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Via www.regulations.gov

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Office of the Administrator
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable Douglas W. Lamont
Deputy Assistant Secretary of the Army
Office of the Assistant Secretary of the
Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: Proposed waters of the United States rulemaking (EPA-HQ-2017-0203)

Dear Administrator Pruitt and Deputy Secretary Lamont:

The Southern Environmental Law Center submits the following comments on behalf of itself and 63 organizations that share a common commitment to clean water and healthy wetlands. These organizations and their millions of members recognize that clear, predictable protections for streams and wetlands—as provided by the Clean Water Rule—are essential to safeguarding the waters where Americans swim, fish, boat, paddle, hunt, and get their drinking water. This rulemaking would eliminate these protections without justification. We respectfully request that the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers withdraw the proposed rule.

The Southern Environmental Law Center submits these comments on behalf of: Alabama Rivers Alliance, Altamaha Riverkeeper, Appalachian Voices, Atlanta Audubon Society, Black Warrior Riverkeeper, Blue Ridge Land Conservancy, Broad River Alliance, Cahaba River Society, Carolina Wetlands Association, Catawba Riverkeeper Foundation, Center for a Sustainable Coast, Charleston Waterkeeper, Chattahoochee Riverkeeper, Chattooga Conservancy, Coastal Carolina Riverwatch, Coastal Conservation League, Congaree Riverkeeper, Conservation Voters of South Carolina, Coosa River Basin Initiative, Crystal Coast Waterkeeper, Defenders of Wildlife, Dogwood Alliance, Environment Georgia, Flint Riverkeeper, French Broad Riverkeeper, Friends of the Rappahannock, Friends of the Reedy River, Georgia ForestWatch, Georgia River Network, Green Riverkeeper, Harpeth Conservancy, James River Association, Lynnhaven River NOW, MountainTrue, North Carolina Coastal Federation, North Carolina Conservation Network, North Carolina Wildlife Federation, Obed

Watershed Community Association, Ogeechee Riverkeeper, One Hundred Miles, Potomac Riverkeeper Network, Rivanna Conservation Alliance, River Guardian Foundation, Roanoke River Basin Association, Satilla Riverkeeper, Savannah Riverkeeper, Save Our Saluda, Shenandoah Valley Network, Shoals Environmental Alliance, Sierra Club-Virginia Chapter, Sound Rivers, SouthWings, South Carolina Native Plant Society, St. Marys EarthKeepers, Tennessee Citizens for Wilderness Planning, Tennessee Clean Water Network, The Wilderness Society, Upstate Forever, Waccamaw Riverkeeper, WakeUP Wake County, Watauga Riverkeeper, White Oak-New Riverkeeper Alliance, Winyah Rivers Foundation.

I. THE SOUTH HAS TREMENDOUS RESOURCES AT STAKE IN THIS RULEMAKING.

Our southern streams, rivers, lakes, estuaries, and oceans are foundational to the region's history, culture, and economy. Compared to other regions, the South has more miles of streams and more acres of wetlands combined with underfunded state water-quality programs, making the region especially vulnerable to the loss of federal clean-water protections. North Carolina, South Carolina, and Georgia alone have approximately 18 million acres of wetlands, many of which are pocosins, Carolina bays, cypress domes, or other unique wetland types that are only found in the South and were granted clearer protection by the Clean Water Rule. Because of these tremendous natural resources, the effects of the agencies' actions in this rulemaking have a significant effect on our region.

Each year, tourists from across the country vacation on southern beaches. Recreational fishermen catch trout in our mountain streams, bass in our piedmont lakes and streams, and any number of saltwater fish in our extensive estuaries and from our beaches. Commercial fishermen fish our estuaries and ocean waters, landing more than \$380 million worth of catch in 2015 according to the National Marine Fisheries Service.¹ Our populations are growing as people move to our expanding cities and our developing retirement communities. Each of these parts of the southern economy depends on clean water.

The recreational industry in the Southeast benefits when small streams and wetlands, which are integral for fish and wildlife habitat, are protected. In 2011, in the six states where SELC works—Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee—the U.S. Fish and Wildlife Service reported that a total of \$19 billion was spent on wildlife recreation, including \$5.7 billion on fishing; more than 15.9 million people participated in these recreational activities throughout the six-state region.² The Ecological Economics Journal estimates the Clean Water Act has been responsible for adding as much as \$15.8 billion in

¹ See National Marine Fisheries Service, Annual Commercial Landings Statistics, *available at* https://www.st.nmfs.noaa.gov/st1/commercial/landings/annual_landings.html (totals for VA, NC, SC, GA, AL).

² See U.S. Department of the Interior, U.S. Fish and Wildlife Service, U.S. Department of Commerce, and U.S. Census Bureau. 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, *available at* <https://www.census.gov/prod/2012pubs/fhw11-nat.pdf>.

economic benefits for the Commonwealth of Virginia, alone.³ And a host of Virginia industries rely on access to clean water—including tourism, which employs 350,000 Virginians and generates \$18 billion for the economy.

II. SUMMARY OF COMMENTS.

In 2015, after engaging in an extensive outreach program, conducting an exhaustive scientific review, and preparing a comprehensive legal analysis, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers published the Clean Water Rule—a regulation that clearly and comprehensively defines what waters are protected by the Clean Water Act. In the four years the two agencies worked to craft the rule, they reviewed over 1,200 scientific studies, collected over 1,000,000 public comments, drafted over 6,000 pages of responses, and held over 400 public meetings. Yet within two months of taking office, the Trump administration announced a plan to rescind the Clean Water Rule and replace it with another regulatory scheme that would eliminate Clean Water Act protections for many of the Nation’s waters. The following comments explain how such a move would violate the law, disregard proven science, and jeopardize the Nation’s water resources.

As is clear from the dearth of analysis supporting any part of the proposed rule, the agencies’ motivation in proposing this rulemaking has little to do with protecting the streams, rivers, and wetlands where Americans swim, paddle, boat, fish, hunt, and get their drinking water. Instead, it is a political decision that will result in dirtier water, destroyed wetlands, and a failure to meet the Clean Water Act’s objective. What’s more disappointing is that Administrator Pruitt has been leading a dishonest campaign against the Clean Water Rule. In a recent interview, the administrator claimed that the Clean Water Rule extended federal jurisdiction over puddles.⁴ That is indisputably false.⁵ He has further asserted that the Clean Water Rule was responsible for extending Clean Water Act protections to creek beds that are sometimes dry.⁶ Creek beds, which are created by flowing water, have been regulated under the Clean Water Act for over 40 years because they are essential to maintaining downstream water quality—even if they go dry for parts of the year.⁷ Mr. Pruitt has also claimed that the Clean Water Rule extended jurisdiction to

³ Jim Epstein, *Clean Water Is Vital for Success of Virginia Business*, The Daily Progress, available at http://www.dailyprogress.com/opinion/opinion-column-clean-water-is-vital-for-success-of-virginia/article_54a3fad0-71c6-11e4-ab71-23593a302e82.html.

⁴ Ariel Wittenberg, *Pruitt Stars in Industry Video Promoting WOTUS Repeal*, E&E News, Aug. 21, 2017, available at <https://www.eenews.net/stories/1060058985>.

⁵ In reality, the final rule expressly excludes puddles—something the agencies noted in the preamble to the final rule. 33 C.F.R. § 328.3(b)(4)(vii) (providing that “[p]uddles” “are not ‘waters of the United States’ even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section”); U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, *Clean Water Rule: Definition of “Waters of the United States,”* 80 Fed. Reg. 37,054, (June 29, 2015).

⁶ Ariel Wittenberg, *Pruitt Stars in Industry Video Promoting WOTUS Repeal*, E&E News, Aug. 21, 2017, available at <https://www.eenews.net/stories/1060058985>.

farm ponds and ditches.⁸ Again, this is false. Farm ponds have been exempt from regulation since 1977 and remain exempt under the Clean Water Rule.⁹ Ironically, the Clean Water Rule carves out explicit exemptions for ditches to clear up any confusion, while that exclusion was only implicit before.¹⁰

The agencies' distortion of reality continues in the justification offered for the proposed rule, as the agencies contend that the action would do nothing more than maintain the legal "status quo."¹¹ This isn't so. The Sixth Circuit's judicial stay of the Clean Water Rule is a temporary measure; by contrast, the proposed regulation would result in a permanent repeal.¹² In attempting to reestablish the regulations and guidance that existed prior to the Clean Water Rule, moreover, the administration has failed to acknowledge the flaws of the earlier guidance. The previous guidance was based on a misinterpretation of Supreme Court decisions and does not reflect the intent of the Clean Water Act. Thus, it illegally denies protections to waters that are covered by the Clean Water Act.

The proposed revival of an under-protective, case-by-case regime would result in renewed uncertainty and an unlawful abdication of the agencies' responsibility for protecting clean water. That choice must be judged—and analyzed—both on its merits and in comparison to the Clean Water Rule, which clarifies the scope of the Act and simplifies the Act's implementation. The Clean Water Rule categorizes waters, provides clearer definitions, and includes bright-line tests. This clarification is important because the "waters of the U.S." definition applies to more than just wetlands and small streams; it defines the reach of the water-quality program, the oil-spill-prevention-and-response program, and the states' right to veto federal permits and projects that would compromise state waters.¹³ In short, the Clean Water Rule determines the jurisdictional reach of the entire Clean Water Act. If the Clean Water Rule is successfully repealed, decades of work to improve the condition of the Nation's waters could be undone—and the clarity provided by the rule would give way to case-by-case abandonment of protections by the agencies.

⁷ See, e.g., Department of the Army, Engineers Corps, Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37,121, 37,129 (1977).

⁸ Ariel Wittenberg, Pruitt Stars in Industry Video Promoting WOTUS Repeal, E&E News, Aug. 21, 2017, available at <https://www.eenews.net/stories/1060058985>.

⁹ Clean Water Act, Pub. L. No. 95-217, § 67 (a), (b), 91 Stat. 1600 (1977); 80 Fed. Reg. 37,053, 37,098

¹⁰ 80 Fed. Reg. at 37,104.

¹¹ 82 Fed. Reg. at 34,900.

¹² *In re EPA and Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015).

¹³ 80 Fed. Reg. at 37,055.

As state water-quality reports and EPA research have proven, we still have significant work to do—work that is unlikely to occur if Clean Water Act protections are slashed. More than 50 percent of the rivers, streams, and wetlands assessed in a recent EPA study were impaired.¹⁴ Nearly 80 percent of the bays and estuaries assessed were impaired, as were 91 percent of ocean and near-coastal waters and 100 percent of Great Lakes open waters.¹⁵

While the Trump administration argues that the states will step up and provide water-quality protections, this contention fails for two reasons. First, it was the states that led the Nation’s water-quality efforts in the decades leading up to the Clean Water Act’s passage in 1972. The condition of our waters in that period was abysmal. It was because of this water-quality crisis that Congress felt compelled to pass the Clean Water Act. Without the statute’s broad protections, this country could return to an era of widespread unacceptable water quality. Second, while some states would not allow water quality to degrade, others would. When the Clean Water Rule was finalized, 31 states filed lawsuits challenging it. It is likely that many of these states would not enact legislation or regulations replacing the Clean Water Act’s protections with state requirements. In fact, 36 states have statutes or rules that prohibit the adoption of state protections that would be stronger than those promulgated by the agencies.¹⁶ The purpose of the Act is to prevent the race to the bottom that plagued even interstate waters before the 1972 overhaul of federal water-quality law.

In the following comments, we explain the many flaws of the administration’s current proposal. We also demonstrate that the assumptions underlying the proposed repeal are incorrect, making the agencies’ reliance on them arbitrary and unlawful.

III. IF THE AGENCIES WISH TO REPEAL THE CLEAN WATER RULE AND CODIFY A DIFFERENT REGULATORY SCHEME, THEY MUST CONSIDER THE IMPLICATIONS OF THESE CHANGES—WITH THE ASSISTANCE OF PUBLIC COMMENT.

The agencies’ approach to repealing the Clean Water Rule betrays an extraordinary disregard for the requirements of the Administrative Procedure Act and the views of the American public. According to the notice, the proposed repeal—a permanent, substantive regulation—would “simply codify the legal *status quo*” as “a temporary, interim measure pending” a “substantive rulemaking” at some point down the road.¹⁷ Based on this erroneous

¹⁴ See also, EPA summary of states’ reported water-quality data, *available at* http://ofmpub.epa.gov/waters10/attains_nation_cy.control.

¹⁵ *Id.*

¹⁶ Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* at 7 (2013) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

¹⁷ U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Proposed Rule, Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,903 (July 27, 2017).

premise, the agencies have refused to “undertake any substantive reconsideration” of either the Clean Water Rule, which their proposal would eliminate, or the new regulatory scheme, which they previously repealed.¹⁸ Remarkably, the agencies have also refused to allow for public comments on the merits of the proposed regulation.¹⁹

Federal law has a term for rulemakings of this sort: “arbitrary and capricious.”²⁰ Unless the agencies wish to adopt an indefensible rule, the proposed action should be abandoned.

A. The Agencies’ Refusal to Allow Substantive Comments on the Implications of Their Proposed Action Is Impermissible Under the Administrative Procedure Act.

With the Administrative Procedure Act, Congress established a vital “process for formulating, amending, ... [and] repealing” agency regulations.²¹ Three steps are required. First, an agency must publish a “[g]eneral notice of proposed rule making” that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”²² Second, the agency is required to give the public “an opportunity to participate in the rule making” by inviting comments on the merits of the proposed action.²³ Finally, after considering all of the relevant comments received, the agency must respond to them on the record.²⁴

“The important purposes of this notice and comment procedure cannot be overstated.”²⁵ Rather than “erect[ing] arbitrary hoops through which federal agencies must jump without reason[,]” the process “improves the quality of agency rulemaking by exposing regulations to diverse public comment,” “ensures fairness to affected parties,” and “provides a well-developed record that enhances the quality of judicial review.”²⁶ It also “helps [to] ensure ‘that the agency maintains a flexible and open-minded attitude towards its own rules,’ ... because the opportunity to comment ‘must be a meaningful opportunity[.]’”²⁷ In short, as the D.C. Circuit has explained,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See 5 U.S.C. § 706(2)(A) (directing federal courts to “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

²¹ *Id.* § 551(5).

²² *Id.* § 553(b).

²³ *Id.* § 553(c).

²⁴ *Id.*

²⁵ *N.C. Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012).

²⁶ *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (internal quotations omitted).

²⁷ *N.C. Growers’ Ass’n*, 702 F.3d at 763 (quoting *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985), and *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011)).

the requirements of notice and comment “serve important purposes of agency accountability and reasoned decisionmaking”—and they “impose a significant duty on the agency.”²⁸

1. Because the Proposed Action Would Repeal the Clean Water Rule and Codify a Different Regulation, the Agencies Must Allow for Public Comments on the Substance of Both Regulatory Schemes.

In refusing to allow comments on the relative merits of the Clean Water Rule and the proposed regulatory scheme, the agencies have unlawfully denied the public a meaningful role in the rulemaking process.²⁹ Despite the agencies’ assertions to the contrary, the proposed action would alter the Nation’s clean-water program in two fundamental respects. First, it would permanently repeal the Clean Water Rule, stripping protections from wetlands and streams across the United States. Second, it would impose a new regulatory scheme based on the prior regulation and the agencies’ flawed 2003 and 2008 guidance.³⁰ Given these changes, the substantive requirements of the Clean Water Rule, as well as those of the proposed regulatory scheme, could not be more “relevant” or “important” to the agencies’ decision.³¹ The public must accordingly be granted an opportunity to submit comments on the merits of the proposed action—comments that must be addressed by the agencies before a final decision is made.³²

²⁸ *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

²⁹ See 82 Fed. Reg. at 34,903 (proposed rule) (stating that the agencies are not “soliciting comment on the specific content of [the proposed rule]”).

