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September 2, 2021

Via www.regulations.gov

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

Mr. John Goodin
Director
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

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

Mr. Vance F. Stewart III
Acting Principal Deputy
Office of the Assistant Secretary of the
Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

**Re: Request for Recommendations on Defining “Waters of the United States”
Docket No. EPA-HQ-OW-2021-0328¹**

Dear Administrator Regan, Acting Assistant Secretary Pinkham, Mr. Goodin, and Mr. Stewart:

Together, our 85 organizations write to ask you to take two steps to protect critical wetlands, streams, and other waters that we and our millions of members rely on for swimming, fishing, boating, drinking water, and our livelihoods. First, we urge the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (together, the “Agencies”) to promptly restore and implement the regulatory framework in effect prior to the so-called Navigable Waters Protection Rule (“NWPR”). Second, we urge the Agencies to promulgate a new definition of “waters of the United States” that is rooted in science, consistent with Supreme Court precedent, and faithful to the objective of the Clean Water Act.

The term “waters of the United States” is the jurisdictional “linchpin” for virtually every one of the Clean Water Act’s (“Act’s”) critical safeguards,² including the Act’s core prohibition established by Section 301 against the discharge of pollutants without a National Pollutant Discharge Elimination System permit, the requirements regarding dredge and fill material in

¹ The documents cited herein (aside from case law, executive orders, statutes, and regulations), were submitted via ShareFile to the EPA Docket Center on September 2, 2021. A list of the documents submitted is attached as Appendix A.

² “Civiletti Memorandum,” 43 Op. Atty. Gen. 197, at 200–01 (Sept. 5, 1979) (“The term navigable waters . . . is a linchpin of the Act . . . Its definition is not specific to § 404, but is included among the Act’s general provisions.”).

Section 404, the obligation that states develop water quality standards, and several other key statutory provisions. The prior administration’s removal of these protections through its promulgation of the NWPR has allowed pollution into our rivers, lakes, and drinking water sources, which are only as clean as the source waters that feed them.

The unlawful NWPR has now been invalidated. On August 30, 2021, the U.S. District Court for the District of Arizona vacated and remanded the rule based on “[t]he seriousness of the Agencies’ errors in enacting the NWPR, the likelihood that the Agencies will alter the NWPR’s definition of ‘waters of the United States,’ and the possibility of serious environmental harm if the NWPR remains in place”³ The court’s sound decision followed the recent acknowledgment by the Agencies, in seeking remand of the NWPR, that they had “substantial concerns” that the rule had been adopted unlawfully and had caused “harmful effects” on the nation’s waters.⁴

Consistent with the *Pascua Yaqui Tribe* decision, the concerns raised by the Agencies themselves, and the reasons set forth in these comments, we urge the Agencies to swiftly restore and implement the regulatory framework that preceded the NWPR to better protect important streams, wetlands, and other waters from pollution and destruction.⁵ The Agencies, the public, environmental groups, and industry all have substantial experience with these longstanding clean water protections—a “familiar, if imperfect approach.”⁶

After a straightforward restoration of the regulatory framework that preceded the NWPR, we urge the Agencies to promulgate a new definition of “waters of the United States” that is rooted in science, consistent with Supreme Court precedent, and faithful to the Clean Water Act’s language, structure, and purpose. In that substantive rulemaking, we urge the Agencies to avoid the deficiencies of the NWPR and to:

- incorporate the scientific literature published in, and since, EPA’s 2015 Science Report⁷;
- identify and address the potential impacts of any revised definition of “waters of the United States” on environmental justice communities;
- factor in the implications of climate change;

³ *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5 (D. Ariz. Aug. 30, 2021).

⁴ Decl. of Radhika Fox ¶¶ 10, 8, *Conservation Law Found. v. Regan*, No. 1:20-cv-10820-DPW (D. Mass. June 9, 2021), <https://perma.cc/G8RL-L7S5> (“Fox Decl.”); Decl. of Jaime A. Pinkham ¶¶ 10, 8, *Conservation Law Found. v. Regan*, No. 1:20-cv-10820-DPW (D. Mass. June 9, 2021), <https://perma.cc/NVB7-KLQC> (“Pinkham Decl.”).

⁵ Many of the organizations signing on to this letter also submitted or joined comments by the Southern Environmental Law Center (“SELC”) on the proposal for the NWPR. Those comments appear in the docket for the NWPR at EA-HQ-OW-2019-0149-9717, and we are again submitting them here. See Letter from Kelly F. Moser, SELC, to Andrew Wheeler, EPA, & R.D. James, Dep’t of the Army (Apr. 15, 2019).

⁶ See, e.g., Comments of the American Petroleum Institute et al. in Response to the Environmental Protection Agency’s and the Army Corps of Engineers’ Supplemental Notice of Proposed Rulemaking on the Recodification of the Preexisting ‘Waters of the United States’ Rule, EPA-HQ-OW-2017-0203-15253, at 16 (Aug. 13, 2018) (“The Agencies, States, and regulated public have significant experience operating under the longstanding regulations,” a “familiar, if imperfect approach” (citation and quotations omitted)); see also *Pascua Yaqui Tribe*, 2021 WL 3855977, at *5 (observing that “[t]he pre-2015 regulatory regime is familiar to the Agencies and industry alike”).

⁷ EPA Office of Res. & Dev., *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Jan. 2015), <https://perma.cc/5KDU-HP4W> (“Science Report”).

- restore a science-based, functional approach to the determination of stream and wetland jurisdiction;
- restore the jurisdictional category for “interstate waters”; and
- modify or eliminate several harmful exclusions that appear in the NWPR.

To assist in this rulemaking process, we also request that the Agencies populate the current administrative record with the administrative records for the 2015 Clean Water Rule,⁸ the 2018 Suspension Rule,⁹ the 2019 Repeal Rule,¹⁰ and the NWPR.¹¹

The Southern Environmental Law Center submits these comments on behalf of itself and the following organizations:

Alabama Rivers Alliance	Environmental Law & Policy Center
The Alliance for the Great Lakes	Freshwater Future
American Rivers	The Friends of Big Canoe Creek
American Sustainable Business Council	Friends of the Rappahannock
Amigos Bravos	Georgia Interfaith Power and Light
Appalachian Voices	Georgia River Network
Atchafalaya Basinkeeper	Good Stewards of Rockingham
Azul	Great Egg Harbor Watershed Association
Black Warrior Riverkeeper	GreenLatinos
Cahaba River Society	Harpeth Conservancy
Cahaba Riverkeeper	Haw River Assembly
Cape Fear River Watch	Hoosier Environmental Council
Carolina Wetlands Association	Jean-Michel Cousteau’s Ocean Futures
Center for a Sustainable Coast	Society
Charleston Waterkeeper	Kentucky Waterways Alliance
Chattahoochee Riverkeeper	League of Conservation Voters
Children’s Environmental Health Network	Mill Creek Alliance
Clean Water Action	National Latino Farmers & Ranchers Trade
Clean Water Action/Clean Water Fund	Association
Coastal Carolina Riverwatch	National Parks Conservation Association
Congaree Riverkeeper	National Wildlife Federation
Coosa River Basin Initiative	NC Conservation Network
Coosa Riverkeeper, Inc.	NC League of Conservation Voters
Defenders of Wildlife	Nebraska Wildlife Federation
Dogwood Alliance	Neuse Riverkeeper
Environment America	North American Climate, Conservation and
Environment Georgia	Environment
Environment North Carolina	North Carolina Coastal Federation

⁸ Docket Number EPA-HQ-OW-2011-0880: Clean Water Rule: Definition of “Waters of the United States.”

⁹ Docket Number EPA-HQ-OW-2017-0644: Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule.

¹⁰ Docket ID Number EPA-HQ-OW-2017-0203: Definition of “Waters of the United States”—Recodification of Preexisting Rule.

¹¹ Docket ID Number EPA-HQ-OW-2018-0149: Revised Definition of “Waters of the United States.”

North Carolina Wildlife Federation
Obed Watershed Community Association
Ogeechee Riverkeeper
One Hundred Miles
Pamlico-Tar Riverkeeper
Potomac Riverkeeper Network
Protect Our Aquifer
Public Employees for Environmental
 Responsibility
River Guardian Foundation
The River Project
Satilla Riverkeeper
Save Our Saluda
Shoals Environmental Alliance
Sierra Club
Sound Rivers, Inc.
South Carolina Coastal Conservation
 League

South Yuba River Citizens League
SouthWings
St. Marys EarthKeepers
Surfrider Foundation
Tennessee Chapter Sierra Club
Tennessee Citizens for Wilderness Planning
Tennessee Conservation Voters
Tennessee Environmental Council
Tennessee Riverkeeper
Tennessee Scenic Rivers Association
Tree Fredericksburg
Upstate Forever
Virginia Conservation Network
Wetlands Watch
Yadkin Riverkeeper

I. The Agencies Should Promptly Restore and Implement the Pre-NWPR Regulatory Framework.

A. The NWPR’s harm to the nation’s waters has been significant.

The NWPR upended a regulatory regime that had been in place for decades, under which streams, wetlands, and navigable lakes, among other critical waters, received protection. The rule categorically excluded ephemeral streams—streams that flow in response to precipitation¹²—which comprise millions of the nation’s stream miles.¹³ It also excluded tens of millions of wetland acres,¹⁴ some untold number of intermittent streams (which flow continuously during part of the year), and many perennial streams, lakes, ponds, and other waters across the country.¹⁵

During the NWPR rulemaking, the Agencies under the prior administration admitted that lost protections for these waters would cause substantial harms, including increased water pollution, flooding, loss of aquatic habitat, oil spills, reduced ecosystem services, and degraded drinking water.¹⁶ In the months after the NWPR took force, these concerns were borne out. The

¹² The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,338 (Apr. 21, 2020).

¹³ Letter from Steve Moyer, Trout Unlimited, to Andrew Wheeler, EPA, & R.D. James, Dep’t of the Army 5, 13 (Apr. 15, 2019) (“Trout Unlimited Comments”).

¹⁴ Decl. of Jovian Sackett ¶ 23, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. May 21, 2021), ECF No. 119-50 (“Sackett Decl.”).

¹⁵ See EPA & Dep’t of the Army, Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States” 22–23 (Jan. 22, 2020) (“EA”) (describing Rule as maintaining jurisdiction over “most perennial and many intermittent streams relative to” prior policy); see also *id.* at 9–17.

¹⁶ *Id.* at 105–06.

Agencies now warn that the “cascading and cumulative downstream effects [of the NWPR] . . . on water supplies, water quality, flooding, drought, erosion, and habitat integrity” are severe.¹⁷ In vacating the rule, the District of Arizona stressed that leaving the rule in place “would risk serious environmental harm” considering that “[t]he Agencies have ‘identified indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practices.’”¹⁸

Developers and other project proponents applied for safe harbor under the NWPR at a record-setting pace. Given the rule’s severe restrictions on Clean Water Act jurisdiction, the Agencies have in turn excluded entire categories of waters from the Clean Water Act’s safeguards against pollution or destruction.¹⁹ For example, Georgia’s Savannah Army Corps District has received over 400 requests for approved jurisdictional determinations since the NWPR went into effect on June 22, 2020.²⁰ Prior to implementation of the NWPR, the Savannah District typically received approximately 50 requests for approved jurisdictional determinations per year.²¹ And just in the Coastal Branch, Savannah District staff have reviewed over 3,300 acres of wetlands and determined that they are non-adjacent under the NWPR’s restrictive definition of that term and thus non-jurisdictional—i.e., unprotected.²²

In a striking example of the NWPR’s harmful effects, the Twin Pines titanium mine proposed on the border of the iconic Okefenokee National Wildlife Refuge in southeast Georgia is proceeding without any federal oversight or Clean Water Act permitting.²³ As planned, the mine would destroy hundreds of acres of wetlands formerly protected under the Act.²⁴

Shortly after the NWPR took effect, the mine’s operator, Twin Pines Minerals, sought and quickly obtained a new jurisdictional determination; the new determination excluded close to 400 acres of wetlands in the project area from Clean Water Act protections based on the NWPR’s unlawful “adjacent wetlands” definition and found *zero* jurisdictional waters.²⁵ As a result, Twin Pines Minerals withdrew its permit application²⁶ and may now destroy hundreds of acres of wetlands without federal protections. This destruction is likely to irreparably damage the hydrology and quality of the refuge and the plants and animals that rely on it.²⁷

¹⁷ Fox Decl. ¶ 20; Pinkham Decl. ¶ 20.

¹⁸ *Pascua Yaqui Tribe*, 2021 WL 3855977, at *5 (quoting Fox Decl ¶ 15 and Pinkham Decl. ¶ 15).

¹⁹ See, e.g., Amena H. Saiyid, *Companies Eager to ‘Lock In’ Trump-Era Water Rule Exemptions*, Env’t & Energy Report (Bloomberg Law) (Sept. 10, 2020), <https://perma.cc/8LU4-YM9G>.

²⁰ U.S. Army Corps of Eng’rs, Savannah District, Regulatory Update (July 21, 2021).

²¹ *Id.*

²² *Id.*

²³ Decl. of Ben Prater, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. May 21, 2021), ECF No. 119-19; see also Steven Mufson & Desmond Butler, *Trump rule eases effort to strip-mine near Okefenokee Swamp*, Wash. Post (Nov. 25, 2020), <https://perma.cc/T2D5-CYSJ>.

²⁴ *Id.*

²⁵ See U.S. Army Corps of Eng’rs, Approved Jurisdictional Determination, Permit No. SAS-2018-00054 (Oct. 14, 2020).

²⁶ Letter from Christopher Terrell et al., TTL, Inc., to Holly Ross, U.S. Army Corps of Eng’rs (Oct. 21, 2020).

²⁷ See Letter from William W. Sapp, SELC, to Col. Daniel Hibner, U.S. Army Corps of Eng’rs 16–18, 39–43 (Sept. 12, 2019).

In South Carolina, the proposed Riverport Development, a major mixed-use development in Jasper County on the border of the Savannah National Wildlife Refuge, is moving forward with 200 wetlands no longer protected under the Clean Water Act.²⁸ There, the developer's initial permit application stated that the project would fill approximately 35 acres of wetlands protected under the Act.²⁹ After the NWPR was finalized, the developer requested a revised jurisdictional determination.³⁰ Applying the NWPR, the Corps determined that more than 200 acres of the wetlands within the project site were no longer jurisdictional.³¹ As a result, all 200 acres were left open to potential filling and destruction without federal permitting protections. Moreover, the development threatens to fragment additional wetlands; because the NWPR generally required wetlands to touch, or have a surface connection to, another jurisdictional water to be protected,³² over 1,000 wetland acres in the project area could lose protection, illustrating yet another damaging facet of the NWPR.³³

The Twin Pines mine and the Riverport Development are far from the only examples of destructive projects allowed to proceed under the NWPR with little to no Clean Water Act protection. According to the Agencies, “[i]n 2020–2021, there has been a threefold (338%) increase from 2019–2020 and a fourfold (412%) increase from 2018–2019 in the number of projects being determined to not require section 404 permits under the [Clean Water Act].”³⁴ In fact, *at least* 333 projects that would have been subject to Clean Water Act Section 404 permitting requirements prior to the NWPR's promulgation no longer were,³⁵ including “an oil pipeline which will cause discharges into nearly 100 ephemeral streams that are no longer jurisdictional.”³⁶ That number of projects is likely a significant underestimate that does not reflect “the full universe of projects” that have lost protections under the NWPR, because many project proponents do not even apply for a jurisdictional determination for newly excluded waters.³⁷

Looking at individual water resources, the statistics are similarly staggering. Of the 40,211 wetlands, streams, and other waters evaluated by the Corps under the NWPR between June 22, 2020 and April 15, 2021, at least 76% have been found to be non-jurisdictional.³⁸ Based

²⁸ See Letter from Christopher K. DeScherer, SELC, to Richard L. Darden, U.S. Army Corps of Eng'rs 1, 5–7 (Mar. 1, 2021) (“Riverport Comment Letter”).

²⁹ U.S. Army Corps of Eng'rs, Charleston Dist., Joint Public Notice, Permit No. SAC-2010-00064 at 6 (May 27, 2020).

³⁰ U.S. Army Corps of Eng'rs, Approved Jurisdictional Determination, Permit No. SAC-2010-00064 at 33 (Oct. 5, 2020) (stating that determination was supported by applicant's request for reassessment).

³¹ U.S. Army Corps of Eng'rs, Charleston Dist., Joint Public Notice, Permit No. SAC-2010-00064 at 6 (Jan. 29, 2021).

³² NWPR, 85 Fed. Reg. at 22,338.

³³ Riverport Comment Letter at 4.

³⁴ EPA & Dep't of the Army, Memorandum for the Record re: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule 3 (June 8, 2021), <https://perma.cc/Y66K-ESHC> (“Memorandum for the Record”).

³⁵ Fox Decl. ¶ 15; Pinkham Decl. ¶ 15.

³⁶ Memorandum for the Record at 3–4.

³⁷ *Id.* at 1–2 (“[T]he agencies believe that many project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams; the effects of such projects are not tracked by the Corps database. . . .”).

³⁸ *Id.* at 2–3.

on EPA’s data, that number may actually be closer to 92%.³⁹ Over that same time period, only 29% of Approved Jurisdictional Determinations (“AJDs”) identified any streams, wetlands, or other waters afforded protection under the NWPR—compared with 54% of AJDs that afforded protections to similar waters under the 2015 Clean Water Rule and the pre-2015 regulatory framework.⁴⁰ Of more than 1,500 streams assessed in New Mexico and Arizona, “*nearly every one has been found to be a non-jurisdictional ephemeral resource, which is very different from the status of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.*”⁴¹ And “[c]ompounding potential resource losses, eliminating ephemeral streams from jurisdiction under the NWPR also typically eliminates jurisdiction over any nearby wetlands.”⁴²

The NWPR also left vast swaths of integral water resources in the Southeast open to pollution and destruction. In the Charleston Harbor watershed, for example, nearly 160,000 acres of wetlands likely lost protection under the rule.⁴³ In North Carolina’s Cape Fear River watershed, 526,996 acres of wetlands were vulnerable to losing coverage.⁴⁴ Some 162,149 acres, 364,586 acres, and 90,299 acres of wetlands were similarly vulnerable in Georgia’s Chattahoochee River watershed, North Carolina’s Neuse River watershed, and Virginia’s James River watershed, respectively.⁴⁵

The Agencies now acknowledge that these widespread decreases “in jurisdiction ha[ve] been more dramatic than the deregulatory effects the Agencies had identified in the NWPR preamble or supporting documents in the record”⁴⁶ In fact, given these alarming statistics, Administrator Regan has cautioned that the NWPR “is leading to significant environmental degradation.”⁴⁷ And both EPA and the Corps have described having “substantial concerns about the lawfulness of . . . the NWPR and the harmful effects of the NWPR on the nation’s waters.”⁴⁸ Having concluded their review of the NWPR, the Agencies confess that the rule “is causing significant, ongoing and *irreversible* environmental damage.”⁴⁹ Given Congress’s “broad, systemic view of the goal of maintaining and improving water quality”⁵⁰ in enacting the Clean Water Act, allowing such damage to occur is indefensible—especially when we are so far from meeting the Act’s “national goal” of achieving water quality that is both fishable and swimmable.⁵¹ EPA’s own data show that the nation’s waters remain severely threatened by

³⁹ Decl. of Libbie Weimer ¶ 13, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. May 21, 2021), ECF No. 119-52.

