Nos. 15-3751, 15-3799, 15-3822, 15-3823, 15-3831, 15-3850, 15-3853, 15-3858, 15-3885, 15-3887

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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, Published on June 29, 2015 (MCP No. 135)

On Petitions for Review of a Final Rule of the
U.S. Environmental Protection Agency and the
U.S. Army Corps of Engineers

OPENING BRIEF OF PETITIONERS WATERKEEPER ALLIANCE, ET AL.

James N. Saul
Earthrise Law Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
Ph: (503) 768-6929
Fax: (503) 768-6642
jsaul@lclark.edu

Deborah A. Sivas
Alicia E. Thesing
Environmental Law Clinic
Mills Legal Clinic, Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8620
Ph: (650) 723-0325
Fax: (650) 725-8509
dsivas@stanford.edu
athesing@stanford.edu

CORPORATE DISCLSOURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, petitioners Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., and Turtle Island Restoration Network, Inc. make the following disclosures:

1. None of the above-named petitioners is a subsidiary or affiliate of a publicly owned corporation.

2. There is no publicly owned corporation not a party to these proceedings that has a financial interest in the outcome.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34 and Circuit Rule 34(a), petitioners Waterkeeper Alliance, et al. respectfully request oral argument.

INTRODUCTION

In June of 2015 respondents U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, the "Agencies") promulgated a regulation that has broad ramifications for the implementation of nearly every regulatory program under the Clean Water Act ("CWA"). *Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (June 29, 2015) ("Clean Water Rule" or "Rule"). The Rule constitutes the Agencies' latest effort to define the statutory phrase "waters of the United States," *see* 33 U.S.C. § 1362(7), and thereby identify the waters subject to CWA jurisdiction. The Rule, in part, reaffirms CWA jurisdiction over waters—such as many tributaries and their adjacent wetlands—historically protected by the Agencies.

However, in many respects the Rule deviates from past Agency practice by imposing severe and unjustified limitations on, or absolute exclusions from, CWA jurisdiction, thereby abandoning crucial federal protections for potentially huge swaths of wetlands, ponds, ephemeral streams, and hydrologically-connected groundwater once protected by the

Agencies for their potential effects on interstate commerce. These exclusions—some of which were inserted in the Rule at the eleventh hour, with no public involvement—fly in the face of common sense, statutory purpose, and the recommendations of the Agencies' own scientific advisors, and are wholly unsupported by the administrative record.

The Agencies' decision to abandon jurisdiction over such waters means that the CWA's essential safeguard—the prohibition on unauthorized discharges, *see* 33 U.S.C. § 1311(a)—would not apply, and that those waters may be dredged, filled, or polluted with impunity. Given the Rule's far-reaching impacts for these aquatic ecosystems and the many threatened or endangered species that depend upon them, the Agencies were required to ensure that the Rule would not jeopardize the continued existence of any such species and to engage in inter-agency consultation under section 7(a)(2) of the Endangered Species Act ("ESA"). Further, these impacts—which are apparent on the Agency's own record—render the Corps' "finding of no significant impact" arbitrary and capricious, meaning that agency should have prepared an environmental impact

statement ("EIS") under section 102(2)(C) of the National Environmental Protection Act ("NEPA").

STATEMENT OF JURISDICTION

This Court has held that it has jurisdiction over these consolidated petitions for review under CWA section 509(b)(1). Opinion, No. 15-3751, Dkt. #72-2. That jurisdiction extends to Waterkeeper's[1] claims that the Agencies failed to comply with their procedural obligations under the ESA and NEPA when they promulgated the Rule.[2] *See NRDC v. EPA*, 822 F.2d 104, 126–31 and n.1 (D.C. Cir. 1987); *Defenders of Wildlife v. EPA*, 420 F.3d 946, 955–56 (9th Cir. 2005), *rev'd on other grounds sub nom Natl. Ass'n of*

[1] Petitioners in No. 15-3837 are Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., and Turtle Island Restoration Network, Inc. (collectively referred to as "Waterkeeper"). Waterkeeper is also an intervenor in Nos. 3751, 3799, 3822, 3823, 3831, 3850, 3853, 3858, 3885, and 3887.

[2] Absent jurisdiction under CWA § 509(b), Waterkeeper's ESA and NEPA claims would be brought in federal district court. *See, e.g., Friends of Tims Ford v. Tenn. Valley Auth.*, 585 F.3d 955, 964 (6th Cir. 2009); 16 U.S.C. § 1540(g)(1)(A) (ESA's citizen suit provision).

Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (both finding jurisdiction to review EPA's alleged noncompliance with the ESA or NEPA under CWA § 509(b)).

STATEMENT OF ISSUES

1. Whether the Agencies violated the ESA by failing to ensure that promulgation of the Rule is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of such species' critical habitat and by failing to consult with federal wildlife services under 16 U.S.C. § 1536(a)(2) prior to the promulgation of the Rule;
2. Whether the Corps' determination that the promulgation of the Rule was not a major federal action significantly affecting the quality of the human environment requiring an EIS under NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C), was arbitrary and capricious within the meaning of the Administrative Procedure Act ("APA");
3. Whether the Agencies' promulgation of the Rule was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law within the meaning of the APA because it (a) unreasonably excludes waters over which the Agencies have historically asserted jurisdiction based on their commerce clause authority; (b) imposes an arbitrary distance limitation on the application of the significant nexus test; (c) defines "adjacent" waters to exclude waters used for established normal farming, ranching, and silviculture activities; (d) defines "tributary" as requiring both a bed and banks and an ordinary high water mark ("OHWM"); and (e) categorically excludes all groundwater, ephemeral features, and waste treatment systems, and most ditches with ephemeral or intermittent flow, from CWA jurisdiction.

STATEMENT OF THE CASE[3]

Congress enacted the CWA with the express goal of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). In furtherance of that cause, the

[3] Waterkeeper adopts and incorporates the Statement of the Case presented in the brief of petitioners NRDC et al., and provides some additional jurisprudential and procedural background in this section.

CWA prohibits discharges of pollutants to the "navigable waters," except as in compliance with permits issued under either CWA sections 402 or 404. *Id.* §§ 1311(a) and 1362(12). The CWA defines the term "navigable waters" to mean, in pertinent part, "the waters of the United States." *Id.* § 1362(7). While Congress left this latter term undefined, the accompanying Conference Report indicates that Congress intended it to "be given the broadest possible constitutional interpretation." S. Rep. No. 92-1236, p. 144 (1972).

The issues before this Court come laden with a significant historical backdrop. The Agencies last addressed the definition of "waters of the United States" by promulgating essentially identical rules in the mid-1970s. Those regulations asserted jurisdiction over traditionally navigable waters, non-navigable tributaries to those (and other) waters, wetlands adjacent to other jurisdictional waters, and any "other waters," the use, degradation, or destruction of which could affect interstate or foreign commerce. *See, e.g.*, 33 C.F.R. § 328.3(a)(1), (5), (7), and (3), respectively.

Over the course of the next few decades, the Supreme Court issued

three significant opinions grappling with the validity of various aspects of these rules. First, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court determined that the Corps could assert jurisdiction over wetlands adjacent to traditional navigable waters. Second, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Court concluded that the Corps had impermissibly asserted jurisdiction under the "other waters" regulation, 33 C.F.R. § 328.3(a)(3), over isolated ponds where the ponds' only nexus to interstate commerce was that they provided migratory bird habitat.