³⁰ *Id.* at 34,900 (“The proposed regulatory text would ... replace the stayed rulemaking text, and re-codify the regulatory definitions ... in the Code of Federal Regulations ... as they existed prior to the promulgation of the stayed 2015 definition. If this proposed rule is finalized, the agencies would continue to implement those prior regulatory definitions), [*sic*] informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.”).

³¹ 5 U.S.C. § 553(c) (requiring agencies to consider all “relevant matter presented” during the rulemaking process); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an administrative action is “arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem”); 82 Fed. Reg. at 34,902 (proposed rule) (conceding that “[t]he scope of CWA jurisdiction is an issue of great national importance” deserving of “robust deliberations”). See also 82 Fed. Reg. at 34,901 (proposed rule) (asserting that “[t]he agencies have the authority to rescind and revise the regulatory definition of ‘waters of the United States,’ consistent with the guidance in the Executive Order, so long as the revised definition is authorized under the law and based on a reasoned explanation” (emphasis added) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

³² See, e.g., *N.C. Growers’ Ass’n*, 702 F.3d at 769-70. While the agencies have promised that substantive comments will be allowed during a later rulemaking process, 82 Fed. Reg. at 34,903, “the APA expressly contemplates that notice and an opportunity to comment will be provided *prior* to agency decisions to repeal a rule[.]” *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982) (emphasis added), *aff’d sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983). See also, e.g., *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980) (“[T]he purpose of prior notice and comment is to afford persons an opportunity to influence agency action in the formulative stage, before implementation, when the agency is more likely to be receptive to argument.”).

The need for substantive comments is underscored by the agencies' only substantive argument in defense of the proposed repeal. According to the notice, the present rulemaking is aimed at providing "regulatory continuity and clarity for the many stakeholders affected by the definition of 'waters of the United States.'"³³ As the agencies admit, however, this rationale was the very one offered in support of the Clean Water Rule they now wish to repeal.³⁴ Given the agencies' about-face on the question of how best to establish a clear regulatory scheme, they must solicit—and consider—public comments on the issue.³⁵

2. *Contrary to the Agencies' Assertions, the Proposed Action Is Designed to Change—Not Codify—the "Legal Status Quo."*

In attempting to avoid the statutory requirements of public comment and agency consideration, the agencies repeatedly argue that their proposed regulation would do nothing at all, eliminating any need for informed deliberation. According to the agencies, because the Clean Water Rule "has already been stayed by the Sixth Circuit," the proposed rule "would merely codify the legal status quo, not change current practice."³⁶ As a result, the agencies contend, there is simply no regulatory change for the public to comment on.³⁷

The suggestion that the proposed rule would have no legal effect is contradicted by the agencies' own preamble. In it, the agencies admit that the very purpose of their proposal is to *change* the legal *status quo* by converting the Sixth Circuit's temporary stay into a permanent repeal.³⁸ As evidenced by their only argument in support of the proposed action, the agencies are clearly concerned about the fact that the Sixth Circuit's injunction could be lifted "at any

³³ 82 Fed. Reg. at 34,902.

³⁴ *Id.* at 34,901 (noting that the Clean Water Rule was developed to "provide clarity and certainty on the scope of the waters protected by the CWA").

³⁵ *See, e.g., Fox*, 556 U.S. at 515-16 ("Sometimes ... [an agency] must [provide a more detailed justification than what would suffice for a new policy created on a blank slate]—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. ... It would be arbitrary or capricious to ignore such matters. In such cases ... [,] a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *N.C. Growers' Ass'n*, 702 F.3d at 769-70.

³⁶ 82 Fed. Reg. at 34,903 (italics omitted in original).

³⁷ *Id.*; *see also, e.g., id.* at 34,900 ("This proposed rule will not establish any new regulatory requirements. Rather, the rule simply codifies the current legal *status quo* while the agencies engage in a second, substantive rulemaking to reconsider the definition of 'waters of the United States.'"); *Id.* at 34,902 ("[T]he agencies are proposing as an interim action to repeal the 2015 definition of 'waters of the United States' and codify the legal *status quo* that is being implemented now under the Sixth Circuit stay of the 2015 definition of 'waters of the United States' and that was in place for decades prior to the 2015 rule.").

³⁸ *See In re: Clean Water Rule*, 803 F.3d 804, 806, 809 (6th Cir. 2015) (granting "a stay of the Clean Water Rule pending completion of the court's review"); 82 Fed. Reg. at 34,901 (proposed rule) (acknowledging that "the Sixth Circuit stayed the 2015 rule nationwide to restore the 'pre-Rule regime, *pending judicial review*'" (emphasis added)).

time”—which would require them to implement the protections of the Clean Water Rule.³⁹ Rather than doing nothing, therefore, the proposed repeal is designed to eliminate this possibility by permanently removing the Clean Water Rule from the Code of Federal Regulations and ensuring that it will never come back into force.⁴⁰ Because the proposed action “involves the agency’s delegated power to make law through rules,” it must be preceded by a meaningful opportunity for public comment.⁴¹

It is true, of course, that “[t]he agencies have the authority to rescind and revise the regulatory definition of ‘waters of the United States,’ ... so long as the revised definition is authorized under the law and based on a reasoned explanation.”⁴² In taking such action, however, they must “display awareness that ... [they are] changing position” and “show that there are good reasons for the new policy[,]” as federal agencies “may not ... simply disregard rules that are still on the books.”⁴³ Given the agencies’ unwillingness to acknowledge that the proposed action would result in significant changes to the “legal *status quo*,” they have failed to satisfy the most basic requirements of the APA.⁴⁴ The proposed rule should accordingly be abandoned.

3. *If the Agencies Intend to Base Their Proposed Regulatory Scheme on the 2003 and 2008 Guidance, the Text of the Guidance Documents Must be Included in the Proposed Rule.*

In what appears to be an unprecedented approach, the agencies propose to promulgate a new rule that would be limited by guidance documents issued 9 and 14 years ago. But the text of this guidance, which sets out the actual regulatory scheme proposed, is nowhere to be found in the preamble to the proposed rule or in the text of the proposed rule itself. Such an approach

³⁹ 82 Fed. Reg. at 34,902-03 (proposed rule) (arguing, for three paragraphs, that “[t]he pre-CWR regulatory regime is in effect as a result of the Sixth Circuit’s stay of the 2015 rule but that regime depends upon the pendency of the Sixth Circuit’s order and could be altered at any time by factors beyond the control of the agencies”). *See also, e.g., Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (“As we have explained, ‘an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked’ and ‘may not alter [such a rule] without notice and comment.’”).

⁴⁰ 82 Fed. Reg. at 34,903.

⁴¹ *White v. Shalala*, 7 F.3d 296, 303-04 (2d Cir. 1993); *Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000) (“In this circuit, we have stated that legislative rules are those that ‘create new law, rights, or duties, in what amounts to a legislative act.’”).

⁴² 82 Fed. Reg. at 34,901 (citing *Fox*, 556 U.S. at 515).

⁴³ *Fox*, 556 U.S. at 515.

⁴⁴ Though cited in support of the agencies’ action, *P&V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021 (D.C. Cir. 2008), is not to the contrary. In that case, there was no “final agency action” for the D.C. Circuit to review. *Id.* at 1024-27. Here, the agencies have proposed a regulation that will be subject to challenge whenever it is finalized. *See* 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”); *id.* § 551(13) (defining “agency action” to include “the whole or a part of an agency rule”).

invites confusion and cannot pass muster under the APA. The 2003 and 2008 guidance documents referenced in the agencies’ preamble are clearly “agency statement[s] of general or particular applicability and future effect designed to implement” the proposed new rule.⁴⁵ The agencies are accordingly required to publish, as part of their proposed action, “the terms or substance” of the referenced guidance.⁴⁶ By omitting the guidance in the proposed rule text, the agencies have violated fundamental APA requirements for notice and comment. Failing to incorporate the guidance into the proposed rule makes it impossible for the public to provide meaningful comment.

4. *In Attempting to Repeal the Clean Water Rule Before Reviewing Its Merits, the Agencies Have Defied the Requirements of Executive Order 13,778.*

While the agencies have also attempted to defend their proposed action as being consistent with Executive Order 13,778, it isn’t.⁴⁷ Under Executive Order 13,778, President Trump directed the agencies to:

[1] *review the final rule* entitled “Clean Water Rule: Definition of ‘Waters of the United States,’” ... for consistency with the policy set forth in ... [the] order and [2] *publish for notice and comment a proposed rule rescinding or revising the rule*, as appropriate and consistent with law.⁴⁸

Like the Administrative Procedure Act, this language requires the agencies to complete their “review” before taking action.⁴⁹ It further directs them to propose a single regulation to amend or repeal the Clean Water Rule. The agencies’ current “two-step process”—which seeks to repeal the Clean Water Rule before reviewing it—is accordingly at odds with Executive Order 13,778.⁵⁰

B. *The EPA Administrator Has Pre-Determined the Outcome of This Rulemaking and Must Recuse Himself from the Process.*

Ultimately, the agencies’ disinterest in receiving substantive comments regarding the proposed repeal is unsurprising. As demonstrated by his statements and actions in response to the

⁴⁵ 5 U.S.C. § 551(4).

⁴⁶ *Id.* § 553(b)(3).

⁴⁷ *See, e.g.*, 82 Fed. Reg. at 34,902 (“This rulemaking action is consistent with the February 28, 2017, Executive Order and the Clean Water Act.”).

⁴⁸ Executive Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017), § 2(a) (emphasis added) (citation omitted).

⁴⁹ *Id.*

⁵⁰ 82 Fed. Reg. at 34,899.

Clean Water Rule, the current administrator of the U.S. Environmental Protection Agency has already made up his mind.

Administrator Pruitt began his assault on the Clean Water Rule more than two years ago, while he was serving as Oklahoma’s attorney general. On July 8, 2015—nearly two months before the regulation even became effective—Attorney General Pruitt filed a challenge to the Clean Water Rule in the United States District Court for the Northern District of Oklahoma.⁵¹ In testifying about the regulation before a joint hearing of the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure, Mr. Pruitt declared that it was “a naked power grab by the EPA” and “a classic case of overreach”—one “flatly contrary to the will of Congress, who, with the passing of the Clean Water Act, decided that it was the States who should plan the development and use of local land and water resources.”⁵² He went on to accuse his future agency of being “generally ... unresponsive to concerns expressed by States, local governments, and individual citizens,” and complained that the EPA had engaged in “a public relations campaign designed to sway opinion and rule America.”⁵³ According to Mr. Pruitt, the Clean Water Rule was “unlawful and should be withdrawn.”⁵⁴

Since becoming administrator, Mr. Pruitt has continued his attack on the Clean Water Rule, utilizing an aggressive public-relations and administrative campaign. According to a recent *New York Times* report, he has gone so far as to dictate the results of economic studies.⁵⁵ In the words of the article:

Mr. Pruitt’s efforts to undo ... [the] major water protection rule are one example of his moves to quickly and stealthily dismantle regulations.

* * *

E.P.A. employees say that in mid-June, as Mr. Pruitt prepared a proposal to reverse the ... [Clean Water Rule], they were told by his deputies to produce a new analysis of the rule—one that

⁵¹ Complaint for Declaratory and Injunctive Relief, *State of Oklahoma ex rel. E. Scott Pruitt v. U.S. EPA*, No. 15-CV-381-CVE-FHM (N.D. Okla. July 8, 2015), available at <https://www.ok.gov/oag/documents/Complaint.pdf>.

⁵² Impacts of the Proposed “Waters of the United States” Rule on State and Local Governments: Joint Hearing before the Committee on Transp. and Infra., U.S. House of Representatives, and the Comm. on Env’t. and Pub. Works, U.S. Senate, 114th Cong. 70 (2015) (statement of Okla. Att’y Gen. Scott Pruitt).

⁵³ *Id.*

⁵⁴ *Id.* at 71.

⁵⁵ Coral Davenport and Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. Times, Aug. 11, 2017, available at <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html?emc=eta1>.

stripped away the half-billion-dollar economic benefits associated with protecting wetlands.

“On June 13, my economists were verbally told to produce a new study that changed the wetlands benefit,” said Elizabeth Southerland, who retired last month from a 30-year career at the E.P.A., most recently as a senior official in the agency’s water office.

“On June 16, they did what they were told,” Ms. Southerland said. “They produced a new cost-benefit analysis that showed no quantifiable benefit to preserving wetlands.”

Ms. Southerland and other experts in federal rule-making said such a sudden shift was highly unusual — particularly since studies that estimate the economic impact of regulations can take months or even years to produce, and are often accompanied by reams of paperwork documenting the process.

“Typically there are huge written records, weighing in on the scientific facts, the technology facts and the economic facts,” she said. “Everything’s in writing. This repeal process is political staff giving verbal directions to get the outcome they want, essentially overnight.”⁵⁶

The first economic study showed that the Clean Water Rule’s benefits outweighed its costs. Instead of having the EPA’s economists reconsider their study, Administrator Pruitt simply directed them to remove the benefits they had attributed to the Clean Water Rule.

In pushing for his desired outcome, Administrator Pruitt has gone so far as to launch a misinformation tour aimed at cultivating support for the proposed repeal.⁵⁷ During a recent stop in Iowa, Mr. Pruitt seemed willing, even, to announce his decision by posing with a sign that declared “IT’S TIME TO DITCH the RULE.”⁵⁸

⁵⁶ *Id.*

⁵⁷ See, e.g., Ariel Wittenberg, Pruitt Stars in Industry Video Promoting WOTUS Repeal, E&E News, Aug. 21, 2017, available at <https://www.eenews.net/stories/1060058985> (noting that while Administrator Pruitt has asserted that “[t]he Obama administration ... defined a water of the United States as being a puddle, a dry creek bed and ephemeral drainage ditches all across this country,’ ... the regulation specifically lists puddles among features that are not considered waters of the U.S. and also specifies that it excludes dry creek beds that do not have a bed, bank and high-water mark and ephemeral ditches that ‘flow only after precipitation’”).

⁵⁸ Available at <https://twitter.com/Spokesmaneditor/status/894980097308061698>; <https://twitter.com/StephCarlson20/status/894970054139420673>.



Administrator Pruitt has proven himself to have an “unalterably closed mind on matters critical to the disposition of th[is] proceeding[.]”⁵⁹ As a result, he must immediately recuse himself from any further involvement.⁶⁰

IV. THE PROPOSED ACTION WOULD BE ARBITRARY AND UNLAWFUL—NOT “DESIRABLE AND APPROPRIATE.”

With respect to the single question posed in the agencies’ request for public comment—“whether it is desirable and appropriate” to permanently repeal the Clean Water Rule and replace it with the previous regulatory scheme—the answer is decidedly “no.”⁶¹ As explained below, the agencies have made no effort to assemble a record in support of their proposed action. In contrast, the extensive record underlying the Clean Water Rule, which is described below, demonstrates that its repeal would result in the loss of critical protections for wetlands and streams across the United States.

While the agencies have argued that a repeal is nonetheless justified as a means of providing a “stable regulatory foundation” during their promised “re-evaluation ... of the definition of ‘waters of the United States[.]’” it would do the opposite.⁶² Due to the deficiencies

⁵⁹ *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

⁶⁰ *Id.*

⁶¹ 82 Fed. Reg. at 34,903 (requesting “comment as to whether it is desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rulemaking to reconsider the definition of ‘waters of the United States’”).