⁴⁰ Memorandum for the Record at 2.

⁴¹ Fox Decl. ¶ 16 (emphasis added); Pinkham Decl. ¶ 16 (emphasis added).

⁴² Memorandum for the Record at 3.

⁴³ Sackett Decl. ¶¶ 23–24.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Memorandum for the Record at 1–2.

⁴⁷ Press Release, EPA, EPA, Army Announce Intent to Revise Definition of WOTUS (June 9, 2021), <https://perma.cc/R6M7-Q572>.

⁴⁸ Fox Decl. ¶ 8; Pinkham Decl. ¶ 8.

⁴⁹ Email from Karen Gude, EPA, to Tribal Partners (June 9, 2021), Decl. of Ronnie Ben, Ex. 1, *Navajo Nation v. Regan*, No. 2:20-cv-00602-MV-GJF (D.N.M. July 7, 2021), ECF No. 34-2 (emphasis added).

⁵⁰ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

⁵¹ *See* 33 U.S.C. § 1251(a)(2).

pollution, storms, droughts, algal blooms, and other stressors. Among the nation’s impaired waters, of those assessed as of 2017, are over 55% of rivers and streams; over 70% of lakes, ponds, and reservoirs (including the Great Lakes); nearly 80% of bays and estuaries; 91% of ocean and near-coastal waters; and 100% of the Great Lakes’ open waters.⁵² These areas suffer from industrial contamination, harmful bacteria, nutrient pollution, and sediment overload that suffocate fish and other aquatic wildlife.⁵³ The nation’s wetlands are also struggling, with 32% of those assessed in poor condition, adversely affecting fish and wildlife species, reducing recreational opportunities, and leading to diminished water quality and flood prevention.⁵⁴

As a nation, we are far from achieving the Clean Water Act’s objective. Now is not the time for the Agencies to abdicate their responsibility to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵⁵ Any delay in restoring and implementing the pre-2015 clean water protections and subsequently adopting a more protective definition of “waters of the United States” comes with known risks to our economy, our infrastructure, and the health and well-being of our communities.

B. The Agencies must restore the pre-NWPR regulatory framework because the NWPR was patently unlawful.

In addition to recognizing the significant, actual environmental harms the NWPR has caused over a year of its implementation, the Agencies now acknowledge that the NWPR “did not appropriately consider the effect of the revised definition of ‘waters of the United States’ on the integrity of the nation’s waters.”⁵⁶ As the court found in *Pascua Yaqui Tribe*, the concerns identified by the Agencies “are not mere procedural errors or problems that could be remedied through further explanation Rather, they involve fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition of ‘waters of the United States.’”⁵⁷ Given the seriousness of the NWPR’s deficiencies⁵⁸ and the substantial harms it has caused on the ground, the Agencies are armed today with what they need to swiftly restore the regulatory framework that the NWPR replaced and then move forward expeditiously in promulgating a more robust definition of “waters of the United States.”

As explained in greater detail below, the NWPR upended prior policy without adequate explanation, undermined the Clean Water Act’s sole objective, and applied an interpretation of the Clean Water Act repudiated by a majority of the Supreme Court. These legal infirmities are

⁵² See EPA, National Water Quality Inventory: Report to Congress (Aug. 2017), <https://perma.cc/RMK8-SSEE>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 33 U.S.C. § 1251(a).

⁵⁶ Notice of Public Meetings Regarding “Waters of the United States”; Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 41,911, 41,912 (Aug. 4, 2021).

⁵⁷ *Pascua Yaqui Tribe*, 2021 WL 3855977, at *5 (internal citation omitted).

⁵⁸ A report by EPA’s Office of Inspector General found that the NWPR process was one of the rulemakings between 2015 and 2019 “least adherent” to EPA’s own policies and procedures. EPA Off. of Inspector Gen., Report No. 21-P-0115, *EPA Does Not Always Adhere to Its Established Action Development Process for Rulemaking* 10–12 (Mar. 31, 2021), <https://perma.cc/6XNN-SBSP> (discussing NWPR in analysis of 58 EPA rulemakings from fiscal years 2015 through 2019 for their adherence to EPA’s internal rulemaking process).

detailed at greater length in the motion for summary judgment filed by the plaintiffs in *South Carolina Coastal Conservation League v. Regan*,⁵⁹ a copy of which is submitted with these comments. Because the NWPR was patently unlawful, we urge the Agencies to act at a speed commensurate with the serious, irreversible water quality impacts the rule has caused to restore longstanding clean water protections.

1. *The NWPR Violated the Administrative Procedure Act.*

In promulgating the NWPR, the Agencies under the prior administration violated foundational tenets of administrative procedure. For close to half a century, the Agencies had recognized that Clean Water Act jurisdiction must be defined functionally, and extended broadly, to achieve the Act’s “objective . . . to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁶⁰ Yet in the NWPR, the Agencies discarded their longstanding functional approach, stripping protections from millions of stream miles and wetland acres that science shows are integral to achieving the Act’s objective. At no point in the rulemaking did the Agencies meaningfully address—much less repudiate—the voluminous science underlying prior policy, nor assess how the NWPR’s withdrawal of clean water protections would affect the nation’s water quality. These oversights violated basic principles of administrative law: that agencies must provide “good reasons” for changing policy,⁶¹ leave no “unexplained inconsistency in agency policy,”⁶² and address “important aspect[s] of the problem” aired in a rulemaking.⁶³ These deficiencies give the Agencies ample justification to quickly restore the regulatory framework that preceded the NWPR.

- a. The Agencies failed to justify their dramatic departure from prior policy.

With the NWPR, the Agencies reversed decades of precedent for protecting streams and wetlands that are integral to the quality of downstream traditional navigable waters⁶⁴—all without providing “good reasons” for their dramatic change of course.⁶⁵ As the Supreme Court has explained, “an unexplained inconsistency in agency policy is a reason for holding an

⁵⁹ Pls.’ Mem. in Supp. of Mot. for Summ. J., *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. May 21, 2021), ECF No. 119-1.

⁶⁰ 33 U.S.C. § 1251(a).

⁶¹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁶² *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation and quotations omitted).

⁶³ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁶⁴ See, e.g., National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,529 (May 22, 1973) (regulating “[t]ributaries of navigable waters of the United States”); Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,128 (July 19, 1977) (regulating “adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States”); EPA & Dep’t of the Army, Clean Water Act Jurisdiction following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* 1, 8, 12 (Dec. 2, 2008) (“*Rapanos* Guidance”), <https://perma.cc/X3SF-U987> (regulating impermanent streams and wetlands not abutting navigable waters if shown to significantly affect navigable water quality); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,055, 37,104–06 (June 29, 2015) (regulating impermanent streams and wetlands shown to significantly affect navigable water quality).

⁶⁵ *Fox*, 556 U.S. at 515.

interpretation to be an arbitrary and capricious change from agency practice.”⁶⁶ Perhaps the NWPR’s most glaring “unexplained inconsistencies” were its categorical exclusion of large public lakes that are also cooling ponds; ephemeral streams; and many wetlands outside the annual floodplain of jurisdictional streams and rivers.

The NWPR excluded, for the first time, a class of waters that had been protected since the passage of the Clean Water Act: “cooling ponds,” or large public lakes that also provide cooling water to power plants or other facilities. By decreeing that traditional navigable waters are now *unprotected* if they fit into any of the NWPR’s exclusions,⁶⁷ and extending the preexisting waste treatment exclusion to cooling ponds,⁶⁸ the prior administration unlawfully withdrew clean water protections from important public lakes used for swimming, boating, fishing, and drinking water.

To support a policy change, an agency must acknowledge the change and provide “good reasons” for it.⁶⁹ But here, the Agencies not only failed to justify the dramatic changes they made to the waste treatment exclusion and the exclusion of traditional navigable waters: they denied they changed policy at all.⁷⁰ The Agencies stated only that they “provided clear exclusions for many water features *that traditionally have not been regulated*,”⁷¹—without ever acknowledging that their rule *also* excludes waters that traditionally *had* been protected under the Clean Water Act.

The NWPR also categorically excluded ephemeral streams and many non-floodplain wetlands from federal protection, notwithstanding the determination the Agencies made in 2015 and again in 2019 that such waters were integral to protecting water quality. EPA’s 2015 Science Report, reviewed and approved by a panel of 27 of the nation’s top scientists,⁷² confirmed that ephemeral streams and many non-floodplain wetlands exert a significant effect on the quality of downstream waterways.⁷³ Based largely on those findings, the Agencies in the 2015 Clean Water Rule concluded that protecting the integrity of the nation’s waters *necessitated* regulating the pollution and destruction of many ephemeral streams and integral non-floodplain wetlands.⁷⁴ Then, in 2019, the Agencies in promulgating the “Repeal Rule” announced that they would apply the 2008 *Rapanos* Guidance,⁷⁵ which deems streams and wetlands jurisdictional if they have a “significant nexus” to traditional navigable waters based on “the functions” they provide.⁷⁶ Yet

⁶⁶ *Encino Motorcars*, 136 S. Ct. at 2126 (citation and quotations omitted).

⁶⁷ NWPR, 85 Fed. Reg. at 22,325, 22,338.

⁶⁸ *Id.* at 22,339 (§ 328.3(c)(15)).

⁶⁹ *Fox*, 556 U.S. at 515.

⁷⁰ NWPR, 85 Fed. Reg. at 22,328 (claiming that the Agencies were “not changing the longstanding approach to implementing the waste treatment system exclusion”); *see Fox*, 556 U.S. at 515 (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* . . .”).

⁷¹ NWPR, 85 Fed. Reg. at 22,270 (emphasis added).

⁷² Clean Water Rule, 80 Fed. Reg. at 37,062.

⁷³ *See, e.g.*, Science Report at ES-2 to ES-4, 2-22 to 2-30, 3-1 to 3-45, 4-20 to 4-39.

⁷⁴ *See, e.g.*, Clean Water Rule, 80 Fed. Reg. at 37,055, 37,104–06.

⁷⁵ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,644 (Oct. 22, 2019).

⁷⁶ *Rapanos* Guidance at 11.

without pointing to any “change[d] circumstances” that would warrant such an abrupt reversal⁷⁷ or disputing the factual conclusions of the Science Report, the Clean Water Rule, or the *Rapanos* Guidance, the Agencies in the NWPR excluded ephemeral streams and many non-floodplain wetlands from Clean Water Act protection. These failures were textbook Administrative Procedure Act (“APA”) violations.⁷⁸

- b. The Agencies failed to meaningfully address the most important aspect of the problem: the NWPR’s impact on the nation’s water quality.

The Agencies did not consider or explain the effects of their chosen jurisdictional boundaries on the integrity of the nation’s waters. They thereby failed to meaningfully address the rulemaking’s most important issue: the NWPR’s impact on the Clean Water Act’s objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷⁹ The rulemaking record demonstrated that the exclusion of ephemeral streams and many wetlands would significantly degrade water quality.⁸⁰

The Agencies now acknowledge “concern that when interpreting the jurisdictional scope of the [Clean Water Act], the NWPR did not appropriately consider the effect of the revised definition of ‘waters of the United States’ on the integrity of the nation’s waters, as well as concern over the loss of waters protected by the [Act].”⁸¹ As the Agencies point out, in adopting the rule, they “explicitly and definitively stated in numerous places in the NWPR administrative record that they *did not* rely on agency documents in the record that provided some limited assessment of the effects of the rule on water quality”⁸² The Agencies’ concession that they failed to adequately evaluate the NWPR’s effects on water quality evinces a clear APA violation.

- c. The Agencies failed to meaningfully consider reliance interests.

As the Supreme Court recently made clear, agencies may not dismiss the real-world consequences of their policy changes. In *Department of Homeland Security v. Regents of the University of California*, the Court invalidated the prior administration’s attempt to rescind the Deferred Action for Childhood Arrivals program because it failed to consider and balance the

⁷⁷ *State Farm*, 463 U.S. at 42.

⁷⁸ See *Fox*, 556 U.S. at 516 (“[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”); *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020) (“[W]hen departing from precedents or practices, an agency must offer a reason to distinguish them or explain its apparent rejection of their approach.” (internal quotations omitted)); *Renewable Fuels Ass’n v. EPA*, 948 F.3d 1206, 1255 (10th Cir. 2020) (finding change in agency policy arbitrary and capricious where “EPA ignored or failed to provide reasons for deviating from prior studies”), *rev’d on other grounds*, *Holly Frontier Cheyenne Refining, LLC v. Renewable Fuels Ass’n*, 141 S. Ct. 2172 (2021).

⁷⁹ 33 U.S.C. § 1251(a).

⁸⁰ See, e.g., EA at 105–06; Trout Unlimited Comments at 5, 13; Preliminary Results of Attempted Analyses of the National Hydrography Dataset and the National Wetlands Inventory 2–5, 9 (Sept. 5, 2017); Science Report at ES-2 to ES-4, 2-22 to 2-30, 3-1 to 3-45, 4-20 to 4-39.

⁸¹ *Fox* Decl. ¶ 10; *Pinkham* Decl. ¶ 10.

⁸² *Fox* Decl. ¶ 12 (emphasis added); *Pinkham* Decl. ¶ 12; see also NWPR, 85 Fed. Reg. at 22,332 (“[T]he final rule is not based on the information in the agencies’ economic analysis or resource and programmatic assessment.”).

harms to the thousands of immigrants who had relied on the program to go about their lives.⁸³ The Court held that the agency was “required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”⁸⁴ The agency’s failure to do so was an obvious violation of the APA.⁸⁵

Here, the reliance interests are significant: people have bought homes and made their livings based upon decades of federal protections for clean water, including protections for streams and wetlands expressly excluded from coverage under the NWPR.⁸⁶ But in violation of the APA, the Agencies did not meaningfully assess such interests, determine whether they were significant, or weigh them against competing policy concerns.⁸⁷

d. The Agencies failed to treat similar situations similarly.

Administrative law requires that “[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.”⁸⁸ Because the NWPR lacked any consistent or scientific principle governing which streams and wetlands are jurisdictional and which are not, it failed to treat similar cases in a similar manner.

First, the NWPR treated similarly situated streams differently with no rational justification. The Agencies concluded that ephemeral streams fed by precipitation “perform similar hydrological and ecological functions [as groundwater-fed perennial and intermittent streams do], including moving water, sediments, and nutrients, providing connectivity within the watershed and habitat to wildlife,” and “supporting biodiversity.”⁸⁹ Yet the Agencies categorically excluded ephemeral streams from jurisdiction without adequate justification.⁹⁰ This disparate treatment of streams that provide similar ecological functions produced wildly inconsistent results. For example, in the arid Southwest, a large ephemeral stream fed by precipitation, such as an arroyo, that is used for drinking water—and that has a far greater influence on downstream waters than many smaller jurisdictional “intermittent” streams fed by groundwater—would have been left without clean water protections under the NWPR.

Second, the NWPR treated similarly situated wetlands inconsistently. A wetland with no surface water connection to nearby jurisdictional waters was jurisdictional if separated from such waters by a *natural* berm or dune, but the same wetland separated by an otherwise identical *artificial* berm or dune was not jurisdictional.⁹¹ And a wetland flooded *from* jurisdictional waters

⁸³140 S. Ct. 1891, 1913–16 (2020).

⁸⁴*Id.* at 1915.

⁸⁵*Id.* at 1914–16.

⁸⁶ See, e.g., Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 37,128 (protecting all streams and wetlands in “reasonable proximity to other waters of the United States”); *Rapanos* Guidance at 1, 8, 12.

⁸⁷ See *Dep’t of Homeland Sec.*, 140 S. Ct. at 1915. The Agencies briefly considered (and summarily dismissed) only *states’* reliance interests, and even then, only the *states’* reliance interests in the 2015 Clean Water Rule and 2019 Repeal Rule—not in the federal clean water protections that had been in place since the 1980s. See EPA, Navigable Waters Protection Rule—Public Comment Summary Document, Topic 1: Legal Arguments 29.

⁸⁸ *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

⁸⁹ EA at 107.

⁹⁰ See NWPR, 85 Fed. Reg. at 22,338.

⁹¹ Compare *id.* at 22,311 with *id.* at 22,312.

was jurisdictional, because such flooding creates a “surface connection with another jurisdictional water”; however, a wetland that floods *into* jurisdictional waters was not jurisdictional, despite the surface water connection.⁹² The NWPR’s arbitrary distinctions between wetlands with similar hydrology and functioning was the hallmark of unreasoned decision-making.

2. *The NWPR Violated the Clean Water Act.*

The NWPR also codified an unlawful interpretation of the Clean Water Act; it was incompatible with the sole congressional objective set out in the first words of the Act and upended 40 years of Supreme Court precedent and agency practice protecting waters that significantly affect the quality of traditional navigable waters. Moreover, the two jurisdictional tests at the heart of the NWPR—the relative permanence and continuous surface connection requirements—were rejected by a majority of the Supreme Court for lacking any “support in the language and purposes of the Act or in [the Court’s] cases interpreting it.”⁹³ This affront to the Clean Water Act and implementing Supreme Court precedent should never return.

a. The NWPR was incompatible with the Clean Water Act’s objective.

In light of a statute declaring as its sole objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”⁹⁴ it was plainly unlawful for the NWPR to strip protections from millions of stream miles and wetland acres that science shows are integral to the quality of downstream navigable waters.⁹⁵ For decades, the Supreme Court and courts across the country have recognized that achieving the Act’s objective requires protecting waters and wetlands that significantly affect navigable water quality.⁹⁶

⁹² *Id.* at 22,310.

⁹³ *Rapanos v. United States*, 547 U.S. 715, 768 (2006) (Kennedy, J., concurring in the judgment); *see also id.* at 800 (Stevens, J., joined by three Justices, dissenting).

⁹⁴ 33 U.S.C. § 1251(a).

⁹⁵ *See, e.g.*, Science Report at ES-2 to ES-4, 2-22 to 2-30, 3-1 to 3-45, 4-20 to 4-39; *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment) (explaining that jurisdictional limits codified by the Rule “give insufficient deference to Congress’ purposes in enacting the Clean Water Act”); *id.* at 806 (Stevens, J., dissenting) (stating that this interpretation “endangers the quality of waters which Congress sought to protect”).

⁹⁶ *See Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (“[T]o constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” (quoting *SWANCC*, 531 U.S. at 167, 172)); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001) (“*SWANCC*”) (“It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the [Clean Water Act] in *Riverside Bayview Homes.*”); *Riverside Bayview*, 474 U.S. at 135 n.9 (valid jurisdiction based on whether covered wetlands “have significant effects on water quality and the aquatic ecosystem” (emphasis added)); *see also United States v. Donovan*, 661 F.3d 174, 183–84 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 798–99 (8th Cir. 2009); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *United States v. Johnson*, 467 F.3d 56, 64–66 (1st Cir. 2006); *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003) (finding jurisdiction because “discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters.”).

