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RE: Docket ID No. EPA–HQ–OW–2017–0203

Comment on the Proposed Rule Titled "Definition of 'Waters of the United States' - Recodification of Preexisting Rules"

The Natural Resources Defense Council files the following comments on behalf of our more than three million members and online activists and on behalf of the Environmental Working Group and Clean Water Action. The Environmental Protection Agency and Army Corps of Engineers' proposed repeal of the agencies' 2015 Clean Water Rule violates the law, common sense, and basic norms of good government. It must be withdrawn.

I. Pollution Plagues the Nation's Waters, Requiring Vigorous Clean Water Act Enforcement.

The agencies' proposal to repeal clean water protections ignores the essential role of the Clean Water Act. The proposal likewise ignores the current state of America's water bodies. Had the agencies taken proper account of Congressional intent and the problems that continue to threaten water quality across the country, they would never have proposed this repeal.

Congress enacted the Clean Water Act in response to rampant contamination of waterways and brought about important improvements across the nation. By the 1960s, pollution brought numerous water bodies to the brink of death. The Cuyahoga River, running through Cleveland, Ohio into Lake Erie, became so polluted with industrial waste in the 1950s and 1960s that it caught fire on more than one occasion.[1] Lake Erie itself received so much municipal waste and agricultural runoff that it was projected to become biologically dead. Unchecked water pollution in inland waterways accounted for record fish kills; for example, some 26 million fish died as a result of the contamination of Lake Thonotosassa, Florida.[2] Industry discharged mercury into the

[1] *U.S. v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).
[2] Robert W. Adler, et al., *The Clean Water Act: 20 Years Later* 5 (1993). An excerpt from this book, along with the bulk of the material cited in these comments, has been sent to the docket of this rulemaking via two separate

Detroit River at a rate of between 10 and 20 pounds per day, causing in-stream water to exceed the Public Health Service limit for mercury six times over.[3] Waterways in many cities across the country served as nothing more than sewage receptacles for industrial and municipal waste. The rate of wetlands loss from the 1950s to the 1970s was approximately 450,000 acres per year.[4]

Leaving the problem to individual states coupled with piecemeal federal law clearly failed. Our decision-makers generally – and accurately – understood that past approaches relying on state-by-state water quality standards could not clean up the waters and, indeed, waters were becoming more polluted. There was clearly a need for a broader federal role to address water pollution. Public outcry demanded a strong response from Congress. As Senator Edmund Muskie told the Senate when introducing the bill that was to become the new Act, "The committee on Public Works, after 2 years of study of the Federal water pollution control program, concludes that the national effort to abate and control water pollution is inadequate in every vital aspect."[5]

So Congress responded. The 1972 Act represented the first truly comprehensive federal water pollution legislation. Congressman John Blatnik, Chairman of the House Public Works Committee, characterized it as a "landmark in the field of environmental legislation."[6] Senator Jennings Randolph, Chairman of the Senate Committee on Public Works, said, "It is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment."[7] To take but one example, the Act required industry-specific discharge standards, which now prevent more than 700 billion pounds of toxic pollutants per year from being dumped into the nation's waters. The rate of wetlands loss decreased substantially compared to the pre-Clean Water Act era. Thanks to these and other innovations, Americans benefit from numerous services water bodies provide, and being able to use waterways across the country for a variety of purposes.

However, despite the pollution controls Congress adopted in the Clean Water Act, most the nation's waters still face challenges to their health 45 years later. The country remains far short of the Clean Water Act's goal of swimmable and fishable waters (a goal Congress intended the country to reach by 1983). Consider a few facts:

- Lakes and ponds: The most recent available data from states indicate that, of assessed lakes, reservoirs, and ponds, 70.5 percent (12,918,363 acres) are impaired for some water quality standard. The 2012 National Lakes Assessment found that 35 percent of lakes

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submissions because the agencies state they "will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system)," 82 Fed. Reg. 34899 (July 27, 2017), and because individually uploading the numerous materials would be extremely time-consuming. *See* Letter from Jon Devine, NRDC, to EPA Docket EPA-HQ-OW-2017-0203 (Aug. 11, 2017), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-1346; Letter from Jon Devine, NRDC, to EPA Docket EPA-HQ-OW-2017-0203 (Sept. 25, 2017). Additional material will be submitted along with these comments.

[3] *Id.*; *see also* Comm. on Pub. Works, Committee Print 93d Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 1253 (1973) (hereinafter "1972 Legislative History").

[4] W.E. Frayer et al., U.S. Fish & Wildlife Service, *Status and Trends of Wetlands and Deepwater Habitats in the Coterminous United States, 1950s to 1970s* at 3 (Apr. 1983).

[5] *Id.* at 1253 (emphasis added).

[6] 1972 Legislative History at 350.

[7] *Id.* at 1269.

assessed had excess nitrogen and 40 percent had excess phosphorus. Moreover, the Assessment reported "that 31% of lakes have degraded benthic macroinvertebrate communities, which include small aquatic creatures like snails and mayflies." [8] And some indicators of lake health worsened since the 2007 assessment; in that five-year period, the Assessment examined "the density of cyanobacteria cells, which can produce cyanotoxins, as an indicator of toxic exposure risk," and it showed "8.3% more lakes in the most disturbed condition in 2012 than in 2007." Additionally, detection of the algal toxin microcystin, which prompted the multi-day contamination event in Toledo, Ohio, that deprived several hundred thousand people of drinking water, increased by 9.5 percent.

- Rivers and streams: Based on state water quality inventories, 52.7 percent of assessed rivers and streams (a total of 579,166 miles – more than twice the distance to the moon) fail to meet one or more state water quality standards. Similarly, the 2008/2009 Rivers and Streams Assessment paints a discouraging picture. Only 28 percent of rivers and streams were in good condition and 46 percent were in poor condition. More than 40 percent of rivers and streams have excess nutrients. [9] Nearly a quarter of river and stream miles have bacteria levels above thresholds that indicate a threat to human health when people are exposed via recreation. And "[o]ver 13,000 miles of rivers are found to have mercury in fish tissue at levels that exceed thresholds protective of human health."
- Wetlands: In the 2011 National Wetland Condition Assessment, fewer than 50 percent of wetlands (48 percent) were in good biological condition and nearly one-third (32 percent) were in poor condition. [10] Moreover, as documented in the most recent report to Congress on the status and trends in the nation's wetlands,[11] the country continues to experience a net loss of wetlands and "[f]or the first time in 50 years, the rate of net wetland loss had accelerated, increasing by a whopping 140 percent from the previous survey. The nation lost 45,000 more wetland acres per year during 2004−2009 than during the previous period. Even worse, wetland losses have recently accelerated in areas of particular importance to waterfowl, such as the Prairie Pothole Region."[12]
- Other waters: Of assessed bays and estuaries, 79.5 percent (44,692 square miles) were found to be impaired for some water quality standard. In 2017, the Gulf of Mexico "dead zone" was the largest ever measured since surveying started in 1985; this year it "is 8,776 square miles, an area about the size of New Jersey."[13]

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[8] U.S. EPA, The National Lakes Assessment (NLA) 2012, available at https://www.epa.gov/sites/production/files/2016-12/documents/nla_fact_sheet_dec_7_2016.pdf.
[9] U.S. EPA, The National Rivers and Streams Assessment 2008/2009, available at https://www.epa.gov/sites/production/files/2016-03/documents/fact_sheet_draft_variation_march_2016_revision.pdf.
[10] U.S. EPA, The National Wetland Condition Assessment 2011, available at https://www.epa.gov/sites/production/files/2016-05/documents/2011_nwca_fact_sheet_final.pdf.
[11] T.E. Dahl, U.S. Fish & Wildlife Serv., Status and Trends of Wetlands in the Conterminous United States 2004 to 2009 (2011), available at https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.
[12] Scott Yaich, Ducks Unlimited, Conservation: Gains and Losses, available at http://www.ducks.org/conservation/waterfowl-habitat/conservation-gains-and-losses.
[13] Natl. Oceanic & Atmospheric Admin., Gulf of Mexico 'dead zone' is the largest ever measured (Aug. 2, 2017), available at http://www.noaa.gov/media-release/gulf-of-mexico-dead-zone-is-largest-ever-measured.

Thus, neither the historic nor the present condition of the nation's water bodies justifies the agencies shirking the responsibility with which Congress entrusted them. As discussed in the following section, the Supreme Court's decisions during the 2000s likewise dictate that waters that significantly impact the condition of downstream waterways warrant protection.

II. The 2015 Clean Water Rule Represents a Modest and Well-Documented Response to Water Quality Challenges and Congress's Direction in the Clean Water Act.

The Clean Water Act is a watershed statute, in both senses of the word. Congress recognized that to achieve its ambitious goal of restoring and protecting our Nation's waters, it would be necessary to "control pollution at the source." Thus, the Act applied not just to navigable-in-fact waters, but to the "waters of the United States." As the Supreme Court concluded, that term extends to waters that have a significant impact on traditionally navigable waters.

To develop the Clean Water Rule, EPA and the Army Corps decided they needed to demonstrate, through an examination of the scientific evidence, which waters significantly influence traditionally navigable and interstate waters. They did so by undertaking an unprecedented review of the scientific literature describing the many vital connections between tributaries, wetlands, and downstream waters. The resulting Science Report found extensive and compelling evidence that tributaries and adjacent wetlands play critical roles in maintaining the physical, chemical, and biological integrity of downstream waters.

The agencies also considered a wealth of input from numerous stakeholders. The rulemaking process for the Clean Water Rule took approximately four years to complete.[14] The agencies solicited comments on the proposed rule for more than 200 days, and the Rule reflects over one million public comments submitted on the proposal, "as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others."[15]

Based on their deliberate approach, the Agencies restored categorical regulatory coverage for tributaries and adjacent waters, as defined in the Rule, and retained the ability to protect certain other waters on a case-by-case basis.

A. The Clean Water Act is an ambitious statute, aimed at restoring and protecting the "total water resources of the United States."

In the Clean Water Act, Congress laid a weighty charge on the Agencies: the Act's objective is nothing less than to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). But our leaders also provided strong tools to achieve that objective; Congress "knew exactly what it was doing" when it defined "navigable waters"

[14] *See* 80 Fed. Reg. at 37,102-03 (describing consultation with states, local governments, and Indian tribes at the "onset of rule development in 2011"); Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22,188, 22,196 (Apr. 21, 2014) (stating that a draft of EPA's report on the connectivity of streams, wetlands, and downstream waters, which provides much of the scientific basis for the Rule, was completed in October 2011).

[15] 80 Fed. Reg. at 37,057.

broadly to mean the "waters of the United States." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1323 (6th Cir. 1974) (quoting 33 U.S.C. § 1362(7)). Congress's "clear intention … was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution a part of a navigable stream." *Id*. at 1323. That is because the Act's ambitious goal could not be achieved unless its protections applied to "'all water bodies, including main streams and their tributaries.'" *Id.* at 1325 (quoting statement of Rep. Dingell). Any reading of the Act that interpreted it not to apply to non-navigable tributaries of navigable waters would "violate the specific language of the [Act] and turn a great legislative enactment into a meaningless jumble of words." *Id.*

Likewise, the Supreme Court recognized the Act's broad scope when it upheld the Act's application to adjacent wetlands. As the Court observed, the Act incorporates a "broad, systemic view of the goal of maintaining and improving water quality." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). The Court also noted Congress's determination that "[p]rotection of aquatic ecosystems … 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.'" *Id*. at 132–33 (quoting S. Rep. No. 92-414, p. 77 (1972)).

Consistent with Congress's vision, for nearly three decades the Agencies implemented the Act to comprehensively protect the waters of the United States.

B. After *SWANCC* and *Rapanos*, the Agencies struggled to realize Congress's vision.

In the 2000s, two Supreme Court cases and the Agencies' guidance documents that followed those decisions created confusion over the scope of the Act's coverage.

In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Court ruled that the Agencies' "Migratory Bird Rule," which interpreted the Agencies' regulations to protect waters used by migratory birds, on the basis of a link to interstate commerce, was not authorized under the Act when applied to "an abandoned sand and gravel pit." 531 U.S. 159, 162, 164, 174 (2001).

In *Rapanos v. United States*, the Court remanded, for further review, the Corps' application of the Act to four wetlands lying "near ditches or man-made drains that eventually empty into traditional navigable waters."[16] *Rapanos* produced splintered opinions, with no majority: a four-Justice plurality proposed one test for determining whether a water body is a "water of the United States."[17] Justice Kennedy, concurring in the judgment, proposed another; he concluded that the Act protects wetlands that have a "significant nexus" to waters traditionally considered

[16] 547 U.S. 715, 729, 757 (2006).

[17] *Id.* at 739 (citation omitted) ("[T]he phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes.' The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.") The opinion also would require wetlands to have a "continuous surface connection" to jurisdictional waters to be protected. *Id.* at 742.

navigable.[18] And four dissenting Justices would have left the Agencies' definition in place, but would at a minimum uphold protection for waters satisfying either the plurality's or Justice Kennedy's test.[19]

Even though neither *SWANCC* nor *Rapanos* invalidated any regulatory provision, they led the Agencies to retreat from enforcing the regulations on the books, leaving critical waters vulnerable.[20] The Agencies also exacerbated the confusion by implementing informal policies, not compelled by the Supreme Court's decisions, that made it difficult to apply the Act's protections to certain waters. Specifically:

- The guidance that followed *SWANCC* required the Agencies' field staff to receive headquarters' approval to apply Clean Water Act protections to any "isolated waters that are both intrastate and non-navigable,"[21] but the Agencies have implemented this guidance as an effective ban on protecting such waters. As EPA acknowledged in 2011: "Since *SWANCC*, no isolated waters have been declared jurisdictional by a federal agency."[22]

- Although the guidance that followed *Rapanos* properly stated that the Agencies would not deny Clean Water Act protection to water bodies that satisfied either the plurality's test or Justice Kennedy's, the Agencies significantly undermined the "significant nexus" analysis. Specifically, the post-*Rapanos* guidance directed the Agencies' staff to ignore all waters except for the specific tributary into which a discharge would be made and the wetlands adjacent to that tributary; indeed, the guidance even more myopically focuses just on the "reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)." Consequently, the "significant nexus" analysis does not evaluate the watershed-wide impact of similar waters (tributaries and

[18] *Id*. at 759, 787 (Kennedy, J., concurring in the judgment). Wetlands possess such a nexus when they, "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.'" *Id*. at 780 (Kennedy, J., concurring in the judgment).

[19] *Id*. at 810 (Stevens, J., dissenting).

[20] *See* Letter from Representatives James Oberstar & Henry Waxman to Stephen Johnson, EPA Administrator (July 7, 2008) (attaching internal memorandum from Granta Nakayama, Assistant Administrator for Enforcement & Compliance Assurance to Benjamin Grumbles, Assistant Administrator for Water, which identified hundreds of cases in which EPA chose not to pursue formal enforcement action or lowered the priority of the case, or in which defendants raised jurisdictional defenses); Earthjustice et al., *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm* (Aug. 2004); Earthjustice et al., *Courting Disaster: How the Supreme Court Has Broken the Clean Water Act and Why Congress Must Fix It* (2009); U.S. EPA Inspector Gen., *Special Report: Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation*, Report No. 09-N-0149, at 1 (Apr. 30, 2009).

[21] 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003).

[22] U.S. EPA, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction, at 3 (Apr. 27, 2011). There is no reason to think this practice has changed in more recent years. *See* NRDC et al., Letter to Docket ID No. EPA-HQ-OW-2011-0880, at 19-22 (Nov. 14, 2014) (hereinafter "NRDC Proposed CWR Comments") (collecting evidence of agencies' practice of treating "isolated," non-navigable, intrastate waters as unprotected), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15437.

adjacent wetlands, e.g.), and ignoring those collective impacts increases the risk that individual waters will be left unprotected.[23]

The net practical effect of the Court's decisions, the interpretation of those decisions by lower courts, and the Agencies' guidance has been confusion in many instances and the absence of pollution protection in many others. First, so-called "isolated" waters effectively lack federal protection from the Agencies, even if they have a significant nexus to traditional navigable waters. Second, because lower courts dealt with *Rapanos* differently, and not all courts adopted the Agencies' approach of considering either the plurality's or Justice Kennedy's test,[24] "almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination."[25] Third, because the Agencies' guidance takes such a constrained geographic view of the "significant nexus" analysis rather than examine the question at a more appropriate scale, these demonstrations could be inconsistent across the country, as well as time-consuming and costly, even if a significant nexus could ultimately be shown.

Numerous parties therefore urged the Agencies to revise their regulations. NRDC and other conservation groups sought a rule that included clear protections for water bodies in a way that both respected the Supreme Court's decisions and remained true to Congress's original design.[26]

C. The Rule largely restores the Act's proper scope of coverage.

The Clean Water Rule largely restores the scope of coverage that Congress intended, by protecting waters that are scientifically demonstrated to have a significant impact on navigable waters.[27] Because the Agencies' reliance on case-by-case significant nexus determinations had hamstrung their practical ability to enforce the Act, a main purpose of the rulemaking effort was to provide the scientific basis for coverage of entire categories of waters, obviating the need for individual review. Thus, EPA began by producing and vetting the Science Report, a state-of-the-

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[23] This practice also conflicts with Justice Kennedy's formulation of the "significant nexus" analysis. *See Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment) ("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.'" (emphasis added)); *id.* at 780-81 ("Through regulations or adjudication, the Corps may choose to identify *categories of tributaries* that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, *in the majority of cases*, to perform important functions for an aquatic system incorporating navigable waters." (emphasis added)).

