



September 3, 2021

Via email to [ow-docket@epa.gov](mailto:ow-docket@epa.gov) and online submission to [www.regulations.gov](http://www.regulations.gov)

The Honorable Michael Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

The Honorable Jaime A. Pinkham  
Acting Assistant Secretary of the Army for  
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Department of the Army  
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Washington, DC 20310

Mr. John Goodin  
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U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
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Mr. Vance F. Stuart, III  
Acting Principal Deputy,  
Office of the Assistant Secretary of the  
Army for Civil Works  
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108 Army Pentagon  
Washington, DC 20310

**Re: Notice of Public Meetings Regarding “Waters of the United States”;  
Establishment of a Public Docket; Request for Recommendations –  
Docket ID No. EPA–HQ–OW–2021–0328**

Dear Administrator Regan, Acting Assistant Administrator Pinkham, Mr. Goodin, and Mr. Stuart:

Thank you for this opportunity to comment on the U.S. Environmental Protection Agency’s (“EPA”) and Department of the Army, Corps of Engineers, Department of Defense (“Corps”) (collectively, the “agencies”) public notice and solicitation of public feedback<sup>1</sup> on revising the definition of “waters of the United States” under the Clean Water Act (“CWA”)<sup>2</sup> and repealing the “Navigable Waters Protection Rule” definition finalized by the Trump administration on April 21, 2020 (the “NWPR”).<sup>3</sup>

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<sup>1</sup> Notice of Public Meetings Regarding “Waters of the United States”; Establishment of a Public Docket; Request for Recommendations,” 86 Fed. Reg. 41911 (Aug. 4, 2021) (hereinafter “Notice”).

<sup>2</sup> Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251, *et seq.*, commonly known as the Clean Water Act.

<sup>3</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.

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 NWPR<sup>4</sup> and fully restore and implement the Pre-2015 Regulatory Definition of “waters of the United States.”<sup>5</sup> 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,”<sup>6</sup> 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*<sup>7</sup> and the agencies have already determined,<sup>8</sup> 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

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<sup>4</sup> 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.

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

<sup>6</sup> Notice, 86 Fed. Reg. at 41911.

<sup>7</sup> 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.

<sup>8</sup> 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>.

the plain, unambiguous meaning of the CWA, and disrespects decades of binding U.S. Supreme Court and myriad other federal court precedents. The NWPR flies in the face of congressional intent; is harming public health, water quality, and wildlife; constitutes arbitrary and capricious agency action and an abuse of discretion; and is otherwise unlawful.<sup>9</sup>

The NWPR is particularly dangerous because it strips protections against uncontrolled industrial, municipal, agricultural, and other pollution discharges into many, and in some parts of the country, nearly all, rivers, streams, lakes, ponds, wetlands, and other waters. It has left vast swaths of the Nation's waters unprotected against dangerous pollution discharges and destructive dredging and filling that harm drinking water supplies, fisheries, and recreational waters, as well as people, endangered and threatened species, and the nation's vast, interconnected aquatic ecosystems that will be exposed to dangerous levels of pollution and destruction in both directly impacted and downstream waters. It irresponsibly impedes the ability of states, tribes, communities, and even of other federal agencies and EPA itself, to protect waters and ecosystems and the people and wildlife that depend on them across the country.

In sum, the NWPR is riddled with numerous very serious, material, environmentally destructive, and legally fatal errors that necessitate the agencies taking urgent, immediate action to restore and implement the longstanding protections provided by the Pre-2015 Regulatory Definition. It is imperative that the agencies take urgent action to restore and implement the Pre-2015 Regulatory Definition because, as the agencies have acknowledged, stakeholders across the country are reporting "destructive impacts to critical water bodies" from the NWPR and the agencies have determined that the NWPR "is leading to significant environmental degradation."<sup>10</sup>

The Pre-2015 Regulatory Definition is consistent with the CWA, will restore longstanding protections, and will immediately begin to address the significant, ongoing harms to the Nation's waters and the people, ecosystems, businesses, and endangered and threatened species that depend upon them. **The agencies must change their stated course and take action to immediately restore and urgently implement the Pre-2015 Regulatory Definition across the country.**

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<sup>9</sup> The NWPR narrows the CWA and limits state and federal authority to control pollution in violation of the Administrative Procedure Act ("APA"), CWA, Endangered Species Act ("ESA"), National Environmental Policy Act ("NEPA"), and United States Supreme Court precedent. Waterkeeper Alliance and multiple Waterkeeper groups are currently plaintiffs in legal challenges to the NWPR raising some or all of these claims. *See, e.g., Waterkeeper Alliance et al. v. Regan*, 3:18-CV-3521 (N.D. Ca. filed Dec. 22, 2020) (Waterkeeper Alliance, Humboldt Baykeeper, Monterey Coastkeeper, Lake Worth Waterkeeper; Missouri Confluence Waterkeeper, Rio Grande Waterkeeper, Russian Riverkeeper, Snake River Waterkeeper, Sound Rivers, Inc., and Upper Missouri Waterkeeper); *Puget Soundkeeper et al. v. EPA*, 2:20-CV-950 (W.D. Wash. filed June 22, 2020) (Puget Soundkeeper); *S.C. Coastal Conserv. League v. Regan*, 2:20-CV-1687 (D.S.C. filed April 29, 2020) (Charleston Waterkeeper, Chattahoochee Riverkeeper).

<sup>10</sup> Press Release, at 1.

## INTERESTS OF THE COMMENTING ORGANIZATIONS

Waterkeeper Alliance is a not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable, and swimmable. We are composed of approximately 350 Waterkeeper groups based in 48 countries on 6 continents, covering over 2.75 million square miles of watersheds. In the United States, Waterkeeper Alliance represents the interests of more than 170 U.S. Waterkeeper groups, all of their individual members and supporters, as well as the collective interests of more than 15,000 individual supporting members that live, work and recreate in or near waterways across the country—many of which are severely impaired by pollution.

The CWA is the bedrock of our collective work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of all of our members and supporters, as well as to protect people and communities that depend on clean water for drinking, sustenance fishing, recreation, their livelihoods, and their survival. Our work—in which we have answered Congress' call for “private attorneys general” to enforce and defend the CWA when regulators lack the willingness or resources to do so themselves—requires us to develop and maintain scientific, technical, and legal expertise on a broad range of water quality and quantity issues.

We understand and have seen first-hand how important a broad definition of the “waters of the United States” is to the functioning and effectiveness of the CWA in protecting and restoring water quality across the country. The NWPR: (1) Is substantively and procedurally arbitrary, capricious and contrary to law, (2) Illegally reduces jurisdiction over the nation's historically protected waters contrary to the CWA, and (3) Does not comply with the federal Administrative Procedure Act (“APA”),<sup>11</sup> National Environmental Policy Act (“NEPA”)<sup>12</sup> and the Endangered Species Act (“ESA”).<sup>13</sup> Restoring the Pre-2015 Regulatory Definition consistent with the CWA's plain meaning, objective, and intent, is critical to our collective work to protect public health and our nation's waterways from dangerous pollution.

Commenters and their members have substantial interests in clean water for drinking, recreation, fishing, economic growth, food production, and other beneficial uses. These interests have been, and will continue to be, injured by the NWPR if the agencies do not take urgent action to restore the longstanding protections provided by the Pre-2105 Regulatory Definition. We submit the following comments in response to the Notice, including previous comments on administrative

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<sup>11</sup> Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

<sup>12</sup> National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

<sup>13</sup> Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

actions relating to the regulatory definition of “waters of the United States” which we hereby incorporate by reference herein.<sup>14</sup>

## INTRODUCTION

In the Notice, the agencies state “[i]n conformance with Executive Order 13990, the agencies reviewed the NWPR and have decided to initiate two new rulemakings,” in part because they “have substantial and legitimate concerns that the NWPR did not appropriately consider the effect of the revised definition of ‘waters of the United States’ on the integrity of the nation’s waters.”<sup>15</sup>

It would be difficult to overstate the critical importance of the CWA regulatory definition of “waters of the United States” to the protection of human health, the wellbeing of communities, the success of local, state and national economies, and the functioning of our nation’s vast, interconnected aquatic ecosystems, as well as the many threatened and endangered species that depend upon those resources. If a stream, river, lake, or wetland is not included in the definition of “waters of the United States,” untreated toxic, biological, chemical, and radiological pollution can be discharged directly into those waters without meeting any of the CWA’s permitting and treatment requirements.<sup>16</sup>

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<sup>14</sup> Natural Resource Defense Council *et al.*, Comments on Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007), Docket ID No. EPA-HQ-OW-2007-0282 (Jan. 21, 2008) (“2007 Comments”); Natural Resource Defense Council *et al.*, Comments on 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, Docket ID No. EPA-HQ-OW-2011-0409, (Aug. 1, 2011) (“2011 Comments”), *available at*: <https://www.regulations.gov/comment/EPA-HQ-OW-2011-0409-3608>; Final Waterkeeper Comments on EPA-HQ-OW-2011-0880 (Nov. 14, 2014) (“Waterkeeper CWR Comments”), *available at*: <https://www.regulations.gov/document/EPA-HQ-OW-2011-0880-16413>; Waterkeeper Alliance, *et al.*, Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017) (“Repeal Comments”), *available at*: <https://www.regulations.gov/document/EPA-HQ-OW-2017-0203-13681>; Comments of Waterkeeper Alliance *et al.*, on Definition of “Waters of the United States” – Schedule of Public Meetings: Docket ID No. EPA-HQ-OW-2017-0480 (Nov. 28, 2017), (“Step 2 Comments”) *available with attachments at*: <https://www.regulations.gov/document/EPA-HQ-OW-2017-0480-0750>; Waterkeeper Alliance *et al.*, Comments on Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA-HQ-OW-2017-0644 (Dec. 13, 2017), (“Delay Comments”) *available at*: <https://www.regulations.gov/document/EPA-HQ-OW-2017-0644-0401>; Waterkeeper Alliance *et al.*, Comments on Definition of Waters of United States - Recodification of Pre-Existing Rules (“Supplemental Notice Comments”), Docket ID No. EPA-HQ-OW-2017-0203, (Aug. 12, 2018) (“Repeal Supplemental Comments”), *available with attachments at*: <https://www.regulations.gov/comment/EPA-HQ-OW-2017-0203-15360>; and Waterkeeper Alliance *et al.*, Comments on Revised Definition of Waters of the United States, Docket ID No. EPA-HQ-OW-2018-0149, (April 14, 2019) (“Waterkeeper NWPR Comments”) *available with attachments at*: <https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-11318> (collectively hereinafter “Previous Comments”), all of which are attached hereto as (Attachment 1).

<sup>15</sup> Notice, 86 Fed. Reg. at 41912.

<sup>16</sup> For example, the CWA contains the following core water quality protections: point sources discharging pollutants into waters must have a permit, 33 U.S.C. §§ 1311(a) & 1342; the absolute prohibition against discharging “any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste,” *id.* § 1311(f); protections against the discharge of oil or hazardous substances, *id.* § 1321; and restrictions on the disposal of sewage sludge, *id.* § 1345.

Excluded waterways can be dredged, filled, and polluted with impunity because the CWA’s most fundamental human health and environmental safeguard—the prohibition of unauthorized discharges in 33 U.S.C. § 1311(a)—would no longer apply. Unregulated pollution discharged into waterways that fall outside the agencies’ definition will not only harm those receiving waters but will often travel through well-known hydrologic processes before harming other water resources, drinking water supplies, recreational waters, fisheries, industries, agriculture, and, ultimately, human beings. Obviously, this pollution disproportionately impacts environmental justice communities both directly and downstream from newly non-jurisdictional waters.

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain severely polluted, and by some indications, pollution appears to be increasing. For example, while water quality in a large percentage of the Nation’s waters has not been assessed, data from EPA shows water pollution in assessed waters has impaired 588,173 river/stream miles, 13,208,917 lake/reservoir acres, 44,625 square miles of bays/estuaries, 3,329 square miles of coastal waters, 672,924 wetland acres, and 39,230 square miles of the Great Lakes Open Water.<sup>17</sup> By comparison, EPA’s 2004 CWA Section 305(b) Report showed that there were 246,002 miles of impaired rivers/streams and 10,451,401 acres of impaired lakes as of 2004.<sup>18</sup>

Additionally, clean water is important to nearly every aspect of our lives and livelihoods, but, most importantly, is essential to life itself. As a nation, we cannot have clean water unless we control pollution at its source – wherever that source may be. This entails protecting waters throughout the entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are connected to traditionally navigable waterways.

The breadth of the waters protected under the CWA, and the reasons therefore, were firmly established with the passage of the CWA in 1972 and are reflected in the agencies’ Pre-2015 Regulatory Definition of “waters of the United States” in 1973 (EPA) and 1977 (Corps), which protected navigable-in-fact waters, interstate waters, the territorial seas, impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and “[a]ll other waters ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.”<sup>19</sup>

If we can ever hope to restore the chemical, physical and biological integrity of our Nation’s waters—which was the sole bedrock “objective” of Congress when it passed the CWA—it is

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<sup>17</sup> EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, *available at* [http://ofmpub.epa.gov/waters10/attains\\_nation\\_cy.control](http://ofmpub.epa.gov/waters10/attains_nation_cy.control) (last accessed on Sept. 3, 2021). (Attachment 2).

<sup>18</sup> EPA, Findings on the National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle, *available at*: [https://www.epa.gov/sites/production/files/2015-09/documents/2009\\_01\\_22\\_305b\\_2004report\\_2004\\_305breport.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/2009_01_22_305b_2004report_2004_305breport.pdf) (last accessed on Aug. 28, 2021) (Attachment 3).

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

essential that the Pre-2015 Regulatory Definition be fully restored and that we protect traditionally navigable waters; interstate waters; tributaries, rivers and streams (whether they are perennial, intermittent, or ephemeral); adjacent waters; wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes; lakes and reservoirs; estuaries and bays; and other waters that either provide important functions protected by the CWA themselves or have an influence on downstream waters. Protection of all of the Nation’s waters has become even more important since passage of the CWA in 1972 as we face serious climate change challenges, including the need to protect the quality of diminishing water supplies and to preserve wetlands to help mitigate and adapt to a changing climate.

## **REGULATORY BACKGROUND**

The agencies first changed their longstanding interpretation of the waters that are subject to the CWA’s critical safeguards in the June 29, 2015 “Clean Water Rule.”<sup>20</sup> Although the CWR reaffirmed CWA jurisdiction over some waters historically protected under the CWA, it also included many legally and scientifically indefensible provisions that, among other things, impermissibly exclude waters that must be protected under the CWA as a matter of law, unreasonably exclude waters over which the agencies have historically asserted jurisdiction based on their commerce clause authority, and arbitrarily deviate from the best available science.

The agencies’ second change came in an October 22, 2019 rule repealing the CWR and reinstating the text of the Pre-2015 Regulatory Definition. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (October 22, 2019) (“Repeal Rule”).

The agencies’ third change, the NWPR, came along a few months later. This time, in disregard of significant legal precedent and based on an erroneous legal analysis, the agencies narrowed the categories of protected waters in an extreme and arbitrary manner that upends the intentionally crafted state and federal partnership underpinning the entire national CWA program and leaves the Nation’s waters unprotected.<sup>21</sup> Under the NWPR, the definition of “waters of the United States” encompasses only “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.”<sup>22</sup>

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<sup>20</sup> Clean Water Rule: Definition of ‘Waters of the United States,’ 80 Fed. Reg. 37054 (June 29, 2015) (“CWR”).

<sup>21</sup> For a more detailed description of the legal and scientific errors in the NWPR see *Waterkeeper Alliance et al. v. Regan*, 3:18-CV-3521, Amended Complaint, Dkt. 91-1 at ¶¶ 185-357 (Dec. 20, 2020) (“Amended Complaint”) (Attachment 4).

<sup>22</sup> NWPR, 85 Fed. Reg. at 22273.

