remains that the huge number of small wetlands representing an extremely important waterfowl habitat but limited acreage is not being addressed by WRP.

Most WRP acreage is land that was drained for agriculture, but failed to become productive for agriculture. It is much more cost effective and ecologically desirable to prevent such wetlands from being drained in the first place than to pay farmers to restore them later.

Not all wetlands restored under the WRP program are protected in perpetuity. Currently, 77 percent are in permanent easements, 16 percent in 30-year easements, and 7 percent in 15-year agreements (Harry Slaughter - NRCS, personal communication).

### 3. Other Farm Bill Conservation Programs

Several other Farm Bill conservation programs provide incentives to restore or protect wetlands. The Wildlife Habitat Incentives Program provides some funding for cost-share agreements to restore wetlands and in-stream habitats, however only about 10 percent of the funds for this program are used for aquatic habitats. The Conservation Reserve Program and Conservation Reserve Enhancement Program (along with the state CREP match) provide some funding for the restoration and enrolment of wetlands and some riparian habitats in conservation easements. However, the majority of CRP funds are spent on upland habitats and most easements in these programs are short-term. The Continuous sign-up Conservation Reserve program also provides funding for riparian restoration, however agreements are for only 10-15 years. None of these programs protects waters from point-source discharges of pollutants, though some are designed to reduce non-point source pollution. These programs, while supported by our organizations for their value in providing some wildlife habitat and filtration of run-off, are of little value as backstops to loss of Clean Water Act protections.

### 4. Partners for Fish and Wildlife

This program, administered by the U.S. Fish and Wildlife Service has helped to restore 574,800 acres of wetlands and 4,190 miles of streamside and in-stream habitat since 1987 (Martha Naley – USFWS, personal communication). While we are highly supportive of the program, and hope that it receives the requested \$9.6 million increase in funding for the FY04 budget, wetlands and streams restored through this program are not usually protected by a legal mechanism, thus are vulnerable to future development projects. Additionally, none are protected from point-source discharges of pollutants. As such, the program, even if given additional funding, will never serve as a significant backstop for loss of regulatory protection.

### 5. Coastal Wetlands Restoration Program

The Coastal Wetlands Conservation grant program has awarded \$32 million to 23 coastal States and 1 U.S. Territory. Through this grant program 40,000 acres of coastal wetlands have, or will be, acquired, protected, or restored. However these are coastal wetlands that are hopefully not at risk of losing jurisdiction under the Federal Clean Water Act, therefore it provides no backstop

to the loss of Clean Water Act protections for nontidal waters. Further, with a major movement underway to raise federal funding to restore coastal Louisiana, it is important to ensure that any public investment in this worthy effort is not undermined by accelerated drainage of wetlands and channelization of streams in the upper reaches of the Mississippi River or within Louisiana itself – which maintains no state level program to protect wetlands independent of Clean Water Act authority.

6. National Estuary Program

The National Estuary Program was established by Congress in 1987 to improve the quality of estuaries of national importance. The Clean Water Act, § 320 directs EPA to develop plans for attaining or maintaining water quality in an estuary. This includes protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on water, requires that control of point and nonpoint sources of pollution to supplement existing controls of pollution. Several funding mechanisms are available. This significant and valuable public investment in restoring and maintaining the health of our nation's estuaries will be significantly undermined if upstream waters that provide fresh water to these estuaries are contaminated or degraded.

7. National Wildlife Refuge System

The National Wildlife Refuge System, in its 100 years of operation has protected some very key wetland habitats across the nation as refuges and waterfowl production areas. Nationally, about 35-40 percent of the refuge system's 95 million acres (including waterfowl production areas) is some type of aquatic habitat (Ken Grannemann – USFWS, personal communication). However, new acquisition is not proceeding very rapidly as full funding of the Land and Water Conservation Fund has yet to occur. In fact, the President's budget request for FY 04 represents about a 60 percent cut in funding for refuge acquisition despite his promise to fully fund the LWCF (Jim Waltman – The Wilderness Society, personal communication). Chronic under-funding of refuge operations and maintenance programs also prevents many refuge-owned areas from being restored as wetlands, though the President's request for an increase in this funding level for FY04 is certainly welcomed by our groups.

While the wetlands already protected within the refuge system enjoy fairly good protection from dredge and fill activities, it is not anticipated that new acquisitions will increase significantly within the next few years, nor do we anticipate that the small, scattered wetlands and headwater streams most at risk from a change in Clean Water Act rulemaking will be targeted for acquisition within the refuge system due to the difficulty in managing such scattered units. Additionally, due to resource extraction activities on refuges and lack of protection for many upstream waters, refuge waters could be increasingly vulnerable to pollution. Indeed, according to the personal experience of National Wildlife Federation Board Member, Gerome Ringo, (personal communication) many Louisiana refuges are being contaminated with oil leaking from wells on the refuges. Without § 311, or OPA protections for some types of waters, liability for clean up of these spills would lie with the taxpayers.

8. 5 Star Restoration Program

With average grants that run about \$10,000 per project, the 5 Star Restoration Program is more effective at leveraging local funding and labor for stream and wetland restoration and clean up programs than it is a major force for long term conservation of aquatic systems. While the program has achieved impressive results with small amounts of funding, no long-term protection mechanisms are required to ensure that the progress is not eventually reversed.

9. North American Wetlands Conservation Act

Through the North American Wetlands Conservation Act, approximately 3.5 million acres of wetlands and associated uplands have been affected across the United States since 1989. Of these, about 978,130 acres have been acquired through fee title transactions and another 796,844 acres are under easement, and the rest not protected by any long term mechanism. Exact records are not available regarding how much of the total acreage affected is wetland or other aquatic habitat (as opposed to “associated upland”). However the Fish and Wildlife Service estimates that about 25 percent of the acreage affected is aquatic habitat, with the remaining 75 percent in associated uplands. Thus about 244,532 acres of wetlands and other aquatic habitats have been acquired and another 199,211 acres of wetlands are under some type of easement. About 205,072 acres of wetlands/aquatic habitats have been restored and 275,00 acres of wetlands/aquatic habitats have been enhanced for waterfowl use (Joe Moteo – USFWS, email and personal communications 4/10/03). While still impressive, these numbers are easily undermined by past and anticipated accelerated future losses of wetlands and other aquatic habitats to development and agriculture and their potential pollution from point and non-point source discharges of pollution.

Like other programs, including the Western Hemisphere Shorebird Reserve Network, that target waterbird conservation within the United States, the NAWCA emphasizes the protection of areas that receive seasonally large concentrations of birds, even though many species make routine use of small, “isolated” wetlands. These areas are frequently single sites found along migratory routes (Haig et al. 1998). Even though many species make use of multiple, smaller wetlands, protection is rarely afforded to these smaller complexes. Birds are highly mobile, and move, often relatively frequently, between multiple sites. Haig et al. (1998) discusses that protecting only one single wetland (which is frequently the case with both NAWMP and WHSRN) ignores that fact that individuals make frequent movements between sites. Additionally, most areas are managed specifically for target species, thus the entire range of wetland functions, or even habitats, is not considered. Furthermore, few streams are protected through this funding.

D. CONCLUSION - FEDERAL AND STATE PROGRAMS ARE INADEQUATE BACKSTOPS

As documented above, there is not – by any stretch of the imagination – a serviceable safety net to backstop protections provided by the Clean Water Act to all our nation’s waters. The extremely spotty protections that exist on the state and federal level are wholly insufficient to prevent a backslide of the progress we have made as a nation over the past 30 years in cleaning up the nations waters. Furthermore, without a sea change in state and other federal programs,

there is no prospect for such a safety net to develop any time in the foreseeable future. Any contraction of jurisdiction under the Clean Water Act will have measurable, deleterious effects on the health of our nation's waters.

### **VIII. IMPLICATIONS OF THE CONTEMPLATED JURISDICTIONAL ROLLBACK FOR FEDERAL REGULATORY PROGRAMS**

The hitherto unquestioned jurisdictional reach of the CWA provides the legal bedrock on which a great number of federal regulatory programs are founded. Some of these are authorized by other provisions of the CWA, others have independent statutory bases. In all the cases discussed below, any retrenchment of CWA jurisdiction can be demonstrated to lead inexorably to reductions in environmental and/or human health protection in other regulatory programs.

#### **A. CLEAN WATER ACT PROGRAMS**

##### **1. Oil Pollution Prevention and Response Under CWA § 311 and the Oil Pollution Act**

###### **a. Overview of oil pollution protections under the Clean Water Act**

Preventing oil pollution from damaging the nation's waters and harming public health, wildlife, and the economy has been a concern of Congress since long before passage of the Clean Water Act in 1972. The Rivers and Harbors Act of 1899 prohibited the discharge of oil and other refuse matter from vessels. The Oil Pollution Act of 1924 prohibited "discharges of oil by any method...into or upon the coastal waters of the United States," unless permitted as not "deleterious" to health or seafood in regulations issued by the Secretary of War. Prior versions of the Federal Water Pollution Control Act dating back to 1966 also contained prohibitions on the discharge of oil into the navigable waters of the U.S.

On June 22, 1969, a floating oil slick on the Cuyahoga River was ignited by welding sparks and burst into flames, damaging two railroad trestles. This particular fire on the Cuyahoga captured public attention and galvanized national support for passage of the Clean Water Act in 1972.<sup>79/</sup>

###### **b. Section 311 of the Clean Water Act**

The centerpiece of § 311 is the congressional declaration that "it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the

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<sup>79</sup> A fire on the Cuyahoga in 1952 caused \$1.5 million in damages. Property damage was not the only threat posed by river fires caused by floating oil slicks. In 1952, a low hanging kerosene lamp on a tugboat ignited vapors "lying above an extensive accumulation of petroleum products spread over the surface" of the Schuylkill River, killing a sailor aboard the tug. See Kernan v. American Dredging, 355 U.S. 426, 427 78 S.Ct. 394, 395, 2 L.Ed.2d 382 (1958).

contiguous zone.”<sup>80/</sup> In order to implement this policy, Congress enacted a prohibition on discharges of oil or hazardous substances into waters of the U.S. “in such quantities as may be harmful as determined by the President.” 311(b)(3). The amount of spilled oil necessary to be harmful to the environment is very small. It includes discharges that “(a) Violate applicable water quality standards; or (b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.”<sup>81/</sup> In addition, Congress mandated a series of oil spill planning, prevention and cleanup measures.

Key provisions in §311 include:

- Mandatory self-reporting of any discharge of oil or a hazardous substance by the owner or operator of a discharging facility or vessel. § 311(b)(5)
- Authorization for the assessment of administrative penalties against the owner or operator of a discharging facility who fails to comply with cleanup provisions of § 311 (311(b)(6));
- A non-discretionary duty for the President to “issue regulations ... establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges...” § 311(j)(1) This provision is the source of EPA’s authority for requiring subject facilities to develop, maintain and update Spill Prevention, Control and Countermeasure (SPCC) Plans.

In addition, under § 311, Congress established the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), the federal government’s blueprint for responding to both oil spills and hazardous substances releases.<sup>82/</sup> The NCP “has given rise to regional and local plans that govern in some detail the official response to oil and hazardous substance spill contingencies.”<sup>83/</sup>

Section 311(d) authorizes the U.S. to take summary action “whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches. In addition, § 311(e) authorizes the President to require the U.S. attorney in the relevant judicial district to seek judicial relief to abate any “imminent and substantial threat.” Finally, §§ 311 (f) and (g) provide for the allocation of cleanup costs to the responsible owner or operator of a facility, including natural resource damages.

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<sup>80</sup> Section 311 of the 1972 amendments to the FWPCA was largely drawn from the Water Quality Improvement Act of 1970.

<sup>81</sup> 40 C.F.R. §110.3

<sup>82</sup> See EPA’s Oil Program website at <http://www.epa.gov/cgi-bin/epaprintonly.cgi>.

<sup>83</sup> William H. Rodgers, Jr., *Environmental Law: Air and Water* (1986), p 521.

c. The Oil Pollution Act of 1990

In January 1988, a 4-million gallon oil storage tank split apart and collapsed at an Ashland oil storage facility in Floreffe, Pennsylvania. Approximately 1 million gallons of the released diesel oil ran into an uncapped storm drain that emptied directly into the Monongahela River. The spill moved through Pennsylvania, West Virginia and Ohio, polluting both the Monongahela and Ohio River ecosystems. Drinking water sources for an estimated 1 million people in Pennsylvania, West Virginia and Ohio were temporarily contaminated. Thousands of birds and fish were killed as a result of the spill.<sup>84/</sup>

In March 1989 the Exxon Valdez spilled 10.8 million gallons of crude oil in Prince William Sound Alaska, killing an estimated 250,000 seabirds, 2,800 sea otters, 300 harbor seals, 250 bald eagles, up to 22 killer whales, and billions of salmon and herring eggs,<sup>85/</sup> and costing hundreds of millions of dollars in damages to sportsfishing and tourism.<sup>86/</sup>

Chiefly in response to these disasters, Congress passed the Oil Pollution Act of 1990 (“OPA 90”). OPA 90 both amended and supplemented § 311 of the Clean Water Act. The law increased EPA’s authority to pursue administrative, judicial and criminal penalties for violations of the regulations and for discharges of oil and hazardous substances. In addition, OPA 90 requires certain facilities to develop plans for responding to a worse case discharge or the substantial threat of such a discharge. This requirement lead to the development of regulations for Facility Response Plans (FRPs).<sup>87/</sup>

OPA 90 also created a unified federal fund, called the Oil Spill Liability Trust Fund (OSLTF), to pay for the cleanup and other costs of federal oil spill response authorized at \$1 billion, far higher than any of the other funds previously authorized. The Fund makes payments to federal, state and Indian tribe trustees to carry out natural resource damage assessments and develop plans to restore, rehabilitate, replace or acquire equivalent natural resources; as well as pay claims for uncompensated removal costs and damages. The Fund is administered by the Coast Guard’s National Pollution Funds Center.

Although the Valdez and Ashland spills were the high profile spills that pushed Congress to act to strengthen protections for the nation’s waters against oil pollution, they were only two of the thousands of spills that had occurred in the previous years. Between 1980 and 1986, some 80 to

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<sup>84</sup> See the GAO report requested by Senator Arlen Specter, Inland Oil Spills: Stronger Regulation and Enforcement Needed to Avoid Future Incidents (February 1989) GAO/RCED-89-65.

<sup>85</sup> Q&A from the Exxon Valdez Oil Spill Trustee Council (<http://www.oilspill.state.ak.us/facts/qanda.html>)

<sup>86</sup> *Id.*

<sup>87</sup> 59 FR 34070 (July 1, 1994).



91 million gallons of oil spilled into U.S. waters<sup>88/</sup> and according to GAO, between 1980 and 1989 there were 3,910 oil spills from land-based pipelines that released nearly 20 million gallons of petroleum into U.S. waters, nearly twice as much as was released by the Exxon Valdez spill.<sup>89/</sup> Congress had full knowledge of the scope of oil spills across the country and acted accordingly in strengthening the Clean Water Act in order to improve the federal capability to implement the existing prohibitions on unpermitted discharges of oil into the nation's waters or onto their shorelines. Congress took no steps to restrict the historic understanding of the scope of the Clean Water Act in 1990, nor to reverse court decisions that interpreted the scope of § 311 broadly to include small, non-navigable and non-perennial streams and tributaries.<sup>90/</sup>

d. Courts have interpreted the scope of §311 of the Clean Water Act broadly

While the Cuyahoga River, Prince William Sound and Monangahela River are all traditionally navigable waters, the phenomenon of oil spills, and their damage to water quality and wildlife has never been limited to these waters. And, as courts have found repeatedly over the years, Congress did not intend to limit the protective scope of the Clean Water Act only to discharges of oil directly into traditionally navigable waters.

In United States v. Ashland Oil and Transportation Co., 364 F.Supp. 349 (1973), Ashland was charged with failing to report a discharge of 3,200 gallons of crude oil from a pipeline into a small non-navigable stream, tributary to Little Cypress Creek, under 311(b)(5). Ashland argued that the stream was not "waters of the United States" because it was not navigable and it did not have a sufficient connection to interstate commerce to be regulated by the federal government under the Commerce Clause. The district court rejected Ashland's argument, stating:

"The facts before this Court clearly indicate that the discharge of pollutants into this stream, and the water quality of the stream itself, have a substantial effect upon and connection with interstate commerce. However, this Court is of the opinion that in prosecutions under this Act, the government is not required to establish the effect on interstate commerce of any particular discharge or of any particular stream. The legislative history of the Act is laden with reports, references and statements supporting the widely accepted conclusion that water pollution is a national problem severely affecting the health of our people, the welfare of the nation and the efficient conduct of interstate commerce.

With knowledge of this problem firmly in mind, Congress legislated a regulatory scheme for "*all waters* in the United States..." Ashland 364 F.Supp at 351 (emphasis in original)

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<sup>88</sup> NRDC, "No Safe Harbor: Tanker Safety in America's Ports" (1990).

<sup>89</sup> GAO Pollution from Pipelines: DOT Lacks Prevention Program and Information for Timely Response, (January 1991) GAO/RCED-91-60.

<sup>90</sup> See U.S. v. Ashland Oil and Transportation Co., 504 F.2d 1317 (1974); United States v. Texas Pipe Line Co., 611 F.2d 345 (1979).

The District Court was upheld by the Court of Appeals for the Sixth Circuit. The court relied heavily upon the extensive stipulation of facts filed by the parties. The stipulation stated that Little Cypress Creek was a tributary to Cypress Creek which was itself a tributary to Pond River and Pond River was, in turn tributary to the Green River, a navigable-in-fact water. The parties further stipulated that the quality of water in Little Cypress Creek affected the produce of the farms that it drains and to which it supplies water. U.S. v. Ashland Oil and Transportation Co., 504 F.2d 1317, 1320 (1974).

In an extended and thorough discussion of the entire Clean Water Act and its legislative history, the Court of Appeals concluded that “Congress’ clear intention as revealed in the Act itself was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution a part of a navigable stream.” Ashland Oil, 505 F.2d 1317, 1323. The court also carefully examined the serious impacts pollution from upstream, non-navigable sources can ultimately have on traditionally navigable waters. “Obviously water pollution is a health threat to the water supply of the nation. It endangers our agriculture by rendering water unfit for irrigation. It can end the public use and enjoyment of our magnificent rivers and lakes for fishing, for boating, and for swimming. These health and welfare concerns are, of course, proper subjects for Congressional attention because of their many impacts upon interstate commerce generally. But water pollution is also a direct threat to navigation – the first interstate commerce system in this country’s history and still a very important one.” Ashland at 1325-1326.

The court took judicial notice of repeated fires on both the Rouge and Cuyahoga Rivers and observed: “Such pollution is an obvious hazard to navigation which Congress has every right to seek to abate under its interstate commerce powers.” The court made clear its understanding of the connection between “upstream” pollution of non-navigable waters and their impacts on downstream navigable waters: “It would, of course, make a mockery of those powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.” Ashland at 1326

A similar issue was addressed in United States v. Texas Pipe Line Company, 528 F.Supp. 728 (1978). That case involved the spilling of five hundred seventy-five barrels into an unnamed tributary of Caney Creek in Atoka County, Oklahoma. Texas Pipe Line challenged its liability for the discharge, in part, on the grounds that the discharge of oil was not into “navigable waters of the United States” within the meaning of the Clean Water Act.

The district court noted that Caney Creek joins Clear Boggy Creek which in turn drains into the Red River. Although the record indicated that the unnamed tributary that received the discharge was flowing at the time of the discharge, it was not established whether Caney Creek, Clear Boggy Creek or the Red River were flowing at the time of the discharge. Texas Pipe Line, 528 F.Supp at 731. Texas Pipe Line contended that for the discharge to be jurisdictional under the Act, the government had to prove that the unnamed tributary, Caney Creek, Clear Boggy Creek

and the Red River were all flowing into each other at the time of the discharge into the unnamed tributary.

The court rejected defendant's claim, finding that the Act's provisions applied to "the tributaries of navigable waters and this is so regardless of whether there is a continuous flow of water from the point of an oil spill, through any intermediate tributaries and eventually into navigable waters at the specific time of the spill."

The district court's decision was upheld by the Court of Appeals for the Tenth Circuit, holding that "it makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense." United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (1979).

Thus, in the context of oil spill pollution, federal courts have long held that discharges into non-navigable tributaries, including intermittent or ephemeral tributaries, are subject to the jurisdiction of the Clean Water Act. The judicial opinions by the Courts of Appeals discussed above are still good law. There is nothing in the holding of *SWANCC* to suggest that the Supreme Court intended, in ruling narrowly on an assertion of jurisdiction based solely upon use by migratory birds, to sweep away thirty years of jurisprudence addressing Congress' intent or authority to prohibit and prevent discharges of oil and other pollutants into waters of the United States, including those that are non-navigable, intermittent or ephemeral, man-made, or lacking a direct surface connection to downstream waters.

#### e. An Ongoing Flood of Oil Spills

The few reported cases involving discharges of oil into waters of the United States are just the tip of the iceberg in considering how many such spills actually take place around the country. EPA recently estimated in testimony before Congress that there are approximately 24,000 oil spills each year, and "well over half" of those occur within the inland zone. In addition, the agency estimated that "[o]n average, one spill of greater than 100,000 gallons occurs every month from oil storage facilities and the entire transportation network."<sup>91</sup> Many of these spills are into or near waters placed at risk for loss of Clean Water Act protection by a rulemaking or already improperly abandoned under the direction of the Guidance.

The principal source for tracking the number, type, location and effects of oil spills across the country is the Emergency Response Notification System or "ERNS" database. The ERNS database is limited in several fundamental respects: it is based upon initial reports of spills and is rarely updated or amended based upon later information; because the information is typically provided by the owner or operator of the facility, there is some incentive to downplay the seriousness of the spill. Nevertheless, even the imperfect anecdotal information provided by

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<sup>91</sup> Testimony of Timothy Fields, Jr. Assistant Administrator, Office of Solid Waste and Emergency Response before the Subcommittee on Water Resources and the Environment of the Committee on Transportation and Infrastructure, U.S. House of Representatives, February 9, 2000.

ERNS provides a useful snapshot of the types of oil spills that persist across the nation, and the importance and value of the Clean Water Act's requirements for SPCC plans and Facility Response plans as well as the liability trust fund for states, federal authority to recover cleanup costs from liable owners or operators of facilities, and federal authority to collect penalties and conduct facility inspections.

Here are just three of the spills described in the ERNS database from 2002<sup>92/</sup>:

On December 19, 2002, 7,500 gallons of Number 2-D fuel oil discharged from an oil/water separator when a tank truck operator accidentally filled the oil/water separator instead of the facility's holding tank. 3,000 gallons of the material entered French Creek in Avon, Ohio.

On January 10, 2002, 1,300 gallons of number two fuel oil was spilled in Memphis, TN. The material was in a generator fuel tank, when the inline fuel filter popped off and allowed the material to release. The material overflowed secondary containment, flowed across a parking lot, and proceeded to enter a storm drain, which drains into the Loosahatchi River.

On January 9, 2002, 2,500 gallons of number two fuel oil were discovered to have spilled from a storage tank when the valve malfunctioned. The failed valve caused one tank to pump into a second tank, which caused the second tank and secondary containment to overflow. An unknown amount of the material has entered the storm drain, which drains into the Old Muggy River.

The ERNS database also contains reports that illustrate the benefits of the Clean Water Act's requirements for SPCC plans, secondary containment structures, and facility response plans. For example, in Galesburg, Illinois, on January 28 of this year, 40,000 gallons of fuel oil was released from a storage tank due to a pipe failure. All the material was reportedly released into secondary containment and there were no offsite impacts.

One of the most prominent weaknesses of the ERNS database and the National Response Summaries is that they rarely report on the damages to water, land, wildlife and public health caused by the spills. To our knowledge, no comprehensive repository of such damage assessments is available. Nevertheless, it is well understood that the consequences of oil spills for wildlife can be devastating. According to EPA, "in the United States there are more than 70 spills reported on an average day. When oil spills occur, plants and animals will be contaminated and some will be unable to survive. Whether they occur in oceans, estuaries, rivers, lakes, ponds, or on land, they can affect algae, plants, invertebrates, fish, amphibians and reptiles, birds, and mammals. These species and communities are at risk of smothering, hydrocarbon toxicity, hypothermia, and chronic long-term effects."<sup>93/</sup>

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<sup>92</sup> Reports from the ERNS database can be viewed at the website of the National Response Center as National Response Team Incident Summaries. See <http://www.nrc.uscg.mil/insum>.

<sup>93</sup> EPA Office of Emergency and Remedial Response, "Understanding Oil Spills and Oil Response" p.21, (December 1999) EPA 540-K-99-007

However, it is possible to gain insight into the costs of a small number of spills by consulting alternative sources including the EPA Oil Spill Program's own Oil Spill Program Update. The newsletter includes reports of some of the spills reported from EPA's regional offices across the country. These reports sometimes contain descriptions of fish kills and other harm to wildlife, threats to drinking water supplies and, occasionally injury or death to nearby citizens. For an example of the latter, see the July and October 1999 Updates, describing three fatalities resulting from the Olympic pipeline leak of 277,000 gallons of fuel and subsequent explosion along Whatcom Creek in Bellingham, Washington on June 10, 1999.

In addition, we believe that each of EPA's regional offices is likely to have many spill reports, photographs and other records that would themselves paint a powerful portrait of the extent to which oil spills pose a persistent threat to the integrity of the nation's waters as well as their harm to public health and wildlife.

In short, 30 years after the passage of the Clean Water Act, there is an ongoing epidemic of oil spills across the country. Spills into wetlands, seasonal streams and non-navigable tributaries continue to harm public health and the environment. In light of this reality, it defies common sense or understanding that the agencies would even contemplate withdrawal of existing Clean Water Act protections from any of the nation's waters.

f. Current Legal Challenges to the New SPCC Rules

SPCC plans are the regulatory centerpiece of the Oil Program's effort to meet the goal of § 311 to prevent oil spills from storage facilities into (or near) the nation's waters. The initial regulations requiring certain facilities to develop Spill Prevention, Containment and Countermeasure (SPCC) plans to prevent any discharge of oil into or upon navigable waters of the United States or adjoining shorelines date from 1973.<sup>94</sup> Although proposed revisions and clarifications were published by EPA in 1980, 1991, 1993 and 1997<sup>95</sup>, an update to the original SPCC rules was only finalized in July 2002.<sup>96</sup> For a facility to be subject to the SPCC rule it must 1) be non-transportation-related; 2) must have an aggregate aboveground storage capacity greater than 1,320 gallons or a completely buried storage capacity greater than 42,000 gallons; and 3) there must be a reasonable expectation of a discharge into or upon navigable waters of the United States or adjoining shorelines.<sup>97</sup>

In addition to the written spill prevention plans, SPCC regulations contain provisions for covered facilities to use various methods of preventing and controlling oil spills including: tank leak

<sup>94</sup> 38 FR 34164 (December 11, 1973).

<sup>95</sup> 56 FR 54612 (October 22, 1991), 58 FR 8824 (February 17, 1993), 62 FR 63812 (December 2, 1997).

<sup>96</sup> 67 FR 47042 (July 17, 2002).

<sup>97</sup> US EPA, *Spill Prevention, Control and Countermeasure (SPCC) Regulation: A Facility Owner/Operator's Guide to Oil Pollution Prevention* (undated).

detection systems, spill/overflow protection, pipe external protection, secondary containment, as well as formal training of employees.

EPA has determined that a facility's compliance with even one of four SPCC provisions: (1) tank leak detection systems; (2) spill/overflow protection systems; (3) pipe external protection; and (4) secondary containment "had a significant effect on reducing the annual number of oil spills, the annual total volume of oil spilled, the annual total costs of cleaning up the spilled oil, and the degree of off-site migration."<sup>98/</sup>

The American Petroleum Institute (API), Marathon Oil, and the Petroleum Marketers Association have filed legal challenges against the July 17, 2002 SPCC rule. In their complaints, both API and Marathon Oil argue that the revised SPCC rule reaches too far, regulating facilities that are outside the scope of the Clean Water Act. In its complaint, API argues that, "[u]nder the reasoning of the Supreme Court, necessary to its decision in *SWANCC*, the term 'navigable waters' extend only to waters that are, have been, or could reasonably be made, navigable in fact ('traditional navigable waters') and wetlands adjacent to traditional navigable waters." API further asserts that, because the definition of "navigable waters" in the 2002 SPCC rule includes waters that "lie across the border of two states" or whose "use" could affect interstate or foreign commerce, it is in excess of the Administrator's authority under the Clean Water Act.

Marathon Oil does not base its assertion that EPA has overstepped its jurisdictional authority on the *SWANCC* decision. Rather, it simply asserts that the definition of "navigable waters" "extends only to waters that are, have been, or could reasonably be made, navigable in fact ('traditionally navigable waters') and wetlands adjacent to navigable waters." Marathon then asserts that because the definition of "navigable waters" in the SPCC rule reaches beyond traditionally navigable waters and their adjacent wetlands, that the rule exceeds the Administrator's authority under the Clean Water Act.

Thus, API's members as well as Marathon Oil are reading the Supreme Court's holding regarding the assertion of jurisdiction over intrastate, non-navigable, "isolated" waters solely upon their use by migratory birds as justification for removing all federal protections from oil spills for all waters that are not traditionally navigable, including interstate waters. This is, of course, an extreme and absurd reading of both the *SWANCC* decision and the intent of Congress.

Perhaps even more troubling than the legal claims filed by API and Marathon oil concerning the jurisdiction of the CWA is the fact that EPA has taken comment upon a proposal to postpone the compliance deadline for the regulatory provisions of the 2002 SPCC rule for at least one year, and entered settlement discussions with the plaintiffs that could, among other things, "resolve" the issue of the SPCC rule's jurisdiction.

If the argument of API, Marathon oil, and all the other regulated industries that seek to escape the Clean Water Act's requirements, is accepted by EPA and the Corps in settlement

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<sup>98</sup> US EPA, *Results of 1995 Survey of Oil Storage Facilities (July 1996)*, "Analysis of the Effectiveness of EPA's SPCC Program on Spill Risk" p. 4.

discussions, or in the course of a rulemaking on the definition of “waters of the United States,” or by a federal court as a result of litigation, the effectiveness of the oil spill provisions of the Clean Water Act will be dramatically curtailed as previously regulated facilities abandon or fail to adopt spill prevention measures and response plans. In addition, the oil spill cleanup and restoration costs for states could increase, as they arguably would no longer have access to the oil spill trust fund to reimburse cleanup costs for spills into waters that are no longer considered “waters of the United States.”

The jurisdictional claims of API and Marathon Oil are without merit. EPA should vigorously contest the oil industry’s challenge to the agency’s jurisdiction under the Clean Water Act.

g. Potential Impacts of Withdrawing Jurisdiction for Prevention of Oil Spills: Some Questions to Consider

We are concerned that EPA has not thoroughly considered the potential consequences of withdrawing Clean Water Act authority, including the provisions of § 311, from currently-protected waters. Considering only the withdrawal of provisions of § 311 from any of the waters that have historically been protected under the Act raises significant questions. For example, for spills into waters no longer protected (or their adjoining shorelines), will mandatory reporting requirements still apply? If not, is there a substitute mechanism in place to ensure that some state or federal authority is notified of the spill? Will EPA retain authority to conduct cleanups that pose an imminent and substantial hazard as it currently does under § 311(d)? Will EPA retain the authority to recover cleanup costs, including natural resource damages, from owners or operators for discharges into non-jurisdictional waters?

Will states and tribes be able to obtain reimbursement through the OSLTF for the costs of clean up and restoration of waters (including natural resource damages) polluted by oil spills that are no longer considered “waters of the United States?” Will EPA retain authority to levy administrative penalties, or collect civil or criminal penalties for future discharges into non-jurisdictional waters? Will EPA have inspection authority for facilities that are no longer sufficiently close to jurisdictional waters to pose a reasonably likely threat of discharge? How will the national, regional and local contingency planning structures be affected by withdrawal of jurisdiction from a large class of the nation’s waters?

Based upon the litigation discussed above, we anticipate that any change to the existing rules governing jurisdiction of § 311 will result in aggressive litigation by the oil industry and others to interpret the “new” definition of “waters of the United States” as narrowly as possible. The regulated community could argue that, for any spills that occur in waters no longer considered “waters of the United States,” none of the provisions of 311 apply. Has EPA thoroughly considered the consequences for the environment of opening up this Pandora’s box?

What will be the likely affects on the economy and the environment from increased and unregulated oil spills? What harm does the agency anticipate for the public, either via fires and explosions from oil on our waters, or from poisoning of drinking water supplies? What will be the impacts to wildlife, including threatened and endangered species of increased oil spills?

How will water-dependent businesses and local, state, regional and national economies be affected by oil spills threatening the viability of recreational waters, waters containing fish and shellfish, and waters that draw tourism?

What will be the costs paid by the American taxpayer? In our view, it seems likely that taxpayers could suffer at both the state and federal levels. Federal authority to recover cleanup costs directly from the owner or operator responsible for spills into waters of the United States could shrink along with the scope of the definition of waters of the U.S. As a result, the citizens whose water may increasingly be fouled by oil spills will be required to foot more of the bill for cleaning up those oil spills into “isolated” waters.

We urge EPA to consider these questions seriously and fully evaluate the potential consequences of withdrawing existing Clean Water Act protections from oil spills for an unspecified number of the nation’s waters.

#### h. Oil Pollution in the United States: Back to the Future?

If EPA abandons protection from oil spills for an undetermined class of wetlands, streams, ponds and other waters, oil pollution on traditionally navigable waters is sure to increase. Future spills into headwaters, intermittent streams, non-navigable tributaries or wetlands, whether or not they are arbitrarily and unscientifically classified as “isolated” by EPA and the Corps, will ultimately flow back down into the pseudo-protected “traditionally navigable waters.” Eventually, the oil will reach the Cuyahoga, Rouge and Monangahela Rivers and hundreds of other navigable rivers, bays and other waters, possibly even Prince William Sound. There they will poison drinking water, kill wildlife and, possibly, burst into flame. We will have come full circle.

### 2. Implications for Clean Water Act §401 Certification Program

Prior to enactment of the Federal Water Pollution Control Act (FWPCA) Amendments of 1972, federal efforts to control water pollution primarily centered on assisting states in the identification and attainment of water quality standards. Difficulties in establishing scientifically reliable and legally defensible abatement requirements for point sources led Congress to shift the focus of water pollution control efforts to technology-based effluent limitations. The pre-1972 water quality standards system was preserved, however, both as a measure of program effectiveness and as a guide to the extensive water quality planning process established by the CWA. Water quality standards also serve as a secondary tool for regulating point source discharges.

Section 401 fits into this scheme by requiring “any applicant for a Federal license or permit for conducting any activity . . . which may result in any discharge to the navigable waters” to secure from the state in which the discharge originates a certification that the discharge will comply with several provisions of the CWA related to effluent discharge limitations and water quality standards. If the state denies water quality certification, the federal permitting agency may not, regardless of other considerations, grant the applicant a permit for the proposed activity. The states’ most important role in the § 401 certification process – because the states may not impose



their own technology based effluent limitations and performance standards unless they are more stringent than EPA's requirements – is to determine whether an applicant for a federal license or permits has demonstrated compliance with state water quality standards and, if not, to deny or “condition” certification so that the activity will comply with those standards.

In addition to dramatically limiting the reach of the 402, 404, and TMDL programs, restricting the jurisdiction of the Act will cripple the states' ability to manage their waters when affected by federally permitted or licensed activities. And the states covet their § 401 authority. Last summer, for instance, the Western Governors' Association unanimously passed a policy resolution which makes it abundantly clear how much the Western states rely on their ability to condition federally permitted projects to prevent state water quality standards from being violated by federal activities.<sup>99/</sup> As the Western Governors noted last summer in response to proposed amendments to the CWA that would have limited the reach of § 401:

[s]tate involvement in administration of the Clean Water Act is essential to assure that local goals are met at the same time that water quality is protected. States consider land use, economic development, and other locally-adopted policies in their decisions regarding the allocation of the privilege to discharge waste. Normally, no one discharger is given the privilege to use up all the capacity of a water body to assimilate potential discharges; to do so would result in prohibitive pollution-abatement costs for other potential dischargers, thereby curtailing much desired development. . . .

. . . .  
Congress should refrain from weakening or removing a vital tool for states to influence [federally permitted and licensed activities] within their borders and upon their waters.  
***Section 401 of the CWA is operating as it was intended and should be retained without amendment.***

***Certification authority under § 401 of the CWA is especially important at this time.*** Our states are working closely with federal and private partners to restore fish populations under the Endangered Species Act and, in the face of consent decrees, to develop total maximum daily (pollutant) loads (TMDLs) for discharges into state waters so as to bring them into compliance with water quality standards. It almost goes without saying that by eliminating coverage under 401 for so called “isolated” waters and wetlands or for intermittent and ephemeral waters and wetlands, the administration will undermine the states' ability to restore endangered fish species and balance pollutant loadings under the CWA's TMDL program. But it hasn't gone without saying: the Western Governors have clearly signaled in this unanimous, non-partisan resolution that maintaining the reach and authority of § 401 is a very high priority for them.

But the importance of the water quality certification authority is not limited to the Western states. The National Association of Attorneys General adopted a resolution in the spring of 1998

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<sup>99/</sup> Western Governors' Association, Policy Resolution 02-04, *State Authority Regarding the Federal Hydropower Licensing Process*, June 25, 2002.

in response to proposed amendments to the CWA's § 401, and could not have been more clear, resolving that the National Association of Attorneys General:

Reaffirms NAAG's support as expressed in the 1991 resolution for the States' broad authority in certifying federally licensed projects' compliance with state programs authorized under the Clean Water Act;

Supports legislation that preserves the current scope of the Clean Water Act, assuring that the States may continue their comprehensive administration of their authorized water quality programs;

**Opposes any legislation which would limit or hinder the States' authority and application of ¶ 401 of the Clean Water Act . . . .<sup>100/</sup>**

It would be especially incongruous for EPA to pull the rug from under the states on this score, given that during the prior Bush administration, it went to great lengths to *stimulate* the use of § 401 by the states to protect wetlands. In its publication *Wetlands and 401 Certification, Opportunities and Guidelines for States and Eligible Indian Tribes* (April 1989), EPA stresses the importance of the 401 process to states and eligible tribes, urging them to take advantage of federal water quality certification to protect their wetlands. It recommends a host of actions and provides a wealth of information to aid them in doing so, including advice on jurisdiction, the scope of review, appropriate conditions, and developing 401 regulations. The agency couldn't have been more emphatic about the critical role of 401:

*Clearly, the integrity of waters of the U.S. cannot be protected by an exclusive focus on wastewater effluents in open waters. While the federal § 404 program addresses many discharges into wetlands, and other federal agencies have environmental review programs which (sic) benefit wetlands, these do not substitute for a State's responsibilities under § 401. A State's authority under § 401 includes consideration of a broad range of chemical, physical, and biological impacts. The State's responsibility includes acting upon the recognition that wetlands are critical components of healthy, functioning aquatic systems.*

. . . .  
In States without a wetlands regulatory program, the water quality certification process may be the only way in which a State can exert any direct control over projects in or affecting wetlands. It is thus critical for these States to develop a program that fully includes wetlands in their water quality certification process.

But even in States which (sic) have their own wetlands regulatory programs, the water quality certification process can be an extremely valuable tool to protect wetlands. First, most State wetland regulatory laws are more limited in the wetlands that are subject to

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<sup>100/</sup> National Association of Attorneys General, *Resolution Supporting the States' Authority under Section 401 of the Clean Water Act 2* (Spring Meeting, March 11-13, 1998, Washington, D.C.).

regulation than is the Clean Water Act. The Clean Water Act covers all interstate wetlands; wetlands adjacent to other regulated waters; and all other wetlands, the use, degradation or destruction of which *could* affect interstate or foreign commerce. ***This definition is extremely broad and one would be hard pressed to find a wetland for which it could be shown that its use or destruction clearly would not affect interstate commerce.*** Federal jurisdiction extends beyond that of States which (sic) regulate only coastal and/or shoreline wetlands, for instance. And in States that regulate inland wetlands, often size limitations prevent States from regulating wetlands that are subject to federal jurisdiction.<sup>101/</sup>

We cannot say it better than the states or the EPA have themselves stated the case. “Clearly, the integrity of waters of the U.S. cannot be protected by an exclusive focus on wastewater effluents in open waters,” and the states cannot protect their water quality standards if federally permitted or licensed activities affecting so called “isolated” wetlands or intermittent or ephemeral streams can go forward without review and conditioning authority by the states.

### 3. Implications for Clean Water Act § 402 Permitting Programs

Changing the definition of “waters of the United States” would have devastating impacts on the NPDES program, the principal CWA regulatory program to control discharges of pollutants into waterways. The NPDES program is viewed as the most successful of CWA programs, estimated by EPA in 1989 as responsible for reducing discharges by of toxic organic pollutants by point sources by 99% and of toxic metals by 98%.<sup>102/</sup> More recent EPA data contained in its draft Effluent Guidelines Strategy estimate that Clean Water Act technology standards implemented through the NPDES permitting program:

Prevent discharge of almost 700 billion pounds of pollutants each year. Of this total over 1 billion pounds are toxic pollutants such as heavy metals, over 470 billion pounds are nonconventional pollutants such as nutrients and salts, and almost 220 billion pounds are conventional pollutants such as suspended solids. These pollutants include chemicals known to cause or contribute to cancer, impact reproductive health, hinder mental and motor development in children, impact the central nervous system, and damage major organs such as the liver and kidney.<sup>103/</sup>

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<sup>101/</sup> Environmental Protection Agency, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes* (Office of Water (A-104F)(April 1989), at 6, 9 (footnotes omitted; emphasis in bold added, other emphasis in original).

<sup>102/</sup> EPA, *Report to Congress: Water Quality Improvement Study*, Office of Water Regulation and Standards (1989), pp. 7-8.

<sup>103/</sup> U.S. EPA, *Draft Strategy for National Clean Water Industrial Regulations*, [www.epa.gov/guide.strategy](http://www.epa.gov/guide.strategy).

There are several ways in which the NPDES program is linked to the definition of waters of the United States, including in the definition of “discharge of a pollutant,” 33 U.S.C. 1362(12), which then links with the prohibition on unpermitted discharges in § 301(a) and with the permitting authority in § 402(a). 33 U.S.C. 1311(a), 1342(a).

There is currently no systematic way to link current NPDES permit holders (or even major dischargers) to the types of waters that are at risk of losing protection in a federal rulemaking. That information could be made available by the federal government through linking USGS’s National Hydrography Database with the Permit Compliance System (PCS) or, even better, the Enforcement and Compliance History Online (ECHO) database that is available on-line and searchable by the public, but the federal government has not yet done so. EPA should analyze and make public all information available through federal databases that would identify NPDES dischargers into waterbodies that may lose protection as a result of a rulemaking. Since a number of industries argue that the definition of waters of the United States should be limited to navigable-in-fact waters and immediately abutting wetlands,<sup>104/</sup> information on NPDES dischargers into all other types of waters should be collected and made public in a searchable database.

While we therefore cannot begin to estimate the full environmental and human health impacts of abandoning these waters to unlimited pollutant discharges, we certainly know that doing so will pollute those waters and everything to which they are hydrologically connected with toxic pollution, oil and grease, oxygen depleting substances, and other substances that will adversely impact human health and the environment.

Based on the limited information we have so far, however, there are thousands of NPDES permit holders authorized to discharge into waters that are potentially affected by this rulemaking, including intermittent and ephemeral streams, nontidal non-adjacent wetlands, creeks that are not navigable in fact, natural ponds, manmade conveyances, etc. For example, the state of Missouri estimates that 82.5% of its NPDES permittees discharge into unclassified streams that are intermittent or ephemeral.<sup>105/</sup> Missouri also notes that “many headwater and intermittent streams have regulated sewage discharge permits associated with them.”<sup>106/</sup> California notes that “many [municipal, industrial, stormwater, and confined animal] discharges are to ephemeral

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<sup>104/</sup> See., e.g, V.S. Albrecht and S.M. Nickelsburg, “Could *SWANCC* be Right? A New Look at the Legislative History of the Clean Water Act,” 32 ELR 11042 (Sept. 2002); Comments of Pacific Legal Foundation, “Regarding the United States Environmental Protection Agency and United States Army Corps of Engineers’ Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” April 17, 2003 [sic].

<sup>105/</sup> Comments of Missouri Department of Natural Resources on OW-2002-0050 (March 5, 2003), p.1.

<sup>106/</sup> Comments of Missouri Department of Conservation on OW-2002-0050 (March 12, 2003), p. 3.

and intermittent (“effluent –dominated”) streams,” and that “any effluent discharged into an ephemeral or intermittent stream will eventually drain to navigable waters.”<sup>107/</sup> In addition, an employee of the California Regional Water Quality Board (based on this individual’s expertise, but not speaking for the agency as a whole) identifies the California Mojave River Fish Hatchery, Victor Valley Wastewater Reclamation Authority, and several phase II stormwater communities (County of San Bernadino, City of Victorville, County of Los Angeles, and City of Lancaster) as current NPDES dischargers that will be potentially outside the scope of Clean Water Act protection under this rulemaking.

We provide detailed information on one type of NPDES discharge that will almost certainly be affected by a rule change, -- concentrated animal feeding operations:.

### **Environmental and Public Health Impacts of Discharges from CAFOs**

Today, large-scale industrial animal factories, which raise millions of animals and produce over 500 million tons of waste annually, dominate animal production in the United States.<sup>108/</sup> The proliferation of concentrated animal feeding operations (CAFOs) has resulted in significant environmental degradation and threats to public health.

Nutrient pollution threatens the future of this country’s waterways. Excessive nutrients are responsible for almost twenty percent (20%) of reported water quality problems in impaired rivers and streams and fifty percent (50%) of impaired lake acres.<sup>109/</sup> Nutrients in animal manure cause eutrophication and toxic algal blooms that harm recreational waters, kill fish, and alter the species composition of our coastal fisheries.<sup>110/</sup> CAFOs contribute to water pollution when waste lagoons break, spill, or fail, releasing wastewater into rivers, lakes, and streams.<sup>111/</sup> In fact, over 1,000 spills occurred at feedlots in just ten states between 1995 and 1998, resulting in the death of more than 13 million fish.<sup>112/</sup> In addition, outbreaks of the toxic microbe, *Pfiesteria piscicida*,

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<sup>107/</sup> Comments of California State Water Resources Control Board on OW-2002-0050 (March 14, 2003), p. 9.

<sup>108/</sup> See preamble, *National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)*; Final Rule, 68 Fed. Reg. 7176, 7179 (February 12, 2003).

<sup>109/</sup> See U.S. Environmental Protection Agency, *National Water Quality Inventory: 2000 Report to Congress* (2002).

<sup>110/</sup> See generally, Robbin Marks, *Cesspools of Shame. How Factory Farm Lagoons and Sprayfields Threaten Environmental and Public Health*, NRDC and the Clean Water Network (July 2001).

<sup>111/</sup> See generally, Merritt Frey et al, *Spilling Swill*, Clean Water Network (1999).

<sup>112/</sup> See Merritt Frey, *Spills and Kills, Manure Pollution and America’s Livestock Feedlots*, Clean Water Network. August 2000.

have been linked to nutrient pollution from animal waste in North Carolina and Maryland.<sup>113/</sup> *Pfiesteria* has killed over a billion fish in coastal waters in North Carolina alone.<sup>114/</sup> Discharges of animal waste from CAFOs also contribute to the “dead zone” in the Gulf of Mexico, more than 8,000 square miles of water devoid of sufficient oxygen to support aquatic life.<sup>115/</sup>

Many CAFOs were established without an adequate land base to make environmentally sound use of manure as nutrient inputs for agricultural operations. As a result, CAFOs often chronically over-apply nutrients, salts, and other waste components, leading to significant surface and ground water degradation and soil deterioration.<sup>116/</sup> The Natural Resources Conservation Service has identified numerous areas around the country where the nutrient load from animal production is significantly out of balance with the available land base.<sup>117/</sup> Furthermore, ammonia emissions from open-air lagoons and sprayfields redeposit nitrogen on land and waterbodies, adding to nutrient pollution.<sup>118/</sup>

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<sup>113/</sup> See Minority Staff of the U.S. Senate Committee on Agriculture, Nutrition and Forestry, *Animal Waste Pollution in America: An Emerging national Problem*, Washington, D.C. (December 1997), at 10.

<sup>114/</sup> See Southern Environmental Law Center, “*Industrial Hog Production: North Carolina*,” [http://www.southernenvironment.org/act\\_hogs\\_background.html](http://www.southernenvironment.org/act_hogs_background.html).

<sup>115/</sup> See Mark Schleifstein, “*Gulf’s dead zone has gone Godzilla, expert says; Oxygen-deprived area reaches record size*,” *The Times-Picayune* (New Orleans), July 27, 2001.

<sup>116/</sup> See Laura Jackson & E. Gilbert, *Swine Manure Management Plans in North-Central Iowa: Nutrient Loading and Policy Implications*, *Journal of Soil & Water Conservation*, vol. 55, no. 2 (2000)(study of a six square mile area of Hamilton County, Iowa, found that the land area required for agronomic application of phosphorous was 9.4 times the amount of land that was being used and 6.2 times the available land); see also J. Schimmel, R. Levins, & D. Keeney, *Phosphorous Balance in Minnesota Feedlot Permitting*, Generic Environmental Impact Statement on Animal Agriculture in Minnesota: Final Technical Working Paper on Economic Structures, Profitability and External Costs. State of Minnesota Environmental Quality Board (June 29, 2001) (analysis of 3,607 Minnesota feedlot permits indicated that the larger the operations, the greater the excess phosphorous per acre, Minnesota feedlots are currently over-applying 1.4 million pounds of surplus phosphorous every year.). California’s 1998 Clean Water Act § 305(b) report listed 41 California ground water basins impaired by salinity, chlorides, and/or total dissolved solids from animal operations. State Water Resources Control Board, 1998 California State Water Resources Control Board (May 1999).

<sup>117/</sup> See Neal Gollehon et al., *Confined Animal Production and Manure Nutrients*, USDA Agriculture Information Bulletin No. 771 (June 2001); Robert Kellog, et al., *Manure Nutrients Relative to the Capacity of the Cropland and Pastureland to Assimilate Nutrients*, USDA Pub. No. NPS 00-0579 (December 2000).

<sup>118/</sup> See Eldridge R. Collins, Jr., *Ammonia Emissions From a Large Swine Production Complex*, The American Society of Agricultural Engineers, Chicago, Illinois (December 18-20, 1990).

*Withdrawing Jurisdiction over Some Set of Waters Could Legalize Discharges of Animal Wastes from Cafos.*

The Clean Water Act prohibits the discharge of any pollutant except under the terms of a permit.<sup>119/</sup> “Discharge of pollutants” is defined as any addition of pollutants from a point source into navigable waters.<sup>120/</sup> The Clean Water Act defines a point source as “any discernable, confined and discrete conveyance, including but not limited to any ... *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged.”<sup>121/</sup> Thus, when a discharge comes from a CAFO, it is a point source discharge.

Large-scale hog, dairy, chicken, and beef operations across the country discharge into traditionally navigable rivers, lakes, and streams, but they also discharge into non-navigable, intrastate waters, including wetlands, natural ponds, ephemeral and intermittent streams, and larger non-navigable tributaries. While the ANPRM contemplates redefining many of these waterways as “isolated” waters, and thereby considers pushing these waterways outside the protective ambit of the Clean Water Act, by no means are such waterways “isolated.” In fact, they serve as integral parts of watersheds, performing essential functions affecting the health of water systems. Furthermore, in many areas of the country, CAFOs do not discharge directly to surface water, but rather discharge to groundwater that is hydrologically connected to surface water.<sup>122/</sup> Other CAFOs discharge to man-made conveyances such as culverts, dams, canals, and agricultural ditches, which drain into larger rivers, lakes and streams and thus can contribute substantial pollution loads to our nation’s waterways.

Federal courts have recognized that discharges from CAFOs to man-made conveyances violate the CWA.<sup>123/</sup> Courts have also recognized that CWA jurisdiction extends to discharges from CAFOs into groundwater that is hydrologically connected to surface water.<sup>124/</sup> Clearly, redefining the scope of navigable “waters of the United States” under the CWA could undermine federal regulation oversight of these facilities and the ability to both prevent discharges to ditches, canals, and groundwater that are connected to surface waters, as well as force compliance with no discharge requirements through federal and citizen enforcement action.

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<sup>119/</sup> See 33 U.S.C. § 1311(a).

<sup>120/</sup> 33 U.S.C. § 1362(12)(A).

<sup>121/</sup> 33 U.S.C. § 1362(14) (emphasis added)

<sup>122/</sup> See, e.g. B. Katz and H. Hornsby, *A Preliminary Assessment of Sources of Nitrate in Springwater in Suwanee River Basin, Florida*, U.S.G.S. Report 98-69 (1998)

<sup>123/</sup> See e.g., *Community Association For Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9<sup>th</sup> Cir. 2002); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001).

<sup>124/</sup> See *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Id. 2001).

Under current EPA regulations and federal case law defining waters of the U.S., very few CAFOs are able to demonstrate that they do not discharge from the production area or land application area to waters of the U.S. or to groundwater that is hydrologically connected to waters of the U.S. Thus, most CAFOs are required to obtain NPDES permits to control and prevent water pollution. However, in the event EPA weakens its definition of waters of the U.S. as contemplated in the ANPRM and explicitly redefines man-made conveyances, such as agricultural ditches and canals, as “isolated” waters, a greater number of CAFOs could escape NPDES permitting requirements. As a result, many large-scale CAFOs that are substantially contributing to the impairment of our waterways will continue to operate without any federal oversight of their activities.

In addition to those entities that currently discharge toxins, manure, sewage, industrial effluent and other pollutants into currently protected waters that may lose Clean Water Act protection, it is important to keep in mind as well that other currently permitted dischargers would try to take advantage of the huge loophole that would be created by excluding manmade conveyances, such as canals, to exempt themselves from Clean Water Act coverage. Facilities could change the configuration of their discharges so that the “receiving water” was a canal, non-adjacent wetland, or perhaps even a pipe so that they could argue that they no longer discharged into waters of the U.S. and were no longer required to have a permit or to meet Clean Water Act treatment or water quality standards. Currently, we prosecutors bring criminal actions against entities that use such mechanisms to evade Clean Water Act regulation, but if this rulemaking proceeds, enforcement entities might become powerless to prevent even such blatant circumvention of minimum Clean Water Act standards.

As recognized by several of the states that have already filed comments, changes to the scope of the Clean Water Act would be detrimental not only to drinking water quality, surface water quality, water quantity, wildlife habitat, flooding control regimes, etc., but it would even be detrimental to the interests of all those NPDES permitted entities who continue to discharge into navigable-in-fact waters. Those dischargers can expect to have increasingly stringent water-quality based effluent limitations with which to comply since the receiving water would be getting dirtier, the headwaters and wetlands would no longer be filtering the pollution, and the universe of responsible parties would shrink. They would be left holding the bag.

#### 4. Implications for Clean Water Act Antidegradation Program

The goal of the CWA “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. The integrity of rivers and streams (including navigable rivers) depends on the complex interrelationship between headwaters and the larger streams they serve.

Specific existing functions of headwaters streams with a direct and immediate effect on downstream waters include but are not limited to: hydrologic retention capacity and contribution to the base flows of larger streams; reduction of frequency and intensity of flooding; retention of sediment and improvement of aquatic habitat; temperature maintenance of downstream waters; establishing base-level chemical composition of the overall watershed; nutrient and energy



retention and measured export downstream; buffering of nonpoint source pollution; supplying food resources to riparian and downstream ecosystems; providing a thermal refuge at critical life history stages or during critical times of the year for aquatic life; providing vital spawning habitats and habitat for juvenile fishes; and providing critical habitat for a range of unique and threatened species.

Thus, healthy and intact headwaters play a critical role in the success and vigor of the larger watershed and ecosystem. The protection of ephemeral, intermittent, and other headwater tributaries is crucial to the protection of the chemical, physical, and biological integrity of downstream waters. Clean Water Act jurisdiction has been the foundation of that protection. In particular, States must establish water quality standards in order to “protect the public welfare”, “enhance the quality of water” and “taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes...taking into consideration their use and value for navigation.” 33 U.S.C. § 1313(b)(2)(A). One of these standards, antidegradation policy and implementation procedures requires states to assess activities that may lower the quality of the states’ waters. 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. §§ 131.6(d), 131.12(a). This assessment relies on an accurate and predictable knowledge of baseline water quality and upstream sources of pollution. A jurisdictional change would undermine any attempt to accurately assess baseline water quality. Upstream activities would unpredictably discharge any amount of pollutant, toxin, dirt, rock, or contaminated fill – the sources unidentified and unmonitored – creating huge unanticipated declines in water quality. These discharges would not only devastate headwater streams but also undermine attempts to write permits protective of water quality downstream.

The federal antidegradation policy establishes three levels of water quality protection: Tier 1, Tier 2, and Tier 3. Tier 1 protection establishes the minimum protection for all waters and requires that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1). Obviously, eliminating key antidegradation existing use protections for ephemeral, intermittent, and other headwater tributaries would destroy the public uses of these streams for recreation, support of aquatic and other wildlife life, and, in some rural communities, drinking water.

However, as described above, the existing uses of ephemeral, intermittent, and other headwater tributaries do not exist in a vacuum but are an essential part of the health and maintenance of the larger watershed and navigable rivers. EPA recognizes this connection and in jurisdictional waters requires “[in] designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.” 40 C. F. R. § 131.10 (b). Thus, eliminating existing and designated uses protections for the headwaters jeopardizes the antidegradation and use protections guaranteed for all waters through 40 C.F.R. § 131.12(a)(1).

Tier 2 antidegradation protection provides that, where the water quality of a water body exceeds that necessary to support aquatic life and recreation, that level of water quality shall be maintained unless the state determines that “allowing lower water quality is necessary to

accommodate important economic or social development in the area in which the waters are located.” 40 C.F.R. § 131.12(a)(2). In addition, “the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.” Id.

Eliminating Tier 2 protections from high quality headwater streams would eliminate the need to conduct a rigorous and open public review process to assure that the economic and social benefits of the proposed activity outweigh the costs of degrading the water. It would also eliminate the need to consider less degrading alternatives to the discharge. Ultimately, discharges could take place even in the face of obvious and devastating public harm (including harm to navigable waters involved in interstate or foreign commerce) or if reasonable no discharge or less degrading alternatives existed.

Eliminating Tier 2 protections in headwaters streams would significantly impact Tier 2 reviews downstream by reducing a stream’s assimilative capacity to a greater degree than would have occurred with upstream antidegradation protection in place. The reduction in assimilative capacity would reduce or *eliminate* the number of socially beneficial projects allowed to proceed without a violation of water quality standards and without prematurely triggering prohibitions on discharges that “cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard.” 40 C. F. R. § 122.44 (d). In essence discharges outside the jurisdiction of the Clean Water Act would be able to use a valuable public resource – public waterways - at their discretion for private gain at public expense.

Tier 3 protection provides that, “[w]here high quality waters constitute[s] an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.” 40 C.F.R. § 131.12(a)(3). Failure to absolutely protect headwater tributaries would lead to serious and significant degradation of ONRW’s for the many reasons outlined for Tier 1 and 2 protections. As some of the most valuable water resources in the country, their future and very existence could not be assured.

#### 4. Implications for Federal assistance to state water pollution control programs

In addition to actually running NDPEs programs or portions of state NPDES programs in a number of states and running the § 404 program in most states (every state except NJ and Michigan), EPA provides financial and technical assistance to all states in designing and implementing their programs to protect waters of the United States from pollution under the Clean Water Act.

**Water pollution control program grants:** Water pollution control program grants (§ 106 grants) provide financial assistance to states for permitting, pollution control activities, surveillance, monitoring, training and public information, and enforcement. Many of those activities will no longer be authorized under the CWA for waters that are no longer considered to be waters of the US. It seems likely, therefore that the available funding for these purposes will

be reduced substantially as well. The President has requested \$200,400,000 for § 106 grants for FY 04. Funding in the FY 03 appropriation for § 106 grants is \$192,500,000.

**Clean Water State Revolving Fund and Nonpoint program funding:** Clean Water State Revolving Fund money can be spent on three types of projects (33 U.S.C. 1383(c)) – construction of publicly-owned treatment works, implementation of a nonpoint management program under § 319, and development and implementation of an estuary plan under § 329. The President has requested \$850,000,000 in state revolving fund money in FY 04. The congressionally approved budget for this fund in FY 03 was \$1,350,000.

While there does not appear to be a statutory link between the definition of “navigable waters” and the construction of publicly-owned treatment works, permits for such facilities would no longer be required under federal law if they discharge into waters that are no longer waters of the U.S. While not necessarily required by law, it seems likely that the funding for construction of such facilities (including decentralized wastewater and distributed stormwater approaches that are probably most likely to discharge into excluded waters) would be reduced substantially since those activities would no longer be Clean Water Act programs.

State nonpoint management programs are “for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.” 33 U.S.C. 1329(b)(1). Thus, funds would not appear to be available to control nonpoint pollution into waters that are no longer navigable waters under the CWA. In addition to the SRF money identified above, the President has requested \$238,000,000 in § 319 funding for FY 2004 and Congress appropriated \$240,000,000 in § 319 funding for FY 2003.

State revolving funds have been used to pay for a variety of nonpoint source related activities, including drinking water source protection, wetlands restoration, decentralized wastewater treatment, and agricultural best management practices. Funding for all of those activities may be threatened where they relate to protecting waters that are no longer covered by the state’s management plan since they are no longer considered to be waters of the U.S.

In addition, EPA can provide technical assistance to states, upon their request, to develop a management program “for those portions of the navigable waters requested by such State.” 33 U.S.C. 1329(f). EPA technical assistance is, therefore, limited to programs for navigable waters.

## B. OTHER FEDERAL ENVIRONMENTAL PROGRAMS

### 1. Implications for Endangered Species Act Programs

Narrowing the scope of the CWA frustrates the policies and purposes not only of the CWA, but also of the Endangered Species Act. Elimination of the endangered species rationale from the MBR effectively denies ESA protection to endangered species and their habitat, because many habitat-disturbing actions receive ESA review only because a CWA permit is required – thus trigger the ESA’s consultation requirement. The Supreme Court in *SWANCC* has not called into question the other factors of the MBR; only this Administration has. EPA and the Corps must,

and can, retain the factor relating to use of waters by threatened and endangered species as habitat.

So-called "isolated" waters support numerous threatened and endangered plant and animal species. Examples of such species, and the wetlands upon which they depend, include vernal pool complexes with endangered tadpole shrimp and delta green ground beetle; desert springs that provide habitat for endangered big horn sheep, Owens pupfish, Devils Hole pupfish, and Warm Springs pupfish; Nebraska sandhills that are habitat for whooping crane and bald eagle; sinkholes that harbor the northeastern bulrush, swamp pink and Virginia sneezeweed; and dune swales, frequented by the St. Andrew beach mouse. See "The U.S. Supreme Court Limits Federal Regulation of Wetlands: Implications of the *SWANCC* Decision," California Research Board (February 2002), available at < <http://www.library.ca.gov/crb/02/03/02-003.pdf> >; Tiner, R.W., H. C. Bergquist, G. P. DeAlessio, and M. J. Starr. 2002. Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States. U.S. Department of the Interior, Fish and Wildlife Service, Northeast Region, Hadley, MA, available at < [http://wetlands.fws.gov/Pubs\\_Reports/isolated/report.htm](http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm) >.

If the Administration were to persist with its interpretation as in the Guidance Memorandum, that the *SWANCC* Court struck down all factors of the Migratory Bird Rule, including even "isolated" waters known to be habitat for a threatened or endangered species, the EPA and Corps would lose jurisdiction over those waters, further imperiling threatened and endangered species. The Fish and Wildlife Service (FWS) reviews activities impacting threatened and endangered species that are federally executed, funded, or authorized. See 16 U.S.C. § 1536(a)(2). If there is no federal permit -- e.g., no Corps jurisdiction -- the Endangered Species Act (ESA) has no provision that triggers FWS review of a project that may jeopardize listed species.

Using the *SWANCC* decision to justify removal of jurisdiction based on habitat use by endangered species will not only flaw future application of the CWA, but will also undermine the ESA. Such a reading will result in the reduced FWS involvement in projects involving "isolated" wetlands outside of Corps and EPA jurisdiction. Thus, a project adversely affecting so-called "isolated waters" which harbor listed species may escape review under the ESA, 16 U.S.C. §§ 1531 *et seq.* The loss of ESA protections to a significant amount of endangered species habitat will further harm numerous species, making our duty to recover these species even more challenging.

## 2. Implications for Federal Safe Drinking Water Act Program

xxx intro sent In enacting the FWPCA, Pub. L. 92-500, 86 Stat. 816 *et seq.*, and the 1977 Clean Water Act, Pub. L. 95-217, 91 Stat. 1567 *et seq.*, Congress was acutely aware that there are substantial public health implications to the pollution of the nation's waters. Congress clearly stated that its objective was to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). As the Act's legislative history repeatedly demonstrates, one of the key reasons for Congressional concern about the need to restore and maintain the integrity of the nation's waterways was to protect public health, both from drinking, and from coming into contact with contaminated water.

In enacting the FWPCA in 1972, Congress reacted to water quality crises such as the Cuyahoga River catching fire. The Senate Committee drafting the legislation noted that the Committee became increasingly concerned during 1970 with the effects of pollution on public health. S. Rep. 92-414, *reprinted at* 1972 U.S.C.C.A.N. 3668, 3670 (October 28, 1971). The Committee noted that the Act is intended to implement the interim goal, by 1981, wherever attainable, a standard of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water, and *also assures that public water supplies will be protected. Id.*, at 3712.

Any effort to use the *SWANCC* decision as an excuse for failing to control pollution discharges and fill of non-traditionally navigable waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, would have profound public health implications. As elementary school earth sciences classes learn, these waters generally are all interconnected through the hydrologic cycle. One third of all surface waters derive from groundwater, the recharge of which industry argues should not be protected because they are often “isolated” wetlands. Moreover, many intermittent streams recharge groundwater, and of course often provide base flow for larger rivers, and also recharge lakes. In addition, it is an elementary hydrogeological principle that all rivers have headwaters, much or all of which would be excluded from coverage the approach industry urges upon EPA (i.e. allowing protection only of waters that are traditionally navigable by a boat).

Unregulated contamination of non-traditionally navigated waters by sewage, industrial point source pollution, discharges of oil or hazardous materials, or other pollution could spell disaster for the nation’s drinking water supplies. We learned this lesson when pollution of the Milwaukee River contaminated the city of Milwaukee’s drinking water supply (which reportedly was in compliance with all EPA drinking water regulations at the time) with the waterborne chlorine-resistant parasite *Cryptosporidium*, sickening over 400,000 people and killing 50 to 100.<sup>125/</sup> More recently, in 1999, more than 1,000 people at a county fair in upstate New York were stricken by an extremely virulent strain of *E. coli* (the same bacteria that we have come to associate with bad meat) after drinking water contaminated by polluted runoff from a stream at a nearby cattle farm that contaminated a well using shallow groundwater. On that occasion, over 1,000 people became ill, and a three-year-old girl and an elderly man died of acute kidney failure when their bodies could not fight off the pathogen.<sup>126/</sup>

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<sup>125</sup> W. R. MacKenzie, *et. al.*, A Massive Outbreak in Milwaukee of *Cryptosporidium* Infection Transmitted Through the Public Water Supply, *New England Journal of Medicine*, 1994, 331: 161B167. The precise number of people killed by the Milwaukee outbreak is not known with certainty. A count by the *Milwaukee Journal* put the number at over 100, while the official state and local health department count was a minimum of 50 deaths. See Marilyn Marchione. Deaths continued after crypto outbreak: State report attributes a minimum of 50 deaths from ‘93 to ‘95. *The Milwaukee Journal Sentinel*, May 27, 1996.

<sup>126</sup> 1061 suspected *E. coli* Cases in New York Outbreak, *Infectious Disease News* (October 1999), *available online at*

Each year, the Centers for Disease Control and Prevention (CDC), counts a dozen or more significant waterborne disease outbreaks attributable to contaminated drinking water, and this is widely viewed as a serious undercount.<sup>127/</sup> Recent estimates published by EPA and independent researchers estimate that *each year*, about 7.1 million Americans become mildly to moderately ill from tap water, including 520,000 to 690,000 moderate to severe cases, triggering about 1,200 deaths.<sup>128/</sup>

There are over 11,400 community public water systems (PASS), serving over 178,000,000 Americans, that use surface water as their primary source for their tap water.<sup>129/</sup> Most of these water systems use World War I-era technologies for water treatment, including coagulation, sedimentation, and (generally sand) filters to remove some of the larger particles in the water.<sup>130/</sup> Some surface water systems, such as Boston, New York, and parts of the Seattle and San Francisco systems, and some smaller systems, use no filtration at all, hoping that protection of their watersheds will be sufficient to protect their citizens. Many other water suppliers use filtration that is of questionable efficacy against even the most basic pathogens. Only about 10% of even the larger, more sophisticated surface water systems have any form of advanced treatment designed to remove inorganic chemicals such as arsenic or synthetic organic chemicals such as pesticides and industrial chemicals.<sup>131/</sup> Thus, primary reliance upon treatment of drinking water supplies for protection of public health is extremely risky, and likely to be disastrous.

In addition, most of the over 42,000 groundwater-supplied drinking water systems, which in total serve about 86,000,000 Americans with their tap water, have little or no treatment, with the exception in many cases of chlorine treatment. There is essentially no safety net for most of these systems; as waterborne disease and water contamination statistics show, these generally untreated or minimally treated waters, once contaminated, pose a serious threat to public health.

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[www.infectiousdiseaseneews.com/199910/frameset.asp?article=ecoli.asp](http://www.infectiousdiseaseneews.com/199910/frameset.asp?article=ecoli.asp); Centers for Disease Control and Prevention, Public health dispatch: Outbreak of *Escherichia coli* O157:H7 and *Campylobacter* among attendees of the Washington County Fair, New York, Morbidity and Mortality Weekly Report (MMWR), 1999, 48(36): 803.

<sup>127</sup> See, CDC-EPA Biennial Reports on Waterborne Disease Outbreaks in *MMWR*.

<sup>128</sup> R. Levin and W. Harrington, Infectious Waterborne Disease and Disinfection Byproducts in the US: Costs of Disease, *printed in* E.G. Reichard and G.A. Zapponi, Assessing and Managing Health Risks from Drinking Water Contamination: Approaches and Applications at 305 (IAS, Rome, Publication No. 233, 1994).

<sup>129</sup> EPA, OGWDW, *Factoids: Drinking Water and Ground Water Statistics for 2000* at 1 (2001), available online at <http://www.epa.gov/safewater/data/00factoids.pdf>

<sup>130</sup> NRDC, *Victorian Water Systems Enter the 21<sup>st</sup> Century* (1995).

<sup>131</sup> *Ibid.*

Thus, any rollback in EPA's jurisdiction over waters of the United States is likely to wreak havoc with watershed and aquifer protection efforts. Contamination of headwaters and of "isolated" wetlands that recharge groundwater connected to drinking water will pose substantial threats to public health. Any EPA action with this impact would not only pose a major public health risk, but would directly contravene Congressional intent to protect public health and the source waters of public water supplies.

## **IX. IMPLICATIONS OF THE CONTEMPLATED JURISDICTIONAL ROLLBACK ON SELECTED ECOLOGICAL REGIONS**

### **A. ALASKA'S NORTH SLOPE**

#### **1. Wetlands in Alaska Are a Resource of Regional and National Importance.**

America's largest state is also its wettest. The U.S. Fish and Wildlife Service estimates that there are almost 175,000,000 acres of wetlands in Alaska.<sup>132/</sup> With nearly two-thirds of the nation's wetlands, Alaska boasts many of the most diverse and critical wetland habitats on the continent. Coastal estuaries, saltwater lagoons, river corridors, marshes, muskegs, bogs, and wet tundra support an astounding variety of fish and wildlife species.

Wetlands in Alaska provide nesting, rearing, and staging habitat for millions of waterfowl and shorebirds important to hunters and birdwatchers throughout the nation. Thirty-four species of waterfowl nest in Alaska's wetlands that nest nowhere else in the United States. Eighty percent of the world's trumpeter swans and 50 percent of all tundra swans nest there. Ten million ducks, 750,000 geese, and 80,000 swans migrate annually from nesting grounds in Alaska to wintering areas in the Lower 48, Canada, Mexico, and Asia. Another two million ducks and 300,000 geese depend on Alaska's wetlands as critical staging areas. Alaska's wetlands support up to 60 percent of North America's northern pintails, 25 percent of widgeon, and nearly 20 percent of scaup and canvasbacks. Seventeen percent of all geese and 11 percent of all ducks harvested in North America are reared in Alaska's wetlands.

No natural ecosystem has a greater influence on Alaska's economy than wetlands. Wetlands provide critical habitat for fish such as salmon that support a multi-billion dollar commercial fishing industry. Annual gross revenues from salmon harvests alone exceed \$1.5 billion and provide more than 70,000 jobs. Sport fishing is a significant and growing industry whose health depends on Alaska's wetlands. Sport fishing generates more than 5,000 full-time jobs and \$350 million in revenues. Hunting also depends on wildlife species sustained by wetlands and contributes more than \$80 million in gross revenues. Tourism is Alaska's largest growth industry, generating more than \$1 billion in revenues and 13,500 jobs. Wildlife is one of the state's key visitor attractions. Many wildlife species are dependent upon wetlands habitats for at least part of their life cycle, including brown bears, caribou, moose, muskoxen, wolves, wolverines, foxes, river otters, beavers, mink and muskrats.

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<sup>132</sup> Hall, Jonathon V., W.E. Frayer, and Bill O.Wilen, Status of Alaska Wetlands 3 (1994) (attached).

Subsistence use of wetlands resources in Alaska is extensive. Nearly all of Alaska's rural Native villages are located in or near wetlands because their subsistence-based economies depend on fish and wildlife that are sustained by wetlands.<sup>133/</sup> Fish and wildlife resources harvested for subsistence use that are dependent on wetlands include five species of Pacific salmon, shellfish, ducks, geese, beaver, and otter. Plant materials frequently collected from wetlands include blueberries, cranberries, Labrador tea, and willow.

While the hydrologic and water quality functions of Alaska wetlands are often poorly understood, studies have shown that these wetlands offer many of the same values as Lower 48 wetlands. For instance, black spruce wetlands are prominent features of taiga landscapes and have been widely portrayed as having relatively little value. However, studies have shown that black spruce wetlands perform several substantial water quality functions. According to the U.S. Environmental Protection Agency, the peat and peat-forming vegetation of these wetlands compete for nutrients and form a sediment-trapping microtopography in bogs. Some vegetation responds to nutrient input with increased uptake. Peat accumulation sequesters nutrients and contaminants.<sup>134/</sup>

## 2. North Slope wetlands are not "isolated."

Approximately 1,542,000 acres of wetlands (83 percent of the land surface) are found on Alaska's North Slope.<sup>135/</sup> An additional five percent of the area is lacustrine (lake) habitat. The wetlands areas range from temporary flooded willow areas along streams to saturated moist tundra dominated by cottongrass, sedge, and low shrubs.

The mosaic of vegetated wetlands, ponds, and lakes of the coastal plain forms a nearly continuous cover stretching from tidal areas to the foothills of the Brooks Range. Non-wetlands habitats are limited to well-drained terraces along rivers, some small dune areas near the coast, bluffs, and pingos. Precipitation is the dominant source of water for the wetlands ecosystems in the region. Although annual precipitation amounts are very low, wetlands hydrology is maintained by the presence of a permafrost table near the soil surface and low rates of evapotranspiration.

The land surface of the arctic coastal plain slopes gently toward the Beaufort Sea. During the spring snow melt period, large volumes of water move across the land surface as sheet flow toward the sea. In areas of slightly rolling terrain, the water flows directly into streams that lead to rivers. All of these rivers flow northward and eventually empty into the Beaufort Sea. There are few closed basins that are isolated from this regional movement of water from south to north.<sup>136/</sup> Thus, wetlands and other waters on Alaska's North Slope are adjacent or hydrologically connected to the Beaufort Sea, a water that is navigable in fact.

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<sup>133</sup> Ellanna, L.J., and P.C. Wheeler, Subsistence Use of Wetlands in Alaska (1986) (in The Environmental Institute, Alaska Regional Wetland Functions – Proceedings of a Workshop 85-103) (attached).

<sup>134</sup> Post, Roger A., for U.S. Environmental Protection Agency, Functional Profile of Black Spruce Wetlands in Alaska 130 (1996).

<sup>135</sup> Hall (1994).

<sup>136</sup> Hall, Jonathon, V., (personal communication) (April 2, 2003).



EPA and the Corps have long recognized that the broad goals of the Clean Water Act require a systemic approach to maintaining and improving water quality. Indeed, a key factor in the Supreme Court's decision in Riverside Bayview Homes was the Corps' determination that wetlands near lakes, rivers, streams, and other bodies of water may be integral parts of a larger ecosystem: "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 ecosystem. Water moves in hydrological 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." Riverside Bayview Homes, 474 U.S. at 134 (quoting 42 Fed. Reg. 37128 (1977)).

Wetlands on the North Slope are part of a larger aquatic ecosystem that includes the Beaufort Sea and the rivers and streams that drain into the sea. These waters are hydrologically connected and functionally interdependent. For example, the Beaufort Sea, a water that is inarguably subject to federal jurisdiction, depends on the wetlands of the coastal plain for flood and erosion buffering, nutrient discharge, and pollution control. Moreover, the value of the Beaufort Sea for wildlife is greatly enhanced by the fact that coastal plain wetlands are part of the larger ecosystem. The bottom line is that wetlands on the North Slope are not isolated. They are part of a vast complex of wetlands that are adjacent to the Beaufort Sea, inseparably bound to that water through myriad hydrologic and ecologic connections. In fact, by most standards, the wetlands of the North Slope are more closely tied to the Beaufort Sea than the wetlands in Riverside Bayview Home were to the Black River. See Riverside Bayview Homes, 474 U.S. at 131.

### 3. North Slope wetlands perform numerous critical environmental functions.

Although North Slope wetlands are physically and hydrologically connected to the Beaufort Sea, and are therefore not affected by the SWANCC decision, it is important to acknowledge the critical functions and values of these waters. In particular, it should be emphasized that arctic wetlands as a whole perform the same wetlands functions as temperate wetlands in the Lower 48 states.

#### A. Hydrologic Functions

Although arctic wetlands are not sites of discharge or recharge of subpermafrost aquifers, suprapermafrost groundwater can influence wetland communities below arctic slopes in ways comparable to aquifer discharge in temperate regions. For instance, these wetlands provide storage for flood and storm waters and are integral to natural drainage patterns.<sup>137/</sup>

During the summer, wetlands on the coastal plain are an effective means of flow regulation. Thaw thickens the active layer and evapotranspiration lowers the water table. Both events increase the capacity of wetlands to store precipitation. Regulation of flow is evident

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<sup>137</sup> Oceanographic Institute of Washington, for U.S. Army Corps of Engineers, Alaska North Slope Wetlands Study IV-26 (1979) (attached).

when wetlands trap and hold incident precipitation, lowering hydrographic peaks. The mechanisms for flow regulation and storage in these wetlands are ice-free voids and cracks, absorption by dehydrated moss and peat, low relief, subsurface flow, and thaw pond storage.<sup>138/</sup> Although groundwater discharge may regulate streamflow in permafrost-free areas, tundra streams on the North Slope are entirely fed by surface or near-surface wetland discharge.<sup>139/</sup>

Arctic-tundra wetlands also stabilize sediment and anchor shorelines, as well as maintain the thermal equilibrium of ice-rich soils. Some North Slope wetlands dissipate mechanical erosive forces and anchor shorelines because aquatic vegetation and shallow water absorb wave energy. For instance, coastal plain lakes may be many kilometers long and capable of generating waves that cause mechanical erosion. However, *Carex aquatilis* and *Arctophila fulva* are dominant vascular plants in these freshwater habitats, forming belted patterns around ponds and lakes which anchor the shorelines and dissipate mechanical erosive forces.<sup>140/</sup> Removal of the surface wetland vegetation cover in the arctic has been shown to result in thermokarst and extensive erosion.<sup>141/</sup>

#### B. Water Quality Functions

Wetlands on the North Slope purify water by trapping sediments and by transforming or retaining nutrients and toxicants. The physical structure of tundra streams, particularly the smaller drainages, consists of a series of “beads” (small thermokarst ponds) connected by narrow, deep channels. At breakup, beaded streams flood adjacent tundra creating extensive wetlands complexes. Later in the summer, when beaded streams are confined to their channels and discharges may be intermittent, water velocities are typically very low on the flat coastal plain providing ample opportunity for quiescent settling of particulates.<sup>142/</sup>

Sediment can also be trapped by riparian wetlands along large arctic rivers such as the Colville and Sagavanirktok. For instance, the Sagavanirktok River has a braided pattern and a broad floodplain with many vegetated and unvegetated islands. At breakup, turbid water covers the floodplain, inundating the complex of channels, islands, and riparian wetlands. Zones of low water velocity are created by the increased cross-sectional area of the inundated floodplain, frictional resistance of flooded vegetation, and low wetlands gradients, allowing settling of particulates. As river discharge diminishes, pools in high-water channels and microtopographic depressions retain water, trapping sediment.<sup>143/</sup>

North Slope wetlands also play an important role in nutrient uptake and contaminant removal. Tundra pond wetlands, which cover a significant area of the Arctic coastal plain, are reasonably productive and actually contain fine sediments that have high cation exchange and

<sup>138</sup> Racine, Charles H., for U.S. Army Corps of Engineers, Current Issues in Alaska Wetland Management 7 (1994) (attached).