[24] Courts, however, consistently rejected the sole reliance on the plurality's test to determine Clean Water Act coverage. Every court of appeals to decide the issue held that at least those waters that met Justice Kennedy's test qualified as "waters of the United States" under the Act. *See* U.S. EPA & U.S. Army Corps of Eng'rs, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, at 41-42 (May 27, 2015) (citing cases). This fact, as discussed below, means that the agencies' present plan ultimately to adopt rules based on the plurality test is unlawful; and that unlawfulness is one reason why the agencies cannot treat the instant rulemaking as simply an interim step.

[25] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015).

[26] *See, e.g.*, NRDC Proposed CWR Comments, *supra*; NWF Comments, available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15020; Earthjustice Comments, available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14564.

[27] We say "largely" above not because the Rule is over-inclusive, as Administrator Pruitt, discharging industries, and other critics often claim, but rather because it excludes some waters that should be protected under the Act.

art review and synthesis of the extensive scientific literature describing the numerous important connections between tributaries, adjacent waters, and downstream waters.[28]

The Science Report found unequivocal evidence that all tributaries, including perennial, intermittent, and ephemeral streams, "exert a strong influence on the integrity of downstream waters." Science Report at ES-2. Relying on the Science Report's findings, the Agencies determined that all tributaries have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas (collectively, "foundational waters"). Thus, the Agencies restored the Act's categorical coverage of tributaries, as defined in the Rule. 33 C.F.R. § 328.3(a)(5).

The Science Report also found clear evidence that wetlands and open waters in floodplains are "highly connected" to tributaries and rivers "through surface water, shallow groundwater, and biological connectivity." Science Report at ES-2, 4-39. Relying on these findings, the Agencies concluded that all waters adjacent to foundational waters, impoundments, and tributaries have a significant nexus to foundational waters. The Agencies therefore restored the Acts' categorical coverage of adjacent waters, as defined in the Rule. 33 C.F.R. § 328.3(a)(6).

Finally, the Science Report found that wetlands and open waters located outside of floodplains also provide numerous functions, such as storage of floodwater, that benefit downstream water integrity. Science Report at ES-3. Based on these findings, the Agencies retained the ability to find that certain non-adjacent waters qualify as waters of the United States if they are determined on a case-by-case basis to have a significant nexus to foundational waters. 33 C.F.R. § 328.3(a)(7)-(8).

D. The Rule complies with the Clean Water Act because it properly protects waters that have a significant nexus to downstream waters.

1. The Rule's reliance on the significant-nexus test comports with Supreme Court case law.

At a minimum, the Supreme Court's decisions stand for the proposition that a water body is a "water of the United States"—and therefore protected under the Clean Water Act—if it belongs to a category of waters that significantly affects a traditional navigable water, interstate water, or the territorial seas. The Agencies properly used this significant-nexus standard when defining the breadth and application of the Act's protections under the Rule.

The Supreme Court's first interpretation of the scope of the Clean Water Act expressly upheld federal authority to regulate discharges into both traditional navigable waters and wetlands adjacent to such waters. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131, 135 (1985). Even though wetlands are not ordinarily navigable, the Court stated 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." *Id.* at 133. The Court explained that in light of the "breadth of federal regulatory authority contemplated by the Act," and the difficulty of line-drawing in this context, the agency's ecological judgment that wetlands have significant

[28] U.S. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA/600/R-14/475F (Jan. 2015).

impacts on water quality and the aquatic ecosystem in adjacent waterways is sufficient to deem such wetlands covered by the Act. *See id*. at 134. If the covered wetlands have such effects in the majority of cases, all such wetlands may be covered. *Id*. at 135 n.9.

The Court reiterated the importance of a waterway's impacts on traditional navigable waters when examining the Act's scope in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*. 531 U.S. 159 (2001). There, the Court addressed a narrow issue and overturned a regulatory interpretation that would have protected "an abandoned sand and gravel pit" on the basis that it was used by migratory birds. *Id*. at 162, 164, 174. The Court distinguished the wetlands at issue in *Riverside Bayview* from the sand and gravel pit in *SWANCC* because of the "significant nexus" the *Riverside Bayview* wetlands had with other waters of the United States. *See id*. at 167. The Court, however, did not invalidate any portion of the federal regulations in *SWANCC*—it held only that the regulations, "as clarified and applied to petitioner's balefill site" under the Migratory Bird Rule, exceeded the Corps' authority under the Clean Water Act. *Id*. at 174.

Finally, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court remanded for further review the Corps' determination that certain wetlands, which were adjacent to non-navigable waters, were "waters of the United States." Id. at 729, 757, 759. A four-Justice plurality devised one test for the courts to apply on remand in identifying "waters of the United States," *id*. at 757 (plurality opinion); Justice Kennedy employed another, *id*. at 759 (Kennedy, J., concurring in the judgment); and four dissenting Justices would have deferred to the Corps' regulations as the proper test, but also said they would uphold coverage for any water satisfying either the plurality or Justice Kennedy's test. *Id*. at 810 (Stevens, J., dissenting).

The Rule employs the test articulated by Justice Kennedy in *Rapanos*, which drew on *Riverside Bayview* and *SWANCC*. Justice Kennedy concluded that the Act protects wetlands with a "significant nexus" to waters traditionally considered navigable. *Id*. at 759, 787 (Kennedy, J., concurring in the judgment). Such a nexus exists where 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.'" *Id*. at 780. Justice Kennedy explained that the Corps was free, by regulation, to "identify categories of tributaries that, due to their volume of flow…, their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id*. at 780-81.

Justice Kennedy pointed out that ephemeral waterways, which may be dry much of the time, as well as wetlands without a surface connection to tributaries, can still meet the significant nexus standard. He described the plurality's attempt to impose a continuous flow requirement as making little sense, because "torrents thundering at irregular intervals through otherwise dry channels," which could significantly affect downstream waterways, would not be covered. *Id*. at 769; *see also* fig.2 below. Similarly, Justice Kennedy noted that wetlands separated by land from another waterway can be vital to it: if such a wetland is destroyed, "floodwater, impurities, or runoff that would have been stored or contained in the wetlands" could instead "flow out to major waterways." *Id*. at 775. The very absence of a hydrological connection could thus make

protection of the wetland critical. *Id*. Subsequently, courts have held time and again that waters meeting Justice Kennedy's test qualify as "waters of the United States."[29]

Justice Kennedy made clear that water bodies could be shown to have a significant nexus on a categorical basis, and all water bodies within those categories could be protected, even if specific individual waters in the class did not influence downstream water quality. *Id*. at 780-81 ("the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, *in the majority of cases*, to perform important functions for an aquatic system incorporating navigable waters." (emphasis added)). This categorical approach follows that of the unanimous Court in *Riverside Bayview*, which noted:

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that *in the majority of cases*, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n. 9 (emphasis added). In making these categorical judgments, the agencies' ecological judgment about the importance of certain types of waters need not be so refined that each and every water body within the category must, alone or cumulatively, have significant downstream effects. Waters qualify for Clean Water Act coverage on a categorical basis if the agencies reasonably conclude that a majority of waters in the category likely have a "significant nexus."

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[29] Although the Supreme Court has not decided that Justice Kennedy's opinion in *Rapanos* is controlling, every Court of Appeals to have decided the question has found that if Justice Kennedy's "significant nexus" test is satisfied, jurisdiction is proper. *See United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006) (Justice Kennedy's "significant nexus" standard governs or suffices); *United States v. Robison*, 505 F.3d 1209, 1222 (11th Cir. 2007) (same); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) (same); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (if either plurality or Justice Kennedy's test is met, there is a "water of the United States"); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011) (same); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) (same). EPA and the Army Corps likewise concluded that Justice Kennedy's test is sufficient to establish Clean Water Act coverage, though the agencies went a step further and concluded that the plurality test also serves as an independent basis for coverage. *See* U.S. EPA & U.S. Army Corps of Eng'rs, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States*& *Carabell v. United States*, at 3 (Dec. 2, 2008) (hereinafter "2008 Guidance"), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf ("regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied").

Drawing on these Supreme Court opinions, including Justice Kennedy's concurrence in *Rapanos*, the Rule interprets the scope of the Act in line with the significant nexus standard. 80 Fed. Reg. 37,060. Waters are "waters of the United States" under the Rule if they "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." *Id*. The Rule requires that some waters meet this test on a case-specific basis. 33 C.F.R. 328.3(a)(7)-(8). The Rule also protects waters that the Agencies found categorically meet this test—specifically, tributaries and "adjacent" waters. 33 C.F.R. 328.3(a)(5)-(6).

As explained further below, the extensive scientific record amply supports the Agencies' determination that covered tributaries and adjacent waters categorically satisfy the significant nexus standard. The majority of waters in these categories likely have significant effects downstream, either alone or when considered collectively.

2. The scientific record confirms that tributaries and adjacent waters significantly influence downstream waters

The scientific record overwhelmingly supports the Agencies' determination that tributaries and adjacent waters have a significant nexus to foundational waters. As the Science Report demonstrates, tributaries and adjacent waters play fundamental roles in determining both the course a river takes and what is in it. They do this by supplying the materials that form the river's bed and banks, such as sediment, and the materials that fill it, such as water, nutrients, and organisms. *See, e.g.*, Science Report at 3-47 tbl.3-1, 4-40 tbl.4-3. And in some cases they do this by keeping out, or delaying the delivery, of other materials, like contaminants or floodwaters. *Id*. at 3-47 tbl.3-1, 4-40 tbl.4-3.

To understand the significance of the connections between tributaries and downstream waters, or between adjacent waters and downstream waters, one must consider the combined effect of those connections across the watershed and over time. *Id*. at 6-10. Although opponents of the Rule often talk about, or show images of, dry waterways, doing so misleadingly implies that one can assess the importance of those waterways to downstream waters by viewing a single photograph. But if you wanted to learn how local traffic contributed to traffic on an arterial highway, you would not rely on a snapshot of a single local road in the middle of the afternoon, much less one photo hand-picked by lawyers or lobbyists for someone claiming the roads had insignificant traffic. If you did that, you might conclude, incorrectly, that local roads were not contributing any traffic to the highway. To accurately gauge such a roadway's impact, you would collect data from roads and interchanges throughout the area, at low-traffic and high-traffic times, and look at all the data together to understand the impact of local traffic on the highway.

Just as a highway has many inputs, so does a river—each tributary contributes water, sediment, chemicals, and organic material, and together these inputs help constitute the river. And, just as traffic on a highway fluctuates at different times of the day and week and year, river networks expand and contract as the seasons change and as precipitation comes and goes. The illustration below shows the same river during wet and dry periods. See fig.1. If you looked only at the connections between the river and its adjacent wetlands during the dry period, you might underestimate the significance of those connections. As the Science Report concluded, the

effects of tributaries and adjacent waters on downstream waters are cumulative, and the connections between those waters must be analyzed together. Science Report at 6-10.

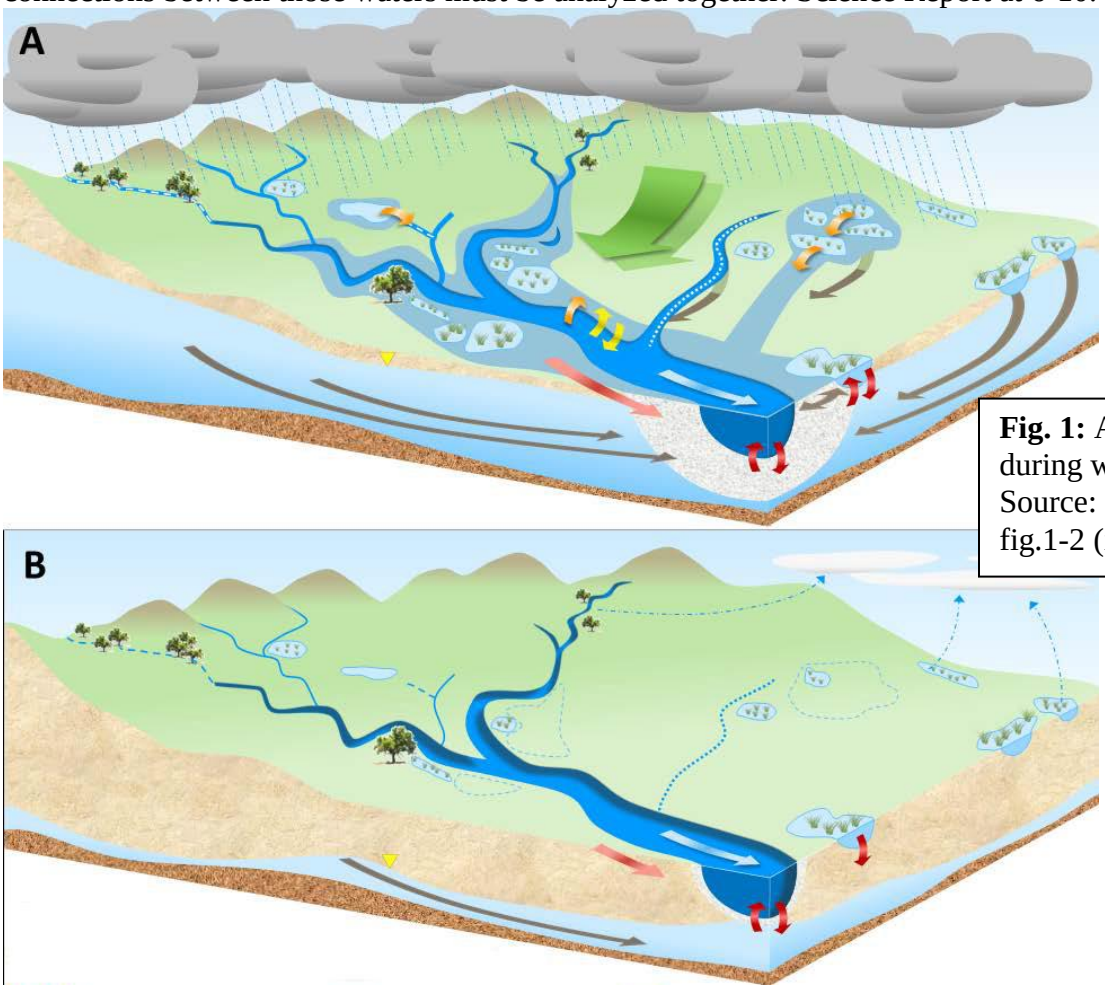


Fig. 1: A river network during wet and dry periods. Source: Science Report 1-7 fig.1-2 (including key).

As described in the following paragraphs, the Science Report amply demonstrates that tributaries—including ephemeral and intermittent ones—and adjacent waters have a significant nexus to downstream waters.

a. Tributaries significantly affect the physical, chemical, and biological condition of downstream waters.

The Science Report defines "tributary" more broadly than the Rule: for purposes of the report, a tributary is any stream that flows into a larger stream or river, and has a bed and banks. See id. at A-13 (defining "tributary"), A-12 (defining "stream"), 2-2 (explaining that channels are "defined by the presence of continuous bed and bank structures"). In contrast, under the Rule a tributary must meet three requirements: (1) it must contribute flow to a downstream water, and it must exhibit the physical indicators of (2) a bed and banks and (3) an ordinary high water mark. See 33 C.F.R. § 328.3(c)(3).

Even analyzing tributaries more broadly (i.e., without the narrowing requirement of an ordinary high water mark), the Science Report concluded that all tributaries, including ephemeral and

intermittent ones, are "physically, chemically, and biologically connected to downstream rivers." Science Report at 6-1. Individually or cumulatively, tributaries "exert a strong influence on the integrity of downstream waters." *Id*.

One reason tributaries are so important to downstream waters is that, to a large degree, they determine what's in them—physically, chemically, and biologically. *Id*. at 3-45 to 3-46. For example, most rivers get most of their water from tributaries, as opposed to rain or groundwater. *Id*. at 3-5, 6-2. A watershed is like a funnel: tributaries cover a broader expanse than rivers do, and they collect water and other materials across that broad area, and deliver it toward a concentrated point downstream. *Id*. at 3-5.

In the arid and semiarid Southwest, where most tributaries are seasonally dry, *id*. at 2-29, flows from ephemeral tributaries are a "major driver" of flows in downstream rivers, *id*. at B-59. Ephemeral channels supply substantial amounts of surface water to rivers during infrequent, but influential, flood events. *Id*. For instance, during a high-intensity storm in New Mexico that dropped up to one-quarter of the area's annual rainfall over the course of two days, flood flows from the Rio Puerco, an ephemeral tributary to the Rio Grande River, accounted for 76% of the flood flow downstream in the Rio Grande. *Id*. at 3-7 to 3-8; Vivoni 2006; see fig.2.

Fig. 2: Floodwaters swelling and receding in the Rio Puerco, an ephemeral tributary. Source: Vivoni 2006.

Even when water in ephemeral tributaries sinks into the ground before reaching downstream rivers, it plays a critical role in replenishing shallow groundwater flows. These groundwater flows, in turn, are a vital source of surface water for the downstream rivers. See Science Report at B-59, 5-8 (ephemeral tributaries supply roughly half of the San Pedro River's "baseflow," the portion of the river fed by groundwater), B-39 (most perennial and intermittent rivers in the Southwest are groundwater dependent).