Contrary to more than 40 years of legal precedent and longstanding, well-settled agency interpretations of the CWA, the agencies concocted unsupportable legal theories and utilized arbitrary, unscientific line drawing and undisclosed “policy choices” to attempt to justify a definition of “waters of the United States.” The resulting definition, the NWPR, radically constrains the CWA’s protections to only certain commercially navigable waters, the territorial seas, and a narrow subset of the waters with certain types of connections to these other covered waters. Unlike every court and agency in the history of the CWA, the agencies misconstrued the plain statutory text of the CWA to wrongly determine, among other things, that a large portion of the Nation’s waters are not “waters of the United States,” 85 Fed. Reg. at 22,253, and that protection of those waters, or lack thereof, was no longer their concern.<sup>23</sup>

With the NWPR, the agencies did not evaluate whether the definition would achieve the objective and goals of the CWA for the Nation’s waters and failed to meaningfully assess which waters would remain protected under their new definition of “waters of the United States.”<sup>24</sup> Claiming their first-of-its-kind interpretation of the CWA was so clear the agencies lacked discretion to protect important rivers, streams, lakes, and other waters across the country, the agencies also refused to consider scientific information in the record demonstrating their narrow jurisdictional definition eliminates protections for waters that are essential to the integrity of the Nation’s waters and endangers drinking water supplies, recreational waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across the nation.<sup>25</sup>

## **I. THE CWA MANDATES A BROAD DEFINITION OF “WATERS OF THE UNITED STATES” CONSISTENT WITH CONGRESSIONAL INTENT TO RESTORE AND MAINTAIN THE NATION’S WATERS**

Congress passed the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq.*, commonly known as the Clean Water Act (“CWA”), with a singular objective—“restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”<sup>26</sup>—and it intended to achieve that objective, primarily by regulating pollution at its source. *See Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1473 (2020) (citing *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202-04 (1976) (basic purpose of Clean Water Act is to regulate pollution at its source)). Accordingly, Congress provided that the CWA applies to all “waters of

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<sup>23</sup> See U.S. EPA, The Navigable Waters Protection Rule—Public Comment Summary Document (Response to Comments), EPA Docket ID No. EPA-HQ-OW-2018-0149-11574 (Apr. 21, 2020) (“NWPR, RTC”).

<sup>24</sup> See, e.g., NWPR RTC, Topics 5 at 44 and 11 at 103.

<sup>25</sup> See, e.g., NWPR RTC, Topics 11, at 3, 8-9, 13.

<sup>26</sup> *PUD No. 1 of Jefferson County v. Wash. Dep’t. of Ecology*, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).



the United States, including the territorial seas.”<sup>27</sup> The Conference Report accompanying the CWA confirms that Congress intended that the phrase “waters of the United States” be given “the broadest possible constitutional interpretation.”<sup>28</sup>

The CWA, as a result, has long been recognized as “an all-encompassing program of water pollution regulation” that “applies to all point sources and virtually all bodies of water.” *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (internal quotations omitted). “Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’ [This is precisely why] Congress chose to define the waters covered by the Act broadly.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing S. Rep. No. 92414, p. 77 (1972)) (“*Riverside Bayview*”).

The Congressionally-intended breadth of the CWA is indisputably apparent in the comprehensive and interrelated goals, policies, definitions, programs, and directives set forth in text of the Act itself, as well as in Congress’ direction that the entire Act applies broadly to protect the “waters of the United States, including the territorial seas.”<sup>29</sup> The intended breadth is further illuminated and confirmed by the (1) history of the legislative acts that preceded and formed the basis of the CWA, (2) more than four decades of judicial precedent confirming it, (3) the longstanding federal and state regulations, programs, permits, standards, and enforcement actions implementing it, and (4) the Congressional efforts to broaden its application and fund these actions.

The CWA is a comprehensive regulatory statute for the Nation’s waters. *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t. of Ecology*, 511 U.S. 700, 704 (1994). Congress’ intention in amending the Water Pollution Control Act in 1972 was “clearly to establish an all-encompassing program of water pollution regulation . . . [and] ‘to establish a comprehensive long-range policy for the elimination of water pollution.’ S.Rep.No.92–414, at 95, 2 Leg.Hist. 1511 (emphasis supplied). No Congressman’s remarks on the legislation were complete without reference to the ‘comprehensive’ nature of the Amendments.” *City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 318 (1981) (internal footnotes omitted).

The national goal of the CWA is the elimination of discharges of pollutants into waters of the United States, with the interim goal of achievement of “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the

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<sup>27</sup> 33 U.S.C. § 1362(7).

<sup>28</sup> S. Rep. No. 92-1236, at 144 (1972).

<sup>29</sup> 33 USC § 1362(7); *Riverside Bayview*, 474 U.S. at 132-33 (citing H.R.Rep. No. 92–911, p. 76 (1972); S.Rep. No. 92–414, p. 77 (1972); U.S. Code Cong. & Admin.News 1972, pp. 3668, 3742) (To accomplish these goals, the Court in *Riverside Bayview* concluded, Congress defined the “waters covered by the Act broadly” to encompass all “waters of the United States.”).

water.” 33 U.S.C. § 1251(a)(1), (2). “To do this, the [CWA] does not stop at controlling the ‘addition of pollutants,’ but deals with ‘pollution’ generally, see § 1251(b), which Congress defined to mean ‘the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,’ § 1362(19).” *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 385 (2006).

CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person, unless such discharge complies with the terms of any applicable permits and with CWA sections 301, 302, 306, 307, 318, 402, and 404. 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, 1344. “Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). “Navigable waters” are broadly defined as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

CWA section 402, 33 U.S.C. § 1342, establishes the statutory permitting framework for regulating pollutant discharges under the National Pollutant Discharge Elimination System (“NPDES”) program. CWA section 404, 33 U.S.C. § 1344, establishes the permitting framework for regulating the discharge of dredged or fill material into waters of the United States. CWA section 401, 33 USC §1341, establishes a program for states to provide water quality certifications for federal licenses.

With the CWA and many other federal environmental laws, Congress employed a program of cooperative federalism under which States are given the “choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation” and, as such, the CWA “anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *See New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Virginia Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264, 289 (1981), *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)) (internal citations omitted).<sup>30</sup>

In sum, contrary to the NWPR and the exclusions in the CWR, the CWA is an all-encompassing program of water pollution regulation that applies to the Nation’s waters - i.e., the “waters of the United States.”<sup>31</sup>

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<sup>30</sup> (“This arrangement, which has been termed ‘a program of cooperative federalism,’ *Hodel, supra*, is replicated in numerous federal statutory schemes. These include the Clean Water Act, *see Arkansas v. Oklahoma*, (Clean Water Act “anticipates a partnership between the States and the Federal Government, animated by a shared objective”).”

<sup>31</sup> *See Cty. of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318–19 (1981); 2003 Comments *infra* fn. 46; 33 U.S.C. §. 1313 (applying water quality standard to “interstate waters,” “intrastate waters,” “navigable waters” and simply “waters.”); and N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 J. Energy & Env’tl L 80, note 36 at pp. 92-195 (2013), <https://gwujeel.files.wordpress.com/2013/10/4-2-hines.pdf> (hereinafter “Hines”) (Attachment 5).

## II. THE AGENCIES' LONG-STANDING PRE-2015 REGULATORY DEFINITION BROADLY PROTECTS 'WATERS OF THE UNITED STATES' CONSISTENT WITH THE CWA

Prior to the 2015 CWR, the definition of “waters of the United States” under the CWA had remained in place largely unchanged since the 1970s<sup>32</sup> and broadly encompassed jurisdiction over the Nation’s waters consistent with the CWA.<sup>33</sup> The Pre-2015 Regulatory Definition has never been overturned by a court.<sup>34</sup>

As the agencies correctly noted in the preamble to the CWR:<sup>35</sup>

“Waters of the United States,” which include wetlands, rivers, streams, lakes, ponds and the territorial seas, provide many functions and services critical for our nation’s economic and environmental health. In addition to providing habitat, rivers, lakes, ponds and wetlands cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits.

The inclusion of broad categories of waters that encompass these waters in the definition of “waters of the United States” is necessary to implement the CWA’s “comprehensive regulatory program” that established “a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation’s waters except pursuant to a permit.” *Cty. of Milwaukee*, 451 U.S. at 310-11, 317.

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<sup>32</sup> See regulatory definitions at 33 CFR part 328 and 40 CFR parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401.

<sup>33</sup> This is true with the exception of the illegal waste treatment exclusion described in Section V of these comments.

<sup>34</sup> Importantly, the Supreme Court has not invalidated any provision in Pre-2015 Regulatory Definition. As the agencies acknowledge in the Notice, “In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) [(“*SWANCC*”)], the Court (in a 5–4 opinion) held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA.” 86 Fed. Reg. at 41912. However, *SWANCC* dealt only with an administrative interpretation of 33 C.F.R. § 328.3(a)(3) (1999), dubbed the “Migratory Bird Rule,” that purported to assert jurisdiction based on the mere fact that particular waters were or could be used by migratory birds. The Court did not vacate 33 C.F.R. § 328.3(a)(3). Nothing in *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”) is to the contrary. See e.g., 80 Fed. Reg. at 37061 (recognizing that nothing in *Rapanos* “invalidated any of the current regulatory provisions defining ‘waters of the United States’”).

<sup>35</sup> CWR, 79 Fed. Reg. 21,188, 21,191.

Consistent with Congressional intent, the EPA (1973)<sup>36</sup> and the Corps (1977)<sup>37</sup> adopted regulations further defining “waters of the United States” for the purposes of the CWA to include broad categories of waters beyond those protected by traditional navigability tests. When the Corps adopted its definition of “waters of the United States” in 1977, it recognized that “[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system.”<sup>38</sup> In the Preamble to the Corps’ 1977 rule defining “waters of the United States,” the Corps stated:

Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government’s broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce **even though they are not interstate waters or part of a tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have an effect on interstate commerce.** The Corps’ earlier 1975 definition identified certain of these waters. These included waters used:

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

We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over ‘other waters’ such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.<sup>39</sup>

Under the 1977 Definition, waters in Categories 1, 2, and 3, over which jurisdiction was “obvious”

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<sup>36</sup> 38 Fed. Reg. 10834 (1973).

<sup>37</sup> 42 Fed. Reg. 37122 (1977).

<sup>38</sup> 42 Fed. Reg. 37128 (July 19, 1977).

<sup>39</sup> 42 Fed. Reg. 37127-37128 (emphasis added).

under the Federal Government’s broad powers to regulate interstate commerce, included: (1) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands; (2) Tributaries to navigable waters of the U.S., including adjacent wetlands; and (3) Interstate waters and their tributaries, including adjacent wetlands.<sup>40</sup> Additionally, based on reasoning set forth above, the Corps included “other waters” where the use or destruction of the waters could affect interstate commerce within the definition of “waters of the United States.”<sup>41</sup> This “other waters” provision remained in place for decades prior to the CWR. *See, e.g.*, 33 C.F.R. § 328.3(a)(3) (2015).

The “other waters” category had long ensured that many waters of local, regional, or national importance were properly afforded CWA protections, consistent with the CWA and Congressional intent. There are many significant waterways that provide valuable ecological, recreational, drinking water, and economic services that lose protections under the CWA without inclusion of the “other waters” category. For example, so-called “closed basins” and other waters that lack a connection to traditionally navigable waters, have historically been protected under these interstate commerce factors for “other waters,” such as Idaho’s Upper Snake River Closed Basin, Carolina Bays in North Carolina, Oregon’s Crater Lake, and New Mexico’s Central Closed Basins.<sup>42</sup>

“Closed-basins” make up roughly 20% of the land area in New Mexico, and include many rivers, streams and wetlands. These waters provide recreation, fishing and water supply in a region with

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<sup>40</sup> *See e.g.*, 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

<sup>41</sup> 42 Fed. Reg. 37122 (1977).

<sup>42</sup> *See, e.g.*, Waterkeeper Alliance Fact Sheets on the Impacts to Twelve Watersheds across the United States, (“Waterkeeper Alliance Fact Sheets,”) attached hereto as: (Attachment 6) (**Snake River Fact Sheet**: In the Snake River watershed, at least five percent of the watershed (about 5,185 sq. miles or 3,318,400 acres) is considered a “closed basin” because the waterways are only connected to the Snake River via subsurface connections. Called the “Upper Snake Closed Basin,” in east-central Idaho, it includes the drainages of five watersheds, the Big Lost, Little Lost, Birch, Medicine Lodge, and Beaver–Camas., which play an important economic and ecological role that is already being impacted by pollution. For example, Medicine Lodge Creek and its tributaries contain rainbow trout, brook trout, and Yellowstone cutthroat trout, and Little Lost Creek includes critical habitat for bull trout, listed as threatened under the Endangered Species Act.; **Cape Fear Watershed Fact Sheet**: There are multiple Carolina Bays in the Cape Fear River Basin, which includes portions of Bladen County, the location of the highest concentration of Carolina Bays in the country. While most Carolina Bays have been altered or filled in, the remaining bays are important to rare and declining plants and animals; numerous Carolina Bays are also used for recreation. Carolina Bays often lack surface water connections to other waterways. However, there is scientific evidence of significant hydrologic connectivity with nearby waterways via groundwater flow. **Rogue River and Crater Lake Fact Sheet**: Crater Lake is a national treasure known for its iconic blue waters, which is considered by scientists to be the cleanest and clearest body of water in the world. Crater Lake is a considered a closed basin that may lack surface connections to the Rogue River. **Rio Grande Fact Sheet**: In the Rio Grande Basin, there is a roughly 14,605 square mile area known as the Central Closed Basins with water resources that are essential to communities and wildlife that lost protection NWPR. For example, based on NHD data, there are more than 33,933 miles of streams that lost protection because they may not be connected to the Rio Grande via surface connections.)

scarce water resources and must be protected under the CWA.<sup>43</sup> Similarly, in southern Idaho, the Upper Snake Closed Basin contains “numerous creeks and rivers that do not flow on the surface beyond the borders of the state,” but do flow into the Snake River Plain Aquifer, which supplies water to the Snake River.<sup>44</sup> Some rivers and streams within the Upper Snake Closed Basin have been determined to be jurisdictional based on navigability; however, others are jurisdictional solely because they have an impact on interstate commerce, including their use for irrigation water for cropland and the fact that they support “high-quality trout fisheries that attract anglers from all over the United States.”<sup>45</sup> Retention of the “other waters” regulatory language in the Pre-2015 Regulatory Definition is critical for protecting these and similar types of waters across the country.

As discussed in more detail below, it is beyond dispute that Congress intended the CWA to fully protect the Nation’s waters and aquatic ecosystems without regard to whether the waters could satisfy historic navigability tests under the Commerce Clause. The agencies must expressly retain all Commerce Clause grounds for including the Nation’s waters within the regulatory definition of “waters of the United States.” As explained in detail in the 2003 Comments, “the chemical, physical, and biological integrity of the Nation’s waters cannot be restored and maintained without Clean Water Act regulation of all waters protected by the current regulations – including those identified by the (a)(3) factors [other waters interstate commerce factors].”<sup>46</sup>

And, as stated by the court in *U.S. v. Holland*:

It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution. Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms ... Congress is not limited by the ‘navigable waters’ test in its authority to control pollution under the Commerce Clause.<sup>47</sup>

The Third Circuit recently confirmed this view in a case involving challenges to a CWA Total

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<sup>43</sup> See Waterkeeper Alliance Fact Sheet for Rio Grande, *supra* fn. 42 (Attachment 6); Reckless Abandon, *infra* fn. 89 at 7.

<sup>44</sup> See Waterkeeper Alliance Fact Sheet for Snake River, *supra* fn. 42 (Attachment 6); Reckless Abandon, *infra* fn. 89, pp. 12-13.

<sup>45</sup> *Id.*

<sup>46</sup> See Comments submitted by national environmental organizations on the 2003 Advance Notice of Proposed Rulemaking and Guidance, which are a part of the official public docket in 2003 at: <https://www.regulations.gov/comment/EPA-HQ-OW-2002-0050-1674> (hereinafter “2003 Comments”) at 18-38 (Attachment 7).

<sup>47</sup> *Holland*, 373 F. Supp. at 673.

Maximum Daily Load to control pollution within the watershed of the Chesapeake Bay, when it stated:

In response to that fire and to the general degradation of American water that followed the post-war industrial boom, Congress determined that the EPA should have a leadership role in coordinating among states to restore the Nation's waters to something approaching their natural state. See 33 U.S.C. § 1251 . . . [and] “[a]s the Supreme Court has admonished in the water-pollution context, ‘We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.’ *E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 132, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 777, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968)).”<sup>48</sup>

Consistent with the CWA and Supreme Court and lower court precedent, readoption of the Pre-2015 Regulatory Definition will restore protections for important waters across the country that are only protected by the “other waters” language in the definition. As discussed in more detail below, nothing in the *SWANCC* opinion or any other precedent supports or requires the elimination of this definitional category, and the agencies lack authority to “update” the Pre-2015 Regulatory Definition to eliminate the “other waters” commerce factors.