⁶² *Id.*

outlined in these comments, the agencies' proposal is both arbitrary and unlawful. Rather than establishing a "stable regulatory foundation[.]" in other words, the proposed action would only result in further litigation regarding both the repeal and later jurisdictional determinations under the guidance.⁶³ If it's clarity the agencies seek, they should leave the Clean Water Rule in place.

A. The Agencies Have Failed to Assemble a Record in Support of the Proposed Rule, Rendering the Action Arbitrary and Capricious.

In *FCC v. Fox Television Stations, Inc.*,⁶⁴ the Supreme Court expanded on the arbitrary-and-capricious test that it had previously established in the seminal case on the subject, *State Farm Mutual Automobile Insurance Co.*⁶⁵ In *State Farm*, the Court held that if an agency attempts to repeal an administrative rule, the agency must examine alternative ways of achieving the objectives of the controlling statute, address the alternatives, and give adequate reasons for abandoning the existing rule.⁶⁶ In *Fox*, the Court confirmed that if an agency decides to change a policy, it must provide a "reasoned explanation" for doing so and provide a record that supports the change.⁶⁷ This is especially true when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy[.]"⁶⁸ In such instances, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."⁶⁹

Here, the EPA and the Corps are confronted with an extremely well-developed record supporting the Clean Water Rule, as described immediately below, yet the agencies do effectively nothing to address the facts developed in that record. The only record document that they produce is an economic report that directly conflicts with the more extensive and better researched economic analysis prepared to back the Clean Water Rule.⁷⁰

It is not surprising that the EPA and the Corps have not been able to produce a sufficient record for the proposed rule. This is a rush job, driven not by science or any reasoned analysis, but by politics. President Trump signed the Executive Order seeking the repeal of the Clean

⁶³ *Id.*

⁶⁴ 556 U.S. at 502.

⁶⁵ 463 U.S. 29 (1983).

⁶⁶ *Id.* at 48.

⁶⁷ *Fox*, 556 U.S. at 515-16.

⁶⁸ *Id.* at 515.

⁶⁹ *Id.* at 515-16.

⁷⁰ U.S. Environmental Protection Agency and U.S. Department of the Army, Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, (Draft) (2017), available at https://www.eenews.net/assets/2017/07/07/document_gw_04.pdf (last visited July 25, 2017).

Water Rule on February 28, 2017.⁷¹ And based on Administrator Pruitt’s statements regarding the agencies’ rulemaking timeline, the proposed repeal is slated to be completed by the end of 2017 or the first quarter of 2018.

B. In Contrast to the Proposed Action, the Clean Water Rule Is Supported by an Extensive Administrative Record.

The agencies’ extensive public outreach on the Clean Water Rule began in 2011 and continued through the end of the rulemaking process. That consultation included outreach to state and local governments, more than 40 Native American tribes,⁷² the National Governor’s Association, the National Conference of State Legislatures, the Council of State Governors, the National Association of Counties, the National Association of Towns and Townships, the International City/County Management Association, and the Environmental Council for the States.⁷³ Many of these meetings and conference calls took place before the Clean Water Rule was even proposed.⁷⁴ The EPA documented this extensive voluntary outreach in a report that it included in the record.⁷⁵

And the EPA reached out to organizations that focus on environmental justice. In 2014, the EPA discussed the proposed rule with the environmental-justice community. The agency’s conclusion from these discussions was that the Clean Water Rule would not adversely affect members of this community. Again, the EPA documented this outreach for the record.⁷⁶

In total, the agencies held over 400 public meetings to allow stakeholders to voice support or raise complaints with the proposed Clean Water Rule.⁷⁷ The owners of small businesses and farms attended these meetings, as well as miners, academics, county commissioners, city mayors, environmentalists, other federal agencies, and the general public.⁷⁸

⁷¹ Exec. Order No. 13778, 82 Fed.Reg. 12,497 (Feb. 28, 2017) (titled Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule).

⁷² Final Summary of Tribal Consultation for the Clean Water Rule: Definition of “Waters of the United States,” Under the Clean Water Act, Final Rule (Docket ID No. EPA-HQ-OW-2011-0880) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

⁷³ 80 Fed. Reg. 37,102.

⁷⁴ *Id.*

⁷⁵ See Report on the Discretionary Consultation and Outreach to State, Local, and County Governments on the Clean Water Rule: Definition of “Waters of the United States,” Final Rule (Docket ID No. EPA—HQ-OW-2011-0880) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

⁷⁶ U. S. Environmental Protection Agency, Environmental Justice Report for the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act, (Final Rule) (2015) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

⁷⁷ 80 Fed. Reg. 37,057.

⁷⁸ *Id.*

At these meetings, stakeholders were encouraged to address ways the agencies could improve upon the proposed rule.⁷⁹

The agencies continued to seek out and accommodate the public during the comment period, extending the deadline several times. In the end, the agencies solicited comments for over 200 days, and more than a million comments were received.⁸⁰ A substantial majority of these comments supported the proposed rule and the agencies' efforts to clarify the scope of the Clean Water Act's protections.⁸¹

It was also during this time that the agencies built a considerable scientific record in support of the Clean Water Rule. In the scientific report prepared by the EPA's Office of Research and Development, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,"⁸² the authors examined over 1,200 peer-reviewed scientific studies that demonstrated the importance of headwater streams and wetlands to the proper functioning of larger waterbodies.⁸³

When a draft of the report was completed, it was reviewed by the EPA's Science Advisory Board (SAB), which provides the agency with independent advice on technical issues.⁸⁴ The panel that reviewed the connectivity report was comprised of 27 experts, which included hydrologists, stream and wetland ecologists, biologists, and geomorphologists, among others.⁸⁵ The panel included representatives of academia, industry, environmental groups, and consulting firms.⁸⁶ In addition to inviting the SAB to review the draft report, the EPA also invited the public to comment in order to make its views known to the SAB before the SAB began its work.⁸⁷ The EPA received over 133,000 public comments during this process.⁸⁸ During

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, (Final Report), EPA/600/R-11/098B (2015), *available at* <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414> (last visited Sept. 22, 2017) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

⁸³ *Id.*

⁸⁴ 80 Fed. Reg. 37,062.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

its review, the SAB conducted a number of public meetings and teleconferences to further ensure that it was taking all viewpoints into consideration.

In its October 2014 report, the SAB made five overarching conclusions.⁸⁹ First, tributaries, including ephemeral and intermittent streams, are connected to downstream waters and play important roles in maintaining the health and viability of those larger waters. Second, wetlands and other waters located within floodplains are chemically, physically, or biologically connected to downstream rivers. Third, waters that are not located in a flood plain serve functions that could constitute connections to downstream waters, but those connections vary on a gradient and may or may not constitute a substantial connection. Fourth, the connections within a watershed vary both spatially and temporally. And fifth, the incremental effects of waters within a watershed must be evaluated cumulatively.

In addition to reviewing the connectivity report, the SAB also reviewed the proposed rule for technical weaknesses. In a 2014 letter, the SAB provided its advice on how the proposed rule could be strengthened.⁹⁰ For example, the SAB advised the EPA to consider waters such as Carolina and Delmarva bays, Texas coastal prairie wetlands, prairie potholes, pocosins, and western vernal pools as similarly situated given their potential impacts on downstream waters.⁹¹

To supplement the administrative record still further, the agencies prepared a cost-benefit analysis of the proposed rule.⁹² In the analysis, the agencies found that the benefits of clarifying the definition of “waters of the United States” far outweighed any additional costs associated with implementing the regulation.⁹³

Finally, in conducting the rulemaking for the Clean Water Rule, the agencies brought to the table their combined 80 years of experience in implementing the Clean Water Act. They employed this experience in preparing the technical, policy, and legal foundations for the final rule. This included responding to the 20,000 substantive comments that were submitted to the

⁸⁹ *Id.* at 37,062-63.

⁹⁰ Letter from David Allen, Chair U.S. Environmental Protection Agency Science Advisory Board, to Gina McCarthy, Administrator, U.S. Environmental Protection Agency, (Sep. 30, 2014), *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007+unsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf) (last visited July 25, 2017) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

⁹¹ *Id.* at 3.

⁹² U.S. Environmental Protection Agency and U.S., Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015), *available at* https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf (last visited July 25, 2017) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

⁹³ *Id.* at 53-54.

agencies during the comment period. To address these comments, the agencies prepared 6,114 pages of responses.⁹⁴

In failing to address the extensive Clean Water Rule record, the agencies have not offered any support for the “new policy [that] rests upon factual findings that contradict those which underlay [the] prior policy[.]”⁹⁵ As such, the proposed rule violates the APA and should be abandoned.

V. THE AGENCIES HAVE NOT EXPLAINED HOW THEY WILL RESTORE AND MAINTAIN THE NATION’S WATERS IF THE CLEAN WATER RULE IS PERMANENTLY REPEALED.

The agencies’ complete failure to develop a record in support of the proposed rule eliminates any possibility of a “reasoned explanation.” Perhaps most importantly, the agencies have provided no analysis of either the Clean Water Rule or the proposed rule in terms of the overarching purpose of the Clean Water Act—to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁹⁶ That analysis is essential here, where the Clean Water Rule record clearly explains the rationale for why it serves that purpose. In this circumstance, “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁹⁷ None exists.

A. The Clean Water Rule Advances the Act’s Purpose of Restoring and Maintaining the Integrity of the Nation’s Waters.

The Clean Water Rule provides clarity that improves water-quality protection and advances the purpose of the Clean Water Act. Although the underlying legislative history clearly outlines the broad reach of the Act, the Corps and the EPA were timid in implementing the Act’s protections following the *Rapanos* decision, leaving many waters that should have been found to be jurisdictional unprotected. The Clean Water Rule clarified those protections.

Section 101(a) of the CWA states the single “objective” of the Act—to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁹⁸ Congress could not have declared a more encompassing approach to addressing the Nation’s waters; the statute is aimed at addressing every aspect of the country’s water-quality problem. Congress

⁹⁴ See, e.g., U.S. Environmental Protection Agency, Clean Water Rule Response to Comments–Topic 10, *available at* https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf (last visited July 26, 2017) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

⁹⁵ *Fox*, 556 U.S. at 515.

⁹⁶ 33 U.S.C. § 1251(a).

⁹⁷ *Fox* at 515-16.

⁹⁸ 33 U.S.C. § 1251(a).

realized that merely making the water look better would do little to address the chemicals that might be hiding within it—that the appearance of a waterway meant little if it could not sustain fish and other aquatic life. And Congress realized that to improve water quality in the Nation’s waters, it would have to protect their very source.⁹⁹

If the sources of our waterways were not included in Nation’s effort to control water pollution, Congress realized that it could not accomplish its goal of cleaning up the waters—polluters could release toxins into those waters, which would wash down into larger waters downstream. In short, it would have been futile for Congress to pass the CWA but not extend its protections to so-called isolated wetlands or small streams that, in some areas, comprise 80 percent or more of the stream miles in a watershed.

1. The Current State of the Nation’s Waters Emphasizes the Need for the Clean Water Rule

EPA research and reporting have consistently demonstrated that even with the significant improvements in water quality since the Act’s passage, we still have a long way to go in applying and meeting the directives of the Clean Water Act. Despite the statute’s stated “goal that the discharge of pollutants into the navigable waters be eliminated by 1985[,]” toxins continue to be discharged into our waters.¹⁰⁰ In its most recent National Rivers and Streams Assessment, the EPA reported that nearly half of the waters assessed exhibited poor conditions and only 28 percent were classified as “good.”¹⁰¹ The EPA’s summary of the states’ reported water-quality data shows that states have a poor record of assessment, but of the waters assessed, 53 percent of rivers and streams, 71 percent of lakes, reservoirs and ponds, and 80 percent of bays/estuaries are failing to meet one or more water-quality standards.¹⁰²

Not only have discharges of pollutants not been eliminated with the implementation of the Clean Water Act, in many respects they are barely controlled. Toxic algal blooms, which are occurring with greater frequency due to warming temperatures and lower water levels, are exacerbated by failing wastewater-treatment systems and agricultural runoff, which allow the algae to grow and spread. Lake Erie, once a ray of hope for positive change under the Act, has become smothered once again by algal blooms and dead fish due to unabated and increasing nutrient runoff from farms and development. Close to half a million residents of nearby Toledo were unable to use their tap water for three days in 2014 due to the toxic blooms.¹⁰³ In addition

⁹⁹ S. Rep. No. 92-414, at 77 (1971).

¹⁰⁰ 33 U.S.C. § 1251(a)(1).

¹⁰¹ U.S. Environmental Protection Agency, National Rivers and Streams Assessment 2008-2009, at p. xiii, available at https://www.epa.gov/sites/production/files/2016-03/documents/nrsa_0809_march_2_final.pdf

¹⁰² National Summary of State Information (last accessed July 24, 2017), available at https://ofmpub.epa.gov/waters10/attains_nation_cy.control

¹⁰³ Michael Wines, *Behind Toledo’s water crisis, a long-troubled Lake Erie*, N.Y. Times, Aug. 4, 2014, available at <https://www.nytimes.com/2014/08/05/us/lifting-ban-toledo-says-its-water-is-safe-to-drink-again.html>; Emily Chung,

to harming drinking-water supplies, algal blooms can threaten crops—like in 2016, when algae spread from Lake Utah to the Jordan River, which is a major supplier of irrigation water for farmland in the Salt Lake City area.¹⁰⁴ The coastal waters of Florida have also been plagued by enormous algal blooms. The blooms that drain from Lake Okeechobee have shut down beaches for days at a time, harming tourism in the area.¹⁰⁵

Development also continues to decimate wetlands. Losses continue to outdistance gains, especially for forested wetlands and salt marshes.¹⁰⁶ And even when wetland acres are not lost, they are often degraded. As a result, they are not as effective in providing wildlife habitat, cleaning waters, and controlling flooding. By 2011, almost a third of the remaining wetlands in the country were in poor biological condition.¹⁰⁷

In short, the United States remains far from achieving the Clean Water Act’s objective of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.”¹⁰⁸ The Clean Water Rule’s clarification of protections for streams and wetlands was an important—and legally required—step towards accomplishing the Act’s purpose.

2. *Protecting Wetlands Is Essential to Restoring and Maintaining the Chemical, Physical, and Biological Integrity of the Nation’s Waters.*

The wetlands that would be most vulnerable under the proposed rule are those that are geographically “isolated” but chemically, physically, or biologically connected to downstream waters. Indeed, “isolation is a term that is not very useful from an ecological perspective.”¹⁰⁹ Geographically isolated wetlands are at times connected to other waters by groundwater flows,

Lake Erie’s Algae Explosion Blamed on Farmers, CBC News, Aug. 7, 2014, available at <http://www.cbc.ca/news/technology/lake-erie-s-algae-explosion-blamed-on-farmers-1.2729327>.

¹⁰⁴ Associated Press, *Huge toxic algae bloom sickens more than 100 in Utah amid heatwave*, The Guardian, July 22, 2016, available at <https://www.theguardian.com/us-news/2016/jul/22/toxic-algae-bloom-utah-lake-100-sick-heatwave>.

¹⁰⁵ *Toxic algae bloom causes Florida state of emergency*, BBC, July 5, 2016, available at <http://www.bbc.com/news/world-us-canada-36718484>.

¹⁰⁶ U.S. Fish and Wildlife Service, *Status and trends of wetlands in the coterminous United States 2004-2009 Report to Congress*, at 16, available at <https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf>.

¹⁰⁷ U.S. Environmental Protection Agency, *The National Wetland Condition Assessment 2011 Fact Sheet*, available at https://www.epa.gov/sites/production/files/2016-05/documents/2011_nwca_fact_sheet_final.pdf

¹⁰⁸ 33 U.S.C. § 1251(a).