Emphasizing the Clean Water Act’s objective, the Supreme Court held last year in *County of Maui v. Hawaii Wildlife Fund* that courts must reject interpretations of the Act that carry “consequences that are inconsistent with major congressional objectives, as revealed by the statute’s language, structure, and purposes.”⁹⁷ The Court explained that statutory interpretations should not “creat[e] loopholes that undermine the statute’s basic federal regulatory objectives.”⁹⁸ It is difficult to conceive of a greater loophole than the one created by the NWPR. By stripping protections from integral streams and wetlands, the NWPR encouraged polluters to discharge waste upstream of traditional navigable waters, allowing “[t]he navigable part of the river [to] become a mere conduit for upstream waste,”⁹⁹ not to mention damaging the unprotected streams and wetlands themselves. Such consequences are incompatible with the Act’s objective and with the logic of *County of Maui*.

To be sure, the Agencies have discretion, based on their scientific expertise, to determine which waters require protection to achieve the Act’s objective.¹⁰⁰ But that deference does not extend so far as to permit the Agencies to disregard science and the Act’s objective or to strip protections from streams, wetlands, and lakes that undisputed science shows are integral to water quality. We commend the Agencies for their recent acknowledgement “that consideration of the effects of a revised definition of ‘waters of the United States’ on the integrity of the nation’s waters is a critical element in assuring consistency with the statutory objective of the [Clean Water Act].”¹⁰¹ This should compel the Agencies to restore longstanding clean water protections that were in place for decades and then to promptly promulgate a new, more robust definition of “waters of the United States,” to prevent further undermining of the Act’s objective.

In promulgating the NWPR, the Agencies wrongly suggested that the Clean Water Act’s sole “objective” set out in Section 101(a) must be balanced against—and ultimately yield to—the “policy” described in Section 101(b) “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.”¹⁰² But nothing in the text, structure, or legislative history of the Act suggests that Congress enacted Section 101(b) as an exception to the Act’s water quality objective, carving out huge swaths of the nation’s streams and wetlands from the Act’s regulatory protections. To the contrary, the Act was passed in 1972 *because of* the failures of state-based regulatory systems that “ha[d] been inadequate in every vital aspect,”¹⁰³ bringing about a “total restructuring” that assigned the federal government the predominant role.¹⁰⁴ The cooperative federalism approach outlined in Section 101(b) has nothing to do with excluding surface waters from the Act’s jurisdiction; it is about sharing the responsibilities for protecting the “waters of the United States.”

⁹⁷140 S. Ct. 1462, 1468, 1477 (2020) (rejecting construction that would preclude EPA from regulating discharges to groundwater that reach navigable waters).

⁹⁸ *Id.* at 1477.

⁹⁹ *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

¹⁰⁰ *See, e.g., Riverside Bayview*, 474 U.S. at 134 (“[T]he Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.”).

¹⁰¹ Fox Decl. ¶ 13; Pinkham Decl. ¶ 13.

¹⁰² 33 U.S.C. § 1251(b).

¹⁰³ S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674, 1971 WL 11307.

¹⁰⁴ *City of Milwaukee v. Illinois*, 451 U.S. 304, 317–18 (1981); *see also Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 22 (1981).

- b. A majority of the Supreme Court has rejected the NWPR’s interpretation of “waters of the United States” as unlawful.

Although the Supreme Court in *Rapanos v. United States* split 4-1-4 over the meaning of “waters of the United States,” a binding majority rejected Justice Scalia’s plurality interpretation as impermissible. Because the NWPR codified that repudiated interpretation, it is unlawful. Even if the majority’s clear rejection of Justice Scalia’s opinion were not binding, the opinion of five Justices in *Rapanos* that the NWPR’s governing tests are unlawful is persuasive authority against the rule.

In the NWPR, the Agencies for the first time embraced the *Rapanos* plurality’s interpretation of “waters of the United States.”¹⁰⁵ Indeed, that was President Trump’s directive,¹⁰⁶ which the Agencies dutifully followed.¹⁰⁷ The NWPR adopted the two main jurisdictional tests of Justice Scalia’s plurality opinion, declaring that “waters of the United States” only “encompass *relatively permanent* flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific *surface water connection* to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.”¹⁰⁸

Yet a majority of the Supreme Court in *Rapanos* unambiguously rejected the plurality’s interpretation as an impermissible construction of the phrase “waters of the United States.”¹⁰⁹ Justice Kennedy explained that the plurality’s approach was “inconsistent with the [Clean Water] Act’s text, structure, and purpose,” and that the approach “makes little practical sense in a statute concerned with downstream water quality.”¹¹⁰ The four Justices in dissent likewise found that the plurality’s “limitations . . . are without support in the language and purposes of the Act or in our cases interpreting it.”¹¹¹

As a consistent line of Supreme Court cases has established, points of law embraced by any five Justices—even Justices in dissent—are binding precedent.¹¹² Indeed, several circuit

¹⁰⁵ See *Colorado v. EPA*, 445 F. Supp. 3d 1295, 1311 (D. Colo. 2020) (finding the Agencies “self-consciously intended to take the plurality opinion . . . , flesh out the details, and make it the new law of the land.”), *rev’d on other grounds*, 989 F.3d 874 (10th Cir. 2021).

¹⁰⁶ See Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, Exec. Order No. 13,778, § 3, 82 Fed. Reg. 12,497 (Mar. 3, 2017), *revoked by* Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990 § 7(a), 86 Fed. Reg. 7037 (Jan. 25, 2021).

¹⁰⁷ See, e.g., NWPR, 85 Fed. Reg. at 22,261, 22,288–89.

¹⁰⁸ *Id.* at 22,273 (emphasis added); compare *Rapanos*, 547 U.S. at 739, 742.

¹⁰⁹ See 547 U.S. at 770–71 (Kennedy, J., concurring in the judgment); *id.* at 801, 805 (Stevens, J., joined by three Justices, dissenting).

¹¹⁰ *Id.* at 769, 776 (Kennedy, J., concurring in the judgment).

¹¹¹ *Id.* at 800 (Stevens, J., joined by three Justices, dissenting).

¹¹² See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 254 n.15 (2007) (analyzing opinions of “five concurring and dissenting Justices” in prior decision to ascertain rule of law with majority support); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413–14 (2006) (noting “holding” of prior fractured case was principle endorsed by “majority” comprised of concurrences and dissents); *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001)

courts interpreting the *Rapanos* decision itself have looked to the opinions of all the Justices to ascertain majority-supported rules of law.¹¹³ As then-circuit judge Kavanaugh explained, “when at least five Justices—the dissent plus either the plurality or concurrence—would reach a given result, then lower courts should reach that result.”¹¹⁴ The alternative—ignoring the four *Rapanos* dissenters—would “contradict[] the will of a majority of the Supreme Court,” defying “common sense” and “vertical stare decisis.”¹¹⁵ It was thus unlawful for the Agencies to base the NWPR on an interpretation of the Act rejected by a majority of the Supreme Court. *Rapanos* provides independent grounds for returning to the pre-2015 regulatory framework.

II. After Restoring the Pre-NWPR Regulatory Framework, the Agencies Should Craft a Definition of “Waters of the United States” Rooted in Science, Consistent With Supreme Court Precedent, and Faithful to the Objective of the Clean Water Act.

We offer these recommendations in response to the Agencies’ specific requests for feedback largely to inform the Agencies’ substantive rulemaking to define the term “waters of the United States” consistent with the Clean Water Act, Supreme Court precedent, and science. These comments also support the prompt restoration of the pre-NWPR regulatory framework, which will allow for greater protection of streams, wetlands, and other waters across the nation.

A. Implementation. Any rule defining “waters of the United States” must be implemented consistent with Supreme Court precedent and the objective of the Clean Water Act; the NWPR could not be implemented consistent with either.

- 1. The Clean Water Rule’s significant nexus analysis was consistent with Supreme Court precedent and the Act’s objective; the Agencies should apply a similarly consistent approach in their new rule.*

For decades, consistent with Supreme Court precedent and the objective of the Act, the Agencies had protected streams and wetlands with a “significant nexus” to traditional navigable

(analyzing concurring and dissenting opinions to ascertain point of law supported by Court majority in prior case); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 285 (1995) (“[T]he combination of Justice Blackmun and the four dissenting Justices in [a prior case] had made five to require application of [a legal standard they agreed upon].”); *Vasquez v. Hillery*, 474 U.S. 254, 262 n.4 (1986) (explaining that agreement of five Justices, even when not joining each other’s opinions, “carr[ies] the force of law”); *Alexander v. Choate*, 469 U.S. 287, 293 n.8 (1985) (noting that “holding” of prior fractured case was rule of law supported by four concurring Justices and three dissenting Justices); *United States v. Jacobsen*, 466 U.S. 109, 115–18 (1984) (holding that controlling rule of law in prior case was principle adopted by two Justices writing separately in majority and four Justices who dissented); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (“On remand, the Court of Appeals correctly recognized that the four dissenting Justices and Justice BLACKMUN formed a majority to require application of the *Colorado River* test.”).

¹¹³ *Johnson*, 467 F.3d at 65 (collecting cases and holding where, as in *Rapanos*, it is “immediately obvious how [the Justices’] views could be combined to form a five-Justice Majority,” courts have no “reservations” about “combining a dissent with a concurrence to find [a] ground of decision embraced by a majority of the Justices.”); *accord Donovan*, 661 F.3d at 182–83; *Bailey*, 571 F.3d at 798–99.

¹¹⁴ *United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (citing *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting)).

¹¹⁵ *Id.* at 611, 618.

waters as “waters of the United States.”¹¹⁶ As articulated by Justice Kennedy in *Rapanos*, a water has a “significant nexus,” and is thus jurisdictional, if the water or its functions, “significantly affect the chemical, physical, and biological integrity” of traditional navigable waters.¹¹⁷ The 2015 Clean Water Rule properly rested its interpretation of “waters of the United States” on these Supreme Court opinions, notably on the “significant nexus” test as most recently articulated by Justice Kennedy in *Rapanos*.¹¹⁸ “Where an adequate nexus is established for a particular wetland,” Justice Kennedy added, “it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.”¹¹⁹ Consistent with that test, the Clean Water Rule properly applied the Act’s safeguards to wetlands and tributaries if they, “either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.”¹²⁰

To answer the question of which waters satisfied the “significant nexus” standard, the Agencies undertook more than four years of research, analysis, and public outreach¹²¹ and compiled a considerable scientific record.¹²² In 2015, EPA’s Office of Research and Development published the results of the comprehensive Science Report.¹²³ After synthesizing more than 1,200 peer-reviewed studies, the Science Report reached “major conclusions” that would serve as the foundation of the Clean Water Rule.¹²⁴ First, the report confirmed that “streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters.”¹²⁵ Streams that meet the rule’s definition of “tributary,” the agency declared, “including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers”¹²⁶ The report also concluded that “[w]etlands and open waters in non-floodplain landscape settings . . . provide numerous functions that benefit downstream water integrity”—including “storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species.”¹²⁷ Thus, evaluation “of the degree of connectivity for specific groups or classes of wetlands (*e.g.*, prairie potholes or vernal pools)” required a science-based “case-by-case analysis.”¹²⁸

¹¹⁶ *SWANCC*, 531 U.S. at 167; *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167, 172); *see also Riverside Bayview*, 474 U.S. at 134–35 & n.9.

¹¹⁷ *See* 547 U.S. at 759, 779–80 (Kennedy, J., concurring in the judgment) (quoting 33 U.S.C. § 1251(a)).

¹¹⁸ Clean Water Rule, 80 Fed. Reg. at 37,060–61.

¹¹⁹ *Rapanos*, 547 U.S. at 782.

¹²⁰ Clean Water Rule, 80 Fed. Reg. at 37,060.

¹²¹ *See* EPA & Dep’t of the Army, Report on the Discretionary Consultation and Outreach for State, Local, and County Governments on the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act; Final Rule, Docket ID No. EPA-HQ-OW-2011-0880-20864 (May 2015).

¹²² *See generally* Science Report.

¹²³ *Id.* at ES-1.

¹²⁴ *Id.* at ES-2.

¹²⁵ *Id.*; *see* Clean Water Rule, 80 Fed. Reg. at 37,076 (quoting Science Report at ES-2).

¹²⁶ Clean Water Rule, 80 Fed. Reg. at 37,063; Science Report at ES-2.

¹²⁷ Science Report at ES-3.

¹²⁸ *Id.* at ES-4; *see also* Clean Water Rule, 80 Fed. Reg. at 37,057, 37,063 (summarizing report).

With the Clean Water Rule, the Agencies translated this science into clear regulatory standards that are “easier to understand, consistent, and environmentally more protective” than the Agencies’ prior regulations and guidance.¹²⁹ The Clean Water Rule clearly organized the nation’s waters into three classes: “[w]aters that are jurisdictional in all instances, waters that are excluded from jurisdiction, and a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional.”¹³⁰

The class of waters deemed “jurisdictional in all instances” included traditional navigable waters, interstate waters, and the territorial seas, along with “impoundments” of such waterbodies.¹³¹ To this list of waters, the Clean Water Rule added both “tributaries” that contribute flow to a primary water and have “a bed and banks and an ordinary high water mark[,]” and “waters adjacent” to other jurisdictional waters, “including wetlands, ponds, lakes, oxbows, impoundments, and similar waters[.]”¹³² According to the Agencies, “[t]he great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters.”¹³³ As to “adjacent waters,” the regulation used “bright line boundaries” to target only “those waters that . . . possess the requisite connection to downstream waters and function as a system to protect the chemical, physical, or biological integrity of those waters.”¹³⁴

In outlining the “narrow category of waters subject to case-specific analysis” under the Clean Water Rule, the Agencies “identified . . . five specific types of waters in specific regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they function alike and are sufficiently close to function together in affecting downstream waters.”¹³⁵ “Consistent with Justice Kennedy’s opinion in *Rapanos*, the agencies determined that . . . [these] waters”— “Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands”—“should be analyzed ‘in combination’ (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus” to such downstream waters.¹³⁶

The Clean Water Rule was deeply rooted in the Science Report and over 1,200 peer-reviewed studies—never since disputed—that document how wetlands and streams affect the integrity of downstream waters. The Agencies used that science, along with their “technical expertise and extensive experience in implementing the [Clean Water Act] over the past four decades” to carry out the statutory objective to “restore and maintain” the nation’s waters—by

¹²⁹ Clean Water Rule, 80 Fed. Reg. at 37,057.

¹³⁰ *Id.*

¹³¹ *Id.* at 37,057–58.

¹³² *Id.* at 37,104–05.

¹³³ *Id.* at 37,058.

¹³⁴ *Id.*; see also *id.* at 37,105 (defining “adjacent” to include waters within defined distances from the “ordinary high water mark” of other jurisdictional waters). To the extent the Agencies consider bright-line boundaries in their new rulemaking, those boundaries should be reasonably explained and rooted in science.

¹³⁵ *Id.* at 37,059.

¹³⁶ *Id.*

protecting waters that “significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.”¹³⁷ The Agencies here should implement a similar scientific approach in defining “waters of the United States.”

2. *The NWPR’s jurisdictional test was contrary to, and could not be implemented consistent with, Supreme Court precedent or the Agencies’ own science.*

Central to the NWPR’s unprecedented contraction of jurisdiction was its abandonment of the functional approach to defining Clean Water Act jurisdiction and the Supreme Court’s “significant nexus” standard in favor of Justice Scalia’s plurality opinion in *Rapanos*. Consistent with that opinion, “waters of the United States” as defined by the NWPR encompassed only “relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.”¹³⁸ Not only did a majority of the Court reject Justice Scalia’s¹³⁹ (and thus the NWPR’s) jurisdictional test, but it was also contrary to the Act’s objective and science.

Justice Kennedy explained that Justice Scalia’s relative permanence requirement “makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a ‘water’ subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not.”¹⁴⁰ Justice Kennedy noted that the Los Angeles River, which “ordinarily carries only a trickle of water and often looks more like a dry roadway than a river . . . is illustrative of what often-dry watercourses can become when rain waters flow.”¹⁴¹ Indeed, “nothing in the statute suggests” that Congress “exclude[d] irregular waterways.”¹⁴² The relative permanence requirement derives not from the statute but from a selective reading of the definition of “waters” in Webster’s Dictionary, which ignores that the same dictionary also lists “flood or inundation” as “waters.”¹⁴³

The plurality’s second limitation—the surface connection requirement, also adopted by the NWPR—“is as arbitrary as its first.”¹⁴⁴ But here, Justice Scalia “plainly neglected to consult

¹³⁷ *Id.* at 37,055, 37,060.

¹³⁸ NWPR, 85 Fed. Reg. at 22,273.

¹³⁹ *See supra* Section I.B.2.b.

¹⁴⁰ *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment); *see also id.* at 800 (Stevens, J., dissenting) (“Under the plurality’s view, then, the Corps can regulate polluters who dump dredge into a stream that flows year round but may not be able to regulate polluters who dump into a neighboring stream that [does not]—even if the dredge in the second stream would have the same effect on downstream waters as the dredge in the year-round one.”).

¹⁴¹ *Id.* at 769–70 (Kennedy, J., concurring in the judgment).

¹⁴² *Id.* at 770 (Kennedy, J., concurring in the judgment); *see also id.* at 801 (Stevens, J., dissenting) (noting the distinction between “relatively permeant” and not relatively permanent waters is “arbitrary” and has no basis in the text of the statute).

¹⁴³ *Id.* at 770 (Kennedy, J., concurring in the judgment) (citations omitted); *see also id.* at 801 (Stevens, J., dissenting) (“common sense and common usage” establish that intermittent and ephemeral streams are still “streams,” and thus, “waters”).

¹⁴⁴ *Id.* at 804 (Stevens, J., dissenting).

a dictionary,” as Webster’s Second defines “adjacent” as “[I]ying near, close, or contiguous; neighboring; bordering on’ and acknowledges that ‘[o]bjects are ADJACENT when they lie close to each other, but *not necessarily in actual contact*.’”¹⁴⁵ Indeed, in describing the concept of “adjacency,” *Riverside Bayview* “focus[ed] on wetlands’ ‘significant effects on water quality and the aquatic ecosystem,’” as did *SWANCC*, and “deemed it irrelevant whether ‘the moisture creating the wetlands . . . find[s] its sources in the adjacent bodies of water.’”¹⁴⁶ Given wetlands’ essential pollutant-filtering, runoff-storage, and erosion-prevention functions, “the absence of an interchange of waters prior to the dredge and fill activity [may be what] makes protection of the wetlands critical to the statutory scheme.”¹⁴⁷

“*SWANCC*, likewise, does not support the plurality’s [or the NWPR’s] surface-connection requirement.”¹⁴⁸ As Justice Kennedy stated, the Court’s *SWANCC* decision “is not an explicit or implicit overruling of *Riverside Bayview*’s approval of adjacency as a factor in determining the Corps’ jurisdiction.”¹⁴⁹ Justice Kennedy went on to emphasize, as the Court recognized in *Riverside Bayview*, that “[i]n many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in wetlands will instead flow out to major waterways.”¹⁵⁰

By focusing on relative permanence and surface water connections, the NWPR inappropriately disregarded groundwater connectivity, even though science has shown that surface water and groundwater are a single resource.¹⁵¹ The NWPR also entirely ignored the longstanding functional connectivity test for jurisdiction. As EPA’s Science Advisory Board has made clear, consistent with the Court’s *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions, the connectivity of waters cannot be determined by looking at “hydrologic connectivity alone,”¹⁵² much less surface water connections alone. Rather, connectivity must be evaluated in terms of all of the physical, chemical, and biological *functions* that streams and wetlands provide downstream waters, including the transport and transformation of groundwater, wood, food resources, sediment, nutrients, and contaminants; habitat for fish and other species; movement of organisms or their seeds and eggs; and the delayed or regulated release of stormwater.¹⁵³ Streams, wetlands, lakes, and ponds that do not have a direct hydrologic surface connection to a jurisdictional water “in a typical year” “can be functionally important to downstream [and nearby] waters.”¹⁵⁴ Indeed, it is *the variations* in “frequency, duration, magnitude, timing, and rate” of *the region’s* stream and wetland *functions* that are critical to the integrity and sustainability of downstream waters.¹⁵⁵ As the Agencies previously explained:

¹⁴⁵ *Rapanos*, 547 U.S. at 806 (Stevens, J., dissenting) (citations omitted) (emphasis in original).