Additionally, many other types of waters are connected in various ways to traditionally navigable waters, the territorial seas, and interstate waters. Because the central objective of the CWA is to ensure broad protections for the Nation’s waters by controlling pollution at its source, it is imperative that the regulatory definition broadly encompass all of those hydrologically connected waters—both to protect their physical, chemical and biological integrity and to protect the integrity of any downstream surface waters to which they are connected.

As noted in the 2013 Draft Connectivity Report and the 2014 Science Advisory Board (“SAB”) Review of that Report for the 2015 Clean Water Rule, there is strong scientific evidence to support the conclusion that ephemeral streams, intermittent streams, perennial streams, floodplain wetlands, non-floodplain wetlands, and other waters are either connected to downstream waters or

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<sup>48</sup> *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 305 and 309 (3d Cir. 2015) (“By contrast, in Clean Water Act cases where there were arguable Commerce Clause problems, the *SWANCC* Court would not interpret the Act to confer federal jurisdiction over an abandoned, man-made sand and gravel pit absent a “clear statement” from Congress to that effect because such an interpretation raised serious constitutional concerns (that the Government had failed to identify an activity that substantially affected interstate commerce . . . Moreover, in *Rapanos* it appears five justices had no constitutional concerns in any event.”).

sustain the physical, chemical, and/or biological integrity of downstream waters.<sup>49</sup> Thus, it is imperative that CWA protections for these waters be restored.

As EPA’s own Office of Research and Development has summarized:<sup>50</sup>

- “The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”
- “The literature clearly shows that wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter.”
- “Wetlands and open waters in non-floodplain landscape settings (hereafter called ‘non-floodplain wetlands’) provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and ground-water flows and through biological and chemical connections.”

In addition, EPA’s own Science Advisory Board (“SAB”) concluded, “groundwater connections, particularly via shallow flow paths in unconfined aquifers, can be critical in supporting the

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<sup>49</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 (Sept. 2013) (hereinafter “Draft Connectivity Report”); U.S. Environmental Protection Agency, Science Advisory Board, Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 (Oct. 17, 2014) (hereinafter “SAB Report”). Both available at: [https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/7724357376745F48852579E60043E88C/\\$File/WOUS\\_ERD2\\_Sep2013.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf) (last accessed on Sept. 25, 2017).

<sup>50</sup> U.S. EPA, Office of Research and Development, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence* (January 2015) at ES-3, 4, available at: <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414> (“Connectivity Report”).



hydrology and biogeochemical functions of wetlands and other waters. Groundwater also can connect waters and wetlands that have no visible surface connections.”<sup>51</sup>

The Pre-2015 Regulatory Definition is protective of all of these waters and must be restored as soon as possible without any “updates” or amendments. Prior to the CWR, this broad definition of “waters of the United States” had been in place since 1975 and is consistent with the intent of Congress announced in 1972. This longstanding definition of “waters of the United States” for the purposes of the CWA includes:<sup>52</sup>

- A. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- B. All interstate waters, including interstate “wetlands.”
- C. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
  - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (3) Which are used or could be used for industrial purposes by industries in interstate commerce.
- D. All impoundments of waters otherwise defined as waters of the United States under this definition.
- E. Tributaries of waters identified in paragraphs (a) through (d) of this definition.

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<sup>51</sup> Letter from Dr. David T. Allen, Chair, EPA Science Advisory Board, to EPA Administrator Gina McCarthy, *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”* (Sept. 30, 2014) (“SAB Report”), at 2-3, available at: [https://yosemite.epa.gov/sab/sabproduct.nsf/368203f97a15308a852574ba005bbd01/518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007+unsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/368203f97a15308a852574ba005bbd01/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf).

<sup>52</sup> See e.g., 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

F. The territorial seas.

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

### **III. THE PRE-2015 REGULATORY DEFINITION SHOULD NOT BE AMENDED OR UPDATED UPON READOPTION**

As the first step in replacing the NWPR, the agencies have stated that they “intend to propose restoring the longstanding Clean Water Act regulations that were in place for decades prior to 2015, as amended to be consistent with relevant Supreme Court decisions.” Notice, 86 Fed. Reg. at 41912 (emphasis added).<sup>53</sup> The Notice identifies the relevant Supreme Court cases as *Riverside Bayview*, *SWANCC*, and *Rapanos*. *Id.* at fn. 1.

First, although there is extensive Supreme Court precedent relevant to the meaning of “waters of the United States” and the intended jurisdictional coverage of the CWA, and even more abundant precedent from the courts of appeals and federal district courts,<sup>54</sup> the agencies continue to focus on only three Supreme Court cases, *Riverside Bayview*, *SWANCC*, and *Rapanos*, in attempting to redefine “waters of the United States.” In so doing, the agencies have wrongly ignored precedent that is central to defining CWA jurisdiction and erroneously interpreted these three cases in a manner that has drastically reduced CWA jurisdiction over broad classes of waters contrary to the law.

Second, the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions do not give rise to a need to amend or update the Pre-2015 Regulatory Definition. Those cases did not overturn or invalidate the Pre-2015 Regulatory Definition, and the regulation can, and must, be interpreted and applied consistent with all Supreme Court and other binding legal precedent. This can be done, as with myriad other regulations that have been interpreted and applied by the courts, without amending the regulation to address each relevant binding precedent established by a judicial opinion. To the extent that the agencies determine they want to consider altering the foundational requirements of the Pre-2015 Regulatory Definition in their second rulemaking, this must be done in a manner that fully considers all relevant precedent, the objective of the CWA, the text and legislative history of the CWA, and the specific impacts of any proposed amendments on the physical, chemical and biological integrity of the Nation’s waters.

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<sup>53</sup> In the event the agencies amend the Pre-2015 Regulatory Definition and/or adopt a new regulatory definition in a step two rulemaking, the agencies must fully comply with NEPA and the ESA. *See* Amended Complaint, *supra* fn. 21 at ¶¶ 20, 60-84, 183-84, 288-89; 2014 Comments and NWPR Comments, *supra* fn. 14.

<sup>54</sup> *See* 2007 Comments, 2011 Comments and 2014 Comments, *supra* fn. 14.

Third, the agencies must correctly interpret and apply all binding Supreme Court and lower court precedent in implementing the Pre-2015 Regulatory Definition and in considering amendments to that foundational definition in any second rulemaking. There is a plethora of precedent, including Supreme Court opinions, confirming the intended breadth of the phrase “waters of the United States,” and consistently applying the agencies’ long-standing interpretation of that phrase set forth in the agencies’ Pre-2015 Regulatory Definition. Some of this precedent upholding broad CWA jurisdiction over the nation’s waters is discussed in Section I above.

Additionally, in *Riverside Bayview*, the Court held that Congress took a “broad, systemic view of the goal of maintaining and improving water quality” with the word “integrity,” contained in the Act’s “objective,” referring to “a condition in which the natural structure and function of ecosystems [are] maintained.” The “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for [w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”<sup>55</sup> To accomplish these goals, the Supreme Court in *Riverside Bayview* concluded, Congress defined the “waters covered by the Act broadly” to encompass all “waters of the United States.” The unanimous *Riverside Bayview* opinion remains good law, confirms the breadth of the CWA and the reasoning underlying the Pre-2015 Regulatory Definition, and does not require that the agencies amend or update the Pre-2015 Regulatory Definition.

Unlike the Rivers and Harbors Act of 1899, the CWA is not focused on the prevention of “navigation-impeding” conduct in navigable waters.<sup>56</sup> Instead, as the Supreme Court held in *International Paper Co. v. Ouellette*, the CWA established “an all-encompassing program of water pollution regulation” that “**applies to all point sources and virtually all bodies of water.**”<sup>57</sup> While extensive Rivers and Harbors Act precedent demonstrated that the Commerce Clause provided adequate authority for regulation of navigable waters and their tributaries, it is equally clear that Congress’ Commerce Clause authority to control pollution was not limited to traditionally navigable waters or traditional tests of navigability.

For example, when it invalidated portions of the Corps’ 1974 regulations that limited CWA jurisdiction to waters “which had been, are, or may be, used for interstate or foreign commerce,” the U.S. District Court for the District of Columbia held that when Congress defined the term “navigable waters” as “the waters of the United States, including the territorial seas” it “**asserted**

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<sup>55</sup> *Riverside Bayview*, 474 U.S. at 132-33 (citing H.R.Rep. No. 92-911, p. 76 (1972); S.Rep. No. 92-414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742).

<sup>56</sup> See *U.S. v. Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974); see also *Quarles Petroleum Co. v. United States*, 551 F.2d 1201, 1206 (Ct. Cl. 1977) (“In addition, the overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States.”).

<sup>57</sup> *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

**federal jurisdiction over the Nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.** Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability.”<sup>58</sup> This holding is consistent with the Conference Committee Report for the final bill which states “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”<sup>59</sup>

When Representative John Dingell presented the Conference version of the bill to the House of Representatives, he explained that in defining “navigable waters” broadly for the purposes of the CWA as “waters of the United States, including the territorial seas”:

The Conference bill defined the term ‘navigable waters’ broadly for water quality purposes. It means ‘all the waters of the United States’ in a geographic sense. It does not mean ‘navigable waters of the United States’ in the technical sense as we sometimes see in some laws.... Thus, this new definition clearly encompasses **all water bodies, including main streams and their tributaries, for water quality purposes.** No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.<sup>60</sup>

The Supreme Court has also explicitly recognized on at least three occasions that “navigable waters” under the CWA include “something more than traditional navigable waters.”<sup>61</sup>

Additionally, in *Riverside Bayview*, the Supreme Court held that “the Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import. In adopting this definition of ‘navigable waters,’ **Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes** and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed “navigable” under the classical understanding of that term.”<sup>62</sup> The *Riverside Bayview* Court also noted that, while:

[I]t is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional test of navigability, it is another to assert that Congress intended to abandon traditional notions of “waters” and **include in that**

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<sup>58</sup> *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); 39 Fed. Reg. 12119 (April 3, 1974) (emphasis added).

<sup>59</sup> Conference Report, Senate Report No. 92-1236, Sept. 28, 1972 at 144, U.S. Code Cong. & Admin. News 1972, p. 3822; Reprinted in Legislative History, Committee on Public Works, Committee Print, 93<sup>rd</sup> Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 327 (hereinafter “1972 Legislative History”).

<sup>60</sup> 118 Cong. Rec. 33, 756 (1972); *id.* at 250-51.

<sup>61</sup> See *Rapanos v. United States*, 547 U.S. 715, 731 (2006).

<sup>62</sup> *Riverside Bayview*, 474 U.S. at 133 (emphasis added).

**term “wetlands”** as well. Nonetheless, the **evident breadth of congressional concern for protection of water quality and aquatic ecosystems** suggests that it is reasonable for the Corps to interpret the term “waters” to encompass **wetlands adjacent to waters as more conventionally defined**.<sup>63</sup>

In the Notice, the agencies state that the Court in *SWANCC* “held that the use of ‘isolated’ non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA.” Notice, 86 Fed. Reg. at 41912. However, the Court in *SWANCC* held solely that 33 C.F.R. 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the Migratory Bird Rule, 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA.”<sup>64</sup> Thus, the *SWANCC* decision was particularly fact-specific as to the respondents’ abandoned sand and gravel pit, related solely to CWA Section 404 jurisdiction under the Migratory Bird Rule, and did not impact or limit the agencies’ jurisdiction over any other waters, including non-navigable tributaries, rivers, or streams, adjacent wetlands, lakes, impoundments, non-navigable, intrastate ponds, or “other waters” that could affect interstate or foreign commerce.<sup>65</sup>

Because the Supreme Court limited its holding to the jurisdictional basis asserted by the Corps—the Migratory Bird Rule—the decision did not require, or even imply, that the agencies could not continue to rely on any provisions in the pre-2015 definition of “waters of the United States” to assert CWA jurisdiction. The corollary is also true—*SWANCC* does not authorize or provide any basis for the agencies to remove any protections or jurisdictional bases under the Commerce Clause for tributaries, adjacent waters or other waters encompassed within the Pre-2015 Regulatory Definition.

Similarly, the Supreme Court in *Rapanos*, did not invalidate the Pre-2015 Regulatory Definition of “waters of the United States” when it ruled on issues presented in the consolidated cases - the extent of CWA jurisdiction **over wetlands adjacent to tributaries that are not traditionally navigable** under Section 404 of the CWA.<sup>66</sup> The *Rapanos* Court issued no majority opinions and the differing opinions suggested three different tests for determining whether wetlands adjacent to non-navigable tributaries can be covered under the CWA.<sup>67</sup>

In the Notice, the agencies state that in *Rapanos* “a four-Justice plurality interpreted ‘waters of the United States’ as covering ‘relatively permanent’ waters as well as wetlands with a ‘continuous

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<sup>63</sup> *Id.*

<sup>64</sup> *SWANCC*. 531 U.S. at 174.

<sup>65</sup> See 2003 Comments, *supra* fn. 46.

<sup>66</sup> *Rapanos*, 547 U.S. at 787 (emphasis added).

<sup>67</sup> *Id.* at 715.

surface connection’ to such water bodies. Justice Kennedy’s concurring opinion concluded that **a water or wetland must possess a ‘significant nexus’** to traditional navigable waters to be a ‘water of the United States.’” Notice, 86 Fed. Reg. at 41912 (emphasis added). This statement is not an accurate description of the *Rapanos* opinions, which are summarized below:

- **Relatively Permanent Test:** The four-justice plurality opinion, written by Justice Scalia, recognized that the CWA covers non-navigable waters in addition to traditionally navigable waters, but declined to “decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act.”<sup>68</sup> Instead, the plurality focused on the meaning of “the waters” in 33 U.S.C. § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”).
  - The plurality concluded that “[o]n this definition, ‘the waters of the United States’ include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in **‘streams,’ ‘oceans,’ ‘rivers,’ ‘lakes,’ and ‘bodies’ of water ‘forming geographical features.’** All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.”<sup>69</sup>
  - The plurality also noted that “[b]y describing ‘waters’ as ‘relatively permanent,’” it did not “necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances” or “seasonal rivers which contain continuous flow during some months of the year . . .” and, further, that it had “no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify a channel as a ‘wate[r] of the United States.’”<sup>70</sup>
  - Upon this opinion, the plurality sought remand of the cases for a determination by the lower courts **“whether the ditches or drains near each wetland are “waters” in the ordinary sense of containing a relatively permanent flow;** and (if they are) whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.”<sup>71</sup> Based on this test, wetlands adjacent to “relatively permanent” bodies of water are covered under the CWA as long as they possess a “continuous surface connection” to that water.

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<sup>68</sup> *Id.* at 731.

<sup>69</sup> *Id.* at 731-32 (internal citations omitted) (emphasis added).

<sup>70</sup> *Id.* (internal citations omitted).

<sup>71</sup> *Id.* at 757 (emphasis added).

- **Significant Nexus Test:** Justice Kennedy concurred with the plurality that the cases should be remanded, but firmly rejected the plurality’s reasoning for doing so. Justice Kennedy identified the issue to be decided in the consolidated case as “whether the term ‘navigable waters’ in the Clean Water Act extends **to wetlands that do not contain and are not adjacent to waters that are navigable in fact.**”<sup>72</sup> According to Justice Kennedy’s opinion:
  - [T]he Corps' jurisdiction over **wetlands** depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute’s goals and purposes . . . With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters – functions such as pollutant trapping, flood control, and runoff storage . . . Accordingly, **wetlands** possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the **wetlands**, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’<sup>73</sup>
  - Justice Kennedy further opined that “[w]hen the Corps seeks to regulate **wetlands adjacent to navigable-in-fact waters**, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, **the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries.**”<sup>74</sup> Notably, Justice Kennedy indicated that the record before the Court contained evidence of a possible significant nexus and that the end result of the remand might well be that the “Corps assertion of jurisdiction is valid,” as suggested by the dissent.<sup>75</sup>
- **Existing Definition Test:** The dissent, written by Justice Stevens, and joined by Justices Souter, Ginsburg, and Breyer, opined that the agencies’ existing regulatory definition is a reasonable interpretation of the statutory term “waters of the United States.” The dissent rejected the rationales of the plurality and Justice Kennedy, but stated “[g]iven that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy’s test is

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<sup>72</sup> *Id.* at 759 (emphasis added)

<sup>73</sup> *Id.* at 779-80 (emphasis added).