¹⁰⁹ Dennis F. Whigham and Thomas E. Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS 541, 541-49 (2003).

intermittent streams, or overland flows.¹¹⁰ Such connections have been found between larger waters and bays,¹¹¹ pocosins,¹¹² and limesink wetlands.¹¹³

Because of hydrological connections, even wetlands that appear isolated can have significant effects on the health of downstream waters. Wetlands can capture and store large amounts of water, acting as sponges. As they absorb flood water, run-off, and rain, they also filter pesticides, excess nutrients, sediment, and other pollutants, protecting the health of downstream tributaries, rivers, and wetlands.¹¹⁴ For example, a 2010 assessment prepared for the EPA of geographically isolated wetlands in 88 counties of the Carolinas showed that geographically isolated wetlands stored significant amounts of water and, in doing so, captured heavy metals, nutrients, and carbon.¹¹⁵ Accordingly, the loss of chemically, physically, or biologically connected, yet geographically isolated, wetlands would have negative effects on the quality of downstream waters, as well as the human and ecological communities that rely on them.¹¹⁶

One of the many benefits of wetlands is flood-water retention. A single acre of wetlands can store approximately 1 million gallons of floodwater.¹¹⁷ The EPA has reported that it would cost \$1.5 million annually to replace the natural flood-control functions of a 5,000 acre tract of drained Minnesota wetlands alone.¹¹⁸ During Hurricane Sandy, in 2012, wetlands prevented \$625 million in flood damage by shielding property in 12 states.¹¹⁹ President Carter had earlier

¹¹⁰ *Id.*

¹¹¹ Ge Sun, et al., Modeling the Climatic and Subsurface Stratigraphy Controls on the Hydrology of a Carolina Bay Wetland in South Carolina, USA, 26 *WETLANDS* 567, 567-80 (2006).

¹¹² Curtis J. Richardson, Pocosins: Hydrologically Isolated or Integrated Wetlands on the Landscape? 23 *WETLANDS* 563, 563-76 (2003).

¹¹³ Stephen P. Opsahl, Organic Carbon Composition and Oxygen Metabolism Across a Gradient of Seasonally Inundated Limesink and Riparian Wetlands in the Southeast Coastal Plain, USA, 76 *Biochemistry* 47, 47-68 (2004).

¹¹⁴ Letter from Society of Wetland Scientists to Donna Downing, U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds (April 16, 2003), *available at* <http://www.sws.org/regional/northcentral/documents/swscommentsisolatedwetlands.pdf>.

¹¹⁵ RTI International, Inc., Assessing Geographically Isolated Wetlands in North and South Carolina: The Southeast Isolated Wetlands Assessment (SEIWA), Final Report, Prepared for U.S. Environmental Protection Agency (Feb. 11, 2011).

¹¹⁶ Whigham, *supra* note 109.

¹¹⁷ U.S. Environmental Protection Agency, *Wetlands: Protecting Life and Property from Flooding*, at 1 (May 2006), *available at* water.epa.gov/type/wetlands/outreach/upload/Flooding.pdf.

¹¹⁸ U.S. EPA Wetlands Fact Sheet, EPA842-F-95-001 (Feb. 1995).

¹¹⁹ Siddharth Narayan, et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, Scientific Reports (Aug. 31, 2017), *available at* <https://www.nature.com/articles/s41598-017-09269-z>.

recognized such benefits when he signed Executive Order 11,988, which directs federal agencies to avoid, to the extent possible, the long- and short-term adverse impacts associated with modification of floodplains and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative.¹²⁰

Another important example of connectivity between wetlands and downstream estuaries and other traditional navigable waters is the flow of sediment and food between them.¹²¹ Because of this flow, many species that utilize estuaries benefit from food produced in tidal marshes and wetlands even though they never occupy these areas. One study demonstrated that there was rarely a time when the aquatic animals living in the estuary studied did not contain signs that they had consumed smaller plants and animals in the region, including organisms from distant marshes. The results indicate that there is significant material flow from areas of primary production in marshes to estuarine and open-water environments, and that wetlands do not function in isolation when supporting estuarine secondary production, but rather are integrated components of larger systems.¹²²

Hydrologic models of Carolina-bay wetlands indicate that the bays are a flow-through wetland system, receiving groundwater contained in adjacent uplands and recharging the groundwater to lower topographic areas, especially during wet periods in winter months.¹²³ A later study of similar areas concluded that “the dynamic nature of the hydrology in this Carolina bay clearly indicates it is not an isolated system as previously believed.”¹²⁴

Pocosins demonstrate similar physical connections to downstream waters. Pocosins are both important water-storage systems and a source of water for the coastal plains, connecting them to downstream and coastal waters.¹²⁵ Because of surface overflow and because pocosins cover significant parts of the coast, wetland biologists consider these wetlands to be connected to traditional navigable waters.¹²⁶ In fact, a survey of Corps personnel in North Carolina indicates that most pocosins are considered hydrologically connected to regional waters because they are

¹²⁰ Exec. Order No. 11988, 3 C.F.R. 117 (1977), *available at* <http://www.archives.gov/federal-register/codification/executive-order/11988.html>.

¹²¹ Michael P. Weinstein et al., Considerations of Habitat Linkages, Estuarine Landscapes, and the Tropic Spectrum in Wetland Restoration Design, 40 *Journal of Coastal Research* 51, 51-63 (2005).

¹²² *Id.*

¹²³ Ge Sun, et al., Modeling the Climatic and Subsurface Stratigraphy Controls on the Hydrology of a Carolina Bay Wetland in South Carolina, USA, 26 *WETLANDS* 567, 567-80 (2006).

¹²⁴ Jennifer E. Pyzoha et al., A Conceptual Hydrologic Model for a Forested Carolina Bay Depressional Wetland on the Coastal Plain of South Carolina, 22 *USA HYDROL. Process* 2689 (2008).

¹²⁵ Curtis J. Richardson, Pocosins: Hydrologically Isolated or Integrated Wetlands on the Landscape? 23 *WETLANDS* 563, 563-76 (2003).

¹²⁶ *Id.*

the primary source of surface-water flow on landscapes where they dominate.¹²⁷ In accordance with this understanding of physical connectivity, wetlands scientists have concluded that the entire hydrologic system needs to be considered in establishing a definition of hydrologic isolation.¹²⁸

Pocosins, Carolina bays, and similar wetlands, moreover, are biologically diverse ecosystems. The loss of such wetland habitats could have a serious impact on the survival of the species that depend on them. Out of the total of 274 at-risk plant and animal species supported by geographically isolated wetlands, 35 percent are not known to be supported by any other type of habitat.¹²⁹ Additionally, 86 plant and animal species that have been identified as “threatened,” “endangered,” or candidates for listing under the Endangered Species Act are found in geographically isolated wetland habitats.¹³⁰

Numerous species are dependent on geographically isolated wetlands in the Southeast. Importantly, because all of these species travel between wetlands, they serve to link wetlands to one another and to other waters. The following are examples of scientific findings regarding the presence and movement of species of ducks, frogs, turtles, salamanders, fish, newts, and snakes in Southeastern wetlands:

- Wood ducks living in the riverine wetlands of the Tennessee-Tombigbee Rivers and Waterway in Alabama and at Noxubee National Wildlife Refuge (NNWR) in Mississippi traveled from these traditional navigable waters to geographically isolated scrub-shrub wetlands to breed.¹³¹
- Green tree frogs, which are typically found in permanent lakes, ponds, and swamps, and occasionally in temporary ponds, were shown to interbreed with barking frogs, which dwell entirely in geographically isolated wetlands. Their hybrids return to these geographically isolated wetlands to breed.¹³²

¹²⁷ *Id.*

¹²⁸ Thomas Winter and James W. LaBaugh, *Hydrologic Considerations in Defining Isolated Wetlands*, 23 WETLANDS 532, 532-40 (2003).

¹²⁹ P. Comer et al., *Biodiversity Values of Geographically Isolated Wetlands in the United States*. NATURE SERVE, Arlington, VA. (2005), available at http://www.natureserve.org/library/isolated_wetlands_05/isolated_wetlands.pdf (Submitted by NRDC to EPA Docket Center, August 11, 2017).

¹³⁰ *Id.*

¹³¹ Brian Davis et al., *Survival of Wood Duck Ducklings and Broods in Mississippi and Alabama*. 71 JOURNAL OF WILDLIFE MANAGEMENT 507, 507-517 (2007).

¹³² Margaret S. Gunzburger, *Differential Predation on Tadpoles Influences the Potential Effects of Hybridization between *Hyla cinerea* and *Hyla gratiosa**, 39 JOURNAL OF HERPETOLOGY 682, 682-87 (2005).

- The semi-aquatic Eastern mud turtle is a bottom-dweller of shallow, slow-moving water bodies and geographically isolated wetlands, but during the late summer and fall, individuals leave their aquatic habitat for extended periods to overwinter on land. Movement between water bodies is common.¹³³
- Chicken turtles, which are found primarily in shallow and seasonally fluctuating wetlands in the Southeastern United States but are rare in permanent wetlands, have been documented to move distances of several hundred meters between geographically isolated wetlands.¹³⁴
- Sirens and salamanders in the Savannah River Site in South Carolina colonize geographically isolated wetlands through temporary aquatic connections to other bodies of water.¹³⁵
- Fish found in geographically isolated Carolina-bay wetlands in the Savannah River Site confirm surface-water connections between the wetlands and the Savannah River during times of wetland overflow flooding.¹³⁶
- Red-spotted newts in a series of mountain ponds in the Shenandoah Mountains of Virginia were documented to migrate “en masse” every August and September, moving to and from ponds to breed.¹³⁷
- Several species of aquatic and semi-aquatic worm snakes, found primarily in geographically isolated wetlands, formed clustered populations in the Lower Atlantic Coastal Plain of South Carolina during periods of inundation when wetland boundaries expanded and the wetland system became more interconnected.¹³⁸

¹³³ Leigh Anne Harden et al., Terrestrial Activity and Habitat Selection of Eastern Mud Turtles (*Kinosternon subrubrum*) in a Fragmented Landscape: Implications for Habitat Management of Golf Courses and Other Suburban Environments, 1 *COPEIA* 78, 78-84 (2009).

¹³⁴ Kurt A. Buhlmann et al., Ecology of Chicken Turtles (*Deirochelys Reticularia*) in a Seasonal Wetland Ecosystem: Exploiting Resource and Refuge Environments, 65 *HERPETOLOGICA* 39, 39-53 (2009).

¹³⁵ Joel W. Snodgrass et al., Influence of Hydroperiod, Isolation, and Heterospecifics on the Distribution of Aquatic Salamanders (*Siren* and *Amphiuma*) among Depression Wetland, 53 *CAN. J. FISH. AQUAT. SCI.* 443 (1999).

¹³⁶ Joel W. Snodgrass et al., Factors Affecting the Occurrence and Structure of Fish Assemblages in Isolated Wetlands of the Upper Coastal Plain, U.S.A., 53 *CAN. J. FISH. AQUAT. SCI.* 443, 443-454 (1996).

¹³⁷ Douglas E. Gill, The Metapopulation Ecology of the Red-spotted Newt, *Notophtalmus viridescens* (Rafinesque), 48 *ECOLOGICAL MONOGRAPHS*, 145, 145-166 (1978).

¹³⁸ Kevin R. Russell, Aspects of the Ecology of Worm Snakes (*Carphophis amoenus*) Associated with Small Isolated Wetlands in South Carolina, 33 *JOURNAL OF HERPETOLOGY* 339, 339-344 (1999).

- Alligators in southern Georgia were shown to form functional connectivity among the seasonal wetland, terrestrial, and creek-river systems. This connectivity is a consequence of the ontogenetic niche shift in habitat use and results in significant movement of energy and biomass. As alligators progress from juvenile life stages to adulthood, they shift from using wetland habitat to using riverine habitat. Females also return to wetlands to breed.¹³⁹

In addition to providing essential habitat for a variety of species, the second way geographically isolated wetlands preserve biodiversity is by allowing the formation of clusters of organisms on a regional scale.¹⁴⁰ Individuals migrate between geographically isolated wetlands and traditional navigable waters and their tributaries via overland corridors that connect them, allowing local populations to form clusters, which are essential to maintaining the integrity of local and regional populations.¹⁴¹ This is called the “rescue effect,” a central component of metapopulation theory, which asserts that immigration and the recolonization of separate patches of habitat increase the persistence of local populations, and that the rate of local extinctions increases as the distance between local populations increases.¹⁴²

The loss of geographically isolated wetlands has been shown to reduce the population of species in larger wetlands.¹⁴³ This phenomenon has been documented extensively in populations of pond-breeding amphibians, like newts.¹⁴⁴ The loss or alteration of any wetland, large or small, reduces the total number of sites at which pond-breeding individuals can reproduce and successfully recruit juveniles into the breeding population.¹⁴⁵ Decreasing the extent of geographically isolated wetlands reduces the number of individuals dispersing and increases the distance individuals must travel between wetlands, decreasing the species’ ability to maintain larger and more viable meta-populations.¹⁴⁶

¹³⁹ Amanda L. Subalusky et al., *Ontogenetic Niche Shifts in the American Alligator Establish Functional Connectivity Between Aquatic Systems*, 142 *BIOLOGICAL CONSERVATION* 1507, 1507-1514 (2008).

¹⁴⁰ J. Whitfield Gibbons, *Terrestrial Habitat: A Vital Component for Herpetofauna of Isolated Wetlands*, 23 *WETLANDS*, 630, 630-635 (2003).

¹⁴¹ *Id.*

¹⁴² Per, Sjogren, *Extinction and Isolation Gradients in Metapopulations: the Case of the Pool frog (Rana lessonae)*, 42 *BIOLOGICAL JOURNAL OF THE LINNEAN SOCIETY* 135, 135-147 (1991).

¹⁴³ Raymond D. Semlitsch, and J. Russell Bodie, *Are Small, Isolated Wetlands Expendable?* 12 *CONSERVATION BIOLOGY* 1129, 1129-33 (1998).

¹⁴⁴ Douglas E. Gill, *The Metapopulation Ecology of the Red-spotted Newt, Notophtalmus viridescens (Rafinesque)*, 48 *ECOLOGICAL MONOGRAPHS*, 145, 145-166 (1978).

¹⁴⁵ Raymond D. Semlitsch, and J. Russell Bodie, *Are Small, Isolated Wetlands Expendable?* 12 *CONSERVATION BIOLOGY* 1129, 1129-33 (1998).

¹⁴⁶ *Id.*

For all of these the reasons, the protections for geographically isolated wetlands that are clarified in the Clean Water Rule are critically important. As discussed in detail below, the proposed rule would put these wetlands in peril due to the likelihood of agency inaction and the agencies' longstanding failure to fully and properly apply the significant-nexus standard.