<sup>139</sup> Post, Roger A., Alaska Department of Fish and Game, Effects of Petroleum Operations in Alaska Wetlands: A Critique 13 (1990) (attached).

<sup>140</sup> Post at 14 (1990).

<sup>141</sup> Racine at 7 (1994).

<sup>142</sup> Post at 16 (1990).

<sup>143</sup> Post at 17 (1990).

buffering capacity, particularly in relation to phosphate. In addition, studies show that tundra vegetation is biologically active at low temperatures and rapidly takes up phosphorus in response to fertilization.<sup>144/</sup> Vascular plants, plankton, and soil microflora of arctic-tundra wetlands either respond, or have the potential to respond, to nutrient input with increased growth. The period of high productivity coincides with the period of potential nutrient or contaminant input, enhancing the water purification function of these wetlands.<sup>145/</sup>

### C. Habitat Functions

The extraordinary habitat functions of North Slope wetlands are well established, especially with respect to birds. These wetlands support large numbers of breeding and postbreeding loons, geese, ducks, gulls, terns, and shorebirds. Interspersed upland tundra habitats are used by passerines, ptarmigan, and raptors.<sup>146/</sup> Some 135 bird species have been recorded on the coastal plain of the Arctic National Wildlife Refuge, of which 70 are regular nesters. Birds come from all 50 states, Mexico, Central and South America, the mid- and South Pacific Islands, Asia, and even Africa and Antarctica.<sup>147/</sup> Distribution of waterfowl on the North Slope during spring and summer clearly reflects the relative abundance of water with major concentrations occurring near Peard Bay, Dease Inlet, Harrison Bay (including Teshekpuk Lake), and the Colville Delta.<sup>148/</sup>

In spring, birds from several groups, but particularly waterfowl, shorebirds, and songbirds, arrive on the coastal plain via coastal and inland migration routes. At the same time, large areas of the plain are inundated with water due to melting of snow and ice and the poor drainage characteristics due to the continuous layer of permafrost. North Slope wetlands are important for early production of invertebrate populations and provide waterfowl and shorebirds with an early source of food and open water habitat while the majority of lake and pond basins are still frozen. Wetlands remain important areas for waterfowl and shorebird utilization throughout the summer although some species disperse to adjacent lakes and ponds when they thaw for foraging and breeding purposes.<sup>149/</sup>

While there are other extensive areas of moist tundra in Alaska, the northern coastal plain is unique in its geographic position, its climate regime, and its possible importance to birds moving in east-west migration. Moreover, recognition of the importance of the coastal plain to usually nonbreeding species of waterfowl, such as pintails, has increased with the knowledge

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<sup>144</sup> Racine at 8 (1994).

<sup>145</sup> Post at 22 (1990).

<sup>146</sup> Derksen, Dirk V., Thomas C. Rothe, and William D. Eldridge, U.S. Fish and Wildlife Service, Use of Wetland Habitats by Birds in the National Petroleum Reserve-Alaska (1981) (attached).

<sup>147</sup> Whitten, Ken, for National Wildlife Federation, The Arctic National Wildlife Refuge Wildlife Values 16 (2002) (attached).

<sup>148</sup> Lensink, Calvin J. and Thomas C. Rothe, Values of Alaskan Wetlands for Waterfowl 7 (1986) (attached).

<sup>149</sup> Oceanographic Institute of Washington at IV-15 (1979).

that drought-displaced prairie ducks often migrate to northern habitats.<sup>150/</sup>

Wetlands on Alaska's North Slope also provide crucial habitat for a number of mammal species.<sup>151/</sup> Mammals found to forage or den in these wetlands include brown lemmings, collared lemmings, moose, masked shrews, arctic foxes, red foxes, least weasels, ermine, gray wolves, and grizzly bears.<sup>152/</sup> These wetlands also host one of the greatest wildlife spectacles in North America: the annual migration of caribou. Each year, over 100,000 caribou migrate to the Arctic coastal plain from wintering grounds to the south and east in Alaska, the Yukon, and Northwest Territories of Canada. The vast wetlands complexes of the North Slope provide ideal calving ground for the caribou as well as superior forage and a place to escape predators and insects. In addition, polar bears and muskoxen can be found in the Arctic coastal plain in any season of the year.<sup>153/</sup>

#### D. Recreation Functions

Few places on the globe possess the untrammelled expanses of arctic landscapes. These landscapes and the wetlands they contain provide unique recreation and heritage values. Consequently, there are more people visiting areas like the Arctic Refuge and they are staying longer than the average tourist at road accessible areas such as Prudhoe Bay. In 1989, there were 1,289 personal-use days in the wetlands of the arctic coastal plain. Many of these visits involved guided or unguided river raft trips or backpacking trips. The remaining wetlands use came from sport hunters and unreported private use. Recreational use of some rivers in the Arctic Refuge have reached such a magnitude as to require regulation of commercial operations.<sup>154/</sup>

#### 4. The degradation or destruction of North Slope wetlands would have substantial effects on interstate and foreign commerce.

Unlike the abandoned sand and gravel pit at issue in SWANCC, the vast wetlands of Alaska's North Slope are among the most pristine, scenic, and biologically productive waters in the entire country. There is no question that failure to regulate activities in these waters could substantially affect interstate and foreign commerce and that these activities are therefore well within Clean Water Act jurisdiction. For example, loss of wetlands on the North Slope could have harmful effects on the 123,000-strong Porcupine caribou herd. Over a dozen Native villages in two nations depend on these animals for subsistence and cultural identity. The Porcupine caribou herd is so important that in 1987 the United States signed an agreement with Canada on the Conservation of the Porcupine Caribou Herd. The agreement's objectives include protecting caribou habitat and ensuring continued opportunities for subsistence hunters. The International Porcupine Caribou Board, established to advise the two nations on managing and

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<sup>150</sup> Bergman, Robert D., Robert L. Howard, Kenneth F. Abraham, and Milton W. Weller, U.S. Fish and Wildlife Service, Water Birds and their Wetlands Resources in Relation to Oil Development at Storkersen Point, Alaska, 35-36 (1977) (attached).

<sup>151</sup> Post at 26-27 (1990).

<sup>152</sup> Oceanographic Institute of Washington at IV-21 (1979).

<sup>153</sup> Whitten at 9-15 (2002).

<sup>154</sup> Post at 28-29 (1990).

protecting the caribou, has identified the coastal plain of the Arctic Refuge as sensitive habitat for calving and summer grazing.<sup>155/</sup>

B. MOUNTAINTOP REMOVAL COAL MINING IN APPALACHIA

If the definition of “waters of the United States” was redefined to no longer include intermittent and ephemeral streams, central Appalachian streams would receive significantly less protection than they currently have. Indeed, the filling of many hundreds of miles of streams that is currently regulated by the U.S. Army Corps of Engineers would no longer be regulated at all by the federal agencies.

Most of the streams filled and destroyed by coal companies in central Appalachia are intermittent or ephemeral in nature, although hundreds of miles of perennial streams have also been filled by strip mines in the region. If the Corps were to stop regulating activities on intermittent and ephemeral streams, these streams would lose important protections provided by Section 404 of the Clean Water Act and NEPA. The 404(b)(1) guidelines currently provide the most important protections to streams filled by these mines. Without the protection of the 404(b)(1) guidelines, the fills will be much larger, more stream miles will be filled and the mitigation currently required will be lost. Also, because there would no longer be federal permits at issue, NEPA protections would no longer be available.

The loss of 404 and NEPA protection for these streams would be devastating. In addition to avoidance minimization and mitigation, Section 404 requires analysis of individual and cumulative impacts before permit issuance. In central Appalachia, the cumulative impacts of these mines are devastating. For example, in West Virginia, more than 40% of the upper reaches of the Mud River watershed have been filled. In just three counties in West Virginia more than 400 miles of ephemeral and intermittent stream have been filled by these mines. Protecting the upper reaches of these streams is essential to protecting the ecology of the lower reaches, because the lower stream reaches and rivers that depend on such tributaries are dependent on the energy exported from upper reaches. (Wallace 2001; Stout 1999). If the cumulative impacts of the hundreds of fills in the region are not analyzed and limited, the ecology of the region’s streams and rivers will be devastated.

Additionally, the Corps’ jurisdiction to authorize fills in intermittent and ephemeral streams provides cover to State agencies with NPDES primacy to certify 404 permits pursuant to Section 401 of the Clean Water Act. If the Corps loses its authority to permit fills under Section 404, the fills would then actually violate state clean water laws because the discharge of pollutants currently covered by and certified pursuant the 404 permit would not be certifiable by state agencies that do not have delegated 404 authority. In other words, because “waters of the state” would still include ephemeral and intermittent stream segments, any discharge of rock and dirt (pollutants) would have to be certified. If there were no 404 permit, such discharges could not comply with water quality standards and would be impermissible under state law.

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<sup>155</sup> Whitten at 4-5 (2002).

The devastation of the Appalachian region by mountaintop removal coal mining is already extensive. What is desperately needed is greater enforcement of environmental protection laws, like the federal Clean Water Act – not attempts to weaken federal statutes or their regulations to leave communities, like those harmed by mountaintop removal mining, with even fewer protections.

## **PART TWO**

### **Critique of Fabricant/Morello “Guidance Document”**

#### Introduction

Attached to the Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States” published on January 15, 2003, the EPA and the Army Corps of Engineers issued a “Guidance Document” or “Joint Memorandum.” Its stated purpose is to provide “clarifying guidance” regarding the *SWANCC* decision and Clean Water Act jurisdiction issues that had arisen since *SWANCC*. The authors of the guidance are the General Counsels of EPA and the Department of the Army.

The guidance has two parts. First, it establishes what effectively amount to new rules for circumstances under which the agencies claim there is no longer jurisdiction under the Clean Water Act. This is done, however, without any public notice or rulemaking procedures. It is done without any compliance with the National Environmental Policy Act. Instead, the guidance automatically changes the jurisdictional rule based on the agencies’ new interpretation of a two-year-old Supreme Court case, *SWANCC*. By characterizing the *SWANCC* opinion as far broader than it is, the authors of the guidance simply set forth new rules on jurisdiction that become effective immediately, but have no basis in fact or law and bypass all procedural requirements.

Second, the guidance opines about the status of traditional navigable waters and adjacent wetlands and tributary systems and adjacent wetlands. To support the lack of jurisdiction under the Clean Water Act, the authors repeatedly cite U.S. District Court decisions that are currently under appeal by the authors’ own agencies -- EPA and the Army Corps of Engineers. They conclude, however, that jurisdictional and permitting decisions should proceed on a case-by-case basis.

#### New Rules for “No Jurisdiction” Determinations

The guidance announces what amounts to a new rule for the EPA and the Army Corps of Engineers. First, the new rule in the guidance improperly expands the “no jurisdiction” rule from one factor to three factors. Second, the new rule creates a process for declining to assert jurisdiction over an even broader category of waters, requiring agency personnel to get Headquarters’ permission before asserting jurisdiction over these waters. Third, the new rule violates laws of administrative rulemaking and environmental procedure.

The *SWANCC* opinion is clearly articulated and very narrow, and summarized by the 5 to 4 majority as follows: “We hold 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 §404(a) of the CWA.” *SWANCC*, 531 U.S. at 174. It is meant to apply only to that section of the “Migratory Bird Rule” that applied to petitioner’s balefill site – use of waters as habitat for migratory birds that cross state lines in their migrations.

The authors of the guidance, however, take great liberties with the *SWANCC* opinion. They disregard the limitations of the stated holding and now claim that the Supreme Court in *SWANCC* raised questions about all the factors under the Migratory Bird Rule, 51 Fed. Reg. 41217 (i.e., use of the water as habitat for birds protected by Migratory Bird Treaties; use of the water as habitat for Federally protected endangered or threatened species; or use of the water to irrigate crops sold in interstate commerce). The guidance claims that *SWANCC* “calls into question whether CWA jurisdiction over “isolated,” intrastate, non-navigable waters would now be predicated on the other factors listed in the Migratory Bird Rule.” Guidance, at p. 25. That is simply false. Nowhere in the *SWANCC* opinion is there even a mention of its holding being broader than the stated habitat for migratory birds.

Under this new rule, no person in those agencies may assert Clean Water Act jurisdiction over so-called “isolated,” intrastate, non-navigable waters, where the sole basis available for asserting jurisdiction rests on “any of the factors listed in the ‘Migratory Bird Rule.’” Guidance, at p. 25 (emphasis added). Therefore, effective January 15, 2003, the rule on jurisdiction was instantaneously expanded from no jurisdiction based on habitat for migratory birds to (1) no jurisdiction based on habitat for migratory birds, (2) use of water as habitat for Federally protected endangered or threatened species and (3) use of the water to irrigate crops sold in interstate commerce. Such an expansion of no jurisdiction is not based on the Supreme Court law; neither is it pursuant to administrative or environmental procedural statutes.

In addition to the automatic “no jurisdiction” rule, the guidance also contains general instructions for another, broader category of jurisdictional factors. The guidance provides: “In addition, in view of the uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 C.F.R. § 328.3(a)(3)(i)-(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions.” Guidance, at p. 25. The statement on its face reflects, again, the misreading of *SWANCC* to have caused such “uncertainties,” when the Supreme Court made clear what its holding was. *SWANCC*, 531 U.S. at 174. And, similar to the rest of the guidance, this creates a new rule without any administrative or environmental procedural compliance

Such a rule by the General Counsels of EPA and the Army Corps of Engineers would certainly have a chilling effect on assertions of jurisdiction from the field and, indeed, appears to be designed to achieve precisely that result. Field staff are directed to call headquarters for instructions *only* when they plan to assert jurisdiction over this undefined category of “isolated” waters. If they plan to ignore the Clean Water Act and *not* assert jurisdiction, they do not have to ask permission or even inform headquarters. Further, the guidance says that “generally speaking” the agencies will continue to protect tributaries of navigable waters and their adjacent wetlands. (The exceptions to this “generally speaking” policy are not spelled out in the “guidance.”) Once again, jurisdiction over these waters was not at issue in the Supreme Court’s decision.

This vaguely-worded “guidance” will open the way for developers, mining companies, and other polluters to argue with the Corps and EPA that all kinds of wetlands, small streams, non-



navigable ponds or other waters – perhaps even some tributaries – are “isolated.” The case-by-case determination portion of the guidance does little to guide or instruct. It provides no advice on how to handle any specific situation. It merely recommends that where questions remain, “the regulated community should seek assistance from the agencies on questions of jurisdiction.” The guidance will be used to try to allow destruction and pollution of waters that have been protected by the Clean Water Act and its regulations for 30 years.

Finally, the guidance comes into existence without any procedural and administrative legality. Although the agencies promise full APA rulemaking and National Environmental Policy Act (NEPA) compliance under the ANPRM, they do not hesitate to implement an entire new “no jurisdiction” rule under the guidance without satisfying either the APA or NEPA. The APA was promulgated so that federal agencies would be required to go through formal rulemaking, with an opportunity for public notice and comment, before thrusting a new rule upon members of the public. Under the guidance, however, the APA was ignored. A new jurisdictional rule was promulgated, and there was no opportunity for any member of the public to comment. NEPA was promulgated so that a decisionmaker would understand the environmental effects of his or her decision and to keep the public informed about decisionmaking. In promulgating their guidance, EPA and the Army Corps of Engineers gave no opportunity for the agencies to weigh the environmental consequences of their decision. It is particularly noteworthy that it will be hard for any member of the public to ever know what waters have been deemed as “non-jurisdictional” under the guidance, given that there is no way to determine which waters have been declared not under Clean Water Act jurisdiction since January 2003.

#### Discussion of the Case Law

In addition to announcing the new “no jurisdiction rule,” the guidance also contemplates just how broadly *SWANCC* could be interpreted. The guidance talks broadly about different courts’ decisions. Unfortunately, the guidance does little to distinguish between the cases that are currently under appeal by the government, and those that are settled law, and tends to speak of both types of cases as comparable even though the overwhelming majority of post-*SWANCC* decisions have supported the Department of Justice’s position that the Supreme Court’s decision does not require any change in existing rules. It does, however, appear that most -- if not all -- of the cases favoring an expanded reading of *SWANCC* are currently under appeal. Therefore, the position of the United States, representing the EPA and Army Corps of Engineers, is that these lower court rulings were in error. That makes the citation of these district court cases for any other proposition somewhat disingenuous.

The conclusion of the discussion is that “[f]ield staff should continue to assert jurisdiction over traditional navigable water (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).” Guidance, at p. 31. It is silent, however, about what law to apply. In fact, it simply lists out factors to be considered, including the “guidance, applicable regulations, and any additional relevant court decisions.” Id.

Overall, the Guidance Document unlawfully issues a new “no jurisdiction” rule based on a misreading of Supreme Court law, violates the procedural requirements of the APA and NEPA, and portends even further erosion of federal environmental rules.

## **CONCLUSION**

For the foregoing reasons, we urge EPA and the Corps not to go forward with a proposed rulemaking and to withdraw the Guidance attached to the ANPRM immediately.

Respectfully submitted,

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# ATTACHMENT 8



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# **EPA and the Army Corps' Proposed Rule to Define "Waters of the United States"**

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## Summary

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed a rule defining the scope of waters protected under the Clean Water Act (CWA). The proposal would revise regulations that have been in place for more than 25 years. Revisions are proposed in light of 2001 and 2006 Supreme Court rulings that interpreted the regulatory scope of the CWA more narrowly than previously, but created uncertainty about the precise effect of the Court's decisions.

In 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings. The 2011 proposed guidance was extremely controversial, with some contending that it represented an overreach beyond the agencies' statutory authority. Most environmental groups welcomed the proposed guidance, although some would have preferred a stronger document. The 2014 proposed rule would replace the existing guidance, which remains in effect because the 2011 proposed guidance was not finalized.

According to the agencies, the proposed rule would revise the existing administrative definition of "waters of the United States" consistent with legal rulings and science concerning the interconnectedness of tributaries, wetlands, and other waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. Waters that are "jurisdictional" are subject to the multiple regulatory requirements of the CWA. Non-jurisdictional waters are not subject to those requirements.

This report describes the proposed rule and includes a table comparing the existing regulatory language that defines "waters of the United States" with the proposal. The proposed rule is particularly focused on clarifying the regulatory status of waters located in isolated places in a landscape. It does not modify some categories of waters that currently are jurisdictional by rule (traditional navigable waters, interstate waters and wetlands, the territorial seas, and impoundments). Proposed changes would increase the asserted scope of CWA jurisdiction, in part as a result of expressly declaring some types of waters categorically jurisdictional (such as all waters adjacent to a jurisdictional water), and also by application of definitions, which would give larger regulatory context to some types of waters, such as tributaries.

Beyond the categories of waters that would be categorically jurisdictional under the proposal is a category sometimes referred to as "other waters." The regulatory term "other waters" applies to wetlands and non-wetland waters such as prairie potholes that are not considered traditionally navigable or meet other of the proposed rule's jurisdictional definitions. Much of the controversy since the Supreme Court rulings has focused on the degree to which "other waters" are jurisdictional. According to the agencies' analyses, 17% of these "other waters" would be categorically jurisdictional under changes in the proposal. It also lists waters and features that would not be jurisdictional, such as prior converted cropland and certain ditches. It makes no change to existing CWA statutory and regulatory exclusions, such as permit exemptions for normal farming and ranching activities.

The agencies believe that the proposal does not exceed the CWA's coverage or protect new types of waters that have not been protected historically. While it would enlarge jurisdiction beyond that under the existing EPA-Corps guidance, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court's narrow reading of jurisdiction. Others may

disagree. Overall, the agencies estimate that approximately 3% of U.S. waters will additionally be subject to CWA jurisdiction as a result of the proposed rule (including additional "other waters"), compared with current field practice. EPA and the Corps estimate that costs of the proposal, from additional permit application expenses, for example, range from \$162 million to \$279 million annually. Benefits, including the value of ecosystem services such as flood protection, are estimated to range from \$318 million to \$514 million per year. They acknowledge uncertainties and limitations in these estimates.



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## Introduction

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed a rule defining the scope of waters protected under the Clean Water Act (CWA). The proposed rule would revise regulations that have been in place for more than 25 years.<sup>1</sup> Revisions are proposed in light of Supreme Court rulings in 2001 and 2006 that interpreted the regulatory scope of the CWA more narrowly than previously, but created uncertainty about the precise effect of the Court's decisions.<sup>2</sup>

In April 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance previously issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings for the regulated community, regulators, and the general public. The guidance documents sought to identify, in light of the Court's rulings, categories of waters that remain jurisdictional, categories not jurisdictional, and categories that require a case-specific analysis to determine if CWA jurisdiction applies. The 2011 proposed guidance identified similar categories as in the 2003 and 2008 documents, but it would have narrowed categories that require case-specific analysis in favor of asserting jurisdiction categorically for some types of waters. The 2014 proposed rule would replace the existing 2003 and 2008 guidance, which remains in effect because the 2011 proposed guidance was not finalized.<sup>3</sup>

The 2011 proposed guidance was extremely controversial, especially with groups representing property owners, land developers, and the agriculture sector, who contended that it represented a massive federal overreach beyond the agencies' statutory authority. Most state and local officials were supportive of clarifying the extent of CWA-regulated waters, but some were concerned that expanding the CWA's scope could impose costs on states and localities as their own actions (e.g., transportation projects) become subject to new requirements. Most environmental advocacy groups welcomed the proposed guidance, which would more clearly define U.S. waters that are subject to CWA protections, but some in these groups favored even a stronger document. Still, both supporters and critics of the 2011 proposed guidance urged the agencies to replace guidance with revised regulations that define "waters of the United States." Three opinions in the 2006 Supreme Court *Rapanos* ruling similarly urged the agencies to initiate a rulemaking, as they now have done.

In Congress, a number of legislative proposals were introduced to bar EPA and the Corps from implementing the 2011 proposed guidance or developing regulations based on it; none of these proposals was enacted. Similar criticism followed almost immediately after release of the proposed rule on March 25, 2014, with some Members asserting that the proposed rule would result in job losses and would damage economic growth. Supporters of the Administration, on the other hand, defended the agencies' efforts to protect U.S. waters and reduce frustration that has

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<sup>1</sup> Definition of "waters of the United States" is found at 33 C.F.R. §328.3 (Corps) and 40 C.F.R. §122.2 (EPA). The term is similarly defined in other EPA regulations, as is the term "navigable waters." See **Table 1**.

<sup>2</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>3</sup> For background on the Supreme Court rulings, subsequent guidance, and other developments, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

resulted from the unclear jurisdiction of the act.<sup>4</sup> Support was expressed by environmental and conservation organizations, among others.<sup>5</sup>

## The CWA and the Proposed Rule

The proposed rule was published in the *Federal Register* on April 21, 2014. The deadline for public comments is October 20, 2014.<sup>6</sup> **Table 1** in this report provides a comparison of the current regulatory language that defines “waters of the United States” with language in the proposed rule.

The CWA protects “navigable waters,” a term defined in the act to mean “the waters of the United States, including the territorial seas.”<sup>7</sup> Waters that are jurisdictional are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, do not have the federal legal protection of those requirements. The act’s single definition of “navigable waters” applies to the entire law. In particular, it applies to federal prohibition on discharges of pollutants except in compliance with the act’s requirements (§301), requirements for point sources to obtain a permit prior to discharge (§§402 and 404), water quality standards and measures to attain them (§303), oil spill liability and oil spill prevention and control measures (§311), certification that federally permitted activities comply with state water quality standards (§401), and enforcement (§309). It impacts the Oil Pollution Act and other environmental laws, as well.<sup>8</sup> The CWA leaves it to the agencies to define the term “waters of the United States,” which EPA and the Corps have done several times, most recently in 1986.

According to the agencies, the proposed rule would revise the existing administrative definition of “waters of the United States” in regulations consistent with legal rulings—especially the recent Supreme Court cases—and science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. It is particularly focused on clarifying the regulatory status of waters located in isolated places in a landscape, the types of waters with ambiguous jurisdictional status following the Supreme Court’s 2001 ruling in *SWANCC*, and small streams, rivers that flow for part of the year, and nearby wetlands, the types of waters affected by the Court’s 2006 ruling in *Rapanos*. In developing the proposed rule, EPA and the Corps relied on a draft synthesis of more than 1,000 published and peer-reviewed scientific reports; the synthesis discusses the current scientific understanding of the connections or isolation of streams and wetlands relative to large water bodies such as river, lakes, estuaries, and oceans.

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<sup>4</sup> Anthony Adragna and Amena Saiyid, “Republicans Contend EPA Overreached on Clean Water Act Jurisdiction Proposal,” *Daily Environment Report*, vol. 58 (March 26, 2014), p. A-7.

<sup>5</sup> U.S. Environmental Protection Agency, “Here’s What They’re Saying About the Clean Water Act Proposed Rule,” press release, March 26, 2014, <http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/3f954c179cf0720985257ca7004920fa!OpenDocument>.

<sup>6</sup> Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, “Definition of ‘Waters of the United States’ Under the Clean Water Act, Proposed Rule,” 79 *Federal Register* 22188-22274, April 21, 2014. The agencies recently extended the original 90-day comment period for an additional 90 days, to October 20, 2014.

<sup>7</sup> CWA §502(7); 33 U.S.C. §1362(7).

<sup>8</sup> For example, the reach of the Endangered Species Act (ESA) is affected, because that act’s requirement for consultation by federal agencies over impacts on threatened or endangered species is triggered through the issuance of federal permits.

The purpose of the report is to summarize current understanding of these connections, the factors that influence them, and the mechanisms by which connected waters affect the function or condition of downstream waters.<sup>9</sup> This draft assessment document is under review by EPA's Science Advisory Board (SAB), which provides independent engineering and scientific advice to the agency. A number of EPA's critics have suggested that the agencies should have deferred developing or proposing a revised rule until a final scientific review document is complete. In the preamble to the proposal, the agencies state that the rule will not be finalized until the SAB's review and a final report are complete. However, some have expressed concern that the final report will not be available during the public comment period on the rule.

Under the first section of the proposed rule, the following waters would be jurisdictional by rule, or, categorically jurisdictional:

- Waters susceptible to interstate commerce, known as traditional navigable waters (no change from current rules);
- All interstate waters, including interstate wetlands (no change from current rules);
- The territorial seas (no change from current rules);
- Impoundments of the above waters or a tributary, as defined in the rule (no change from current rules);
- Tributaries of the above waters (these waters are jurisdictional under current rules, but the term "tributary" is newly and broadly defined in the proposal); and
- All waters, including wetlands, that are adjacent to a water identified in the above categories (by including all *adjacent waters*—not simply *adjacent wetlands*, as is the case under current rules—the proposal is more inclusive than current rules in finding these waters categorically jurisdictional; they are considered jurisdictional under the proposed rule because they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas).

The concept of significant nexus is critical because courts have ruled that, to establish CWA jurisdiction of waters, there needs to be "some measure of the significance of the connection for downstream water quality," as Justice Kennedy found in the 2006 *Rapanos* case. He said, "Mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."<sup>10</sup> However, as EPA and the Corps observe in the proposed rule, significant nexus is not itself a scientific term, but rather a determination of the agencies in light of the law and science. Functions that might demonstrate significant nexus include sediment trapping and retention of flood waters. In the proposed rule, the agencies note that a hydrologic connection is not necessary to demonstrate significant nexus, because the function may be demonstrated even in the absence of a connection (e.g., pollutant trapping is another such function).

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<sup>9</sup> 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, September 2013, [http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/\\$File/WOUS\\_ERD2\\_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf).

<sup>10</sup> 547 U.S. at 784-785.

## "Other Waters"

Beyond the categories of waters that would be categorically jurisdictional under the proposed rule is a category sometimes referred to as "other waters." The regulatory term "other waters" applies to wetlands and non-wetland waters that do not fall into the category of waters susceptible to interstate commerce (traditional navigable waters), interstate waters, the territorial seas, tributaries, or waters adjacent to waters in one of these four categories. Current regulations contain a non-exclusive list of "other waters," such as intrastate lakes, mudflats, prairie potholes, and playa lakes (see **Table 1**). Headwaters, which constitute most "other waters," supply most of the water to downstream traditional navigable waters, interstate waters, and the territorial seas.

EPA and the Corps recognize that the Supreme Court decisions in *SWANCC* and *Rapanos* put limitations on the scope of "other waters" that may be determined to be jurisdictional under the CWA. Much of the controversy since the Court's rulings has focused on uncertainty as to what degree "other waters" are jurisdictional, either by definition/rule, or as determined on a case-by-case basis to evaluate significant nexus to a jurisdictional water. Under the 2003 and 2008 guidance, which remain in effect today, all "other waters" require a case-by-case evaluation to determine if a significant nexus exists, thus providing a finding of CWA jurisdiction. There likewise has been uncertainty as to what degree "other waters" that are similarly situated may be aggregated or combined for a significant nexus determination.<sup>11</sup> Since issuing these guidance documents, the agencies have not found jurisdiction over any "other water" based solely on significant nexus.<sup>12</sup> In the proposed rule, "other waters," including wetlands, that are adjacent to a jurisdictional water are categorically jurisdictional. Non-adjacent "other waters" and wetlands will continue to require a case-by-case determination of significant nexus. Also, the proposed rule allows broader aggregation of "other waters" that are similarly situated than under the existing guidance,<sup>13</sup> which could result in more "other waters" being found to be jurisdictional following a significant nexus evaluation.

Some in the regulated community have urged EPA and the Corps to provide metrics, such as quantifiable flow rates or minimum number of functions for "other waters," to establish a significant nexus to jurisdictional waters. The agencies declined to do so in the proposed rule, saying that absolute standards would not allow sufficient flexibility to account for variability of conditions and the varied functions that different waters provide.

The agencies acknowledge that there may be more than one way to determine which "other waters" are jurisdictional, and they are requesting comment on alternate approaches, combination of approaches, scientific and technical data, case law, and other information that would clarify which "other waters" should be considered categorically jurisdictional or following a case-specific significant nexus determination.

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<sup>11</sup> In the *Rapanos* ruling, Justice Kennedy stated that wetlands possess the requisite significant nexus if the wetlands, "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780.

<sup>12</sup> The agencies have found some "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 is a traditional navigable water. Personal communication, EPA Office of Water, May 23, 2014.

<sup>13</sup> Under the proposed rule, "other waters" may be aggregated for a significant nexus determination if they perform similar functions and are located sufficiently close together to be evaluated as a single landscape unit in the same watershed with regard to their effect on a jurisdictional downstream water.

In addition, EPA and the Corps are asking for public comment on whether to conclude by rule that certain types of "other waters"—prairie potholes, western vernal pools, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, and perhaps other categories of waters—have a significant nexus and are *per se* jurisdictional. These waters would not require a case-by-case analysis. At the same time, the agencies are asking for comment on whether to determine by rule that playa lakes and perhaps other categories of waters do not have a significant nexus and are not jurisdictional. If so determined, these waters would not be subject to a case-by-case analysis of significant nexus.

## Exclusions and Definitions

The second section of the proposed rule excludes specified waters from the definition of "waters of the United States." The listed waters and features would not be jurisdictional even if they would otherwise be included within categories that are jurisdictional. The exclusions are:

- Waste treatment systems, including treatment ponds or lagoons, that are designed to meet CWA requirements (no change from current rules);
- Prior converted cropland (no change from current rules);
- A list of features that have been excluded by long-standing practice and guidance and would now be excluded by rule, such as artificially irrigated areas that would revert to upland should application of irrigation water to the area cease (see **Table 1** for the full list); and
- Two types of ditches: ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial (i.e., permanent) flow; and ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, impoundment, or the territorial seas. Other ditches, if they meet the rule's definition of "tributary," would continue to be "waters of the United States"—a point of much controversy with some stakeholders.

The proposed rule makes no change to and does not affect existing statutory and regulatory exclusions: exemptions for normal farming, ranching, and silviculture activities such as plowing, seeding, and cultivation (CWA §404(f)); exemptions for permitting of agricultural stormwater discharges and return flows from irrigated agriculture; or exemptions for water transfers that do not introduce pollutants into a waterbody. Nor would it change permitting processes.

In the third section of the proposed rule, the agencies add definitions of several terms, including "tributary," "significant nexus," and "neighboring," "floodplain," and "riparian" as components of the existing term "adjacent." The terms "adjacent" and "wetland" are not redefined in the proposed rule. (See **Table 1**.)

EPA and the Corps believe that the proposed definitions of these terms are fully consistent with long-standing practice and historical implementation of CWA programs and that they are scientifically based.<sup>14</sup> Nevertheless, because definitions often are key to interpreting statutory law and regulations, some stakeholder groups have criticized the new definitions, suggesting that they

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<sup>14</sup> 79 *Federal Register* 22202, 22207.

would enable broader assertion of CWA jurisdiction than is consistent with law and science. Some critical attention has focused, for example, on the term “tributary,” previously defined in guidance but not in regulation. As noted above, tributaries are *per se* jurisdictional under the proposal, which defines the term to mean a water that is physically characterized by the presence of a bed and banks and ordinary high water mark (as currently defined at 33 C.F.R. §328.3(e)) and which contributes flow, either directly or through another water, to a jurisdictional water. In addition, under the proposal, wetlands, lakes, and ponds are tributaries—even if they lack a bed and banks or ordinary high water mark—if they contribute flow, either directly or through another water, to a jurisdictional water. Further, under the proposed definition, a water that otherwise qualifies as a tributary does not lose its status as a tributary if, for any length, there are one or more manmade breaks (e.g., dams) or natural breaks (e.g., debris piles), so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.<sup>15</sup>

Finally, the proposed rule includes two appendixes. One is an abbreviated, but lengthy, version of the scientific assessment document currently being reviewed by EPA’s Science Advisory Board, plus additional detail of the agencies’ reasoning concerning science in support of the proposed rule. The other is an analysis of relevant case law.

## Impacts of the Proposed Rule

The agencies acknowledge that the proposed rule would increase the categorical assertion of CWA jurisdiction, when compared to a baseline of current practices under the existing regulations and the 2003/2008 EPA-Corps guidance. This results in part from the agencies’ expressly declaring some types of waters categorically jurisdictional and not requiring case-specific evaluation of them (such as all waters adjacent to a jurisdictional water), and also by application of definitions, which would give larger regulatory context to some types of waters, such as tributaries.

The agencies believe, however, that the proposed rule does not protect any new types of waters that have not been protected historically and that it does not exceed the CWA’s coverage. That is, while it would enlarge categorical jurisdiction beyond that under the 2003 and 2008 EPA-Corps guidance, which the agencies believe was narrower than is justified by science and the law, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court’s narrow reading of jurisdiction. Others may disagree. Many stakeholders are concerned with what changes the proposed rule will make, how much additional waters will be considered categorically jurisdictional, and what additional costs will result.

The agencies’ proposed categorical assertion of waters that are jurisdictional, compared to existing regulation and current practice, does not identify specific waters that will be found to be jurisdictional—that is, this or that particular stream or pond—but the proposed rule attempts to draw more of a bright line of CWA jurisdiction than in the past.

In an Economic Analysis document accompanying the proposed rule, EPA and the Corps estimate that, overall, approximately 3% of U.S. waters would additionally be subject to CWA jurisdiction as a result of the proposed rule, compared with current field practice, and thus subject to CWA requirements. The estimated increase includes about 17% of “other waters” (discussed above)

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<sup>15</sup> 79 *Federal Register* 22199.

that were not jurisdictional under the 2003/2008 guidance, as well as the result of assuming that all tributary streams and adjacent wetlands are jurisdictional.<sup>16</sup>

According to the analysis, costs to regulated entities and governments (federal, state, and local) are likely to increase as a result of the proposal. Indirect costs would result from additional permit application expenses (for CWA Section 404 permitting, stormwater permitting for construction and development activities, and permitting of pesticide discharges and confined animal feeding operations [CAFOs] for discharges to waters that would now be determined jurisdictional) and additional requirements for oil storage and production facilities needing to develop and implement spill prevention, control and countermeasure (SPCC) plans. Federal and state governments would likely experience costs to administer and process additional permits. Other costs would likely include compensatory mitigation requirements for permit impacts (if applicable), affecting land developers and state and local governments. In all, the agencies estimate that incremental costs associated with the rule range from \$162 million to \$279 million per year.

The Section 404 program would see the greatest impact as a result of broader assertion of CWA jurisdiction. Most of the projected costs are likely to affect landowners and development companies, state and local governments investing in infrastructure, and industries involved in resource extraction.<sup>17</sup>

The agencies believe that indirect benefits accruing from the proposed rule include the value of ecosystem services provided by the waters and wetlands protected as a result of CWA requirements, such as habitat for aquatic and other species, support for recreational fishing and hunting, and flood protection. Other benefits would include government savings on enforcement expenses, because the rule is intended to provide greater regulatory certainty, thus reducing the need for government enforcement. Business and government may also achieve savings from reduced uncertainty concerning where CWA jurisdiction applies, they believe. In all, the agencies estimate that benefits of the proposed rule range from \$318 million to \$514 million per year. However, they note that “there is uncertainty and limitations associated with the results,” due to data and information gaps, as well as analytic challenges. The analysis does not quantify all possible costs and benefits, and values are meant to be illustrative, not definitive.<sup>18</sup> Overall, they conclude that benefits would exceed costs.

Unclear for now is a question of the extent to which case law construing the existing administrative definition of “waters of the United States” will continue to apply. Some of that case law has been in place for more than 35 years. The preamble to the proposed rule does not address this issue.

The agriculture sector has been vigorous in criticizing and challenging EPA regulatory actions that may affect the sector’s operations, making potential impacts of the proposed rule on agriculture a likely focus of controversy. One of the sector’s concerns about a new “waters of the United States” rule has been whether it would modify existing statutory provisions that exempt

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<sup>16</sup> U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, March 2014, <http://www2.epa.gov/uswaters/economic-analysis-proposed-revised-definition-waters-united-states>, p. 12.

<sup>17</sup> *Ibid.*, p. 32.

<sup>18</sup> *Ibid.*, pp. 21-22, 32.



“normal farming and ranching” practices from dredge and fill permitting or others that exclude certain agricultural discharges, such as irrigation return flow and stormwater runoff, from all CWA permitting. As described above, the proposed rule makes no change and does not affect these exemptions, which are self-implementing. An EPA fact sheet discusses the continued exclusions and exemptions.<sup>19</sup>

In addition, simultaneous with proposing the rule, EPA and the Corps issued an interpretive rule that identifies 56 conservation practices approved by the U.S. Department of Agriculture’s Natural Resources Conservation Service (NRCS) that additionally qualify for exemption under the CWA Section 404(f)(1)(A) exclusion of “normal farming and ranching” activities from Section 404 permit requirements and do not require determination whether the discharge involves a “water of the United States.” The 56, which are a subset of all NRCS conservation practices, are practices such as stream crossings and wetland restoration that take place in aquatic, riparian, or wetland environments. Through this interpretive rule, the agencies intend to resolve uncertainties about “normal farming” activities that are exempt from permitting when these conservation practices are used. In other words, effective immediately, producers who utilize any of the 56 identified practices according to NRCS technical standards need not seek a determination of CWA jurisdiction and need not seek a CWA permit. The three agencies also have signed a Memorandum of Understanding detailing implementation of the interpretive rule and identifying a process for reviewing and updating the list of qualifying NRCS conservation practices. Although the interpretive rule is already in effect, EPA and the Corps are accepting public comment until July 7, 2014.<sup>20</sup> The interpretive rule is intended by the three agencies to clarify agricultural practices that are exempt from CWA Section 404 permitting. Nevertheless, confusion remains about NRCS’s role in providing technical assistance to farmers with respect to 404 permitting.

## Conclusion

The Corps and EPA will accept public comment on the proposed rule for a total of 180 days, until October 20, 2014. As noted above, the agencies pledge that a final rule will not be promulgated before completion of EPA’s scientific assessment report; so, when that may occur is likely to be some months in the future.

The EPA Administrator recently stated at a congressional hearing that it generally takes about one year to finalize a rule. Complex and controversial rules can take much longer from proposal to promulgation. Once a rule is finalized, legal challenges are likely, possibly delaying implementation of any rule for years. New regulations may clarify many current questions, but they are unlikely to please all of the competing interests, as one environmental advocate observed.

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<sup>19</sup> See [http://www2.epa.gov/sites/production/files/2014-03/documents/cwa\\_ag\\_exclusions\\_exemptions.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf).

<sup>20</sup> Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, “Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices,” 79 *Federal Register* 22276, April 21, 2014. The list of practices, the Memorandum of Understanding, and the interpretive rule are available at <http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm>. The agencies recently extended the public comment period on the interpretive rule for an extra 30 days, from June 5 to July 7, 2014. USDA had no formal role in developing the Corps-EPA proposed rule, but it was among the federal agencies commenting on it during interagency review.

However, a rulemaking would only benefit wetlands if it did not reduce the jurisdiction offered by current regulations and if the Administration remained faithful to sound science. If politics were to trump science in the rulemaking process, the likelihood of such a protective rule would not be promising. Also, rules are subject to legal challenge and can be tied up in court for years before they are implemented.<sup>21</sup>

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<sup>21</sup> James Murphy, "Rapanos v. United States: Wading Through Murky Waters," *National Wetlands Newsletter*, vol. 28, no. 5, September-October 2006, p. 19.

**Table I. Comparison of “Definition of Waters of the United States” Regulatory Language**

Current Regulatory Language and Proposed Rule Announced by EPA and the Army Corps of Engineers March 25, 2014

Current Regulatory Language <sup>a</sup>	Proposed Regulatory Language (3/25/2014)	Comments <sup>b</sup>
(a) The term <i>waters of the United States</i> means	(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 <i>et seq.</i> and its implementing regulations, subject to the exclusions in subsection (b) of this section, the term “waters of the United States” means:	
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(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;	These waters are often referred to as “traditional navigable waters” (TNWs), which include but are not limited to the “navigable waters of the United States” within the meaning of Section 10 of the Rivers and Harbors Act of 1899. No change from the existing rule.
(2) All interstate waters including interstate wetlands;	(2) All interstate waters, including interstate wetlands;	These waters include tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and “other waters” that have a significant nexus to interstate waters. No change from the existing rule. Interstate waters would continue to be “waters of the United States” even if they are not navigable in fact and do not connect to such waters.
(3) 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 could affect interstate or foreign commerce including any such waters:	(7) On a case-specific basis, other waters, including wetlands, provided that 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 (a)(1) through (3) of this section.	In the existing rule, there is a non-exclusive list of the types of “other waters” which may be found to be “waters of the U.S.” The existing description is omitted under the proposal as unnecessary and confusing because it includes some waters that would be jurisdictional under one of the categories of waters that are jurisdictional by rule under the proposal (for example, an intermittent stream that meets the definition of tributary). Under the proposed rule, “other waters” are not jurisdictional as a single category but require a case-specific analysis of a significant nexus to a traditional navigable water, an interstate water, or the territorial seas. They may be evaluated either individually, or as a group of waters where they are determined to be similarly situated in a region. “In the region” means the watershed that drains to the nearest traditional navigable water, interstate

Current Regulatory Language <sup>a</sup>	Proposed Regulatory Language (3/25/2014)	Comments <sup>b</sup>
(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or		water, or the territorial seas through a single point of entry. How other waters are aggregated for a case-specific significant nexus analysis depends on the functions they perform and their spatial arrangement within the region or watershed. It is the landscape position within the watershed that is the determinative factor for the analysis, which will focus on the degree to which the functions provided by the other waters affect the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters.
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or		Current rule asserts jurisdiction more broadly than what is proposed; the proposal deletes language requiring that an “other water” be one “the use, degradation or destruction of which could affect interstate commerce” and replaces it with requirement that the “other water” meet the significant nexus standard. The agencies consider this a substantial change from the current rule.
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;		Specific examples are omitted in the proposed rule as unnecessary. The agencies say that the listing has led to confusion where it has been incorrectly read as an exclusive list.
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;	(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;	Impoundments of a traditional navigable water, interstate water, the territorial seas, or a tributary are jurisdictional by rule.
		As a matter of policy and law, impoundments do not de-federalize a water, even where there is no longer flow below the impoundment. That is, damming or impounding a water of the United States does not make the water non-jurisdictional.
(5) Tributaries of waters identified in paragraphs (a)(1)	(5) All tributaries of waters identified in paragraphs	Tributaries, as defined in the proposed rule, of a

Current Regulatory Language <sup>a</sup>	Proposed Regulatory Language (3/25/2014)	Comments <sup>b</sup>
through (4) of this section;	(a)(1) through (4) of this section;	traditional navigable water, interstate water, the territorial seas, or an impoundment would be jurisdictional by rule.
(6) The territorial seas;  (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.	(3) The territorial seas;  (6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and	Unless excluded under subsection (b) of the proposed rule, any water that meets the proposed definition of tributary is a water of the United States, whether it is perennial, intermittent, or ephemeral. The water may contribute flow directly or may contribute flow to another water or waters that eventually flow into a jurisdictional water. The tributary must drain, or be part of a network of tributaries that drain, into an (a)(1) through (a)(4) water.  “Tributary” is defined below.  Jurisdictional by rule; no change from the existing rule.  All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary would be jurisdictional by rule. Under the proposed rule, wetlands, ponds, lakes, and similar waterbodies that are adjacent to traditional navigable waters, interstate waters, and the territorial seas, as well as waters and wetlands adjacent to other jurisdictional waters such as tributaries and impoundments, would be jurisdictional by rule.
(8) Waters of the United States do not include prior converted cropland. <sup>c</sup> Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.	(b) The following are not “waters of the United States”  (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.	No change proposed.
Waste treatment systems, including treatment ponds or	(1) Waste treatment systems, including treatment	The agencies do not believe that omitting the

Current Regulatory Language <sup>a</sup>	Proposed Regulatory Language (3/25/2014)	Comments <sup>b</sup>
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. <sup>d</sup>	ponds or lagoons, designed to meet the requirements of the Clean Water Act.	parenthetical reference to 40 C.F.R. 423.11(m) is a change in substance to the waste treatment exclusion or how it is applied.
	(3) Ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial flow.	<p>Proposed rule would codify long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction.</p> <p>Excluded ditches must be dug only in uplands, drain only uplands, and have ephemeral or intermittent flow. 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.</p> <p>Other ditches, if they meet the new proposed definition of “tributary,” would continue to be waters of the United States.</p> <p>Ditches may function as point sources that discharge pollutants, thus subject to CWA Section 402.</p>
	(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.	<p>Proposed rule would codify long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction. These waters would not be jurisdictional by rule.</p> <p>Ditches that do not contribute flow to the tributary system of a traditional navigable water, interstate water, impoundment, or the territorial seas are not “waters of the United States,” even if the ditch has a perennial flow.</p> <p>Other ditches, if they meet the new proposed definition of “tributary,” would continue to be waters of the United States.</p> <p>Ditches may function as point sources that discharge pollutants, thus subject to CWA Section 402.</p>

Current Regulatory Language <sup>a</sup>	Proposed Regulatory Language (3/25/2014)	Comments <sup>b</sup>
<p>(b) The term <i>wetlands</i> means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.</p> <p>(c) The term <i>adjacent</i> means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”</p>	<p>(5) The following features: (i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease; (ii) artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; (iii) artificial reflecting pools or swimming pools created by excavating and/or diking dry land; (iv) small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; (v) water-filled depressions created incidental to construction activity; (vi) groundwater, including groundwater drained through subsurface drainage systems; and (vii) gullies and rills and non-wetland swales.</p> <p>(c) Definitions—</p> <p>(6) <b>Wetlands:</b> The term <i>wetlands</i> means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.</p> <p>(1) <b>Adjacent:</b> The term <i>adjacent</i> means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”</p>	<p>Proposed rule would codify long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction. These waters would not be jurisdictional by rule.</p> <p>No change proposed.</p> <p>Wetlands are ecosystems that often occur at the edge of aquatic (water, fresh or salty) or terrestrial (upland) systems. Wetlands typically represent transitional zones between aquatic and upland systems.</p> <p>Current rule limits consideration of adjacency to wetlands. Proposed rule would change “adjacent wetlands” to “adjacent waters” so that waterbodies such as ponds and oxbow lakes [a U-shaped body of water formed when a wide meander from a river is cut off to form a lake] as well as wetlands that are adjacent to jurisdictional waters are “waters of the U.S.” by regulation. The rule would include wetlands and other waterbodies that meet the proposed definition of adjacent, including “neighboring,” which is defined separately. Adjacent waters are those that provide similar functions which, <i>together with functions provided</i></p>

Current Regulatory Language <sup>a</sup>	Proposed Regulatory Language (3/25/2014)	Comments <sup>b</sup>
<p>(d) The term <i>high tide line</i> means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.</p>	No change proposed	<p><i>by tributaries to which they are adjacent</i>, have a significant nexus to traditional navigable waters (TNWs), interstate waters, and the territorial seas. “In the aggregate, all adjacent waters have a significant nexus with their downstream TNWs or interstate waters.” The lateral limits of an adjacent water, other than wetlands or tributaries, are determined by the presence of an ordinary high water mark (OHWM) without the need for a bed and banks. Deletion of parenthetical phrase in the existing rule is intended to ensure that all waters that meet the proposed definitions of “adjacent” are “waters of the U.S.” regardless of whether or not another adjacent water is located between those waters and the tributary.</p>
<p>(e) The term <i>ordinary high water mark</i> means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as 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</p>	No change proposed	



Current Regulatory Language <sup>a</sup>	Proposed Regulatory Language (3/25/2014)	Comments <sup>b</sup>
the surrounding area.	No change proposed	Waters, including wetlands, that are located within the riparian area or floodplain of an (a)(1) through (a)(5) water would be jurisdictional without a case-specific significant nexus analysis. Even if separated from such a water by natural or man-made features (e.g., a berm), the water would be adjacent and thus jurisdictional.
(f) The term <i>tidal waters</i> means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.	(2) <b>Neighboring:</b> The term <i>neighboring</i> , for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (a)(5) of this section, or waters with a surface or shallow subsurface hydrologic connection to such a jurisdictional water.	The term “riparian area” is used to help identify waters, including wetlands, that may be “adjacent” and would, therefore, be “waters of the United States” under the proposed rule. No uplands located in “riparian areas” can ever be “waters of the United States.”
	(3) <b>Riparian area:</b> The term <i>riparian area</i> means an area bordering a water where surface or subsurface hydrology influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.	The term “floodplain” is used to help identify waters, including wetlands, that may be “adjacent” and would, therefore, be “waters of the United States” under the proposed rule. No uplands located in “floodplains” can ever be “waters of the United States.”
	(4) <b>Floodplain:</b> The term <i>floodplain</i> means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.	This term has not previously been defined in any regulation or preamble.
	(5) <b>Tributary:</b> The term <i>tributary</i> means a waterbody physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 C.F.R. §328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through	Bed and banks and ordinary high water mark (OHWM) are features that generally are physical indicators of flow. OHWM generally defines the lateral limits of a water. In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the OHWM.
		Wetland tributaries are wetlands that are located

Current Regulatory Language <sup>a</sup>	Proposed Regulatory Language (3/25/2014)	Comments <sup>b</sup>
	<p>(3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams) or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made waterbody and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.</p> <p>(7) <b>Significant nexus:</b> The term <i>significant nexus</i> means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to a water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or close to a “water of the U.S.” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.</p>	<p>within the stream channel itself or that form the start of the stream channel.</p> <p>Man-altered and man-made tributaries perform many of the same functions as natural tributaries and provide connectivity between streams and downstream rivers.</p> <p>A significant nexus analysis may be based on a particular water alone or on the effect that the water has in combination with other similarly situated waters in the region. “Region” means the watershed that drains to a water identified in (a)(1) through (a)(3) through a single point of entry.</p> <p>Proposed rule adopts the concept of aggregating certain waters to determine whether they meet the “alone or in combination with similarly situated waters” test of Justice Kennedy. Waters must perform similar functions and be located sufficiently close together or close to a traditional navigable water, interstate water, or the territorial seas so that they can be evaluated as a single landscape unit with regard to their effects. Examining both functionality and proximity limits the “other waters” that can be aggregated for purposes of determining jurisdiction.</p> <p>Functions that might demonstrate significant nexus include sediment trapping and retention of flood waters. A hydrologic connection is not necessary, because the function may be demonstrated even in the absence of a connection (e.g., pollutant trapping).</p>

**Source:** Prepared by CRS.

**Notes:** The proposed rule that was announced on March 25, 2014, was published in the *Federal Register* on April 21, 2014 (79 *Federal Register* 22188-22274), which initiated a public comment period that will end on October 20, 2014.

- a. 33 C.F.R. 328.3, 40 C.F.R. 122.2, 40 C.F.R. 230.3, and 40 C.F.R. 232.2 (definition of “waters of the United States”). The term “navigable waters” is defined at 40 C.F.R. 110.1 (Discharge of Oil); 40 C.F.R. 112.2 (Oil Pollution Prevention); 40 C.F.R. 116.3 (Designation of Hazardous Substance); 40 C.F.R. 117.1(i) (Determination of Reportable Quantities for Hazardous Substances); 40 C.F.R. 300.5 and Appendix E 1.5 to Part 300 (National Oil and Hazardous Substances Pollution Contingency Plan); and 40 C.F.R. 302.3 (Designation, Reportable Quantities, and Notification).
- b. Comments in this table are drawn in large part from the preamble to the proposed rule.
- c. The term “prior converted cropland” is included in the U.S. Department of Agriculture’s administrative definition of the term “wetland” (see 7 C.F.R. 12.2).
- d. A definition of “waste treatment system” is found in EPA regulations (35 C.F.R. 35.905): “Complete waste treatment system. A complete waste treatment system consists of all of the treatment works necessary to meet the requirements of title III of the Act, involved in (a) The transport of waste waters from individual homes or buildings to a plant or facility where treatment of the waste water is accomplished; (b) the treatment of the waste waters to remove pollutants; and (c) the ultimate disposal, including recycling or reuse, of the treated waste waters and residues which result from the treatment process. One complete waste treatment system would, normally, include one treatment plant or facility, but also includes two or more connected or integrated treatment plants or facilities.”

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# ATTACHMENT 9



# **RECKLESS ABANDON:** How the Bush Administration is Exposing America's Waters to Harm



## August 2004

*Reckless Abandon* is a publication of Earthjustice, National Wildlife Federation, Natural Resources Defense Council, and Sierra Club. These organizations recognize the following individuals for their valuable work in researching, drafting, editing and/or compiling information and photographs for this report and thank them for making its publication possible: Navis Bermudez, John Garder, David Groves, Ed Hopkins, Cat Lazaroff, Robin Mann, Amy Maron, Joan Mulhern, Jim Murphy, Daniel Rosenberg, Julie Sibbing, Nancy Stoner, Ray Wan, and Maria Weidner.

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# EXECUTIVE SUMMARY

Every region of the country contains unique types of aquatic ecosystems — some so rare that they are found only in part of a single state. These wetlands, ponds, lakes, and streams support a wide variety of life, supply clean drinking water, sustain imperiled species, provide natural flood control, and perform a host of other functions important to both human and wildlife communities. These waters are varied in their names and descriptions — including arroyos, prairie potholes, intermittent and ephemeral streams, bogs, playa lakes, forested vernal pools, and desert springs — but all are an important part of our natural and cultural heritage.

More than thirty years ago, Congress enacted the Clean Water Act to make the nation's waters safe for fishing and swimming by eliminating water pollution at its source. Yet a new Bush administration policy is now placing many streams, wetlands, and other waters in serious danger of pollution and destruction, threatening not only these waters but also the larger rivers, lakes, and coastal waters into which they flow. This threat comes at a time when water pollution continues to be one of the nation's most serious environmental problems — and a central environmental concern for most of the public.

On January 15, 2003, the Bush administration announced a new policy directive designed to remove Clean Water Act protections for many streams, wetlands, ponds, lakes, and other waters. The policy — initiated through a joint memorandum issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) — effectively directed federal regulators to withhold protection from tens of millions of acres of wetlands, streams, and other waters unless they first get permission from their national headquarters in Washington, DC. The directive made clear that no prior permission is required for EPA and Corps field staff to ignore Clean Water Act protections and allow industrial dischargers, developers, and others to pollute, fill, or destroy these waters.

This report illustrates how federal officials are using the January 2003 policy directive to deny Clean Water Act jurisdiction over waters that had been included in the Clean Water Act's protective scope for over thirty years. The case studies in the report provide several examples of the Corps declining to enforce federal restrictions against water pollution in lakes, rivers, streams and wetlands across the country,



Wyman Meinzer

such as a 150-mile-long river in New Mexico, thousands of acres of wetlands in one of Florida's most important watersheds, headwater streams in Appalachia, playa lakes in the Southwest, a sixty-nine-mile long canal used as a drinking-water supply, and even an eighty-six-acre lake in Wisconsin that is a popular fishing spot. The implementation of the Bush administration's policy has effectively left all of these waters — and many, many more — without the Clean Water Act to protect them.

As the examples in this report demonstrate, the Bush administration's policy has given developers and other polluters a green light to ignore the Clean Water Act where it legally applies. The administration must immediately withdraw the January 2003 policy directive and replace it with clear instructions to Corps and EPA staff that they shall enforce existing Clean Water Act limits on water pollution to the full extent of the law. In addition, Congress should act to ensure that the nation's waters remain protected.

*Playas are critical habitat for millions of migratory birds.*



# BACKGROUND

Early in 2001, a bare majority of the U.S. Supreme Court ruled in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*<sup>1</sup> that the Clean Water Act does not apply to certain non-navigable, intrastate, “isolated” waters, *based solely on the use of these waters by migratory birds*. Nothing in the SWANCC decision compelled any change to the longstanding definition of waters of the United States used by both the EPA and the Corps. Nevertheless, the Bush administration has used the Supreme Court decision as an excuse to remove protections for all kinds of small streams, wetlands, lakes, and ponds by declaring them “isolated.”

*“These sound like wetlands with functions that should be protected, but alas...”*

– EMAIL MESSAGE BETWEEN  
CORPS EMPLOYEES  
IN SACRAMENTO DISTRICT

As scientists have extensively documented, very few waters are truly “isolated” from a hydrological perspective, since pollution in or destruction of even small wetlands, headwater streams, and seasonal waterways will have serious effects on the chemical, physical, and biological integrity of other downstream waters. But the January 2003 policy directive by the Bush administration is based on the assertion that many wetlands, headwater or seasonal streams, non-navigable ponds, and certain other waters should be treated as if they are “isolated.”<sup>2</sup> Under this policy, even some tributaries of rivers could be treated as “isolated.”<sup>3</sup>

The majority of states, many members of Congress, hunting and fishing groups, environmental organizations, respected scientists, and members of the public from across the country have strongly criticized the policy of removing federal Clean Water Act protections from these so-called “isolated” waters. However, the Bush administration’s policy directive is still in effect today. As a result, many waters are being left unprotected.

EPA itself has estimated that some 20 million acres of wetlands in the continental United States are at risk of losing Clean Water Act protections under the administration’s policy directive.<sup>4</sup> In addition, tens of thousands of miles of seasonal and headwater streams<sup>5</sup> as well as small lakes and ponds are also at risk of being deemed “isolated” and becoming discharge sites for toxics, sewage, animal waste, oil, or other pollution or being destroyed by dredge or fill activities.

If the Bush administration is allowed to continue to follow this policy instead of enforcing the Clean Water Act, more wetlands and small streams will be polluted or lost altogether, and the rivers, lakes, and coastal waters they feed will become more degraded. The administration must withdraw its policy directive and Congress must enact the Clean Water Authority Restoration Act (H.R. 962 and S. 473), reaffirming its original intent to protect all waters of the United States.

<sup>1</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* 531 U.S. 159 (2001). Five Justices joined the Court’s opinion; four strongly dissented.

<sup>2</sup> The January 2003 policy directive does not define the term “isolated,” but numerous industry groups pressing the Bush administration to restrict the scope of the Clean Water Act have taken the position that any waters that are not themselves navigable or do not have an above-ground, year-round, natural connection directly touching a commercially navigable waterway should be considered “isolated.” See, for example, the comments of the National Mining Association, the Independent Petroleum Association of America, National Association of Home Builders, and other industry groups on the January 2003 policy directive and proposed rulemaking. These comments are available on the Web at [www.epa.gov/edocket](http://www.epa.gov/edocket).

<sup>3</sup> See *Federal Register* notice on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991, 1997, January 15, 2003.

<sup>4</sup> Eric Pianin, “Administration Establishes New Wetlands Guidelines,” *The Washington Post*, January 11, 2003; p. A05. See also Douglas Jehl, “U.S. Plan Could Ease Limits on Wetlands Development,” *The New York Times*, January 11, 2003.

<sup>5</sup> *National Water Quality Inventory: 1998 Report to Congress*, 2000, Appendix A-1, <http://www.epa.gov/305b/98report/appenda.pdf>.

# THE CLEAN WATER ACT: A Landmark in Protecting the Nation's Waters

**T**hirty-two years ago, Congress overhauled the Federal Water Pollution Control Act, marking a national commitment to control water pollution.<sup>6</sup> In passing the 1972 law that became known as the Clean Water Act, Congress articulated one of the broadest ecosystem restoration and protection aspirations in all of environmental law. This objective — to reverse the many years of degradation of the nation's waters and to make them again capable of supporting aquatic life and recreation — was an enormous advancement from the narrow goals of simply limiting pollution in interstate waters or only protecting navigation that were in earlier laws.

The Clean Water Act established broad new authority to restore and protect *all* of the nation's waters. For the first time, the Act made certain that previously unprotected bodies of water such as wetlands, small streams, arroyos, prairie potholes, bogs, playa lakes, forested vernal pools, and desert springs were protected from unrestricted pollution and destruction.

Under the Clean Water Act, great advances have been made in reducing water pollution as well as

the rate of wetland destruction. This progress could not have been made unless the Clean Water Act was applied to a broad category of water bodies, not simply to interstate or commercially navigable waters. As such, the application of the law's protections — not only to rivers and oceans, but also to lakes, ponds, streams, wetlands, and other waters — has been critical to reducing water pollution.



Running Water Publications ([www.running-water.com](http://www.running-water.com))

<sup>6</sup> Pub. L. No. 92-500, 86 Stat. 816 (1972).

# Bush Administration Seeks to Narrow the Scope of the Clean Water Act

In January 2003, the Bush administration began a formal effort to restrict the types of waters protected under the Clean Water Act. It simultaneously issued two documents: an Advanced Notice of Proposed Rulemaking<sup>7</sup> to begin the process of changing Clean Water Act rules; and a new policy directive ordering federal regulators to immediately begin withholding protections for certain streams, wetlands, ponds, and other waters. Although the effort to formally change Clean Water Act rules was eventually abandoned after an enormous public outcry, the policy directive is still in effect today.

This directive, issued as a joint memorandum by the EPA and the Corps, directs federal regulators to withhold protection from tens of millions of acres of wetlands, streams, and other waters. The directive purports to provide guidance to federal regulators on how to interpret the 2001 U.S. Supreme Court *SWANCC* decision that held that Clean Water Act protections do not extend to certain non-navigable, intrastate, “isolated” waters, based solely on the use of these waters by migratory birds.

While the *SWANCC* opinion itself and many subsequent lower court decisions have made clear that *SWANCC* applies in only the very limited instances described above, the Bush administration has used this narrow court ruling as a pretext to undermine clean water protections for a much broader category of waters.

In a bold departure from existing Clean Water Act law, the policy directs regulators to stop extending Clean Water Act protections to any intrastate, non-navigable water — even streams — that they might consider “isolated.” The directive created an unfair and one-sided process whereby regulators must gain permission from headquarters in Washington, DC, before extending protections to any water that might be considered “isolated,” but are not required to defend or even document when they decide *not* to extend protections. The fact that EPA and Corps headquarters have received very few requests for approval of decisions to *affirmatively* regulate waters is indication that regulators are erring on the side of not protecting waters.<sup>8</sup>

## Specifically, the directive:

- Instructs federal agencies to stop protecting so-called “isolated” waters without first obtaining “project-specific” approval from Corps headquarters in Washington, DC. Agency personnel are not required to get permission to allow pollution or destruction of these waters without any federal permit or limitations.
- Tells staff not to assert Clean Water Act jurisdiction over so-called “isolated” waters on the basis that the waters are used as habitat for federally protected endangered or threatened species or to irrigate crops sold in interstate commerce—an unwarranted reversal of a Reagan-era policy.
- Presumes that all so-called “isolated” intrastate, non-navigable waters are no longer protected, even if the water is used in interstate commerce or if the pollution or destruction of the water would affect interstate commerce. This means the agencies’ default position is that such waters are not protected.
- Indicates that “generally speaking,” the agencies will continue to protect tributaries of navigable waters and wetlands directly adjacent to those tributaries. (The exceptions to this “generally speaking” policy are not spelled out, but our research suggests that this “general” protection has opened the way for many specific streams and other waters to be denied Clean Water Act safeguards.)

<sup>7</sup> 68 Fed. Reg. 1991, January 15, 2003.

<sup>8</sup> Additionally, it is disturbing to note that the instances where field staff have requested permission to assert protection over “iso-

lated” waters have been shrouded in secrecy, with few if any details publicly available regarding the water at issue, the basis for the field staff’s request, or the final determination by headquarters, including the basis for the final decision.

# Public Outcry Unleashed Over Policy

**R**eaction to the administration's plans to narrow the scope of the Clean Water Act was overwhelmingly negative. EPA and the Corps received approximately 135,000 comments, close to 99 percent of which opposed narrowing the scope of the Act.<sup>9</sup> Thirty-two states provided negative comments on the policy directive. Indeed, as many pointed out, most states lack the legal authority or the funding to protect waters should the federal government relinquish its authority.<sup>10</sup>

In addition to the states, a number of state associations and regional authorities, the scientific community, and a bi-partisan group of 219 U.S. Representatives and twenty-six U.S. Senators all urged the administration to abandon the rulemaking and withdraw the directive.

Unsurprisingly, the major trade associations representing polluting industries including mining, oil, developers, and agriculture took a different approach. Their consistent position is that, after the SWANCC decision, only “traditionally navigable waters” and their immediately abutting wetlands should remain protected under the Clean Water Act. This radical interpretation, if adopted by the Bush administration, would result in the complete loss of

*“Within the Midwest and northern plains, ‘fens’ constitute one of the rarest wetland types and provide habitat for a variety of rare plants and invertebrates. . . . It is likely that these rare wetland types would receive virtually no protection under . . . the current agency guidance.”*

-SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS



F.G. Courtney, National Wildlife Federation

*Hunters and anglers from across the southeast learn about the harm being caused to the nation's waters by the Bush administration's policy directive at a workshop sponsored by the Georgia Wildlife Federation, National Wildlife Federation, Trout Unlimited and Ducks Unlimited.*

Clean Water Act protections for the vast majority of the nation's streams and wetlands. In many states, more than 90 percent of the waters would lose all Clean Water Act protections.

As a result of the national outcry in support of clean water, in December 2003 the Bush administration announced that it was abandoning plans for a rulemaking to officially narrow the scope of the Clean Water Act. However, the policy directive was not withdrawn and EPA and the Corps have indicated that they have no plans to do so, effectively leaving many waters unprotected even though the law has not been changed.

<sup>9</sup> Personal communication with EPA staff.

<sup>10</sup> For example, only nineteen states currently have any state-level laws or programs that protect wetlands or other waters from dredge and fill activities not regulated by federal law, and most

of these are considerably weaker than the Clean Water Act. Little or no state protection is provided in the states with some of the largest at-risk wetland acreages, including Alaska, Georgia, Kansas, Louisiana, Mississippi, North Dakota, South Carolina, South Dakota, and Texas.

# Corps' Implementation of Policy Directive Results in Destruction and Pollution of Waters

To evaluate how federal regulators are implementing or applying the Bush administration's policy directive, Earthjustice, the Natural Resources Defense Council (NRDC), the National Wildlife Federation (NWF), and the Sierra Club submitted a series of Freedom of Information Act (FOIA) requests to Corps headquarters and its districts to determine the basis for their decisions not to enforce Clean Water Act protections over certain waters. In addition, our organizations have spoken with federal, state, and local officials and citizens around the country to learn more about waters being abandoned by the Bush administration.

As the following case studies illustrate, many of the decisions not to regulate particular water bodies violate the Clean Water Act and put important water resources at risk. This report understates the problem because several Corps districts do not appear to be documenting any of their decisions not to regulate and, in many cases, the Corps is not consulting or coordinating with EPA or the

Fish and Wildlife Service prior to abandoning protection for previously protected waters. One thing is certain: The result of the Bush administration's policy is that untold thousands of acres of wetlands, small streams, and other waters that provide critical environmental values are being opened up to destruction and degradation without any federal environmental review or limitations.

## GETTING THE PUBLIC'S INFORMATION OUT OF THE CORPS

On September 25, 2002, Earthjustice submitted a Freedom of Information (FOIA) request to Corps headquarters on behalf of itself, the Natural Resources Defense Council, the National Wildlife Federation, and the Sierra Club, seeking information regarding withdrawals of assertions of jurisdiction over any waters that were or would have been classified as jurisdictional prior to *SWANCC* (individual determinations) and information regarding the development of policy and guidance interpreting the ruling (policy development). While Corps headquarters provided some documents regarding policy development, it took nearly a year for it to begin providing a response to the request for individual determinations, even though the statutory deadline for responding to a FOIA request is twenty days.

In August 2003, the Corps began providing the responses from its eight divisions and forty-one districts. Ultimately, thirty-four districts responded to the 2002 request for individual determinations. The responses varied widely: some districts, such as Jacksonville, stated that they had no information; others, including Charleston and Savannah, provided thousands of pages of documents.

In light of the Bush administration's January 2003 policy directive, the groups sent a new FOIA request to individual Corps districts seeking non-jurisdiction determinations. Between August 2003 and April 2004, FOIA requests were sent to thirty-five of the districts. In some

instances, Corps districts have sent documents responding to the 2002 FOIA request together with the response to the more recent request.

In sum, the results of the 2003-2004 FOIA request, which are the primary basis of the case studies in this report, are as follows:

**Districts that have responded to the FOIA request and provided some or all files, in several instances after delays of several months:** Albuquerque, Anchorage, Buffalo, Honolulu, Huntington<sup>79</sup>, Jacksonville, Little Rock<sup>80</sup>, Los Angeles, Louisville, Memphis, Mobile, Nashville, New England<sup>81</sup>, New Orleans, New York, Omaha, Philadelphia, Pittsburgh, Portland, Rock Island, Sacramento, Seattle, St. Louis, St. Paul, Tulsa, Walla Walla, and Wilmington.

**Districts that have not yet responded:** Ft. Worth and Vicksburg.

**Districts that have refused to grant a fee waiver:** Chicago (denied Sierra Club appeal), Detroit (granting limited waiver in response to appeal), and Omaha (granted waiver after NWF appeal).

**Districts that either claim not to have documents or refuse to provide them:** Baltimore, Galveston (Earthjustice is administratively appealing), Kansas City (provided some documents but is still withholding 92 files as privileged), and San Francisco (called the FOIA request a "fishing expedition"; NRDC is administratively appealing their refusal).

<sup>79</sup> Response provided after Earthjustice appeal of initial "no documents" determination.

<sup>80</sup> Response provided following Sierra Club appeal of initial fee waiver denial.

<sup>81</sup> Summary information only; fee waiver withheld for files.

## NEW MEXICO RIVERS: Entire Basins Deemed “Isolated”

The Tularosa Basin, located in New Mexico and Texas, averages sixty miles in width and is approximately 150 miles long. Within it lies the Sacramento River and Tularosa Creek, the two major waterways of the region. Water is diverted from the Sacramento River and Tularosa Creek for community water supplies as well as for numerous private ranches and the U.S. Forest Service. In a region with scarce water supplies, the availability and quality of these surface waters is of critical importance.

Yet in June 2003, the Corps’ Albuquerque District ruled that the entire Sacramento River and all of its tributaries are non-jurisdictional under the Clean Water Act because they are part of a “closed basin” system.<sup>11</sup> This decision was in response to applications for Clean Water Act permits filed by the Federal Highway Administration, which wanted to realign a highway to cut across the Sacramento River in four places. The Albuquerque District told the Federal Highway Administration that no permits were required to discharge pollutants into the river.

Indeed, according to documents obtained under the FOIA, the Albuquerque District has refused to assert Clean Water Act protections in all other instances to date where the permit request would affect waters in so-called closed basin systems.

The New Mexico Department of Game and Fish has determined that 20 percent of New Mexico’s waters could be considered within a closed basin, including eighty-four miles of perennial streams and rivers and 3,900 miles of intermittent streams and rivers.<sup>12</sup> All of these waters could lose federal protections under the Albuquerque District’s interpretation of the policy directive. Not only is the Corps failing to consider other factors that could clearly justify maintaining protections for such waters — such as use for industry, recreation, and fishing — they are also failing to protect waters that cross state lines, such as the Tularosa Basin that is within both New Mexico and Texas. This is in direct contradiction to federal law, which has explicitly protected interstate waters since 1948.

*“It appears that no waters of the United States are located within the project site. However, a site visit was not made and waters of the United States may be located on the site.”*

—A “NO JURISDICTION”  
CALL BY THE CORPS’  
ALBUQUERQUE DISTRICT



Forest Guardians (<http://www.forestguardians.org/>)

*The U.S. Army Corps of Engineers Albuquerque District ruled that the entire Sacramento River, a water supply for communities, and all of its tributaries are non-jurisdictional under the Clean Water Act.*

<sup>11</sup> Corps letter declining jurisdiction over the Sacramento River (and all other waters within the Tularosa Basin), June 23, 2003.

<sup>12</sup> Letter from Larry G. Bell, Commissioner, New Mexico Department of Game and Fish, to U.S. EPA, April 15, 2003.

Other basins in New Mexico that have already been ruled non-jurisdictional include the Estancia, Jornada del Muerto, Mimbres, San Augustine, and Santa Clara Basins. On these same facts, basins the Corps could consider “isolated” in the future are the North Plains, Salt, and Southwestern Basins.

## STREAMS IN APPALACHIA: Obliterated by Coal Mining Industry

Appalachia's headwater tributaries are critically important to the health of all of the region's watersheds.<sup>13</sup> Even the Bush administration, in its recent draft Environmental Impact Statement on mountaintop removal mining, acknowledged that these headwater streams are of great ecological and hydrological importance and that filling them with mining waste has irreversible harmful effects<sup>14</sup> — effects the Corps is largely ignoring.

In June 2000, the coal mining company Beech Fork Processing, Inc., was given an authorization by the Corps under a nationwide general permit that allowed the company to dump waste generated by its massive mountaintop removal mining operation into streams and wetlands in Martin County, Kentucky. As originally approved, this project was to “permanently impact” (i.e., bury) more than six miles of jurisdictional waters in eastern Kentucky's Big Sandy River Basin, an area that includes the headwater tributaries of Little Beech Fork Creek, Rough Branch, Upper and Lower Twin Branch, Lick Fork, Rockhouse Fork, and Bent Branch.

The proposed destruction of six miles of streams brought a legal challenge from the non-profit group Kentuckians For The Commonwealth, which contended that filling streams with waste was illegal under the Clean Water Act. This case also drew the attention of the EPA, which took issue with the fact that Beech Fork had been granted a general permit

rather than an individual permit for such a large and destructive project.<sup>15</sup>

In February 2003 — just one month after the Bush administration released the policy directive — Beech Fork requested a revised authorization to bury streams at the Martin County mining site. The new proposal was similar to the project described in the company's original submission, but there was at least one glaring difference. While the company's mountaintop removal mining project remained virtually the same in its scope and magnitude, the “permanent impacts” to streams were now reported to be much less. Instead of more than six miles of jurisdictional waters destroyed, the permit now declared that barely two miles would be buried.

Unfortunately, the claim that fewer miles of *jurisdictional* streams would be destroyed appears not because fewer miles of actual streams would be destroyed. While the mining companies made some changes that reduced some stream impacts, the reduction in the estimate of stream miles affected was mostly due to new jurisdictional determinations made by the Corps that favored Beech Fork's dumping activities. That is, while the Corps had previously determined that the Beech Fork project would destroy more than six miles of U.S. waters, it revisited and reversed these determinations to find that less than one-third of the stream miles that would be destroyed were still covered by the Clean Water Act.

*This photo shows the point in the stream at which the mining company consultant tells the Corps to cut off Clean Water Act jurisdiction; this means the stream above that point can be filled with mining waste without any federal permits or environmental protections.*



U.S. Army Corps of Engineers Huntington District

On June 27, 2003, EPA wrote to the Corps stating its concern that stream impacts had been reduced due to changes in jurisdictional determinations and that Beech Fork's revised application "... indicates that the scope of jurisdictional waters has *decreased sharply* from previous Corps determinations."<sup>16</sup> EPA noted that some of the reduction in stream impacts occurred by moving the valley fills higher up in the valleys, but they concluded that the original jurisdictional determinations included more stream miles to be protected by the Clean Water Act than the revised proposal.<sup>17</sup>

Despite these concerns, on November 4, 2003, the Corps determined that the proposed project would permanently destroy only two miles of streams subject

to the Clean Water Act and left the rest of the streams without any federal protection.<sup>18</sup> In response to the EPA's comments, the Corps claimed that a portion of the difference in stream miles affected was due to changes in the acreage of the valley fills, but even by its reckoning, at least two miles of streams were simply deemed non-jurisdictional.

Unfortunately, this is not a solitary case of headwater streams being dropped from protections; as the groups' FOIA results examined to date show, the Huntington District has also redrawn the jurisdictional lines of the Clean Water Act to benefit other coal mining operations since the January 2003 policy directive was issued.



Vivian Stockman, Ohio Valley Environmental Coalition

**According to recent studies, coal companies have already buried over 1200 miles of streams in Appalachia with mountain-top removal mining waste.**

<sup>13</sup> See Testimony of J. Bruce Wallace, Professor, University of Georgia, before the U.S. Senate Committee on Environment and Public Works, June 6, 2002.

<sup>14</sup> Mountaintop Mining/Valley Fills in Appalachia, Draft Programmatic Environmental Impact Statement, 68 Fed. Reg. 32487, May 30, 2003.

<sup>15</sup> In May 2002, the Bush administration changed the Clean Water Act rule at issue and repealed a twenty-five-year-old ban on filling streams and other waters with industrial waste. A federal district court in West Virginia found that the dumping and the rule change were illegal in *Kentuckians For The Commonwealth v. Rivenburgh*, 204 F. Supp. 2d 927 (S.D.W.Va. 2002), but this decision was overturned by the Fourth Circuit Court of Appeals, 317 F.3d 425 (4th Cir. 2003).

<sup>16</sup> Letter from Thomas C. Welborn, Chief, Wetlands, Coastal and Watersheds Branch, EPA Region 4, to Ginger Mullins, Chief, Regulatory Branch, U.S. Army Corps of Engineers, Huntington, June 27, 2003 (emphasis added).