And third, in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"), the Court grappled with the permissibility of the Agencies' assertion of jurisdiction over wetlands adjacent to non-navigable tributaries, resulting in a fractured opinion. As this Court noted in *United States v. Cundiff*:

> The four-Justice plurality interpreted the Act to cover "relatively permanent, standing, or continuously flowing bodies of water," that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies.

555 F.3d 200, 207 (6th Cir. 2009) (internal citations omitted). In his concurrence Justice Kennedy found that the Agencies could regulate wetlands adjacent to tributaries where they "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made" and noted that, "[a]bsent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis[.]" *Rapanos*, 547 U.S. at 759, 782 (Kennedy, J., concurring).

This Court recognized in *Cundiff* that extracting the "law" from *Rapanos* presents a difficult problem under *Marks v. United States*, 430 U.S. 188 (1977), because "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's view." *Cundiff*, 555 F.3d at 210. Finding that there would be jurisdiction in the case before it under either test, this Court left the "ultimate resolution of the *Marks*-meets-*Rapanos* debate to a future case." *Id.*; *see also* Order, Dkt. #49-2 at 4, n.3 (noting that "[t]here are real questions regarding the collective meaning of the Court's

fragmented opinions in *Rapanos*").[4]

The Agencies were likewise left to discern and implement the rule of law following *Rapanos*. After initially doing so through agency guidance,[5] the Agencies eventually commenced a rulemaking, and released the proposed Clean Water Rule for public comment in 2014. *See* Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule,

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[4] Every other Circuit to consider the question has determined that CWA jurisdiction exists at least whenever Justice Kennedy's test is met. *See United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *United States v.* Donovan, 661 F.3d 174 (3d Cir. 2011); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006); and *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) (all finding that there should be jurisdiction where either Justice Kennedy or the plurality would find jurisdiction); *see also N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); and *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007) (both determining that jurisdiction should exist *only* in situations in which Justice Kennedy's test is met). Importantly, none of these Circuits has deemed the plurality opinion in *Rapanos* to have *any* significance, in terms of limiting jurisdiction, in situations in which Justice Kennedy's test is met.

[5] EPA and Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) ("Rapanos Guidance"), a*vailable at* https://www.epa.gov/ sites/ production/files/2016-2/documents/ cwa_jurisdiction_following_rapanos120208.pdf (last visited November 1, 2016). The Agencies later released— but never finalized—a revised guidance document *See* 76 Fed. Reg. 24,479 (May 2, 2011).

79 Fed. Reg. 22,188 (April 21, 2014). The final Clean Water Rule followed just over a year later, in June of 2015. Both the Rapanos Guidance and the Rule relied heavily upon the significant nexus approach, which looks to whether waters,

> either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integration of traditional navigable waters, interstate waters, or the territorial seas.

80 Fed. Reg. at 37,060.

These consolidated cases come before the Court on petitions for review filed pursuant to CWA section 509(b)(1). This Court issued a nationwide stay of the Rule on October 15, 2015, *see* Order, Dkt. #49–2[6], and denied numerous motions to dismiss for lack of jurisdiction on February 22, 2016. Opinion, Dkt. #72–2. The Court then partially granted motions filed by several petitioners, including Waterkeeper, to complete or supplement the administrative record. Memorandum Opinion and Order, Dkt. #119–2.

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[6] Unless otherwise noted, all docket citations herein are to the lead case, *Murray Energy Corporation v. United States Environmental Protection Agency*, No. 15–3751.

In addition to the broader structural and procedural deficiencies with the Rule discussed below, Waterkeeper seeks review of the following specific Rule provisions that drastically and impermissibly limit the scope of CWA jurisdiction:

- A 4,000-foot distance limitation on the case-specific application of the "significant nexus" test for many waters, *see* 33 C.F.R. § 328.3(a)(8);[7]
- A categorical exclusion for all waste treatment systems, *see id.* § 328.3(b)(1);
- A categorical exclusion for most ephemerally or intermittently flowing ditches, *see id.* § 328.3(b)(3);
- A categorical exclusion of all "ephemeral features," *see id.* § 328.3(b)(4)(vi);
- A categorical exclusion of all groundwater, *see id.* § 328.3(b)(5);
- A definition of "adjacent" that excludes waters used for established normal farming, ranching, and silviculture activities, *see id.* § 328.3(c)(1); and
- A definition of "tributary" that requires a bed, banks, and ordinary high water mark, *see id.* § 328.3(c)(3).

[7] *See* 80 Fed. Reg. at 37,104–05. The regulatory citations are to the Corps' definition of "waters of the United States."

Of these seven limiting provisions, only two—the groundwater exclusion and the definition of "tributary"—were in the Proposed Rule in their current form.[8]

SUMMARY OF THE ARGUMENT

The Agencies failed to meet their substantive and procedural obligations under the ESA and NEPA when they promulgated the Clean Water Rule. The sweeping impact of the Rule—which will result in a massive net loss of CWA jurisdiction as compared to the Agencies' historic practice under their prior rule—required the Agencies to ensure that the Rule "is not likely to jeopardize the continued existence of" any ESA-listed species or lead to the destruction of their habitats under ESA section 7(a)(2). 16 U.S.C. § 1536(a)(2). Further, the Corps' "finding of no significant impact" cannot stand on this record, and a full EIS was required by NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C). These failures were arbitrary, capricious, and contrary to law under APA section 706(2)(A), and the Corps' FONSI should be set aside.

[8] *See* Definition of Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. at 22,262-63.

The Rule also violates the CWA and the APA in a number of important ways. First, the Agencies reversed their prior practice of asserting jurisdiction over waters with an interstate commerce nexus based solely on a misinterpretation of Supreme Court case law. Second, the Agencies' narrow definition of "tributary" in the Rule lacks a rational, scientific basis in the record. Third, the Agencies' definition of "adjacent" as excluding waters used for normal farming, ranching, and silviculture activities is contrary to CWA section 404(f). Fourth, the Agencies' imposition of a 4,000-foot distance limit on the application of the significant nexus test lacks justification in the record and is arbitrary. Finally, the Agencies' exclusions for all waste treatment systems, groundwater, and ephemeral features, and most ditches, impermissibly deviate from the Agencies' own "significant nexus" framework and are contrary to the extensive scientific evidence in the record. Those unlawful provisions of the Rule should be severed and vacated, and the remainder of the Rule should be remanded to the Agencies without vacatur.

ARGUMENT

I. Standard of Review

The APA provides the standard of review for challenges to CWA regulations, and requires a reviewing court to hold unlawful an agency regulation that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 934 (6th Cir. 2009). That same standard of review applies to claims alleging noncompliance with NEPA, as well as claims alleging a failure to consult and ensure no jeopardy under ESA section 7(a)(2). *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013) (NEPA); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011) (ESA).

Although the APA standard of review is deferential, it does not require the reviewing court "merely to rubber stamp the [agency's] decision." *Kentucky Waterways All. v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008). Rather, it is incumbent upon the agency to articulate a "rational connection between the facts found and the choice made." *Motor Vehicle*

Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). In NEPA cases specifically, the reviewing court "will insist that the agency has, in fact, adequately studied the issue and taken a hard look at the environmental consequences of its decision." *Latin Americans for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 464 (6th Cir. 2014) (internal quotations omitted).

II. Waterkeeper has Article III Standing

Waterkeeper has standing to pursue its claims as demonstrated in the declarations submitted with this brief.[9] An association has standing to bring suit on behalf of its members when those members would otherwise have standing in their own right. *Sierra Club v. U.S. Envt'l Prot. Agency*, 793 F.3d 656, 661 (6th Cir. 2015). Those members have standing where the member demonstrates particularized injury, traceable to the conduct in question, that the court can redress. *See id.* at 661–63; *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004).