¹⁴⁶ *Id.* at 772–73 (Kennedy, J., concurring in the judgment) (quoting *Riverside Bayview*, 474 U.S. at 135 & n.9).

¹⁴⁷ *Id.* at 775 (Kennedy, J., concurring in the judgment).

¹⁴⁸ *Id.* at 774 (Kennedy, J., concurring in the judgment).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 775 (Kennedy, J., concurring in the judgment).

¹⁵¹ S. Mažeika P. Sullivan et al., Comment Letter on Proposed Rule: Revised Definition of “Waters of the U.S.” 5 (Apr. 5, 2019) (“SAB Members Comment Letter”).

¹⁵² EPA Sci. Advisory Bd., SAB Review of the Draft EPA Report “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” 54 n.3 (Oct. 17, 2014) (“SAB Review”).

¹⁵³ *See id.* at 21, 30.

¹⁵⁴ SAB Members Comment Letter at 5.

¹⁵⁵ EPA, CWR Response to Comments – Topic 9: Scientific Evidence Supporting Rule 20 (emphasis added).

Connections with low values of one or more descriptors (e.g., low-frequency, low-duration streamflows caused by flash floods) can have important downstream effects when considered in the context of other descriptors (e.g., large volume or magnitude of water transfer). At the other end of the frequency range, high-frequency, low-magnitude vertical (surface-subsurface) and lateral flows contribute to aquatic biogeochemical processes, including nutrient and contaminant transformation and organic matter accumulation. The timing of an event can alter both connectivity and the magnitude of its downstream effect. For example, when soils become saturated by previous rainfall effects, even low or moderate rainfall can cause streams or wetlands to overflow, transporting water and other materials to downstream waters. Fish that use non-perennial or perennial headwater stream habitats to spawn or rear young, and invertebrates that move into seasonally inundated floodplain wetlands prior to emergence, have life cycles that are synchronized with the timing of flows, temperature thresholds, and food resource availability into those habitats.¹⁵⁶

With its arbitrary focus on surface water flow and permanence, the NWPR's definition of "tributary" excluded some perennial and intermittent streams—and all ephemeral streams—that have a "significant nexus" through chemical, physical, and biological connections to traditional navigable waters.¹⁵⁷ The NWPR's focus on hydrologic surface connection also dismissed "the importance of chemical and biological connectivity between wetlands and downstream waters."¹⁵⁸ It improperly excluded a wide range of non-floodplain wetlands (*i.e.*, wetlands with no direct surface water connection to a water of the United States) and even potentially some riparian and floodplain wetlands, despite their strong water-quality and ecological connections to jurisdictional waters.¹⁵⁹ Here again, the Science Advisory Board relied on science where the Agencies under the prior administration did not:

[T]he available science supports defining adjacency or determination of adjacency [for waters and wetlands] on the basis of functional relationships, not [solely] on how close an adjacent water is to a navigable water. The Board also notes that local shallow subsurface water sources and regional groundwater sources can strongly affect connectivity.¹⁶⁰

¹⁵⁶ *Id.*; see also SAB Review at 22 ("Low-frequency, high-magnitude flows connect channels to the furthest reaches of the floodplains, thereby controlling species composition and abundance in forests and aquatic habitats in the floodplain and transporting large clasts and/or woody debris that otherwise cannot be transported by more-frequent, lower-magnitude flows.") (internal citations omitted); *id.* at 37 ("Finally, the SAB recommends that the conclusions concerning ephemeral streams be strengthened by clarifying how and when ephemeral headwaters provide critical habitat and corridors for biota commonly connected to habitats associated with downstream rivers.").

¹⁵⁷ EA at 10–11, 22–23.

¹⁵⁸ SAB Members Comment Letter at 5.

¹⁵⁹ See *id.*

¹⁶⁰ Science Advisory Board, Consideration of the Adequacy of the Scientific and Technical Basis of the Clean Water Rule 2–3 (Sept. 30, 2014).

Indeed, some wetland functions, such as protecting downstream waters from pollutants, are “enhanced by the relative isolation” of wetlands.¹⁶¹ As detailed in the Science Report, wetlands “next to,” “near,” or “close to”¹⁶² other “waters of the United States,” but not necessarily abutting or having a direct hydrologic surface connection (*e.g.*, many floodplain wetlands), often exhibit functional connections to other “waters of the United States” and merit protection.¹⁶³

For those wetlands “inundated by flooding,” the NWPR not only required a demonstration of a surface water connection between the wetland and another jurisdictional water, but also a demonstration that the water creating the connection comes *from* the jurisdictional water body and *not* the wetland.¹⁶⁴ This portion of the NWPR defied science and eliminated from jurisdiction wetlands that are not flooded by a jurisdictional water in a typical year, including wetlands such as seeps, hardwood flats, non-riverine swamp forests, pocosins, Carolina bays, pine savannahs, pine flats, basin wetlands, bogs, floodplain pools, cypress domes, and many more, despite the ecological benefits they provide their watershed and downstream waters. It was also contrary to Supreme Court precedent.¹⁶⁵

Because the NWPR’s jurisdictional test was contrary to Supreme Court precedent and the Agencies’ own science, it cannot be implemented lawfully.

3. *The NWPR’s typical-year test was confusing, complex, and unpredictable.*

According to the Agencies when they finalized the rule, the NWPR was “intended to establish categorical bright lines that provide clarity and predictability for regulators and the regulated community.”¹⁶⁶ In reality, and at odds with its stated purpose, the NWPR’s core test for identifying jurisdictional waters was confusing and complex in its application and unpredictable in its results.

To be jurisdictional under the NWPR, streams were required to flow at least intermittently in a “typical year”¹⁶⁷; adjacent wetlands were jurisdictional if a jurisdictional water flowed into them in a “typical year”¹⁶⁸; and lakes, ponds, and impoundments could be jurisdictional if they contributed flow to a jurisdictional water in a “typical year.”¹⁶⁹ The Agencies’ “typical year” concept was supposed to delimit these and nearly every other category of jurisdictional waters, but the concept was fundamentally indeterminate.

¹⁶¹ SAB Review at 21.

¹⁶² Clean Water Rule, 80 Fed. Reg. at 37,063; Webster’s II, New Riverside University Dictionary (1994) (defining “adjacent” as “next to,” “adjoining,” “to lie near,” or “close to”). In the NWPR, the Agencies arbitrarily limited the definition.

¹⁶³ See SAB Members Comment Letter at 5.

¹⁶⁴ 85 Fed. Reg. at 22,315–16.

¹⁶⁵ See *Rapanos*, 547 U.S. at 773 (describing *Riverside Bayview Court* as “deem[ing] it irrelevant whether ‘the moisture creating wetlands . . . find[s] its source in the adjacent bodies of water.’”) (citing *Riverside Bayview*, 474 U.S. at 135).

¹⁶⁶ NWPR, 85 Fed. Reg. at 22,325; see also *id.* at 22,273 (similar).

¹⁶⁷ *Id.* at 22,339 (33 C.F.R. § 328.3(c)(12))

¹⁶⁸ *Id.* at 22,338 (33 C.F.R. § 328.3(c)(1)(ii)).

¹⁶⁹ *Id.* at 22,338 (33 C.F.R. § 328.3(c)(6)).

“Typical year” was defined under the NWPR as a time “when precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.”¹⁷⁰ The NWPR’s preamble described the typical year as having precipitation between the “70th and 30th percentiles for totals from the same date range over the preceding 30 years.”¹⁷¹ To demonstrate that a year was “typical” required that the observed rainfall from the previous three months fell within the 30th and 70th percentiles established by a 30-year rainfall average generated at National Oceanic and Atmospheric Administration (“NOAA”) weather stations.¹⁷² This was not a simple test; it required expert analysis to determine what was “typical” in light of drought and floods and left much to interpretation.

Among other flaws, this definition failed to specify which time period was to be averaged in calculating the normal periodic range—it could be a “seasonal[]” or “annual[]” average, or some other unspecified time period. Whether precipitation counted as “typical” or “atypical” depended on whether it was evaluated against an annual or a seasonal average: a dry season could be atypical compared to the seasonal average, but precipitation over the whole year could be typical, or vice versa. Consequently, a given stream’s flow could qualify as intermittent—and thus potentially jurisdictional—or not, depending on whether a given year’s (or season’s) precipitation was deemed typical or not. The test is far from clear and predictable.

Despite the prior administration’s claims, people could not determine whether a stream or wetland is jurisdictional by standing on their property. Rather, a property owner needed to determine the source and timing of flow, whether the stream flowed into a navigable water off-property, whether wetlands abutted a jurisdictional water, and whether a downstream segment lacked sufficient flow or otherwise broke jurisdiction. Many of these inquiries required the decision-maker to trespass onto properties of others, or worse, guess. As the Agencies conceded during the NWPR rulemaking, making these types of determinations “can be challenging.”¹⁷³

The typical year test was unclear on its face, contained inconsistent seasonal and annual elements, and suffered from such inherent uncertainty that a water could be both jurisdictional and non-jurisdictional in the same year or even in the same minute. In adopting the test, the Agencies under the prior administration provided no underlying principle to guide agency discretion, inadequately account for changing climatic conditions, and inserted case-by-case analyses for every jurisdictional determination despite their claim that it “*provide[s] a predictable framework* in which to establish federal jurisdiction”¹⁷⁴ The typical-year test

¹⁷⁰ *Id.* at 22,339 (33 C.F.R. § 328.3(c)(13)).

¹⁷¹ *Id.* at 22,274. *But see* EPA, The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 9: Typical Year 5 (“The agencies may also consider alternative methods . . . , *including different statistical percentiles.*”) (emphasis added). The Agencies provided no explanation as to how the appropriate periodic range or statistical percentiles should be selected.

¹⁷² *See* NWPR, 85 Fed. Reg. at 22,274; *see also* EPA, Fact Sheet, “Typical Year” and the Navigable Waters Protection Rule, <https://perma.cc/MMS5-S4MT>.

¹⁷³ Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, at 4177–78 (“[L]andowners may find it difficult to determine whether there is a jurisdictional break downstream of a feature on their property”); *id.* at 4,189 (“[I]dentifying remotely whether wetlands abut a jurisdictional water can be challenging”).

¹⁷⁴ NWPR, 85 Fed. Reg. at 22,273–74 (emphasis added).

should be abandoned and replaced with a functional test for jurisdiction consistent with prior agency practice, science, and Supreme Court precedent.

B. *Regional, State, and Tribal interests. States and Tribes could not fill the gap in federal clean water protections left by the NWPR.*

1. States made clear—and the Agencies acknowledged—the substantial obstacles to states “filling the gap” left by the NWPR.

While the prior administration claimed that states would form a backstop to the NWPR’s significant restriction of federal jurisdiction, the Agencies acknowledged that many states lacked comparable clean water programs.¹⁷⁵ Worse, 36 of the 50 states have laws in place that substantially hinder them from protecting waters left unprotected by the federal government.¹⁷⁶ Numerous states provided comments on the proposed NWPR that raised serious concerns about legal and practical constraints on their ability to make up for the removal of federal protections from many waters.

In their comments, 14 states and the District of Columbia spelled out the hardships that accompany taking on additional responsibility to protect waters and “fill the gap” created by the proposed contraction of federal Clean Water Act jurisdiction. As they put it, the rule “would create a gaping hole in water pollution control,” forcing states “either to fill the large gap in water protections that the proposal creates by bearing the administrative burdens of expanding their own water programs, or avoid those costs and suffer the significant harms associated with degradation of their water resources.”¹⁷⁷ States also criticized the purported federalism rationale of the proposal, pointing out that “[33 U.S.C.] Section 1251(b) is primarily concerned with state implementation of water pollution control measures, not the jurisdictional reach of the Act.”¹⁷⁸ Notably, while Congress provided a mechanism for states to exert more authority over waters within their borders by assuming the regulatory program under Section 404(g), only two states—New Jersey and Michigan—have opted to do so.¹⁷⁹

¹⁷⁵ See *id.* at 22,270 (“The agencies acknowledge that States without comprehensive pre-existing programs that seek to regulate waters no longer jurisdictional under this final rule may incur new costs and administrative burdens . . .”).

¹⁷⁶ Env’tl. L. Inst., *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* 7 (2013), <https://perma.cc/D3CB-6LJE> (“ELI Report”); see also EPA and Dep’t of the Army, Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the U.S.” 56–57 (Jan. 23, 2020) (“RPA”). ELI’s 2013 review found that 13 states have absolute prohibitions against regulation more stringent than the federal Clean Water Act. ELI Report at 1. Such laws would need to be repealed before those states could take action to protect waters outside the jurisdictional scope of the NWPR.

¹⁷⁷ Barbara D. Underwood et al., Comment Letter on Revised Definition of “Waters of the United States” 3 (Apr. 15, 2019) (“AG Comments”).

¹⁷⁸ *Id.* at 21.

¹⁷⁹ RPA at 48; see also Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1276 (1995); Lance D. Wood, *The ECOS Proposal for Expanded State Assumption of the CWA §404 Program: Unnecessary, Unwise, and Unworkable*, 39 Env’tl. L. Rep. News & Analysis 10209, 10213 (2009).

The Maine Department of Environmental Protection pointed out in comments that its state law allows alteration of wetlands under 4,300 feet in area without a permit, and that the removal of federal protections from many wetlands would mean no oversight at the state or federal level for such activities.¹⁸⁰ Maine officials were concerned that the weakening of federal jurisdiction would incentivize legislative action to erode state jurisdiction as well.¹⁸¹

North Carolina’s “isolated” wetlands protections have been under legal attack since they were promulgated over 17 years ago,¹⁸² and in 2015 North Carolina narrowed these already limited protections¹⁸³ to cover only basin wetlands and bogs.¹⁸⁴ This meant that North Carolina’s wetland program was positioned to provide only limited, if any, protection to many of the wetland types from which federal protection was withdrawn by the NWPR, including pocosins, Carolina bays, pine savannas, pine flats, and headwater forest wetlands.¹⁸⁵ In response to the NWPR, the North Carolina Department of Environmental Quality adopted temporary rules intended to provide state protections for wetlands that are no longer protected under the NWPR but that “significantly affect” downstream waters. In quick order, however, a budget provision intended to preempt the effort to protect those wetlands and further strip state protections from isolated wetlands was proposed in the largely Republican North Carolina legislature—and only narrowly defeated.¹⁸⁶

Even states without strong internal opposition to strong clean water protections lack the resources or framework to adequately fill the gap left by the NWPR. California, for example, noted that its “state authorities have [historically] been used *in conjunction with* [Clean Water Act] authorities[,]” and that it would have to “expend significant resources to implement and enforce” recently adopted state dredge and fill restrictions “to ensure the same level of protection for waters” that it has “traditionally regulated . . . in tandem with the Corps.”¹⁸⁷ California also voiced concern that its ability to control water pollution would be hindered because “the existing state water quality enforcement mechanism” is not as effective as the Clean Water Act enforcement framework, with lower penalties, more prerequisites for prosecution, and no citizen enforcement provision.¹⁸⁸

New York reported that only about half of its 2.4 million acres of wetlands are freshwater wetlands subject to its state regulation.¹⁸⁹ New York relies on the federal Clean Water Act to protect the many floodplain, riparian, and headwater wetlands falling outside of its state

¹⁸⁰ AG Comments Attach. A at 6.

¹⁸¹ *Id.*

¹⁸² See Richard Whisnant, *Wetlands in North Carolina*, 6 Environmental and Conservation Law (Dec. 1999).

¹⁸³ North Carolina’s Isolated Wetlands law provides limited protections for Basin Wetlands and Bogs. N.C. Sess. Law 2015-286, § 4.18(c).

¹⁸⁴ N.C. Sess. Law 2015-286, § 4.18.

¹⁸⁵ Moffat & Nichol, Proposed Changes to the Waters of the United States (WOTUS) Definition—Summary of M&N Conclusions 5–9 (Apr. 7, 2019).

¹⁸⁶ Kirk Ross, *House Budget Boosts Resilience, But Wetlands Plan Draws Ire*, Coastal Review, Aug. 6, 2021, <https://perma.cc/B9C9-3HGY>. Efforts are underway in North Carolina to adopt permanent rules similar to the temporary rules currently in place.

¹⁸⁷ AG Comments Attach. A, at 4 (emphasis added).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 31.

protections.¹⁹⁰ Many states are also concerned about the effects of pollution from other states—with weaker protections—flowing downstream across their borders. Maryland officials observed that narrowing the scope of federal jurisdiction, stripping some upstream waters of protection, “would hamper Maryland’s ability to preserve and improve the quality of the Chesapeake Bay and other state waters.”¹⁹¹

In their Economic Analysis, the Trump-era Agencies conceded that many states could not afford to assume responsibility for regulating fill activities in the millions of acres of wetlands that are left unprotected at the federal level by the NWPR.¹⁹² Virginia’s Department of Environmental Quality echoed this concern, writing that replacing reduced federal protections at the state level would require Virginia to “hire and train new personnel to fill the gap left by the federal withdrawal of protections to those waters currently funded by federal tax dollars” and stating that increased federal funding would be needed to offset these costs.¹⁹³ In 2012, Virginia studied what would be required if it chose to assume the Section 404 permitting program, and concluded that administering a program as robust as the federal program would cost \$18 million up front to implement, and \$3.4 million annually afterward.¹⁹⁴ In deciding against assumption, Virginia identified losing the Corps’ knowledge base as a critical cost.¹⁹⁵

Nor was “filling the gap” created by the withdrawal of federal programs under the NWPR simply a matter of creating or expanding state programs to include waters previously protected by federal law. The NWPR Economic Analysis acknowledged that the rule would result in harms including increased dredging and filling of streams, reduced wetland habitats, increased flood risk, degraded aquatic habitats, greater waterbody impairments, greater pollutant loads, and increased sedimentation, and harms to ecosystems and drinking water supplies from the increased likelihood of oil spills.¹⁹⁶ These multiple harms, including upstream transboundary pollution, promised only to compound the increased burden that the NWPR would place on states.