3. *The Protection of Small Streams Is Essential to the Chemical, Physical, and Biological Integrity of Downstream Waters.*

Small streams make up a majority of the stream miles in the United States, and they impact the chemical, physical, and biological integrity of our waters. Intermittent and ephemeral streams alone comprise a significant portion of the river network, underscoring the need for their protection. For example, in arid and semi-arid states, including Arizona, New Mexico, Nevada, Utah, Colorado, and California, over 81 percent of stream miles have been classified as ephemeral or intermittent.¹⁴⁷ Even in some non-arid states, intermittent streams are predominant; in Alabama, 80 percent of stream miles on national-forest lands are classified as intermittent.¹⁴⁸ The importance of these small streams to the Nation's clean and safe drinking water is well recognized. The EPA reports that these streams are the source of drinking water for 117 million Americans.¹⁴⁹

Headwater streams, whether perennial, ephemeral, or intermittent, impact downstream flooding, base flows, water quality, and the entire food chain.¹⁵⁰ Headwater streams prevent devastating floods by absorbing significant amounts of rainwater, runoff, and snowmelt. While headwaters are the smallest upstream component of a river network, they have the most extensive contact with soil, thereby providing the greatest opportunity for groundwater recharge.¹⁵¹ Physical, chemical, and biological processes of headwaters retain and transform

¹⁴⁷ Lainie R. Levick et al., *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*, U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046 (2008) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

¹⁴⁸ J.L. Meyer, et al., Comments of Professional Aquatic Scientists on Advanced Notice of Proposed Rulemaking for on the Clean Water Act Regulatory Definition of "Waters of the United States" (Docket ID No. OW-2002-0050) (2003) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

¹⁴⁹ U.S. Environmental Protection Agency, Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S. [hereinafter EPA, GIS Analysis], available at http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm; see also Charles Duhigg and Janet Roberts, *Rulings Restrict Clean Water Act, Foiling EPA*, N.Y. TIMES, Feb. 28, 2010 (quoting New York State Assistant Commissioner for Water Resources on the gaps left in clean water protections: "There are whole watersheds that feed into New York's drinking water supply that are, as of now, unprotected."), available at http://www.nytimes.com/2010/03/01/us/01water.html?pagewanted=all&_r=0.

¹⁵⁰ Duhigg at A1.

¹⁵¹ J.L. Meyer, et al., Comments of Professional Aquatic Scientists on Advanced Notice of Proposed Rulemaking for on the Clean Water Act Regulatory Definition of "Waters of the United States" (Docket ID No. OW-2002-0050) (2003) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

excess nutrients, preventing them from entering downstream community water supplies, lakes, and eventually estuaries. These headwaters not only provide numerous ecosystem services to people but also provide vital habitat for other species. Most aquatic species spend at least some portion of their lifecycle in these small perennial, ephemeral, and intermittent streams. Preserving headwater streams under the Clean Water Act means cleaner water for larger downstream rivers, estuaries, and oceans. It is well known that processes occurring upstream within these small streams affect the entire river network's structure and function.

As with geographically isolated wetlands, the Clean Water Rule clarified protection for small streams. Those protections would be muddled by the proposed rule, and the confusion that would result threatens these streams.

B. The 2008 Guidance Erroneously Interpreted the *Rapanos* Decision and Resulted in Jurisdictional Waters Being Left Unprotected.

The proposed action would permanently adopt the 1986 regulations as limited by the 2008 guidance.¹⁵² Doing so would unlawfully leave certain waters of the United States unprotected due to the guidance's impermissibly narrow interpretation of the significant-nexus test.¹⁵³

Justice Kennedy recognized that Congress intended for the Clean Water Act to be interpreted in a broad manner. At one point in his opinion, he found fault with the plurality for not fully appreciating this intent. He stated that: "The limits the plurality would impose ... give insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate."¹⁵⁴ According to Justice Kennedy's opinion, "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.'"¹⁵⁵

Prior to the Clean Water Rule, many of the small streams and geographically isolated wetlands that are jurisdictional were left effectively unprotected because of flaws in the 2008 guidance. The guidance misinterpreted the *Rapanos* decision and created confusion, resulting in timid enforcement of the Clean Water Act by the agencies.

¹⁵² See 82 Fed. Reg. 34,899.

¹⁵³ We note, however, that by proposing such a rule based on the 1986 rule and 2008 guidance, the agencies acknowledged that CWA jurisdiction is at least as broad as established under that regulatory scheme.

¹⁵⁴ *Rapanos*, 547 U.S. at 778.

¹⁵⁵ *Rapanos*, 547 U.S. at 780 (emphasis added).

First, the 1986 regulation protected tributaries to traditional navigable waters. The Clean Water Rule likewise protects those waters.¹⁵⁶ The 2008 guidance, however, subjects tributaries—which were not at issue in *Rapanos*—to case-by-case “relatively permanent” and “significant nexus” tests.¹⁵⁷ This analysis is time and resource intensive and is not required under a lawful interpretation of the significant-nexus test.

Second, the guidance imposes a significant-nexus test that is more burdensome and exclusive than Justice Kennedy envisioned.¹⁵⁸ As described by Justice Kennedy, the test is to be inclusive. Even the justices in the plurality acknowledged that the significant-nexus test as described by Justice Kennedy could be read expansively.¹⁵⁹ Justice Kennedy’s analysis recognized that wetlands meet the standard if they, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters.”¹⁶⁰ In addition, Justice Kennedy acknowledged that after the Corps finds a specific wetland to have a significant nexus, the Corps may “presume covered status for other comparable wetlands in the region.”¹⁶¹ Yet the guidance requires a site-specific analysis for each wetland, ensuring confusion, complexity, and a needless administrative burden.¹⁶²

Third, the guidance unlawfully limits the scope of aggregation to a single reach or segment of a tributary and the wetlands along that reach.¹⁶³ Justice Kennedy was clear that the scope of “similarly situated” wetlands is the region, not a specific reach of a tributary.¹⁶⁴ The guidance’s limitation of “similarly situated” wetlands to those in the immediate vicinity of a single segment of a tributary instead of the watershed at issue unlawfully limits jurisdiction. This erroneous interpretation is also applied to tributaries. To the extent tributaries are subject to the significant-nexus test, their contribution to the chemical, physical, and biological integrity of downstream waters must be considered in combination with similarly situated tributaries in the watershed.

¹⁵⁶ 80 Fed. Reg. 37,105, 37,106.

¹⁵⁷ See 2008 Guidance at 8.

¹⁵⁸ The 2008 Guidance largely formalized prior agency practice.

¹⁵⁹ *Rapanos*, 547 U.S. at 756 n.15.

¹⁶⁰ 547 U.S. at 780

¹⁶¹ 547 U.S. at 781.

¹⁶² See 2008 Guidance at 10-11.

¹⁶³ *Id.*

¹⁶⁴ 547 U.S. at 781.

Finally, it is clear that the burden of a case-by-case significant-nexus analysis for headwater streams is leaving many streams unprotected. For example:

- The Nashville District rejected Clean Water Act protections for three ephemeral streams, despite acknowledging the potential importance of such waters. In each case, the district based its assessment of the likelihood of a downstream effect on nothing more than distance and its unsubstantiated conclusion that such distance would attenuate the impact. As the district said in each case: “It is possible during a heavy precipitation event that the ... tributary ... [at issue] could carry pollutants and flood waters to ... [a traditional navigable water] along with transferring nutrients and oranic [sic] carbon. However, due to the fact that the water has to travel through two tributaries and between 5-10 river miles to the ... [traditional navigable water], the impacts, if any would be very minor.”¹⁶⁵
- The Jacksonville District declared an ephemeral tributary draining a sub-basin approximately seven acres in size to be non-jurisdictional, with little analysis. The district’s determination stated, in a conclusory fashion, that “[t]he frequency and amount of flow in the ditch is not significant enough to provide notable physical, chemical, or biological benefits to downstream waters or a ... [traditional navigable water].”¹⁶⁶
- The Huntington District made what appears to be conflicting non-jurisdictional and jurisdictional determinations for ephemeral and intermittent tributaries in Ohio. Two determinations found that there was no “significant nexus” for some small streams.¹⁶⁷ On the other hand, the district concluded in a contemporaneous jurisdictional determination that an ephemeral stream was protected because the stream would carry stormwater to the tributary system and “serve to dissipate energy” in the tributary system—things the other streams presumably would do as well.¹⁶⁸
- The Buffalo District found three separate ephemeral tributaries to the Cuyahoga River to be non-jurisdictional based on the lack of a “significant nexus,” without considering the

¹⁶⁵ U.S. Army Corps of Engineers, Nashville District, Approved Jurisdictional Determinations: Horn Springs Group, 200701845, 200701844, and 200701843, at 6 (Sept. 5, 2007).

¹⁶⁶ U.S. Army Corps of Engineers, Jacksonville District, Approved Jurisdictional Determination: SAJ-2007-4563, at 5 (Aug. 31, 2007).

¹⁶⁷ U.S. Army Corps of Engineers, Huntington District, Approved Jurisdictional Determination: Good Samaritan Hospital, LRH-2007-449-GMR, at 7 (Oct. 4, 2007) (finding that significant nexus was absent because, *inter alia*, stream was of low quality, lacked adjacent wetlands, was contained in a culvert over 40% of its length and does not have a developed floodplain); U.S. Army Corps of Engineers, Huntington District, Approved Jurisdictional Determination: North Clayton Development, LRH-2006-518-GMR, at 7 (Oct. 5, 2007) (finding lack of significant nexus because it conveys a small amount of stormwater and does not provide habitat or have significant floodplain).

¹⁶⁸ Army Corps of Engineers, Huntington District, Approved Jurisdictional Determination: North Clayton Development, LRH-2006-518-GMR, at 7 (Oct. 5, 2007).

tributaries collectively (much less in combination with similar tributaries in the region).¹⁶⁹

Similarly, the Corps is having difficulty making accurate jurisdictional determinations under the 2008 guidance for other waterbodies. For example:

- In South Carolina, the EPA asserted jurisdiction over interdunal wetlands on St. Helena Island, which had been incorrectly deemed non-jurisdictional by the Corps. The site was adjacent to three traditional navigable waters. The Corps had incorrectly assumed that the wetlands had to have a surface-water connection to the rivers.¹⁷⁰
- In Wisconsin, the St. Paul District's draft jurisdictional determination declined jurisdiction over Ranch Lake and its adjacent wetlands, asserting that they were isolated waters with no connection to interstate commerce. But the agency's final determination, which was issued on March 3, 2008, asserted jurisdiction because the lake was obviously navigable-in-fact, with commercial fishing and recreational boats available for rent at the lake.¹⁷¹
- A Minnesota lake, known as Bah Lakes, with a depth of 10 feet and an area of 70 acres, was also incorrectly found non-jurisdictional by the Corps. The EPA correctly found the water jurisdictional based on its accessibility by road, its management by the Minnesota Department of Natural Resources as a public lake, and the nearby commercial recreational attractions.¹⁷²

In the Southeast, there are certain waters that are particularly at risk of jurisdictional mistakes by the Corps and the courts. For example:

- The Pine Hill Tract, in South Carolina, is a 2,000 acre, high-ground wetland that drains through small perennial streams into a cypress swamp. Water from the swamp drains to the Ashley River. After the 2008 guidance was put in place, the Corps

¹⁶⁹ Army Corps of Engineers, Buffalo District, Approved Jurisdictional Determination: City of Independence, 2006-00191, Ephemeral Stream 1, at 5 (Nov. 1, 2007); *see also* Army Corps of Eng'rs, Buffalo District, Approved Jurisdictional Determination: City of Independence, 2006-00191, Ephemeral Stream 2, at 5 (Nov. 1, 2007); Army Corps of Engineers, Buffalo District, Approved Jurisdictional Determination: City of Independence, 2006-00191, Ephemeral Stream 3, at 5 (Nov. 1, 2007).

¹⁷⁰ U.S. Environmental Protection Agency, Memorandum to Assert Jurisdiction for SAC-2008-2191 (Apr. 22, 2009).

¹⁷¹ U.S. Environmental Protection Agency, Memorandum for JD # 2007-5500-LMK. (Mar. 3, 2008).

¹⁷² U.S. Environmental Protection Agency, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008).

determined that the Pine Hill Tract was isolated. In response to a lawsuit, the Corps changed its mind and found the wetland to be jurisdictional.¹⁷³

- In 2010, a South Carolina landowner sought judicial review after the South Carolina Department of Health and Environmental Control denied a request for a permit to fill 32 acres of a freshwater wetland under state law. The Administrative Law Court determined that the permit must be issued after it wrongly held that isolated waters are not protected. The South Carolina Supreme Court reversed this decision.¹⁷⁴

As demonstrated by these examples, the 2003 and 2008 guidance documents have proven to be confusing and resource intensive. Further documentation of the shortcomings of the guidance was outlined by the Environmental Law Institute in 2011.¹⁷⁵ The Clean Water Rule was drafted to address these shortcomings. Furthermore, the guidance is not consistent with the Kennedy test in many respects. Where it is consistent, it is being implemented incorrectly. If the Clean Water Rule were permanently or even temporarily replaced with the guidance, the public, the environment, the regulated community, the environmental community, and the agencies themselves would suffer.

VI. THE FACTUAL, LEGISLATIVE, AND LITIGATION HISTORY OF THE CLEAN WATER ACT REQUIRES BROAD FEDERAL PROTECTIONS.

Congress intended the regulatory agencies to interpret the term “waters of the United States” broadly. The poor condition of the Nation’s waters prior to 1972, and the legislative history of the Act itself, demonstrate that in passing the statute, Congress intended for it to fully protect the Nation’s waters. The federal courts have repeatedly recognized Congress’s expansive intent.

¹⁷³ Doreen Cubie, Federal law protected the nation’s streams and wetlands for decades; now, due to recent Supreme Court interpretations, the safeguards are at risk and so are many of America’s waters, NAT’L WILDLIFE FED. (Mar. 3, 2011), available at <https://www.nwf.org/News-and-Magazines/National-Wildlife/Animals/Archives/2011/Crisis-for-Clean-Water.aspx>.

¹⁷⁴ *Spectre v. S.C. Dep’t of Health and Envtl. Control*, 688 S.E.2d 844 (S.C. 2010).

¹⁷⁵ Environmental Law Institute, America’s Vulnerable Waters: Assessing the Nation’s Portfolio of Vulnerable Aquatic Resources since *Rapanos v. United States* (Aug. 2011) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

A. The Water Quality Crisis in the 1960s and Early 1970s Was Due to Poor State Protections That Forced Congress to Enact the Sweeping Reforms of the Clean Water Act.

Prior to 1972, the states were largely responsible for protecting the Nation's waters.¹⁷⁶ This experiment failed miserably, leading to a common recognition that federal intervention was necessary. During a 1992 Senate hearing commemorating the passage of the Clean Water Act, LaJuana Wilcher, then Assistant Administrator for Water at the EPA, described the state of the Nation's waters in the years leading up to 1972 as follows:

Untreated sewage was flowing into our rivers and bays. Industrial wastes poured into the Mississippi and Ohio Rivers, and the Cuyahoga River was so laden with industrial waste that it periodically caught fire. Massive algae blooms choked the Great Lakes, particularly Lakes Erie and Ontario, killing millions of fish and tainting the water supplies of millions. In fact, the 1968 World Book Encyclopedia noted that Lake Erie was testament to mankind's ability to kill a lake and predicted it would soon be an aquatic desert.¹⁷⁷

Wetlands were also disappearing at an alarming rate. Of the estimated 221 million acres of wetlands that were originally present in the coterminous states, more than half had been lost to dredging, filling, draining, and flooding.¹⁷⁸

The proverbial race to the bottom on environmental standards could not have been better exemplified than in the water-quality arena during the time leading up to 1972. Many of the states that had been entrusted with addressing water pollution had shirked this task. A new and comprehensive approach was needed to address this environmental and human-health disaster.

B. Beginning with the Clean Water Act of 1972, Congress Made Sweeping Changes to Address the States' Failure to Protect Water Quality.

With the passage of the Clean Water Act in 1972, Congress elevated the federal government's role in protecting the Nation's waters. Congress gave the fledgling Environmental

¹⁷⁶ See, e.g., Pub. L. No. 89-234, 79 Stat. 903, 909 (1965) (In the 1965 Amendments, Congress adopted a new approach to addressing water pollution; Congress mandated that the states develop water quality standards for their respective interstate waters by 1967.).

¹⁷⁷ 138 CONG. REC. D612 (daily ed. Sept. 22, 1992) (Prepared Statement of LaJuana S. Wilcher, Assistant Administrator for Water, at EPA, Hearing Before the Committee on Environment and Public Works, United States Senate).