Waterkeeper's members use, recreate on or near, derive myriad

[9] Waterkeeper has filed 27 declarations in support of standing; these declarations are found in the Addendum following this brief.

aesthetic and spiritual benefits, and work to protect many different types of water bodies across the United States. Several of these members actively use and enjoy waters that are excluded from CWA jurisdiction by the Rule, some of which provide habitat for endangered or threatened species. The Rule's inadequate protection for, and exclusion from protection of, certain categories of waters will harm these members by enabling pollution of waters they use and enjoy, or by making the protection of these waters uncertain or more difficult to ensure. *See Sierra Club*, 793 F.3d at 663–65 (citing *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 n. 3 (2010)). A decision in Waterkeeper's favor will allow these members to use tools available under the CWA to protect the waters they use and enjoy.

Waterkeeper's NEPA and ESA claims in particular are procedural in nature, and Waterkeeper need not "meet[] all the normal standards for redressability and immediacy." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573, n.7 (1992). Thus the uncertain outcome of ESA consultation or NEPA review—that is, whether such review would in fact change the Clean Water Rule—does not defeat Waterkeeper's redressability. *See Cottonwood*

Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1083 (9th Cir. 2015), *cert. denied*, 2016 WL 2840129 (Oct. 11, 2016). Accordingly, Waterkeeper has standing to bring these claims regarding the Clean Water Rule.

III. The Agencies Violated the ESA By Failing to Consult on the Clean Water Rule and by Failing to Ensure No Jeopardy Would Result from the Rule

In the Clean Water Rule the Agencies abdicate federal jurisdiction over potentially thousands of acres of wetlands, ponds, ditches, and other waters that provide habitat to aquatic and water-dependent species nationwide. Despite the Rule's broad jurisdictional limitations and its clear potential to have dramatic impacts for scores of species listed as endangered or threatened under the ESA, the Agencies failed to ensure that the Rule "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species" as required by ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), and failed to consult with the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS")

(collectively "the Services") regarding the potential species impacts. *Id.*[10] The Agencies' failure is contrary to law under APA section 706(2)(A).

A. The Agencies' Promulgation of the Rule Was a Discretionary Federal Action Triggering ESA Consultation

ESA section 7(a)(2) imposes "two obligations upon federal agencies": the "substantive" obligation to ensure ESA-listed species and their habitat will not be jeopardized, and the "procedural" obligation to consult with the Services. *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1138 (11th Cir. 2008). The ESA requires federal agencies to consult on "actions," broadly defined to include "the promulgation of regulations." 50 C.F.R. § 402.02. As the Supreme Court has noted, Congress "has spoken in the plainest of words" in ESA section 7, and this "affirmative command . . . admits of no exception." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173, 194 (1978).

Even so, the federal action must be "discretionary" with the agency to trigger section 7 consultation. 50 C.F.R. § 402.03. Here, the Agencies'

[10] Waterkeeper gave notice of its intent to sue the Agencies for violations of ESA section 7(a)(2) by letter dated August 5, 2015, a copy of which is included in the Addendum to this brief.

promulgation of the Rule was plainly discretionary; the CWA does not require the Agencies to define "waters of the United States" or to issue a rule limiting the reach of the Act. Instead, the Agencies have relied upon their "discretion to interpret the bounds of CWA jurisdiction." 80 Fed. Reg. at 37,082. As such, the Agencies' promulgation of the Rule is a discretionary agency action for which ESA consultation is required.

B. The Rule Will Likely Jeopardize ESA-Listed Species and their Critical Habitats

Federal agencies are required to consult under ESA section 7(a)(2) if the proposed action "may affect" listed species or their critical habitat. 50 C.F.R. § 402.14(a). The "may affect" threshold for triggering ESA consultation is low: "*Any possible effect*, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphasis added). In other words, federal actions that have "*any chance* of affecting listed species or critical habitat . . . require at least some consultation

under the ESA," and an agency may avoid consultation only when it affirmatively determines "that its action will have 'no effect' on a listed species or critical habitat." *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (emphasis added). To satisfy its burden in this litigation, therefore, Waterkeeper need only show "that an effect on listed species or critical habitat is plausible." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1122 (9th Cir. 2012).

The Clean Water Rule easily surpasses the low "may affect" threshold, triggering the duties to ensure no jeopardy and to consult under ESA section 7. First, the breadth of the Rule—which establishes the framework for determining the jurisdictional status of every waterbody in the nation—strongly suggests that ESA consultation was required here. *See Kraayenbrink*, 632 F.3d at 496 ("The sheer number of acres affected by the 2006 Regulations and number of special status species who reside on those lands alone suggest that the proposed amendments "may affect" a listed species or its critical habitat)." As EPA has noted, "more than one-third of the United States' threatened and endangered species live only in

wetlands, and nearly half use wetlands at some point in their lives." EPA, Why are wetlands important?, *available at* https://www.epa.gov/wetlands/why-are-wetlands-important (last visited Nov. 1, 2016)).[11]

Second, although the Rule is definitional in nature, it "impacts the granting and denying of permits in fundamental ways." Dkt. #72–2, at 14. The consequences of its promulgation are direct and immediate, especially for those waters that will lose their jurisdictional status.[12] *See California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1019 (9th Cir. 2009) (rejecting an argument that the agency action "independently would have no effect on the environment," and finding ESA section 7 applied because

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[11] The Court is not bound by the administrative record in its consideration of Waterkeeper's ESA claim, which is brought pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1), not the APA. *See Kraayenbrink*, 632 F.3d at 497.

[12] The Corps suggests that CWA jurisdiction is "expected to have a beneficial impact on fish and wildlife for which the protected waters provide habitat," including threatened and endangered species. [JA]#20867, EA at 24. As discussed below, the Agencies are mistaken in their contention that the Rule will lead to a net increase in jurisdictional waters and thus a net benefit to ESA-listed species. But even were that true, such a benefit itself "triggers the formal consultation requirement" under ESA section 7. 51 Fed. Reg. at 19,949.

the action resulted in the loss of "substantive protections afforded to" areas protected by prior regulation). The Corps recognizes that "individual permits cannot be issued until Section 7 consultation is complete," Updated Standard Operating Procedures for U.S. Army Corps of Engineers, 66 Fed. Reg. 11,202, 11,216 (Feb. 22, 2001), and yet concedes that such consultation "would not occur if [the waters] were not subject to [CWA] jurisdiction." [JA]#20867, EA at 23. Thus, waters excluded from jurisdiction under the Rule will lose all benefits that may flow from future ESA consultation.

Most troubling is the Agencies' failure to consult regarding the Rule's several provisions that reduce the reach of CWA jurisdiction as compared to the Agencies' historic practice. For example, the Rule's 4,000-foot limitation on the application of the significant nexus test "remove[s] from CWA jurisdiction what is potentially as much as 10% of the currently jurisdictional aquatic resources," mostly wetlands that would not meet the Rule's definition of "adjacent." [JA]Moyer Memo at **¶¶ 7-**8. The Agencies' own record establishes that these non-adjacent wetlands

provide essential habitat for threatened and endangered species. *See, e.g.*, [JA]#20869, TSD at 303 (wetlands in the Great Lakes region support "many endangered and threatened species"); *id*. at 111 ("Non-floodplain wetlands provide unique and important habitats for many species, both common and rare."). For example, the record identifies a large wetlands complex that lies beyond 4,000 feet from Chickasawhatchee Creek in Georgia that has previously been found jurisdictional by the Corps, but would no longer be jurisdictional under the Rule. [JA]Moyer Memo, Appx. A., Ex. 13. The creek is designated critical habitat for five ESA-listed mussel species. 72 Fed. Reg. 64286, 64308 (Nov. 15, 2007). Destruction of those wetlands may degrade water quality in the creek, adversely modifying the mussel's critical habitat.