2. *State actions and inaction since the NWPR’s effective date have validated these concerns.*

Many of the states’ concerns have in fact been borne out by state responses, or lack thereof, to the withdrawal of federal protections from wide swaths of streams, wetlands, and other waters. Indeed, the Agencies now admit that in adopting the NWPR they wrongly assumed

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 7.

¹⁹² EA at 48 (reporting that many states do not “have the resources to staff and manage the new or expanded programs”).

¹⁹³ Comments of David K. Paylor, Director, Va. Dep’t of Env’tl. Quality, RE: Proposed Waters of the United States Rule, Attach. A, at 8 (Apr. 12, 2019).

¹⁹⁴ Va. Dep’t of Env’tl. Quality, *Report To Legislature: Study of the Costs and Benefits of State Assumption of Federal § 404 Clean Water Act Permitting Program 2* (Dec. 2012), <https://perma.cc/MBW8-4P8B>.

¹⁹⁵ *Id.* at 3.

¹⁹⁶ EA at 105–06.

that states would not seek to weaken their own clean water protections to match the rule, when in fact they have.¹⁹⁷

On June 25, 2020, for example, Ohio issued a general permit for filling isolated streams and wetlands.¹⁹⁸ The general permit authorizes, pursuant to some requirements, the filling of certain isolated wetlands up to a total of 0.5 acres of impacts, and specifically disallows fill above that threshold. The general permit also authorizes the filling of ephemeral streams, with enhanced requirements for projects impacting over 300 linear feet of stream; the permit places no upper bound on ephemeral stream impacts, but reserves for the state environmental agency director the right to deny coverage to any project that would result in significant water quality impacts.¹⁹⁹ It is unclear how Ohio will handle projects not qualifying for the general permit (e.g., any project impacting more than a total of 0.5 acres of wetlands). Meanwhile, in March 2021, the Ohio legislature introduced legislation that would “deregulate certain ephemeral water features” under state law by expressly excluding “ephemeral features” from the definition of “waters of the state” and making other amendments.²⁰⁰ The bill would also redefine “ephemeral feature” to exclude reference to the groundwater table.

Washington Department of Ecology officials stated shortly after the NWPR took effect that they were still determining how to proceed in order to protect state waters no longer protected by federal law, and expressed concern about the need for additional staff to write permits and enforce state water quality requirements.²⁰¹ In April 2020, the Department of Ecology’s director said that the federal jurisdictional rollbacks would leave Washington “without an established permitting process or clear guidelines to review potential environmental impacts” and would “mean confusion and potential delays for development” in the state, calling the NWPR a “tragic abdication of federal responsibility.”²⁰² The director also noted that the NWPR could potentially increase the burden on state and local taxpayers to pay for cleanups in waters no longer under federal jurisdiction.²⁰³

Colorado has stated that 25–50% of its waters “will need” state-level protection while the years-long rulemaking process to restore strong federal clean water protections plays out, because there are no existing state laws or regulations to permit the filling of state waters, and

¹⁹⁷ See Memorandum for the Record at 4 (“The agencies are also aware of certain states that have already begun taking deregulatory steps to change their state regulatory practices to match the [Rule], contrary to the agencies’ estimates . . .”).

¹⁹⁸ State of Ohio, Isolated Wetland and Ephemeral Stream General Permit (June 25, 2020), <https://perma.cc/Q7F7-T2QH>.

¹⁹⁹ *Id.*

²⁰⁰ The Ohio Legislature, 134th General Assembly, House Bill 175, <https://perma.cc/9VME-G986> (last visited Aug. 25, 2021); see H.B. 175 As Introduced, <https://perma.cc/NYA5-2BZK> (last visited Aug. 25, 2021).

²⁰¹ Christopher Dunagan, Puget Sound Inst., Univ. of Wash., *State Officials Scramble to Protect Streams and Wetlands in Wake of Federal Rule* (June 24, 2020), <https://perma.cc/M33S-LWTR> (citing Department of Ecology spokesperson).

²⁰² Dep’t of Ecology, State of Wash., *Statement from Ecology Director on Federal Government Rolling Back Wetland and Stream Protections* (Apr. 21, 2020), <https://perma.cc/X2XQ-YEBY> (last visited Aug. 25, 2021).

²⁰³ *Id.*

because “Colorado has relied on the federal government to protect these waters[.]”²⁰⁴ Colorado began the process of developing a state dredge-and-fill permitting program to fill the permitting gap.²⁰⁵ In June 2020, the Colorado Association of Home Builders announced it had helped to stop introduction of legislation establishing such a program.²⁰⁶

In April 2021, Indiana’s governor signed into law a bill, opposed by state regulators concerned about water quality, that partially repealed state water and wetland protections, paving the way for development and other destructive projects to move forward without oversight. The law eliminates the requirement that industry and other project proponents must obtain a permit for impacts to any ephemeral features (wetlands or streams) and removes the requirement to obtain a permit or perform compensatory mitigation for impacts to “isolated” wetlands on certain former agricultural lands.²⁰⁷

These developments demonstrate the risks posed to the nation’s waters by the NWPR or any weakening of federal clean water protections. Many states have laws prohibiting their regulation of water from exceeding the federal “floor.”²⁰⁸ Many others have other limitations on their ability to adopt regulations to protect state waters. A number of states are struggling with the legal and practical implications of the need to exercise state authority on a much larger scale than in the past in order to protect waters eliminated from federal Clean Water Act protections. Even in states that have adopted or sought to develop additional protections for state waters outside the NWPR’s scope, efforts to limit or undo these protections—and even to further weaken state law—have already achieved some success. The health of our nation’s waters cannot be left to states.

Accordingly, the Agencies should resume the longstanding cooperative federalism contemplated by the Clean Water Act, whereby states—unless hamstrung by their own legislatures, agencies, or resource constraints—are free to implement stricter standards while the Clean Water Act serves as a federal backstop.

3. *Navigable and non-navigable interstate waters should be protected under any definition of “waters of the United States.”*

Generally, an “interstate water” is one that forms a border between two states or that crosses a state boundary. Few would argue that a “navigable” interstate water and its tributaries are not “waters of the United States.” However, the NWPR for the first time excluded from the Clean Water Act’s protection certain ponds, lakes, rivers, and streams that cross state lines but

²⁰⁴ Colo. Dep’t of Pub. Health & Env’t, “Waters of the United States and the Navigable Waters Protection Rule,” <https://perma.cc/WG3E-S3AM> (last visited Aug. 25, 2021).

²⁰⁵ Colo. Dep’t of Pub. Health & Env’t, “WOTUS – Dredge and Fill Handout,” <https://perma.cc/6JJW-BPHM> (last visited Sept. 1, 2021).

²⁰⁶ Bill Ray, Colo. Ass’n of Home Builders, *General Assembly Finishes 2020 Session; Governor Preparing Protect Our Neighbors Phase of Pandemic Reopening* (June 19, 2020), <https://perma.cc/HA59-H2CK>.

²⁰⁷ Casey Smith, *Indiana Governor Signs Wetland Repeal Bill, Despite Pushback*, Associated Press (Apr. 29, 2021), <https://perma.cc/U9NJ-6ZN4> (last visited Sept. 1, 2021); Nat’l Ass’n of Home Builders, *New Indiana Wetlands Law Allows Builders to Benefit from Federal Water Rule*, NAHB Now (May 14, 2021), <https://perma.cc/YKG5-8W9H>.

²⁰⁸ See, e.g., N.C. Gen. Stat. § 150B-19.3(a); Va. Code §§ 62.1-44.15(3a), (10); Colo. Rev. Stat. § 25-8-504(1); Mont. Code Ann. §§ 75-5-203, 75-6-116.

have no surface connection to larger downstream waters. Ever since Congress began regulating water pollution control, these non-navigable interstate waters have been protected by the federal government. The NWPR's approach was not only an outlier, it was wrong. Interstate waters should receive categorical protection, as they have for decades.

- a. From the Water Pollution Control Act of 1948 on, Congress has stated and affirmed that all interstate waters fall under federal protection.

Decades before it acknowledged that the nation suffered from water quality issues, Congress enacted legislation to preserve the navigability of waters for commerce. The Rivers & Harbors Act of 1899 directed that no "refuse" could be discharged to, or piled on the banks of, the "navigable waters of the United States and their tributaries" without a Corps permit.²⁰⁹ Congress realized that to be effective, the jurisdiction of the Refuse Act had to be extensive.

Once Congress recognized that the water pollution problem in the United States was mounting and had to be addressed, it enacted the Water Pollution Control Act of 1948.²¹⁰ Instead of focusing on navigation, Congress broadened the reach of federal control to include all interstate waters, which it defined as "all rivers, lakes, and other waters that flow across, or form a part of, state boundaries."²¹¹ Unlike its approach in the Refuse Act, Congress made no distinction between navigable and non-navigable interstate waters.

In 1961, Congress amended the Water Pollution Control Act to extend the jurisdiction of the Act to all "interstate or navigable waters" and the tributaries of each.²¹² Through this change, Congress established two independent bases for federal jurisdiction: all navigable waters, as well as all interstate waters that were not navigable.

Then in 1965, Congress further amended the Water Pollution Control Act, adding (among other protections) that if states did not set water quality standards for "interstate waters or portions thereof," the federal government could step in and do so.²¹³ Again, without qualification, all interstate waters fell under federal jurisdiction.

A few years later, in an attempt to forestall the development of the Clean Water Act of 1972, President Nixon and the Corps attempted to resurrect the Refuse Act and create a federal regulatory program that would address the nation's burgeoning water quality problem.²¹⁴ Although the program commenced in July 1971,²¹⁵ it suffered a significant setback later that year when a federal district court held that the Corps lacked authority under the Refuse Act's narrow

²⁰⁹ Ch. 425, § 13, 30 Stat. 1152 (1899).

²¹⁰ See Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948).

²¹¹ Section 10, 62 Stat. 1161.

²¹² See Pub. L. No. 87-88, § 8(a), 75 Stat. 204, 208 (1961); see 33 U.S.C. §§ 466a, 466g(a) (1964).

²¹³ Pub. L. No. 89-234, § 5, 79 Stat. 903, 908, 909 (1965).

²¹⁴ In 1966, the Supreme Court held that the Refuse Act could be used by the Corps to regulate water quality, as well as to limit obstruction of navigation. *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966).

²¹⁵ H.R. Rep. No. 92-911, at 398 (1972).

scope to issue permits on non-navigable waters.²¹⁶ It is telling, however, that in fashioning the Clean Water Act, Congress determined that the jurisdictional reach of the Refuse Act, limited by navigability, was inadequate to keep the nation's waters clean and expanded federal protections to the streams, wetlands, and other waters that affect the chemical, physical, and biological integrity of the nation's waters.

- b. The legislative history, plain language, and regulatory interpretations of the Clean Water Act confirm that the Act's protections extend to both navigable and non-navigable interstate waters.

While the various provisions of the Clean Water Act were being debated, it became readily apparent that Congress did not intend to abandon any waters that it was already protecting under the Water Pollution Control Act and its pre-Clean Water Act amendments. For instance, in an early draft of the statute, the reach of the Clean Water Act was based on the limits of the Rivers & Harbors Act of 1899, that is, the "navigable waters of the United States."²¹⁷ It was not long before the word "navigable" was removed from this provision, clarifying Congress's intent that the Clean Water Act's "waters of the United States" are intended to cover more waters than the Rivers & Harbors Act of 1899's "navigable waters of the United States."

The Clean Water Act's legislative history confirms that the Act was "not merely another law 'touching interstate waters'" but was "viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation."²¹⁸ In the Conference Report, the conferees stated that they "fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."²¹⁹ In enacting the Clean Water Act, Congress thus expanded federal jurisdiction over the nation's waters, including interstate waters.

The Act's plain language also supports this interpretation. As explained, prior to the passage of the Clean Water Act, states were required to establish waters quality standards for all *interstate waters*.²²⁰ If Congress meant to exclude non-navigable interstate waters from Act's protections, it would not have continued to protect them by requiring water quality standards.

The manner in which EPA and the Corps interpreted "waters of the United States" under every administration until the prior one, also demonstrates that the Act was meant to cover interstate waters whether they are navigable or not. In 1973, EPA issued its first rule interpreting

²¹⁶ See *Kalur v. Resor*, 335 F. Supp. 1, 9 (D.D.C. 1971) (holding that while Refuse Act prohibited discharges into non-navigable tributaries, it did not authorize Corps to issue permits for discharges into any waters other than traditional navigable waters).

²¹⁷ Compare S. Rep. No. 92-1236, at 144 (1972) (Conf. Rep.), reprinted in 1972 U.S.C.C.A.N. 3776, 1972 WL 12735, with H.R. Rep. No. 92-911, at 356.

²¹⁸ See *City of Milwaukee*, 451 U.S. at 317; see also *id.* at 318 ("Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation."); see also *Middlesex Cnty. Sewerage Auth.*, 453 U.S. at 22 (noting that existing statutory scheme "was completely revised" by enactment of Clean Water Act).

²¹⁹ See S. Rep. No. 92-1236, 1972 U.S.C.C.A.N. at 3822.

²²⁰ Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,745 (July 7, 1998).

”waters of the United States,” in which the agency defined its jurisdiction under the Act to cover interstate waters and their tributaries, including adjacent wetlands.²²¹ Although the Corps initially attempted to confine the Act’s jurisdiction to the “navigable waters of the United States” and their tributaries, claiming it lacked the resources to regulate anything more, by 1977 it had adopted the same test as EPA.

In the preamble to its 1977 regulations, the Corps accepted as correct EPA’s broader interpretation of the Act’s scope, explaining that “[t]he [e]ffects of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate.”²²² Of course, this observation is true whether an interstate water is navigable or not. Significant discharges of pollutants into any water that is bisected by a state boundary could cause adverse water quality effects to all of the states that the water touches.

Until the prior administration finalized the NWPR, the Agencies had always extended jurisdiction to interstate waters, consistent with the Act. As the Supreme Court has held, long-standing regulatory interpretations—like the Agencies’ historically consistent inclusion of interstate waters as “waters of the United States” and other protections—that have been scrutinized by the public and Congress and have survived statutory amendments should be presumed to be correct.²²³ The Act’s protections extend to interstate waters, and the Agencies should promptly restore protections to these critical waters.

C. Science. “Establishing a sound, consistent, scientifically supported and clear definition of ‘waters of the United States’ . . . is a critical component of implementing the [Clean Water Act].”²²⁴

As the prior administration’s own Science Advisory Board found, the Trump-era Agencies failed to incorporate the best available science, including the Science Report, into the NWPR rulemaking process and provided no “comparable body of peer reviewed evidence” to support the drastic restriction in Clean Water Act protections.²²⁵ “The Board concluded that the [NWPR] does not incorporate best available science and as such we find that a scientific basis for the proposed Rule, and its consistency with the objectives of the Clean Water Act, is lacking.”²²⁶ Specifically, the Board found that the NWPR’s exclusion of “ephemeral streams, and wetlands which connect to navigable waters below the surface . . . lacks a scientific justification, while potentially introducing new risks to human and environmental health.”²²⁷

²²¹ National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528.

²²² Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 37,127.

²²³ *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

²²⁴ EPA Sci. Advisory Bd., Final Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 1 (Feb. 27, 2020) (“SAB Final Commentary”), <https://perma.cc/6J5F-GR6A>.

²²⁵ *Id.* at 2.

²²⁶ *Id.* at 1.

²²⁷ *Id.* at 4.

As documented in EPA’s Science Report and supported by scientific literature including those articles listed in Appendix B to these comments,²²⁸ ample evidence supports a broad definition of “waters of the United States” based on the connectivity of waters within an aquatic ecosystem. This research demonstrates that even small and geographically remote wetlands and streams can play important roles in maintaining the chemical,²²⁹ physical,²³⁰ and biological²³¹ integrity of the nation’s waters. We urge the Agencies to develop a lawful definition of “waters of the United States” that is rooted in the science documented in the Science Report, as supplemented by the literature identified in Appendix B and other recent research.

D. *Environmental justice interests. An unduly restrictive definition of “waters of the United States”—such as the one embodied by the NWPR—disproportionately harms environmental justice communities.*

Executive Order 12898 directs each federal agency “[t]o the greatest extent practicable and permitted by law” to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations”²³² EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”²³³ In his recent Executive Order 14008, President Biden called on his administration to “develop a strategy to address current and historic environmental injustice” and to “strengthen enforcement of environmental violations with disproportionate impact on underserved communities.”²³⁴

As described in Section I.A, above—and as publicly acknowledged by the Agencies²³⁵—the NWPR has harmed waters across the United States. But this harm does not fall equally on all populations. The effects of such a dramatic withdrawal of federal clean water protections are disproportionately felt by low-income communities and communities of color—in many cases, the communities least equipped to handle them. Accordingly, the Agencies must (1) acknowledge the disproportionate harms the NWPR has inflicted on low-income

²²⁸ The majority of these sources were submitted by ShareFile to the EPA Docket Center on September 2, 2021. We have identified each source submitted in Appendix B under the heading “Copies submitted with these comments.”

²²⁹ See, e.g., Richard B. Alexander et al., *Effect of Stream Channel Size on the Delivery of Nitrogen to the Gulf of Mexico*, 403 *Nature* 758 (2000); John M. Marton et al., *Geographically Isolated Wetlands are Important Biogeochemical Reactors on the Landscape*, 65 *BioScience* 408–18 (2015).

²³⁰ See, e.g., Grey Evenson et al., *Geographically Isolated Wetlands and Watershed Hydrology: A Modified Model Analysis*, 529 *J. Hydrol.* 240 (2015); Josefin Thorslund et al., *Solute Evidence for Hydrological Connectivity of Geographically Isolated Wetlands*, 29 *Land Degradation & Dev.* 1 (2018).

²³¹ See, e.g., Judy L. Meyer et al., *The Contribution of Headwater Streams to Biodiversity in River Networks*, 43 *J. Am. Water Res. Assoc.* 86 (2007); Susan A.R. Colvin et al., *Headwater Streams and Wetlands Are Critical for Sustaining Fish, Fisheries, and Ecosystem Services*, 44 *Fisheries* 73–91 (2019).

²³² Presidential Documents, Exec. Order No. 12,898, § 1-101, 59 *Fed. Reg.* 7629, 7629 (Feb. 16, 1994).

²³³ EPA, *Environmental Justice*, <https://perma.cc/L6FK-9W3A>.

²³⁴ Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008, §§ 222(b)(i), 220(d), 86 *Fed. Reg.* 7619, 7630, 7631 (Feb. 1, 2021).

²³⁵ Fox Decl. ¶ 8; Pinkham Decl. ¶ 8.

communities and communities of color; and (2) identify and address the potential impacts of any revised definition of “waters of the United States” on such communities. These considerations weigh both in favor of the prompt restoration of the pre-NWPR clean water protections and a subsequent rulemaking that vigorously protects the nations’ waters and its most vulnerable communities.