<sup>74</sup> *Id.* at 782 (emphasis added).

<sup>75</sup> *Id.* at 784 (emphasis added).

satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.”<sup>76</sup>

In concurring with the plurality opinion, Chief Justice Roberts noted that, with regard to the Court’s decision regarding jurisdiction over the wetlands at issue in *Rapanos*, “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act.”<sup>77</sup>

In sum, *SWANCC* should be read as standing for the narrow proposition that the Corps cannot rely on the interpretations in the Migratory Bird Rule to assert jurisdiction over isolated, intrastate sand and gravel pits under the CWA. *Rapanos* should similarly be narrowly applied solely to evaluate CWA jurisdiction over certain types of wetlands. *See e.g., Sackett v. EPA*, 19-35469 at 23 (9th Cir. Aug. 16, 2021) (Holding that under *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), “our circuit’s law is that Justice Kennedy’s understanding of ‘significant nexus’ provides the governing standard for determining when **wetlands are regulable under the CWA**” and “EPA reasonably determined that the Sacketts’ property contains wetlands that share a significant nexus with Priest Lake, such that the lot was regulable *under the CWA* and the relevant [Pre-2015] regulations.”)<sup>78</sup>

By contrast, in the CWR, purportedly on the basis of a single sentence from the Supreme Court’s decision in *SWANCC*, the agencies improperly eliminated CWA protections for “other waters,” erroneously concluding “that the general other waters provision in the existing regulation based on [Commerce Clause effects unrelated to navigation] was not consistent with Supreme Court precedent.”<sup>79</sup> Elsewhere in the rulemaking record, however, the agencies recognized that the Supreme Court in *SWANCC* “did not vacate (a)(3) of the existing regulation” and that “[n]o Circuit

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<sup>76</sup> *Id.* at 810.

<sup>77</sup> *Id.* at 758 (emphasis added).

<sup>78</sup> *See also United States v. Cundiff*, 555 F.3d 200, 2010 (6th Cir. 2009) (declining to determine which test applies and finding wetland to be jurisdictional under both tests); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (“The federal government can establish jurisdiction over the target sites [wetlands] if it can meet either the plurality’s or Justice Kennedy’s standard as laid out in *Rapanos*.”); *United States v. Donovan*, 661 F.3d 174, 184 (3d Cir. 2011) (“We hold that federal jurisdiction to regulate wetlands under the CWA exists if the wetlands meet either the plurality’s test or Justice Kennedy’s test from *Rapanos*.”); and *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (“[W]e join the First Circuit in holding that the Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy’s test.”), with *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (“Justice Kennedy’s proposed standard . . . must govern the further stages of this litigation” relating to jurisdiction over wetlands); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (“Justice Kennedy’s concurrence provides the controlling rule of law for our case” relating to jurisdiction over a rock quarry pit and wetlands).

<sup>79</sup> *See* U.S. EPA and U.S. Dept. of the Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015) at 78 (“TSD”) (citing *SWANCC*, 531 U.S. at 172), available at: <https://www.regulations.gov/document/EPA-HQ-OW-2011-0880-20869>.



Court has interpreted SWANCC to have vacated the other waters provision of the existing regulation.”<sup>80</sup>

The agencies, which are duty-bound to fully effectuate the objective of the CWA, should not rely on *SWANCC* and *Rapanos* to limit CWA jurisdiction over categories of water that were not addressed by those opinions or to eliminate the broad Commerce Clause bases for covering rivers, streams, lakes, adjacent waters, and other waters in the Pre-2015 Regulatory Definition. Neither *SWANCC*, *Rapanos*, nor any other precedent limits or establishes the outer bounds of this Commerce Clause authority for purposes of the CWA.<sup>81</sup>

Additionally, it is essential to recognize that, prior to the enactment of the CWA, both traditionally navigable waters and their non-navigable tributaries were believed to be well within the Commerce Clause powers of the federal government under traditional tests of navigability.<sup>82</sup> Congress intended to expand the number and nature of the waters covered under the CWA in order to protect water quality and aquatic ecosystems in the **Nations’ waters** to the fullest extent permitted by the Commerce Clause. With the 1972 Amendments, Congress intended to expand coverage under the CWA beyond interstate waters, traditionally navigable waters and their tributaries, and did not premise such expansion of jurisdiction on the extent to which waters were connected to traditionally navigable waters. To the contrary, Congress intended to repudiate the traditional navigability tests and limitations on federal authority, and to instead utilize the full authority of the federal government to regulate water pollution under the Commerce Clause.

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<sup>80</sup> TSD at 77-78.

<sup>81</sup> In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. See 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court “expressly declined to reach” the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court “on precisely how to read Congress’ limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, “in *Rapanos* it appears five justices had no constitutional concerns in any event ... [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause ....” *Am. Farm Bureau Fed’n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), cert. denied sub nom., *Am. Farm Bureau Fed’n v. E.P.A.*, 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016) (citing *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring); see also 2003 Comments, *supra* fn. 46 at 4-6 and 2011 Comments, *supra* fn. 14 at 9-15.

<sup>82</sup> The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to traditionally navigable waters and “into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . .” 33 U.S.C. § 407.

Lastly, in the years preceding the CWR, the 2003 *SWANCC*<sup>83</sup> and 2008 *Rapanos*<sup>84</sup> Guidance Documents implemented by the agencies reduced protections for the Nation's waters by limiting jurisdiction in a manner that was not justified by law or science.<sup>85</sup> The Guidance Documents were issued by the agencies in response to the *SWANCC* and *Rapanos* opinions but unfortunately interpreted those decisions more broadly than the decisions allow or require in contravention of the CWA's objective. The Guidance Documents also imposed limitations on assertions of jurisdiction that were inconsistent with those decisions resulting in decreased jurisdiction over historically protected waters and inconsistent application by the agencies.<sup>86</sup> For example, the 2008 *Rapanos* Guidance<sup>87</sup> inappropriately provided tributary streams less-than categorical protection although the existing regulatory definition protected, without any limitation, all tributaries to other specified jurisdictional waters, and despite the fact that the Supreme Court has not issued any holding limiting the jurisdictional status of tributaries.<sup>88</sup> The 2003 and 2008 Guidance has left many categories of waters that had previously been protected vulnerable to pollution and destruction, and hindered regulatory and enforcement actions contrary to law.<sup>89</sup> These Guidance Documents, and the erroneous interpretations and applications of *SWANCC* and *Rapanos* therein, must not be used to amend, update, or apply the Pre-2015 Regulatory Definition once it is readopted.

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<sup>83</sup> See Legal Memoranda Regarding Solid Waste Agency of Northern Cook County (*SWANCC*) v. United States (Jan. 15, 2003) (hereinafter 2003 Guidance), available at: [https://www.epa.gov/sites/production/files/2016-04/documents/swancc\\_guidance\\_jan\\_03.pdf](https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf).

<sup>84</sup> U.S. Environmental Protection Agency and Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (2008) (hereinafter "2008 *Rapanos* Guidance") available at: [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008\\_12\\_3\\_wetlands\\_CWA\\_Jurisdiction\\_Following\\_Rapanos120208.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf)

<sup>85</sup> See e.g., Claudia Copeland, EPA and the Army Corps' Rule to Define "Waters of the United States," Congressional Research Service Report R43455, at 6 (June 10, 2014) ("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.") (Attachment 8).

<sup>86</sup> See 2011 Comments, *supra* fn. 14.

<sup>87</sup> See 2008 *Rapanos* Guidance (providing for "significant nexus" analysis for "[n]on-navigable tributaries that are not relatively permanent").

<sup>88</sup> 2011 Comments at 13-14, *supra* fn. 14.

<sup>89</sup> See generally, Earthjustice *et al.*, Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm (2004), available at: <https://www.nwf.org/Educational-Resources/Reports/2004/08-12-2004-Reckless-Abandon> (hereinafter "Reckless Abandon") (Attachment 9).

#### **IV. THE NWPR IS CAUSING SEVERE ENVIRONMENTAL HARM AND THE PRE-2015 DEFINITION MUST BE IMMEDIATELY RESTORED**

The agencies completed their evaluation of the NWPR in June 2021 and identified several very serious, material, environmentally destructive, and legally fatal errors with the rule. Yet, in the Notice, the agencies state “[n]otwithstanding these concerns and ongoing litigation, the agencies will continue to implement the NWPR until it is no longer in effect, as a result of either a new final rule going into effect or by virtue of a court order.”<sup>90</sup> It is unreasonable to continue implementing the NWPR with full knowledge of its illegality and acknowledgement of ongoing “destructive impacts to critical water bodies” across the country.<sup>91</sup> Commenters implore the agencies to reconsider this position and urgently restore and implement the Pre-2015 Regulatory Definition.

The NWPR’s illegal elimination of CWA protections for vast swaths of the Nation’s waters is harming drinking water supplies, fisheries, and recreational waters, as well as people, threatened and endangered species, and the Nation’s vast, interconnected aquatic ecosystems that are exposed to dangerous levels of pollution and destruction in both directly impacted and downstream waters. When waters are excluded from the definition of “waters of the United States,” all of the protections of the CWA – the discharge standards and permitting requirements for pollution discharges, dredging and filling standards and permitting, water quality standards, effluent limitation guidelines, total maximum daily loads, water quality certifications, and myriad other CWA standards and programs – become inapplicable and cannot prevent or even mitigate the harm.

The harm from the NWPR that started propagating across the country in June 2020, and which is ongoing, was apparent in the agencies’ own administrative record for the NWPR rulemaking. At the time, however, the agencies refused to consider any of the scientific information in the record. That information demonstrated that their narrow jurisdictional definition eliminated protections for waters that are essential to the integrity of the Nation’s waters and would endanger drinking water supplies, recreational waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across the Nation.<sup>92</sup>

Immediate implementation and enforcement of the Pre-2015 Regulation is the only way to stop the ongoing pollution and environmental destruction across the country caused by the NWPR. Commenters urge the agencies to immediately restore the longstanding CWA protections for the Nation’s waters provided by the Pre-2015 Regulatory Definition. This is an essential, urgent step

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<sup>90</sup> Notice, 86 Fed. Reg. at 41912.

<sup>91</sup> Press Release, at 1.

<sup>92</sup> See, e.g., NWPR RTC, Topic 11, at 3, 8-9.

the agencies must take while they engage in the lengthy rulemaking process they intend to undertake.<sup>93</sup>

**A. The Agencies Have Already Determined that the NWPR Has Caused and Will Cause Serious Environmental Harm.**

The NWPR strips protections against uncontrolled industrial, municipal, agricultural, and other pollution discharges into many, and in some parts of the country, nearly all, rivers, streams, lakes, ponds, wetlands, and other waters.<sup>94</sup> In June 2021, the agencies announced that they had “carefully reassessed” the administrative record and the legal and scientific basis for the NWPR under Executive Order No. 13990.<sup>95</sup> The agencies’ review identified “substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the Nation’s waters.”<sup>96</sup> Accordingly, the agencies announced on June 9, 2021 that they were seeking remand of the NWPR and that, at some unknown time in the future, they intend to “initiate a new rulemaking process that restores the protections in place prior to the 2015 WOTUS implementation,” and, then later, it “anticipate[d] developing a new rule that defines [water of the United States] and is informed by a robust engagement process as well as the experience of implementing the [Pre-2015 Regulatory Definition], the Obama-era Clean Water Rule, and the Trump-era Navigable Waters Protection Rule.”<sup>97</sup>

In its announcement, the agencies noted that 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 [NWPR],” and EPA Administrator Regan was quoted as saying that EPA had “determined that [the NWPR] is leading to **significant environmental degradation**.”<sup>98</sup> The agencies have also admitted several very serious, material, environmentally destructive, and legally fatal errors that necessitate the immediate replacement of the NWPR with the Pre-2015 Regulatory Definition.

First, the agencies have repeatedly said that they have “substantial concerns” regarding the legality of the NWPR. For example, Radhika Fox, Principal Deputy Assistant Administrator for EPA’s

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<sup>93</sup> See e.g., Press Release at 2 (referring to rulemaking including a “robust engagement process” and “input from a wide array of stakeholders,” which will necessarily take additional time as compared to other rulemakings); Estrin Dec. ¶¶ 10-11, 33-34.

<sup>94</sup> See Declaration of Radhika Fox,<sup>#</sup> (“Fox Dec.”) ¶¶ 8, 10, 14-20; Declaration of Jaime A. Pinkham,<sup>#</sup> (“Pinkham Dec.”) ¶¶ 8, 10, 14-20; Declaration of Daniel E. Estrin in Support of Plaintiffs’ Partial Opposition to Defendants’ Motion for Remand Without Vacatur (“Estrin Dec.”) ¶¶ 12, 17-22 (Attachment 10).

<sup>95</sup> “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.” 86 Fed. Reg. 7037 (Jan. 25, 2021) (“EO 13990”).

<sup>96</sup> Fox Dec. ¶ 8; Pinkham Dec. ¶ 8.

<sup>97</sup> Press Release, at 2.

<sup>98</sup> *Id.* at 1(emphasis added).

Office of Water, said in a sworn statement that “the Biden Administration’s EPA and Army have substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the nation’s waters.”<sup>99</sup> The agencies also stated that they “have identified substantial concerns with the NWPR and have determined that additional considerations should be given to certain aspects of the NWPR through notice-and-comment rulemaking, including concern that when interpreting the jurisdictional scope of the CWA, the NWPR did not appropriately consider the effect of the revised definition of ‘waters of the United States’ on the integrity of the nation’s waters, as well as concern over the loss of waters protected by the CWA.”<sup>100</sup> As particular examples, the agencies stated that “[e]phemeral streams, wetlands, and other aquatic resources provide numerous ecosystem services, and there could be cascading and cumulative downstream effects from impacts to these resources, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity. The agencies have substantial concerns about the consideration of these effects on the chemical, physical, and biological integrity of the nation’s waters in the NWPR rulemaking process.”<sup>101</sup>

Second, the concerns identified by the agencies with the substance of the NWPR go to the heart of whether the NWPR complies with the law and are not limited to mere procedural failures or to concerns that may be cured merely by additional explanation. For example, the agencies, through their declarations, state that the NWPR failed to properly account for harm to the chemical, physical, and biological integrity of the Nation’s waters.<sup>102</sup> In the context of the CWA this is the

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<sup>99</sup> Fox Dec. ¶¶ 1, 3, 8; Pinkham Dec. ¶ 8.

<sup>100</sup> Fox Dec. ¶ 10; Pinkham Dec. ¶ 10 (same).

<sup>101</sup> Fox Dec. ¶ 20; Pinkham Dec. ¶ 20 (same).

<sup>102</sup> See Fox Dec. ¶ 10 (expressing concern that “the NWPR did not appropriately consider the effect of the revised definition of ‘waters of the United States’ on the integrity of the nation’s waters, as well as concern over the loss of waters protected by the CWA.”); Pinkham Dec. ¶ 10 (same); Fox Dec. ¶ 13 (“Based on a careful evaluation of the record of the NWPR, including the above-quoted statement, the agencies have substantial and legitimate concerns regarding the adequacy of consideration of the CWA’s water quality goals in the development of the NWPR. As such, the agencies believe it is appropriate to reconsider these issues—and, in particular, the effects of the ‘waters of the United States’ definition on the chemical, physical, and biological integrity of the nation’s waters—in a new rulemaking.”) (citing *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468-69 (2020)); Pinkham Dec. ¶ 13 (same); Fox Dec. ¶ 14 (“In light of the text, structure, and legislative history of the Act, and *Maui* and other Supreme Court decisions, the agencies have concluded there must be some consideration of the effects of a revised definition of ‘waters of the United States’ on the integrity of the nation’s waters. Based on the record at the time the agencies promulgated the NWPR, significant concerns exist about the sufficiency of the agencies’ consideration of the effects of the NWPR on the chemical, physical, and biological integrity of the nation’s waters when determining the limits of the specific definitional language ‘waters of the United States’ in the NWPR.” And providing as an example the effects of ephemeral waters on traditional navigable waters); Pinkham Dec. ¶ 14 (same); Fox Dec. ¶ 20 (“Ephemeral streams, wetlands, and other aquatic resources provide numerous ecosystem services, and there could be cascading and cumulative downstream effects from impacts to these resources, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity. The agencies have substantial concerns about the consideration of these effects on the chemical, physical, and biological integrity of the nation’s waters in the NWPR rulemaking process.”); Pinkham Dec. ¶ 20 (same); see also Estrin Dec. ¶¶ 15-16, Exhibits 1, 2 (providing criticism by EPA’s own Scientific Advisory Board that EPA failed to consider science and the objectives of the CWA in promulgating the NWPR).

most fundamental failure possible because it represents that the NWPR failed to account for *the sole 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) (providing “the objective” of the CWA).