Tributaries also have a major influence on the chemical composition of downstream waters. *Id*. at 3-46, 6-1 to 6-2. This makes sense: tributaries supply a large proportion of the water in rivers, and that water carries chemicals with it. *Id*. at 3-22. For example, in the Southwest, organic material, important for biological productivity, accumulates in ephemeral channels during dry periods, and is carried downstream in great quantities when those channels fill with rain and floodwater. *See id*. at 3-29, B-48 (in the San Pedro River, dissolved organic carbon doubled or tripled during storm events from a flush of terrestrial organic matter and nutrients). Tributaries

can also affect the chemical makeup of downstream waters by removing, transforming, or delaying the delivery of harmful chemicals discharged upstream. *Id*. at 3-47 tbl.3-1.

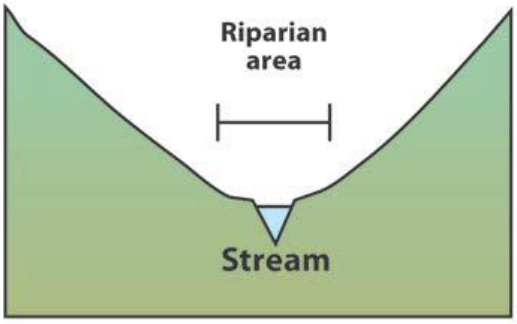
Finally, tributaries are essential to the living organisms in downstream waters. *Id*. at 3-46. Headwater tributaries provide crucial habitat for many aquatic species, including plants, insects, crustaceans, and fish. *Id*. at 3-38, 6-3. In the arid and semiarid Southwest, fish may not travel up ephemeral channels to the same degree, but water flowing down those channels nonetheless has a significant influence on fish in downstream rivers. Native fish are adapted to the variable flows that ephemeral tributaries provide, and these adaptations allow them to outcompete invasive species. *Id*. at B-38, B-58.

b. Adjacent waters significantly affect the physical, chemical, and biological condition of downstream waters.

The Rule defines adjacent waters as "bordering, contiguous, or neighboring" foundational waters, impoundments, or tributaries. 33 C.F.R. § 328.3(a)(6) & (c)(1). "Neighboring" waters are those waters that are very close to a foundational water, impoundment, or tributary (i.e., within 100 feet, *id*. § 328.3(c)(2)(i), or within 1,500 feet of tidally influenced waters or the Great Lakes, *id*. § 328.3(c)(2)(iii)), or that are within the 100-year floodplain of such a water, out to a distance of 1,500 feet, *id*. § 328.3(c)(2)(ii)).

Smaller tributaries have smaller floodplains than large rivers, Science Report at 4-6, and some tributaries have little or no floodplain, *id*. at 2-5, 2-6; *see* fig.3. As a result, for some tributaries the area in which waters are "adjacent" will be limited to a shorter distance than 1,500 feet, because the 100-year floodplain will not extend that far. And for some rivers with large floodplains, the 100-year floodplain will extend well beyond 1,500 feet, but only waters within 1,500 feet will be deemed "adjacent."

A. Headwater Stream with Riparian Area and Minimal or No Floodplain



B. River with Riparian Area and Floodplain

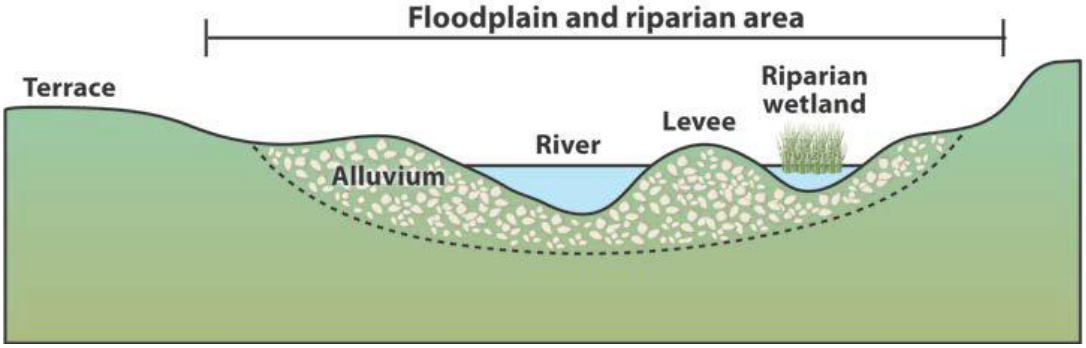


Fig. 3: A tributary with minimal or no floodplain, and a river with a larger floodplain. Source: Science Report at 2-6 fig.2-3.

The Science Report found clear evidence that wetlands located in floodplains are "highly connected" to rivers and tributaries. *Id*. at 4-39. Although the word "floodplain" may give the impression that these connections occur primarily during times of flooding, in fact, many important connections between rivers and floodplain wetlands persist at other times as well. *Id*.

The physical connections between rivers and floodplain wetlands are extensive. Floods, even if infrequent, have significant, lasting impacts because they allow rivers and wetlands to exchange water and other materials, in two directions. *Id*. at 4-1, 4-39. For example, sediment released from wetlands during a flood can help shape a river's channel and thereby affect its physical integrity. *Id*. at 4-39. Floodplain wetlands also reduce floods by storing water that overflows from rivers. *Id*. at 4-1, 6-4.

Even when there is no surface-water connection between a river and a neighboring wetland, however, shallow groundwater flows may provide important connections. *Id*. at 4-39. That is because tributaries and rivers are not "pipes" that simply carry water from one place to another. *Id*. at 2-21. Instead, they are porous, and water from a river's channel regularly enters the shallow subsurface, where it may mix with other subsurface water (including water from neighboring wetlands) before returning to the channel again. *Id*. at 2-12, 4-7.

Floodplains are frequently composed of alluvium—a combination of silt, sand, or other matter deposited over time—that tends to be "highly permeable" and thus particularly well suited to conveying shallow groundwater flows. *Id*. at 2-12; see fig.3 (above). These flows can connect

rivers to floodplain wetlands during both high-flow and low-flow periods. *Id*. at 2-12, 4-7; *see* fig.4.

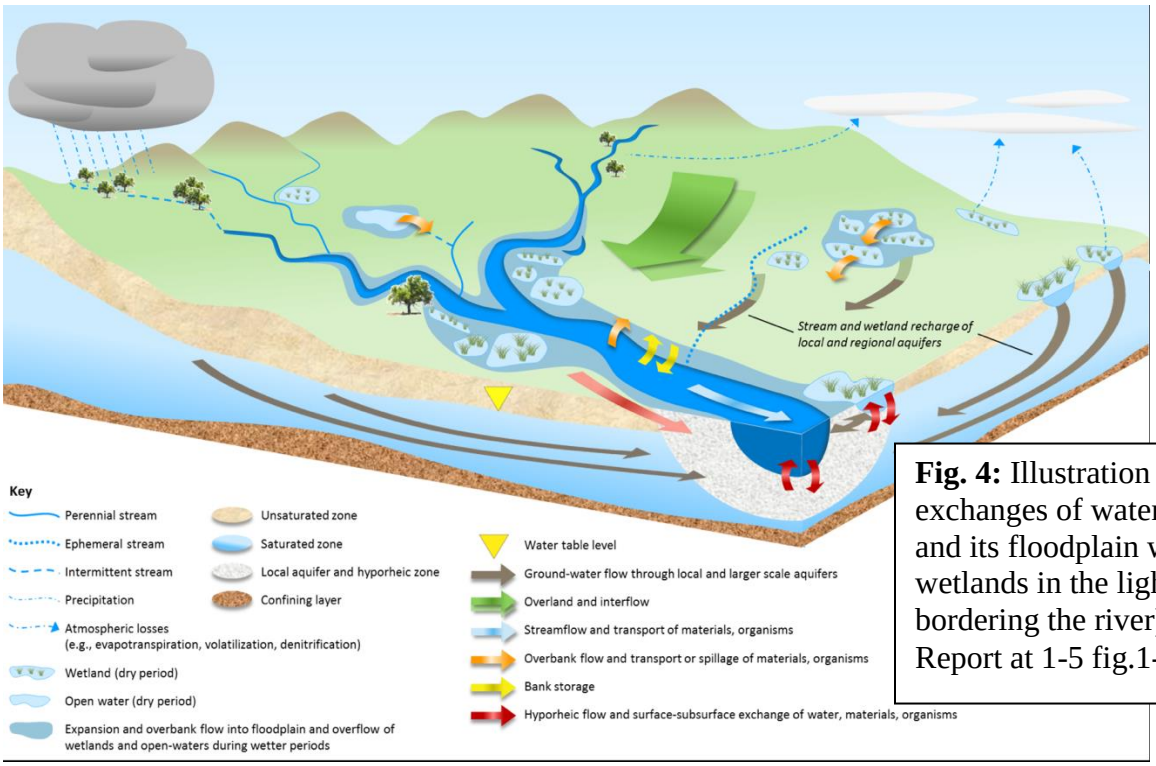


Fig. 4: Illustration of subsurface exchanges of water between a river and its floodplain wetlands (i.e., wetlands in the light blue band bordering the river). Source: Science Report at 1-5 fig.1-1A.

The subsurface flows connecting floodplain wetlands to rivers also convey chemicals. *Id*. at 4-11. One of the most important functions of floodplain wetlands is to intercept contaminants, such as excess fertilizer and pesticides from agricultural operations, by filtering them through the roots of wetland plants. The plants absorb the contaminants and prevent them from reaching the river. *Id*. at 4-11, 4-14.

Finally, wetlands provide essential habitat for many aquatic animals, including fish that use wetlands as nurseries. *Id*. at 4-17. There is strong evidence that fish can move between rivers and floodplain wetlands, even when the hydrological connections between these water bodies are seasonal or temporary. *Id*.

The Science Report found compelling evidence of strong and extensive connections between tributaries and downstream waters, and between floodplain wetlands and downstream waters. *Id*. at 6-1 to 6-5. The Agencies therefore reasonably concluded that tributaries and adjacent waters have a significant nexus to foundational waters, and are categorically entitled to the protections of the Act.

During the subsequent litigation about the Clean Water Rule, numerous scientists and scientific societies supported the agencies' analysis. For example, a friend-of-the-court brief filed in the Sixth Circuit on behalf of several scientists stated:

> Amici curiae are wetland and water scientists, actively involved in research and teaching about the fresh and estuarine waters of the United States. As practicing scientists who have spent our careers studying streams, wetlands, and other aquatic ecosystems, we – and many in our profession – have long explored the ways in which human activities that affect one part of a watershed can also affect – and damage – other parts of that watershed. In doing so, we have applied the basic tools of our profession: literature review, on-site observations, measurements, experimental manipulations, studies of "natural experiments," and modeling based on observations and our understanding of the physical sciences. Based upon these tools, we believe that current science provides sound support for the Clean Water Rule.[30]

c. Waters not considered "adjacent" can significantly affect the physical, chemical, and biological condition of downstream waters.

The Rule provides for Clean Water Act coverage on a case-by-case basis for non-tributary waters that, because of their distance from other "waters of the United States," the rule considers not to be adjacent. Specifically, the Rule protects such waters "where they are determined, on a case-specific basis, to have a significant nexus" to foundational waters,[31] and defines "significant nexus" consistent with Justice Kennedy's opinion in *Rapanos*.[32] For some kinds of non-adjacent waters, the agencies found that they are "similarly situated," such that the Rule requires a cumulative analysis of all such waters in the region; this approach applies to prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands.[33]

The Rule's approach to these waters comports with the scientific evidence. When asked to review the proposed rule, the Science Advisory Board said the following about these "other waters":

> The scientific literature has established that "other waters" can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define "other waters" as waters of the United States on a case-by-case basis, either alone or in combination with

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[30] Amicus Brief of Dr. M. Siobhan Fennessy et al., *In re: Envtl. Protection Agcy. & Dept. of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, No. 15-3751, at 1 (Jan. 20, 2017); *see also* Letter from Soc. of Wetland Scientists et al. to President Trump (Mar. 1, 2017) at 1 (representing views of SWS, American Fisheries Society, American Institute of Biological Sciences, Ecological Society of America, Phycological Society of America, Society for Ecological Restoration & Society for Freshwater Science) ("The organizations that have signed this letter agree with the [Fennessy et al.] brief and its use of sound science to explain the urgent need for the Clean Water Rule.").

[31] 33 C.F.R. §§328.3(a)(7) & (8).

[32] *Id.* §328.3(c)(5) ("The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term 'in the region' means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters."); *see also id.* (identifying aquatic functions relevant to significant nexus analysis).

[33] *Id.* §§328.3(a)(7)(i)-(v).

similarly situated waters in the same region. As mentioned previously for adjacent waters, distance should not be the sole indicator used to evaluate the connection of "other waters" to jurisdictional waters.

There is also adequate scientific evidence to support a determination that certain subcategories and types of "other waters" in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, chemical and biological integrity of downstream waters and are similarly situated on the landscape) and thus could be considered waters of the United States. Furthermore, as the science continues to develop, other sets of wetlands may be identified as "similarly situated." The Board notes, however, that the existing science does not support excluding groups of "other waters" or subcategories thereof.[34]

In the same vein, the Science Report concluded that non-adjacent waters "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."[35] Because the strength of these functions depend on "the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters," the Science Report notes that these waters' connectivity to downstream waters "occurs along a gradient," such that "current science does not support evaluations of the degree of connectivity for specific groups or classes of wetlands (e.g., prairie potholes or vernal pools)," though "[e]valuations of individual wetlands or groups of wetlands … could be possible through case-by-case analysis."[36]

E. Summary: The Clean Water Rule Includes Sensible Protections Reflecting the Function of Various Categories of Water Bodies.

The Clean Water Rule takes account of the Supreme Court's analysis in *Riverside Bayview*, *SWANCC*, and *Rapanos* and the painstakingly-compiled scientific record to ensure categorical protection for water bodies that unquestionably perform numerous important functions for downstream waters' integrity. It also properly provides for case-by-case protections for non-adjacent waters which significantly influence the downstream physical, chemical, or biological integrity of other waters.

III. The Agencies Justify Their Proposed Repeal of the Clean Water Rule for Only One Reason.

As described above, the Clean Water Rule appropriately applies the legal framework in the Clean Water Act – as interpreted by the Supreme Court – to the scientific evidence of water bodies' functions in order to fulfill the purpose of the Act: restoring the integrity of the nation's

[34] Letter from Dr. David T. Allen, Chair, Science Advisory Board, to EPA Administrator Gina McCarthy, at 3 (Sept. 30, 2014).
[35] Science Report at 6-5.
[36] *Id.*

waters. Against that backdrop, the agencies now propose to repeal the Clean Water Rule, but offer a single reason for doing so: avoiding uncertainty about the standard that applies, given ongoing litigation about the Rule. This section describes the background of, and justification for, the proposed repeal.

A. Litigation Over the Rule Leads to Stay and Cases Pending in the Sixth Circuit and Supreme Court.

The agencies adopted the Clean Water Rule in June, 2015. Despite dozens of lawsuits by polluting industries and several states – including litigation initiated by now-Administrator Pruitt – the Rule took effect in the vast majority of states that August.[37] At that point in time, the agencies implemented the Clean Water Rule everywhere but 13 states,[38] a practice that continued until October 9, 2015, when the Sixth Circuit stayed implementation of the Rule pending judicial review.[39] Briefing on the merits began in that court in late 2016, with the agencies filing a 245-page vigorous defense of the Clean Water Rule in January 2017, saying: "The Clean Water Rule is a carefully tailored response to Supreme Court precedent, peer-reviewed science, and the Agencies' long experience in implementing the Act."[40]

Although the Sixth Circuit noted that the stay was "for the time being," and envisioned that it would be "temporarily" in place while the merits were litigated in that court,[41] intervening events prolonged the stay. Specifically, the Supreme Court granted review of a jurisdictional issue in the case – whether challenges to the Rule belonged exclusively in the courts of appeal or in the district courts – and the Sixth Circuit accordingly stayed further proceedings in that court. The Supreme Court case will be argued in October, 2017.

B. President Trump Issues an Executive Order Initiating Review of the Rule Based not on the Status of the Litigation, but on Numerous Falsehoods.

The lawfulness of, and technical support for, the Clean Water Rule thus were on track to be resolved (albeit on a delayed timeline) via judicial review until President Trump and Administrator Pruitt intervened. On February 28, the president signed Executive Order 13778, titled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."[42] The order contains three provisions relevant to the current rulemaking action:

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[37] *North Dakota v. U.S. EPA*, 127 F.Supp.3d 1047 (D.N.D. 2015) (issuing preliminary injunction against Clean Water Rule); *North Dakota v. U.S. EPA*, No. 3:15-cv-59, Order Limiting the Scope of Preliminary Injunction to the Plaintiffs (D.N.D. Sept. 4, 2015) (clarifying that injunction applied only in 13 states that had sued in that court).
[38] *Compare, e.g.*, http://www.lrc.usace.army.mil/Portals/36/docs/regulatory/jd/2015/LRC-2015-547jd.pdf (determination dated Sept. 9, 2015, applying Clean Water Rule to features located in Illinois) *with* http://www.nwo.usace.army.mil/Portals/23/docs/regulatory/ND/jds/NWO-2015-1471-BIS.pdf (determination dated Sept. 23, 2015, applying pre-Rule guidance to features located in Nebraska).
[39] *In re: Envtl. Protection Agcy. & Dept. of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, 803 F.3d 804 (6th Cir. 2015).
[40] *In re: EPA*, No. 15-3751, Brief for Respondents, at 2 (6th Cir. Jan. 13, 2017).
[41] *In re: EPA.*, 803 F.3d at 808.
[42] 82 Fed. Reg. 12,497 (Mar. 3, 2017).