It is well-established that the burdens of environmental contamination and industrial pollution fall disproportionately on low-income communities and communities of color.²³⁶ Water pollution is no exception. Environmental justice communities often face the most severe and persistent drinking water contamination²³⁷ and the most limited access to clean water.²³⁸ Low-income populations and people of color are more likely to live in areas with inadequate water infrastructure.²³⁹ According to a recent analysis, counties with higher racial, ethnic, and language vulnerability also have greater rates of violations of laws protecting safe drinking water.²⁴⁰ An earlier EPA report indicated that drinking water systems on Native American reservations had health violations or other significant reporting violations at a far higher rate (61%) than all public systems in the United States (27%).²⁴¹

Further, because low-income communities and many communities of color—ranging from Native American and Alaskan Natives to African Americans, Latinos, and Asian Americans—have some of the highest rates of fish consumption,²⁴² they also disproportionately bear the cost of fish contamination from polluted water. Indeed, for communities that rely on

²³⁶ See, e.g., Robert D. Bullard et al., *Toxic Wastes and Race at Twenty, 1987-2007: A Report Prepared for the United Church of Christ Justice and Witness Ministries* (2007), <https://perma.cc/7JKF-QS9K>; Paul Mohai & Robin Saha, *Which Came First, People or Pollution? A Review of Theory and Evidence from Longitudinal Environmental Justice Studies*, 10 *Envtl. Research Letters* 125011 (2015), <https://perma.cc/S49L-8EG9>; Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 *U. Colo. L. Rev.* 921 (1992).

²³⁷ Gary W. Evans & Elyse Kantrowitz, *Socioeconomic Status and Health: The Potential Role of Environmental Risk Exposure*, 23 *Annual Rev. of Pub. Health* 303–31 (2002).

²³⁸ James VanDerslice, *Drinking Water Infrastructure and Environmental Disparities: Evidence and Methodological Considerations*, 101 *Am. J. Pub. Health* S109-S114, S113 (2011), <https://perma.cc/S79Z-DHHA>.

²³⁹ Sacoby M. Wilson et al., *Built Environment Issues in Unserved and Underserved African-American Neighborhoods in North Carolina*, 1 *Envtl. Justice* 63 (2008), <https://perma.cc/AV7Y-F5D3>. Carolina L. Balazs & Isha Ray, *The Drinking Water Disparities Framework: On the Origins and Persistence of Inequities in Exposure*, 104 *Am. J. Pub. Health* 603–11 (2014), <https://perma.cc/2G6G-9GUW>.

²⁴⁰ Nat. Res. Defense Council et al., R:19-09-A, *Watered Down Justice* 18 (2019), <https://perma.cc/G6KD-NJR2>.

²⁴¹ EPA, *2006: National Public Water System Compliance Report* (2009), <https://perma.cc/HE3L-KS5Q>.

²⁴² Nat’l Envtl. Justice Advisory Council, *Fish Consumption and Environmental Justice 2* (2002), <https://perma.cc/VF2M-UL7B>; Office of Environmental Health Hazard Assessment. Cal. EPA, *Chemicals in Fish: Consumption of Fish and Shellfish in California and the United States* (2001); Jason Corburn, *Combining Community-Based Research and Local Knowledge to Confront Asthma and Subsistence-Fishing Hazards in Greenpoint/Williamsburg, Brooklyn, New York*, 110 *Envtl. Health Perspectives* 241–48 (2002); Laura Hunter et al., *Envtl. Health Coal., Survey of Fishers on Piers in San Diego Bay: Results and Conclusions* (2005), <https://perma.cc/FLG2-DQ7B>; Fraser M. Shilling, *Fishing for Justice or Just Fishing?*, 36 *Ecology Law Currents* 205–11 (2009), <https://perma.cc/3563-NBHZ>; Linda Silka, *The Southeast Asian Environmental Justice Partnership: Citizens Revive a New England Mill Town River*, *New Village Journal*, <https://perma.cc/DT2Y-ABCY> (last visited Aug. 31, 2021); Rebecca L. Williams et al., *An Examination of Fish Consumption by Indiana Recreational Anglers: An On-Site Survey*, Technical Report 99-D-HDFW-2 (June 30, 2000), <https://perma.cc/D5FA-P7WU>; AMAP Working Group, *AMAP Assessment 2009: Human Health in the Arctic* (2009), <https://perma.cc/43S9-7KFD>.

subsistence fishing for their way of life, increased pollution and the loss of fish habitat threaten a food source and a means of family bonding.²⁴³

So, too, are the impacts of climate change—including sea level rise, flooding, and drought—more likely to adversely affect environmental justice communities. Many such communities experience climate-change impacts most acutely because they are the least able to mitigate and adapt to climate-related changes.²⁴⁴ For communities that rely on fish and other aquatic life for income, changing water temperatures and flows can drastically affect their livelihoods.²⁴⁵ Environmental justice communities tend to be particularly vulnerable to increased flooding; they are both more likely to live in flood-prone areas (because the land was historically cheaper to build on) and less able to recover from the damage flooding causes.²⁴⁶ And as discussed in Section E, below, preserving wetlands is critical to protecting against flooding and other impacts of climate change.²⁴⁷

Because water pollution and climate-change impacts disproportionately affect environmental justice communities, the implementation of a rule that removes safeguards against these effects—namely, the NWPR—places a particularly heavy burden on the health and safety of such communities. This burden is not merely theoretical. The Agencies attest that after “nearly a full year of implementation” of the NWPR, they have identified “an increase in determinations by the Corps that waters are non-jurisdictional and an increase in projects for which [Clean Water Act] Section 404 permits are no longer required.”²⁴⁸ According to the Agencies, “[p]rojects . . . proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the [Act] are not authorized” will “result in discharges without any regulation or mitigation from federal, state, or tribal agencies.”²⁴⁹ For example, as the Agencies have acknowledged, tribes in arid areas such as New Mexico have estimated that the NWPR removed more than 80% of stream miles within their jurisdictions from Clean Water Act protections, amounting to more than 1,400 miles of streams.²⁵⁰ Because these tribes lack the authority and resources to independently regulate surface waters within and upstream of their reservations, they cannot protect their scarce waters from upstream dischargers

²⁴³ Ralph B. Brown & John F. Toth Jr., *Natural Resource Access and Interracial Associations: Black and White Subsistence Fishing in the Mississippi Delta*, 17 *S. Rural Sociology* 81, 104 (2001), <https://perma.cc/EJ5Z-JXPP>; Colvin et al., *supra* note 231, at 85.

²⁴⁴ Rachel Morello-Frosch et al., *The Climate Gap: Inequalities in How Climate Change Hurts Americans & How to Close the Gap* (2009), <https://perma.cc/9Z25-6UTR>; Susan Cutter, *The Geography of Social Vulnerability: Race, Class and Catastrophe*, *Understanding Katrina: Perspectives from the Social Sciences* 120–22 (2006), <https://perma.cc/H9BU-DCZS>.

²⁴⁵ Food and Agriculture Organization of the United Nations, *Climate Change Adaptation and Mitigation in the Food and Agriculture Sector* (2008), <https://perma.cc/P9DF-5Q9C>.

²⁴⁶ Dalbyul Lee & Juchul Jung, *The Growth of Low-Income Population in Floodplains: A Case Study in Austin, TX*, 18 *KSCE J. of Civ. Eng’g* 684 (2014); Jonathan M. Katz, *Who Suffers When Disasters Strike? The Poorest and Most Vulnerable*, *Wash. Post* (Sept. 1, 2017), <https://perma.cc/UGA9-CWH5>.

²⁴⁷ Even when they crafted the NWPR, the Agencies admitted that increased flood risk would result from the loss of wetlands protection under the rule. *See* RPA at 98; EA at 133.

²⁴⁸ Fox Decl. ¶ 15; Pinkham Decl. ¶ 15.

²⁴⁹ Fox Decl. ¶ 18; Pinkham Decl. ¶ 18.

²⁵⁰ Fox Decl. ¶ 19; Pinkham Decl. ¶ 19.

such as uranium and coal mines.²⁵¹ And the impacts to the many ephemeral streams, wetlands, and other aquatic resources that the NWPR excluded from Clean Water Act protection had the potential to cause “cascading and cumulative downstream effects,” including “effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity.”²⁵²

Of particular concern, many of the Corps’ “no jurisdiction” determinations—and the “significant, actual environmental harms” that follow²⁵³—took place in low-income communities or communities of color. Highlighted below are just nine of the hundreds of projects for which the Corps issued an approved jurisdictional determination finding waters not jurisdictional under the restrictive standards of the NWPR. We have used EPA’s pre-decisional screening tool, EJSCREEN, to identify potential environmental justice concerns associated with each approved jurisdictional determination.

- *Riverport Development, Hardeeville, S.C.* In October 2020, the Corps excluded from Clean Water Act jurisdiction over 225 acres of wetlands on the outskirts of Hardeeville, South Carolina, that it found to be non-adjacent.²⁵⁴ The wetlands could thus be destroyed without Clean Water Act protections to create the Riverport Development, a 6,000-acre mixed-use development bordering the Savannah National Wildlife Refuge.²⁵⁵ Seventy-one percent of the population in the immediate vicinity are people of color and 32% are low-income²⁵⁶; within Hardeeville, which the project surrounds, 88% of the population are people of color and 76% are low-income. Portions of the proposed project site already have a Wastewater Discharge Indicator in the 67th percentile, indicating the area’s population is already burdened with industrial water pollution.²⁵⁷
- *Weyerhauser Site, Winnsboro, S.C.* In January 2021, the Corps issued an approved jurisdictional determination to Weyerhauser, finding over 3,000 linear feet of ephemeral streams near Winnsboro in Fairfield County, South Carolina, to be non-jurisdictional.²⁵⁸ Weyerhauser is attempting to sell the property for redevelopment.²⁵⁹ The immediate area is 60% people of color and 41% low-income, while Winnsboro as a whole is nearly 70% African American, with almost 40% of the population living below the poverty line.²⁶⁰

²⁵¹ Fox Decl. ¶ 19; Pinkham Decl. ¶ 19.

²⁵² Fox Decl. ¶ 20; Pinkham Decl. ¶ 20.

²⁵³ Fox Decl. ¶ 17; Pinkham Decl. ¶ 17.

²⁵⁴ Approved Jurisdictional Determination, SAC-2010-00064 (Oct. 5, 2020), <https://perma.cc/C5HJ-EFX4>.

²⁵⁵ *Riverport Development Along the Savannah River*, Coastal Conservation League, <https://perma.cc/9Z8X-F6N7> (last visited Aug. 17, 2021).

²⁵⁶ For the purposes of EJSCREEN, EPA defines “low-income” as having a household income less than or equal to twice the federal poverty level. EPA, *Overview of Demographic Indicators in EJSCREEN*, <https://perma.cc/CJM9-D5QD> (last visited Aug. 31, 2021).

²⁵⁷ EJSCREEN’s Wastewater Discharge Indicator reflects a given location’s proximity to streams and the toxicity-weighted pollutant load in those streams, offering a measure of the level of water pollution already burdening a community. EPA, *Frequent Questions About EJSCREEN*, <https://perma.cc/98YD-DNMK> (last visited Aug. 31, 2021).

²⁵⁸ Approved Jurisdictional Determination, SAC-2020-01254 (Jan. 7, 2021), <https://perma.cc/Y99R-F358>.

²⁵⁹ Weyerhauser Site, South Carolina I-77 Alliance (<https://perma.cc/2BEE-BQNZ>).

²⁶⁰ U.S. Census Bureau, ACS Demographic and Housing Estimates for Winnsboro town, SC, <https://data.census.gov/cedsci/table?q=Winnsboro%20town,%20South%20Carolina&tid=ACSDP5Y2019.DP05>

Fairfield County has already experienced issues with water pollution, including high levels of radioactivity and *E. coli*.²⁶¹

- *Burke Business Park, Waynesboro, GA.* Just outside of Waynesboro, Georgia, the Corps in September 2020 excluded from Clean Water Act coverage 13 separate wetlands totaling over 30 acres in an approved jurisdictional determination for the development of a nearly 500-acre industrial park.²⁶² The site includes portions of the watersheds for both the Ogeechee River and Savannah River—two of the largest rivers in Georgia.²⁶³ Sixty-seven percent of the population in the project area are people of color; 48% are low-income. The project area already has a Wastewater Discharge Indicator in the 70th percentile.
- *Berry Hill Resort and Commerce Centre, Berry Hill, VA.* In April 2021, the Corps excluded 29,331 linear feet (or over 5.5 miles) of ephemeral streams from Clean Water Act jurisdiction in issuing an approved jurisdictional determination for a proposed industrial park in Pittsylvania County, Virginia.²⁶⁴ In the area surrounding the proposed development, 27% of the population are people of color and 52% are low-income. The site’s Wastewater Discharge Indicator in the 75th percentile; a mile away is the Dan River, the site of a massive 2014 coal ash spill that released several harmful pollutants into the river.²⁶⁵ Less than 10 miles away is the city of Danville, Virginia, whose population is 49% African American.²⁶⁶
- *Cocoa Apartment Complex, Cocoa, FL.* In issuing an approved jurisdictional determination for a 268-unit apartment complex in July 2020,²⁶⁷ the Corps determined that 54.37 acres of wetlands were not protected by the Clean Water Act under the NWPR’s restrictive definition of “adjacent wetlands.”²⁶⁸ In contrast to Cocoa as a whole, where less than half the population is people of color,²⁶⁹ the area where the proposed development would occur—and where over 50 acres of flood-preventing wetlands are

(last visited Aug. 31, 2021); U.S. Census Bureau, Poverty Status in the Past 12 Months for Winnsboro town, SC, <https://data.census.gov/cedsci/table?q=Winnsboro%20town,%20South%20Carolina&tid=ACSST5Y2019.S1701> (last visited Aug. 31, 2021).

²⁶¹ Sammy Fretwell, *SC Regulators Question Utility After Radioactivity Found in Drinking Water Near Columbia*, Greenville News (Jul. 30, 2019), <https://perma.cc/GA3A-K87H>; Tanita Gaither, *SCE&G Fined for Water Pollution at V.C. Summer Plant*, WIS Channel 10 (Oct. 19, 2017), <https://www.wistv.com/story/36635653/sceg-fined-for-water-pollution-at-vc-summer-plant/>.

²⁶² Approved Jurisdictional Determination, SAS-2013-00539 (Sept. 3, 2020), <https://perma.cc/JJ38-24LT>; Raymond Property/Burke Business Park, Development Authority Burke County, <https://perma.cc/QRW5-LUC7> (last visited Aug. 18, 2021).

²⁶³ Georgia Rivers, Georgia River Alliance, <https://perma.cc/9MHD-BRKK> (last visited Aug. 18, 2021).

²⁶⁴ Approved Jurisdictional Determination, NAO-2010-00424-VDP (Apr. 5, 2021), <https://perma.cc/V9S9-HVY9>.

²⁶⁵ Case Summary: Duke Energy Agrees to \$3 Million Cleanup for Coal Ash Release in the Dan River, EPA, <https://perma.cc/NDC9-969N>.

²⁶⁶ U.S. Census Bureau, *Danville city, Virginia*, <https://data.census.gov/cedsci/profile?g=1600000US5121344> (last visited Aug. 31, 2021).

²⁶⁷ Jack Witthaus, *New \$50.9M Residential Project Proposed*, Orlando Bus. J. (Feb. 24, 2020), <https://perma.cc/DDA7-6G9U>.

²⁶⁸ Approved Jurisdictional Determination, SAJ-2020-00352 (July 14, 2020), <https://perma.cc/Q6BD-QVXR>.

²⁶⁹ Cocoa City, Florida QuickFacts, U.S. Census Bureau, <https://perma.cc/N37K-FBP2> (last visited Aug. 17, 2021).

left open to destruction—has population that is predominantly people of color (91%) and low-income (68%).²⁷⁰ In 2020, the Florida Department of Environmental Protection found that Cocoa’s surface drinking water sources were “considered to be at high risk because of the many potential sources of contamination present in the assessment area.”²⁷¹

- *Former Hollybrook Plantation, East Carroll Parish, LA.* In March 2021, the Corps issued an approved jurisdictional determination for the former Hollybrook Plantation in East Carroll Parish, Louisiana, that found over 157 wetland acres of “prior converted cropland” to be outside the scope of the Clean Water Act—without ever visiting the site.”²⁷² Over 70% of the population in the area immediately surrounding the project are people of color and 51% are low-income. Less than five miles away is Lake Providence, Louisiana, in which 98% are people of color and 95% are low-income. Surface water quality in East Carroll Parish is already degraded due to agricultural, municipal, and industrial activities in the Mississippi River basin upstream.²⁷³ According to East Carroll Parish’s 2016 Hazard Mitigation Plan Update, “East Carroll Parish has experienced significant flooding in its history and can expect more in the future.”²⁷⁴
- *Road Rerouting Project, Red River Parish, LA.* In a September 2020 approved jurisdictional determination, the Corps excluded from jurisdiction over 20 acres of wetlands, nearly 7,500 linear feet of ephemeral streams, and over 13 acres of lakes in connection with the rerouting of roads that approach a sand mine.²⁷⁵ Fifty-nine percent of the area’s population are people of color, while 77% are low-income. The project location is just two miles from the Red River and eight miles upstream of Coushatta, the parish seat and once the site of extreme racial violence during Reconstruction.²⁷⁶ The area already has a Wastewater Discharge Indicator in the 74th percentile.
- *White Mesa Mine, Zia Pueblo, N.M.* In January 2021, the Corps issued an approved jurisdictional determination to the American Gypsum Company for an expansion of its White Mesa open-pit gypsum mine.²⁷⁷ Applying the NWPR, the Corps excluded nearly 5,000 linear feet of ephemeral streams from jurisdiction just outside the Zia Pueblo,²⁷⁸ a reservation in central New Mexico whose population is entirely people of color and 65% low-income.²⁷⁹ The newly excluded streams included the headwaters of the Arroyo

²⁷⁰ Overview of Demographic Indicators in EJSCREEN, <https://perma.cc/2E8C-6VXC>.

²⁷¹ City of Cocoa, *2020 Annual Water Quality Report*, <https://perma.cc/K9K7-99FH>.

²⁷² Approved Jurisdictional Determination, MVK-2017-00854-JLD (Mar. 18, 2021), <https://perma.cc/38AB-TSZL>.

²⁷³ Water Resources of East Carroll Parish, Louisiana, U.S. Geological Survey (June 2019), <https://perma.cc/6RHU-RTSC>.

²⁷⁴ East Carroll Parish Hazard Mitigation Plan Update, Stephenson Disaster Management Institute at 2-28 (Oct. 27, 2016), <https://perma.cc/4MJU-TFWP>.

²⁷⁵ Approved Jurisdictional Determination, MVK-2019-00187 (Sept. 18, 2020), <https://perma.cc/3E2S-SSKH>.

²⁷⁶ White League Massacre at Coushatta, Facing History, <https://perma.cc/WX4K-TBDQ> (last visited Aug. 19, 2021).

²⁷⁷ Approved Jurisdictional Determination, SPA2016-139 (Jan. 22, 2021), <https://perma.cc/P4A7-ZREU>.

