

On behalf of Waterkeeper Alliance, the undersigned U.S. Waterkeeper groups, and our respective tens of thousands of individual members and supporters, we respectfully urge you to take urgent action in response to the recent vacatur of the NWPR⁴ and fully restore and implement the Pre-2015 Regulatory Definition of “waters of the United States.”⁵ We also urge the agencies to focus substantial resources on urgently reviewing jurisdictional determinations made under the NWPR, halting projects that are polluting, dredging or filling “waters of the United States” that were rendered non-jurisdictional under the NWPR, and ensuring that all permitting and enforcement actions are implementing the Pre-2015 Regulatory Definition. The Pre-2015 Regulatory Definition was in effect for roughly four decades without ever being overturned by any court and protects the Nation’s waters consistent with the objective and text of the CWA, plain congressional intent, and binding Supreme Court and lower court precedent.

While we applaud the agencies’ decision to replace the NWPR and “restore the regulations defining ‘waters of the United States’ that were in place for decades until 2015,”⁶ we are extremely concerned that: (1) prior to the vacatur, the agencies’ intended to keep the harmful and unlawful NWPR in place during a potentially lengthy rulemaking process that will take place at some unknown point in the future, (2) the agencies’ indicate they intend to “update” the pre-2015 regulatory definition during the first rulemaking based on undisclosed views of only three of the relevant U.S. Supreme Court cases, and (3) the agencies may use portions of the 2015 “Clean Water Rule” or any part of the NWPR to redefine “waters of the United States” in a second rulemaking.

As we explain in detail herein, and as the U.S. District Court for the District of Arizona in *Pasqua Yaqui Tribe, et al., v. EPA*⁷ and the agencies have already determined,⁸ the NWPR is plagued with procedural and substantive legal error; is causing significant, actual environmental harm to the nation’s waters; and will continue to cause harm so long as it remains in place. The NWPR radically redefined “waters of the United States” under the CWA in a manner that is contrary to the objective of the CWA and the scientific information in the administrative record. It violates

⁴ On August 30, 2021, the court in *Pasqua Yaqui Tribe, et al., v. EPA*, 4:20-cv-00266, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021) vacated the NWPR, which had the effect of restoring the Pre-2015 Regulatory Definition. In the event the vacatur order is appealed or is found not to have nationwide effect, we urge the agencies to take action to immediately repeal the NWPR.

⁵ See, e.g., 40 C.F.R. § 122.2 (2015); 33 C.F.R. § 328.3 (2015) (hereinafter the “Pre-2015 Regulatory Definition”).

⁶ Notice, 86 Fed. Reg. at 41911.

⁷ The court vacated and remanded the rule based on “[t]he seriousness of the Agencies’ errors in enacting the NWPR, the likelihood that the Agencies will alter the NWPR’s definition of ‘waters of the United States,’ and the possibility of serious environmental harm if the NWPR remains in place . . .” *Pasqua Yaqui Tribe v. EPA*, at *5.

⁸ See, e.g., U.S. EPA, “News Releases from Headquarters > Water (OW) EPA, Army Announce Intent to Revise Definition of WOTUS,” (June 9, 2021) (“Press Release”) available at: <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>; EPA and Corps Request for Remand and Supporting Documentation, available at: <https://www.epa.gov/wotus/request-remand-and-supporting-documentation>.