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Via email to ow-docket@epa.gov and online submission to www.regulations.gov

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

The Honorable Jaime A. Pinkham
Acting Assistant Secretary of the Army (Civil Works), Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: Revised Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2021-0602

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

Thank you for this opportunity to comment on the U.S. Environmental Protection Agency's ("EPA") and Department of the Army, Corps of Engineers, Department of Defense ("Corps") (collectively, the "agencies") Proposed Rule revising the definition of "waters of the United States"[1] under the Clean Water Act ("CWA").[2] The Proposed Rule would replace the recently vacated[3] "Navigable Waters Protection Rule" definition finalized by the Trump administration on April 21, 2020 ("NWPR")[4] and the text of the Pre-2015 regulatory definitions that the vacaturs restored.

On behalf of Waterkeeper Alliance, the undersigned U.S. Waterkeeper groups, and our respective tens of thousands of individual members and supporters, we applaud the agencies' decision to reject the NWPR, restore CWA jurisdiction over interstate waters, and eliminate many of the flawed limitations on CWA jurisdiction that have been promulgated by the agencies over the last few years, such as the categorical exclusion of ephemeral streams.

[1] Proposed Rule, Revised Definition of "Waters of the United States," 86 Fed. Reg. 69371 (Dec. 4, 2021) (hereinafter "Proposed Rule").

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

[3] On August 30, 2021, the U.S. District Court for the District of Arizona in *Pasqua Yaqui Tribe, et al., v. EPA*, 4:20-cv-00266, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021) vacated the NWPR, which had the effect of restoring the Pre-2015 regulatory definitions. Less than one month later, the U.S. District Court for the District of New Mexico also issued an order vacating and remanding the NWPR. *Navajo Nation v. Regan*, No. 2:20–cv–00602 (D.N.M. Sept. 27, 2021).

[4] The Navigable Waters Protection Rule was published in the Federal Register on April 21, 2020, 85 Fed. Reg. 22250 (Apr. 21, 2020), and became effective on June 22, 2020.

However, we strenuously object to the agencies' proposal to transform the CWA from a statute requiring the protection and restoration of water quality in all of the Nation's waters to a statute that merely seeks to protect and restore the water quality of "foundational waters," which the agencies narrowly and unreasonably define as encompassing only traditional navigable waters, interstate waters, and the territorial seas.[5] According to the Proposed Rule, "the object of federal protection is foundational waters" and the CWA only protects tributaries, wetlands, and open waters to the extent that they are "necessary to protect the foundational waters."[6] This is quite obviously not the objective of the CWA, and the agencies lack the discretion to reshape and weaken the CWA in this manner.

The agencies' unfounded view of the CWA's objective underpins major portions of this rulemaking resulting in arbitrary and capricious limitations on jurisdictional categories. These limitations undermine the objective of the law by, for example, eliminating categorical protections for all tributaries and removing the longstanding interstate commerce bases for protection of "other waters." Interpreting the CWA in the manner proposed by the agencies is contrary to the objective, text and structure of the CWA, as well as its legislative history, longstanding agency interpretations, and all of the extensive Supreme Court and lower court precedent interpreting the Act. It is also contrary to the agencies' own analysis of the Act, its history, and court precedent in the Proposed Rule preamble and Technical Support Document.[7]

For example, any conceivable notion of "foundational waters" must encompass waters that were already federally protected at the time of the Federal Water Pollution Control Act Amendments of 1972[8]— i.e., "there is an "indisputable federal interest in the protection of foundational waters that prompted Congress to enact the various incarnations of the Act."[9] It is also beyond dispute that Congress intended to expand protections to additional waters that had not previously been federally protected such that, according to the Supreme Court, the CWA protects entire "aquatic ecosystems"[10] and "applies to virtually all surface water in the country."[11]

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[5] Proposed Rule, 86 Fed. Reg. at 69373.

[6] Proposed Rule, 86 Fed. Reg. at 69394.

[7] Technical Support Document for the Proposed "Revised Definition of 'Waters of the United States Rule'" (Dec. 6, 2021), available at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081 ("Proposed Rule TSD").

[8] Federal Water Pollution Control Act Amendments of 1972 ("1972 Amendments"), Public Law 92–500, 86 Stat. 816 (Oct. 18, 1972).

[9] *See also* Proposed Rule, 86 Fed. Reg. at 69400 ("As explained above, Clean Water Act jurisdiction encompasses (and is limited to) those waters that significantly affect the indisputable federal interest in the protection of the foundational waters that prompted Congress to enact the various incarnations of the Act—i.e., traditional navigable waters, interstate waters, and the territorial seas.") (emphasis added).

[10] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing S. Rep. No. 92414, p. 77 (1972)) ("*Riverside Bayview*").

[11] *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987). The Court, at fn. 6, relied on its prior opinion in *Riverside Bayview*, the text of the CWA, and the CWA's legislative history to support this finding regarding the breadth of the

The agencies acknowledge that navigable waters and their tributaries have been protected since 1899,[12] and that interstate waters and their tributaries have been protected since 1948.[13] The agencies also acknowledge that:

> "[T]he legislative history clearly demonstrates that Congress was expanding jurisdiction—not narrowing it—with the 1972 amendments. Thus, it is reasonable to conclude that by defining 'navigable waters' as 'the waters of the United States' in the 1972 amendments, Congress included not just traditionally navigable waters, but all waters previously regulated under the Federal Water Pollution Control Act, including non-navigable interstate waters."[14]

However, despite explicitly stating that Congress intended that the scope of the 1972 CWA encompass and expand upon "waters already subject to federal water pollution control law,"[15] the agencies inexplicably conclude that "foundational waters" encompass only traditional navigable waters, interstate waters, and territorial seas (but not their tributaries)—thus rendering "foundational waters," and the CWA, dramatically more constrained than the scope of waters protected prior to the 1972 Amendments.

Even worse, the agencies propose to exclude some tributaries to navigable and interstate waters from CWA protections altogether by eliminating categorical protections and mandating certain types of connections—e.g., a significant nexus—to this narrow construction of "foundational

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CWA's protection of the Nation's waters. ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); 33 U.S.C. § 1362(7) (defining navigable waters as 'waters of the United States'); 118 Cong.Rec. 33756–757 (1972), 1 Legislative History of Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 250 (1973) (hereinafter Leg.Hist.).").

[12] *See* Rivers and Harbors Act of 1899, also later known as the Refuse Act, 33 U.S.C. § 407 (making it unlawful to discharge refuse ''into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water;"); *see also United States v. Standard Oil*, 384 U.S. 224 (1966).

[13] See Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948); Technical Support Document for the Proposed Rule ("Proposed Rule TSD"), at 14 ("§ 2(d)(1),(4), 62 Stat. at 1156-1157 stated that the 'pollution of interstate waters' in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is declared to be a public nuisance and subject to abatement as provided by the Act. (emphasis added)); § 2(a), 62 Stat. 1155 (requiring comprehensive programs for 'interstate waters and tributaries thereof'); § 5, 62 Stat. 1158 (authorizing loans for sewage treatment to abate discharges into 'interstate waters or into a tributary of such waters').").

[14] Proposed Rule TSD, at 16; *see also* S. Rep. No. 414, 92d Cong., 1st Sess. 77 ("Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited . . . Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.").

[15] Proposed Rule TSD, at 16 ("Thus, Congress intended the scope of the 1972 Act to include, at a minimum, the waters already subject to federal water pollution control law . . .").

waters." This is despite the agencies' acknowledgement that "the Supreme Court's interpretations of the scope of 'waters of the United States' do not require adoption of a significant nexus test."[16]

The Supreme Court's opinions have not mandated, or even indicated support for, the agencies' decision to limit CWA jurisdiction to only those tributaries, wetlands, and other waters that are relatively permanent or have a significant nexus to "foundational waters." As the agencies admit, this approach will "routinely" leave "many waters" non-jurisdictional and, thus, unprotected against pollution, degradation, and destruction.[17] We implore you to change course, hew to the longstanding understanding of the CWA's objective, and fully restore broad CWA protections for all of the Nation's waters—i.e., the "waters of the United States"—consistent with binding Supreme Court precedent and the CWA's "major congressional objectives, as revealed by the statute's language, structure, and purposes.'' *See, e.g., County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020).

The Proposed Rule represents the fourth time since 2014 that the agencies have proposed a novel interpretation of the CWA that constrains Congress' intended breadth of the law and vision for full restoration of water quality for the nation's waters. This approach—finding new ways to interpret the objective of the CWA and, thus, reduce the breadth of its protections—has been wholly unsuccessful to date. The nation needs a durable definition of "waters of the United States," and we recognize that is the agencies' goal with this rulemaking but redefining the objective of the CWA and eliminating protections for waters that have historically been protected is not the way to get there. We urge the agencies to consider the reality that there has been only one durable regulatory definition of "waters of the United States." That regulatory definition has been in place for more than 40 years. Its elimination has been the high priority target of several industries for many years, but it has never been overturned by any court or amended by Congress. It protects the Nation's waters consistent with the objective and text of the CWA, plain congressional intent, and binding Supreme Court and lower court precedent. It is the epitome of durable regulation.

We respectfully urge the agencies to fully restore the Pre-2015 Regulatory Definitions of "waters of the United States"[18] without the new limitations proposed by the agencies for impoundments, tributaries, wetlands, and other waters. Those definitions protect (1) traditional navigable waters, (2) interstate waters, (3) other waters, including intrastate waters, where their use, degradation, or destruction could affect interstate or foreign commerce, (4) impoundments of any other jurisdictional water, (5) all tributaries to the preceding categories of waters, (6) the territorial seas, and (7) wetlands adjacent to the preceding categories of waters. We further urge the agencies to limit the waste treatment exclusion "only to manmade bodies of water which neither were originally

[16] Proposed Rule, 86 Fed. Reg. at 69407.

[17] Proposed Rule, 86 Fed. Reg. at 69432.

[18] *See, e.g.,* 40 C.F.R. § 122.2 (2015); 33 C.F.R. § 328.3 (2015) (hereinafter the "Pre-2015 Regulatory Definitions").

created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of "waters of the United States," as originally intended.

Readoption of the Pre-2015 Regulatory Definitions without amendment will restore longstanding protections for the Nation's waters, and will immediately begin to address the significant, ongoing harms to the Nation's waters—and the people, ecosystems, businesses, and endangered and threatened species that depend upon them—that have resulted from the agencies' narrowing of CWA jurisdiction through guidance documents and multiple attempted rulemaking actions.

INTERESTS OF THE COMMENTING ORGANIZATIONS

Waterkeeper Alliance is a not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable, and swimmable. We are composed of approximately 350 Waterkeeper groups based in 48 countries on 6 continents, covering over 2.75 million square miles of watersheds. In the United States, Waterkeeper Alliance represents the interests of 165 U.S. Waterkeeper groups, all of their individual members and supporters, as well as the collective interests of more than 15,000 individual supporting members that live, work, and recreate in or near waterways across the country—many of which are severely impaired by pollution.

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

We understand and have seen first-hand how important a broad definition of "waters of the United States" is to the functioning and effectiveness of the CWA to protect and restore water quality across the country. The Proposed Rule would restore critical protections for the Nation's waters in many respects, but its limitations: (1) Are arbitrary, capricious, and contrary to law, (2) Illegally reduce jurisdiction over the nation's historically protected waters contrary to the CWA, and (3) Do not comply with the federal Administrative Procedure Act ("APA"),[19] National Environmental Policy Act ("NEPA"),[20] and the Endangered Species Act ("ESA").[21] Restoring the Pre-2015 Regulatory Definitions consistent with the CWA's plain meaning, objective, and intent, is critical to our collective work to protect public health and our nation's waterways from dangerous pollution.

[19] Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq*.

[20] National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*.

[21] Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*.

Commenters and their members have substantial, protectable interests in clean water for drinking, recreation, fishing, economic growth, food production, and other beneficial uses. These interests have been, and will continue to be, injured if the agencies do fully restore the longstanding protections provided by the Pre-2105 Regulatory Definitions. We submit the following comments in response to the Proposed Rule, and further rely upon previous comments on administrative actions relating to the regulatory definition of "waters of the United States" which we incorporate by reference herein.[22]

INTRODUCTION

The CWA regulatory definition of "waters of the United States" is of critical importance to the protection of human health, the wellbeing of communities, the success of local, state and national economies, and the functioning of our nation's vast, interconnected aquatic ecosystems, as well as the many threatened and endangered species that depend upon those resources. Clean water is important to nearly every aspect of our lives and livelihoods, but, most importantly, is essential to life itself. As a nation, we cannot have clean water unless we control pollution at its source—wherever that source may be. This entails protecting waters throughout the nation's watersheds without regard to whether waters are connected to traditional navigable waters, interstate waters, or the territorial seas.

[22] Natural Resource Defense Council *et al*., Comments on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (June 5, 2007), Docket ID No. EPA–HQ–OW–2007–0282 (Jan, 21, 2008) ("2007 Comments"); Natural Resource Defense Council et al., Comments on 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, Docket ID No. EPA-HQ-OW-2011-0409, (Aug. 1, 2011) ("2011 Comments"), available at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0409-3608; Final Waterkeeper Comments on EPA-HQ-OW-2011-0880 (Nov. 14, 2014) ("Waterkeeper CWR Comments"), available at: https://www.regulations.gov/document/EPA-HQ-OW-2011-0880-16413; Waterkeeper Alliance, *et al*., Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017) ("Repeal Comments"), available at: https://www.regulations.gov/document/EPA-HQ-OW-2017-0203-13681; Comments of Waterkeeper Alliance *et al*., on Definition of ''Waters of the United States" – Schedule of Public Meetings: Docket ID No. EPA-HQ-OW-2017-0480 (Nov. 28, 2017), ("Step 2 Comments") available with attachments at: https://www.regulations.gov/document/EPA-HQ-OW-2017-0480-0750; Waterkeeper Alliance *et al*., Comments on Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA–HQ–OW–2017–0644 (Dec. 13. 2017), ("Delay Comments") available at: https://www.regulations.gov/document/EPA-HQ-OW-2017-0644-0401; Waterkeeper Alliance *et al*., Comments on Definition of Waters of United States - Recodification of Pre-Existing Rules ("Supplemental Notice Comments"), Docket ID No. EPA–HQ–OW–2017–0203, (Aug. 12, 2018) ("Repeal Supplemental Comments"), available with attachments at: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0203-15360; Waterkeeper Alliance *et al.*, Comments on Revised Definition of Waters of the United States, Docket ID No. EPA-HQ-OW-2018-0149, (April 14, 2019) ("Waterkeeper NWPR Comments") available with attachments at: https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-11318; and Waterkeeper Alliance *et al.*, Comments on Notice of Public Meetings Regarding ''Waters of the United States''; Establishment of a Public Docket; Request for Recommendations, Docket ID No. EPA–HQ–OW–2021–0328-0285 (Waterkeeper 2021 Public Notice Comments"), available with attachments at https://www.regulations.gov/comment/EPA-HQ-OW-2021-0328-0285 (collectively "Previous Comments"), all of which are attached hereto as (Attachment 1).

If a body of water is not included in the definition of "waters of the United States," untreated toxic, biological, chemical, and radiological pollution can be discharged directly into it without meeting any of the CWA's permitting and treatment requirements.[23] When waters are excluded from the definition of "waters of the United States," all of the protections of the CWA—the Section 402 National Pollutant Discharge Elimination System discharge standards and permitting requirements, the Section 404 Dredge and Fill standards and permitting, water quality standards, effluent limitation guidelines, total maximum daily loads, water quality certifications, and myriad other CWA standards and programs—become inapplicable and cannot prevent pollution, degradation, and destruction as intended under the CWA.

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

The breadth of the waters protected under the CWA, and the reasons therefore, were firmly established with the passage of the CWA in 1972. This breadth is reflected in the agencies' Pre-2015 Regulatory Definitions of "waters of the United States" in 1973 (EPA) and 1977 (Corps), which protected navigable-in-fact waters, interstate waters, the territorial seas, impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and "[a]ll other waters … the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce."[24]

The regulatory definition of "waters of the United States" must continue to provide broad jurisdiction in order to control pollution in the Nation's waters consistent with the intent of Congress when it enacted the CWA. Unfortunately, the Proposed Rule does not meet this standard.

Based on a legally and factually unsound analysis, the agencies propose to dramatically reframe the entire CWA to only protect traditional navigable waters, interstate waters, the territorial seas, and a unidentified subset of upstream waters to the extent that they "impact the integrity" of those

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

[24] EPA, 38 Fed. Reg. 10834 (1973) and 42 Fed. Reg. 37122 (1977); *see also* 40 C.F.R. § 122.3 (1981) (45 Fed. Reg. 33,290, 33,424 (May 19, 1980)) and 33 C.F.R. § 323.2 (1983) (47 Fed. Reg. 31,794, 31,810 (July 22, 1982)).

downstream "foundational waters," as determined by "relatively permanent" and "significant nexus" requirements.[25] Regulatory authority over the enormous remainder of the Nation's waters would be left exclusively to the protection of the states,[26] which have a long and dismal record of failing to protect the Nation's waters in the absence of federal CWA authorities and requirements.[27] This result is plainly contrary to the text, structure and objective of the Act, as well as decades of case law and agency construction to the contrary.

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain severely polluted, and by some indications, pollution appears to be increasing. For example, while water quality in a large percentage of our nation's waters has not been assessed, data from EPA shows water pollution in assessed waters has impaired 588,173 river/stream miles, 13,208,917 lake/reservoir acres, 44,625 square miles of bays/estuaries, 3,329 square miles of coastal waters, 672,924 wetland acres, and 39,230 square miles of the Great Lakes Open Water.[28] By comparison, EPA's 2004 CWA Section 305(b) Report showed that there were 246,002 miles of impaired rivers/streams and 10,451,401 acres of impaired lakes as of 2004.[29]

If we can ever hope to restore the chemical, physical, and biological integrity of the Nation's waters—which was the sole bedrock "objective" of Congress when it passed the CWA—it is essential that the Pre-2015 Regulatory Definitions be fully restored and that we protect traditional navigable waters; interstate waters; impoundments; tributaries, including rivers and streams (whether they are perennial, intermittent, or ephemeral), lakes, ditches, canals, and ponds; adjacent wetlands, including playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes; estuaries and bays; and other waters, including closed basins, where their use, degradation, or destruction could impact interstate or foreign commerce. Protection of all of the Nation's waters has become even more important since passage of the CWA in 1972 as we face an unprecedented serious climate change crisis and increasing environment injustices, including the need to protect the quality of diminishing water supplies and to preserve wetlands to help mitigate and adapt to a changing climate.

REGULATORY BACKGROUND

The agencies first made major substantive changes to their longstanding regulatory interpretation of the waters that are subject to the CWA's critical safeguards in the June 29, 2015 "Clean Water

[25] Proposed Rule, 86 Fed. Reg. at 69404.

[26] Proposed Rule, 86 Fed. Reg. at 69373.

[27] Proposed Rule, 86 Fed. Reg. at 69400.

[28] EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, available at http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last accessed on Aug. 28, 2021). (Attachment 2).

[29] EPA, Findings on the National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle, available at: https://www.epa.gov/sites/production/files/2015-09/documents/2009_01_22_305b_2004report_2004_305breport.pdf (last accessed on Aug. 28, 2021) (Attachment 3).

Rule" ("CWR").[30] Although the CWR reaffirmed CWA jurisdiction over some waters historically protected under the CWA, it also included many legally and scientifically indefensible provisions that, among other things, impermissibly excluded waters that must be categorically protected as a matter of law and waters over which the agencies historically asserted jurisdiction based on their commerce clause authority.[31] The agencies' second change came in an October 22, 2019 rule repealing the CWR and reinstating the text of the Pre-2015 Regulatory Definitions.[32] The agencies' third change, the NWPR, was proposed a few months later.

Contrary to more than 40 years of legal precedent and longstanding, well-settled agency interpretations of the CWA, in the NWPR, the agencies concocted unsupportable legal theories and utilized arbitrary, unscientific line drawing, and undisclosed "policy choices" to attempt to justify their unprecedently narrow definition of "waters of the United States."[33] Unlike every court and agency in the history of the CWA, the agencies misconstrued the plain statutory text of the CWA to wrongly determine, among other things, that a large portion of the Nation's waters are not "waters of the United States," 85 Fed. Reg. at 22,253, and that protection of those waters, or lack thereof, was no longer their concern.[34] The resulting regulatory definition radically constrained the CWA's protections to "relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters." [35]

In promulgating the NWPR, the agencies did not evaluate whether the definition would achieve the objective and goals of the CWA for the Nation's waters and failed to meaningfully assess which waters would remain protected under their new regulatory definition of "waters of the United States."[36] Claiming their first-of-its-kind interpretation of the CWA was so clear the agencies lacked discretion to protect important rivers, streams, lakes, and other waters across the country, the agencies also refused to consider scientific information in the record demonstrating that their narrow jurisdictional definition eliminated protections for waters that are essential to the integrity

[30] Clean Water Rule: Definition of 'Waters of the United States,' 80 Fed. Reg. 37054 (June 29, 2015).

[31] Waterkeeper CWR Comments, *supra* fn. 22.

[32] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019) ("Repeal Rule").

[33] For a more detailed description of the legal and scientific errors in the CWR, Repeal Rule, and NWPR see *Waterkeeper Alliance et al. v. Regan*, 3:18-CV-3521, Amended Complaint, Dkt. 91-1 ¶¶ 185-357 (Dec. 20, 2020) ("Amended Complaint") (Attachment 4).

[34] *See* U.S. EPA, The Navigable Waters Protection Rule––Public Comment Summary Document (Response to Comments), EPA Docket ID No. EPA-HQ-OW-2018-0149-11574 (Apr. 21, 2020) ("NWPR, RTC"). (Attachment 5).

[35] NWPR, 85 Fed. Reg. at 22273.

[36] *See, e.g.,* NWPR RTC, Topics 5, at 44, and 11, at 103.

of the Nation's waters and endangered drinking water supplies, recreational waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across the nation.[37]

In the Proposed Rule, the agencies describe these three rulemaking actions as undertaking "the challenge of developing and implementing a durable definition of the term 'waters of the United States' that draws the line on the *Riverside Bayview* 'continuum' consistent with the objective of the Act—to restore and maintain the chemical, physical, and biological integrity of the nation's waters—based on science, and refined over the years by extensive experience in implementing the definition in the field."[38]

But that is precisely the problem—the Supreme Court's holding in *Riverside Bayview* does not direct, or even provide support for, the agencies defining "waters of the United States" by drawing a line on a "continuum" to determine which rivers, lakes, streams, and other waters are protected under the CWA. In other words, the agencies are attempting to answer the wrong question. As a result, the agencies have repeatedly proposed narrowed regulatory definitions that weaken the CWA and are inconsistent with the objective and text of the Act, Supreme Court precedent, and Congressional intent.

Contrary to the agencies' framing, the Supreme Court in *Riverside Bayview* recognized the breadth of the CWA's jurisdiction over "waters," including "lakes, rivers, streams, and other bodies of water" and "aquatic ecosystems" - as the Court has done on many other occasions.[39] The difficult boundary drawing identified by the Court in *Riverside Bayview* related solely to whether Congress <u>also</u> intended for the CWA to protect "wetlands."

The *Riverside Bayview* court recognized the challenge in determining the boundary between land and protected waters when regulating wetlands adjacent to "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'"[40] The Court framed the issue like this: between the protected waters and "dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious."[41]

Importantly, the Court found that the Corps had reasonably drawn that line by protecting "wetlands adjacent to lakes, rivers, streams, and other bodies of water"—i.e., wetlands adjacent to "waters of

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[37] *See, e.g.,* NWPR RTC, Topics 11, at 3, 8-9, 13.

[38] Proposed Rule, 86 Fed. Reg. at 69373.

[39] *Riverside Bayview*, 474 U.S. at 131-35.

[40] *Id.* (The Court in *Riverside Bayview* resolved this question: "whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded <u>by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters</u>.'") (emphasis added).

[41] *Id*. at 132.

the United States."[42] Nothing in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") (isolated sand and gravel pit based on its use by migratory birds) or *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") (wetlands adjacent to non-navigable tributaries) directs the agencies to determine the extent of CWA jurisdiction over rivers, streams, lakes, or other bodies of water on a continuum either. This conclusion is obvious because rivers, streams, lakes, and other water are "waters" that have long been protected by the CWA consistent with the intent of Congress, the text of the CWA, and binding Supreme Court precedent.

THE PROPOSED RULE REDEFINING WATERS OF THE UNITED STATES

We are pleased that the agencies recognize the CWA must be interpreted "in light of the purposes Congress sought to achieve" and that "[t]o thus adequately consider the Act's statutory objective, a rule defining 'waters of the United States' must consider its effects on the chemical, physical, and biological integrity of the nation's waters."[43] The agencies also conclude, and we agree, that "[t]wo recent Supreme Court Clean Water Act decisions, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) ("*Maui*") and *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018) ("*National Association of Manufacturers*"), affirm that Congress used specific language in the definitions of the Act in order to meet the objective of the Act, that the definition of 'waters of the United States' is fundamental to meeting the objective of the Act, and, therefore, that the objective of the Act must be considered in interpreting the term 'waters of the United States.'"[44]

Consistent with those principles, we strongly support the agencies' decisions to: (1) reject the NWPR, (2) reestablish categorical protections for interstate waters, (3) eliminate the NWPR's non-scientific, arbitrary flow and other requirements for protecting rivers, streams, wetlands, lakes, and other waters, (4) provide categorical protections for wetlands adjacent to traditional navigable waters, interstate waters, and territorial seas, and (5) recognize that ditches, canals, lakes, and ponds often function as tributaries that must be protected.

We strenuously object, however, to the agencies' position that the goal of the CWA is solely to protect "downstream foundation waters," and to the resulting reduction in CWA jurisdiction over tributaries, impoundments, wetlands, and other waters in the Proposed Rule. Specifically, with regard to the limitations on jurisdictional categories, we object to the Proposed Rule to the extent that it: (1) does not provide categorical protection for all tributaries and excludes tributaries to "other waters," (2) eliminates the interstate commerce factors for protecting "other waters," (3) does not provide categorical protection for certain non-floodplain wetlands that have a significant nexus to other "waters of the United States" (e.g., Carolina and Delmarva Bays, pocosins, prairie potholes, and vernal pools), (4) authorizes "waters of the United States" to be converted into waste

[42] *Id.* at 134-135.

[43] Proposed Rule, 86 Fed. Reg. at 69387.

[44] Proposed Rule, 86 Fed. Reg. at 69387.

treatment systems, (5) excludes impoundments of certain tributaries and other waters from the impoundment category, (6) excludes important water functions, such as endemic aquatic species habitat and recreation, from the "significantly affect" definition unless those functions affect a "downstream foundational water," (7) allows other uses besides the growing of crops to take advantage of the prior converted cropland exclusion, (8) excludes impoundments and other waters from the waters to which wetlands may be adjacent, (9) employs the significant nexus standard to exclude waters that may lack a hydrologic connection to "foundational waters" due to climate change, and (10) adopts the NWPR's misapplication of the *SWANCC* decision as it relates to federalism and the purported need to balance state and federal regulation authority in defining "waters of the United States."

These limitations flow from the agencies' misconstruction of the CWA's objective and Supreme Court precedent, as well as the agencies' improper failure to consider the effects of their proposed narrowing of the regulatory definition of "waters of the United States" on the chemical, physical, and biological integrity of the Nation's waters.

The CWA is a comprehensive statutory scheme to protect and restore the chemical, physical, and biological integrity of the Nation's waters, and its ultimate goal is to eliminate all discharges of pollutants into those waters.[45] It accomplishes that goal in "carefully constructed and interconnected ways," including through the establishment of water quality standards and total maximum daily loads for navigable waters, interstate waters, and intrastate waters that protect the uses of "foundational" and non-foundational waters in their own right, as well as to protect any other waters to which they are connected.[46] The CWA applies to the Nation's waters—i.e., the "waters of the United States"—including, but not limited to, waters specifically referenced in the text of the CWA such as navigable waters, interstate waters, intrastate waters, wetlands, streams, rivers, lakes, territorial seas, coastal waters, sounds, estuaries, tributaries, and bays.[47]

Unfortunately, the agencies now propose to completely transmute that careful construction and interconnection by converting the CWA into a scheme with an objective that seeks only to "restore and maintain" water quality in downstream traditionally navigable waters, interstate waters, and territorial seas.[48] Under this reimagining, Congress only wanted to protect other waters if they

[45] 33 U.S.C. § 1251(a).

[46] *See e.g.,* William Hines, History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform, 4 J. Energy & Envt'l L 80, fn. 36 at 92-195 (2013), https://gwujeel.files.wordpress.com/2013/10/4-2-hines.pdf (hereinafter "Hines History of the CWA") (Attachment 6); 33 U.S.C. § 1313.

[47] *See Cty. of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318–19 (1981); 2003 Comments *supra* fn. 22; 33 U.S. C § 1313 (applying water quality standard to "interstate waters," "intrastate waters," "navigable waters" and simply "waters."), § 1253 ("rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes"); and Hines History of the CWA, *supra* fn. 46.

[48] Proposed Rule, 86 Fed. Reg. at 69373.

"significantly affect" the water quality of these downstream "foundational waters."[49] The agencies state that "[t]he proposed rule's limits appropriately draw the boundary of waters subject to federal protection by ensuring that where upstream waters significantly affect the integrity of waters and the federal interest is indisputable—the traditional navigable waters, interstate waters, and territorial seas—Clean Water Act programs would apply to ensure that those downstream waters are protected."[50]

Under the Proposed Rule's approach, and contrary to the plain text of the CWA,[51] the destruction of aquatic fishery habitat in a non-navigable lake or the pollution of a recreational tributary is not addressed by the CWA at all unless the destruction or pollution impairs water quality in a downstream "foundational water." And even if the lake and river are found to be jurisdictional under that restrictive standard, none of the CWA's programs would apply to protect the lake's fishery or the tributary's recreational uses—the CWA would only apply to protect the water quality of downstream "foundational waters." This, frankly outrageous, concept cannot be found in the text of the CWA, the legislative history of the Act, or Supreme Court opinions. In fact, it is directly contrary to the objective of the Act, which is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters - not the integrity of a narrower class of downstream waters the agencies deem "foundational."[52]

In the estimation of the agencies, the Proposed Rule will result in many waters being routinely determined to be non-jurisdictional.[53] Although the agencies acknowledge that they have an "obligation to consider the objective of the Act by assessing the water quality effects of revising the definition of 'waters of the United States,'"[54] they have utterly failed to assess the water quality impacts of the Proposed Rule, their unfounded "foundational waters" approach, and the resulting unnecessary and unauthorized limitations they are placing on the Pre-2015 Regulatory Definitions. Despite this failure, the agencies simply assert without any supporting evidence that the Proposed Rule amendments to the Pre-2015 Regulatory Definitions "would restore and maintain the chemical, physical, and biological integrity of the nation's waters."[55]

The agencies also paradoxically state that:

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[49] Proposed Rule, 86 Fed. Reg. at 69373-74.