²⁷⁸ *Id.*

²⁷⁹ In the project area itself, 78% of the population are people of color and 67% are low-income.

Piedra Parada, a tributary to the Jemez River.²⁸⁰ The project site’s Wastewater Discharge Indicator is in the 55th percentile, while Zia Pueblo is in the 83rd percentile, indicating the surrounding tribal communities are already burdened with industrial water pollution.

- *NM 54 Drainage Project, Zuni Reservation, N.M.* In March 2021, the Corps issued an approved jurisdictional determination on the Zuni Reservation in western New Mexico that excluded 4,000 linear feet of ephemeral streams from Clean Water Act jurisdiction.²⁸¹ Approximately one mile from the project area, those streams flow into the Black Rock Reservoir, which was created in 1908 to store water for the reservation.²⁸² The reservoir was once an important recreational resource for the reservation before sedimentation greatly diminished its capacity.²⁸³ In the project area, located a mile from Black Rock, New Mexico, and five miles from Zuni Pueblo, New Mexico (the largest town on the Zuni Reservation), 95% of the population are people of color and 79% are low-income. EPA has also identified multiple brownfield (contaminated former industrial) sites near the project site in need of redevelopment.²⁸⁴

While this list of approved jurisdictional determinations under the NWPR is far from exhaustive, it illustrates the significant adverse effects that implementation of an unduly restrictive definition of “waters of the United States” has on environmental justice communities—and underscores the importance of restoring longstanding clean water protections.

E. *Climate implications. Climate change must be factored into any new definition of “waters of the United States.”*

President Biden has announced that his administration “will take swift action to tackle the climate change emergency.”²⁸⁵ EPA, for its part, has announced several initiatives to support environmental justice and climate action.²⁸⁶ If this administration is serious about these commitments and to “build[ing] resiliency and develop[ing] tools to respond to climate change,”²⁸⁷ the Agencies must factor our changing climate into a rulemaking to define “waters of the United States.”

EPA has correctly acknowledged that

[c]limate change is changing our assumptions about water resources. As climate change warms the atmosphere, altering the hydrologic cycle, changes to the

²⁸⁰ Approved Jurisdictional Determination, SPA2016-139 (Jan. 22, 2021), <https://perma.cc/2GFF-U2N3>.

²⁸¹ Approved Jurisdictional Determination, SPA-2020-00286-ABQ (Mar. 19, 2021), <https://perma.cc/9PN7-2ZHU>.

²⁸² Historic American Engineering Record, U.S. Indian Irrigation Service, Zuni Dam, Across Zuni River, Black Rock, McKinley County, NM, Library of Congress (1968), <https://perma.cc/8GY5-BQQH>.

²⁸³ William A. Dodge, *Black Rock: A Zuni Cultural Landscape and the Meaning of Place* 181–82 (2010).

²⁸⁴ Equitable Redevelopment of Petroleum Brownfields for Zuni Pueblo and Other Tribal Communities, EPA (May 2013), <https://perma.cc/MM9T-U4TA>.

²⁸⁵ The White House, *The Biden-Harris Administration Immediate Priorities*, <https://perma.cc/48B8-NCTS>.

²⁸⁶ EPA, *EPA Administrator Regan Announces New Initiatives to Support Environmental Justice and Climate Action* (Apr. 23, 2021), <https://perma.cc/CPY8-BLUE>.

²⁸⁷ EPA, *Addressing Climate Change in the Water Sector*, <https://perma.cc/CYA9-SXXU>.

amount, timing, form, and intensity of precipitation will continue. Other expected changes include the flow of water in watersheds, as well as the quality of aquatic and marine environments. These impacts are likely to affect the programs designed to protect water quality, public health, and safety.²⁸⁸

Studies have shown that climate change has affected and will affect the quality and surface flow of our nation's waters.²⁸⁹ "Rising air and water temperatures and changes in precipitation are intensifying droughts, increasing heavy downpours, reducing snowpack, and causing declines in surface water quality, with varying impacts across regions."²⁹⁰ More frequent high-intensity rainfall events mobilize pollutants such as sediments and nutrients.²⁹¹ Future warming will add to the stress on water supplies and adversely impact the availability of water in parts of the United States, especially the already water-strapped West.²⁹²

Climate change is already changing the timing of water supplies in many parts of the country, especially those that rely on snow melt for late-spring, summer, and early-fall flows. Increasing temperatures will both reduce the amount of snowpack and cause it to melt faster, more extensively, and earlier.²⁹³ As a result, flows will be reduced, concentrating pollutants and degrading water quality. These "[i]ncreases in water temperature and changes in seasonal patterns of runoff will [also] very likely disturb fish habitat and affect recreational uses of lakes, streams, and wetlands."²⁹⁴

In the southwestern United States, drought and wildfire caused by climate change are adversely impacting clean water, wildlife habitat, and jobs. For example, with a warming climate, more of New Mexico's waters are drying up. As waters become stressed by drought, overuse, and climate change, many perennial and intermittent streams and springs are fading. Many critical rivers and tributaries in the state are not entirely perennial (e.g., the Rio Grande, Canadian River, Rio Puerco, Rio Galisteo, Dry Cimarron, Ute Creek, Rio Hondo), and many are fed by ephemeral streams. With warming temperatures, these waters will likely diminish and the region's need for scarce clean water will strain river systems even further.²⁹⁵

²⁸⁸ *Id.*

²⁸⁹ SAB Members Comment Letter at 7; Colvin et al., *supra* note 231, at 76.

²⁹⁰ U.S. Global Change Research Program, Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States 27 (2018) ("2018 National Climate Assessment"), <https://perma.cc/6D65-U5L9>.

²⁹¹ *Id.* at 152.

²⁹² See U.S. Global Change, National Assessment Synthesis Team, Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change, Overview 11, 98 (2000) ("Climate Change Impacts Overview"), <https://perma.cc/CS7Q-Q9XC> ("Reduced summer runoff, increased winter runoff, and increased demands are likely to compound current stresses on water supplies and flood management, especially in the western US.").

²⁹³ *Id.* at 96.

²⁹⁴ *Id.* at 11.

²⁹⁵ Letter of James Kenney, N.M. Env't Dep't, Comments on Proposed Navigable Waters Protection Rule 5 (Apr. 15, 2019).

Changing rainfall patterns and increased storms in many parts of the country are also producing increased flooding.²⁹⁶ A single acre of wetlands can store up to one million gallons of water, but when that acre of wetland is removed, those one million gallons flow unimpeded downstream, increasing the risk of flooding.²⁹⁷ It is therefore critically important that wetlands remain protected.

During Hurricane Sandy in 2012, wetlands prevented \$625 million in flood damage by shielding property in 12 states.²⁹⁸ Since that time, incidents of flooding have only increased. NOAA officials have referred to the current flood season as “potentially unprecedented.”²⁹⁹ Floods have already caused billions of dollars in damages throughout the Midwest and multiple deaths.³⁰⁰ 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.³⁰¹ The Midwest’s flooding has only risen in recent years, in both frequency and severity.³⁰²

In just the last five years, North Carolina and other southern states have been hit with several devastating 500-year storms, including Hurricane Matthew, Hurricane Florence, and Tropical Storm Michael. It has been estimated that the damage from Hurricane Florence reached nearly \$17 billion and from Hurricane Matthew \$4.8 billion, with most of the damage caused by floodwaters.³⁰³ Without the storage capacity of the region’s remaining wetlands, the damage would have been even more catastrophic.³⁰⁴ These types of “back-to-back hurricanes” are “projected to increase in frequency, power, and duration,” making the preservation of wetlands more important than ever.³⁰⁵

²⁹⁶ See Climate Change Impacts Overview at 96 (“Precipitation is very likely to continue to increase on average, especially in middle and high latitudes, with much of the increase coming in the form of heavy downpours. Changes in the amount, timing, and distribution of rain, snowfall, and runoff are very probable, leading to changes in water availability as well as in competition for water resources. Changes are also likely in the timing, intensity, and duration of both floods and droughts, with related changes in water quality.”).

²⁹⁷ EPA, EPA843-F-06-001, Wetlands: Protecting Life and Property from Flooding (May 2006); see also N.C. Dept. of Env’t Qual., Div. of Coastal Mgmt., NC-CREWS: NC Coastal Region Evaluation of Wetland Significance 45–50 (May 1999), <https://perma.cc/F7BC-K2VJ> (describing multiple factors that determine how much a given wetland can contribute to flood reduction).

²⁹⁸ Siddharth Narayan, et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, 7 Sci. Reports 9463 (2017), <https://perma.cc/UGJ5-RCP5>.

²⁹⁹ NOAA, Spring Outlook: Historic, widespread flooding to continue through May (Mar. 21, 2019), <https://perma.cc/6D3U-UEYT>.

³⁰⁰ John Schwartz, *25 States Are at Risk of Serious Flooding This Spring, U.S. Forecast Says*, N.Y. TIMES, Mar. 21, 2019, <https://perma.cc/RT4A-R9QG>; Mark Berman & Reis Thebault, *Two Dead, Two Missing Amid ‘Historic’ Flooding Across the Midwest*, Wash. Post (Mar. 18, 2019), <https://perma.cc/XX6W-X9E4>.

³⁰¹ EPA, EPA843-F-06-001, Wetlands: Protecting Life and Property from Flooding (May 2006).

³⁰² Gary Galluzo, *Study Finds Midwest Flooding More Frequent*, Iowa Now, Feb. 9, 2015, <https://perma.cc/S49K-VTX9>.

³⁰³ Comments of N.C. Dep’t of Env’tl. Quality & Office of N.C. Attorney Gen. on Proposed Revised Waters of the United States (“WOTUS”) Rule at 3–4 (Apr. 15, 2019), <https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-4362>.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 4.

In addition to guarding against flooding, wetlands filter upstream pollution and prevent pollution from entering our sensitive estuaries and marine environments. With a warming climate and pollution mobilized through increases in precipitation, wetlands play a critical role in removing sediment and excess nutrients—pollutants that have the potential to decimate valuable commercial and recreational fisheries. Millions of people in the Southeast and across the country get their drinking water from surface waters kept clean by wetlands. Wetlands also recharge groundwater supplies, which is important for the millions more who rely on wells as their source of drinking water. As the climate warms, the nation’s wetlands are becoming ever more critical for the health of our waters and safety of our communities.

Small, including ephemeral, streams are also becoming more essential with climate change. Small streams transform and store carbon before it can be transported downstream.³⁰⁶ They break down leaf litter and other organic matter, which ephemeral streams release downstream in pulses during storm events.³⁰⁷ These pulses provide an important source of carbon for downstream animals.³⁰⁸ Ephemeral streams—even more than perennial streams—play a critical role in carbon sequestration, a process in which carbon is stored in sediment or taken up by organisms rather than being released into the atmosphere where it contributes to climate change.³⁰⁹ These streams should not be categorically excluded; they should be protected under the Act where they significantly affect downstream waters.

More frequent and intense extreme weather and climate-related events are expected to continue to damage infrastructure, ecosystems, and social systems that provide essential benefits to communities. Future climate change is expected to further disrupt many areas of life, exacerbating existing challenges to stressed ecosystems and economic inequality. Impacts within and across regions will not be distributed equally. People who are already vulnerable, including low-income populations and communities of color, have lower capacity to prepare for and cope with extreme weather and climate-related events and are expected to experience greater impacts.³¹⁰ To fulfill the Biden administration’s commitment to protecting vulnerable communities and tackling climate change, the Agencies must address climate change in defining “waters of the United States” and extend broad protections to wetlands and streams that assist in combating the effects of a warming climate.

F. *The scope of jurisdictional tributaries. In defining jurisdictional tributaries, the Agencies must analyze the functional importance of streams on the chemical, physical, and biological integrity of downstream waters.*

Justice Kennedy rooted his *Rapanos* opinion in the common-sense notion that stopping pollution from getting into a river requires stopping the pollution from getting into connected upstream waters. He realized that waters are connected and that the integrity of the upstream

³⁰⁶ Elizabeth Guinessey et al., A Literature Review: The Chemical, Physical and Biological Significance of Geographically Isolated Wetlands and Non-Perennial Streams in the Southeast 30–31 (Apr. 12, 2019)

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ 2018 National Climate Assessment at 25.

aquatic ecosystem must be maintained if the downstream aquatic ecosystems are to survive.³¹¹ Referring back to *SWANCC*, Justice Kennedy would require the Agencies to show a physical, biological, and chemical linkage—a “significant nexus”—between a water body and an actually navigable one in order for it to be protected under the Clean Water Act.³¹²

Determining whether tributaries have a requisite “significant nexus” must, in light of “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems,”³¹³ employ the functional analysis that the Supreme Court has affirmed over decades and multiple decisions.³¹⁴ A significant nexus analysis should assess the flow characteristics and functions of (i) the water at issue (wetland, stream, lake, etc.), (ii) any waters adjacent to the water at issue, and (iii) any other waters within the watershed that possess the same or similar flow characteristics and functions, to determine whether the waters, taken together, significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters. Anything short of that would flout the Act’s water-quality objective.

Justice Kennedy held that wetlands and waters “come within the statutory phrase ‘navigable waters’” 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 more readily understood as ‘navigable.’”³¹⁵ Justice Kennedy was clear that the scope of “similarly situated” is *the region*.³¹⁶ That is, in applying Justice Kennedy’s standard, the Agencies should aggregate the downstream effects of similarly situated streams, at minimum, across the *relevant region (i.e., watershed)*³¹⁷ in determining whether the requisite nexus is categorically present. After making that determination, the Agencies may regulate categories of waters without site-specific inquiry where “it is reasonable . . . to conclude that in the majority of cases, [such waters] have significant effects on water quality and the aquatic ecosystem.”³¹⁸

Informed by science, the Agencies in the Clean Water Rule identified a category of tributaries that were “waters of the United States” based on those waters having sufficient flow volume, duration, and frequency to form two physical indicators of flow—a bed and banks and another indicator of ordinary high water mark. The science demonstrates how valuable these

³¹¹ See *Rapanos*, 547 U.S. at 780–81 (Kennedy, J., concurring in the judgment).

³¹² *Id.* at 759 (Kennedy, J., concurring in the judgment) (citing *SWANCC*, 531 U.S. at 167, 172).

³¹³ *Riverside Bayview*, 474 U.S. at 133.

³¹⁴ See *id.* at 134–35 n.9 (finding valid jurisdiction over wetlands with “significant effects on water quality and the aquatic ecosystem”); *SWANCC*, 531 U.S. at 167 (“It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.”); *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (similar).

³¹⁵ *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

³¹⁶ *Id.*

³¹⁷ The *Rapanos* Guidance restricts the scope of the term “region” to the segment of a stream on which the wetland at issue is located, as opposed to the relevant watershed. The guidance achieves this result by defining “tributary” as “the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).” *Rapanos* Guidance at 6 n.24. The Clean Water Rule, in contrast, contained a definition for “region” that was true to Justice Kennedy’s concurrence, namely, “the watershed which drains to the nearest traditional navigable water, interstate water or territorial sea” Clean Water Rule, 80 Fed. Reg. at 37091

³¹⁸ *Riverside Bayview*, 474 U.S. at 135 n.9.

waters are to the chemical, physical, and biological integrity of downstream traditional navigable waters, and they should be protected as “tributaries” under the Act.

For example, intermittent and ephemeral streams and headwaters (“small streams”) make up a majority of the stream miles in the United States,³¹⁹ and they impact the chemical, physical, and biological integrity of downstream waters. Intermittent and ephemeral streams alone comprise 79% of river length in the coterminous United States, and they directly drain over 70% of its land area, underscoring the need for their protection.³²⁰ In arid and semi-arid states, including Arizona, New Mexico, Nevada, Utah, Colorado, and California, over 81% of stream miles have been classified as ephemeral or intermittent.³²¹ Even in some non-arid states, intermittent streams are predominant; in Alabama, 80% of stream miles on national-forest lands are classified as intermittent.³²² The importance of these small streams to the nation’s clean and safe drinking water is indisputable. Not only do these waters sustain fisheries and important ecosystem functions,³²³ they are the source of drinking water for 217 million Americans.³²⁴

Perennial, intermittent, and ephemeral headwater streams, whether considered individually or cumulatively, impact downstream flooding, base flows, water quality, and the food chain.³²⁵ The processes occurring upstream within these waters affect the entire river network’s chemical, physical, and biological structure and function.³²⁶ For the health of larger downstream rivers, estuaries, and oceans, headwater streams cannot be ignored.

Small streams, *regardless of flow permanence or volume*, control the transport of pollution, nutrients, and carbon to downstream waters. Through filtration, sequestration, storage, and accumulation of toxins by microorganisms, algae, plants, and animals,³²⁷ they prevent pollution and excess nutrients from entering downstream community water supplies, rivers,

³¹⁹ See, e.g., Colvin et al., *supra* note 231, at 74, 77, 86.

³²⁰ *Id.* at 74.

³²¹ EPA, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest, U.S. EPA and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046 (2008); David C. Goodrich et al., *Southwestern Intermittent and Ephemeral Stream Connectivity*, 54 J. Am. Water Res. Ass’n 401 (2018).

³²² Judy 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,” at 2 (Docket ID No. OW-2002-0050) (Apr. 10, 2003) (“AQ Scientists Comments”).

³²³ Colvin et al., *supra* note 231, at 74.

³²⁴ SELC Calculations from EPA Safe Drinking Water Information System (SDWIS) (2020), <https://perma.cc/B4ML-8X42>, and U.S. Census Bureau (USCB) Population and Housing State Data (2020), <https://perma.cc/ENC6-UPE4>; see also EPA, Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S., <https://perma.cc/MVM2-DWEV> (117 million).

³²⁵ See generally AQ Scientists Comments; Goodrich et al., *supra* note 321, at 402; Alexander et al., *supra* note 229, at 291; Ken M. Fritz et al., *Physical and Chemical Connectivity of Streams and Riparian Wetlands to Downstream Waters: A Synthesis*, 54 J. Am. Water Res. Ass’n 323 (2018).

³²⁶ See generally AQ Scientists Comments; Goodrich et al., *supra* note 321, at 402; Alexander et al., *supra* note 229, at 291.