¹⁷⁸ Thomas E. Dahl & Craig E. Johnson, U.S. Department of the Interior, Wetlands: Status and Trends of Wetlands in the Coterminus United States, Mid-1970s to the Mid-1980s (1991).

Protection Agency primary authority over administering the Act, while reserving some responsibilities under the statute to the Army Corps of Engineers. The Corps has the day-to-day responsibility of regulating “discharges of dredged or fill material”¹⁷⁹ into the “waters of the United States” under the Section 404 program,¹⁸⁰ while the EPA has the responsibility of regulating discharges of all other pollutants to those same waters under the Section 402 program.¹⁸¹ The EPA also has the responsibility of promulgating “guidelines”¹⁸² covering Section 404 permit decisions, and of engaging in enforcement actions against unpermitted dischargers. Finally, the EPA has veto authority over the Corps’ permit decisions,¹⁸³ as well as the final say (as between the two agencies) on the jurisdictional reach of the CWA.¹⁸⁴

To characterize the Clean Water Act of 1972 as simply another set of amendments to the long series of federal water-pollution-control statutes that Congress enacted during the 1940s, 1950s, and 1960s—collectively, the Federal Water Pollution Control Acts—would be fundamentally misleading. The FWPCAs had relied on the concept of water-quality standards that would be enforced by the states. They had also placed the federal government in a support role to the states. These approaches had not been successful in reducing water pollution. As a result, Congress gave more responsibility to the federal government when it passed the Clean Water Act of 1972 to ensure that water quality improved.

Section 101 of the Clean Water Act states the objective of the CWA—to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁸⁵ It then states specific goals aimed at reaching that objective:

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation

¹⁷⁹ Certain discharges of dredged or fill material are exempt from regulation under section 404. These categories include farming, silviculture, the maintenance of dikes, dams, and levees, and the construction of temporary sedimentation basins on a construction site. 33 U.S.C § 1344 (f) (1).

¹⁸⁰ 33 U.S.C. § 1344(a) (1972); U.S. Environmental Protection Agency, Overview of Wetlands Permitting, *available at* <https://www.epa.gov/cwa-404>.

¹⁸¹ 33 U.S.C. § 1342.

¹⁸² 33 U.S.C. § 1344 (b) (The EPA guidelines are located at 40 C.F.R. § 230).

¹⁸³ 33 U.S.C §1344 (c).

¹⁸⁴ 43 Op. Att’y Gen. 197 (1979), *available at* <https://www.epa.gov/cwa-404/1979-civiletti-memorandum> (last visited June 10, 2017).

¹⁸⁵ 33 U.S.C. § 1251.

of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited¹⁸⁶

In setting this objective and these goals, Congress made a clear statement of its broad approach to protecting the Nation's waters.

In short, it would have been futile for Congress to pass a "Clean Water Act" without extending the regulatory authority of the EPA and the Corps to waters that serve vital functions. In Georgia, for example, ephemeral, intermittent, and headwater streams supply drinking water to 99.89 percent of those people who get their drinking water from surface waters.¹⁸⁷

Even in defining the term "navigable waters," Congress made it clear that it was expanding federal jurisdiction. Prior to 1972, the term "navigable waters" had been associated with a long line of Supreme Court cases expanding federal jurisdiction that can be traced back to 1871, when the Court decided the seminal case on navigability, *The Daniel Ball*.¹⁸⁸ In that case, the Court departed from English common law and determined that "navigable waters" do not have to be subject to the ebb and flow of the tides as long as they can be used to transport commerce.¹⁸⁹ The Court held that navigable waters were those waters that were navigable-in-fact or susceptible of being made navigable-in-fact.¹⁹⁰ Since deciding *The Daniel Ball*, the Supreme Court has expanded the scope of "navigable waters" and federal authority. For example, the Court's cases have gone so far as to extend federal regulatory authority to include rivers and streams containing waterfalls and rapids, as well as others passable only by canoes and kayaks.¹⁹¹ It is these waters that are often referred to as "navigable waters in the traditional

¹⁸⁶ 33 U.S.C. § 1251.

¹⁸⁷ Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S., Completed by the U.S. EPA (July 2009).

¹⁸⁸ 77 U.S. (10 Wall.) 557 (1881).

¹⁸⁹ *Id.* at 563. Specifically, the Court held that to be subject to federal control waters first had to be "navigable-in-fact" waters that "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Second, the waters had to be "navigable waters of the United States," that is, waters that "form in their ordinary condition by themselves, or by uniting with other waters, a *continued highway* over which commerce is or may be carried on *with other States or foreign countries* in the customary modes in which such commerce is conducted by water." *Id.*

¹⁹⁰ 77 U.S. (10 Wall.) 557, 563 (1881).

¹⁹¹ *United States v. Steamer Montello*, 87 U.S. (20 Wall.) 430 (1874) (rapids and small waterfalls do not necessarily defeat jurisdiction); *Ex Parte Boyer*, 109 U.S. 629 (1884) (a wholly artificial canal can be navigable); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) (federal jurisdiction can extend to non-navigable tributaries); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921)(if a water was ever navigable, then it will continue to be so under law); *United States v. Utah*, 283 U.S. 64 (1931)(the possibility of future commerce could make a water navigable); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940)(reasonable

sense”¹⁹² or “traditional navigable waters.”¹⁹³ But the expansion of federal jurisdiction did not end there. In *United States v. Rio Grande Dam & Irrigation Co.*,¹⁹⁴ the Supreme Court once again expanded federal jurisdiction to include the tributaries of these traditional navigable waters.¹⁹⁵

In response to *Rio Grande Dam*, Congress affirmed that federal jurisdiction reached such tributaries when it enacted the Rivers & Harbors Act of 1899.¹⁹⁶ Section 13 of that Act made it clear that federal jurisdiction included tributaries, because activities on them could affect the navigable capacity of larger navigable-in-fact rivers. Section 13 of the Act, which was dubbed the “Refuse Act,” provides as follows:

it shall not be lawful to ... discharge ... any refuse matter of any kind or description whatsoever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any *navigable water of the United States*, or into *any tributary of any navigable water* from which the same shall be washed into such *navigable water*, and it shall not be lawful to deposit . . . material of any kind in any place on the bank of any such *navigable water*, or on the bank of *any tributary of any navigable water*, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed [without a permit].¹⁹⁷

Under this authority, the Corps could regulate discharges of refuse matter into the “navigable waters of the United States.” In order to accomplish this goal, Section 13 also gave the Corps the authority to regulate such discharges into “any tributary of any navigable water.”

improvements could make a water navigable); and *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 312 U.S. 592 (1941)(federal jurisdiction extends to ordinary high water mark).

¹⁹² *Rapanos*, 547 U.S. at 779 (2006).

¹⁹³ Following the Supreme Court’s decision in *Rapanos*, the EPA and the Corps defined “traditional navigable waters” as including: “all of the “navigable waters of the United States,” defined in 33 C.F.R. Part 329 and by numerous decisions in the federal courts, plus all other waters that are navigable-in-fact (*e.g.*, the Great Salt Lake, UT and Lake Minnetonka, MN). U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D, Legal Definition of “Traditional Navigable Waters,” May 30, 2007 (includes waters that can be navigated with a recreational canoe).

¹⁹⁴ 174 U.S. 690 (1899).

¹⁹⁵ *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899)(federal jurisdiction can extend to non-navigable tributaries).

¹⁹⁶ 33 U.S.C. §§ 401, 403, & 407.

¹⁹⁷ 33 U.S.C. § 407 (emphasis added).

By extending the Corps' jurisdiction to the tributaries of navigable waters, Congress provided the authority for a regulatory program with a jurisdictional reach that far eclipsed the previous limits of federal authority.

The only other statutory forerunner to the Clean Water Act was the Federal Water Pollution Control Act of 1948.¹⁹⁸ Under it and later amendments, the states were to set water-quality standards to serve as the basis of their attempts to control water pollution. The federal government was relegated to, at best, a technical role.¹⁹⁹ Because few states wanted to clamp down on industrial discharges, the Federal Water Pollution Control Act did little to improve water quality.²⁰⁰

By 1972, Congress realized that the federal government must have a bigger role in controlling water pollution after concluding that the Federal Water Pollution Control Act and the Refuse Act were “inadequate in every vital aspect.”²⁰¹ Congress determined that federal jurisdiction must be extended beyond non-navigable tributaries if the water-quality crisis in this country was to be successfully combatted. Congress signaled this further expansion by redefining “navigable waters” in the Clean Water Act as “waters of the United States, including the territorial seas.”²⁰² Without addressing pollutants that were being discharged into the smaller waters that feed into the “navigable waters of the United States” and their tributaries, the condition of the Nation’s waters would not improve and Congress’s objective in enacting the Clean Water Act would not be met. The legislative history of the 1972 Act and its 1977 amendments bear this out.

C. The Legislative History of the Clean Water Act Demonstrates That Congress Intended the Statute to Protect All of the Nation’s Waters.

Congress established the scope of the Clean Water Act after considerable debate.²⁰³ Interestingly, the definition for navigable waters that ultimately emerged—waters of the United States and the territorial seas—has never been amended despite “subsequent—sometimes substantial—amendments to other portions of the CWA.”²⁰⁴

¹⁹⁸ Ch. 758, 62 Stat. 1155.

¹⁹⁹ See William W. Sapp, Tracy L. Starr & M. Allison Burdette, From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term ‘Navigable Waters,’ ENVTL. L. RPTR. 10190, 10201 (2006).

²⁰⁰ S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672.

²⁰¹ S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

²⁰² 33 U.S.C. § 1362.

²⁰³ Sapp, Starr & Burdette at 10201-04 (recounting the legislative history of 1972 and 1977 amendments).

²⁰⁴ Stephen Samuels & Judy Harvey, *The Clean Water Act Goes to Court*, 62 RMMLR-INST 21-1, 21-5 (2016).

Of the two houses, the Senate was the first to arrive at a definition for the term “navigable waters.” The Senate Environment and Public Works Committee introduced S. 2770 on October 28, 1971.²⁰⁵

The Committee Report for the bill affirms a broad scope. It provides that “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”²⁰⁶ The only way pollutants can be “controlled at the source” is if the Clean Water Act’s protections extend to the far reaches of tributaries.

One of the most telling references concerning the definition of “waters of the United States” is found in the House Report that accompanied H.R. 11896, the House’s version of the Clean Water Act, which provides:

One term the committee was reluctant to define was the term “navigable waters.” The reluctance was based on the fear that the interpretation would be read narrowly. However, this is not the committee’s intent. The committee fully intends 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.²⁰⁷

The Committee was clear that the term “navigable waters” was to be confined only to the extent the Constitution required.

In discussing the Conference Report for S. 2770 and H.R. 11896, several representatives and senators described at great length the differences between the two bills. What is significant about these discussions is that not one of these individuals mentioned that the definition of “navigable waters” in H.R. 11896 differed from that in S. 2770. Instead, the members pointed out other differences. For example, S. 2770 provided the EPA with veto power over state-issued permits, whereas H.R. 11896 did not. S. 2770 included a no-discharge goal by 1985, whereas H.R. 11896 did not. And S. 2770 provided for national pollution standards, whereas H.R. 11896 did not.²⁰⁸ Had there been any dispute about the breadth of Clean Water Act jurisdiction, it would have surfaced in these discussions. Both houses of Congress wanted a comprehensive plan to address pollution at its source.

²⁰⁵ S. 2770, 92d Cong. (1971).

²⁰⁶ S. Rep. No. 92-414, at 77 (1971) (emphasis added).

²⁰⁷ H.R. REP. NO. 92-911, at 131 (1972).

²⁰⁸ See e.g., H.R. Deb. on H.R. 11896, 92d Cong. (1972).

Although the discussion leading up to the passage of the Clean Water Act centered on tributaries, many members of Congress understood that wetlands are an integral part of the hydrologic system. By 1972, the scientific community was rapidly increasing its understanding of the vital role that wetlands play in aquatic ecosystems. As early as 1956, the FWS published a report that coined the phrase “wetlands” and articulated a taxonomy of wetland types. It also explained the value of wetlands as habitat for fish and wildlife, and called for protecting these areas.²⁰⁹ Others stressed the importance of wetlands too, including authors such as John and Mildred Teal, whose book *Life and Death of a Salt Marsh* was published in 1969.²¹⁰ By 1970, at least one committee in the U.S. House of Representatives had recognized the importance of wetlands and published a report explaining how the Corps could help protect this important resource.²¹¹

Because President Nixon believed the sewage-treatment components of the legislation would cost too much, he vetoed the bill when it reached his desk.²¹² The bill was debated a final time and nothing was said about the definition of “navigable waters.”²¹³ Congress easily overrode President Nixon’s veto by votes of 52 to 12 in the Senate and 247 to 23 in the House.²¹⁴

Consistent with the legislative history of the Act, after the Clean Water Act became law, the EPA immediately promulgated a broad definition of the term “waters of the United States” to implement the Section 402 program. The Corps, concerned about its own resources, promulgated a much narrower definition of the same term for the Section 404 program. The Corps’ regulations were challenged on the grounds that this definition was not consistent with the intent of the CWA. In 1975, the Corps lost this case and was ordered to promulgate regulations consistent with those of the EPA.²¹⁵

²⁰⁹ Samuel P. Shaw & C. Gordon Fredine, *Wetlands of the United States: Their Extent and Their Value to Waterfowl and Other Wildlife*, FWS Circular No. 39 (1971) (excerpt).

²¹⁰ John Teal & Mildred Teal, *Life and Death of a Salt Marsh* (1969).

²¹¹ *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H.R. Rep. No. 91-917 (1970).

²¹² Letter from Richard Nixon, President of the United States, to the Senate of the United States, Veto of the Federal Water Pollution Control Act Amendments of 1972, (October 17, 1972) *available at* <http://www.presidency.ucsb.edu/ws/?pid=3634>.

²¹³ 118 Cong. Rec. H36871-79 (daily ed. Oct. 18, 1972), at 95-113; S. Deb. on Veto of S. 2770, 92d Cong. (1972), at 115-36.

²¹⁴ Pub. L. No. 92-500, § 502 (7), 86 Stat. (1972).

²¹⁵ *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) (asserted that Clean Water Act guaranteed “federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.”).

1. *The Legislative History of the Clean Water Act of 1977 Demonstrates That Congress Intended the Statute to Protect All of the Nation’s Waters.*

In 1977, Congress reauthorized the Clean Water Act. The issue of what waters were covered by the Clean Water Act was the most hotly debated issue during the reauthorization hearings. At one point, Senator Lloyd Bentsen of Texas offered an amendment that would have limited Clean Water Act jurisdiction to the “traditional navigable waters and their adjacent wetlands.”²¹⁶ This “Bentsen Amendment” was defeated, confirming that Congress was standing behind the expansive jurisdictional reach of the Act.²¹⁷

As Senator Howard Baker, then a Republican from Tennessee, explained in a debate over the Clean Water Act amendments in 1977, the scope of the Clean Water Act needed to remain broad:

Comprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors. Thus, artificially limiting the jurisdiction can create a considerable competitive disadvantage for certain dischargers.²¹⁸

Senator Baker saw economic reasons for a comprehensive Clean Water Act, as well as environmental ones. In his opinion, businesses downstream should not suffer the pollution of those located upstream. Whether it is to protect the ecological integrity of the Nation’s waters or the wellbeing of the businesses that rely on those waters, Congress determined that selecting only certain waters for protection would not address the water-quality crisis facing the Nation.

The legislative histories of the 1972 Act and the 1977 Act reveal that Congress meant the Clean Water Act to have a broad reach that would control pollution at its source.²¹⁹ To accomplish this, the Clean Water Act had to protect all those waters that are connected to ensure that the chemical, physical, and biological integrity of the Nation’s waters are reestablished and maintained.