<sup>17</sup> *Id.*

<sup>18</sup> The Corps' decision is even more disturbing given that Beech Fork acknowledged in a 2002 letter to the Corps' Huntington District that it could avoid the use of U.S. waters for waste disposal by instead placing its waste in an old mining site, although it indicated its preference for the option of dumping the waste into streams. Letter from Paul B. Horn Jr., P.E., manager of engineering, Beech Fork Processing, Inc., to Ginger Mullins, Chief, Regulatory Branch, U.S. Army Corps of Engineers, Huntington, June 3, 2002.



## FLORIDA WETLANDS: Four Thousand Acres Sacrificed to Phosphate Mine

Florida is home to many of the country's important rivers and wetlands, including the Suwannee River and its environs, designated by the EPA as a "national showcase watershed."<sup>19</sup> The Suwannee flows from the Okefenokee Swamp in southeastern Georgia 235 miles to the Gulf of Mexico in northern Florida. Along the way, the river and its wetlands are used by people for recreation and provide important habitat for numerous wildlife species.

The Corps and EPA created a significant new threat to the health of the Suwannee watershed in March 2003 when they released a Final Supplemental Environmental Impact Statement approving the Potash Corporation of Saskatchewan's (PCS) proposed Hamilton County Mine expansion, which eliminated 3,997 acres of forested wet-

lands as "waters of the United States."<sup>20</sup> With this decision, the agencies dramatically reduced their calculation of federally protected wetlands — from 5,768 to 1,671 acres — associated with expanding the massive phosphate mining operation in the deep bend of the Suwannee River as it snakes through Hamilton County.

The Corps and EPA excluded as "isolated" and non-jurisdictional essentially all of the wetlands outside of the floodplain that they determined did not have a direct, hydrological link to the Suwannee River. The agencies ignored the presence of indicators that these wetlands function integrally with the Suwannee River ecosystem and have multiple existing and potential connections to interstate commerce.

First, the depressional pond-cypress and other forested wetlands and their surrounding uplands provide habitat for federally threatened and endangered species of wildlife. The presence of the endangered wood stork and the threatened eastern indigo snake and bald eagle are well documented. The wetlands are recognized as potential habitat for the federally endangered red-cockaded woodpecker and gray bat and the threatened flatwoods salamander. Prior to the issuance of the policy directive, presence of these species would have been a basis for protecting this 4,000-acre tract of wetlands.

Second, the agencies ignored the critical role played by the mosaic of forested depressional wetlands for maintaining the water quality and hydrology of the Suwannee River, a major navigational and recreational waterway that is already experiencing pollution problems, including excessive nutrients.

Third, the agencies dismissed the fact that these wetlands themselves "are or could be used by interstate or foreign travelers for recreational or other purposes" as provided in Clean Water Act regulations.<sup>21</sup>

In a letter to EPA regarding the January 2003 policy directive and proposed rulemaking, Florida's Department of Environmental Protection recognized the important ecosystem functions of the forested and other depressional wetlands in the Florida panhandle

*Hamilton County phosphate mining operation in progress, with nearby clay slurry pits representing post-mining wildlife habitat.*



Wyatt Gallery (www.WyattGallery.com)

<sup>19</sup> See <http://www.epa.gov/owow/showcase/suwanneeriver>.

<sup>20</sup> Final Supplemental Environmental Impact Statement on White Springs Agricultural Chemicals, Inc. (d/b/a PCS Phosphate-

White Springs), Hamilton County Mine Continuation Permitting, Hamilton County, Florida, March 26, 2003.

that might be excluded from Clean Water Act protection under the administration's policy changes. Their letter noted that these wetlands provide the following critical uses: drinking-water sources as well as shelter, resting, and feeding habitat for threatened and endangered species; collection and storage of overland flows of stormwater that can reduce flooding; and recreational opportunities, including birding and hunting. The Florida DEP raised the PCS mining site as a specific concern with respect to the agency's interpretation of the Clean Water Act, noting the similarity of the wetland features on the mine site to those of concern in the panhandle. The Florida DEP concluded that:

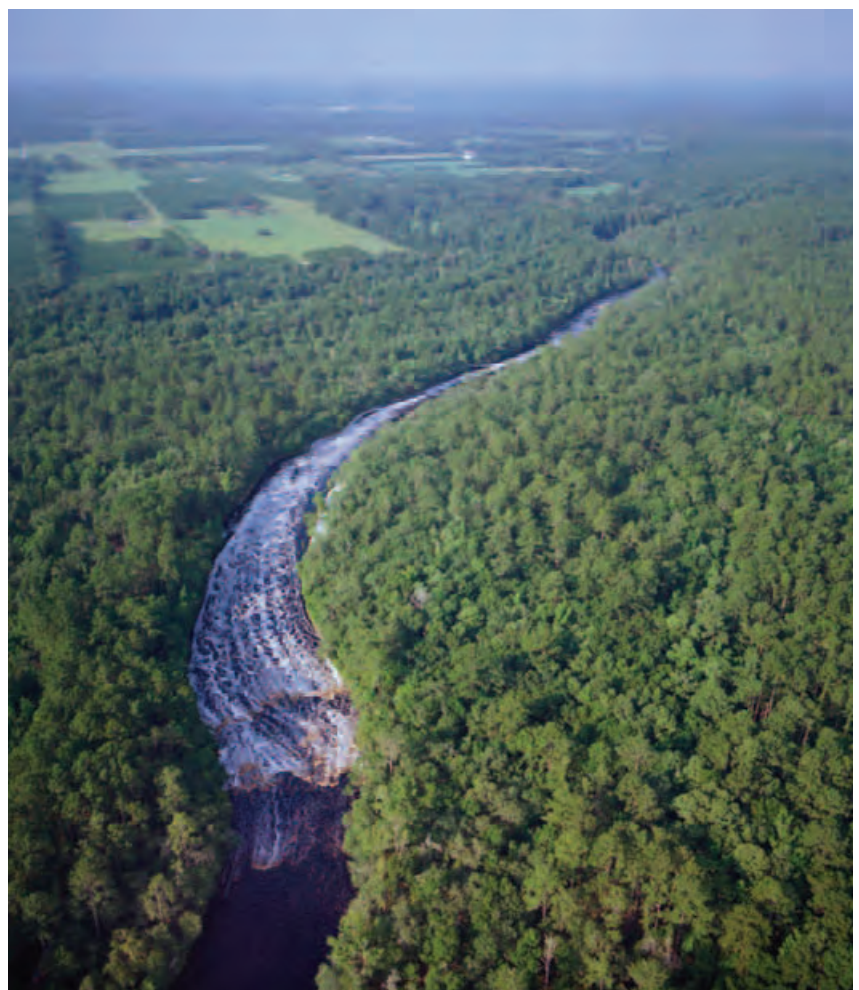
The "isolated" wetlands in the Florida panhandle are used by hunters, hikers, photographers, and bird-watchers, and for industrial purposes, such as collecting frogs and harvesting of cypress mulch by non-state residents who travel to Florida. "Isolated" wetlands also are used by migrating birds, which are protected under the Migratory Bird Treaty Act. We believe from the evidence in Florida and elsewhere that "isolated" wetlands do have a clear nexus to interstate commerce, and that the [Clean Water Act] should regulate alterations to all "isolated" wetlands that are navigable waters, that are adjacent to navigable waters, that could affect interstate or foreign commerce, or that could be used by interstate or foreign travelers for recreational or other purposes.<sup>22</sup>

The consequences of writing off the 3,997 acres of wetlands along the Suwannee as non-jurisdictional are profound. Under the Clean Water Act, pollution or destruction of waters of the United States must be avoided or minimized whenever possible; the Corps and the EPA's decision, in contrast, gives PCS a green light to destroy these wetlands without these considerations.

In addition, the federal non-jurisdiction determination for these pond-cypress and other so-called "isolated" wetlands relegates them to the substantially lower standard for mitigation under Florida's requirements, which allow the functions of these complex wetland systems to be "replaced" with the construction of the ponds

designed to hold the clay slurry generated by the mining operation. The federal agencies make the dubious argument in the impact statement that the clay slurry areas provide a net ecological benefit because they add aquatic habitat, since they are more continuously inundated than the more intermittently wet natural systems. The agencies justify this argument by noting that these slurry ponds attract a wider diversity of species, without any scientific support for the notion that introducing new species to a complex, natural system is an environmental benefit. The agencies note that wood storks have been sighted at the clay slurry areas, apparently suggesting that these artificial ponds are an ecologically equivalent substitute for the wetlands that existed before becoming polluted or filled by the phosphate mine.

*A stretch of the famous Suwannee River, with its forested corridor still intact, near the phosphate mine. (see opposite page)*



Wyatt Gallery (www.WyattGallery.com)

<sup>21</sup> 33 CFR 328.3(a)(3)(i).

<sup>22</sup> Florida Department of Environmental Protection letter to U.S. EPA, April 16, 2003.

## IDAHO'S LOST RIVER DRAINAGES: Lost for Good?

The southern portion of Idaho contains numerous creeks and rivers that do not flow on the surface beyond the borders of the state of Idaho. These are the Lost River Drainages. These watersheds contain seventy-three streams and rivers in an area that covers over 5,500 square miles, which is nearly as large as the states of Connecticut and Rhode Island combined.

The more prominent waters within this area are the Big Lost River, the Little Lost River, Birch Creek, Medicine Lodge Creek, and Mud Lake. The Big Lost River is 131 miles long, the Little Lost River is forty-two miles long, and Birch Creek is fifty-three miles long. Most of the creeks in the area are tributaries to one of these water bodies, which mainly have their headwaters in the high mountains of south-central Idaho and flow in a generally southern direction toward the Snake River.

Even though these are substantial water bodies, they do not flow through to the Snake River on the surface because of the underlying, highly fractured basalt that essentially swallows them up. But these rivers and creeks do feed the Snake River Plain Aquifer, a very large aquifer that supplies substantial flow to the Snake River.

Although all are intrastate water bodies, they all have significant ties to interstate commerce. For example,

the Big Lost River and Mud Lake are navigable waters, while the Little Lost River, Birch Creek, and Medicine Lodge Creek may be considered capable of supporting navigation, as each has enough flow to float a canoe or kayak. There are FERC-licensed hydroelectric projects on Birch Creek and Little Lost River. Most of these water bodies supply irrigation water for large areas of croplands, and the Big Lost River, Little Lost River, and Birch Creek support high-quality trout fisheries that attract anglers from all over the United States.

The Snake River Plain Aquifer, which is fed by these water bodies, supports much of the southern Idaho ecosystem, where the majority of the population of the state lives. Much of the irrigation water for farming in southern Idaho is drawn from wells sunk into the aquifer, and the Thousand Springs area near Twin Falls is the primary outlet for the aquifer. This area supports a world-class trout farming industry that utilizes the high flow of cold, clean water flowing out of the basalt cliffs into the Snake River. These springs contribute approximately 5,000 to 7,000 cubic feet per second of flow to the Snake River.

All of the drainages contain extremely important aquatic resources. In this very dry landscape, the lim-

*Birch Creek is one of several large watersheds in southern Idaho for which the Corps is contemplating removing all Clean Water Act protections.*

Bart Gamett, U.S.D.A. Forest Service



ited stream and wetland areas provide critical habitat for wildlife. Although less than 1 percent of Idaho's area is wetland, more than 75 percent of the state's wildlife species depend on these wetlands during some part of their lifecycle.<sup>23</sup>

In 2003, the Walla Walla District requested permission from Corps headquarters to declare the "isolated" Lost River Drainages of Idaho jurisdictional under the Clean Water Act. EPA Region 10 and the state of Idaho<sup>24</sup> were supportive of declaring the watersheds jurisdictional. The Corps' headquarters agreed that the Big Lost River and Mud Lake were jurisdictional based upon their navigability; however, they declined to approve a positive jurisdictional determination for the Little Lost River, Birch Creek, or Medicine Lodge Creek. A final decision by the Corps as to whether this vast network of springs, wetlands, streams, and rivers remains protected by the Clean Water Act is still pending nearly a year after the request was made by the Corps' district office.<sup>25</sup>

Several factors make the recalcitrance of Corps headquarters particularly troubling and underscore how the January 2003 policy directive has undermined protections for the nation's waters.

First, the Corps already determined back in 1985 that each of the Lost River Drainages, despite their intrastate and "isolated" nature, had sufficient connections to interstate commerce to support their protection as waters of the United States under the Clean Water Act. A report by the Corps, prepared at the request of the Fish and Wildlife Service to determine which "isolated" waters the Corps considered jurisdictional, describes "a list of isolated waters in the State of Idaho which were studied and determined to be subject to Clean Water Act jurisdiction ... because of their connection to interstate or foreign commerce. Following each water body listed is a brief summary



Bart Garnett, U.S.D.A. Forest Service

of the connection to interstate commerce which formed the basis for our determination."<sup>26</sup>

Under the heading "Birch Creek, Big Lost River, Little Lost River (Lemhi, Custer, Butte, and Clark Counties)," the report offers four bases for finding a sufficient connection to interstate or foreign commerce to warrant assertion of Clean Water Act jurisdiction: fishing, recreation, hunting, and agriculture. Similar bases for asserting jurisdiction over Medicine Lodge Creek are outlined elsewhere in the report.<sup>27</sup>

Second, while the Corps report does not go into great detail as to the types of fish and other species found in these waters, at least one fish species listed as threatened under the Endangered Species Act, the Bull Trout, is found in the Little Lost River. As previously discussed, prior to issuance of the administration's policy directive, the use of a water body by an endangered or threatened species as well as its use for irrigation of crops sold in foreign commerce were factors used by the Corps and EPA as bases for asserting jurisdiction over intrastate, "isolated" waters. By contrast, the policy directive explicitly prohibits use of these factors for asserting jurisdiction,<sup>28</sup> and thus removes two previously available grounds for protecting the Little Lost River, Birch Creek, and Medicine Lodge Creek.

***Bull Trout, a threatened species, is found in the Birch Creek watershed. Prior to issuance of the Bush administration's policy, presence of threatened or endangered species was a basis for extending Clean Water Act protection to these valuable waters.***

<sup>23</sup> The preceding summary is drawn from "Fact Sheet Re Idaho Lost River Drainages," August 2003, obtained via FOIA request to EPA Region 10.

<sup>24</sup> Idaho does not have its own permitting program that regulates dredge and fill discharges in so-called "isolated" wetlands, lakes, and closed basins nor in most headwaters. In addition, Idaho has a "no more stringent than" provision in its state law, which could be interpreted to bar state law from protecting waters not protected by the federal Clean Water Act.

<sup>25</sup> EPA considered making a "special case" of the matter and elevating the issue within both EPA and the Corps, an action reserved for the most contentious of jurisdictional disputes between the two agencies.

<sup>26</sup> "Initial Report on Isolated Waters in the State of Idaho Subject to Clean Water Act Jurisdiction," Walla Walla District, April 26, 1985.

<sup>27</sup> Id.

<sup>28</sup> See 68 Fed. Reg. 1997.

## FISH OR FOUL: Abandoning Wetlands Important to Fisheries on the Texas Coast



Carol Hollister, Member, Houston Yacht Club

White pelicans roosting at wetlands in Bayport, adjacent to Galveston Bay.

*“Indeed, these ‘isolated’ wetlands constitute the majority of the tributary system that cleanses and then delivers freshwater runoff into coastal plain streams and bays from undeveloped lands.”*

—TEXAS PARKS AND WILDLIFE DEPARTMENT

Along large parts of the Texas coast, the Corps is failing to enforce Clean Water Act jurisdiction over large tracts of unique and ecologically important wetlands that the agency previously considered protected by federal law. The destruction of these wetlands will lead to an overall deterioration of water quality in Galveston Bay, which produces two-thirds of Texas’s oyster harvest and one-third of the state’s recreational fishery and commercial shrimp catch.<sup>29</sup> Biologists in the state estimate that there are 3.3 million acres of freshwater wetlands on the Texas coastal plains, many of which are put in jeopardy if they are no longer protected by the Clean Water Act.<sup>30</sup>

The Galveston District ruled that the Clean Water Act no longer protects more than 120 acres of freshwater wetlands on the northwest shoreline of Galveston Bay. The decision came in response to an application by the Port of Houston Authority to build a shipping container terminal at Bayport, dredging new channels and filling wetlands. The 1,100-acre project site is filled with wetlands that are hydrologically connected by ditches and overland sheet flow to the Bay, and many are even within the Bay’s one-hundred-year floodplain.

According to Corps documents, there are approximately 146 acres of freshwater wetlands on the proposed project site. Originally, in 1999, the Galveston District found

102.2 acres of these covered by the Clean Water Act.<sup>31</sup> Then, in January 2004, after the policy directive was issued, the Corps issued its permit for the project that only considered 19.7 acres of these wetlands to be jurisdictional; the vast majority, 126.7 acres — *more than 86 percent of the freshwater wetlands on the site* — were stripped of protections afforded by the federal Clean Water Act because the Corps deemed them “isolated.”

Nonetheless, an extensive system of ditches on the Bayport site connects many acres of wetlands to traditional navigable waters. None of the wetlands connected by these ditches is more than one mile from a tidal water body. Some of the wetlands the Corps said were non-jurisdictional are within a few hundred feet of Galveston Bay or the Bayport navigation channel. The Corps even refused to consider Harris County Flood Control District topographic data establishing many of these wetlands to be in the 100-year floodplain.

The surrounding communities of Shoreacres, Seabrook, Taylor Lake Village, and El Lago — along with the Galveston Bay Conservation and Preservation Association, Houston Yacht Club, Galveston Bay Foundation, Gulf Restoration Network, Texas Committee on Natural Resources, and seafood professionals’ organization PISCES — opposed the wetlands destruction and brought suit, arguing that the Corps violated the Clean Water Act by ignoring multiple hydrological connections between the wetlands and the Bay.

In court, the Corps claimed that even if all 146 acres *were* jurisdictional, they were requiring enough mitigation that they would have approved Bayport’s application to fill all the wetlands anyway — an argument that completely ignores the way the Clean Water Act works. The Act requires the Corps to ensure that wetlands losses are avoided and minimized whenever possible; only when unavoidable losses will occur is mitigation required. Unfortunately, the district court chose to defer to the Corps’ decision.<sup>32</sup>

<sup>29</sup> See [www.gbpc.net/galveston\\_bay.htm](http://www.gbpc.net/galveston_bay.htm).

<sup>30</sup> Letter from Larry D. McKinney, Ph.D., Senior Director, Aquatic Resources, Texas Parks & Wildlife Department, to U.S. EPA, April 15, 2003.

<sup>31</sup> U.S. Army Corps of Engineers, File Memorandum: Port of Houston Authority, Jurisdiction Delineation Verification, April 21, 1999.

<sup>32</sup> *City of Shoreacres v. The Army Corps of Engineers*, H-03-2443 (S.D. Tex., May 4, 2004). This case demonstrates how destructive the impacts of the policy directive and the Corps’ decision making can be when courts defer to the agency and do not scrutinize its actions. The case is on appeal.

## PLAYA LAKES IN THE SOUTHWEST: Open for Pollution, No Questions Asked

Perhaps nowhere are wetlands more critical than in the arid Southwest and the southern plains of Texas. Along the vast Southern High Plains and Llano Estacado Plateau of Texas and New Mexico are some 22,000 shallow round basins, known as playa lakes. “When inundated, the [playa] basins form shallow lakes and wetlands that significantly increase plant and animal diversity in an intensively cultivated landscape.”<sup>33</sup>

Playas serve a number of crucial functions for people and for wildlife. Dry much of the year, they fill during rainstorms in May through September, capturing rainwater and helping to control flooding. Playas replenish the Ogallala Aquifer, the only source of water on Llano Estacado. If playas are depleted, existing water shortages in the region will become critical.

The playa lake region also offers critical habitat for waterfowl, shorebirds, raptors, and other migratory birds. Some 2 million ducks winter in the region, as do an estimated 400,000 to 500,000 sandhill cranes and similar numbers of geese. Between 12 and 15 million migrating birds are estimated to rest and refuel around playas. In the absence of playas, amphibians could not survive in the region.<sup>34</sup>

Although playas are specifically identified in the current Clean Water Act rules as waters of the United States, the Bush administration’s policy directive explicitly prohibits continued protection of these critically important wetlands.<sup>35</sup>

The Tulsa District, which is responsible for Clean Water Act permitting in Oklahoma and most of the Texas panhandle, has applied this directive vigorously. In response to permit applications, the district is routinely sending out a largely boilerplate letter declaring that the playa at issue is not jurisdictional under the Clean Water Act. Tulsa disclosed ten of these letters in response to the groups’ FOIA request — all of them virtually identical in content. Based upon the records provided, it appears that the Tulsa District is not conducting site visits or any

independent review whatsoever in considering whether any particular playa might have hydrological connections to other waters, be used in interstate commerce, be navigable part of the year, or exhibit other features that would form an additional basis for Clean Water Act jurisdiction.

In one instance, in June 2003, a playa that was slated to receive an average of more than a quarter of a million gallons per day of effluent from the City of Panhandle, Texas’s new wastewater treatment plant, was declared outside the scope of the Clean Water Act, in the same cursory manner of a form letter.<sup>36</sup>

In another instance, in February 2003, the Texas Department of Transportation (DOT), in materials provided as part of its preconstruction notification pursuant to a nationwide permit, stated its conclusion that the playa at issue *was* jurisdictional, because it was clearly hydrologically connected to a nearby playa. The Texas DOT stated: “[T]his lake lacks the ‘isolated hydrological’ status for it to be non-jurisdictional — meaning the Corps of Engineers has jurisdiction over this playa because it has a hydrological connection to a separate waterbody — a nearby playa located approximately 1,600 feet to the northwest.”<sup>37</sup> Nevertheless, the Corps’ only response was to send the DOT its standard boilerplate letter stating that the playa was “non-navigable, intrastate, and hydrologically isolated” and therefore not protected by the Clean Water Act.<sup>38</sup>

The importance of playas for replenishing the Ogallala Aquifer and as wildlife habitat in an otherwise barren landscape demonstrates the recklessness of the current policy directive, which opens these vital wetlands to unlimited discharges from an array of industrial polluters.



Wyman Meinzer

*Although dry for much of the year, after heavy rains many playas can support navigation by boat or canoe.*

<sup>33</sup> Eric G. Bolen, Loren M. Smith, and Harold L. Schramm Jr., 1989, *Playa Lakes: Prairie Wetlands of the Southern High Plains*, *BioScience* (9): 615-622.

<sup>34</sup> Beth Baker, *Wetlands at Risk: Imperiled Treasures*, a Report of the National Wildlife Federation and the Natural Resources Defense Council, July 2002.

<sup>35</sup> 68 Fed. Reg. 1997.

<sup>36</sup> Letter from Larry D. Hogue, P.E., Chief, Planning, Environmental and Regulatory Division, Tulsa District of the

Army Corps, to Scott W. Honeyfield, P.E. of Parkhill, Smith & Cooper, Inc. June 25, 2003.

<sup>37</sup> Pre-Construction Notification to the United States Army Corps of Engineers of Highway Work Planned in a Water of the United States, Texas Department of Transportation, February 2003. p.5.

<sup>38</sup> Letter from Army Corps, Larry D. Hogue, P.E., Chief, Planning, Environmental, and Regulatory Division, Tulsa District of the Army Corps, to Mr. Davis Melton, Texas Department of Transportation, February 27, 2003.

## WISCONSIN: Land O' Endangered Lakes?

Gurno Lake in Sawyer County, Wisconsin, is a twenty-seven-foot deep, eighty-six-acre lake that is popular with anglers for its populations of bluegill, largemouth bass, muskellunge, northern pike, and walleye.<sup>39</sup> There are two inlets that feed the lake; one originating from nearby Indian Lake, an eighty-four-acre lake with a boat ramp. Gurno Lake is surrounded on three sides by roads within one hundred yards from the lake's edge. According to the Wisconsin Department of Natural Resources' database of Wisconsin lakes, Gurno Lake has two roadside access points from these roads. Moreover, Gurno Lake is located in the Hayward Lakes region of northwestern Wisconsin, an area that draws international travelers for its fishing opportunities, including an annual muskie tournament.

While acknowledging that public access to the lake exists, in February 2003, the St. Paul District nonetheless decided "Gurno Lake is not and can not be used by interstate or foreign travelers for recreational or other purposes." No comment was made on the lake's obvious navigability or its adjacency to the navigable Indian Lake. The Corps ruled the entire lake non-jurisdictional; therefore, no permit was required for any work that would discharge pollutants

into Gurno Lake and its associated wetlands. Unfortunately, the St. Paul District's response to the groups' FOIA request did not include sufficient information to determine, for the majority of non-jurisdiction determinations (including this one), what the nature of the proposed impact was or even who was proposing the project.

The St. Paul District's adherence to the administration's policy directive (and erroneous interpretation of the *SWANCC* decision) has prompted it to determine that many waters, including other large lakes, are "geographically isolated."<sup>40</sup> For example, this district, which covers all of Minnesota and Wisconsin, has determined that no permit would be required to work in a 300-acre wetland complex as well as lakes larger than one hundred acres in size.

Through FOIA, the St. Paul District released files for 840 cases where it ruled that lakes, wetlands, and other waters were non-jurisdictional. Of these, only 68 percent had recorded the acreage of affected lakes or wetlands. Based on these cases alone, the St. Paul District has ruled that the Clean Water Act no longer covers more than 4,000 acres of waters.

*Eighty-six acre Gurno Lake was ruled non-jurisdictional by the St. Paul District. As a result, no Clean Water Act permit is required to dump animal waste, toxic chemicals or other pollutants into this lake.*



Bob Olsgard

<sup>39</sup> See [www.lake-link.com](http://www.lake-link.com).

<sup>40</sup> Other lakes in Minnesota and Wisconsin that have been ruled non-jurisdictional by the St. Paul District include Anderson

Lake, Colby Lake, Eagle Point Lake, Finnegan Lake, Fish Lake, Horseshoe Lake, Long Lake, Mann Lake, Markgrafs Lake, Powderhorn Lake, Powers Lake, S.E. Bass Lake, Staples Lake, Wakefield Lake, and Wright's Lake.

## EYES WIDE SHUT IN DELAWARE: Wetlands Left Unprotected Without Site Inspection

In January 2004, a seven-acre forested wetland just 1,800 feet from the Little River in Kent County near Dover, Delaware, was written off as non-jurisdictional by a senior staff biologist with the Philadelphia District of the Corps. The biologist's decision was based solely on information submitted by a consultant to the landowner. No site inspection was conducted.

The Corps' memorandum for the record characterizes the wetland as "isolated," "closed," "not navigable," and lacking a surface connection to other waters of the United States, including the Little River.<sup>41</sup> The consultant's report indicated that a small "remnant" ditch formerly connected the wetland to the Little River but that it had been severed with the construction of State Route 1, adjacent to the parcel.<sup>42</sup> The report included a hand-drawn map of the parcel, indicating the remnant ditch as terminating on the property.

As a result of the groups' FOIA request, the Philadelphia District's Office of Counsel was made aware of this case and arranged a site inspection. The inspection turned up an additional ditch — a "good-sized" one, according to a Corps official — which was not shown on the consultant's map and which flows along the eastern edge of the property adjacent to the wetlands.<sup>43</sup> The ditch drains to a culvert running under the highway and into a network of pipes, apparently discharging the flow to the nearby Little River.

The Corps official acknowledged the need to review the district's flawed "desk only" determination in this case, given the discovery of the direct hydrological link between the wetland and the river. Available information indicates that while the Philadelphia District rarely makes such non-jurisdictional determinations without a site visit, several other districts routinely rely solely on applicants' submissions to make determinations without leaving the office.



R. Mann

*Approximately one mile upstream from this location on the Little River, a ditch channels flow from the forested wetland that was declared "closed" and "isolated." From here, the Little River flows through the Little Creek Wildlife Area to the Delaware Bay.*

<sup>41</sup> John Brundage, Philadelphia District Senior Staff Biologist, "Memorandum for Record", January 14, 2004 (regarding project file #200300103).

<sup>42</sup> Michael F. Green, Environmental Consulting Services, Inc., "Wetlands Investigation of The Dover 8 Acres Site, Kent County, Delaware," January 10, 2003.

<sup>43</sup> Personal communication with Philadelphia District Office of Counsel, June 3, 2004.



## MORE DRIVING, LESS DRINKING IN CALIFORNIA: Highway Project Threatens Drinking Water Source

The Folsom South Canal is a man-made structure that conveys water diverted from Lake Natoma on the American River in California. After running for sixty-nine miles,<sup>44</sup> the canal terminates at a road crossing. The canal provides drinking water for the city of Rancho Cordova and serves other industrial and agricultural uses. According to a recent story in the local newspaper, water from the Folsom South Canal may also be sent to the East Bay Municipal Utility District in the future.<sup>45</sup>

Despite these domestic and commercial uses of the water, the Corps determined that the Folsom South

Canal was not a water of the United States under the Clean Water Act in response to a proposal to widen a highway in Sacramento County that crosses the canal. According to the Corps' April 15, 2003, letter to the county's Board of Environmental Review approving the project, the Sacramento District accepted the jurisdictional recommendations of the county's consultant, who decided that just under one-half acre of the Folsom South Canal could be filled without any Clean Water Act protections because it does not connect with other waters of the United States.

According to the consultants, the canal has no surface outlet. For this reason, the Corps ruled that the canal's waters are not protected by the Clean Water Act. The consultants' report states that:

The Folsom South Canal was not considered a Waters of the United States (*sic*) because the hydrology of the canal is artificially maintained, it does not connect Waters of the U.S., and it does not bisect other Waters of the U.S.<sup>46</sup>

The determination by the Corps to decline Clean Water Act jurisdiction over an entire canal ignores not only the fact that the water is large enough to be navigable, but more importantly, that the canal has several commercial uses and is even used as a source of drinking water. Clearly, even if the canal is man-made and has no outlet into another surface water, it has substantial connections to interstate commerce, and pollution of the water could cause serious threats to public health and welfare.<sup>47</sup> While the Corps claims that its determination that the canal is not a water of the United States is for purposes of "dredge and fill" permits under Section 404 and does not affect other parts of the Act, this argument does not hold water (see sidebar). Following the Corps' logic, the Folsom South Canal would not be protected against other forms of water pollution by the Clean Water Act.

*In spite of being a source for drinking water, the Corps determined that the Folsom South Canal was not a water of the United States under the Clean Water Act.*



Jan Fleckenstein

<sup>44</sup> [www.recreation.gov](http://www.recreation.gov)

<sup>45</sup> Molly Dugan, Officials, Cyclists Chart New Path for Folsom Canal, <http://www.SacBee.com>, January 3, 2004.

<sup>46</sup> Area West Environmental, *Wetland Delineation for the Hazel Avenue Widening Project*, March 2003, p. 11. The canal does go under (through culverts) and over (through raised structures) streams in the area, but apparently does not connect with these waters.

<sup>47</sup> In their 1998 water quality reports to EPA, states reported over 110,000 miles of canals and ditches as waters within their

borders. See *National Water Quality Inventory: 1998 Report to Congress*, 2000, Appendix A-1. This is a vast underestimation of the total number and extent of these man-made water bodies, as many states did not submit any information about these waters within their borders. Other states, however, reported a large number of canal miles — including eight that reported over 5,000 miles of canals and ditches in their state (California, Colorado, Florida, Georgia, Idaho, Louisiana, Montana, and Texas). Under the policy directive, these states' canals could lose all federal protections against increased water pollution.

## HEAR NO EVIL: Ignoring State Biologists in Georgia

When a Georgia state official went out to inspect a proposed 1,017-acre residential subdivision in Effingham County for water quality compliance, he was surprised by what he found. On July 2, 2003, the Corps issued a Joint Public Notice determining that 159 of the 270 acres of wetlands on the project site were protected under the Clean Water Act, and that a Section 404 permit would be required for any impacts to 5.74 acres of these jurisdictional wetlands, with the rest of the 159 acres to be set aside as mitigation. However, upon visiting the site, the state official found that there were more than 111 acres of wetlands that were likely to be affected by the project but were not discussed in the Corps' notice. More surprisingly, the state official found that for much of these wetlands there appeared to be "hydrological connectivity" to other waters.

Two major wetland areas were of concern to the state official. One was a forty-eight-acre wetland separated from other jurisdictional waters only by a one-lane dirt road. According to existing Clean Water Act rules, this barrier in itself is not enough to sever jurisdiction since "wetlands separated from other waters of the United States by man-made dikes or barriers ... are 'adjacent wetlands'" and therefore jurisdictional.<sup>48</sup>

The state official describes this wetland as "contiguous with the floodplain of [jurisdictional] Polly Creek" and questioned the Corps' determination.<sup>49</sup>

The other large wetland of concern was a twenty-eight-acre water body adjacent to a railroad track bed. According to the state official, "a swale in the road provides hydrological connectivity [from the jurisdictional wetlands] to the wetland on the project property."<sup>50</sup> Moreover, there is a sixteen-inch concrete culvert under the railroad track connecting the two wetlands.

These wetlands are contained within a pine plantation area contiguous to the floodplain of Polly Creek, which feeds the lower Savannah River. Wetland loss due to rapid development, like that proposed at the site, has been a major factor in the degradation of the lower Savannah River Basin, which provides habitat to abundant wildlife and provides anglers with a warm-water fishery of bass, pickerel, shad, and catfish. Unregulated wetland loss like the Corps is allowing in this area will lead to further sediment loading, algal blooms in the river, decreases in groundwater recharge — a pressing issue as drinking water becomes scarcer — habitat destruction, flooding, and stream turbidity.

### THE CLEAN WATER ACT HAS ONLY ONE DEFINITION OF WATERS ...

**M**any of the Corps' rulings included in this report — finding that certain wetlands, streams, ponds, canals, and other waters are no longer within the Clean Water Act's scope — contain the following clause (or something close to it):

*This disclaimer of jurisdiction is only for Section 404 of the federal Clean Water Act. Other federal, state, and local laws may apply to your activities.*

This statement misleads the public into thinking that there is a different definition of "waters of the United States" for purposes of dredge and fill activities permitted under Section 404 than exists for other parts of the Act. This is not true.

The Bush administration's January 2003 policy directive affects the application of the *entire* Clean Water Act, not just one part of the Act or a single permitting program. The Act has one definition of waters that applies to the entire law, so whichever streams, ponds, lakes, wetlands, and other waters the policy directive and Corps decisions leave unprotected could be left without any federal limits on polluting, filling, and destroying. Even the *Federal Register* notice announcing the Bush policy recognizes that it affects provisions limiting point sources of pollution, preventing oil spills, and the general provisions of the Act.

<sup>48</sup> 33 CFR §328.3(c).

<sup>50</sup> *Id.*, p. 2.

<sup>49</sup> Letter from Keith Parsons, Environmental Specialist with the Georgia Department of Natural Resources, to Chief of Regulatory of the Savannah District, September 8, 2003, p. 1.

## SOLOMON RIVER: Are Impaired Waters Getting Dirtier in Kansas?

Even the smallest of streams are sources of water for larger streams and rivers, which is why one of the central goals of the Clean Water Act is to eliminate water pollution at the source, even if that source is not a “navigable” water.

Nonetheless, in February 2004 — and based on the files provided through the groups’ FOIA request, relying on very little data — an intermittent stream running through a wetland that then flowed directly into a tributary of the Solomon River in north-central Kansas was found to be outside of the scope of the Clean Water Act by the Kansas City District of the Corps.

Electronic mail from a local Natural Resources Conservation Service (NRCS) employee requested an opinion from a Corps field office about the jurisdictional status of the intermittent stream and wetland. The NRCS official stated in the six-sentence message that the stream, or “drain,” lacked an ordinary high water mark and a defined bed and bank although it drained water from twenty-seven acres of lands, but then stated, “The unnamed intermittent stream is flows (*sic*) in to Battle Creek and this creek ends at the Solomon River less than one mile away.”<sup>51</sup>

Based only on this information and a 1:10,000 scale NRCS map,<sup>52</sup> the Corps official replied two business

days later, “From the information provided, I wouldn’t call this small drain a water of the U.S.” He attached to this message a form declaring the stream and wetland non-jurisdictional for the purposes of the Clean Water Act<sup>53</sup> — despite the fact that it was clear that the water from this stream went directly into the Solomon River through Battle Creek.

The lower Solomon River, into which Battle Creek flows, has the following designated uses, according to the Kansas Department of Health and Environment:

Expected Aquatic Life Support, Primary Contact Recreation, Domestic Water Supply; Food Procurement; Ground Water Recharge; Industrial Water Supply Use; Irrigation Use; Livestock Watering Use for Main Stem Segments.<sup>54</sup>

Unfortunately, because of poor water quality conditions, including elevated levels of fecal coliform and other bacteria, environmental standards to make these uses safe and healthy are currently not being met in the Solomon River. This pollution will undoubtedly be made even worse in the future by decisions — such as this one — that cut the river’s tributaries out of the Clean Water Act.

*A tributary to the Solomon River in north-central Kansas was found to be outside of the scope of the Clean Water Act by the Kansas City District of the Corps. Protections are lost for a river already impaired by fecal coliform and other pollutants.*



Roger Hrabec

<sup>51</sup> Email message from Gary Parks, Soil Scientist, Natural Resources Conservation Service, USDA, to Luke M. Cory, U.S. Army Corps of Engineers, February 13, 2004.

<sup>52</sup> Records supplied in response to the FOIA request do not include any other information considered by the Corps or indicate that a Corps site visit was performed.

<sup>53</sup> The Corps email message indicated that the wetland might be jurisdictional even if the stream was not, but then said, “we exempt all pit ponds even when they are constructed in wetlands.”

<sup>54</sup> See [http://www.kdhe.state.ks.us/tmdl/so/SolomonR\\_Cl.pdf](http://www.kdhe.state.ks.us/tmdl/so/SolomonR_Cl.pdf).

## TENNESSEE WILDLIFE: Victim to Airport Expansion

Abundant wildlife is known to utilize a ten-acre wetland complex between Cookeville and Sparta, Tennessee. Although these wetlands are hydrologically connected to navigable waters, the Corps recently determined that they do not fall within the scope of the Clean Water Act. The wetlands are home to barking tree frogs, raccoons, deer, ducks, geese, and the endangered gray bat and support a wide variety of vegetation, including the buttonbush, sedge, soft rush, and woolgrass. Habitat for the federally endangered yellow-eyed grass has also been documented at this site.

The wetlands are hydrologically connected to the Falling Water River, which feeds the Caney Fork and Cumberland rivers. The wetlands connect through a pipe to a clear running stream that flows underground and reemerges several times before finally flowing into the Falling Water River. This area of Tennessee abounds with recreational opportunities, boasting trails and spectacular vistas along Falling Water River.

Nonetheless, when the Upper Cumberland Regional Airport applied for a permit to fill and destroy these wetlands to expand its existing facility, the Corps incorrectly determined that the wetlands in question were not waters of the United States even though they are clearly connected by both surface water and groundwater to the



John Harwood

*This 10-acre wetland in the headwaters of Tennessee's Cumberland River provides habitat to a diversity of flora and fauna, including endangered species. Denied Clean Water Act protection, it will soon be paved over to make way for an airport expansion.*

Falling Water River. The Corps' decision was based entirely on a report produced by a consultant for the Upper Cumberland Regional Airport — a report that contained no information about the hydrology of the wetlands and instead used an economic analysis to justify the fill activities necessary for airport expansion.

## WEST VIRGINIA STREAMS: Out of Sight, Out of the Clean Water Act

In January 2004, the Pittsburgh District declared a small wetland, a 670-foot section of stream running from the wetland, and a one-acre pond in Berkeley County, West Virginia, to be outside the scope of the Clean Water Act. The pond appears to have been declared non-jurisdictional because a berm “separates the pond from downstream waters,”<sup>55</sup> although the Corps' regulations define “adjacent” to mean “bordering, contiguous, or neighboring.”<sup>56</sup>

The wetlands and stream were declared non-jurisdictional because the stream ran into a sinkhole and disappeared underground. In a telephone conversation, a Corps official acknowledged that such waters might ultimately resurface or otherwise hydrologically connect

to downstream waters. The Corps official also conceded that the Pittsburgh District does not require permit applicants to conduct dye tests to support claims of non-jurisdiction based upon the subsurface flow of streams and other waters.<sup>57</sup> Typically, a Corps official will conduct a site visit and walk “downstream” of the sinkhole where the stream disappears to see if it resurfaces, but if it does not show up within some indeterminate distance, it is deemed “isolated.”

Because of West Virginia's geology, many waters disappear underground only to re-surface elsewhere, including the well-known Lost River, which plunges underground for more than a mile.

<sup>55</sup> Delineation of Waters of the United States Fries Property, Approximately 34 Acres, Berkeley County, West Virginia. Prepared by Resource International, Ltd., October 8, 2003, p. 5.

<sup>56</sup> 33 CFR 328.3(c).

<sup>57</sup> Personal communication with Allen Edris, June 23, 2004.

## ALASKAN TREASURES UNDERVALUED: Pond's Connections to Marine Area Ignored

According to a city employee in Anchorage, Alaska, the Anchorage District of the Corps has applied arbitrary and troubling interpretations of what waters retain Clean Water Act protections around Anchorage since the policy directive was put in place. The Corps is also refusing to consult with EPA or local agencies, despite Anchorage's demonstrated interest in protecting its wetland resources. The employee says that the Corps' practices here "now make wetland decisions a nightmare."<sup>58</sup>

One example of the troubling actions of this district office is the case of Exxon Pond in Anchorage. According to the Corps, water from Exxon Pond flows northeasterly into a Municipality of Anchorage storm drain, and a second channel along the eastern edge of the pond flows into the same storm drain. This drainage network eventually flows into Knik Arm, an ecologically thriving, tidally influenced marine community supporting expansive habitat for waterfowl

and many other forms of marine life as well as providing outstanding scenic vistas for the surrounding communities. Three state refuges, popular with local hunters and tourists alike, are located on Knik Arm.

Despite clear surface connections explicitly acknowledged by the Corps, Exxon Pond was deemed "isolated" and outside the scope of the Clean Water Act by the Anchorage District when a development company applied to completely fill the pond and its associated wetlands to construct roads and other infrastructure.<sup>59</sup> This ruling was made even after a Corps employee visited the site and staked the wetlands and the channel connecting Exxon Pond to the storm drain network.<sup>60</sup> While filling the pond will likely cause damaging sediment to flow downstream, it is even more troubling to contemplate the damage that could have occurred had the company decided to dispose of waste oil or other pollutants in the pond in the absence of federal Clean Water Act protections.

*Knik Arm, an ecologically thriving, tidally influenced marine community could be harmed by sedimentation from upstream waters, such as Exxon Pond, which was found to be "isolated" and not protected under the Clean Water Act.*



www.UntraveledRoad.com

<sup>58</sup> Personal communication.

<sup>59</sup> The non-jurisdiction determination for Exxon Pond was made in 2001, before the policy directive was issued, but the result in this case is reinforced by the January 2003 policy directive, which

questions the basis for asserting jurisdiction based on connections between waters by man-made conveyances such as the stream between Exxon Pond and Knik Arm. See 68 Fed. Reg., 1997.

<sup>60</sup> Alaska District Memorandum for Record, prepared by Dave Casey, Project Manager, South Section, May 15, 2001.

## COLORADO: Bridge over Troubled Waters

The Lower Boulder Ditch is a major water conveyance that winds through the many farms around Longmont, Colorado. Irrigation equipment is a common sight along its route. Although called a ditch, it likely follows the path of former stream channels, and many other streams have been diverted to feed it, directing water to the agricultural producers of this dry landscape. The flow of the ditch is comparable to a large stream or small river. The banks of the ditch form what a consultant's report termed "self-sustaining healthy wetland communities" offering aquatic habitat for wildlife in the area.<sup>61</sup>

A consultant hired by Weld County noted that the Lower Boulder Ditch "flows from southwest to northeast into Boulder Creek and eventually into the South Platte River."

Nonetheless, when the county applied for a permit in August 2002 to replace two bridges over the ditch, the Omaha District of the Corps ruled that it was not a water of the United States. Despite the obvious connection to the South Platte River, the Omaha District decided that the Lower Boulder Ditch was "isolated" and beyond the scope of the Clean Water Act.<sup>62</sup>

Many farmers depend on this ditch as the lifeblood of their farming operations. Any disruption in the flow of this waterway or discharges of pollution into it could harm the livelihood of many who live and farm downstream, not to mention the impacts to fish and wildlife that rely on the few water sources and wetland habitats available in this arid region.

Unfortunately, this is not an isolated incident in the Omaha District, which is continuing to rule that many man-made streams, ditches, and canals are outside the scope of the Clean Water Act, no matter where the water eventually flows or how much there is of it, an interpretation promoted, rather than prohibited by the administration's policy.<sup>63</sup> As most natural waterways in the region have already been



Julie Sibbing, National Wildlife Federation

conveyed or converted into ditches or culverts for irrigation or flood control purposes, this could have catastrophic effects on the region's water resources. Additionally, the Omaha District is not regulating reservoirs or lakes they deem to be geographically "isolated," even if they are large, navigable, or have potential for interstate commerce.<sup>64</sup>

*The flow of the Lower Boulder Ditch, similar to a large stream or small river, eventually flows into the South Platte River.*

<sup>61</sup> Darcy Tiglas, "Wetland Delineation at a Bridge Replacement Site Along Lower Boulder Ditch at Bridge 3/12B," August 6, 2002.

<sup>62</sup> This "no jurisdiction" decision was made shortly before the Bush administration published the policy directive in the Federal Register, but the directive explicitly encourages field staff to question federal Clean Water Act protections for ditches and other man-made (or enhanced) stream channels such as the Lower Boulder Ditch. See 68 Fed. Reg at 1997.

<sup>63</sup> Other streams, creeks, and ditches ruled non-jurisdictional by the Omaha District include Brantner Ditch, Brighton Lateral

Ditch, City Channel Creek, Croak Canal, Denver Hudson Canal, Farmer's Independent Ditch, Highland Ditch, Irrigation Tailwater Ditch, Lake Canal, Leyner Cottonwood No.1 Ditch, Longmont Supply Ditch, Oligarchy Ditch, Tuck Lateral, Twomile Canyon Creek, Union Ditch, and Wadsworth Ditch.

<sup>64</sup> Such water bodies that have been ruled non-jurisdictional by the Omaha District include Croke Reservoir, Eastlake Reservoirs 2 & 3, Hayes Lake, Independent Reservoir, Ketring Lake, Lutz Reservoir, Milton Reservoir, Ward Lake, and Westerdol Lake.

# ENVIRONMENT AT RISK

## from Implementation of Policy Directive

**T**he case studies offered in this report are merely the tip of the iceberg of the overall wetlands, streams, lakes, and other waters that have been wrongly denied Clean Water Act protection under the Bush administration's January 2003 policy directive. We have reviewed many more cases where Corps districts across the country have ignored Clean Water Act requirements. In case after case, the Corps has blatantly disregarded evidence that destruction of these waters violates the Clean Water Act and threatens public health, our natural environment, and the U.S. economy.

Our nation's network of rivers, lakes, and streams originates from a myriad of small streams, springs, and wetlands — many so small they do not appear on any map. Yet these headwater streams and wetlands exert critical influences on the character and quality of downstream waters. The natural processes that occur in such headwater systems benefit humans by mitigating flooding, maintaining water quality and quantity, and recycling nutrients. According to many studies, small, or headwater, streams make up 80 percent of the nation's stream network.<sup>65</sup> The health of these small streams and wetlands is critical to the health of the entire river watersheds.

Small streams and wetlands also offer an enormous array of habitats for plants and animals. Such small freshwater systems provide animals with shelter and food, protection from predators, spawning sites, nursery areas, and travel corridors through the landscape. Many species depend on small streams and wetlands at some point in their life history. For example, headwater streams are vital for maintaining many of America's fish species, including trout and salmon.

Further abandoning these waters to destruction and degradation under the Bush administration's policy will:

- **Increase water pollution.** EPA's most recent data show that the nation's waters are already getting dirtier and almost half of the rivers, streams, lakes, and coastal estuaries are not safe for fishing, swim-

ming, or boating.<sup>66</sup> Even where waters are deemed fishable, in many cases, EPA has issued dietary restrictions on fish consumption.

- **Exacerbate flooding.** Wetlands — nature's sponges — will no longer be available to absorb excess water. When wetlands are destroyed they are often replaced by impermeable paving or structures that increase runoff.
- **Threaten public health** when citizens drink water contaminated with bacteria, pathogens, toxics, and other pollutants that would no longer be regulated for all types of industrial discharges. It will also increase treatment costs to remove pollutants.
- **Deplete drinking-water sources** that are recharged by playa lakes and other wetland and stream systems.
- **Reduce and potentially extinguish endangered or threatened wildlife species** — 43 percent of which rely on wetlands for survival.
- **Place at risk the breeding habitat used by over half the ducks in North America.**
- **Eliminate many seasonal wetlands** that serve as nurseries for juvenile frogs, toads, salamanders, and other species as well as small streams that are essential to sustain healthy populations of fish, amphibians, and other aquatic species.

<sup>65</sup> Judy L. Meyer, et al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, September 2003.

<sup>66</sup> EPA, *National Water Quality Inventory Report to Congress: 2000 Report*.

# BUSH ADMINISTRATION'S ACTIONS Contrary to Its Own Justice Department's Arguments and Court Rulings

**T**he Supreme Court's *SWANCC* decision is a misinterpretation of the Clean Water Act and Congressional intent, yet it is a very narrow opinion. As summarized by the five to four majority: "We hold 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,' ... exceeds the authority granted to respondents under §404(a) of the CWA."<sup>67</sup> The decision only invalidated the policy of asserting Clean Water Act protections over so-called "isolated" waters solely because the water is used as habitat for migratory birds that cross state lines.

The authors of the Bush administration's January 2003 policy directive, however, took great liberties with the *SWANCC* opinion to reach their goal of leaving many waters used for other purposes, and connected to larger water bodies, without federal protections.

Not only is the policy directive flatly inconsistent with the *SWANCC* opinion itself, it is contradicted by the Bush administration's own lawyers' interpretation of current law and the overwhelming majority of federal courts that have ruled on the scope of the Clean Water Act in the wake of the *SWANCC* decision.

As represented in at least two-dozen briefs filed since *SWANCC*, the Department of Justice (DOJ) has argued for a much narrower interpretation of that decision than the one EPA and the Corps concocted to justify the January 2003 directive. Rather than finding that the definition of waters of the United States needs to be changed or reinterpreted, as the Bush administration has done, the DOJ has steadfastly and successfully argued in its briefs in federal court that *the agencies' existing definition of waters of the United States is valid and, indeed, required to achieve the purposes of the Clean Water Act.* In the vast majority of cases, the federal courts have agreed, ruling that the Clean Water Act continues to protect these waters.



Bart Gamett, U.S.D.A. Forest Service

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<sup>67</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. at 174 (internal citations omitted).



For example, in disputing a lower court's ruling, the DOJ's brief to the Fourth Circuit Court of Appeals in the case *United States v. Newdunn* argues that:

The [district] court fails to explain *why or how* Congress could have intended to regulate discharges into all primary tributaries but not secondary tributaries, regardless of their significance to the traditional navigable waters into which they flow, *directly or indirectly*.<sup>68</sup>

In that case, the Newdunns claimed that the Corps had no jurisdiction under the Clean Water Act to require them to obtain a permit to fill approximately 38 acres of wetlands — with over 2.4 miles of intermittent natural streams and man-made ditches — that flowed into a navigable river, Stony Run. The district court held that these waters were not protected; DOJ disagreed, noting that the federal government:

... has consistently construed the Act to encompass wetlands adjacent to tributaries to traditional navigable waters — be they primary, secondary, tertiary, etc. — since 1975, a construction that comports with Congress's intent to control pollution at its source and broadly protect the integrity of the aquatic environment.<sup>69</sup>

The Fourth Circuit of the U.S. Court of Appeals agreed with the Justice Department and overturned the district court's ruling. The U.S. Supreme Court refused to hear the Newdunns' appeal.

In another influential case, *United States v. Rapanos*, the Sixth Circuit Court of Appeals overturned a lower court decision and ruled that the Clean Water Act continued to protect wetlands adjacent to a non-navigable man-made drain which eventually flowed into the Kawkawlin River and ultimately into Saginaw Bay, a part of Lake Huron. In this case, the property owner, Rapanos, filled several acres of wetlands on his property in flagrant disregard of a state agency determination that he needed a permit to do so. He was convicted of violating the Clean Water Act, but his conviction was sent back to district court on appeal for consideration in

light of *SWANCC*. The district court overturned Rapanos's conviction, saying the wetlands on his property were no longer covered under the Clean Water Act.

The federal government appealed. In its brief, DOJ contended:

To exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would *disserve the recognized policies underlying the Act, since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters*.<sup>70</sup>

The Sixth Circuit Court of Appeals agreed with the DOJ, ruling that:

Although the [*SWANCC*] opinion limits the application of the Clean Water Act, the Court did not go as far as Rapanos argues, restricting the Act's coverage to only wetlands directly abutting navigable water. ... The evidence presented in this case suffices to show that the wetlands on Rapanos's land



Running Water Publications (www.running-water.com)

<sup>68</sup> *United States v. Newdunn Associates*, 195 F. Supp. 2d 751 (E.D. Va. 2002). Emphasis added.

<sup>69</sup> Brief for the United States in *United States v. Newdunn* (emphasis added).

<sup>70</sup> Brief for the United States in *United States v. Rapanos* (emphasis added).

are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two . . . Any contamination of the Rapanos wetlands could affect the Drain, which, in turn, could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos’s land is a fair extension of the Clean Water Act.<sup>71</sup>

The court affirmed the policy need for broad Clean Water Act protection, stating, “[T]he Clean Water Act cannot purport to police only navigable-in-fact waters in the United States in order to keep those waters clean from pollutants.”<sup>72</sup> The court further stated, “Although wetlands are not traditionally navigable-in-fact, they play an important ecological role where they exist.”<sup>73</sup> The U.S. Supreme Court has also declined to review this circuit court’s decision.

Another significant decision is the U.S. Court of Appeals for the Ninth Circuit, *Headwaters, Inc., v. Talent Irrigation District*.<sup>74</sup> The court considered whether a local irrigation district needed a permit under the Clean Water Act’s National Pollution Discharge Elimination System (NPDES) to spray pesticides in non-navigable irrigation canals. The court found that the canals were not “isolated” and were connected as tributaries to other waters of the United States because they “receive water from natural streams and lakes and divert water to streams and creeks.” The court further concluded that even tributaries that flow intermittently are waters of the United States. In explaining its reasoning, the court quoted favorably from an Eleventh Circuit decision:

Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.... It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a “water of the United States” under the Act.<sup>75</sup>



Bart Garnett, U.S.D.A. Forest Service

The DOJ’s briefs and the federal courts’ near-unanimous agreement that the *SWANCC* decision is narrow and the scope of the Clean Water Act remains broad underscores the legal bankruptcy of the Bush administration’s policy of denying Clean Water Act protections for non-navigable streams, wetlands, ponds, canals, and other waters.

<sup>71</sup> *United States v. Rapanos* 339 F. 3d at 453 (citations omitted).

<sup>72</sup> *Id.*, at 451.

<sup>73</sup> *Id.*

<sup>74</sup> 243 F. 3d 526 (9th Cir. 2001).

<sup>75</sup> *Id.*, at 534, quoting favorably from *United States v. Eidson*, 108 F. 3d 1336, 1342 (11th Cir. 1997).

# BUSH ADMINISTRATION MUST RESCIND ITS POLICY DIRECTIVE and Fully Enforce the Clean Water Act

As the case studies described above clearly demonstrate, the Bush administration is using its policy directive to undermine key environmental protection requirements of the Clean Water Act, even in the face of court opinions that require a narrow interpretation of the SWANCC decision. The directive is allowing federal regulators to make decisions every day to allow dredging, filling, and polluting of waters that clearly fall under the Act's jurisdiction. Each day that this reckless and illegal policy remains in place, our nation's water quality, wildlife habitat, and groundwater supplies continue to deteriorate, facing permanent destruction and degradation.

*"[B]y issuing the joint guidance memorandum and proposing new rule-making, the agencies have gone well beyond their obligation under the SWANCC decision and consequently initiated a major federal action that may place them in violation of NEPA if not the CWA."*

-ARKANSAS GAME AND FISH COMMISSION

The United States has lost over half of its original wetlands since European settlement. The U.S. Fish and Wildlife Service estimates that — even prior to the Bush administration's January 2003 policy directive — wetlands were being destroyed at a rate in excess of 58,500 acres per year or *160 acres of wetlands every day*.<sup>76</sup> Approximately 45 percent of the nation's waters still do not meet water quality standards for supporting fishing and swimming.<sup>77</sup>

The nation cannot afford to needlessly sacrifice any more valuable wetland acreage or the health of rivers, streams, lakes, and coastal waters to a flawed and destructive federal policy. For our nation's waters to be truly protected from pollution and degradation, immediate action is needed.

To start, *the Bush administration must rescind its January 2003 policy directive immediately* and replace it with instructions to agency staff to enforce Clean Water Act protections to the full extent of the law. Additionally, all Corps districts need to maintain public transparency in their decision-making and be held

accountable for their decisions. Currently it is virtually impossible for citizens to get clear, accurate, and complete information regarding waters in their area that are being denied Clean Water Act protections.<sup>78</sup>

Finally, Congress needs to pass the Clean Water

Authority Restoration Act (H.R. 962 and S. 473) to reaffirm the Act's original intent to protect all waters of the United States, so that we may restore the chemical, physical, and biological integrity of our nation's waters.



Wyman Meinzer

<sup>76</sup> U.S. Department of the Interior, Fish and Wildlife Service, Status and Trends of Wetlands in the Conterminous United States 1986 to 1997, 2000.

<sup>77</sup> Statement of G. Tracy Mehan III, Assistant Administrator for Water, U.S. EPA, Before The Committee on Environment and Public Works, United States Senate, October 8, 2002.

<sup>78</sup> In response to an August 8, 2003, request from EPA to the Corps, Acting Assistant Secretary of the Army John Paul Woodley Jr. agreed that, for a one-year period beginning in

April 2004, the Corps would post summary information about its decisions to decline Clean Water Act protections over waters on its websites and otherwise make this information publicly available. See letter from John Paul Woodley Jr. to G. Tracy Mehan III, Assistant Administrator for Water, EPA, October 27, 2003. While the posting of data is an improvement over having no data available (other than through FOIA requests), in almost all instances the information being provided is missing most key information about the basis for ruling that a water is no longer jurisdictional and relevant supporting documents.

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(202) 667-4500  
[www.earthjustice.org](http://www.earthjustice.org)

### **National Wildlife Federation**

11100 Wildlife Center Drive  
Reston, VA 20190-5362  
(800) 822-9919  
[www.nwf.org](http://www.nwf.org)

### **Natural Resources Defense Council**

40 West 20th Street  
New York, NY 10011  
(212) 727-2700  
[www.nrdc.org](http://www.nrdc.org)

### **Sierra Club**

Legislative Office  
408 C Street, NE  
Washington DC 20002  
(202) 547-1141  
[www.sierraclub.org](http://www.sierraclub.org)



# ATTACHMENT 10

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9 *Attorneys for Plaintiffs*

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 WATERKEEPER ALLIANCE, INC.;  
13 HUMBOLDT BAYKEEPER, a program of  
14 Northcoast Environmental Center; LAKE  
15 WORTH WATERKEEPER; MISSOURI  
16 CONFLUENCE WATERKEEPER;  
17 MONTERREY COASTKEEPER, a program of  
18 The Otter Project, Inc.; RIO GRANDE  
19 WATERKEEPER, a program of WildEarth  
20 Guardians; RUSSIAN RIVERKEEPER;  
21 SNAKE RIVER WATERKEEPER, INC.;  
22 SOUND RIVERS, INC.; UPPER MISSOURI  
23 WATERKEEPER, INC.; TURTLE ISLAND  
24 RESTORATION NETWORK; WILDEARTH  
25 GUARDIANS; ECOLOGICAL RIGHTS  
26 FOUNDATION,

27 Plaintiffs,

28 v.

MICHAEL REGAN, in his official capacity as  
Administrator of the U.S. Environmental  
Protection Agency; U.S. ENVIRONMENTAL  
PROTECTION AGENCY; TAYLOR N.  
FERRELL, in his official capacity as Assistant  
Secretary of the Army for Civil Works; and U.S.  
ARMY CORPS OF ENGINEERS,

Defendants.

Civil Case No. 18-cv-3521

**DECLARATION OF DANIEL E.  
ESTRIN IN SUPPORT OF  
PLAINTIFFS' PARTIAL  
OPPOSITION TO DEFENDANTS'  
MOTION FOR REMAND  
WITHOUT VACATUR**

1 I, Daniel E. Estrin, declare as follows:

2 1. I am the General Counsel and Advocacy Director for Waterkeeper Alliance  
3 (“Waterkeeper”). I have worked with the Waterkeeper movement in various capacities for more than 28  
4 years. As Waterkeeper’s General Counsel and Advocacy Director, I am responsible for supervising all  
5 of the organization’s legal and advocacy work, including all litigation to which Waterkeeper is a party.

6 2. Waterkeeper is a not-for-profit corporation organized under the laws of the State of New  
7 York and a charitable corporation under section 501(c)(3) of the Internal Revenue Code. Waterkeeper  
8 maintains its headquarters at 180 Maiden Lane, Suite 603, New York, New York 10038.

9 3. Waterkeeper seeks to protect water quality in every major watershed around the world,  
10 and to restore and maintain all waterways as drinkable, fishable, and swimmable consistent with the  
11 goals of the federal Clean Water Act (“CWA”) and other laws. The CWA is the bedrock of  
12 Waterkeeper’s work to protect rivers, streams, channels, lakes, reservoirs, wetlands, bays, estuaries, and  
13 coastal waterways for the benefit of their communities. Waterkeeper works toward this vision through  
14 direct advocacy and through the grassroots advocacy of its Waterkeeper member and affiliate  
15 organizations, which Waterkeeper connects and supports to provide a voice for waterways and their  
16 communities worldwide.

17 4. Waterkeeper is a membership organization with two classes of members—licensed  
18 organizational members and individual members. Waterkeeper currently connects more than 350  
19 Waterkeeper member and affiliate organizations in 47 countries on six continents, including more than  
20 150 Basinkeepers, Baykeepers, Bayoukeepers, Canalkeepers, Channelkeepers, Coastkeepers,  
21 Creekkeepers, Inletkeepers, Lakekeepers, Riverkeepers, Shorekeepers, Soundkeepers, and Waterkeepers  
22 (“U.S. Member Organizations”), and approximately 20 affiliate organizations licensed by Waterkeeper  
23 in the United States (“U.S. Affiliate Organizations”). Additionally, Waterkeeper has over 15,000  
24 individual members, and our U.S. Member Organizations and U.S. Affiliate Organizations cumulatively  
25 have tens of thousands of individual members, that live, work, and recreate on waterways and in  
26 watersheds across the United States and whose interests are injured by regulatory actions that weaken or  
27 eliminate protections for waterways and the communities that rely on them.



1           5.       I am very familiar with the CWA, the various regulatory definitions of “waters of the  
2 United States” under the CWA, Supreme Court and lower court case law interpreting and applying the  
3 definition, and various agency guidance documents and interpretive statements regarding the definition.  
4 I have been in frequent communication with my staff about the 2020 Navigable Waters Protection Rule  
5 (“2020 NWPR”),<sup>1</sup> and its implications have been discussed and evaluated extensively by Waterkeeper  
6 and many of our U.S. Member Organizations. My understanding and opinions about the 2020 NWPR  
7 and the adverse impacts it is presently having and will continue to have on the Nation’s waters,  
8 Waterkeeper Alliance, U.S. Member and Affiliate Organizations, and our respective individual members  
9 are informed by these discussions, our formal comments on the 2020 NWPR, recent statements from the  
10 Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (the “Agencies”), and  
11 my nearly three decades of experience interpreting, enforcing, and protecting the CWA.

12           6.       The CWA regulatory definition of “waters of the United States” is of critical importance  
13 to the protection of human and community health, the economy, the functioning of our Nation’s vast  
14 interconnected water resources and ecosystems, and the many endangered and threatened species that  
15 depend on clean water. If a water is not included with the definition of “waters of the United States,” it  
16 can be dredged, filled, and polluted with impunity because the CWA’s most fundamental human health  
17 and environmental safeguard – the prohibition of unauthorized discharges in 33 U.S.C. § 1311(a) – no  
18 longer applies.

19           7.       The Agencies first addressed the definition of “waters of the United States” by  
20 promulgating rules in the mid-1970s. Those regulations asserted jurisdiction over traditionally navigable  
21 waters, interstate waters, tributaries to those (and other) jurisdictional waters, wetlands adjacent to other  
22 jurisdictional waters, and any “other waters,” the use, degradation, or destruction of which could affect  
23 interstate or foreign commerce. *See, e.g.*, 40 C.F.R. § 122.2 (2015); 33 C.F.R. § 328.3 (2015) (“Pre-2015  
24 Regulatory Definition”).  
25  
26

27  

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<sup>1</sup> The Navigable Waters Protection Rule was published in the Federal Register on April 21, 2020, *see* 85  
Fed. Reg. 22250 (Apr. 21, 2020), and became effective on June 22, 2020.

1           8.       On June 29, 2015, the Agencies promulgated the “Clean Water Rule” in an attempt to re-  
2 define “waters of the United States.” *Clean Water Rule: Definition of ‘Waters of the United States,’* 80  
3 Fed. Reg. 37054 (June 29, 2015). The impact of the Clean Water Rule was sweeping; it resulted in a net  
4 loss of CWA jurisdiction as compared to the Agencies’ 1970s Regulatory Definition and their  
5 longstanding interpretations of the CWA.

6           9.       On October 22, 2019, the Agencies promulgated a rule repealing the Clean Water Rule  
7 (“Repeal Rule”) and reinstating the regulatory text of the 1970s definition of “waters of the United  
8 States.” *Definition of “Waters of the United States”—Recodification of Pre-Existing Rules,* 84 Fed. Reg.  
9 56626 (October 22, 2019).

10          10.      On April 21, 2020, the Agencies promulgated the 2020 NWPR, redefining “waters of the  
11 United States” for the third time in 5 years. The 2020 NWPR was designed to, and did, eliminate a huge  
12 number of waters across the Nation from CWA jurisdiction. This is the most extreme diminishment of  
13 CWA jurisdiction since the Act’s inception nearly 50 years ago.

14          11.      Under the 2020 NWPR, the definition of “waters of the United States” encompasses only  
15 “relatively permanent flowing and standing waterbodies that are traditional navigable waters in their  
16 own right or that have a specific surface water connection to traditional navigable waters, as well as  
17 wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.” 2020  
18 NWPR, 85 Fed. Reg. at 22273. The Agencies’ adoption of this extremely narrow definition dramatically  
19 eliminated CWA protections for waters across the country, leaving many, and in some areas nearly all,  
20 rivers, streams, lakes, ponds, wetlands, and other waters vulnerable to dangerous pollution discharges  
21 and destructive dredging and filling.

22          12.      Eliminating CWA protections for vast swaths of the Nation’s waters harms drinking  
23 water supplies, fisheries, and recreational waters, as well as people, threatened and endangered species,  
24 and the Nation’s vast, interconnected aquatic ecosystems that are exposed to dangerous levels of  
25 pollution and destruction in both directly impacted and downstream waters. When waters are excluded  
26 from the definition of “waters of the United States,” all of the protections of the CWA – the discharge  
27 standards and permitting requirements for pollution discharges, dredging and filling standards and

1 permitting, water quality standards, effluent limitation guidelines, total maximum daily loads, water  
2 quality certifications, and myriad other CWA standards and programs – become inapplicable and cannot  
3 prevent or even mitigate the harm.

4 13. The harm that is now occurring, and will continue to occur, from implementation of the  
5 narrow 2020 NWPR definition was apparent in the Agencies’ own administrative record for the  
6 rulemaking process, but they refused to consider any of the scientific information in the record  
7 demonstrating that their narrow jurisdictional definition eliminated protections for waters that are  
8 essential to the integrity of the Nation’s waters and would endanger drinking water supplies, recreational  
9 waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across  
10 the Nation. *See, e.g.*, The Navigable Waters Protection Rule—Public Comment Summary Document  
11 (Response to Comments), Topic 11, at 3, 8-9, EPA Docket ID No. EPA-HQ-OW-2018-0149-11574  
12 (Apr. 20, 2020) (“2020 NWPR, RTC”).

13 14. The Agencies shaped their definition of “waters of the United States” in the 2020 NWPR  
14 based on impermissible policy choices that are in opposition to the objectives, goals, policies, and  
15 programs that Congress built into the CWA. *See, e.g.*, Revised Definition of “Waters of the United  
16 States,” 84 Fed. Reg. 4154, 4169 (February 14, 2019) (“Proposed NWPR”) (“The agencies are  
17 proposing this line-drawing based primarily on their interpretation of the language, structure, and  
18 legislative history of the statute and the policy choices of the executive branch agencies.”).

19 15. The EPA’s own Science Advisory Board (“SAB”) criticized the 2020 NWPR, and how  
20 the Agencies understood and represented the science that they used to support the rule. *See* EPA, SAB,  
21 Draft Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the  
22 Clean Water Act (Oct. 16, 2019), <https://perma.cc/RBC7-V58V> and EPA, SAB, Final Commentary on  
23 the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, (Feb.  
24 27, 2020), <https://perma.cc/76UW-LW9R>. True and correct copies are attached hereto as Ex. 1 and 2,  
25 respectively.

26 16. In its final commentary, the SAB concluded that the 2020 NWPR “does not incorporate  
27 best available science” and that “a scientific basis for the proposed Rule, and its consistency with the

1 objectives of the Clean Water Act, is lacking.” *Id.* at 1. Additionally, the SAB found that the 2020  
2 NWPR “decreases protection for our Nation’s waters and does not provide a scientific basis in support  
3 of its consistency with the objective of restoring and maintaining ‘the chemical, physical and biological  
4 integrity’ of these waters.” *Id.* at 2.

5 17. Several Plaintiffs in this action also submitted extensive written comments to the  
6 administrative record during the public comment period for the 2020 NWPR, including a comment letter  
7 containing extensive evidence demonstrating that (1) important water resources would lose CWA  
8 protections under 2020 NWPR without any sound legal or scientific basis, and (2) the Rule would cause  
9 serious harm to waters, people, aquatic systems, and endangered and threatened species and their  
10 designated critical habitats. *See, e.g.*, Comments of Waterkeeper Alliance on 2020 NWPR with  
11 supporting attachments (“Waterkeeper 2020 NWPR Comments”), submitted to the EPA Docket: EPA-  
12 HQ-OW-2018-0149 on April 15, 2019.<sup>2</sup>

13 18. For example, Plaintiff WildEarth Guardians (“Guardians”) is a regional 501(c)(3) non-  
14 profit environmental advocacy and conservation organization headquartered in Santa Fe, New Mexico  
15 that has been working for 30 years to protect and restore the wildlife, wild places, wild rivers, and health  
16 of the American West. Guardians is the parent organization of Rio Grande Waterkeeper, a licensed U.S.  
17 Member Organization. Plaintiff Rio Grande Waterkeeper works to safeguard clean water and healthy  
18 flows in the Rio Grande and its tributaries, from its headwaters in the San Juan Mountains of Colorado  
19 through Southern New Mexico. Guardians and Rio Grande Waterkeeper represent hundreds of  
20 thousands of members and activists, including many members and supporters that reside in the Rio  
21 Grande watershed.

- 22 a. The Waterkeeper 2020 NWPR Comments documented that the 2020 NWPR  
23 excludes all waters within a 14,605 square mile “closed basin,” within the Rio  
24 Grande Basin, as well as roughly 90 percent of streams and rivers in New Mexico  
25 outside of the “closed basin” – waters that contribute significant flows to and  
26 influence the water quality of the Rio Grande and its tributaries. *See, e.g.*,

27  

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<sup>2</sup> Available at: <https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-11319>.

1 Waterkeeper 2020 NWPR Comments, at 105, fn. 395 and Attachment 11, at 50-64  
2 (Rio Grande Case Study). A true and correct copy of Waterkeeper 2020 NWPR  
3 Comments Attachment 11 is attached hereto as Ex. 3.

4 b. Many of these rivers and streams receive pollution discharges that were regulated  
5 under CWA, such as the currently-CWA-permitted pollution discharges from Los  
6 Alamos National Laboratories, a site that has become synonymous with radioactivity  
7 and other types of pollution, into an ephemeral stream above one of the City of Santa  
8 Fe's drinking water intakes within the Rio Grande Basin. *Id.* This change is all the  
9 more harmful given that New Mexico does not have either a delegated CWA  
10 program or its own state law water quality program to in any way ameliorate the  
11 unprecedented and dangerous loss of water quality protections resulting from the  
12 2020 NWPR. *Id.*

13 c. The elimination of CWA protection for these and many other waters allows  
14 unlimited discharges of pollutants, along with unregulated dredging and filling  
15 activities, in these unprotected waters, degrading the water quality of the waters used  
16 and enjoyed by Rio Grande Waterkeeper and Guardians' members and threatening  
17 the survival and recovery of numerous imperiled aquatic and riparian species,  
18 including endangered and threatened species listed under the federal Endangered  
19 Species Act.

20 19. As another example, Plaintiff Missouri Confluence Waterkeeper is a grassroots, citizen-  
21 led nonprofit conservation organization and a licensed U.S. Member Organization that is focused on  
22 clean water and dedicated to protecting fishable, swimmable, drinkable water for all Missourians. The  
23 Waterkeeper 2020 NWPR Comments documented, among other things, that the 2020 NWPR's  
24 exclusion of large numbers of rivers and streams that briefly flow subsurface and then reemerge as  
25 surface waters will have significant adverse impacts on waters throughout Missouri, including large,  
26 important downstream waterways such as the Missouri and Meramec Rivers. *See, e.g.,* Ex. 3 at 30-41  
27 (Missouri Confluence Waterkeeper Case Study). Excluding these and other waters from CWA

1 protections against pollution discharges and dredging/filling, will degrade water quality; threaten public  
2 health; destroy habitat; and endanger wildlife, fish, amphibians, reptiles and other aquatic life, including  
3 ten endangered and one threatened ESA mussel species. *Id.*

4 20. In official comments for the administrative record, Plaintiffs also provided the Agencies  
5 with numerous other examples of harmful impacts to waters that will occur as a result of removing  
6 CWA protections rivers, streams, wetlands, lakes, and other waters around the country where U.S.  
7 Member Organizations are working to protect the interests of their members from water pollution. *See,*  
8 *e.g.*, Ex. 3 Waterkeeper 2020 NWPR Comments, Attachment 11. For example, the Waterkeeper 2020  
9 NWPR Comments documented the expected loss of CWA jurisdiction from the 2020 NWPR to:

- 10 a. Texas coastal prairie wetlands crucial to the health of Lower Galveston Bay, which  
11 is protected on behalf of its members by Bayou City Waterkeeper, a licensed U.S.  
12 Member Organization, *Id.* at 2-8;
- 13 b. Ephemeral streams, reservoirs, ditches, and canals that receive pollution discharges  
14 and which flow into Boulder Creek – the primary drinking water supply for the  
15 Colorado cities of Boulder, Louisville, Lafayette, Erie, Superior, and Nederland –  
16 which is protected on behalf of its members by Boulder Waterkeeper, a licensed U.S.  
17 Member Organization, *Id.* at 9-14;
- 18 c. Between an estimated 500 and 1,000 miles of ephemeral and ditched streams that  
19 flow into the Niagara River, the channel that connects two Great Lakes - Erie and  
20 Ontario, which is protected on behalf of its members by Buffalo Niagara  
21 Waterkeeper, a licensed U.S. Member Organization, *Id.* at 15-21;
- 22 d. Hydrologically connected Pocosins and Carolina Bays, and ditched and ephemeral  
23 streams that receive animal waste pollution discharges, in the Cape Fear Basin of  
24 North Carolina, which is protected on behalf of its members by Cape Fear  
25 Riverkeeper, a licensed U.S. Member Organization, *Id.* at 22-29;
- 26 e. Ephemeral streams that provide habit and water supply for federally threatened  
27 Chinook salmon, coho salmon, chum salmon and steelhead trout, and ditched

1 streams that receive animal waste, industrial and municipal pollution discharges in  
2 the Puget Sound Basin of Washington, which is protected on behalf of its members  
3 by Puget Soundkeeper, a licensed U.S. Member Organization, *Id.* at 42-49;

4 f. An estimated 9,165 miles of ephemeral streams in the Rogue River Basin in Oregon  
5 that provide drinking water for the region, as well as habitat and spawning grounds  
6 for federal threatened Southern Oregon/Northern California Coast coho salmon and  
7 steelhead; numerous canals and ditches that receive pollution discharges that are  
8 hydrologically connected to and influence the quality of the Rogue River; and the  
9 Agate Desert vernal pools that are the only vernal pools in Oregon and support  
10 unique species, such as the vernal pool fairy shrimp listed as threatened under the  
11 Endangered Species Act. These waters are protected on behalf of its members by  
12 Rogue Riverkeeper, a licensed U.S. Member Organization, *Id.* at 65-75;

13 g. More than 40 percent of the streams that flow into and influence the water quality of  
14 San Francisco Bay in California, as well as provide spawning grounds for  
15 endangered Chinook salmon, which are protected on behalf of its members by San  
16 Francisco Baykeeper, a founding U.S. Member Organization, *Id.* at 76-80;

17 h. All of the waters, including premiere trout streams and critical habitat for federally  
18 threatened bull trout, located within 5,185 square mile area in the upper Snake River  
19 Basin of Idaho that are connected to the Snake River by subsurface flows and  
20 springs, and 14,866 miles of ditches, ditched streams and canals that receive  
21 pollution discharges and flow into the Snake River. These waters are protected on  
22 behalf of its members by Snake River Waterkeeper, a licensed U.S. Member  
23 Organization, *Id.* at 81-89; and

24 i. An estimated 30,297 miles (85 percent) of the streams in the Upper Missouri River  
25 Basin of Montana that feed into and impact water quality in the Big Hole River  
26 (world-class trout fishery), Beaverhead River (premiere brown trout fishery),  
27 Jefferson River (Westslope cutthroat habitat and drinking water supply), Madison

1 River (Yellowstone cutthroat and Westslope cutthroat trout habitat), and the Gallatin  
2 River (Yellowstone Park and Downstream Recreation). These waters are protected  
3 on behalf of its members by Upper Missouri Waterkeeper, a licensed U.S. Member  
4 Organization, *Id.* at 90-106.

5 21. After the 2020 NWPR became effective, the massive scope and geographic extent of the  
6 loss of CWA protections for the Nation's waters began to be documented, to some extent, in a database  
7 maintained on an EPA webpage showing approved CWA jurisdictional determinations by the EPA and  
8 the U.S. Army Corps of Engineers. *See* EPA, Clean Water Act Approved Jurisdictional Determinations,  
9 <https://watersgeo.epa.gov/cwa>; *see also*, True and correct images of maps from the EPA database for all  
10 U.S. waters, New Mexico, California, and Missouri on June 29, 2021 and June 30, 2021 are attached as  
11 Ex. 4.

12 22. I have reviewed maps and data taken from this EPA database and my review found as  
13 follows:

- 14 a. As of June 29, 2021, maps from that database show that out of the 14,435 approved  
15 CWA jurisdictional determinations made under the 2020 NWPR across the country,  
16 13,290 waters were found to be non-jurisdictional and only 1,145 were found to be  
17 jurisdictional. *Id.* As of June 30, 2021, maps from that database show that out of the  
18 31,520 approved CWA jurisdictional determinations made under the 2020 NWPR  
19 across the country, 23,819 waters were found to be non-jurisdictional and only 7,701  
20 were found to be jurisdictional. *Id.*
- 21 b. In New Mexico, as of June 29, 2021, there were 176 total determinations under the  
22 2020 NWPR, with 176 negative jurisdictional determinations and 0 positive  
23 jurisdictional determinations under the 2020 NWPR. As of June 30, 2021, there were  
24 197 total determinations, with 195 negative jurisdictional determinations and 2  
25 positive jurisdictional determinations. One of those negative jurisdictional  
26 determinations excluded an ephemeral stream from CWA protections at the Los  
27



1 Alamos National Laboratories (Project Id: SPA-2021-00044-ABQ Potrillo Canyon).<sup>3</sup>

2 Another negative jurisdictional determination excluded ephemeral streams and two  
3 open water mine pits from CWA protections based on exclusions in the 2020 NWPR  
4 at the United Nuclear Corporation St. Anthony Uranium Mine (Project Id: SPA-  
5 2020-00169-ABQ).<sup>4</sup>

6 c. In California, as of June 29, 2021, there were 2,129 total jurisdictional  
7 determinations made under the 2020 NWPR, with 2,107 negative jurisdictional  
8 determinations and only 22 positive jurisdictional determinations. Notably, 1,717 of  
9 those jurisdictional determinations were made between January 20, 2021 and June  
10 16, 2021 and resulted in the exclusion of large numbers of wetlands, ephemeral  
11 streams, and other waters from CWA protections. As of June 30, 2021, there were  
12 2,368 total determinations, with 2,292 negative jurisdictional determinations and 76  
13 positive jurisdictional determinations.