> **Section 1**. *Policy*. It is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.
>
> **Sec. 2**. *Review of the Waters of the United States Rule*. (a) The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army for Civil Works (Assistant Secretary) shall review the final rule entitled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.
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> ***
>
> **Sec. 3**. *Definition of "Navigable Waters" in Future Rulemaking*. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The text of the Executive Order said that the agencies should evaluate, "as appropriate and consistent with law," changing or repealing the Clean Water Rule,[43] likely phrased that way because it would be unlawful for the agencies to choose an outcome expressly prior to undertaking notice and comment rulemaking. But in his remarks while signing the order, President Trump made clear what he wanted the agencies to do – repeal the Rule. In particular, the president made numerous false claims about the Rule, displaying obvious antipathy for it, and stated that, by his order, he was "directing the EPA to take action, paving the way for the elimination of this very destructive and horrible rule."[44]

- False Claim #1 – President Trump said the Rule "has truly run amok" and is hurting farmers and ranchers. "It's prohibiting them from being allowed to do what they're supposed to be doing. It's been a disaster." In fact, as discussed above, the Rule is not being implemented.
- False Claim #2 – President Trump said the Rule seeks to regulate "nearly every puddle." In fact, the Rule explicitly excludes "puddles" from oversight.
- False Claim #3 – President Trump said the Rule seeks to regulate "every ditch." In fact, the Rule expressly excludes from regulation numerous man-made waters; this includes a variety of ditches on farms, as well as those alongside roadways, airports or railroads.
- False Claim #4 – President Trump said the Rule represents "a massive power grab." In fact, the Clean Water Act mandates protection of the nation's important waters, and

[43] *Id.* (directing agencies to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law").
[44] The White House, Office of the Press Secretary, Remarks by President Trump at Signing of Waters of the United States (WOTUS) Executive Order (Feb. 28, 2017), available at https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-signing-waters-united-states-wotus-executive.

protecting those waters requires protecting the wetlands and streams that flow into those waters. The Rule also does not cover any kinds of waters the law historically excluded.

- False Claim #5 – President Trump said "The EPA's regulators were putting people out of jobs by the hundreds of thousands." In fact, there is no evidence of jobs being affected by the Rule, especially given that it is not being implemented. There is also no factual support for the claim that the rule would have the kinds of impacts the President described.
- False Claim #6 – President Trump said the Rule treats "small farmers and small businesses as if they were a major industrial polluter." In fact, the Rule maintains exemptions for normal farming operations and agricultural runoff and it treats small businesses no different from any other group, just like Clean Water Act itself does.
- False Claim #7 – President Trump said "If you want to build a new home, for example, you have to worry about getting hit with a huge fine if you fill in as much as a puddle, just a puddle on your lot." In fact, again, the Rule explicitly excludes "puddles" from oversight.
- False Claim #8 – President Trump cited a case in which the EPA fined a Wyoming rancher "for digging a small watering hole for his cattle." In fact, this case had nothing to do with the Clean Water Rule, as it began even before the Rule was proposed, and the Trump administration did not drop the case despite urging from the landowner's attorneys.[45]

Administrator Pruitt likewise routinely misleads the public about the Clean Water Rule, as discussed in more detail below.

To implement the Executive Order, EPA and the Corps plan to conduct two rulemaking actions, the first of which would repeal the Clean Water Rule, and the second of which would establish new standards for what waters qualify for Clean Water Act protection.[46] The current proposal constitutes the first step in the process.

C. The Agencies Argue the Proposed Repeal Rule is Needed to Address Litigation-Related Uncertainty.

The agencies now propose to repeal the Clean Water Rule and to adopt, as the regulatory definition of "waters of the United States," the same language (including typographical errors and incorrect cross-references)[47] once used in the regulations that the Clean Water Rule replaced. One major exception to that principle, however, is that the agencies "will administer the

[45] Pacific Legal Foundation, Press Release, Final pre-trial hearing set for Friday in feds' suit against farmer for plowing (June 14, 2017) ("Duarte and his attorneys with Pacific Legal Foundation — along with farming advocates across the country — have asked the Trump Administration to abandon the unprecedented prosecution, which was commenced during the Obama Administration."), available at https://pacificlegal.org/press-release/final-pre-trial-hearing-set-for-friday-in-feds-suit-against-farmer-for-plowing/.

[46] *See* U.S. EPA, Waters of the United States (WOTUS) Rulemaking: Rulemaking Process, available at https://www.epa.gov/wotus-rule/rulemaking-process.

[47] *See, e.g.*, *id.*at 34,905 (proposed 33 C.F.R. § 328.3(a)) (referring to "cooling ponds as defined in 40 CFR 423.11(m)," a section of the Code of Federal Regulations that defines the term "coal pile runoff"); *id.* at 34,908 (proposed 40 C.F.R. §232.2) (referring to "paragraphs (g)(1)-(4) of this section" and "paragraphs (q)(1)-(6) of this section," neither of which exist).

regulations as they are currently being implemented, consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents."[48]

Although the preamble to the current proposal discusses the legal basis for the Clean Water Rule, a few specific requirements of the Clean Water Act, and the Supreme Court cases that preceded the Clean Water Rule, none of those things constitute the rationale for, or even seem related to, the proposed repeal. Rather, the agencies indicate that such issues will be considered in the second planned rulemaking, saying: "[t]he scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations *on the ultimate regulation*."[49]

The sole rationale for the repeal action is that the agencies claim it will ensure certainty about which regulatory standards apply if developments in the litigation lead to the partial implementation of the Clean Water Rule while the agencies seek to develop a follow-on rulemaking at some future date. The agencies' full rationale for the current rulemaking consists of just three paragraphs:

> The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations on the ultimate regulation. While engaging in such deliberations, however, the agencies recognize the need to provide as an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of "waters of the United States." The pre-CWR regulatory regime is in effect because of the Sixth Circuit's stay of the 2015 rule but that regime depends upon the pendency of the Sixth Circuit's order and could be altered at any time by factors beyond the control of the agencies. The Supreme Court's resolution of the question as to which courts have original jurisdiction over challenges to the 2015 rule could impact the Sixth Circuit's exercise of jurisdiction and its stay. If, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule, the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order.
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> As noted previously, prior to the Sixth Circuit's stay order, the District Court for North Dakota had preliminarily enjoined the rule in 13 States (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico). Therefore, if the Sixth Circuit's nationwide stay were to expire, the 2015 rule would be enjoined under the North Dakota order in States covering a large geographic area of the country, but the rule would be in effect in the rest of the country pending further judicial decision-making or substantive rulemaking under the Executive Order.
>
> Adding to the confusion that could be caused if the Sixth Circuit's nationwide stay of the 2015 rule were to expire, there are multiple other district court cases pending on the 2015 rule, including several where challengers have filed motions for preliminary injunctions. These cases—and the pending preliminary injunction motions—would likely be reactivated

[48] *Id.* at 34,900.
[49] 82 Fed. Reg. at 34,902 (emphasis added).

> if the Supreme Court were to determine that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule. The proposed interim rule would establish a clear regulatory framework that would avoid the inconsistencies, uncertainty and confusion that would result from a Supreme Court ruling affecting the Sixth Circuit's jurisdiction while the agencies reconsider the 2015 rule. It would ensure that, during this interim period, the scope of CWA jurisdiction will be administered exactly the way it is now, and as it was for many years prior to the promulgation of the 2015 rule. The agencies considered other approaches to providing stability while they work to finalize the revised definition, such as simply withdrawing or staying the Clean Water Rule, but did not identify any options that would do so more effectively and efficiently than this proposed rule would do. A stable regulatory foundation for the status quo would facilitate the agencies' considered re-evaluation, as appropriate, of the definition of "waters of the United States" that best effectuates the language, structure, and purposes of the Clean Water Act.[50]

Notably, the agencies do not argue that the proposed regulations (and implementation practices) are substantively preferable to the Clean Water Rule, or even that they are reasonable definitions of "waters of the United States." Moreover, the agencies do not intend to evaluate the merits of the rules and policies they seek to adopt, as they specifically discourage public comment on the appropriateness of these rules; the preamble says "the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations."[51]

IV. The Agencies' Proposed Clean Water Rule Repeal and Enactment of Policies They Recognize as Inferior is Unlawful.

The proposal raises a very simple legal question: if an agency repeals a rule and adopts another in its place, if it gives absolutely no substantive justification for the repeal, and if it provides only one non-substantive justification that is transparently not accomplished by the rule it adopts, can the action stand? The answer obviously is no.

As described in the following sections, the agencies' proposal represents as clear an example of arbitrary and capricious decision-making as is imaginable. Moreover, the proposal violates basic procedural requirements. It is thoroughly unlawful. In particular, the entire regulatory action rests on a fundamentally arbitrary and therefore illegal foundation: the agencies ask stakeholders to believe that the present action – which enacts an enormous change in the substantive regulations that determine the scope of federal protection for waters across the country– is so ministerial that they need not justify the substance of their action or accept public comment on it.[52]

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[50] *Id.* at 34,902-03.
[51] *Id.* at 34,903.
[52] *Compare id.* at 34,900 ("In this proposed rule, the agencies define the scope of 'waters of the United States' that are protected under the Clean Water Act (CWA).") *with id.* at 34,901 (In the second step the agencies will undertake a "substantive review of the appropriate scope of 'waters of the United States.'").

A. The Proposed Rule is Arbitrary and Capricious.

An agency rule is arbitrary and capricious if, among other things, "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[53] As described further below, the action here fails each of these tests and more.

First, the agencies' proposal relies on factors ("continuity and certainty") to the exclusion of the Clean Water Act's objectives. Second, the proposal entirely fails to consider an important aspect of the problem -- the relative substantive value of the regulations it will adopt compared to the Clean Water Rule, and the very real possibility that enacting the text of the 1986 regulations will not be temporary. Third, the proposal offers an explanation that runs counter to the evidence, because its solution to claimed uncertainty will plunge implementation of the Clean Water Act back into a regime that was characterized by uncertainty – a fact underscored by the agencies' inability to even articulate in the proposal what the rules they plan to adopt will require. Finally, the proposal depends on implausible bases, including reliance on a methodologically deficient and politically-motivated economic analysis that improperly ignores enormous benefits associated with implementing the Clean Water Rule.

1. The Proposal Undermines, Rather than Serves, the Clean Water Act's Objective.

The agencies' proposal relies on a factor Congress did not intend for it to consider exclusively. The lone rationale stated for the repeal rulemaking is avoiding possible inconsistency in, and confusion about, the standards by which the term "waters of the United States" will be evaluated. But the agencies do not explain how the consistency the repeal would allegedly deliver (which it will not, as discussed below) serves Congress's overriding purpose in adopting the Clean Water Act – clean water. Because the repeal rule would actually undermine this purpose, the proposal is arbitrary and capricious.

Congress declared the objective of the Clean Water Act forcefully: "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." As noted above, Congress determined that achieving this objective required protections that controlled pollution at its source, a principle Congress achieved by defining "navigable waters" broadly to mean "the waters of the United States." Indeed, both the House and Senate expressed concern about potential narrow interpretations of which waters they intended to be covered by the new Act.[54] The House Public Works Committee stated its concern as follows:

> One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term

[53] *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983).

[54] For additional detail on the extensive evidence of Congressional intent to cover waters broadly under the law, *see* NRDC Proposed CWR Comments at 4-12.

> "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.[55]

The Senate Committee on Public Works stated:

> Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source.[56]

In the same vein, when Congress reconsidered the proper scope of the law in 1977, it kept the broad approach intact. For example, Senator Baker emphasized that:

> Comprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors.[57]

To avoid this outcome, the Senate Environment and Public Works Committee developed an amendment that exempted certain activities from needing permits, but which did not backtrack on jurisdiction. Senator Gary Hart then framed the choice for his colleagues:

> The Congress can capitulate. The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those *small streams, marshes, wetlands, and swamps* which will make their way into the bigger waterways of this country…. Or we can establish a program of the sort the committee has established, which will protect all of those water systems; which will protect *all of the elements of those systems*, which will not permit dredge and fill activities to deposit very toxic materials into those waterways."[58]

In contrast to this manifest Congressional intent, the agencies' proposal seeks to narrow the Clean Water Act's applicability compared to the Clean Water Rule,[59] and they do not explain how weakening the standards to achieve consistency (which, again, this rule will not actually

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[55] H.R. Rep. No. 92-911 at 131 (1972), Comm. on Pub. Works, Committee Print 93d Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 818 (1973) (hereinafter "1972 Legislative History").
[56] S. Rep. No. 92-414 at 77 (1971), 1972 Legislative History at 1495.
[57] Comm. on Env't & Pub. Works, Committee Print, 95th Cong., 2d Sess., Legislative History of the Clean Water Act of 1977, at 920 (Oct. 1978); *see also id.* at 922 (Senator Baker stating: "Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource."); *id.* at 923 (Senator Baker continuing, "let me emphasize that the protection of water quality must encompass the protection of the interior wetlands and smaller streams.").
[58] *Id.* at 908 (emphasis added).
[59] *See* 82 Fed. Reg. at 34,903 ("The agencies estimated that the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented").

achieve) will better ensure the integrity of the Nation's waters. Consequently, the agencies' proposal relies – indeed, depends entirely – upon a factor Congress did not intend for them to consider exclusively.

2. The Proposal Entirely Fails to Consider Important Aspects of the Definition of "Waters of the United States"

a. The proposal entirely ignores the Clean Water Rule's legal and scientific record.

The agencies propose to permanently repeal the Clean Water Rule without any consideration of the legal and scientific support that undergirds it. As discussed above, the Rule conservatively relies on the "significant nexus" approach outlined in *Rapanos*, which the Bush administration and every federal appeals court to consider the question found to be a proper basis for Clean Water Act coverage. And to determine whether certain waters have such a nexus with foundational waters, the Rule appropriately depends on a massive and state-of-the-art scientific analysis of the functions that various kinds of water bodies perform in the watersheds in which they are located.

In contrast to the proposal's silence, the agencies forcefully declared the reasonableness and appropriateness of the Clean Water Rule in a brief filed in the U.S. Court of Appeals for the Sixth Circuit in January of this year. The agencies' full-throated defense of the Rule begins:

> The Clean Water Act ("CWA" or "Act") was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act protects "navigable waters," which is defined as "waters of the United States." 33 U.S.C. § 1362(7). The agencies charged with implementing the CWA—the United States Environmental Protection Agency and the United States Army (the "Agencies")—"must necessarily choose some point at which water ends and land begins," which is no easy task because "[w]here on this continuum to find the limit of 'waters' is far from obvious." United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985). After three Supreme Court decisions and years of determining CWA jurisdiction on a case-by-case basis, and in response to suggestions by Supreme Court Justices, Congress, and the public, the Agencies conducted a multi-year rulemaking culminating in the Clean Water Rule, a regulation interpreting the scope of "waters of the United States."
>
> The foundation of the Agencies' interpretation is the significant nexus standard. The overwhelming scientific evidence—virtually unchallenged here—demonstrates a continuum of chemical, physical, and biological connections between important downstream waters and streams, ponds, wetlands, and other waters. The Agencies' task in interpreting the statutory term "waters of the United States" was to identify where on that continuum the nexus is "significant" enough to bring waters within the Act's jurisdictional reach and under what circumstances the Act does not apply notwithstanding a possible nexus. The Agencies' overarching goal was to make identification of waters protected under the CWA easier to understand and more predictable, while protecting the streams, wetlands, and other waters at the core of our Nation's water resources.

> The Clean Water Rule is a carefully tailored response to Supreme Court precedent, peer-reviewed science, and the Agencies' long experience in implementing the Act.[60]

The agencies have not repudiated any aspect of this legal analysis or the scientific evidence and conclusions on which the Rule relies. Nevertheless, the proposal's entire discussion of the Clean Water Rule's formulation is one sentence: "Following public notice and comment on a proposed rule, the agencies published a final rule defining the scope of 'waters of the United States' on June 29, 2015 (80 FR 37054)."[61] The agencies thus completely failed to consider not only an important element of this issue, but the very essence of it: they have proposed to repeal the Rule without considering the Rule.

b. The proposal ignores the relative substantive value of the rule text it seeks to enact compared with the Clean Water Rule.

The agencies' proposal does two things – it repeals the Clean Water Rule and it enacts into positive law the text of the prior regulations. Given the choice between these two sets of regulations, the agencies provide absolutely no analysis of how each approach serves Congress's intent in enacting the law. The proposal lacks any substantive justification for promulgating the text of the rules as they previously existed, to be interpreted based on case law and guidance documents, rather than maintaining the regulations adopted through the Clean Water Rule. Because the agencies fail to analyze the substantive merit of the rules they propose to repeal and those they propose to enact, the proposal fails to consider an essential issue.[62]

The agencies concede that they have no substantive justification for enacting the text of the once-governing rules, by saying: "the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations."[63] Moreover, as described above, the proposal lacks any evaluation of the Clean Water Rule itself, in terms of whether it reasonably protects features important to achieving the objective of the Clean Water Act. The agencies say they "will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking."[64] They do not even bother to take issue with their own strong defense of the Rule in the Sixth Circuit. Absent analysis of the relative merits of the rules being repealed and enacted, the agencies' decision to adopt one rather than the other lacks a reasoned justification.