[50] *Id.*

[51] *See, e.g., PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 700 (1994) ("A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an "antidegradation policy"—that is, a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.")

[52] 33 U.S.C. § 1251(a).

[53] Proposed Rule, 86 Fed. Reg. at 69432.

[54] Proposed Rule, 86 Fed. Reg. at 69408.

[55] Proposed Rule, 86 Fed. Reg. at 69373.

> The Supreme Court in *Riverside Bayview* "observed that the broad objective of the Clean Water Act to restore the integrity of the nation's waters 'incorporated a broad, systemic view of the goal of maintaining and improving water quality .... Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' *Id.* at 132-33 (citing S. Rep. 92-414)" and that "'In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into 'navigable waters,' see CWA [sections] 301(a), 404(a), 502(12), 33 U.S.C. [sections] 1311(a), 1344(a), 1362(12), 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."[56]

Thus, the agencies' have not provided any reasonable basis for their determination that the CWA is designed to protect only the integrity of downstream "foundational waters" rather than the Nation's waters as broadly defined to protect entire "aquatic ecosystems." A careful review of the Proposed Rule does not reveal any reasoned explanation for the agencies' contradictory statements and dramatic constriction of the CWA's objective. In fact, the agencies' analysis in the Proposed Rule preamble and Proposed Rule TSD confirm the long-settled understanding of the objective of the CWA and the breadth of the law's protection of the Nation's waters, including categorical protections for tributaries of other waters of the United States and the interstate commerce bases for protecting "other waters."

The closest thing to a basis found in the Proposed Rule is the agencies' statement that they "are proposing to restore the longstanding, familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by Supreme Court case law." But this vague statement referencing unidentified statutory limits informed by (not bound by) Supreme Court cases does nothing to illuminate the agencies' rationale for severely limiting the Act's reach as well as their own regulatory authority to achieve Congress's objective.[57]

The agencies also assert, as they did in the vacated NWPR, that they "interpret [*Riverside Bayview* and *SWANCC*] to mean that the *object* of federal protection is foundational waters, and that jurisdiction encompasses (and is limited to) those tributaries, wetlands, and open waters that are necessary to protect the foundational waters.[58] But that conclusion is contrary to the agencies' descriptions of *Riverside Bayview* and *SWANCC* in the Proposed Rule. Additionally, as discussed in

[56] Proposed Rule, 86 Fed. Reg. at 69379.

[57] Proposed Rule, 86 Fed. Reg. at 69385 (emphasis added).

[58] Proposed Rule, 86 Fed. Reg. at 69394.

detail below, those cases plainly do not stand for that proposition, and the agencies have a long history of interpreting them otherwise.[59] The Court's statements in *Riverside Bayview* and *SWANCC* that the word "navigable" in the CWA "has limited import" and that Congress "had in mind" its traditional authority cannot reasonably be interpreted to mean that the CWA's "object of federal protection" is exclusively traditional navigable waters, interstate waters and the territorial seas. Such a conclusion is nonsensical and contrary to the text and history of the CWA, as well as the Supreme Court cases upon which the agencies purport to rely. The phrase "waters of the United States" gives meaning to the phrase "navigable waters" under the CWA—not the other way around.

Unfortunately, the agencies simply say it is so and proceed to redefine "waters of the United States" in a manner designed achieve this greatly diminished and weakened objective for the CWA—a law universally described as a comprehensive and all-encompassing program of water pollution regulation.[60] Based on the agencies' unsupportable view of the CWA, the agencies now propose "to interpret the term 'waters of the United States' to include: traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; certain impoundments of 'waters of the United States'; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments, that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and 'other waters' that meet either the relatively permanent standard or the significant nexus standard."[61]

We implore the agencies to reconsider. The Proposed Rule would be a disastrous weakening of our nation's most important water quality law that will have wide ranging negative ramifications for the nation's water quality protections and people that depend on them. The Proposed Rule's limitations on tributaries, impoundments, other waters, and wetlands are not consistent with the text or objective of the CWA, case law, or the longstanding regulatory definitions of "waters of the United States" that have been implemented by courts and the agencies for several decades. None of the cases interpreting the CWA in its nearly 50-year history have construed the CWA as narrowly as the agencies are proposing, and there are no sound legal, technical, or policy reasons for the agencies to attempt to constrain the objective of the CWA in this manner or to this extent.

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[59] For example, the agencies' have consistently recognized that *SWANCC* "did not invalidate the 1986 regulations' 'other waters' provision or any other parts of the 1986 regulations' definition of 'waters of the United States.' *See* Proposed Rule, 86 Fed. Reg. at 69419. Prior to this Proposed Rule, the agencies have never asserted that *Riverside Bayview,* which expressly upheld the broad 1986 regulations, actually stands for the proposition that Congress sought only to protect water quality in these narrow categories of "foundational waters."

[60] *See e.g.*, Proposed Rule, 86 Fed. Reg. 69387-88 (surveying cases); *City of Milwaukee,* 451 U.S. at 318 ("No Congressman's remarks on the legislation were complete without reference to [its] 'comprehensive' nature.").

[61] Proposed Rule, 86 Fed. Reg. at 69373.

I. THE CWA MANDATES A BROAD DEFINITION OF "WATERS OF THE UNITED STATES" CONSISTENT WITH CONGRESSIONAL INTENT TO RESTORE AND MAINTAIN WATER QUALITY IN ALL OF THE NATION'S WATERS

Congress passed CWA with a singular objective—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[62]—and it intended to achieve that objective, primarily by regulating pollution at its source. *Cty. of Maui v. Haw. Wildlife Fund,* 140 S. Ct. at 1473 (citing *EPA v. Cal. ex rel. State Water Resources Control Bd*., 426 U.S. 200, 202-04 (1976) (basic purpose of Clean Water Act is to regulate pollution at its source). Accordingly, Congress provided that the CWA applies to all "waters of the United States, including the territorial seas."[63] The Conference Report accompanying the CWA confirms that Congress intended that the phrase "waters of the United States" be given "the broadest possible constitutional interpretation."[64] The Congressionally-intended breadth of the CWA is indisputably apparent in the comprehensive and interrelated goals, policies, definitions, programs, and directives set forth in text of the Act itself, as well as in Congress' direction that the entire Act applies broadly to protect the "waters of the United States, including the territorial seas."[65] The intended breadth is further illuminated and confirmed by (1) the history of the legislative acts that preceded and formed the basis of the CWA, (2) more than four decades of judicial precedent confirming it, (3) the longstanding federal and state regulations, programs, permits, standards, and enforcement actions implementing it, and (4) Congress' intent to broaden the scope of the CWA and fund these actions.

The national goal of the CWA is the elimination of discharges of pollutants into "waters of the United States," with the interim goal of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(1), (2). "To do this, the [CWA] does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally, see § 1251(b), which Congress defined to mean 'the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,' § 1362(19)." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot*., 547 U.S. 370, 385 (2006).

CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person, unless such discharge complies with the terms of any applicable permits and with CWA sections 301, 302, 306, 307, 318, 402, and 404. 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, 1344. "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point

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[62] *PUD No. 1 of Jefferson County v. Wash. Dep't. of Ecology,* 511 U.S. 700, 704 (1994) (*quoting* 33 U.S.C. § 1251(a)).

[63] 33 U.S.C. § 1362(7).

[64] S. Rep. No. 92-1236, at 144 (1972).

[65] 33 USC § 1362(7); *Riverside Bayview*, 474 U.S. at 132-33 (*citing* H.R.Rep. No. 92–911, p. 76 (1972); S.Rep. No. 92–414, p. 77 (19072); U.S. Code Cong. & Admin.News 1972, pp. 3668, 3742) (To accomplish these goals, the Court in Riverside Bayview concluded, Congress defined the "waters covered by the Act broadly" to encompass all "waters of the United States.").

source." 33 U.S.C. § 1362(12). "Navigable waters" are broadly defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

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

A long line of Supreme Court and lower court cases have consistently confirmed the breadth of the CWA and its protections for all of the Nation's waters (i.e., "waters of the United States"). These decisions indisputably establish that CWA jurisdiction is not limited to traditional navigable waters, interstate waters, and the territorial seas (and the waters that significantly impact their integrity). The objective of the CWA is not restoration of water quality in "foundational waters." The CWA seeks to completely eliminate water pollution in all of the waters of the United States. For example:

- In *City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 318 (1981),[66] a unanimous Supreme Court determined that Congress' intention in amending the Water Pollution Control Act in 1972 was "clearly to establish an all-encompassing program of water pollution regulation . . . [and] 'to establish a comprehensive long-range policy for the elimination of water pollution.' S.Rep.No.92–414, at 95, 2 Leg.Hist. 1511 (emphasis supplied). No Congressman's remarks on the legislation were complete without reference to the 'comprehensive' nature of the Amendments."

- In *Riverside Bayview* (1985), a unanimous Supreme Court determined that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' [This is precisely why] Congress chose to define the waters covered by the Act broadly."[67] As noted above, the Court also confirmed the breadth of the CWA jurisdiction over "waters," including "lakes, rivers, streams, and other bodies of water."[68]

- In *Int'l Paper Co. v. Ouellette* (1987), the Supreme Court held that the CWA has long been recognized as "an all-encompassing program of water pollution regulation" that "applies to all point sources and virtually all bodies of water" and "virtually all surface water in the

[66] (internal footnotes omitted) (Justice REHNQUIST delivered the unanimous opinion of the Court).

[67] *Riverside Bayview* at 132-33 (citing S. Rep. No. 92414, p. 77 (1972)) (Justice WHITE delivered the unanimous opinion of the Court).

[68] *Riverside Bayview*, 474 U.S. at 131-35.

country."[69] The Court noted that "Congress intended to dominate the field of pollution regulation" and that the goal of the Act is the "elimination of water pollution."[70] With regard to Section 101(b), the Court found that "the [1972 CWA] amendments also recognize that the States should have a significant role in protecting their own natural resources. 33 U.S.C. § 1251(b). The Act provides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U.S.C. § 1342(b)."[71]

- In *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't. of Ecology*, 511 U.S. 700, 704 (1994), the Supreme Court described the CWA as a "complex statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities." The Court confirmed that CWA Section 303 "requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters," and that EPA had approved, for example, the State of Washington's Class AA "water quality standards for 81 specified fresh surface waters, as well as to all 'surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas,' all "lakes and their feeder streams within the state,' and all 'unclassified surface waters that are tributaries to Class AA waters."[72] Two Justices dissented but on other grounds.

As explained in more detail in Section III(B) below, contrary to the agencies' view that CWA Section 101(b) directs the agencies to define "waters of the United States" through some sort of "balancing of the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation,"[73] the Supreme Court has determined that Congress established that balance of state and federal power over water pollution when it enacted the CWA and established broad jurisdiction over the Nation's waters, *i.e.,* "virtually all surface water in the country," in order to eliminate water pollution.[74]

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[69] *Int'l Paper Co. v. Ouellette*, 479 U.S. at 486 and 492 (emphasis added)(internal quotations omitted) (POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and SCALIA, JJ., joined).

[70] *Int'l Paper Co. v. Ouellette*, 479 U.S. at 492 and 494 (emphasis added).

[71] *Int'l Paper Co. v. Ouellette*, 479 U.S. at 489.

[72] *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. at 717 (emphasis added) (O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion.)

[73] Proposed Rule, 86 Fed. Reg. at 69419.

[74] *See, e.g., Int'l Paper Co. v. Ouellette*, 479 U.S. at 489; *Env't Prot. Agency v. California ex rel. State Water Res. Control Bd,* 426 U.S. 200, 206–08 and fn. 16(1976)' and *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc*., 452 U.S. 264, 289 (1981), *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)).

With the CWA and many other federal environmental laws, the Supreme Court has confirmed that Congress employed a program of cooperative federalism under which States are given the "choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation" and, as such, the CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[75] As the Supreme Court found in *Env't Prot. Agency v. California ex rel. State Water Res. Control Bd.* (1976), in the CWA, "[c]onsonant with its policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,' [in Section 101b] Congress also provided that a State may issue NPDES permits for discharges into navigable waters within its jurisdiction, but only upon EPA approval of the State's proposal to administer its own program."[76]

II. THE AGENCIES' LONGSTANDING PRE-2015 REGULATORY DEFINITIONS BROADLY PROTECT 'WATERS OF THE UNITED STATES" CONSISTENT WITH THE CWA

Prior to the 2015 CWR, the definition of "waters of the United States" under the CWA had remained in place largely unchanged since the 1970s[77] and broadly encompassed jurisdiction over the Nation's waters consistent with the CWA.[78] The Pre-2015 Regulatory Definitions have never been overturned by any court.[79] In the Proposed Rule, the agencies correctly note that "*SWANCC* did not invalidate the 1986 regulations' 'other waters' provision or any other parts of the 1986 regulations' definition of 'waters of the United States,'[80] and that "[n]either the plurality nor the concurring opinions in *Rapanos* invalidated any of the regulatory provisions defining 'waters of the United States.'"[81]

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[75] *See New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc*., 452 U.S. 264, 289 (1981), *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)) (internal citations omitted). ("This arrangement, which has been termed 'a program of cooperative federalism,' Hodel, supra, is replicated in numerous federal statutory schemes. These include the Clean Water Act, *see Arkansas v. Oklahoma*, (Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective").")

[76] 426 U.S. 200, 206–08 and fn. 16(1976), (citing "s 101(b), 33 U.S.C. s 1251(b) (1970 ed., Supp. IV))".

[77] *See* regulatory definitions at 33 C.F.R. part 328 and 40 C.F.R. parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401.

[78] This is true except for the illegal waste treatment exclusion described in Section IV(J) of these comments.

[79] Importantly, the Supreme Court has not invalidated any provision in Pre-2015 Regulatory Definition. As the agencies acknowledge in the Proposed Rule, "[i]*n Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) [("SWANCC")], the Court (in a 5–4 opinion) held that the use of 'isolated' nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal authority under the Clean Water Act." 86 Fed. Reg. at 69379. However, *SWANCC* dealt only with an administrative interpretation of 33 C.F.R. § 328.3(a)(3) (1999), dubbed the "Migratory Bird Rule," that purported to assert jurisdiction based on the mere fact that particular waters were or could be used by migratory birds. The Court did not vacate 33 C.F.R. § 328.3(a)(3). Nothing in *Rapanos* is to the contrary. *See e.g*., 80 Fed. Reg. at 37061 (recognizing that nothing in *Rapanos* "invalidated any of the current regulatory provisions defining 'waters of the United States'").

[80] Proposed Rule, 86 Fed. Reg. at 69419.

[81] Proposed Rule, 86 Fed. Reg. at 69380.

Consistent with the objective and text of the CWA, the Pre-2015 Regulatory Definitions include broad categories of waters to ensure the "protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water"[82] in all of the nation's waters as intended by Congress. The CWA does not protect these values only in "foundational waters" as narrowly defined by the agencies in the Proposed Rule but requires protection of water quality in all of the nation's navigable, interstate, and intrastate waters based on the uses of those individual waters "to protect the public health or welfare, enhance the quality of water and serve the purposes" of the CWA.[83]

As the agencies recognized in the preamble to the CWR:

> "Waters of the United States," which include wetlands, rivers, streams, lakes, ponds and the territorial seas, provide many functions and services critical for our nation's economic and environmental health. In addition to providing habitat, rivers, lakes, ponds and wetlands cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits.[84]

The Pre-2015 Regulatory Definitions' broad categories that encompass these waters within the definition of "waters of the United States" are necessary to achieve the objective of the CWA, protect waters quality in all of the Nation's waters, and implement the Act's "comprehensive regulatory program" that established "a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *Cty. of Milwaukee*, 451 U.S. at 310-11, 317.

Other Waters

[82] *See, e.g.*, 33 U.S.C. § 1312(a) and 1313(c)(2)(A) ("Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation").

[83] *Id.*

[84] CWR, 79 Fed. Reg. 21,188, 21,191.

Consistent with Congressional intent, EPA (1973)[85] and the Corps (1977)[86] adopted regulations defining "waters of the United States" for the purposes of the CWA to include broad categories of waters beyond those protected by traditional navigability tests. When the Corps adopted its definition of "waters of the United States" in 1977, it recognized that "[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system."[87]

In the Proposed Rule, the agencies inexplicably misconstrue this statement by the Corps as supporting their decision to narrow the definition of "waters of the United States" from the Corp's 1977 Regulatory Definition such that it would only protect water quality in narrowly defined "foundational waters" and certain waters that affect the integrity of only those "foundational waters."[88] But the Corps made that finding to support expansion of the definition of "waters of the United States" to encompass "other waters" that have an effect on interstate commerce—one of the categories of waters the agencies now propose to eliminate.

In the Preamble to the Corps' 1977 rule defining "waters of the United States," the Corps stated:

> Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce **even though they are not interstate waters or part of a tributary system to navigable waters of the United States**. **The condition or quality of water in these other bodies of water will have an effect on interstate commerce**. The Corps' earlier 1975 definition identified certain of these waters. These included waters used:
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> - By interstate travelers for water-related recreational purposes;
> - For the removal of fish that are sold in interstate commerce;
> - For industrial purposes by industries in interstate commerce; and
> - In the production of agricultural commodities sold or transported in interstate commerce.
>
> We recognized, however, that this list was not all inclusive, as some waters may be

[85] 38 Fed. Reg. 10834 (1973).

[86] 42 Fed. Reg. 37122 (1977).

[87] 42 Fed. Reg. 37128 (July 19, 1977).

[88] Proposed Rule, 86 Fed. Reg. at 68389 (The "proposed rule includes the categories long identified by the agencies as affecting the water quality of traditional navigable waters, interstate waters, and the territorial seas, including tributaries, adjacent wetlands, impoundments, and "other waters.").

> involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over 'other waters' such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.[89]

Under the 1977 Definition, waters in Categories 1, 2, and 3, over which jurisdiction was "obvious" under the Federal Government's broad powers to regulate interstate commerce, included: (1) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands; (2) Tributaries to navigable waters of the U.S., including adjacent wetlands; and (3) Interstate waters and their tributaries, including adjacent wetlands.[90] Additionally, based on reasoning set forth above, the Corps included "other waters" where the use or destruction of the waters could affect interstate commerce within the definition of "waters of the United States."[91] This "other waters" provision remained in place for decades prior to the CWR, *see, e.g.*, 33 C.F.R. § 328.3(a)(3) (2015), and has never been invalidated by any court.

By contrast, the agencies now inexplicably propose to eliminate CWA jurisdiction over some "waters that fall within categories 1, 2, and 3" and which "are obvious candidates for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce." The agencies also propose to eliminate all CWA jurisdiction over other waters that are "used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States." In other words, the agencies are drawing artificial lines and are proposing a definition that does not protect "the waters that together form the entire aquatic system" contrary to the intent of Congress, the text of the CWA, and Supreme Court precedent.

It is beyond dispute that Congress intended the CWA to fully protect water quality in all of the Nation's waters and aquatic ecosystems. As we explain in detail in our 2003 Comments, "the chemical, physical, and biological integrity of the Nation's waters cannot be restored and maintained without Clean Water Act regulation of all waters protected by the current regulations – including those identified by the (a)(3) factors [other waters interstate commerce factors]."[92] And,

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[89] 42 Fed. Reg. 37127-37128 (emphasis added).

[90] *See, e.g.,* 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

[91] 42 Fed. Reg. 37122 (1977).

[92] *See* Comments submitted by national environmental organizations on the 2003 Advance Notice of Proposed Rulemaking and Guidance, which are a part of the official public docket in 2003 at: https://www.regulations.gov/comment/EPA-HQ-OW-2002-0050-1674 (hereinafter "2003 Comments") at 18-38. (Attachment 11(A)).

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

> It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution. Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms . . . Congress is not limited by the 'navigable waters' test in its authority to control pollution under the Commerce Clause.[93]

The Third Circuit recently confirmed this view in a case involving challenges to a CWA total maximum daily load to control pollution within the watershed of the Chesapeake Bay, by stating:

> In response to that fire and to the general degradation of American water that followed the post-war industrial boom, Congress determined that the EPA should have a leadership role in coordinating among states to restore the Nation's waters to something approaching their natural state. See 33 U.S.C. § 1251 . . . [and] "[a]s the Supreme Court has admonished in the water-pollution context, 'We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.' *E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 132, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 777, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968))."[94]

Continued protection of "other waters" where their use, degradation, or destruction could impact interstate or foreign commerce is also supported the legislative history of the CWA. For example, as the agencies noted in the Proposed Rule:

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[93] *Holland*, 373 F. Supp. at 673. The agencies note that "EPA and the House Committee on Government Operations agreed with the decision in *Holland*., *see* Proposed Rule, 86 Fed.Reg 69378, fn. 7 ("EPA expressed the view that 'the *Holland* decision provides a necessary step for the preservation of our limited wetland resources,' and that 'the [*Holland*] court properly interpreted the jurisdiction granted under the [Clean Water Act] and Congressional power to make such a grant.' *See* section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Pub. Works, 94th Cong., 2d Sess. 349 (1976) (letter dated June 19, 1974, from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers). Shortly thereafter, the House Committee on Government Operations discussed the disagreement between the two agencies (as reflected in EPA's June 19 letter) and concluded that the Corps should adopt the broader view of the term 'waters of the United States' taken by EPA and by the court in *Holland*. *See* H.R. Rep. No. 93-1396, at 23-27 (1974). The Committee urged the Corps to adopt a new definition that 'complies with the congressional mandate that this term be given the broadest possible constitutional interpretation.' *Id*. at 27 (internal quotation marks omitted).").

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

> "In 1977, Congress considered and rejected a legislative proposal that would have redefined and limited the waters subject to the Corps' permitting authority under section 404 of the Clean Water Act to only navigable-in-fact waters and their adjacent wetlands. In 1975, the Corps had extended the scope of "waters of the United States" to encompass, in a phased approach, non-navigable tributaries, wetlands adjacent to primary navigable waters, intermittent rivers, streams, tributaries, and certain other categories of waters. 40 FR 31325–31326 (1975). In reaction to that broadened definition, Congress considered a proposal to limit the geographic reach of section 404, but it was defeated in the Senate and eliminated by the Conference Committee. H.R. Conf. Rep. No. 95-830, at 97-105 (1977). As the Supreme Court explained in *Riverside Bayview*, "efforts to narrow the definition of 'waters' were abandoned; the legislation as ultimately passed, in the words of Senator Baker, 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.'" 474 U.S. at 136–137; see also 123 Cong. Rec. 26718 (1977) (remarks of Senator Baker: "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.")." Proposed Rule, 86 Fed. Reg. at 69377 (emphasis added).

The agencies must retain all interstate commerce bases for encompassing the Nation's waters within the regulatory definition of "waters of the United States." Consistent with the CWA and Supreme Court and lower court precedent, readoption of subsection (a)(3) of the Pre-2015 Regulatory Definitions without amendment is necessary to restore protections for important waters across the country that are only protected by the "other waters" interstate commerce factors in the definition. Protecting (a)(3) other waters from pollution, where the use, degradation or destruction of those waters impacts interstate or foreign commerce, does not invoke the outer limits of Congress' Commerce powers.[95] Congress has "the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[96]

Tributaries, Impoundments, and Adjacent Wetlands

The Pre-2015 Regulatory Definitions also protect many other types of waters that are connected to traditionally navigable waters, the territorial seas, and interstate waters. Because the central the

[95] *See, e.g., United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940); *see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–526 (1941) ("[T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce.").

[96] *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

CWA is designed to achieve its objective by ensuring broad protections for the Nation's waters in order to control pollution at its source, it is imperative that the regulatory definition broadly encompass all of those connected waters—both to protect their physical, chemical, and biological integrity and to protect the integrity of any downstream surface waters to which they are connected.

For example, tributaries to traditional navigable and interstate waters were categorically protected for decades under the predecessor law to the 1972 CWA and are also categorically protected by the Pre-2015 Regulatory Definitions. They must remain categorically protected under the Proposed Rule because it is indisputable that Congress intended to protect all of the waters protected under the CWA's predecessor laws and to expand protections to other waters through the 1972 Amendments. Any regulatory definition will be contrary to Congressional intent if it does not encompass all tributaries to traditional navigable waters, interstate waters, and the territorial seas.[97]

Additionally, as noted in the 2013 Draft Connectivity Report and the 2014 Science Advisory Board ("SAB") review of that report for the CWR, there is strong scientific evidence to support the conclusion that ephemeral streams, intermittent streams, perennial streams, floodplain wetlands, non-floodplain wetlands, and other waters are either connected to downstream waters or sustain the physical, chemical, and/or biological integrity of downstream waters.[98] The Pre-2015 Regulatory Definitions protect these waters and it is imperative that CWA protections for these waters be fully restored in any final rule promulgated by the agencies.

As EPA's own Office of Research and Development has summarized:[99]

- "The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."

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[97] *See e.g.,* Proposed Rule TSD, at 16.

[98] U.S. Environmental Protection Agency, Office of Research and Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence - External Review Draft - EPA/600/R-11/098B (Sept. 2013) (hereinafter "Draft Connectivity Report"), available at: https://www.epa.gov/cwa-404/draft-scientific-report-connectivity-streams-and-wetlands-downstream-waters-review-and (Attachment 7); U.S. Environmental Protection Agency, Science Advisory Board, Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA-SAB-15-001 (Oct. 17, 2014) (hereinafter "SAB Report"), available at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0101

[99] U.S. EPA, Office of Research and Development, Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence (January 2015) at ES-3, 4, available at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0074 ("Connectivity Report").

- "The literature clearly shows that wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter."

- "Wetlands and open waters in non-floodplain landscape settings (hereafter called 'non-floodplain wetlands') provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and ground-water flows and through biological and chemical connections."

In addition, the SAB concluded, "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. Groundwater also can connect waters and wetlands that have no visible surface connections."[100]

The Pre-2015 Regulatory Definitions are protective of all of these waters and must be restored as soon as possible without amendment. Prior to the issuance of the CWR in 2015, this broad definition of "waters of the United States" had been in place since 1975 and is consistent with the intent of Congress announced in 1972. This longstanding definition of "waters of the United States" includes:[101]

A. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

B. All interstate waters, including interstate wetlands.

C. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural

[100] Letter from Dr. David T. Allen, Chair, EPA Science Advisory Board, to EPA Administrator Gina McCarthy, Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act" (Sept. 30, 2014) ("SAB Letter"), at 2-3, available at: https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100RO1P.TXT (Attachment 8).

[101] *See e.g.,* 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce.

D. All impoundments of waters otherwise defined as waters of the United States under this definition.

E. Tributaries of waters identified in paragraphs (a) through (d) of this definition.

F. The territorial seas.

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

III. THE AGENCIES' PROPOSED AMENDMENTS OF THE PRE-2015 REGULATORY DEFINITION ARE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW

Under the APA, the agencies are required to "provide reasoned explanation" for their actions, and "must show that there are good reasons" for replacing the Pre-2105 Regulations with the Proposed Rule definition[102] As stated in *FCC v. Fox Television Stations, Inc.* ("*Fox*"),[103] a more detailed justification is required when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy" and "[i]t would be arbitrary or capricious to ignore such matters … [because] a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[104] The agencies must also demonstrate that their action is a "permissible construction" of the CWA,—*i.e.* that the agencies' action is not "arbitrary, capricious, or manifestly contrary to the statute."[105]

The Agencies have not met these requirements in the Proposed Rule regarding the proposed limitations on tributaries, impoundments, other waters, and wetlands adjacent to impoundments,

[102] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

[103] *Id.*

[104] 556 U.S. at 515-16 (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, (1996)).

[105] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

tributaries, and other waters. As explained throughout these comments, the agencies have not provided a reasoned explanation for replacing the Pre-2105 Regulatory Definition with the much narrower one announced in the Proposed Rule.

Additionally, the agencies must evaluate the Pre-2015 Regulatory Definition in relation to the Proposed Rule to determine the impacts of the Proposed Rule on water resources and CWA programs, as well as for the economic evaluation. The agencies have completely failed to undertake that analysis. Instead, the agencies compared the Proposed Rule to the NWPR and the Pre-2015 "regulatory regime," which is the "agencies' pre-2015 definition of 'waters of the United States,' implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience."[106] However, the Pre-2015 regulatory regime, the 2003 *SWANCC*[107] and 2008 *Rapanos*[108] Guidance Documents, and the agencies' interpretations of these guidance documents are not the law that the agencies propose to replace with the Proposed Rule. Further, as explained below, the 2003 *SWANCC* and 2008 *Rapanos* Guidance Documents are inconsistent with the CWA and with Supreme Court precedent.

In the Proposed Rule, the agencies summarize the proposed definition and its legal and factual bases as follows:

> In developing the proposed rule, the agencies also considered the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and expertise after more than 30 years of implementing the 1986 regulations defining ''waters of the United States,'' including more than a decade of experience implementing those regulations consistent with the Supreme Court's decisions in Riverside Bayview, SWANCC, and Rapanos. The agencies' interpretation also reflects consideration of the statute as a whole, including section 101(b), which states that ''it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'' 33 U.S.C. 1251(b). The proposed rule's limits appropriately draw the boundary of waters subject to federal protection by ensuring that where upstream waters significantly affect the integrity of waters and the federal interest is indisputable—the traditional navigable waters, interstate

[106] Proposed Rule, 86 Fed. Reg. 69373, fn. 4.

[107] Legal Memorandum on Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters (2001 SWANCC Guidance), EPA-HQ-OW-2021-0602-0094; 68 FR 1995 (2003 SWANCC Guidance), available at: EPA-HQ-OW-2021-0602-0095.

[108] U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (June 5, 2007), superseded December 2, 2008 (the "2008 *Rapanos* Guidance"), see also Proposed Rule, 86 Fed.Reg at 69381("The agencies note that the guidance '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.' Rapanos Guidance at 4 n.17.").