14 d. In Missouri, as of June 29, 2021, there were 191 total jurisdictional determinations  
15 under the 2020 NWPR, with 170 negative jurisdictional determinations and only 21  
16 positive jurisdictional determinations. 106 of those jurisdictional determinations  
17 were made between January 20, 2021 and June 16, 2021 and resulted in the  
18 exclusion of large numbers of wetlands, ephemeral streams and other waters from  
19 CWA protections. As of June 30, 2021, there were 473 total determinations, with  
20 374 negative jurisdictional determinations and 99 positive jurisdictional  
21 determinations.

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24 3

25 [https://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Jurisdiction/Approved%20JDs/N  
ew%20Mexico/2021-044.AJD.pdf?ver=hw4MtRMiZ1x8OLsCa9bikg%3d%3d](https://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Jurisdiction/Approved%20JDs/N<br/>26 ew%20Mexico/2021-044.AJD.pdf?ver=hw4MtRMiZ1x8OLsCa9bikg%3d%3d)

4

27 [https://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Jurisdiction/Approved%20JDs/N  
ew%20Mexico/2020-169.AJD.pdf?ver=z1oT4bB1sIO1U0eF78njmw%3D%3D](https://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Jurisdiction/Approved%20JDs/N<br/>ew%20Mexico/2020-169.AJD.pdf?ver=z1oT4bB1sIO1U0eF78njmw%3D%3D)

1           23.     On June 9, 2021, the Agencies announced that they had completed their review of the  
2 2020 NWPR under President Biden’s Executive Order 13990, and that at some unknown time in the  
3 future, they intend to “initiate a new rulemaking process that restores the protections in place prior to the  
4 2015 WOTUS implementation,” and later “anticipate[] developing a new rule that defines WOTUS . . . .”  
5 EPA, Army Announce Intent to Revise Definition of WOTUS, (June 9, 2021).<sup>5</sup> A true and correct copy  
6 of this press release is attached as Ex. 5. In the announcement, the Agencies noted that a “broad array of  
7 stakeholders – including states, Tribes, local governments, scientists, and non-governmental  
8 organizations – are seeing *destructive impacts to critical water bodies* under the 2020 rule.” *Id.*  
9 (emphasis added).

10           24.     EPA Administrator Regan stated that the “EPA and Department of the Army have  
11 determined that this rule is leading to *significant environmental degradation*,” and Acting Assistant  
12 Secretary of the Army for Civil Works Jaime Pinkham stated that the 2020 NWPR “has resulted in a 25  
13 percentage point reduction in determinations of waters that would otherwise be afforded protection.” *Id.*  
14 (emphasis added).

15           25.     The Agencies also determined that the 2020 NWPR is “significantly reducing clean water  
16 protections” and that the “lack of protections is particularly significant in arid states, like New Mexico  
17 and Arizona, where nearly every one of over 1,500 streams assessed has been found to be non-  
18 jurisdictional.” *Id.* The Agencies further stated that they are “aware of 333 projects that would have  
19 required [CWA] Section 404 permitting prior to the Navigable Waters Protection Rule, but no longer  
20 do.” *Id.*

21           26.     On the same day as their announcement, June 9, 2021, the Agencies filed a Motion for  
22 Remand without Vacatur in an action challenging the 2020 NWPR in the U.S. District Court for the  
23 District of Massachusetts. *Conservation Law Foundation et al. v. EPA et al.*, No. 20-10820, DKT. 112  
24 (D. Mass. June 9, 2021) (“*Conservation Law Foundation*”). The motion filed in the *Conservation Law*  
25 *Foundation* case is essentially the same as was filed here, and the Agencies filed their declarations from  
26 the *Conservation Law Foundation* case as their supporting declarations herein. In their supporting  
27

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<sup>5</sup> Available at: <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>

1 Memorandum of Law in the *Conservation Law Foundation* case and herein, the Agencies stated that  
2 they “have identified substantial concerns with the NWPR” and “the effects of the NWPR on the  
3 nation’s waters, including whether the NWPR adequately considered the CWA’s statutory objective in  
4 determining the scope of the ‘waters of the United States’ and, as a result, whether the process  
5 adequately considered the effects of the NWPR on the integrity of the nation’s waters.” *Conservation*  
6 *Law Foundation*, Defendants’ Memorandum of Law in Support of Motion for Voluntary Remand  
7 without Vacatur, DKT. 113 (June 9, 2021).

8 27. Declarations in support of the Motion for Remand without Vacatur in the *Conservation*  
9 *Law Foundation* case more definitively characterize the Agencies’ findings regarding the legal errors  
10 and harm resulting from 2020 NWPR and contain findings consistent with the evidence of illegality and  
11 harm Waterkeeper submitted to the administrative record during the rulemaking comment period.  
12 *Conservation Law Foundation*, Declaration of Radhika Fox, DKT. 113-1 (“Fox Dec.”) and Declaration  
13 of Jaime A. Pinkham, DKT. 113-2, (June 9, 2021).

14 28. For example, Principal Deputy Assistant Administrator for the EPA Office of Water,  
15 Radhika Fox, stated that after careful reassessment of the administrative record and the legal and  
16 scientific basis for the 2020 NWPR, the Agencies identified “substantial concerns about the lawfulness  
17 of aspects of the NWPR and the harmful effects of the NWPR on the nation’s waters.” Specifically, the  
18 Agencies found:

19 a. “For example, the agencies explicitly and definitively stated in numerous places in  
20 the NWPR administrative record that they did not rely on agency documents in the  
21 record that provided some limited assessment of the effects of the rule on water  
22 quality in determining the scope of the definition of ‘waters of the United States.’

23 See, e.g., 85 Fed. Reg. at 22332, 22335 (“[T]he final rule is not based on the  
24 information in the agencies’ economic analysis or resource and programmatic  
25 assessment.”).” Fox Dec. at 4, ¶ 12.

26 b. “The agencies now believe that consideration of the effects of a revised definition of  
27 ‘waters of the United States’ on the integrity of the nation’s waters is a critical

1 element in assuring consistency with the statutory objective of the CWA . . .” and  
2 “[b]ased on a careful evaluation of the record of the NWPR . . . the agencies have  
3 substantial and legitimate concerns regarding the adequacy of consideration of the  
4 CWA’s water quality goals in the development of the NWPR.” Id. at 4-5, ¶ 13.

5 c. “In light of the text, structure, and legislative history of the Act, and Maui and other  
6 Supreme Court decisions, the agencies have concluded there must be some  
7 consideration of the effects of a revised definition of ‘waters of the United States’ on  
8 the integrity of the nation’s waters. Based on the record at the time the agencies  
9 promulgated the NWPR, significant concerns exist about the sufficiency of the  
10 agencies’ consideration of the effects of the NWPR on the chemical, physical, and  
11 biological integrity of the nation’s waters when determining the limits of the specific  
12 definitional language ‘waters of the United States’ in the NWPR. For example, the  
13 agencies are concerned that the NWPR did not look closely enough at the effect  
14 ephemeral waters have on traditional navigable waters when the agencies decided to  
15 categorically exclude all ephemeral waters.” Id. at 5, ¶ 14.

16 d. “Staff at EPA and the Army have reviewed approved jurisdictional determinations  
17 and identified indicators of a substantial reduction in waters covered under the  
18 NWPR compared to previous rules and practices . . . Of the 40,211 individual  
19 aquatic resources or water features for which the Corps made approved jurisdictional  
20 determinations under the NWPR between June 22, 2020 and April 15, 2021,  
21 approximately 76% were found to be non-jurisdictional. Many of the non-  
22 jurisdictional waters are excluded ephemeral resources (mostly streams) and  
23 wetlands that are not adjacent under the NWPR. The agencies are aware of 333  
24 projects that would have required Section 404 permitting prior to the NWPR, but no  
25 longer do under the NWPR. The agencies are also aware that this number is not the  
26 full universe of projects that no longer require Section 404 permitting under the  
27 NWPR, partly because to the extent that project proponents are not seeking any

1 determinations for waters that the NWPR now excludes, such as ephemeral streams,  
2 the effects of such projects are not tracked in the Corps database. As a whole, the  
3 reduction in jurisdiction is notably greater than the deregulatory effects discussed in  
4 the rule preamble and the economic analysis case studies.” Id. at 5-6, ¶ 15.

5 e. “These changes have been particularly significant in arid states. In New Mexico and  
6 Arizona, for example, of over 1,500 streams assessed under the NWPR, nearly every  
7 one has been found to be a non-jurisdictional ephemeral resource, which is very  
8 different from the status of the streams as assessed under both the Clean Water Rule  
9 and the pre-2015 regulatory regime.” Id. at 6, ¶ 16.

10 f. States, tribes, scientists, and non-governmental organizations have informed the  
11 agencies that the reduction in CWA jurisdiction attributable to the 2020 NWPR is  
12 “resulting in significant, actual environmental harms,” including from specific  
13 projects and discharges that would no longer be subject to CWA protections, from  
14 withdrawn permits, and from dredge and fill operations that are proceeding without  
15 permits or compensatory mitigation on “large swaths of wetlands in sensitive areas,  
16 in the floodplains of jurisdictional waters, or even within several hundred yards of  
17 traditional navigable waters . . .” Id. at 7, ¶ 17.

18 g. “Stakeholders have also identified for EPA many other wetlands and streams, newly  
19 deemed non-jurisdictional, which are likely to be filled for commercial and housing  
20 developments, mines, water pipelines, and other forms of development without  
21 CWA oversight.” Id.

22 h. “Projects are proceeding in newly non-jurisdictional waters in states and tribal lands  
23 where regulation of waters beyond those covered by the CWA are not authorized,  
24 and, based on available information, will therefore result in discharges without any  
25 regulation or mitigation from federal, state, or tribal agencies.” Id. at 7, ¶ 18.

26 i. “One project that stakeholders have identified for EPA is the construction of a high-  
27 pressure oil pipeline that would cut through a drinking water well field, which is

1 expected to result in discharges to nearly 100 ephemeral streams that appear to be no  
2 longer jurisdictional under the NWPR; another project is the construction of a mine  
3 that would destroy hundreds of previously jurisdictional wetlands, deemed non-  
4 jurisdictional under the NWPR, next to a National Wildlife Refuge.” Id.

5 j. “Some tribes have estimated that the NWPR removes more than 80% of stream  
6 miles within their jurisdictions from CWA protections, amounting to more than  
7 1,400 miles of streams. These tribes lack the authority and the resources to  
8 independently regulate surface waters within and upstream of their reservations, and  
9 therefore cannot protect their scarce waters from upstream dischargers, such as  
10 uranium and coal mines.” Id. at 8, ¶ 19.

11 k. Excluded “[e]phemeral streams, wetlands, and other aquatic resources provide  
12 numerous ecosystem services, and there could be cascading and cumulative  
13 downstream effects from impacts to these resources, including but not limited to  
14 effects on water supplies, water quality, flooding, drought, erosion, and habitat  
15 integrity.” Id. at 8, ¶ 20.

16 29. The results of the Agencies’ review of the 2020 NWPR and their findings are further  
17 described and documented in a June 8, 2021 Memorandum for the Record with Supporting  
18 Documentation. EPA and Department of Army, Memorandum for the Record: Review of U.S. Army  
19 Corps of Engineers ORM2 Permit and Jurisdictional Determination Database to Assess effects of the  
20 Navigable Waters Protection Rule, (June 8, 2021)<sup>6</sup> and Attachment A: Data Analysis.<sup>7</sup> (“Memorandum  
21 for the Record”). True and copies of the Memorandum for the Record and Supporting Analysis are  
22 attached as Ex. 6 and Ex. 7, respectively.

23 30. The Memorandum for the Record further demonstrates some of the harms that are  
24 occurring as a result of the 2020 NWPR, documents significant loss of jurisdiction under the Army  
25 Corps of Engineers’ regulatory programs, and more definitively states that the Agencies failed to

26 \_\_\_\_\_  
27 <sup>6</sup> [https://www.epa.gov/sites/production/files/2021-](https://www.epa.gov/sites/production/files/2021-06/documents/3_final_memorandum_for_record_on_review_of_data_web_508c.pdf)

[06/documents/3\\_final\\_memorandum\\_for\\_record\\_on\\_review\\_of\\_data\\_web\\_508c.pdf](https://www.epa.gov/sites/production/files/2021-06/documents/3_final_memorandum_for_record_on_review_of_data_web_508c.pdf)

<sup>7</sup> [https://www.epa.gov/sites/production/files/2021-06/documents/combined\\_4\\_thru\\_12\\_508.pdf](https://www.epa.gov/sites/production/files/2021-06/documents/combined_4_thru_12_508.pdf)

1 adequately consider the effects on the rule's elimination of CWA jurisdiction on the chemical, physical,  
2 and biological integrity of the Nation's waters. For example, the Agencies found that:

- 3 a. "The Corps finalized 6,351 AJDs between the NWPR's effective date of June 22,  
4 2020 and April 15, 2021. When this dataset was adjusted to account for differences  
5 in how determination forms were designed under the different regulatory regimes,  
6 the Corps found approximately 71% of AJDs identified non-jurisdictional aquatic  
7 resources and 29% identified jurisdictional aquatic resources.<sup>3</sup> In comparison, AJDs  
8 made under the 2015 Clean Water Rule and the pre-2015 regulatory regime from the  
9 time periods of June 22, 2018 to April 15, 2019, and June 22, 2019 to April 15,  
10 2020, found that approximately 46% of AJDs included non-jurisdictional aquatic  
11 resources and 54% included jurisdictional aquatic resources." Ex. 7 at 2.
- 12 b. "The Corps' ORM2 database contains AJDs that evaluated 40,211 individual aquatic  
13 resources or water features under the NWPR between June 22, 2020 and April 15,  
14 2021; of these individual aquatic resources, approximately 76% were found to be  
15 non-jurisdictional by the Corps. Specifically, 69% of streams and wetlands were  
16 found to be non-jurisdictional, including 9,548 ephemeral features (mostly streams)  
17 and 12,895 wetlands that did not meet the NWPR's revised adjacency criteria (and  
18 thus are non-jurisdictional under the NWPR). Ditches were also frequently excluded  
19 (3,849 individual exclusions)." *Id.* at 2-3.
- 20 c. "Of particular concern to the agencies is the NWPR's disproportionate effect on arid  
21 regions of the country. The Corps' data show that in New Mexico, of the 258  
22 streams assessed in AJDs, 100% were found to be non-jurisdictional ephemeral  
23 resources. In Arizona, of the 1,284 streams assessed in AJDs, 1,280, or 99.6%, were  
24 found to be non-jurisdictional ephemeral resources. Compounding potential resource  
25 losses, eliminating ephemeral streams from jurisdiction under the NWPR also  
26 typically eliminates jurisdiction over any nearby wetlands." *Id.* at 3.
- 27

- 1 d. “The more telling aspect of these 968 [no permit required] actions in 2020-2021 is  
2 the comparison to prior years. In 2020-2021, there has been a threefold (338%)  
3 increase from 2019-2020 and a fourfold (412%) increase from 2018-2019 in the  
4 number of projects being determined to not require section 404 permits under the  
5 CWA. These metrics likely capture only a small portion of projects that are  
6 occurring on the ground since there is typically no need for a project proponent to  
7 seek a “no permit required” determination after having already received a wholly  
8 negative AJD and other project proponents may not feel the need to obtain any sort  
9 of JD at all if they believe their aquatic resources are non-jurisdictional under the  
10 NWPR. Many projects could be occurring without consultation with the Corps due  
11 to the non-jurisdictional bright lines established under the NWPR. While the Corps’  
12 ORM2 data do not represent all aquatic resources in the United States, they shed  
13 light on the trend and magnitude of losses under the NWPR.” *Id.* at 3.
- 14 e. “The agencies are aware that projects are proceeding in newly non-jurisdictional  
15 waters in states and tribal lands where regulation of waters beyond those covered by  
16 the CWA are not authorized, and, based on available information, will therefore  
17 result in discharges without any regulation or mitigation from federal or state  
18 agencies . . . The agencies are also aware of certain states that have already begun  
19 taking deregulatory steps to change their state regulatory practices to match the  
20 NWPR, contrary to the agencies’ estimates in the ‘[I]ikely response category’ for  
21 such states identified [sic] the NWPR’s EA. *See* EA at 39-41 (estimating that some  
22 states are likely to continue their current dredged/fill permitting practices; however,  
23 some of those states have instead sought to reduce the scope of state clean water  
24 protections after the NWPR was finalized).” *Id.* at 4.
- 25 f. Ephemeral streams, wetlands that do not meet the NWPR’s revised adjacency  
26 criteria, and other aquatic resources not protected by the NWPR provide numerous  
27 ecosystem services, and the absence of protections for such resources could cause



1 cascading, cumulative, and substantial downstream effects, including but not limited  
2 to effects on water supplies, water quality, flooding, drought, erosion, and habitat  
3 integrity. These substantial effects on the chemical, physical, and biological integrity  
4 of the nation’s waters were inadequately considered during the NWPR rulemaking  
5 process.” *Id.*

6 31. On June 21, 2021, ten U.S. Senators sent a letter to EPA Administrator Regan and Acting  
7 Assistant Secretary of the Army for Civil Works Jaime Pinkham detailing a briefing call EPA and the  
8 Army Corps of Engineers provided to Congressional staff after the Agencies’ June 9 announcement. The  
9 Senators stated that the Agencies had informed them that their decision to replace the 2020 NWPR was  
10 based on “significant environmental damage,” “ongoing environmental harm,” “implementation  
11 challenges,” and “a reduction in findings of federal jurisdiction resulting from the NWPR.” *See* June 21,  
12 2021 Letter from Ten Members of the U.S. Senate Committee on Environment and Public Works to  
13 EPA Administrator Regan and Acting Assistant Secretary of the Army for Civil Works Jaime Pinkham  
14 regarding the Navigable Waters Protection Rule Announcement, a true and correct copy of which is  
15 attached as Ex. 8.


16 32. The interests of Waterkeeper’s members, and the members of our U.S. Member  
17 Organizations and U.S. Affiliate Organizations in clean water for drinking, fishing, swimming,  
18 recreational and aesthetic enjoyment, and conservation of aquatic species and wildlife are injured by the  
19 reduction and elimination of CWA protections for myriad rivers, streams, wetlands, lakes, and other  
20 waters under the 2020 NWPR. Many of these members live, recreate and work in watersheds that  
21 contain rivers, intermittent streams, ephemeral streams, lakes, wetlands, or other waters that have either  
22 entirely lost CWA protection or are downstream from waters that have lost CWA protection.

23 33. Remand and vacatur of the 2020 NWPR is necessary to redress the injuries to  
24 Waterkeeper Alliance, our U.S. Member Organizations and individual supporting members by restoring  
25 the regulatory definition of “waters of the United States” that protected our Nation’s waters for nearly  
26 four decades, and by preventing further damage and destruction of the Nation’s waters under the 2020  
27 NWPR, which has led to an exponential increase in negative CWA jurisdictional determinations as

1 compared to the Pre-2015 Regulatory Definition. *See, e.g., supra*, ¶ 31(d); *see also, e.g.*, Ex. 8,  
2 Attachment A at 3-9

3 34. The Pre-2015 Regulatory Definition is consistent with the CWA's objective and goals  
4 and will ensure that waters that are utilized and enjoyed by our members across the country will again be  
5 protected and their interests in clean water for drinking, fishing, swimming, recreational and aesthetic  
6 enjoyment, and conservation of aquatic species and wildlife will not be further injured as a result of  
7 unregulated pollution and destruction of these waters. As demonstrated above, if the 2020 NWPR is not  
8 vacated, the irreparable harm caused by uncontrolled pollution, dredging and filling of the nation's water  
9 will continue and increase in number, geographic scope and cumulative downstream human health and  
10 environmental impacts.

11  
12 I declare under penalty of perjury under the laws of the United States that the foregoing is true and  
13 correct to the best of my knowledge. Executed this 2nd day of July, 2021, in Norwalk, Connecticut.

14  
15 

16 Daniel E. Estrin  
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Estrin Ex. 1

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON D.C. 20460**

OFFICE OF THE ADMINISTRATOR  
SCIENCE ADVISORY BOARD

EPA-SAB-20-xxx

The Honorable Andrew R. Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally  
Regulated Under the Clean Water Act

Dear Administrator Wheeler:

Establishing a sound, consistent, scientifically supported and clear definition of “waters of the United States” (WOTUS) is a critical component of implementing the United States Federal Water Pollution Control Act (1972), more commonly known as the Clean Water Act (CWA). The Act itself does not provide such a definition. Achievement of the Act’s overall objective “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters” requires a clear definition of the geographic and hydrologic scope of these waters. On February 14, 2019, the EPA and the Department of the Army, Corps of Engineers published a new proposed rule defining the scope of waters federally regulated under the Clean Water Act (84 FR 4154)<sup>1</sup>. At the EPA Science Advisory Board (SAB) meeting on June 5-6, 2019, the SAB discussed the scientific and technical underpinnings of the proposed WOTUS rule and concluded that aspects of the proposed rule are in conflict with established science, the existing WOTUS rule developed based on the established science, and the objectives of the Clean Water Act. The SAB voted to provide a commentary to the Agency outlining the nature of this conflict.

**Process Used by the SAB to Develop This Commentary**

The SAB established a WOTUS Work Group to develop an initial draft of this commentary. The draft commentary was then reviewed and approved by the full SAB at a public teleconference held on [insert date]. The SAB WOTUS Work Group consisted of Drs. Alison Cullen (chair), Bob Blanz, John Guckenheimer, Michael Honeycutt, Clyde Martin, Robert Merritt, Robert Puls, and Tara Sabo-Attwood. The SAB Work Group considered the proposed rule’s content,

<sup>1</sup> Available at: <https://www.govinfo.gov/content/pkg/FR-2019-02-14/pdf/2019-00791.pdf>

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1 supporting materials and documents, a previous fact-finding teleconference with EPA, comments  
 2 from EPA staff at the June 5-6, 2019 SAB meeting, and the deliberation of the entire chartered  
 3 SAB at this meeting in developing the draft commentary.

4  
 5 **Commentary on Revised Definition of “Waters of the United States” (84 FR 4154)**  
 6

7 The SAB finds that the proposed revised definition of WOTUS (84 FR 4154) (hereafter, the  
 8 proposed Rule) decreases protection for our Nation’s waters and does not support the objective  
 9 of restoring and maintaining “the chemical, physical and biological integrity” of these waters. At  
 10 the June 5-6, 2019 SAB meeting, the Board offered to support EPA in the application of more  
 11 recent scientific advances to increase clarity and consistency for CWA needs. However, it was  
 12 made clear that the EPA has chosen to interpret the CWA and subsequent case law as  
 13 constraining them to limiting the definition of WOTUS to the language of the proposed rule. The  
 14 SAB acts under no such constraint to give deference to shifting legal opinions in its advisory  
 15 capacity and is in fact obligated by statute to communicate the best scientific consensus on this  
 16 topic. The following key elements amplify this finding.

- 17  
 18 - The proposed Rule does not fully incorporate EPA’s 2015 Connectivity Report (U.S.  
 19 EPA 2015)<sup>2</sup>, Rains (2011)<sup>3</sup>, and Rains et al. (2016)<sup>4</sup> and is a substantial departure from  
 20 the earlier WOTUS rule definition. The EPA’s 2015 Connectivity Report emphasizes that  
 21 functional connectivity is more than a matter of surface geography. The report illustrates  
 22 that a systems approach is imperative when defining the connectivity of waters, and that  
 23 functional relationships must be the basis of determining adjacency. The proposed Rule  
 24 offers no comparable body of peer reviewed evidence to support such a departure, and no  
 25 scientific justification for abandoning the more expansive view of connectivity of waters  
 26 accepted by current hydrological science, which has advanced substantially since the  
 27 CWA was enacted decades ago, as reflected in the Connectivity report.  
 28  
 29 - The proposed Rule neglects established science pertaining specifically to the connectivity  
 30 of ground water to wetlands and adjacent major bodies of water by failing to  
 31 acknowledge watershed systems and processes discussed in EPA’s 2015 Connectivity  
 32 Report. In particular, there is no scientific justification for excluding ground water from  
 33 WOTUS if spring-fed creeks are considered to be jurisdictional. The chemical or  
 34 biological contamination of ground water may lead to contamination of functionally  
 35 connected surface water. Ground water may also contribute to intermittent flow of  
 36 jurisdictional tributaries. Shallow ground water may directly connect wetlands to adjacent  
 37 major bodies of water. Therefore, the scientific importance of ground water protection  
 38 and ground water connections should require that these waters be protected from  
 39 unacceptably high contamination. The same threats apply to those bodies of water that  
 40 only occasionally flow, such as the arroyos of the Southwest United States. In the

---

<sup>2</sup>U.S. EPA. 2015. *Connectivity of streams and wetlands to downstream waters: a review and synthesis of the scientific evidence technical report*. EPA/600/R-14/475F. U.S. Environmental Protection Agency, Washington, D.C.

<sup>3</sup> Rains, M.C. 2011. Water Sources and Hydrodynamics of Closed-Basin Depressions, Cook Inlet Region, Alaska. *Wetlands* 31:377-387.

<sup>4</sup> Rains, M.C., S.G. Leibowitz, M. J. Cohen, I.F. Creed, H.E. Golden, J.W. Jawitz, P. Kalla, C.R. Lane, M.W. Lang, and D.L. McLaughlin. 2016. Geographically isolated wetlands are part of the hydrological landscape. *Hydrological Processes* 30:153-160.

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1 proposed Rule the EPA and Department of the Army specifically requested comment on  
 2 “if and under what circumstances subsurface water connections between wetlands and  
 3 jurisdictional waters could be used to determine adjacency.” The SAB submits that there  
 4 is a solid body of scientific evidence regarding the existence of these connections  
 5 documented in EPA’s 2015 Connectivity Report, which provide the basis for answering  
 6 this request for comment.

- 7
- 8 - The proposed Rule excludes irrigation canals from the definition of WOTUS. The  
 9 biological and chemical contamination of large-scale irrigation canals is an established  
 10 and serious threat to public health and safety (Allende and Monaghan 2015)<sup>5</sup>. The  
 11 presence of *E. coli* in leafy vegetables is often traceable to irrigation water contaminated  
 12 by animals in feed lots or pastures adjacent to the canals. Water associated with confined  
 13 animal feeding operations has also been shown to contain chemical contaminants, such as  
 14 steroids, that are associated with public health concerns (Allende and Monaghan 2015;  
 15 Bartelt-Hunt et al. 2011; Gall et al. 2014).<sup>6,7,8</sup>
  - 16
  - 17 - The definition of jurisdictional waters in the proposed Rule also departs from established  
 18 science cited by EPA in support of the 2015 WOTUS Rule, in the exclusion of adjacent  
 19 wetlands that do not abut or have a direct hydrologic surface connection to otherwise  
 20 jurisdictional waters. SAB review of the 2015 WOTUS rule found a sound scientific  
 21 basis for the inclusion of these wetlands (U.S. EPA Science Advisory Board 2014)<sup>9</sup>. No  
 22 body of peer reviewed evidence has been presented to support an alternative conclusion.
  - 23
  - 24 - The proposed Rule portrays three Supreme Court decisions as establishing a coherent  
 25 basis for drawing simple “bright lines” to determine jurisdictional waters for the purpose  
 26 of the CWA; however, by abandoning a scientific basis to adopt a simplistic, if clear  
 27 surface water-based definition, this approach neither rests upon science, nor provides  
 28 long term clarity, as is evidenced by the continuing interpretation and re-interpretation of  
 29 these decisions over time. However, we understand that the EPA and Department of the  
 30 Army will abide by their current interpretation of the law.

31

32 In summary, the SAB is disappointed that the EPA and Department of the Army have decided  
 33 that the CWA and subsequent case law precludes full incorporation of the scientific aspects of  
 34 EPA’s 2015 Connectivity Report into the proposed Rule. The proposed definition of WOTUS is

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<sup>5</sup> Allende, A. and J. Monaghan. 2015. Irrigation Water Quality for Leafy Crops: A Perspective of Risks and Potential Solutions. *International Journal of Environmental Research and Public Health*, 2015 Jul. 12(7): 7457-7477.

<sup>6</sup> Ibid.

<sup>7</sup> Bartelt-Hunt, S., D.D. Snow, T. Damon-Powel, and D. Miesbach. 2010. Occurrence of steroid hormones and antibiotics in shallow groundwater impacted by livestock waste control facilities. *Journal of Contaminant Hydrology* 123(3-4):94-103. doi: 10.1016/j.jconhyd.2010.12.010. Epub 2011 Jan 4.

<sup>8</sup> Gall, H.E., S.A. Sassman, B. Jenkinson, L.S. Lee, and C.T. Jafvert. 2015. Comparison of export dynamics of nutrients and animal-borne estrogens from a tile-drained Midwestern agroecosystem. *Water Research* 72:162-73. doi: 10.1016/j.watres.2014.08.041. Epub 2014 Sep 6.

<sup>9</sup>U.S. EPA Science Advisory Board. 2014. *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA’s Proposed Rule titled “Definition of Waters of the United States under the Clean Water Act.”* EPA-SAB-14-007. U.S. EPA Science Advisory Board, Washington, D.C.

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1 not fully consistent with established EPA recognized science, may not fully meet the key  
2 objectives of the CWA – “to restore and maintain the chemical, physical and biological integrity  
3 of the Nation’s waters,” and is subject to a lack of clarity for implementation. The departure of  
4 the proposed Rule from EPA recognized science threatens to weaken protection of the nation’s  
5 waters by disregarding the established connectivity of ground waters and by failing to protect  
6 ephemeral streams and wetlands which connect to navigable waters below the surface. These  
7 changes are proposed without a fully supportable scientific basis, while potentially introducing  
8 substantial new risks to human and environmental health.

9  
10 It is readily apparent that a conflict exists between current, recognized hydrological science  
11 versus the CWA and its subsequent case law. This suggests that new legislation is needed to  
12 update the CWA to reflect scientific discoveries since 1972.

13  
14 Dr. Michael Honeycutt, Chair

15  
16  
17  
18 Science Advisory Board

19  
20  
21 Enclosure

22  
23 1) Roster, EPA Science Advisory Board

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**NOTICE**

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This report has been written as part of the activities of the EPA Science Advisory Board (SAB), a public advisory group providing extramural scientific information and advice to the Administrator and other officials of the Environmental Protection Agency. The SAB is structured to provide balanced, expert assessment of scientific matters related to problems facing the Agency. This report has not been reviewed for approval by the Agency and, hence, the contents of this report do not necessarily represent the views and policies of the Environmental Protection Agency, nor of other agencies in the Executive Branch of the Federal government, nor does mention of trade names of commercial products constitute a recommendation for use. Reports of the SAB are posted on the EPA Web site at <http://www.epa.gov/sab>.



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2 **Science Advisory Board**

3  
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11  
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45 Global Health, College of Public Health and Health Professionals, University of Florida,  
46 Gainesville, FL

**Science Advisory Board (SAB) Draft Commentary (10/16/19) – Do Not Cite or Quote.**  
**This draft has not been reviewed or approved by the chartered SAB and does not represent EPA policy.**

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Estrin Ex. 2



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON D.C. 20460**

**OFFICE OF THE ADMINISTRATOR  
SCIENCE ADVISORY BOARD**

February 27, 2020

EPA-SAB-20-002

The Honorable Andrew R. Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally  
Regulated Under the Clean Water Act

Dear Administrator Wheeler:

Establishing a sound, consistent, scientifically supported and clear definition of “waters of the United States” (WOTUS) is a critical component of implementing the United States Federal Water Pollution Control Act (1972), more commonly known as the Clean Water Act (CWA). The Act itself does not provide such a definition. Achievement of the Act’s overall objective “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters” requires a clear definition of the geographic and hydrologic scope of these waters. On February 14, 2019, the EPA and the Department of the Army, Corps of Engineers published a new proposed rule defining the scope of waters federally regulated under the Clean Water Act (84 FR 4154).<sup>1</sup> At the EPA Science Advisory Board (SAB) meeting on June 5-6, 2019, the SAB discussed the scientific and technical underpinnings of the proposed WOTUS rule. The Board concluded that the proposed WOTUS rule does not incorporate best available science and as such we find that a scientific basis for the proposed Rule, and its consistency with the objectives of the Clean Water Act, is lacking. The SAB voted to provide a commentary to the Agency outlining the nature of this inconsistency.

**Process Used by the SAB to Develop This Commentary**

The SAB established a WOTUS Work Group to develop an initial draft of this commentary. The draft commentary was then reviewed and approved by the full SAB at a public teleconference

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<sup>1</sup> Available at: <https://www.govinfo.gov/content/pkg/FR-2019-02-14/pdf/2019-00791.pdf>

held on January 24, 2020.<sup>2</sup> Four SAB members indicated that they did not concur with the commentary.<sup>3</sup> The SAB WOTUS Work Group consisted of Drs. Alison Cullen (chair), Bob Blanz, John Guckenheimer, Michael Honeycutt, Clyde Martin, Robert Merritt, Robert Puls, and Tara Sabo-Attwood. The SAB Work Group considered the proposed rule's content, supporting materials and documents, a previous fact-finding teleconference with EPA, comments from EPA staff at the June 5-6, 2019 SAB meeting, and the deliberation of the entire chartered SAB at this meeting in developing the draft commentary.

### **Commentary on Revised Definition of “Waters of the United States” (84 FR 4154)**

The SAB finds that the proposed revised definition of WOTUS (84 FR 4154) (hereafter, the proposed Rule) decreases protection for our Nation's waters and does not provide a scientific basis in support of its consistency with the objective of restoring and maintaining “the chemical, physical and biological integrity” of these waters. At the June 5-6, 2019 SAB meeting, the Board offered to support EPA in the application of more recent scientific advances to increase clarity and consistency for CWA needs. EPA representatives responded that the agency has chosen to interpret the CWA and subsequent case law as constraining them to limiting the definition of WOTUS to the language of the proposed Rule. The SAB acts under no such constraint in its advisory capacity and is in fact obligated by statute to communicate the best available science on this topic. The following key elements amplify this finding.

- The proposed Rule does not fully incorporate the body of science on connectivity of waters reviewed previously by the SAB and found to represent a scientific justification for including functional connectivity in rule making: EPA's 2015 Connectivity Report (U.S. EPA 2015),<sup>4</sup> Rains (2011),<sup>5</sup> and Rains et al. (2016).<sup>6</sup> The EPA's 2015 Connectivity Report emphasizes that functional connectivity is more than a matter of surface geography. The report illustrates that a systems approach is imperative when defining the connectivity of waters, and that functional relationships must be the basis of determining adjacency. The proposed Rule offers no comparable body of peer reviewed evidence, and no scientific justification for disregarding the connectivity of waters accepted by current hydrological science.
- In the proposed Rule the EPA and Department of the Army specifically requested comment on “if and under what circumstances subsurface water connections between wetlands and jurisdictional waters could be used to determine adjacency.” The SAB

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<sup>2</sup> The SAB notes that on January 23, 2020, subsequent to the development of the SAB draft commentary, the EPA and the Department of the Army finalized the rule defining “waters of the United States.”

<sup>3</sup> Drs. Bob Blanz, Donald van der Vaart, Richard Williams, and Stanley Young indicated that they did not concur. Comments from Dr. van der Vaart are available at: [https://yosemite.epa.gov/sab/sabproduct.nsf//BA0F9868EC1BD0FF8525850D0063CE9F/\\$File/van+der+Vaart+comments+SAB+WOTUS.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf//BA0F9868EC1BD0FF8525850D0063CE9F/$File/van+der+Vaart+comments+SAB+WOTUS.pdf)

<sup>4</sup>U.S. EPA. 2015. *Connectivity of streams and wetlands to downstream waters: a review and synthesis of the scientific evidence technical report*. EPA/600/R-14/475F. U.S. Environmental Protection Agency, Washington, D.C.

<sup>5</sup> Rains, M.C. 2011. Water Sources and Hydrodynamics of Closed-Basin Depressions, Cook Inlet Region, Alaska. *Wetlands* 31:377-387.

<sup>6</sup> Rains, M.C., S.G. Leibowitz, M. J. Cohen, I.F. Creed, H.E. Golden, J.W. Jawitz, P. Kalla, C.R. Lane, M.W. Lang, and D.L. McLaughlin. 2016. Geographically isolated wetlands are part of the hydrological landscape. *Hydrological Processes* 30:153-160.

submits that there is a solid body of scientific evidence regarding the existence of these connections documented in EPA's 2015 Connectivity Report, and reviewed by the SAB, which provide a basis for answering this request for comment.

- There is no scientific justification for excluding connected ground water from WOTUS if spring-fed creeks are considered to be jurisdictional. The proposed Rule neglects the connectivity of ground water to wetlands and adjacent major bodies of water with no acknowledgement of watershed systems and processes discussed in EPA's 2015 Connectivity Report. The SAB's previous review found a scientific justification for the conclusion that chemical or biological contamination of ground water may lead to contamination of functionally connected surface water. Ground water may also contribute to intermittent flow of jurisdictional tributaries. Further, shallow ground water may directly connect wetlands or other bodies of water that only occasionally flow to adjacent major bodies of water.
- The proposed Rule excludes irrigation canals from the definition of WOTUS. Biological and chemical contamination of large-scale irrigation canals presents a documented and serious risk to public health and safety (Allende and Monaghan 2015).<sup>7</sup> The presence of *E. coli* in leafy vegetables is often traceable to irrigation water contaminated by animals in feed lots or pastures adjacent to the canals. Water associated with confined animal feeding operations has also been shown to contain chemical contaminants, such as steroids, that are associated with public health concerns (Allende and Monaghan 2015; Bartelt-Hunt et al. 2011; Gall et al. 2014).<sup>8,9,10</sup>
- The definition of jurisdictional waters in the proposed Rule excludes adjacent wetlands that do not abut or have a direct hydrologic surface connection to otherwise jurisdictional waters. This definition is inconsistent with previous SAB review which justified scientifically the inclusion of these wetlands (U.S. EPA Science Advisory Board 2014).<sup>11</sup> No new body of peer reviewed scientific evidence has been presented to support an alternative conclusion.
- The proposed Rule does not present a scientific basis for adopting a surface water based definition of Waters of the U.S. The proposed definition is inconsistent with the body of science previously reviewed by the SAB, while no new science has been presented. Thus the approach neither rests upon science, nor provides long term clarity.

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<sup>7</sup> Allende, A. and J. Monaghan. 2015. Irrigation Water Quality for Leafy Crops: A Perspective of Risks and Potential Solutions. *International Journal of Environmental Research and Public Health*, 2015 Jul. 12(7): 7457-7477.

<sup>8</sup> Ibid.

<sup>9</sup> Bartelt-Hunt, S., D.D. Snow, T. Damon-Powel, and D. Miesbach. 2010. Occurrence of steroid hormones and antibiotics in shallow groundwater impacted by livestock waste control facilities. *Journal of Contaminant Hydrology* 123(3-4):94-103. doi: 10.1016/j.jconhyd.2010.12.010. Epub 2011 Jan 4.

<sup>10</sup> Gall, H.E., S.A. Sassman, B. Jenkinson, L.S. Lee, and C.T. Jafvert. 2015. Comparison of export dynamics of nutrients and animal-borne estrogens from a tile-drained Midwestern agroecosystem. *Water Research* 72:162-73. doi: 10.1016/j.watres.2014.08.041. Epub 2014 Sep 6.

<sup>11</sup> U.S. EPA Science Advisory Board. 2014. *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act."* EPA-SAB-14-007. U.S. EPA Science Advisory Board, Washington, D.C.

In summary, current scientific understanding of the connectivity of surface and ground water, which has been reviewed by the SAB previously, is not reflected in the proposed Rule. Specifically, the proposed definition of WOTUS excludes ground water, ephemeral streams, and wetlands which connect to navigable waters below the surface. The proposed Rule does not present new science to support this definition, thus the SAB finds that the proposed Rule lacks a scientific justification, while potentially introducing new risks to human and environmental health.

Sincerely,

/s/

Dr. Michael Honeycutt, Chair  
Science Advisory Board

Enclosure



## NOTICE

This report has been written as part of the activities of the EPA Science Advisory Board (SAB), a public advisory group providing extramural scientific information and advice to the Administrator and other officials of the Environmental Protection Agency. The SAB is structured to provide balanced, expert assessment of scientific matters related to problems facing the Agency. This report has not been reviewed for approval by the Agency and, hence, the contents of this report do not necessarily represent the views and policies of the Environmental Protection Agency, nor of other agencies in the Executive Branch of the Federal government, nor does mention of trade names of commercial products constitute a recommendation for use. Reports of the SAB are posted on the EPA Web site at <http://www.epa.gov/sab>.

**U.S. Environmental Protection Agency  
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Estrin Ex. 3

Estrin Ex. 4

Ex. 4 – Selected Maps from EPA Website Database of Approved Jurisdictional Determinations on June 29 and June 30, 2021, available at: <https://watersgeo.epa.gov/cwa/>

### U.S. Approved Jurisdictional Determinations under the NWPR as of 6/30/21



### U.S. Approved Jurisdictional Determinations under the NWPR as of 6/29/21

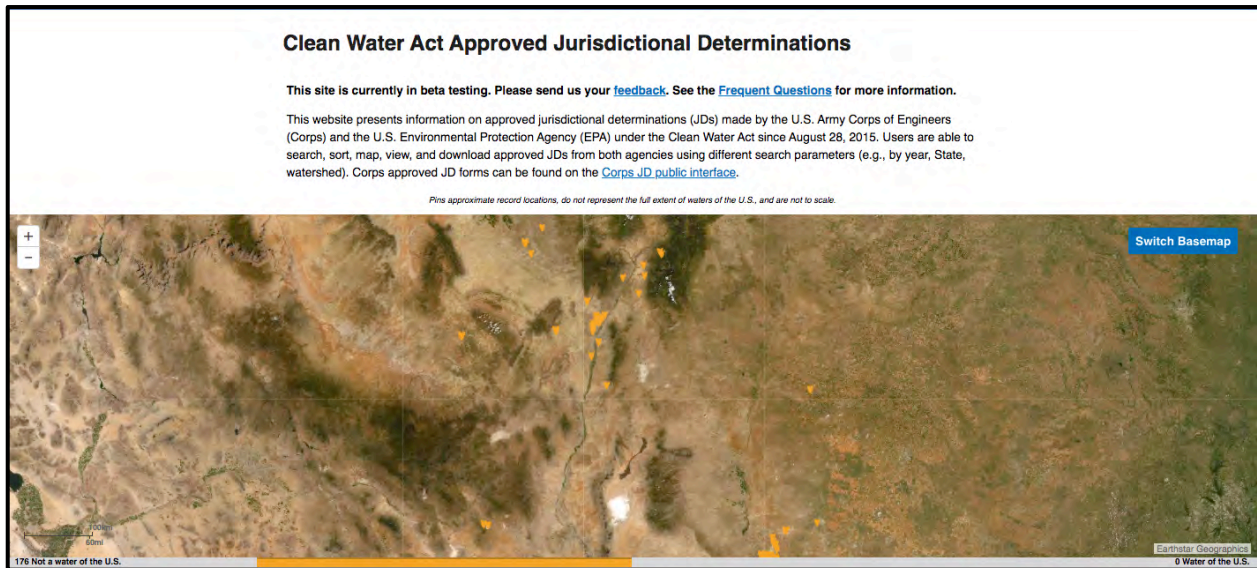


Ex. 4 – Selected Maps from EPA Website Database of Approved Jurisdictional Determinations on June 29 and June 30, 2021, available at: <https://watersgeo.epa.gov/cwa/>

### New Mexico Approved Jurisdictional Determinations under the NWPR as of 6/29/21



### New Mexico Approved Jurisdictional Determinations under the NWPR as of 6/29/21





Ex. 4 – Selected Maps from EPA Website Database of Approved Jurisdictional Determinations on June 29 and June 30, 2021, available at: <https://watersgeo.epa.gov/cwa/>

### California Approved Jurisdictional Determinations under the NWPR as of 6/30/21



### California Approved Jurisdictional Determinations under the NWPR as of 6/29/21



Ex. 4 – Selected Maps from EPA Website Database of Approved Jurisdictional Determinations on June 29 and June 30, 2021, available at: <https://watersgeo.epa.gov/cwa/>

**Missouri Approved Jurisdictional Determinations under the NWPR as of 6/30/21**



**Missouri Approved Jurisdictional Determinations under the NWPR as of 6/29/21**



Estrin Ex. 5



An official website of the United States government.



## News Releases from Headquarters › Water (OW)

# EPA, Army Announce Intent to Revise Definition of WOTUS

06/09/2021

### Contact Information:

EPA Press Office ([press@epa.gov](mailto:press@epa.gov))

**WASHINGTON** – Today, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) are announcing their intent to revise the definition of “waters of the United States” (WOTUS) to better protect our nation’s vital water resources that support public health, environmental protection, agricultural activity, and economic growth. As described in an EPA declaration requesting remand of the 2020 Navigable Waters Protection Rule, a broad array of stakeholders—including states, Tribes, local governments, scientists, and non-governmental organizations—are seeing destructive impacts to critical water bodies under the 2020 rule.

“After reviewing the Navigable Waters Protection Rule as directed by President Biden, the EPA and Department of the Army have determined that this rule is leading to significant environmental degradation,” **said EPA Administrator Michael S. Regan**. “We are committed to establishing a durable definition of ‘waters of the United States’ based on Supreme Court precedent and drawing from the lessons learned from the current and previous regulations, as well as input from a wide array of stakeholders, so we can better protect our nation’s waters, foster economic growth, and support thriving communities.”

“Communities deserve to have our nation’s waters protected. However, the Navigable Waters Protection Rule has resulted in a 25 percentage point reduction in determinations of waters that would otherwise be afforded protection,” **said Acting Assistant Secretary of the Army for Civil Works Jaime A. Pinkham**. “Together, the Department of the Army and EPA will develop a rule that is informed by our technical expertise, is straightforward to implement by our agencies and our state and Tribal co-regulators, and is shaped by the lived experience of local communities.”

Upon review of the Navigable Waters Protection Rule, the agencies have determined that the rule is significantly reducing clean water protections. The lack of protections is particularly significant in arid states, like New Mexico and Arizona, where nearly every one of over 1,500

streams assessed has been found to be non-jurisdictional. The agencies are also aware of 333 projects that would have required Section 404 permitting prior to the Navigable Waters Protection Rule, but no longer do.

As a result of these findings, today, the Department of Justice is filing a motion requesting remand of the rule. Today's action reflects the agencies' intent to initiate a new rulemaking process that restores the protections in place prior to the 2015 WOTUS implementation, and anticipates developing a new rule that defines WOTUS and is informed by a robust engagement process as well as the experience of implementing the pre-2015 rule, the Obama-era Clean Water Rule, and the Trump-era Navigable Waters Protection Rule.

The agencies' new regulatory effort will be guided by the following considerations:

- Protecting water resources and our communities consistent with the Clean Water Act.
- The latest science and the effects of climate change on our waters.
- Emphasizing a rule with a practical implementation approach for state and Tribal partners.
- Reflecting the experience of and input received from landowners, the agricultural community that fuels and feeds the world, states, Tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns.

The agencies are committed to meaningful stakeholder engagement to ensure that a revised definition of WOTUS considers essential clean water protections, as well as how the use of water supports key economic sectors. Further details of the agencies' plans, including opportunity for public participation, will be conveyed in a forthcoming action. To learn more about the definition of waters of the United States, visit: <https://www.epa.gov/wotus>.

## Background

The Clean Water Act prohibits the discharge of pollutants from a point source to navigable waters unless otherwise authorized under the Act. Navigable waters are defined in the Act as “the waters of the United States, including the territorial seas.” Thus, “waters of the United States” (WOTUS) is a threshold term establishing the geographic scope of federal jurisdiction under the Clean Water Act. The term “waters of the United States” is not defined by the Act but has been defined by EPA and the Army in regulations since the 1970s and jointly implemented in the agencies' respective programmatic activities.

The 2020 Navigable Waters Protection Rule was identified in President Biden's Executive Order 13990, which directs federal agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021. See Fact Sheet: List of Agency Actions for Review, available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

LAST UPDATED ON JUNE 9, 2021



Estrin Ex. 6



## **MEMORANDUM FOR THE RECORD**

**DATE:** June 8, 2021

**SUBJECT:** Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule

On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) (collectively “the agencies”) promulgated the Navigable Waters Protection Rule (NWPR), which comprehensively revised regulations defining “waters of the United States” for purposes of the Clean Water Act (CWA). On January 20, 2021, President Joseph R. Biden Jr. signed Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (EO 13990) to declare the Administration’s policy “to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.” EO 13990 directs federal agencies to “immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” The order also specifically revoked 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), which had initiated development of the NWPR.

Consistent with Executive Order 13990, the agencies have completed their review of the NWPR.

As a part of that review, agency staff reviewed available data to assess the potential effects of the rule, informed by nearly a full year of implementation.<sup>1</sup>

### **Effects of the Navigable Waters Protection Rule and Potential Environmental Harms**

EPA and Army staff have reviewed jurisdictional determinations as recorded in the U.S. Army Corps of Engineers’ (Corps) internal ORM2 database<sup>2</sup> and have identified numerous clear and

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<sup>1</sup> The attachments to this memorandum contain the information the agencies reviewed to assess the potential effects of the NWPR.

<sup>2</sup> The Corps tracks preliminary jurisdictional determinations and approved jurisdictional determinations through an internal regulatory management database, called Operation and Maintenance Business Information Link, Regulatory Module (ORM2). This database documents Department of the Army authorizations under CWA section 404 and Rivers and Harbors Act section 10, including permit application processing and jurisdictional determinations. This



consistent indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practice. These indicators include an increase in section 404 permit applicants seeking approved jurisdictional determinations (AJDs) rather than preliminary jurisdictional determinations (PJDs), an increase in determinations by the Corps that waters are non-jurisdictional, and an increase in projects for which section 404 permits are no longer required. Additionally, the agencies believe that many project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams; the effects of such projects are not tracked by the Corps database.

Although the agencies did not quantify the estimated change in jurisdiction in the NWPR rulemaking process, including the supporting documents in the record, the decrease in jurisdiction has been more dramatic than the deregulatory effects the agencies had identified in the NWPR preamble or supporting documents in the record for the rule. After reviewing available data, the agencies have found that PJDs (through which applicants proceed with permitting as though all aquatic resources were jurisdictional) are much less common under the NWPR, indicating that fewer project proponents believe waters are jurisdictional to begin with. Conversely, AJDs are more common under the NWPR, and the available data demonstrate that these AJDs are much less likely to result in finding jurisdictional aquatic resources than AJDs made under prior regulatory regimes. The Corps finalized 6,351 AJDs between the NWPR's effective date of June 22, 2020 and April 15, 2021. When this dataset was adjusted to account for differences in how determination forms were designed under the different regulatory regimes, the Corps found approximately 71% of AJDs identified non-jurisdictional aquatic resources and 29% identified jurisdictional aquatic resources.<sup>3</sup> In comparison, AJDs made under the 2015 Clean Water Rule and the pre-2015 regulatory regime from the time periods of June 22, 2018 to April 15, 2019, and June 22, 2019 to April 15, 2020, found that approximately 46% of AJDs included non-jurisdictional aquatic resources and 54% included jurisdictional aquatic resources.<sup>4</sup>

The agencies' data provide evidence of trends in the way specific aquatic resources are being affected by implementation of the NWPR. The Corps' ORM2 database contains AJDs that evaluated 40,211 individual aquatic resources or water features under the NWPR between June 22, 2020 and April 15, 2020; of these individual aquatic resources, approximately 76% were

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database does not include aquatic resources that are not associated with a jurisdictional determination or permit request or resource impacts that are not associated with a Corps permit or enforcement action.

<sup>3</sup> Under the NWPR, a single AJD in the Corps' database can include both affirmative and negative jurisdictional determinations. Under prior regulatory regimes, the Corps' database was structured such that a single AJD could have only affirmative, or only negative, jurisdictional determinations. Because of this difference, a NWPR jurisdictional determination that includes both affirmative and negative jurisdictional resources was normalized and counted as two separate approved jurisdictional determinations, one affirmative and one negative.

<sup>4</sup> Due to preliminary injunctions, the 2015 Clean Water Rule and the pre-2015 regulatory regime were being implemented in different parts of the country during a portion of the time periods for which the agencies assessed data. Data used in this analysis for the 2015 Clean Water Rule are from August 16, 2018 (the date that the nationwide stay was lifted) to April 15, 2019, and June 22, 2019 to December 22, 2019 (the Clean Water Rule was replaced by the 2019 Repeal Rule on December 23, 2019). The 2015 Clean Water Rule was never in effect for the entire country due to preliminary injunctions. For the time periods assessed under this analysis, the pre-2015 regulatory regime was in effect nationwide from June 22, 2018 to August 15, 2018, and December 23, 2019 (effective date of the 2019 Repeal Rule) to April 15, 2020. The 2019 Rule Repeal, which reinstated the pre-2015 regulatory regime, was in effect until the NWPR's effective date of June 22, 2020, but the agencies chose to analysis data for comparable time periods as the data available for NWPR determinations.

found to be non-jurisdictional by the Corps. Specifically, 69% of streams and wetlands were found to be non-jurisdictional, including 9,548 ephemeral features (mostly streams) and 12,895 wetlands that did not meet the NWPR's revised adjacency criteria (and thus are non-jurisdictional under the NWPR). Ditches were also frequently excluded (3,849 individual exclusions).

Of particular concern to the agencies is the NWPR's disproportionate effect on arid regions of the country. The Corps' data show that in New Mexico, of the 258 streams assessed in AJDs, 100% were found to be non-jurisdictional ephemeral resources.<sup>5</sup> In Arizona, of the 1,284 streams assessed in AJDs, 1,280, or 99.6%, were found to be non-jurisdictional ephemeral resources. Compounding potential resource losses, eliminating ephemeral streams from jurisdiction under the NWPR also typically eliminates jurisdiction over any nearby wetlands. Ephemeral streams that have the presence of physical indicators of flow including a bed, bank, and ordinary high water mark, and contribute flow to a traditional navigable water, interstate water, or territorial sea, would have been jurisdictional as tributaries under the 2015 regulations defining "waters of the United States" (the Clean Water Rule). Many, though not all of these streams and their nearby wetlands, would likely have been jurisdictional under the pre-2015 regulatory regime after a case-specific significant nexus analysis.

The agencies are aware of at least 333 projects that required CWA section 404 permitting pre-NWPR, but no longer do under the NWPR. In the year since the NWPR has come into effect, 968 actions associated with AJDs under the NWPR had "no permit required" findings by the Corps. This metric includes the 333 projects that no longer required section 404 permitting due to the NWPR as well as projects that did not require 404 permitting because the activity was not occurring in waters of the United States (projects that are deemed to not require permits can include activities occurring in uplands or in waters that may have also been found to be non-jurisdictional under prior regulatory regimes; such projects would have not required permits under prior regulatory regimes as well.). The more telling aspect of these 968 actions in 2020-2021 is the comparison to prior years. In 2020-2021, there has been a threefold (338%) increase from 2019-2020 and a fourfold (412%) increase from 2018-2019 in the number of projects being determined to not require section 404 permits under the CWA. These metrics likely capture only a small portion of projects that are occurring on the ground since there is typically no need for a project proponent to seek a "no permit required" determination after having already received a wholly negative AJD and other project proponents may not feel the need to obtain any sort of JD at all if they believe their aquatic resources are non-jurisdictional under the NWPR. Many projects could be occurring without consultation with the Corps due to the non-jurisdictional bright lines established under the NWPR. While the Corps' ORM2 data do not represent all aquatic resources in the United States, they shed light on the trend and magnitude of losses under the NWPR.<sup>6</sup>

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<sup>5</sup> These non-jurisdictional ephemeral resources are predominantly ephemeral streams, but a small portion may be swales, gullies, or pools.

<sup>6</sup> Requests for AJDs and the jurisdictional dispositions of the aquatic resources evaluated as part of those AJDs are imperfect measures of activities that might affect those jurisdictional or non-jurisdictional aquatic resources. The AJD data in the Corps ORM2 database generally contains only records for situations in which landowners or project proponents have requested jurisdictional determinations from the Corps or that are associated with an enforcement action, and thus does not represent all aquatic resources that exist within the United States. The proportion and

The agencies have heard concerns from a broad array of stakeholders, including states, tribes, scientists, and non-governmental organizations, that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms. The agencies are aware that projects are proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized, and, based on available information, will therefore result in discharges without any regulation or mitigation from federal or state agencies. *See* EA at 40 (indicating that a large number of states do not currently regulate waters more broadly than the CWA requires, and are “unlikely to increase state regulatory practices” following the NWPR). The agencies are also aware of certain states that have already begun taking deregulatory steps to change their state regulatory practices to match the NWPR, contrary to the agencies’ estimates in the “[l]ikely response category” for such states identified in the NWPR’s EA. *See* EA at 39-41 (estimating that some states are likely to continue their current dredged/fill permitting practices; however, some of those states have instead sought to reduce the scope of state clean water protections after the NWPR was finalized). One project that stakeholders have identified is the construction of an oil pipeline which will cause discharges into nearly 100 ephemeral streams that are no longer jurisdictional, and another is construction of a mine that would destroy hundreds of previously jurisdictional wetlands, deemed non-jurisdictional under the NWPR, next to a National Wildlife Refuge.

Ephemeral streams, wetlands that do not meet the NWPR’s revised adjacency criteria, and other aquatic resources not protected by the NWPR provide numerous ecosystem services, and the absence of protections for such resources could cause cascading, cumulative, and substantial downstream effects, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity.<sup>7</sup> These substantial effects on the chemical, physical, and biological integrity of the nation’s waters were inadequately considered during the NWPR rulemaking process.

Attachments:

Attachment A: Data Analysis.

Letter from the Southern Environmental Law Center, the Natural Resources Defense Council, and the National Parks Conservation Association, to Radhika Fox, Acting Assistant Administrator for Water, USEPA, Re: Harm Resulting from the 2020 Waters of the United States Definition (March 11, 2021).

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specific types of aquatic resources evaluated for jurisdiction via AJDs varies both geographically and also from year to year. In addition, the ORM2 data collected from AJDs conducted under different regulatory regimes have some metrics that are not directly comparable. Notwithstanding these limitations, the volume of ORM2 data on AJDs and associated aquatic resources is quite large and is tracked in a reasonably accurate fashion, and thus provides a reasonable estimate of overall trends and conditions on the ground. It represents the best data available to the agencies at this time.

<sup>7</sup> U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report), EPA/600/R-14/475F, (Washington, DC: U.S. Environmental Protection Agency, (2015)). <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

How the Trump Administration Eased Destruction of the Nation's Wetlands and Streams, David Groves, 51 Env'l Law Reporter 10194 (2021).

Complaint, *Pueblo of Laguna; Pueblo of Jemez*, No. 1:21-cv-00277-JFR-KK (D.N.M. Mar. 26, 2021).

Declaration of Rebecca Roose, *State of California et al. v. Wheeler et al.*, No. 3:20-cv-03005-DMR (N.D. Cal. May 18, 2021).

Letter from Jeanette Wolfley and James Grieco, University of New Mexico School of Law, to Andrew Wheeler et al., Re: Comments on Proposed Rulemaking, Docket ID No. EPA-HQ-QW-2018-0149 (April 15, 2019).

Indiana Senate Bill 389. Signed on April 29, 2021. Available at: <http://iga.in.gov/legislative/2021/bills/senate/389>.

Ohio House Bill 175. Deregulate Certain Ephemeral Water Features. Introduced March 3, 2021. Available at: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-HB-175>.

Estrin Ex. 7

## Attachment A: Data Analysis

The U.S. Environmental Protection Agency and the U.S. Department of the Army conducted four assessments on the effects of the Navigable Waters Protection Rule (NWPR) on jurisdictional determinations and related individual aquatic resources using data sourced from the U.S. Army Corps of Engineers' (Corps) ORM2 database. Due to the sensitive information found in the ORM2 database, the raw data associated with these analyses are not being provided here. The ORM2 database was deployed to all of the Corps' 38 districts in 2008 and has been continuously improving since that time. Because of changes to regulation and tracking priorities, the data are most reliable from the year 2016 to present. The following assessments are based on data within specific time frames: June 22 to April 15 in the years of 2018-2019, 2019-2020, and 2020-2021.

These assessments use the following metrics:

- Total number of approved jurisdictional determinations (AJDs) and preliminary jurisdictional determinations (PJDs) by given time period.
  - o The above metric was further broken down by total number of AJDs that included jurisdictional and non-jurisdictional determinations.<sup>1</sup>
- Total number of individual aquatic resources found to be jurisdictional and non-jurisdictional within AJDs under the NWPR.<sup>2</sup>
  - o The above metric was further broken down by the categories of jurisdictional waters and exclusions in the NWPR (i.e., (a)(2), (a)(4), (b)(1), and (b)(3) categories).
- Total number of AJDs in New Mexico and Arizona that included stream resources that were found to be jurisdictional and non-jurisdictional.
- Total number of projects that resulted in 'No Permit Required' closure methods.

### Background:

The Operation and Maintenance Business Information Link, Regulatory Module (ORM2) is the Corps' internal database that documents Clean Water Act (CWA) section 404 application and permit data, including information on jurisdictional determinations (JDs).<sup>3</sup> A JD is a written Corps determination that a water is subject to regulatory jurisdiction under section 404 of the CWA (33 U.S.C. 1344) or a written determination that a water is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).<sup>4</sup> JDs are identified as either preliminary or approved, and

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<sup>1</sup> The NWPR AJD data entry in ORM2 allows for and is often used to compile determinations about both jurisdictional and non-jurisdictional aquatic resources together for a single project site; under prior regulatory regimes, data entry in ORM2 restricted project managers to entering AJDs in separate entries for jurisdictional and non-jurisdictional resources on the same project site.

<sup>2</sup> Individual aquatic resources were only assessed under the NWPR because jurisdictional determinations carried out under prior regimes had less clear differentiation between types of aquatic resources. For example, a lake under prior regimes could have been classified as a tributary, an impoundment, a traditional navigable water, an interstate water, and sometimes even an adjacent water or adjacent wetland.

<sup>3</sup> The public interface for the Corps' ORM2 Database is available at: <https://permits.ops.usace.army.mil/orm-public>.

<sup>4</sup> 33 CFR 331.2.

both types are recorded in ORM2. An approved jurisdictional determination (AJD) is an official Corps document stating the presence or absence of “waters of the United States” on a parcel or a written statement and map identifying the limits of “waters of the United States” on a parcel. A preliminary jurisdictional determination (PJD) is a non-binding written indication that there may be “waters of the United States” on a parcel; an applicant can elect to use a PJD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination.<sup>5</sup>

#### Methods:

In the ORM2 database, an AJD can contain one or multiple aquatic resources. For this reason, the agencies assessed data on the AJD-level and at the aquatic resource level.

#### *Data Quality Assurance and Control:*

NWPR AJD Data from ORM2 was refined to account for foundational differences in how AJD information is reported under the various regulatory regimes. Because a single AJD in ORM under the NWPR can contain both jurisdictional and non-jurisdictional determinations, the instances of these “mixed” AJD forms had to be separated into two buckets.<sup>6</sup> To explain, when totaling whether an AJD was for a jurisdictional or non-jurisdictional resource, if an AJD under the NWPR contained both, it was counted in both categories (i.e., a tally would be added under the jurisdictional category and the non-jurisdictional category). This refinement was made on 1,318 AJDs and thus normalized the NWPR AJDs so that it could be compared to AJDs conducted under the previous regulatory regimes. Additionally, any AJDs that were conducted on drylands or Rivers and Harbors Act section 10 waters only were excluded from this analysis, as they are either excluded from the definition of “waters of the United States” or do not fall under the joint jurisdiction of the EPA and Corps under the CWA. This led to 1,099 AJDs from ORM2 being excluded from this analysis. Additionally, AJDs from Colorado were excluded from this analysis.<sup>7</sup>

The agencies also assessed actions from 2020-2021 associated with the Corps’ “No Permit Required” closure method within ORM2, looking specifically at closure methods for “Activities that occur in waters that are no longer WOTUS under the NWPR” and “Activities that do not occur in WOTUS.” “Activities that occur in waters that are no longer WOTUS under the NWPR” is a new closure method created by the Corps for the ORM2 database that helps track actions that would have required a permit prior to the NWPR but that no longer do due to the NWPR’s revised definition of “waters of the United States.” However, this closure method is not being uniformly used across the Districts and by Corps project

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<sup>5</sup> When the Corps provides a PJD, or authorizes an activity through a general or individual permit relying on a PJD, the Corps is not making a legally binding determination of any type regarding whether jurisdiction exists over the particular aquatic resource in question even though the applicant or project proponent proceeds as though the resource were jurisdictional. A PJD is “preliminary” in the sense that a recipient of a PJD can later request and obtain an AJD if that becomes necessary or appropriate during the permit process or during the administrative appeal process. See 33 CFR 331.2.

<sup>6</sup> Under the pre-2015 regulatory regime and the 2015 Clean Water Rule, AJDs in ORM could contain only jurisdictional features or only non-jurisdictional features.

<sup>7</sup> Because the NWPR was enjoined in the state of Colorado during the 2020-2021 period of record, all data for sites in the state of Colorado were removed from the 2020-2021 dataset. In order to make the data more suitable for comparative purposes between years, all Colorado data were also removed from the 2018-2019 and the from the 2019-2020 datasets for AJDs made under the previous regulatory regimes.

managers and thus likely undercounts the number of projects that would have required a permit prior to the NWPR but that no longer do.

*Statistics:*

Because data within ORM2 are imperfect in nature -- due to varying regulatory regimes, economic and development trends, and general human error related to data entry -- the assessment carried out is summary in nature. In short, statistics on significance cannot be run and rather than comparing whole numbers between different time periods, it is more telling to compare percentages. While exact numbers are not obtainable from the data there is more than sufficient volume and accuracy of the data to demonstrate clear trends.

Results and discussion:

*AJDs and PJDs over time*

Of 6,570 NWPR AJDs that were finalized from June 22, 2020 to April 15, 2021, 71% were found to include non-jurisdictional aquatic resources (Table 1, Figures 1 and 2). The trend to pull from this percentage is that at a national level, when a project proponent wants an official determination of the jurisdictional status of aquatic resources on a parcel and requests an AJD, 71% of the time the AJDs identified non-jurisdictional aquatic resources, while under prior regimes, that same outcome occurred 46% of the time. Similarly telling, since the NWPR has been in effect, the percent of jurisdictional determinations being carried out as AJDs versus PJDs has gone up by 95% and 116% depending on prior time periods considered (Table 1). Fewer PJDs indicates that fewer project proponents are assuming aquatic resources on their project sites are jurisdictional. This has two implications: project proponents are requesting AJDs rather than PJDs and/or they are simply not notifying the Corps of their activities that might result in the discharge of dredged or fill material into aquatic resources because they believe those resources are no longer jurisdictional under the NWPR. The lower rates of PJD requests under the NWPR may be the most striking metric for how trends in jurisdiction have changed.

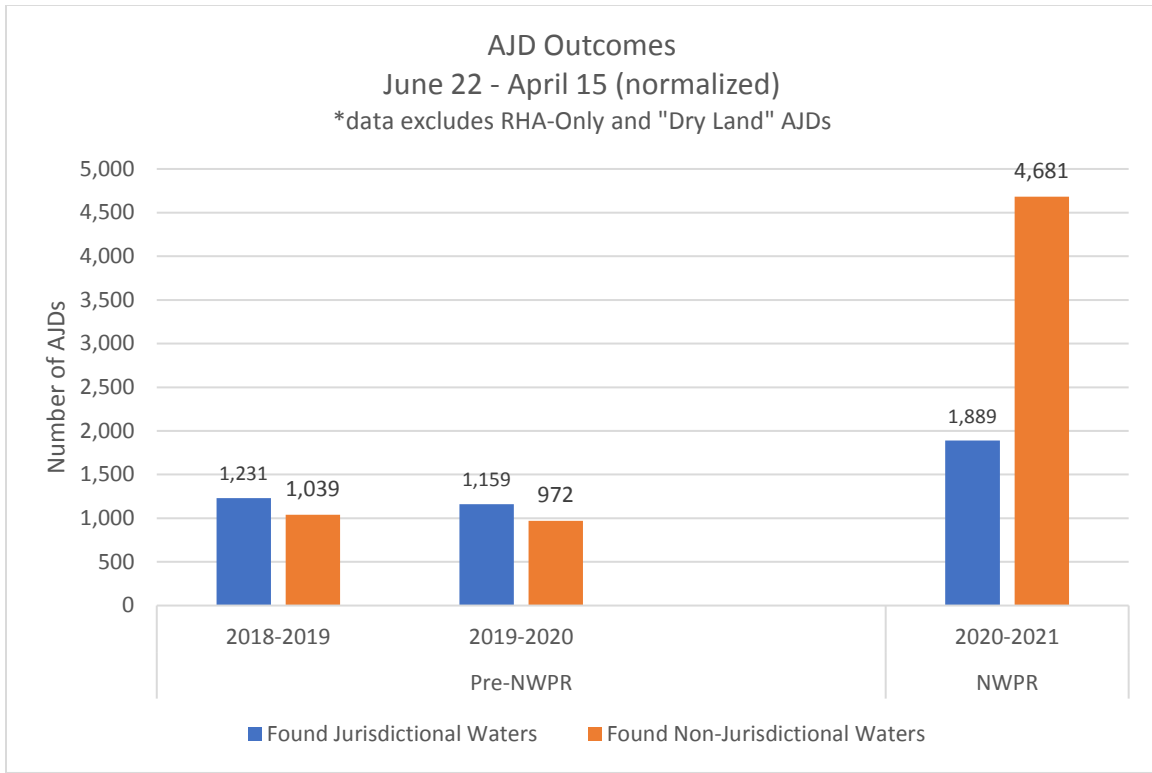
Table 1: Jurisdictional vs Non-jurisdictional determinations over time

JDs: PJDs vs AJDs					
Time period	PJD	AJD	Total	% AJD	% Change in % AJD
2018-2019	8,465	3,731	12,196	31%	116%
2019-2020	7,351	3,761	11,112	34%	95%
2020-2021	3,961	7,669	11,630	66%	

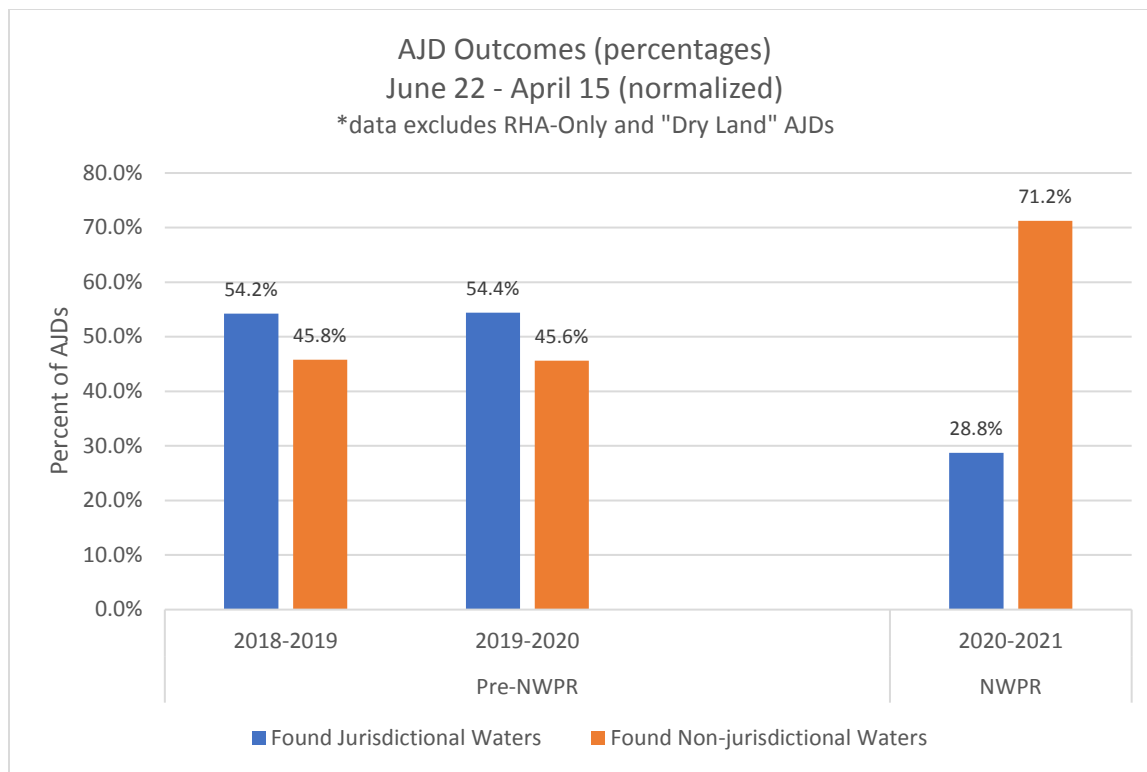
AJDs: Jurisdictional vs Non-jurisdictional					
Time period	Jurisdictional	Non-jurisdictional	Total	% Non-jurisdictional	% Change in % Non-jurisdictional
2018-2019	1,231	1,039	2,270	46%	
2019-2020	1,159	972	2,131	46%	
2020-2021	1,889	4,681	6,570	71%	56%

The data used are the normalized data, excluding dry lands and RHA section 10 waters only and data from Colorado.





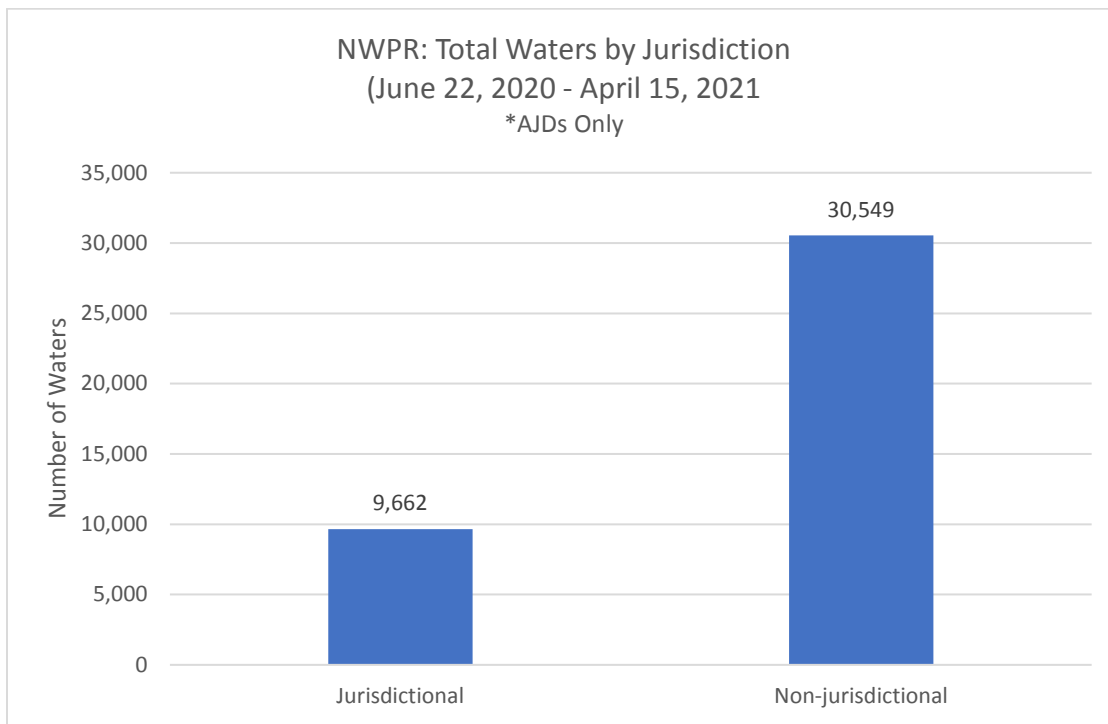
**Figure 1.** Breakdown of AJDs that found jurisdictional and non-jurisdictional waters (June 22 – April 15), for each of the three periods evaluated. These data exclude both “RHA-only” AJDs and “Dry Land” AJDs as well as AJD data from Colorado. Data have been normalized.



**Figure 2.** Breakdown of AJDs (by percentages) that found jurisdictional and non-jurisdictional waters (June 22 – April 15), for each of the three periods of record. This data excludes both “RHA-only” AJDs and “Dry Land” AJDs as well as data from Colorado. Data have been normalized.

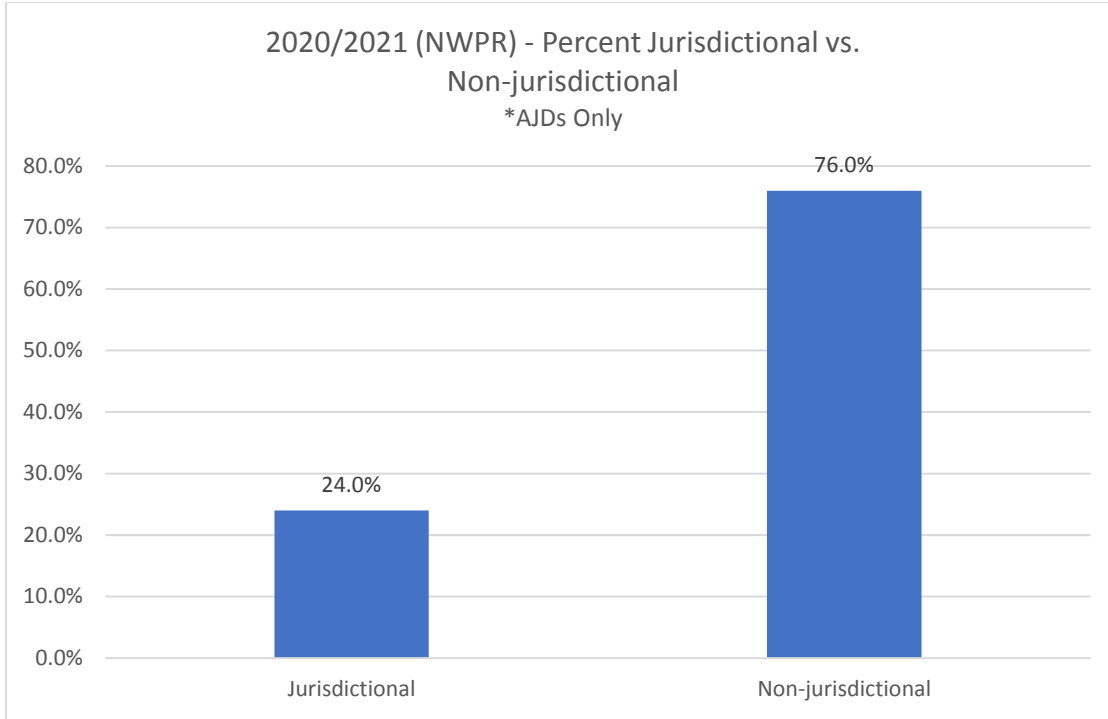
*Individual Aquatic Resources associated with NWPR AJDs*

Because data on individual aquatic resources are not directly comparable between regulatory regimes, the focus in this part of the analysis is on what resources are being found to be non-jurisdictional under the NWPR (Figures 3, 4, 5, and 6).<sup>8</sup> Under the NWPR, 76% of the individual aquatic resources evaluated to date have been found to be non-jurisdictional (Figure 4). Wetlands that do not meet the NWPR's adjacency criteria and ephemeral channelized features make up the majority (73%) of these non-jurisdictional resources (Figures 5 and 6). Additionally, excluded ditches also make up a large portion (12.6%) of the total resources found to be non-jurisdictional (Figure 5).