Ironically, the proposal cites a Supreme Court decision, *FCC v. Fox Television Stations, Inc.*,[65] that underscores the unlawfulness of the agencies' plan. In that case, which involved an agency's change of policy, the Court stated that not every such change does warrants a heightened review,

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[60] *In re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, No. 15-3751, Brief for Respondents, at 1-2 (6th Cir. Jan. 13, 2017).
[61] 82 Fed. Reg. at 34,901.
[62] *N. Carolina Growers' Ass'n, Inc. v United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012).
[63] 82 Fed. Reg. at 34,903.
[64] *Id.*
[65] 556 U.S. 502 (2009).

but noted that simply passing reasonableness review means "of course the agency must show that there are good reasons for the new policy," and that the agency must indicate it "believes [the new policy] to be better [than the old one]."[66] The agencies here do not even meet that basic threshold of reasoned decision-making: they do not claim the pre-Clean Water Rule regulations are "better" policy than the Clean Water Rule; indeed, they acknowledge they do not intend to consider the matter.[67]

Similarly, another case cited in the preamble, *Nat'l Assn of Home Builders v. EPA*,[68] makes clear that the agencies' actions here are illegal. In that case, the agency's change of course was not arbitrary because EPA "reasonably believed [the amended rule] would be more reliable, more effective, and safer than the original rule,"[69] considerations that were directly relevant under the governing statute. Here, EPA and the Corps give no such "reasoned explanation," instead giving only a non-substantive rationale that has nothing to do with the core objective of the Clean Water Act, as discussed in the preceding section.[70]

Although the present proposal fails to satisfy even the least rigorous reasonableness review, the agencies must provide a more detailed explanation in the present case because the agencies *acknowledged* that the Clean Water Rule was needed and substantively preferable to the state of affairs created by the policies this rulemaking seeks to reinstate. Moreover, the agencies offer no reason to think this is no longer true.[71]

c. The proposal ignores the very real possibility that enacting the text of the pre-Clean Water Rule regulations will not be temporary.

The agencies suggest that this rulemaking will provide a consistent set of requirements to bridge the supposedly brief gap until its promised second rule replaces this one. As noted above, the agencies expect to base their planned second rulemaking on Justice Scalia's opinion in *Rapanos*. But there are numerous reasons to suspect the second rule will not happen, will take substantial time to develop, or will be invalidated. Treating the second rulemaking as a foregone conclusion ignores those likely outcomes, and thus an important aspect of this issue.

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[66] *Id.* at 515.

[67] *Fox* also states that an agency changing policy must at a minimum "display awareness that it is changing position. An agency may not, for example ... simply disregard rules that are still on the books." 556 U.S. at 515. In the present rulemaking, the agencies fail to acknowledge that they are changing the law, repeatedly referring to this as an enactment of the "*status quo*," even though they are repealing duly-adopted rules that are on the books.

[68] 682 F.3d 1032 (D.C. Cir. 2012).

[69] *Id.* at 1039

[70] The preamble suggests that the two-step rulemaking effort as a whole will address the proper balance of state-federal authority, 82 Fed. Reg. at 34,901 ("Re-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated"), but it does not suggest that inquiry acts as a rationale for *this* action and in fact concludes that this rulemaking has no federalism implications. *Id.* at 34,904.

[71] *FCC v. Fox*, 556 U.S. at 516 ("a reasoned explanation is needed for disregarding facts and circumstances that underlay ... the prior policy").

First, the outcome of the second rulemaking process necessarily cannot legally be definitively determined today, as even the President's executive order itself recognizes.[72] The agencies therefore cannot rely on the content, or even completion, of the second rulemaking they now contemplate.

Second, the Clean Water Rule is supported by an extensive and compelling scientific record, and there are strong legal justifications for its protections; these factors will require the agencies to carefully explain and support any new rule they may propose that does not enact the same protections.[73] At a minimum, doing so will take time.

Third, the agencies could well be convinced to abandon their Scalia-based scheme upon consideration of public input. Some stakeholders provided pre-proposal input on the planned second rule this summer, but the agencies have yet to hear from the vast majority of affected people about what a proposal should contain,[74] much less receive actual comments on such a proposal. Already, however, signs point to opposition and trepidation about the agencies' Scalia-based approach. For instance, when EPA requested input on "regulations that may be appropriate for repeal, replacement, or modification,"[75] in response to Executive Order 13777, the overwhelming majority of the submitted comments that referred to the scope of the Clean Water Act opposed weakening the Clean Water Rule. In June, NRDC analyzed the submitted comments based on several word searches and obtained the following results:[76]

Search term	Number of records	Total comments supporting Rule	Total comments opposing Rule
"Clean Water Rule"	3685	3655	30
"Waters of the US"	24882	24854	28
"Waters of the United States"	10330	10215	115
"Waters of the U.S."	1655	1595	60
"WOTUS"	149	46	103

As further evidence that the agencies' planned second rulemaking may never come to fruition, at least in anything resembling the form they now imagine, and may take substantial time to

[72] *See* Exec. Order No. 13,778, 82 Fed. Reg. at 12,497, § 2 (ordering the agencies to review the Rule and publish a proposal rescinding or revising it "as appropriate and consistent with law"); *see also Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (it is unlawful for an agency official to prejudge irrevocably the outcome of a rulemaking).

[73] *See FCC v. Fox*, 556 U.S. at 515–16 (when an agency changes regulatory policy, it "must show that there are good reasons for the new policy," and when, for example, the new policy "rests upon factual findings that contradict those which underlay [the] prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate"); *State Farm*, 463 U.S. at 43 (an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotation marks omitted)).

[74] *Cf.* U.S. EPA, Waters of the United States (WOTUS) Rulemaking: Outreach Meetings (announcing schedule for teleconferences in which participants can make three minute presentations on a first-come, first-served basis), available at https://www.epa.gov/wotus-rule/outreach-meetings.

[75] U.S. EPA, Laws & Regulations: Regulatory Reform, available at https://www.epa.gov/laws-regulations/regulatory-reform.

[76] NRDC analysis of Docket ID: EPA-HQ-OA-2017-0190 (completed June 16, 2017).

complete, consider the views about that second rulemaking the Association of Clean Water Administrators provided to EPA in August. In a letter, ACWA requested "that EPA and the Corps take whatever time is needed to ensure that a final rule is the result of thorough examination of the science and implementation concerns, as well as extensive consultation with states throughout the rulemaking."[77] Furthermore, ACWA requests additional pre-proposal interaction with the agencies, by urging "EPA to continue to take advantage of consulting with our members by asking for feedback as the text of the proposed rule is drafted and prior to publication of a proposed rule."[78] And ACWA notes that the second planned rulemaking raises numerous potential thorny issues, including: "what are potential impacts, both intended and unintended, of a definition inspired by Justice Scalia's *Rapanos* decision on state CWA programs, how states would react to changes in federal jurisdiction (given that some states have 'Waters of the State' definitions that cannot be more stringent than EPA's definition while others have more expansive 'Waters of the State' definitions), and how states with less robust state permitting infrastructure would adapt to changes in the number of jurisdictional waters."[79]

Fourth, the agencies may also shift course in response to new evidence. Critically, the agencies have yet to evaluate a Scalia-based rule's impact on water quality—which should be the single most important factor in enacting a rule under the Clean Water Act. That much became clear when the agencies began discussing the Scalia-based rule with states this spring; in that context, the agencies suggested a wide range of possible interpretations for key terms in Justice Scalia's *Rapanos* opinion, and asked states for their thoughts on the impacts of embracing those differing interpretations.[80] Similarly, the Southern Environmental Law Center sought records on this very subject from both EPA and the Corps, namely:

> all records relating to any preliminary or final studies, analyses, reports, or inquiries that the Corps has performed, commissioned, or collected that compare:

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[77] Letter from Jennifer Wigal, ACWA President, to Stacy Jensen, U.S. Army Corps of Eng'rs & Donna Downing, U.S. EPA, at 1 (Aug. 31, 2017)

[78] *Id.* at 2.

[79] *Id.* Because the agencies only recently made them public, we have not had sufficient time for a detailed review of the numerous submissions received from state, local, and tribal stakeholders about a Scalia-based rule. However, we note that a number of commenters strongly discouraged the agencies' planned approach. *See, e.g.*, Letter from Robert J. Klee, Commissioner, Connecticut Dept. of Energy & Envtl. Prot., to EPA Administrator Pruitt & Douglas W. Lamont, Army Corps of Eng'rs, at 2 (June 19, 2017) ("Connecticut is extremely concerned that any revision to the WOTUS definition not exclude intermittent headwaters (streams and wetlands) from protection under the federal Clean Water Act. Headwater streams and wetlands are essential to the protection of our cold water stream ecosystems and the native brook trout populations these waters support. Protection of these waters becomes critical when considering the potential of a warming climate."), available at https://www.epa.gov/sites/production/files/2017-09/documents/ct-deep_2017-06-19.pdf; Letter from Richard Whitman, Oregon Dept. of Envtl. Quality et al., to EPA Administrator Pruitt & Douglas W. Lamont, Army Corps of Eng'rs, at 1 (June 19, 2017) ("The Waters of the United States (WOTUS) rule is vitally important to the nation's ecological and economic wellbeing. The State of Oregon supported the 2015 WOTUS rule because it was based on sound science and took into account the practical and ecological realities of hydrology, seasonality and interconnected waters. Any rule that replaces the 2015 rule must accomplish the same in order to achieve the objective of protecting the chemical, physical and biological integrity of Oregon's and our nation's waters."), available at https://www.epa.gov/sites/production/files/2017-09/documents/or-governor-brown_2017-06-19.pdf.

[80] U.S. EPA, PowerPoint presentation: The Definition of "Waters of the U.S." E.O. 13132 Federalism Consultation Meeting, at 9-11 (Apr. 19, 2017) (suggesting potential interpretations of "relatively permanent" & "continuous surface connection" & posing numerous questions about implications of different approaches).

1) the Scalia test and the Kennedy test to determine the waters of the United States that would be identified under both tests;
2) a Scalia-only test to the current test that applies both the Scalia and Kennedy tests to determine waters of the United States; and
3) a Scalia-only test to the Clean Water Rule test, which relies primarily on the Kennedy test.

The only responsive document either agency identified was the economic analysis for the repeal rule, which does not evaluate the Scalia approach's impact. Thus, it appears that the agencies know very little about how decreasing federal protection using a Scalia-based approach would harm water quality. If the agencies take their Clean Water Act responsibilities seriously, they will only pursue a Scalia-based rule after understanding its impacts and reasonably concluding that water quality will not suffer. Because that analysis remains undone and because it is almost certain to show that pollution will increase under such a regime, the agencies cannot presume now that it will come to pass.

Fifth and most importantly, because relying on Justice Scalia's opinion is flatly illegal, the agencies likely will not adopt a Scalia-based final rule or, if they do, the rule will be invalidated in court. A majority of the justices in *Rapanos* explicitly rejected Justice Scalia's view of the Clean Water Act; five justices – Justice Kennedy and the dissenting justices – held that the limitations Justice Scalia read into the Act did not in fact constrain what kinds of aquatic features the law protects.[81] Courts have confirmed that the agencies cannot shirk responsibilities entrusted to them under the Act by refusing to regulate sources or waterbodies that Congress intended to include within the scope of the Act. As the agencies told the Sixth Circuit: "No court has held that the plurality standard is the sole available method for establishing CWA jurisdiction."[82] Finally, adopting a Scalia-only approach would contradict the Bush administration's interpretation of *Rapanos*.[83]

In combination, the preceding factors make it exceedingly unlikely that the agencies will promptly issue a rule to replace the one that the present rulemaking seeks to enact. Indeed, the agencies seem quite likely to repeat a prior regulatory misadventure, when the agencies considered weakening the Clean Water Act regulations in the wake of *SWANCC*. Back then, citizen groups, states, members of Congress, and scientists raised such an outcry that it deterred the agencies from weakening the Clean Water Act jurisdictional rules at the beginning of the George W. Bush administration.[84]

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[81] *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring in the judgment) (stating that Justice Scalia's plurality opinion "is inconsistent with the Act's test, structure, and purpose."); *id.* at 800 (Stevens, J., dissenting) ("Even setting aside the plurality's dramatic departure from our reasoning and holding in *Riverside Bayview*, its creative opinion is utterly unpersuasive.").

[82] *In re: EPA*, No. 15-3751, Brief for Respondents, at 50.

[83] 2008 Guidance at 3 ("regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied").

[84] *See* EPA, Press Release, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003) ("After soliciting public comment to determine if further regulatory clarification was needed, the EPA and the Corps have decided to preserve the federal government's authority to protect our wetlands."), available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/540f28acf38d7f9b85256dfe00714ab0.html

d. The proposal suggests that the regulatory text proposed to be included in the Code of Federal Regulations may be illegal as written.

The agencies propose to adopt, as a new regulation, the text of the regulations that were in place prior to the Clean Water Rule's enactment. 82 Fed Reg at 34,901. But they also propose *not* to enforce that text as written. Instead, they will enforce the rule as "informed by" "applicable" guidance documents — listing (as examples) 2003 and 2008 guidance documents —as well as "relevant" memoranda and guidance letters, and "consistent with" the *SWANCC* and *Rapanos* Supreme Court decisions, "applicable" case law, and "longstanding agency practice." *Id.* at 34,902; *see also id.* at 34,899, 34,900.

The agencies therefore will not follow the text of the Code of Federal Regulations they are proposing to enact, but rather a set of rules that may be found in various guidance documents, memoranda, letters, case law, and "agency practice." As described below, this violates the APA's notice and comment requirements, because the notice does not adequately describe the rule the agencies are actually proposing, and deprives the public of an opportunity to comment meaningfully on the rules the agencies have in mind.

That scheme is also substantively arbitrary and capricious. The agencies are proposing a rule for the Code of Federal Regulations that they apparently think either *should* not or *cannot* be enforced as written—if it could, the long list of "informative" guidance documents would be unnecessary. Indeed, the agencies suggest that enforcing the text of the proposed rule might contravene Supreme Court precedent; they note that the *SWANCC* and *Rapanos* decisions "limited" the way the regulations were implemented.[85] They also state that the Clean Water Rule increased the Act's coverage as compared to pre-Rule practice, but *decreased* coverage as compared to the pre-Rule regulations themselves, suggesting that the practice resulted in a narrower scope of coverage than the pre-Rule regulations alone would have.[86] Indeed, the 2003 guidance referenced by the agencies says that with regard to certain types of waterways, "it is uncertain" whether there "remains any basis for jurisdiction" under certain sections of the rule that the agencies are now proposing to enact into law.[87]

Proposing a rule that *the agency itself* believes is at least in part unwise or potentially illegal is patently arbitrary and capricious. *State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *see also FCC v. Fox*, 556 U.S. 502, 515 (2009) (an agency action is not arbitrary and capricious if, among other things, the "agency *believes* [the new policy] is better"); *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 531–32 (2009) (banking regulation invalidated as beyond statutory authority despite the agency's attempt to limit the regulation via narrowing language in the rule's preamble).

[85] *See* 82 Fed Reg at 34,901

[86] *Id.* at 34,903; *see also supra* (describing how the practical impact of *SWANCC* and *Rapanos* was to curtail the agencies' assertion of coverage under the Act).

[87] 68 Fed. Reg. 1991, 1996 (Appendix A: Joint Memorandum to Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "waters of the United States").

A major proposed rule interpreting the scope of the Clean Water Act should not be a convenient expedient; it should reflect the interpretation of the Act that the agencies think is best. It should *not* be a rule that the agencies themselves find to be, at least in part, on "uncertain" legal footing such that they claim they will not even enforce it as written.

3. The Proposal Offers an Explanation for Repeal Counter to the Evidence.

The sole explanation the agencies offer for the rulemaking is that enacting the pre-Clean Water Rule text will provide certainty and continuity to stakeholders, but that rationale directly contradicts the available evidence. In contrast to the agencies' assumptions, the evidence strongly supports the conclusion that reinstating the pre-Clean Water Rule regime would perpetuate the confusion and inconsistency that defined that approach. Moreover, the available evidence provides no reason to think that implementing the Clean Water Rule in some places, even if it were to be stayed elsewhere, would cause confusion. And even if one accepted the premise that the possibility of different jurisdictional rules applying in different places could create confusion, the agencies ignore strong evidence that such a regime will result from this very rulemaking.

a. The pre-Clean Water Rule regime lacked clarity and consistency.