> waters, and territorial seas—Clean Water Act programs would apply to ensure that those downstream waters are protected. And where they do not, the agencies would leave regulation to the states and tribes. The proposed rule's relatively permanent and significant nexus limitations are thus based on the agencies' conclusion that together, those standards are consistent with the statutory text, advance the objective of the Act, are supported by the scientific record and Supreme Court case law, and appropriately consider the policies of the Act. In addition, because the proposed rule reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, it is familiar and implementable.[109]

Thus, the Proposed Rule does not build on the foundation of the 1986 Regulations—it is dismantling the definition's core supports. The proposed definition would not even protect all of the waters that were covered by the water pollution laws in effect prior to the 1972 CWA.[110] The Proposed Rule would transform the CWA from the federal "all-encompassing program of water pollution regulation" designed to eliminate all water pollution that the Supreme Court described in *City of Milwaukee v. Illinois*, *Riverside Bayview, International Paper Co. v. Ouellette, PUD No. 1 of Jefferson Cnty. v. Wash. Dep't. of Ecology,* and *Arkansas v. Oklahoma*, into a narrow law focused solely on protecting water quality in traditional navigable waters, interstate waters, and the territorial seas. The CWA, constrained as proposed by the agencies, leaves all of the other water pollution in the Nation's waters unaddressed by the CWA and up to the states and tribal governments to resolve on their own. The Proposed Rule would, thus, recreate the very problem that Congress solved through enactment of the CWA.

In addition to the reasons set forth in Section II above, as explained in detail below, the fundamental bases for the Proposed Rule's limitations on the Pre-2015 Regulatory Definitions are contrary to the objective and text of the CWA, Congressional intent, binding Supreme Court precedent, and longstanding agency interpretations of the Act.

A. The Proposed Definition is Inconsistent with the Statutory History Giving Rise to the CWA and Undermines the Comprehensive Nature of the CWA, its Objective, and its Programs

First, although there is extensive Supreme Court precedent relevant to the meaning of "waters of the United States" and the intended jurisdictional reach of the CWA, and even more abundant precedent from the courts of appeals and federal district courts,[111] the agencies continue to focus primarily on three Supreme Court cases, *Riverside Bayview*, *SWANCC* and *Rapanos* and, as a result, propose to redefine "waters of the United States" in a manner far more narrow than the jurisdiction

[109] Proposed Rule, 86 Fed. Reg. at 69374 (emphasis added).

[110] Hines History of the CWA, at 1-20.

[111] *See* 2007 Comments, 2011 Comments and 2014 Comments, *supra* fn. 22.

provided under the Pre-2015 Regulatory Definitions (and the nation's water quality laws in effect prior to 1972). In so doing, the agencies impermissibly ignore precedent that is central to defining CWA jurisdiction and erroneously interpret *Riverside Bayview*, *SWANCC* and *Rapanos* in a manner that will significantly reduce CWA jurisdiction over protected waters contrary to the law. As the agencies' noted in the Proposed Rule TSD, "[n]either the *SWANCC* Court nor the plurality or Kennedy opinions in *Rapanos* purports to set out the complete boundaries of Clean Water Act jurisdiction. *See, e.g.*, 547 U.S. at 731 ('[w]e need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.') (plurality opinion)."[112] Additionally, as the agencies also noted, *SWANCC* and *Rapanos* did not overrule prior Supreme Court case law confirming the breadth of the waters protected by the CWA.[113]

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

Third, the agencies have failed to interpret and apply all binding Supreme Court and lower court precedent in amending the Pre-2015 Regulatory Definitions. There is a plethora of precedent, including Supreme Court opinions, confirming the intended breadth of the phrase "waters of the United States," and consistently applying the agencies' longstanding interpretation of that phrase set forth in the agencies' Pre-2015 Regulatory Definitions. Some of this precedent upholding broad CWA jurisdiction over the nation's waters is discussed in Sections I and II above. None of that precedent is consistent with the agencies' proposal to only protect the nation's waters to the extent that those waters "significantly affect" the integrity of traditional navigable waters, interstate waters, and the territorial seas, and the agencies have failed to provide any rational basis for limiting the CWA in that manner.

It is imperative the agencies recognize that the CWA requires categorical protection tributaries and ensure that the Proposed Rule maintains that categorical protection. Prior to the enactment of the 1972 CWA, both traditionally navigable waters, interstate waters, and their non-navigable tributaries were accepted as being well within the Commerce Clause powers of the federal

[112] Proposed Rule TSD, at 21.

[113] *Id.* at 19.

government.[114] The agencies acknowledge that Section 13 of the Rivers and Harbors Act of 1899, the Refuse Act, made it unlawful to discharge refuse "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water,"[115] and provided a lengthy analysis demonstrating that Congress protected interstate waters and their tributaries under the Water Pollution Control Act of 1948 and subsequent iterations of that law.[116] In fact, the agencies state that "[t]he Clean Water Act is clear that interstate waters that were previously subject to federal regulation remain subject to federal regulation."[117] Thus, the agencies have not provided any rational basis for their decision not to categorically protect tributaries to traditional navigable and interstate waters under the CWA.

With the 1972 Amendments, Congress created "an all-encompassing program of water pollution regulation" [118] and, thus, intended to expand the number and nature of the waters covered under the CWA—beyond interstate waters, traditionally navigable waters and their tributaries— to protect water quality and aquatic ecosystems in the Nations' waters to the fullest extent permitted by the Commerce Clause. As the agencies recognize, the "major purpose" of the CWA was "to establish a comprehensive long-range policy for the elimination of water pollution."[119] *Riverside Bayview* stands for the proposition that Congress took a "broad, systemic view of the goal of maintaining and improving water quality" with the word "integrity," contained in the Act's "objective," referring to "a condition in which the natural structure and function of ecosystems [are] maintained."[120]

The Court, in *Riverside Bayview*, noted "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems"[121] and that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic

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[114] The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to traditionally navigable waters and "into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . .. " 33 U.S.C. § 407; Water Pollution Control Act of 1948, Pub. L. No. 80-845, 2(d)(1), (4), 62 Stat. 1156-57.

[115] Proposed Rule, 86 Fed.Reg at 69375.

[116] Proposed Rule, 86 Fed.Reg at 69417 ("The 1948 Water Pollution Control Act declared that the 'pollution of interstate waters' and their tributaries is 'a public nuisance and subject to abatement.' 33 U.S.C. 466a(d)(1) (1952) (codifying Pub. L. 80– 845 section 2(d)(1), 62 Stat. 1156 (1948)). Interstate waters were defined without reference to navigability: 'all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.' 33 U.S.C. 466i(e) (1952) (codifying Pub. L. 80–845 section 10(e), 62 Stat. 1161 (1948)).."); Proposed Rule TSD, at 11-25.

[117] Proposed Rule TSD, at 12.

[118] *International Paper Co. v. Ouellette*, 479 U.S. at 492.

[119] Proposed Rule, 86 Fed. Reg. at 69375 (*citing* S. Rep. No. 92-414, at 95 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 1511 (1971) (emphasis added).

[120] *Riverside Bayview,* 474 U.S. at 132.

[121] *Riverside Bayview,* 474 U.S. at 132-33.

cycles and it is essential that discharge of pollutants be controlled at the source.'"[122] To accomplish these goals, the Supreme Court in *Riverside Bayview* concluded, Congress defined the "waters covered by the Act broadly" to encompass all "waters of the United States."[123]

The Court also held that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import. In adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term."[124] The unanimous *Riverside Bayview* opinion remains good law, confirms the breadth of the CWA, and is consistent with the legal bases for the categories of jurisdictional waters included in the Pre-2015 Regulatory Definitions.

Thus, unlike the Rivers and Harbors Act of 1899, the CWA is not focused on the prevention of "navigation-impeding" conduct in navigable waters.[125] Congress did not premise this expansion of jurisdiction on the extent to which waters were connected to traditional navigable or interstate waters. To the contrary, Congress intended to repudiate the traditional navigability tests and limitations on federal authority, and to instead utilize the full authority of the federal government to regulate water pollution in "virtually all surface water in the country"[126] under its Commerce Clause authority. While extensive Rivers and Harbors Act precedent dating from 1899 demonstrates that the Commerce Clause provided adequate authority for regulation of navigable waters and their tributaries, it is equally clear that Congress' Commerce Clause authority to control pollution was not limited to traditionally navigable waters or traditional tests of navigability.

For example, when it invalidated portions of the Corps' 1974 regulations that limited CWA jurisdiction to waters "which had been, are, or may be, used for interstate or foreign commerce," the U.S. District Court for the District of Columbia held that when Congress defined the term "navigable waters" as "the waters of the United States, including the territorial seas" it "asserted federal jurisdiction over the Nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not

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[122] *Riverside Bayview,* 474 U.S. at 132-33 (citing H.R.Rep. No. 92–911, p. 76 (1972); S.Rep. No. 92–414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742).

[123] *Riverside Bayview,* 474 U.S. at 133.

[124] *Riverside Bayview,* 474 U.S. at 133 (emphasis added).

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

[126] *See, e.g., Int'l Paper Co. v. Ouellette*, 479 U.S. at 489; *Env't Prot. Agency v. California ex rel. State Water Res. Control Bd,* 426 U.S. 200, 206–08 and fn. 16(1976)' and *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc*., 452 U.S. 264, 289 (1981), *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)).

limited to the traditional tests of navigability."[127] This holding is consistent with the Conference Committee Report for the final bill which states "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[128]

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

> The Conference bill defined the term 'navigable waters' broadly for water quality purposes. It means 'all the waters of the United States' in a geographic sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws . . . Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.[129]

Thus, while the agencies may possess some discretion to determine the outer bounds of the definition of "waters of the United States" with regard to wetlands,[130] the text and objective of the CWA and binding Supreme Court precedent constrain that discretion, most obviously with regard to traditional navigable waters, interstate waters, and their tributaries which were protected prior to the 1972 Amendments, but also with regard to "other waters" and wetlands. The agencies acknowledge that Congress intended to expand CWA protections beyond those the waters protected prior to the 1972 Amendments.[131] The text of the CWA and Supreme Court precedent confirm that truth.

In the face of all of this, the agencies state:

> By proposing regulations interpreting the Act to cover waters that meet the relatively permanent standard or the significant nexus standard, the agencies have reasonably interpreted the Act to protect those waters necessary to protect the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas while leaving regulatory authority over all other waters exclusively to the states. **This**

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[127] *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); 39 Fed. Reg. 12119 (April 3, 1974) (emphasis added).

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

[129] 118 Cong. Rec. 33, 756 (1972); *id*. at 250-51.

[130] See *Rapanos,* 474 U.S. at 758 (Roberts, C.J., concurring) (''[g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the [agencies] would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority'' under the Clean Water Act.)

[131] *See, e.g.,* Proposed Rule, 86 Fed. Reg. at 69396; Proposed Rule TSD, at 11-25.

> **interpretation respects the statutory history that gave rise to the Act and gives effect to the comprehensive nature of the Clean Water Act,** its objective, and the many programs affected by the scope of "waters of the United States" designed to meet that objective, along with other important policies of the Act, while ensuring that states have sole authority over waters with no or insignificant connection to the foundational waters clearly protected by the Clean Water Act.[132]

The agencies' proposed interpretation fails to give effect to the comprehensive nature of the CWA, and as demonstrated above, is not consistent with the statutory history giving rise to the Act. The Proposed Rule would not protect waters that were jurisdictional in the statutes giving rise to the Act, and it does not respect Congress' universally accepted intent to expand upon those protected waters to comprehensively control water pollution in all of the Nation's waters. It is not rational for the agencies to assert that Congress intended to only protect "other waters" and wetlands to the extent that they function as tributaries with a continuous surface connection or significant nexus interstate waters, traditional navigable waters, or the territorial seas. This is no expansion at all. In fact, because the agencies are proposing to place "relatively permanent" and "significant nexus" requirements on jurisdiction over tributaries, the agencies are actually proceeding as if the 1972 CWA Amendments reduced the numbers and types of waters protected by the CWA. This is an entirely unsupportable and indefensible position.

B. The Agencies Misconstrue and Misapply the Holdings in *Riverside Bayview*, *SWANCC*, and *Rapanos*

Riverside Bayview

In the Proposed Rule, the agencies misconstrue *Riverside Bayview* by stating that "[t]he U.S. Supreme Court first addressed the scope of 'waters of the United States' protected by the Clean Water Act in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (''Riverside Bayview''), which involved wetlands adjacent to a traditional navigable water in Michigan."[133] The agencies further state that "[t]he Court went on to note that to achieve the goal of preserving and improving adjacent wetlands that have significant ecological and hydrological impacts on traditional navigable waters, it was appropriate for the Corps to regulate all adjacent wetlands, even though some might not have any impacts on traditional navigable waters. Id. at 135 n.9."[134]

As discussed extensively throughout these comments, the *Riverside Bayview* case is not the first time the Supreme Court addressed the scope of the waters protected under the CWA. Additionally, the Court did not limit its holding to the CWA's jurisdiction over wetlands adjacent to "traditional

[132] Proposed Rule, 86 Fed. Reg. at 69404 (emphasis added).

[133] Proposed Rule, 86 Fed. Reg. at 69379 (emphasis added).

[134] *Id.* (emphasis added).

navigable waters." The Court did not say anything about protecting adjacent wetlands "that have significant ecological and hydrological impacts on traditional navigable waters" in footnote 9 or elsewhere in the opinion. To the contrary, the Court recognized the breadth of the CWA's jurisdiction over "waters," including "lakes, rivers, streams, and other bodies of water" and "aquatic ecosystems"[135] and determined that the "significant effects on water quality and the aquatic ecosystem" present in the majority of cases justify the protection of wetlands adjacent to "other bodies of water."[136]

This is important because the Court in *Riverside Bayview* addressed the scope of CWA jurisdiction over wetlands adjacent to other "waters of the United States," which the Court recognized encompassed "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'"[137] The Court noted the challenge of determining the boundary between land and protected waters when regulating adjacent wetlands. The Court was not evaluating the adjacency of wetlands to "traditionally navigable waters" as the agencies assert, but rather adjacency to the broader category of "other waters" protected by the CWA. The Court stated:

> [o]f course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended **to abandon traditional notions of "waters" and include in that term "wetlands" as well**. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass **wetlands adjacent to waters as more conventionally defined** . . . In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all

[135] *Riverside Bayview*, 474 U.S. at 131-35.

[136] Instead, the Court stated in fn. 9 that "[o]f 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. See 33 C.F.R. § 320.4(b)(4) (1985)." (emphasis added).

[137] *Riverside Bayview,* 474 U.S. at 131 (resolving the question, "whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'").

> wetlands adjacent to **other bodies of water over which the Corps has jurisdiction** is a permissible interpretation of the Act.[138]

Thus, the Court, consistent with prior Supreme Court precedent, recognized that "of course" Congress intended that the CWA protect rivers, streams, and other bodies of water that did not satisfy traditional tests of navigability, but protection of wetlands adjacent to those waters was a tougher call. Wetlands adjacent to "other bodies of water over which the Corps [and EPA] have jurisdiction" is where the line drawing between land and waters and the need for evaluation of the function of wetlands as part or the "aquatic environment" came into play. But importantly, the Court concluded, based on the extensive evidence of the importance of adjacent wetlands to the Nation's waters, that it was reasonable to conclude wetlands adjacent to other "waters of the United States" are themselves jurisdictional waters under the CWA.

SWANCC

In the Proposed Rule, the agencies state that the Court in *SWANCC* "held that the use of 'isolated' non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal authority under the Clean Water Act."[139] However, the Court in *SWANCC* held **solely** that 33 C.F.R. 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the Migratory Bird Rule, 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA."[140] Thus, the *SWANCC* decision was particularly fact-specific as to the respondents' abandoned sand and gravel pit and related solely to CWA Section 404 jurisdiction under the Migratory Bird Rule.

SWANCC did not impact or limit the agencies' jurisdiction over any other waters, including non-navigable tributaries, rivers, or streams, adjacent wetlands, lakes, impoundments, non-navigable, intrastate ponds, or "other waters" that could affect interstate or foreign commerce under subsection (a)(3) of the Pre-2015 Regulatory Definitions.[141] The agencies acknowledge that the "Supreme Court did not invalidate" the section (a)(3) "other waters" provision of the Pre-Regulatory Definitions.[142]

Because the Supreme Court limited its holding to the jurisdictional basis asserted by the Corps (the Migratory Bird Rule), the decision did not require, or even imply, that the agencies could not continue to rely on any provisions in the pre-2015 definition of "waters of the United States" to assert CWA jurisdiction. The corollary is also true. *SWANCC* does not authorize or provide any basis

[138] *Riverside Bayview,* 474 U.S. at 133 (emphasis added).

[139] 86 Fed.Reg at 69379.

[140] *SWANCC,* 531 U.S. at 174.

[141] *See* 2003 Comments, *supra* fn. 22.

[142] *See* Proposed Rule TSD, at 131-32.

for the agencies to remove any protections or jurisdictional bases under the Commerce Clause for tributaries, adjacent waters or "other waters" encompassed within the Pre-2015 Regulatory Definitions.

Rapanos

Similarly, the Supreme Court in *Rapanos*, did not invalidate the Pre-2015 Regulatory Definitions of "waters of the United States" when it ruled on issues presented in the consolidated cases—the extent of CWA jurisdiction **over wetlands adjacent to non-navigable tributaries to traditional navigable waters** under Section 404 of the CWA.[143] The *Rapanos* Court issued no majority opinions and the differing opinions suggested three different tests for determining whether wetlands adjacent to non-navigable tributaries of traditional navigable waters may be protected under the CWA.[144] The Rapanos decision did not overrule the Court's opinion in *Riverside Bayview*.

In the Proposed Rule, the agencies mischaracterize *Rapanos* when they state that "[a] four-Justice plurality in Rapanos interpreted the term ''waters of the United States'' as covering ''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."[145] The agencies further mischaracterize *Rapanos* by stating "Justice Kennedy concluded that 'to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.'"[146] The agencies' mischaracterizations of the *Rapanos* opinions are summarized below, and we urge the agencies to carefully reconsider their reliance on their misinterpretations to limit CWA jurisdiction over tributaries, impoundment, wetlands, and "other waters."[147]

- **Relatively Permanent Test:** The four-justice plurality opinion, written by Justice Scalia, recognized that the CWA covers non-navigable waters in addition to traditional navigable waters, but declined to "decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act."[148] Instead, the plurality focused on the

[143] *Rapanos*, 547 U.S. at 787 (emphasis added).

[144] *Rapanos, 547 U.S. at* at 715.

[145] Proposed Rule, 86 Fed. Reg. at 69379 (internal citations omitted).

[146] Proposed Rule, at 69279-80 (emphasis added).

[147] *See e.g.,* Proposed Rule TSD, at 19-25 (The agencies provide a different interpretation of both *SWANCC* and *Rapanos* in the Proposed Rule TSD noting, for example, that "[n]either the SWANCC Court nor the plurality or Kennedy opinions in Rapanos purports to set out the complete boundaries of Clean Water Act jurisdiction. *See, e.g.,* 547 U.S. at 731 ('[w]e need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.') (plurality opinion)."). The agencies' logic and reasoning apply equally to tributaries, impoundments, adjacent wetlands, and "other waters.").

[148] *Rapanos*, 547 U.S. at. at 731.

meaning of "the waters" in 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

- The plurality concluded that "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in **'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features**.' All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[149]

- The plurality also noted that "[b]y describing 'waters' as 'relatively permanent,'" it did not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances" or "seasonal rivers which contain continuous flow during some months of the year . . .'" and, further, that it had "no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify a channel as a 'wate[r] of the United States.'"[150]

- Upon this opinion, the plurality sought remand of the cases for a determination by the lower courts "**whether the ditches or drains near each wetland are "waters" in the ordinary sense of containing a relatively permanent flow**; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*."[151] Based on this test, the wetlands at issue would be jurisdictional only if they are adjacent to "relatively permanent" bodies of water that are covered under the CWA and possess a "continuous surface connection" to that water.

- The plurality held "[t]hus, establishing that **wetlands such as those at the Rapanos and Carabell sites** are covered by the Act requires two findings: first, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[152]

- The context for the opinion is essential to understanding its holding, as the court was opining based on the facts of the cases before it and the jurisdictional bases asserted

[149] *Rapanos*, 547 U.S. at 731-32 (internal citations omitted) (emphasis added).

[150] *Rapanos*, 547 U.S. at 731-32 (internal citations omitted).

[151] *Rapanos*, 547 U.S. at 757 (emphasis added).

[152] *Rapanos*, 547 U.S. at 742 (emphasis added).

by the Corps.[153] The wetlands at issue in *Rapanos* were asserted to be jurisdictional as wetlands adjacent to a non-navigable tributary of a traditional navigable water under the Corps' Pre-2015 Definition. Accordingly, this is the jurisdictional basis the *Rapanos* plurality evaluated.

- The wetlands were alleged to be adjacent to a: (1) a "drain" that flowed to a creek then to a navigable river, (2) a "drain" that flowed to a tributary of a navigable river, (3) wetlands with a surface connection to river that flows into Lake Huron, and (4) a "drain" or ditches that eventually flowed to Lake St. Clair. Thus, the plurality concluded that assertion of jurisdiction over adjacent wetlands in these types of circumstances (i.e. wetlands adjacent to "drains," other wetlands, or ditches) required application of the "relatively permanent" test.

- The plurality did not opine on or establish a test for asserting jurisdiction over tributaries, lakes, ponds, impoundments, interstate waters, "other waters," or even every type of wetland in every circumstance—only wetlands alleged to be jurisdictional based on their adjacency to drains, other wetlands, and particular types of ditches under the tributaries to traditional navigable waters category of the Corps' Pre-2015 Regulatory Definition.

- **Significant Nexus Test:** Justice Kennedy concurred with the plurality that the cases should be remanded, but firmly rejected the plurality's reasoning for doing so. Justice Kennedy identified the issue to be decided in the consolidated case as "whether the term 'navigable waters' in the Clean Water Act extends **to wetlands that do not contain and are not adjacent to waters that are navigable in fact**."[154] According to Justice Kennedy's opinion:

  - "In Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (SWANCC), the Court held, **under the circumstances presented there**, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[155] While we do not agree that this is an accurate description of the Court's holding in *SWANCC*, the "circumstances presented there" involved an abandoned sand and gravel pit with no alleged connection to any other "water of the United States," which was alleged to be

[153] Wetlands adjacent to tributaries of traditionally navigable waters were jurisdictional under the Corps Pre-2015 Regulatory Definition through a "combination of §§ 323.2(a)(1) (covering traditionally navigable waters), (4) (covering tributaries of subsection (a)(1) waters), and (7) (covering wetlands adjacent to subsection (a)(4) waters)," *see, e.g., Rapanos*, 547 U.S. at 792, fn. 3.

[154] *Rapanos*, 547 U.S. at 759 (emphasis added).

[155] *Rapanos*, 547 U.S. at 759 (emphasis added).

jurisdictional based on the Migratory Bird Rule—not the Pre-2015 Regulatory Definitions. In the Proposed Rule, the agencies omitted the "under the circumstances present there" language when characterizing Justice Kennedy's opinion. With that language restored, it is clear that Justice Kennedy was merely summarizing his view of the *SWANCC* decision and was not announcing an entirely new standard for determining the extent of CWA jurisdiction over all of the Nation's waters.

- Rather, Justice Kennedy determined: "[T]he Corps' jurisdiction over **wetlands** depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes . . . With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters – functions such as pollutant trapping, flood control, and runoff storage. . . Accordingly, **wetlands** possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the **wetlands**, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of **other covered waters more readily understood as 'navigable.**' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[156]

    - Justice Kennedy's use of "navigable" here meant other covered waters that are "waters of the United States"—not "waters that are or were navigable in fact or that could reasonably be so made" as asserted by the agencies in the Proposed Rule.[157]

- Justice Kennedy further opined that "[w]hen the Corps seeks to regulate **wetlands adjacent to navigable-in-fact waters**, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, **the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries.**"[158] Notably, Justice Kennedy indicated that the record before the Court contained evidence of a possible significant nexus and that the end result of the remand might well be that the "Corps assertion of jurisdiction is valid," as suggested by the dissent.[159]

[156] *Rapanos*, 547 U.S. at 779-80 (emphasis added).

[157] *Rapanos*, 547 U.S. at 69279-80 (emphasis added).

[158] *Rapanos*, 547 U.S. at 782 (emphasis added).

[159] *Rapanos*, 547 U.S. at 784 (emphasis added).

- Accordingly, Justice Kennedy's "significant nexus" test applies to situations where the agencies are attempting to "regulate wetlands based on adjacency to non-navigable tributaries." It does not apply to all other categories of waters protected under the Pre-2015 Regulatory Definitions. In fact, it doesn't even apply to all wetlands. Specifically, Justice Kennedy did not announce a "significant nexus" test for determining the scope of the CWA's jurisdiction over tributaries. To the contrary, with regard to asserting jurisdiction over wetlands adjacent to non-navigable tributaries:

    - Justice Kennedy stated "[t]hrough 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**."[160]

    - Justice Kennedy further determined that the Corps' Pre-2015 Regulatory Definition "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with **other regulated waters** to constitute 'navigable waters' under the Act," but "[a]bsent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[161]

    - Again, "navigable waters" under the CWA are "waters of the United States," and the CWA is concerned with protection of "other regulated waters" and the "entire aquatic ecosystem" – not solely downstream "foundational waters" as the agencies have proposed.

- **Existing Definition Test:** The dissent, written by Justice Stevens, and joined by Justices Souter, Ginsburg, and Breyer, noted the "narrow question presented" in the case was whether "wetlands adjacent to tributaries of traditionally navigable waters are 'waters of the United States' subject to the jurisdiction of the Army Corps" and opined that the Corps' Pre-2015 Regulatory Definition that protects these types of wetlands is a reasonable interpretation of the statutory term "waters of the United States."[162]

[160] *Rapanos*, 547 U.S. at 780-81.

[161] *Rapanos*, 547 U.S. at 781-82 (internal citations omitted) (emphasis added).

[162] *Rapanos*, 547 U.S. at 787.

- Justice Stevens noted that "[t]he Army Corps has determined that **wetlands adjacent to tributaries of traditionally navigable waters** preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision."[163]

- Justice Stevens further noted that the Court's "unanimous opinion in *Riverside Bayview* squarely controls these cases" and rejected the rationales of the plurality and Justice Kennedy, but stated "[g]iven that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases–and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied–on remand each of the judgments should be reinstated if *either* of those tests is met."[164]

- Justice Breyer issued a separate dissenting opinion stating that, in his view, "the authority of the Army Corps of Engineers under the Clean Water Act extends to the limits of congressional power to regulate interstate commerce . . . I therefore have no difficulty finding that the wetlands at issue in these cases are within the Corps' jurisdiction, and I join Justice STEVENS' dissenting opinion.[165]

In concurring with the plurality opinion, Chief Justice Roberts noted that, with regard to the Court's decision regarding jurisdiction over the **wetlands** adjacent to non-navigable tributaries of traditional navigable waters at issue in *Rapanos*, "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act."[166] Justice Roberts further stated that "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the

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[163] *Rapanos*, 547 U.S. at 788, 796 ("Among other things, wetlands can offer "nesting, spawning, rearing and resting sites for aquatic or land species"; "serve as valuable storage areas for storm and flood waters"; and provide "significant water purification functions." 33 CFR § 320.4(b)(2) (2005); 474 U.S., at 134–35. These values are hardly "independent" ecological considerations as the plurality would have it, *ante*, at 2226—instead, they are integral to the "chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a).")

[164] *Rapanos*, 547 U.S. at 792, 810.

[165] *Rapanos*, 547 U.S. at 811 (citing Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U.S. 159, 181–182 (2001) (SWANCC) (STEVENS, J., dissenting).).

[166] *Rapanos*, 547 U.S. at 758 (emphasis added).

Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority."[167]

In sum, *SWANCC* should be read as standing for the narrow proposition that the Corps cannot rely on the interpretations in the Migratory Bird Rule to assert jurisdiction over isolated, intrastate, non-navigable sand and gravel pits or similar waters under the CWA. *Rapanos* should similarly be narrowly construed solely to evaluate CWA jurisdiction over certain wetlands adjacent to non-navigable tributaries.[168] However, because no opinion commanded a majority in *Rapanos*, the agencies should exercise their discretion to interpret the CWA consistent with their longstanding interpretations of the CWA based on the text, objective, and legislative history of the Act, which are reflected in the Pre-2015 Regulatory Definitions and are consistent with other binding Supreme Court opinions confirming the breadth of the protections that the CWA provides for the Nation's waters.

Riverside Bayview, SWANCC and *Rapanos* do not mandate, or even support, the regulatory definition that the agencies have proposed. The agencies, which are duty-bound to fully effectuate the objective of the CWA, should not rely on these opinions to narrow CWA jurisdiction over tributaries or to eliminate the broad Commerce Clause jurisdictional bases for protecting rivers, streams, lakes, wetlands, and (a)(3) other waters. Neither *Riverside Bayview*, *SWANCC*, *Rapanos*, nor any other precedent, limits or establishes the outer bounds of Commerce Clause authority for purposes of the CWA.[169] However, *Riverside Bayview* and many other Supreme Court opinions confirm that the waters long protected by the agencies' Pre-2015 Regulatory Definitions should remain protected in any definition promulgated by the agencies.

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[167] *Rapanos*, 547 U.S. at 758 (emphasis in original).

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

[169] In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. See 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court "expressly declined to reach" the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, "in Rapanos it appears five justices had no constitutional concerns in any event … [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause …." *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), cert. denied sub nom., Am. Farm Bureau Fed'n v. E.P.A., 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016) (citing *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring); *see also* 2003 Comments, *supra* fn. 22 at 4-6 and 2011 Comments, *supra* fn. 22 at 9-15

C. The Agencies Must Not Interpret CWA Sections 101(b) and 510 as Limiting CWA Jurisdiction

The CWA, as reflected in the text of Sections 101(b) and 510, establishes a system of cooperative federalism "that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."[170] These sections do not, contrary to the agencies' view, authorize the agencies to balance "the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation"[171] in defining "waters of the United States."

For example, Section 510 states:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.[172]

When the full text of the Section 510 is evaluated, its meaning becomes apparent. It "does no more than to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters."[173]

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[170] *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981); *New York v. United States*, 505 U.S. 144, 167 (1992) [internal citations omitted] ("This arrangement, which has been termed 'a program of cooperative federalism,' Hodel, supra, is replicated in numerous federal statutory schemes. These include the Clean Water Act, see Arkansas v. Oklahoma, (Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective");" *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489–91.