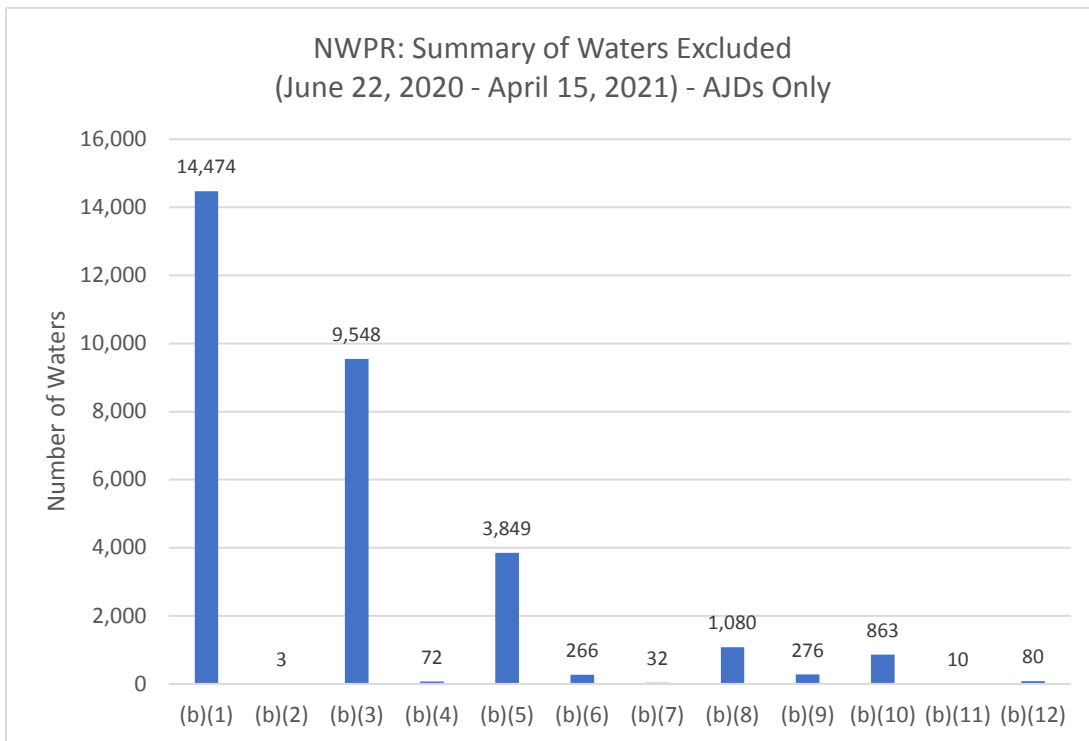


**Figure 3.** Total number of waters and water features found jurisdictional vs. non-jurisdictional under the NWPR (June 22, 2020 – April 15, 2021). Data reported here are from AJDs only.

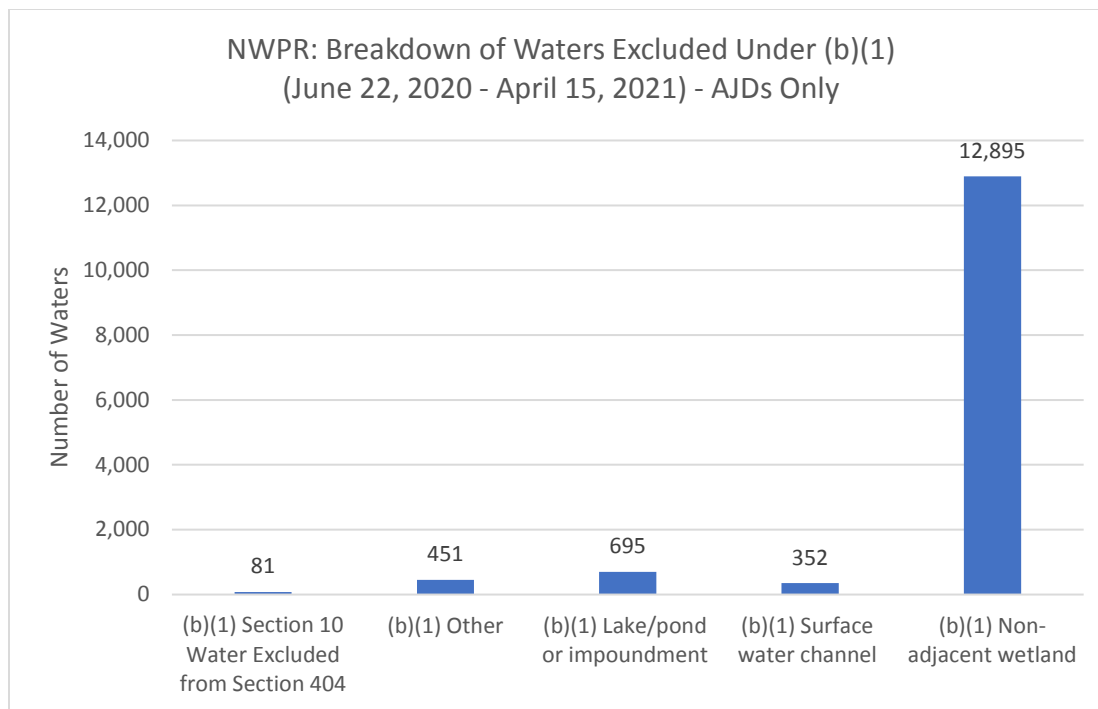
<sup>8</sup> This analysis includes only those aquatic resources associated with AJDs.



**Figure 4.** Percentage breakdown of waters and water features found jurisdictional vs. non-jurisdictional under the NWPR (June 22, 2020 – April 15, 2021). Data reported here are from AJDs only.



**Figure 5.** Breakdown of waters found non-jurisdictional under NWPR by exclusion type (June 22, 2020 – April 15, 2021). Data reported here are from AJDs only.



**Figure 6.** Breakdown of waters found non-jurisdictional under paragraph (b)(1) of the NWPR, broken down by the tracked (b)(1) exclusion subcategories in ORM2 (June 22, 2020 – April 15, 2021). Data reported here are from AJDs only.

#### *Arid West AJDs*

NWPR AJDs in Arizona and New Mexico were found to be dominated by non-jurisdictional ephemeral channelized features (Table 2). Interpreting what these percentages mean for on the ground implementation, based on the available data under the NWPR, if someone submits an AJD request for a stream in the state of New Mexico or Arizona, there is nearly a 100% likelihood that the AJD will be for a non-jurisdictional ephemeral stream. Under the NWPR, this means that any nearby wetlands would also generally be non-jurisdictional.

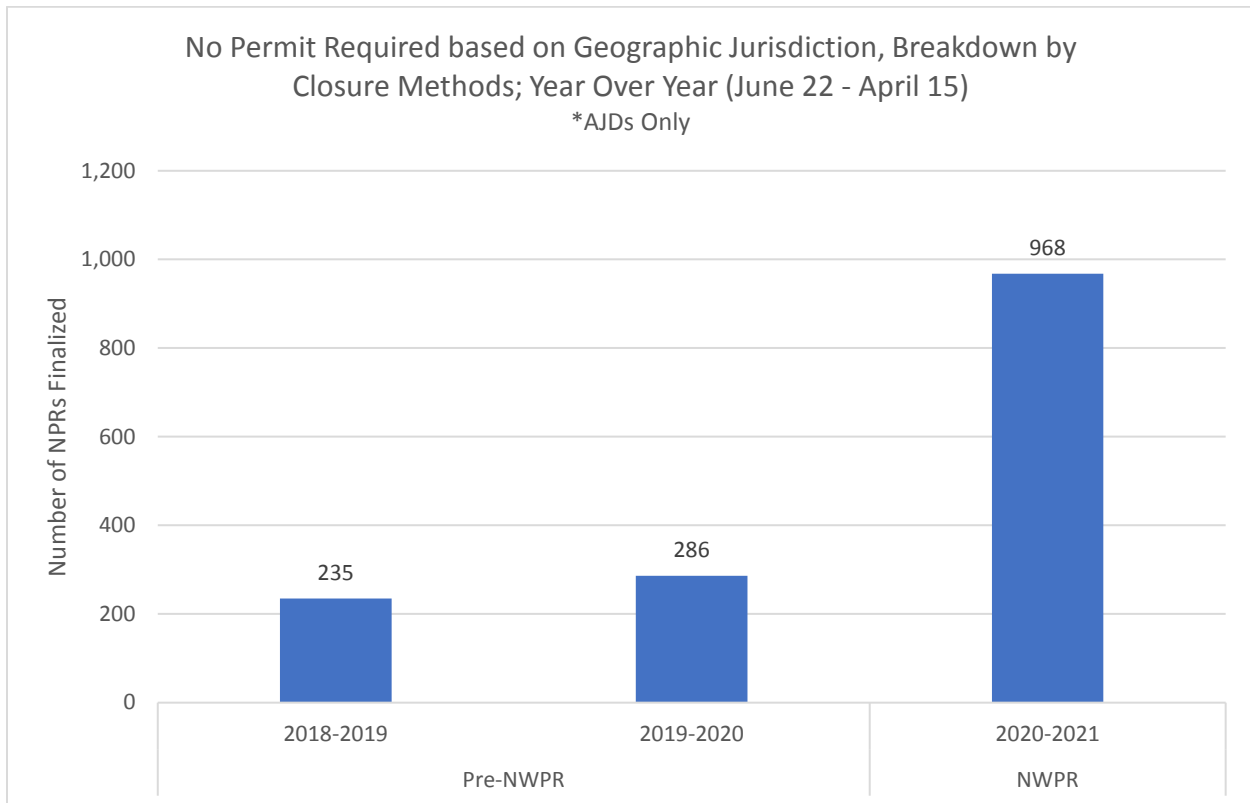
Table 2: Arid West jurisdictional findings under the NWPR

State	Jurisdictional streams	Non-jurisdictional streams	Total Streams	Percent Non-jurisdictional streams
Arizona	4	1,280	1,284	99.7%
New Mexico	0	258	258	100.0%

Note that only (b)(3) resources were looked at for non-jurisdictional data.

*No Permit Required based on AJDs only*

Based on an assessment of the two specific “No Permit Required” closure methods in ORM2 associated with projects with AJDs, under the NWPR there has been a reported threefold (338% for 2019-2020) to fourfold (412% for 2018-2019) increase in projects that do not require CWA 404 permits as compared to what was reported under the previous regulatory regimes (Figure 7). Given that one of the closure methods included here, “Activities that occur in waters that are no longer WOTUS under the NWPR,” has not been used uniformly by all Corps project managers across the U.S., it is likely that the overall number of projects that fit into this category are likely under-represented.



**Figure 7.** Projects with ‘No permit required’ closure methods of “Activities that do not occur in WOTUS” and “Activities that occur in waters that are no longer WOTUS under the NWPR”.

Data Limitations

While ORM2 contains data on individual aquatic resources that the Corps has determined are or are not jurisdictional on a site-specific basis, JDs are typically conducted at the request of the landowner. In other words, they usually represent where landowners or project proponents want to know if jurisdictional waters are located within their properties or project sites, including but not limited to for purposes of conducting dredged or fill activities. Thus, some aquatic resource types may be over- or underrepresented in the population of PJDs and AJDs.

The agencies recognize that these PJDs and AJDs may not be uniformly distributed across the country. There may be selection bias in terms of where the Corps has available information on JDs. A landowner or applicant can decide whether they would like an AJD – meaning the Corps makes an official determination of whether an aquatic resource is jurisdictional – or whether they would prefer to voluntarily waive or set aside questions regarding jurisdiction with the use of a PJD). In addition, Corps Districts across the country vary in their receipt of requests for AJDs versus PJDs, with some Districts primarily being requested to complete PJDs, particularly prior to the NWPR. Because PJDs cannot determine that something is not a “water of the United States” and/or whether there are no “waters of the United States” on the site and in light of the reduction in jurisdiction under the NWPR, the use of PJDs has appeared to decrease.

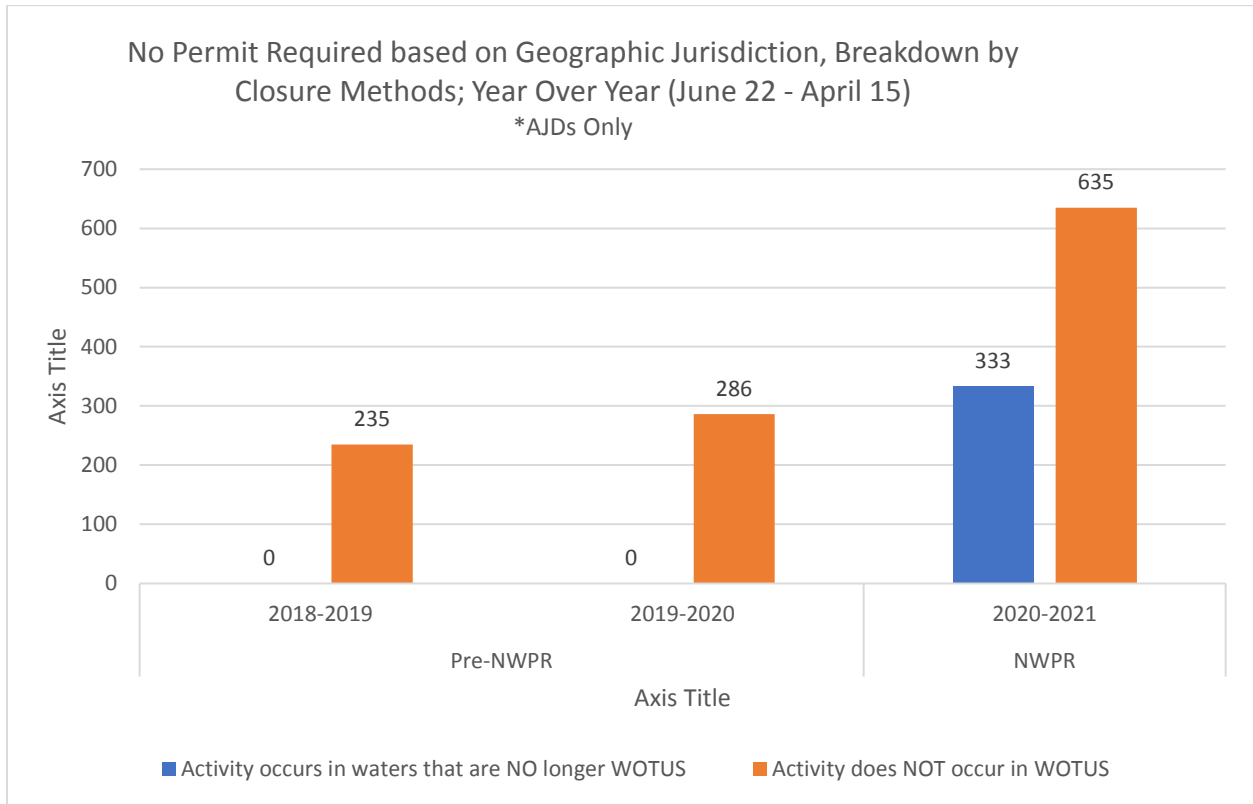
The States of New Jersey and Michigan have assumed administration of the CWA section 404 permit program for certain waters within their state boundaries. On December 17, 2020, Florida became the third state to receive approval to assume administration of the program. The Corps, however, retains administration of the section 404 permitting program for specific waters as listed under the parenthetical of CWA section 404(g)(1). Thus, the Corps conducts JDs for only a subset of waters within New Jersey, Michigan, and Florida, which have been included in the analysis of ORM2 data where available. In Florida, the number of NWPR JDs conducted by the Corps will be limited compared to the number of JDs in that state conducted under the prior regulatory regimes, as EPA’s approval for the state to assume administration of the section 404 program occurred a few months after the effective date of the NWPR.

The new closure method “Activities that occur in waters that are no longer WOTUS under the NWPR” is not being uniformly used across the Districts and by Corps project managers and thus likely undercounts the number of projects that would have required a CWA section 404 permit prior to the NWPR but that no longer do. However, it serves as the best available indicator of projects that are tracked and no longer require a section 404 permit in light of the NWPR’s reduction in CWA jurisdiction.

On a national level, ORM2 data are analyzed for reasonableness; when a correction is warranted, it is accomplished by Corps field project managers. Not all individual records, however, are verified and data entry errors may exist.

Despite these limitations, the agencies have concluded that assessing the ORM2 data associated with the NWPR is a reasonable way to evaluate the effects of the rule. The data represent the best national-level information on the resources that are being called non-jurisdictional under the NWPR, and the agencies have concluded that it is reasonable to compare the NWPR data from 2020-2021 with data from the same time period in prior years that are associated with determinations made under the 2015 Clean Water Rule and the pre-2015 regulatory regime, which was reestablished with the 2019 Rule.

Addendum



**Figure 8.** Projects with ‘No permit required’ closure methods of “Activities that do not occur in WOTUS” and “Activities that occur in waters that are no longer WOTUS under the NWPR”.



Actions Associated with an Approved Jurisdictional Determination in ORM2 (June 22, 2020-April 15, 2021) with the No Permit Required Closure Method of "Activity occurs in waters that are NO longer WOTUS under the NWPR"

DA Number	Action Type	Project Name	Closure Method	County	State	Proposed Project Description
SAJ-2018-03203	NPR	Midwest Transit Inc / Tomoka Farms RV Storage Facility	Activity occurs in waters that are NO longer WOTUS under the NWPR	Volusia County	FL	Applicant proposes to JD s21t15r32
SWT-2016-00344	NPR	Martin Marietta Materials Pre JD Expansion of Mill Creek Quarry Johnston County OK	Activity occurs in waters that are NO longer WOTUS under the NWPR	Johnston County	OK	NPR with no AJD due to water on site but not impacted by expansion. Expansion of existing Martin Marietta Materials mine / quarry as the current 'Granite Quarry' extends westward. An unnamed tributary to Mill Creek was observed but per application will not be impacted by the planned expansion. Future expansion of an adjacent (across the highway between the two) mine known as the 'Mill Creek Stone Quarry' may impact WOUS. Approximate center of Granite Quarry expansion area is 34.359340 x -96.812253.
SAJ-2007-06262	NPR	Cocoa Landing	Activity occurs in waters that are NO longer WOTUS under the NWPR	Brevard County	FL	construct a 484 unit residential development
NWK-2020-00417	NPR	Evergy Services, Inc. - Jayhawk Switch Station	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bourbon County	KS	Proposed construction of a new switch station
NWK-2014-00061	NPR	Marmaton Watershed Joint District No. 102 - Ericson Site (I-5 Site withdrawn)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bourbon County	KS	Proposed construction of an impoundment. The "Ericson Site", as proposed, would involve the construction of a 16 feet high, 1000 feet long earthen dam which would result in a reservoir sediment pool surface area of 4 acres and a detention pool area of 10 acres. The "I-5 Site", was originally proposed to involve the construction of a 32.6 feet high, 941 feet long earthen dam and a sediment pool surface area of 7.6 acres and a detention pool area of 30.1 acres was subsequently withdrawn. The "Ericson Site" is located in an unnamed tributary to Pawnee Creek primarily within the SW 1/4 of the NW 1/4 of Section 15, Township 27 South, Range 23 East, in Bourbon County, Kansas (Lat: 37.69774°N, Lon: -94.88572°W).
LRL-2020-00532-LCL	NPR	Dirk Ricke Farms Ditch Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rush County	IN	Dirk Ricke Farms Ditch Project. Tile and fill 3,000 ft of excluded (b)(5) ephemeral ditch. AJD issued 7-23-20.
SPK-1994-00909	NPR	Edgewood Golf Course Waters Restoration	Activity occurs in waters that are NO longer WOTUS under the NWPR	El Dorado County	CA	excavate accumulated sediments and place fill to restore creeks and wetlands
SPL-2020-00379-LP	NPR	17300 Sesnon Blvd Project - Granada Hills	Activity occurs in waters that are NO longer WOTUS under the NWPR	Los Angeles County	CA	.
LRC-2020-00527	NPR	Glenview Park District	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cook County	IL	Park West, Glenview, Cook County IL
NWW-2020-00334-I02	NPR	Feld, Conan-ditch reconstruction project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bingham County	ID	proposed ditch reconstruction project on Conan Feld property in Springfield Idaho.
LRC-2017-00413	NPR	Dr. Steve Burlison - Wetland Landscaping	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lake County	IL	Residential development nnnnn
LRL-2020-00271	NPR	Alexandria Pike Site	Activity occurs in waters that are NO longer WOTUS under the NWPR	Campbell County	KY	Residential Development
SAJ-1997-00935-CMW	NPR	UNITED PARCEL SERVICE, INC / UPS BAYSIDE - FLBAY / 5201 EAGLE TRAIL DRIVE / HILLSBOROUGH	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hillsborough County	FL	ACTID: 199700935 - UPS site - Project Formerly known as EAGLE CREEK COMM PARK / CRACCHIOLO / UPS 3/25/2019 - JD request to get confirmation that jurisdictional wetlands are not located on project site, and permit is not needed. 7/3/2020 - Request for a letter of No Permit Required.
SAJ-2020-02689	NPR	HTG Bryce Landing, LLC / Bryce Landing	Activity occurs in waters that are NO longer WOTUS under the NWPR	Clay County	FL	-
NWK-2013-00891	NPR	City of Concordia, KS - Blosser Airport Improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cloud County	KS	Construct new runways for the airport
SPA-2020-00168	NPR	DJR Nageezi Unit B02-2309	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	DJR is proposing to horizontally drill and possibly produce four oil and natural gas wells. Each well would access federally and/or FIMO managed minerals. The surface features associated with the project would consist of a well pad measuring 435 Å— 480 feet. In addition, there would be a 50-foot-wide construction zone surrounding the well pad's perimeter, a 104-foot-long access road, a 11,322-foot-long pipeline, and a 250 Å— 250 Å½foot G-tank pad, as well as a 30-foot-wide construction zone surrounding the G-tank's perimeter and an irregularly shaped staging area measuring approximately 160 Å— 265 feet.

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SPA-2020-00170	NPR	DJR Nageezi Unit H33-2409	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	DJR is proposing to horizontally drill and possibly produce two oil and natural gas wells. Each well would access federally and/or FIMO managed minerals. The surface features associated with the project would consist of a well pad measuring 435 Å— 440 feet; in addition, there would be a 50-foot-wide construction zone surrounding the well pad's perimeter, an 882-foot-long access road, and a 1,113-foot-long pipeline.
SPA-2020-00171	NPR	DJR Nageezi Unit M35-2409	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	DJR is proposing to horizontally drill and possibly produce five oil and natural gas wells. Each well would access federally and/or FIMO managed minerals. The surface features associated with the project would consist of an asymmetrical well pad measuring 565 feet at its widest point and 400 feet at its longest point. In addition, there would be a 50-foot-wide construction zone surrounding the well pad's perimeter, a 2,646-foot-long access road, a 2,655-foot-long pipeline, a 250 Å— 250Å½foot G-tank pad, as well as a 50-foot-wide construction zone surrounding the G-tank's perimeter; and a 250 Å— 100Å½foot staging area.
SPA-2020-00172	NPR	Kinder Morgan Cortez Pipeline washout MP 135	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	KMCO2 plans to install a zippered HYDROTEXT mat system to armor the pipeline, and prevent future exposures. The HYDROTEX AB400 system has an overall Cast-In-Place (CIP) design measurement of 98 feet x 40 feet and provides a block orientation that is offset to dissipate energy from any water down the mat system. The downstream perimeter of the mat system will be trenched in to a target depth of five (5) feet and will be backfilled with large rock or other compactable rock material. The single lateral high bank trench is targeted at three (3) feet and will be backfilled with in-situ material. The mat system will extend ten (10) feet from the toe and will begin to drop down over a distance of approximately thirty (30) feet. The tail and leading edge will be backfilled with rock to help prevent future scour around the mat.
SWF-2020-00274	NPR	Gateway Industrial Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kaufman County	TX	by VanTrust Real Estate to develop an 45-acre industrial site located in the City of Forney, Kaufman County, Texas
SPL-2020-00421-LP	NPR	Ranchero Road Widening Project - Hesperia, San Bernardino County	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	.
POA-2020-00355	NPR	Emmet Trimble, Anchor Point, Anchor River, JD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kenai Peninsula Borough	AK	JD/NPR
SAM-2019-00653-JDC	NPR	Jefferson Co Board of Education-new Warrior Elementary School	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	AL	new school
MVK-2020-00174-AEL	NPR	William Lewis/030420/ Alleged Violation Concrete Culvert and Wall Across Stream, Garland County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Garland County	AR	William Lewis, Alleged Violation Concrete Culvert and Wall Across Stream, Garland County, Arkansas
NWK-2018-01233	NPR	KCI Raymore Industrial Land, LLC	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cass County	MO	Construction of three industrial buildings at N. Cass Pkwy & Dean Ave. in Raymore, MO.
LRN-2020-00587	NPR	Project Sunshine, Sweetwater, McMinn County TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	McMinn County	TN	The applicant proposes to construct Phase 1 of Project Sunshine which will consist of a 430,000 square foot warehouse/distribution building on the western 68.4 acres of a larger 150-acre site. The project is located on Pleasant Grove Road in Sweetwater, McMinn County, Tennessee. The project will include interior access roads, utilities, and a mix of conventional and green stormwater infrastructure. The project requires unavoidable alterations to 0.14 acres of wetlands and a total of 172 linear feet of ephemeral stream channel through fill impacts. Based on these impacts, the applicant is seeking coverage for the project under Nationwide Permit 39, Commercial and Institutional Developments.
SAW-2019-01644	NPR	Captain Smyth's Preserve	Activity occurs in waters that are NO longer WOTUS under the NWPR	Henderson County	NC	Residential development
MVP-2019-02516-SSC	NPR	Mary Lake Outlet Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hennepin County	MN	Delineation
SWF-2014-00458	NPR	CEMEX Krueger Canyon Tract	Activity occurs in waters that are NO longer WOTUS under the NWPR	Comal County	TX	by CEMEX Construction Materials South, LLC for verification of an aquatic resource delineation report for approximately 800 acres located in Comal County, Texas
SWF-2020-00201	NPR	Riverset Phase 2	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dallas County	TX	by Wilbow Riverset, LLC to construct a residential development located in the City of Garland, Dallas County, Texas
MVS-2020-00460	NPR	Withrow Creek Clean Out	Activity occurs in waters that are NO longer WOTUS under the NWPR	Perry County	MO	Clean gravel from channel
MVP-2020-01151-JMB	NPR	Jesse Jones Construction / Commercial Site Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Chippewa County	WI	ATF-Discharge of fill material into wetlands for the construction of a gravel building pad and an extension to a gravel access. Located in the SE NW of S28, T32N, R6W in Chippewa County, WI

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SPA-2020-00187	NPR	Kinder Morgan Cortez Pipeline Erosion Control Project - MP 94 Site 2	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	KM proposes to install an engineered erosion control structure to reduce soil erosion at an existing pipeline crossing of a desert wash in order to maintain pipeline integrity and environmental/public safety. At this distinct wash location along the existing Cortez CO2 Pipeline, erosion has resulted in reduced soil cover over the existing pipeline. By implementing this Project, KM would be able to protect the pipeline right-of-way (ROW) against further erosion associated with high flow events within the wash. The Project will encompass 4,800 square feet of cast in place articulated mat and include approximately 0.07 acres of additional temporary workspace (ATWS) to accommodate construction activities.
LRL-2020-00066	NPR	The Veridian	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	KY	The project would include the construction of eight multi-family apartment buildings along with associated roads, utilities, stormwater management and other required infrastructure.
POA-2020-00365	NPR	Trimble, Anchor Point, Danver Street Pond, AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kenai Peninsula Borough	AK	JD Lot 18A
LRL-2019-00930	NPR	Anchor Richwood	Activity occurs in waters that are NO longer WOTUS under the NWPR	Boone County	KY	Development
NWP-2019-00519	NPR	Buffalo Slough Outfall Replacement (Minor Discharge)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Multnomah County	OR	Portland meadows redevelopment proposal
NWK-2019-00219	NPR	Southwest Kansas Groundwater Management District No. 3 - Irrigation Head Gate Replacement & Ditch Lining	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kearny County	KS	Replace Irrigation head gate structure to Farmers Ditch from the Arkansas River. Line three miles of the canal with clay from Lake McKinney.
NWK-2020-00579	NPR	Whisman, Berdena - Livestock watering pipeline	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rooks County	KS	Installation of a livestock watering pipeline according to NRCS design standards.
NWP-2020-00234	NPR	Penske Truck Leasing Facility	Activity occurs in waters that are NO longer WOTUS under the NWPR	Multnomah County	OR	Penske Truck Leasing Co., LP is proposing to build a 23,924 sq.ft. truck rental and repair building on a 13.03-acre property in Portland, Multnomah County, Oregon
NWO-2020-01386-RWY	NPR	Chris Crosby, Crosby Ditch, AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Big Horn County	WY	AJD
NWK-2020-00582	NPR	Bucklin Tractor and Implement Company, Inc. - New commercial facility	Activity occurs in waters that are NO longer WOTUS under the NWPR	Barton County	KS	New 88,000 sq ft building for Jon Deere dealership.
LRL-2020-00515	NPR	UNT to Little Indian Creek Pipeline Maintenance	Activity occurs in waters that are NO longer WOTUS under the NWPR	Monroe County	IN	Pipeline Maintenance
NWK-2020-00607	NPR	Pospichal, Gale - Grassed waterway rebuild	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ellis County	KS	Reshaping of a 2,796 foot grassed waterway according to NRCS design standards.
SAJ-2008-04602-LEO	NPR	LINDVEST FRUITVILLE, LTD. AND LINDVEST SARASOTA EAST, LTD. / LINDVEST FRUITVILLE PROPERTY / SARASOTA (fka: Dog Kennel Road Parcels)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sarasota County	FL	2008 - Formal JD / SWFWMD Formal Determination # 42 034558.000 5/6/2016 - RESIDENTIAL SUBDIVISION 12/6/2017 - Request to obtain a time extension of 1 additional year (until March 13, 2019)
MVP-2020-01308-MJB	NPR	Anoka Ponds	Activity occurs in waters that are NO longer WOTUS under the NWPR	Anoka County	MN	AJD
MVP-2020-01194-DAS	NPR	Byron Storm Water Pond 8100.29	Activity occurs in waters that are NO longer WOTUS under the NWPR	Olmsted County	MN	Delineation
NWK-2020-00348	NPR	Scannell Properties - Project Super Bowl	Activity occurs in waters that are NO longer WOTUS under the NWPR	Wyandotte County	KS	Commercial development
MVR-2020-00635-ajf	NPR	Mid American Energy	Activity occurs in waters that are NO longer WOTUS under the NWPR	Johnson County	IA	Jurisdictional Determination
SPA-2020-00200-ABQ	NPR	Nambe Pueblo/Low Water Crossing	Activity occurs in waters that are NO longer WOTUS under the NWPR	Santa Fe County	NM	The applicant proposes to construct a lower water crossing within an ephemeral waterway and has requested a jurisdictional determination of the project area.
MVP-2005-06049-DCR	NPR	Zander Construct Roadway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Waseca County	MN	AJD
MVP-2020-01242-DCR	NPR	Pine Brook Estates	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dakota County	MN	AJD
MVP-2019-02082-DCR	NPR	Glenwood Heights Subdivision	Activity occurs in waters that are NO longer WOTUS under the NWPR	Nobles County	MN	Discharge of Fill Material
MVP-2014-03699-DCR	NPR	Waconia, City of / TH 5 Improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	Carver County	MN	Discharge fill material into 2.15 acres of wetlands
NWK-2020-00437	NPR	Davidson, Bruce - Wetlands enhancement	Activity occurs in waters that are NO longer WOTUS under the NWPR	Pratt County	KS	Proposed construction of berms in order to flood out portions of cattail choked wetlands and manage wetland hydrology/vegetation with stop-log structures. Applicant stated max depth of pools would be about 3.5' at the deepest portions out to 0" with much microtopography throughout. The project would be located in non-adjacent wetlands in the SE 1/4 of Section 30 and the NE 1/4 of Section 31; all in Township 27 South, Range 11 West, Pratt County, Kansas (Lat: 37.661145Â°, Lon: -98.560519Â°).
MVP-2020-01268-DCR	NPR	Dairyland Power Cooperative N-14N-250 69 Kilovolt (kV) Transmission Line Rebuild Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Freeborn County	MN	Pre-App
SAC-2020-00290	NPR	Clements Ferry Towns fka Thompson Tract	Activity occurs in waters that are NO longer WOTUS under the NWPR	Berkeley County	SC	a
MVR-2019-01294-AF	NPR	Hallet Matierals	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dallas County	IA	Commercial Development
NWK-2020-00630	NPR	Salmans, Galen - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hodgeman County	KS	Construction of a 1,875 foot grassed waterway according to NRCS design standards.
LRL-2020-00677-MKD	NPR	Goecker Housing Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jackson County	IN	Housing Development
SAJ-2020-01528	NPR	Smith, Jerry / US1 Offices / fill	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Johns County	FL	-
NWK-2020-00577	NPR	Lippert, Jim - Pond Construction	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jackson County	MO	Construction of a recreational pond in Lee's Summit, MO.
SWF-2020-00033	NPR	Lewisville 11.87-Acre Commercial Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Denton County	TX	by AR Reddy Spring Creek, LLC to construct a commercial development located in the City of Lewisville, Denton County, Texas

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MVK-2012-00732-TB	NPR	William Murphy Jones/080212/Construct Crossing to Provide Ingress/Egress to a Single Family Residential Tract of Land, Jefferson County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	AR	William Murphy Jones, Construct Crossing to Provide Ingress/Egress to a Single Family Residential Tract of Land, Jefferson County, Arkansas
SWT-2020-00259	NPR	Ron Walters Home Construction Proposed Crystal Creek at Westbury Earthwork and Grading Improvements Sec 11 T11N R5W Canadian County OK	Activity occurs in waters that are NO longer WOTUS under the NWPR	Canadian County	OK	Earthwork and Grading Improvements
MVS-2020-00481	NPR	St. Louis Bombers Rugby Club	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Wetland Delineation for Rugby Club
SAJ-2020-01837-RGH	NPR	TOWNE REALTY / LWR 4 / 4400 BLOCK OF LAKEWOOD RANCH BLVD / MANATEE	Activity occurs in waters that are NO longer WOTUS under the NWPR	Manatee County	FL	Construction of multifamily structures and associated infrastructure. Includes filling of approximately 0.29 acres of WOUS ditch for roadway crossings
SWF-2020-00238	NPR	QTS-TRP	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bexar County	TX	by QTS Data Centers to construct a data center located in San Antonio, Bexar County, Texas
SPA-2020-00216-LCO	NPR	TXDOT- Culvert 64 Jurisdictional Determination	Activity occurs in waters that are NO longer WOTUS under the NWPR	Culberson County	TX	A request by Texas Department of Transportation to do an approved jurisdictional determination on RM 652 in Culberson County, TX
MVR-2020-00907-AF	NPR	Iowa DOT	Activity occurs in waters that are NO longer WOTUS under the NWPR	Pottawattamie County	IA	The proposed project is located entirely within Pottawattamie County, Iowa along Interstate 29 (1-29) and Interstate 480 (1-480). The major components of the project include the reconstruction of northbound and southbound 1-29 from just north of the Union Pacific Railroad north to approximately 0.28 mile north and east of Avenue G, and the reconstruction of the 1-29/1-480 System Interchange. Other work will involve the relocation of the 1-480/41 st Street interchange, the reconstruction/reconfiguration of the I-29/9th Avenue interchange and the I-29/Avenue G interchange, the construction of new one-way frontage roads parallel to mainline 1-29 between 9th Avenue and Avenue G, the removal of the 35th Street interchange and ramps, the construction of new dual 1-29 bridges over West Broadway/US Highway 6, 9th Avenue, and 2nd Avenue, the relocation of a segment of Dodge Riverside Drive, the construction of new local road connectors in residential areas east of 1-29, the construction of new retaining walls at several locations, the installation of culverts for drainage and/or storm sewer improvements, and the construction of a seepage berm on the landward side of the Federal levee (south of 1-480).
SAM-2020-00490-CMS	NPR	Shelby County Environmental Services Landfill - Proposed New Cell #5	Activity occurs in waters that are NO longer WOTUS under the NWPR	Shelby County	AL	Proposed Cell #5 landfill expansion area
SAW-2020-01381	NPR	Claes Property 4004 Ellijay Road	Activity occurs in waters that are NO longer WOTUS under the NWPR	Macon County	NC	Proposed pond
MVP-2020-01386-SSC	NPR	Territorial Greens West	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hennepin County	MN	Discharge of fill Material
MVS-2018-00455	NPR	Top Soil Removal From Wetland 1illy Dr	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Top Soil Removal From Wetland
MVS-2020-00027	NPR	Premier Pkwy Lot 28 & Harry S Truman Blvd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Wetland Delineation
SAW-2020-00987	NPR	2525 Snow Hill Road Pump Station / Durham NC / Durham County	Activity occurs in waters that are NO longer WOTUS under the NWPR	Durham County	NC	Proposed fill of 0.129 acre wetland for a new wastewater pump station and associated infrastructure. NWP application was withdrawn. Waters determined to be excluded under NWPR.
MVM-2019-00141-jfb	NPR	H & H Farms / Landclearing	Activity occurs in waters that are NO longer WOTUS under the NWPR	Crittenden County	AR	convert wooded wetlands to agriculture field
MVS-2020-00522	NPR	Residential Development @ 720 Ries Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Residential Development, Request for JD
MVP-2020-00799-MJB	NPR	Windermere South 3rd Addition Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Scott County	MN	Delineation
SPA-2020-00218	NPR	Plexxar Capital, Ltd. 27-acre lot Jurisdictional Determination	Activity occurs in waters that are NO longer WOTUS under the NWPR	El Paso County	TX	A request by Kimley-Horn and Associates, INC on behalf of Plexxar Capital, Ltd. to do an approved jurisdictional determination on a 27-acre study area in El Paso, El Paso County, Texas. The study area is located at approximately latitude 31.901, longitude: -106.571.
NAE-2020-00216	NPR	Hotel Range Fort Devens Devens & Lancaster, MA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Worcester County	MA	request for preliminary jurisdictional determination
SPL-2017-00769	NPR	Atwell Butterfield Phased Development (TTM 37298), Pardee Homes, GLA, Banning, Riverside County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	Pardee Homes proposes to develop Phase I of the Butterfield Specific Plan Development Project (residential/commercial development of 1,543 acres over five phases; Phase I is on approximately 199 acres and proposes approximately 529 residential units).
NWP-2020-00299	NPR	City of Eugene ( Commercial Development-Airport)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lane County	OR	City of Eugene ( Commercial Development-Airport)
NWP-2020-00319	NPR	Aster St Multi-Family	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lane County	OR	The proposed project consists of a complex of three multi-family buildings, a private joint-use driveway, parking stalls, stormwater, wastewater, associated utilities and a public right-of-way extension for Aster St.
SAW-2017-00274	NPR	Morehead City CC - Golf Course Improvement	Activity occurs in waters that are NO longer WOTUS under the NWPR	Carteret County	NC	Pre application
MVP-2019-02831-SSC	NPR	Love's Truck Stops	Activity occurs in waters that are NO longer WOTUS under the NWPR	Anoka County	MN	Delineation
SPL-2020-00502-VCL	NPR	XpressWest 7 West Cronese Dry Lake AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	West Cronese Dry Lake AJD
POH-2020-00091	NPR	Tetra Tech, Paeahu Solar, Kihei, Maui, HI	Activity occurs in waters that are NO longer WOTUS under the NWPR	Maui County	HI	x
SAJ-2020-01585-RGH	NPR	3KS FAMILY LIMITED PARTNERSHIP / LYKES RD PROPERTY / 4611 LYKES RD / HILLSBOROUGH	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hillsborough County	FL	JD request for a site in Plant City
MVP-2020-01428-DCR	NPR	Vault Storage Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dakota County	MN	Development
MVR-2020-00896-KB	NPR	Leidahl Farms	Activity occurs in waters that are NO longer WOTUS under the NWPR	Buena Vista County	IA	Wetland Restoration
POA-2020-00360	NPR	Simpson, JD, Un-named trib to K-Bay, Homer	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kenai Peninsula Borough	AK	JD

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SAJ-2020-03491	NPR	Pulte Group & Home Corp. / Build Single Fa. Homes	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
NWK-2020-00693	NPR	Devlin, Lane - Farm Pond Removal	Activity occurs in waters that are NO longer WOTUS under the NWPR	Smith County	KS	Removal of a farm pit pond and embankment dam.
SWL-2019-00214	NPR	AECC - Cleburne Co - Pertain to Heber Springs Transmission Line	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cleburne County	AR	T-Line Construction under Nationwide 12. This will complete a transmission loop that will improve the reliability of electric service to the members of Petit Jean and First Electric Cooperatives. Switching Station construction
SWT-2019-00219	NPR	Residential Development Annecy Sec 9 T13N R4W Oklahoma County OK	Activity occurs in waters that are NO longer WOTUS under the NWPR	Oklahoma County	OK	Bill Roberts Residential Development Annecy Sec 9 T13N R4W Oklahoma County OK
NWP-2019-00406	NPR	New Holland	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	OR	Includes the residential development of 4.67 acres with two new roads that extend from existing roads (SE Powell and SE Bell avenues), a new private alley (Bell Court), a new parking lot (40 spots), three community garden areas, a play area, and 44 units.
MVS-2020-00461	NPR	Fick Supply Expansion	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Expand Existing Storage
MVP-2020-00829-DCR	NPR	MN CSG 14, LLC	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rice County	MN	Delineation NPR
LRB-2020-01001	NPR	Monroe County DOT - Elmgrove Road over Round Creek Tributary	Activity occurs in waters that are NO longer WOTUS under the NWPR	Monroe County	NY	Culvert Rehabilitation
SPL-2013-00853-GS	NPR	Esperanza Hills Residential Development Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Orange County	CA	The proposed project would develop 340 single family homes on 468.9 acres.
NWK-2020-00083	NPR	Wet Waders LLC - road/levee construction	Activity occurs in waters that are NO longer WOTUS under the NWPR	Henry County	MO	Road/levee construction.
SWF-2020-00321	NPR	Alexander Village Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dallas County	TX	by the City of Balch Springs to construct a commercial development located in the City of Balch Springs, Dallas County, Texas
MVP-2020-01549-DCR	NPR	The Waters North Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Nicollet County	MN	Residential Development
SAJ-2015-00216-JDP	NPR	Jel Land Development - Jakubcin Place Townhouse	Activity occurs in waters that are NO longer WOTUS under the NWPR	Seminole County	FL	Applicant proposes to construct townhouses s16t21r31
SWF-2019-00074	NPR	Big Springs Siding Project Toyah Subdivision MP 513.79 to 516.54	Activity occurs in waters that are NO longer WOTUS under the NWPR	Howard County	TX	by Union Pacific Railroad to install 2.75 miles of siding track and widen the embankment along Toyah Subdivision Mainline located in the City of Big Spring, Howard County, Texas
SPL-2020-00270-EBR	NPR	Monarch Hills Residential Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	Construct a residential community containing 489 residential units. The project also includes the relocation of right-of-way Hawker-Crawford Channel
MVN-2020-00657-CE	NPR	Mark McCrory - Construction of 18249 McCrory Dr. Lot A-1 & A-2, Clear & Fill - Ascension	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ascension Parish	LA	Construction of 18249 McCrory Dr., Lot A-1 & A-2; to include site clearance, fill for concrete homesite and fill (limestone) for driveway.
LRN-2017-00799	NPR	Vanderbilt University Medical Center-Proposed Commercial Development JD, Spencer Creek Watershed, Franklin., Williamson County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Williamson County	TN	Vanderbilt University Medical Center-Proposed Commercial Development JD, Spencer Creek Watershed, Franklin., Williamson County, TN
SAJ-2020-03621-LCK	NPR	LTC Ranch DRI - Village 2/ Port St Lucie	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Lucie County	FL	20200904; requesting verification that the project elements entailing the discharge of dredged or fill material into select portions of these waters would not require a DA permit.
SPK-2020-00114	NPR	Montessori and Camero Unit 1	Activity occurs in waters that are NO longer WOTUS under the NWPR	Clark County	NV	housing
SAJ-2020-02106-JDP	NPR	Reserve at Hillview, Develop. / Request for JD Only-JCP-NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Seminole County	FL	Request for JD Only-JCP-NPR
SPL-2020-00390	NPR	Arrowhead Estates TTM 33540	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	Applicant applying for NWP #29 for residential project, proposed project aims to develop residential uses and preserve lots for open space, cemetery and flood control uses as allowed under the City's General Plan that will provide housing to serve the community and preserve open space and the existing cemetery on-site.
SPL-2020-00538	NPR	Atwell Butterfield Phase 3-8 Development, non JD, Riverside County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	See SPL-2017-00769 for details of planned development. This is the upper portions (phases) of the planned development for JD purposes (no JD due to NWPR)
MVR-2019-00365-JCK	NPR	Candace Cummins	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sangamon County	IL	Pond / Dam Construction
SWF-2020-00348	NPR	UPRR Dothan Siding Extension, Baird Subdivision	Activity occurs in waters that are NO longer WOTUS under the NWPR	Eastland County	TX	by Union Pacific Railroad to extend existing siding track on the Baird Subdivision located in the City of Cisco, Eastland County, Texas
MVR-2020-01020-AM	NPR	Snyder & Associates	Activity occurs in waters that are NO longer WOTUS under the NWPR	Polk County	IA	PreApp
MVS-2020-00569	NPR	Trico Replace Existing Wastewater Treatment Plant	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jackson County	IL	Replace Existing Wastewater Treatment Plant
NWK-2020-00780	NPR	Esfeld Construction Inc. - Borrow Pit (KDOT KA-5539-01)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Borrow pit for a KDOT construction project.
SPL-2020-00547-DLC	NPR	Baldy Mesa Solar Project--Adelanto, San Bernardino County, CA.	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	.
SAJ-2020-03418	NPR	RUKJS Inv. 3, LLC / ATF Fill	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bay County	FL	for after the fact wetland impacts associated with a commercial convenience store development

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SAJ-2010-02269	NPR	Oviedo, City of / Build Kiosk, S. Walk, B. Walk & Fishing Pier	Activity occurs in waters that are NO longer WOTUS under the NWPR	Seminole County	FL	Previous: Oviedo, City of/Washington Heights and Area Sidewalks. The applicant proposes to construct 5-foot wide sidewalks and drainage improvements to the Washington Heights, Johnson Hill and Round Lake Estates Areas. The project will result in 68.1 square feet of wetland impacts associated with a culvert extension.
NWK-2019-00989	NPR	Ryan Companies US, Inc - Oxford on the Blue	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jackson County	MO	Request for a JD on a parcel in Kansas City, MO.
MVS-2020-00438	NPR	Wentzville I-70 Parkway South Interchange Modification	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Interchange Modification
SWF-2020-00343	NPR	Big Spot Lake	Activity occurs in waters that are NO longer WOTUS under the NWPR	Milam County	TX	by Mr. Fouch to construct a lake located in the City of Milano, Milam County, Texas
SAJ-2006-02025-MJD	NPR	Hamilton, David / Build 1400Sqft Metal Garage w Conc. Floor	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	Previous: Gil, Constante s.f. wetland fill
SWF-2020-00375	NPR	Rianna Woods Pond Proposal	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bastrop County	TX	by Mr. Nissen to construct 8-acre pond on property located in the City of Dale, Caldwell County, Texas
SWF-2020-00161	NPR	Davis Ranch Residential Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bexar County	TX	Removal of trees, shredding/mulching
POA-2013-00257	NPR	Great northwest, Inc., Channel B	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	JD
POA-2003-01422	NPR	Tin Cup LLC	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	POA-Historical
POA-2008-00550	NPR	Universal Welding and Fabrication, Inc., Channel C	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	2008 permit application for wetland fill associated with gravel mining; 2010 JD request for 3 parcels - Quinnell subdivision
POA-2005-00384	NPR	Peterson, Larry	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	south fairbanks JD
MVS-2020-00471	NPR	MO RT A Roadway and Signal Improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Roadway and Signal Improvements
NWK-2020-00794	NPR	Barton County, KS - Request for Approved Jurisdictional Determination	Activity occurs in waters that are NO longer WOTUS under the NWPR	Barton County	KS	Request for an Approved Jurisdictional Determination (AJD) concerning a culvert replacement project.
MVP-2020-01530-SRK	NPR	ArcelorMittal Minorca Mine East Pit #2	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MN	AJD
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
NWO-2020-01777-RWY	NPR	Chris and Martha McCool, McCool Livestock Reservoirs, Kinnaman Draw and Marrow No. 1 Stock Reservoir, Sheridan County, NPR/AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sheridan County	WY	We have reviewed the information provided by WWC Engineering and from a site visit conducted on September, 9, 2020 and have determined that the proposed activity would not result in the discharge of dredged or fill material into a "waters of the United States." The existing irrigation ditch and livestock reservoir are excluded from the new Navigable Waters Protection Rule and are not jurisdictional. A Department of the Army (DA) permit will not be required for the construction of the proposed reservoirs.
POH-2020-00071	NPR	Farrington Highway Bridges Expansion, Ewa, Oahu, HI	Activity occurs in waters that are NO longer WOTUS under the NWPR	Honolulu County	HI	to expand a section of Farrington Highway between Old Fort Weaver Road and Kapolei Golf course Road
POH-2020-00063	NPR	WCME, Maui Coast Hotel Expansion, Kihei, Maui HI	Activity occurs in waters that are NO longer WOTUS under the NWPR	Maui County	HI	x
NWO-2020-00729-RWY	NPR	Wyoming Sugar Company, Precipitated Calcium Carbonate Ponds Expansion, Drainage Ditch (Ditch #1), Washakie County, ARI/AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Washakie County	WY	ARI and AJD for Wyoming Sugar Company
MVP-2020-01481-JRS	NPR	Premier Clayton Avenue Estates	Activity occurs in waters that are NO longer WOTUS under the NWPR	Winnebago County	WI	residential development with 7846 sf of wetland impacts
LRL-2020-00820	NPR	Fedex Parking Lot Expansion: Boone Co., KY	Activity occurs in waters that are NO longer WOTUS under the NWPR	Boone County	KY	Parking lot expansion
SAJ-2019-01797	NPR	Collier County Government / Sports Complex	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	Sports Complex
NWK-2020-00795	NPR	Tilley, Todd Grassed Waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ford County	KS	Construct a grassed waterway
SWF-2020-00396	NPR	Rueter Solar	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bosque County	TX	by Belltown Power Texas to construct a solar power generation facility located in the Bosque County, Texas

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SPK-2011-01121	NPR	Ash Creek Pipeline and Toquer Reservoir	Activity occurs in waters that are NO longer WOTUS under the NWPR	Washington County	UT	new water supply reservoir
LRC-2020-00871	NPR	800 Oak Brook Road, Village of Oak Brook, DuPage County IL	Activity occurs in waters that are NO longer WOTUS under the NWPR	DuPage County	IL	800 Oak Brook Road, Village of Oak Brook, DuPage County IL
SPK-2020-00586	NPR	Foothills Development Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Placer County	CA	to construct commercial development
SPA-2020-00243	NPR	Enterprise Largo Canyon Trunk F Bank Stabilization	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rio Arriba County	NM	Mats will be placed over the pipeline and stream bank to protect the pipeline and prevent erosion of the stream bank. The area covered by the mats is 496' L x 39' W. All of the proposed work is within the pipeline's ROW. The ends of the mats will be anchored in a 5' deep x 3' wide trench filled with 12" rock.
POA-2008-01421	NPR	Fountain Head Development, Inc., Tanana River (also see POA-2002-620)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	JD
SPK-2006-00691	NPR	Placer Gold Industrial Park (Phase I & II)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Placer County	CA	to construct a rail-served industrial park with manufacturing and warehouse space within the Sunset Industrial Area.
SAJ-2020-02874	NPR	Alley, Arthur / Build Single Family Home	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	(NWP29 (404))
SAJ-2018-01410-ACM	NPR	Paddyfote, Daniel / Build Home & Driveway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	Previous: SFR Fill
NWK-2020-00823	NPR	Renken, David - Construct a Grass Waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Smith County	KS	Construct a new 1140 linear feet grassed waterway
MVS-2006-00475	NPR	Corisande Woods	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	MO	-
NWK-2020-00826	NPR	Gilliland, Harrison - Grass Waterway Rehab	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ellis County	KS	Rehabilitate 3746' of grass waterway
SPN-2020-00397	NPR	Mt. Shasta Driveway project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Siskiyou County	CA	construct driveway to undeveloped property
POA-2011-00966	NPR	Dosch, Tanana River	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	JD
SAJ-2020-01769	NPR	AARC Holding, Inc./ Nona AARC/ airport parking	Activity occurs in waters that are NO longer WOTUS under the NWPR	Orange County	FL	airport parking
NWW-2020-00487	NPR	Trilogy Development - Feather Cove Subdivision No. 3 (AJD)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Canyon County	ID	Residential Development
NWK-2020-00860	NPR	Pearson, George - Grassed Waterway Rebuilds	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osage County	KS	Rebuild two existing grassed waterways
SAJ-1999-02045-hwb	NPR	Nat. Develop. Corp. of America / Bucks Run JD Review for Land Parcel	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	Previous: ACTID: 199902045
SAJ-2020-04051	NPR	3HWA Land Hold., LLC / NPR Req. for Resid. Develop.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	-
SWF-2020-00276	NPR	Wolf Lakes	Activity occurs in waters that are NO longer WOTUS under the NWPR	Williamson County	TX	Wolf Lakes, LP request of an NPR and AJD for a 162-acre tract of land located in the City of Georgetown, Williamson County, Texas
SAJ-2011-01869-JPF	NPR	Mosaic Corporation/Ona Phosphate Mine	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hardee County	FL	Ona Phosphate Mine
MVR-2020-01354-AM	NPR	Terracon	Activity occurs in waters that are NO longer WOTUS under the NWPR	Pottawattamie County	IA	JD Request
SAJ-2020-04094	NPR	Donovan & Livingston Parcel / AJD Rev. for Construct or Develop.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SWF-2017-00354	NPR	East Centre Park	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dallas County	TX	by Gray and Company Realtors, Inc. to construct a culvert in existing open channel to facilitate the development of a distribution facility located in DeSoto, Dallas County, Texas
MVR-2020-01395-WF	NPR	Kelsey Farms	Activity occurs in waters that are NO longer WOTUS under the NWPR	Putnam County	IL	Pond Construction
LRN-2013-00519	NPR	Community Health Systems-Tennova Medical Park- Entrance Road	Activity occurs in waters that are NO longer WOTUS under the NWPR	Knox County	TN	JD verification
SWF-2017-00148	NPR	Meadows at Morgan Creek	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rockwall County	TX	by Oak National Holdings, LLC to dredge a pond and install an outfall for a residential development in Royse City, Rockwall County, Texas
SWF-2020-00438	NPR	Bowie-Cass Solar Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bowie County	TX	by Hecate Energy Piney Woods, LLC for the development of a solar farm located in the City of Sims, Bowie County, Texas
LRH-2002-01163-OHR	NPR	Red Stone Farm Wetland Mitigation Bank, Baker Fork	Activity occurs in waters that are NO longer WOTUS under the NWPR	Pike County	OH	Fish & Wildlife-Enhancement
NWK-2020-00886	NPR	Jezek, Ernest - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ellsworth County	KS	Construction of 1300 foot grassed waterway according to NRCS design standards.
NWK-2020-00852	NPR	Heier, James - Grass Waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sheridan County	KS	Construct Grasswaterway
SAJ-2003-12445-ACM	NPR	Youngquist Trade Center	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	Commercial development
SPL-2020-00411-AJS	NPR	Bank Stabilization for 3200 Beachcomber Drive, Morro Bay	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Luis Obispo County	CA	install approximately 60 linear feet of bank stabilization consisting of rock gabion baskets
SAJ-2006-07020-	NPR	Dunn Jax, LLC / US1 Watson Coml Parcel	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Johns County	FL	-
SPA-2020-00106	NPR	Chimayo Fire Station Bank Stabilization	Activity occurs in waters that are NO longer WOTUS under the NWPR	Santa Fe County	NM	Bank Stabilization
MVP-2020-01844-SRK	NPR	Donnay Soccer Field	Activity occurs in waters that are NO longer WOTUS under the NWPR	Stearns County	MN	Discharge fill into 0.203 ac of wetland
MVN-2020-00466-EG	NPR	Renaissance Neighborhood Development - JD Henry - Construction at the NW corner of LA Hwy 190 and Privette Blvd, Covington - St Tammany	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Tammany Parish	LA	JD to An 18ac site at the NW corner of La.Hwy 190 and Privette Blvd in Covington SITE PREP, INFRASTRUCTURE AND CONSTRUCTION OF AN 18.919 ACRE MULTI-FAMILY DEVELOPMENT ON LA.HWY 190 IN COVINGTON, LA .
NWK-2020-00902	NPR	Finkenbinder, Dustin - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Construction of 2 grassed waterways according to NRCS design standards.
LRB-2020-00756	NPR	Chemung County Department of Public Works - Christian Hollow Road Culvert Replacement	Activity occurs in waters that are NO longer WOTUS under the NWPR	Chemung County	NY	Replace existing culvert
SPA-2020-00258	NPR	California Water Service Group JD Request	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	Requesting JD of aquatic resource
SPK-2020-00370	NPR	Whitney Residence	Activity occurs in waters that are NO longer WOTUS under the NWPR	Placer County	CA	to construct a single-family home
SAJ-2004-01549	NPR	Contractors Business Park	Activity occurs in waters that are NO longer WOTUS under the NWPR	Orange County	FL	-
SAJ-2017-03438-JKA	NPR	Supreme Builders Inc/ 17775 72nd Road N, Loxahatchee/ Palm Beach	Activity occurs in waters that are NO longer WOTUS under the NWPR	Palm Beach County	FL	20200903; jurisdictional 20171221; fill for new construction
SAJ-2020-03453-JKA	NPR	Rose, Jacqueline/ 6510 Duckweed Road, Lake Worth (Homeland Lot 275)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Palm Beach County	FL	20200826; jurisdictional determination

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NWK-2020-00913	NPR	Whipple, Rex - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ness County	KS	Construction of a 2800 foot and a 1800 foot NRCS designed grassed waterway.
NWK-2020-00915	NPR	Anschutz, Warren - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Russell County	KS	Construction of a 800 foot NRCS designed grassed waterway.
NWK-2020-00723	NPR	Vitt, Don & Vera - Fourmile Creek Tributary Bank Stabilization	Activity occurs in waters that are NO longer WOTUS under the NWPR	Neosho County	KS	Possible bank stabilization along eroding stream banks
SPA-2020-00261	NPR	Los Lunas Subdivision - AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Valencia County	NM	housing
SAJ-2020-04465	NPR	The Harmony on the S. Barbara / JD Rev. for Construct or Develop	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SPA-2020-00207	NPR	SSCAFCA AJD Black Arroyo loc 2	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00208	NPR	SSCAFCA AJD Montoyas loc 3	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00209	NPR	SSCAFCA AJD Montoyas loc 4	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00210	NPR	SSCAFCA AJD La Barranta loc 1	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00211	NPR	SSCAFCA AJD Black Arroyo loc 3	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00212	NPR	SSCAFCA AJD Venada loc 4	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00213	NPR	SSCAFCA AJD Montoyas loc 5	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00214	NPR	SSCAFCA Venada Loc 3	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2016-00139-ABQ	NPR	White Mesa Gypsum Mine Expansion Project on Pueblo of Zia Lands in Sandoval County, New Mexico	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	A proposal to expand the existing and currently operational White Mesa Gypsum Mine on Pueblo of Zia lands in Sandoval County, New Mexico.
SPA-2020-00169	NPR	St. Anthony Mine	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cibola County	NM	Mine protection and reclamation
SAJ-2020-04078-KRD	NPR	PRICE, BRYAN / SEAWALL AND DOCK REPLACEMENT / 212 HUNTLEY OAKS BLVD / HIGHLANDS	Activity occurs in waters that are NO longer WOTUS under the NWPR	Highlands County	FL	To replace 44 LF of the existing seawall in the same footprint and to remove and replace the existing 4-foot-wide by 20-foot-long dock with 16-foot by 16-foot T-head along Saddlebags Lake at 212 Huntley Oaks Boulevard, Lake Placid, Highlands County, FL.
SWF-2010-00380	NPR	Belmont Mixed-Use Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Denton County	TX	by Realty Capital Belmont, Ltd & Argyle 114 Ltd. to construct a mixed-use development that will include a mixed use residential and commercial development located at the northwest corner of the intersection of Interstate Highway 35W and Farm-to-Market Road (FM) 407, Cities of Northlake and Argyle, Denton County, Texas.
NAO-1999-02948	NPR	Given Bulkhead Replacement	Activity occurs in waters that are NO longer WOTUS under the NWPR	Virginia Beach city	VA	04SEP20 construct a 82LF of open pile timber bulkhead with fill
MVN-2019-01295-MM	NPR	Slidell Fremaux Convenience Store - JD - Construction on Squares 12 & 13 in Beverly Hills SUB at US Hwy 190, Slidell - St Tammany	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Tammany Parish	LA	JD to A 2.2ac site located north of Hwy 190 in Slidell Clear, grade, and fill to construct convenience store and gas pumping station.
NWK-2020-00950	NPR	Meyer, Brad - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Washington County	KS	Construction of a 2550 foot long grassed waterway according to NRCS design standards.
SWL-2020-00204	NPR	Javiation - Lawrence Co - Request for AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Barry County	MO	Request Approved Jurisdictional Determination for the purpose of construction project
SAJ-2019-03458	NPR	Seminole Tribe of Florida / Hunting Adventure Pond MOD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hendry County	FL	Applicant requested a MOD
SPL-2020-00654	NPR	AJD Alta Mesa Wind Project Repower AJD north Palm Springs Aspen Riverside County CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	request for AJD
SPL-2020-00657	NPR	AJD Mesa Wind Project Repower AJD Whitewater Aspen Riverside County CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	AJD on wind energy site
SPL-2020-00660	NPR	AJD Tract 35011 AJD Murrieta Riverside County CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	ajd request
SPA-2020-00260	NPR	Northeast aquifer storage and recharge enhanced arroyo project	Activity occurs in waters that are NO longer WOTUS under the NWPR	El Paso County	TX	The project site would be used by the City of El Paso to develop the proposed aquifer storage and recharge enhanced arroyo project. Located between Martin Luther King Boulevard and McCombs Street, in the Northeastern portion of El Paso, El Paso County, Texas. Located at approximately latitude: 31.957123 and longitude: -106.422488.
MVP-2020-00973-CCK	NPR	Ham Lake, City of / SAP 197-124-004 / 133rd Lane NE Twin Birch Reconstruction	Activity occurs in waters that are NO longer WOTUS under the NWPR	Anoka County	MN	No Permit Required
SAJ-2020-04615	NPR	MA Inv. Boca, LLC / Develop Resid. Housing Proj.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	-
NWK-2020-00973	NPR	Cornwell, Lowell - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Reshaping of a 568 foot grassed waterway according to NRCS design standards.
LRB-2020-00817	NPR	Rochester's Cornerstone Group, Ltd. Hubbard Springs Apartments	Activity occurs in waters that are NO longer WOTUS under the NWPR	Monroe County	NY	Discharge of fill into 0.20 acres of delineated federal jurisdictional Wetland A
POA-2020-00517	NPR	Olgoonik Construction Services, Fish Creek, Legacy Wells - Inigok #1	Activity occurs in waters that are NO longer WOTUS under the NWPR	North Slope Borough	AK	Remediate the Inigok #1 well
NWK-2020-00976	NPR	Flax, Roger - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Trego County	KS	Construction of a 3138 foot grassed waterway according to NRCS design standards.
NAO-2020-01733	NPR	Bede shoreline stabilization	Activity occurs in waters that are NO longer WOTUS under the NWPR	Virginia Beach city	VA	12 existing trees must be removed to install the riprap revetment that will stabilize the new bank.
SAJ-2020-04096	NPR	Peguero SFR Fill	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
MVK-2020-00870-KB	NPR	James Carson/111820/James Carson T12805 Wetland Determination, Franklin Parish, Louisiana	Activity occurs in waters that are NO longer WOTUS under the NWPR	Franklin Parish	LA	James Carson, James Carson T12805 Wetland Determination, Franklin Parish, Louisiana
NWK-2020-00987	NPR	City of Valley Center, KS- W 77th St. N Road improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sedgwick County	KS	Proposed road improvements including replacement of RCBs
SAJ-2020-04108	NPR	Aleksiejczuk, Maciey / Build Driveway through Wetlands	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-



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NWO-2020-02051-RWY	NPR	Paul G. & Kathleen L. Kimball Revocable Trusts, Deland Ditch, Owl Creek Lot 4, PreApp, AID	Activity occurs in waters that are NO longer WOTUS under the NWPR	Teton County	WY	Alder Environmental is requesting an Aquatic Resources Inventory (ARI) and Request for Jurisdictional Determination (JD) on behalf of Paul and Kathleen Kimball for their property, Owl Creek Lot 4 in Teton County, WY.
NWO-2020-01783-RWY	NPR	DRM, Inc. (Largent & Sons landowner), drainage of South Fork Powder River, Borrow Source for I-25 Casper-Kaycee, PreApp, AID, NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Johnson County	WY	DRM, Inc. is proposing a borrow source and enlargement of the Largent No. 1 Stock Pond on a tributary to South Fork Powder River for a WYDOT project I-25 Casper-Kaycee, TTT Section-NBL (WYDOT #0255095 & 1310002 Comb).
SAJ-2020-02112-ACM	NPR	MWC Land, Develop. LLC / New Home Const., 68th Ave	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	SFR
SAJ-2020-04248	NPR	TKR #3, LLC (Frey, B.) / Build Driveway in W. lands	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SAJ-2020-02866	NPR	Kopper, Maria / Install 4000 Sqft Driveway W/Lands Impact	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	(NWP29 (404))
SAJ-2018-03242-JKA	NPR	Androsiglio, Jeanne/ 15608 85th Way N, Palm Beach Gardens/ Palm Beach Co.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Palm Beach County	FL	20201202; new JD under NWPR 20181101; Clear site for house pad (END)
NAO-2020-01816	NPR	Jubilee bulkhead	Activity occurs in waters that are NO longer WOTUS under the NWPR	Virginia Beach city	VA	construct a 66' timber bulkhead with fill for erosion prevention
SAJ-2020-01297	NPR	Lescault, Henry / 2 Story Home Const.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	-
SWF-2020-00452	NPR	Brownwood Quarry	Activity occurs in waters that are NO longer WOTUS under the NWPR	Brown County	TX	by Vulcan Lands Inc. to request an approved jurisdictional determination for the construction of a quarry located in the City of Brownwood, Brown County, Texas
SWL-2020-00185	NPR	MoDOT - Jasper Co - New Roundabout at Route 171/96	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jasper County	MO	Construction of a new roundabout at the intersection of MO Route 171 and MO Route 96 in Jasper County MO
MVR-2020-01713-AF	NPR	Tom Rappenecker	Activity occurs in waters that are NO longer WOTUS under the NWPR	Des Moines County	IA	Pond Excavation
MVP-2020-02238-RJH	NPR	BFW Wetland Commercial Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fond du Lac County	WI	Commercial Development (Discharge of fill material) for 4,098 sf of wetland impacts
NWP-2020-00404	NPR	Wastewater System Improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	Union County	OR	The proposed project consists of constructing a wetland and transmission pipeline north of the existing treatment ponds.
MVK-2020-00632-KB	NPR	Barry Bridgforth /082620/ JD Request for Laughter Road 12.3 Acres, DeSoto County, Mississippi	Activity occurs in waters that are NO longer WOTUS under the NWPR	DeSoto County	MS	Barry Bridgforth, JD Request for Laughter Road 12.3 Acres, DeSoto County, Mississippi
SAM-2017-01215-JSC	NPR	Woodward Oaks Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	AL	PJD
SPL-2016-00817	NPR	Rancho San Gorgonio Development Project, Banning, Sycamore Creek, Riverside County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	Approximately 3,400 dwelling unit residential/commercial development within the city limits of Banning
SPL-2018-00746-PJB	NPR	Tuscany Valley/Crest Residential Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	Construction of 336 single family homes on 97.4 acres.
SPL-2020-00716-DLC	NPR	Euclid Commerce Center Project--Chino, San Bernardino County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	-
MVP-2020-02277-MJB	NPR	Highum Pit Delineation	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fillmore County	MN	Delineation
SAJ-2020-04949	NPR	Heron Bay/Moore Haven/NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Glades County	FL	JD & NPR
SWL-2020-00152	NPR	Woody - Lawrence Co - Farm Pond Construction	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lawrence County	MO	build a dam, which will in turn pool water to form a multiuse pond. Provide Livestock Water, Fishing, improve wildlife habitat. The dam will also provide a secondary access to private residence
SAJ-2008-02942	NPR	IPS Enterprises / Bassett Rd School	Activity occurs in waters that are NO longer WOTUS under the NWPR	Duval County	FL	x
MVK-2009-00398-BAG	NPR	Southern Trace Development Corp/022809/Norris Ferry Road at Southern Loop Development Site, Caddo Parish, LA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Caddo Parish	LA	Southern Trace Development Corporation - Norris Ferry Road at Southern Loop Development Site, Caddo Parish, Louisiana
NWO-2020-01913-MTH	NPR	Double C Ranch (Pond & Stream Consulting) Construct Trout Pond - Unnamed Wetland (Beaverhead County)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Beaverhead County	MT	Construct Trout Pond
SAJ-2020-04971	NPR	Beiswenger, Alex / Build Single Family Home (24066)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	-
NWK-2020-01029	NPR	Hendrich, Clarence - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Grassed waterway
NWK-2020-01030	NPR	Hendrich, C.E. - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Grassed waterway
SAJ-2020-03882	NPR	3E On Time Inv. Corp. / Const. of Single Family Home	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SAJ-2020-03771	NPR	Frey, Barry / JD & Pre-App. Req. for Const. & Develop.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SAJ-2020-04995	NPR	Alico Road Project/JD & NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	commercial development
MVK-2018-00756-TB	NPR	City of Hot Springs/092818/Proposed Water Supply Improvements, Garland County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Garland County	AR	City of Hot Springs, Proposed Water Supply Improvements, Garland County, Arkansas
SAJ-2020-05032	NPR	Iconic Homes/36th Ave SE/JD & NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	construct SFD
SPA-2020-00273	NPR	Enterprise Products Operating LLC, Simmons No. 10 Removal	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	Enterprise is proposing to remove approximately 80 feet of pipe from Largo Wash and approximately 125 feet of pipe landward of the wash.
SAJ-2020-05052	NPR	Valeiras/30th Ave SE/SFD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	construct SFD
SAJ-2020-02197	NPR	Velazquez, Abril / Build Driveway to Home	Activity occurs in waters that are NO longer WOTUS under the NWPR	Charlotte County	FL	(RGP 20)
SAJ-2020-05060	NPR	Capital Homes/6th Street NW/Southern Parcel	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	construct SFD
SAJ-2020-04852	NPR	Capital Homes 6th Street NW/SFD Fill	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	construct SFD
SAJ-2019-04331	NPR	Gooden Investment Holdings LLLP / Lt 22 Blk 128 Jasper St	Activity occurs in waters that are NO longer WOTUS under the NWPR	Santa Rosa County	FL	-
NWK-2020-01051	NPR	Marmaton Watershed Joint District #102 - Geiger Site watershed dam	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bourbon County	KS	NPR request for proposed WJD dam site
MVR-2020-01467-AM	NPR	Foth	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dubuque County	IA	JD Request
LRH-2020-00440-OHR	NPR	Mr. Robert Jones - Retention Pond	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hamilton County	OH	Retention Pond for Agricultural activities.
SWF-2020-00198	NPR	Three Corners	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collin County	TX	by Three Corners, LLC to develop a 24-acre commercial site located in the City of Frisco, Collin County, Texas

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MVP-2020-01953-SSC	NPR	128th Ave Parcels Blaine KES#2020-148	Activity occurs in waters that are NO longer WOTUS under the NWPR	Anoka County	MN	AJD
SPA-2020-00284	NPR	BNSF Abo Arroyo AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Valencia County	NM	The AJD requested by authorized agent, Jacobs Engineering Group, Inc. on behalf of BNSF Railway for the purpose of determining Corps jurisdiction of the single stream feature labeled as the Abo Arroyo resides within the proposed study area. Located near the city of Belen and situated in both Valencia County and Socorro County, New Mexico. The coordinates for the proposed study area are approximately latitude: 34.457082 and longitude: -106.504325.
MVR-2021-00048-AS	NPR	Giesking HUD Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Tama County	IA	HUD Project
MVS-2020-00772	NPR	Proposed Grading 17485A N Outer 40 Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Proposed Grading, OD-R 20-048
MVR-2020-01512-DH	NPR	Marlyn Jorgensen	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	IA	Earthen Embankment
NWW-2020-00620	NPR	Trilogy Development - Fossil Creek Subdivision No. 1	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ada County	ID	Production of single-family lots in Kuna, requiring the filling of irrigation ditches
NWK-2021-00082	NPR	Hajek, John - AJD determination	Activity occurs in waters that are NO longer WOTUS under the NWPR	Marion County	KS	AJD determination
LRL-2020-01063-jlb	NPR	East Kentucky Network - Proposed Culvert Crossings for Tower Access Road near McDowell	Activity occurs in waters that are NO longer WOTUS under the NWPR	Floyd County	KY	Proposal to install 4 culverts between 21 and 36 inches in diameter into an unnamed tributary in Floyd County, Kentucky. The proposed length of culverts are less than 200 feet with an impact area less than 0.05 acres. The culverts are proposed with ephemeral drains to construct an access road to a tower site. Based on the NWPR, these streams are excluded from regulation
SPL-2020-00568-ERS	NPR	Robert A. Curtis Park Expansion Project -- Mission Viejo, Orange County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Orange County	CA	.
NWW-2021-00041	NPR	Drainage District 2, Lateral 10 Box Culvert Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ada County	ID	installation of a new box culvert to facilitate roadway expansion along N Hamlin Ave
NWW-2020-00035	NPR	Snoqualmie Falls Subdivision No. 15	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ada County	ID	build out of an existing subdivision in Eagle
MVK-2021-00030-KB	NPR	City of Thornton/010821/ Application Request for the Thornton Community Center Funded by a Block Grant from Arkansas Economic Development Commission, Calhoun County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Calhoun County	AR	City of Thornton, Application Request for the Thornton Community Center Funded by a Block Grant from Arkansas Economic Development Commission, Calhoun County, Arkansas
LRL-2021-00051-jws	NPR	Kraft Nursery	Activity occurs in waters that are NO longer WOTUS under the NWPR	Vanderburgh County	IN	AJD request for a previous dump site
LRL-2020-01105-jws	NPR	Pollack Lynn Road JD Request	Activity occurs in waters that are NO longer WOTUS under the NWPR	Vanderburgh County	IN	AJD Request
MVS-2020-00784	NPR	Mikesch Construct Lake 6417 Oak Hills Dr	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ste. Genevieve County	MO	Construct Lake
NAO-2010-02201-tca	NPR	6418 Telegraph Road	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairfax County	VA	This is a request for a verification of a jurisdictional determination. 10-V1851- To construct a swale west of the retaining wall and east of the property line. It may need to be lined with riprap or similar material to prevent erosion. At the end of the retaining wall the water will begin to sheet flow across the front of the lot.
MVS-2021-00037	NPR	Orchard Farm School & Park	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	JD for School & Park
SPA-2021-00040	NPR	Photosol Solar Farm	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	Construction of a solar farm
MVK-2019-00438-TB	NPR	Waggoner Engineering, Incorporated/052219/Request for a Preliminary Jurisdictional Determination on a 4.1 Acre Site for the New Fire Crash Rescue Station, Rankin County, Mississippi	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rankin County	MS	Waggoner Engineering, Incorporated, Request for a Preliminary Jurisdictional Determination on a 4.1 Acre Site for the New Fire Crash Rescue Station, Rankin County, Mississippi
POA-2021-00064	NPR	Exclusive Paving, Southside Pit	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	Request for a JD and NPR
MVN-2020-00242-ES	NPR	Capital Automotive Real Estate Services - JD - Construction fronting and north of Holiday Square Blvd, Covington - St Tammany	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Tammany Parish	LA	JD to A 4.35 ACRES FRONTING AND NORTH OF HOLIDAY SQUARE BLVD Infrastructure and construction of an automotive dealership on a 4.35 acre tract in Covington, LA.
SPL-2020-00579-VN	NPR	San Bernardino International Airport City Creek Bypass Channel Project--San Bernardino, San Bernardino County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	The San Bernardino International Airport Authority (SBIAA) is proposing to conduct maintenance activities within an approximately 5,280-foot-long ephemeral channel that is maintained by the San Bernardino International Airport (SBIA) and located in the City of San Bernardino, San Bernardino County, California.
NWO-2021-00239-RWY	NPR	John Leibowitz and Ruth Marcus, Deland Ditch, Owl Creek Lot 29, PreApp AJD, NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Teton County	WY	AJD requested for Owl Creek Lot 29 for eventual residential development. Agent - Alder Environmental. Requested by Cairn Landscape Architects on behalf of landowners, John Leibowitz and Ruth Marcus.
NWK-2021-00124	NPR	City of Manhattan, KS - Manhattan Regional Airport - Reconstruction of Runway 03/21	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riley County	KS	Reconstruction of Runway 03/21 at Manhattan Regional Airport, which includes runway, building and hangars, and adjacent taxiways and open areas.
SWF-2020-00476	NPR	Forney Tract D	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kaufman County	TX	by Seefried Industrial Properties, Inc. to request an approved jurisdictional determination for industrial site development located in the City of Forney, Kaufman County, Texas

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SPA-2021-00022	NPR	Calabacillas Arroyo West Branch Watershed Grade Control Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bernalillo County	NM	The AJD requested by Albuquerque Metropolitan Arroyo Flood Control Authority for the purpose of determining Corps jurisdiction of the unnamed single stream feature residing in the Calabacillas west branch water shed. Located near the Village of Rio Rancho and situated in Bernalillo County, New Mexico. The coordinates for the proposed study area are at approximately latitude: 35.207355 and longitude: -106.73825.
MVS-2020-00185	NPR	IL AM Water Chouteau Island Water Intake Facility Repair	Activity occurs in waters that are NO longer WOTUS under the NWPR	Madison County	IL	IL American Water Company seeks authorization for the repair of their Chouteau Island water intake facility following the 2019 Flood event after a adjacent levee breached and created a scour how within the facility. The project is located on Chouteau Island, Madison County, IL.
MVS-2017-00189	NPR	Valley Park Lakehill Grading	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Fill In Lake
MVS-2014-00760	NPR	I 74 and 57 Interchange	Activity occurs in waters that are NO longer WOTUS under the NWPR	Champaign County	IL	expand the interchange
MVR-2021-00354-SC	NPR	Sunpin Energy Services	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kankakee County	IL	Solar Development
POA-2021-00094	NPR	Gall, Homer, Kachemak Bay, JD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kenai Peninsula Borough	AK	JD
MVS-2017-00177	NPR	Fox Creek (Willjeck Tract) Residential Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	MO	Construct Subdivision
SWF-2021-00076	NPR	Longview North Business Park	Activity occurs in waters that are NO longer WOTUS under the NWPR	Gregg County	TX	by Longview Economic Development Corporation to request an approved jurisdictional determination for two properties located in the City of Longview, Gregg County, Texas
MVS-2021-00133	NPR	Build Retention Pond between 339 & 347 Eureka Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Build Retention Pond
MVK-2018-00303-JLD	NPR	Prairie Mist Solar Project, LLC/041618/Request for Preliminary Jurisdictional Determination for Proposed Solar Farm Developments, Ashley County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ashley County	AR	Prairie Mist Solar Project, LLC, Request for Preliminary Jurisdictional Determination for Proposed Solar Farm Developments, Ashley County, Arkansas
SWF-2021-00153	NPR	Proposed Commercial Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collin County	TX	by Winkelmann & Associates, Inc. request an approved jurisdictional determination for property located in the City of Melissa, Collin County, Texas
MVS-2021-00153	NPR	Residential Development @ 150 Kammeier Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Residential Development
SAM-2021-00262-JSC	NPR	Maxwell Air Force Base Airfield Drainage Improvements Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Montgomery County	AL	Jurisdictional Determination (AJD) regarding man-made drainage conveyances within the Maxwell AFB airfield located in Montgomery County, Alabama.
NAE-2021-00749	NPR	Scannell Properties, LLC	Activity occurs in waters that are NO longer WOTUS under the NWPR	Middlesex County	CT	Jurisdictional determination-irrigation pond
SPA-2021-00044	NPR	LANL Potrillo Canyon AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Los Alamos County	NM	AJD
MVK-2020-00850-TB	NPR	Hub Water Association/102920/Proposed FY 2020-Drinking Water Improvements, Marion and Lamar Counties, Mississippi	Activity occurs in waters that are NO longer WOTUS under the NWPR	Marion County	MS	Hub Water Association, Proposed FY 2020-Drinking Water Improvements, Marion and Lamar Counties, Mississippi
MVS-2021-00113	NPR	Crooked Lake Maintenance @ 8251 Bunkum Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Clair County	IL	Lake Maintenance
LRL-2021-00261-jlb	NPR	Jurisdictional Determination for EastPark Lot 22 Build Site	Activity occurs in waters that are NO longer WOTUS under the NWPR	Boyd County	KY	Ashland Alliance, Inc. has requested a Jurisdictional Determination for Lot 22 at the EastPark Multi-Use Business Park Site B in Boyd County, Kentucky
MVR-2021-00465-AS	NPR	Mike Phillips	Activity occurs in waters that are NO longer WOTUS under the NWPR	Poweshiek County	IA	Stormwater Improvements
MVS-2015-00150	NPR	Defiance RV Park (Trail Smokehouse and Visitors Center)	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Replace span bridge with culvert crossing unnamed trib to Femme Osage Ck
MVK-2021-00237	NPR	Grant Parish Police Jury/030921/JD Request for 35 Acres, Grant Parish, LA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Grant Parish	LA	Grant Parish Police Jury/030921/JD Request for 35 Acres, Grant Parish, LA
SPL-2018-00831	NPR	Painted Desert Solar Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Coconino County	AZ	Develop the Painted Desert Solar Project on Navajo Nation.
MVS-2021-00209	NPR	Pontoon Park Develop Lots 3, 4 & 5	Activity occurs in waters that are NO longer WOTUS under the NWPR	Madison County	IL	Develop Lots for Construction
MVR-2021-00523-AS	NPR	Iowa County Conservation Board	Activity occurs in waters that are NO longer WOTUS under the NWPR	Iowa County	IA	Watershed Improvements
SPA-2021-00078	NPR	Vista de la Sierra AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Santa Fe County	NM	AJD
MVM-2021-00101-jme	NPR	Nucor Steel, Tioga, Memphis, Shelby Co., TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Shelby County	TN	JD request
SPL-2021-00114	NPR	AJD Keller Crossing Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	JD Request
MVK-2021-00314-TB	NPR	Alleged Violation/040521/Mr. John McCuan has placed Fill Material in a Stream Flowing from Ms. Stephens Property Across his Property and on into a Perennial Stream for a Garden Spot, Lincoln County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lincoln County	AR	Alleged Violation, Mr. John McCuan has placed Fill Material in a Stream Flowing from Ms. Stephens Property Across his Property and on into a Perennial Stream for a Garden Spot, Lincoln County, Arkansas
MVK-2018-00609-ael	NPR	Jim Webb /08092018/ Wetland Delineation on Flowood Industrial Park LLC 6 Acre Parcel Caterpillar Drive, Rankin County, Mississippi	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rankin County	MS	Jim Webb, Wetland Delineation on Flowood Industrial Park LLC 6 Acre Parcel Caterpillar Drive, Rankin County, Mississippi
MVK-2021-00219-AEL	NPR	Aethon Energy Operating, LLC/030221/ Proposed Well Pad Expansion for Existing Caplis 30-16-12 Well Pad Project, Caddo Parish, Louisiana	Activity occurs in waters that are NO longer WOTUS under the NWPR	Caddo Parish	LA	Aethon Energy Operating, LLC, Proposed Well Pad Expansion for Existing Caplis 30-16-12 Well Pad Project, Caddo Parish, Louisiana
SWL-2007-00509-krc	NPR	Bentonville, City of - Opal Road Sewerline	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	AR	placement of approximately 3500 linear feet of 36" interceptor sewer line Replacement of previously constructed 36-inch sewer line.
SWL-2007-00509-krc	NPR	Bentonville, City of - Opal Road Sewerline	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	AR	placement of approximately 3500 linear feet of 36" interceptor sewer line Replacement of previously constructed 36-inch sewer line.
SWL-2007-00509-krc	NPR	Bentonville, City of - Opal Road Sewerline	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	AR	placement of approximately 3500 linear feet of 36" interceptor sewer line Replacement of previously constructed 36-inch sewer line.
NWW-2020-00410	NPR	W. State Street Warehouse Shells	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ada County	ID	The project will include installing a concrete bridge across Sand Creek for the purpose of truck turnaround capability and fire access between two commercial warehouse parcels.