The agencies justify enacting the text of the pre-Clean Water Rule regulations by claiming that doing so will promote continuity and reduce confusion, but this runs counter to the evidence that the pre-Rule regime was inconsistent and confusing. Even the preamble for the present proposal acknowledges that the agencies adopted the Clean Water Rule in response to confusion following the Supreme Court's *SWANCC* and *Rapanos* decisions and calls from multiple sectors for clarification about what kinds of features the Act protects. As the agencies acknowledge, "[t]he *SWANCC* decision created uncertainty with regard to the jurisdiction of other isolated non-navigable waters and wetlands."[88] Moreover, the proposal notes,"[a]fter issuance of the 2008 guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA."[89]

The pre-Clean Water Rule regime lacked clarity in several ways, in large part because the agencies leaned heavily on guidance documents and internal practices that created considerable uncertainty. These guidance documents first introduced uncertainty by making most jurisdictional questions decided on a water-by-water basis, and by leaving it to those individual jurisdictional assessments whether and to what extent the guidance documents would even be followed. Take, for instance, the issue of so-called "isolated" waters. The post-*SWANCC* guidance raises the specter of leaving such waters entirely without protection, but fails to resolve

[88] 82 Fed. Reg. at 34,900.
[89] *Id*. at 34,901; *see also* U.S. EPA, Persons and Organizations Requesting Clarification of Waters of the US by Rulemaking.

the question.[90] It also adds to then-existing uncertainty about those waters' status in the states of the Fourth Circuit.[91] Finally, the guidance punts on the matter – directing field staff to seek headquarters approval prior to treating any "isolated" water as protected.[92] As a consequence of these statements, the stated policy of the United States is that "isolated" waters are legally eligible for protection, but the actual practice of the United States is to treat such waters as unprotected.[93]

The post-*Rapanos* guidance fares no better at providing certainty and consistency to stakeholders. It expressly disclaims that it delivers any such certainty, as it says field staff may well not follow it "depending on the circumstances," and it says that others could challenge its "appropriateness" to a given situation, without saying how either determination should be made:

> The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.[94]

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[90] 68 Fed. Reg. at 1996 ("in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)–(iii) over isolated, non-navigable, intrastate waters (i.e., use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce)").

[91] *Compare id.* ("Furthermore, within the states comprising the Fourth Circuit, CWA jurisdiction under 33 CFR § 328.3(a)(3) in its entirety has been precluded since 1997 by the Fourth Circuit's ruling in United *States v. Wilson*, 133 F. 3d 251, 257 (4th Cir. 1997) (invalidating 33 CFR § 328.3(a)(3)).") *with* U.S. EPA & U.S. Army Corps of Eng'rs, Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson*, at 6 (May 29, 1998) (stating that "neither the Corps nor the EPA will cite or rely upon the regulatory provision of 33 C.F.R. 328.3(a)(3) as a basis for asserting CWA jurisdiction over any area for any purpose within the Fourth Circuit"; noting, however, that both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, within the Fourth Circuit, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce, and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce."), available at http://bit.ly/2xAN112.

[92] 68 Fed. Reg. at 1996.

[93] *See* Testimony of Benjamin H. Grumbles, EPA Assistant Administrator for Water, Hearing of House Transportation & Infrastructure Committee: "The 35th Anniversary of the Clean Water Act: Successes and Future Challenges" (Oct. 18, 2007), available at http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg38565/html/CHRG-110hhrg38565.htm ("[T]he basic point there is in the guidance we held open the possibility that there could be circumstances under (a)(3) paragraphs of our regulations where there could be an assertion of jurisdiction over isolated interstate non-navigable waters without relying on the migratory bird rule provisions. As a legal matter, that is still possible, but as a practical matter we had not asserted jurisdiction over those types of wetlands based on that guidance, which is still in place.").

[94] 2008 Guidance at 4 n. 17.

Adding to the uncertainty the guidance created, the regulations on the books disagreed with the agencies' guidance and/or practice. For instance, the regulations on their face provided (and will provide again, if the agencies adopt this proposal) coverage of waters "the use, degradation, or destruction of which would or could affect interstate or foreign commerce, including any such waters … [w]hich are used or could be used for industrial purposes by industries in interstate commerce." But, as discussed throughout these comments, the evidence reveals that the agencies will not protect such waters if they consider them "isolated." Similarly, although the pre-Clean Water Rule regulations (and therefore the rules proposed here for adoption) cover tributaries and adjacent wetlands without qualification, the pre-Clean Water Rule guidance specifies that protection depends on a case-specific showing that the water in question satisfies either the significant nexus or Scalia test.

These multiple ambiguities had real-world effects. When the EPA Inspector General interviewed the Director of EPA's Office of Enforcement and Compliance Assurance, Wetlands Enforcement Division, and his staff, they openly acknowledged the lack of regulatory clarity and its impact on efficient administration of the Clean Water Act, saying:

- *Rapanos* has created a lot of uncertainty with regards to EPA's compliance and enforcement activities. Processing enforcement cases where there is a jurisdictional issue has become very difficult. ***
- Overall, CWA enforcement activities (for Sections 311 (oil spills), 402 (National Pollutant Discharge Elimination System), and 404) have decreased since the *Rapanos* ruling. An estimated total of 489 enforcement cases (Sections 311, 402, and 404 combined) have been affected such that formal enforcement was not pursued as a result of jurisdictional uncertainty, case priority was lowered as a result of jurisdictional uncertainty, or lack of jurisdiction was asserted as an affirmative defense to an enforcement action.
- *** In the wake of *Rapanos*, however, it has become "almost impossible" for EPA to refer a case to the Department of Justice on "significant nexus" grounds. Lingering uncertainty over the limits of Federal jurisdiction has made the Department of Justice reticent to accept referrals wholly on these grounds.
- Staff also stated that the Department of Justice is "willing" to take CWA Section 404 cases, in principle, but they are often loathe [sic] to right now because of the lingering jurisdictional uncertainties associated with *Rapanos*. ***[95]

Tellingly, the agencies' proposal does not attempt to argue that the pre-Clean Water Rule regulations and guidance together provided clear direction to stakeholders attempting to understand the scope of the Clean Water Act.

In fact, the extreme nature of the agencies' proposal reveals that the "regulatory certainty" rationale is a sham. If the agencies were actually concerned only with consistent nationwide application of the Clean Water Act during the pending litigation, they would have proposed for notice-and-comment rulemaking a stay of the Rule during the litigation—not a permanent repeal that is designed to, and will, persist well beyond the end of litigation. A stay would be illegal for

[95] U.S. EPA Inspector Gen., *Special Report: Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation*, Report No. 09-N-0149, at 1-2 (Apr. 30, 2009).

many of the same reasons the proposed repeal is illegal—for instance, it also would undermine the objective of the Act, and there would be absolutely no good reason for it. But the point is that the agencies have chosen to take an axe to the Rule when, on its face, a much less drastic action would seem better suited to their professed rationale. That reveals the true aim of this proposal as not being "certainty" but simply getting rid of the Rule—preferably without having to address its merits.[96] The APA will not allow this.

The pre-Clean Water Rule regime also lacked national consistency, which will return if the agencies implement this rule as they claim they will. Depending on where a particular pollution discharge occurred, the standard (or standards) varied for assessing whether an area contains a "water of the United States." As the agencies explained to the Sixth Circuit:

> Three courts of appeals have given effect to the common denominator between Justice Kennedy's concurrence and the four-Justice dissenting opinion in holding, consistent with the Agencies' position, that CWA jurisdiction is established if Justice Kennedy's significant nexus standard is met. *See Donovan*, 661 F.3d at 180-84; *United States v. Bailey*, 571 F.3d 791, 797-99 (8th Cir. 2009); *Johnson*, 467 F.3d at 62-66. These decisions also allow the Agencies to assert jurisdiction under the *Rapanos* plurality standard. *** [Other] decisions hold that Justice Kennedy's significant nexus standard is either sufficient or exclusive. *See United States v. Robison*, 505 F.3d 1208, 1219-22 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006).[97]

Accordingly, because the proposal seeks to reinstate the uncertain and inconsistent legal regime that pre-dated the Clean Water Rule, the proposal's clarity and consistency rationale contradicts the available evidence.

b. Partially implementing the Clean Water Rule would not create confusion.

The agencies claim that the possibility of different rules applying in different locations would create confusion, but direct evidence indicates otherwise. The exact scenario the agencies allegedly fear actually played out for roughly a month and a half because – with the exception of the 13 states that obtained a preliminary injunction against the rule from the U.S. District Court for the District of North Dakota -- the Rule took effect nationwide in August 2015 and the agencies implemented different rules in different places until the Sixth Circuit issued a nationwide stay.[98] Notably, the United States opposed applying the North Dakota injunction nationally, even though the consequence of its position would be having two different regimes in place in different parts of the country.[99] Despite having numerous records from the period in

[96] The agencies claim that a stay of the Rule would not achieve the agency's objectives as "effectively and efficiently" as a full-blown repeal, without saying why. 82 Fed Reg at 34,903.
[97] *In re: EPA*, No. 15-3751, Brief for Respondents, at 49-50; *see also supra* (discussing status of 33 C.F.R. § 328.3(a)(3) in the states of the Fourth Circuit).
[98] *See* 82 Fed. Reg. at 34,901 (acknowledging period during which Clean Water Rule was effective except in 13 states).
[99] *See N. Dak. v. U.S. EPA*, No. 15-00059, Federal Defendants' Response to the Court's August 28, 2015 Order Setting Briefing Schedule (D.N.D., Sept. 1, 2015).

which the agencies simultaneously implemented these two approaches, the agencies point to no evidence that it was confusing or difficult to accomplish; indeed, they make no effort to examine the jurisdictional determinations made during that time period to see if their assumption that this is a problem requiring drastic regulatory action has any basis in fact. The evidence simply does not support the agencies' nonsensical assumption that implementing confusion everywhere is better than having clarity in at least some states.

Underscoring the lack of evidence for the agencies' conclusion, the economic analysis document accompanying the proposal acknowledges that the agencies possess no meaningful information about the effects of the supposed reduced uncertainty: "Absent a great deal more data concerning how various land developers and manufacturers make decisions about new projects and in light of remaining jurisdictional uncertainty, the agencies are unable to quantify the benefits of the reduced uncertainty."[100]

The agencies also ignore a key fact: if the circumstances the agencies describe actually arise, and if they actually result in confusion, the relevant courts will have inherent authority to manage and fix the situation. The proposal only obliquely acknowledges this critical detail, when the agencies state that differential standards might result in the absence of "further judicial decision-making" by courts hearing challenges to the Clean Water Rule.[101]

Naturally, conservation groups would prefer that strong, national standards be consistently applied across the country. Having the Clean Water Rule implemented less than nationwide thus is not ideal. But it is a far sight better than repealing the Clean Water Rule altogether and returning nationwide to the conditions that necessitated the Rule.

c. The very same outcome the agencies claim to be guarding against could result from the adoption of this rule.

If the agencies can be believed, the proposal seeks to avoid the prospect of different regimes being implemented if the Supreme Court were to hold that challenges to the Clean Water Rule should have been filed in district court.[102] Yet if the Supreme Court in fact reaches that conclusion, challenges to this repeal action also would appropriately belong in the district courts, which just as easily could reach contradictory results – that is, some courts might invalidate the repeal as to certain jurisdictions (thereby maintaining the Clean Water Rule there) and others might uphold it. The net result of such litigation? Stakeholders in different places would be subject to different standards (the Clean Water Rule and the newly promulgated replacement). In other words, this rule quite likely could lead to the identical state of affairs the agencies claim it will prevent.

[100] U.S. EPA, Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, at 12 (June 2017) (hereinafter "2017 Economic Analysis").
[101] 82 Fed. Reg. at 34,903.
[102] Ironically, the agencies' rationale depends on the Supreme Court rejecting the United States' position about where challenges to rules like the Clean Water Rule belong.

4. The Proposal Depends on Implausible Bases, Including a Grossly Inaccurate Economic Analysis.

As discussed throughout these comments, the agencies' lone rationale for repealing the Clean Water Rule and adopting the text of the regulations that predated that Rule lacks any reasonable basis. However, we strongly suspect that the stated rationale does not matter to the agencies, as their primary objective is getting rid of the Clean Water Rule however possible. Therefore, in case the agencies decide to shift rationales,[103] we discuss below why one such potential basis – that the quantified economic benefits of the action allegedly outweigh the quantified costs – is wholly implausible.

a. The agencies concluded that the benefits associated with the Clean Water Rule could not be quantified.

The economic analysis the agencies developed recognizes that, because the proposal would completely reverse the Clean Water Rule (by repealing it and enacting the rule text that was in the Code of Federal Regulations before the Rule), the costs and benefits of this action should be mirror images of those associated with the Clean Water Rule. Specifically, costs to industry dischargers (permitting expenses, e.g.) arising from the Clean Water Rule would become benefits (in the form of avoided costs) from the repeal. The Clean Water Rule's benefits would be lost, however, becoming costs of this repeal. Because the agencies found when enacting the Clean Water Rule that its benefits outweighed the costs, a straightforward analysis of repealing it should have found that the costs of repeal outweigh the benefits.

But that did not happen. Instead, the document takes the steps described above but with one critical alteration – the agencies now say that the value of wetlands' ecosystem services, which make up the largest component of the benefits from the Clean Water Rule, cannot be quantified. The primary reason the agencies present for ignoring the benefits of wetlands is the age of the benefits studies relied on for the 2015 Clean Water Rule analysis. This remarkable shift relies on sheer speculation: "The studies were published between 1986 and 2000, although the agencies attempted to find more recent studies. More recent wetland studies were not available. The age of these studies introduces uncertainty, because public attitudes toward nature protection *could* have changed."[104] In addition, the agencies suggest that the forgone benefits of the Clean Water Rule's protections might be less if states protect more than the federal definition does.

> "[S]tates' responses to this proposed rulemaking could have a significant impact on the avoided costs and forgone benefits. *** The agencies were unable to factor the magnitude of this effect into the analysis leading to increased uncertainty. This additional uncertainty applies to both the avoided costs and the forgone benefits. In the case of the forgone benefits of wetland protection the agencies believe the cumulative uncertainty in this context is too large to include quantitative estimates in the main analysis for this proposed rule."[105]

[103] We do not concede the agencies could lawfully do so. *See State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.").
[104] 2017 Economic Analysis at 8-9 (emphasis added).
[105] *Id*. at 9.

But this is no basis for revising the benefits estimate, as the agencies make no effort to identify the amount of waters subject to state-level coverage, nor to evaluate which, if any, of the various protections in the Clean Water Act attach to state-protected waters. The agencies claim they were "unable" to take factors related to state-level protection into account, leading to further "uncertainty" on this score, but that is simply untrue. Of course, an analysis of the scope of state-level water protections is entirely possible. The agencies simply chose not to do it.

The agencies acknowledge that treating a huge category of benefits as unquantifiable distorts reality, but it appears the agencies intended that outcome. The economic analysis states: "As the categories not estimated all fall in the benefits column, comparing the quantified totals may potentially lead to a lower estimate of net benefits, depending on any regulatory response by the states."[106] This decision, according to a former agency staffer, was not driven by any reasoned agency decision-making, but instead directed by political appointees:

> E.P.A. employees say that in mid-June, as Mr. Pruitt prepared a proposal to reverse the rule, they were told by his deputies to produce a new analysis of the rule — one that stripped away the half-billion-dollar economic benefits associated with protecting wetlands.
>
> "On June 13, my economists were verbally told to produce a new study that changed the wetlands benefit," said Elizabeth Southerland, who retired last month from a 30-year career at the E.P.A., most recently as a senior official in the agency's water office.
>
> "On June 16, they did what they were told," Ms. Southerland said. "They produced a new cost-benefit analysis that showed no quantifiable benefit to preserving wetlands."[107]

b. The agencies' failure to quantify wetland benefits from the Clean Water Rule depends on implausible bases.

Because the critical decision to exclude significant benefits was political, not principled, close scrutiny of the reasoning in the agencies' economic analysis reveals numerous methodological flaws.

First, despite the agencies' implication that the 2015 analysis lacked accuracy, that prior document specifically notes: "Since completion of the economic analysis at proposal the Corps of Engineers undertook significant efforts to complete quality assurance on 404 program data. This resulted in improvements in data availability and data quality, which in some instances revised previously-reported values."[108]

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[106] *Id*. at 8.
[107] Coral Davenport & Eric Lipton, Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say, New York Times (Aug. 11, 2017), available at https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html?mcubz=3.
[108] U.S. EPA & U.S. Army Corps of Eng'rs, Economic Analysis of the EPA-Army Clean Water Rule, at 6 (May 20, 2015).

Second, the economic analysis runs afoul of standard government practice. Specifically, guidance documents from both the Office of Management and Budget and EPA urge agencies to deal with uncertainty about the precise amount of costs or benefits by expressing them as a numerical range, rather than as a single point value and rather than treating them as not quantifiable at all. As OMB states:

> When benefit and cost estimates are uncertain…, you should report benefit and cost estimates (including benefits of risk reductions) that reflect the full probability distribution of potential consequences. Where possible, present probability distributions of benefits and costs and include the upper and lower bound estimates as complements to central tendency and other estimates."[109]

Similarly, EPA's guidance for performing economic analyses states:

> Ideally, an economic analysis would present results in the form of probability distributions that reflect the cumulative impact of all underlying sources of uncertainty. When this is impossible, due to time or resource constraints, results should be qualified with descriptions of major sources of uncertainty. If at all possible, information about the underlying probability distribution should be conveyed.[110]

The agencies' failure to heed this advice in the economic analysis accompanying the present rulemaking creates a false impression about the impacts of the rule they propose.

Third, effectively zeroing out the wetland benefits of the Clean Water Rule ignores recent evidence that these waters contribute enormously to public well-being. For example, "[c]oastal wetlands thwarted $625 million worth of property damage during Hurricane Sandy in 2012, according to a study published … in Scientific Reports."[111] That study revealed:

> temperate coastal wetlands reduced flood heights and thus avoided more than US $625 Million in flood damages across 12 coastal states affected by Hurricane Sandy, from Maine to North Carolina. In total, wetlands are estimated to have reduced a little over 1% of the flood damage from Hurricane Sandy though this value varies considerably between zip-codes. Across the 707 zip-codes flooded, wetlands reduced flood damages by an average of 11%. Wetlands reduced flood heights and damages in 80% of the region and increased flood heights and damages in 20% of the region. In 382 of the 707 zip-codes

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[109] Office of Management & Budget, Circular A-4 (Sept. 17, 2003), available at https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/; *see also id*. ("If the non-quantified benefits and costs are likely to be important, you should carry out a 'threshold' analysis to evaluate their significance. Threshold or 'break-even' analysis answers the question, 'How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?'").