[171] Proposed Rule, 86 Fed. Reg. at 69419.

[172] 33 U.S.C.A. § 1370

[173] *See Arkansas v. Oklahoma*, 503 U.S. 91, 98–100 (1992) ("On remand, Illinois argued that § 510 of the Clean Water Act, 33 U.S.C. § 1370, expressly preserved the State's right to adopt and enforce rules that are more stringent than federal standards.[5] The Court of Appeals accepted Illinois' reading of § 510, but held that that section did "no more than to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters*." Illinois v. Milwaukee*, 731 F.2d 403, 413 (CA7 1984), *cert. denied*, 469 U.S. 1196, 105 S. Ct. 979, 83 L.Ed.2d 981

Similarly, CWA Section 101(b) provides that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[174] Section 101(b) recognizes "that the States should have a significant role in protecting their own natural resources" and the CWA, for example, "provides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U.S.C. § 1342(b)."[175]

To achieve Congress' ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments.[176] It is clear that the states can take a primary role in eliminating pollution in waters that are protected by the federal CWA.[177] This is the system of cooperative federalism under the CWA that has been in place since 1972, and it is essential to achieving the objective of the CWA.[178] Nothing in this section, or any other section of the Act, authorizes the Agencies to narrowly

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(1985). This Court subsequently endorsed that analysis in *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S. Ct. 805, 93 L.Ed.2d 883 (1987).")

[174] 33 U.S.C. § 1251(b).

[175] *Int'l Paper Co. v. Ouellette*, 479 U.S. at 489; *accord Env't Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. at 206–08. *See also Rapanos,* 547 U.S. 803 (Steven, J. dissenting) ("As modified, § 1251(b) specifically recognizes this role for the States as part of their primary responsibility for preventing water pollution. Even focusing only on the Act as it stood between 1972 and 1977, but see *International Paper Co. v. Ouellette*, 479 U.S. 481, 489–490, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) (interpreting § 1251(b) in light of the 1977 additions), broad exercise of jurisdiction by the Corps still left the States with ample rights and responsibilities. *See S.D. Warren Co. v. Maine Bd. of Environmental Protection, ante*, at 386–387, 126 S.Ct. 1843, 1848–1849, 164 L.Ed.2d 625. States had the power to impose tougher water pollution standards than required by the Act, § 1370, and to prevent the Corps and the EPA from issuing permits, § 1341(a)(1)—not to mention nearly exclusive responsibility for containing pollution from nonpoint sources.").

[176] *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 700 (1994).

[177] This fact is expressly acknowledged in the NWPR Supplemental Notice: "Congress envisioned a major role for the states in implementing the CWA . . . Under this statutory scheme, the states are responsible for developing water quality standards for waters of the United States within their borders and reporting on the condition of those waters to EPA every two years. Id. at 1313, 1315. States are also responsible for developing total maximum daily loads (TMDLs) for waters that are not meeting established water quality standards and must submit those TMDLs to EPA for approval. Id. at 1313(d). States also have authority to issue water quality certifications or waive certification for every federal permit or license issued within their borders that may result in a discharge to navigable waters. Id. at 1341. A change to the interpretation of ''waters of the United States'' may change the scope of waters subject to CWA jurisdiction and thus may change the scope of waters for which states may assume these responsibilities under the Act . . . Forty-seven states administer the CWA section 402 permit program for those waters of the United States within their boundaries, and two administer the section 404 permit program." NWPR Supplemental Notice, at 32232-33.

[178] *See e.g., Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 129 (D.C. Cir. 1976) ("Thus, without the national standards required by s 301, the fifty states would be free to set widely varying pollution limitations. These might arguably be different for every permit issued ... The plainly expressed purpose of Congress to require nationally uniform interim limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by

define "waters of the United States" by somehow balancing states' rights against the objective of the CWA. Congress has already considered and resolved those issues in the CWA,[179] and it is not within the authority of the agencies to insert their own judgment to the contrary.

Additionally, having due regard for the role of the states is not the same thing as defining "waters of the United States" in a manner that reduces federal, and increases state, jurisdiction—which was plainly the agencies' goal in elevating and contorting the meaning of CWA Section 101(b) in the NWPR. *S.D. Warren Co. v. Maine Bd. of Environmental Protection* confirms that Congress protected states' interests by broadly protecting the nation's waters and providing mechanisms for the states to protect their own interests articulated in 101(b) through the CWA itself:

> Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns. See 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"); § 1256(a) (federal funds for state efforts to prevent pollution); see also § 1370 (States may impose standards on the discharge of pollutants that are stricter than federal ones). State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970). These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge.[180]

Although the agencies appear to recognize this and to have rejected the analysis of Section 101(b) in the NWPR to a great extent,[181] the agencies also indicate that they believe Section 101(b) somehow constrains the Congress' intended scope of the CWA by stating:

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establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.").

[179] *See* Hines History of the CWA at 82, 99, *supra* fn.46.

[180] *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

[181] Proposed Rule, 86 Fed. Reg. at 69376, 69400-69404.

> The agencies agree that the policy in section 101(b) is both important and relevant to the agencies' defining an appropriate scope of "waters of the United States." Consistent with the text of the statute and as emphasized by the Supreme Court, federal jurisdiction under the Clean Water Act has limits. As explained above, Clean Water Act jurisdiction encompasses (and is limited to) those waters that significantly affect the indisputable federal interest in the protection of the foundational waters that prompted Congress to enact the various incarnations of the Act—i.e., traditional navigable waters, interstate waters, and the territorial seas. And consistent with the section 101(b) policy, where protection (or degradation) of waters do not implicate this federal interest, such waters fall exclusively within state or tribal regulatory authority, should they choose to exercise it.[182]

The agencies further state that "the proposed rule's relatively permanent and significant nexus limitations appropriately draw this boundary by ensuring that where upstream waters significantly affect the integrity of the traditional navigable waters, interstate waters, and territorial seas, Clean Water Act programs will apply to ensure that those downstream waters are protected, and where they do not, the agencies will leave regulation to the states and tribes."[183]

The indisputable federal interests in protecting the integrity of the Nation's waters are substantially broader than those the agencies have identified, and nothing in Sections 101(b) or 510 provide support for reducing CWA jurisdiction over the Nation's waters, particularly in the manner proposed by the agencies here. The agencies' proposal to limit CWA jurisdiction based on Sections 101(b) and 510 is contrary to the text of the CWA, binding Supreme Court precedent, Congressional intent, and longstanding agency interpretations of the Act.

D. State and Tribal Governments Cannot and Will Not Fill the Enormous Regulatory Gap that would Result from this Proposed Redefinition of WOTUS

The suggestions throughout the Proposed Rule that the redefinition and narrowing of "waters of the United States" will merely shift regulatory and enforcement authority from the federal government to the states flies directly in the face of decades of history and empirical data. As the agencies are well-aware, the passage of the CWA and a host of other federal laws in the 1970s occurred as a direct result of public outcry regarding dangerous pollution problems that resulted from failures by states to protect people and public trust resources from pollution.[184] The agencies know that it is extremely unlikely most states and tribal governments will be able or willing to sufficiently regulate dangerous pollution on newly deregulated rivers, streams, and wetlands utilizing state law alone, and without the federal regulatory "floor" established by the CWA.

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[182] Proposed Rule, 86 Fed. Reg. at 69400.

[183] Proposed Rule, 86 Fed. Reg. at 69374.

[184] *See generally*, Hines History of the CWA, at 81-82.

In the Proposed Rule, the agencies state that "[w]aters that do not implicate federal interest in these foundational waters are left entirely to state and tribal protection and management."[185] While the possibility of states and tribal governments stepping in to control water pollution where the agencies have eliminated CWA protections provides absolutely no support for reducing CWA jurisdiction as proposed by the agencies, this assertion is also contrary to information that the agencies provided in the Proposed Rule demonstrating that states and tribal governments have not replaced, and cannot replace, the protections provided by the CWA for the Nation's waters.

For example, in a section of the Proposed Rule entitled "States and Tribes Did Not Fill the Regulatory Gap Left by the NWPR," the agencies stated that "[g]iven the limited authority of many states and tribes to regulate waters more broadly than the Federal government, the narrowing of federal jurisdiction would mean that discharges into the newly non-jurisdictional waters would in many cases no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation's waters."[186] Additionally, the agencies noted that they are "not aware of any tribes that expanded their clean water protections to compensate for a reduction in protections under the NWPR. During the agencies' tribal consultation and coordination for this rulemaking process, tribes overwhelmingly indicated that they lack the independent resources and expertise to protect their waters and therefore rely on Clean Water Act protections."[187]

The agencies state that "[i]n their experience many waters under the proposed rule will not have a significant nexus to downstream foundational waters, and thus will not be jurisdictional under the Act, and the agencies under current practice routinely conclude that there is no significant nexus."[188] Thus, the new jurisdictional limitations on tributaries, wetlands, and "other waters" in the Proposed Rule will plainly eliminate CWA protections for "many" waters protected by the Pre-2015 Regulatory Definitions contrary to the objective of the CWA. State and tribal governments will not be able to step in to address the resulting harms.

As detailed below in Section IV(E), one of the places that will be most harmed by the elimination of CWA protections under the Proposed Rule is New Mexico. New Mexico has the distinction of not having state laws in place to supplant the loss of CWA protections, and the state already lost CWA protections for <u>most</u> of its waters due to the illegal, non-scientific NWPR. This dire reality demonstrates the urgent importance of the agencies' full restoration of the Pre-2015 Regulatory

[185] Proposed Rule, 86 Fed. Reg. at 69415.

[186] Proposed Rule, 86 Fed. Reg. at 69415.

[187] *Id*.

[188] Proposed Rule, 86 Fed. Reg. at 69432.

Definitions, as well as prioritizing resources toward quickly reconsidering jurisdictional determinations that eliminated CWA protections under NWPR.

Moreover, the very concept encapsulated in the agencies' rationale for the Proposed Rule of simply "shifting" regulatory responsibility from the federal government to the states is irrational and nonsensical. As Cynthia Giles, the former head of EPA's Office of Enforcement and Compliance Assurance astutely observed in 2017:

> Don't be fooled by the suggestion that if the EPA walks away, everything will still be fine because states will step to the plate and enforce the law. The EPA's retreat will only embolden industry and weaken states. If the EPA is not there to enforce laws, then in many cases no one will.[189]

Ms. Giles's op-ed then provided several specific and noteworthy reasons why proposals to shift regulatory and enforcement responsibility to states (such as the Proposed Rule) are anathema to good public policy. These reasons were so clearly spelled out by Ms. Giles that we will repeat portions of her article verbatim:

> First, states often don't enforce the laws within their own borders when the people primarily harmed live downwind or downriver in another state. States don't want to spend their money or their political capital to benefit other states….
>
> Second, many significant violators are national companies that operate in many states. Individual states can't effectively take on nationwide operations. Filing cases one state at a time is inefficient and leads to inconsistent results. The EPA enforces against national and multinational companies, and, through a single case, can secure an agreement that cuts pollution at all of a company's facilities nationwide. States frequently join the EPA in these national cases….
>
> Third, many states don't take action to enforce criminal environmental laws. Environmental crimes have real victims, who are injured and sometimes killed by companies that cut corners on toxic pollution control. The EPA's criminal enforcement, especially against individual managers, sends a powerful deterrent message: Company managers who are considering cheating on drinking-water tests or turning off air-pollution controls better think twice before making choices that could land them in jail.

[189] Cynthia Giles, Why We Can't Just Leave Environmental Protection to the States, Grist, April 26, 2017, https://grist.org/opinion/why-we-cant-just-leave-environmental-protection-to-the-states/ (Attachment 9).

> Fourth, states don't always have the political will to take on powerful companies. When the EPA sued Southern Coal Corporation for long-standing and serious water-pollution violations across Appalachia, four states—Alabama, Kentucky, Tennessee, and Virginia—joined the EPA in that case. West Virginia did not sign on, even though many of the violations occurred there. Why? The owner of the company was influential in the state, and now serves as its governor. The EPA is far less likely to be held hostage to companies with local political clout.
>
> Fifth, companies that play by the rules need protection from companies that cheat. Weak enforcement gives an unfair competitive advantage to companies that violate the law. The EPA helps to ensure a level playing field and prevent a race to the bottom by providing backup for states that don't have the resources or the will to insist on compliance….
>
> Sixth, sidelining the EPA won't empower states, it will weaken them. Companies have known that if they don't resolve their enforcement problems at the state level, they may have to face the EPA instead. Announcing that the EPA is no longer a threat will change that dynamic. A diminished EPA will encourage companies to push back against state enforcers. Eliminating CWA protections will make their jobs harder.[190]

Of course, none of this should come as a surprise to the agencies.

1. Water Pollution Regulation and Enforcement by States is Currently Insufficient to Protect Water Quality.

The CWA and many other federal environmental statutes provide for, encourage and in some cases even require federal delegation of regulatory programs to states. For example, only three states have *not* been delegated NPDES permitting authority under Section 402 of the Act.[191]

EPA provides significant grant funding to states that carry out regulatory programs to implement federal law. Notwithstanding this substantial federal investment, however, many states are currently failing to adequately protect communities, waterways and ecosystems from dangerous water pollution. EPA's Solicitor General has made this observation, noting that state enforcement efforts are "incomplete and inconsistent."[192] These ongoing challenges are borne out in EPA's own

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[190] *Id.*

[191] The three states are Massachusetts, New Hampshire and New Mexico. Notably, only three states (Florida, Michigan and New Jersey) have received full delegation to administer CWA dredge and fill permit programs under CWA Section 404.

[192] Irreplaceable: Why States Can't and Won't Make Up for Inadequate Federal Enforcement of Environmental Laws, Institute for Policy Integrity, New York University School of Law (June 2017) (*citing* U.S. EPA Office of the Inspector General, 12-P-0113, EPA Must Improve Oversight of State Enforcement 8 (2011) (Attachment 10).

water quality assessment data as well. The most recent nationally representative water quality assessment estimates that of those waters that have been assessed, around 53 percent of U.S. river and stream miles, 71% of lake acreage, and 80% of estuary and bay square mileage are not safe for fishing, swimming, or other beneficial uses.[193]

Given the water quality challenges our nation continues to face almost 50 years after the passage of the CWA, it is plain that the Act's requirements and enforcement desperately need to be supported and strengthened, not diminished. Weakening the CWA by reducing the scope of federal jurisdictional waters and implying that state and tribal governments all have the desire, will, and capacity to pick up the slack, stretches credulity well beyond the breaking point.

State regulation and enforcement will further diminish under the Proposed Rule. There can be no serious question that removing "many" tributaries, wetlands, and other waters from federal water pollution regulation and enforcement will make matters significantly worse for water quality across the country.

E. The Agencies' 2003 SWANNC and 2008 Rapanos Guidance Documents Should Not Be Utilized to Interpret or Redefine WOTUS

In the years preceding the CWR, the 2003 *SWANCC* and 2008 *Rapanos* Guidance Documents, as implemented by the agencies, reduced protections for the Nation's waters by limiting jurisdiction in a manner that was not justified by law or science.[194] These Guidance Documents were issued by the agencies in response to the *SWANCC* and *Rapanos* opinions but unfortunately interpreted those decisions more broadly than the decisions allow or require in contravention of the CWA's objective.

The Guidance Documents also imposed limitations on assertions of jurisdiction that were inconsistent with those decisions, resulting in decreased jurisdiction over historically protected waters and inconsistent application by the agencies.[195] For example, the 2008 Rapanos Guidance[196] inappropriately provided tributary streams less-than categorical protection even though the existing regulatory definition protected, without any limitation, all tributaries to other specified jurisdictional waters, and despite the fact that the Supreme Court had not issued any holding limiting the jurisdictional status of tributaries.[197] The 2003 *SWANCC* and 2008 *Rapanos* Guidance have left many categories of waters that were previously protected vulnerable to pollution and

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[193] EPA, National Summary of State Information, Assessed Waters of the United States, *supra* fn. 28.

[194] *See* Summary of Objections to Guidance in Congressional Research Service Report R43455, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States" at 6 (June 10, 2014) (Attachment 11).

[195] *See* 2011 Comments, *supra* fn. 22.

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

[197] 2011 Comments at 13-14, *supra* fn. 22.

destruction, and hindered regulatory and enforcement actions contrary to law.[198] The Agencies cannot lawfully rely on these Guidance Documents, or the erroneous interpretations and applications of *SWANCC* and *Rapanos* therein, to support their justification for the Proposed Rule.

F. The Connectivity Report and Other Scientific Information Do Not Support the Reductions in CWA Jurisdiction in the Proposed Rule

The agencies must employ science to evaluate whether the Proposed Definition is adequate to achieve the objective of the CWA, but that is not what the agencies have done here. Instead, the agencies used science evaluating the "significant nexus" test as a basis for "not including all tributaries, adjacent wetlands, and 'other waters' as jurisdictional waters" in the definition. The agencies also placed limits on those categories because doing so "is consistent with the best available science because waters in these categories can have significant effects on downstream foundational waters."[199] This is circular logic. The agencies cannot reasonably rely on science that was limited to evaluating "significant nexus" to justify only protecting waters that possess the "significant nexus" identified by that same science.

While it is beyond dispute the extensive scientific information supports CWA jurisdiction over all waters with a "significant nexus" to other "waters of the United States," the Connectivity Report and other scientific information do not support elimination of jurisdiction over waters that lack a "significant nexus" to traditionally navigable waters, interstate waters, and the territorial seas. This should be obvious since the Connectivity Report was designed for the sole purpose of evaluating waters' significant nexus to downstream waters. Because of this, it is arbitrary and capricious for the agencies to rely on the Connectivity Report and SAB Report to conclude the Proposed Rule's jurisdictional limitations are supported by science.

IV. PROPOSED RULE CATEGORIES, DEFINITIONS, AND IMPLEMENTATION

In the Proposed Rule, the agencies pose numerous questions regarding the proper scope of jurisdiction over tributaries, ditches, adjacent wetlands, and other waters. Commenters have provided extensive feedback to the agencies on these questions, in Previous Comments, and in the Amended Complaint.[200] We urge the agencies to carefully consider those comments and the Amended Complaint in addition to the comments below.

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

[199] Proposed Rule, 86 Fed. Reg. at 69390.

[200] Amended Complaint at ¶¶ 185-357, *supra* fn. 33; Previous Comments, *supra* fn. 22.

A. The Relatively Permanent Test Does Not Advance the Objective of the Act

According to the Proposed Rule, "[t]he "relatively permanent standard" means waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters."[201] As detailed in Section III(B) above, this is not an accurate description of the plurality's "relatively permanent" standard from *Rapanos*.

The standard does not require that waters be standing or "**continuously**" flowing in order to be a "water of the United States." The plurality stated that "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water."[202] The Court explained that this does not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances" or "seasonal rivers which contain continuous flow during some months of the year . . .'" and, further, that the Court had "no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify a channel as a 'wate[r] of the United States.'"[203]

Additionally, the plurality's "relatively permanent standard" from *Rapanos* does not state that it only encompasses "waters with a continuous surface connection" to relatively permanent waters. The agencies are erroneously conflating the jurisdictional test for "wetlands adjacent to non-navigable tributaries of traditionally navigable waters" with the jurisdictional test for all waters. This is inexplicable and contrary to law. The Rapanos plurality merely stated that "establishing that **wetlands such as those at the Rapanos and Carabell sites** are covered by the Act requires two findings: first, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters); and second, that **the wetland has a continuous surface connection with that water**, making it difficult to determine where the 'water' ends and the 'wetland' begins."[204] Nowhere does the plurality state all waters are required to have "continuous surface connection" to those types of waters to qualify as "waters of the United States."

We agree with the agencies that "limiting the scope of jurisdiction to waters meeting the relatively permanent standard is insufficient to meet the objective of the Clean Water Act"[205] and that "the relatively permanent standard is insufficient as the sole standard for geographic jurisdiction under the Clean Water Act as it is inconsistent with the Act's text and objective and runs counter to the science."[206] We further agree that the NWPR's broad adoption of this standard for jurisdiction for

[201] Proposed Rule, 86 Fed. Reg. at 69373.

[202] *Rapanos*, 547 U.S. at 731-32 (internal citations omitted) (emphasis added).

[203] *Rapanos*, 547 U.S. at 731-32 (internal citations omitted).

[204] *Rapanos*, 547 U.S. at 742 (emphasis added).

[205] Proposed Rule, 86 Fed. Reg. at 69395.

[206] Proposed Rule, 86 Fed. Reg. at 69397.

all waters had ''consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes.'' *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020)."[207]

We object, however, to the agencies' mischaracterizations of the "relatively permanent standard" and note that those mischaracterizations severely impact the agencies' analysis of how the standard applies to CWA jurisdiction over tributaries, wetlands, other waters, and "open waters." The agencies must properly define the "relatively permanent standard" and limit its application to "wetlands adjacent to non-navigable tributaries of traditional navigable waters." Although we agree that any water that falls within the properly interpreted "relatively permanent" standard is certainly a "water of the United States," use of this standard should absolutely not eliminate categorical jurisdiction over tributaries (perennial, intermittent, or ephemeral) and "other waters" where there use, degradation, and destruction could impact interstate and foreign commerce. Properly interpreted, the standard is appropriate as one of many bases for protecting wetlands adjacent to non-navigable tributaries of traditional navigable waters, but it should not be used as a bar to the asserting CWA jurisdiction over all wetlands. Certainly, the agencies should not use their misinterpretation of the "relatively permanent" standard as a jurisdictional limit on any waters.

B. The Significant Nexus Test Is Not Consistent with the CWA When It Is Employed to Reduce Jurisdiction Over Tributaries, Other Waters, Impoundments, and All Wetlands

As the science referenced throughout the Proposed Rule preamble and TSD demonstrate, it is obvious that any water with a significant nexus to any other "waters of the United States" are themselves jurisdictional waters. This does not mean, however, that the agencies have authority to apply Justice Kennedy's "significant nexus" test from *Rapanos* to define the extent of CWA jurisdiction over all non-foundational waters as the agencies are proposing. Additionally, as discussed extensively above, the agencies mischaracterize Justice Kennedy's "significant nexus" test and, as a result, it is being improperly employed in the Proposed Rule to reduce CWA jurisdiction over historically protected waters. The agencies acknowledge that this approach will "routinely" leave "many waters" across the country non-jurisdictional and unprotected against pollution, degradation, and destruction.[208] This is plainly contrary to the objective and text of the CWA.

Again, Justice Kennedy merely determined that "**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.**'" [209] Contrary to the

[207] Proposed Rule, 86 Fed. Reg. at 69373-74.

[208] Proposed Rule, 86 Fed. Reg. at 69432.

[209] *Rapanos*, 547 U.S. at 779-80 (emphasis added).

agencies' assertion in the Proposed Rule, Justice Kennedy did not conclude or imply that the CWA only encompasses waters "that 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 (the ''foundational waters'')."[210] The agencies erroneous view of Justice Kennedy's "significant nexus" test forms the legal basis for the Proposed Rules' ultimate jurisdictional limitations on tributaries, impoundments, "other waters," and wetlands. Accordingly, we urge the agencies to restore the Pre-2015 Regulatory Definitions without these improper jurisdictional limitations.

In the Proposed Rule, the agencies indicate that the Supreme Court's decision in *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*[211] provides support for their "significant nexus" jurisdictional limitations. For example, the agencies state that:

> "[t]he Supreme Court's "functional equivalent" standard has several key characteristics in common with the significant nexus standard and the agencies' approach in the proposed rule. Both standards require an analysis focused on the specific facts at issue in a particular instance. The "functional equivalent" standard requires consideration of facts related to the discharge at issue, the geologic substrate through which the discharges travels, the location and nature of the receiving water, and other factors. Likewise, the significant nexus standard requires consideration of scientific principles of upstream functions and effects on the integrity of downstream waters and facts related to the specific waters at issue."[212]

The very obvious difference between the "functional equivalent" test in *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund* and the "significant nexus" test in the Proposed Rule is the fact that the "functional equivalent" test applies to evaluate discharges through groundwater to protect the "waters of the United States,"[213] whereas the agencies here are proposing to use the "significant nexus" test to dramatically reduce the scope of protected waters.

C. Traditional Navigable Waters

The agencies do not propose any changes to the text of the Pre-2015 Regulatory Definitions for traditional navigable waters, which include "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are

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[210] Proposed Rule, 86 Fed. Reg. at 69373.

[211] *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. at 1479.

[212] Proposed Rule, 86 Fed. Reg. at 69399.

[213] *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund,* 140 S. Ct. at 1479, fn. 1 ("The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." § 1362(7).").

subject to the ebb and flow of the tide."[214] We support the agencies' decision not to propose any changes to the text of the definition for traditional navigable waters. It is beyond dispute that traditional navigable waters are encompassed within the meaning of "waters of the United States," and the agencies are required to ensure that they are protected under the CWA regulatory definition. However, the agencies are also required to categorically protect all tributaries to traditional navigable waters for the reasons stated throughout these comments. For example, the agencies state that they intend to protect all waters that were protected under predecessor laws to the 1972 CWA Amendments and have acknowledge that the 1899 Refuse Act encompassed any navigable water of the United States, as well as their tributaries.[215]

Additionally, it is essential that the agencies clarify the meaning of the term traditionally navigable waters in the Preamble consistent with our previous comments on this subject.[216] We support the agencies' retention of the ''U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D, 'Traditional Navigable Waters'' (''Appendix D''), and we applaud the agencies' revocation of the previous administration's "U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA)" ("TNW Coordination Memo") on November 17, 2021. The TNW Coordination Memo improperly undermined use by recreational craft serving as a basis for a traditional navigable water determination.

The Agencies must clarify that it is appropriate to base navigability determinations on evidence that a water is used, or is susceptible to being used, for navigation by recreational watercraft, including canoes, kayaks, or rafts. The Supreme Court has confirmed "that navigability does not depend on the particular mode in which such use is or may be had––whether by steamboats, sailing vessels or flat-boats,"[217] and that the "lack of commercial traffic [is not] a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."[218]

Recreational trips, such as the one down the Los Angeles River (discussed below), are precisely the type of examination that should be conducted to determine whether a water body is a traditional navigable water. On many rivers the only commerce that will occur in the future is recreational use by paddlers in canoes, kayaks, and rafts. Thus, the question is: could this water body ever be used for commercial recreational boating? If a boating trip can establish that the water is or could be

[214] *See* 33 CFR 328.3(a)(1) (2014); 40 CFR 122.2 (2014); 40 CFR 230.3(s)(1) (2014).

[215] Proposed Rule, 86 Fed.Reg at 69375 (The agencies acknowledge that Section 13 of the Rivers and Harbors Act of 1899, the Refuse Act, made it unlawful to discharge refuse "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.").

[216] *See* 2011 Comments, *supra* note 22 at pp. 18-28.

[217] *United States v. Utah*, 283 U.S. 64, 76 (1931) (quoting *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926)).

[218] *Appalachian Electric Power*, 311 U.S. 377, 416 (1940).

made navigable for small watercraft, then the water should be classified a traditional navigable water.

One particularly high-profile example of the need for clarity on agency interpretations of navigability under the CWA involves the Los Angeles River where, in 2008, the Corps determined that only 4 miles of the 51-mile river was "navigable" and, therefore, categorically protected by the CWA.[219] In July 2010, EPA Region 9 and EPA Headquarters overruled the Corps and determined that the "the mainstem of the Los Angeles River is a "Traditional Navigable Water" from its origins at the confluence of Arroyo Calabasas and Bell Creek to San Pedro Bay at the Pacific Ocean, a distance of approximately 51 miles.[220] EPA based is determination on a number of factors "including the ability of the Los Angeles River under current conditions of flow and depth to support navigation by watercraft; the history of navigation by watercraft on the river; the current commercial and recreational uses of the river; and plans for future development and use of the river which may affect its potential for commercial navigation," and determined that "[a[vailable evidence on each of these factors indicates that the Los Angeles River mainstem possesses the physical characteristics and past, present, or future use for navigation consistent with a "Traditional Navigable Water."[221] A 2008 expedition of kayakers and canoeists down the Los Angeles River played a prominent role in convincing EPA that the river was a traditional navigable water under the CWA.[222]

D. Interstate Waters

We strongly support the agencies' decision to maintain categorical protection for interstate waters consistent with the Pre-2015 Regulatory Definitions. We further support the agencies' legal analysis underpinning their determination to do so set forth in the Proposed Rule TSD and believe that it is essential that interstate waters encompass waters that flow across, or form a part of, boundaries of federally recognized tribes because these waters flow across, or form a part of, state boundaries.[223] The use and value of protecting interstate waters has been obvious for many decades, as has the mandatory legal duty to protect them under the CWA and its predecessor laws dating back to 1948. Interstate waters and their tributaries have been protected under the nation's water quality laws since the 1948 Water Pollution Control Act,[224] and under the CWA since its

[219] *See* Letter from Jared Blumenfeld, Region 9 EPA Administrator, to Colonel Mark Troy, U.S. Army Corps of Engineers District Engineer, Los Angeles District, transmitting SPECIAL CASE EVALUATION REGARDING STATUS OF THE LOS ANGELES RIVER, CALIFORNIA, AS A TRADITIONAL NAVIGABLE WATER (July 6, 2010), available at: https://archive.epa.gov/region9/mediacenter/web/pdf/laspecialcaseletterandevaluation.pdf (Attachment 13).

[220] *Id*.

[221] *Id*.

[222] *Id.* at 23-26.

[223] For example, waters within the Tularosa Closed Basin in New Mexico, the Rio Tularosa, Three Rivers and their tributaries, flow across the boundary of the Mescalero Apache Reservation and the State of New Mexico and should be protected as interstate waters for all of the reasons that waters flowing across state boundaries are protected.