These admissions of the NWPR’s failure to properly consider the CWA’s objective are also reflected in the agencies’ “Memorandum for the Record.”<sup>103</sup> For example, the agencies again admit that “[e]phemeral 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. These substantial effects on the chemical, physical, and biological integrity of the nation’s waters were inadequately considered during the NWPR rulemaking process.”<sup>104</sup>

Relatedly, the agencies have also admitted that the NWPR failed to consider science. Given the stated objective of the CWA, science is an obvious and necessary consideration in determining and setting CWA protections.<sup>105</sup> However, the agencies now acknowledge both that consideration of science was necessary, and that the agencies did not adequately consider the science when promulgating the NWPR. *See, e.g.*, Fox Dec. ¶ 12 (“Certain statements in the NWPR preamble call into significant question whether the agencies’ consideration of science and water quality impacts in developing the rule was consistent with [the goals of the CWA]. For example, the agencies explicitly and definitively stated in numerous places in the NWPR administrative record that they did not rely on agency documents in the record that provided some limited assessment of the effects of the rule on water quality in determining the scope of the definition of ‘waters of the United States.’”) (citation omitted); Pinkham Dec. ¶ 12 (same); *see also* Estrin Dec. ¶¶ 15-16, Exhibits 1, 2 (providing criticism by EPA’s own Scientific Advisory Board that EPA failed to consider science and the objectives of the CWA in promulgating the NWPR).

The agencies also determined that the NWPR inaccurately under-estimated the decrease in jurisdiction caused by the NWPR. For example, the agencies, through their declarations, stated that “the reduction in jurisdiction [under the NWPR] is notably greater than the deregulatory effects discussed in the rule preamble and the economic analysis case studies.”<sup>106</sup> This is consistent

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<sup>103</sup> The results of the Agencies’ review of the NWPR and their findings are further described and documented in a June 8, 2021 Memorandum for the Record with Supporting Documentation. EPA and Department of Army, Memorandum for the Record: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Database to Assess effects of the Navigable Waters Protection Rule, (June 8, 2021) and Attachment A: Data Analysis. (“Memorandum for the Record”), Estrin Dec. ¶¶ 29-30 and Ex. 6 and Ex. 7, respectively.

<sup>104</sup> Memorandum for the Record at 4.

<sup>105</sup> *See* 33 U.S.C. § 1251(a).

<sup>106</sup> Fox Dec. ¶ 15; Pinkham Dec. ¶ 15 (same).

with EPA's admission in its Memorandum for the Record that, "[a]lthough 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." Memorandum for the Record at 2.

Indeed, the NWPR has removed CWA protections from nearly all waters in some arid states. *See, e.g.*, Fox Dec. ¶ 15 ("These changes have been particularly significant in arid states. In New Mexico and Arizona, for example, of over 1,500 streams assessed under the NWPR, nearly every stream has been found to be a non-jurisdictional ephemeral resource, which is very different from the status of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime."); Pinkham Dec. ¶ 15 (same). EPA also admits that the NWPR's removals of jurisdiction are already causing harm to various sensitive ecosystems. *See, e.g.*, Fox Dec ¶ 17 (identifying harms to waters); Pinkham Dec. ¶ 17 (same).

The agencies also acknowledge that the NWPR will result in discharges without any regulation in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized.<sup>107</sup> The agencies further state that the NWPR unrealistically and incorrectly considered states' actions to reduce their own clean water protections in response to the reductions in jurisdiction from the NWPR. The agencies had incorrectly and unrealistically asserted that states would not amend their own clean water protections to bring them down to the new federal floor represented by the NWPR and that this retention of state jurisdiction would ameliorate environmental harm from the NWPR. The agencies provide this admission in support of their stated need to remand the NWPR for further consideration. *See* Memorandum for the Record at 4 ("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 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).").

Thus, the agencies have already determined that the NWPR has caused serious harm to the environment and that this harm will continue so long as the NWPR and its illegal definition of "waters of the United States" are in place. For example, EPA's press release regarding its decision to revise the NWPR admits that the NWPR is causing "destructive impacts to critical water bodies," "is leading to significant environmental degradation," and "is significantly reducing clean

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<sup>107</sup> *See* Fox Dec. ¶ 18; Pinkham Dec. ¶ 18; Memorandum for the Record at 4; *see also* U.S. Senate Committee on Environment and Public Works, "June 21, 2021 Letter to Michael S. Regan and Jaime A. Pinkham," attached as Exhibit 8 to Estrin Dec. (Senate committee letter to EPA recounting EPA's reasoning to committee for needing new rule as including "significant environmental damage," "ongoing environmental harm," and reductions in findings of federal jurisdictions for waters).

water protections.”<sup>108</sup> More specifically, the agencies admit that “[o]f the 40,211 individual aquatic resources or water features for which the Corps made approved jurisdictional determinations under the NWPR between June 22, 2020 and April 15, 2021, approximately 76% were found to be non-jurisdictional ... [and t]he agencies are also aware that this number is not the full universe of projects that no longer require Section 404 permitting under the NWPR...”<sup>109</sup> The agencies’ data also shows that they believe the rate of negative jurisdictional determinations is about 39% higher under the NWPR than it was in the approximately two-year period prior to the NWPR’s effective date.<sup>110</sup> EPA also found that

[i]n 2020-2021, [under the NWPR,] 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 [advanced jurisdictional determination] and other project proponents may not feel the need to obtain any sort of [jurisdictional determination] 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.

Memorandum for the Record at 3; *see also* Estrin Dec. ¶¶ 21-22 (providing analysis of harm from EPA database tracking jurisdictional determinations and showing that negative jurisdictional determinations under the NWPR continue to be issued at a very fast pace).

The agencies do not need additional information to justify the immediate repeal of the NWPR and restoration of the Pre-2015 Regulatory Definition. To the contrary, the agencies have already determined that the NWPR is contrary to law and is resulting in serious, ongoing environmental harm. Under these circumstances, the agencies are obligated by the objective of the CWA (and EPA by its mission to protect human health and the environment) to take urgent action to restore CWA protections for the Nation’s waters by restoring and implementing the Pre-2015 Regulatory Definition without any amendments or updates.

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<sup>108</sup> Press Release at 1; *see also* Memorandum for the Record at 1-2 (explaining that EPA and the Corps “have identified numerous clear and consistent indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practice.”) and at 4 (referencing several specific instances of “significant, actual environmental harms” from NWPR identified by stakeholders); Fox Dec. ¶ 15 (“Staff at EPA and the Army have reviewed approved jurisdictional determinations and identified indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practices.”); Pinkham Dec. ¶ 15 (same).

<sup>109</sup> Fox Dec. ¶ 15; Pinkham Dec. ¶ 15 (same).

<sup>110</sup> *Compare* Memorandum for the Record at 2 (comparing rates of negative jurisdictional determinations between the two time periods); Fox Dec. ¶ 15; Pinkham Dec. ¶ 15.



## **B. The NWPR Has Caused and Will Continue to Cause Serious Harm to Waterkeeper, Waterkeeper Organizations and their Respective Members**

The NWPR's reductions in protections to waters of the United States are causing Waterkeeper, Waterkeeper Groups, and our respective members to suffer various injuries.<sup>111</sup> For example, the agencies have explained that “[t]he lack of protections [under the NWPR] 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.”<sup>112</sup> Specifically, the agencies noted that “[o]f 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. 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.”<sup>113</sup>

Commenters have specific interests in the waters of New Mexico that EPA has identified as being locations where harm from the NWPR is “particularly significant.”<sup>114</sup> For example, WildEarth Guardians is “headquartered in Santa Fe, New Mexico [and] has been working for 30 years to protect and restore the wildlife, wild places, wild rivers, and health of the American West.”<sup>115</sup> WildEarth Guardians is the parent organization of Rio Grande Waterkeeper, a Waterkeeper Alliance member which “works to safeguard clean water and healthy flows in the Rio Grande and its tributaries from its headwaters in the San Juan Mountains of Colorado through Southern New Mexico.”<sup>116</sup>

Commenters submitted substantial evidence into the administrative record during the rulemaking for the NWPR demonstrating that the definition excludes all waters within a 14,605 square mile “closed basin,” within the Rio Grande Basin, as well as roughly 90 percent of streams and rivers in New Mexico outside of that “closed basin”—waters that contribute significant flows to and influence the water quality of the Rio Grande and its tributaries.<sup>117</sup> In fact, “[i]n New Mexico, as of June 29, 2021, there were 176 total determinations under the [NWPR], with 176 negative jurisdictional determinations and 0 positive jurisdictional determinations... As of June 30, 2021,

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<sup>111</sup> See, e.g., Estrin Dec. ¶¶ 3, 4, 6, 12, 13, 17-21, 32; Waterkeeper Fact Sheets *supra* fn. 42 (Attachment 6).

<sup>112</sup> Fox Dec. ¶ 16; Pinkham Dec. ¶ 16 (same).

<sup>113</sup> See Memorandum for the Record at 3.

<sup>114</sup> See *id.*

<sup>115</sup> Estrin Dec. ¶ 18.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* ¶ 18a; Waterkeeper Facts Sheets for Rio Grande Watershed, *supra* fn. 42 (Attachment 6).

there were 197 total determinations [under the NWPR], with 195 negative jurisdictional determinations and 2 positive jurisdictional determinations.”<sup>118</sup>

One of those negative jurisdictional determinations excluded an ephemeral stream from CWA protections at the Los Alamos National Laboratories.”<sup>119</sup> Notably, Waterkeeper provided evidence of a threat to Santa Fe, New Mexico’s water supply from eliminated jurisdiction over ephemeral streams receiving pollution discharges from Los Alamos National Laboratories and noted a lack of delegated CWA authority in New Mexico as part of its comments on the then-proposed NWPR.<sup>120</sup> The agencies, however, did not find that issue relevant, and simply responded that “[t]he applicability of the final rule to site-specific discharge scenarios as described in the comments regarding the Los Alamos National Labs is outside of the scope of this rulemaking . . .”<sup>121</sup> In other words, at the time of the NWPR Rulemaking, the agencies felt they were allowed to completely ignore this threat posed by the NWPR, which has now come to pass as predicted. While that result is not a surprise, it is highly concerning as Los Alamos National Laboratories is a notorious source of radioactivity and other pollution and has a long history of serious NPDES permit violations.<sup>122</sup>

Another negative jurisdictional determination in New Mexico “excluded ephemeral streams and two open water mine pits from CWA protections based on exclusions in the [NWPR] at the United Nuclear Corporation St. Anthony Uranium Mine.”<sup>123</sup> The elimination of CWA protection for these and many other waters allows unlimited discharges of pollutants, along with unregulated dredging and filling activities, in these unprotected waters—degrading the quality of the waters used and enjoyed by Rio Grande Waterkeeper and Guardians’ members and threatening the survival and recovery of numerous imperiled aquatic and riparian species, including ESA-listed endangered and threatened species.<sup>124</sup>

Commenters submitted extensive written comments to the administrative record during the public comment period for the NWPR, including a comment letter containing extensive evidence demonstrating that (1) important water resources would lose CWA protections under NWPR without any sound legal or scientific basis, and (2) the NWPR would cause serious harm to waters, people, aquatic systems, and endangered and threatened species and their designated critical habitats.<sup>125</sup> Commenters also identified impacts to specific Waterkeeper groups and their members,

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<sup>118</sup> *Id.* ¶ 22.

<sup>119</sup> Estrin Dec. ¶ 22b (citations omitted).

<sup>120</sup> *Id.* ¶ 18b; Waterkeeper Facts Sheets for Rio Grande Watershed, *supra* fn. 42 (Attachment 6).

<sup>121</sup> NWPR RTC, Topic 11 at p. 49.

<sup>122</sup> *Id.* ¶ 18b.

<sup>123</sup> *Id.* ¶ 22b (citations omitted).

<sup>124</sup> *Id.* ¶ 18c.

<sup>125</sup> *See, e.g.*, Waterkeeper NWPR Comments, *supra* fn. 14.

including Missouri Confluence Waterkeeper, Snake River Waterkeeper, Upper Missouri Waterkeeper, Bayou City Waterkeeper, Boulder Waterkeeper, Buffalo-Niagara Waterkeeper, Cape Fear Riverkeeper, Puget Soundkeeper, Rogue Riverkeeper, San Francisco Baykeeper.<sup>126</sup> For example, the Waterkeeper NWPR Comments documented the expected loss of CWA jurisdiction from the rule to:

- Large numbers of rivers and streams protected by the Missouri Confluence Waterkeeper that briefly flow subsurface and then reemerge as surface waters and which will have significant adverse impacts on waters throughout Missouri, including large, important downstream waterways such as the Missouri and Meramec Rivers.<sup>127</sup> Excluding these and other waters from CWA protections against pollution discharges and dredging/filling, will degrade water quality; threaten public health; destroy habitat; and endanger wildlife, fish, amphibians, reptiles and other aquatic life, including ten endangered and one threatened ESA mussel species;<sup>128</sup>
- Texas coastal prairie wetlands crucial to the health of Lower Galveston Bay, which is protected on behalf of its members by Bayou City Waterkeeper;<sup>129</sup>
- Ephemeral streams, reservoirs, ditches, and canals that receive pollution discharges and which flow into Boulder Creek—the primary drinking water supply for the Colorado cities of Boulder, Louisville, Lafayette, Erie, Superior, and Nederland—which is protected on behalf of its members by Boulder Waterkeeper;<sup>130</sup>
- Between an estimated 500 and 1,000 miles of ephemeral and ditched streams that flow into the Niagara River—the channel that connects two Great Lakes, Erie and Ontario— which is protected on behalf of its members by Buffalo Niagara Waterkeeper;<sup>131</sup>
- Pocosins, Carolina Bays, and ditched and ephemeral streams that receive animal waste pollution discharges, in the Cape Fear Basin of North Carolina, which is protected on behalf of its members by Cape Fear Riverkeeper;<sup>132</sup>

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<sup>126</sup> See Estrin Dec. ¶¶ 4, 6, 12-13, 17-22, 32; Waterkeeper Facts Sheets for Rio Grande Watershed, *supra* fn. 42 (Attachment 6).

<sup>127</sup> See Estrin Dec. ¶ 19, Waterkeeper Facts Sheets for Missouri Confluence Watershed, *supra* fn. 42 at 30-41 (Attachment 6).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*, Waterkeeper Fact Sheets for Lower Galveston Bay at 2-8.

<sup>130</sup> *Id.* Waterkeeper Fact Sheets for Boulder Creek Watershed at 9-14.

<sup>131</sup> *Id.* Waterkeeper Fact Sheets for Buffalo Niagara Watershed at 15-21.

<sup>132</sup> *Id.* Waterkeeper Fact Sheets for Cape Fear Watershed at 22-29.