Similarly, the record makes clear that the Rule's exclusion of all ephemeral features and most ditches has serious implications for ESA-listed species. *See, e.g.*, [JA]#8046, SAB Panel Comments on Draft Connectivity Report, at 20 (waters that are "seasonally dry or even dry for several years in a row can be critical to . . . a wide range of species" and

their degradation "can result in the listing of new threatened and endangered species"); [JA]#20872, Clean Water Rule Comment Compendium Topic 6, at 230 (irrigation ditches are important for "the highly endangered silvery minnow in New Mexico"); [JA]#7617 at 26 (certain ditches are used for "reintroducing fish that are listed as threatened or endangered . . . because they are the best remaining aquatic habitat in the region"); [JA]#20872, Clean Water Rule Comment Compendium Topic 8, at 286 (several species "classified as State and/or federal threatened, endangered or candidate" species in New Mexico rely on intermittent or ephemeral waters).

Further, the categorical exclusion of groundwater undoubtedly may affect ESA-listed species. *See, e.g.*, [JA]#20872, Clean Water Rule Comment Compendium Topic 7, at 244–45 (explaining that groundwater provides the base flow for several southwestern rivers that are used as habitat by ESA-listed species). Indeed, there are several groundwater-dependent crustaceans listed or proposed for listing under the ESA. *See, e.g.*, 81 Fed. Reg. 67,270, 67,277 (Sept. 30, 2016) (noting that degraded

groundwater quality is "one of the primary drivers of Ken's amphipod viability"); Addendum at ADD-251 (Curry Decl.).

The Agencies, in consultation with the Services, bore the burden of demonstrating that their Rule would not jeopardize listed species or their habitats, in consultation with the Services. *Karuk Tribe,* 681 F.3d at 1027–28; *Ctr. for Biological Diversity*, 698 F.3d at 1122. Their failure to do so violated ESA section 7(a)(2), and was contrary to law under APA section 706(2)(A).

IV. The Corps' EA/FONSI Violated NEPA and the APA

The Agencies' decision to eliminate CWA jurisdiction for potentially thousands of acres and entire categories of waters covered under their prior rule has serious ecological implications. Nonetheless, the Corps failed to fully assess the Rule's potential impacts as required by NEPA. Instead, it issued a "finding of no significant impact" ("FONSI"), accompanied by a cursory environmental assessment ("EA"). The Corps' findings reflected in the EA and FONSI are deeply flawed, counter to the

scientific evidence in the record, and arbitrary and capricious under the APA.

A. The Corps Failed to Assess the Impacts of the Rule's Likely Loss of Jurisdiction over Many Wetlands and Other Waters

NEPA contains a set of "action-forcing" procedures that require federal agencies to take a "hard look at [the] environmental consequences" of their proposed actions. *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013) (internal citations omitted). Agencies must prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Promulgation of a rule is a "Federal action" under NEPA. 40 C.F.R. § 1508.18(b)(1).

An agency uncertain of the impacts of its proposal may begin with an environmental assessment ("EA"), a "concise public document" that "provide[s] sufficient evidence and analysis" for determining whether to prepare an EIS. 40 C.F.R. § 1508.9(a). The EA must discuss the potential environmental impacts of the proposed action, *see* 40 C.F.R. § 1508.9(b);

provide sufficient analysis for determining whether an EIS is appropriate; and discuss "appropriate alternatives if there are unresolved conflicts concerning alternative uses of available resources[.]" 33 C.F.R. § 230.10(a).

If, after preparing an EA, the agency determines that the proposed action is not likely to significantly affect the environment, it may issue a FONSI instead of an EIS. 40 C.F.R. § 1508.13. A FONSI is a final agency action that is independently subject to judicial review, and may be "set aside" under APA section 706(2)(A). *Sw. Williamson Cty. Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1037 (6th Cir. 1999); *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004).

An agency's ultimate NEPA decision must be the product of "reasoned decisionmaking," and "simple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotations omitted). Agency conclusions based upon "unexplained conflicting findings about the environmental impacts" violate the APA.

Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 969 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1509 (2016). Moreover, a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1); *see also Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 505 (6th Cir. 1995) (actions projected to have both adverse and beneficial impacts must be assessed through an EIS).

Here, the Corps' EA relies on a deeply flawed and wholly unsupported assumption that the Rule would likely result in an "incremental increase in Clean Water Act jurisdiction[.]" [JA]#20867, EA at 21.[13] The Corps somehow reached this conclusion without expressly

[13] Despite the fact that it prepared an EA and FONSI for the Rule, the Corps may suggest that it is covered by EPA's partial NEPA exemption found in CWA section 511(c)(1), 33 U.S.C. 1371(c)(1). This contention is meritless for at least two reasons. First, the exemption in 511(c)(1) applies solely to actions of the EPA Administrator; here, the Corps alone is revising 33 C.F.R. § 328.3(a), which is that agency's definition establishing "jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act." 33 C.F.R. § 328.1. Moreover, that exemption does not apply to "the issuance of a permit" under section 402, *see* 33 U.S.C. 1371(c)(1), and the Agencies have argued—and this Court has agreed—that the Rule is the functional equivalent of an action "in

identifying, let alone considering, the impacts of the last-minute changes made to the final Rule. As noted above, at least five significant changes were made following notice and comment on the Proposed Rule, all of them narrowing the scope of CWA jurisdiction, and yet none of them are assessed in the EA:

(1) The 4,000-foot distance limitation on the case-specific application of the "significant nexus" test for most waters;

(2) The categorical exclusion for most ephemerally or intermittently flowing ditches;

(3) The categorical exclusion of all "ephemeral features";

(4) The modified definition of "adjacent," excluding waters used for established normal farming, ranching, and silviculture activities; and

(5) The modified definition of "tributary," requiring a bed, banks, and ordinary high water mark.

The Corp's erroneous conclusion about the purported "incremental increase" in jurisdiction appears to be based entirely upon EPA's May 20,

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issuing or denying any permit[.]" *See* Agencies' Response to Motions to Dismiss, Dkt. #58 at 32; Order, Dkt. #72-2 at 10. The Agencies cannot have it both ways, and to the extent the Rule equates to the "issuance of a permit" analysis under NEPA was required.

2015 Economic Analysis, in which EPA estimated that promulgation of Rule would result in an increase of approximately 2.8 to 4.7% in the number of positive jurisdictional determinations. [JA]#20866, Econ. Analysis at 14.[14] But that analysis itself contained an essential caveat that the Corps ignored in its EA:

> The available data only can inform the agencies how many currently negative determinations may become positive based on the final rule. The agencies note that there will be some waters that will no longer meet the definition of "waters of the U.S." and therefore, this analysis may over-estimate the increase in positive determinations.

Id. at 5; *see also id*. at 7 (stating that "reviewing how current positive JDs may become negative as a result of the final rule was determined to be outside the scope of this analysis").