[224] Water Pollution Control Act of 1948, Pub. L. No. 80-845, 2(d)(1), (4), 62 Stat. 1156-57.

inception nearly 50 years ago, until April 2020 when the agencies adopted the NWPR.[225] The agencies provided no valid legal or scientific basis for removing interstate waters from CWA jurisdiction under the NWPR.[226]

When they promulgated the NWPR, the agencies simply asserted that "[i]nterstate waters without any connection to traditional navigable waters are not within the agencies' authority under the CWA and may be more appropriately regulated by the states and tribes under their sovereign authorities."[227] The agencies did not explain how they expect states and tribal governments to regulate pollution outside their boundaries, which they lack the authority to do,[228] and they did not provide a reasoned basis for rejecting their own legal analysis supporting jurisdiction over interstate waters as reflected in the CWR TSD.[229]

Contrary to the NWPR, interstate waters must include all rivers, lakes, and other waters that flow across, or form a part of, state boundaries without regard to navigability, and their tributaries as required by the 1948 Water Pollution Control Act.[230] The 1948 Water Pollution Control Act also declared federal jurisdiction over "the waterways of the Nation," but left the primary responsibility for pollution control in the hands of the states.[231] Federal jurisdiction was expanded to navigable or interstate waters in the 1961 Amendments, and the 1965 Amendments provided for the creation of water quality standards for interstate waters to be developed by the states, or the Secretary of Health, Education, and Welfare if a state failed to act.[232] In language that is nearly identical to the 1972 CWA, the 1966 Amendments directed that water quality standards for interstate waters and their tributaries "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. In establishing such standards the Secretary, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public

[225] *See, e.g.,* 33 U.S.C §§ 1313, 1319, 1341, 1342.

[226] *Compare* NWPR, 85 Fed. Reg. at 22,282-83 with Repeal Rule, 84 Fed. Reg. at 56,669–70 (reinstating 1986 definition, including interstate waters); National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,529 (May 22, 1973) (EPA's first "navigable waters" definition, including interstate waters).

[227] NWPR RTC, Topic 11 at 26, *supra* fn. 34.

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

[229] *See, e.g.*, U.S. EPA and U.S. Dept. of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015), at 67 ("CWR TSD") (Attachment 14); NWPR RTC, Topic 3, at 5, *supra* fn. 34.

[230] *Id*. at 10, 62 Stat. 1161.

[231] *Id.* § 7, 62 Stat. 1169; *see also* Hines History of the CWA, at 82, 85-99.

[232] See Public Law 89-234, § 5(a), 79 Stat. 908 (1965).

water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses."[233]

For example, CWA Section 303, like the 1966 Amendments, requires states to adopt water quality standards consistent with federal requirements for interstate waters, which are also similar to the 1966 standards.[234] Once approved, these water quality standards become the federal standards for implementing the CWA.[235] In other words, it has long been the case that Congress directed the protection of interstate waters and their tributaries in their own right and not solely for the benefit of downstream water quality of interstate or navigable waters.

Due to the failure of this approach to address the nation's serious pollution problems, in part because of narrowly defined categories of protected waters and limited federal authority, Congress passed the 1972 CWA recognizing that solving the nation's water quality problems required "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.'"[236] To accomplish these goals, the Supreme Court in *Riverside Bayview* concluded, Congress defined the "waters covered by the Act broadly" to encompass all "waters of the United States."[237]

Congress clearly did not intend to make the CWA less protective of the nation's waters than its predecessor laws.[238] To the contrary, the CWA's coverage of, and regulatory programs for, interstate waters and their tributaries are so broad and comprehensive that the Act eliminated alternative remedies in interstate pollution cases according to the Supreme Court in *City of Milwaukee v. Illinois* (displaced federal common law),[239] *International Paper Co. v. Ouellette*[240] (preempted downstream

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[233] *Id*. § 5(a)(3).

[234] 33 U.S.C. §1313(a)(1) (*See, e.g.,* 33 U.S.C. § 1313(a)(1) (This section provides "any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to [October 18, 1972], shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to [October 18, 1972].").

[235] *See Arkansas v. Oklahoma*, 503 U.S. 91, 110(1992) ("In such a situation, then, state water quality standards promulgated by the States with substantial guidance from the EPA and approved by the Agency-are part of the federal law of water pollution control.") (footnote omitted).

[236] *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing H.R.Rep. No. 92–911, p. 76 (1972); S.Rep. No. 92–414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742). The Agencies' Notice for this Proposed Rule misconstrues *Riverside Bayview.* The unanimous Supreme Court opinion in *Riverside Bayview* is far more significant in determining the definition of "waters of the United States" than indicated by the Agencies' description, *see* sections II and III *ante*.

[237] *Id.*

[238] *See e.g.,* S. Rep. No. 92-1236, at 144 (1972). 2011 Comments, pp. 28-30.

[239] *Milwaukee v. Illinois,* 451 U.S. 304 (1981).

[240] *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

state's common law) and *Arkansas v. Oklahoma*[241] (a downstream state's remedy is to enforce its water quality standard against an upstream state through the CWA's NPDES permitting process). The NWPR's elimination of CWA jurisdiction and programs for interstate waters and their tributaries by eliminating them from the regulatory definition of "waters of the United States" left states in a worse position to address interstate water pollution than they were for the century preceding the CWA, since they have been held to have lost the common law remedies that were available to them prior to the Act.[242]

Additionally, the removal of interstate waters and their tributaries could lead to an expansion of the number of "closed basins" with rivers, streams, lakes, and wetlands that are currently protected only because of their connection to an interstate water. The impact of not protecting interstate waters and their tributaries would be devastating to the quality of the Nation's waters contrary to Congressional intent, the plain text of the CWA,[243] and extensive Supreme Court and lower court precedent.[244]

It is indisputable that the agencies are legally required to include all interstate waters, including rivers, lakes, and any other waters that flow across, or form a part of, state boundaries without regard to navigability, and <u>their tributaries</u> in the regulatory definition of "waters of the United States." The agencies state in the Proposed Rule, and we agree, that they "interpret interstate waters to encompass all waters that Congress sought to protect since 1948" and that "[t]hese waters need not meet the relatively permanent standard or significant nexus standard."[245] However, as the agencies acknowledge in the Proposed Rule TSD, the waters Congress sought to protect since 1948 include, not only all rivers, lakes, and other waters that flow across, or form a part of, state boundaries, but also all tributaries to those waters.[246] Accordingly, the agencies must categorically

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[241] *Arkansas v. Oklahoma*, 503 U.S. 91, 98–100 (1992).

[242] *See e.g., City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 325–26 (1981) ("It is also significant that Congress addressed in the 1972 Amendments one of the major concerns underlying the recognition of federal common law in Illinois v. Milwaukee. We were concerned in that case that Illinois did not have any forum in which to protect its interests unless federal common law were created. See 406 U.S., at 104, 107, 92 S.Ct., at 1393, 1394. In the 1972 Amendments Congress provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress.")

[243] *See, e.g.*, 33 U.S.C. § 1313(a)(1).

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

[245] Proposed Rule, 86 Fed. Reg. at 69418 (citing s. Pub. L. 80–845, sec. 10, 62 Stat. 1155, at 1161 (1948).

[246] Proposed Rule TSD, at 14 (The 1948 Water Pollution Control Act "made discharges of pollutants into interstate waters and their tributaries a nuisance, subject to abatement and enforcement by the United States. See § 2(d)(1),(4), 62 Stat. at 1156-1157 (section 2(d)(1) of the Water Pollution Control Act of 1948, 62 Stat. at 1156, stated that the "pollution of interstate waters" in or adjacent to any State or States (whether the matter causing or contributing to

protect all tributaries to interstate waters in the regulatory definition of "waters of the United States," and cannot require them to "meet the relatively permanent standard or significant nexus standard" as the agencies have proposed.

E. Other Waters Where Their Use, Degradation, or Destruction Could Impact Interstate or Foreign Commerce

It is crucial to ensure protection of the Nation's waters that the agencies' regulatory definition of "waters of the United States" continue to encompass "other waters" where their use, degradation, or destruction could impact interstate and foreign commerce." As demonstrated throughout these comments, maintaining these (a)(3) interstate and foreign commerce factors as a basis for CWA jurisdiction without amendment is consistent with the objective of the CWA, binding Supreme Court precedent, and Congressional intent.

As described in detail above, the agencies' have failed to fully consider all Supreme Court precedent and are misinterpreting the holdings in *Riverside Bayview*, *SWANCC*, and *Rapanos* in a manner that improperly constricts the scope and objective of the CWA to merely protect the integrity of traditional navigable waters, interstate waters, and the territorial seas. Further, in Sections II and III of these comments, we explain that the agencies' proposed limitations on CWA jurisdiction over "other waters" is contrary to the text and objective of the CWA, Supreme Court precedent, and congressional intent.

Additionally, the agencies have long recognized 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."[247] Further, in the Proposed Rule, the agencies acknowledge that "the Supreme Court's interpretations of the scope of 'waters of the United States' do not require adoption of a significant nexus test,"[248] and that adoption of the "relatively permanent" standard had ''consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes.'' *County of Maui, Hawaii v. Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1477 (2020)."[249]

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such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is declared to be a public nuisance and subject to abatement as provided by the Act. (emphasis added)); § 2(a), 62 Stat. 1155 (requiring comprehensive programs for "interstate waters and tributaries thereof"); § 5, 62 Stat. 1158 (authorizing loans for sewage treatment to abate discharges into "interstate waters or into a tributary of such waters").).

[247] *See* CWR TSD, at 77-78, *supra* fn. 229; *see also* Memorandum from Gary S. Guzy, EPA General Counsel and Robert M. Andersen, Corps Chief Counsel re: Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters ("2001 *SWANCC* Guidance") (Jan. 2001), available at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0094.

[248] Proposed Rule, 86 Fed. Reg. at 69407.

[249] Proposed Rule, 86 Fed. Reg. at 69373-74.

Yet, contrary to all of this, the agencies propose to amend the Pre-2015 Regulatory Definitions "to delete all of the provisions referring to authority over activities that 'could affect interstate or foreign commerce' and replace them with the relatively permanent and significant nexus standards the agencies have developed based on their best judgment and relevant Supreme Court case law."[250] Such an amendment would improperly convert the "other waters" protections into a far less protective[251] category of tributaries that are only jurisdictional to the extent they possess the requisite connections to traditional navigable waters, interstate waters, and the territorial seas. The "other waters" category was created to encompass rivers, streams, lakes, and wetlands that lack these very types of connections, but which can impact interstate and foreign commerce, within the regulatory definition of "waters of the United States." The agencies' proposal to require that these waters function like tributaries in order to be protected by the CWA is contrary to clear Congressional intent to expand CWA protections for the Nation's waters.

Inexplicably, the agencies state they are proposing to eliminate these protections for "other waters" because *SWANCC* and "subsequent Supreme Court decisions" have led the agencies to "conclude that asserting jurisdiction over nonnavigable, intrastate 'other waters' based solely on whether the use, degradation, or destruction of the water could affect interstate or foreign commerce pushes the scope of the Clean Water Act beyond the limitations intended by Congress."[252] The agencies do not identify the "limitations intended by Congress" they purport to rely on and do not provide a reasoned explanation for their conclusion that *SWANCC* or "subsequent Supreme Court decisions" support the elimination of CWA protections for "other waters" that could impact interstate and foreign commerce. For its part, the Supreme Court expressly declined to address the reach of Congress' commerce power in *SWANCC*[253] and did not address that question in *Rapanos* or *County of Maui, Hawaii v. Hawaii Wildlife Fund* either. To the extent the agencies purport to rely on CWA Section 101(b) to reduce the scope of the CWA' protections, this is clearly contrary to Congressional intent and multiple Supreme Court opinions as detailed in Section III(C) of these comments.

Rather than lending support for the agencies' view of the CWA, the Court's decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund* actually supports retention of the "other waters" interstate and foreign commerce factors in the regulatory definition of ''waters of the United States" because doing so is consistent with "congressional objectives, as revealed by the statute's language, structure, and purposes."[254] The CWA requires "protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and

[250] Proposed Rule, 86 Fed. Reg. at 69418 (emphasis added).

[251] The "other waters" category as proposed would be less protective because it requires add the requirement for a continuous surface connection to traditional navigable, interstate waters, tributaries, or the territorial seas.

[252] Proposed Rule, 85 Fed. Reg. at 68419.

[253] *SWANCC*, 531 U.S. at 162, 174.

[254] *County of Maui, Hawaii v. Hawaii Wildlife Fund,* 140 S. Ct. at 1477.

wildlife, and allow recreational activities in and on the water"[255] in all of the Nation's waters as intended by Congress. The CWA does not protect these values only in "foundational waters" as narrowly defined by the agencies in the Proposed Rule but requires protection of water quality in all of the nation's navigable, interstate, and intrastate waters based on the uses of those individual waters "to protect the public health or welfare, enhance the quality of water and serve the purposes" of the CWA.[256]

The "other waters" jurisdictional category has long ensured that many waters of local, regional, or national importance were properly afforded CWA protections, consistent with the objective of the CWA and Congressional intent. There are many significant waterways that provide valuable public health, agricultural, recreational, drinking water, ecological, and economic services that would lose protections under the CWA if the "other waters" (a)(3) interstate and foreign commerce jurisdictional bases are eliminated from the regulatory definition of "waters of the United States" as proposed by the agencies.[257] For example, so-called "closed basins" and other waters that lack a connection to traditionally navigable and interstate waters, have historically been protected under the (a)(3) interstate and foreign commerce factors for "other waters," such as Idaho's Upper Snake River Closed Basin, Carolina Bays in North Carolina, Oregon's Crater Lake, and New Mexico's Closed Basins.[258]

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[255] *See, e.g.,* 33 U.S.C. § 1312(a); *see also* 1313(c)(2)(A) ("Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation").

[256] *Id.*

[257] The (a)(3) interstate and foreign commerce jurisdictional bases for protecting "other waters" should be maintained for the same reasons that the agencies articulated for maintaining interstate waters to protect waters within New Mexico's closed basins that cross the Texas or Mexico borders, i.e., this waters "serve as essential sources of water for drinking and irrigation for tribes and other communities, but waters within these basins were no longer be jurisdictional under the NWPR if there is no traditional navigable water in the watershed." See Proposed Rule TSD, at 26.

[258] *See, e.g.,* Waterkeeper Alliance Fact Sheets on the Impacts to Twelve Watersheds across the United States, ("Waterkeeper Alliance Fact Sheets,") attached hereto as: (Attachment15) (Snake River Fact Sheet: Detailing loss of CWA protections and impacts for the Upper Snake River Closed Basin; Cape Fear Watershed Fact Sheet: There are multiple Carolina Bays in the Cape Fear River Basin, which includes portions of Bladen County, the location of the highest concentration of Carolina Bays in the country. While most Carolina Bays have been altered or filled in, the remaining bays are important to rare and declining plants and animals; numerous Carolina Bays are also used for recreation. Carolina Bays often lack surface water connections to other waterways. However, there is scientific evidence of significant hydrologic connectivity with nearby waterways via groundwater flow. Rogue River and Crater Lake Fact Sheet: Crater Lake is a national treasure known for its iconic blue waters, which is considered by scientists to be the cleanest and clearest body of water in the world. Crater Lake is a considered a closed basin that may lack surface connections to the Rogue River. Rio Grande Fact Sheet: In the Rio Grande Basin, in addition to other closed basins, there is a roughly 14,605 square mile area known as the Central Closed Basins with water resources that are essential to communities and wildlife that lost protection NWPR. For example, based on NHD data, there are more than 33,933 miles of streams would lose CWA protections because they may not be connected to the Rio Grande via surface connections.); *see also* Waterkeeper Alliance Videos submitted to the record via a Dropbox link to Timothy Young, Young.Timothy@epa.gov, on Feb. 7, 2022.

Contrary to the agencies' statements in the Proposed Rule, it is simply untrue that "the agencies have not in practice asserted jurisdiction over 'other waters' based on the 1986 regulations' provision since *SWANCC*."[259] The agencies have continued to assert jurisdiction over rivers, streams, lakes, wetlands, and other waters located in "closed basins" under the "other waters" provisions of the Pre-2015 Regulatory Definition after *SWANCC*. As described below, within New Mexico and Idaho closed basins for example, CWA Section 402 NPDES discharge permits are still in place for municipal and industrial point source dischargers, CWA Section 303 federally approved water quality standards are still in effect, CWA Section 402(b) construction stormwater permits have been issued, and CWA Section 303(d) listings and total maximum daily loads are still in effect.

New Mexico's Closed Basins

"Closed-basins" make up roughly 20% of the land area in New Mexico and a significant portion of the Mescalero Apache Reservation.[260] These closed basins include 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas, acequias, and wetlands.[261] These waters are of critical importance to the health and welfare of the people that reside within those basins and New Mexico's economic development, as well as to the many out-of-state visitors to these areas for their unique recreational and fishing opportunities.

The waters within New Mexico's Tularosa, Mimbres, Animas Valley, Estancia, San Agustin, Salt, Southwestern, Jornado Del Muerto, Jornada Draw, Playas Lake, and North Plains Closed Basins provide recreation, aquatic habitat, irrigation water, and drinking water in a region with scarce water resources. These basins are home to portions of two National Wilderness Areas (Aldo Leopold Wilderness and White Mountain Wilderness) that contain CWA designated Outstanding National Resource Waters and multiple closed basins have EPA-approved CWA water quality standards.[262] New Mexico's closed basins also intersect many areas of national importance, such as the Gila National Forest, the Cibola National Forest, the Lincoln National Forest, White Sands National Park

[259] Proposed Rule, 86 Fed. Reg. at 69419 and 69395, fn. 27 ("Cognizant of the Supreme Court's direction in SWANCC and to ensure that any assertion of authorities over (a)(3) waters is consistent with the Court's precedents, since SWANCC, the agencies have required that before exercising jurisdiction over an (a)(3) water field staff get approval from headquarters. 68 FR 1991 (January 15, 2003). As a practical matter, and as discussed in more detail below, section V.C.3 of this preamble, field staff have rarely, if ever, sought such approval and therefore the agencies have not asserted jurisdiction over (a)(3) waters.").

[260] Waterkeeper Alliance, Maps of New Mexico Closed Basins (Feb. 7, 2022). (Attachment 16) (with layers from the EPA Facility Registry Service – NPDES System, U.S. Geological Survey HUC8 Hydrologic sub basins within the State of New Mexico, National Wilderness Area, U.S. Forest Service Region 3 Primitive Area or Wilderness Study Area in the Southwest Region, and Water Layers from Esri, National Atlas of the United States and the U.S. Geological Survey).

[261] Written Testimony of Ron Curry, Secretary of the New Mexico Environment Department, before the United States House of Representatives' Transportation and Infrastructure Committee Regarding the Clean Water Restoration Act (HR 2421) July 17, 2007. (Attachment 17).

[262] 20.6.4 NMAC, New Mexico Standards for Interstate and Intrastate Surface Waters, (Attachment 18).

and Lake Holloman, and the Organ Mountains Desert Peaks National Monument.[263] It is essential to the people of New Mexico and to all of the people from around the world that visit these areas that these waters within these closed basins remain protected under the CWA.[264]

For example, in response to efforts by the Corps to eliminate CWA protections in New Mexico's closed basins, in 2003, New Mexico's Governor Bill Richardson filed comments on the EPA's Advance Notice of Proposed Rulemaking Regarding the U.S. Supreme Court Decision in SWANNC, EPA Docket OW-2002-0050.[265] Governor Richardson noted that EPA Region 6 officials supported the continued regulation of waters in New Mexico's closed basins under the (a)(3) "other waters" category, and that the Corps had only reversed its position and reinitiated interstate and foreign commerce evaluations after a meeting with EPA. He further noted:

> "The use of water to irrigate crops is of particular importance to the State of New Mexico. The perennial waters within the closed basins are used for irrigating crops used in interstate and foreign commerce. All perennial waters within closed basins are classified under the state water quality standards designated for uses such as irrigation and livestock watering. These waters need protection under the CWA to support the designated uses that are important to local communities along these drainages . . . Additional links to interstate commerce include the presence of mineral resources dependent on water quality such as salt from the Estancia Basin, potential use by interstate or foreign travelers for recreational or other purposes, and potential industrial use related to interstate commerce."[266]

Governor Richardson also explained that "[m]ining impacts are an important concern in how SWANCC relates to the closed basins of New Mexico. Several active large mines and many historic smaller mines exist within closed basins. These mines can create huge amounts of acid mine drainage, and without coverage under NPDES through the CWA it would be impossible for water quality standards to be met. Exclusion of waters affected by mine drainage threatens the designated uses that communities rely on."[267] He further explained that New Mexico's closed basins have long been protected through Section 401 Water Quality Certifications, Section 404 permits and Section 402 NPDES permits covering a range of activities and that there would be significant detrimental effect of water quality and fisheries, including endangered and threatened species, if the closed basins were no longer protected under the CWA.[268]

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[263] Waterkeeper Alliance, Map of New Mexico Closed Basins, *supra* fn. 260.

[264] *See* Polluted Waters Videos from New Mexico Residents, submitted to the record via a Dropbox link to Timothy Young, Young.Timothy@epa.gov, on Feb. 7, 2022; Waterkeeper Alliance Fact Sheet for Rio Grande, *supra* fn. 258; Reckless Abandon, at 7, *infra* fn. 198.

[265] Comments of Governor Bill Richardson, (Mar. 2003), (Attachment 19).

[266] *Id.* at 3.

[267] *Id.* at 4.

[268] *Id.* at 5.

Regarding the Mimbres River Closed Basin, Governor Richardson's comments stated:[269]

- Although the Mimbres River drains a closed basin, it has a strong basis for inclusion as a water of the United States according to 33 CFR 328.3(a)(3)(i-iii), due to its use by out-of-state travelers and industrial uses in interstate commerce.

- The Mimbres River has its headwaters in the Aldo Leopold Wilderness, which is a travel destination for many interstate and foreign tourists. The river is an essential part of the wilderness experience and provides the only reliable source of drinking water for backpackers or tourists on horseback. It also provides habitat for trout fishing which is an activity that brings many visitors to the area.

- There are also three species of fish known to be native to the Mimbres River: Chihuahua chub *(Gila nigrescens),* Rio Grande sucker *(Catostomus(Pantosteus)plebeius),* and the extirpated beautiful shiner *(Cyprinellaformosa).* All three species are also native to other streams that drain the neighboring Guzman Basin, which is an indication that these basins may have been hydrologically connected in the past.

- Tourism associated with the Aldo Leopold Wilderness, the Gila National Forest, and the Mimbres River is an important factor in the local economy that has been weakened by declines in the mining industry . . . In addition to interstate and foreign commerce from tourism in the National Forest, the Mimbres River provides recreational opportunities further downstream.

- Although land status is generally dominated by private properties through the lower reaches of the Mimbres River, the New Mexico Department of Game and Fish has a parcel of State land open to fishing and other river-related recreational activities.

- The privately held properties located along the lower Mimbres River are generally rural farm and ranch operations. The principle crops are hay and alfalfa grown for cattle feed. Apples are another source of agricultural income. These are commercial activities that rely on water from the Mimbres River.

- In addition to tourism and agriculture the Mimbres River Basin supports a mining industry. Phelps Dodge Mining Company conducts mining operations in the Mimbres watershed and holds significant water rights from both surface and groundwater sources. Phelps Dodge is a large international corporation that sells copper from the Santa Rita Mine throughout the world.

[269] *Id*. at 5-6.

Regarding the Central Closed Basin, Governor Richardson's comments stated:[270]

- These basins support perennial waters, riparian areas, and wetlands that are important resources to communities such as Bent, Nogal, Tularosa, and Mescalero-the primary community of the Mescalero Apache tribe. The Mescalero Tribe uses drinking water from springs at the headwaters of the Rio Tularosa, and the residents of Nogal and Bent depend on the local shallow water table associated with the Tularosa for their drinking water. Some residents drink directly from the river.

- The jurisdictional uncertainty related to closed basins threatens coordination and water quality protection across tribal boundaries. The Mescalero Tribe operates a wastewater treatment plant situated within the floodplain of the Tularosa River, which the town of Bent has claimed discharged untreated waste to the river. This issue was resolved through the National [Pollutant] Discharge Elimination System ("NPDES) provisions of the Clean Water Act.

- The Bureau of Land Management is developing recreation and a riparian demonstration area along the Rio Tularosa. Other areas along the stream are managed under grazing permits, and cow-calf operations water their cattle in the stream.

- Other uses of the stream are for irrigating apple orchards, alfalfa, and pistachios that are used in interstate and foreign commerce. Large ranches threatened by development are also situated along the stream and some new subdivisions are springing up.

- An old abandoned mine is situated above the town of Bent and is a possible source of acid drainage which is affecting the local water table. The U.S. Fish and Wildlife Service runs a trout hatchery near the Town of Mescalero and trout fishing occurs along the stream**.**

The New Mexico Department of Game and Fish has also provided EPA with an extensive evaluation of how waters within New Mexico's closed basins provide important ecosystem services and functions that are "inextricably tied to intrastate, interstate, and foreign commerce," including serving "as points for groundwater recharge, surface water storage, and material sinks that function in the water purification process (nutrient cycling, pollution abatement). These ecosystem functions provide clean water sources for human consumption, agricultural irrigation programs, and beneficial use by livestock, fish and wildlife."[271] In addition to documenting many other values provided by New Mexico's closed basins, the New Mexico Department of Game and Fish notes that (1) hydrologic and mineral resources are extracted from the waters of the closed basins and provide

[270] *Id*. at 6.

[271] New Mexico Department of Game and Fish, Comments on EPA's Advance Notice of Proposed Rulemaking Regarding the U.S. Supreme Court Decision in SWANNC, EPA Docket OW-2002-0050, (Apr. 15, 2003). (Attachment 20).

significant revenue for the state and private industries (e.g. oil and gas, potash, agriculture, and livestock) that contribute to interstate and foreign commerce, (2) "numerous authors have emphasized protection of wetlands and waters of isolated basins as unique, functioning ecosystems as the top priority for the conservation of aquatic habitats and non-game species." and (3)"of the 118 species and subspecies of wildlife listed as threatened and endangered in New Mexico (NMDGF 2002), nearly 25% of these taxa (30 of 118) are restricted to or occur in wetlands, riparian areas and waters of isolated basins."[272]

Surface waters of the Tularosa closed basin provide water for communities within the basin including Tularosa, Alamogordo, Carrizozo, Timberon, La Luz, Cloudcroft, and Holloman.[273] The Rio Tularosa and all perennial tributaries except Three Rivers and Dog Canyon Creek have EPA approved water quality standard designated uses for coldwater aquatic life, fish culture, irrigation, livestock watering, wildlife habitat, public water supply, and primary contact.[274] Additional perennial streams include Freznal Creek and La Luz Creek. The La Luz Acequia[275] provides water for growing crops and pasture. Many waters within the Tularosa closed basin are listed as impaired on the CWA Section 303(d) list.[276]

Thus, it is beyond dispute that the waters within New Mexico's massive closed basins provide functions and values Congress intended for the CWA to protect, and that the use, degradation, or destruction of these waters could impact interstate or foreign commerce.

Prior to the NWPR (and even after it to varying extents), the CWA has continued to protect waters within New Mexico's closed basins. For example, maps generated by the New Mexico Environment Department document the location of multiple individual NPDES permits, MSGP permits, and CGP permits, and water supply intakes, as well as numerous waters protected under federal CWA water quality standards as Outstanding Natural Resource Waters, within New Mexico's closed basins.[277] Additional active NPDES permits for a large number of industrial and municipal dischargers, including many mines and quarries, are shown on a map created by Waterkeeper Alliance based on EPA's Facility Registry Service – NPDES System Sites, including permits for the Silver City Wastewater Treatment System (FRS ID – 110022692175, NPDES: NM0020109 – Mimbres), Banner Mill (FRS ID: 110070031986, NPDES: NMR053467 – Animas Valley), and Freeport-McMoran

[272] *Id*. at 6-10.

[273] State of New Mexico Interstate Stream Commission – Office of the State Engineer, Tularosa-Sacramento-Salt Basins Regional Water Plan, at 63 (Oct. 2016) (Attachment 21).

[274] 20.6.4 NMAC, New Mexico Standards for Interstate and Intrastate Surface Waters, at 20.6.4.801, *supra* fn. 262.

[275] *See La Luz Community Ditch Co. v. Town of Alamogordo*, 34 N.M. 127 (N.M. 1929).

[276] Tularosa-Sacramento-Salt Basins Regional Water Plan, *supra* fn. 273.

[277] New Mexico Environment Department, Map of Surface Water Coverage For New Mexico Under the Navigable Waters Protection Rule and New Mexico Environment Department Map of NPDES Permits and Public Water Supply Intakes in Closed Basins (Attachment 22).

Tyrone, Inc. (FRS ID: 110064870938, NPDES: NMR053073 – Mimbres).[278] Holloman Air Force Base, (FRS ID: 110042049253) has also had multiple NPDES permits that are either expired, terminated, or pending.[279] Additional CWA permits for stormwater construction and other activities are also shown on the Waterkeeper Alliance map.

The agencies have not undertaken any evaluation of the impacts of eliminating CWA jurisdiction and programs for the waters in New Mexico's closed basins, which are likely to be quite substantial given the significance and number of the sources currently regulated under the CWA and the lack of any state regulatory program to address these pollution sources in the absence of the CWA. Accordingly, the agencies have not provided a reasonable basis for concluding that the Proposed Rule's limitations on "other waters," which will eliminate CWA protections for waters within New Mexico's closed basins, are "consistent with the text of the Clean Water Act, advance the objective of the Act, and are consistent with relevant decisions of the Supreme Court."[280]

Idaho's Snake River Closed Basins

In Idaho's Snake River basin, at least five percent of the watershed (about 5,185 sq. miles or 3,318,400 acres) is considered a "closed basin" because the waterways are only connected to the Snake River via subsurface connections.[281] Called the "Upper Snake Closed Basin," in east-central Idaho, it includes the drainages of five watersheds, the Big Lost, Little Lost, Birch, Medicine Lodge, and Beaver–Camas, which play an important economic and ecological role that is already being impacted by pollution. These basins contain numerous high-quality rivers, streams, lakes, and wetlands.[282] For example, Medicine Lodge Creek and its tributaries contain rainbow trout, brook trout, and Yellowstone cutthroat trout, and Little Lost Creek includes critical habitat for bull trout, listed as threatened under the ESA.[283]

The Upper Snake River Closed Basin contains "numerous creeks and rivers that do not flow on the surface beyond the borders of the state," but do flow into the Snake River Plain Aquifer, which supplies water to the Snake River.[284] Some rivers and streams within the Upper Snake River Closed Basin have been determined to be jurisdictional based on navigability; however, others are

[278] See Waterkeeper Alliance Maps of New Mexico Closed Basins, *supra* fn. 260; *see also* EPA FRS and ECHO reports for selected facilities in the closed basins (Attachment 23).

[279] *Id*.

[280] 86 Fed. Reg. at 69419.

[281] *See* Waterkeeper Alliance Fact Sheet for the Snake River Basin, *supra* fn. 258.