- Ephemeral streams that provide habit and water supply for federally threatened Chinook salmon, coho salmon, chum salmon and steelhead trout, and ditched streams that receive animal waste, industrial and municipal pollution discharges in the Puget Sound Basin of Washington, which is protected on behalf of its members by Puget Soundkeeper;<sup>133</sup>
- An estimated 9,165 miles of ephemeral streams in the Rogue River Basin in Oregon that provide drinking water for the region, as well as habitat and spawning grounds for federal threatened Southern Oregon/Northern California Coast coho salmon and steelhead; numerous canals and ditches that receive pollution discharges that are hydrologically connected to and influence the quality of the Rogue River; and the Agate Desert vernal pools that are the only vernal pools in Oregon and support unique species, such as the vernal pool fairy shrimp listed as threatened under the ESA. These waters are protected on behalf of its members by Rogue Riverkeeper;<sup>134</sup>
- More than 40 percent of the streams that flow into and influence the water quality of San Francisco Bay in California, as well as provide spawning grounds for endangered Chinook salmon, which are protected on behalf of its members by San Francisco Baykeeper;<sup>135</sup>
- All of the waters, including premiere trout streams and critical habitat for federally threatened bull trout, located within 5,185 square mile “closed basin” area in the upper Snake River Basin of Idaho that are connected to the Snake River by subsurface flows and springs, and 14,866 miles of ditches, ditched streams and canals that receive pollution discharges and flow into the Snake River. These waters are protected on behalf of its members by Snake River Waterkeeper;<sup>136</sup> and
- An estimated 30,297 miles (85 percent) of the streams in the Upper Missouri River Basin of Montana that feed into and impact water quality in the Big Hole River (world-class trout fishery), Beaverhead River (premiere brown trout fishery), Jefferson River (Westslope cutthroat habitat and drinking water supply), Madison River (Yellowstone cutthroat and Westslope cutthroat trout habitat), and the Gallatin River (Yellowstone Park and Downstream Recreation). These waters are protected on behalf of its members by Upper Missouri Waterkeeper.<sup>137</sup>

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<sup>133</sup> *Id.* Waterkeeper Fact Sheets for Puget Sound at 42-49.

<sup>134</sup> *Id.* Waterkeeper Fact Sheets for Crater Lake and Rogue Watershed at 65-75.

<sup>135</sup> *Id.* Waterkeeper Fact Sheets for San Francisco Bay Watershed at 76-80.

<sup>136</sup> *Id.* Waterkeeper Fact Sheets for Snake River Watershed at 81-89.

<sup>137</sup> *Id.* Waterkeeper Fact Sheets for Upper Missouri Watershed at 90-106.

After the 2020 NWPR became effective, the massive scope and geographic extent of the loss of CWA protections for the Nation's waters began to be documented, to some extent, in a database maintained on an EPA webpage showing approved CWA jurisdictional determinations by the EPA and the Corps.<sup>138</sup> A review of the database and associated maps shows massive numbers of waters that are not protected under the NWPR, *id.*, for example:<sup>139</sup>

- As of June 29, 2021, maps from that database show that out of the 14,435 approved CWA jurisdictional determinations made under the 2020 NWPR across the country, 13,290 waters were found to be non-jurisdictional and only 1,145 were found to be jurisdictional. As of June 30, 2021, maps from that database show that out of the 31,520 approved CWA jurisdictional determinations made under the 2020 NWPR across the country, 23,819 waters were found to be non-jurisdictional and only 7,701 were found to be jurisdictional.
- In California, as of June 29, 2021, there were 2,129 total jurisdictional determinations made under the 2020 NWPR, with 2,107 negative jurisdictional determinations and only 22 positive jurisdictional determinations. Notably, 1,717 of those jurisdictional determinations were made between January 20, 2021 and June 16, 2021 and resulted in the exclusion of large numbers of wetlands, ephemeral streams, and other waters from CWA protections. As of June 30, 2021, there were 2,368 total determinations, with 2,292 negative jurisdictional determinations and 76 positive jurisdictional determinations.
- In Missouri, as of June 29, 2021, there were 191 total jurisdictional determinations under the 2020 NWPR, with 170 negative jurisdictional determinations and only 21 positive jurisdictional determinations. 106 of those jurisdictional determinations were made between January 20, 2021 and June 16, 2021 and resulted in the exclusion of large numbers of wetlands, ephemeral streams and other waters from CWA protections. As of June 30, 2021, there were 473 total determinations, with 374 negative jurisdictional determinations and 99 positive jurisdictional determinations.

Additionally, Alabama-based mining company Twin Pines has proposed a heavy mineral sand strip mine between the St. Mary's River and 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.<sup>140</sup> The proposed mine would be 50-feet deep on average and would destroy hundreds of acres of wetlands and streams that are critical to the St. Marys River and Okefenokee's diverse ecosystems, threatening the hydrology of the swamp. Recently, the Corps determined that

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<sup>138</sup> See EPA, Clean Water Act Approved Jurisdictional Determinations, <https://watersgeo.epa.gov/cwa>; see also, True and correct images of maps from the EPA database for all U.S. waters, New Mexico, California, and Missouri on June 29, 2021 and June 30, 2021, Estrin Dec., Ex. 4.

<sup>139</sup> Estrin Dec. ¶ 22.

<sup>140</sup> St. Marys Riverkeeper and Suwannee Riverkeeper work to protect waters that are impacted by this decision.

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.<sup>141</sup> For reasons that are unclear, the Corps did not discuss the streams at the site, which appear to be, but not are not being treated as, jurisdictional waters under the CWA.<sup>142</sup> 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.

In sum, failure to start immediately implementing the Pre-2015 Regulatory Definition during lengthy rulemaking processes with indefinite timelines will cause irreversible harm to the environment, including to waterways protected and used by Waterkeeper, Waterkeeper Groups and their respective members.

## V. RESPONSES TO SPECIFIC REQUESTS FOR FEEDBACK

In the Notice, the agencies identified several issues upon which they are specifically seeking feedback from stakeholders.<sup>143</sup> The regulatory definition of “waters of the United States” is required to broadly protect the Nation’s waters to achieve the objective of the CWA. It must be consistent with Congressional intent, the text of the CWA and sound science. However, many of the questions posed in the Notice suggest that the agencies intend to build upon the legally and scientifically erroneous approaches that underlay the 2003 and 2008 Guidance, the CWR, and the NWPR.

In the first rulemaking, to the extent it is necessary, the agencies should simply repeal the NWPR and readopt the Pre-2015 Regulatory Definition without amendment. To the extent a second rulemaking is truly required, we urge the agencies to instead build upon the solid and proven foundation provided by the longstanding Pre-2015 Regulatory Definition and avoid repeating the mistakes that led to the repeals of the CWR and NWPR.

Commenters have extensively addressed the questions posed in multiple comment letters filed with the agencies during previous rulemakings relating to the regulatory definition of “waters of the United States.”<sup>144</sup> Accordingly, we urge the agencies to consider those comments when evaluating any of the issues identified in the Notice and additional issues that may arise. Significant portions of the CWR and the entirety of the NWPR are contrary to law and science, and thus, the agencies should not rely upon those provisions in the CWR or any part of the NWPR to define “waters of

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<sup>141</sup> Corps Approved Jurisdictional Determination, ORM Number: SAS-2018-00554 (Oct. 14, 2020) (Attachment 11).

<sup>142</sup> National Wetlands Inventory Map of the Twin Pines Mine Site Area, *available at*: <https://www.fws.gov/wetlands/data/Mapper.html> (Attachment 12).

<sup>143</sup> Notice, 86 Fed. Reg. at 41913-14.

<sup>144</sup> See Previous Comments *supra* fn. 14.

the United States" in the first or second rulemaking contemplated in this Notice. These issues are fully addressed in our Previous Comments, as well as in the Amended Complaint filed in *Waterkeeper Alliance et al. v. Regan*, 3:18-CV-3521 (N.D. Ca. filed Dec. 22, 2020),<sup>145</sup> which we also urge the agencies to consider during the rulemakings.

## A. Implementation

In the Notice, the agencies specifically requested feedback on significant nexus analyses under the pre-2015 regulatory regime and the 2015 Clean Water Rule, as well as the typical year analysis under the NWPR. With regard to the illegality of the application of the significant nexus test as the sole basis for determining jurisdiction over broad classes of waters, including tributaries, rivers, streams, lakes, ponds, impoundments, ditches, canals, non-navigable intrastate waters and other waters, under the Pre-2015 Regulatory Definition, Guidance Documents, and CWR, see our comments in Sections II and III above.

### 1. Distance Limits on the Significant Nexus Test

Additionally, however, the CWR illegally and arbitrarily limited the application of the significant nexus test to waters within a certain distance from traditionally navigable waters, interstate waters and the territorial seas contrary to the CWA and in violation of the APA notice and comment provisions.<sup>146</sup> The CWR defined waters of the United States to include “all waters located within 4,000 feet of the high tide line or ordinary high water mark of” these per se jurisdictional waters, “where they are determined, on a case-specific basis, to have a significant nexus” with such waters.<sup>147</sup>

As a result, under the CWR, with limited exceptions, waters located more than 4,000 feet of the high tide line or ordinary high water mark of a traditionally navigable water, interstate water, or territorial sea are automatically excluded from CWA jurisdiction, even if those waters possess a significant nexus with the jurisdictional water or otherwise have a significant effect on interstate commerce. *See* CWR, 80 Fed. Reg. at 37086 (describing the “exclusive” and “narrowly targeted circumstances” under which case-specific significant nexus determinations can be made under the CWR). Additionally, in establishing the “4,000 foot bright line boundaries for these case-specific significant nexus determinations” in the CWR, the agencies purported to be “carefully applying the available science.” CWR, 80 Fed. Reg. at 37059. But the opposite is true; as noted in the

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<sup>145</sup> Amended Complaint, *supra* fn. 21 at 28-91.

<sup>146</sup> Under the CWR, a case-by-case significant nexus analysis also applies to five categories of waters that the agencies “have determined are ‘similarly situated’ for purposes of a significant nexus determination” (such as prairie potholes and western vernal pools), as well as to waters within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea. 80 Fed. Reg. at 37086.

<sup>147</sup> CWR, 80 Fed. Reg. at 37114.

preamble to the CWR, EPA’s own SAB “found that distance could not be the sole indicator used to evaluate the connection of ‘other waters’ to jurisdictional waters.” *Id.* at 37064.

## 2. Typical Year Limitations

With regard to the use of “typical year” under the NWPR, it is unclear why the agencies are requesting feedback on that phrase given their intent to repeal the NWPR. Under the NWPR, for each category of jurisdictional waters, with the exception of commercially navigable waters and territorial seas, the agencies further illegally limited CWA jurisdiction through the use of the arbitrary and enigmatic phrase “typical year.”

For example, under the NWPR, rivers and streams are only jurisdictional if they contribute flow to a commercially navigable water in a “typical year” so long as that flow is perennial or intermittent in a “typical year.”<sup>148</sup> Lakes, ponds, and impoundments are jurisdictional if they contribute flow to a commercially navigable water or territorial sea in a “typical year.”<sup>149</sup> Wetlands are only jurisdictional if they are inundated or flooded by a jurisdictional water in a “typical year” or if they are separated from a jurisdictional water by an artificial structure but have a direct hydrologic surface connection between them in a “typical year.”<sup>150</sup>

Besides being a non-scientific term with no basis in the law, the term is so vague that it is impossible to understand how to apply it or how it will impact CWA jurisdiction when the agencies employ it in jurisdictional determinations. In fact, a preliminary review of Corps’ Approved Jurisdictional Determinations shows that it is not being applied in a consistent manner between Corps districts and that data to evaluate it is not readily available.<sup>151</sup>

Additionally, the use of term is premised, in part, on the Relatively Permanent test from *Rapanos* and some additional erroneous legal theories employed to justify the extreme reduction of

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<sup>148</sup> NWPR, 85 Fed. Reg. at 22340-41.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See e.g., Selected Corps Approved Jurisdictional Determinations (Attachment 13) (New Mexico SPA2020-169 (Mar. 2, 2021) - “Due to this lack of a consistent amount of precipitation from year to year for the review area, it is difficult to determine whether the [APT] analysis has been conducted during normal, wetter, or drier conditions. Regardless, the results of this AJD are not heavily reliant on the typical year assessment.” Instead, the Corps’ AJD relied largely on a Aquatic Resources Delineation Report prepared by United Nuclear Corporation with the services of SWCA Environmental Consultants.); (Montana NWO-2021-00236-MTB (Mar. 1, 2021) - No typical year evaluation for a pond that receives discharges from Exxon Mobil Refinery and flows into a tributary of the Yellowstone River.); (New Mexico SPA-2020-00200-ABQ (Sept. 9, 2020) - “Antecedent Precipitation Tool (APT) was used to determine if the site visit was conducted during a climatological ‘typical year’ for the review area” for a July 31, 2020 site visit during the dry season.); (Montana NWO-2014-02239-MTB (Mar. 29, 2021) - “Maps on Google Earth were reviewed to conduct an electronic site visit. Remote tools were used to evaluate imagery throughout the past 30 years and growing seasons” for an AJD on streams and wetlands near the Gallatin River).



jurisdictional waters in the NWPR.<sup>152</sup> The use of this concept for determining jurisdiction allows a river or stream to shift between being jurisdictional and non-jurisdictional, and the boundaries between jurisdictional and non-jurisdictional waters can shift as well. *See, e.g.*, NWPR RTC, Topic 5, p. 14 (“the point at which a tributary becomes ephemeral may fluctuate upstream and downstream in a typical year based on climatic conditions, changes in topography and surrounding development, water input and water withdrawals.”). Under the NWPR, the fluctuating jurisdictional status of these rivers and streams can also be caused by water withdrawals.<sup>153</sup> Under such a regime, pollution control requirements and, thus, protections for the public and aquatic life, could shift from year to year in unpredictable ways – endangering the public and creating regulatory uncertainty for regulated entities.

The use of the phrase “typical year” to define CWA jurisdiction under the NWPR is a barrier to the achievement of the objectives of the CWA. It should be squarely rejected by the agencies and not revived or considered during the first or second rulemaking.

## **B. Regional, State and Tribal Interests**

In the Notice, the agencies asked for feedback on “how or whether states and tribes have taken any actions in response to changes in the jurisdictional scope of “waters of the United States” under the NWPR.”<sup>154</sup> The agencies have already stated in the Memorandum for the Record that:

“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 . . . 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 [sic] 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).”<sup>155</sup>

New Mexico has the distinction of not having state laws in place to supplant the loss of CWA protections, and has now lost CWA protections for most of its waters due to the illegal, non-scientific NWPR. This dire reality, ongoing for more than a year at this point, requires urgent

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<sup>152</sup> *See* Amended Complaint, *supra* fn. 21 at 68-82; Waterkeeper NWPR Comments, *supra* fn. 14.

<sup>153</sup> NWPR, 85 Fed. Reg. at 22291.

<sup>154</sup> Notice, 86 Fed. Reg. 41913.

<sup>155</sup> Memorandum for the Record, at 4.

action on the part of the agencies to immediately implement the Pre-2015 Regulatory Definition, including prioritizing resources toward urgently reconsidering administrative determinations that eliminated CWA protections under NWPR.

### 1. Interstate Waters

In the Notice, the agencies also inquire “about the use and value of the jurisdictional category for interstate waters.” The use and value of protecting interstate waters has been obvious for many decades, and mandatory legal requirements to protect them have been in place since 1948.

Interstate waters have been protected under the nation’s water quality laws since the 1948 Water Pollution Control Act,<sup>156</sup> and under the CWA since its inception nearly 50 years ago, until April 2020 when the agencies adopted the NWPR. *See, e.g.*, 33 U.S.C §§ 1313, 1319, 1341, 1342. The agencies provided no valid legal or scientific basis for removing interstate waters from CWA jurisdiction under the NWPR. *Compare* NWPR, 85 Fed. Reg. at 22,282-83 with Repeal Rule, 84 Fed. Reg. at 56,669–70 (reinstating 1986 definition, including interstate waters); National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,529 (May 22, 1973) (EPA’s first “navigable waters” definition, including interstate waters).

With the promulgation of the NWPR, the agencies simply asserted that “[i]nterstate waters without any connection to traditional navigable waters are not within the agencies’ authority under the CWA and may be more appropriately regulated by the states and tribes under their sovereign authorities.”<sup>157</sup> The agencies did not explain how they expect states and tribal governments to regulate pollution outside their boundaries, which they lack the authority to do,<sup>158</sup> and they did not provide a reasoned basis for rejecting their own legal analysis supporting jurisdiction over interstate waters as reflected in the Clean Water Rule Technical Support Document.<sup>159</sup>

Contrary to the agencies’ unsupported assertions when they promulgated the NWPR, the CWA’s coverage of, and regulatory programs for, interstate waters are so broad and comprehensive that it eliminated alternative remedies in interstate pollution cases according to the Supreme Court in *City of Milwaukee*, 451 U.S. 304 (displaced federal common law), *Ouellette*, 479 U.S. 481

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<sup>156</sup> Water Pollution Control Act of 1948, Pub. L. No. 80-845, 2(d)(1), (4), 62 Stat. 1156-57.

