

the Clean Water Act and implement the Act'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."²⁵ The definition includes:²⁶

- 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.
- 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.

The agencies first made major substantive changes to their longstanding regulatory interpretation of the waters that are subject to the Clean Water Act's critical safeguards in the June 29, 2015 "Clean Water Rule" ("CWR").²⁷ Although the CWR reaffirmed Clean Water Act jurisdiction over some waters historically protected under the Act, it also included many legally and scientifically indefensible provisions that, among other things, impermissibly excluded waters that must be categorically protected as a matter of law. The agencies' second change came in an October 22,

²⁵ *City of Milwaukee*, 451 U.S. at 310-11, 317.

²⁶ See, e.g., 40 C.F.R. § 230.3 (1993).

²⁷ Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) ("CWR").