[282] Waterkeeper Alliance, Maps of Idaho Closed Basins (Feb. 7, 2022) (with layers from EPA's Facility Registry Service NPDES Sites, U.S. Geological Survey National Hydrography Dataset, U.S. Fish and Wildlife Service Federally Protected Species and Critical Habitat Data, and State of Idaho 303(d) Listed Streams Data. (Attachment 24)

[283] *See* Waterkeeper Alliance Fact Sheet for the Snake River Basin, *supra* fn. 258.

[284] *See* Waterkeeper Alliance Fact Sheet for Snake River Basin, *supra* fn. 258; Reckless Abandon, *infra* fn. 198, pp. 12-13.

jurisdictional solely based on the "other waters" category because they have could have an impact on interstate or foreign commerce, including their use for irrigation water for cropland and the fact that they support "high-quality trout fisheries that attract anglers from all over the United States."[285]

The agencies' proposal to only protect "other waters" that are "relatively permanent" or have "a significant nexus" will remove CWA protections that are currently in place for waters within the Upper Snake Closed Basin.[286] For example, failure to control pollution in the Little Lost River under the CWA will adversely impact high quality fisheries and recreational opportunities for in-state and out-of-state visitors.[287] Currently, there are multiple CWA NPDES permits that are controlling pollution discharges into the Snake River Closed Basin, including, for example, Lost River Trout Hatchery (FRS ID: 110006676249), Mackay State Fish Hatchery (FRS ID: 110070695083 and 110022297174), Mackay WWTP (FRS ID: 110009726001), Van Zant Family Retreat (FRS ID: 110070948705), Medicine Lodge Ranch (FRS ID: 110017859398), Larsen Feedlot (FRS ID: 110024574110), Bybee Cattle Company (FRS ID: 110024574138), Riverence Provisions Lost River Trout Hatchery (FRS ID: 110070694518), and Mud Lake West Slough (FRS ID: 110070047459).[288] Additionally, many of the streams within the Upper Snake Closed Basin are listed on Idaho's CWA Section 303(d) List of Impaired Waters.[289] As is the case with the New Mexico closed basins, the agencies have failed to

Retention of the "other waters" regulatory language in the Pre-2015 Regulatory Definitions is critical for protecting these and similar types of waters across the country. Accordingly, the agencies must retain the following language in the regulatory definition of "waters of the United States" for protection "other waters" with amendment:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

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[285] *Id.*

[286] *See, e.g.,* E&E News, The river disappears, but the pollution doesn't, (July 16, 2019) ("Mackay Reservoir on the Big Lost River is navigable, so any constant or intermittent flows of the Big Lost or its tributaries upstream from the reservoir have always been and would continue to be regulated under the new rule. But water downstream from the reservoir does not have a surface water connection to 'navigable' waters, meaning the rest of the Big Lost River would not be regulated . . . Regulators decided to keep protecting the Big Lost, even though they weren't sure the decision would stand up in court. 'We sort of tried to keep it quiet inside the agency because we didn't want to create low-hanging fruit for someone to file a challenging lawsuit on," former EPA Office of Water attorney Mark Ryan said.")

[287] See Declaration of Ferrell S. Ryan (Nov. 18, 2019) (Attachment 25) and Declaration of Dr. John Carter (Nov. 9, 2019) (Attachment 26).

[288] Waterkeeper Alliance, Maps of Idaho Closed Basins, *supra* fn. 282.

[289] *Id.*

- Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

- From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

- Which are used or could be used for industrial purposes by industries in interstate commerce; and

- All impoundments of waters otherwise defined as waters of the United States under this definition.[290]

F. Impoundments

The Pre-2015 Regulatory Definitions include "[a]ll impoundments of waters otherwise defined as waters of the United States under this definition."[291] The Proposed Rule includes "[a]ll impoundments of waters otherwise defined as waters of the United States under the definition, other than impoundments of waters identified under paragraph (a)(3) [other waters]." The agencies state that they are proposing this change based on ". . . the agencies' consideration of the jurisdictional concerns and limitations of SWANCC and Rapanos" and that "[t]he proposed change ensures that the impoundment of an ''other water'' does not change the jurisdictional status of tributaries or adjacent wetlands to it."[292]

This is not a reasonable basis for excluding impoundments of "other waters" from the CWA. As the agencies acknowledge, "[i]mpoundments of jurisdictional waters were not addressed in the Rapanos decision"[293] and *SWANCC* did not address this issue either. Impoundments of all protected "waters of the United States" should remain protected by the definition.[294] It is arbitrary, capricious and contrary to law for the Agencies to eliminate CWA jurisdiction over impoundments of other waters. Impoundment of a body of water does not remove the need to protect the waters' beneficial uses or eliminate the potential for upstream and downstream impacts.[295]

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[290] *See, e.g.*, 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a)

[291] *See* 40 C.F.R. § 230.3(s)(4).

[292] Proposed Rule, 86 Fed. Reg. at 69420.

[293] *Id.*

[294] *See* Technical Support Document for the CWR, a p. 230. ("The Supreme Court has confirmed that damming or impounding a 'water of the United States' does not make the water non-jurisdictional. See S. D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.").

[295] *See e.g. PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 717, 114 S. Ct. 1900, 1911, 128 L. Ed. 2d 716 (1994); CWR TSD, supra fn. 229; Connectivity Report, at p 3-48 (For example, "[t]he United States has more

G. Tributaries

Tributaries have been categorically protected by the CWA since its inception. In fact, as noted above, tributaries to "navigable waters" have been protected since 1899, and tributaries to interstate water have been protected since 1948. There is no reasonable basis for eliminating categorical CWA protections for tributaries. Their jurisdictional status cannot be seriously disputed and has been confirmed directly and indirectly in many Supreme Court and lower court opinions spanning decades.

Despite this, in the Proposed Rule, the agencies are attempting to only protect tributaries that meet "the relatively permanent and significant nexus standards based on their conclusion that together those standards are consistent with the statutory text, advance the objective and policies of the Act, and are supported by the scientific record."[296] The agencies further state that "[i]ndeed, the agencies are not reaching any conclusions, categorical or otherwise, about which tributaries, adjacent wetlands (other than those adjacent to traditional navigable waters, interstate waters, or the territorial seas), or 'other waters' meet either the relatively permanent or the significant nexus standard. Instead, the proposal enables the agencies to make science-informed determinations of whether or not a water that falls within these categories meets either jurisdictional standard and is therefore a 'water of the United States,' on a case-specific basis."[297]

The agencies' narrow approach to determining jurisdiction of tributaries in the Proposed Rule is contrary to more than 40 years of legal precedent, longstanding agency interpretations of the CWA, and the analysis set forth in the preamble to Proposed Rule and Proposed Rule TSD. The agencies have failed to "provide reasoned explanation" for their action, and have failed to "show that there are good reasons" for replacing the Pre-2015 Regulatory Definitions of "waters of the United States" with the definition in the Proposed Rule.[298] The agencies have also failed to demonstrate that their action is a "permissible construction" of the CWA, *i.e.* that the agencies' action is not "arbitrary,

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than 80,000 dams, over 6,000 of which exceed 15 m in height (USACE, 2009). Numerous studies have shown that dams impede biotic movements, reduce biological connectivity between upstream and downstream locations (e.g., Greathouse et al., 2006; Hall et al., 2011), and form a discontinuity in the normal stream-order related progression in stream ecosystem structure and function (Stanford and Ward, 1982). Upstream of large dams, riparian areas are permanently inundated, increasing lateral hydrologic connectivity. Downstream, dams decrease peak stream volumes during the normal high runoff seasons, while increasing minimum flows during normal low-flow seasons—an overall dampening of stream-flow variability (Poff et al., 2007). Because many riverine organisms are adapted (life history, behavioral, and morphological) to the seasonality of natural flow regimes, dampening flow variability can have deleterious effects on species persistence where dams have been built (Lytle and Poff., 2004). This reduction in high flows also decreases the connectivity of riparian wetlands with the stream by reducing the potential for overbank lateral flow. This can affect downstream water quality, because overbank flow deposits sediment and nutrients that would otherwise remain entrained in the river (Hupp et al., 2009).).

[296] Proposed Rule, 86 Fed. Reg. at 69390.

[297] Proposed Rule, 86 Fed. Reg. at 69390.

[298] *FCC v. Fox Television Stations, Inc.,* 556 U.S.502, 516 (2009).

capricious, or manifestly contrary to the statute."[299] The agencies are also required to provide a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" the Pre-2015 Regulatory Definitions, but have failed to do so.[300]

Under the agencies' Pre-2015 Regulatory Definitions, all tributaries to traditionally navigable waters, interstate waters, impoundments, and "other waters" are categorically defined as "waters of the United States."[301] Taken together, the Proposed Rule's improper limitations on CWA jurisdiction over tributaries undermine the entire CWA by creating many unsupported and vaguely defined barriers to controlling pollution in historically protected rivers, streams and other waters.

All of the tributaries protected under that regulation must continue to be included in the definition of "waters of the United States." As demonstrated previously, the Supreme Court has not issued any opinion limiting CWA jurisdiction over tributaries to these waters. To the contrary, it is well settled that tributaries to other "waters of the United States" are jurisdictional waters within the meaning of "waters of the United States."[302] Neither *SWANCC* nor *Rapanos* invalidated or limited the scope of jurisdiction provided by the pre-2015 definition's inclusion of tributaries.[303] Tributaries are obviously connected to, and thus adversely impact, their downstream waters without regard the tributaries are "relatively permanent" or have a "significant nexus" to traditional navigable waters, interstate waters, or the territorial seas. This is consistent with the findings of the Connectivity Report[304] and the SAB Report,[305] as well as the individual comment of the SAB members.[306]

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[299] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

[300] *Fox*, 556 U.S. at 516.

[301] *See e.g.*, 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

[302] *See, e.g., N. Cal. River Watch v. City of Healdsburg,* 496 F.3d 993, 997 (9th Cir. 2007) ("The Supreme Court has since confirmed that regulable waters of the United States include tributaries of traditionally navigable waters and wetlands adjacent to navigable waters and their tributaries. The only question reserved in Riverside Bayview Homes was the issue of CWA jurisdiction over truly isolated waters." citing *Riverside Bayview,* 474 U.S. at 106; 33 C.F.R. 328.3(a)(1),(4),(7); and *Rapanos*, 547 U.S. at 792 fn. 3); *see also Benjamin v. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210, 1215 & n. 2 (D. Or. 2009) (indicating that jurisdiction over tributaries did not require demonstration of significant nexus); *United States v. Vierstra*, 2011 WL 1064526, at *5 (D. Id. Mar. 18, 2011) ("It is an open question as to whether Justice Kennedy's concurrence applies in the tributary context."). *But see, e.g., United States v. Robison*, 505 F.3d 1208 (11th Cir 2007) (applying "significant nexus" analysis to tributary stream).

[303] *See* 2011 Comments, *supra* fn. 22 at pp. 9-15; *see also* 2003 Comments, *supra* fn. 22 at pp. 4-6.

[304] Connectivity Report, *supra* fn. 99.

[305] SAB Report, *supra* fn. 98.

[306] Compilation of Preliminary Comments from Individual Panel Members on the Scientific and Technical Basis of the Proposed Rule Title "Definition of 'Waters of the United States' Under the Clean Water Act" (August 14, 2014) (hereinafter "Member Comments") (Attachment 27).

All ephemeral, intermittent and perennial tributaries, as those terms are defined by science, must be categorically included as "waters of the United States."[307] Their inclusion is necessary to achieve the objective of the CWA, which requires controlling water pollution at its source. This conclusion is supported by the Connectivity Report, and the SAB Member Comments. Wetlands, lakes and ponds should be included as tributaries based on the agencies' longstanding interpretation of the CWA and on the findings of the Connectivity Report and many individual SAB Member Comments.[308]

According to EPA, "[t]he scientific literature documents that tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches, are integral parts of river networks."[309] Additionally, in the preamble to the Proposed CWR, the agencies noted that "tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, or biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."[310] In the preamble to the final CWR, the agencies explained that the effects tributaries exert on downstream waters "occur even when the covered tributaries flow infrequently (such as ephemeral covered tributaries), and even when the covered tributaries are great distances from the traditional navigable water, interstate water, or the territorial sea." 80 Fed. Reg. at 37,069.

In addition to the prior agency determinations, the Connectivity Report and the SAB Report, numerous scientific reports and government documents from across the country illustrate the importance of protecting these waters. A report produced by Trout Unlimited, using USGS National Hydrography Dataset, documents the abundance and importance of intermittent and headwater streams across the country showing, for example, that 48 percent of stream miles with native trout historical range are classified as intermittent or ephemeral, and 58 percent of stream miles are in headwater streams.[311] The Trout Unlimited Report also states that 64 percent of stream miles with salmon/steelhead range are classified as intermittent or ephemeral, and 57 percent of stream miles are in headwater streams. In North Carolina, research conducted by the North Carolina Department of Natural Resources – Division of Water Quality, concluded that:

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[307] *See e.g., United States v. Hercules, Inc., Sunflower Army Ammunition Plant, Lawrence, Kan.*, 335 F. Supp. 102, 106 (D. Kan. 1971) (The defendant next makes a motion to dismiss on the ground that, if any ammonia was dumped into a watercourse, it was dumped into a tributary of a tributary of a navigable water and not the "tributary of a navigable water" as stated in the statute. This contention borders on the frivolous. Defendant argues that the words of the statute should be interpreted in the ordinary every day sense. This Court agrees. A tributary is defined in Bouvier, Dictionary of Law Vol. II, p. 384 (5th ed.); Black's Law Dictionary p. 1677 (4th ed.), as "all streams flowing directly or indirectly into a river.")

[308] *See e.g.,* Connectivity Report *supra* fn. 99, at 1-8 (nutrient removal and cycling); Member Comments, *supra* fn. 306 Rosi-Marshall at 81 and Sullivan at 85.

[309] CWR TSD, at 243, *supra* fn. 229.

[310] 79 Fed. Reg. at 22,224 (emphasis added).

[311] Rising to the Challenge – How Anglers Can Respond to Threats to Fishing in America, available at http://www.tu.org/sites/default/files/TU_Rising_to_the_Challenge_web.pdf (Attachment 28).

> In summary, staff of the Division of Water Quality have been conducting intensive research on headwater streams and headwater wetlands across the state for the past several years. Headwater streams are very common and provide significant benefits to downstream water quality and aquatic life. Intermittent streams have significant aquatic life even though their flow is not constant throughout the year. Headwater wetlands are often associated with these streams and provide important water quality filtration to protect downstream water quality as well as significant aquatic life habitat. Therefore based on this on-going research, the Division of Water Quality believes that protection of these headwater streams and wetlands is essential to protect downstream water quality.[312]

Similarly, the SAB provided comments on categorical exclusions of certain ditches under the Proposed CWR, and specifically rejected the exclusion of ditches as "not justified by science." The SAB explained: "There is . . . a lack of scientific knowledge to determine whether ditches should be categorically excluded. Many ditches in the Midwest would be excluded under the proposed rule because they were excavated wholly in uplands, drain only uplands, and have less than perennial flow. However, these ditches may drain areas that would be identified as wetlands under the Cowardin classification system and may provide certain ecosystem services." SAB Report at 3.

In the final CWR, the agencies significantly altered the provision regarding ditches, changing the exclusion to include: "[d]itches with ephemeral flow that are not a relocated tributary or excavated in a tributary"; "[d]itches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands"; and, "[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section." 80 Fed. Reg. at 37,105.

Contrary to that decision, the agencies have noted that man-made and man-altered tributaries—such as "ditches, canals, channelized streams, piped streams, and the like,"—"likely enhance the extent of connectivity" between streams and downstream rivers, "because such structures can reduce water losses from evapotranspiration and seepage." TSD at 256-57. In other words, to the extent perennial, intermittent, and ephemeral tributaries have significant impacts on downstream waters, the increased flow associated with man-made or man-altered ditches may exacerbate these effects.

The agencies' fundamental basis for failing to categorically protect all tributaries to other "waters of the United States" is arbitrary, capricious and contrary to law. The agencies have not provided a

[312] Memo from John Dorney, Wetlands Program Development Unit, NC DWQ. April 5, 2006. Background information on the water quality and aquatic life values of headwater streams and headwater wetlands, available at http://aswm.org/pdf_lib/cover_letter_and_summary_nc.pdf (Attachment 29).

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

Nothing in the law or science supports the definitional limitations the agencies are proposing, and as a result, neither the agencies nor the public can discern which tributaries will be protected under the Proposed Rule. The obvious corollary to this fact is that the agencies cannot evaluate the impact of their proposed definition on the Nation's' waters and CWA programs, which means the agencies cannot determine or demonstrate that their definition is consistent with the CWA. In fact, the agencies have not even taken meaningful steps to do so. Commenters, on the other hand, have evaluated how the narrowing of CWA protections could affect twelve watersheds across the country, and it appears the impacts could be devastating, particularly in the arid West, but the problems are significant in other areas as well.[313]

H. Territorial Seas

We fully support the agencies inclusion of the territorial seas in the regulatory definition of "waters of the United States," as this category in included in the definition of "navigable waters" in the text of the CWA.[314]

I. Adjacent Wetlands

We strongly support the agencies decision to categorially protect wetlands adjacent to traditional navigable waters, interstate waters, and the territorial seas as "waters of the United States" in the proposed regulatory definition. As described above in Section III(B), this is consistent with the Supreme Court's holding in *Riverside Bayview*. Additionally, as the agencies note, "the *Rapanos* decision did not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are 'waters of the United States."[315]

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[313] *See, e.g.,* Waterkeeper Alliance Fact Sheets, *supra* fn. 258 (demonstrating the importance of protecting tributaries in twelve Waterkeeper watersheds across the country); see also Waterkeeper Alliance Videos, *supra* fn. 258.

[314] 33 U.S.C. § 1362(7).

[315] Proposed Rule, 86 Fed. Reg. 69422 (The agencies state: "See *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) ('As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.'), *id.* at 810 (Stevens, J. dissenting) ('Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases--and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied--on remand each of the judgments should be reinstated if either of

However, we urge the agencies to consider fully protecting all wetlands adjacent to other "waters of the United States" consistent with the Court's opinion in *Riverside Bayview*. Prior to *Rapanos,* under the Pre-2015 Regulatory Definitions, the agencies protected wetlands adjacent to all other "waters of the United States," with the exception of "waters that are themselves wetlands," as jurisdictional waters under the CWA. Limiting CWA protections for wetlands adjacent to non-foundational waters (as narrowly defined by the agencies) based on the "relatively permanent" and "significant nexus" tests is inconsistent with the objective of the CWA, particularly with regard to tributaries as those waters should be categorically protected as "foundational waters."[316]

Long ago, the agencies compellingly established the importance of protecting wetlands adjacent to other "waters of the United States" and the Supreme Court in *Riverside Bayview* upheld the agencies' view as a reasonable interpretation of the CWA. This agencies' view, noted by the Court in *Riverside Bayview*, is as follows:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.[317]

As discussed extensively throughout these comments, Supreme Court in *Riverside Bayview* upheld the agencies' assertion of CWA jurisdiction over wetland adjacent to "other waters of the United States" as provided in Pre-2015 Regulatory Definitions—not merely wetlands adjacent to traditional navigable or "foundational" waters. The Court held:

> "[w]e cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States—based as it is on the Corps' and EPA's technical expertise—is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of

those tests is met.); *see also Riverside Bayview*, 474 U.S. 121, 134 ("[T]he Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."); Rapanos Guidance at 5. Moreover, ample scientific information makes clear that the health and productivity of rivers and lakes, including foundational waters, depends upon the functions provided by upstream tributaries, adjacent wetlands, and 'other waters.'")

[316] *See* Waterkeeper Alliance Facts Sheets and Waterkeeper Alliance Videos, *supra* fn. 258 (demonstrating importance of broadly protecting wetlands in twelve Waterkeeper watersheds across the country).
[317] *Riverside Bayview*, 474 U.S. at 133 (*citing* 42 Fed. Reg. 37128 (1977)).

> defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."[318]

This combined with the overwhelming evidence regarding the importance of protecting wetlands adjacent to rivers, streams, wetlands, lakes, and other waters in the Connectivity Report and SAB Report[319] provides more than ample scientific support for the agencies' to categorically protect all wetlands adjacent to other waters defined as "waters of the United States" in any regulatory definition. In other words, the agencies have adequate legal authority to categorically protect all wetlands adjacent to other "waters of the United States" and providing categorical protection for all adjacent wetlands is required to achieve the objective of the CWA.

The agencies agree that "the Supreme Court's interpretations of the scope of 'waters of the United States' do not require adoption of a significant nexus test" for determining jurisdiction under the CWA.[320] In interpreting, *Rapanos* the agencies should consider the reasoning of the four Justice dissent, as it is consistent with the Court's holding in *Riverside Bayview*, and *Rapanos* does not have a majority opinion. Further, Justice Kennedy and the plurality do not share a common analytical framework for determining whether wetlands adjacent to non-navigable tributaries are protected by the CWA as "waters of the United States." The opinions do not even share a common understanding of the CWA, *Riverside Bayview* or *SWANCC*. For example, the plurality refers to Justice Kennedy's "significant nexus" approach as a "gimmick,"[321] and Justice Kennedy says the plurality's approach, among other things, is "without support in the language and purposes of the Act or in our cases interpreting it."[322]

As discussed extensively throughout these comments, the objective of the CWA is to protect water quality in all of the Nation's waters—not just traditional navigable waters, interstate waters, and the territorial seas. The agencies' have already determined that broadly protecting "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment"[323] and the Supreme Court has already determined that this is a reasonable basis for protecting those wetlands as "waters of the United States" under the CWA. While it is obvious that adjacent wetlands meet the "relatively permanent" or "significant nexus" test are reasonably encompassed within "waters of the United States," the agencies need to protect wetlands adjacent to all "waters of the United States" in order to achieve the objective of the CWA.

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[318] *Riverside Bayview,* 474 U.S. at 134.

[319] Connectivity Report, *supra* fn. 99 at ES-3, 4.

[320] Proposed Rule, 86 Fed. Reg. at 69407.

[321] *Rapanos*, 547 U.S. at 756.

[322] *Rapanos*, 547 U.S. at 768.

[323] *Riverside Bayview Homes*, 474 U.S. at 135.

J. Exclusions:

These exemptions and definitions in the NWPR encompassed waters that have long been protected as jurisdictional "waters of the United States" under the CWA, and their removal from protections under the CWA was unlawful.[324] Additionally, as discussed extensively in the Waterkeeper CWR Comments and the Amended Complaint, the CWR also contained numerous exemptions that are contrary to law and science (i.e. waste treatment, ditches, ephemeral features, distance limitations, definition of tributary, and ordinary high water mark definition).[325] We support the agencies decision not to adopt the illegal exclusions in the NWPR and CWR, and provide the following comments on the agencies' proposed exclusions for prior converted cropland and waste treatment systems.

1. Prior Converted Cropland

The prior converted cropland exclusion was added to the Pre-2015 Regulatory Definitions in 1993.[326] The exclusion was intended to exempt cropland that no "longer performs the [wetland] functions or has values that the area did in its natural condition" from the CWA and ensure consistency with other federal programs affecting wetlands.[327] The agencies should reject the overly broad approach to the prior converted cropland exemption adopted in the NWPR and return to the original intent and practice from 1993 such that "if the cropland is 'abandoned,' meaning that crop production ceases and the area reverts to a wetland state" the area will no longer be considered prior converted cropland. Additionally, consistent with the "change in use" approach, the agencies should ensure that an area that is put to a non-agricultural use, such as for development, it immediately loses its exempt status and once again becomes potentially jurisdictional under the CWA.[328]

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[324] For example, because the agencies narrowly defined jurisdictional waters in the NWPR, and also defined "upland" in a manner that could include waters that have historically been protected as "waters of the United States," the exclusions allow for mining and construction activity to take place in, discharge pollutants to, or destroy streams, rivers, lakes, wetlands and other waters contrary to the CWA. Waterkeeper NWRP Comments, *supra* fn. 22, at 79, 87-90; *see also* Selected Corp Jurisdictional Determinations, Corps Approved Jurisdictional Determination SAJ-2010-01702 (Dec. 7, 2020) (exempting multiple ditches by deeming them prior converted cropland whether the ditches are "connected to the now interconnected system of ditches that have successfully dewatered <u>much of the site</u> for agriculture. All ditches on site were excavated to drain wetlands that do not satisfy the conditions of (c)(1).") (emphasis added) (Attachment 30).

[325] Amended Complaint, *supra* fn. 33 at ¶¶ 98-155; Waterkeeper CWR Comments, *supra* fn. 22.

[326] 58 FR 45008, 45031 (Aug. 25, 1993).

[327] 86 Fed. Reg. at 69424; 58 Fed. Reg. 45008, 45031.

[328] *See* 86 Fed. Reg. at 69425.

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

In the Proposed Rule, the agencies are proposing to adopt a revised version of the 1986 waste treatment exclusion, which the agencies characterize as a "return to the longstanding version of the exclusion that the agencies have implemented for decades."[329] The exclusion provides that "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States."[330]

(a) History of the Waste Treatment System Exclusion

On May 19, 1980, EPA promulgated a rule establishing the requirements for several environmental permitting programs, including the NPDES program. *See* 45 Fed. Reg. 33290 (May 19, 1980). As part of this action, EPA promulgated a definition of the term "waters of the United States." That rule stated:

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

45 Fed. Reg. 33290, 33424 (emphasis added); *see also* 40 C.F.R. § 122.3 (1980). The preamble to this 1980 rule explains that the second sentence of this regulation was included "[b]ecause [the] CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems[.]" 45 Fed. Reg. 33290, 33298.

Two months later, EPA suspended the second sentence of this regulation (italicized above) by removing it from the regulation entirely. In its place, EPA inserted a footnote stating that the sentence was "suspended until further notice." 45 Fed. Reg. 48620 (July 21, 1980). EPA explained in a Federal Register notice that it was suspending this sentence due to industry's objections that the regulation "would require them to obtain permits for discharges into existing waste water treatment systems, such as power plant ash ponds, which had been in existence for many years." *Id*.

EPA did not provide the public with an opportunity to comment on the suspension before this significant regulatory action was taken in 1980. Instead, EPA noted its intent to "promptly develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of

[329] Proposed Rule, 86 Fed. Reg. 69426.

[330] *Id.*

that rulemaking, EPA will amend the rule, or terminate the suspension." *Id*. EPA never developed a revised definition, and thus never submitted a proposed rule regarding this limitation on the waste treatment system exclusion for notice and comment. The public, therefore, never had the opportunity to comment on or legally challenge the unilateral suspension of this sentence from the Code of Federal Regulations.

The Proposed CWR included the "suspended" second sentence of the waste treatment system exclusion but noted in a footnote that the suspension was still in effect. *See* 79 Fed. Reg. 22188, 22268 (April 21, 2014). In addition, in the preamble to the Proposed CWR the agencies purported to make only "ministerial" changes to the waste treatment system exclusion and, thus, stated that they were not seeking comment on this exclusion. *Id*. at 22190, 22217. The preamble to the Final CWR also describes the changes to the waste treatment system exclusion as "ministerial," and notes that "[b]ecause the agencies are not making any substantive changes to the waste treatment system exclusion, the final rule does not reflect changes suggested in public comments." *See* 80 Fed. Reg. at 37114, 37097.

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

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

80 Fed. Reg. at 37,114. As it did before, "Note 1" of the revised 40 C.F.R. § 122.2 purports to continue the suspension of the last sentence of the waste treatment system exclusion.

Thus, under the waste treatment system exclusion in the CWR (including the ongoing suspension of the last sentence of that exclusion), waters such as adjacent wetlands, ponds, or tributaries are not subject to CWA jurisdiction if they are deemed to be part of a "waste treatment system"—even if they are naturally occurring waters, were created entirely within a naturally occurring water, or were created by impounding a water of the United States. 80 Fed. Reg. at 37114; 40 C.F.R. § 122.2.

For example, under the CWR, an industrial facility could unilaterally destroy CWA jurisdiction over a naturally occurring wetland or tributary merely by using that wetland or tributary as part of its on-site "waste treatment system." This exemption is contrary to the fundamental purposes of the

CWA and flies in the face of any permissible reading of "waters of the United States." *See* 33 U.S.C. § 1251(a).

Under the NWPR, the agencies falsely claimed that the NWPR's exclusion of waste treatment systems from CWA jurisdiction has "been expressly included in regulatory text for decades, but [that] the agencies are defining [the exclusion] for the first time to enhance implementation clarity." NWPR, 85 Fed. Reg. at 22317, 22324. The exclusion for "waste treatment systems" in the NWPR excluded any jurisdictional water from CWA protections if it was used for a waste treatment system prior to 1972 or if it is converted to a waste treatment system thereafter "in accordance with the requirements of the CWA." NWPR, 85 Fed. Reg. at 22325. Under the NWPR, and contrary to the CWA, the agencies affirmatively relinquished jurisdiction over otherwise jurisdictional waters that are converted to waste treatment systems through CWA Sections 402 and 404 permits. NWPR, 85 Fed. Reg. at 22322. And, for the first time, the agencies defined waste treatment systems to include cooling ponds, which encompasses large public lakes – often used for boating, fishing, recreation, and other public uses - that were created by impounding jurisdictional waters to provide cooling water for industry. NWPR, 85 Fed. Reg. at 22328-39.

Instead of keeping the promise EPA made over thirty years ago, with the NWPR, the agencies attempted to evade compliance with the CWA and APA by bootstrapping the impermissible exclusion onto a new "waters of the United States" definition without ever having provided an adequate legal or factual basis for doing so as required under the CWA and APA. This exclusion is premised on a rewriting of the CWA and is not based on a permissible construction of the law. It allows industries to transform the Nation's waters into waste treatment systems and thereby strip them of CWA jurisdiction contrary to the CWA, legislative history, and case law. *See, e.g.*, 45 Fed. Reg. 48620, 48620 (July 21, 1980). Even navigable-in-fact lakes, important for navigation, interstate commerce, drinking water, and recreation, could be rendered non-jurisdictional, destroyed, and turned into treatment systems for industrial waste under the NWPR.

In the Proposed Rule, the agencies are once again attempting to remove the suspended language that limited the waste treatment system exclusion to manmade bodies of water without ever evaluating the impact of allowing waste treatments to be constructed and operated in the Nation's waters and without providing any reasoned factual and legal basis for doing so. Instead, the agencies are simply relying on the fact that "EPA has *not* limited application of the waste treatment system exclusion to manmade bodies of water for over four decades" and "EPA's decades-long practice," despite the fact that this "practice" was evading the requirements of the APA and the CWA by failing to conduct substantive notice and comment rulemaking as promised in 1980.[331]

[331] Proposed Rule, 86 Fed. Reg. at 69427.