[110] U.S. EPA, Natl. Ctr. for Envtl. Econ., Guidelines for Preparing Economic Analyses, at p. 11-9 (Dec. 17, 2010; updated May 2014), available at https://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf.

[111] Nsikan Akpan, "Wetlands stopped $625 million in property damage during Hurricane Sandy. Can they help Houston?", PBS Newshour (Aug. 31, 2017), available at http://www.pbs.org/newshour/updates/wetlands-stopped-650-million-property-damage-hurricane-sandy-can-help-houston/.

(i.e. just over half), avoided damages exceeded 0.5% of the total. Across these zip-codes, the average reduction in damages due to wetlands was 22%.[112]

Likewise, numerous recent articles have suggested a connection between wetlands loss and Houston's increased vulnerability to flooding, such as the devastation experienced because of Hurricane Harvey.[113]

Fourth, several independent reviews of the agencies' analysis find it to be unsupportable and internally inconsistent. Dr. John Whitehead, a professor in the Department of Economics at Appalachian State University, reviewed the document for the Southern Environmental Law Center. Dr. Whitehead identified several flaws in the agencies' failure to quantify wetlands benefits:

> There is no need for the agencies to resort to qualitative analysis of the wetland mitigation benefits. A review of the pre-2000 studies now dismissed by the agencies indicates that many of the concerns made by EPA-Army (2017) are not justified. ***
>
> In addition, there have been more recent wetland valuation studies that have appeared in the literature. *** These studies suggest that the wetland mitigation benefits estimated by the agencies in their original economic analysis (EPA-Army 2015) were accurately measured.
>
> Finally, the agencies have taken two extreme positions with regard to the uncertainty of wetland mitigation benefits. *** Using a sensitivity analysis as an appropriate strategy is discussed below.
>
> Considering these issues, the agencies' decision to consider only qualitative wetland mitigation benefits appears to be an overreaction to a normal level of uncertainty in the conduct of standard benefit-cost analysis of environmental policy. Even if the agencies now feel justified in only presenting qualitative wetland mitigation benefits, there is no

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[112] Siddharth Narayan et al., "The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA," 7 Scientific Reports, article 9463, at 2 (Aug. 31, 2017) (citations omitted), available at https://www.nature.com/articles/s41598-017-09269-z.

[113] *See, e.g.*, Ana Campoy & David Yanofsky, "Houston's flooding shows what happens when you ignore science and let developers run rampant," Quartz (Aug. 29, 2017), available at https://qz.com/1064364/hurricane-harvey-houstons-flooding-made-worse-by-unchecked-urban-development-and-wetland-destruction/; Leanna Garfield, "Houston was a ticking time-bomb for a devastating hurricane like Harvey," Business Insider (Aug. 28, 2017), available at http://www.businessinsider.com/hurricane-harvey-why-houston-flooded-2017-8; Terence Cullen, "Houston's development boom destroyed wetlands that naturally absorbed flood water — and left thousands in Harvey's path," New York Daily News (Aug. 30, 2017), available at http://www.nydailynews.com/news/national/houston-development-boom-destroyed-water-absorbing-wetlands-article-1.3454807; David Schaper, "3 Reasons Houston Was A 'Sitting Duck' For Harvey Flooding," Natl. Pub. Radio (Aug. 31, 2017), available at http://www.npr.org/2017/08/31/547575113/three-reasons-houston-was-a-sitting-duck-for-harvey-flooding; Shawn Boburg & Beth Reinhard, "Houston's 'Wild West' growth," Washington Post (Aug. 29, 2017), available at https://www.washingtonpost.com/graphics/2017/investigations/harvey-urban-planning/?utm_term=.8e6f81391196; Henry Grabar, "Don't Blame Houston's Lax Zoning for Harvey's Destruction," Slate (Aug. 31, 2017), available at http://www.slate.com/articles/business/metropolis/2017/08/how_houston_and_harris_county_s_zoning_approach_affected_hurricane_harvey.html.

> evidence that these benefits would be so small as to reverse the sign on the net benefits calculation (i.e., positive net cost savings on page 20 in EPA-Army (2017)). The only way to justify a negative net benefit calculation would be to conduct the appropriate sensitivity analysis, as discussed below, and show that negative net benefits are more likely than positive net benefits, which was not done.[114]

SELC also obtained a second review, this one conducted by Dr. Jeffrey Mullen, an associate professor in the College of Agricultural and Environmental Sciences at the University of Georgia. Dr. Mullen likewise concluded that the agencies' new analysis erroneously disregarded the Clean Water Rule's benefits while continuing to consider its costs. In particular, Dr. Mullen noted that the claimed reasons for the agencies' decision not to quantify the Clean Water Rule's benefits likewise applied to its costs, which the agencies still quantified in the new analysis:

> Several sources of uncertainty are noted: an insufficient number of studies were used to establish the estimates, the data were too old, and those studies may not have followed what are currently considered best practices for data collection and analysis. Ironically, the same sources of uncertainty are also relevant to the permit application cost estimates for CWA Section 404 – those estimates relied on just two studies conducted during the same time period as the benefit studies, and they fail to report sufficient information to assess whether best practices for data collection and analysis have been followed.[115]

Like Dr. Whitehead, Dr. Mullen also notes that "there have been numerous empirical studies published in peer-reviewed journals since 2000" regarding the value of wetlands.[116]

Similarly, the Institute for Policy Integrity reviewed the agencies' analysis and concluded it is "biased, incomplete, and inaccurate." Summarizing Policy Integrity's principal findings, the review states:

- First, evidence used in economic analyses should be selected based on quality and relevance and should not be mechanically excluded based solely on the study's age. The criteria for inclusion should be applied consistently across evidence of both costs and benefits. Currently, the agencies wrongly exclude relevant studies on the environmental benefits of wetlands based purely on their age, while including old studies of compliance costs, which may actually be outdated because of changing circumstances.
- Second, when estimating costs, the agencies have failed to consider changing conditions like mitigation banks, making these estimates unreliable.

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[114] John C. Whitehead, Comments on "Economic Analysis for the Proposed Definition of 'Waters of the United States' – Recodification of Pre-existing Rules" at 2 (Sept. 2017) (prepared for & submitted by the Southern Environmental Law Center).
[115] Review of the 2017 EPA Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules at 13 (Sept. 2017) (prepared for & submitted by the Southern Environmental Law Center).
[116] *Id.*

- Third, relevant evidence for quantifiable, forgone benefits from wetland protection was ignored by the agencies, including recent estimates of positive economic value for isolated wetlands.
- Fourth, evidence shows that the 2015 Clean Water Rule would have substantial additional value relative to state-level regulations.
- Finally, the agencies should maintain the 2015 Clean Water Rule as the baseline for analysis.[117]

The agencies' economic analysis is thus a thoroughly implausible basis on which to rely for the action to repeal the Clean Water Rule.

B. The proposal is "without observance of procedure required by law"

1. The agencies may not refuse to accept and consider comments on the substance of the rule they are repealing or the rule they are issuing.

a. The Administrative Procedure Act imposes notice-and-comment requirements that govern this action.

The APA requires agencies to follow certain procedures before "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (defining rulemaking). The agency must (1) publish a general notice of proposed rulemaking in the Federal Register that includes "the terms or substance of the proposed rule or a description of the subjects and issues involved"; (2) give "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) "[a]fter consideration of the relevant matter presented, . . . incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* § 553(b), (c); *see N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012).

"The important purposes of [the APA's] notice and comment procedure cannot be overstated." *North Carolina Growers*, 702 F.3d at 763. The process promotes informed agency decisionmaking by allowing agencies to "benefit from the expertise and input of the parties who file comments," *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), and ensuring that "agency regulations are tested via exposure to diverse public comment," *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011). The process also helps ensure that "the agency maintains a flexible and open-minded attitude towards its own rules." *Nat'l Tour Brokers*, 591 F.2d at 902.

The notice-and-comment process is no less important when an agency is repealing a rule. "The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982).

[117] Institute for Policy Integrity Comments to Docket EPA-HQ-OW-2017-0203, at 1-2 (Sept. 2017).

Regardless whether an agency is issuing, amending, or repealing a rule, the "opportunity for comment must be a meaningful opportunity." *Prometheus Radio*, 652 F.3d at 450. "That means enough time with enough information to comment and for the agency to consider and respond to the comments." *Id.*

b. The content restriction imposed by the agencies violates the APA.

There is no question that the APA's notice-and-comment requirements apply here. The agencies are repealing a duly promulgated rule, the Clean Water Rule, and are formulating a new rule, by reinstating the regulatory text that preceded the Clean Water Rule. Indeed, the agencies have implicitly acknowledged that these requirements apply, by soliciting public comment on their action. But the agencies have imposed a content restriction on public comments: they ask the public not to comment on the substance of either the Clean Water Rule or the pre-Clean Water Rule text, which they are now enacting into law. 82 Fed. Reg. at 34,903. This content restriction violates the APA.

In *North Carolina Growers*, the Fourth Circuit held that a similar content restriction violated the APA. There, the Department of Labor suspended a rule for nine months, pending a rulemaking to replace the rule. In the interim, the Department reinstated the prior rule. Although the Department sought public comment, it stated that it "only would consider comments concerning the suspension action itself, and not regarding the merits of either set of regulations." 702 F.3d at 761. The Fourth Circuit held that the record "clearly demonstrate[d] that the Department did not satisfy its notice and comment obligations." *Id.* at 769. The content restriction "was so severe in scope, by preventing any discussion of the 'substance or merits' of either set of regulations, that the opportunity for comment cannot be said to have been 'a meaningful opportunity.'" *Id.* at 770 (quoting *Prometheus Radio*, 652 F.3d at 450). The same is true here.

The agencies advance two justifications for the content restriction they impose here. First, they claim that they are "simply codify[ing] the legal *status quo*" by reinstating the pre-Clean Water Rule text. 82 Fed. Reg. at 34,903. Second, they claim that their action is a "temporary, interim measure pending substantive rulemaking." *Id.* Neither justification is valid.

First, by claiming that they are codifying the status quo, the agencies try to avoid acknowledging what they are actually doing: engaging in rulemaking. A court may have stayed the Clean Water Rule pending a legal challenge (a stay that could be lifted, as the agencies acknowledge in their proposal, *id.* at 34,902). But that judicial stay doesn't change the fact that the rule on the books is the Clean Water Rule. *E.g.*, 33 C.F.R. § 328.3; *see also Fox*, 556 U.S. at 515 ("An agency may not . . . simply disregard rules that are still on the books."). By proposing to repeal the Clean Water Rule and issue a different rule (which is not currently on the books), the agencies are engaging in rulemaking, and the APA's notice-and-comment requirements apply.

It does not matter that the agencies are proposing to "reinstat[e]" regulations that previously were in effect and that those regulations "previously had been subject to notice and comment procedures." *North Carolina Growers*, 702 F.3d at 764. Notice-and-comment requirements apply whenever an agency formulates a rule, regardless "whether the rule at issue was newly drafted or

was drawn from another source." *Id.* at 765. When the agencies issued the Clean Water Rule in June 2015, it "superseded the [prior] regulations." *Id.* at 765. "As a result, the [prior] regulations ceased to have any legal effect, and their reinstatement would . . . put in place a set of regulations that [are] new and different 'formulations' from the [Clean Water Rule]." *Id.* This is rulemaking. *Id.* at 765-66.

In fact, the agencies acknowledge they are engaging in rulemaking. They refer repeatedly to their action as a "proposed rule" and a "rulemaking," 82 Fed. Reg. at 34,899-904, and they solicit public comments, albeit with a content restriction, *id.* at 34,903. This "conduct . . . is highly relevant and shows that the [agencies] view[] the reinstatement of the [prior] regulations as 'rule making.'" *North Carolina Growers*, 702 F.3d at 765. "Similar attempts by an agency to comply with APA notice-and-comment procedures suggest that the agency believed them to be applicable, and support the conclusion that those procedures were applicable." *Id.* (internal quotation marks omitted).

Second, the agencies cannot justify their content restriction by claiming that the reinstatement of the pre-Clean Water Rule text is temporary. There is no guarantee that the reinstatement will be temporary; as discussed above, the agencies may not even complete the second step of their envisioned rulemaking at all, much less quickly. But even if the reinstatement were temporary, that would not matter. The agencies are still repealing a rule and issuing a new rule, and they must comply with APA notice-and-comment requirements, regardless of the length of time the new rule will be in effect. In *North Carolina Growers*, the rule suspension was expressly temporary—just nine months—but that did not change the court's analysis. The court concluded that, "by reinstating the superseded and void [prior] regulations (albeit temporarily), the Department engaged in the 'formulating' and the 'repealing' aspects of 'rule making' under the APA," and notice-and-comment requirements therefore applied. *Id.* at 765-66.

Because the agencies are engaging in a rulemaking proceeding and the APA's notice-and-comment requirements apply, the agencies are "obligated to identify and respond to relevant, significant issues raised during [this] proceeding[]." *Id.* at 769. Here, as in *North Carolina Growers*, the merits of the rule the agency proposes to repeal and the rule it proposes to reinstate are "not only 'relevant and important,' but [are] integral to the proposed agency action and the conditions that such action [seeks] to alleviate." *Id.* at 769-70. Here, as discussed above, the agencies' entire rationale for the action is to ensure clear regulatory standards. For starters, then, the question whether the pre-Clean Water Rule text or the Clean Water Rule is more likely to achieve regulatory clarity is highly relevant to the action.

Even more critically, the agencies cannot avoid analyzing, and seeking comment on, the substance of the two rules by pretending that this is not a substantive rulemaking. *Cf. P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1024 (D.C. Cir. 2008) (holding that Corps did not "reopen" regulations to challenge where Corps did not even propose to amend regulations, much less formally repeal and replace regulations), cited at 82 Fed. Reg. at 34,903. It is hard to imagine a more substantive outcome to a rulemaking than repealing a rule in its entirety and replacing it with a different rule. "It quite defies belief that the [proposal] deem[s] comments on the merits of the regulations to be suspended or the regulations to be reinstated out of bounds. . . . In other words, the very agency actions that would most affect those subject to the

varying sets of regulations [are] ruled off limits to discussion." *North Carolina Growers*, 702 F.3d at 772 (Wilkinson, J., concurring).

By refusing to receive comments on the substance of the Clean Water Rule or the pre-Clean Water Rule text, the agencies are "ignor[ing] important aspects of the problem" and are "not follow[ing] procedures required by law." *Id.* at 770. "This all risks giving the impression that the agency ha[s] already made up its mind and that the comment period [i]s, at best, for show and provided only in an effort to do the minimum necessary to squeak by judicial review." *Id.* at 772 (Wilkinson, J., concurring). The proposal violates the APA and must be withdrawn.

2. The agencies may not propose one rule for the Code of Federal Regulations while proposing to enforce a different and ambiguous set of unpublished rules

The agencies' proposal is without observance of procedure required by law (5 U.S.C. § 706(2)(D)) for a second reason: it does not give the "terms or substance of the proposed rule," *id.* § 553(b)(3), and so does not give interested citizens "an opportunity to participate in the rule making," *id.* § 553(c).

a. Enacting one rule while proposing to enforce some other vaguely described rules violates the agencies' obligation to give notice of the proposal.

The agencies propose to codify "the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule." 82 Fed Reg at 34,901. But they do not plan to enforce that text outright. Instead, they will enforce the rule *as informed by*:

- "applicable" guidance documents (giving two examples),
- "relevant" memoranda,
- guidance letters,
- Supreme Court decisions,
- "applicable" case law, and
- "longstanding agency practice."

Id. at 34,902, 34,899. In other words, the agencies propose to follow rules that are not expressly spelled out in the proposal, but that apparently may be found somewhere on a long, vague list of outside documents.

This does not give the public adequate notice of the rules the agencies are proposing to enforce and apply. As described above, the most salient characteristic of the regulatory regime the agencies are proposing to reenact (*i.e.*, the application of the pre-2015 text as "informed by" various guidelines and case law interpretations) was confusion. The proposal to return willingly to an opaque and inconsistent set of guidelines and principles necessarily deprives the public of a meaningful opportunity to comment.

It is no answer for the agencies to say that this confusing practice is already in place—the "status quo." While a regulatory regime might, over time, become unclear, that hardly excuses an agency's decision to *purposefully enact an unclear legal framework.* It is even less acceptable for the agencies to have already ended that confusing legal framework by issuing the Clean Water Rule, and then propose to scrap the extant clarifying regulation in favor of a regression to a legal mess. The so-called "status quo" that the agencies are proposing was such a mess; the proposal therefore does not, and perhaps cannot, clearly delineate exactly what rules and definitions the agencies are proposing to apply here.

Proposing a set of ill-defined rules to be found in a long list of outside documents violates the requirement to give fair notice and enable informed comment. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (notice requirements are designed to ensure that regulations are tested via exposure to public comment, to ensure fairness to affected parties, and to give affected parties a chance to develop evidence to support their objections and thereby enhance judicial review).

b. If the agencies are proposing to treat the "guidance documents" as law, they must go through the notice-and-comment process.