<sup>157</sup> NWPR RTC, Topic 11 at 26.

<sup>158</sup> *See Arkansas v. Oklahoma*, 503 U.S. 91, 98–100 (1992) (“On remand, Illinois argued that § 510 of the Clean Water Act, 33 U.S.C. § 1370, expressly preserved the State’s right to adopt and enforce rules that are more stringent than federal standards. The Court of Appeals accepted Illinois’ reading of § 510 but held that that section did “no more than to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters.” *Illinois v. Milwaukee*, 731 F.2d 403, 413 (CA7 1984), cert. denied, 469 U.S. 1196, 105 S.Ct. 979, 83 L.Ed.2d 981 (1985). This Court subsequently endorsed that analysis in *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987).”

<sup>159</sup> *See, e.g.*, TSD at 197-222; NWPR RTC, Topic 3, p. 5.

(preempted downstream state’s common law), and *Arkansas v. Oklahoma*, 503 U.S. at 98–100 (a downstream state’s remedy is to enforce its water quality standard against an upstream state through the CWA’s NPDES permitting process). Eliminating CWA jurisdiction and programs for interstate waters by removing them from the definition of “waters of the United States” has left states in a worse position to address interstate water pollution than they were for the century preceding the CWA contrary to Congressional intent, the plain text of the CWA<sup>160</sup> and extensive Supreme Court and lower court precedent.<sup>161</sup>

### **C. The Scope of Jurisdiction over Tributaries, Ditches, Adjacent Waters, and Non-adjacent, Intrastate, Non-navigable Waters**

In the Notice, the agencies pose numerous questions regarding the proper scope of jurisdiction over tributaries, ditches, adjacent waters and non-adjacent, intrastate, non-navigable waters.<sup>162</sup> Commenters have provided extensive feedback to the agencies on these questions, in Previous Comments, and in the Amended Complaint.<sup>163</sup> We urge the agencies to consider those comments and the Amended Complaint during the first and second rulemakings. Commenters also highlight a few of those deficiencies in response to specific agencies requests in the Notice below.

As noted in detail above in Sections II and III, tributaries to other “waters of the United States” are per se jurisdictional and there is no sound legal or scientific basis for subjecting tributaries to a significant nexus analysis; flow regime, duration, or size limitations; factors for landscape position or stream network density; or any distance from a traditional navigable water, territorial sea, or interstate water limitations.

#### **1. Ordinary High Water Mark**

The CWR’s definition of tributary, which includes only those waters that have a bed and banks and an additional indicator of an ordinary high water mark, lacks legal and scientific support. EPA’s SAB “advised EPA to reconsider the definition of tributaries because not all tributaries

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<sup>160</sup> See, e.g., 33 U.S.C. § 1313(a)(1) (This section provides “any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to [October 18, 1972], shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to [October 18, 1972].”).

<sup>161</sup> See, e.g., *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 304 (3d Cir. 2015) (“At the same time, federal power over interstate waterways, ‘from the commencement of the [federal] government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.’ *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 190, 6 L.Ed. 23 (1824). And for at least a century, federal common law has governed disputes over interstate water pollution. *Arkansas v. Oklahoma*, 503 U.S. at 98, 112 S. Ct. 1046 (citing *Missouri v. Illinois*, 200 U.S. 496 (1906); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907))”).

<sup>162</sup> Notice, 86 Fed. Reg. 41913-14.

<sup>163</sup> Amended Complaint, *supra* fn. 21 at ¶¶ 185-357; Previous Comments, *supra* fn. 14.

have ordinary high water marks,” and urged EPA to change the definition’s wording to “bed, bank, and other evidence of flow.”<sup>164</sup> The SAB explained that “[a]n ordinary high water mark may be absent in ephemeral streams within arid and semi-arid environments or in low gradient landscapes where the flow of water is unlikely to cause an ordinary high water mark.”<sup>165</sup>

EPA’s own scientific analyses underpinning the CWR do not provide support for the requirement that a tributary have both bed, banks and ordinary high water mark to impact downstream waters.<sup>166</sup> Historically, the definition of tributary only required the presence of defined bed and banks, and the addition of the requirement for an ordinary high water mark under the CWR improperly excluded many waters without any sound legal and scientific basis.<sup>167</sup> While EPA noted that available science “supports the conclusion that sufficient volume, duration, and frequency of flow are required to create a bed and banks and ordinary high water mark” within a tributary, TSD at 171, this self-evident conclusion has no bearing on whether a particular tributary (or group of similarly situated tributaries) “provide[s] many common vital functions important to the chemical, physical, and biological integrity of downstream waters” and should thus be per se jurisdictional.<sup>168</sup> Indeed, the TSD explicitly recognized, and did not dispute, the SAB’s view that “from a scientific perspective there are tributaries that do not have an ordinary high water mark but still affect downstream waters.”<sup>169</sup>

Members of the SAB panel also expressed concerns regarding the proposed CWR’s exclusion of ephemeral streams, noting for example that such waters are ecologically important to downstream water quality (especially in the arid southwest), see SAB Report at 2 -3 and TSD at 67; can deliver nutrients and other agricultural pollutants to downstream waters when tilled;<sup>170</sup> and may provide valuable habitat for certain organisms that have adapted to them.<sup>171</sup>

In the final CWR, the agencies also significantly expanded the illegal exclusion for ephemeral features to include “[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed

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<sup>164</sup> CWR, 80 Fed. Reg. at 37,064.

<sup>165</sup> SAB Report at 2.

<sup>166</sup> See TSD at 67.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 235.

<sup>169</sup> *Id.* at 242.

<sup>170</sup> Memorandum from Dr. Amanda D. Rodewald, Chair of the SAB Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair of the SAB, *Comments to the Chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled “Definition of ‘Waters of the United States’ Under the Clean Water Act”* (Sep. 2, 2014) at 8.

<sup>171</sup> *Id.* at 25, Revised Comments by Kurt D. Fausch on the proposed rule “Definition of ‘Waters of the United States’ Under the Clean Water Act.”

waterways.”<sup>172</sup> In the Preamble to the CWR, the agencies explained that the term “ephemeral features” broadly encompasses “ephemeral streams that do not have a bed and banks and ordinary high water mark.”<sup>173</sup>

According to EPA, “[t]he scientific literature documents that tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches, are integral parts of river networks.”<sup>174</sup> Additionally, in the preamble to the Proposed CWR, the agencies noted that “tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, or biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”<sup>175</sup>

In the preamble to the final CWR, the agencies explained that the effects tributaries exert on downstream waters “occur even when the covered tributaries flow infrequently (such as ephemeral covered tributaries), and even when the covered tributaries are great distances from the traditional navigable water, interstate water, or the territorial sea.”<sup>176</sup>

There is no sound legal or scientific basis for excluding tributaries, including ephemeral streams, from CWA jurisdiction based on the presence or absence of an ordinary high water mark and this limitation must be abandoned by the agencies.

### 3. CWR Limitations on Ditches

The SAB provided comments on categorical exclusions of certain ditches under the Proposed CWR, and specifically rejected the exclusion of ditches as “not justified by science.”<sup>177</sup> The SAB explained: “There is . . . a lack of scientific knowledge to determine whether ditches should be categorically excluded. Many ditches in the Midwest would be excluded under the proposed rule because they were excavated wholly in uplands, drain only uplands, and have less than perennial flow. However, these ditches may drain areas that would be identified as wetlands under the Cowardin classification system and may provide certain ecosystem services.”<sup>178</sup>

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<sup>172</sup> CWR, 80 Fed. Reg. at 37,105.

<sup>173</sup> *Id.* at 37,058.

<sup>174</sup> TSD at 243.

<sup>175</sup> 79 Fed. Reg. at 22,224 (emphasis added).

<sup>176</sup> 80 Fed. Reg. at 37,069.

<sup>177</sup> SAB Report at 3.

<sup>178</sup> *Id.*

In the final CWR, the agencies significantly altered the provision regarding ditches, changing the exclusion to include: “[d]itches with ephemeral flow that are not a relocated tributary or excavated in a tributary”; “[d]itches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands”; and, “[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.”<sup>179</sup>

Contrary to that decision, the agencies have noted that man-made and man-altered tributaries—such as “ditches, canals, channelized streams, piped streams, and the like,”—“likely enhance the extent of connectivity” between streams and downstream rivers, “because such structures can reduce water losses from evapotranspiration and seepage.”<sup>180</sup> In other words, to the extent perennial, intermittent, and ephemeral tributaries have significant impacts on downstream waters, the increased flow associated with man-made or man-altered ditches may actually exacerbate these effects.

Despite noting the significant impacts that ditches and ephemeral streams have on downstream waters, the agencies provided no legal or scientific basis for excluding ditches that are ephemeral, intermittent, or indirectly connected to traditional navigable waters, interstate waters, or the territorial seas, nor did the agencies provide a legal or scientific basis for per se excluding ephemeral features such as ephemeral streams that do not meet the definition of a tributary. Additionally, the agencies provided no justification, legal, scientific, or otherwise, for concluding in the final CWR that all tributaries are “waters of the United States,” while categorically exempting certain types of ditches—a category of tributary under the CWR. Finally, the agencies have provided no legal or scientific basis for exempting from CWA jurisdiction ditches that flow into traditional navigable waters, interstate waters, or the territorial seas, despite concluding in the Proposed CWR that such waters are “waters of the United States.”<sup>181</sup>

#### **D. Other Exclusions from the Definition**

In the Notice, the agencies specifically requested feedback on the “implementability and clarity of exclusions present in the NWPR and identified in the 2015 Clean Water Rule or the pre-2015 regulations and the preambles to those regulations.”<sup>182</sup> As discussed extensively in the Waterkeeper NWPR Comments, and as outlined in the Amended Complaint, because the NWPR illegally narrowed the protected classes of jurisdictional waters, many of the exclusions and all of

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<sup>179</sup> 80 Fed. Reg. at 37,105.

<sup>180</sup> TSD at 256-57.

<sup>181</sup> Compare 79 Fed. Reg. 22,273–74 (excluding “[d]itches that do not contribute flow . . . to water identified in paragraphs (l)(1)(i) through (iv) of this section”) with 80 Fed. Reg. 37,105 (excluding “[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section”).

<sup>182</sup> Notice, 86 Fed. Reg. at 41914.

definitions in the NWPR that build upon that foundation are contrary to law and science, including, but not limited to:

- The blanket exemption of “Waters or water features that are not identified in paragraph (1)(i), (ii), (iii), or (iv);”
- Ephemeral streams;
- “Ditches that are not waters identified in paragraph (1)(i) or (ii) of this definition, and those portions of ditches constructed in waters identified in paragraph (1)(iv) of this definition that do not satisfy the conditions of paragraph (3)(i) of this definition;”
- “Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated **in upland or in non-jurisdictional waters**, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (3)(vi) of this definition;”
- “Water-filled depressions constructed or excavated in **upland or in non-jurisdictional waters** incidental to mining or construction activity, and pits excavated in **upland or in non-jurisdictional waters** for the purpose of obtaining fill, sand, or gravel;”
- “Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, **constructed or excavated in upland or in non-jurisdictional waters**;”
- Waste treatment systems; and
- all of the definitions in the NWPR.<sup>183</sup>

These exemptions and definitions encompass waters that have long been protected as jurisdictional “waters of the United States” under the CWA, and their removal from protections under the CWA is unlawful.<sup>184</sup> Additionally, as discussed extensively in the Waterkeeper CWR Comments and the

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<sup>183</sup> Amended Complaint, *supra* fn. 21 at ¶¶ 185-269; Waterkeeper NWPR Comments, *supra* fn. 21 at 54-98.

<sup>184</sup> For example, because the agencies narrowly defined jurisdictional waters in the NWPR, and also defined “upland” in a manner that could include waters that have historically been protected as “waters of the United States,” the exclusions allow for mining and construction activity to take place in, discharge pollutants to, or destroy streams, rivers, lakes, wetlands and other waters contrary to the CWA. *Id.* at 79, 87-90, *see also* Corps Approved Jurisdictional Determination SAJ-2010-01702 (Dec. 7, 2020) (exempting multiple ditches by deeming them prior converted cropland whether the ditches are “connected to the now interconnected system of ditches that have successfully dewatered **much of the site** for agriculture. All ditches on site were excavated to drain wetlands that do not satisfy the conditions of (c)(1).”) (emphasis added) (Attachment 14).

Amended Complaint, the CWR also contained numerous exemptions that are contrary to law and science (i.e. waste treatment, ditches, ephemeral features, distance limitations, definition of tributary, and ordinary high water mark definition).<sup>185</sup>

1. The Waste Treatment System Exclusion Is Contrary Law and Illegally Authorizes Pollution of the Nation's Waters

In the Notice, the agencies specifically asked whether the NWPR definition of waste treatment systems is “appropriate under the Clean Water Act, easy to understand, and implementable” and whether it has “any benefits or harmful impacts.”<sup>186</sup>

On May 19, 1980, EPA promulgated a rule establishing the requirements for several environmental permitting programs, including the NPDES program.<sup>187</sup> As part of this action, EPA promulgated a definition of the term “waters of the United States.” That rule stated:

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*<sup>188</sup>

The preamble to this 1980 rule explains that the second sentence of this regulation was included “[b]ecause [the] CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems[.]”<sup>189</sup>

Two months later, EPA suspended the second sentence of this regulation (italicized above) by removing it from the regulation entirely. In its place, EPA inserted a footnote stating that the sentence was “suspended until further notice.”<sup>190</sup> EPA explained in a Federal Register notice that it was suspending this sentence due to industry’s objections that the regulation “would require

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<sup>185</sup> Amended Complaint, *supra* fn. 21 at ¶¶ 98-155; Waterkeeper CWR Comments, *supra* fn. 14.

<sup>186</sup> Notice, 86 Fed. Reg. at 41914.

<sup>187</sup> See 45 Fed. Reg. 33290 (May 19, 1980).

<sup>188</sup> 45 Fed. Reg. 33290, 33424 (emphasis added); see also 40 C.F.R. § 122.3 (1980).

<sup>189</sup> 45 Fed. Reg. 33290, 33298.

<sup>190</sup> 45 Fed. Reg. 48620 (July 21, 1980).



them to obtain permits for discharges into existing waste water treatment systems, such as power plant ash ponds, which had been in existence for many years.”<sup>191</sup>

EPA did not provide the public with an opportunity to comment on the suspension at the time this significant regulatory action was taken in 1980. Instead, EPA noted its intent to “promptly develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension.” *Id.* EPA never developed a revised definition, and thus never submitted a proposed rule regarding this limitation on the waste treatment system exclusion for notice and comment. The public, therefore, never had the opportunity to comment on or legally challenge the unilateral suspension of this sentence from the Code of Federal Regulations.

The Proposed CWR included the “suspended” second sentence of the waste treatment system exclusion but noted in a footnote that the suspension was still in effect.<sup>192</sup> In addition, in the preamble to the Proposed CWR the agencies purported to make only “ministerial” changes to the waste treatment system exclusion and, thus, stated that they were not seeking comment on this exclusion.<sup>193</sup> The preamble to the Final CWR also describes the changes to the waste treatment system exclusion as “ministerial,” and notes that “[b]ecause the agencies are not making any substantive changes to the waste treatment system exclusion, the final rule does not reflect changes suggested in public comments.”<sup>194</sup>

The definition of “waters of the United States” in 40 C.F.R. § 122.2, as revised by the Final CWR, provides that “[t]he following are not ‘waters of the United States’ even where they otherwise meet the terms of (1)(iv) through (viii) of the definition” [i.e., even if they are otherwise jurisdictional as impoundments, tributaries, adjacent waters, or waters with a significant nexus to traditional navigable waters, interstate waters, or the territorial seas]:

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]<sup>195</sup>

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<sup>191</sup> *Id.*

<sup>192</sup> *See* 79 Fed. Reg. 22188, 22268 (April 21, 2014).

<sup>193</sup> *Id.* at 22190, 22217.

<sup>194</sup> *See* 80 Fed. Reg. at 37114, 37097.

<sup>195</sup> 80 Fed. Reg. at 37,114.