(b) Coal Ash Surface Impoundments

This exclusion has had, and will continue to have, serious consequences for our Nation's waters if it is not eliminated. For example, it has been a common practice for the utility industry to impound streams and rivers to create waste dumps for coal ash[332] and other wastes associated with coal-fired power plants. In fact, EPA specifically cited the utility industry's concern about coal ash impoundments as one of the primary reasons it suspended the sentence making clear that permits are required for discharges into a waste treatment system created by impounding "waters of the United States."[333]

Coal-fired power plants discharge millions of gallons of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. This pollution is discharged directly from the power plant; flows from old, unlined surface impoundments or "ponds" that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge; and seeps from unlined ponds and landfills into ground and surface waters. These coal ash "[i]mpoundments, EPA tells us, have been 'largely ineffective at controlling discharges of toxic pollutants and nutrients.'"[334] EPA estimates that *at least 5.5 billion pounds* of pollution are released into the environment by coal-burning power plants every year.[335] Coal-burning power plants are responsible for at least 50 to 60 percent of the toxic pollutants discharged into waters of the U.S—more than the other nine top polluting industries *combined*.[336]

Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Due to the bio-accumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems. In short, coal plant water pollution has serious public health consequences and causes lasting harm to the environment. According to EPA, power plant pollution has caused over 160 water bodies not to meet state water quality standards, prompted government agencies to issue fish consumption advisories for 185 waters, and degraded 399 water bodies across the country that serve as public drinking water supplies.[337]

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

[333] 45 Fed. Reg. at 48620.

[334] *Southwestern Electric Power Co. v. EPA*, No. 15-60821, at 2 (5th Cir. April 12, 2019) (internal citation omitted).

[335] U.S. EPA, Environmental Assessment for the Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category 3-14 (Apr. 2013), Docket No. EPA-HQ-OW-2009-0819-2260 ("EA").

[336] *Id*. at 3-13.

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

Despite these horrific realities, utilities have effectively been allowed to steal our Nation's waters to create these toxic lagoons in some cases. For example, an analysis of coal ash disposal units in seven southeastern states by Waterkeeper Alliance showed that 113 of 405 dumps were created by impounding or burying a "water of the United States."[338] Of those 113 dumps, 85 were classified as surface impoundments, 26 as landfills, and 2 as Flue Gas Desulfurization (FGD) waste disposal units.[339] Waterkeeper Alliance's analysis identified more than 140 stream segments that have been impounded or otherwise obstructed by coal ash disposal units, with a combined length of 113 miles. The estimated volume of toxic coal ash in the dumps built on top of or in a water of the United States in these eight states alone was 132 billion gallons.[340]

Utilities in other states have also created coal ash dumps by impounding or burying a "water of the United States." For example, the FirstEnergy Little Blue Run impoundment in Pennsylvania, the nation's largest coal ash impoundment, was created by damming Little Blue Run stream. In 2014, the Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment and ordered a $169 million dollar cleanup and closure of Little Blue Run.[341]

(c) The Agencies do not have the authority to exempt "waters of the United States" from coverage under the CWA.

The broad exclusion for waste treatment systems from CWA jurisdiction in the Proposed Rule is directly contrary to the CWA and decades of law holding that once a body of water is a "water of the United States," it is always a water of the United States.[342] While some of these decisions examined the term "navigable waters" as opposed to "waters of the United States," the CWA most certainly encompasses the narrower category of "navigable water" as defined under other statutes. There is no evidence Congress intended to depart from this well settled law to allow the agencies to remove bodies of water that fall squarely within the definition of "waters of the United States," especially

[338] Waterkeeper Alliance performed a geospatial analysis by overlaying coal ash disposal sites on historical topographical maps published by the U.S. Geological Survey, allowing the identification of coal ash ponds and landfills that were constructed by impounding or burying one or more preexisting blue-line streams. The analysis examined known coal ash sites in Alabama, Georgia, Florida, North Carolina, South Carolina, Tennessee, and Virginia. See (Attachment 31).

[339] *Id*.

[340] *Id.*

[341] Pa. Dep't of the Env't, DEP Issues Permit Requiring Closure of FirstEnergy's Little Blue Run Impoundment (Apr. 3, 2014), available at: http://www.paenvironmentdigest.com/newsletter/default.asp?NewsletterArticleID=28339&SubjectID=&SearchWord=blue+run (Attachment 32).

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

where those "waters of the United States" are impounded to create a private dump for a utility or other industrial operation.[343] Further, it is impossible to justify any assertion that navigable waters retain a protected status forever, while waters of the United States—by definition also "navigable waters"—can be excluded from protection when they are impounded to create a dump.[344]

To the contrary, legislative history speaks directly to this issue and the general common law rule prior to the enactment of the CWA was that a body of water forever remains a water of the United States once it has been identified as a water of the United States.[345] The Senate Committee on Public Works, in approving the Federal Water Pollution Control Act Amendments of 1971, explicitly found that "[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable."[346] Several years later, another Senate Report stated that the CWA "stipulated that the Nation's fresh and marine waters would not be an element of the waste treatment process. That continues to be national policy."[347] There appear to be no contrary statements in the legislative history.

(d) EPA's interpretation of the proposed waste treatment exclusion does not make it a permissible construction of the CWA.

EPA has, at times, asserted that the waste treatment system exemption is not really as broad as the plain language suggests because it interprets the regulation to exclude only older waste treatment systems constructed from waters of the United States. Generally, an agency's interpretation of its own regulations is subject to judicial deference unless it is "plainly erroneous or inconsistent with the regulation."[348] In this case, EPA's interpretation conflicts with the plain language of the Proposed Rule, and the Agencies have advanced a second interpretation that does exclude newly created waste treatment systems in some circumstances.

When it first finalized the waste treatment system definition in 1980, EPA stated that Congress did not intend for the CWA to exempt waste treatment systems created by impounding waters of the United States.[349] Specifically, EPA said:

> [b]ecause CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the

[343] *Id*. at 523.

[344] *Id*. at 522-23.

[345] *See, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) ("When once found to be navigable, a waterway remains so.").

[346] S. Rep. No. 92-414, at 7 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3674.

[347] S. Rep. No. 95-370, at 4 (1977) reprinted in 1977 U.S.C.C.A.N. 4326, 4330.

[348] *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

[349] 45 Fed. Reg. at 33,298.

> United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting interstate or foreign commerce.[350]

Even when the agency suspended the final sentence of the regulation, it reiterated its purposes, noting that "[t]he Agency's purpose in the new last sentence was to ensure that dischargers did not escape treatment requirement by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands."[351]

In the Proposed Rule definition, however, the waste treatment exemption does not include any language limiting the exclusion to treatment systems created by impounding waters of the United States that have been in existence "for many years" or for any other time period. Further, it is illogical—and courts have held as much—to suggest that a waste impoundment created prior to the CWA has been designed to meet the requirements of the CWA.[352] In any event, the plain language of the Proposed Rule appears to illegally exempt all waste treatment systems regardless of when the treatment systems are constructed.[353]

After promulgating a rule that reflected the intent of Congress that our nation's rivers, lakes, and streams are not to be used as private dumps, and then backtracking, EPA came up with a new spin on how to treat coal ash and other industrial impoundments instead of following through on its promise to revisit the suspension. In a 1986 memorandum, EPA stated that it evaluates what is an exempt waste treatment system on a case-by-case basis, treating "newly created impoundments of waters of the U.S. as 'waters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments as 'wastewater treatment systems designed to meet the requirements of the CWA' and therefore are not 'waters of the U.S."[354] EPA states that, in fact, it suspended the last sentence of the waste treatment system in

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[350] *Id*.

[351] 45 Fed. Reg. at 48,620.

[352] *See, e.g., California Sportfishing Prot. Alliance v. Cal. Ammonia Co*., 2007 WL 273847, *6 (E.D. Cal 2007) (noting that the fact that a waste treatment impoundment is created prior to the Clean Water Act is evidence that it is not "designed to meet the requirements of the Clean Water Act").

[353] *See also,* Proposed Rule, 86 Fed. Reg. at 69428.

[354] Memo from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, attach. B at 7 (Apr. 2, 1986).

order to allow for such case-by-case decisions.[355] EPA has echoed the interpretation articulated in the 1986 memorandum in various scenarios.[356]

The agencies have attempted to reverse this interpretation in recent years to exclude even *newly* created waste treatment systems from "waters of the United States." *See, e.g.*, Jon Devine et al., *The Intended Scope of the Clean Water Act*, 41 Envtl. L. Rep. News & Analysis 11,118, 11,125 (2011) (noting that the agencies have advanced this broader interpretation in a 1998 Federal Register notice, a 2000 guidance document, and by the Corps in recent litigation. "Under the agencies' revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is covered by a § 404 permit; that way, the system is 'designed to meet the requirements of the Act,' as required by the regulation."[357]) The Agencies are attempting to rely on such interpretations as a basis for the exclusion in the Proposed Rule. For example the agencies state "[a] waste treatment system may be ''designed to meet the requirements of the Clean Water Act'' where, for example, it is constructed pursuant to a Clean Water Act section 404 permit." However, EPA's non-regulatory and evolving interpretations of the regulation do not transform the Proposed Rule's waste treatment system exemption into a permissible construction of the CWA.[358]

For all these reasons, the waste treatment system exclusion is illegal and fails Step One and Step Two of the *Chevron* test. Commenters strongly urge the agencies to eliminate the exclusion or publish a revised definition of waste treatment system that complies with the CWA. At a minimum, EPA must provide full notice and comment rulemaking through a supplemental notice that includes a detailed explanation of the proposed waste treatment system exclusion and the agencies' legal and factual basis for it. In short, the agencies must reverse course and close this gaping hole they have unlawfully created in the CWA that authorizes utilities and industrial operators to use our Nation's waters as their own private sewers.

K. Definitions

1. Ordinary High Water Mark

The agencies have proposed that a definition of ordinary high water mark be included in the regulation, but it is unclear exactly how the agencies plan to use that definition. The agencies should

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[355] *Id*. (noting that EPA suspended the sentence in order to "restor[e] the ambiguity of the earlier regulations, so that each case must be decided on its own facts"). This is, of course, contrary to the purpose EPA provided when it suspended the sentence. 45 Fed. Reg. at 48,620 (noting that EPA would re-examine the waste treatment system definition and "promptly . . . develop a revised definition and to publish it as a proposed rule for public comment").

[356] Jon Devine et al., The Intended Scope of Clean Water Act Jurisdiction, 41 Envtl. L. Rep. News & Analysis 11,118, 11,125 (2011) (citing Letter from Lisa P. Jackson, Administrator, EPA, to Rep. James L. Oberstar at 1 (Apr. 30, 2010). EPA has taken the same position in litigation. *See W. Va. Coal Ass'n v. Reilly,* 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), aff'd, 932 F.2d 964 (4th Cir. 1991).

[357] *Id*.

[358] Proposed Rule, 86. Fed. Reg. at 69427.

not narrow jurisdiction over tributaries through the adoption of a mandatory requirement for tributaries to possess a bed, bank, and Ordinary High Water Mark ("OHWM"). The existence of an OHWM should not be a requirement for asserting jurisdiction over tributaries, as it is not supported by law and science. As noted in the Connectivity Report and the Member Comments, the requirement of an OHWM improperly limits jurisdiction and is not consistent with the science regarding how tributaries are affected by pollution or how tributaries impact downstream waters.

The Proposed Rule incorporates the definition of OHWM from existing regulations developed for the CWA Section 404 Program into the definition of tributary. The definition is taken from 33 C.F.R. 328.3(e), which provides:

> The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

While this definition may have some reasonable meaning in its original context, it has nothing to do with the extent of "waters of the United States" in the context of regulating and responding to discharges of pollutants. As the Corps noted in 1977:

> Prior to enactment of the FWPCA, the mean tide line or (mean higher tide line on the West Coast) was used to delineate the shoreward extent of jurisdiction over the regulation of most activities in tidal waters under the 1899 Act as well as for mapping, delineation of property boundaries, and other related purposes. In freshwater lakes, rivers and streams that are navigable waters of the United States, the landward limit of Jurisdiction has been traditionally established at the ordinary high water mark. The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.[359]

Thus, the concept of an OHWM or High Water line was utilized in the context of the Rivers and Harbors Act of 1899 and jurisdictional consideration related to traditional navigability where "[t]he need to protect navigable capacity of a waterway above the mean high water line was obviously minimal."[360] The inapplicability of this limitation to the CWA was addressed in the *Holland* case

[359] 42 Fed. Reg. 37122, 37128 (July 19, 1977).

[360] *Holland*, 373 F. Supp. at 670-673.

which outlined both the authority and need to regulate waters beyond the reach of the traditional navigability tests and stated that "to recognize this and yet hold that pollution does not affect interstate commerce unless committed in navigable waters below the mean high water line would be contrary to reason."[361]

These long-held views as to the inapplicability of the OHWM to the meaning of "waters of the United States" under the CWA are confirmed by the Connectivity Report which states: "[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."[362] There is nothing in the Connectivity Report to support the idea that these connections are limited to tributaries with OHWMs or that OHWMs are the sole indicator of connectivity. Individual SAB members also expressed disagreement or concern with the addition of a requirement for an OHWM for tributaries. For example, one member stated that:

> The definition of the lotic-type tributary is appropriately comprehensive because it inherently includes ephemeral and intermittent streams (as well as perennial) streams. The former types are often overlooked but ecologically important, particularly in arid landscapes with seasonal patterns of precipitation. However, there may be some types of tributaries, such as spring-fed streams, that lack an obvious OHWM because their groundwater sources dominate the water budget, are temporally stable, and so there is no fluctuation in the hydrograph to generate a 'line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear line on the banks . . .' Therefore the definition should be 'bed and bank, and sometimes an OHWM.'[363]

Another SAB member similarly commented that the Proposed Definition should allow "flexibility to for [sic] field personnel to define functional tributaries, even where those functional tributaries might lack obvious indicators of bed and bank (e.g., alluvial deposits on the bed of a headwater stream in a humid mountain setting) but have less obvious indicators of tributary flows (e.g., directionally bent herbaceous vegetation and subtle debris lines in swales connecting vernal pools to downstream waters in arid and semi-arid settings)."[364]

With regard to the CWR, the SAB "advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks," and urged EPA to change the definition's

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[361] *Holland*, 373 F. Supp. at 670-673.

[362] Connectivity Report, *supra* fn. 99, at 1-3, and related Chapters.

[363] Member Comments, *supra* fn. 306, Aldous at 2-3 (internal citations omitted).

[364] Member Comments, *supra* fn. 306, Rains at 71.

wording to "bed, bank, and other evidence of flow."[365] The SAB explained that "[a]n ordinary high water mark may be absent in ephemeral streams within arid and semi-arid environments or in low gradient landscapes where the flow of water is unlikely to cause an ordinary high water mark." [366]

EPA's own scientific analyses underpinning the CWR do not provide support for the requirement that a tributary have both bed, banks and ordinary high water mark to impact downstream waters.[367] Historically, the definition of tributary only required the presence of defined bed and banks, and the addition of the requirement for an ordinary high water mark under the CWR improperly excluded many waters without any sound legal and scientific basis.[368] While EPA noted that available science "supports the conclusion that sufficient volume, duration, and frequency of flow are required to create a bed and banks and ordinary high water mark" within a tributary,[369] this self-evident conclusion has no bearing on whether a particular tributary (or group of similarly situated tributaries) "provide[s] many common vital functions important to the chemical, physical, and biological integrity of downstream waters" and should thus be *per se* jurisdictional.[370] Indeed, the TSD explicitly recognized, and did not dispute, the SAB's view that "from a scientific perspective there are tributaries that do not have an ordinary high water mark but still affect downstream waters."[371]

In addition to the fact that there is no sound legal or scientific basis for adding the requirement for an OHWM to the jurisdictional requirements, it is important to note there have been extensive problems with interpretation and implementation of the OHWM requirement in the CWA Section 404 Program. This issue also demonstrates why the OHWM requirement should not be required for jurisdiction over tributaries. For example, the U.S. General Accounting Office ("GAO") has noted that the Corps' definition of OHWM is ambiguous and may be reasonably interpreted differently by competent staff.[372] For example:

- The Portland District reported that it was difficult to identify the OHWM, even in portions of the Columbia River and that three different staff would likely make three different jurisdictional determinations.

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[365] CWR, 80 Fed. Reg. at 37,064.

[366] SAB Report, supra fn. 98, at 2-3.

[367] CWR TSD, at 67, *supra* fn. 229.

[368] *Id.*

[369] *See* CWR TSD, at 171, *supra* fn. 229.

[370] *Id.* at 235.

[371] *Id.* at 242.

[372] U.S. General Accounting Office. (Feb. 2004). WATERS AND WETLANDS Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction. (GAO Publication No. 04-297) (hereinafter "GAO Report"), available at: http://www.gao.gov/new.items/d04297.pdf, (Attachment 33).

- The Philadelphia District reported that identifying OHWMs in the upper reaches of watersheds was one of its most difficult challenges, as one progresses upstream, the depth of the bed and bank diminishes, and the key indicators of an ordinary high water mark gradually disappear.

The GAO also noted that "officials from the Chicago District said that because their district was heavily urbanized many channels had been manipulated and contained, often in ways that obscured the ordinary high water mark" and that identifying the OHWM in the arid West was particularly difficult due to intermittent flow and flooding. *Id*. There is no valid scientific or legal basis for excluding channelized streams, the upper reaches of tributaries, or streams in arid regions that lack an OHWM from the definition of "waters of the United States." To the contrary, the need to include and protect these waters is well documented through the Connectivity Report and is supported by the SAB Report.

2. Significantly Affect

The agencies have proposed a definition of "significantly affect" for the purpose of determining whether a significant nexus to "foundational waters" exists under the regulatory definition. As discussed throughout these comments, we object to the agencies' use of the "significant nexus" test as a jurisdictional limitation on tributaries, wetlands, and "other waters." Additionally, we object to the follow limitations on the application the "significant nexus" test to determine jurisdictional waters:

- The agencies state that: "[p]rovision of habitat for non-aquatic species, such as migratory birds, and endemic aquatic species would not be considered as part of a significant analysis under the proposed rule . . . There are also a wide variety of functions that streams, wetlands, and open waters provide that translate into ecosystem services that benefit society that would not be considered in a significant nexus analysis under the proposed rule. These include recreation (e.g., fishing, hunting, boating, and birdwatching), production of fuel, forage, and fibers, extraction of materials (e.g., biofuels, food, such as shellfish, vegetables, seeds, nuts, rice), plants for clothes and other materials, and medical compounds from wetland and aquatic plants or animals." There is no reasonable basis for the agencies' exclusion of habitat and other functions that translate into ecosystem services from "significant nexus" evaluations.[373] These functions are directly relevant to the physical, chemical, and biological integrity of the Nation's waters and these uses are precisely the type of uses intended to be protected under the CWA.[374]

[373] 86 Fed. Reg. at 69431.

[374] *See, e.g*., 33 U.S.C. §§ 1312 and 1313.

- The agencies state that: "As the agencies have discussed, consideration of biological functions such as provision of habitat is relevant for purposes of significant nexus determinations under the proposed rule only to the extent that the functions provided by tributaries, adjacent wetlands, and "other waters" significantly affect the biological integrity of a downstream foundational water."[375] As explained throughout these comments, the agencies are required to protect all of the Nation's water and the entire aquatic ecosystem consistent with the objective of the CWA and Supreme Court precedent. The agencies lack authority to limit CWA jurisdiction to only waters with a "significant nexus" to "foundational waters."

- The agencies also state "[c]onsistent with the pre-2015 regulatory regime, the agencies are also proposing that a water may be determined to be a "water of the United States" when it "significantly affects" any one form of chemical, physical, or biological integrity of a downstream traditional navigable water, interstate water, or the territorial seas."[376] The agencies lack authority to limit CWA jurisdiction to only waters with a "significant nexus" to "foundational waters" in this manner.

Lastly, we agree that "Congress intended the Clean Water Act to 'restore and maintain' all three forms of 'integrity,' section 101(a), so if any one is compromised then that is contrary to the statute's stated objective."[377] However, we think it is apparent from the text and history of the CWA, as well as Supreme Court precedent, that Congress intended to restore and maintain all three forms of integrity in all of the Nation's waters—not just "foundational waters." We also agree that "[i]t would contravene the plain language of the statute and subvert the objective if the Clean Water Act only protected waters upon a showing that they had effects on every attribute of the integrity of a traditional navigable water, interstate water, or the territorial sea,"[378] however, it also contradicts the plain language for the statute and subverts the objective of the CWA for the agencies to only protect the Nations' waters if they impact the integrity of traditional navigable waters, interstate waters, and the territorial seas.

V. THE NWPR WAS INCONSISTENT WITH THE CWA AND CAUSED SEVERE ENVIRONMENTAL HARM AND MUST BE FULLY REJECTED BY THE AGENCIES

As we explained in detail in our lawsuit challenging the NWPR[379] and in our previous comments on the NWPR,[380] and as the U.S. District Court for the District of Arizona in *Pasqua Yaqui Tribe, et al., v.*

[375] Proposed Rule, 86 Fed. Reg. at 69432, fn. 54.

[376] Proposed Rule, 86 Fed. Reg. at 69431.

[377] *Id.*

[378] *Id*.

[379] Amended Complaint, *supra* fn. 33.

[380] *See* Waterkeeper NWPR Comments and Waterkeeper 2021 Public Notice Comments, *supra* fn. 22.

EPA[381] and the agencies have already determined,[382] the NWPR is plagued with procedural and substantive legal error and has caused significant, actual environmental harm to the nation's waters. The NWPR radically redefined "waters of the United States" under the CWA in a manner that is contrary to the objective of the CWA and uncontroverted evidence in the administrative record.[383] It violates the plain, unambiguous meaning of the CWA, and disrespects decades of binding U.S. Supreme Court and myriad other federal court precedents. The NWPR flies in the face of congressional intent; is harming public health, water quality, and wildlife; constitutes arbitrary and capricious agency action and an abuse of discretion; and is otherwise unlawful.[384] As discussed extensively in the Waterkeeper NWPR Comments, and as outlined in the Amended Complaint, because the NWPR illegally narrowed the protected classes of jurisdictional waters, many of the exclusions and all of definitions in the NWPR that build upon that foundation are contrary to law and science

- The blanket exemption of "Waters or water features that are not identified in paragraph (1)(i), (ii), (iii), or (iv);"

- Ephemeral streams;

- "Ditches that are not waters identified in paragraph (1)(i) or (ii) of this definition, and those portions of ditches constructed in waters identified in paragraph (1)(iv) of this definition that do not satisfy the conditions of paragraph (3)(i) of this definition;"

- "Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-**jurisdictional waters**, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (3)(vi) of this definition;"

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

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

[383] *See e.g.,* Amended Complaint, *supra* fn. 33; Waterkeeper NWPR Comments, *supra* fn. 22.

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

- "Water-filled depressions constructed or excavated in **upland or in non-jurisdictional waters** incidental to mining or construction activity, and pits excavated in **upland or in non-jurisdictional waters** for the purpose of obtaining fill, sand, or gravel;"

- "Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, **constructed or excavated in upland or in non-jurisdictional waters**;"

- Waste treatment systems; and

- all of the definitions in the NWPR.[385]

Commenters generally agree with the agencies' evaluation and rejection of the NWPR, including the agencies' rejection of the use of the "typical year" concept as a basis for excluding waters from the CWA.[386] However, Commenters strongly disagree with the portions of the Proposed Rule preamble that adopt some of the legal bases for the NWPR, particularly limiting CWA jurisdiction based on CWA Section 101(b).

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

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[385] Amended Complaint, ¶¶ 185-269, *supra* fn. 33; Waterkeeper NWPR Comments, *supra* fn. 22 at 54-98.

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

The harm from the NWPR that started propagating across the country in June 2020, and which is ongoing, was apparent in the agencies' own administrative record for the NWPR rulemaking. At the time, however, the agencies refused to consider any of the scientific information in the record. That information demonstrated that their narrow jurisdictional definition eliminated protections for waters that are essential to the integrity of the Nation's waters and would endanger drinking water supplies, recreational waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across the Nation.[387]

In sum, the NWPR was riddled with numerous very serious, material, environmentally destructive, and legally fatal errors that preclude it from serving as a basis for the definition of "waters of the United States." It is imperative that the agencies fully reject the NWPR because, as the agencies have acknowledged, stakeholders across the country reported "destructive impacts to critical water bodies" from the NWPR and the agencies have determined that the NWPR "is leading to significant environmental degradation."[388]

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

The NWPR stripped protections against uncontrolled industrial, municipal, agricultural, and other pollution discharges into many, and in some parts of the country, nearly all, rivers, streams, lakes, ponds, wetlands, and other waters.[389] In June 2021, the agencies announced that they had "carefully reassessed" the administrative record and the legal and scientific basis for the NWPR under Executive Order No. 13990.[390] The agencies' review identified "substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the Nation's waters."[391] Accordingly, the agencies announced on June 9, 2021 that they were seeking remand of the NWPR and that, at some unknown time in the future, they intend to "initiate a new rulemaking process that restores the protections in place prior to the 2015 WOTUS implementation," and, then later, it "anticipate[d] developing a new rule that defines [water of the United States] and is informed by a robust engagement process as well as the experience of implementing the [Pre-2015 Regulatory

[387] *See, e.g.*, NWPR RTC, Topic 11, at 3, 8-9.

[388] Press Release, at 1.

[389] *See* Declaration of Radhika Fox,# ("Fox Dec.") ¶¶ 8, 10, 14-20; Declaration of Jaime A. Pinkham,# ("Pinkham Dec.") ¶¶ 8, 10, 14-20; Declaration of Daniel E. Estrin in Support of Plaintiffs' Partial Opposition to Defendants' Motion for Remand Without Vacatur ("Estrin Dec.") ¶¶ 12, 17-22 (Attachment 34).

[390] "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021) ("EO 13990").

[391] Fox Dec. ¶ 8; Pinkham Dec. ¶ 8.

Definitions], the Obama-era Clean Water Rule, and the Trump-era Navigable Waters Protection Rule."[392]

In its announcement, the agencies noted that a "broad array of stakeholders – including states, Tribes, local governments, scientists, and non-governmental organizations – are seeing **destructive impacts to critical water bodies** under the [NWPR]," and EPA Administrator Regan was quoted as saying that EPA had "determined that [the NWPR] is leading to **significant environmental degradation**."[393]

First, the agencies have repeatedly said that they have "substantial concerns" regarding the legality of the NWPR. For example, Radhika Fox, Principal Deputy Assistant Administrator for EPA's Office of Water, said in a sworn statement that "the Biden Administration's EPA and Army have substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the nation's waters." Fox Dec. ¶¶ 1, 3, 8.[394] The agencies also stated that they "have identified substantial concerns with the NWPR and have determined that additional considerations should be given to certain aspects of the NWPR through notice-and-comment rulemaking, including concern that when interpreting the jurisdictional scope of the CWA, the NWPR did not appropriately consider the effect of the revised definition of 'waters of the United States' on the integrity of the nation's waters, as well as concern over the loss of waters protected by the CWA."[395] As particular examples, the agencies stated that "[e]phemeral streams, wetlands, and other aquatic resources provide numerous ecosystem services, and there could be cascading and cumulative downstream effects from impacts to these resources, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity. The agencies have substantial concerns about the consideration of these effects on the chemical, physical, and biological integrity of the nation's waters in the NWPR rulemaking process."[396]

Second, the concerns identified by the agencies with the substance of the NWPR go to the heart of whether the NWPR complies with the law and are not limited to mere procedural failures or to concerns that may be cured merely by additional explanation. For example, the agencies, through their declarations, stated that the NWPR failed to properly account for harm to the chemical, physical, and biological integrity of the Nation's waters.[397] In the context of the CWA this is the most

[392] Press Release, at 2.

[393] *Id.* at 1(emphasis added).

[394] *See also* Pinkham Dec. ¶ 8.

[395] Fox Dec. ¶ 10; Pinkham Dec. ¶ 10 (same).

[396] Fox Dec. ¶ 20; Pinkham Dec. ¶ 20 (same).

[397] See Fox Dec. ¶ 10 (expressing concern that "the NWPR did not appropriately consider the effect of the revised definition of 'waters of the United States' on the integrity of the nation's waters, as well as concern over the loss of waters protected by the CWA."); Pinkham Dec. ¶ 10 (same); Fox Dec. ¶ 13 ("Based on a careful evaluation of the record of the NWPR, including the above-quoted statement, the agencies have substantial and legitimate concerns regarding the adequacy of consideration of the CWA's water quality goals in the development of the NWPR. As such,

fundamental failure possible because it represents that the NWPR failed to account for *the sole objective* of the CWA: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (providing "the objective" of the CWA).

These admissions of the NWPR's failure to properly consider the CWA's objective are also reflected in the agencies' "Memorandum for the Record."[398] For example, the agencies again admitted that "[e]phemeral streams, wetlands that do not meet the NWPR's revised adjacency criteria, and other aquatic resources not protected by the NWPR provide numerous ecosystem services, and the absence of protections for such resources could cause cascading, cumulative, and substantial downstream effects, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity. These substantial effects on the chemical, physical, and biological integrity of the nation's waters were inadequately considered during the NWPR rulemaking process." Memorandum for the Record at 4.