The Corps does make a passing reference to the 4,000-foot limitation in the EA, stating without explanation that "the vast majority of wetlands with a significant nexus are located within the 4,000 foot boundary" and

[14] The Economic Analysis is cited repeatedly in the EA for this very point, *see* [JA]#20867, EA at 21, 25, 28, and no other document or study is referenced for the alleged "incremental increase in Clean Water Act jurisdiction."

asserting that any impact to waters outside that boundary are "speculative and hypothetical[.]" [JA]#20867, EA at 23.[15] That contention is absurd, and regardless, such a subjective, conclusory statement cannot be the basis for a rational FONSI. *See Nat'l Parks & Conservation Ass'n v. F.A.A.*, 998 F.2d 1523, 1533 (10th Cir. 1993) (Agency's FONSI was arbitrary where it included "analysis based on various assumptions and subjective values" that did not result in a "rational decision").

The record shows that the impact of the 4,000-foot cutoff, in particular, will be incredibly significant. As the Moyer Memorandum explains, "approximately 10% of all waters over which the Corps has asserted jurisdiction under its 1986 regulations and current guidance are non-abutting adjacent wetlands," some of which undoubtedly "fall outside of 4,000 linear feet of the OHWM/HTL[.]" [JA]Moyer Memorandum at 2. Indeed, as Ms. Moyer herself pointed out,

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[15] Even assuming, *arguendo*, that the Rule provides some environmental benefits, the Corps may not avoid its obligation to take a hard look at the adverse impacts of its action. *Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 505 (6th Cir. 1995) (actions projected to have both adverse and beneficial impacts must be assessed through an EIS).

> To remove from CWA jurisdiction what is potentially as much as 10% of the currently jurisdictional aquatic resources without the benefit of a detailed analysis, such as one that would be performed as part of an EIS, would present the potential for significant adverse effects on the natural and human environment.

Id. at 3.[16]

Here, the Corps has failed "to support its pronouncements" regarding the presumed increase in jurisdictional waters "with data or evidence," *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 103 (2d Cir. 2006), and these defects cannot be cured by the agency's "conclusory final-decision statements" in the EA. *Ky. Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 411 (6th Cir. 2013). The Corps' EA is deeply flawed and based upon unsupported conclusions regarding the extent to which the Rule actually affects the number and area of jurisdictional waters, and its FONSI was arbitrary and capricious.

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[16] Appendix A to the Moyer Memorandum provides fifteen "representative examples" of such waters, totaling more than 2,000 acres of wetlands, ponds, and ditches previously found jurisdictional by the Corps, but which would be non-jurisdictional under the Rule due to the 4,000-foot distance cutoff. As Ms. Moyer makes clear, Appendix A is not an exhaustive list; compiling such a list "would take several months of multiple staff members working full time." [JA]Moyer Memorandum at 1–2, ¶3.

B. The Corps Failed to Adequately Assess a Reasonable Range of Alternatives to the Final Rule

In its EA, the Corps assessed only the "no action" alternative to the promulgation of the Clean Water Rule. [JA]#20867, EA at 13. The Corps specifically declined to consider the promulgation of the April 2014 proposed Rule as an alternative to the final Rule, stating without explanation that "it is no longer a viable option to accomplish the purpose and need for action." *Id*. The EA presents no other alternatives. The Corps' failure to consider an adequate range of alternatives, and its failure to consider the Proposed Rule specifically, was arbitrary and capricious.

An EA must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a); *see also id*. § 1508.9(b); 33 C.F.R. § 230.10(a) (requiring the Corps to consider alternatives to the proposed action in the EA); *Burkholder v. Peters*, 58 F. App'x 94, 101 (6th Cir.

2003).[17] Reasonable alternatives cannot be "dismissed in a conclusory and perfunctory manner." *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002). Even in the context of an EA, NEPA "prevents federal agencies from effectively reducing the discussion of environmentally sound alternatives to a binary choice[.]" *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006).

The Corps' suggestion that the language of the proposed Clean Water Rule was not "a viable option to accomplish the purpose and need" of the Rule is baseless. *See* [JA]#20867, EA at 13. The Proposed Rule was developed specifically to offer "clarity to regulated entities as to whether individual water bodies are jurisdictional and discharges are subject to permitting," 79 Fed. Reg. at 22,188, which is squarely in line with the Corps' statement of purpose in the final Rule. *See* [JA]#20867, EA at 1 (purpose of the Rule is to "clarify the scope of the regulatory term 'waters

[17] This Court in *Burkholder* applied 40 C.F.R. § 1502.14(a) to its review of an EA, not an EIS, which was reasonable given that the statutory basis for the alternatives requirement is the same: 42 U.S.C. § 4332(2)(E). Other courts have held that the alternatives analysis in an EA "need not be as rigorous as the consideration of alternatives in an EIS." *Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1323 (D.C. Cir. 2015).

of the United States'" and "simplify implementation of the Clean Water Act[.]"). Indeed, the Agencies expressly recognized in the Proposed Rule that "there may be more than one way to determine which waters are jurisdictional as 'other waters'" and thus sought comment on a variety of "alternatives" to the proposed language, *see* 79 Fed. Reg. at 22,214–15. And yet none of these alternatives were considered in the EA.

In short, the Corps' failure to consider a reasonable range of alternatives—in particular, the Rule as originally proposed—was arbitrary and capricious.

V. Several Aspects Of The Rule Lack Support In The Record, Unjustifiably Deviate From Sound Science Or Past Agency Policy, And Are Arbitrary, Capricious, And Contrary To Law

Waterkeeper agrees that the Agencies can assert jurisdiction over waters that have a significant nexus, and in some contexts can make categorical findings regarding the presence of such a nexus while requiring case-specific demonstrations in others. As a CWA matter, however, there are at least three aspects of Rule that must be overturned. First, the Agencies failed to recognize that they have at least the discretion to

regulate "other waters" based on dynamics other than the presence of a significant nexus, including interstate commerce effects.

Second, the Agencies acted in an arbitrary and capricious manner in defining the term "tributary" to require both a bed and banks and an OHWM, while at the same time exempting ephemeral features and several categories of ditches. And finally, the Agencies acted illegally in categorically excluding groundwater from CWA jurisdiction, regardless of whether it either is adjacent to or has a significant nexus with other relevant waters.

A. The Agencies Must Consider Retaining Jurisdiction over "Other Waters" Based on Interstate Commerce Effects

As mentioned above, the Agencies have long asserted jurisdiction over all waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." *See, e.g.*, 33 C.F.R. § 328.3(a)(3) (2014). In the new Rule, the Agencies have forsworn any ability to regulate waters on this basis, believing their hands tied by the following sentence from *SWANCC:*

> "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

[JA]#20869, TSD at 78 (quoting *SWANCC*, 531 U.S. at 172 (internal citation omitted)). On the basis of that statement alone, the Agencies "concluded that the general other waters provision in the existing regulation based on [Commerce Clause effects unrelated to navigation] was not consistent with Supreme Court precedent." *Id.*

This is a misreading of *SWANCC*, as even the Agencies themselves seem to tacitly recognize. [JA]#20869, TSD at 77–78 (noting that the Supreme Court in *SWANCC* "did not vacate (a)(3) of the existing regulation" and that "[n]o Circuit Court has interpreted *SWANCC* to have vacated the other waters provision of the existing regulation"). *SWANCC* dealt only with an administrative interpretation of 33 C.F.R. § 328.3(a)(3) (1999), dubbed the "Migratory Bird Rule," that purported to assert jurisdiction based on the mere fact that particular waters were or could be

used by migratory birds. In rejecting this interpretation, the Supreme Court took pains to emphasize the narrowness of its holding:

> We hold that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 Fed.Reg. 41217 (1986), exceeds the authority granted to respondents under § 404 of the CWA.