²¹⁶ See 123 Cong. Rec. 26,690, 26,710-11, 26,726 (Aug. 4, 1977) (amendment of Sen. Bentsen); see Stephen Samuels & Judy Harvey, *The Clean Water Act Goes to Court*, 62 RMMLR-INST 21-1, 21-4 (2016).

²¹⁷ *Id.* at 26,728 (Senate’s rejection—51 to 45—of Senator Bentsen’s amendment).

²¹⁸ 123 CONG. REC. S26718 (daily ed. Aug. 4, 1977) (statement of Sen. Baker), reprinted in 4 *Clean Water Act LEGISLATIVE HISTORY* at 920.

²¹⁹ S. Rep. No. 92-414, at 77 (1971) (emphasis added).

D. The Supreme Court Has Never Held That Jurisdiction Is Limited as Circumscribed by the 2008 Guidance.

The Supreme Court’s unanimous decision in *Riverside Bayview Homes* is clear that federal jurisdiction under the Clean Water Act extends to wetlands and that Congress intended for waters to be regulated at their source. When the case was decided, many thought that the question about how broadly the Clean Water Act’s protections were to extend was settled for good—the Clean Water Act was meant to protect all the waters of the United States. The case involved adjacent wetlands that were far removed from the shores of Lake St. Clair in Michigan, yet the Court upheld the Corps’ determination that these wetlands were waters of the United States.²²⁰ In its unanimous decision, the Court held that the Corps was properly within its administrative discretion when it determined that wetlands adjacent to a “navigable waterway” are jurisdictional even if they are not regularly flooded by overflow from traditional navigable waters. The Court concluded that “it was a permissible interpretation of the Act” to conclude that the term “waters of the United States” encompasses “all wetlands adjacent to other bodies of water over which the Corps has jurisdiction.”²²¹

Drawing from the legislative history of the Act, the Court noted that Congress had recognized that “[p]rotection of aquatic ecosystems ... demanded broad federal authority to control pollution, for ‘water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’”²²² The Court also found it instructive that attempts to narrow the definition of “waters of the United States” (i.e., the Bentsen Amendment) had failed in 1977.²²³ The Court concluded its unanimous decision by stating that it “was persuaded that the language, policies, and history of the Clean Water Act compel[led] a finding that the Corps ha[d] acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the ‘waters of the United States.’”²²⁴

In 1986, confident that the Clean Water Act’s jurisdictional reach had been confirmed by the *Riverside Bayview* decision, the Corps reorganized and clarified the regulations governing its regulatory program.²²⁵ In its regulations, the Corps defined “waters of the United States” to include traditional navigable waters, interstate waters, territorial seas, impoundments of jurisdictional waters, tributaries, adjacent wetlands, and:

²²⁰ 474 U.S. 121 (1985).

²²¹ *Id.* at 135. The same year that the Supreme Court decided *Riverside Bayview*, the Tenth Circuit Court of Appeals decided *Quivira Min. Co. v. U.S.E.P.A.*, 765 F.2d 126 (10th Cir. 1985). In that case the Court stated that “It is the intent of the Clean Water Act to cover, as much as possible, all *waters* of the *United States* instead of just some.” *Id.* at 129 (citations omitted).

²²² *Id.* at 132-33 (citing S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).

²²³ *Id.* at 135.

²²⁴ *Id.* at 139.

²²⁵ Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,205 (Nov. 13, 1986).

(3) 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 could affect interstate or foreign commerce including any such waters:

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

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

(iii) Which are used or could be used for industrial purpose[s] by industries in interstate commerce²²⁶

In the preamble to these regulations, the Corps, in concert with the EPA, stated further that “waters of the United States” also include “waters that are or would be used as habitat” by migratory birds protected by the migratory-bird treaties or that cross state lines.²²⁷ This so-called “migratory-bird rule” became the central issue in the next Supreme Court decision concerning the reach of the Clean Water Act—*Solid Waste Agency of Northern Cook County (SWANCC)*.

In *SWANCC*, the Supreme Court held that while geographically isolated waters could be found to be jurisdictional, their connection to covered waters could not be based solely on the migratory-bird rule. The petitioner in the case, the Solid Waste Agency of Northern Cook County, had decided in the early 1990s that it wanted to construct a solid-waste landfill in an abandoned gravel mine outside of Chicago. When the Corps discovered that migratory birds frequented the numerous ponds at the site, the Corps asserted jurisdiction and denied the permit.²²⁸ A divided 5-4 Court held in 2001 that the migratory-bird rule was not an allowable basis for asserting jurisdiction. But the Court left the door open as to which geographically isolated, intrastate, non-navigable waters could be covered on other grounds, and which could not. The agencies confirmed this interpretation of *SWANCC* when they issued a joint memorandum that specifically established a procedure for evaluating whether such waters are covered by the Clean Water Act.²²⁹

In decisions handed down prior to *Rapanos*, the federal courts of appeals and district courts largely construed the *SWANCC* decision narrowly. The federal courts of appeals for the Fourth, Ninth, and Eleventh circuits have held that the EPA and the Corps may continue to assert

²²⁶ 51 Fed. Reg. at 41,250.

²²⁷ 51 Fed. Reg. at 41,217.

²²⁸ *Solid Waste Agency of N. Cook County v. Corps of Eng’rs*, 531 U.S. 159, 165 (2001).

²²⁹ Joint EPA and Corps Memorandum, 68 Fed. Reg. 1,991, 1,997 (Jan. 15, 2003) (provided guidance on how the Agencies should administer the regulatory program after *SWANCC*).

jurisdiction over non-navigable waters even if those waters are quite small and distant from “traditional navigable waters.”²³⁰

In 2006, the question of what waters are covered by the Clean Water Act reached the Supreme Court for a third and fourth time in *Rapanos* and *Carabell*.²³¹ The specific question in *Rapanos* was whether Clean Water Act jurisdiction extends to wetlands that do not abut a traditional navigable water. The question in *Carabell* was whether Clean Water Act jurisdiction extends to a wetland that is separated from a tributary of a traditional navigable water by a man-made berm.

Rapanos involved four Michigan wetlands, all of which lay near ditches or man-made drains that eventually emptied into navigable-in-fact waters. In *Rapanos*, the petitioners decided to construct a shopping center on three sites that totaled 605 acres. When the petitioners learned from their consultant that the sites had approximately 141 acres of wetlands on them and that they would have to get a permit to fill them, the petitioners simply commenced filling them without a permit. Their fill activities only ceased after they received multiple cease and desist orders from state and EPA officials, and the federal government brought civil and criminal charges against them for filling in wetlands in violation of the CWA.²³² In the civil suit, the district court upheld the Corps’ jurisdiction over all of the wetlands and ruled in the government’s favor finding violations at all three sites.²³³ The United States Court of Appeals for the Sixth Circuit upheld the lower-court decision.²³⁴

In the second case, *Carabell*, the petitioners had applied for a wetlands permit to fill in 15.9 acres of forested wetlands, which drained into the Lake St. Clair watershed, so they could build 130 condominium units. When the Michigan Department of Environmental Quality (MDEQ), which had assumed the wetlands regulatory program from the Corps under Section 1344(g), denied the permit, the petitioners appealed to a state administrative law judge. The ALJ instructed the MDEQ to issue the permit conditioned on the petitioners modifying their proposal to eliminate 18 of the units. The EPA objected to the modified permit and consequently the permit was transferred to the Corps to be processed. The Corps denied the permit. The petitioners challenged the permit denial in federal district court under the Administrative

²³⁰ See e.g., *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004); *United States v. Newdunn Assocs., L.L.P.*, 344 F.3d 407 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004).

²³¹ *Rapanos*, 547 U.S. 715 (2006).

²³² *Rapanos*, 547 U.S. at 763 (2006).

²³³ *Id.*

²³⁴ 376 F.3d 629, 634 (2004).

Procedure Act. The district court granted summary judgment in favor of the Corps.²³⁵ The United States Court of Appeals for the Sixth Circuit affirmed this decision.²³⁶

In both the *Rapanos* and *Carabell* cases, the petitioners sought redress at the Supreme Court, which accepted their petitions and consolidated the cases. The cases were briefed and argued separately, but the Court issued one set of opinions for the two cases.

The petitioners asserted that Congress had only intended that navigable-in-fact waters be covered by the CWA.²³⁷ In contrast, the United States argued that Clean Water Act jurisdiction extended to any water body that was hydrologically connected to a traditional navigable water.²³⁸

The justices split 4-1-4 and authored five separate opinions. Chief Justice Roberts and Justice Breyer wrote brief opinions in which they commented on the three main opinions authored by Justice Scalia, Justice Stevens, and Justice Kennedy.²³⁹ In his dissenting opinion, which was joined by three other justices, Justice Stevens argued that the agency definition for “waters of the United States” was entitled to *Chevron* deference and that the government’s position should have prevailed.²⁴⁰

Justice Scalia, who was also joined by three other justices, attempted to craft a new test for determining what waters should be included in the “waters of the United States.” Adopting a position between those of the petitioners and the government, Justice Scalia opined that when Congress included the term “waters of the United States” in the Clean Water Act, it meant for that term to cover the following and nothing more: traditional navigable waters, streams that have “relatively permanent flow,” and any wetlands that have a “continuous surface connection” to those waters.²⁴¹ This would leave intermittent and ephemeral streams, and wetlands adjacent to those streams, unprotected by the CWA. It could also leave small perennial headwater streams without protection, as well.

In his opinion, Justice Kennedy landed between Justice Scalia’s opinion and the dissent authored by Justice Stevens. Justice Kennedy explained that “waters of the United States” is

²³⁵ 257 F. Supp. 2d 917 (E.D. Mich. 2003).

²³⁶ 391 F.3d 704 (2005).

²³⁷ Brief of Petitioner, *Rapanos v. United States*, 2005 WL 240650 (2005) (No. 04-1034).

²³⁸ Brief of Government at 12, *Rapanos v. United States*, 2005 WL 779568 (2005) (No. 04-1034).

²³⁹ *Rapanos*, 547 U.S. at 755.

²⁴⁰ *Id.* at 787.

²⁴¹ *Rapanos*, 547 U.S. at 755.

based on whether a water has a “significant nexus” to a “navigable water in the traditional sense.”²⁴² The test provides in full:

wetlands possess the requisite [significant] *nexus*, and thus come within the statutory phrase “navigable waters,” if the wetlands, alone or in combination with similarly situated lands *in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term “navigable waters.”²⁴³

Justice Kennedy’s opinion includes strong indicators that he intended the “significant nexus” test to use a broad geographic analysis. For one, he says the government should examine similarly situated wetlands “*in the region*.” Second, Justice Kennedy clearly has a broad geographic view of what effects are important for water-quality purposes; in rejecting the plurality’s “dismissive” attitude toward the resources at issue in the case, Justice Kennedy gave an example of the importance of wetlands on a geographic scale: “Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, ‘dead zone’ in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey.”²⁴⁴

In the three Supreme Court cases that have interpreted the term “navigable waters,” Justice Scalia’s plurality opinion was alone in adopting a narrow standard. In *Riverside Bayview*, the justices voted unanimously in upholding an approach that established comprehensive jurisdiction with the goal of addressing “pollution at its source.”²⁴⁵ In *SWANCC*, five justices placed a single restriction on Clean Water Act jurisdiction, barring the Corps from using the migratory-bird rule in determining whether geographically isolated waters are “waters of the United States,” but leaving the door open for the agencies to base their jurisdiction over such waters on other factors.²⁴⁶ And in *Rapanos*, five justices—Justice Kennedy and the dissenting justices—correctly interpreted the Clean Water Act as having a broad reach.

²⁴² *Id.* at 779.

²⁴³ *Id.* at 717–18 (emphasis added).

²⁴⁴ *Rapanos*, 547 U.S. at 777.

²⁴⁵ *Riverside Bayview*, 474 U.S. at 132-33 (citing S. Rep. No. 92-414, at 77 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742).

²⁴⁶ *Solid Waste Agency of N. Cook County v. Corps of Eng’rs*, 531 U.S. 159, 165 (2001).

E. Section 101(b) Does Not Support the Agencies' Plan to Abandon Federal Jurisdiction.

The statutory and legislative history of the Clean Water Act creates an undeniable oversight role for the federal government, one that cannot be discarded based on a misinterpretation of Section 101(b) read in utter isolation. The proposed rule's preamble erroneously supplants the explicit objective of protecting the chemical, physical, and biological integrity of the Nation's waters, as outlined in Section 101(a), with the newly posited elevation of states' roles in Section 101(b).

The language in Section 101(b) dates back to 1948 and the country's earliest, feckless efforts to address water pollution through state action.²⁴⁷ Rather than provide protection, states found themselves in a race to the bottom to attract industry, sacrificing water quality. "By 1972, when Congress was moved to act again, one-half of the states had no water quality standards, fewer still had set numerical limits in them, and fewer still had permit systems applying them to polluters."²⁴⁸

That failure informs the relationship of sections 101(a) and (b). "Section 1251(b) was trumped by new § 1251(a), announcing a national goal to 'restore and maintain' the nations waters."²⁴⁹ Congress specifically explained how it maintained state authority in Section 101(b) within the confines of the statute. The Clean Water Act identifies the states' role under Section 101(b)—managing the construction-grant program and implementing Sections 401 and 402, as well as allowing them to assume some permitting responsibilities under Section 404.²⁵⁰ In establishing these national programs to be implemented by the states, Congress both departed dramatically from the prior regime and ensured that states would finally follow through with establishing protective water-quality standards and permitting systems suggested by previous statutes. By creating national programs, the Clean Water Act eliminated the "race to the bottom" that states found themselves running under the previous statutes. The EPA's theory that Congress intended to import colossal freight to the vestigial mousehole of Section 101(b)—in essence nullifying the entire structure of the landmark legislation that is the Clean Water Act—is not credible. It is well-settled that Congress "does not alter the fundamental details of a regulatory

²⁴⁷ Oliver Houck, Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited, *Environmental Law Reporter*, 44 ELR 10426 at 10427 (2014).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 10428.

²⁵⁰ See Michigan Department of Environmental Quality, State and Federal Regulations, *available at* http://www.michigan.gov/deq/0,4561,7-135-3313_3687-10801--,00.html (describing Michigan's assumption of some Section 404 authority); U.S. Environmental Protection Agency, New Jersey's § 404 Program, *available at* <https://www.epa.gov/wetlands/new-jerseys-ss404-permit-program> (same).

scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”²⁵¹

Nor can the practical results of a decision to abdicate federal Clean Water Act authority be ignored. If the EPA and the Corps were to unlawfully limit the protections of the Clean Water Act, states cannot be expected to provide that protection. Thirty-six states have enacted legislation or rules that would prevent their environmental agencies from expanding protections to waters left unprotected should the federal agencies abdicate their statutory authority.²⁵² Direct prohibitions on adopting standards more stringent than the federal government, additional procedures for enacting more stringent standards, and/or requirements to pay property owners for any regulatory diminution of property value present a substantial obstacle to state protection of federally unprotected waters in more than two-thirds of the country. If federal jurisdiction is restricted, several of these state agencies would be obligated to similarly lift state protections.²⁵³ If nothing else, the statutes and rules limiting state protections to the federal minimum likely foreshadow a weakening of remnant state protections.

Even if states maintain the legal authority to protect waters and wetlands, many state environmental agencies lack the resources to do so. That is particularly true in the South, where many state agencies have among the lowest per-capita support despite having extensive water resources.²⁵⁴

Section 101(b)’s reference to the states’ role in the Clean Water Act must be read as a directive for the federal government to work with states through the programs prescribed in the Act. It does not, and cannot, support the EPA and the Corps abdicating their statutory authority to enforce the Act in a manner that serves the objective of restoring and maintaining the integrity of our waters.