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SPL-2016-00641	NPR	Western Bypass and Altair Project, Temecula, Riverside County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	The Altair project proposes a mixed-used land plan consisting of approximately 870-1,750 residential units; a small commercial component in the center of the project overlooking a central park on axis with Main Street; a larger civic/commercial use at the southern end of the property; and the revised alignment completing the Western Bypass Corridor.
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**Southern Environmental Law Center • Natural Resources Defense Council •  
National Parks Conservation Association**

March 11, 2021

***Via Electronic Mail***

Radhika Fox  
Acting Assistant Administrator for Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 4101 M  
Washington, DC 20460  
Fox.Radhika@epa.gov

***Re: Harm Resulting from the 2020 Waters of the United States Definition***

Dear Acting Administrator Fox:

Thank you for your concern about the widespread harm to our nation's waters resulting from the implementation of the so-called "Navigable Waters Protection Rule" (NWPR).<sup>1</sup> We summarize below some of the more egregious jurisdictional determinations we have reviewed that deny Clean Water Act protections to streams and wetlands. The examples we highlight here demonstrate that the NWPR undermines the Biden-Harris administration's priorities of environmental justice and climate change, threatens federally protected lands, and leaves important resources without federal Clean Water Act protection.

**Byhalia Pipeline—Mississippi/Tennessee**

The Byhalia Pipeline is a high-pressure oil pipeline intended to connect two existing crude oil pipelines that deliver oil to Valero refineries in Memphis and northern Mississippi. The proposed pipeline route cuts through a drinking water well field in southwest Memphis operated by Memphis, Light, Gas and Water, which draws water from the Memphis Sand Aquifer. The well field is adjacent to an area of the aquifer known to be vulnerable to contamination. The pipeline route cuts through several African American communities in southwest Memphis, including one known as Boxtown. The community got its name after formerly enslaved people used scraps of materials and wood from train boxcars to build homes there in the late 19th century. The Boxtown community is already burdened by dozens of industrial facilities, including the Valero refinery and the Tennessee Valley Authority's recently retired coal plant

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<sup>1</sup> The Southern Environmental Law Center and Natural Resources Defense Council are currently engaged in litigation regarding the NWPR. Geoff Gisler and SELC attorneys represent numerous clients in *South Carolina Coastal Conservation League, et al. v. Nishida, et al.* (No. 20-cv-01687-BHH, D.S.C.). Jolie McLaughlin and other NRDC attorneys represent NRDC and other clients in *Conservation Law Foundation, et al. v. U.S. Environmental Protection Agency, et al.* (No. 20-cv-10820-DPW, D. Mass). NPCA has filed an amicus brief in the *Conservation Law Foundation* case. This letter does not discuss the legal issues in those cases. Nonetheless, EPA counsel have been given advance notice of, and are copied on, this letter.

and active gas plant. A company spokesperson recently offended many community members by stating that the company chose to site the pipeline in “the path of least resistance.”

The NWPR appears to have removed dozens of streams in the pathway of the pipeline from the protection of the Clean Water Act in Mississippi, clearing the path for construction of the pipeline. According to a January 25, 2021 jurisdictional determination summary form,<sup>2</sup> approximately 95 ephemeral streams have been excluded from the protections of the Clean Water Act. They total more than 10,400 feet, nearly 2 miles, of stream impacts. Although these streams are not within the drinking water well field that Boxtown relies on, the removal of protections for the streams increases the likelihood that the project will advance without meaningful consideration of overall water quality impacts. The effects of the NWPR in and around Boxtown are unclear, as the Memphis Corps district has not made public its jurisdictional determination.

### **Twin Pines Mining—Georgia**

Alabama-based mining company Twin Pines has proposed a heavy mineral sand strip mine on the doorstep of the Okefenokee Swamp, one of the largest and most celebrated wetlands in the country and home to both a National Wildlife Refuge and a National Wilderness Area. The proposed mine would be 50-feet deep on average and would destroy hundreds of acres of wetlands that are critical to the Okefenokee’s diverse ecosystem, threatening the hydrology of the swamp. Recently, the Corps determined that nearly 400 acres of previously jurisdictional wetlands near the Refuge are now unprotected by the Clean Water Act, allowing the mining company to begin mining without any involvement by the agency. This decision has important implications for the initial part of the mine as well as the longer-term expansion of the mine to more than 8,000 acres near the Refuge.

### **RiverPort—South Carolina**

The Savannah River National Wildlife Refuge sits on the border of South Carolina and Georgia. The Refuge’s roughly 30,000 acres contain pristine wetland systems, including freshwater marshes, tidal rivers and creeks, and bottomland hardwoods. Nearly half of the refuge is bottomland hardwoods, composed primarily of cypress, gum, and maple trees.<sup>3</sup> Just outside the Refuge’s boundaries are thousands of acres of wetlands that provide a critical buffer for the Refuge as well as important flood storage capacity in this low-lying part of the coastal plain.

The proposed RiverPort development would put a significant acreage of wetlands in peril. In total, the development spans close to 4,300 acres. The project would fill 33 acres of wetlands directly, but the future impacts are likely much greater. A recent jurisdictional determination denied Clean Water Act protection for more than 200 acres of wetlands in the project area. But the development would also fragment nearly 1,400 acres of wetlands, potentially causing those wetlands to lose the hydrologic connection required by the NWPR and,

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<sup>2</sup> <https://www.mvk.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/Approved-JDs/FileId/306445/>

<sup>3</sup> <https://www.fws.gov/refuge/savannah/about.html>.

therefore, to become non-jurisdictional as well. Because South Carolina is unlikely to exercise state authority over the wetlands, future impacts are likely to be much more significant than what has been proposed, with harmful consequences to the Refuge and the area's climate change resilience.

### **Indiana Dunes National Park—Indiana**

The Indiana State Assembly is considering a bill that would repeal the state's Isolated Wetland Law. At present, anyone proposing to impact a non-federally protected wetland must apply for and obtain a permit from the state. If a proposed project meets certain criteria, the developer must mitigate these impacts, ensuring that wetlands across the state are maintained and healthy.

Following the prior administration's rollback of federally jurisdictional waters, the percentage of federally protected wetlands in Indiana decreased from 60% to 20%, leaving 80% of wetlands—approximately 700,000 acres—solely under state jurisdiction. Should the bill pass, these wetlands will be without necessary safeguards. Nearly 70% of wetlands around Indiana Dunes National Park will be newly vulnerable, jeopardizing water quality, habitat, and recreation in the park, which is home to more than 350 species of birds and sees more than 3 million visitors annually.

### **National Impacts**

These examples are part of a broader trend. When NRDC staff recently analyzed the impacts of the rule nationwide using EPA's database of jurisdictional determinations and its filtering tool, they found that the Army Corps determined 6,608 individual features not to be "waters of the United States" under the NWPR between June 22, 2020 and February 3, 2021. Of these features, at least 1,496 ephemeral waters and at least 3,087 distinct wetlands were declared not to be "waters of the United States" under the NWPR. Waters by the thousands are being cut out of the Clean Water Act's protections.

A review of jurisdictional determinations shows significant losses throughout the country. Among those are the following, though this list represents only a sampling of the numerous troubling examples we identified after reviewing a small fraction of the determinations made under the NWPR:

- The Army Corps excluded 355 acres of wetlands in Fairbanks, Alaska, finding that, despite a prior determination that the site included wetlands "directly abutt[ing]" a relatively permanent tributary to the Chena River (a traditional navigable water), the wetlands were separated from the river by an artificial berm that does not allow a direct surface water connection in a typical year, rendering it not "adjacent" under the NWPR.<sup>4</sup>
- The Army Corps excluded 273 ephemeral streams in Arizona and Utah (encompassing over eight acres of area) from Clean Water Act protections. The jurisdictional determination form indicates that the site was previously the subject of a preliminary jurisdictional determination that found at least some of the streams to be "waters of the

<sup>4</sup> [https://www.poa.usace.army.mil/Portals/34/docs/regulatory/JDs/2020/POA\\_2003\\_01422\\_JD\\_29OCT2020.pdf](https://www.poa.usace.army.mil/Portals/34/docs/regulatory/JDs/2020/POA_2003_01422_JD_29OCT2020.pdf).

U.S.”<sup>5</sup> The project involves the construction of a pipeline in Arizona and Utah to withdraw water from Lake Powell (a reservoir on the Colorado River) to two counties for municipal supply. According to the Army Corps’ initial evaluation of a prior application for an individual section 404 permit: “The proposed activity may affect Federally-listed endangered or threatened species or their critical habitat.”<sup>6</sup>

- The Army Corps excluded 30 streams in Nevada as either ephemeral or not having a surface water connection in a typical year to a traditionally navigable water. There was a total of 251,053 linear feet of streams covered by this determination (47.5 miles).<sup>7</sup> Based on the location of the site, the project seems to be associated with the Round Mountain gold mine.
- The Army Corps excluded 190 acres of wetlands and 10,000 linear feet of streams in Texas from Clean Water Act coverage. The site appears to be either near or on the site of the Red River Army Depot.<sup>8</sup>
- The Army Corps excluded 22 wetlands in Ormond Beach, Florida from Clean Water Act protection, classifying all of them as non-adjacent. The wetlands area totaled 145.3 acres and included a single wetland 57.69 acres in area.<sup>9</sup> This determination was made at the request of Ormond Crossings, which is a planned business/residential development on a 3,000-acre tract.<sup>10</sup>

In sum, every day that the NWPR is in effect, we move farther from the Clean Water Act’s ultimate objective as streams and wetlands across the nation are slated for destruction. EPA must move quickly to restore federal clean water protections to critical waters. In the interim, the agency has tools to mitigate some of the damage that the rule is doing. We look forward to discussing these tools with you and working with EPA to restoring the proper scope of the Clean Water Act.

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<sup>5</sup> <https://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/2020/2020.11-Nov/200800354-AR-Apprvd-JD-Form-NWPR.pdf>.

<sup>6</sup> <https://www.spk.usace.army.mil/Media/Regulatory-Public-Notices/Article/1716369/spk-2008-00354-lake-powell-pipeline-project/>

<sup>7</sup> <https://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/2020/2020.11-Nov/200325089-AR-Apprvd-JD-Form-NWPR.pdf>.

<sup>8</sup> <https://www.swt.usace.army.mil/Portals/41/docs/missions/regulatory/JD/SWT-2020-322%20NWPR%20AJD%20FORM.pdf?ver=qA4x2YW8F3StCf1zH1nTCg%3d%3d>.

<sup>9</sup> <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/15241>.

<sup>10</sup> <https://www.ormondbeach.org/199/Ormond-Crossings>.



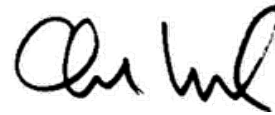
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How the Trump Administration Eased Destruction of the Nation's Wetlands and Streams, David Groves, 51 Env'l Law Reporter 10194 (2021). Available at: <https://elr.info/news-analysis/51/10194/how-trump-administration-eased-destruction-nations-wetlands-and-streams>.  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

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		)	
PUEBLO OF LAGUNA; PUEBLO OF		)	
JEMEZ,		)	
		)	
	Plaintiffs,	)	
		)	
v.		)	No.
		)	
MICHAEL REGAN, in his official capacity		)	COMPLAINT FOR VIOLATIONS
as Administrator of the United States		)	of the ADMINISTRATIVE
Environmental Protection Agency;		)	PROCEDURE ACT; the CLEAN
UNITED STATES ENVIRONMENTAL		)	WATER ACT; and FEDERAL
PROTECTION AGENCY; TAYLOR N.		)	TRUST RESPONSIBILITIES.
FERRELL, in his official capacity as		)	
Acting Assistant Secretary of the Army for		)	
Civil Works; UNITED STATES ARMY		)	
CORPS OF ENGINEERS,		)	
		)	
	Defendants.	)	
		)	
<hr/>		)	

**I. INTRODUCTION**

1. The Pueblo of Laguna and the Pueblo of Jemez (together “the Pueblos”) are both federally recognized tribes that have resided on lands now within the state of New Mexico since time immemorial.

2. For both Pueblos, waters that flow through their lands are necessary for domestic and agricultural uses. Such waters are also essential for cultural and ceremonial practices. The Pueblo of Laguna depends on clean water for irrigation and domestic purposes, and its traditions include ceremonial practices in which members of the Pueblo consume water. The Pueblo of Jemez likewise utilizes clean water for agriculture and domestic purposes, and its water supports

uses including ceremonial and cultural practices, hunting and fishing, as well as domestic, municipal, commercial, and industrial uses.

3. The Pueblos are located in New Mexico, in the arid southwest United States, where water is scarce and therefore of special value. Any water pollution in and around the Pueblos has a disproportionate impact because of the scarcity and preciousness of the resource in the region.

4. Most of the geography surrounding the Pueblos is inscribed by arroyos—gullies carved into the earth by flowing water that for more than a millennium have served as channels for life-giving water in times of rain or snowmelt. Each arroyo, ditch, ephemeral stream, waterway, and acequia with the hydrologic capability to facilitate water flow, regardless of the continuity of that flow, is a vein of life for the Pueblo communities. These conveyances bring water into the lands of the Pueblos and, with it, any pollutants introduced into waterways upstream of or hydrologically connected to the Pueblos' watersheds.

5. Congress enacted the Clean Water Act ("CWA") with the objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Among the CWA's main requirements is the prohibition of unpermitted discharge of pollutants into "navigable waters," defined as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1311(a), 1362(7).

6. The CWA charges the U.S. Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (together, "the Agencies") with implementation of the CWA's pollution protection programs. *See* 33 U.S.C. §§ 1342(a), 1344 (giving the EPA and the Corps authority over the major permitting schemes); *see also* 33 U.S.C. § 1319 (generally giving

the Administrator of the EPA the right to enforce); 33 U.S.C. § 1319(g)(1)(B) (granting limited enforcement power to the Secretary of the Army). Because the CWA does not define “waters of the United States,” the Agencies have interpreted the term in order to establish which waters are protected by the CWA. *See Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng’rs*, 893 F.3d 1017, 1020 (7th Cir. 2018); *see also* 33 C.F.R. § 328.3 (the Corps’ definition of “waters of the United States”) and 40 C.F.R. § 120.2 (the EPA’s definition of “waters of the United States”).

7. Historically, the Agencies have interpreted “waters of the United States” broadly, in keeping with the text, structure, and purpose of the CWA, although that interpretation has been updated over time in response to scientific advances and judicial decisions. *See United States v. Hubenka*, 438 F. 3d 1026, 1030–31 (10th Cir. 2006) (“As the Supreme Court has recognized, ‘Congress chose to define the waters covered by the [CWA] broadly.’” (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985))); *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (finding that Congress intended the definition of “waters of the United States” to be broader than the traditional definition of “navigable waters”); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,053 (June 29, 2015) (issuing a new rule defining “waters of the United States” in response to scientific data) [hereinafter the 2015 Clean Water Rule].

8. The Supreme Court interpreted “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006). Justice Scalia’s plurality opinion found that CWA jurisdiction did not extend to the wetlands in question, relying on a dictionary definition of “waters” as modified by the word “the” to conclude that the term “the waters of the United States” could “confer[] jurisdiction only over relatively permanent bodies of water.” *Id.* at 739.

9. Justice Kennedy’s concurrence in judgment supported a “significant nexus” test, finding CWA jurisdiction where the water or wetland “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. As such, the Supreme Court’s ruling in *Rapanos* rendered both the “Scalia test” and Justice Kennedy’s “significant nexus” test as valid for determining “waters of the United States.”

10. Several federal Circuit Courts of Appeals have subsequently followed Justice Kennedy’s test. *See, e.g., United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).

11. In 2015, the Agencies promulgated the Clean Water Rule, which relied on a thorough survey of the best available science to determine which bodies of water were “waters of the United States” under the significant nexus test. 80 Fed. Reg. at 37,060. In keeping with historic practice and based on clear science, the 2015 Clean Water Rule determined that many of the ephemeral and intermittent streams,<sup>1</sup> such as those common on the lands of the Pueblos, were “waters of the United States.”

12. In 2017, President Donald J. Trump issued an Executive Order directing the Agencies to repeal the Clean Water Rule and consider replacing it with a regulation employing

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<sup>1</sup> Ephemeral streams flow only in response to precipitation whereas intermittent streams flow continuously only at certain times of the year, for example, only flowing in the spring after snowmelt. U.S. Env’tl. Prot. Agency, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest* 6 (2008).

the narrower approach and reasoning of Justice Scalia’s plurality opinion in *Rapanos*. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

13. The Agencies repealed the 2015 Clean Water Rule and then reversed their longstanding policy by promulgating a new, much narrower interpretation of the “waters of the United States.” Definition of “Waters of the United States” — Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) [hereinafter the 2019 Repeal Rule]; The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020) [hereinafter the 2020 Navigable Waters Rule]. The 2020 Navigable Waters Rule follows the directive of Executive Order 13,778, but without due regard for established law.

14. The 2019 Repeal Rule and 2020 Navigable Waters Rule are inconsistent with both the CWA’s objective of “maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters” and the *Rapanos* significant nexus test.

15. The 2019 Repeal Rule and the 2020 Navigable Waters Rule harm the Pueblos by removing federal CWA water pollution protections from many of the ephemeral streams and other waterbodies that sustain the Pueblos. These rules remove CWA protections from 79% to 97% of stream miles in the Pueblo of Laguna. These rules remove CWA protections from 94% of stream miles in the Jemez watershed and 87% of stream miles on Jemez Pueblo trust lands.

16. Where a waterbody is not determined to be a “water of the United States,” the Pueblos alone are left to establish and administer water pollution control programs at their own expense.

17. However, the Pueblos rely on the Agencies to implement nearly all of the CWA's pollution programs on their behalf and do not have the financial or administrative resources or capacity to administer these programs themselves.

18. Further, both Pueblos rely on the federal jurisdiction of the CWA to protect themselves from upstream pollution.

19. For the Pueblos, high water quality is essential to day-to-day life, as well as cultural and religious practices.

20. The removal of federal jurisdiction creates the imminent risk of the degradation and destruction of the Pueblos' waters and would harm the Pueblos' agriculture, as well as cultural and religious practices.

21. The Agencies promulgated both the 2019 Repeal Rule and the 2020 Navigable Waters Rule without due respect to the sovereignty of either Pueblo.

22. The Agencies' actions violated the Administrative Procedure Act ("APA"), the CWA, and the federal trust responsibility toward tribes, as described herein.

23. The Pueblos respectfully request that the Court vacate and set aside the 2019 Repeal Rule and 2020 Navigable Waters Rule and return to the post-*Rapanos* case-by-case application of the "significant nexus" test.

## II. JURISDICTION AND VENUE

24. This Court has jurisdiction over the claims set forth in this complaint pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1362, and 5 U.S.C. § 702. *See Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.*, 138 S. Ct. 617, 623 (2018) (holding that challenges to the Agencies' regulations defining "waters of the United States" must be brought in federal district courts).



25. The relief sought is authorized by 28 U.S.C. § 2201(a), 28 U.S.C. § 2202, and 5 U.S.C. § 706.

26. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(c)(2) and (e)(1). This action seeks relief against federal agencies and federal officers acting in their official capacities. Additionally, venue is proper because a substantial part of the property, including water resources, that is the subject of the action is situated within this judicial district. 28 U.S.C. § 1391 (e)(1)(B).

### III. PARTIES

#### A. Pueblo Petitioners

27. Petitioners, Pueblo of Jemez and Pueblo of Laguna, are both federally recognized American Indian tribes with a government-to-government relationship with the United States. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021).

28. Unlike many other Indian tribes in the United States, the Pueblos were never removed from the land they have held since time immemorial and have retained their property rights to their lands. *See e.g.*, Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922; *New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (10th Cir. 1976) (*Aamodt I*) (outlining the history of congressional confirmation of Pueblo land and resource rights within New Mexico).

#### 1. Pueblo of Laguna

29. The Pueblo of Laguna is located approximately 10 miles west of Albuquerque, New Mexico, with the Pueblo's westernmost boundary approximately 50 miles from Albuquerque.

30. The Pueblo of Laguna encompasses approximately 500,000 acres of combined restricted fee and United States trust land in Cibola, Valencia, Bernalillo, and Sandoval counties. It includes the six villages of Encinal, Laguna, Mesita, Paguete, Paraje, and Seama.

31. As of 2020, there are approximately 4,800 members of the Laguna Pueblo within the reservation boundaries, and there are about 8,900 total enrolled members.

32. The Pueblo of Laguna is located within both the Rio Puerco and Rio San José watersheds. The Rio Paguete also runs through the Pueblo. Each of these three rivers is ephemeral or intermittent.

33. The people of Laguna have been residing within the watersheds of the Rio Puerco and the San José River and using water from both rivers for irrigation and domestic purposes since before European contact.

34. Water is essential to Laguna beliefs, cultural practices, ceremonies, and daily activities. Members of the Pueblo of Laguna consume water directly from the rivers as part of domestic uses and for ceremonial practices.

35. Members of the Pueblo of Laguna are directly affected by upstream water activities that occur beyond the exterior boundaries of the Pueblo and on federal lands.

36. Ephemeral and intermittent streams are a significant source of surface water for the Pueblo of Laguna.

37. The Pueblo of Laguna contains approximately 1,795 miles of linear streams. Under the 2015 Clean Water Rule, all 1,795 stream miles within the Pueblo were considered jurisdictional waters and were protected under the CWA. The 2020 Navigable Waters Rule will remove 79% to 97% of stream miles within the Pueblo from protections under CWA jurisdiction.

38. The Pueblo of Laguna was granted “Treatment in a similar manner as States” (“TAS”) status by the EPA for three CWA programs under Section 518(e) of the Act. The Pueblo of Laguna has received TAS status to participate in the Section 106 pollution control grant program, the Section 303(c) water quality standards program, and the Section 401 water quality certification program.

39. The Pueblo of Laguna has obtained TAS, federally recognized water quality standards, and section 401 certification authority, but must rely on the Agencies and their expertise for permitting and enforcing CWA requirements. These requirements include permit conditions under the National Pollutant Discharge Elimination System (“NPDES”) and section 404 dredge-and-fill programs to help protect the Pueblo’s water.

40. The department responsible for water quality at the Pueblo of Laguna consists of one full-time Surface Water Quality Specialist and one part-time employee who assists the Surface Water Quality Specialist with the water quality monitoring program.

41. The Pueblo of Laguna has relied on the protections of the 2015 Clean Water Rule to protect its water quality standards from degradation by upstream dischargers such as the City of Grants, and the Roca Honda, L-Bar, Homestake, Rio Grande Resources Mount Taylor, and Bluewater uranium mines. The Lee Ranch Coal Company is also located upstream of the Pueblo of Laguna.

42. According to public census data, the Pueblo of Laguna has an average annual per capita income of \$14,743, less than half of the average annual income in the United States, with a poverty rate of 32%, more than double the rate of the United States at 13.4%.

43. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule harm the Pueblo of Laguna by removing the ability to enforce federal water quality standards within nearly all its waterways. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule also harm the Pueblo of Laguna by leaving the Pueblo without the capacity or resources to administer its own water quality standards and without the legal authority under the CWA to enforce water quality standards against upstream discharges.

## **2. Pueblo of Jemez**

44. The modern-day Pueblo of Jemez is located approximately 40 miles northwest of Albuquerque, New Mexico.

45. The Pueblo of Jemez's reservation encompasses more than 89,000 acres. The Pueblo's land includes lands held in fee with federal restrictions, thereby constituting federal trust lands, federal reservations held by the United States in trust for the Pueblo, and fee lands. These figures do not include Indian aboriginal title lands.

46. The Pueblo of Jemez is home to more than 3,400 enrolled tribal members.

47. The Pueblo of Jemez is historically linked to the Pueblo of Pecos, as they were legally merged into one Pueblo by an Act of Congress. Act of June 19, 1936, Pub. L. No. 74-693, 49 Stat. 1528 (1936) (consolidating the Pueblos of Jemez and Pecos). The Pecos culture and traditions have been preserved and incorporated with the Jemez culture, as the Pueblo of Jemez recognizes the Governor of Pecos as their second Lieutenant Governor.

48. The Pueblo of Jemez is located within the Jemez River watershed, and the Jemez River flows through the Pueblo's lands and jurisdiction. There are 57.5 stream miles located

within the Pueblo of Jemez's reservation, of which 80% are ephemeral streams and 7% intermittent streams. Additionally, there are 888.9 stream miles located outside the Pueblo's reservation lands that are part of the hydrologic systems that have supported Pueblo life for more than a millennium. These waters have a direct effect on the Pueblo and the waters within it.

49. The Pueblo of Jemez lacks the authority to regulate and protect those hydrologically connected waters outside its jurisdiction, which consist of 80% ephemeral streams and 14% intermittent streams.

50. The Pueblo of Jemez relies on federal authority under the CWA to protect the waters of the Pecos watershed that lie outside of the Pueblo's jurisdiction.

51. The Pecos watershed consists of 189,789 acres and is culturally significant to the Pueblo as ancestral homelands. The Pecos watershed consists of 309 stream miles, all of which have a direct effect on the Pueblo way of life and safety.

52. The Jemez Natural Resources Department manages water and air quality monitoring, in addition to managing the Pueblo of Jemez's forestry, range, wildlife, environmental and cultural compliance, farm services, and overseeing the irrigation system. A department of 22 full-time employees plus a tribal Youth Conservation Corps manages this program.

53. According to Jemez core beliefs, water is considered the key to life. Throughout time, water has been the greatest predictor of villages, farms, commerce, and other markers of human success.

54. For the Pueblo, there is a significant connection between the Jemez River and the sustainability of the Pueblo's agriculture and way of life. Given this connection, members of the

Jemez community directly consume and use water from the Jemez River and other streams on and off the reservation as part of daily life and ceremonial practices.

55. These streams continue to have historic, spiritual, and cultural significance to the Pueblo, and Pueblo members continue to visit and use these waters for ceremonial purposes, including spiritual purposes, which require that a high level of water quality be maintained.

56. The Pueblo of Jemez currently receives two grants annually from the EPA. One grant is the General Assistance Program that the Pueblo receives because of its TAS status. It also receive a water quality grant to fund the water quality work that includes sampling, written sampling programs, and documentation of best practices.

57. According to public census data, the Pueblo of Jemez has an average annual per capita income of \$15,538, about half the per capita income in Albuquerque, New Mexico. Jemez Pueblo has a poverty rate of 24.8%, about 1.5 times the rate of Albuquerque at 16.2%.

58. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule harm the Pueblo of Jemez by removing its authority to enforce federal water quality standards within waterbodies on and off Pueblo lands that are critical to Pueblo agriculture, culture, and religion. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule also harm the Pueblo of Jemez by leaving the Pueblo without the capacity or resources to administer its own water quality standards and without the legal authority under the CWA to enforce water quality standards against upstream discharges.

#### **B. Government Defendants**

59. Defendant Michael S. Regan is the Administrator of the EPA, and as such is charged with the primary duties and responsibilities of the United States and the EPA, including

as trustee and fiduciary regarding protection of clean air, land, and water under EPA control or responsibility to which federally recognized Indian tribes have rights, including Plaintiff Pueblos.

60. Defendant United States Environmental Protection Agency is the federal agency charged with primary implementation and enforcement of the CWA. Together with the Corps, EPA promulgated the 2019 Repeal Rule and 2020 Navigable Waters Rule. EPA's responsibilities include duties as trustee and fiduciary regarding protection of clean air, land, and water under EPA control or responsibility to which federally recognized Indian tribes have rights, including Plaintiff Pueblos.

61. Defendant Taylor N. Ferrell is the Acting Assistant Secretary of the Army for Civil Works, supervising the Corps' Civil Works program, and is trustee and fiduciary regarding implementation of the CWA and management of lands under the Corps' control or responsibility to which federally recognized Indian tribes have rights, including Plaintiff Pueblos.

62. Defendant United States Army Corps of Engineers is the federal agency responsible for delivering public and military engineering services, and whose Civil Works mission includes regulatory programs and permitting power. The Corps is housed within the United States Army, as part of the United States Department of Defense. Together with the EPA, the Corps promulgated the 2019 Repeal Rule and 2020 Navigable Waters Rule. The Corps' responsibilities include those as trustee and fiduciary regarding protection of clean air, land, and water under the Corps' control or responsibility to which federally recognized Indian tribes have rights, including Plaintiff Pueblos.

#### IV. STATUTORY AND REGULATORY BACKGROUND

##### A. Federal Government Trust Obligations

63. The United States trust responsibility is one of the oldest and most foundational doctrines of federal Indian law. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831) (describing Indigenous tribes as “domestic dependent nations”); see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (rejecting the State of Georgia’s claim of jurisdiction over the Cherokee Nation and re-affirming the federal government’s responsibility to protect the tribes); *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (“[T]he legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes . . .”).

64. The United States trust responsibility entails recognizing and protecting tribal lands, assets, and resources, including the water that flows over and through tribal lands, and the natural resources that depend on that water. See *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (relying on “the undisputed existence of a general trust relationship between the United States and the Indian people.”). The Supreme Court reasoned in *Mitchell*, a case involving the Bureau of Indian Affairs’ control over a tribe’s timber resources, that “a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.” *Id.* at 225<sup>2</sup>; cf. Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed.

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<sup>2</sup> Further, the Court stated “where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.” 463 U.S. at 225 (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980).



Reg. 9223 (Mar. 12, 1990) (the Department of the Interior’s express recognition that “Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”).

65. In 1913, the United States Supreme Court held that Pueblos are tribes for purposes of federal jurisdiction, and Congress holds the power to “enact laws for the benefit and protection of [Pueblo] Indians as a dependent people.” *Sandoval*, 231 U.S. at 48.

66. As dependent Indian communities, Pueblos are considered Indian Country for which the United States has a “duty of exercising a fostering care and protection.” *Id.* at 46; *see also* 18 U.S.C. § 1151.

67. The Tenth Circuit has acknowledged the United States trust responsibility to the Pueblos. *Aamodt I*, 537 F.2d at 1111 (“Under *Sandoval* . . . , the United States has treated the Pueblos like other Indians. It is their guardian and trustee.”).

68. The United States has recognized its trust responsibility to protect Pueblo water resources in the recent settlement involving the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque. *See* Claims Resolution Act of 2010, Aamodt Litigation Settlement Act, Pub. L. No. 111-291, § 613(c), 124 Stat. 3064, 3141–42 (2010).

69. In addition, Congress recognized and preserved the priority of Pueblos’ water rights in Section 9 of the Pueblo Lands Act of 1933, 48 Stat. 108.

70. It is the duty of the EPA to “restore and maintain the . . . integrity of the Nation’s waters.” 33 U.S.C. § 1251(a), (d). The Pueblos’ water resources necessarily entail the right to clean water for domestic and ceremonial uses. *Cf.*, *United States v. Washington*, 853 F.3d 946, 965 (9th Cir. 2017) (holding that the State of Washington’s construction of culverts blocking

streams necessary for salmon habitat violated tribes' treaty rights because "the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish.").

71. Under executive branch policies relating to the trust duty, executive agencies have a duty to meaningfully consult with tribes, consider how agency actions affect tribal rights and resources, and respect tribal self-governance and sovereignty when taking actions that have tribal implications. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 9, 2000); Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009) ("executive departments and agencies (agencies) [sic] are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications"); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021) (President Biden recognizing the policy announced in Executive Order 13,175 and continuing commitment to "honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities.").

72. Executive Order 13,175 requires agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." 65 Fed. Reg. at 67,250.

73. These high standards of conduct apply to all executive departments, not just agencies with a "special statutory responsibilit[y]," such as the Bureau of Indian Affairs. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 225 (1982 ed.)).

74. The federal government's trust duty and the policies of the Agencies relating to the trust duty require that the Agencies consider how their rulemakings impact tribal rights and resources. *See Nw. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996) (stating that the federal trust obligation imposes a fiduciary duty on “any government action” relating to Indian tribes) (citing *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981)); *HRI, Inc.*, 198 F.3d at 1245.

75. The EPA has assumed a trust responsibility to Indian tribes as articulated in the agency's own official policies and procedures. In a 2019 policy statement, the EPA “reiterate[d] its recognition of the unique legal relationship with tribal governments” and “acknowledge[d] the federal government's trust responsibility to tribes.” Andrew R. Wheeler, *Envtl. Prot. Agency, Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy 1* (2019). The policy states that the “EPA works with tribes on a government-to-government basis to protect their land, air, and water.” *Id.*

76. The EPA has also developed specific consultation policies which require the EPA “to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests.” U.S. *Envtl. Prot. Agency, EPA Policy on Consultation and Coordination with Indian Tribes 1* (2011). The EPA describes consultation as “a process of meaningful communication and coordination between the EPA and tribal officials prior to the EPA taking actions or implementing decisions that may affect tribes.” *Id.*

77. The EPA policy requires four phases in the consultation process: “Identification, Notification, Input, and Follow-up.” *Id.* at 4–5.

78. The Identification Phase requires the EPA to identify “activities that *may be* appropriate for consultation” and the policy lists a number of avenues to ensure such activities are properly identified, including regular meetings with tribal partnership groups, analysis by tribal consultation advisors located in regional and national offices, and initiating an Action Development Process (“ADP”) as early as possible to ensure the results of the ADP are available to affected tribes. *Id.* at 4, 6 (emphasis in original).

79. The Notification Phase requires the EPA to “notif[y] the tribes of activities that may be appropriate for consultation.” *Id.* at 4. This notification entails direct communication with tribes and “includes sufficient information for tribal officials to make an informed decision about the desire to continue with consultation and sufficient information to understand how to provide informed input.” *Id.*

80. During the Input Phase, the “EPA coordinates with tribal officials . . . to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input.” *Id.* at 5. As “new issues arise,” the EPA “may need to undertake subsequent rounds of consultation.” *Id.*

81. During the Follow-up Phase, the EPA should “provide[] feedback to the tribe(s) involved in the consultation to explain how their input was considered in the final action.” *Id.* The feedback “should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation.” *Id.*

82. The EPA has also established an environmental policy for working with Native American tribes “to better clarify and integrate environmental justice principles in a consistent manner in the Agency’s work with federally recognized tribes.” U.S. Env’tl. Prot. Agency, EPA

Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous Peoples 1 (2011). The policy states that “[t]he EPA consults with federally recognized tribes and provides meaningful involvement opportunities for indigenous peoples . . . and considers the potential impact of Agency actions that may affect their human health or environmental interests.” *Id.* at 2.

83. In the policy, “meaningful involvement” is defined as: “(1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their human health or environment; (2) the public’s input can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.” *Id.* at 5.

84. This trust responsibility also extends to the Corps in the exercise of its CWA responsibilities. *Nw. Sea Farms*, 931 F. Supp. at 1519–20 (finding that the fiduciary duty extends to the Corps in permitting duties) (citing *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1523 (W.D. Wash. 1988)).

85. The Corps similarly states in its Tribal Consultation Policy that “[t]he trust responsibility will be honored and fulfilled” and that the Corps “will ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands.” U.S. Army Corps of Eng’rs, Tribal Consultation Policy in the Regulatory Program and Related Documents, USACE Tribal Nations Community of Practice 2, 3 (2016); U.S. Army Corps of Eng’rs, Tribal Consultation Policy and Related Documents, USACE Tribal Nations Community of Practice 2, 3 (2013).

86. The federal trust duty alters the standard deference afforded to federal lawmaking. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (“the standard principles of statutory construction do not have their usual force in cases involving Indian law.”); *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”).

87. The Tenth Circuit has also held the trust duty and the Indian law canons of construction to be extended to executive agency actions. *HRI*, 198 F.3d at 1245 (“Considering this duty . . . we conclude that it is reasonable for EPA to adopt an interpretation of its regulations requiring, when lands are in dispute, presumptions in favor of Indian country status and resulting federal jurisdiction.”); *see also United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935) (holding that the federal executive is held to a strict fiduciary standard in relations with Indian tribes and is to take “all appropriate measures for protecting and advancing” those tribes’ interests).

88. The canons of construction regarding federal Indian law apply even when an executive official is implementing a statute of general applicability. *HRI*, 198 F.3d at 1246–47 (stating that an EPA decision “made within the framework of administering the [Safe Drinking Water Act], implicates the core federal trust responsibilities of administering—and safeguarding—Indian lands.”). In reaching its holding, the Tenth Circuit relied on Felix Cohen’s articulation of this trust responsibility as it applies to executive agencies:

[T]he federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies—unless, of course, Congress has expressly authorized a deviation from these standards in exercise of its “plenary” power. Since the trust obligations are binding on the United States, these standards of conduct would seem

to govern all executive departments that may deal with Indians, not just those such as the Bureau of Indian Affairs which have special statutory responsibilities for Indian affairs. Moreover, in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies.

*Id.* at 1245 (quoting Cohen, Handbook at 225). The federal trust responsibility has been expressly acknowledged by the EPA. *See* U.S. Env'tl. Prot. Agency, EPA Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous Peoples 4 (2011) (“The EPA ... acknowledges the federal government’s trust responsibility to federally recognized tribes, based on the U.S. Constitution, treaties, statutes, executive orders, and court decisions.”).

#### **B. The Administrative Procedure Act**

89. The APA establishes requirements for federal agency decision making, including the agency rulemaking process. Final agency actions, including final rules, are subject to judicial review if there is no otherwise adequate remedy in a court. 5 U.S.C. § 704.

90. An agency must publish a notice of a proposed rulemaking in the Federal Register and provide an opportunity for public participation through the submission of comments or other information. 5 U.S.C. § 553(b)–(c).

91. A rule is unlawful and must be set aside when an agency acts in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, . . . or short of statutory right,” or “without observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (C), (D).

92. As detailed in *Motor Vehicle Manufacturers Ass’n. v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 43 (1983), a rule is arbitrary and capricious if “the agency has relied

on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

93. When an agency changes or reverses a prior rule, it must “provide a reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005)); *Renewable Fuels Ass’n v. EPA*, 948 F.3d 1206, 1255 (10th Cir. 2020).

94. While an agency need not show that a new rule is “better” than the rule it replaced, it must demonstrate that there are good reasons for the change in policy and that the change is permissible under the statute. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

95. Furthermore, when an agency’s new policy contradicts a previous policy, the agency must provide a more detailed justification for that change in position when “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* (internal citation omitted).

96. Any “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Brand X*, 545 U.S. at 981.



### C. Environmental Justice

97. In 1994, President Bill Clinton signed Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. 59 Fed. Reg. 7629 (Feb. 16, 1994). As amended in 2021 by President Biden, Executive Order 12,898 remains in force today. *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629–32 (Jan. 27, 2021).

98. Executive Order 12,898 requires that each federal agency “shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” 59 Fed. Reg. 7629. By its terms, Executive Order 12,898 also applies expressly to Indian tribes such as the Pueblo of Laguna and Pueblo of Jemez. § 6-606 (“Each Federal agency responsibility set forth under this order shall apply equally to Native American programs.”).

99. Since 1994, in order to ensure compliance with Executive Order 12,898, administrative and judicial courts have required agencies to conduct an environmental justice analysis. For example, in one citizen challenge to proposed oil drilling in the Arctic Ocean, the EPA Environmental Appeals Board (“EAB”) remanded permits under the CWA, directing the EPA “to reconsider the adequacy of its environmental justice analysis.” *In re Shell Offshore, Inc.*, 15 E.A.D. 103, 157 (EAB 2010). In a citizen challenge to an airport runway expansion near Boston, the D.C. Circuit concluded that the “environmental justice analysis in [FFA’s] [National Environmental Policy Act] evaluation [was] properly subject to ‘arbitrary and capricious’ review under the APA.” *Cmtys. Against Runway Expansion, Inc., v. FAA*, 355 F.3d 678, 689 (D.C. Cir.

2004). In a challenge by the Standing Rock Sioux Tribe to construction of the Dakota Access Pipeline, the district court agreed with the Tribe that the Corps failed to adequately consider the environmental justice aspects of the project in question “and thus failed to take a hard look at its environmental consequences.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017). In a citizen challenge to construction of the Atlantic Coast Pipeline, the Fourth Circuit found that a state agency subject to federal oversight “fail[ed] to consider the disproportionate impact” of the project on a predominantly African-American community. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020) (observing that “environmental justice is not just a box to be checked,” the court vacated the state air permit and remanded for further proceedings).

100. As the district court noted in *Standing Rock*, “[t]he purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations.” 255 F. Supp. 3d at 140 (internal citations omitted). As indicated in the cases cited above, administrative and judicial courts have required environmental justice analyses from federal agencies operating under different federal statutes, including the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* Under NEPA, for example, while agencies are not required to take “the course of action that best serves environmental justice,” they are required “to take a ‘hard look’ at environmental justice issues.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 102 (D.D.C. 2017) (quoting *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017)).

101. In *Standing Rock*, the district court explained that “[t]he National Environmental Policy Act . . . has two aims: it ‘places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,’ and ‘it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking [sic] process.’” 255 F. Supp. 3d at 112 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). In evaluating the impact a proposed action might have, an agency is to consider, along with other factors, “the degree to which the action ‘may cause loss or destruction of significant . . . cultural[ ] or historical resources.’” 255 F. Supp. 3d at 123 (citing 40 C.F.R. § 1508.27).

102. An assessment of the impact on cultural and historical resources should be considered a vital part of an environmental justice analysis. An agency, such as the EPA, should “recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action.” Council of Env'tl. Quality, Executive Office of the President, *Environmental Justice Guidance Under the National Environmental Policy Act* (1997).

103. The EPA’s own guidance on environmental justice states that the “EPA should be particularly careful not to diminish tribal resources, including cultural and natural resources and treaty rights, without tribal concurrence and the EPA should ensure the protection of such resources from environmental harm.” U.S. Env'tl. Prot. Agency, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (1998).

104. Removing or limiting access to clean water for both Pueblos’ populations directly threatens to diminish tribal resources and adversely impact their cultural practices.

105. Both Pueblos use water from local sources, both on and off their reservations, for domestic, ceremonial, and cultural practices.

106. The Agencies failed to recognize the interrelated cultural factors that amplify the environmental effects of narrowing the definition of “waters of the United States,” leaving unprotected hundreds of miles of ephemeral streams and wetlands that are essential to domestic uses and ceremonial and cultural practices.

107. The Agencies additionally failed to consider the adverse and disproportionate effects on the populations of the Pueblos by promulgating the 2019 Repeal Rule and the 2020 Navigable Waters Rule in direct violation of executive direction regarding environmental justice and their own stated policies on incorporating environmental justice concerns into the NEPA process.

108. Loss of protection for waters used by the Pueblos for domestic, ceremonial, and cultural practices is a direct impact from the EPA’s rulemaking, and the cultural importance of using water from ephemeral streams and wetlands greatly amplifies the effects of the Agencies’ new rule.

109. The EPA arbitrarily failed to conduct an environmental justice analysis, falsely—and illogically—asserting that one was not required “because there is no significant evidence of disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12,898.” Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328). Had the EPA conducted an environmental justice analysis to support the 2020 Navigable Waters Rule, the agency would have learned and

understood how the narrowed definition of “waters of the United States” disproportionately affects the Pueblos.

110. “Environmental justice is not just a box to be checked,” *Friends of Buckingham*, 947 F.3d at 92. Addressing the issue of environmental justice would have and should have informed the Agencies’ decision-making before they disregarded concerns expressed previously on behalf of the Pueblos. In particular, in promulgating the 2020 Navigable Waters Rule, the Agencies ignored the oral and written comments of the Pueblos opposing the proposed rule that would narrow the scope of “Waters of the United States.” *See infra* ¶¶ 173–78. Accordingly, the Agencies failed to meet their obligations under Executive Order 12,898 and subsequent case law for achieving the ends of environmental justice.

#### **D. Clean Water Act**

##### **1. Legislative Intent and Structure of the Clean Water Act**

111. In 1972, Congress enacted the Federal Water Pollution Control Act, commonly referred to as 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).

112. Congress intended the CWA to be an “all-encompassing program of water pollution regulation” that would remedy the prior “inadequate” legal framework that left water pollution control primarily to states. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 319 n.10 (1981); S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3669, 3674.

113. To achieve that aim of an all-encompassing program, Congress incorporated into the statute “a broad, systemic view of the goal of maintaining and improving water quality . . . .” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

114. Congress chose to apply the protections of the CWA broadly because it recognized that “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” *Id.* at 133 (citing S. Rep. No. 92–414, *as reprinted in* 1972 U.S.C.C.A.N. at 3742).

115. The CWA’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.” *Riverside Bayview*, 474 U.S. at 133.

116. The CWA expanded federal jurisdiction over water quality beyond the “traditional navigable waters” that had been the subject of prior, much weaker legal protections. Although the key substantive provisions of the CWA continue to apply to “navigable waters,” 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), Congress defined the term in 1972 to more expansively mean “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

117. Congress also included in the CWA another provision that made clear that the term “navigable waters” applied to “waters . . . other than those waters which are presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce . . . .” 33 U.S.C. § 1344(g)(1). This provision shows “that the Act’s term ‘navigable waters’ includes something more than traditional navigable waters.” *Rapanos*, 547 U.S. at 731.

118. The Conference Report from the passage of the CWA makes clear that Congress intended a broad reach through this definition: “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.” S. Rep. No. 92-1236, at 144 (1972) (Conf. Report), *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3822

(emphasis added); *see also Hubenka*, 438 F.3d at 1033 (stating that the CWA was intended “to cover, as much as possible, all waters of the United States instead of just some.”).

119. The CWA effects its comprehensive scheme of controlling water pollution at its source by prohibiting the discharge of any pollution into the “waters of the United States” without a permit. *See* 33 U.S.C. §§ 1311, 1342.

120. The CWA establishes two broad types of permitting programs.

121. Section 402 establishes the NPDES permitting program, which is administered by the EPA for the discharge of pollutants from point sources. 33 U.S.C. § 1342.

122. The CWA allows the EPA to delegate the operation of this program to states and tribes. 33 U.S.C. § 1344(g)(1); 33 U.S.C § 1342(b); 40 C.F.R. § 123.33(a)–(b). Most states have received authority to administer the NPDES permitting program in their jurisdictions. There are only a few states that do not have this authority. For those states, including New Mexico and the tribes within its borders, the EPA administers this program.

123. The second major permitting program is the Section 404 program, which establishes a permit process for the discharge of dredge-and-fill materials into “waters of the United States,” administered by the Corps. 33 U.S.C. § 1344. As with Section 402, the CWA allows the EPA to delegate certain parts of Section 404 operation to states and tribes. However, such delegations are rare. To date, the Corps administers the Section 404 program for all but three states and for all tribes.

124. In addition, Section 303 of the CWA requires states to adopt water quality standards that meet EPA minimum guidelines, or, if states fail to adopt adequate standards, to have the EPA set standards for the state. 33 U.S.C. § 1311. Section 401 in turn prohibits a federal

agency from permitting or licensing a discharge into “waters of the United States” unless the state (or tribe) where the discharge originates issues a certification that the permit or license will comply with applicable water quality requirements under Section 303 or waives its right to do so. 33 U.S.C. § 1341.

125. Other sections of the CWA establish minimum federal requirements for pollution controls that together establish a minimum level of nationwide pollution protection, including requirements for technology-based standards that must be incorporated into NPDES permits. *See* 33 U.S.C. §§ 301, 302, 304, 306, 307, 510(1); 33 U.S.C. §§ 1311, 1312, 1314, 1316, 1317, 1370(1).

## **2. Treating Tribes in a Similar Manner as States Under the CWA**

126. Federally recognized eligible tribes may apply to the EPA for “treatment in a similar manner as a state” status to implement particular CWA regulatory programs. 33 U.S.C. § 1377.

127. Tribes that receive TAS have the option to administer CWA regulatory programs that would otherwise be administered by the EPA, which include Section 303(c) water quality standards, Section 303(d) impaired water listing and total maximum daily loads programs, Section 401 water quality certification programs, Section 404 dredge-and-fill permitting, Section 402 NPDES programs, and Section 405 sewage sludge management programs. 40 C.F.R. §§ 123.32, 130.16, 131.8, 233.60, 501.23.

128. Tribes are not required to obtain or apply for TAS status. Tribes that choose to apply must go through a rigorous application process, which includes providing information on



the tribe's substantial capacity and technical experience to administer and enforce CWA provisions. 40 C.F.R. §§ 123.32, 130.16, 131.8, 501.23.

129. Nationwide, at least 70 tribes have received TAS status to establish Section 303(c) water quality standards, administer Section 401 water quality certifications, or to administer both programs. No tribes have received TAS authority for Section 402 NPDES permitting, Section 404 dredge-and-fill permitting programs, or Section 303(d) impaired water listings and total maximum daily loads programs.

130. The Pueblo of Laguna was granted TAS status for Section 303(c) and 401 programs.

131. The Pueblo of Laguna and the Pueblo of Jemez have applied for and received federal Clean Water Act grants under Section 106 for administering water quality programs.

132. Despite the TAS designation, the Pueblo of Laguna and the Pueblo of Jemez rely heavily on the EPA and the Corps to implement the majority of CWA protections within and around their boundaries.

### **3. Prior Regulations and Case Law on “Waters of the United States”**

133. Beginning with rulemakings in 1975, the Agencies have interpreted the “waters of the United States” to apply to “not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non[-]navigable intrastate waters whose use or misuse could affect interstate commerce.” *Riverside Bayview*, 474 U.S. at 124; Permits for Activities in Navigable or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975).

134. The Supreme Court has on several occasions issued decisions interpreting the permissible scope of “waters of the United States.”

135. In *Riverside Bayview*, a unanimous Court found that the Corps' assertion of CWA jurisdiction over wetlands adjacent to open waters was a permissible interpretation of "waters of the United States" given the language, policies, and history of the CWA. 474 U.S. at 139.

136. In *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987), the Court found that the CWA preempted state common law where that law would require "standards of effluent control . . . incompatible with those established" by the CWA. The Court found field preemption in part because of Congress' intent to establish a "comprehensive" program that "applies to all point sources and virtually all bodies of water." *Id.* at 492.

137. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166 (2001) (hereinafter *SWANCC*), the Supreme Court held that "isolated," non-navigable intrastate ponds used by migratory birds were not permissibly classified as "waters of the United States." The Court explained that in contrast to the isolated ponds at issue, the finding of jurisdiction over wetlands in *Riverside Bayview* was predicated on "the significant nexus between the wetlands and 'navigable waters.'" *SWANCC* at 167.

138. In 2006, the Supreme Court considered the permissible interpretation of "waters of the United States" in a plurality decision in *Rapanos*, 547 U.S. at 715–16.

139. Justice Scalia's plurality opinion found that CWA jurisdiction did not extend to the wetlands in question, relying on a dictionary definition of "waters" as modified by the word "the" to conclude that the term "the waters of the United States" could "confer[] jurisdiction only over relatively permanent bodies of water." *Id.* at 739.

140. Justice Kennedy's concurrence in judgment supported a "significant nexus" test, finding CWA jurisdiction where the water or wetland "either alone or in combination with

similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. As such, the Supreme Court’s ruling in *Rapanos* rendered both the “Scalia test” and Justice Kennedy’s “significant nexus” test as valid for determining “waters of the United States.”

141. In response to *Rapanos*, the Corps and the EPA issued a guidance letter clarifying how they would address CWA jurisdiction in light of the Supreme Court’s decision. *Env’tl. Prot. Agency & U.S. Dep’t of Army, Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. & Carabell v. U.S. (2008)*. In the guidance, the EPA and the Corps stated that they would assert jurisdiction over waters and wetlands in a manner “consistent with the *Rapanos* decision.” *Id.* at 4.

142. The Agencies’ post-*Rapanos* Guidance Memo “identifies those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the *Rapanos* decision.” *Id.* at 4. Accordingly, the Agencies determined that they would apply jurisdiction to “non-navigable tributaries that are not relatively permanent” and “certain adjacent wetlands” on a case-by-case basis by applying the significant nexus test. *Id.* at 8.

143. The Agencies would “assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.” *Id.* at 8.

144. Prior to the Supreme Court’s *Rapanos* decision, the Tenth Circuit followed a significant nexus test in *Hubenka*. 438 F.3d 1026, 1031, 1034 (citing *United States v. Rapanos*,

339 F.3d 447, 452) (6th Cir. 2003); *Headwaters Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001)).

145. After *Rapanos* was decided by the Supreme Court, several federal appellate courts interpreted and applied Justice Kennedy’s significant nexus test, alone or in unison, to determine whether waterbodies were under CWA jurisdiction. *See, e.g., Gerke Excavating, Inc.*, 464 F.3d 723, 725 (the Seventh Circuit holding that the significant nexus test “must govern the further stages of [the] litigation. . . .”); *N. Cal. River Watch*, 496 F.3d 993, 999 (the Ninth Circuit holding that 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.”); *Robison*, 521 F.3d 1319, 1322 (the Eleventh Circuit affirming application of the significant nexus test) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977) (for the proposition that the courts must determine “which of the positions taken by the *Rapanos* Justices *concurring in the judgment* is the ‘narrowest,’ i.e., the least ‘far reaching.’”)) (emphasis in original)).

#### 4. 2015 Clean Water Rule

146. The Agencies promulgated the Clean Water Rule in 2015 to help regulated entities better understand the scope of “waters of the United States,” protect the nation’s public health and aquatic resources, and to provide predictability as to where the CWA regulatory programs would be implemented. 80 Fed. Reg. at 37,054.

147. In the rule, the Agencies articulated a definition of “waters of the United States” based on the significant nexus test and the CWA’s objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* at 37,056.

148. The Agencies based their jurisdictional determination on an analysis of the best available peer-reviewed science to determine the “strength of . . . chemical, physical, and biological” connectivity between various waters and wetlands and navigable waters in order to demonstrate the “nexus” between such waters. *Id.* at 37,062.

149. The EPA’s Office of Research and Development prepared a comprehensive report that formed the technical basis for the 2015 Clean Water Rule, 80 Fed. Reg. at 37,057. *Envtl. Prot. Agency, Connectivity of Streams and Wetlands To Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (2015) (hereinafter *Science Report*). *See Env’tl. Prot. Agency & U.S. Dep’t of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (2015). The *Science Report*, which was subject to a “comprehensive technical review,” synthesized approximately 1,200 peer-reviewed studies, papers, agency guidance and regulatory determination manuals, and federal and state reports that address the connectivity of aquatic resources and effects on downstream waters and reached major conclusions as to the significant nexus between waterbodies and navigable waters. 80 Fed. Reg. at 37,057, 37,062.

150. The 2015 Clean Water Rule includes four waters as "jurisdictional by rule" including traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." 80 Fed. Reg. at 37,058. The 2015 Clean Water Rule also identified two categories of waters that required case-by-case analysis and waters that were categorically excluded from the rule. *Id.*

151. Based on the scientific analysis, the 2015 Clean Water Rule states that to meet the definition of “tributary” a water must both “flow, either directly or through another water, to a

traditional navigable water, interstate water, or the territorial seas” and possess a “bed and banks and an indicator of ordinary high-water mark.” *Id.* at 37,076.

152. Critically, as long as these criteria were met, the Agencies determined that the flow in a tributary could be “perennial, intermittent, or ephemeral,” as the science showed that all of these types of tributaries “are very effective at transporting pollutants downstream.” *Id.*

### **5. 2019 Repeal Rule**

153. On February 28, 2017, President Trump issued Executive Order 13,778, which directed the Agencies to “repeal the 2015 Clean Water Act and promulgate a rule interpreting the term ‘navigable waters’ in a ‘manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*.’” Exec. Order No. 13,778, 82 Fed. Reg. 12,497.

154. On July 27, 2017, the Agencies proposed to repeal the 2015 Clean Water Rule and revert to and recodify the previous regulation and guidance. Definition of “Waters of the United States”-Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,903 (July 27, 2017).

155. On October 22, 2019, the Agencies published the 2019 Repeal Rule which rescinded the 2015 Clean Water Rule and readopted the prior regulations dating back to 1986. 84 Fed. Reg. 56,626. The Agencies stated that they were repealing the 2015 Clean Water Rule in large part because the rule “misapplied and inappropriately expanded the significant nexus standard.” *Id.* at 56,640.

156. In adopting the 2019 Repeal Rule, the Agencies provided no explanation, analysis, discussion, or refutation of the Science Report or any of the other research and science in the administrative record that were relied on to establish which waters met the significant nexus test in the 2015 Clean Water Rule. Nor did the Agencies present any new science that

would support returning to the pre-2015 regulatory definition of “waters of the United States” under the significant nexus standard.

157. In adopting the 2019 Repeal Rule, the Agencies failed to consider, evaluate, or analyze the effects of the repeal on Pueblos or their water resources.

#### **6. 2020 Navigable Waters Rule**

158. The Agencies proposed the 2020 Navigable Waters Rule on February 14, 2019. 84 Fed. Reg. 4154. The Agencies promulgated the final rule on April 21, 2020. 85 Fed. Reg. 22,250.

159. Pursuant to President Trump’s Executive Order 13,778, the 2020 Navigable Waters Rule adopts a narrow definition of what waterbodies constitute “waters of the United States” that is “consistent with the opinion of Justice Antonin Scalia” in the *Rapanos* decision. 82 Fed. Reg. 12,497.

160. The 2020 Navigable Waters Rule interprets “the waters” to “encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.” 85 Fed. Reg. at 22,273.

161. Despite making clear that the rule’s interpretation of the “waters of the United States” is based on Justice Scalia’s *Rapanos* opinion, the Agencies stated that their jurisdictional determinations give effect to some commonalities between the Scalia opinion and Justice Kennedy’s concurrence. However, the Agencies did not rely on the significant nexus test articulated by Justice Kennedy to determine the jurisdictional status of different waters. *Id.*

162. The Agencies consider “waters of the United States” under the 2020 Navigable Waters Rule to be “(1) [t]he territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands).” *Id.*

163. The Agencies did not explain the rule’s exclusion of some interstate waters and failed to consider the effects that ephemeral waters have on the physical, chemical, or biological integrity of downstream waters.

164. Under the 2020 Navigable Waters rule, waters that do not fall into its jurisdictional categories will not be considered “waters of the United States” regardless of the waterway’s significant nexus to traditionally navigable waters or other jurisdictional waters.

165. These narrow categories are limited further by their corresponding definitions. For example, a tributary, as defined by the 2020 Navigable Waters Rule, must be “perennial or intermittent in a typical year.” *Id.* at 22,339. This definition of tributary eliminates ephemeral streams from federal CWA jurisdiction, which the Agencies made explicit in their Final Rule: “[T]he final rule specifically clarifies that waters of the United States do not include . . . ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools . . . .” *Id.* at 22,251.

166. The Agencies failed to address or consider the findings of the Science Report regarding the connectivity and effect of tributaries on downstream waters.

167. Preliminary feedback from the EPA’s Science Advisory Board (“SAB”) was provided to the Agencies on October 16, 2019 and reaffirmed that the Science Report utilized in



the 2015 Clean Water Rule was sound science, warranting respect as the best science available with regards to the connectivity of waterbodies. The SAB criticized the 2020 Navigable Waters Rule as “in conflict with established science, the existing [“waters of the United States”] rule developed based on established science and the objectives of the Clean Water Act.” Env’tl. Prot. Agency, Sci. Advisory Bd., Letter of the Science Advisory Board to EPA Administrator, Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 1 (2019).

168. EPA’s SAB issued final comments on the proposed rule, concluding that it “decreases protection for our Nation’s waters and does not provide a scientific basis in support of its consistency with the objective of restoring and maintaining ‘the chemical, physical and biological integrity’ of these waters.” Env’tl. Prot. Agency, Sci. Advisory Bd., Letter of the Science Advisory Board to EPA Administrator, Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 2 (2020).

169. The final SAB comments specifically criticized the rule for excluding ephemeral streams from CWA jurisdiction. “[T]he proposed definition of [“waters of the United States”] excludes ground water, *ephemeral streams*, and wetlands which connect to navigable waters below the surface. The proposed Rule does not present new science to support this definition, thus the SAB finds that the proposed Rule lacks a scientific justification, while potentially introducing new risks to human and environmental health.” *Id.* at 4 (emphasis added).

170. The Agencies finalized the 2020 Navigable Waters Rule before considering the final comments of the SAB.

171. In response to the preliminary comments of the SAB, the Agencies acknowledged that only “certain aspects” of their jurisdictional determinations were “informed” by the Science Report. Instead, they posited that “[s]cience cannot dictate where to draw the line between Federal and State waters, as this is a legal question that must be answered based on the overall framework and construct of the CWA.” 85 Fed. Reg. at 22,261.

172. Pueblo of Laguna staff made oral comments on the proposed 2020 Navigable Waters Rule at the Tribal Co-Regulators Forum in Albuquerque, New Mexico, on March 27, 2019.

173. The Pueblo of Laguna provided written comments regarding the proposed 2020 Navigable Waters Rule. Pueblo of Laguna, Comment Letter on Proposed Revised Definition of “Waters of the United States,” Comment ID: EPA-HQ-OW-2018-0149-4799 (Apr. 14, 2019).

174. In its comments, the Pueblo of Laguna emphasized that the proposed 2020 Navigable Waters Rule posed an imminent threat to tribes, failed to honor trust obligations, and would result in sources of water no longer being considered or protected by the CWA. The Pueblo of Laguna went on to comment that the rule would create significant gaps of protection from pollution in their surface water that would result in pollution that will generate consequences for generations to come. *Id.*

175. The Pueblo of Jemez also submitted written comments on the proposed 2020 Navigable Waters Rule. Pueblo of Jemez, Comment Letter on Proposed Revised Definition of “Waters of the United States,” Comment ID: EPA-HQ-OW-2018-0149-4565 (Apr. 15, 2019).

176. In its comments, the Pueblo of Jemez warned that the proposed 2020 Navigable Waters Rule did not adequately consider the complexity of the drainage system in the arid

southwest. The proposed rule would exclude Pueblo of Jemez waters from protection under the CWA, and also much of the surface water in the Southwest. The Pueblo of Jemez commented that it lacks the resources to fill the gap created by the proposed 2020 Navigable Waters Rule. *Id.*

177. In addition, on April 19, 2019, the All Pueblo Council of Governors (“APCG”), of which the Pueblo of Jemez and Pueblo of Laguna are members, provided written comments on the proposed 2020 Navigable Waters Rule. All Pueblo Council of Governors, Comment Letter on Proposed Revised Definition of “Waters of the United States,” Comment ID: EPA-HQ-OW-2018-0149-5107 (Apr. 15, 2019).

178. In its comments, the APCG warned that the proposed 2020 Navigable Waters Rule weakens CWA protections for tribal waters and poses an imminent threat to tribal communities. The APCG went on to comment that the proposed 2020 Navigable Waters Rule created enforcement gaps and failed to protect tribal lands under the CWA, which would result in pollution and negative consequences for Pueblo generations to come. *Id.*

**E. The 2019 Repeal Rule and 2020 Navigable Waters Rule Harm the Pueblo of Laguna and the Pueblo of Jemez**

179. The 2019 Repeal Rule and 2020 Navigable Waters Rule harm the sovereign, governmental, environmental, economic, and proprietary interests of the Pueblos.

**1. Tribal Water Resources Will No Longer be Protected from Pollution by Federal Standards, and Tribal Governments will not Have the Capacity to Provide the Same Level of Protection**

180. The Pueblo of Laguna is located downstream of the City of Grants, the Roca Honda, L-Bar, Homestake, Rio Grande Resources Mount Taylor mine, and Bluewater uranium mines, and the Lee Ranch Coal Mine. Pollution discharged by upstream entities pollutes multiple waterbodies on the Pueblo of Laguna.

181. The Pueblo of Jemez is located downstream of the Village of Jemez Springs, Cañon, Ponderosa, Soda Dam, pumice mines, and thousands of dispersed recreational camp sites. The South Pit Pumice Mine, within the Jemez watershed, is currently proposed for expansion, posing an imminent and increasing threat to downstream water quality of the Pueblo.

182. The 2019 Repeal Rule and the 2020 Navigable Waters Rule narrow the scope of the CWA to waters that flow constantly and explicitly excludes ephemeral waters.

183. Most of the waterways in the Pueblos are ephemeral, which means they lack continuous surface flow of water.

184. The Pueblos use ephemeral waters for domestic, agricultural, cultural, and religious purposes.

185. The Pueblos rely on the protections of the CWA, including federal enforcement of CWA standards and technical assistance, to protect their water resources, including ephemeral waters. They also have relied on the “significant nexus” test and the 2015 Clean Water Rule’s jurisdictional determinations to protect these waters.

186. The 2019 Repeal Rule and 2020 Navigable Waters Rule are harming and will imminently harm the Pueblo of Laguna and the Pueblo of Jemez and their members because they have stripped CWA protections from many waterbodies within the respective Pueblos, from waterways upstream of the Pueblos’ reservation borders, and from waterways that are on federal lands to which the Pueblos’ have ongoing and longstanding legal and cultural connections. Hundreds of miles of ephemeral streams that support the Pueblos’ agriculture, recreation, and cultural and spiritual practice are now at imminent risk of degradation and destruction without federal protection.

187. The Pueblo of Laguna will be and already is subjected to actual harms because it is no longer able to exercise its CWA Section 401 right to certify certain upstream dischargers as meeting its Section 303 water quality standards for those waterbodies that are now stripped of their CWA jurisdiction. For example, the Pueblo of Laguna previously reviewed an upstream NPDES permit through its Section 401 TAS program.

188. Both Pueblos will be and already are subjected to actual harms because they no longer can rely on the Agencies to enforce or provide technical assistance for the protection of waterbodies that are no longer jurisdictional. The Pueblo of Jemez relies on the EPA and the Corps to enforce and administer all water pollution protection programs on its lands. The Pueblo of Laguna relies on the EPA and the Corps to enforce and administer all water pollution programs on its lands except for the Section 303(c) and 401 programs for which it has TAS status. Even for these programs, it relies on federal technical assistance.

189. Although the Agencies suggested that tribes and states now have the advantage of creating their own water pollution protection programs for non-jurisdictional waters, the Pueblos do not have the resources and technical capacity to take over fully the federal role in protecting water quality under the CWA, and the Agencies have acknowledged this contradiction. 85 Fed. Reg. at 22,336–37.

190. To the extent that the Pueblos do attempt to create tribal water pollution control programs for non-jurisdictional waters, they will be economically harmed because they will need to expend scarce resources on these programs. The Pueblos have fewer resources than states to implement their own comprehensive water quality programs.

191. Further, any Pueblo efforts to initiate tribal water pollution control programs for non-jurisdictional waters will take significant time, during which the waters of both Pueblos will be left unprotected and in jeopardy.

192. These harms are directly traceable to the actions of the Agencies in promulgating a narrower, unscientific definition of “waters of the United States,” contrary to the purpose of the CWA.

193. The imminent and actual harms suffered by the Pueblos will be directly redressed by a decision from this court to set aside and vacate the 2019 Repeal Rule and the 2020 Navigable Waters Rule.

**2. The Agencies’ Failure to Meaningfully Consult with the Pueblos Regarding Concerns with the 2019 Repeal Rule and the 2020 Navigable Waters Rule is a Violation of the Federal Trust Duty and Adversely Impacts Tribal Sovereignty**

194. The Pueblos are federally recognized tribes. 86 Fed. Reg. at 7556.

195. In recognition of the trust duty, federal government policy—as stated by Executive Order and internal agency policy—is to engage in meaningful government-to-government consultation prior to taking significant actions that may affect tribal interests. *See* U.S. Env’tl. Prot. Agency, EPA Policy on Consultation and Coordination with Indian Tribes 1 (2011); Wheeler, Reaffirmation of the U.S. Environmental Protection Agency’s Indian Policy 1; U.S. Army Corps of Eng’rs, Tribal Consultation Policy and Related Documents, USACE Tribal Nations Community of Practice; Exec. Order No. 13,175, 65 Fed. Reg. 67,249.

196. The Agencies failed to follow their tribal consultation policies requiring regular and meaningful government-to-government communication and coordination. Rather, tribes were offered listening sessions, where EPA gave Tribes’ the opportunity to express concerns

about the rollback of protected waters. These listening sessions did not allow for any response or dialogue from the EPA, nor did the EPA provide a consolidated version of the comments provided at these sessions to the tribes afterwards.

197. The EPA failed to “seek out and facilitate” meaningful involvement from tribal leaders. *See* U.S. Env'tl. Prot. Agency, EPA Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous Peoples 5.

198. The Agencies conducted no leader-to-leader meetings with the Pueblo of Jemez or the Pueblo of Laguna, either in person, or via telephone or video conferencing. *See* U.S. Env'tl. Prot. Agency, Summary Report of Tribal Consultation and Engagement for the Navigable Waters Protection Rule 22–27.

199. The EPA did not follow its own policy of providing feedback to senior tribal officials of either Pueblo explaining how their input was considered in the rulemaking. U.S. Env'tl. Prot. Agency, EPA Policy on Consultation and Coordination with Indian Tribes 4, 6.

200. Despite the Agencies’ establishing tribal consultation policies for the purpose of respecting tribal sovereignty through government-to-government consultation, the Agencies have ignored the Pueblos’ concerns about the 2019 Proposed Rule and 2020 Navigable Waters Rule.

*Id.*

201. Contrary to their tribal consultation policies, the Agencies actually undermined tribal sovereignty by failing to consider the economic and administrative impact on the Pueblos’ implementation of water resource protections, disregarding the reality that “many Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to

expand programs . . . .” Instead, the Agencies relied on the flimsy assertion that the rule “preserves tribal authority.” 85 Fed. Reg. at 22,336–37.

202. The Agencies promulgated the 2019 Repeal Rule and the 2020 Navigable Waters Rule without due respect for Pueblo sovereignty by undermining the Pueblos’ ability to protect waters within their boundaries and to gain enforcement of water standards on upstream users. The Agencies failed to consult with the Pueblos on a government-to-government basis and in accordance with their own policies and failed to address the gap in protection that the 2019 and 2020 rules create. By only providing generalized presentations and “listening sessions” but no direct consultation, the Agencies further undermined the Pueblos’ sovereignty by failing to engage with or meaningfully consult tribal leadership, or provide feedback showing how they took into account the Pueblos’ comments and concerns in the final rulemaking.

#### **F. Vacatur of a Current Rule**

203. The Administrative Procedure Act provides that the reviewing court shall set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706(2)(A), (B), (C), (D); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971).

204. Vacatur is “the presumptively appropriate remedy for a violation of the APA.” *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (citing *Fed. Commc’n Comm’n v. Nextwave Personal Commc’ns, Inc.*, 573 U.S. 293, 300 (2003)). See also *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (“We have made clear that ‘when a reviewing court determines that the agency regulations are unlawful, the



ordinary result is that the rules are vacated . . . .”) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

205. The Tenth Circuit has held that when an agency action is arbitrary and capricious, vacatur “is a common, and often appropriate form of injunctive relief granted by district courts.” *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017).

206. This Court also holds that “vacatur is the normal and presumed remedy” for violations of the Administrative Procedure Act. *N.M. Farm & Livestock Bureau v. U.S. Dep’t of Interior*, No. 15-428, slip. op., 2021 WL 275535 at \*8 (D.N.M. Jan. 27, 2021).

207. Because vacatur is the normal remedy, a court is only permitted “to remand without vacating the agency’s action in limited circumstances.” *Id.* at \* 5 (citing *Am. Great Lakes Ports Ass’n v. Schultz*, 962 F.3d 510, 518 (D.C. Cir. 2020)).

208. The party seeking remand without vacatur carries the burden of overcoming a presumption of vacatur. *Id.* (citing *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018)).

209. In determining whether to allow unlawful agency action to stand pending agency action on remand, this Court assesses “the seriousness of the [agency action’s] deficiencies (and thus the extent of doubt whether the agency chose correctly)” with “the disruptive consequences of an interim change that may itself be changed.” *Id.* (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (establishing the *Allied-Signal* test)).

210. This Court has recently applied the *Allied-Signal* test to determine that vacatur was the appropriate remedy for APA violations in a variety of cases. *See, e.g., N.M. Farm & Livestock Bureau*, No. 15-428, 2021 WL 275535 (employing the *Allied-Signal* test to vacate

unlawful critical habitat reduction); *N. N.M. Stockman's Ass'n v. U.S. Fish and Wildlife Serv.*, No. 18-1138, 2020 WL 6048149 (D.N.M. Oct. 13, 2020) (same); *N.M. Health Connections v. U.S. Dep't of Health and Human Serv.*, 340 F. Supp. 3d 1112 (D.N.M. 2018) (applying the *Allied-Signal* test to vacate an agency action based on erroneous assumptions).

211. Balancing the equities under the *Allied-Signal* test strongly favors remand with vacatur. The seriousness of the agency's deficiencies in the promulgation of the 2020 Navigable Waters Rule, the potential prejudice to the Pueblos if the rule were to remain in effect on remand, and the purpose of the substantive statute far outweigh any potential consequences of invalidating the agency rule. The removal of federal jurisdiction over the vast majority of the Pueblos' waters leaves them with little ability to adequately protect their waters against upstream polluters, threatening adverse effects on the health and welfare of their members.

212. The Agencies' deficiencies in promulgating the 2020 Navigable Waters Rule were significant, serious, and substantive. The rule is an impermissible interpretation of "waters of the United States" as it fails to protect those waters as required by the CWA and the Supreme Court. By narrowing the definition of "waters of the United States" to exclude waters having an effect on or connection to the integrity of downstream, traditionally navigable waters, the Agencies have violated the statutory mandate.

213. Courts regularly decline to exercise their discretion to order remand without vacatur "when an agency has committed substantive errors, as opposed to procedural ones." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 344 F. Supp. 3d 355, 378 (D.D.C. 2018). In addition to the Agencies' substantive errors, the Agencies also engaged in a variety of procedural errors by promulgating a rule that was arbitrary, capricious, and an abuse of discretion because it was

not adequately supported by the record; by failing to meaningfully consider and address the Pueblos' comments; and by violating their trust responsibility to the Pueblos.

214. This Court has adopted additional equitable factors aiding its *Allied-Signal* analysis to determine if such limited circumstances exist to remand without vacatur. *Id.* (citing *Coal. of Arizona/New Mexico Cnty. for Stable Econ. Growth v. Salazar*, No. 07-CV-00876, 2009 WL 8691098 at \*3 (D.N.M. May 4, 2009)) (including “(1) the purpose of the substantive statute . . . ; (2) the consequences of invalidating or enjoining the agency action; (3) potential prejudice to those who will be affected by maintaining the status quo; and (4) the magnitude of the [alleged] administrative error and how extensive and substantive it was.”).

215. In *N.M. Health Connections*, after employing the equitable factors in the *Allied-Signal* test, this Court listed other scenarios in which vacatur is appropriate, including “where ‘such fundamental flaws in the agency’s decision make it unlikely that the same rule would be adopted on remand . . . .’” 340 F. Supp 3d at 1178 (quoting *Pollinator Stewardship Council v. U.S. Env’tl. Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015)); as well as “where the agency’s reasoning behind a rule is ‘flimsy and [] half-hearted . . . .’” *Id.* (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002)).

216. The Agencies’ promulgation of the 2020 Navigable Waters Rule was fundamentally flawed, arbitrary and capricious, and it is unlikely that it would be adopted on remand; the Agencies’ reasoning that the Rule supports or advances tribal sovereignty by removing federal protection is flimsy and half-hearted. The Pueblos rely on federal protection for clean water; removing that protection for the overwhelming majority of the Pueblos’ waters

endangers them with uncontrolled pollution, threatening adverse effects on the physical, economic, and spiritual health and welfare of the communities.