SWANCC, 531 U.S. at 174; *see also United States v. Krillich*, 152 F.Supp.2d 983, 988 (N.D. Ill. 2001), *aff'd* 303 F.3d 784 (7th Cir. 2002) ("*SWANCC* does not reach the question of whether, on a basis other than being visited by migratory birds, isolated wetlands may fall under the definition of navigable waters/waters of the United States").[18] It would have been easy for the Court in *SWANCC* to invalidate all of section 328.3(a)(3) if that had been its intent, but it did not, and this Court should reject the Agencies' position that *SWANCC* means more than it says.[19]

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[18] Nothing in *Rapanos* is to the contrary. *See* 80 Fed. Reg. at 37,061 (recognizing that nothing in *Rapanos* "invalidated any of the current regulatory provisions defining 'waters of the United States'").

[19] The Court owes the Agencies no deference with regard to their interpretations of Supreme Court opinions. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *see also Negusie v. Holder*, 555 U.S. 511, 521 (2009) (rejecting an agency's determination that a Supreme Court

Needless to say, the Agencies have made no attempt to estimate the effects that the loss of these waters—including the many waters "lost to CWA jurisdiction as a result of the application of the 4,000 linear foot limitation," [JA]Moyer Memorandum at 2—may have on interstate commerce. But it is clear that, absent a commerce clause basis for jurisdiction, waters of great cultural, recreational, and economic significance may be left vulnerable. Among these are: (1) "closed basins" such as those that comprise roughly 20% of the land area in New Mexico, and include many rivers, streams and wetlands; (2) wholly intrastate waters such as the Little Lost River watershed in southern Idaho, which contains "numerous creeks and rivers that do not flow on the surface beyond the borders of the state," instead flowing into the Snake River Plain Aquifer, which in turn supplies water to the Snake River; and (3) "isolated" glacial kettle ponds which include, for example, hundreds on Cape Cod in Massachusetts that, in addition to being tourist attractions,

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case was binding in a context different from that in which it was decided without even considering whether deference was due under *Chevron*).

are vital to protecting that region's drinking water. *See* [JA]#16413, Waterkeeper Comments at 29; National Park Service, Kettle Pond Data Atlas for Cape Code National Seashore (April 2001).[20]

The Agencies may or may not be able to reasonably conclude, under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), that they can justify changing course from their prior position of regulating those waters the use, degradation, or destruction of which might affect interstate commerce. At a minimum, however, they must supply a valid reason for such a major shift in their interpretation of the Act. *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Merely invoking *SWANCC* does not suffice. *See Negusie*, 555 U.S. at 521–23 (ordering remand where the agency's mistaken conclusion that Supreme Court precedent was controlling under the circumstances "prevented [it] from a full consideration of the statutory question").

[20] A*vailable at* https://www.nps.gov/caco/learn/nature/upload/Pondatlasfinal.pdf (last visited Nov. 1, 2016).

B. The Rule's Definition of "Tributary" and its Categorical Exclusion of All "Ephemeral Features" are Unsupported by the Record, and Arbitrary and Capricious

The Clean Water Rule deviates from long-standing Agency practice by imposing two separate requirements in the definition of "tributary": (1) a bed and banks, and (2) an OHWM.[21] *See* 80 Fed. Reg. at 37,076, 37,079; 33 C.F.R. § 328.3(c)(3). The Rule also expressly excludes "ephemeral features that do not meet the definition of tributary," even where they might otherwise be jurisdictional as an adjacent water or by application of the significant nexus test. 33 C.F.R. § 328.3(b)(4)(vi).[22] Taken together, these two provisions mean there is no middle ground for ephemeral and other small streams: they are either per se jurisdictional if they meet the definition of tributary, or they are per se excluded if they do not. *See* 80 Fed. Reg. at 37,058 (noting the Rule explicitly excludes "ephemeral

[21] Pre-*Rapanos*, all tributaries—including ephemeral streams—were considered jurisdictional. Following *Rapanos*, the Agencies considered ephemeral streams jurisdictional if they had a significant nexus with downstream navigable waters, and the presence of an OHWM was but one consideration. *See* Rapanos Guidance at 10.

[22] The Proposed Rule did not contain an express exclusion for "ephemeral features." *See* 79 Fed. Reg. at 22,263-64.

streams that do not have a bed and banks and ordinary high water mark"). These provisions lack support in the record, are contrary to best available science, and are arbitrary and capricious.

The Agencies' record makes clear that ephemeral streams—waters that "flow briefly . . . during and immediately following precipitation" and "are above the water table at all times," [JA]#20869, TSD at 131—are a critically important part of the hydrologic landscape. A joint peer-reviewed report by EPA and the U.S. Department of Agriculture on the importance of ephemeral and intermittent streams in the desert Southwest, which the Agencies call "a state-of-the-art synthesis of current knowledge of the ecology and hydrology in these systems," *id.* at 259, recognizes that ephemeral streams "perform the same critical hydrologic functions as perennial streams: they move water, sediment, nutrients, and debris through the stream network and provide connectivity within the watershed." [JA]#8280, Ephemeral Streams Report at 13. *See also* 80 Fed. Reg. at 37,063; [JA]#20869, TSD at 104-05, 259-60 (noting the ecological importance of ephemeral streams).

The ability to protect ephemeral streams under the CWA—either as defined tributaries or by application of the significant nexus test—is critically important in areas like the desert Southwest, where ephemeral streams comprise the vast majority of waters. [JA]#8280, Ephemeral Streams Report at 5. In such contexts, ephemeral streams "provide much of the ecological and hydrological connectivity in a landscape," and their disturbance or loss "has dramatic physical, biological, and chemical impacts" on the watershed. *Id*. at 8.

Notwithstanding their importance to arid landscapes in particular, ephemeral streams often lack an OHWM. *See, e.g.*, [JA]#7617, Comments to the chartered SAB, at 2 (noting that "[t]he absence of OHWM is relatively common in ephemeral streams within arid and semi-arid environments or low gradient landscapes"). Even the Agencies concede that "regional variation in hydrology, climate and other factors" can make identification of an OHWM difficult in the arid west. *See* [JA]#20872, Response to Comments – Topic 8, at 313-14. For these reasons, members

of EPA's Science Advisory Board[23] "recommended that the presence of OHWM not be a required attribute of a tributary and suggested that the wording in the definition be changed to 'bed, bank, and other evidence of flow.'" [JA]#7617, SAB Comments at 2. *See also* [JA]#20869, TSD at 242 (noting that SAB members "expressed the view that from a scientific perspective there are tributaries that do not have an ordinary high water mark but still affect downstream waters").

The irrational nature of the Agencies' exclusion of all ephemeral features is perhaps best demonstrated with an example. Under the Rule, an ephemeral stream that forms the headwaters of a covered tributary is categorically exempt, even if it periodically contributes direct surface flow to that tributary. By contrast, a wetland or pond with no apparent hydrologic connection to that same tributary is per se jurisdictional as an "adjacent water" if it is within 1,500 feet of the tributary, and may be

[23] EPA's Science Advisory Board ("SAB") is an external review body that advises EPA on scientific matters. The SAB chartered a Panel to review the scientific and technical basis for the Rule, and in particular the EPA report entitled Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. *See* [JA]#7617; [JA]#8046.

jurisdictional under the significant nexus test if it is up to 4,000 feet away. The record contains no rational basis for such an absurd result.