VII. THE ECONOMIC ANALYSIS IS ARBITRARY AND CAPRICIOUS.

Like the agencies’ arguments in support of the proposed repeal, their 2017 economic analysis (“2017 assessment”) is wholly inadequate. The assessment, in large part, adopts the 2015 economic analysis and updates the prices to reflect 2016 price levels.²⁵⁵ The new

²⁵¹ *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001)

²⁵² Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* at 7 (2013) (Submitted by NRDC to EPA Docket Center, August 11, 2017).

²⁵³ *Id.* at 14-15

²⁵⁴ *See* Environmental Council of the States, *Status of State Environmental Agency Budgets (EAB), 2013-2015* at 20-21 (Mar. 15, 2017).

²⁵⁵ U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Economic Analysis for the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules* at 3-4 (June 2017) (“2017 economic assessment”).

assessment, however, conspicuously singles out wetland-mitigation benefits—the most significant category under the Clean Water Rule—as the *only* unreliable aspect of the 2015 evaluation. SELC requested information from the EPA and the Corps regarding any analysis in support of the proposed rulemaking, and the agencies responded that they had no documents.²⁵⁶ The substance of the 2017 economic analysis makes clear that no actual analysis was done—something recent press reports have confirmed.²⁵⁷ It is unsurprising that one prominent economist described the 2017 assessment as “the worst regulatory analysis I have ever seen.”²⁵⁸ As discussed below and revealed by the agencies’ feckless effort to refute the prior analysis, the only rationale for removing those benefits is to justify a pre-ordained decision to repeal the Clean Water Rule.

A. The Agencies Failed to Provide Any Legitimate Rationale for Dismissing Quantified Wetland Benefits.

The agencies’ assertion that benefits of wetland protection were too uncertain to quantify does not stand up to scrutiny. The actual reason, as demonstrated below, is that the wetland benefits of the Clean Water Rule significantly outweighed the costs, which raised an obstacle in the agencies’ pursuit of their pre-ordained result—the repeal of the Clean Water Rule.

The primary critique that the 2017 assessment puts forward is that the studies relied on to calculate wetland benefits in the earlier analysis are too old, given that they were published between 1986 and 2000.²⁵⁹ Yet the age of those studies did not make the wetland-benefit estimate unique. In the 2017 assessment, the agencies cited other studies that were published contemporaneously with those they rejected.²⁶⁰ Moreover, the 2015 analysis relied on studies of a similar age for other analyses. Those analyses were accepted and advanced in the 2017 assessment. The Section 402 stormwater cost-benefit analysis was based on a 1999 study.²⁶¹ Similarly, the Section 401 CAFO cost-benefit analysis simply updated the figures from the EPA’s 2003 CAFO-general-permit rulemaking, which relied on data from the 1990s.²⁶² Finally,

²⁵⁶ See Letter from M. Eisenberg, USEPA, to W. Sapp, SELC (June 29, 2017).

²⁵⁷ As reported in the New York Times, economists were verbally directed to eliminate the wetland benefits by political appointees without any rationale or supporting analysis. Coral Davenport and Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. Times, Aug. 11, 2017, available at <https://www.nytimes.com/2017/08/11/us/>.

²⁵⁸ Amena H. Saiyid, *EPA Water Rule Repeal Based on Sloppy Cost Analysis: Economists*, Bloomberg Daily Environment Report (July 27, 2017), available at <https://www.bna.com/epa-water-rule-n73014462367/> (quoting David Sunding).

²⁵⁹ See 2017 economic assessment at 8-9.

²⁶⁰ See *id.* at 14 (citing United Church of Christ (1987)), 16 (citing Arrow (1996)), 18 (citing Jin (1995)).

²⁶¹ See U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Economic Analysis of the EPA-Army Clean Water Rule* at 25 (May 20, 2015) (“2015 economic analysis”).

²⁶² *Id.* at 27.

the Section 404 wetland costs were based on two sets of data, both of which were from the late 1990s.²⁶³ Each of these were updated and included in the agencies' 2017 assessment.²⁶⁴

The Section 404 wetland-permitting cost estimate deserves particular scrutiny due to the date and uncertainty of the data collected. Unlike the wetland-mitigation benefit estimate, which relied on ten studies, the cost estimate is based on just two studies, both of which use data from the 1990s. The low cost estimate was based on selecting the highest value of a range of cost estimates provided by Corps regulators for each permit type without “any sound methodology.”²⁶⁵ The high cost estimates are based on a study so lacking in data or analysis, the results “prohibit any serious evaluation of their robustness or theoretical consistency.”²⁶⁶ Yet the agencies relied on that estimate without hesitation

The 2017 assessment also wrongly suggests that willingness-to-pay is a less reliable method of evaluating environmental benefits. Notably, OMB Circular A-4, which is the cornerstone of federal cost-benefit analyses, identifies willingness-to-pay as the “the most appropriate measure” of benefits and costs because it “captures the notion of opportunity cost by measuring what individuals are willing to pay or forgo to enjoy a particular benefit.”²⁶⁷ The EPA’s own guidelines recommend it as the agency’s preferred method of quantifying benefits. The guidelines state that “[b]ecause environmental policy typically deals with improvements rather than deliberate degradation of the environment, ... [willingness-to-pay] is generally the relevant measure.”²⁶⁸

In addition to identifying willingness-to-pay as the preferred method, the EPA’s guidelines identify the components of an appropriate willingness-to-pay study (defining the commodity, the payment, and the scenario),²⁶⁹ and provide a checklist of ways to evaluate potential shortcomings in the results of such a study.²⁷⁰ Under the heading “Considerations in

²⁶³ *Id.* at 36-38.

²⁶⁴ 2017 economic assessment at 10-11.

²⁶⁵ See Jeffrey D. Mullen, Review of the 2017 EPA Economic Analysis for the Proposed Definition of “Waters of the United States” – Recodification of Pre-Existing Rules at 8 (Sept. 15, 2017).

²⁶⁶ *Id.*

²⁶⁷ Office of Management and Budget, *Circular A-4* (Sept. 17, 2003), available at https://www.whitehouse.gov/omb/circulars_a004_a-4#e (“OMB Circ. A-4”).

²⁶⁸ U.S. Environmental Protection Agency National Center for Environmental Economics, *Guidelines for Preparing Economic Analyses* at 7-8 (May 2014), available at <https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses> (“EPA Economic Guidelines”).

²⁶⁹ *Id.* at 7-36;

²⁷⁰ *Id.* at 7-37.

Evaluating Stated Preference Results,” the guidelines recommend analyzing the survey mode, framing issues, selection of payment vehicle, strategic behavior, yea-saying, treatment of neutral responses, reliability, validity, hypothetical bias, and non-response bias.²⁷¹ OMB Circular A-4 likewise established principles that would apply in evaluating willingness-to-pay studies. The agencies did not apply any of those standards here.

Having failed to do any actual analysis regarding wetland-mitigation benefits, the 2017 assessment does not identify any actual problems with the studies supporting the Clean Water Rule. It argues, instead, that the studies published between 1986 and 2000 *could* be unreliable. The agencies state that “public attitudes toward nature protection *could* have changed,”²⁷² yet do not cite any evidence of change or evaluate any of the studies cited for the effect of that change. The fact that the overwhelming majority of the more than 1,000,000 commenters on the Clean Water Rule supported the rule strongly suggests that if attitudes have changed, they have changed in favor of wetland protections. The assessment further states that “[t]he past 30 years have also seen tremendous advances in statistical and economic methods,”²⁷³ yet fails to identify any of those advances or to explain how the underlying studies may have been improved using the unidentified methods. The analysis does not even assert that those methods were not used, only that the studies “may not have benefited from those advances.”²⁷⁴ Continuing, the assessment states that the “limited number of studies available” also threatens the validity of the results,²⁷⁵ yet fails to address the fact that the studies were specifically focused on the wetland types at issue and were, therefore, directly relevant to the issue before the agency or that other wetland benefit valuation methods exist.²⁷⁶

In short, there was no reason to discard the \$513 million benefit figure contained in the 2015 analysis. The EPA did so solely to reach the incorrect conclusion that under the Clean Water Rule, the costs of protection outweigh the benefits. That unscrupulous tactic was arbitrary and capricious in its own right. As discussed in more detail below, this deception is even more evident when looking at the actual dismissed studies as well as other methods of valuing wetlands.

B. The Studies Cited by the 2015 Economic Analysis Were, and Are, Valid.

If the agencies had evaluated the studies cited by the 2015 analysis, they would have discovered that the studies are valid and that established methods are available to adjust and

²⁷¹ *Id.* 7-39 to 7-43.

²⁷² 2017 economic assessment at 8-9.

²⁷³ *Id.* at 9.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ 2015 economic analysis at 44-47 (May 20, 2015) (summarizing studies relied upon).

validate the 2015 analysis. As described more fully in the attached comments by Dr. John C. Whitehead, the agencies critiques are not justified.²⁷⁷

Contrary to the agencies' claim, the dismissed studies included commonly used tests to ensure validity, including the scope test, cost-sensitivity analysis, and the divergent-validity test. Five applied and passed the scope test, which demonstrates the validity of the benefit estimates.²⁷⁸ In addition, six of the studies analyzed the responsiveness of respondents to the cost of the program and one conducted a divergent-validity test to support its results.²⁷⁹

The assertion that too much time has lapsed since the studies were published is also baseless; there are methods to evaluate and ensure "temporal reliability"—i.e., that changes in public attitudes have not rendered studies invalid. There is significant literature that addresses the durability of willingness-to-pay estimates.²⁸⁰ Importantly, this literature allows economists to evaluate the effect of various methodologies and adjust values from previous studies based on known responses to those methodologies. The agencies cannot, without any analysis, assert that the values used are unreliable.

The agencies' presumption that advances in economic analyses have invalidated prior studies is also invalid. Although economic valuation literature has made advances in the last 20 years, the fundamentals of the methodology remain and the effect of changes can be evaluated. Discrete choice experiments, which ask closed-ended questions rather, have become more common than open-ended willingness-to-pay studies, but "the substance of the two approaches is similar."²⁸¹ Therefore, rather than invalidating prior literature, discrete choice studies "provide[] a means of adjusting the EPA wetland mitigation benefits for state of the art valuation methods."²⁸²

Looking outside the studies cited in 2015, meta-analyses of wetland-valuation literature demonstrate the validity of the methods used in the dismissed studies. Four such studies have been conducted since 2000.²⁸³ These meta-analyses evaluated other wetland-valuation studies, combining smaller data sets into a single, larger data set, which increases statistical reliability.²⁸⁴

²⁷⁷ John C. Whitehead, Comments on "Economic Analysis for the Proposed Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules" (Sept. 26, 2017).

²⁷⁸ *Id.* at 3.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 4.

²⁸¹ *Id.* at 5.

²⁸² *Id.*

²⁸³ *Id.* at 6-7.

²⁸⁴ *Id.* at 7.

As a result, the meta-analyses provide economists insight into various aspects of willingness-to-pay studies. First, it is possible to evaluate the potential effect of changes in methodology on the economic values identified by the earlier studies because the effect of certain question types or scenarios has been documented, meaning the effect of any change in methodology from the studies cited in the 2015 analysis could be evaluated and quantified.²⁸⁵ Second, the meta-analyses satisfy the scope test and would provide a basis for a sensitivity analysis, which would provide greater certainty regarding the benefit estimate.²⁸⁶ EPA has done just that with meta-analyses evaluating other environmental policies. *Id.*

Finally, the appropriate response to remaining uncertainty cannot be deleting wetland-mitigation benefits. Uncertainty is part of any economic analysis. There are two available, textbook methods for addressing uncertainty.²⁸⁷ In a best/worst-case analysis, the agencies could compare the high end of costs with the low end of the benefits range and the low end of costs with the high end of the benefits range. In a breakeven analysis, the agencies would adopt different assumptions or adjustments until the net benefits are zero. Either of these analyses could describe and clarify inherent uncertainty.

C. Even if the Agencies Could Dismiss Valid Studies, They Erroneously Failed to Evaluate Other Methods of Valuing Wetlands.

As described in the EPA's guidelines for economic analyses, "commonly used valuation methods" for "ecological improvements," such as greater wetland protection, include production function, averting behaviors, hedonics, recreation demand, and stated preference.²⁸⁸ Each of these methods is evaluated in the EPA guidelines.²⁸⁹ Even if the 2017 assessment evaluated and discredited the willingness-to-pay studies relied upon by the 2015 evaluation, the agencies have not provided any reasonable basis to conclude that other methods of quantifying wetland benefits are not available. As OMB states, the agencies "should monetize quantitative estimates whenever possible."²⁹⁰

Although the 2017 assessment states that the "agencies attempted to find more recent studies" and that "more recent wetland studies were not available,"²⁹¹ there is more recent literature that is relevant to wetland-valuation estimates. More recent studies have conducted

²⁸⁵ *Id.* at 8.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ EPA Economic Guidelines at 7-9; *see also* 7-17 (Production functions).

²⁸⁹ *See id.* at 7-17 to 7-18.

²⁹⁰ OMB Circ. A-4.

²⁹¹ 2017 at 8.

discrete choice experiments that allow estimation of various wetland functions, such as protection of water quality and wildlife abundance. In addition, four meta-analyses of wetland benefits have been conducted, including one meta-analysis that included six of the ten studies relied on in the 2015 analysis.

D. The Agencies Failed to Adequately Describe Wetland Benefits Using Alternative Quantifiable Metrics.

Even if wetland benefits could not be monetized, the agencies cannot disregard the significant benefits that wetlands provide. OMB recommends other ways to quantify the benefits, stating that “if you can quantify but cannot monetize increase in water quality and fish populations resulting from water quality regulation, you can describe benefits in terms of stream miles of improved water quality for boaters and increases in game fish populations for anglers.”²⁹² If the agencies cannot monetize benefits, they “should present any relevant quantitative information along with a description of the unquantified effects, such as ecological gains, improvements in quality of life, and aesthetic beauty.” The agencies have utterly failed to make any such showing here.

By failing to provide any meaningful rationale for eliminating the monetized wetland benefits calculated as part of the 2015 economic analysis, the agencies have not provided a “reasoned explanation” that could satisfy the APA. Instead, the assessment reflects “an illogical overreaction to a normal level of uncertainty in the conduct of standard benefit-cost analysis of environmental policy.”²⁹³ The 2015 analysis had certain limitations, which it acknowledged, yet attempted to conservatively evaluate the effect of the rule by overestimating costs while underestimating the benefits. The agencies cannot now focus exclusively on the flaws of the one value they dislike, wetland-mitigation benefits, and ignore both the limitations of the cost estimates as well as standard economic methods for reducing uncertainty in the wetland-mitigation benefits analysis.

VIII. CONCLUSION

The EPA and the Corps are proposing to adopt a permanent rule. The process followed, the rationale given, and the record compiled must meet the minimum requirements of the APA. That demand is amplified here, where the regulation that the agencies propose to replace was supported by extensive technical analysis, a thoroughly explained rationale, and an extensive record built on science and widespread public comment. The proposed rule fails at every step. The agencies fail to even acknowledge that they are engaged in a permanent rulemaking and have expressly refused to provide a rationale to support the substance of the proposed rule or allow comment on that substance. Finalizing the proposed rule would accordingly violate the APA.

²⁹² OMB Circ. A-4.

²⁹³ Whitehead Comments, *supra* note 277, at 2.

Rescinding the Clean Water Rule would be a mistake. Doing it as proposed would be unlawful. The agencies must, therefore, withdraw the proposed rulemaking.

Sincerely,



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