The preamble to the proposed rule suggests that the agencies will apply at least the guidance outlined in two documents from 2003 and 2008. If the guidance documents will constrain the agency's discretion in determining the scope of the Clean Water Act, they are "legislative rules" and should be included as part of the proposal for notice and comment. *See e.g.*, *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (rule is a legislative rule that must be subject to notice and comment if it is "of present binding effect" and constrains the agency's discretion). Although the agencies have a footnote in the proposal saying that the 2008 guidance *says* it is not "intended" to create legally binding requirements, 82 Fed. Reg. at 34,901 n.1, what matters is whether in practice the agency's discretion is constrained. *McLouth*, 838 F.2d at 1320 ("EPA's current claim that 'it does not consider itself ... bound by [the VHS] model' ... is obviously of little weight. The agency's past characterizations, and more important, the nature of its past applications of the model, are what count."); *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) (agency pronouncement will be considered binding as a practical matter if it *either* appears on its face to be binding *or* is *applied* by the agency in a way that indicates it is binding). As described above, before the Clean Water Rule's enactment, the agencies' discretion in making jurisdictional determinations was in practice constrained by the guidance outlined in the 2008 memorandum. Assuming the agencies are proposing to return to that practice, at least that memorandum must be formally proposed for notice and comment.

Finally, for the same reasons the agencies' statement that they will not consider substantive comment on the proposal generally is a violation of the APA, as discussed above, the failure to consider substantive comment on the guidance documents violates the APA.

3. Administrator Pruitt's closed mind violates due process.

The proposal also does not observe legally-required procedure because the chief decision-maker in this matter clearly intends to repeal the Clean Water Rule, no matter what legal or factual information stakeholders bring to bear during the comment period. The EPA Administrator has ultimate responsibility for implementing the definition of "waters of the United States" under the Clean Water Act, as a formal Attorney General's opinion confirms.[118] That role requires Administrator Pruitt to provide meaningful opportunity for public input and – critically for the present rulemaking – to fairly consider that input in making a final decision.[119] "Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments."[120] Unfortunately, Administrator Pruitt vehemently opposes the Clean Water Rule, has done so for years, and does not have a mind open to the possibility of retaining the Rule. Instead, the instant action simply serves as Administrator Pruitt's attempt to accomplish the repeal without having to justify himself. The law does not permit such behavior.

Administrator Pruitt has appeared in numerous public (and some less public) forums to condemn the Clean Water Rule. His remarks reveal a perspective that the Rule is unlawful, uncertain, and overreaching, and that it is a "bad" rule that he would "ditch." He also routinely repeats documented falsehoods about the Clean Water Rule, such that he cannot be trusted to "rationally consider arguments" in favor of retaining the Rule. Below, we present several examples of this perspective; as a whole, they clearly show Administrator Pruitt's "unalterably closed mind" and his complete unwillingness to consider contrary views.

On the day President Trump signed the executive order directing the agencies to review and consider changes to the Clean Water Rule, Administrator Pruitt gave a speech to the American Farm Bureau Federation, a longtime opponent of the Rule which sued the agencies over their adoption of the Rule.[121] During his speech, Administrator Pruitt described the executive order's purpose as "to withdraw the waters of the United States Rule," and celebrated along with the attendees that "relief is on the way with respect to withdrawing the Waters of the United States

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[118] 43 U.S. Op. Atty. Gen. 197 (Sept. 5, 1979) ("The Administrator of the Environmental Protection Agency rather than the Secretary of the Army has ultimate administrative authority to construe the jurisdictional term 'navigable waters' under § 404 of the Federal Water Pollution Control Act."); *see also id.* at 200-01 ("The term 'navigable waters,' moreover, is a linchpin of the Act in other respects. It is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the Act, including the § 402 permit program for point source discharges, the regulation of discharges of oil and hazardous substances in § 311 and the regulation of discharges of vessel sewage in § 312. Its definition is not specific to § 404, but is included among the Act's general provisions.") (citations omitted); *id.* at 201 ("It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether-and to what extent-any particular water body comes within the jurisdictional reach of the Federal Government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged and fill permits under § 404 and a different set for purposes of the other pollution control measures in the Act. On this point I believe there can be no serious disagreement.") (citations omitted).

[119] *Grand Canyon Air Tour Coal. v. F.A.A.*, 154 F.3d 455, 468 (D.C. Cir. 1998) ("An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them.").

[120] *Air Transport Ass'n of America, Inc. v. National Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (citing *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C.Cir.1979)).

[121] https://www.youtube.com/watch?v=yVzz3IYrpac

Rule. It's already started." Later, Administrator Pruitt derided the Rule as a vast overreach, and claimed falsely that "puddles" are covered by the Rule, as he has done frequently thereafter:

> That rule reflected a power grab. It reflected an issue that said the EPA was going to take dry creek beds and puddles – literally – and exercise jurisdiction over those areas to require what? Permitting and cost at the expense of fines and penalties if you didn't comply. And that was all because a statute was taken and reimagined in a way that gave this agency – tried to give this agency – more power than what Congress intended.[122]

On a radio broadcast this July, Administrator Pruitt again misled his audience. He repeated the falsehood that the Clean Water Rule covered puddles and – in case one might think he was exaggerating for effect – he doubled down on that statement by saying, "and that's not hyperbole…."[123] He also claimed that the Clean Water Rule's implementation confused landowners,[124] despite identifying no evidence to support that claim and despite the fact that the Rule was enforced for a relatively short time period prior to the Sixth Circuit's stay, making claims of widespread problems hard to believe.

In another radio interview, Administrator Pruitt argued that the Clean Water Rule violated the law, and intimated that courts agreed with him. After being asked about his multiple lawsuits against EPA prior to leading the agency, he said, "my response to that is they deserved it. And they deserved it because the exceeded their statutory authority, they exceeded their constitutional authority, and when they got outside of their lane, they got sued and they got stopped."[125] He maintained inaccurately that a preliminary hold on the Rule showed it to be unlawful: "The EPA got the definition wrong. How do we know they got it wrong? The Sixth Circuit said so. They issued a stay against the WOTUS rule…." And Administrator Pruitt ascribed an ill motive to the prior administration for adopting the Rule, saying, "that was all about power. They wanted to make land use decisions in place of private property owners and the states."[126]

Appearing on Fox News on June 30, Administrator Pruitt responded to concerns about undermining protections for sources of drinking water by using one of his regular talking points: "Look, dry creek beds, puddles, and drainage ditches don't apply under the Clean Water Act."[127] He also suggested that the Clean Water Rule, which applied – appropriately -- to numerous non-navigable waters, violated the law, because "[t]he only authority we have under the Clean Water Act is the authority that Congress gives us. And historically, as you know, that's navigable streams and waters, interstate commerce clause of the Constitution."[128]

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[122] *Id*. The notion that the Clean Water Rule reached "puddles" is demonstrably false. 33 C.F.R. § 328.3(b)(4)(vii) (Clean Water Rule provision explicitly exempting puddles).
[123] WCCO Morning News with Dave Lee, available at https://omny.fm/shows/dave-lee/7-19-17-epa-administrator-scott-pruitt?
[124] *Id.* ("That's what we saw in application, and so it created tremendous uncertainty for those building subdivisions, private property owners just using their land, farming and ranching….").
[125] Rob Port, WDAY, "Audio: EPA Administrator Scott Pruitt Touts Friendlier, More Cooperative Relationship With States" (May 10, 2017), available at https://www.sayanythingblog.com/entry/audio-epa-administrator-scott-pruitt-touts-friendlier-cooperative-relationship-states/.
[126] *Id.*
[127] Fox News: America's Newsroom, available at http://video.foxnews.com/v/5489092917001/?#sp=show-clips.
[128] *Id.*

Within days of becoming Administrator, Mr. Pruitt said in a newspaper interview that the Clean Water Rule overstepped the authority EPA has under the Act and had to be changed. First, he characterized the Rule as unlawful because it "defined waters of the United States so broadly … that there really weren't any boundaries between federal and state jurisdiction…."[129] And he said the Rule "so expanded jurisdiction of the Clean Water Act that it just made it a statute like Congress never intended it to be. They never intended the EPA to have … jurisdiction over puddles and dry creek beds across the country…."[130] Second, Administrator Pruitt revealed that he has a set view that the alleged overreach has to be changed: "Federal jurisdiction usurped and displaced state jurisdiction. So that needs to be fixed." He labeled the basis for the Rule – the significant nexus analysis from *Rapanos* – as "the poorest form of rule-making," and said, "[t]hat has to be fixed going forward, and that means the Kennedy definition is something that doesn't provide" clarity.[131]

As part of a multi-state tour in which Administrator Pruitt barnstormed around the country to meet with organizations and officials that likewise opposed the Clean Water Rule, he visited Iowa and held up an American Farm Bureau Federation sign that said "It's Time to Ditch the Rule," as pictured below. It's hard to imagine a more obvious display of a closed mind than embracing the anti-Clean Water Rule campaign created by one of the Rule's principal opponents.

[129] Philip Brasher, "Pruitt: EPA rewrite will limit reach of WOTUS rule," Agri-Pulse (Mar. 1, 2017), available at https://www.agri-pulse.com/articles/8981-pruitt-epa-rewrite-will-limit-reach-of-wotus-rule.
[130] *Id.*
[131] *Id.*

During an Iowa television interview, Administrator Pruitt repeated his claim that the Clean Water Rule inappropriately covers puddles, dry creek beds, and ephemeral drainage ditches, and alleged that the Rule "would've covered 97 percent of the state of Iowa as a water of the United States."[132] These claims are false. As noted above, the plain text of the Rule belies Administrator Pruitt's "puddles" contention, and copious data disprove the notion that the vast majority of Iowa or any state would be considered a water body.[133] Administrator Pruitt also defended his prior extensive litigation against EPA, including his challenge to the Clean Water Rule, and said that EPA "deserved" those lawsuits.[134]

Sadly, the preceding summary represents only a fraction of Administrator Pruitt's active advocacy against, and closed mind with respect to, the Clean Water Rule. Some other examples include:

- Administrator Pruitt appeared in a video produced by the National Cattlemen's Beef Association, a longtime opponent of the safeguards in the Clean Water Rule. He repeated the same indictments of the Rule – that it overreached and applied to features, including puddles, never meant to be covered – as he has many times before. He also indicated that the outcome of the rulemaking was sure; after denigrating the Clean Water Rule, he said "we're fixing that…."[135] The NCBA video urged viewers to visit its website to comment on the repeal proposal, from which people could copy a form letter saying, among other things: "I am writing to support the proposal to repeal the 2015 "Waters of the U.S." rule. As a cattle producer, I strongly support this effort."[136]
- On July 18, Administrator Pruitt tweeted that he wants EPA to "work with farmers to protect the environment w/o overreaching with rules like #WOTUS."[137]
- On the day he signed the instant proposal, he re-tweeted a message from Speaker Ryan treating the repeal as a foregone conclusion. It said: "The West has finally won in the battle over the Obama administration's WOTUS rule. *** I applaud the Trump administration for siding with American jobs and *rescinding this harmful rule.*[138]
- At an appearance at the Concordia Annual Summit on September 19, Administrator Pruitt repeated his false claim about the Rule applying to "a dry creek bed, a puddle, an ephemeral ditch," and definitively declared the result of the present rulemaking: "*we're withdrawing the bad rule – the one in 2015* that created uncertainty, that enlarged the definition inconsistent with the text and the legislative history."[139]

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[132] KCCI Des Moines, "KCCI Close Up: The Environmental Protection Agency" (Aug. 23, 2017), available at http://www.kcci.com/article/kcci-close-up-the-environmental-protection-agency/12005746.
[133] *See, e.g.*, Iowa Dept. of Natl. Resources, Iowa's Wetlands ("Prior to European settlement, wetland basins covered 4 to 6 million acres, or approximately 11% of Iowa's surface area. Wetlands were part of every watershed in the state, but nearly 95% of them have been drained."), available at http://www.iowadnr.gov/Environmental-Protection/Water-Quality/Water-Monitoring/Wetlands.
[134] KCCI Close Up.
[135] https://www.youtube.com/watch?v=vTVd54WyhDQ&hd=1
[136] Natl. Cattlemen's Beef Ass'n, News Releases: Take Action Now – Tell EPA to Kill WOTUS Today!, available at http://www.beefusa.org/newsreleases1.aspx?newsid=6381.
[137] https://twitter.com/EPAScottPruitt/status/887350781749284864.
[138] https://twitter.com/SpeakerRyan/status/879769583263076356 (emphasis added).
[139] https://www.youtube.com/watch?v=dnq-D-DlQcQ (emphasis added) (Administrator Pruitt's appearance begins at approximately the 4 hour, 7-minute mark).

- The astonishing political decision discussed above – to effectively treat the benefits of wetlands protection as zero – likewise supports the notion that the present rulemaking is a sham public process with a preordained outcome.
- According to an Iowa Farm Bureau report on Administrator Pruitt's August visit to the state, the Administrator condemned the Clean Water Rule as unlawful,[140] pledged to repeal it,[141] and repeated falsehoods about its scope and the regulatory process.[142]

In contrast to these numerous statements showing that Administrator Pruitt already made up his mind to repeal the Clean Water Rule, we are unaware of any comparable statement in which he indicated an openness to retaining the Rule. That is a textbook example of a due process violation, and is yet another reason why the proposed repeal is illegal.

4. The 60-day public comment period is arbitrary and capricious and not consistent with the Clean Water Act.

As the foregoing comments make clear, because this rulemaking action seeks to entirely redefine what aquatic features the Clean Water Act can cover, it is as consequential as one can imagine. Nevertheless, the agencies provided only a 60-day comment period on the proposal, a stark contrast to the approach the agencies took in adopting the very rules that they now seek to repeal. Limiting stakeholder input to such an abbreviated time fails to comply with applicable requirements because it provides inadequate opportunity to the public to fully participate.

Both the APA and the Clean Water Act require meaningful time and opportunity to comment on proposed rules. The APA directs that agencies undertaking rulemaking allow "interested persons an opportunity to participate," and empowers courts to invalidate agency decisions where the length of the comment period is "arbitrary and capricious" or "an abuse of discretion".[143] The Clean Water Act similarly provides that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States."[144]

The opportunity afforded stakeholders to comment on this proposal pales in comparison to that associated with the Clean Water Rule. The agencies published the Clean Water Rule proposal in

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[140] Dirck Steimel, EPA leader pledges to rescind and replace WOTUS rule, Iowa Farm Bureau ("'The agency has not operated within the rule of law,' Pruitt said. 'You had an agency that took the definition of a water of the U.S. under the Clean Water Act and reimagined it. No one in Congress ever thought that a puddle in Iowa should be considered a water of the U.S.'"), available at https://www.iowafarmbureau.com/Article/EPA-leader-pledges-to-rescind-and-replace-WOTUS-rule.

[141] *Id.* ("'We want to get rid of this bad rule and replace it with something much better'").

[142] *Id.* ("The new rule, Pruitt said, will protect the environment without the spreading federal jurisdiction over vast portions of the country. 'We are going to make sure that puddles, dry creek beds, ephemeral drainage ditches, man-made tile lines and irrigation ponds are not considered a water of the United States,' he said."); *see also id.* (Administrator Pruitt reportedly falsely alleged that the Clean Water Rule was the product of improper collusion with conservation organizations: "Another big problem was that the EPA did not go through the prescribed federal rulemaking process in writing WOTUS and instead encouraged litigation from environmental activist groups, the EPA administrator told the Iowa farm leaders. That subverts the process and hurts those regulated, he said.").

[143] 5 U.S.C. §§ 553(c); 706(2)(A).

[144] 33 USC §1251(e).

the Federal Register on April 21, 2014, and the comment period ended on November 14, 2014 – a total of 207 days. Such a period is reasonable in view of the significance of the definition of "waters of the United States" to the proper implementation of the Clean Water Act. The agencies' current proposal acknowledges as much, even while trying to downplay the significance of this action; the preamble states that the "scope of CWA jurisdiction is an issue of great national importance," one that warrants "robust deliberations" about the law's coverage.[145] However, the comment period on this proposal – even accounting for the paltry 30-day extension the agencies granted – only runs from July 27 to September 27, or 62 days.

At a minimum, this brief period of time is arbitrary and capricious and an abuse of the agencies' discretion. The period runs for less than one-third the length of the Clean Water Rule's comment opportunity. Moreover, the time provided is only as long as the presumptive minimum comment period for run-of-the-mill rulemakings pursuant to Executive Order 12,866,[146] rendering it manifestly unreasonable for an action, like this one, "of great national importance".

Finally, the agencies discouraged and frustrated meaningful public input, violating the Clean Water Act's directive to encourage and assist such participation. For instance, the agencies withheld critical information – namely, the views of state, local, and tribal authorities on the propriety of hastily promulgating a follow-up rule based on Justice Scalia's *Rapanos* opinion – until only two weeks before the close of the comment period. In addition, the agencies made commenting practically much more difficult by failing to include in the docket, and therefore imposing on the public the obligation to collect and submit, all relevant materials from prior administrative actions concerning the "waters of the United States" definition.

V. Conclusion

Please abandon this reckless and cynical attempt to take away safeguards for streams, wetlands, and other waters on which people across the country depend for pollution filtration, outdoor recreation, flood control, and drinking water supply. The agencies' proposal represents woefully misguided and unlawful environmental policy and also denies concerned citizens meaningful public participation opportunities.

Sincerely,

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[145] 82 Fed. Reg. at 34,902.
[146] Exec. Order 12,866, 58 Fed. Reg. No. 190, § 6(a)(1) (Oct. 4, 1993) ("each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days").