The agencies have also admitted that the NWPR failed to consider science. Given the stated objective of the CWA, science is an obvious and necessary consideration in determining and setting CWA protections. *See* 33 U.S.C. § 1251(a). However, the agencies now acknowledge both that consideration of science was necessary, and that the agencies did not adequately consider the science when promulgating the NWPR. *See, e.g.,* Fox Dec. ¶ 12 ("Certain statements in the NWPR preamble call into significant question whether the agencies' consideration of science and water quality impacts in developing the rule was consistent with [the goals of the CWA]. For example, the agencies explicitly and definitively stated in numerous places in the NWPR administrative record that they did not rely on agency documents in the record that provided some limited assessment of the effects of the rule on water quality in determining the scope of the definition of 'waters of the

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the agencies believe it is appropriate to reconsider these issues—and, in particular, the effects of the 'waters of the United States' definition on the chemical, physical, and biological integrity of the nation's waters—in a new rulemaking.") (citing County of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1468-69 (2020)); Pinkham Dec. ¶ 13 (same); Fox Dec. ¶ 14 ("In light of the text, structure, and legislative history of the Act, and Maui and other Supreme Court decisions, the agencies have concluded there must be some consideration of the effects of a revised definition of 'waters of the United States' on the integrity of the nation's waters. Based on the record at the time the agencies promulgated the NWPR, significant concerns exist about the sufficiency of the agencies' consideration of the effects of the NWPR on the chemical, physical, and biological integrity of the nation's waters when determining the limits of the specific definitional language 'waters of the United States' in the NWPR." And providing as an example the effects of ephemeral waters on traditional navigable waters); Pinkham Dec. ¶ 14 (same); Fox Dec. ¶ 20 ("Ephemeral streams, wetlands, and other aquatic resources provide numerous ecosystem services, and there could be cascading and cumulative downstream effects from impacts to these resources, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity. The agencies have substantial concerns about the consideration of these effects on the chemical, physical, and biological integrity of the nation's waters in the NWPR rulemaking process."); Pinkham Dec. ¶ 20 (same); see also Estrin Dec., *supra* fn. 389, at ¶¶ 15-16, Exhibits 1, 2 (providing criticism by EPA's own Scientific Advisory Board that EPA failed to consider science and the objectives of the CWA in promulgating the NWPR).

[398] The results of the Agencies' review of the NWPR and their findings are further described and documented in a June 8, 2021 Memorandum for the Record with Supporting Documentation. EPA and Department of Army, Memorandum for the Record: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Database to Assess effects of the Navigable Waters Protection Rule, (June 8, 2021) and Attachment A: Data Analysis. ("Memorandum for the Record"), Estrin Dec. ¶¶ 29-30 and Ex. 6 and Ex. 7, respectively, *supra* fn. 389.

United States.'") (citation omitted); Pinkham Dec. ¶ 12 (same); *see also* Estrin Dec., *supra* fn. 389, at ¶¶ 15-16, Exhibits 1, 2 (providing criticism by EPA's own Scientific Advisory Board that EPA failed to consider science and the objectives of the CWA in promulgating the NWPR).

The agencies also determined that the NWPR inaccurately under-estimated the decrease in jurisdiction caused by the NWPR. For example, through their declarations, the agencies stated that "the reduction in jurisdiction [under the NWPR] is notably greater than the deregulatory effects discussed in the rule preamble and the economic analysis case studies."[399] This is consistent with EPA's admission in its Memorandum for the Record that, "[a]lthough the agencies did not quantify the estimated change in jurisdiction in the NWPR rulemaking process, including the supporting documents in the record, the decrease in jurisdiction has been more dramatic than the deregulatory effects the agencies had identified in the NWPR preamble or supporting documents in the record for the rule." Memorandum for the Record at 2.

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

The agencies also acknowledge that the NWPR will result in discharges without any regulation in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized.[400] The agencies further state that the NWPR unrealistically and incorrectly considered states' actions to reduce their own clean water protections in response to the reductions in jurisdiction from the NWPR. The agencies had incorrectly and unrealistically asserted that states would not amend their own clean water protections to bring them down to the new federal floor represented by the NWPR and that this retention of state jurisdiction would ameliorate environmental harm from the NWPR. The agencies provide this admission in support of their stated need to remand the NWPR for further consideration. *See* Memorandum for the Record at 4 ("The agencies are also aware of certain states that have already begun taking deregulatory steps to change their state regulatory practices to match the NWPR, contrary to the agencies' estimates in the "[l]ikely response category'' for such states identified the NWPR's EA. *See* EA at 39-41

[399] Fox Dec. ¶ 15; Pinkham Dec. ¶ 15 (same).

[400] *See* Fox Dec. ¶ 18; Pinkham Dec. ¶ 18; Memorandum for the Record at 4; see also U.S. Senate Committee on Environment and Public Works, "June 21, 2021 Letter to Michael S. Regan and Jaime A. Pinkham," attached as Exhibit 8 to Estrin Dec., supra fn. 389(Senate committee letter to EPA recounting EPA's reasoning to committee for needing new rule as including "significant environmental damage," "ongoing environmental harm," and reductions in findings of federal jurisdictions for waters).

(estimating that some states are likely to continue their current dredged/fill permitting practices; however, some of those states have instead sought to reduce the scope of state clean water protections after the NWPR was finalized).").

Thus, the agencies have formally determined and represented to numerous courts that the NWPR has caused serious harm to the environment and that this harm will continue so long as the NWPR and its illegal definition of "waters of the United States" are in place. For example, EPA's press release regarding its decision to revise the NWPR admits that the NWPR is causing "destructive impacts to critical water bodies," "is leading to significant environmental degradation," and "is significantly reducing clean water protections."[401] More specifically, the agencies admit that "[o]f the 40,211 individual aquatic resources or water features for which the Corps made approved jurisdictional determinations under the NWPR between June 22, 2020 and April 15, 2021, approximately 76% were found to be non-jurisdictional … [and t]he agencies are also aware that this number is not the full universe of projects that no longer require Section 404 permitting under the NWPR…"[402] The agencies' data also shows that they believe the rate of negative jurisdictional determinations is about 39% higher under the NWPR than it was in the approximately two-year period prior to the NWPR's effective date.[403] EPA also found that

> [i]n 2020-2021, [under the NWPR,] there has been a threefold (338%) increase from 2019-2020 and a fourfold (412%) increase from 2018-2019 in the number of projects being determined to not require section 404 permits under the CWA. These metrics likely capture only a small portion of projects that are occurring on the ground since there is typically no need for a project proponent to seek a 'no permit required' determination after having already received a wholly negative [advanced jurisdictional determination] and other project proponents may not feel the need to obtain any sort of [jurisdictional determination] at all if they believe their aquatic resources are non-jurisdictional under the NWPR. Many projects could be occurring without consultation with the Corps due to the non-jurisdictional bright lines established under the NWPR.

Memorandum for the Record at 3; *see also* Estrin Dec, *supra* fn. 389, at ¶¶ 21-22 (providing analysis of harm from EPA database tracking jurisdictional determinations and showing that negative jurisdictional determinations under the NWPR continue to be issued at a very fast pace).

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

[402] Fox Dec. ¶ 15; Pinkham Dec. ¶ 15 (same).

[403] Compare Memorandum for the Record at 2 (comparing rates of negative jurisdictional determinations between the two time periods); Fox Dec. ¶ 15; Pinkham Dec. ¶ 15.

The agencies do not need additional information to justify the complete disavowal of the NWPR.

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

The NWPR's reductions in protections to waters of the United States are caused Waterkeeper, Waterkeeper Groups, and our respective members to suffer various injuries. *See, e.g.,* Estrin Dec., *supra* fn. 389, at ¶¶ 3, 4, 6, 12, 13, 17-21, 32. For example, the agencies have explained that "[t]he lack of protections [under the NWPR] is particularly significant in arid states, like New Mexico and Arizona, where nearly every one of over 1,500 streams assessed has been found to be non-jurisdictional."[404] Specifically, the agencies noted that "[o]f particular concern to the agencies is the NWPR's disproportionate effect on arid regions of the country. The Corps' data show that in New Mexico, of the 258 streams assessed in AJDs, 100% were found to be non-jurisdictional ephemeral resources. In Arizona, of the 1,284 streams assessed in AJDs, 1,280, or 99.6%, were found to be non-jurisdictional ephemeral resources. Compounding potential resource losses, eliminating ephemeral streams from jurisdiction under the NWPR also typically eliminates jurisdiction over any nearby wetlands."[405]

Commenters have specific interests in the waters of New Mexico that EPA has identified as being locations where harm from the NWPR is "particularly significant." *See id.* For example, WildEarth Guardians is "headquartered in Santa Fe, New Mexico [and] has been working for 30 years to protect and restore the wildlife, wild places, wild rivers, and health of the American West." Estrin Dec., *supra* fn. 389, at ¶ 18. WildEarth Guardians is also the parent organization of Rio Grande Waterkeeper, a Waterkeeper Alliance member which "works to safeguard clean water and healthy flows in the Rio Grande and its tributaries from its headwaters in the San Juan Mountains of Colorado through Southern New Mexico." *Id.*

Commenters submitted substantial evidence into the administrative record during the rulemaking for the NWPR demonstrating that the definition excludes all waters within a 14,605 square mile "closed basin," within the Rio Grande Basin, as well as roughly 90 percent of streams and rivers in New Mexico outside of that "closed basin"—waters that contribute significant flows to and influence the water quality of the Rio Grande and its tributaries. *Id.* ¶ 18a. In fact, "[i]n New Mexico, as of June 29, 2021, there were 176 total determinations under the [NWPR], with 176 negative jurisdictional determinations and 0 positive jurisdictional determinations... As of June 30, 2021, there were 197 total determinations [under the NWPR], with 195 negative jurisdictional determinations and 2 positive jurisdictional determinations.

[404] Fox Dec. ¶ 16; Pinkham Dec. ¶ 16 (same).

[405] *See* Memorandum for the Record at 3.

One of those negative jurisdictional determinations excluded an ephemeral stream from CWA protections at the Los Alamos National Laboratories." Estrin Dec., *supra* fn. 398, at ¶ 22b (citations omitted). Notably, Waterkeeper provided evidence of a threat to Santa Fe, New Mexico's water supply from eliminated jurisdiction over ephemeral streams receiving pollution discharges from Los Alamos National Laboratories and noted a lack of delegated CWA authority in New Mexico as part of its comments on the then-proposed NWPR. *Id.* ¶ 18b. The agencies, however, did not find that issue relevant, and simply responded that "[t]he applicability of the final rule to site-specific discharge scenarios as described in the comments regarding the Los Alamos National Labs is outside of the scope of this rulemaking . . ." NWPR RTC, Topic 11 at p. 49. In other words, at the time of the NWPR Rulemaking, the agencies felt they were allowed to completely ignore this threat posed by the NWPR, which has now come to pass as predicted. While that result is not a surprise, it is highly concerning as Los Alamos National Laboratories is a notorious source of radioactivity and other pollution and has a long history of serious NPDES permit violations. *Id.* ¶ 18b.

Another negative jurisdictional determination in New Mexico "excluded ephemeral streams and two open water mine pits from CWA protections based on exclusions in the [NWPR] at the United Nuclear Corporation St. Anthony Uranium Mine." *Id.* ¶ 22b (citations omitted). The elimination of CWA protection for these and many other waters allows unlimited discharges of pollutants, along with unregulated dredging and filling activities, in these unprotected waters—degrading the quality of the waters used and enjoyed by Rio Grande Waterkeeper and Guardians' members and threatening the survival and recovery of numerous imperiled aquatic and riparian species, including ESA-listed endangered and threatened species. *Id.* ¶ 18c.

Commenters submitted extensive written comments to the administrative record during the public comment period for the NWPR, including a comment letter containing extensive evidence demonstrating that (1) important water resources would lose CWA protections under NWPR without any sound legal or scientific basis, and (2) the NWPR would cause serious harm to waters, people, aquatic systems, and endangered and threatened species and their designated critical habitats.[406] Commenters also identified impacts to specific Waterkeeper groups and their members, including Missouri Confluence Waterkeeper, Snake River Waterkeeper, Upper Missouri Waterkeeper, Bayou City Waterkeeper, Boulder Waterkeeper, Buffalo-Niagara Waterkeeper, Cape Fear Riverkeeper, Puget Soundkeeper, Rogue Riverkeeper, San Francisco Baykeeper. *See* Estrin Dec., *supra* fn. 389, at ¶¶ 4, 6, 12-13, 17-22, 32. For example, the Waterkeeper NWPR Comments documented the expected loss of CWA jurisdiction from the rule to:

- Large numbers of rivers and streams protected by the Missouri Confluence Waterkeeper that briefly flow subsurface and then reemerge as surface waters and which will have significant adverse impacts on waters throughout Missouri, including large, important downstream

[406] *See, e.g.,* Waterkeeper NWPR Comments, *supra* fn. 22; see also Waterkeeper Fact Sheets, *supra* fn. 258.

waterways such as the Missouri and Meramec Rivers.[407] Excluding these and other waters from CWA protections against pollution discharges and dredging/filling, will degrade water quality; threaten public health; destroy habitat; and endanger wildlife, fish, amphibians, reptiles and other aquatic life, including ten endangered and one threatened ESA mussel species;[408]

- Texas coastal prairie wetlands crucial to the health of Lower Galveston Bay, which is protected on behalf of its members by Bayou City Waterkeeper;[409]

- Ephemeral streams, reservoirs, ditches, and canals that receive pollution discharges and which flow into Boulder Creek—the primary drinking water supply for the Colorado cities of Boulder, Louisville, Lafayette, Erie, Superior, and Nederland—which is protected on behalf of its members by Boulder Waterkeeper;[410]

- Between an estimated 500 and 1,000 miles of ephemeral and ditched streams that flow into the Niagara River—the channel that connects two Great Lakes, Erie and Ontario— which is protected on behalf of its members by Buffalo Niagara Waterkeeper;[411]

- Pocosins, Carolina Bays, and ditched and ephemeral streams that receive animal waste pollution discharges, in the Cape Fear Basin of North Carolina, which is protected on behalf of its members by Cape Fear Riverkeeper;[412]

- Ephemeral streams that provide habit and water supply for federally threatened Chinook salmon, coho salmon, chum salmon and steelhead trout, and ditched streams that receive animal waste, industrial and municipal pollution discharges in the Puget Sound Basin of Washington, which is protected on behalf of its members by Puget Soundkeeper;[413]

- An estimated 9,165 miles of ephemeral streams in the Rogue River Basin in Oregon that provide drinking water for the region, as well as habitat and spawning grounds for federal threatened Southern Oregon/Northern California Coast coho salmon and steelhead; numerous canals and ditches that receive pollution discharges that are hydrologically connected to and influence the quality of the Rogue River; and the Agate Desert vernal pools

[407] *See* Estrin Dec., *supra* fn. 389, at ¶ 19, Ex. 3 at 30-41 (Missouri Confluence Waterkeeper Case Study).

[408] *Id.*

[409] *Id.* at 2-8.

[410] *Id*. at 9-14.

[411] *Id.* at 15-21.

[412] *Id.* at 22-29.

[413] *Id.* at 42-49.

that are the only vernal pools in Oregon and support unique species, such as the vernal pool fairy shrimp listed as threatened under the ESA. These waters are protected on behalf of its members by Rogue Riverkeeper;[414]

- More than 40 percent of the streams that flow into and influence the water quality of San Francisco Bay in California, as well as provide spawning grounds for endangered Chinook salmon, which are protected on behalf of its members by San Francisco Baykeeper;[415]

- All of the waters, including premiere trout streams and critical habitat for federally threatened bull trout, located within 5,185 square mile "closed basin" area in the upper Snake River Basin of Idaho that are connected to the Snake River by subsurface flows and springs, and 14,866 miles of ditches, ditched streams and canals that receive pollution discharges and flow into the Snake River. These waters are protected on behalf of its members by Snake River Waterkeeper;[416] and

- An estimated 30,297 miles (85 percent) of the streams in the Upper Missouri River Basin of Montana that feed into and impact water quality in the Big Hole River (world-class trout fishery), Beaverhead River (premiere brown trout fishery), Jefferson River (Westslope cutthroat habitat and drinking water supply), Madison River (Yellowstone cutthroat and Westslope cutthroat trout habitat), and the Gallatin River (Yellowstone Park and Downstream Recreation). These waters are protected on behalf of its members by Upper Missouri Waterkeeper.[417]

After the 2020 NWPR became effective, the massive scope and geographic extent of the loss of CWA protections for the Nation's waters began to be documented, to some extent, in a database maintained on an EPA webpage showing approved CWA jurisdictional determinations by the EPA and the Corps.[418] A review of the database and associated maps shows massive numbers of waters that are not protected under the NWPR, *id.*, for example:

- As of June 29, 2021, maps from that database show that out of the 14,435 approved CWA jurisdictional determinations made under the 2020 NWPR across the country, 13,290 waters were found to be non-jurisdictional and only 1,145 were found to be jurisdictional. As of June

[414] *Id.* at 65-75.

[415] *Id*. at 76-80.

[416] *Id*. at 81-89.

[417] *Id.* at 90-106.

[418] *See* EPA, Clean Water Act Approved Jurisdictional Determinations, https://watersgeo.epa.gov/cwa; see also, True and correct images of maps from the EPA database for all U.S. waters, New Mexico, California, and Missouri on June 29, 2021 and June 30, 2021, Estrin Dec., Ex. 4, *supra* fn. 389.

30, 2021, maps from that database show that out of the 31,520 approved CWA jurisdictional determinations made under the 2020 NWPR across the country, 23,819 waters were found to be non-jurisdictional and only 7,701 were found to be jurisdictional.

- In California, as of June 29, 2021, there were 2,129 total jurisdictional determinations made under the 2020 NWPR, with 2,107 negative jurisdictional determinations and only 22 positive jurisdictional determinations. Notably, 1,717 of those jurisdictional determinations were made between January 20, 2021 and June 16, 2021 and resulted in the exclusion of large numbers of wetlands, ephemeral streams, and other waters from CWA protections. As of June 30, 2021, there were 2,368 total determinations, with 2,292 negative jurisdictional determinations and 76 positive jurisdictional determinations.

- In Missouri, as of June 29, 2021, there were 191 total jurisdictional determinations under the 2020 NWPR, with 170 negative jurisdictional determinations and only 21 positive jurisdictional determinations. 106 of those jurisdictional determinations were made between January 20, 2021 and June 16, 2021 and resulted in the exclusion of large numbers of wetlands, ephemeral streams and other waters from CWA protections. As of June 30, 2021, there were 473 total determinations, with 374 negative jurisdictional determinations and 99 positive jurisdictional determinations.

Additionally, Alabama-based mining company Twin Pines has proposed a heavy mineral sand strip mine between the St. Mary's River and Okefenokee Swamp, one of the largest and most celebrated wetlands in the country, and home to both a National Wildlife Refuge and a National Wilderness Area.[419] The proposed mine would be 50-feet deep on average and would destroy hundreds of acres of wetlands and streams that are critical to the St. Mary's River and Okefenokee's diverse ecosystems, threatening the hydrology of the swamp. Recently, the Corps determined that nearly 400 acres of previously jurisdictional wetlands near the Refuge are now unprotected by the Clean Water Act, allowing the mining company to begin mining without any involvement by the agency.[420] For reasons that are unclear, the Corps did not discuss the streams at the site, which appear to be, but not are not being treated as, jurisdictional waters under the CWA.[421] This decision has important implications for the initial part of the mine as well as the longer-term expansion of the mine to more than 8,000 acres near the Refuge.

[419] St. Mary's Riverkeeper and Suwannee Riverkeeper work to protect waters that are impacted by this decision.

[420] Selected Corps Approved Jurisdictional Determinations, ORM Number: SAS-2018-00554 (Oct. 14, 2020) (Attachment 30).

[421] National Wetlands Inventory Map of the Twin Pines Mine Site Area, available at: https://www.fws.gov/wetlands/data/Mapper.html (Attachment 35).

VI. The Agencies Violated the National Environmental Policy Act and Endangered Species Act in the Promulgation of the Proposed Rule

A. The Agencies Must Comply with the Endangered Species Act's Consultation Requirements

Contrary to the APA, the Agencies provide no meaningful information on the numbers or types of waterways that will be impacted by this Proposed Rule, but it is indisputable that fewer waters will be protected under the Proposed Rule than under the pre-2015 Regulatory Definitions, including wetlands, streams, lakes, rivers and other waters.[422] These waters provide habitat for numerous endangered species across the nation, and the gain or loss of CWA jurisdiction under this Proposed Rule will have adverse impacts on those species that have not been quantified or evaluated in this rulemaking. A loss of CWA jurisdiction means that a waterway can be subjected to unregulated pollution and even total destruction as a matter of federal law. Given the Proposed Rule's far-reaching impacts for these aquatic ecosystems, and the many threatened or endangered species that depend upon them, the Agencies are required to ensure that the Proposed Rule will not jeopardize the continued existence of any such species and to engage in interagency consultation under section 7(a)(2) of the ESA. The Agencies' failure to consult represents a clear and egregious violation of the ESA.

Section 7 of the ESA requires each agency to engage in consultation with Fish and Wildlife Service and/or National Marine Fisheries Service (the "Services") to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species… determined… to be critical…."[423] Section 7 "consultation" is required for "any action [that] may affect listed species or critical habitat."[424] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[425]

Because the CWA does not command EPA or the Corps to promulgate a particular set of regulations defining which "waters of the United States" are protectable under the law, the Agencies' decision to do so in this Proposed Rule is a discretionary action. As a result, just like every other agency, the Agencies must consult when they develop the Proposed Rule if it crosses the "may affect" threshold of the ESA. Case law reinforces the proposition that a regulation that may affect endangered species

[422] *See e.g.*, Proposed Rule, 86 Fed. Reg. at 69432.

[423] 16 U.S.C. § 1536(a)(2).

[424] 50 C.F.R. § 402.14.

[425] *Id.* § 402.02 (emphasis added).

must be the subject of consultation.[426] Because the Proposed Rule will have effects on endangered species and their critical habitats, consultations with the Services are required before the Agencies can proceed.

Under the joint regulations implementing the ESA, if an impact on a listed species is predicted to occur, then the Agencies must complete consultations with the Services.[427] If the Agencies elect to first complete an informal consultation, it must first determine whether its action is "not likely to adversely affect" (NLAA) a listed species or is "likely to adversely affect" (LAA) a listed species.[428] The Services define "NLAA" determination to encompass those situations where effects on listed species are expected to be "discountable, insignificant, or completely beneficial."[429] Discountable effects are limited to situations where it is not possible to "meaningfully measure, detect, or evaluate" harmful impacts.[430] Discountable and insignificant impacts are very rare.

Under the informal consultation process, if the agency reaches an NLAA determination, and the Services concur in that determination, then no further consultation is required. In contrast, if the action agency determines that its activities are likely to adversely affect listed species, then formal consultations must occur. The agencies may, of course, skip the informal consultation process and move directly to the formal consultation process.

During the formal consultation process, the Services assess the environmental baseline –"the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process"[431] – in addition to cumulative effects to the species – "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation" – and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.[432] Here, the environmental baseline is the agencies' Pre-2015 Regulatory Definitions and all effects of the Proposed Rule must thus be assessed in light of that baseline.

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[426] *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell,* 62 F.Supp.3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*., 481 F.Supp.2d 1059 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior,* 457 F. Supp. 2d 1158 (W.D. Was. 2006).

[427] U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act at xv.

[428] *Id.*

[429] *Id*.

[430] *Id*.

[431] *Id*. at xiv.

[432] *Id.* at xiii.

For example, eliminating protections for some wetlands will directly, indirectly, and cumulatively impact endangered species. California vernal pool wetlands that support vernal pool fairy shrimp (*Branchinecta lynchi*)—a federally listed species—that would have received protection under the Pre-Regulatory Definitions. Those wetlands may not receive protection if the Proposed Rule is finalized, meaning that they could be destroyed as no section 404 permit would be required to conduct dredge and fill activities in those waters. Vernal pool fairy shrimp may, therefore, be harmed by the Proposed Rule. Consequently, the EPA's action here easily crosses the "may affect" threshold requiring consultations under the ESA.[433]

The agencies cannot avoid their obligation to consult by claiming that states may step in to address waters no longer protected by the CWA. The issue in the Proposed Rule that the agencies are required to evaluate relates solely to jurisdiction under the federal CWA. It is completely irrelevant to this Proposed Rule that similar state laws may apply to a waterbody, and in any event, the agencies' own analysis demonstrates that there are not similar laws in all 50 states, tribal jurisdictions and territories, and the agencies are aware that state and tribal governments will not be able to fill the gap created by the loss of CWA protections contemplated by this rule.[434]

With this Proposed Rule, the agencies are using their discretion to create a regulatory definition of "waters of the United States." As a result, just like every other agency, the agencies must consult when they embark upon the discretionary task of developing regulations, if and when the effects of those regulations cross the "may affect" threshold set forth in the ESA. Indeed, case law is clear that when a regulation may affect endangered species it must be the subject of consultation.[435] Because the Proposed Rule will affect endangered species and their critical habitats as it is implemented in the future, consultations must occur before the Proposed Rule is finalized.

B. The Agencies Must Comply With NEPA

Under NEPA, the agencies must prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment."[436] Promulgation of a rule is a "Federal action" under NEPA,[437] and there is little doubt that this Proposed Rule will significantly affect the quality of the human environment. However, the agencies

[433] *See, e.g.,* Waterkeeper Alliance Fact Sheet, *supra* fn. 258.

[434] *See* Section III(D), *ante*.

[435] *See, e.g*., *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F.Supp.3d 7, 12 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F.Supp.2d 1059, 1095-97 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior,* 457 F.Supp.2d 1158, 1182-95 (W.D. Was. 2006).

[436] 42 U.S.C. § 4332(2)(C).

[437] 40 C.F.R. § 1508.18(b)(1).

have not prepared either an Environmental Assessment or an Environmental Impact Statement for this action as required by NEPA.[438]

All loses and benefits resulting from this Proposed Rule must be accounted for and evaluated in the NEPA process.[439] NEPA is designed to ensure that agencies take a required "hard look" at the environmental consequences of their actions,[440] and there is no indication in the Notice that the agencies conducted any NEPA analysis or engaged in reasoned decision-making regarding the environmental impacts as required by law.[441]

CONCLUSION

We applaud the agencies' decision to reject the NWPR. However, we object to the agencies' decision to place limitations on the categories of waters protected under the Pre-2015 Regulatory Definitions that will result in a reduction in the scope of waters protected under the CWA. We respectfully implore you to fully restore the Pre-2015 Regulatory Definitions, as is required to fulfill the objective and goals of the CWA.

Respectfully submitted,

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[438] *See* 40 C.F.R. § 1508.9(a) and (b); 33 C.F.R. § 230.10(a); 40 C.F.R. § 1508.13.

[439] *See* 33 C.F.R. § 230.10(a).

[440] *Robertson v. Methow Valley Citizen*s, 490 U.S. 332, 350-54 (1989).

[441] *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotations omitted).

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Potomac Riverkeeper Network / Shenandoah Riverkeeper
Washington, District of Columbia

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Apalachicola Riverkeeper
Apalachicola, Florida

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Collier County Waterkeeper
Naples, Florida

Reinaldo Diaz
Lake Worth Waterkeeper
Lake Worth Beach, Florida

Dr. Rachel Silverstein
Miami Waterkeeper
Miami, Florida

Rusty Chinnis
Suncoast Waterkeeper
Sarasota, Florida

Fletcher Sams
Altamaha Riverkeeper
Brunswick, Georgia

Damon Mullis
Ogeechee Riverkeeper
Savannah, Georgia

Tonya Bonitatibus
Savannah Riverkeeper
Hephzibah, Georgia

John S. Quarterman
Suwannee Riverkeeper
Hahira, Georgia

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Lake Pend Oreille Waterkeeper
Sandpoint, Idaho

Ferrell Ryan
Snake River Waterkeeper
Boise, Idaho

Dean A. Wilson
Atchafalaya Basinkeeper
Plaquemine, Louisiana

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Baltimore Harbor Waterkeeper
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Matt Pluta
Choptank Riverkeeper
Easton, Maryland

Frederick L. Tutman
Patuxent Riverkeeper
Upper Marlboro, Maryland

Brent E Walls
Upper Potomac Riverkeeper
Williamsport, Maryland

Robert Burns
Detroit Riverkeeper
Grosse Ile, Michigan

Chauncey Moran
Yellow Dog Riverkeeper
Big Bay, Michigan

Rachel Bartels
Missouri Confluence Waterkeeper
St. Louis, Missouri

Guy Alsentzer
Upper Missouri Waterkeeper
Bozeman, Montana

Gregory Remaud
NY/NJ Basykeeper
Hazlet, New Jersey

Dawn Buehler
Kansas Riverkeeper
Lawrence, Kansas

Gabrielle Ross
Assateague Coastkeeper
Berlin, Maryland

Annie Richards
Chester Riverkeeper
Chestertown, Maryland

Theaux M. Le Gardeur
Gunpowder Riverkeeper
Monkton, Maryland

Jesse L. Iliff
South, West & Rhode Riverkeeper
Edgewater, Maryland

Betsy Nicholas
Waterkeepers Chesapeake
Takoma Park, Maryland

Heather Smith
Grand Traverse Baykeeper
Traverse City, Michigan

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Pearl Riverkeeper
Madison, Mississippi

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Stevensville, Montana

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Hackensack Riverkeeper
Hackensack, New Jersey

Bill Schultz
Raritan Riverkeeper
Keasbey, New Jersey

Jen Pelz
Rio Grande Waterkeeper
Santa Fe, New Mexico

Tracy Brown
Hudson Riverkeeper
Ossining, New York

Peter Topping
Peconic Baykeeper
Hampton Bays, New York

John Peach
Upper St. Lawrence Riverkeeper
Clayton, New York

Kemp Burdette
Cape Fear Riverkeeper
Wilmington, North Carolina

Gray Jernigan
Green Riverkeeper
Hendersonville, North Carolina

Emily Sutton
Haw Riverkeeper
Bynum, North Carolina

Jillian Howell
Pamlico-Tar Riverkeeper
Washington, North Carolina

Kemp Burdette
Waterkeepers Carolina
Washington, North Carolina

Edgar Miller
Yadkin Riverkeeper
Winston-Salem, North Carolina

Martin Lively
Grand Riverkeeper
Miami, Oklahoma

Jill Jedlicka
Buffalo Niagara Waterkeeper
Buffalo, New York

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Lake George Waterkeeper
Lake George, New York

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Dan Riverkeeper
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Neuse Riverkeeper
New Bern, North Carolina

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Watauga Riverkeeper
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Ashland, Oregon

Travis Williams
Willamette Riverkeeper
Portland, Oregon

Ted Evgeniadis
Lower Susquehanna Riverkeeper
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Eric Harder
Youghiogheny Riverkeeper
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Providence, Rhode Island

Andrew Wunderley
Charleston Waterkeeper
Charleston, South Carolina

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Edisto Riverkeeper
Batesburg, South Carolina

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Lumber Riverkeeper
Conway, South Carolina

Kristen Schlemmer
Bayou City Waterkeeper
Houston, Texas

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Columbia Riverkeeper
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Seadrift, Texas

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Jameson Brunkow
James Riverkeeper
Richmond, Virginia

Angie Rosser
West Virginia Headwaters Waterkeeper
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