As it did before, “Note 1” of the revised 40 C.F.R. § 122.2 purports to continue the suspension of the last sentence of the waste treatment system exclusion.

Thus, under the waste treatment system exclusion in the CWR (including the ongoing suspension of the last sentence of that exclusion), waters such as adjacent wetlands, ponds, or tributaries are not subject to CWA jurisdiction if they are deemed to be part of a “waste treatment system”—even if they are naturally occurring waters, were created entirely within a naturally occurring water, or were created by impounding another water of the United States.<sup>196</sup>

For example, under the CWR, an industrial facility could unilaterally destroy CWA jurisdiction over a naturally occurring wetland or tributary merely by using that wetland or tributary as part of its on-site “waste treatment system.” This exemption is contrary to the fundamental purposes of the CWA and flies in the face of any permissible reading of “waters of the United States.”<sup>197</sup>

Under the NWPR, the agencies falsely claimed that the NWPR’s exclusion of waste treatment systems from CWA jurisdiction has “been expressly included in regulatory text for decades, but [that] the agencies are defining [the exclusion] for the first time to enhance implementation clarity.”<sup>198</sup> In fact, the waste treatment exclusion in the Replacement Rule improperly expands the exclusions reflected in prior definitions and agency interpretations, which, as noted above, were also inconsistent with and/or were adopted in violation of the law.

The exclusion for “waste treatment systems” in the NWPR excludes any jurisdictional water from CWA protections if it was used for a waste treatment system prior to 1972 or if it is converted to a waste treatment system thereafter “in accordance with the requirements of the CWA.”<sup>199</sup> Under the NWPR, and contrary to the CWA, the agencies are “affirmatively relinquishing jurisdiction” over otherwise jurisdictional waters that are converted to waste treatment systems through CWA Sections 402 and 404 permits.<sup>200</sup> And, for the first time, the agencies defined waste treatment systems to include cooling ponds, which encompasses large public lakes – often used for boating, fishing, recreation, and other public uses - that were created by impounding jurisdictional waters to provide cooling water for industry.<sup>201</sup>

Instead of keeping the promise EPA made over thirty years ago, with the NWPR, the agencies attempted to evade compliance with the CWA and APA by bootstrapping the impermissible

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<sup>196</sup> 80 Fed. Reg. at 37114; 40 C.F.R. § 122.2.

<sup>197</sup> See 33 U.S.C. § 1251(a).

<sup>198</sup> NWPR, 85 Fed. Reg. at 22317, 22324.

<sup>199</sup> NWPR, 85 Fed. Reg. at 22325.

<sup>200</sup> NWPR, 85 Fed. Reg. at 22322.

<sup>201</sup> NWPR, 85 Fed. Reg. at 22328-39.

exclusion onto a new “waters of the United States” definition without ever having provided an adequate legal or factual basis for doing so as required under the CWA and APA. This exclusion is premised on a rewriting of the CWA and is not based on a permissible construction of the law. It allows industries to transform the Nation’s waters into waste treatment systems and thereby strip them of CWA jurisdiction contrary to the CWA, legislative history, and case law.<sup>202</sup> Even navigable-in-fact lakes, important for navigation, interstate commerce, drinking water, and recreation, could be rendered non-jurisdictional, destroyed, and turned into treatment systems for industrial waste under the NWPR.

The broad exclusion for waste treatment systems from CWA jurisdiction in the CWR and NWPR is directly contrary to the CWA and decades of law holding that once a body of water is a water of the United States, it is always a water of the United States.<sup>203</sup> While some of these decisions examined the term “navigable waters” as opposed to “waters of the United States,” the CWA most certainly encompasses the narrower category of “navigable water” under other statutes. There is no evidence Congress intended to depart from this well settled law to allow the agencies to remove bodies of water that fall squarely within the definition of “waters of the United States,” especially where those “waters of the United States” are impounded to create a private dump for a utility or other industrial operation.<sup>204</sup>

To the contrary, legislative history speaks directly to this issue and the general common law rule prior to the enactment of the CWA was that a body of water forever remains a water of the United States once it has been identified as a water of the United States.<sup>205</sup> The Senate Committee on Public Works, in approving the Federal Water Pollution Control Act Amendments of 1971, explicitly found that “[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable.”<sup>206</sup> Several years later, another Senate Report stated that the CWA “stipulated that the Nation’s fresh and marine waters would not be an element of the waste treatment process. That continues to be national policy.”<sup>207</sup> There appear to be no contrary statements in legislative history.

This exclusion has had, and will continue to have, serious consequences for our Nation’s waters if it is not eliminated. For example, it has been a common practice for the utility industry to impound

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<sup>202</sup> See, e.g., 45 Fed. Reg. 48620, 48620 (July 21, 1980).

<sup>203</sup> See Scott Snyder, Note, *The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA’s Definition of “Waters of the United States”*, 21 N.Y.U. Envtl. L.J. 504, 522-23 (2014) (providing overview of federal cases prior to the enactment of the CWA holding that once a body of water has been classified as a water of the U.S., it remains a waters of the U.S. forever).

<sup>204</sup> *Id.* at 523.

<sup>205</sup> See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (“When once found to be navigable, a waterway remains so.”).

<sup>206</sup> S. Rep. No. 92-414, at 7 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3674.

<sup>207</sup> S. Rep. No. 95-370, at 4 (1977) reprinted in 1977 U.S.C.C.A.N. 4326, 4330.

streams and rivers to create waste dumps for coal ash<sup>208</sup> and other wastes associated with coal-fired power plants. In fact, EPA cited the utility industry’s concern about coal ash impoundments as one of the primary reasons it suspended the sentence making clear that permits are required for discharges into a waste treatment system created by impounding “waters of the United States.”<sup>209</sup>

Coal-fired power plants discharge millions of gallons of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. This pollution is discharged directly from the power plant; flows from old, unlined surface impoundments or “ponds” that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge; and seeps from unlined ponds and landfills into ground and surface waters. These coal ash “[i]mpoundments, EPA tells us, have been ‘largely ineffective at controlling discharges of toxic pollutants and nutrients.’”<sup>210</sup> EPA estimates that *at least 5.5 billion pounds* of pollution are released into the environment by coal-burning power plants every year.<sup>211</sup> Coal-burning power plants are responsible for at least 50 to 60 percent of the toxic pollutants discharged into waters of the U.S—more than the other nine top polluting industries *combined*.<sup>212</sup>

Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Due to the bio-accumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems. In short, coal plant water pollution has serious public health consequences and causes lasting harm to the environment. According to EPA, power plant pollution has caused over 160 water bodies not to meet state water quality standards, prompted government agencies to issue fish consumption advisories for 185 waters, and degraded 399 water bodies across the country that serve as public drinking water supplies.<sup>213</sup>

Despite these horrific realities, utilities have effectively been allowed to steal our Nation’s waters to create these toxic lagoons in some cases. For example, an analysis of coal ash disposal units in seven southeastern states by Waterkeeper Alliance shows that 113 of 405 dumps were created by

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<sup>208</sup> Coal combustion residuals (“CCR”) “are generated from the combustion of coal by electric utilities and independent power producers for the generation of electricity. CCR include fly ash, bottom ash, boiler slag, and flue gas desulfurization materials and are commonly referred to as coal ash.” U.S. EPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure, 85 Fed. Reg. 53516 (Aug. 28, 2020).

<sup>209</sup> 45 Fed. Reg. at 48620.

<sup>210</sup> *Southwestern Electric Power Co. v. EPA*, No. 15-60821, at 2 (5th Cir. April 12, 2019) (internal citation omitted).

<sup>211</sup> U.S. EPA, Environmental Assessment for the Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category 3-14 (Apr. 2013), Docket No. EPA-HQ-OW-2009-0819-2260 (“EA”).

<sup>212</sup> *Id.* at 3-13.

<sup>213</sup> U.S. EPA, Proposed Effluent Guidelines for the Steam Electric Power Generating Category, RIN 2040-AF14 available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=2040-AF14>.

impounding or burying a “water of the United States.”<sup>214</sup> Of those 113 dumps, 85 are currently classified as surface impoundments, 26 as landfills, and 2 as Flue Gas Desulfurization (FGD) waste disposal units.<sup>215</sup> Waterkeeper Alliance’s analysis identified more than 140 stream segments that have been impounded or otherwise obstructed by coal ash disposal units, with a combined length of 113 miles. The estimated volume of toxic coal ash in the dumps built on top of or in a water of the United States in these eight states alone is 132 billion gallons.<sup>216</sup>

Utilities in other states have also created coal ash dumps by impounding or burying a “water of the United States.” For example, the FirstEnergy Little Blue Run impoundment in Pennsylvania, the nation’s largest coal ash impoundment, was created by damming Little Blue Run stream. In 2014, the Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment and ordered a \$169 million dollar cleanup and closure of Little Blue Run.<sup>217</sup>

In short, the agencies must reverse course and close this gaping hole they illegally created in the CWA that authorizes utilities and industrial operators to use our nation’s waters as their own private sewers.

## **VI. CONCLUSION**

We thank you again for your decision to replace the NWPR with the Pre-2015 Regulatory Definition, and for this opportunity to provide early input into your rulemaking processes. We respectfully implore you to immediately restore and implement the Pre-2015 Regulatory Definition, exclude consideration of the illegal, non-scientific provisions in the CWR and any consideration of the NWPR in your second rulemaking to avoid corruption by the significant flaws and illegalities in the NWPR, and to otherwise fulfill to the best of your capability the objective and goals of the CWA and the agencies’ mission of protecting human health and the environment.

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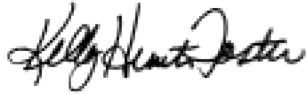
<sup>214</sup> Waterkeeper Alliance performed a geospatial analysis by overlaying coal ash disposal sites on historical topographical maps published by the U.S. Geological Survey, allowing the identification of coal ash ponds and landfills that were constructed by impounding or burying one or more preexisting blue-line streams. The analysis examined known coal ash sites in Alabama, Georgia, Florida, North Carolina, South Carolina, Tennessee, and Virginia. *See* (Attachment 15).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Pa. Dep’t of the Env’t, DEP Issues Permit Requiring Closure of FirstEnergy’s Little Blue Run Impoundment (Apr. 3, 2014), *available at*: <http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=20442&typeid=1>.

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Trey Sherard  
Anacostia Riverkeeper  
Washington, District of Columbia

John Cassani  
Calusa Waterkeeper  
Fort Myers, Florida

Charles Scribner  
Black Warrior Riverkeeper  
Birmingham, Alabama

Cade Kistler  
Mobile Baykeeper  
Mobile, Alabama

Sue Mauger  
Cook Inletkeeper  
Homer, Alaska

Jennifer Kalt  
Humboldt Baykeeper  
Arcata, California

Benjamin Harris  
Los Angeles Waterkeeper  
Los Angeles, California

Don McEnhill  
Russian Riverkeeper  
Healdsburg, California

Melinda Booth  
Yuba River Waterkeeper  
Nevada City, California

Marcel Gaztambide  
Animas Riverkeeper  
Durango, Colorado

Gary Wockner  
Poudre Waterkeeper  
Fort Collins, Colorado

Georgia Ackerman  
Apalachicola Riverkeeper  
Apalachicola, Florida

Jen Lomberk  
Matanzas Riverkeeper  
St. Augustine, Florida

Rachel Silverstein  
Miami Waterkeeper  
Miami, Florida

Justin Bloom  
Suncoast Waterkeeper  
Sarasota, Florida

Jason Ulseth  
Chattahoochee Riverkeeper  
Atlanta, Georgia

Anna Laws  
St. Marys Riverkeeper  
St Marys, Georgia

Jesse Demonbreun-Chapman  
Upper Coosa Riverkeeper  
Rome, Georgia

Buck Ryan  
Snake River Waterkeeper  
Boise, Idaho

Dean Wilson  
Atchafalaya Basinkeeper  
Plaquemine, Louisiana

Kathy Phillips  
Assateague Coastkeeper  
Berlin, Maryland

Theaux Le Gardeur  
Gunpowder Riverkeeper  
Monkton, Maryland

Mark Rasmussen  
Buzzards Baykeeper  
New Bedford, Massachusetts

Rachel Bartels  
Missouri Confluence Waterkeeper  
St. Louis, Missouri

Michele Langa  
Hackensack Riverkeeper  
Hackensack, New Jersey

Lisa Rinaman  
St. Johns Riverkeeper  
Jacksonville, Florida

Fletcher Sams  
Altamaha Riverkeeper  
Brunswick, Georgia

Chris Bertrand  
Satilla Riverkeeper  
Nahunta, Georgia

John S. Quarterman  
Suwannee Riverkeeper  
Hahira, Georgia

Steve Holt  
Lake Pend Oreille Waterkeeper  
Sandpoint, Idaho

Dawn Buehler  
Kansas Riverkeeper  
Lawrence, Kansas

Ivy Frignoca  
Casco Baykeeper  
South Portland, Maine

Matt Pluta  
Choptank Riverkeeper  
Easton, Maryland

Betsy Nicholas  
Waterkeepers Chesapeake  
Takoma Park, Maryland

Abby Braman  
Pearl Riverkeeper  
Madison, Mississippi

Guy Alsentzer  
Upper Missouri Waterkeeper  
Bozeman, Montana

Gregory Remaud  
NY/NJ Baykeeper  
Hazlet, New Jersey

Bill Schultz  
Raritan Riverkeeper  
Keasbey, New Jersey

Jill Jedlicka  
Buffalo Niagara Waterkeeper  
Buffalo, New York

Peter Topping  
Peconic Baykeeper  
Hampton Bays, New York

David Caldwell  
Broad Riverkeeper  
Lawndale, North Carolina

Gray Jernigan  
Green Riverkeeper  
Hendersonville, North Carolina

Jefferson Currie II  
Lumber Riverkeeper  
Pembroke, North Carolina

Jill Howell  
Pamlico-Tar Riverkeeper  
Washington, North Carolina

Edgar Miller  
Yadkin Riverkeeper  
Winston-Salem, North Carolina

George H Kamp  
Spring Creek Coalition, a Waterkeeper Alliance  
Affiliate  
Tulsa, Oklahoma

Brett VandenHeuvel  
Columbia Riverkeeper  
Hood River, Oregon

Jane Conroe  
Chautauqua-Conewango Consortium, a  
Waterkeeper Alliance Affiliate  
Warren, Pennsylvania

Heather Hulton VanTassel  
Three Rivers Waterkeeper  
Pittsburgh, Pennsylvania

Jen Pelz  
Rio Grande Waterkeeper  
Santa Fe, New Mexico

Sean Keller  
Hudson Riverkeeper  
Ossining, New York

Yvonne Taylor  
Seneca Lake Guardian, a Waterkeeper  
Alliance Affiliate  
Watkins Glen, New York

Kemp Burdette  
Cape Fear Riverkeeper  
Wilmington, North Carolina

Emily Sutton  
Haw Riverkeeper  
Chapel Hill, North Carolina

Katy Hunt  
Neuse Riverkeeper  
New Bern, North Carolina

Andy Hill  
Watauga Riverkeeper  
Boone, North Carolina

Earl Hatley  
Grand Riverkeeper  
Vinita, Oklahoma

Rebecca Jim  
Tar Creekkeeper  
Vinita, Oklahoma

Ashley Short  
Tualatin Riverkeepers  
Tualatin, Oregon

Ted Evgeniadis  
Lower Susquehanna Riverkeeper  
Wrightsville, Pennsylvania

Bill Stangler  
Congaree Riverkeeper  
Columbia, South Carolina



Cara Schildtknecht  
Waccamaw Riverkeeper  
Conway, South Carolina

Steve Box  
Environmental Stewardship, a Waterkeeper  
Alliance Affiliate  
Bastrop, Texas

John Weisheit  
Colorado Riverkeeper  
Moab, Utah

Jerry White  
Spokane Riverkeeper  
Spokane, Washington

Cheryl Nenn  
Milwaukee Riverkeeper  
Milwaukee, Wisconsin

Kristen Schlemmer  
Bayou City Waterkeeper  
Houston, Texas

Diane Wilson  
San Antonio Bay Estuarine Waterkeeper  
Seadrift, Texas

Eleanor Hines  
North Sound Baykeeper  
Bellingham, Washington

Angie Rosser  
West Virginia Headwaters Waterkeeper  
Charleston, West Virginia