In short, the Agencies narrowed the definition of "tributary" and interposed an "ephemeral features" exclusion that will leave many ephemeral streams vulnerable, contrary to the overwhelming science in the record regarding the importance of these streams to the hydrologic system, especially in the arid Southwest where an OHWM is often absent. There is no support in the record for the Agencies' decision; it is arbitrary and capricious under APA section 706(2)(A).

C. The Agencies' Categorical Exclusion of Certain Ditches that Otherwise Meet the Definition of Tributary Lacks Any Basis in the Record, and is Arbitrary and Capricious

The Clean Water Rule expressly excludes three types of ditches:

> (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
> (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
> (iii) Ditches that do not flow, either directly or through another water, into a [navigable water, interstate water, or territorial sea].

80 Fed. Reg. at 37,105 (citing 33 C.F.R. § 328.3(b)(3)). These ditches are excluded even if they meet the definition of tributary because they possess a bed and banks and OHWM, and contribute flow to downstream jurisdictional waters. *See* 80 Fed. Reg. at 37,097-98. The Agencies' exclusion of ditches that are also tributaries is contrary to prevailing science, unsupported by the record, and arbitrary and capricious.

The record offers no scientific support for treating man-made ditches differently from natural tributaries. To the contrary, the record is replete with the Agencies' own explanations as to why ditches *should be* jurisdictional as "tributaries" if they function like tributaries. The Agencies candidly admit that "it is not relevant whether a water is man-altered or man-made for purposes of determining whether a water is jurisdictional under the CWA." [JA]#20869, TSD at 74. The Agencies explain that

> Tributary ditches and other man-made or man-altered waters that meet the definition of "tributary" have a significant nexus to (a)(1) through (a)(3) waters due to their impact, either individually or with other tributaries, on the chemical, physical, or biological integrity of those downstream waters.

Id. at 257. In their response to comments, the Agencies note that ditches meeting the definition of tributary provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule." [JA]#20872, Response to Comments – Topic 6, at 28.

Similarly, EPA's Science Report—one of the key documents in the record, and which was subject to extensive peer review by the SAB—provides no basis for, and in fact undermines, the Agencies' disparate treatment of ditches and tributaries. [JA]#20859, Science Report at 1–11 (hydrologic connectivity can be increased by ditches); *id*. at 4–21 (ditches can introduce nutrients to downstream waters); *id*. at 6–10 (drainage ditches can increase connectivity between different types of waters). The SAB found a "lack of scientific knowledge to determine whether ditches should be categorically excluded." *Id*. at 163*; see also* [JA]#7617, SAB Comments at Attachment p. 9 (Dr. Ali) (noting the disparate treatment

between ditches and tributaries "suggests a lack of consistent framework").[24]

In addition, the Agencies' decision to focus primarily upon flow regime—*i.e.*, whether a ditch flows perennially, intermittently, or ephemerally—to determine a ditch's jurisdictional status is unsupported by prevailing science and flatly contrary to the approach correctly used by the Agencies in their treatment of tributaries. *See generally* [JA]#20869, TSD at 256-59. The record makes clear that intermittent and ephemeral tributaries "are chemically, physically, and biologically connected to downstream waters, and these connections have effects downstream." *Id.* at 259. Individual SAB members pointed out the lack of scientific justification to classify ditches based upon their flow regime. *See, e.g.*, [JA]#7617, SAB Comments at Attachment p. 36 (Dr. Harvey) ("there would appear to be no reason [intermittently flowing ditches] should not

[24] Indeed, there was near-universal condemnation among those SAB members reviewing the ditch exclusion, nearly all of whom noted the lack of scientific basis for the exclusion given the ecological importance of many ditches. [JA]#7617, SAB Comments at Attachment pages 14, 19, 51, 70, 97, 106, and 121.

be considered jurisdictional."); *id.* at 41 (Dr. Johnson) (ditches with less than perennial flow "exist in heavily agricultural areas which are subject to runoff containing high concentrations of sediments, nutrients, and pesticides").

Perhaps the Agencies could have lawfully ignored the overwhelming science in the record if they had offered *some* rational explanation for the disparate treatment of ditches and tributaries. *See Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1182 (D.C. Cir. 1994) (rejecting an agency decision made with "apparent inconsistency, unadorned by any attempt at explanation or justification"). But the only justification they provide in the preamble—that the ditch exclusions would make it "clearer for the regulated public to identify and more straightforward for agency staff to identify than proposed rule or current policies," 80 Fed. Reg. at 37,097—is unsupported by the record. In fact, the Agencies recognize that tributaries can include waters "that have been man-altered or constructed, but which science shows function as a tributary." *Id.* at 37,098. Thus, the distinction between a "ditch" and a "tributary" may be blurred to the point of nonexistence,

making the jurisdictional status of such waters impossible to verify under the Rule.

Ultimately, the Agencies' exclusion of most ephemeral and intermittent ditches from CWA jurisdiction—even where those ditches meet the Agencies' own definition of "tributary"—is unsupported by any rationale articulated by the Agencies in the record. The ditches exclusion is arbitrary and capricious, and should be vacated.

D. The Agencies' Categorical Exclusion of Groundwater from the Clean Water Rule was Arbitrary and Capricious

The Agencies embraced the "significant nexus" analysis as the primary basis for defining "waters of the United States" and thereby establishing CWA jurisdiction, *see* 80 Fed. Reg. at 37,057–58; TSD at 2, only to abandon that very framework in their sweeping exclusion of all groundwater. Because the categorical groundwater exclusion lacks any scientific support in the record and creates a striking internal inconsistency that the Agencies leave unexplained, the exclusion is arbitrary and capricious and must be vacated.

The Agencies are well aware of groundwater's importance to the integrity of the nation's waters, and the record is replete with evidence demonstrating that groundwater may in many cases be critical to preserving water quality in down-gradient navigable waters. *See e.g.*, [JA]#7531, SAB Consideration at 3 ("groundwater connections, particularly via shallow flow paths in unconfined aquifers, can be critical in supporting the hydrology and biogeochemical functions of wetlands and other waters"); [JA]#7617, SAB Comments at 6.[25] The record provides absolutely no scientific basis for treating groundwater differently than tributaries, wetlands, and other surface waters that may significantly affect the chemical, physical, and biological integrity of navigable waters. [JA]#7531, SAB Consideration at 3 (noting that the groundwater exclusion "do[es] not have scientific justification").

The Agencies' illogical position is perhaps best demonstrated by the fact that the Rule excludes from jurisdiction even groundwater that, itself,

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[25] Again, SAB members uniformly excoriated the Agencies' groundwater exclusion as scientifically unjustified. [JA]#7617, SAB Comments, Attachment pp. 4, 14, 23, 33-34, 53, 61, 106.

creates the significant nexus that forms the basis for another water's jurisdiction. For example, under the Rule the presence of a "shallow subsurface connection" between a wetland and a tributary "may be an important factor in evaluating" that wetland under the significant nexus test. 80 Fed. Reg. at 37,083. If the shallow groundwater connection establishes the nexus, both the up-gradient wetland and the down-gradient tributary would be jurisdictional, but the groundwater connecting them would not. There simply is no scientific or other rational basis for this incongruent outcome.[26]

The Agencies' try to explain their inconsistent departure from the significant nexus analysis by feebly noting that they have never interpreted

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[26] Waterkeeper does not suggest that the Agencies must or even should regulate isolated and nontributary groundwater. But because they adopted the "significant nexus" test—and embraced the science developed to support that test—as the basis for asserting jurisdiction over the non-navigable, non-interstate waters covered by the Rule, the Agencies must at least apply the test consistently. The record makes abundantly clear that waters can and often do have such a nexus regardless of whether they flow on the surface or underground, and the unexplained disparate treatment of groundwater renders the exclusion unlawful. *See NRDC v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992) (finding EPA decision arbitrary and refusing to defer to EPA's line-drawing due to a lack of data supporting the decision).