217. The consequences of vacatur would not be disruptive, as the 2020 Rule itself is already disruptive to the purpose of the CWA; reinstating jurisdiction over non-navigable waters would not strain the Agencies' resources or expertise, as they have provided support and protection to tribes and their waters before. *Compare N. N.M. Stockman's Ass'n*, No. 18-1138 at \*443 (noting the disruptive consequences posed to the U.S. Fish and Wildlife Service and the endangered Jumping Mouse outweigh the agency's deficiencies in promulgating the mouse's critical habitat designation), *with N.M. Health Connections*, 340 F. Supp. 3d at 1182 (despite alleged economic burdens, not finding sufficient disruption to outweigh vacatur), *and N.M. Cattle Growers Ass'n v. Norton*, No. 02-0461, 2003 U.S. Dist. LEXIS 18534 at \*8–9 (D.N.M. Sept. 30, 2003) (same, and noting “there must be some factual basis for determining what the disruptive consequences might be” (quoting *Bldg. Indus. Legal Def. Found. v. Norton*, 231 F. Supp. 2d 100, 106 (D.D.C. 2002))).

218. The potential prejudice to the Pueblos, if the status quo were to be maintained on remand, is immense. While the Agencies could take months or years to reconsider their rule, the Pueblos would be forced to regulate waters in a similar manner to the Agencies, but with little of the funding, staffing, enforcement power, and expertise afforded to the EPA and the Corps.

219. Applying the *Allied-Signal* test, as this Court has done, to the promulgation of the 2020 Navigable Waters Rule, the Agencies' deficiencies in the promulgation of the rule and the potential prejudice to the Pueblos far outweigh the potential disruptive consequences resulting from vacatur. Vacatur of the 2020 Navigable Waters Rule is therefore an appropriate remedy.

## V. CAUSES OF ACTION

### **CLAIM 1: THE 2020 NAVIGABLE WATERS RULE IS AN IMPERMISSIBLE INTERPRETATION OF “WATERS OF THE UNITED STATES” UNDER THE CWA AND JUDICIAL PRECEDENT**

(2020 Navigable Waters Rule - Violation of the Administrative Procedure Act, 5 U.S.C. § 706 and Clean Water Act, 33 U.S.C. § 1251 *et seq.*)

220. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

221. A rule is unlawful and must be set aside by the court when an agency acts in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, . . . or short of statutory right,” or “without observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (C), (D).

222. The purpose of the CWA “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

223. CWA jurisdiction is limited to “navigable waters,” defined as “waters of the United States.”

224. The 2020 Navigable Waters Rule is contrary to law as it fails to protect the “waters of the United States” as required by the CWA and the judgments of the Supreme Court and the Circuit Courts of Appeals by narrowing the definition of “waters of the United States” to exclude multiple waters that can affect the physical, chemical, and biological integrity of downstream traditional navigable waters.

225. The Agencies exceeded their authority and acted contrary to the CWA by adopting provisions in the 2020 Navigable Waters Rule that unlawfully defined waters of the U.S. to exclude waters having an effect on or connection to the physical, chemical, and biological integrity of downstream, traditional navigable waters, including by: (A) defining

“tributaries” to exclude ephemeral waters; and (B) by excluding waters that lack a surface connection to traditional navigable waters in a “typical year,” but that have an effect on or connection to downstream traditional navigable waters. 85 Fed. Reg. at 22,251; see 33 U.S.C. § 1251 *et seq.* As a result, the Agencies’ promulgation of the 2019 Repeal Rule and the 2020 Navigable Waters Rule was not in accordance with the law and short of statutory right.

**CLAIM 2: THE 2019 REPEAL RULE AND THE 2020 NAVIGABLE  
WATERS RULE ARE ARBITRARY AND CAPRICIOUS AND AN ABUSE  
OF DISCRETION BECAUSE THE FINAL RULE IS NOT ADEQUATELY  
SUPPORTED BY THE RECORD**

(2019 Repeal Rule and 2020 Navigable Waters Rule - Violation of the Administrative Procedure Act, 5 U.S.C. § 706)

226. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

227. A rule is unlawful and must be set aside when an agency acts in a manner that is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A).

228. An agency must demonstrate good reasons for any changes in policy and must show the change is permissible under the governing statute. *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515.

229. An agency rule contradicting previous policy must include a more detailed justification than rules of first interpretation, when “its new policy rests upon factual findings that contradict those which underlay its prior policy, . . . or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* (internal citation omitted).

230. An unexplained inconsistency in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA].” *Brand X*, 545 U.S. at 981.

231. A rule is arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

232. First, the 2019 Repeal Rule and the 2020 Navigable Waters Rule are arbitrary and capricious and an abuse of discretion because they fail to offer a detailed explanation for why they contradict or ignore the scientific factual findings underlying the 2015 Clean Water Rule, and instead reverse course after decades of EPA and Corps practice and judicial decisions supporting federal CWA protections for many types of waters, including ephemeral streams.

233. The 2020 Navigable Waters Rule does not attempt to assess, consider, or explain the effects on this narrowing of jurisdiction, either by characterizing the extent to which waters will lose protections or how this loss of protections may impact their physical, chemical, or biological integrity. Instead, the Agencies claim that they are unable to quantify the changes without any further explanation. 85 Fed. Reg. at 22,332.

234. The Agencies do not offer any detailed refutation or discussion of the findings of the Science Report that served as the basis for the significant nexus determinations in the 2015 Clean Water Rule, stating only that the 2020 Navigable Waters Rule was “informed” by science in “certain aspects.” *Id.* at 22,288.

235. The Agencies fail to provide any support for their assertion that the 2020 Navigable Waters Rule strikes a “better balance” between the objective of the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. §

1251(a), and the statute’s policy “to recognize, preserve, and protect the primary responsibilities and rights of States.” 85 Fed. Reg. at 22,261.

236. The Agencies’ promulgation of the 2020 Navigable Waters Rule also was arbitrary, capricious, and an abuse of discretion because it did not acknowledge, assess, or consider how this reversal of policy would harm the Pueblos’ longstanding reliance on federal CWA protections of their waterbodies. The Agencies failed to consider the economic and administrative impact on the Pueblos’ implementation of water resource protections, disregarded the reality that “many Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to expand programs . . . .,” and instead relied on the flimsy assertion that the rule “preserves tribal authority.” *Id.* at 22,336–37.

237. Finally, the promulgations of the 2019 Repeal Rule and the 2020 Navigable Waters Rule were arbitrary, capricious, and an abuse of discretion because they failed to abide by executive branch policies with regards to environmental justice, including with regards to tribes.

238. The Agencies failed to abide by Presidential Executive Order 12,898, which requires agencies to identify and address, “as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations.” 59 Fed. Reg. 7629.

239. Despite input that the Agencies received from the Pueblos and other tribes, the Agencies arbitrarily and capriciously dismissed environmental justice impacts in the final 2020 Navigable Waters Rule, stating without support that the rule was “not subject to Executive Order 12,898 . . . because there is no significant evidence of disproportionately high and adverse



human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples.” 85 Fed. Reg. at 22,337. The Agencies claimed to find “no significant evidence” of disproportionate impacts even though they failed entirely to conduct an environmental justice analysis that may have identified such disproportionate impacts, in violation of Executive Order 12,898 and subsequent case law.

240. The Agencies arbitrarily ignored their own environmental justice policies, which among other things, require the EPA to use “legal authorities . . . to advance environmental justice goals in its work . . . in Indian country.” U.S. Env’tl. Prot. Agency, Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous Peoples 2.

241. The Agencies failed to adequately demonstrate good reasons for the changes in policy effectuated by the new rulemaking. They further failed to adequately assess the detrimental impacts of the rulemaking considering the Pueblos’ reliance on federal protections and failed to assess the disproportionately high and adverse human health and environmental effects of the rulemaking on tribes and Indigenous peoples. Therefore, the 2019 Repeal Rule and the 2020 Navigable Waters Rule are arbitrary, capricious, and an abuse of discretion.

**CLAIM 3: THE 2020 NAVIGABLE WATERS RULE IS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION BECAUSE THE AGENCIES DID NOT MEANINGFULLY CONSIDER AND ADDRESS SIGNIFICANT COMMENTS OF PUEBLO PETITIONERS**

(2020 Navigable Waters Rule - Violation of the Administrative Procedure Act, 5 U.S.C. § 706)

242. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

243. Under the APA, in a notice-and-comment rulemaking, an agency “must respond in a reasoned manner to those [comments] that raise significant problems.” *City of Waukesha v. Env’tl. Prot. Agency*, 320 F.3d 228, 257 (D.C. Cir. 2003) (quoting *Reytblatt v. Nuclear Regul.*

*Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997)). The failure to respond to significant comments demonstrates that an agency's decision was not based on a consideration of the relevant factors. *Texas Mun. Power Agency v. Env'tl. Prot. Agency*, 89 F.3d 858, 876 (D.C. Cir. 1996) (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984)).

244. The Agencies here failed to consider the significant comments of the Pueblos.

245. In particular, the Agencies failed to address how the Pueblos are supposed to fill in gaps in enforcement created by the rule, how the rule satisfies the Agencies' trust responsibility to the Pueblos, or proposals that the Agencies maintain broader federal CWA jurisdiction for the Pueblos.

246. The Agencies' promulgation of the 2019 Repeal Rule and 2020 Navigable Waters Rule therefore impermissibly failed to consider relevant factors and is arbitrary and capricious and an abuse of discretion.

**CLAIM 4: THE 2020 NAVIGABLE WATERS RULE IS ARBITRARY AND CAPRICIOUS BECAUSE IT IS A VIOLATION OF THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY TO TRIBES**

(2019 Repeal Rule and 2020 Navigable Waters Rule - Violation of Administrative Procedure Act, 5 U.S.C. § 706, and the Agencies' trust responsibility)

247. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

248. "The federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies" when they act in relation to Indian tribes. *HRI, Inc.*, 198 F.3d at 1245 (quoting Cohen, Handbook at 225).

249. First, the federal government's trust duty and the Agencies' own policies relating to the trust duty require that the Agencies consider how their rulemakings impact tribal rights and resources. *See Nw. Sea Farms*, 931 F. Supp. at 1519–20 (stating that the federal trust

obligation imposes a fiduciary duty on “any government action” relating to Indian tribes) (citing *Nance*, 645 F.2d at 711); *HRI, Inc.*, 198 F.3d at 1245.

250. The Pueblos and other tribes warned the Agencies about the harmful effects of the rules on tribal water resources and the lack of tribal capacity to implement enforceable water standards to fill the jurisdictional gap created by the 2020 Navigable Waters Rule.

251. Despite these comments, the Agencies failed to adequately analyze or consider how the rule would affect tribal water resources or whether the tribes would have the capacity to implement their own water pollution control programs.

252. Instead, the Agencies summarily acknowledged that the 2020 Navigable Waters Rule “has tribal implications,” but baldly stated that the rule “will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law.” 85 Fed. Reg. at 22,336.

253. The Agencies offered no rationale for ignoring the Pueblos’ concerns, nor did they identify any changes in the final rule that responded to these concerns. The Agencies merely justified their decision by stating that “the rule preserves tribal authority to choose whether or not to regulate waters that are not covered under the CWA.” *Id.* at 22,337.

254. However, the Agencies have admitted that “[w]hile some Tribes have established tribal water programs under tribal law or have the authority to establish tribal programs under tribal law, many Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to expand programs that currently exist. Other Tribes may rely on the Federal government for enforcement of water quality violations.” *Id.* at 22,336–37.

255. Given this reliance by tribes on the protections of the CWA, the federal government has forgone its responsibilities to protect tribal resources and has violated its trust duty by promulgating the 2020 Navigable Waters Rule. *Id.* at 22,337.

256. The EPA’s Economic Analysis similarly “[did] not consider how the 573 federally recognized tribes might react to a change in CWA jurisdiction, nor does it include tribes in its calculations of costs and benefits.” U.S. Env’tl. Prot. Agency, Economic Analysis for the Final Rule: “Waters of the United States”—Recodification of Pre-Existing Rules 44, Comment ID: EPA-HQ-OW-2018-0149-11690 (Sept. 5, 2019). Nor did the analysis “account for potential effects related to subsistence fishing, rice growing, or cultural uses of water that are unique to tribes and their reliance on waters that would no longer be considered jurisdictional under the final rule.” *Id.* at 45.

257. The 2020 Navigable Waters Rule violates the long-standing trust responsibility to protect tribes and tribal resources. Additionally, the Agencies breached their trust responsibility by not considering how their actions would affect tribal resources. Therefore, the Agencies failed to consider an important aspect of the problem and their promulgation of the rule was arbitrary and capricious.

258. Second, federal agencies have a duty to engage in “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” Exec. Order No. 13,175, 65 Fed. Reg. at 67,250.

259. Under executive branch policies relating to the trust duty, executive agencies have a duty to meaningfully consult with tribes, consider how agency actions affect tribal rights and resources, and respect tribal self-governance and sovereignty when taking actions that have tribal

implications. *Id.*; 74 Fed. Reg. 57,881 (“[E]xecutive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications . . . .”); 86 Fed. Reg. 7491 (President Biden’s recognition of the policy announced in Executive Order 13,175 and continued commitment to “honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities”).

260. The Agencies failed to follow their tribal consultation policies requiring regular and meaningful government-to-government communication and coordination and therefore breached their duty to meaningfully consult with the Pueblos. Rather, tribes were offered listening sessions, where EPA gave tribes the opportunity to voice concerns about the rollback of protected waters. These listening sessions did not allow for any feedback from the EPA nor did the EPA provide a consolidated version of the comments provided at these sessions to the tribes afterwards.

261. The Agencies never conducted any leader-to-leader meetings with the Pueblo of Jemez or Pueblo of Laguna. *See* U.S. Env’tl. Prot. Agency, Summary Report of Tribal Consultation and Engagement for the Navigable Waters Protection Rule 13–14, 22–27. Instead of engaging in a government-to-government dialogue in the development of policy, the EPA offered generic “listening sessions” that did not allow any meaningful conversations.

262. When agencies change or deviate from their existing policies, they must provide a reasoned explanation for doing so. *See Encino Motorcars, LLC*, 136 S. Ct. at 2125. While an agency’s explanation in this regard is not held to a higher standard of review, the agency must “display awareness that it is changing position” and “show that there are good reasons for the

new policy.” *Id.* at 2125–26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515).

Thus, an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Id.* (quoting *Brand X*, 545 U.S. at 981).

263. The 2020 Navigable Waters Rule is arbitrary and capricious because the Agencies did not provide a reasoned explanation for why they failed to provide meaningful consultation, including leader-to-leader meetings, with the Pueblos. This failure is a change in policy inconsistent with internal agency policies regarding tribal trust responsibilities.

264. Finally, the federal trust responsibility generally requires the government to avoid taking actions that harm tribal resources, including waters that flow over and through tribal lands, and the natural resources that depend on that water. *See, e.g., Mitchell*, 463 U.S. at 225–26; *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

265. The trust duty requires agencies and the courts to construe statutes liberally in favor of tribes, resolving ambiguities in their favor. *See Montana*, 471 U.S. at 766; *HRI, Inc.*, 198 F.3d at 1245.

266. The Agencies had discretion to apply a broader interpretation of “waters of the United States” as they did in the 2015 Clean Water Rule, which would have avoided harm to the Pueblos’ waters. Instead, the Agencies’ narrow interpretation of “waters of the United States” in the 2020 Navigable Waters Rule withdraws federal water quality protections over Pueblo streams that are ephemeral, intermittent, and seasonal, as well as groundwater, upon all of which the Pueblos rely.

267. Accordingly, the Agencies breached their trust duty to the Pueblos by failing to engage in meaningful government-to-government consultation, failing to analyze how the 2020 Navigable Water Rule would impact Pueblo rights and resources, and failing to protect tribal water resources. As a result, the 2019 Repeal Rule and 2020 Navigable Waters Rule are arbitrary, capricious, and otherwise not in accordance with law.

## **VI. REQUEST FOR RELIEF**

Plaintiffs respectfully request that the Court:

- A. Declare that the Agencies acted arbitrarily and unlawfully in promulgating the challenged rules, Definition of ‘Waters of the United States’—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019), and The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020);
- B. Vacate and set aside the challenged regulations;
- C. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys’ fees, associated with this litigation; and
- E. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 26th day of March 2021.

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### CIVIL COVER SHEET

JS 44 (Rev. 10/20)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p><b>I. (a) PLAINTIFFS</b>                  Pueblo of Jemez                  Pueblo of Laguna</p> <p><b>(b)</b> County of Residence of First Listed Plaintiff _____                  (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p><b>(c)</b> Attorneys (Firm Name, Address, and Telephone Number)                  see attached.</p>	<p><b>DEFENDANTS</b>                  See attached</p> <p>County of Residence of First Listed Defendant _____                  (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p><b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p><b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <th></th> <th>PTF</th> <th>DEF</th> <th></th> <th>PTF</th> <th>DEF</th> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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**IV. NATURE OF SUIT** (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p><b>PERSONAL INJURY</b></p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<p><b>PERSONAL INJURY</b></p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<p><b>CIVIL RIGHTS</b></p> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<p><b>PRISONER PETITIONS</b></p> <p><b>Habeas Corpus:</b></p> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <p><b>Other:</b></p> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<p><b>LABOR</b></p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 895 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
			<p><b>PROPERTY RIGHTS</b></p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016	
			<p><b>SOCIAL SECURITY</b></p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
			<p><b>FEDERAL TAX SUITS</b></p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

**V. ORIGIN** (Place an "X" in One Box Only)

1 Original Proceeding     2 Removed from State Court     3 Remanded from Appellate Court     4 Reinstated or Reopened     5 Transferred from Another District (specify)     6 Multidistrict Litigation - Transfer     8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
 5 U.S.C. § 702

Brief description of cause:  
 Unlawful agency action re-defining "waters of the United States" regulated under the Clean Water Act.

**VII. REQUESTED IN COMPLAINT:**     CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.    **DEMAND \$** \_\_\_\_\_    CHECK YES only if demanded in complaint.    **JURY DEMAND:**     Yes     No

**VIII. RELATED CASE(S) IF ANY** (See instructions):    JUDGE    See attached.    DOCKET NUMBER \_\_\_\_\_

DATE    MARCH 26, 2021    SIGNATURE OF ATTORNEY OF RECORD   

FOR OFFICE USE ONLY

RECEIPT #    AMOUNT    APPLYING IFP    JUDGE    MAG. JUDGE

## CIVIL COVER SHEET ATTACHMENT

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**Related Cases, Section VIII**

Sr. District Judge Robert C. Brack,  
Docket Number: 1:19-CV-00988-RB-SCY

District Judge Martha Vasquez  
Docket Number: 2:20-CV-00602

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11 IN THE UNITED STATES DISTRICT COURT '

12 FOR THE NORTHERN DISTRICT OF CALIFORNIA '

13 **STATE OF CALIFORNIA BY AND THROUGH**  
 14 **ATTORNEY GENERAL XAVIER BECERRA AND**  
 15 **CALIFORNIA STATE WATER RESOURCES**  
 16 **CONTROL BOARD, STATE OF NEW YORK,**  
 17 **STATE OF CONNECTICUT, STATE OF ILLINOIS,**  
 18 **STATE OF MAINE, STATE OF MARYLAND,**  
 19 **STATE OF MICHIGAN, STATE OF NEW JERSEY,**  
 20 **STATE OF NEW MEXICO, STATE OF NORTH**  
 21 **CAROLINA EX RE. ATTORNEY GENERAL**  
**JOSHUA H. STEIN, STATE OF OREGON, STATE**  
**OF RHODE ISLAND, STATE OF VERMONT,**  
**STATE OF WASHINGTON, STATE OF**  
**WISCONSIN, COMMONWEALTHS OF**  
**MASSACHUSETTS AND VIRGINIA, THE NORTH**  
**CAROLINA DEPARTMENT OF**  
**ENVIRONMENTAL QUALITY, THE DISTRICT OF**  
**COLUMBIA, AND THE CITY OF NEW YORK,**

22 Plaintiffs,

23 v.

24 **ANDREW R. WHEELER, AS ADMINISTRATOR**  
**OF THE UNITED STATES ENVIRONMENTAL**  
**PROTECTION AGENCY; UNITED STATES**  
 25 **ENVIRONMENTAL PROTECTION AGENCY; R.**  
**D. JAMES, AS ASSISTANT SECRETARY OF THE**  
 26 **ARMY FOR CIVIL WORKS; AND UNITED**  
**STATES ARMY CORPS OF ENGINEERS,**

27 Defendants.  
28

Case No. 3:20-cv-03005-DMR

**DECLARATION OF REBECCA ROOSE**

Date:  
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**DECLARATION OF REBECCA ROOSE**

**I, Rebecca Roose, state and declare as follows:**

1. My name is Rebecca Roose. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I submit this declaration in support of the motion by the States and Cities for a preliminary injunction. As discussed below, the WOTUS Rule will have a devastating impact on New Mexico’s waters and the State is in no position to fill the regulatory vacuum left by EPA and the Army Corps as a result of that rule.

**BACKGROUND**

3. I am employed as the Director of the Water Protection Division of the New Mexico Environment Department (Department). In my role, I oversee the Department’s Ground Water Quality, Surface Water Quality, Drinking Water, and Construction Programs Bureaus. I have been employed by the Department for approximately one year. Prior to joining the Department, I worked for the U.S. Environmental Protection Agency (EPA). At EPA Headquarters, I devoted 13 years to supporting EPA, states, and tribes with implementation of Clean Water Act (CWA) programs. Specifically, I drafted and defended National Pollutant Discharge Elimination System (NPDES) program regulations and effluent limitations guidelines promulgated pursuant to CWA Section 402, provided oversight of states’ implementation of NPDES, pretreatment and CWA Section 319 nonpoint source control programs, and developed policy and training for compliance inspections of NPDES permittees and CWA Section 311 spill prevention, control and countermeasures facilities. During my tenure at EPA, I served as a national expert on NPDES requirements for Concentrated Animal Feeding Operations, NPDES program requirements for authorized states and tribes, and NPDES compliance monitoring policy. I earned my law degree and natural resources law certificate from the University of New Mexico in 2004.

4. The purpose of the Department is “to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by

1 the environment; and will maximize the economic and cultural benefits of a healthy people.”  
2 N.M. STAT. ANN. § 74-1-2 (1997).

3 5. The Department serves as agent of the State in matters of environmental management and  
4 consumer protection. N.M. STAT. ANN. § 74-1-6(E) (2009). The Department has primary  
5 responsibility for implementing the activities of the New Mexico Water Quality Control  
6 Commission, the state water pollution control agency for purposes of the federal CWA.

### 7 THE WOTUS RULE’S HARM TO NEW MEXICO WATERS

8 6. New Mexico has seven traditionally navigable waters (TNWs): the Rio Grande, the  
9 Canadian River, the San Juan River, the Cimarron River, the Rio Chama, the Pecos River, and  
10 Navajo Lake. The U.S. Army Corps of Engineers (USACE) has attempted to designate the entire  
11 stretch of the Gila River that flows through New Mexico as a TNW, but this designation has been  
12 challenged and to date remains unresolved. In its review of the National Hydrology Dataset, the  
13 Department has determined that approximately 89% of the State's rivers and streams are  
14 ephemeral, 7% are perennial, and 4% are intermittent. Under the WOTUS Rule, none of the  
15 ephemeral streams will be protected by the CWA.

16 7. The WOTUS Rule will also result in the loss of many wetlands in New Mexico. Saint  
17 Mary’s University of Minnesota's Geospatial Services, with input from the Department, created a  
18 model to evaluate the extent of federally protected wetlands and other surface waters in the  
19 Cimarron River Watershed.<sup>1</sup> The results of this case study show that by narrowing the scope of  
20 federal jurisdiction, the number of wetlands protected by the CWA is substantially decreased,  
21 leading to a likely loss of benefits provided by wetlands such as flood control and attenuation,  
22 pollution control, wildlife habitat, and recreation. Depending on how the new WOTUS rule is  
23 applied, 20-70% of the wetlands in the Cimarron River Watershed would lose CWA protections.

24 8. To represent benefit-cost analyses of the WOTUS Rule, EPA and USACE (collectively  
25 the “Agencies”) relied on three case studies in the supporting Economic Analysis, “to explore  
26

27 <sup>1</sup> For details of the Saint Mary’s University of Minnesota model, visit  
28 <https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>.

(continued...)

1 potential changes and resulting forgone benefits and avoided costs.”<sup>2</sup> The case studies focused on  
2 three geographical regions – the Ohio River Basin, the Lower Missouri River Basin, and the Rio  
3 Grande River Basin – that intersect 10 states. The Rio Grande River Basin was divided into two  
4 major watersheds, the Upper Pecos (HUC 1306) and Lower Pecos (HUC 1307) River Basins,  
5 which contain a combined 44,300 square miles in New Mexico and Texas from east of Santa Fe,  
6 New Mexico to the confluence of the Pecos River and Rio Grande at the Texas-Mexico border.  
7 This case study found 85% of stream miles within the Upper Pecos River Basin in New Mexico  
8 are ephemeral, and 34% of all wetland acres to be “non-abutting” wetlands. These ephemeral  
9 waters and non-abutting wetlands in the Upper Pecos River Basin will no longer be protected  
10 under the WOTUS Rule. Further, the cost analysis for the Pecos River case study shows benefits  
11 of the WOTUS Rule to be minimal or negligible; however, the Agencies did not quantify or  
12 monetize the environmental effects and forgone benefits of the WOTUS Rule for the Rio Grande  
13 River Basin case study, blaming this deficiency on limitations in the data. The *Economic Analysis*  
14 *of the EPA-Army Clean Water Rule*<sup>3</sup> monetized the ecosystem services and benefits from  
15 wetlands, so it is possible to evaluate this important component of any new rule. In fact, the  
16 estimation of nonmarket environmental values is not new – one notable example is compensation  
17 for the 1989 Exxon Valdez oil spill in the Gulf of Alaska. It is well known that wetlands provide  
18 many ecological and economic benefits to watersheds such as filtering and improving water  
19 quality, flood attenuation, erosion control, carbon sequestration, aquifer recharge, and providing  
20 fish and wildlife habitat and nurseries.<sup>4</sup> It is also known that ephemeral waters are ecologically  
21 and hydrologically significant in arid and semi-arid watersheds of the southwestern United  
22 States.<sup>5</sup> Loss of environmental protections for ephemeral streams and wetlands, reductions in

23  
24 <sup>2</sup> Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.” U.S.  
Environmental Protection Agency and U.S. Department of the Army. January 22, 2020.

25 <sup>3</sup> Economic Analysis of the EPA-Army Clean Water Rule. U.S. Environmental Protection Agency and U.S.  
Department of the Army. May 20, 2015. Available at: [https://www.epa.gov/sites/production/files/2015-06/documents/508-final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-20-15.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf)

26 <sup>4</sup> <https://www.epa.gov/sites/production/files/2016-02/documents/wetlandfunctionsvalues.pdf>

27 <sup>5</sup> Levick, L., et al. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the  
28 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.

1 water quality, and cumulative impacts will be devastating to wildlife and humans who are  
2 dependent on these waters, especially at the local scale, and should have been quantified.

3 9. Because of the ephemeral exemption and new definition of “adjacent wetland,” the  
4 WOTUS Rule will create a significant gap in regulation under CWA Section 402 general permits  
5 (i.e., construction and industrial stormwater discharges) and CWA Section 404 dredge and fill  
6 permits in ephemeral streams and non-abutting wetlands. The Agencies considered the potential  
7 effect of the WOTUS Rule on issuance of CWA Section 402 permits for stormwater from  
8 construction activities. Overall, the Agencies concluded that the ephemeral exemption would  
9 likely change circumstances in arid and semi-arid states where many streams are ephemeral, and  
10 CWA protections would be removed from the vast majority of waters in these states.<sup>6</sup> As a result,  
11 many construction sites in arid states will not be required to obtain NPDES permit coverage for  
12 stormwater discharges. Dredge and fill and industrial activities in ephemeral streams will not  
13 need a CWA Section 404 permit. Besides excess sediment, which can smother bottom-dwelling  
14 organisms, fill deep pools that are critical refugia during summer and drought, and clog or injure  
15 gills of fish, stormwater carries other harmful pollutants. Construction, industrial, and urban sites  
16 generate pollutants such as phosphorus and nitrogen from the application of fertilizer, various  
17 metals (arsenic, cadmium, chromium, copper, zinc), acidic wastewaters, pesticides, phenols,  
18 paints, solvents, phthalates, petroleum products, and solid wastes that attach to sediment and/or  
19 get washed into streams and wetlands during overland stormflows. Sediment loading rates from  
20 construction sites are typically 10 to 20 times that of agricultural lands and 1000 to 2000 times  
21 that of forest lands. Even a small amount of construction or industrial activity may have a  
22 significant negative impact on water quality in localized areas if permits are not required and  
23 proper management practices are not implemented to reduce or eliminate pollutants in  
24 stormwater. New Mexico has over a thousand facilities covered by stormwater general permits  
25 and approximately 25-45% of these will no longer be subject to those stormwater management  
26 requirements as a result of the WOTUS Rule.

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28 <sup>6</sup> Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.” U.S.  
Environmental Protection Agency and Department of the Army. January 22, 2020.



1           10. The WOTUS Rule will also create a significant gap in regulation of individual permits  
2 issued by EPA under CWA Section 402 in New Mexico. The Agencies did not effectively  
3 consider the potential effect of the WOTUS Rule on issuance of CWA Section 402 individual  
4 permits for discharges to ephemeral or other non-jurisdictional waters under the WOTUS Rule.  
5 New Mexico currently has 115 individual, EPA-issued NPDES permits in the State, including  
6 permits issued in Indian Country. Under the 2020 Rule, approximately 50% of these current  
7 permittees will no longer be required to obtain an NPDES permit because they discharge to  
8 receiving streams that lose CWA protections. Examples of facilities in New Mexico that would  
9 no longer discharge pursuant to NPDES individual permit requirements include: municipal and  
10 private domestic wastewater treatment plants; tribal and Bureau of Indian Affairs wastewater  
11 treatment plants; multiple types of mines, both active and in reclamation (coal, uranium, cement,  
12 rock, minerals and metals); national laboratories; federal facilities; fish hatcheries; and oilfield  
13 sanitary waste treatment plants. Eliminating CWA protections will degrade ephemeral water  
14 quality and the downstream TNWs and other jurisdictional waters that they feed.

15           11. The Department has relied upon the Agencies' broad interpretation of WOTUS under the  
16 1980s regulations and the *Rapanos* Guidance in order to ensure protection of New Mexico's  
17 waters.

18           12. The WOTUS Rule's ephemeral exemption will have a disproportionate effect on water  
19 quality in the arid Southwest (e.g., Arizona, Nevada, and New Mexico) because many stormwater  
20 discharges from sites into ephemeral streams will no longer be subject to CWA permits. New  
21 Mexico is one of the driest states, averaging less than twenty inches of annual precipitation.  
22 Ephemeral streams provide the same ecological and hydrological benefits as perennial streams by  
23 moving water, sediment and nutrients through the system to be utilized downstream. Ephemeral  
24 flows are in need of CWA protection because when they are functioning properly they provide  
25 important hydrologic connections across the landscape and across geopolitical boundaries; they  
26 dissipate stream energy during high flow events to reduce erosion, thus improving water quality;  
27 they recharge aquifers where water can be stored for current and future drinking water supplies;  
28 they transport, store and deposit sediment to help maintain floodplains; they transport, store and

1 cycle nutrients for vegetation, wildlife and aquatic life; and they support and provide migration  
2 corridors. Given the distribution of ephemeral streams in New Mexico (89% of streams) and their  
3 important hydrological and ecological functions, cumulative impacts of ephemeral streams  
4 throughout a watershed must be considered in order to protect and maintain water quality and  
5 watershed health. Removing protections from ephemeral streams will degrade water quality in the  
6 jurisdictional waters that they feed.

7 13. Science has clearly demonstrated that ephemeral waters are ecologically and  
8 hydrologically significant in the arid southwestern United States. In New Mexico, ephemeral  
9 tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where  
10 pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream  
11 waters, such as the Rio Grande – a TNW. The cumulative impacts of these non-jurisdictional  
12 ephemeral stormflows are detrimental to downstream water quality and threaten human health  
13 and the environment.

14 14. More frequent droughts and shifting precipitation patterns due to climate change result in  
15 lower water levels in rivers, lakes, and streams, leaving less water to dilute pollutants. In addition,  
16 more frequent and more powerful storms increase polluted runoff from urban and agricultural  
17 areas, which transports pollutants from the landscape to nearby waterways. These changes will  
18 stress aquatic ecosystems and dramatically impact communities throughout the United States,  
19 especially in the Southwest. Community impacts include threats to public health, economic strain,  
20 and decreased quality of life. The effects of climate change in New Mexico amplify the  
21 complexities of western water management. A lack of connectivity or perennality today or in a  
22 “typical year” is not a suitable feature that EPA, USACE and New Mexico can rely upon to  
23 define a jurisdictional water.

24 15. Tijeras Arroyo presents an example of the anticipated devastating effects of the WOTUS  
25 Rule on water quality. This waterway winds for 26 miles from its headwaters in the Sandia and  
26 Manzano Mountains east of Albuquerque, New Mexico through developed and undeveloped  
27 areas of Albuquerque in the foothills, including Kirtland Air Force Base, before entering the Rio  
28 Grande. The waterway is perennial in the headwaters but is ephemeral for 11 miles as it flows out

1 of the mountains and into the Rio Grande. Tijeras Arroyo is a major tributary of the Rio Grande  
2 in the Albuquerque area and carries stormwater, and any pollutants mobilized by stormwater, to  
3 the Rio Grande during significant rain events. It is the subject of (1) a Watershed Restoration  
4 Action Strategy to address excess *E. coli* bacteria and sedimentation through stormwater  
5 management and erosion controls; (2) a Total Maximum Daily Load (TMDL) to reduce  
6 watershed nutrient loading during both low-flow and high-flow events; and (3) federal permits  
7 including several CWA Section 404 permits, an individual NPDES permit for Kirtland Air Force  
8 Base, and the Municipal Separate Storm Sewer System (MS4) permit for the Albuquerque-  
9 Bernalillo County area under CWA Section 402. These various permits and requirements limit  
10 and/or monitor the discharge of the following pollutants into Tijeras Arroyo: nitrate-nitrogen,  
11 ammonia-nitrogen, total nitrogen, total phosphorus, ethylene dibromide (EDB), heptachlor, per-  
12 and polyfluoroalkyl substances (PFAS), total residual chlorine, total suspended solids, biological  
13 oxygen demand, and oil and grease. In addition, the Rio Grande downstream of Tijeras Arroyo is  
14 impaired for *E. coli* bacteria, polychlorinated biphenyls (PCBs) in fish tissue, and dissolved  
15 oxygen. Tijeras Arroyo was jurisdictional under the 1980s regulations, the 2008 Rapanos  
16 Guidance, and the 2019 Rule but is not jurisdictional under the 2020 WOTUS Rule. Surface  
17 water quality is also a major concern for the two acequia associations in the Tijeras watershed and  
18 the Pueblo of Isleta, which is downstream of Tijeras Arroyo and the City of Albuquerque. Under  
19 the WOTUS Rule, these CWA protections (e.g., *E. coli* strategy, TMDL, NPDES permits) will  
20 not be enforceable as is. They will either be modified to move the point of discharge to a  
21 jurisdictional water and consequently dilute the limitations and requirements, or they will be  
22 terminated.

23 16. Another example of the WOTUS Rule's harm is the Gila River, which originates in the  
24 Nation's first designated wilderness area (the Gila National Wilderness) and is the last major wild  
25 and free-flowing river in New Mexico. The Gila River supports a remarkable abundance of  
26 aquatic life and wildlife, provides significant economic value to the region through abundant  
27 outdoor recreation opportunities, and is culturally important to indigenous peoples who have lived  
28 in southwestern New Mexico for thousands of years. The Gila River flows from New Mexico into

1 Arizona and typically goes dry before it reaches the Colorado River due to large irrigation  
2 diversions, groundwater mining, and sustained drought. Some segments of the Gila River in  
3 Arizona have been designated as TNWs, but the Gila River is not a designated TNW in New  
4 Mexico. New Mexico's Gila River was named by American Rivers as the country's most  
5 endangered river in 2019 because of threats from water diversions and climate change.<sup>7</sup> If the  
6 new WOTUS Rule is implemented, the Gila River in New Mexico would not be protected by the  
7 CWA, further endangering this precious resource.

8 17. The Rio Hondo Watershed in south-central New Mexico is yet another example of the  
9 irreparable harm the WOTUS Rule will have on New Mexico. As the perennial headwaters of the  
10 Rio Ruidoso and Rio Bonito flow downstream, they become interrupted and eventually go  
11 underground along several ephemeral segments. Because the ephemeral segments are  
12 substantially long (over 50 miles), it is highly unlikely that the Rio Ruidoso, Rio Bonito or  
13 upstream portions of the Rio Hondo have a surface connection to the Pecos River (a TNW) in a  
14 "typical year." Therefore, everything upstream of these ephemeral breaks/segments would be  
15 considered non-jurisdictional under the WOTUS Rule. In this watershed there are several  
16 facilities that would no longer be required to obtain a NPDES permit to discharge to the river,  
17 including the Ruidoso Downs Wastewater Treatment Plant and the Ruidoso Racetrack. The Rio  
18 Ruidoso already exceeds water quality standards for total nitrogen and total phosphorus, two  
19 pollutants that are controlled by the aforementioned NPDES permits. Historically, excess nitrogen  
20 and phosphorus have negatively impacted downstream irrigation uses. Further, construction and  
21 industrial sites would not be required to obtain NPDES permit coverage for their stormwater  
22 discharges. This means industrial facilities and construction sites could discharge pollutants into  
23 the river without consequence under federal law. Loss of federal pollution control for the Rio  
24 Ruidoso could result in polluted water conveyed to local farms via the 82 acequias, or community  
25 ditches, in this area. Acequias have important historical and cultural value in New Mexico, with  
26 many dating to the 17<sup>th</sup> and 18<sup>th</sup> Centuries, and provide essential water for agriculture. Public

27 \_\_\_\_\_  
28 <sup>7</sup> <https://www.americanrivers.org/2019/04/americas-most-endangered-rivers-of-2019-spotlights-climate-change-threats/>

1 health and the environment will be directly impacted by the federal rollback and unregulated  
2 pollutant discharges in the Rio Hondo Watershed.

3 18. Because the vast majority of New Mexico’s waters are ephemeral and large numbers of  
4 wetlands will lose protections, the WOTUS Rule will have a profound adverse effect on water  
5 quality in the state. In much of the country, ephemerality of rivers is typically seen in the upper  
6 watershed where impacts of the proposed rule may be minimal. That is not the case in the arid  
7 West. By removing protections for ephemeral waters, waters like the Santa Fe River, Rio  
8 Ruidoso, Jemez River, Rio Puerco, Tijeras Arroyo, and Rio Grande tributaries on the Pajarito  
9 Plateau (which contain legacy contamination from the Manhattan Project) will have severed and  
10 interrupted jurisdiction in the middle and lower reaches. This will create a patchwork of  
11 jurisdictional and non-jurisdictional segments along the path of a river that will make it nearly  
12 impossible to implement an effective water quality protection program. A patchwork of  
13 unregulated contamination will have serious public health and economic consequences related to  
14 drinking water supplies, cultural and agricultural uses, recreational uses, and aquatic species and  
15 wildlife.

#### 16 **DIFFICULTIES OF FILLING THE FEDERAL REGULATORY GAP WITH STATE** 17 **PROGRAMS**

18 19. New Mexico cannot, as a practical matter, fill the regulatory gap created by the WOTUS  
19 Rule. The WOTUS Rule disproportionately impacts states that do not have authority to operate  
20 the NPDES permitting program under CWA Section 402. This program is the primary  
21 mechanism under the Act for regulating and limiting discharges of pollutants into the “waters of  
22 the United States.” Further, the WOTUS Rule disproportionately impacts arid states that have  
23 many ephemeral waters. The State of New Mexico fits both these characterizations and is  
24 therefore particularly adversely impacted by the WOTUS Rule.

25 20. The Agencies state, “[a]bsent CWA jurisdiction, states and tribes can still choose to  
26 regulate waters irrespective of federal mandates.” While in theory this may be true, in practice  
27 this is impossible for states without NPDES authority or an established state permitting program.  
28 New Mexico is one of only three states without NPDES authority, and the only such state in the

1 west. While the Department is interested in having EPA authorize New Mexico to implement the  
2 NPDES program, adopting and implementing such a program requires significant time, funding,  
3 and staff. Unlike most states with established NPDES programs, New Mexico does not have the  
4 legal and procedural program infrastructure to issue NPDES-like permits to regulate discharges of  
5 pollutants to surface waters of the state that are not WOTUS under the new definition. As laid out  
6 above, the Department estimates that 50% of NPDES individual permits and 25-45% of  
7 stormwater general permits will not be required under the 2020 Rule amounting to hundreds of  
8 unregulated discharges in New Mexico as a result of the federal rollback, creating a burdensome  
9 federal regulatory gap that the state is expected to fill to protect its surface waters and its citizens.

10 21. The WOTUS Rule imposes significant resource burdens on the Department while putting  
11 the health of New Mexico waters at great risk. The premise that all states are capable of  
12 addressing water quality issues in their state is false. Not all states can implement a robust and  
13 successful water quality program without significant federal assistance. Recurring federal and  
14 state funds need to be identified to support a New Mexico surface water discharge permitting  
15 program because reasonable permit fees would not cover the costs of the program in New  
16 Mexico. Federal financial support for pollution control programs has been steadily declining over  
17 the past decade to the detriment of New Mexico's precious surface waters.

18 22. To prevent water quality degradation in State surface waters from the rollback of CWA  
19 protections, the Department will be required to expand the Surface Water Quality Bureau and  
20 develop a State surface water permitting program. The Department lacks sufficient funding to  
21 expand the Bureau and implement a permitting program as the WOTUS Rule goes into effect. In  
22 addition, expansion and funding requests are dependent on approval from the State legislature.  
23 With no new funding associated with this substantial shift in CWA jurisdiction, oversight of  
24 WOTUS Rule implementation will force the Department to pull resources from current Surface  
25 Water Quality Bureau priorities, such as ambient water quality monitoring, assessment and  
26 reporting on the status of the state's surface waters, water quality standards revisions, water  
27 quality management and watershed-based planning, watershed and wetland restoration, and  
28 program and project effectiveness monitoring. In fulfilling its mission to preserve, protect and

1 improve surface water quality across our state, the Department will be harmed by the WOTUS  
2 Rule due to the need to redirect already strained resources, inadequate resources to implement an  
3 effective permitting program, and uncertain legislative and federal support.

4 23. The WOTUS Rule introduces great uncertainty into the Department's regulatory efforts  
5 and burdens the Department with the onerous task of interpreting and applying the Rule. If the  
6 WOTUS Rule becomes effective, previous guidance documents, memoranda, and materials will  
7 be rendered inoperative. In addition, the Department is unaware of a firm commitment by the  
8 Agencies to provide guidance and training to assist with early implementation of the WOTUS  
9 Rule. This would hamper and delay the Department's ability to administer Surface Water Quality  
10 Bureau programs affected by the new WOTUS definition when questions arise. For example, on-  
11 the-ground investigations will be needed to delineate which waters are truly intermittent and  
12 which are ephemeral for compliance and enforcement purposes. Considering New Mexico has  
13 over 88,000 miles of non-perennial streams, and the vast majority of streams in the State do not  
14 have active gages to measure stream flows, these stream-specific investigations will be extremely  
15 resource-intensive. The Department already has received inquiries from various stakeholders  
16 about scope and implementation of the WOTUS Rule that cannot be answered due to  
17 uncertainties related to jurisdictional interpretation and enforcement. These are not insignificant  
18 burdens and may lead to additional costly litigation stemming from the Department's future  
19 interpretation the new WOTUS definition

20 **THE WOTUS RULE WILL ADVERSELY AFFECT THE NEW MEXICO ECONOMY**

21 24. The value of healthy surface waters in New Mexico is both cultural and economic. New  
22 Mexico's diverse waters recharge aquifers, provide important ecological and hydrological  
23 connections, support an amazing variety of wildlife and aquatic life, maintain drinking water  
24 resources, and sustain critical economic activity. The State's lakes, reservoirs, rivers, streams, and  
25 wetlands are essential to the future vitality of the agricultural, outdoor recreation and tourism  
26 industries.

27 25. The WOTUS Rule does not take into account the recreational economy impacts  
28 associated with poorer water quality influencing lake and river recreation as well as the many

1 rafting companies in New Mexico that depend on clean water for their business. Sixty-five  
2 percent of New Mexicans participate in outdoor recreation activities each year. The New Mexico  
3 Tourism Department reports that the State also has a high percentage of visitors who choose  
4 outdoor recreation activities, such as river rafting, fly fishing, camping, boating and wildlife  
5 viewing along the state's scenic waters. Visitors spent \$846 million on recreation in the state in  
6 2017 and spending supports 13,000 direct jobs. In addition, the New Mexico Department of  
7 Game and Fish reports there are 160,000 anglers who fish in New Mexico, spending \$268 million  
8 on their activities annually. In recognition of the state's iconic natural landscapes and treasured  
9 waters, desire to protect and conserve New Mexico's lands and waters, and potential for  
10 developing a more robust outdoor recreation-based economy, the New Mexico Outdoor  
11 Recreation Division was created by legislation during the 2019 legislative session. This Division  
12 is tasked with increasing outdoor recreation-based economic development, tourism and  
13 ecotourism, recruiting new outdoor recreation business to New Mexico, and promoting education  
14 about outdoor recreation's benefits to enhance public health. Investing in outdoor recreation helps  
15 promote healthy lifestyles and a high quality of life and attracts and sustains employers and  
16 families. People do not want to recreate on polluted waters that cannot sustain healthy fish, bird  
17 and wildlife populations. The outdoor recreation industry in New Mexico will be adversely  
18 impacted by the gap in coverage when the WOTUS Rule goes into effect, to the detriment of jobs  
19 and revenue in New Mexico.

20 26. The WOTUS Rule will also create economic burdens associated with new regulatory  
21 gaps. Approximately 40% of New Mexicans rely on surface water as a drinking water source. The  
22 regulatory gaps created by the ephemeral waters exemption and loss of wetlands protections  
23 resulting from the WOTUS Rule will result in decreased water quality, as explained above. As a  
24 result, the cost to treat drinking water and maintain drinking water infrastructure will increase.  
25 The cost to treat surface water to drinking water standards depends on the quality of water  
26 coming into the treatment plant, the technologies used, the size of the system, and the energy  
27 source. Municipalities will likely need to invest in water treatment infrastructure and other costly  
28 technologies, such as desalination and ultrafiltration, to provide clean, safe water for drinking.



1 Degraded water quality coming into the treatment plant, the need for improved and more costly  
2 treatment technologies and the less populated, rural nature of New Mexico as a whole will cause  
3 water treatment costs to increase substantially for many in the state and may force municipalities  
4 to choose lower water quality over necessary investments for clean and safe drinking water. In  
5 addition, enhanced treatment to remove pollutants causes increased water loss during treatment,  
6 which translates to less potable water in an increasingly arid State.

7 27. The Agencies failed to address cross-media implications of the WOTUS Rule. The  
8 federal Resource Conservation and Recovery Act (RCRA) exempts wastewater treatment units  
9 from regulation under RCRA if, in addition to a number of other conditions, those units discharge  
10 effluent pursuant to a NPDES permit. 42 U.S.C. § 6903(27). Under the WOTUS Rule, many  
11 facilities currently discharging pursuant to a NPDES permit would no longer be required to have  
12 such a permit due to the jurisdictional change in the waters to which they discharge. As a result,  
13 these facilities may be subject to regulation under RCRA for the first time, are likely to not have  
14 performed an analysis of whether they are subject to RCRA, and would likely not be in  
15 compliance with RCRA as a result. Given that a number of these facilities are industrial or  
16 municipal facilities that have not contemplated regulation as a RCRA treatment, storage or  
17 disposal facility (TSDF), this will present an additional economic hardship on these facilities in  
18 New Mexico. If the industrial or municipal facilities are discharging into an ephemeral stream in  
19 New Mexico and that ephemeral stream is no longer a WOTUS, these newly regulated TSDFs  
20 may also be deemed as land disposing of waste – or hazardous waste – pursuant to the  
21 implications of WOTUS.

## 22 CONCLUSION

23 28. The Department respectfully requests that the Court enjoin implementation of the  
24 WOTUS Rule. If the rule takes effect, it will have a devastating impact on New Mexico's waters  
25 and harm the New Mexico economy. The rule creates a regulatory vacuum that the State will be  
26 incapable of filling to mitigate its harm.

27 29. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is  
28 true and correct.

1 Executed on the 11th day of May 2020 in Santa Fe, New Mexico.

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Rebecca Roose



April 15, 2019

Filed Electronically at: [OW-Docket@epa.gov](mailto:OW-Docket@epa.gov)

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Re: Comments on Proposed Rulemaking, Docket ID No. EPA-HQ-QW-2018-0149

Dear Administrator Wheeler, Mr. Lamont, and Ms. Gude:

On behalf of the All Pueblo Council of Governors (“APCG”), a tribal consortium made up of the Pueblo Indian tribes in New Mexico and an additional Pueblo in Texas, the University of New Mexico School of Law Natural Resources and Environmental Law Clinic submits the following comments on the proposed rule revising the definition of “Waters of the United States” and narrowing the scope of waters that are federally regulated under the Clean Water Act (CWA).<sup>1</sup> The APCG opposes the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (collectively, the “Agencies”) efforts because: (1) the proposed rule weakens the CWA protections for tribal waters and poses an imminent threat to the health and welfare of tribal communities; (2) the Agencies fail to honor and meet their trust obligations owed to tribal people, and to protect trust water and land resources; (3) the Agencies fail to follow established tribal consultation procedures mandating government-to-government collaboration prior to taking actions affecting tribal governments and tribal lands; (4) the proposed rule is unsupported by any science or technical studies or references; (5) the proposed rule creates an enforcement gap on Pueblo lands, and polluters will take advantage of the limited protections for headwater streams and waterways arising off those lands; (6) many of the water sources for the Pueblos would no longer be considered jurisdictional waters and would no longer be protected under the CWA; (7) many Pueblos would no longer receive funding for CWA programs as there would be no jurisdictional waters on their lands; (8) there would be significant gaps in protection from pollution, affecting Pueblo lands and surrounding non-Indian communities; and (9) the resulting

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<sup>1</sup> Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (Feb. 14, 2019).

pollution and negative consequences cannot be repaired for generations and will be the legacy for our youth.

On February 14, 2019, the Agencies promulgated a regulation (“proposed rule”) that has broad ramifications for the implementation of nearly every regulatory program under the CWA.<sup>2</sup> The proposed rule constitutes the Agencies’ latest effort to define the statutory phrase “waters of the United States,”<sup>3</sup> and thereby identify the waters subject to CWA jurisdiction. The proposed rule, in part, reaffirms CWA jurisdiction over waters—such as many tributaries and their adjacent wetlands—historically protected by the Agencies. However, in many respects the proposed rule deviates from past Agency practice by imposing severe and unjustified limitations on, or absolute categorical exclusions from, CWA jurisdiction, thereby abandoning crucial federal protections for potentially huge swaths of wetlands, ponds, ephemeral streams, and hydrologically-connected groundwater once protected by the Agencies for their potential effects on interstate commerce. These exclusions -- crafted with no tribal-federal government-to-government consultation and no consideration of the federal trust obligations to tribes —fly in the face of common sense, statutory purpose, lack of scientific foundation, and are wholly unsupported by the administrative record.

## **I. Introduction**

### **A. The All Pueblo Council of Governors**

The APCG is a tribal consortium made up of sovereign Indian tribal governments of the nineteen Pueblos of New Mexico and one Pueblo in Texas. Each Pueblo has significant land, water, and other cultural resources which are located both on and off its current lands. These lands are either held in fee with federal restrictions, thereby constituting federal trust lands, federal reservations held by the United States in trust for a Pueblo, or fee lands. Water is the key to life; throughout time, water has been the greatest predictor of villages, farms, commerce, and other markers of human success. Unlike many other Indian tribes in the United States, the Pueblos were never voluntarily or involuntarily removed from the lands they have held since time immemorial. The Pueblos were agrarian communities based on irrigated agriculture prior to the arrival of the Spanish in the New World. In the Pueblo world, water is not only essential for life, there is a strong cultural component attached to it. Each Pueblo is viewed as a guardian of the water it relies on to sustain its community, and it is a Pueblo’s duty to do what it can to protect the integrity of its cultural and natural resources. For some Pueblos there are perennial water sources, but these sources are not the majority. Many of the Pueblos place heavy reliance on streams that are ephemeral, intermittent, and seasonal, depending on rain and snowfall. An important part of the Pueblo culture is the ability to shepherd these waters for life sustaining needs.

The Pueblos, as irrigated agricultural communities since before the Spanish entrada, have federally recognized aboriginal, senior priority rights to use water, as well as related groundwater.<sup>4</sup> The Pueblos also have federally reserved rights to use water on additional lands that are federal

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<sup>2</sup> Clean Water Act §§ 303, 311, 401, 402 and 404 all depend on the definition of “waters of the United States”; *see also infra* notes 17-22.

<sup>3</sup> *See* 33 U.S.C. § 1362(7) (2012).

<sup>4</sup> *New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976); *New Mexico v. Aamodt*, 618 F. Supp. 993, 998 (D. N.M. 1985) *pet. for interlocutory appeal denied Nos. 85-8071 and 85-8072* (10th Cir. 1987).

reservations created by federal statutes or executive orders.<sup>5</sup> These rights to use water are trust resources for which the United States owes the Pueblos a fiduciary duty. The United States has recognized its trust responsibility in the recent water settlements involving the Pueblos of Taos, San Ildefonso, Pojoaque, Nambé and Tesuque.<sup>6</sup> The Department of the Interior's Indian Water Office criteria for Indian Water Rights Settlements recognize that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."<sup>7</sup> Much of the Pueblos' rights to use water arise out of their continued ownership in time immemorial before the appearance of Europeans.<sup>8</sup> And, the United States has an inviolable duty to protect these water rights.<sup>9</sup>

The Pueblos' rights extend to all types of water uses, including ceremonial cultural uses, hunting and fishing, agricultural, domestic, municipal, commercial and industrial; for essentially all uses, the rights are subject to the United States' trust duty by virtue of federal law. Numerous off-reservation tributaries, aquifers, wetlands, streams and other ephemeral bodies of water are all part of the hydrologic systems that have supported Pueblo life for a millennium or more. As such, protecting the instream flows across Pueblo lands is a vital concern of the Pueblos.

There are numerous sites of historic, spiritual, and cultural significance to the Pueblos throughout their aboriginal territories which the Pueblos continue to visit and use to this day. Water is sacred; Water is life. That is what Pueblo people are taught and believe. Pueblo traditions persist and knowledge systems thrive in their communities. Indeed, the reverence for water and its blessings continue to support and shape the tribal political, social, economic, and cultural climate in Indian communities throughout the United States. Today, water remains vital for tribal self-sufficiency, economic development, and providing security for present and future generations. Moreover, many water bodies on or off-reservation have cultural, and ceremonial significance in tribal life and are used for spiritual purification. These types of subsistence, cultural and ceremonial uses directly relate to tribal existence and designation of the area for tribal homelands and, therefore, entitle the tribes to a high level of water quality.

Indeed, in 1996, the EPA recognized the importance of water and its quality to Pueblo people in approving high water quality standards for ceremonial uses by the Pueblo of Isleta. Isleta Pueblo located downstream from the City of Albuquerque received Treatment as a State under the CWA and set water standards to protect their ceremonial practice, more stringent than the federal and state of New Mexico standards.<sup>10</sup> The Court of Appeals for the Tenth Circuit upheld this standard requiring Albuquerque to establish a waste treatment plant to ensure that water in the Rio Grande flowing downstream to the Pueblo would be clean and meet the Tribe's standards. Many other Pueblos have water quality standards similar to those of the Pueblo of Isleta. For example, the Pueblo of Sandia, Pueblo of Acoma, Pueblo of Laguna have adopted water quality standards

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<sup>5</sup> *See id.*

<sup>6</sup> *New Mexico ex. rel. State Engineer v. Aamodt, Settlement Agreement* (D. N.M. 2012).

<sup>7</sup> *Criteria and Procedures for Indian Water Rights Settlements*, 55 Fed. Reg. 9223 (Mar. 12, 1990).

<sup>8</sup> *See New Mexico, ex rel. State Engineer v. Aamodt*, 618 F.Supp. 993, 1010 (D. N.M. 1985) (Aamodt II).

<sup>9</sup> *White Mountain Apache Tribe v. United States*, 8 Cl. Ct. 677 (1985).

<sup>10</sup> *City of Albuquerque v. Browner*, 97 F.3d 415 (10<sup>th</sup> Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

to protect their ceremonial use of water. Similarly, other federal appellate courts have recognized the importance of water and its necessary water quality for ceremonial purposes.<sup>11</sup>

## B. The Southwest in General

By all accounts, water in the Southwestern United States is a sacred and precious resource. A common phrase heard in the Southwest is “El agua es vida” or “water is life.” With most of the Southwest being an arid or semi-arid climate, the reverence towards water originates with the scarcity of water. The lack of perennial surface waters in the Southwestern United States is due to the infrequency of precipitation events and the reliance on seasonal snow melt. According to a 2008 EPA report on ephemeral streams in the Southwest, 81% of all streams in the Southwest are ephemeral and intermittent in nature.<sup>12</sup>



Figure 1: Typical ephemeral stream in the Southwest

According to a New Mexico Environment Department report, 88,810 miles of New Mexico non-tribal waters flow only in response to rain or seasonally.<sup>13</sup> If tribal waters were included in this number, the percentage of 88% ephemeral and intermittent streams would likely increase due to the particularly dry areas that surround Indian country.

These ephemeral and intermittent streams are often headwaters to larger perennial streams and only flow in response to snow melt or monsoonal rains that cause flash flooding. Although these streams seem insignificant from the perspective of a water-heavy area, these ephemeral streams are vital to survival in Pueblo lands. Most communities in the Southwest only have one source of drinking water and contamination of this source would be devastating to the community. As droughts continue to occur and as population in the Southwest continue to grow, the

<sup>11</sup> *Montana v. U.S. Env'tl. Prot. Agency*, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998); *Wisconsin v. U.S. Env'tl. Prot. Agency*, 266 F.3d 741 (7th Cir. 2001).

<sup>12</sup> U.S. ENVTL. PROT. AGENCY, THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST iii (2008).

<sup>13</sup> N.M. ENV'T DEP'T, 2018-2020 STATE OF NEW MEXICO CLEAN WATER ACT SECTION 303(D)/SECTION 305(B) INTEGRATED REPORT 11 (2018).

communities in the Southwest will always be fighting to protect their water resources, knowing how important it is to life.

## II. The Proposed Rule

In 2015, the Agencies promulgated a rule clarifying the definition of “Waters of the United States.”<sup>14</sup> This rule applied the current scientific understanding of watershed function and applied the science to the significant nexus test of Justice Kennedy [in *Rapanos v. United States*].<sup>15</sup> Although this rule faced many legal challenges, it is currently in effect in 22 states.

On February 14, 2019, EPA published a proposed rule in the Federal Register: Revised Definition of “Waters of the United States.”<sup>16</sup> This proposed rule is part of a larger scheme of repealing and replacing the 2015 Clean Water Rule promulgated under the past Administration.<sup>17</sup> Both rules, the 2015 Clean Water Rule and the current proposed rule, attempt to clarify the definition of “Waters of the United States” under the CWA.<sup>18</sup> The “waters of the United States” rule is crucial to the meaning of the CWA because the definition sets the boundaries of which waters are federally regulated under the CWA. The “Waters of the United States” definition applies to water quality standards,<sup>19</sup> oil spill prevention plans,<sup>20</sup> state certification,<sup>21</sup> pollutant discharge permits,<sup>22</sup> and dredge and fill permits.<sup>23</sup>

Paramount to this comment, the proposed rule limits the definition of “Waters of the United States” to a higher degree than seen in the past. Limiting the definition of “waters of the United States” essentially limits the federal jurisdiction of the CWA on a large percentage of water bodies in the United States. One specific limitation is the stated exclusion of ephemeral streams from the definition of “waters of the United States.”<sup>24</sup> The proposed rule defines ephemeral as “surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall.”<sup>25</sup> Intermittent streams are still considered “Waters of the United States” if they fit the proposed rule’s definition of tributaries.<sup>26</sup> Intermittent streams are defined as “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.”<sup>27</sup>

The proposed rule acknowledges that the new definition of “Waters of the United States” will limit the federal government’s jurisdiction over some waters.<sup>28</sup> EPA suggests that this rule

<sup>14</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37053 (June 29, 2015).

<sup>15</sup> *Id.*; *See also* *Rapanos v. United States*, 547 U.S. 715 (2006) (Kennedy, J. concurring).

<sup>16</sup> Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (Feb. 14, 2019).

<sup>17</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37053.

<sup>18</sup> *Id.*; Revised Definition of “Waters of the United States,” 84 Fed. Reg. at 4155.

<sup>19</sup> Clean Water Act § 303, 33 U.S.C. § 1313 (2012).

<sup>20</sup> Clean Water Act § 311, 33 U.S.C. § 1321 (2012).

<sup>21</sup> Clean Water Act § 401, 33 U.S.C. § 1341 (2012).

<sup>22</sup> Clean Water Act § 402, 33 U.S.C. § 1342 (2012).

<sup>23</sup> Clean Water Act § 404, 33 U.S.C. § 1344 (2012).

<sup>24</sup> Revised Definition of “Waters of the United States,” 84 Fed. Reg. at 4173.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 4156.

protects federalism and Section 101(b) of the CWA which emphasize the role the states and tribes should have over their own waters.<sup>29</sup> However, EPA's attempt to protect federalism is misguided, conflicts with the CWA's objective of restoring and maintaining the nation's waters, and ignores the federal-tribal trust relationship and the fact that the role of tribes is essentially unprotected.

### **III. The Trust Doctrine Requires the United States to Exercise its Fiduciary Responsibilities to Protect and Preserve the Lands, Resources and Best Interests of Indian Tribes, and to Consult with Tribal Governments.**

#### **A. United States Has a Trust Obligation to the Pueblos.**

The United States has a two-fold trust duty to Indian Tribes. Courts have long recognized the "existence of a general trust relationship between the United States and the Indian people."<sup>30</sup> The courts are clear that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes."<sup>31</sup>

Second, the federal government has a specific trust duty to protect the rights of the Pueblos. The federally recognized aboriginal rights held by the Pueblos, include the right to clean, safe water for numerous uses, including, but not limited to instream flows.<sup>32</sup> As a result of the federal government's trust responsibilities to the Pueblos, the EPA must ensure that such trust resources are protected in any activity that may impact a Pueblo's uses of water, including regulations such as the proposed rule, that govern discharges into waters that affect the Pueblos' federally protected water rights.

The Supreme Court has consistently recognized that the United States "is something more than a mere contracting party" with Indian tribes, and "has charged itself with the moral obligations of the highest responsibility and trust" to those tribes.<sup>33</sup> The standards of conduct imposed by the trust doctrine apply to all federal agencies when dealing with protected Indian interests.<sup>34</sup> The "trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole."<sup>35</sup> This fiduciary "duty extends to the Corps of Engineers in the exercise of its permit decisions."<sup>36</sup>

Moreover, the United States' obligation to tribes is greater than that of any ordinary trustee. The federal executive is to be "bound by every moral and equitable consideration to discharge its trust with good faith and fairness,"<sup>37</sup> and must exercise the highest degree of care and all the skill

<sup>29</sup> *Id.*; Clean Water Act § 101(b), 33 U.S.C. § 1251(b) (2012).

<sup>30</sup> *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

<sup>31</sup> *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (emphasis in original) (citing *Seminole Nation v. United States*, 316 U.S. 268, 297 (1942)).

<sup>32</sup> *See, e.g., United States v. Gila River Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996).

<sup>33</sup> *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941).

<sup>34</sup> *Id.*; *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.), *cert. denied*, 454 U.S. 1081 (1981) ("It is fairly clear that any federal action is subject to the United States' fiduciary responsibilities toward the Indian tribes"); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966); *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976).

<sup>35</sup> *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995).

<sup>36</sup> *Northwest Sea Farms*, 931 F.Supp. at 1519, (citing *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1523 (W.D. Wash. 1988)).

<sup>37</sup> *United States v. Payne*, 264 U.S. 446, 448 (1924).



at their disposal to protect trust property from loss or damage.<sup>38</sup> Moreover, trust responsibilities require far more than a “judgment call” that subordinates the tribes’ trust resources to competing federal and state interests.<sup>39</sup> A tribe is not required to prove to the trustee that particular measures are necessary; indeed, “[a] tribe is ‘entitled’ to rely on the United States, its guardian, for needed protection of its interests.”<sup>40</sup> Although relevant laws and the federal common law define the contours of the trust obligations, “[t]his does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee’s duties absolves the government of its responsibilities.”<sup>41</sup>

Here, the Agencies’ proposed rule must be considered, reviewed, and judged by the trust duties and responsibilities owed to the Pueblos to protect their water resources, lands and community. The United States and its executive agencies, the EPA and Corps, have an established trust relationship with the Pueblos which places a high priority on native interests when trust resource rights are impacted. The courts are clear that “any Federal government action is subject to the United States’ fiduciary responsibilities toward tribes.”<sup>42</sup>

Federal agencies have tremendous impacts on Indian country through their land management systems, regulatory structure, and implementation of federal environmental laws. Through these processes, the agencies regulate a variety of private activities that have the potential to threaten or degrade the environment. The scheme of environmental laws – the CWA,<sup>43</sup> the Clean Air Act,<sup>44</sup> the Safe Drinking Water Act,<sup>45</sup> the Endangered Species Act,<sup>46</sup> and the National Environmental Policy Act<sup>47</sup> – were enacted to protect the interests of the majority of society, not the specific interests of tribes, tribal resources, cultural resources, or sacred sites. However, the federal agencies are obligated through the trust doctrine and the government-to-government relationship with Indian tribes to protect specific interests of tribes when implementing federal laws.

The trust doctrine creates a heightened level of duty: the United States has charged itself with moral obligations to the tribes of the highest responsibility and trust,<sup>48</sup> to be judged by “the most exacting fiduciary standards.”<sup>49</sup> When undertaking federal action, it is incumbent upon agencies to exercise discretion based on the trust doctrine and the accompanying fiduciary duties

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<sup>38</sup> *Duncan v. United States*, 667 F.2d 36, 45 (Ct. Cl. 1981).

<sup>39</sup> *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973), *modified on other grounds*, 360 F.Supp. 669 (D.D.C. 1973), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

<sup>40</sup> *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

<sup>41</sup> *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001), (quoting *Mitchell II*, 463 U.S. at 225.11).

<sup>42</sup> *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (citing *Seminole Nation v. United States*, 316 U.S. 268, 297 (1942)).

<sup>43</sup> Pub. L. No. 95-217, 91 Stat. 1566 (1977).

<sup>44</sup> Pub. L. No. 88-206, 77 Stat.392 (1963).

<sup>45</sup> Pub. L. No. 93-523, 88 Stat. 1660 (1974).

<sup>46</sup> Pub. L. No. 93-205, 87 Stat. 884 (1973).

<sup>47</sup> Pub. L. No. 91-190, 83 Stat. 852 (1970).

<sup>48</sup> *Seminole Nation v. United States*, 316 U.S. 286 (1942).

<sup>49</sup> *Cobell v. Norton*, 391 F.3d 251, 257 (D.C. Cir. 2004) (quoting *Morton v. Ruiz*, 419 U.S. 199, 236 (1974), and *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941)).

owed to tribes within the environmental statutory scheme in order to protect these vital tribal interests and resources.

### **B. The Agencies Have Failed to Consult with the Pueblos on the Proposed Rule.**

The federal obligation to engage tribes in government-to-government tribal consultation is rooted in the special relationship that exists between the United States and Indian tribes.<sup>50</sup> There is a fundamental difference between the public participation process (notice and comment), which is an information-gathering exercise, and meaningful consultation, which is a government-to-government dialogue that requires greater involvement in decision making by Indian tribes.<sup>51</sup> Consultation between federal agencies and tribal governments is a legal requirement. There is a long list of Congressional acts, Executive Orders, and administrative rules that require consultations with tribes, and some require consent before any federal action can be undertaken.<sup>52</sup> In short, the trust responsibility imposes a duty on the federal government to engage in meaningful pre-decisional consultation on rulemaking and projects that will affect the Tribe's treaty rights and trust resources.

As the EPA knows, meaningful consultation mandates were issued by both Presidents Bush and Obama. The purpose of Executive Order 13175 is "to establish regular and meaningful consultation with tribal officials in the development of Federal policies that have tribal implications, [and] to strengthen the United States government-to-government relationships with tribes. . . ." The Executive Order 13175 defines "Policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements *or actions that have substantial direct effects on one or more tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.*"<sup>53</sup> The proposed rule implicates all three concerns set forth in the Executive Order: (1) this action potentially effects all 567 federally-recognized tribes as each nation presumably has water resources that may be impacted by the proposed interpretation, and also those tribes that receive funding under the CWA will be affected; (2) such an interpretation would affect the relationship between the Federal government and tribes by hurting tribal sovereignty, ignoring the federal trust responsibility to protect the interests of tribes, and to defund existing tribal CWA programs that have been in place for years; and (3) could be seen as a

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<sup>50</sup> Colette Routela & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417, 421.

<sup>51</sup> *See, e.g.*, INDIGENOUS PEOPLES SUBCOMM. OF THE NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING 3, 5 (2000) (Discussing the differences between federal-tribal consultation and public participation in agency decision making and noting that consultation "should be a collaborative process between government peers that seeks to reach a consensus on how to proceed").

<sup>52</sup> In January 2009, the White House published a *List of Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance*. The List notes that it "does not purport to be comprehensive or all encompassing." *See also* Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 22 n.3 (2000).

<sup>53</sup> Exec. Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67, 249 (Nov. 6, 2000) (emphasis Added, Section 1 (a)). President Obama's Memorandum on Tribal Consultation dated November 5, 2009 reaffirms the policy in Executive Order 13175.

unilateral decision due to the lack of consultation, thus creating an imbalance in the distribution of power between the Federal Government and tribes. In particular, Executive Order 13175, directed the Agencies to create internal consultation processes to “ensure the meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”<sup>54</sup>

The Agencies had a clear duty to consult with tribal governments about the proposed rule based on Executive Order 13175,<sup>55</sup> the EPA Policy on Consultation and Coordination with Indian Tribes,<sup>56</sup> the EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights, February 2016, the EPA Responses to Comments on EPA Policy for Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights (“EPA Treaty Guidance Comments”), and the 2009 Memorandum on Consultation.<sup>57</sup> The conclusions of the U.S. Department of Interior, the U.S. Department of the Army, and the U.S. Department of Justice in their report entitled *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*, January 20, 2017 (“*Improving Tribal Consultation*”), also acknowledge the duty to consult with tribal governments. The Corps, is governed by their own consultation policies, including Department of Defense Instruction 4710.02 (“DoD Instruction 4710.02”) and the Corps’ Tribal Consultation Policy (Nov. 1, 2012) (“Corps’ Consultation Policy”).<sup>58</sup>

Pursuant to their trust duty, the Agencies are required to “consult with Indian tribes in the decision-making process to avoid adverse effects on [federally protected] resources.”<sup>59</sup> The trust obligation is not a discretionary duty.<sup>60</sup> The duty to consult is binding on an agency at any time, but the right to meaningful consultation is strongest when the agency has announced a consultation policy and the Tribes have come to rely on that policy.<sup>61</sup> At a minimum, this requires that the

<sup>54</sup> *Id.* at 67,250.

<sup>55</sup> *Id.* It beyond notice-and-comment rulemakings to include “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes.”

<sup>56</sup> U.S. Env’tl. Protection Agency, Policy on Consultation and Coordination with Indian Tribes 4-5 (2011) <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf> (noting that the input phase may consist of “written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved.... [that create] opportunities to provide, receive, and discuss input”).

<sup>57</sup> President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009). Obama’s Memorandum refers to the necessity of “meaningful dialogue between Federal officials and tribal officials,”<sup>57</sup> requiring the two parties engage in back-and-forth discussions to work towards a joint resolution of the issues presented.

<sup>58</sup> See U.S. Army Corps of Engineers Policy Guidance Letter No. 57: Indian Tribal Sovereignty and Government-to-Government Relations with Indian Tribes (1998), <http://www.usace.army.mil/Portals/2/docs/civilworks/pgls/pgl157a/pdf>. Consultation policy promising “pre-decisional and honest consultation” by involving tribes “in collaborative processes designed to ensure information exchange, consideration of disparate viewpoints before and during decision making, and utiliz[ing] fair and impartial dispute resolution mechanisms.”

<sup>59</sup> *Klamath Tribes v. United States*, No. 10-2130, 1996 WL 924509 (D. Or. Oct. 2, 1996) (quoting *Lac Courte Oreille Band of Indians v. Wisconsin*, 668 F. Supp. 133, 140 (W.D. Wis. 1987)); *Ctr. for Biological Diversity v. Salazar*, No. 10-2130, 2011 WL 6000497, at \*11 (D. Ariz. Nov. 30, 2011).

<sup>60</sup> *Ctr. for Biological Diversity*, 2011 WL 6000497 at \*11.

<sup>61</sup> *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D. S.D. 2006); see also *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D. S.D. 1995); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58 (D.C. Cir. 1991); *Indian Educators Fed’n Local 4524 of Am. Fed’n of Teachers, AFL-CIO v. Kempthorne*, 541 F. Supp. 2d 257, 264-65 (D. D.C. 2008).

agency give firm notice of its intentions, which requires, "telling the truth and keeping promises."<sup>62</sup> An agency's failure to provide tribes with accurate information necessary to meaningfully consult before a decision is made constitutes failure to meet the agency's consultation obligation.<sup>63</sup>

The federal government has further obligations to tribes under the National Historic Preservation Act ("NHPA") and the Religious Freedom Restoration Act ("RFRA"). The NHPA was enacted to preserve historic resources, including "traditional cultural properties" in the midst of modern projects and requires agencies to fully consider the effects of its actions on historic, cultural, and sacred sites. Section 106 of the NHPA requires that prior to a federal action agencies must take into consideration the effects of that "undertaking" on historic properties.<sup>64</sup> The Section 106 process also requires consultation between agencies and Indian Tribes on federally funded or authorized "undertakings" that could affect sites that are on, or could be eligible for, listing in the National Register, including sites that are culturally significant to Indian Tribes.<sup>65</sup> An agency official must "ensure" that the process provides Tribes with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . , articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."<sup>66</sup> This requirement imposes on agencies a "reasonable and good faith effort" by agencies to consult with Tribes in a "manner respectful of tribal sovereignty."<sup>67</sup>

Furthermore, under RFRA the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>68</sup> Tribal religious practices and water are significantly tied to oral tradition, ancestral lands, and natural resources.

Significantly, the EPA and the Corps, along with several other departments of the United States Federal Government, entered into a Memorandum of Understanding on Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites on September 23, 2016. The Memorandum acknowledges that federal agencies hold in trust many culturally important sites and resources held sacred by Indian tribes. The Memorandum also recognizes federal agencies are responsible for analyzing the potential effects of agency projects carried out, funded, or permitted on historic properties and resources of traditional cultural and religious importance to Indian tribes including sacred sites. Additionally, international law, treaties, and jurisprudence has repeatedly affirmed the right of Free Prior Informed Consent.<sup>69</sup> The purpose of Free Prior Informed Consent is to establish bottom up participation and consultation of an Indigenous population prior to the

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<sup>62</sup> Yankton Sioux Tribe, 442 F.Supp.2d at 784 (citing Lower Brule Tribe, 911 F Supp. at 399).

<sup>63</sup> *Id.* at 785; see also Cheyenne River Sioux Tribe v. Jewell, No. 3:15-03072, 2016 WL 4625672 (D. S.D. 2016).

<sup>64</sup> 54 U.S.C. § 306108; 36 C.F. R. § 800.1.

<sup>65</sup> 54 U.S.C. § 302706.

<sup>66</sup> 36 C.F.R. §800.2(c)(ii)(A).

<sup>67</sup> *Id.*; 36 C.F.R. §800.2(c)(2)(ii)(B); see also *id.* § 800.3(f) (any Tribe that "requests in writing to be a consulting party shall be one").

<sup>68</sup> 42 U.S.C. § 2000bb-1(b).

<sup>69</sup> See United Nations, Declaration on the Rights of Indigenous People, art. 10 (Mar. 2008).

beginning of a development on ancestral land or impacts on resources within the Indigenous population's territory.<sup>70</sup>

A "Dear Tribal Leader" letter was sent by former Administrator Pruitt, dated April 20, 2017, to Tribes advising them to direct a request for formal government-to-government consultation to Karen Gude, Office of Water Tribal Program Coordinator. A letter to Tribal leaders advising them to request a consultation on the proposed rule does not meet the consultation requirements. There was no active engagement or meaningful opportunity for tribes to meet with the Agencies unless they responded directly to the Agencies and requested a meeting. And, then it was in the Administrator or staff's discretion to meet with the tribe seeking consultation. Indeed, such letters have been found not to meet the consultation mandates.<sup>71</sup> On May 18, 2017, the EPA hosted a webinar explaining the proposed rule, but this nationwide presentation does not constitute tribal consultation under any Executive Order or Agency consultation policy. It is certainly not meaningful. Some tribes submitted comments to the Agencies, but absolutely no changes were made to the proposed rule published in 2017 and republished for comments in 2019.

Since the publication of the proposed rule on February 14, 2019, the Agencies have never engaged in any tribal consultation to meet with any tribal government leadership to discuss the proposed rule and its impacts on tribal communities. Reviewing a Pueblo's comments submitted in conjunction with an agency's general invitation for public comments is not sufficient to meet its trust obligation. Meaningful consultation requires a careful consideration of tribal views and, if not adopted, setting out the reasons why, so that dialogue can continue. The Agencies held a meeting with tribal technical staff in Albuquerque on March 26, 2019, but the Agencies stated it was not a tribal consultation, only a data and information gathering session. Ironically, the Agencies requested tribal staff to assist them by providing data or maps of their lands showing streams and rivers that may be designated as a "Water of the United States." Clearly, this information gathering should have been undertaken to support the proposed rule rather than its categorical waters approach.

If the Agencies had consulted with tribal governments they would have been informed that the proposed rule will necessarily affect aquifers, wetlands, waterways, and tributaries that are federal trust resources or hydrologically connected to the such resources, and that any decision would impact tribal lands and waters. These lands and waters have been recognized by the United States as trust resources and the United States must act as our fiduciary in protecting them as a matter of federal law as set forth above.

The Pueblos are responsible for maintaining their water and other natural resources for the generations to come. The Pueblos cannot protect their waters from off-Reservation pollutants and other degradation if there is no federal regulation of actors outside their sovereign control. This result would not only be an affront to tribal sovereignty over our lands, but would violate the federal trust responsibility owed by the federal government to Indian tribes. Given the profound and negative impacts that such a change in interpretation would have on tribes and their natural resources, the Agencies should have initiated formal, government-to-government consultation on the proposed rule. Asking tribes to provide written comments in reaction to an Executive Order

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<sup>70</sup> *Id.*

<sup>71</sup> Pueblo of Sandia v. U.S. Forest Service, 50 F.3d 856 (10th Cir. 1995).

cannot replace the meaningful consultation mandated by federal law and policy, and the trust responsibility. Consequently, any revised definition of "Waters of the United States" must thoroughly evaluate impacts to the Pueblos in conjunction with government-to-government consultation with the Pueblos. Failure to do is arbitrary and capricious and risks violating the United States' and the EPA's trust responsibility to all of the Pueblos.

#### **IV. The Proposed Rule is Unsupported by the Record, Scientific Consensus, and Erroneously Relies on Justice Scalia's Opinion in *Rapanos*.**

##### **A. The Rule is Unsupported by the Record and Scientific Consensus.**

The proposed rule deviates from long-standing Agency practice by expressly excluding "ephemeral features that do not meet the definition of tributary."<sup>72</sup> Following *Rapanos*, the Agencies considered ephemeral streams jurisdictional if they had a significant nexus with downstream navigable waters, and the presence of an Ordinary High Watermark ("OHWM") was but one consideration.<sup>73</sup> The 2015 Clean Water Rule did not contain an express exclusion for "ephemeral features."<sup>74</sup> The recent proposed rule reverses course and eliminates ephemeral streams, but the recent provisions lack support in the record, are contrary to best available science, and are arbitrary and capricious. Importantly, the proposed rule fails to take into account EPA's own scientific consensus about the contribution ephemeral streams have on navigable waters, ecosystems, and wildlife. According to the EPA website, "[s]cience provides the foundation of Agency policies, actions and decisions made on behalf of the American people."<sup>75</sup> However, there is very little evidence that EPA utilized any of the science available to them, even the scientific evidence that EPA has published in recent years.