"waters of the United States" to include groundwater, 80 Fed. Reg. at 37,099, but they do not explain *why* they have never done so. The TSD points to legislative history showing Congressional intent that the CWA not regulate groundwater, *see* [JA]#20869, TSD at 16–17, but, as several courts noted, this legislative history "only supports the unremarkable proposition with which all courts agree—that the CWA does not regulate "isolated/nontributary groundwater" which has no affect on surface water." *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) (citing *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994)). Thus, the Agencies have again mistakenly assumed their statutory authority was constrained, when in fact it was not. This is not a rational basis for the exclusion and it is owed no deference under *Chevron*. *See Negusie*, 555 U.S. at 521–23.

In conclusion, the Agencies have not adequately explained their decision to deviate from their significant nexus approach and categorically exclude even hydrologically-connected groundwater. To the extent the Agencies rely on a mistaken conclusion about their statutory authority, the

reliance is due no deference. Further, because there is no scientific basis for the groundwater exclusion in the record, it is arbitrary and capricious and should be vacated.

E. Other Aspects of the Rule are Arbitrary, Capricious, and Contrary to Law

The Rule is arbitrary, capricious, or contrary to law in three other significant ways, as detailed in the brief filed by associational petitioners NRDC et al. First, the Rule's definition of "adjacent" to exclude all waters used for "established normal farming, ranching, and silviculture activities" is contrary to CWA section 404(f), 33 U.S.C. § 1344(f)(1), unsupported by the record, and was promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Second, the Rule's categorical exclusion of "waste treatment systems" is an impermissible interpretation of the Act under *Chevron*, was promulgated "without observance of procedure required by law," 5 U.S.C. § 706(2)(D), and is arbitrary and capricious because it is inconsistent with past agency practice and lacks record foundation. And third, the Rule's imposition of a 4,000-foot

distance limitation on the case-specific application of the "significant nexus" test is contrary to prevailing science, lacks any basis in the record, and is arbitrary and capricious. On each of these issues, Waterkeeper adopts and incorporates the arguments presented in the brief filed by petitioners NRDC et al.

VI. The Court Should Partially Vacate And Remand Only Those Unlawful Portions Of The Rule And Should Vacate And Remand The Corp's EA/FONSI

APA section 706(2) instructs a reviewing court to "hold unlawful and set aside" agency actions that are arbitrary, capricious, or not in accordance with law. 5 U.S.C. § 706(2). Nonetheless, even in APA cases, courts have considerable equitable discretion to fashion an appropriate remedy. *See, e.g., Heartland Reg'l Med. Ctr. v. Sebelius,* 566 F.3d 193, 198 (D.C. Cir. 2009) (citing *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law,* 53 Duke L.J. 291, 379 (2003)).

Several unlawful provisions of the Rule are isolated exemptions that are easily severed from the Rule and can be vacated without impairing the function of the Rule as a whole. *See Davis Cty. Solid Waste Mgmt. v. EPA*, 108

F.3d 1454, 1459 (D.C. Cir. 1997); *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 271 (D.D.C. 2014) (vacating "only a few discrete provisions" of a challenged regulation because they "are isolated and severable[.]"). In this category are the Rule's exclusions for ditches, ephemeral features, waste treatment systems, and groundwater. Similarly, the late addendum to the definition of "adjacent" that excludes "established normal farming, ranching, and silviculture activities" as well as that part of the definition of "tributary" that requires "an ordinary high water mark" can be easily severed and vacated. The seriousness of the Agencies' violations with respect to these exemptions warrant vacatur, and because they are discrete provisions, their severance would not be disruptive. So too for the Corp's EA and FONSI; because they are arbitrary and capricious, they should be set aside. 5 U.S.C. § 706(2)(A); *Anderson*, 371 F.3d at 494.

The remainder of the Rule should be remanded without vacatur. This will permit the Agencies to rectify their ESA, NEPA, and APA violations while still relying on the Rule's well-justified categorical

assertion of jurisdiction over waters of great ecological importance, such as adjacent wetlands and many tributaries. Remand without vacatur is consistent with Waterkeeper's goals and the purpose of the CWA itself: "the enhanced protection of the environment." *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000), *as amended on denial of reh'g* (Feb. 14, 2001); *accord, Envtl. Def. Fund, Inc. v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990).

Because the Rule impermissibly narrowed the scope of CWA jurisdiction without adequate record justification and without the consultation required by both the ESA and NEPA, one additional remedial step is warranted to protect those waters left vulnerable by the Rule. The Court should declare the Agencies' artificial limitations on the significant nexus test unlawful, and should clarify that, until the Agencies promulgate a replacement rule and satisfy their procedural obligations under the ESA and NEPA, *at least* those "other waters" that satisfy the significant nexus standard (in addition to waters that are categorically protected under the Rule) are "waters of the United States." *See Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting) (noting that CWA jurisdiction is found "in all . . .

cases in which either the plurality's or Justice Kennedy's test is satisfied"). Given the clear and immediate risks posed to the waters abandoned by the Rule and the threatened and endangered species that rely upon them, such a declaration is warranted here.

CONCLUSION

For the foregoing reasons, Waterkeeper respectfully requests that the Court vacate the Corps' FONSI; vacate the Rule's exclusions for ditches, ephemeral features, waste treatment systems, and groundwater; and vacate that portion of the definition of "adjacent" that excludes waters subject to "established normal farming, ranching, and silviculture activities." Further, the Court should declare the Agencies' artificial limitations on the significant nexus test unlawful, and clarify that, until such time as the Agencies comply with their obligations under NEPA and the ESA, *at least* those "other waters" satisfying the significant nexus test (in addition to waters that are categorically protected under the Rule) are "waters of the United States." The Court should remand the remainder of the Rule without vacatur.

Respectfully submitted this 1st day of November, 2016.

James N. Saul

James N. Saul
Earthrise Law Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
Ph: (503) 768-6929
Fax: (503) 768-6642
jsaul@lclark.edu

Deborah A. Sivas
Alicia E. Thesing
Environmental Law Clinic
Mills Legal Clinic, Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8620
Ph: (650) 723-0325
Fax: (650) 725-8509
dsivas@stanford.edu
athesing@stanford.edu

Counsel for Waterkeeper Alliance, Inc. et al.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for petitioners Waterkeeper Alliance, et al. here by certifies that:

(1) This brief complies with the type-volume limitation set by this Court's Case Management Order No. 3, which permitted Associational Petitioners to file separate opening briefs with an aggregate word limit of 21,000 words, subject to their agreement regarding allocation of those words. *See* Dkt. #102-1 at 1-2. Per agreement among the Associational Petitioners, Waterkeeper's opening brief contains 10,841 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word for Mac (2011) and is set in Iowan Old Style, font size 14.

s/ James N. Saul

CERTIFICATE OF SERVICE

I certify that on November 1, 2016, I filed the foregoing Opening Brief of Petitioners Waterkeeper Alliance, et al. using the Court's CM/ECF system, which will cause it to be electronically served upon all counsel of record for all parties.

s/ James N. Saul