The 2015 Agencies' record makes clear that ephemeral streams—waters that "flow briefly . . . during and immediately following precipitation" and "are above the water table at all times," are a critically important part of the hydrologic landscape. A joint peer-reviewed report by EPA and the U.S. Department of Agriculture ("Ephemeral Stream Report") on the importance of ephemeral and intermittent streams in the desert Southwest, which the Agencies call "a state-of-the-art synthesis of current knowledge of the ecology and hydrology in these systems," recognizes that ephemeral streams "perform the same critical hydrologic functions as perennial streams: they move water, sediment, nutrients, and debris through the stream network and provide connectivity within the watershed."<sup>76</sup>

The ability to protect ephemeral streams under the CWA—either as defined tributaries or by application of the Justice Kennedy's significant nexus test—is critically important in areas like

<sup>72</sup> 33 C.F.R. § 328.3(b)(4)(vi).22.

<sup>73</sup> See U.S. ENVTL. PROT. AGENCY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES*, 10 (2008), [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

<sup>74</sup> See 79 Fed. Reg. at 22,263-64.

<sup>75</sup> U.S. Env'tl. Prot. Agency, *Role of Science at EPA*, <https://www.epa.gov/research/role-science-epa> (last updated Feb. 2, 2018).

<sup>76</sup> U.S. ENVTL. PROT. AGENCY, THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST 13 (2008). See also 80 Fed. Reg. at 37,063.

the desert Southwest, where ephemeral streams comprise the vast majority of waters.<sup>77</sup> In such contexts, ephemeral streams “provide much of the ecological and hydrological connectivity in a landscape,” and their disturbance or loss “has dramatic physical, biological, and chemical impacts” on the watershed.<sup>78</sup> Notwithstanding their importance to arid landscapes in particular, ephemeral streams often lack an OHWM.<sup>79</sup> For these reasons, members of EPA’s Science Advisory Board “recommended that the presence of OHWM not be a required attribute of a tributary and suggested that the wording in the definition be changed to ‘bed, bank, and other evidence of flow.’”<sup>80</sup>

In addition, the Agencies’ decision to focus primarily upon flow regime—*i.e.*, whether a ditch flows perennially, intermittently, or ephemeraly—to determine a ditch’s jurisdictional status is unsupported by prevailing science and flatly contrary to the approach correctly used by the Agencies in their treatment of tributaries. It makes no sense in the southwest where irrigated agriculture has diverted water from flows into ditches, and returns flows to that same flow. The record makes clear that intermittent and ephemeral tributaries “are chemically, physically, and biologically connected to downstream waters, and these connections have effects downstream.” Individual SAB members pointed out the lack of scientific justification to classify ditches based upon their flow regime.<sup>81</sup>

Perhaps the Agencies could have lawfully ignored the overwhelming science in the record if they had offered *some* rational explanation for the disparate treatment of ditches and tributaries.<sup>82</sup> But the only justification they provide in the preamble—that the ditch exclusions would “provide clarity and predictability regarding the regulation of ditches and artificial features,”<sup>83</sup> is unsupported by the record. In fact, the Agencies recognize that tributaries can include waters “that flows through a culvert, dam, or other similar artificial break.”<sup>84</sup> Thus, the distinction between a “ditch” and a “tributary” may be blurred to the point of nonexistence, making the jurisdictional status of such waters impossible to verify under the proposed rule. Ultimately, the Agencies’ exclusion of most ephemeral and intermittent ditches from CWA jurisdiction—even where those ditches meet the Agencies’ own definition of “tributary”—is unsupported by any rationale articulated by the Agencies in the record.

According to the Ephemeral Stream Report, 59% of streams in the continental United States are ephemeral or intermittent, and 88% of streams in New Mexico fit this categorization. This Report discusses the characteristics, functions and ecosystem significance of these streams and concludes that these streams affect the water quality of perennial streams. The Report then recommends effective management of these water resources to protect such water quality.<sup>85</sup>

<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.* at 8.

<sup>79</sup> *See, e.g.*, Comments to the chartered SAB, at 2 (noting that “[t]he absence of OHWM is relatively common in ephemeral streams within arid and semi-arid environments or low gradient landscapes”).

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *See, e.g.*, SAB Comments at Attachment p. 36 (Dr. Harvey) (“there would appear to be no reason [intermittently flowing ditches] should not be considered jurisdictional.”).

<sup>82</sup> *See Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1182 (D.C. Cir. 1994) (rejecting an agency decision made with “apparent inconsistency, unadorned by any attempt at explanation or justification”).

<sup>83</sup> 84 Fed. Reg. at 4179.

<sup>84</sup> *Id.* at 4173.

<sup>85</sup> *Id.* at 76.

Throughout the Report, EPA explores the scientific understanding of the importance of ephemeral and intermittent streams to perennial streams. The report goes further by stating that “ephemeral and intermittent streams in the arid and semi-arid Southwestern U.S. are ecologically and hydrologically connected to downstream waters, and have a significant effect on the chemical, physical, and biological integrity of those waters.” Although this language speaks to the language of the significant nexus test, a test abandoned by the proposed rule, the report is clear that ephemeral and intermittent streams are connected to traditionally navigable waters and their water qualities must be protected. This understanding fits squarely within the scientific foundation of EPA and the Agencies’ 2015 Clean Water Rule.

In 2015, the EPA developed a report summarizing the “current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters.”<sup>86</sup> This Connectivity Report was created to “inform rulemaking by the [EPA] and [Army Corps] on the definition of ‘waters of the United States.’”<sup>87</sup> The 2015 Clean Water Rule promulgated by the Agencies was a rule amending the definition of “waters of the United States” that was based on scientific consensus, consensus gathered through the 2015 Connectivity Report. The report is based on the “review and synthesis of more than 1,200 publications from the peer reviewed scientific literature.”<sup>88</sup> The report itself was peer reviewed by independent scientists and EPA’s Science Advisory board. In the report, the EPA concludes that ephemeral streams are physically, chemically, and biologically connected to downstream rivers and are a major transporter of organic materials and chemical contaminants to those downstream rivers.<sup>89</sup> For ephemeral streams “infrequent, high-magnitude events” are major moments of transmitting materials into downstream perennial rivers.<sup>90</sup> This finding is extremely important for the ephemeral streams on Pueblo lands in the Southwest where monsoon events in the late summer trigger flash floods that carry large amounts of sediment and other materials through ephemeral streams to larger downstream rivers, such as the Rio Grande.

When promulgating a rule, an agency must examine all the relevant information on the issue and provide a satisfactory explanation of its choice in order to avoid a finding of an arbitrary and capricious decision.<sup>91</sup> In providing a reasonable explanation, a court looks at whether or not there is a rational link between the facts found and the choices made.<sup>92</sup> In the case of the EPA or other science-based agencies, the facts found are often scientific facts, which must be rationally linked to the rule being promulgated. When promulgating the 2015 Clean Water

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<sup>86</sup> U.S. ENVTL. PROT. AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE ES-1 (2015).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at ES-2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at ES-8.

<sup>91</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Automobile Ins.*, 463 U.S. 29, 43 (1983); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). In *Motor Vehicle Manufacturers Association*, the court found that the Department of Transportation under Ronald Reagan acted arbitrary and capriciously when it rescinded a seatbelt rule promulgated under the Carter administration because the Reagan rule did not adequately explain its decision to rescind or deal with the previously administration’s reasoning for implementing the rule. *Id.* at 56-57.

<sup>92</sup> *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*, 463 U.S. at 43.



Rule, the EPA did significant scientific fact gathering through the 2015 Connectivity Report to support the rule. In this proposed rule, the Agencies have failed to provide a rational link between the facts found and the proposed rule. The EPA has not adequately addressed its own scientific reports on the importance of protecting ephemeral and intermittent streams with the CWA.

The Agencies' lack of a scientific basis for the proposed rule is evidenced by the Agencies' desire to receive data from state, tribal and federal agency datasets of "Waters of the United States."<sup>93</sup> The Agencies' claim that receiving this data will help the regulated community and co-regulators such as states and tribes know which waterways would be covered under the proposed rule.<sup>94</sup> However, this desire reveals the lack of scientific understanding or basis behind the proposed rule. It is clear that the Agencies do not know which waterways would no longer be covered under the proposed rule. Without this knowledge, the Agencies do not know the extent of the impacts this proposed rule will have on the United States. The Agencies will know the extent of the impacts only after receiving these datasets from others after the rule is already in effect. This is a clear violation of the arbitrary and capricious standard outlined above and is essentially putting the cart before the horse.

The Agencies entirely fails to support their proposed rule with scientific facts. Instead, of attaching supporting documents dealing with the scientific reasoning for the rule, the Agencies have attached an economic analysis supporting document.<sup>95</sup> This document seeks to assess the potential impacts of the proposed rule. As discussed earlier, the Agencies attempt to address the potential impacts of the proposed rule without knowing the extent of the affected waters, as evidenced by their request for geospatial data. Although the Agencies explore the negative impacts pollutants will have on unprotected waters, the Agencies fail to address the positive values associated with cleaner waters, including values created by recreation, drinking water sources, wildlife, and religious values associated with the Pueblos. This economic analysis deeply underestimates the high value of clean water to tribal nations/people in all respects.

#### **B. The Proposed Rule Erroneously Relies on Justice Scalia's Opinion in *Rapanos*.**

The Agencies state in the proposed rule that the basis for this promulgation is based on the legal writings of Justice Scalia in *Rapanos*, legislative history, and the CWA statute.<sup>96</sup> The Executive Order that led to the drafting of this proposed rule echoes these sentiments asking for a rule based on Justice Scalia's plurality opinion.<sup>97</sup> The Agencies have asked for comments on the potential consequences of reinterpreting the "Waters of the United States" rule to be consistent with Justice Scalia's opinion in *Rapanos*. In short, the consequences of such a radical change in interpretation will be devastating. Justice Scalia, was not a scientist and his legal opinion cannot replace decades of reasoned, scientifically supported evidence of the damaging effects of pollution,

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<sup>93</sup> *Id.* at 4198.

<sup>94</sup> *Id.*

<sup>95</sup> U.S. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, ECONOMIC ANALYSIS FOR THE PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES" (2018).

<sup>96</sup> Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4255-56 (Feb. 14, 2019).

<sup>97</sup> Exec. Order No. 13778 (Feb. 28, 2017).

and the positive effects of sound stewardship principals. Critically, Justice Scalia's narrow approach to water bodies has never been adopted by any federal appellate court. Indeed, all eleven circuits have adopted the opinion of Justice Kennedy from Rapanos establishing a significant nexus standard to establish the applicability of the CWA.<sup>98</sup>

Justice Scalia's opinion concluded the following: "(1) The phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are describe in ordinary parlance as 'streams,' 'oceans, rivers, [and] lakes, . . . (2) A wetland may not be considered 'adjacent to' remote 'waters of the Unites States' based on a mere hydrologic connection . . . . Thus, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between the two, are 'adjacent' to such waters and covered by the Act." For purposes of these comments, the key phrases of concern to the Pueblos in Justice Scalia's opinion are "relatively permanent" and "continuous surface connection." As discussed above, the Pueblos' source of water is primarily ephemeral.

It is the objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Adopting a rule predicated on Justice Scalia's interpretation would undermine the clear objectives of the statute. The scope of "the Nation's waters" and thus the reach of the CWA, and the jurisdiction of the EPA and Corps has been, since 1988, interpreted to include traditional navigable waters as well as their tributaries (as determined through the "significant nexus").<sup>99</sup> The reason tributaries are protected is the very real phenomenon of upstream pollution contributing to downstream pollution; something that occurs even where there is a "mere hydrological connection." Thus, protecting only traditional navigable waters without protection of their tributaries would fail to meet the objective of the CWA.

## **V. The Proposed Rule Poses a Serious Threat to the Pueblos**

### **A. The Proposed Rule Would Make Much of the Pueblos' Waters No Longer Jurisdictional Under the CWA.**

Under the proposed rule, there are six categories of water that would be considered -- traditional navigable waters; tributaries, certain ditches, certain lakes and ponds, impoundments, and adjacent wetlands. Critically, the proposed rule takes a narrow view of the complex drainage systems that exist in the arid west, and particularly in the Pueblo lands in New Mexico, where

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<sup>98</sup> *United States v. Johnson*, 467 F.3d 56 (1<sup>st</sup> Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); *Simsbury-Avon Preservation Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir.2009); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 2409 (2012); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011); *United States v. Lucas*, 516 F.3d 316 (5<sup>th</sup> Cir. 2008), *cert. denied*, 555 U.S. 822 (2008); *United States v. Cundiff*, 555 F.3d 200 (6<sup>th</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 74 (2009); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7<sup>th</sup> Cir. 2006), *cert. denied*, 552 U.S. 810 (2007); *United States v. Bailey*, 571 F.3d 791 (8<sup>th</sup> Cir. 2009); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9<sup>th</sup> Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008); *United States v Robertson*, 875 F.3d 1281 (9<sup>th</sup> Cir. 2017); *United States v. Hubenka*, 438 F.3d 1026 (10<sup>th</sup> Cir. 2006); *United States v. Robison*, 505 F.3d 1208 (11<sup>th</sup> Cir. 2007), *cert. denied sub nom* *McWane v. United States*, 555 U.S. 1045 (2008).

<sup>99</sup> 40 C.F.R. § 230.3(o)(3)(v).

there are large ephemeral streams and less than seasonal intermittent streams, including washes, gulches, arroyos, groundwater and ditches. Much, if not all, of the surface water on Pueblo lands in New Mexico would not be considered “Waters of the United States” under the proposed rule. In fact, much of surface water in the Southwest would be excluded from jurisdiction under the CWA. The number of waters and wetlands likely to be affected has been the subject of several geospatial studies. One, conducted by Saint Mary’s University of Minnesota GeoSpatial Services, provides visual mapping of how a watershed in the Southwest loses much of its CWA protection under a restrictive rule.<sup>100</sup> By restricting the potential jurisdiction of the CWA, the proposed rule has the potential to permit an increase in discharge of pollutants into wetlands, streams and waterways in the river basins.

Under the current interpretation of the CWA, most Pueblo water flows are jurisdictional waters. The CWA allows for each Pueblo to protect the water quality of these waters through implementation of parts of the CWA, setting water quality standards (“WQS”) as well as setting tribal WQS (which protect traditional uses of water bodies), and providing a legal framework to object to off-Reservation and non-tribal users who may negatively impact water quality. However, the arid nature of the Southwest does not allow most Pueblo water flows to meet the criteria of “relatively permanent” as outlined by Justice Scalia. A reinterpretation of the CWA, as described in the proposed rule, would prevent the Pueblos from protecting their water sources from off-Reservation upstream actors.

With the advent of a status for tribes—Treatment as State, later Treatment in the Same Manner as State (“TAS”) under the CWA that allowed tribes to fully implement and participate in environmental regulation, the protection of natural resources on tribal lands and Reservations began to change. With TAS, under the CWA, a tribe has the ability to “implement the permit programs under section 402 and 404 of this Act” and to receive funding—as States do—to support these endeavors.<sup>101</sup> However, these tools only apply to waters protected under the CWA, that is, waters of the United States. By adopting Justice Scalia’s rigid and unscientific interpretation of tributaries and streams, the Pueblos would lose all the tools they have gained to assert their sovereignty over their waters on their lands. Additionally, the inability to protect the integrity of the waters flowing across tribal lands will have irreparable harm to non-Indian downstream users. Each Pueblo would also lose the CWA funding promised by law to “support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.”<sup>102</sup> The consequences of this would be devastating to the Pueblos and our surrounding communities.

Waterbodies and tributaries within the United States are as vast and varied as the climates and ecosystems of the U.S. Ecological conditions are not homogenous, and should not be treated as such under the law. Justice Scalia’s interpretation of what a tributary of a traditional navigable water should be, and thus, what type of waterbody should be covered under the CWA, is biased

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<sup>100</sup> Saint Mary’s University of Minnesota, GeoSpatial Services, Modeling Federally Protected Waters and Wetlands, <https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33> (2019) (using the Cimmaron River watershed in New Mexico as a case study).

<sup>101</sup> 40 CFR 101.7(b).

<sup>102</sup> *Id.*

by his lack of understanding of arid ecosystems; he was not a scientist, and his familiarity with western ecosystems was limited. Ecologists understand that the vast majority of waterbodies in the arid Southwest do not exhibit anything resembling "relatively permanent." Their ability to flow is strongly dependent on seasonal precipitation, saturation of soils, and upstream storage and precipitation, which can vary tremendously from one year to the next. These creeks, streams, and rivers, however, are still classified as riparian ecosystems, are still tributaries to traditional navigable waters, and still need to be protected by the CWA in order to meet the objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

The Pueblos' federally protected rights to use water will be impaired if the EPA's definition of "Waters of the United States" fails to take into account the proven potential of off-Reservation streams, wetlands, and other waterways to carry dangerous pollutants to Pueblo lands. Justice Scalia's formulation of "Waters of the United States" in *Rapanos* has the potential to exclude a great many of those important bodies of water that are so crucial to the health of the Pueblos. Such a result could undo the important work that the EPA has done in conjunction with the Pueblos over the past several decades. More importantly, it would violate the Pueblos' rights under federal law, and it would violate United States' fiduciary duty to the Pueblos.

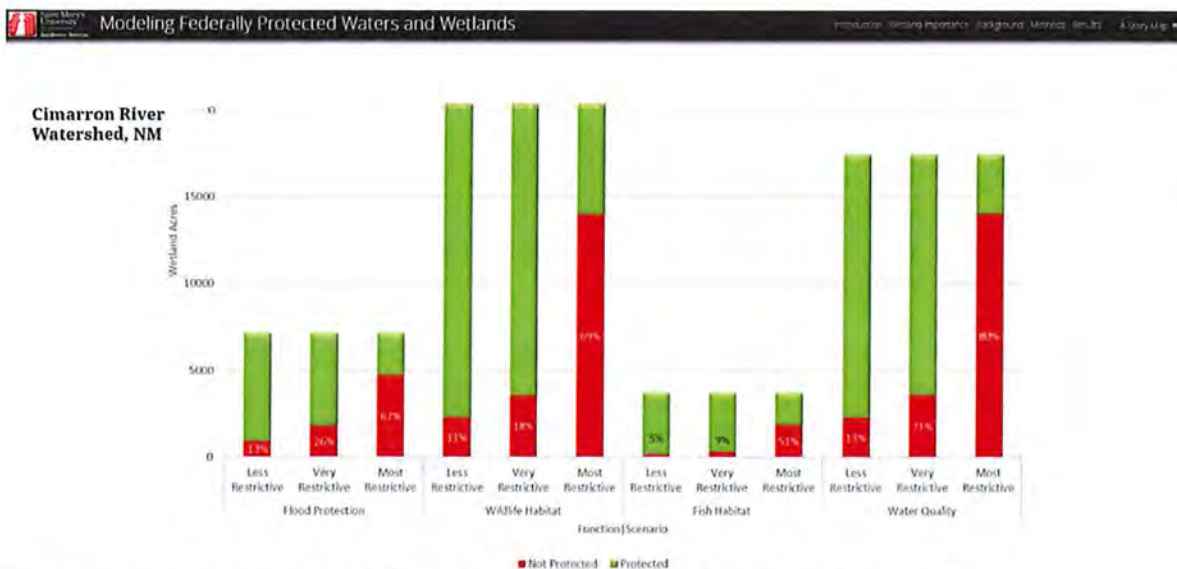


Figure 2: Results from Saint Mary's GIS Modeling Case Study on Cimarron Watershed.<sup>103</sup>

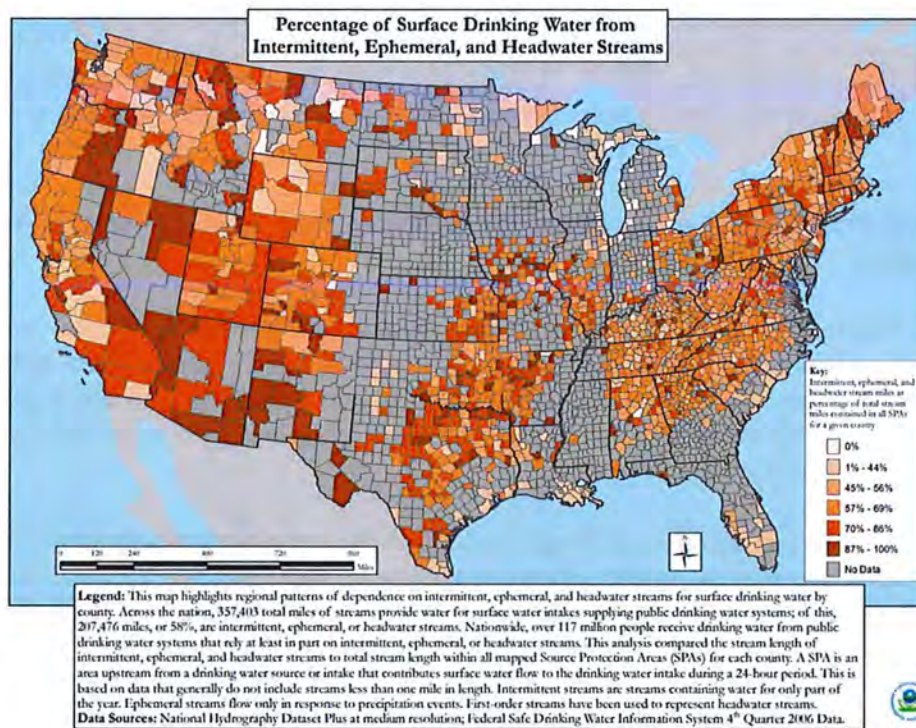


Figure 3: Percent of streams likely affected by the proposed rule.<sup>104</sup>

<sup>103</sup> *Id.*

<sup>104</sup> U.S. Env'tl. Prot. Agency, *Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams: National Map*, <https://www.epa.gov/cwa-404/surface-drinking-water-provided-intermittent-ephemeral-and-headwater-streams-national-map> (last visited Apr. 4, 2019).

**B. The Proposed Rule Results in Impacts to all Pueblos' Federally Recognized Water Rights and Religious Exercise.**

The narrowing the definition of the “Waters of the United States” is a critical concern for the Pueblos in light of the fact that most Pueblos, and their non-Indian neighboring communities have a single source of clean, safe drinking water. As with any degradation of water quality, such pollution implicates rights of the Pueblos that are protected by federal law, including the practice of Pueblo culture and religions.

The proposed rule will affect, aquifers, wetlands, waterways, and tributaries that are hydrologically connected to waters that impact Pueblo lands and waters. In fact, for the Pueblos, those hydrologically related groundwaters are themselves trust resources.<sup>105</sup> The United States must act as out fiduciary in protecting them as a matter of federal law as set forth Part IA.

Water is an essential aspect of Pueblo life and religion. It figures prominently in their theology and represents a key component of their religious ceremonies. Specifically, many of their religious sacraments require either water or ritual deprivation thereof. These ceremonies require that they use only water that is both environmentally and ritually pure. As noted above, the Pueblos have very limited access to water on their lands. Upstream contamination of these waters has the very serious potential to affects the Pueblos' and their members' religious exercise in violation of the Religious Freedom Restoration Act. Indeed, the Tenth Circuit and other federal appellate courts have recognized the importance of water and its necessary water quality for ceremonial purposes.<sup>106</sup>

**C. The Proposed Rule Creates a Jurisdictional Gap That Cannot Be Adequately Filled.**

The CWA has set up a complex permitting system that requires any entity or person to apply for a permit if pollution would result from that entity/person's actions. This system is well established and has created communication between regulated entities and the Agencies. The permitting system, being the enforcement teeth of the CWA has led to the significant reduction in pollutants in the Nation's waters.

Section 401, water quality certification of the CWA, is the primary regulatory mechanism used by the Pueblos to prevent impacts to water quality on their lands. Twelve of the nineteen Pueblo governments have authority to administer water quality standards and the Section 401 program. In New Mexico, until the Pueblos obtain Section 401 certification authority, the 401 process within the reservation is administered by EPA Region 6. The current EPA process requires that all projects authorized under a Section 404 permit (for dredge or fill to “Waters of the United States”) contact and solicit comments from the Pueblos' Water Quality program as part of the application process, and the Tribes' comments are typically addressed as conditions of any granted 401 certification. This process allows tribal staff to review all projects impacting waters of the United States on a Pueblo's lands to verify that the projects will not result in exceedances of the

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<sup>105</sup> See *Aamodt II*.

<sup>106</sup> *City of Albuquerque v. Browner*, 97 F.3d 415 (10<sup>th</sup> Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (upholding EPA's approval of Pueblo of Isleta's water quality standards).

Tribes' water quality standards and to ensure that best management practices are employed to limit non-point source pollution.

The overwhelming number of projects on Pueblo lands requiring Section 404 permitting and Section 401 water quality certification involve work on ephemeral or intermittent tributaries. Without "Waters of the United States" designation, these projects would no longer require a 401 water quality certification from the Pueblo or EPA. Without the need for a Section 404 permit and 401 certification, projects would not be required to implement the appropriate best management practices when working on ephemeral or intermittent streams. When best management practices are not used, projects within reservations have the capacity to greatly impact downstream waters. Additionally, without the CWA protections for ephemeral and intermittent streams, the Pueblos do not have the ability to require project components to clean up pollution resulting from impacts to these stream types.

If ephemeral and intermittent streams are no longer considered "Waters of the United States," protections provided to surface waters on Pueblo lands through Section 401 of the CWA would also be weakened. Within the Pueblos' lands, Section 402 permits are also administered by EPA. Projects that disturb greater than one acre of land are required to follow the terms of EPA's 2017 Construction General Permit for Indian Country. The permit requires the development of Stormwater Pollution Prevention Plan to prevent stormwater discharges into "Waters of the United States." Without CWA protection, operation will be allowed to discharge stormwater, and any pollutants it carries, into ephemeral and intermittent streams. These pollutants could be carried to downstream waters and affect groundwater.

Unlike some states where waters that are not classified as "Waters of the United States" can be protected by state-only water quality laws, due to the land ownership nature of Indian reservations, and the complex division of jurisdiction on the a Pueblo's lands among the Pueblo, Federal government and state government, the Pueblo's water quality laws alone might not be effective at protecting water quality within all its lands. The Pueblos depend on the Agencies to prevent impacts to the waters on their lands. Also, many intermittent and ephemeral streams originate outside Pueblo lands and then flow through Pueblo lands and into traditional navigable waters located within or beyond a Pueblo's boundaries. The Pueblos depend upon federal, state, and neighboring tribal agencies to prevent impacts to streams flowing onto their lands.

There are seven Pueblo governments which do not have Treatment as a State authorization from the EPA for a number of reasons – the infrastructure needed to implement the programs has not been established, the Pueblo may not be able to address the contamination without delegation under a federal statute or it may choose to let the EPA address it, and some may not wish to have the EPA dictate what standards and norms are to be adopted by the tribe. These seven Pueblos depend on the EPA to fully protect the waters on their lands. EPA's proposed rule permits it to withdraw any protections to ephemeral and intermittent streams, and groundwater, and thus, permitting projects and pollution to go unchecked.

Without the reach of the federal government to enforce permitting, a Pueblo will lack immediate options to protect their waters. Most pueblos and tribes do not have enforcement provisions in their laws, because they have relied on federal enforcement through the CWA. The

Pueblos may have the ability to write enforcement provisions into the law but this takes time and resources; actual enforcement takes additional resources that some Pueblos simply do not have. As seen in events such as the Gold King Mine Spill in 2015, environmental or water pollution disasters can happen at any moment with devastating effects. Any time lag between the federal government backing away from protecting tribal waters and the tribes creating enforcement provisions leaves the tribes at incredible risk of disaster.

Without the ability of federal agencies to step in and enforce the federal rights of the Pueblos, the Pueblos will be on their own, left to enforce their own tribal laws on entities that may not respect or understand the complicated nature of tribal sovereignty. There is a long history of jurisdictional disputes on reservations involving states versus tribes, and tribes versus non-Indians. The Pueblos are no different. The withdrawal of federal jurisdiction on reservation lands will exacerbate this problem.

The proposed rule envisions that the states will fill the gap of enforcement left by the federal government. However, this grossly underestimates the variability of different states' positions in filling that gap. Some states such as Minnesota have robust state agency enforcement capabilities with a large staff and access to scientific institutions. Other states lack enforcement capabilities or resources such as New Mexico, which does not have primacy over NPDES permitting under the CWA. States are also constrained by their lack of jurisdiction over tribal lands.<sup>107</sup> A state cannot enforce its own permitting standards or requirements on tribal lands but it has not stopped states from seeking to regulate on non-Indian fee lands. Finally, some states are restricted by law in their authority to regulate their water. According to a 50-State study by the independent Environmental Law Institute,

Over two-thirds of U.S. states, 36 in all, have laws that could restrict the authority of state agencies or localities to regulate waters left unprotected by the federal CWA. These restrictions take the form of absolute or qualified prohibitions that require state law to be “no more stringent than” federal law; property rights limitations; or a combination of the two.<sup>108</sup>

<b>State-by-State Breakdown: Presence of Relevant Limitations Provisions Versus Whether State Waters Are Regulated More Broadly than Required by Federal CWA</b>		
	States that <b>regulate waters more broadly</b> than required by the CWA	States that <b>do not</b> regulate waters more broadly than required by the CWA
States <b>with</b> relevant limitations provisions	FL, IN, ME, MD, MI, MN, NE, NJ, NC, OH, OR, PA, TN, VA, WV, WA, WI [17 states]	AZ, AR, CO, DE, ID, IA, KS, KY, LA, MS, MO, MT, NV, ND, OK, SD, TX, UT, WY [19 states]
States <b>without</b> relevant limitations provisions	CA, CT, IL, MA, NH, NY, RI, VT [8 states]	AL, AK, DC, GA, HI, NM, SC [6 states and DC]

Figure 4: State constraints on regulation their waters.<sup>109</sup>

<sup>107</sup> Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).

<sup>108</sup> ENVTL. LAW INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT (2013).

<sup>109</sup> *Id.* at 2.



New Mexico is a state that does not regulate waters more broadly than the required by the CWA, but also does not have relevant limitations provisions.<sup>110</sup> On the other hand, Texas does not regulate waters more broadly than the CWA, and also has limiting statutes.<sup>111</sup> Many other state in the Southwest are similar to Texas, not in a position to regulate their waters and blocked by limiting statutes, including Arizona, Colorado, Utah, Nevada, and Oklahoma.<sup>112</sup> The Environmental Law Institute report concludes that states that have limiting provisions in their statutes and states that do not protect waters more broadly than the CWA may struggle to fill the gap left by the proposed rule.<sup>113</sup>

The gaps in protection created by the proposed rule are not only enforcement gaps, they are also geographic. The proposed rule eliminates protection of most headwaters and all ephemeral reaches. Many tribes are situated geographically downstream of headwaters and/or ephemeral reaches. If the federal government backs away from protecting these upstream headwaters and ephemeral reaches, the tribes will have no reliable protection for pollution occurring in upstream headwaters, or pollution flowing into tribal lands during a flood event through ephemeral waterways. The unique sovereign nature of tribes leaves a gap in available avenues for protecting their waters from upstream pollution without CWA protection.

#### **D. Many Pueblos Lack the Resources to Fill the Gap Created by the Proposed Rule.**

The proposed rule envisions that the tribes will be able to protect their own tribal waters with their own laws. However, this vision lacks a basis in the reality that most tribes face. Most, if not all, of the tribes in the Southwest struggle with a lack of financial and legal resources. This has been an issue since the recognition of the Pueblos' lands by the Spanish, Mexican and United States governments. Many Pueblos are struggling to fund their existing programs, much less new or expanded ones. It is unconscionable to believe that the Pueblos would be able to fill the gap left by this proposed rule and create enforcement standards and be able to implement them with the same force capable by the EPA. The proposed rule does nothing to suggest that the gap in funding and resources will be closed by a committing funds, training, or resources to the tribes.

### **VI. Conclusion**

The proposed rule will likely have a devastating impact on the Pueblos because it will withdraw federal protection of the waters that the Pueblos rely on under the CWA. This withdrawal is a breach of the federal government's trust responsibility owed to the Pueblos. The proposed rule is not supported by science. The Agencies reversed prior practice of asserting jurisdiction over waters with an interstate commerce nexus based solely on the plurality opinion of Justice Scalia in *Rapanos* that has never been adopted by any of the federal appellate courts. The impacts of the proposed rule are far reaching for the Pueblos. It will create a jurisdictional gap that cannot be filled by the State of New Mexico or the Pueblos. New Mexico lacks jurisdiction on Pueblo lands and the Pueblos lack the resources to fill the jurisdictional gap on their own.

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*


<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

The Agencies' decision to abandon jurisdiction over such waters within tribal lands means that the CWA's essential safeguard—the prohibition on unauthorized discharges<sup>114</sup> would not apply, and that those waters may be dredged, filled, or polluted with impunity. Given the proposed rule's far-reaching impacts for these aquatic ecosystems, the many threatened or endangered species that depend upon them, and the basic water quality needs of rural tribal communities, the Agencies were required to ensure that the proposed rule would not jeopardize the continued existence of lands, communities, species and to engage in meaningful consultation to protect those trust resources. The Agencies have failed utterly.

We ask that the Agencies rescind their proposed rule. The impacts to the Pueblos, are immense and not unique in the Southwest. Further, we demand that the Pueblos or tribes be excluded from a rule limiting the jurisdiction of the CWA to avoid the violation of the federal government's trust relationship. Finally, we ask that the Agencies commit funding, training, and resources to the Pueblos in the event the proposed Rule is adopted.

Sincerely,

  
Jeanette Wolfley

Supervising Attorney  
UNM School of Law  
Natural Resources and Environmental Law Clinic  
Supervising Attorney

4/15/2019

Date

  
James Grieco

Clinical Student  
UNM School of Law  
Natural Resources and Environmental Law Clinic

4/15/2019

Date

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<sup>114</sup> See 33 U.S.C. § 1311(a) (2012).

# Senate Bill 389

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## Enrolled Senate Bill (S)

**Authored by** Sen. Chris Garten, Sen. Mark Messmer, Sen. Linda Rogers.

**Co-Authored by** Sen. Scott Baldwin, Sen. Andy Zay, Sen. Jack Sandlin, Sen. Blake Doriot, Sen. Mike Gaskill, Sen. Rick Niemeyer, Sen. Liz Brown, Sen. Aaron Freeman, Sen. Eric Koch, Sen. Erin Houchin, Sen. Justin Busch, Sen. John Crane, Sen. James Buck, Sen. Chip Perfect, Sen. Philip Boots, Sen. Travis Holdman, Sen. Dennis Kruse, Sen. James Tomes, Sen. Jean Leising.

**Sponsored by** Rep. Matt Lehman, Rep. Doug Gutwein, Rep. Jeffrey Thompson, Rep. Alan Morrison.

## DIGEST

Wetlands. Amends the law requiring a permit and compensatory mitigation for "wetland activity" (the discharge of dredged or fill material) in a state regulated wetland: (1) by changing the definition of "Class II wetland"; (2) by providing that wetland activity may be conducted without a permit: (A) in a Class I wetland; (B) in a Class II wetland with an area of not more than three-eighths acre; (C) in an ephemeral stream; and (D) in a Class II wetland that is located within the boundaries of a municipality and has an area of not more than three-fourths acre; (3) by providing that a permit is not needed for the development of cropland that has been used for agricultural purposes: (A) in the five years immediately preceding the development; or (B) in the 10 years immediately preceding the development if the United States Army Corps of Engineers has issued a jurisdictional determination confirming that the cropland does not contain wetlands subject to federal jurisdiction; (4) by providing that wetland activity in a Class II wetland with an area of more than three-eighths acre requires an individual permit; (5) by providing that: (A) maintenance of a field tile in a Class II wetland can be conducted with a general permit if certain conditions are met; and (B) maintenance of a field tile in a Class III wetland can be conducted with a general permit if certain conditions are met and the applicant obtains a site-specific approval; (6) by establishing conditions for obtaining a site-specific approval; (7) by eliminating the compensatory mitigation requirements for wetland activity in a Class I wetland; and (8) by requiring the department of environmental management (department) to make a decision to issue or deny an individual permit for wetland activity not later than 90 days (instead of 120 days) after receiving the completed application. Amends the law concerning a certification under Section 401 of the federal Clean Water Act for dredge and fill activity in a federally regulated wetland to require the department to make a final determination not later than 90 days (instead of 120 days) after receiving a completed application if the applicant requests a pre-coordination meeting. Establishes the Indiana wetlands task force, a 14 member body that: (1) is required to study and make recommendations concerning a number of wetlands issues; and (2) not later than November 1, 2022, issue a report to the general assembly and the governor setting forth its recommendations. Requires the department of natural resources to provide staff support to the task force.

# Actions for Senate Bill 389

 All Actions  House Actions  Senate Actions

<b>S 04/29/2021</b>	Public Law 160
<b>S 04/29/2021</b>	Signed by the Governor
<b>S 04/28/2021</b>	Signed by the President of the Senate
<b>H 04/22/2021</b>	Signed by the Speaker
<b>S 04/21/2021</b>	Signed by the President Pro Tempore
<b>S 04/14/2021</b>	Senate concurred in House amendments; Roll Call 441: yeas 31, nays 19
<b>S 04/13/2021</b>	Motion to concur filed
<b>H 04/13/2021</b>	Returned to the Senate with amendments
<b>H 04/13/2021</b>	Third reading: passed; Roll Call 428: yeas 58, nays 40
<b>H 04/12/2021</b>	Amendment #4 (Leonard) prevailed; Roll Call 410: yeas 61, nays 34
<b>H 04/12/2021</b>	Amendment #1 (Lindauer) prevailed; Roll Call 409: yeas 54, nays 42
<b>H 04/12/2021</b>	Amendment #6 (Slager) prevailed; voice vote
<b>H 04/12/2021</b>	Second reading: amended, ordered engrossed
<b>H 04/08/2021</b>	Committee report: amend do pass, adopted
<b>H 03/25/2021</b>	Representative Morrison added as cosponsor
<b>H 03/02/2021</b>	First reading: referred to Committee on Environmental Affairs
<b>S 02/02/2021</b>	Referred to the House
<b>S 02/01/2021</b>	Senators Holdman, Kruse, Tomes, Leising added as coauthors
<b>S 02/01/2021</b>	Senator Boots added as coauthor
<b>S 02/01/2021</b>	Cosponsors: Representatives Gutwein and Thompson
<b>S 02/01/2021</b>	House sponsor: Representative Lehman
<b>S 02/01/2021</b>	Third reading: passed; Roll Call 33: yeas 29, nays 19
<b>S 01/28/2021</b>	Senators Buck and Perfect added as coauthors
<b>S 01/28/2021</b>	Amendment #1 (Tallian) failed; Roll Call 24: yeas 19, nays 29
<b>S 01/28/2021</b>	Second reading: ordered engrossed
<b>S 01/26/2021</b>	Senator Crane added as coauthor
<b>S 01/26/2021</b>	Senator Busch added as coauthor
<b>S 01/26/2021</b>	Committee report: amend do pass, adopted
<b>S 01/25/2021</b>	Senator Houchin added as coauthor
<b>S 01/25/2021</b>	Senators Freeman and Koch added as coauthors
<b>S 01/25/2021</b>	Senator Brown L added as coauthor
<b>S 01/14/2021</b>	First reading: referred to Committee on Environmental Affairs
<b>S 01/14/2021</b>	Coauthored by Senators Baldwin, Zay, Sandlin, Doriot, Gaskill, Niemeyer
<b>S 01/14/2021</b>	Authored by Senators Garten, Messmer, Rogers

First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

## SENATE ENROLLED ACT No. 389

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AN ACT to amend the Indiana Code concerning environmental law.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 13-11-2-25.8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2021 (RETROACTIVE)]:  
Sec. 25.8. (a) For purposes of IC 13-18:

(1) "Class I wetland" means an isolated wetland described by one (1) or both of the following:

(A) At least fifty percent (50%) of the wetland has been disturbed or affected by human activity or development by one

(1) or more of the following:

(i) Removal or replacement of the natural vegetation.

(ii) Modification of the natural hydrology.

(B) The wetland supports only minimal wildlife or aquatic habitat or hydrologic function because the wetland does not provide critical habitat for threatened or endangered species listed in accordance with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and the wetland is characterized by at least one (1) of the following:

(i) The wetland is typified by low species diversity.

(ii) The wetland contains greater than fifty percent (50%) areal coverage of non-native invasive species of vegetation.

(iii) The wetland does not support significant wildlife or aquatic habitat.

(iv) The wetland does not possess significant hydrologic function;

SEA 389 — Concur



(2) "Class II wetland" means ~~(A) an isolated wetland that is not a Class I or Class III wetland; or (B) a type of wetland listed in subdivision (3)(B) that would meet the definition of Class I wetland if the wetland were not a rare or ecologically important type;~~ **an isolated wetland that supports moderate habitat or hydrological functions, including an isolated wetland that is dominated by native species but is generally without:**

**(A) the presence of; or**

**(B) habitat for;**

**rare, threatened, or endangered species; and**

(3) "Class III wetland" means an isolated wetland:

(A) that is located in a setting undisturbed or minimally disturbed by human activity or development and that supports more than minimal wildlife or aquatic habitat or hydrologic function; or

(B) ~~unless classified as a Class II wetland under subdivision (2)(B);~~ that is of one (1) of the following rare and ecologically important types:

- (i) Acid bog.
- (ii) Acid seep.
- (iii) Circumneutral bog.
- (iv) Circumneutral seep.
- (v) Cypress swamp.
- (vi) Dune and swale.
- (vii) Fen.
- (viii) Forested fen.
- (ix) Forested swamp.
- (x) Marl beach.
- (xi) Muck flat.
- (xii) Panne.
- (xiii) Sand flat.
- (xiv) Sedge meadow.
- (xv) Shrub swamp.
- (xvi) Sinkhole pond.
- (xvii) Sinkhole swamp.
- (xviii) Wet floodplain forest.
- (xix) Wet prairie.
- (xx) Wet sand prairie.

(b) For purposes of this section, a wetland or setting is not considered disturbed or affected as a result of an action taken after January 1, 2004, for which a permit is required under IC 13-18-22 but has not been obtained.

SEA 389 — Concur



SECTION 2. IC 13-11-2-48.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 48.5. (a) "Cropland", for purposes of IC 13-18-22-1(d), means farmland:**

- (1) that is cultivated for agricultural purposes; and
- (2) from which crops are harvested.

**(b) The term includes:**

- (1) orchards;
- (2) farmland used to produce row crops, close-grown crops, or cultivated hay; and
- (3) farmland intentionally kept out of production during a regular growing season (summer fallow).

**(c) The term does not include pasture land unless the pasture land is in active rotation with cultivated crops for purposes of soil maintenance or improvement.**

SECTION 3. IC 13-11-2-72.4 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 72.4. "Ephemeral stream", for purposes of IC 13-18-22-1(b)(6), means surface water flowing or pooling only in direct response to precipitation such as rain or snowfall.**

SECTION 4. IC 13-11-2-74.5, AS AMENDED BY P.L.113-2014, SECTION 47, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 74.5. (a) "Exempt isolated wetland", for purposes of IC 13-18 and environmental management laws, means an isolated wetland that:**

- (1) is a voluntarily created wetland unless:
  - (A) the wetland is approved by the department for compensatory mitigation purposes in accordance with a permit issued under Section 404 of the Clean Water Act or IC 13-18-22;
  - (B) the wetland is reclassified as a state regulated wetland under IC 13-18-22-6(e); or
  - (C) the owner of the wetland declares, by a written instrument:
    - (i) recorded in the office of the recorder of the county or counties in which the wetland is located; and
    - (ii) filed with the department;that the wetland is to be considered in all respects to be a state regulated wetland;
- (2) exists as an incidental feature in or on:
  - (A) a residential lawn;
  - (B) a lawn or landscaped area of a commercial or



- governmental complex;
- (C) agricultural land;
- (D) a roadside ditch;
- (E) an irrigation ditch; or
- (F) a manmade drainage control structure;
- (3) is a fringe wetland associated with a private pond;
- (4) is, or is associated with, a manmade body of surface water of any size created by:
  - (A) excavating;
  - (B) diking; or
  - (C) excavating and diking;dry land to collect and retain water for or incidental to agricultural, commercial, industrial, or aesthetic purposes;
- (5) ~~subject to subsection (c);~~ is a Class I wetland; ~~with an area, as delineated, of one-half (1/2) acre or less;~~
- (6) ~~subject to subsection (d);~~ **(c)**, is a Class II wetland with an area, as delineated, of ~~one-fourth (1/4)~~ **not more than three-eighths (3/8)** acre; ~~or less;~~
- (7) is located on land:
  - (A) subject to regulation under United States Department of Agriculture wetland conservation programs, including Swampbuster and the Wetlands Reserve Program, because of voluntary enrollment in a federal farm program; and
  - (B) used for agricultural or other purposes allowed under the programs referred to in clause (A); or
- (8) is constructed for reduction or control of pollution.
- (b) For purposes of subsection (a)(2), an isolated wetland exists as an incidental feature:
  - (1) if:
    - (A) the owner or operator of the property or facility described in subsection (a)(2) does not intend the isolated wetland to be a wetland;
    - (B) the isolated wetland is not essential to the function or use of the property or facility; and
    - (C) the isolated wetland arises spontaneously as a result of damp soil conditions incidental to the function or use of the property or facility; and
  - (2) if the isolated wetland satisfies any other factors or criteria established in rules that are:
    - (A) adopted by the board; and
    - (B) not inconsistent with the factors and criteria described in subdivision (1).





(c) The total acreage of Class I wetlands on a tract to which the exemption described in subsection (a)(5) may apply is limited to the larger of:

- (1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(5); and
- (2) fifty percent (50%) of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(5) but for the limitation of this subsection.

~~(d)~~ (c) The total acreage of Class II wetlands on a tract to which the exemption described in subsection (a)(6) may apply is limited to the larger of:

- (1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(6); and
- (2) ~~thirty-three and one-third percent (33 1/3%)~~ **sixty percent (60%)** of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(6) but for the limitation of this subsection.

~~(e)~~ (d) An isolated wetland described in subsection (a)(5) or (a)(6) does not include an isolated wetland on a tract that contains more than one (1) of the same class of wetland until the owner of the tract notifies the department that the owner has selected the isolated wetland to be an exempt isolated wetland under subsection (a)(5) or (a)(6). ~~consistent with the applicable limitations described in subsections (e) and (d).~~

SECTION 5. IC 13-11-2-104.8 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 104.8. "In lieu fee", for purposes of 13-18-22-6, means a fee that:**

- (1) is paid pursuant to:
  - (A) the department of natural resources stream and wetland mitigation program; or
  - (B) another in lieu fee mitigation program;
- (2) is paid to:
  - (A) the state government; or
  - (B) the Indiana natural resources foundation created by IC 14-12-1-4; and
- (3) is applied toward the cost of:
  - (A) restoring, establishing, enhancing, or preserving aquatic resources in compensation for the alteration of



**other aquatic resources; and**

**(B) monitoring and providing long term management of the site where aquatic resources are restored, established, enhanced, or preserved with money provided by the fee.**

SECTION 6. IC 13-11-2-265.8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 265.8. "~~Wetlands delineation~~" or "~~delineation~~", For purposes of ~~section 74.5~~ of this chapter **and IC 13-18-22:**

**(1) "wetlands delineation" or "delineation"** means a technical assessment:

(1) **(A)** of whether a wetland exists on an area of land; and  
 (2) **(B)** if so, of the type and quality of the wetland based on the presence or absence of wetlands characteristics, as determined consistently with the Wetlands Delineation Manual, Technical Report Y-87-1 of the United States Army Corps of Engineers; **and**

**(2) "delineated" describes property that has undergone wetlands delineation.**

SECTION 7. IC 13-18-22-1, AS AMENDED BY P.L.166-2020, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1. (a) Except as provided in subsection (b), a person proposing a wetland activity in a state regulated wetland must obtain a permit under this chapter to authorize the wetland activity.

(b) A permit is not required for the following wetland activities:

(1) The discharge of dirt, sand, rock, stone, concrete, or other inert fill materials in a de minimis amount.

(2) A wetland activity at a surface coal mine for which the department of natural resources has approved a plan to:

(A) minimize, to the extent practical using best technology currently available, disturbances and adverse effects on fish and wildlife;

(B) otherwise effectuate environmental values; and

(C) enhance those values where practicable.

(3) Any activity listed under Section 404(f) of the Clean Water Act, including:

(A) normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters,



causeways, and bridge abutments or approaches, and transportation structures;

(C) construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) construction of temporary sedimentation basins on a construction site that does not include placement of fill material into the navigable waters; and

(E) construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where the roads are constructed and maintained, in accordance with best management practices, to assure that:

- (i) flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired;
- (ii) the reach of the navigable waters is not reduced; and
- (iii) any adverse effect on the aquatic environment will be otherwise minimized.

(4) The maintenance or reconstruction (as defined in IC 36-9-27-2) of a regulated drain in accordance with IC 36-9-27-29(2) as long as the work takes place within the current easement, and the reconstruction does not substantially change the characteristics of the drain to perform the function for which it was designed and constructed.

**(5) Wetland activities in an exempt isolated wetland, as defined in IC 13-11-2-74.5.**

**(6) Dredge and fill activities in an ephemeral stream, as defined in IC 13-11-2-72.4.**

**(7) Dredge and fill activities in a Class II wetland that:**

- (A) is located within the boundaries of a municipality; and**
- (B) has an area, as delineated, of not more than three-fourths (3/4) acre.**

(e) The goal of the permitting program for wetland activities in state regulated wetlands is to:

- (1) promote a net gain in high quality isolated wetlands; and
- (2) assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program.

**(c) If a conflict arises between:**

- (1) the provision in subsection (b)(7) under which dredge and fill activities in a Class II wetland with an area, as delineated, of not more than three-fourths (3/4) acre do not require a permit; and**
- (2) the provision in section 3(a) of this chapter under which a wetland activity in a Class II wetland with an area, as**



delineated, of more than three-eighths (3/8) acre require an individual permit;  
the exemption in subsection (b)(7) controls.

(d) The development of cropland, as defined in IC 13-11-2-48.5, does not require a permit under this chapter if the cropland has been used for agricultural purposes:

- (1) in the five (5) years immediately preceding the development; or
- (2) in the ten (10) years immediately preceding the development, if the United States Army Corps of Engineers has issued a jurisdictional determination confirming that the cropland does not contain wetlands subject to federal jurisdiction under Section 404 of the Clean Water Act.

After receiving a jurisdictional determination described in subdivision (2) from the United States Army Corps of Engineers, the department shall notify the person proposing the wetland activity that the development of the cropland used for agricultural purposes in the immediately preceding ten (10) years is exempt from the permit requirement of subsection (a) under subdivision (2).

SECTION 8. IC 13-18-22-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3. (a) ~~The following shall be authorized by an individual permit: is required to authorize~~

- (1) ~~Wetland activity in a Class II wetland with an area, as delineated, of more than three-eighths (3/8) acre. This subdivision does not apply to the maintenance of a field tile within a Class II wetland under section 4(a)(1).~~
- (2) ~~A Wetland activity in a Class III wetland.~~

~~(b) Except as provided in section 4(a) of this chapter, an individual permit is required to authorize a wetland activity in a Class II wetland.~~

~~(c) (b) The board shall adopt rules under IC 4-22-2 and IC 13-14 not later than June 1, 2005, to govern the issuance of individual permits by the department under subsections subsection (a). and (b).~~

SECTION 9. IC 13-18-22-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 4. (a) ~~Wetland activities with minimal impact in Class I wetlands and Class II wetlands, including the activities analogous to those allowed under the nationwide permit program (as published in 67 Fed. Reg. 2077-2089 (2002)); shall be authorized by a general permit rule. The following shall be authorized by a general permit:~~

- ~~(b) (1) Wetland activities in Class I wetlands shall be authorized by a general permit rule. The maintenance of a field tile within~~



a Class II wetland. However, the maintenance described in this subdivision may be authorized only if the field tile:

(A) is necessary to restore drainage of land adjacent to the wetland; and

(B) does not have the effect of draining the wetland.

(2) The maintenance of a field tile within a Class III wetland. However, the maintenance described in this subdivision may be authorized only if:

(A) the maintenance of the field tile:

(i) is necessary to restore drainage of land adjacent to the wetland; and

(ii) does not have the effect of draining the wetland; and

(B) the applicant obtains a site-specific approval for the maintenance of the field tile under section 12 of this chapter.

(b) The maintenance of a field tile in a Class I wetland does not require a permit.

(c) The board shall adopt rules under IC 4-22-2 and IC 13-14 not later than February 1, 2005, to establish and implement the general permits described in subsections subsection (a). and (b).

SECTION 10. IC 13-18-22-6, AS AMENDED BY P.L.147-2015, SECTION 12, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 6. (a) Except as otherwise specified in subsections (b) and (c), compensatory mitigation shall be provided in accordance with the following table:

Wetland Class	Replacement Class	On-site and In-lieu Fee Ratio	Off-site Ratio
Class I	Class II or III	1 to 1	1 to 1
Class I	Class I	1.5 to 1	1.5 to 1
Class II	Class II or III	1.5 to 1	2 to 1
		Nonforested	Nonforested
		2 to 1	2.5 to 1
		Forested	Forested
Class III	Class III	2 to 1	2.5 to 1
		Nonforested	Nonforested
		2.5 to 1	3 to 1
		Forested	Forested

(b) The compensatory mitigation ratio shall be lowered to one to one (1:1) if the compensatory mitigation is completed before the initiation of the wetland activity.

(c) A wetland that is created or restored as a water of the United



States may be used, as an alternative to the creation or restoration of an isolated wetland, as compensatory mitigation for purposes of this section. The replacement class of a wetland that is a water of the United States shall be determined by applying the characteristics of a Class I, Class II, or Class III wetland, as appropriate, to the replacement wetland as if it were an isolated wetland.

(d) The off-site location of compensatory mitigation must be:

(1) within:

(A) the same eight (8) digit U.S. Geological Service hydrologic unit code; or

(B) the same county;

as the isolated wetlands subject to the authorized wetland activity; or

(2) within a designated service area established in an in lieu fee mitigation program approved by the United States Army Corps of Engineers.

(e) Exempt isolated wetlands may be used to provide compensatory mitigation for wetlands activities in state regulated wetlands. An exempt isolated wetland that is used to provide compensatory mitigation becomes a state regulated wetland.

SECTION 11. IC 13-18-22-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 7. (a) The department shall:

(1) administer the permit programs established by this chapter; and

(2) review and issue decisions on applications for permits to undertake wetland activities in state regulated wetlands in accordance with the rules issued by the board under this chapter.

~~(b) Before the adoption of rules by the board under this chapter, the department shall:~~

~~(1) issue individual permits under this chapter consistent with the general purpose of this chapter; and~~

~~(2) for wetland activities in Class I wetlands, issue permits under this subsection:~~

~~(A) that are simple, streamlined, and uniform;~~

~~(B) that do not require development of site specific provisions; and~~

~~(C) promptly upon submission by the applicant to the department of a notice of registration for a permit.~~

~~(e) (b) Not later than June 1, 2004, The department shall make available to the public (1) a form for use in applying for a permit under subsection (b)(1); and (2) a form for use in submitting a notice of~~

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registration for a permit to undertake a wetland activity in a Class I wetland under subsection (b)(2): **this chapter.**

SECTION 12. IC 13-18-22-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 8. (a) Subject to subsection (f), the department shall make a decision to issue or deny an individual permit under section 3 ~~or 7(b)(1)~~ of this chapter not later than ~~one hundred twenty (120)~~ **ninety (90)** days after receipt of the completed application. If the department fails to make a decision on a permit application by the deadline under this subsection or subsection ~~(f); (d)~~, a permit is considered to have been issued by the department in accordance with the application.

(b) A general permit under section 4 of this chapter becomes effective with respect to a proposed wetland activity that is within the scope of the general permit on the thirty-first day after the department receives a notice of intent from the person proposing the wetland activity that the wetland activity be authorized under the general permit.

~~(e)~~ Except as provided in subsection ~~(d)~~, a permit to undertake a wetland activity in a Class I wetland under section 7(b)(2) of this chapter is considered to have been issued to an applicant on the thirty-first day after the department receives a notice of registration submitted under section 7(b)(2) of this chapter if the department has not previously authorized the wetland activity.

~~(d)~~ The department may deny a registration for a permit for cause under subsection ~~(e)~~ before the period specified in subsection ~~(e)~~ expires:

~~(e)~~ **(c)** The department must support a denial under subsection (a) ~~or (d)~~ by a written statement of reasons.

~~(f)~~ **(d)** The department may notify the applicant that the completed application referred to in subsection (a) is deficient. If the department fails to give notice to the applicant under this subsection not later than fifteen (15) days after the department's receipt of the completed application, the application is considered not to have been deficient. After receipt of a notice under this subsection, the applicant may submit an amended application that corrects the deficiency. The department shall make a decision to issue or deny an individual permit under the amended application within a period that ends a number of days after the date the department receives the amended application equal to the remainder of:

- (1) ~~one hundred twenty (120)~~ **ninety (90)** days; minus
- (2) the number of days the department held the initial application before giving a notice of deficiency under this subsection.

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SECTION 13. IC 13-18-22-12 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 12. (a) A person seeking to engage in maintenance of a field tile within a Class III wetland under section 4(a)(2) of this chapter may apply to the department for a site-specific approval for the activity in accordance with this section and the rules adopted under section 4(c) of this chapter.**

**(b) An applicant for a site-specific approval under this section must provide information to the department on the need to perform the activity described in subsection (a), including the following:**

- (1) Information showing the location and area needed to be disturbed within the Class III wetland.**
- (2) Lack of reasonable alternatives to the disturbance of the area referred to in subdivision (1).**

SECTION 14. IC 13-18-23-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 1. (a) The department shall do the following:**

- (1) Make a final determination on an application for a certification under Section 401 of the Clean Water Act not later than ~~one hundred twenty (120)~~ ninety (90) days after its receipt of a complete application and if the applicant meets the condition set forth in subsection (b).**
- (2) Include in its notice of the final determination to the applicant a statement of reasons for the final determination.**

**(b) At least thirty (30) days before submitting an application under this section, an applicant must contact the department to request a pre-coordination meeting.**

**(c) A failure by the department to act within the period specified in make a final determination not later than ninety (90) days after receiving a complete application, if required under subsection (a)(1), constitutes a waiver of the certification.**

SECTION 15. IC 14-12-4 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

**Chapter 4. Indiana Wetlands Task Force**

**Sec. 1. As used in this chapter, "isolated wetland" means a wetland that:**

- (1) is located in Indiana; but**
- (2) is not subject to regulation under Section 404(a) of the federal Clean Water Act.**

**Sec. 2. As used in this chapter, "task force" refers to the Indiana**





wetlands task force established by section 3 of this chapter.

**Sec. 3. (a) There is established the Indiana wetlands task force. Subject so subsection (c), the task force consists of the following fourteen (14) members:**

**(1) One (1) individual appointed by the governor as chairperson of the task force.**

**(2) One (1) individual who is a representative of Ducks Unlimited.**

**(3) One (1) individual who is a representative of the Indiana Builders Association.**

**(4) One (1) individual who is a representative of Accelerate Indiana Municipalities.**

**(5) One (1) individual who is a representative of the Indiana Farm Bureau.**

**(6) One (1) individual who is a representative of the White River Alliance.**

**(7) One (1) individual who is a representative of the Indiana Society of Professional Land Surveyors and has expertise in regulated drains.**

**(8) One (1) individual who is a representative of the department of environmental management and has expertise in wetlands.**

**(9) One (1) individual who is a representative of the Purdue University Center for the Environment.**

**(10) One (1) individual who is a representative of the Kankakee River basin and Yellow River basin development commission established by IC 14-13-9.**

**(11) One (1) individual who is a representative of the St. Joseph River Basin Commission established by IC 14-30-3.**

**(12) One (1) individual who is a representative of the Indiana Association of Soil and Water Conservation Districts.**

**(13) One (1) individual who is a professional wetland delineator.**

**(14) One (1) individual appointed by the director of the department of natural resources who is:**

**(A) employed as a biologist or hydrologist for the department; and**

**(B) a wetland expert.**

**(b) The governor shall appoint the members described in subsection (a)(2) through (a)(13).**

**(c) Each organization or entity identified in subsection (a)(2) through (a)(12) must provide to the governor the name of at least**



one (1) individual who represents the organization or entity as a candidate for appointment to the task force. If an organization or entity does not, before June 1, 2021, provide to the governor the name of at least one (1) candidate for appointment, the governor may appoint to the task force an individual who is not a representative of the organization or entity in place of a representative of the organization or entity.

(d) A vacancy in a position on the task force shall be filled by the appointment of a replacement member by the appointing authority identified for the task force position in section 3(a) of this chapter.

Sec. 4. (a) The task force shall research and develop recommendations on the following:

(1) Strategies to mitigate the costs incurred by builders to comply with the state regulation of wetland activity under IC 13-18-22 while maintaining the integrity of those environmental safeguards.

(2) The flood reduction benefits of isolated wetlands, including the use of isolated wetlands to aid in quantifying flood risk mitigation.

(3) The role of isolated wetlands in storing carbon dioxide and how to strengthen the carbon markets in Indiana.

(4) Strategies to incentivize the avoidance of isolated wetland impact during development.

(5) Strategies to incentivize the preservation of existing isolated wetlands.

(6) Improvements to the isolated wetland permitting process under IC 13-18-22.

(b) The task force shall also do the following:

(1) Review existing state isolated wetland classifications and recommend new isolated wetland classifications and nomenclature that are in alignment with those used by the United States Army Corps of Engineers.

(2) Review the current mitigation ratios set forth in IC 13-18-22-6 and provide recommendations to:

(A) improve the methodology used in applying those mitigation ratios; and

(B) possibly better align those mitigation ratios with the mitigation ratio determination methods used by the United States Army Corps of Engineers.

(3) Review the current "in lieu of" compensatory mitigation program and make recommendations on how to reduce the costs and improve the transparency of that program.



(4) Study and make recommendations concerning any other wetland related issues that the task force determines should be addressed by the general assembly.

**Sec. 5.** The department of natural resources shall provide staff support to the task force.

**Sec. 6.** The task force shall meet at the call of the chairperson.

**Sec. 7. (a)** A member of the task force who is not a state employee:

(1) is not entitled to the minimum salary per diem provided by IC 4-10-11-2.1(b); but

(2) is entitled to reimbursement for traveling expenses as provided under IC 4-13-1-4 and other expenses actually incurred in connection with the member's duties as provided in the state policies and procedures established by the Indiana department of administration and approved by the budget agency.

(b) A member of the task force who is a state employee is entitled to reimbursement for traveling expenses as provided under IC 4-13-1-4 and other expenses actually incurred in connection with the member's duties as provided in the state policies and procedures established by the Indiana department of administration and approved by the budget agency.

**Sec. 8. (a)** The members of the task force appointed under section 3(a)(2) through 3(a)(14) of this chapter are voting members.

(b) The chairperson appointed under section 3(a)(1) of this chapter is authorized to vote only when voting by the members of the task force appointed under section 3(a)(2) through 3(a)(14) of this chapter results in a tie vote.

(c) The affirmative votes of a majority of the members of the task force are required for the task force to take action on any measure, including the report required by section 9 of this chapter.

**Sec. 9.** The task force shall:

(1) issue a report setting forth the recommendations required or authorized by section 4 of this chapter; and

(2) not later than November 1, 2022, submit the report to the following:

(A) The executive director of the legislative services agency for distribution to the members of the general assembly.

The report submitted to the executive director of the legislative services agency under this clause must be in an electronic format under IC 5-14-6.



**(B) The governor.**

**(C) The commissioner of the department of environmental management.**

**Sec. 10. This chapter expires December 31, 2022.**

**SECTION 16. An emergency is declared for this act.**



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President of the Senate

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President Pro Tempore

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Speaker of the House of Representatives

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Governor of the State of Indiana

Date: \_\_\_\_\_ Time: \_\_\_\_\_

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WITNESS	ORGANIZATION	TESTIFYING AS	DOCUMENT
State Representative Brett H Hillyer	Ohio House of Representative	Proponent	<a href="#">Download</a>

COMMITTEE	DATE	STATUS	BILL TEXT
Agriculture and Conservation	May 4, 2021	2nd Hearing	<a href="#">Download</a>

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 Reggie Stoltzfus  
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WITNESS	ORGANIZATION	TESTIFYING AS	DOCUMENT
Dr. Richard Warner	University of Kentucky	Proponent	<a href="#">Download</a>

Keith B. Kimble	-	Proponent	<a href="#">Download</a>
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Kristin L. Watt	Vorys, Sater, Seymour and Pease LLP	Proponent	<a href="#">Download</a>
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Patrick Jacomet	Ohio Aggregates & Industrial Minerals Association	Proponent	<a href="#">Download</a>
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Andrea Ashley	Associated General Contractors of Ohio	Proponent	<a href="#">Download</a>
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Daniel J. Dew	Pacific Legal Foundation	Proponent	<a href="#">Download</a>
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Kent Scarrett	Ohio Municipal League	Proponent	<a href="#">Download</a>
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Vince Squillace	Ohio Home Builders Association	Proponent	<a href="#">Download</a>
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Stephanie Kromer	Ohio Chamber of Commerce	Proponent	<a href="#">Download</a>
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Chris Ventura	Consumer Energy	Proponent	<a href="#">Download</a>
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COMMITTEE	DATE	STATUS	BILL TEXT
Agriculture and Conservation	May 25, 2021	4th Hearing	Download

WITNESS	ORGANIZATION	TESTIFYING AS	DOCUMENT
Andrew J. Geisler	The Buckeye Institute	Interested Party	Download
Bill Acton	NAIOP Ohio	Interested Party	Download
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Dana Ohman	The Nature Conservancy Ohio	Opponent	Download
Jennifer Fish	Franklin Soil and Water	Opponent	Download



		Metropolitan Wastewater Agencies (AOMWA)		
	Kathleen Mathews	Mud Run Conservancy	Opponent	<a href="#">Download</a>
	Robert Michaels	Environmental Law and Policy Center	Opponent	<a href="#">Download</a>
	Nathan D. Vaughan	Steele Hill Properties II, LLC and RHDK Investments, LLC	Proponent	<a href="#">Download</a>

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**As Introduced**

**134th General Assembly**

**Regular Session**

**2021-2022**

**H. B. No. 175**

**Representative Hillyer**

**Cosponsors: Representatives Seitz, Stoltzfus, Kick, Young, T.**

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**A BILL**

To amend sections 3745.114 and 6111.01 of the  
Revised Code to deregulate certain ephemeral  
water features under various water pollution  
control laws.

**BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:**

**Section 1.** That sections 3745.114 and 6111.01 of the  
Revised Code be amended to read as follows:

**Sec. 3745.114.** (A) A person that applies for a section 401  
water quality certification under Chapter 6111. of the Revised  
Code and rules adopted under it shall pay an application fee of  
two hundred dollars at the time of application plus any of the  
following fees, as applicable:

(1) If the water resource to be impacted is a wetland, a  
review fee of five hundred dollars per acre of wetland to be  
impacted;

(2) If the water resource to be impacted is a stream one  
of the following fees, as applicable:

(a) ~~For an ephemeral stream, a review fee of five dollars~~

~~per linear foot of stream to be impacted, or two hundred  
dollars, whichever is greater;~~ 18  
19

~~(b)~~ For an intermittent stream, a review fee of ten 20  
dollars per linear foot of stream to be impacted, or two hundred 21  
dollars, whichever is greater; 22

~~(e)~~ (b) For a perennial stream, a review fee of fifteen 23  
dollars per linear foot of stream to be impacted, or two hundred 24  
dollars, whichever is greater. 25

(3) If the water resource to be impacted is a lake, a 26  
review fee of three dollars per cubic yard of dredged or fill 27  
material to be moved. 28

(B) One-half of all applicable review fees levied under 29  
this section shall be due at the time of application for a 30  
section 401 water quality certification. The remainder of the 31  
fees shall be paid upon the final disposition of the application 32  
for a section 401 water quality certification. The total fee to 33  
be paid under this section shall not exceed twenty-five thousand 34  
dollars per application. However, if the applicant is a county, 35  
township, or municipal corporation in this state, the total fee 36  
to be paid shall not exceed five thousand dollars per 37  
application. 38

(C) All money collected under this section shall be 39  
transmitted to the treasurer of state for deposit into the state 40  
treasury to the credit of the surface water protection fund 41  
created in section 6111.038 of the Revised Code. 42

(D) The fees established under this section do not apply 43  
to any state agency as defined in section 119.01 of the Revised 44  
Code or to the United States army corps of engineers. 45

(E) The fees established under this section do not apply 46

to projects that are authorized by the environmental protection 47  
agency's general certifications of nationwide permits or general 48  
permits issued by the United States army corps of engineers. As 49  
used in this division, "general permit" and "nationwide permit" 50  
have the same meanings as in rules adopted under Chapter 6111. 51  
of the Revised Code. 52

(F) Coal mining and reclamation operations that are 53  
authorized under Chapter 1513. of the Revised Code are exempt 54  
from the fees established under this section for one year after 55  
~~the effective date of this amendment~~ March 30, 2006. 56

(G) As used in this section: 57

(1) "Ephemeral streamfeature" means ~~a stream that flows~~ 58  
surface water flowing or pooling only in direct response to 59  
~~precipitation in the immediate watershed or in response to the~~ 60  
~~melting of a cover of, such as rain or snow and ice and that has~~ 61  
~~channel bottom that is always above the local water table.~~ 62

(2) "Intermittent stream" means a stream that is below the 63  
local water table and flows for at least a part of each year and 64  
that obtains its flow from both surface runoff and ground water 65  
discharge. 66

(3) "Perennial stream" means a stream or a part of a 67  
stream that flows continuously during all of the calendar year 68  
as a result of ground water discharge or surface water runoff. 69  
"Perennial stream" does not include an intermittent stream or an 70  
ephemeral streamfeature. 71

**Sec. 6111.01.** As used in this chapter: 72

(A) "Pollution" means the placing of any sewage, sludge, 73  
sludge materials, industrial waste, or other wastes in any 74  
waters of the state. 75

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(B) "Sewage" means any liquid waste containing sludge, 76  
sludge materials, or animal or vegetable matter in suspension or 77  
solution, and may include household wastes as commonly 78  
discharged from residences and from commercial, institutional, 79  
or similar facilities. 80

(C) "Industrial waste" means any liquid, gaseous, or solid 81  
waste substance resulting from any process of industry, 82  
manufacture, trade, or business, or from the development, 83  
processing, or recovery of any natural resource, together with 84  
such sewage as is present. 85

(D) "Other wastes" means garbage, refuse, decayed wood, 86  
sawdust, shavings, bark, and other wood debris, lime, sand, 87  
ashes, offal, night soil, oil, tar, coal dust, dredged or fill 88  
material, or silt, other substances that are not sewage, sludge, 89  
sludge materials, or industrial waste, and any other 90  
"pollutants" or "toxic pollutants" as defined in the Federal 91  
Water Pollution Control Act that are not sewage, sludge, sludge 92  
materials, or industrial waste. 93

(E) "Sewerage system" means pipelines or conduits, pumping 94  
stations, and force mains, and all other constructions, devices, 95  
appurtenances, and facilities used for collecting or conducting 96  
water-borne sewage, industrial waste, or other wastes to a point 97  
of disposal or treatment, but does not include plumbing 98  
fixtures, building drains and subdrains, building sewers, and 99  
building storm sewers. 100

(F) "Treatment works" means any plant, disposal field, 101  
lagoon, dam, pumping station, building sewer connected directly 102  
to treatment works, incinerator, or other works used for the 103  
purpose of treating, stabilizing, blending, composting, or 104  
holding sewage, sludge, sludge materials, industrial waste, or 105

other wastes, except as otherwise defined. 106

(G) "Disposal system" means a system for disposing of 107  
sewage, sludge, sludge materials, industrial waste, or other 108  
wastes and includes sewerage systems and treatment works. 109

(H) "Waters of the state" means all streams, lakes, ponds, 110  
marshes, watercourses, waterways, wells, springs, irrigation 111  
systems, drainage systems, and other bodies or accumulations of 112  
water, surface and underground, natural or artificial, 113  
regardless of the depth of the strata in which underground water 114  
is located, that are situated wholly or partly within, or border 115  
upon, this state, or are within its jurisdiction, except those 116  
private waters that do not combine or effect a junction with 117  
natural surface or underground waters. "Waters of the state" 118  
does not include an ephemeral feature. 119

(I) "Person" means the state, any municipal corporation, 120  
any other political subdivision of the state, any person as 121  
defined in section 1.59 of the Revised Code, any interstate body 122  
created by compact, or the federal government or any department, 123  
agency, or instrumentality thereof. 124

(J) "Industrial water pollution control facility" means 125  
any disposal system or any treatment works, pretreatment works, 126  
appliance, equipment, machinery, pipeline or conduit, pumping 127  
station, force main, or installation constructed, used, or 128  
placed in operation primarily for the purpose of collecting or 129  
conducting industrial waste to a point of disposal or treatment; 130  
reducing, controlling, or eliminating water pollution caused by 131  
industrial waste; or reducing, controlling, or eliminating the 132  
discharge into a disposal system of industrial waste or what 133  
would be industrial waste if discharged into the waters of the 134  
state. 135



(K) "Schedule of compliance" means a schedule of remedial 136  
measures including an enforceable sequence of actions or 137  
operations leading to compliance with standards and rules 138  
adopted under sections 6111.041 and 6111.042 of the Revised Code 139  
or compliance with terms and conditions of permits set under 140  
division (J) of section 6111.03 of the Revised Code. 141

(L) "Federal Water Pollution Control Act" means the 142  
"Federal Water Pollution Control Act Amendments of 1972," 86 143  
Stat. 886, 33 U.S.C.A. 1251, as amended by the "Clean Water Act 144  
of 1977," 91 Stat. 1566, 33 U.S.C.A. 1251, and all other 145  
amendments to that act. 146

(M) "Historically channelized watercourse" means the 147  
portion of a watercourse on which an improvement, as defined in 148  
divisions (C)(2) to (4) of section 6131.01 of the Revised Code, 149  
was constructed pursuant to Chapter 940., 6131., or 6133. of the 150  
Revised Code or a similar state law that preceded any of those 151  
chapters and authorized such an improvement. 152

(N) "Sludge" means sewage sludge and a solid, semi-solid, 153  
or liquid residue that is generated from an industrial 154  
wastewater treatment process and that is applied to land for 155  
agronomic benefit. "Sludge" does not include ash generated 156  
during the firing of sludge in a sludge incinerator, grit and 157  
screening generated during preliminary treatment of sewage in a 158  
treatment works, animal manure, residue generated during 159  
treatment of animal manure, or domestic septage. 160

(O) "Sludge materials" means solid, semi-solid, or liquid 161  
materials derived from sludge and includes products from a 162  
treatment works that result from the treatment, blending, or 163  
composting of sludge. 164

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(P) "Storage of sludge" means the placement of sludge on land on which the sludge remains for not longer than two years, but does not include the placement of sludge on land for treatment.

(Q) "Sludge disposal program" means any program used by an entity that begins with the generation of sludge and includes treatment or disposal of the sludge, as "treatment" and "disposal" are defined in division (Y) of section 3745.11 of the Revised Code.

(R) "Agronomic benefit" means any process that promotes or enhances plant growth and includes, but is not limited to, a process that increases soil fertility and moisture retention.

(S) "Sludge management" means the use, storage, treatment, or disposal of, and management practices related to, sludge and sludge materials.

(T) "Sludge management permit" means a permit for sludge management that is issued under division (J) of section 6111.03 of the Revised Code.

(U) "Sewage sludge" has the same meaning as in division (Y) of section 3745.11 of the Revised Code.

(V) "Ephemeral feature" means surface water flowing or pooling only in direct response to precipitation, such as rain or snow.

**Section 2.** That existing sections 3745.114 and 6111.01 of the Revised Code are hereby repealed.

Estrin Ex. 8

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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

MARY FRANCES REPKO, DEMOCRATIC STAFF DIRECTOR  
ADAM TOMLINSON, REPUBLICAN STAFF DIRECTOR

June 21, 2021

The Honorable Michael S. Regan  
Administrator  
US Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

Mr. Jaime A. Pinkham  
Acting Assistant Secretary of the Army  
for Civil Works  
US Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0108

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

We were very disappointed to learn of the decision made public on June 9, 2021 by the Environmental Protection Agency and the US Army Corps of Engineers (Corps) to repeal and replace the 2020 Navigable Waters Protection Rule (NWPR).<sup>1</sup> The NWPR provides clarity, predictability, and consistency in application of the Clean Water Act (CWA). The NWPR also clearly delineates where federal regulations apply and gives states and local authorities more flexibility to determine how to best manage waters and protect the environment within their borders.

After the Administration’s continued commitments to transparency, engagement, and communication with stakeholders and Congress on this issue, the lack of transparency surrounding the decision to abandon this legally defensible and environmentally sound rule is disheartening.

On a briefing call provided to Congressional staff after the announcement, EPA and the Corps made a number of assertions to justify the decision to repeal and replace the NWPR. To date, the limited details provided to support those assertions has contributed to only greater uncertainty for Congress, the states, and regulated entities. EPA and the Corps stated the decision was based on “significant environmental damage” and “ongoing environmental harm” as well as “implementation challenges” and a reduction in findings of federal jurisdiction resulting from the NWPR. The agencies have not provided a complete analysis to back those assertions.

In order to understand the basis for this decision, we request the agencies produce the information relied upon. Please provide the following materials no later than July 5, 2021:

1. Details on, and the definitions of, the “significant environmental damage” and “ongoing environmental harm” EPA and the Corps cite in justifying this action, including the specific instances and locations of the purported “damage” or “harm” EPA and the Corps observed and documented due to the NWPR.

<sup>1</sup> The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (April 21, 2020).

2. Details on the “implementation challenges” EPA staff explicitly cited during the briefing call as a basis for repealing the NWPR, including the NWPR’s prior converted croplands exclusion, treatment of ditches, and treatment of inundated wetlands. Please identify which entities specifically—the agencies themselves, regulated communities, or others—have experienced and reported those challenges, as well as any environmental impacts occurring from those challenges.
3. The complete analysis conducted by the Corps and any supporting information, which reportedly found that there were 333 projects that did not require a permit under the NWPR that would have required a permit under the 2015 “Clean Water Rule: Definition of ‘Waters of the United States’” (2015 WOTUS Rule).
  - a. If not included in the analysis, please provide a list and details on the jurisdictional determinations of the waters in each of these projects, including the purported “damage” or “harm” EPA and the Corps observed and documented due to the NWPR.
  - b. If not included in the analysis, please provide a list and details on the alleged 75 percent of ephemeral streams that would have been jurisdictional under the 2015 WOTUS Rule are not jurisdictional under the NWPR, including the purported “damage” or “harm” EPA and the Corps observed and documented due to the NWPR.
4. Details on the process and standards by which EPA and the Corps will review any permitting decisions currently pending and submitted under the NWPR, as well as any future federal permitting decisions made before a potential replacement rule is in place.
5. Details and a timeline on the process to gather stakeholder input—including the types of stakeholders consulted—and all input that was provided or obtained in advance of the June 9<sup>th</sup> decision.
  - a. Please also describe your plans for future information gathering and stakeholder listening sessions going forward as you prepare the proposal to repeal the NWPR.

It is vital that the American public and their elected officials have confidence in the decisions and statements being made by EPA and the Corps, particularly on a rulemaking with such significant environmental, economic, and legal implications. This confidence can only be achieved through a transparent process, with sufficient information to understand the agencies’ scientific and legal rationales.

Thank you for your consideration and we look forward to your reply.

Sincerely,



Shelley Moore Capito  
Ranking Member



James M. Inhofe  
United States Senator



Kevin Cramer  
United States Senator



Cynthia Lummis  
United States Senator



Richard Shelby  
United States Senator



John Boozman  
United States Senator



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United States Senator



Dan Sullivan  
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