³²⁷ See generally Thibault Datry et al., *Flow intermittence and ecosystem services in rivers of the Anthropocene*, J. Applied Ecology (2017).

lakes, and eventually estuaries.³²⁸ Dryer phases in intermittent and ephemeral streams allow precipitation and runoff to pass through soil and bed material, providing further opportunities for filtering pollution before it enters groundwater and downstream waterways.³²⁹ This overall reduction in pollutants decreases the cost of water treatment, the degradation of downstream water quality, and the risks to human health and aquatic life while improving recreational opportunities such as fishing. Where small headwater streams are polluted, the impacts can be felt throughout a watershed, including in downstream perennial streams and rivers.³³⁰

Small streams process nitrogen, which is important because it decreases the loading of nitrogen to larger downstream waters.³³¹ Excess nitrogen exported downstream causes increased harmful algal growth, decreased light penetration, and reduced oxygen levels, which can lead to toxic water, fish kills, and economic damage.³³²

Small streams also transform and store carbon before it can be transported downstream.³³³ They break down leaf litter and other organic matter, which ephemeral streams release downstream in pulses during storm events.³³⁴ These pulses provide an important source of carbon for downstream animals.³³⁵ Ephemeral streams—even more so than perennial—play a critical role in carbon sequestration, a process in which carbon is stored in sediment or taken up by organisms rather than being released into the atmosphere where it contributes to climate change.³³⁶

Small streams are also physically connected to downstream waters. They retain and transfer sediment, organic matter, nutrients, contaminants, and heat energy to downstream waters.³³⁷ They are closely connected with wetlands and groundwater flows, and are important in regulating the flow of water into downstream water bodies. An estimated 55% of the annual water volume in large rivers originates in small (first-order) streams, the majority of which only flow intermittently.³³⁸ They also play an important role in replenishing groundwater in the arid West, which people heavily depend on for irrigation and drinking water.³³⁹

Water temperature in small streams positively influences downstream waters and the species that depend on them.³⁴⁰ For example, confluences with spring-fed streams were identified as the coldest patches along a northeastern Oregon river that otherwise had summer water temperatures too hot for native salmonids to survive.³⁴¹

³²⁸ Literature Review at 30-33; AQ Scientists Comments at 4; Fritz, *supra* note 325, at 9.

³²⁹ *Id.* at 30.

³³⁰ *Id.* at 33.

³³¹ *Id.* at 31; Colvin et al., *supra* note 231, at 78; Meyer et al., *supra* note 231, at 99.

³³² Literature Review at 31; Colvin et al., *supra* note 231, at 76; Meyer et al., *supra* note 231, at 88.

³³³ Literature Review at 30-31.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *See, e.g.*, Fritz et al., *supra* note 325, at 329-30.

³³⁸ Literature Review at 32; Fritz et al., *supra* note 325, at 327.

³³⁹ EA at 195.

³⁴⁰ *See, e.g.*, Fritz et al., *supra* note 325, at 329.

³⁴¹ *Id.*

Small streams provide vital habitat and protection for insects, fish, mussels, and plants. Most aquatic species spend at least some portion of their lifecycle in perennial, intermittent, or ephemeral streams. “Ephemeral headwater streams can support levels of aquatic invertebrate diversity and abundance comparable to, or greater than, those estimated for perennial headwaters, as well as plants and animals found nowhere else in the watershed.”³⁴²

Each of these functions serves to protect and enhance the integrity of the nation’s waters, as well as the health and wellbeing of all who depend on clean water. The Agencies must assess and supplement these factors consistent with the latest science and the Science Report, which confirmed not only that relatively permanent waters significantly affect navigable waters, but that ephemeral waters are integral to downstream water quality.³⁴³ The Science Report also detailed the “strong influence” of ephemeral tributaries “on the integrity of downstream waters,”³⁴⁴ as well as “the substantial connection and important consequences of runoff, nutrients, and particulate matter originating from ephemeral tributaries on the integrity and sustainability of downstream perennial streams.”³⁴⁵

In determining the presence of flow, the existence of a bed, banks, and an ordinary high water mark has long been a measure to define a stream. Indeed, Justice Kennedy opined that the requirement of a perceptible ordinary high water mark for tributaries “may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute ‘navigable waters’ under the Act.”³⁴⁶ An ordinary high water mark demonstrates a continuous channel providing a clear linkage between a tributary and downstream waters in many places. However, the traditional approach to measuring the ordinary high water mark has relied on physical characteristics alone, neglecting hydrologic measures.³⁴⁷ In the arid Southwest, for instance, typical ordinary high water mark indicators have not been found to be a reliable determination of a stream given the vast difference in “ordinary” flood patterns, and as a result it is suggested that the floodplain itself be used as the ordinary high water mark.³⁴⁸ While a traditional ordinary high water mark is certainly a positive indicator of a tributary, it is not a prerequisite. Moreover, because small headwater streams are the most susceptible to changes in size,³⁴⁹ the ordinary high water mark is more variable and more difficult to ascertain. Thus, we recommend that the Agencies’ step-two rulemaking make clear that tributaries can be defined by the presence of an ordinary high water mark *or* more broadly by hydrologic, geomorphic, ecological, and physical factors and functions to ensure that tributaries across a range of regional and climatic variations are protected.

³⁴² Colvin et al., *supra* note 231, at 76.

³⁴³ See, e.g., Science Report at ES-2 to ES-4, 2-22 to 2-30, 3-1 to 3-45, 4-20 to 4-39.

³⁴⁴ *Id.* at ES-2.

³⁴⁵ *Id.* at 5–8.

³⁴⁶ *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment); see also *id.* at 760–61.

³⁴⁷ U.S. Army Corps of Eng’rs, *Review of Ordinary High Water Mark Indications for Delineating Arid Streams in the Southwestern United States* (2004), <https://perma.cc/6QCW-ZVTK>.

³⁴⁸ U.S. Army Corps of Eng’rs, *Distribution of Ordinary High Water Mark Indicators and Their Reliability for Delineating the Limits of “Waters of the U.S.” in Southwestern Arid Channels* (2006).

³⁴⁹ Emily H. Stanley et al., *Ecosystem Expansion and Contraction in Streams*, 47 *BioScience* 427, 427–35 (1997).

G. *The scope of jurisdictional ditches. Ditches that function as tributaries should be jurisdictional.*

Under the NWPR, the Agencies limited jurisdictional ditches to those that are constructed in a jurisdictional water and satisfy the rule's arbitrary definition of a tributary.³⁵⁰ This definition is not consistent with the Clean Water Act. Ditches that function as tributaries, conveying pollutants, nutrients, biota, and other media along with water to downstream waters, should be jurisdictional.

While the Corps initially attempted to sidestep its obligations under the Clean Water Act by unlawfully equating the jurisdiction of the Clean Water Act with that of the Rivers and Harbors Act of 1899,³⁵¹ the Corps, under court order, soon broadened their definition of "waters of the United States."

In 1975, the District Court for the District of Columbia held that the Corps' narrow interpretation of its jurisdiction was unacceptable and demanded that the Corps expand its jurisdiction to include many additional water bodies, including ditches.³⁵² In *Callaway*, the court berated the Corps for "act[ing] unlawfully and in derogation of their responsibilities under section 404 of the Water Act"³⁵³ Another federal district court held similarly that the Corps' jurisdiction under the Clean Water Act was significantly broader than its jurisdiction under the Rivers and Harbors Act.³⁵⁴ As that court stated, the Clean Water Act "was designed to deal with all facets of recapturing and preserving the biological integrity of the nation's water by creating a web of complex interrelated regulatory programs."³⁵⁵ Although the Corps did not initially regulate upland ditches initially, by 1977 it did.

In *United States v. Eidson*,³⁵⁶ the U.S. Court of Appeals for the Eleventh Circuit articulated the rationale for finding ditches that function as tributaries jurisdictional.³⁵⁷ The court held:

There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes. The fact that bodies of water are 'man-made makes no difference That the defendants

³⁵⁰ NWPR, 85 Fed. Reg. at 22,338.

³⁵¹ Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,081, 12,115 (Apr. 3, 1974) (proposing regulations for work in navigable waters of the United States pursuant to Rivers and Harbors Act of 1899).

³⁵² *Nat. Res. Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

³⁵³ *Id.*

³⁵⁴ *United States v. Holland*, 373 F. Supp. 665, 671 (M.D. Fla. 1974).

³⁵⁵ *Id.* at 668.

³⁵⁶ 108 F.3d 1336 (11th Cir. 1997).

³⁵⁷ *Id.* at 1340.

used them to convey the pollutants without a permit is the matter of importance.³⁵⁸

Citing *Eidson*, the Ninth Circuit in *Headwaters, Inc. v. Talent Irrigation District*³⁵⁹ went one step further and concluded that man-made structures should be treated the same as streams because they are tributaries. The court held that “[a]s tributaries, the [irrigation] canals are ‘waters of the United States,’ and are subject to the [Clean Water Act] and its permit requirement.”³⁶⁰ Cases decided after *SWANCC* only reinforced the holdings, that streams and ditches should be treated alike. In *Community Association for Restoration of the Environment v. Henry Bosma Dairy*,³⁶¹ the Ninth Circuit was confronted with a case involving pollutants that flowed through a series of canals and natural water bodies that ultimately flowed back into the river. The court held that the canals, like the river, were jurisdictional.³⁶² The Fourth Circuit has similarly recognized the importance of extending jurisdiction to ditches that function as tributaries, finding that “[i]f this court were to conclude that the I-64 ditch is not a ‘tributary’ solely because it is manmade, the [Clean Water Act’s] chief goal would be subverted.”³⁶³

Of the three Supreme Court cases that have interpreted the term “navigable waters,” Justice Scalia’s plurality opinion in *Rapanos* 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 the source.”³⁶⁴ 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.³⁶⁵ And in *Rapanos*, five Justices—Justice Kennedy and the four dissenting Justices—correctly interpreted the Clean Water Act as having a broad reach. Case law on traditional navigable waters and ditches is similarly broad. Accordingly, there is no basis for treating ditches that function as tributaries as anything but jurisdictional tributaries. Just like tributaries, they can convey pollutants, nutrients, biota, and other media along with water to downstream waters, and should be jurisdictional.

H. *The scope of adjacency. In the Agencies’ rulemaking to define “waters of the United States,” the Agencies should continue, and modernize, their longstanding functional approach to wetland jurisdiction.*

In defining adjacency and defining jurisdictional wetlands, the Agencies should use their expertise and the latest science on hydrologic connectivity to modernize their implementation of

³⁵⁸ *Id.* at 1342 (quoting *Holland*, 373 F. Supp. at 673, and *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990)).

³⁵⁹ 243 F.3d 526 (9th Cir. 2001).

³⁶⁰ *Id.* at 533.

³⁶¹ 305 F.3d 943, 954 (9th Cir. 2002).

³⁶² *Id.* at 954–55.

³⁶³ *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407, 416–17 (4th Cir. 2003), *cert. denied sub nom. Newdunn Assocs., LLP v. U.S. Army Corps of Eng’rs*, 541 U.S. 972 (2004); *Deaton*, 332 F.3d at 710–11.

³⁶⁴ *Riverside Bayview*, 474 U.S. at 132–33 (citing S. Rep. No. 92-414 at 77 (1972)).

³⁶⁵ *SWANCC*, 531 U.S. at 167, 174.

the Supreme Court’s longstanding functional approach to defining “waters of the United States.” The Agencies should establish categories of “adjacent wetlands” that significantly affect navigable waters and a methodology for how the Agencies will determine jurisdiction in closer cases. In drawing jurisdictional lines, the Agencies should use the latest science to determine “how far coverage must extend in order to protect the navigable waters.”³⁶⁶

The Supreme Court has long taken a functional approach to Clean Water Act jurisdiction, informed by the latest science. In upholding the Corps’ exercise of jurisdiction over “adjacent wetlands,” the Supreme Court in *Riverside Bayview* held that:

In view of the breadth of federal regulatory authority contemplated by the [Clean Water] Act itself and the inherent difficulties of defining precise bounds to regulable waters, *the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.*³⁶⁷

There, the Corps used its scientific judgment and expertise in determining that the wetlands at issue may function as “integral parts of the aquatic environment” of “lakes, rivers, and streams,”³⁶⁸ and were therefore jurisdictional under the Clean Water Act. In making that determination, the Corps focused on the wetlands “tend[ency] to drain into those waters[,]”³⁶⁹ because “[i]n such circumstances, . . . [the] wetlands may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion.”³⁷⁰ In addition, the Corps found that such “adjacent wetlands may ‘serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species.’”³⁷¹ These functions were sufficient for the Corps to exercise jurisdiction over the wetlands even though “the moisture creating the wetlands [did] not find its source in the adjacent bodies of water.”³⁷² In *SWANCC*, the Court reaffirmed that wetlands with a “significant nexus” to navigable waters are “waters of the United States.”³⁷³

And in *Rapanos*, a majority of the Court again endorsed this functional approach to the Corps’ definition of “adjacency.”³⁷⁴ Justice Kennedy explained:

As applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable

³⁶⁶ *Deaton*, 332 F.3d at 711–12.

³⁶⁷ 474 U.S. at 134 (emphasis added).

³⁶⁸ *Id.* at 134–35.

³⁶⁹ *Id.* at 134.

³⁷⁰ *Id.* (internal citations omitted).

³⁷¹ *Id.* at 134–35.

³⁷² *Id.* at 135.

³⁷³ 531 U.S. at 167.

³⁷⁴ 547 U.S. at 780 (Kennedy, J., concurring in the judgment); *id.* at 796 (Stevens, J., joined by three Justices, dissenting).

under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*.³⁷⁵

Consistent with *Riverside Bayview*, Justice Stevens described the functions relevant to determining wetland adjacency to include, “[a]mong other things, [that] wetlands can offer ‘nesting, spawning, rearing and resting sites for aquatic and land species’; ‘serve as valuable storage areas for storm and flood waters’; and provide ‘significant water purification functions.’³⁷⁶ These “ecological considerations” “are integral to the chemical, physical, and biological integrity of the Nation’s waters[.]”³⁷⁷ As to adjacency, therefore, the Agencies should restore the Agencies’ longstanding definition of “adjacent” and extend that definition beyond wetlands to “adjacent waters.” The Agencies should also be directed to consider all evidence of functional connectivity in defining “adjacency.”

Wetlands adjacent to navigable-in-fact waters categorically satisfy the significant nexus standard due to the “reasonable inference of ecologic interconnection” between the two.³⁷⁸ The inference of interconnection is equally valid where a wetland is adjacent to, but separated from, navigable waters.³⁷⁹ “In many cases, . . . filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, . . . it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.”³⁸⁰ As to wetlands adjacent to non-navigable tributaries of navigable waters, Justice Kennedy would have required the Corps to “establish a significant nexus on a case-by-case basis” “[a]bsent more specific regulations.”³⁸¹

Justice Kennedy applied the “significant nexus” test of *Riverside Bayview* and *SWANCC*, holding that wetlands and waters “come within the statutory phrase ‘navigable waters’” 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 more readily understood as ‘navigable.’”³⁸² As observers have explained,

The natural reading of [Justice Kennedy’s] passages is that EPA and the Corps, using their expert judgment, can evaluate available information about specific wetlands, establish that a “significant nexus” is present, and then notify the regulated community and the public that wetlands of the same type over a specified geographic area will be considered protected waters. The agencies also can make . . . similar jurisdictional judgments about wetlands adjacent to

³⁷⁵ *Id.* at 780 (Kennedy, J., concurring in the judgment).

³⁷⁶ *Id.* at 796 (Stevens, J., dissenting) (quoting 33 C.F.R. § 320.4(b)(2)(2005)).

³⁷⁷ *Id.* (quotations omitted).

³⁷⁸ *Id.* at 780 (Kennedy, J., concurring in the judgment).

³⁷⁹ *See id.* at 780–81 (Kennedy, J., concurring in the judgment) (“[I]t may well be the case that *Riverside Bayview*’s reasoning—supporting jurisdiction without any inquiry beyond adjacency—could apply equally to wetlands adjacent to certain major tributaries.”).

³⁸⁰ *Id.* at 775 (Kennedy, J., concurring in the judgment).

³⁸¹ *Id.* at 782 (Kennedy, J., concurring in the judgment).

³⁸² *Id.* at 780 (Kennedy, J., concurring in the judgment) (emphasis added).

categories of tributaries which are important enough . . . that the adjacent wetlands will likely have a significant water quality effect (physical, chemical, or biological) on downstream traditionally navigable waters.³⁸³

Because “[t]he incremental effects of individual streams and wetlands are cumulative across entire watersheds and therefore must be evaluated in context with other streams and wetlands,”³⁸⁴ the “region” for purposes of assessing the aggregate effects of similarly situated wetlands should be no smaller than the relevant watershed. That is, in applying Justice Kennedy’s standard, the Agencies should aggregate the downstream effects of similarly situated wetlands, at minimum, across the relevant watershed in determining whether the requisite nexus is present. Consistent with *Riverside Bayview*, Justice Kennedy noted that “[w]here an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.”³⁸⁵

Finally, because of functional connections, even non-floodplain wetlands or wetlands that appear geographically “isolated” can have significant effects on the health of downstream waters.³⁸⁶ Indeed, “isolation is a term that is not very useful from an ecological perspective.”³⁸⁷ Non-floodplain wetlands are at times connected to other waters by groundwater flows, intermittent streams, or overland flows.³⁸⁸ Such connections have been found between larger waters and bays,³⁸⁹ pocosins,³⁹⁰ and limesink wetlands.³⁹¹

Non-floodplain wetlands can also capture and store large amounts of water, acting as sponges. As they absorb flood water, runoff, and rain, they also filter pesticides, excess nutrients, sediment, and other pollutants, protecting the health of downstream tributaries, rivers, and wetlands.³⁹² For example, a 2010 assessment prepared for EPA of non-floodplain wetlands in 88

³⁸³ American Rivers et al., Comments on the Joint Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*, at 21 (EPA-HQ-OW-2007-0282) (Jan. 21, 2008), <https://perma.cc/R5T3-H9QT>.

³⁸⁴ Science Report at ES-5.

³⁸⁵ *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment). In the *Rapanos* Guidance, the Agencies make clear that streams and their adjacent wetlands have an integral “ecological relationship,” and that in evaluating jurisdiction under Justice Kennedy’s test the functions of streams and their adjacent wetlands must be considered in tandem. *Rapanos* Guidance at 9.

³⁸⁶ See *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1369 (S.D. Ga. 2019) (“[J]ust because the Agencies could not assert jurisdiction over the isolated ponds in *SWANCC* based on migratory birds does not mean that the Agencies could not find . . . that similar ponds have a significant nexus to primary waters.”).

³⁸⁷ Dennis F. Whigham & Thomas E. Jordan, *Isolated Wetlands and Water Quality*, 23 *Wetlands* 541, 541–49 (2003).

³⁸⁸ *Id.*

³⁸⁹ 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), <https://perma.cc/9LS3-N5GV>.

³⁹⁰ Curtis J. Richardson, *Pocosins: Hydrologically Isolated or Integrated Wetlands on the Landscape?*, 23 *Wetlands* 563, 563–76 (2003), https://www.researchgate.net/publication/225962926_Isolated_Wetlands_and_Water_Quality.

³⁹¹ 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).

³⁹² Letter from Society of Wetland Scientists, Western Chapter, to Donna Downing, EPA, Comments on the Advanced Notice of Proposed Rule Making on the Definition of WOTUS, EPA Docket OW-2002-0050 (Apr. 16, 2003), <https://perma.cc/P68T-P6TT>.

counties of the Carolinas showed that non-floodplain wetlands stored significant amounts of water and, in doing so, captured heavy metals, nutrients, and carbon.³⁹³

“[W]etlands that rarely flood can be important because of long-lasting effects on streams and rivers,”³⁹⁴ and wetlands with occasional surface water connections provide benefits “that could affect downstream waters if they are connected to (or isolated from) the river network in such a way that it allows (or prevents) transport of materials to downstream waters.”³⁹⁵ Indeed, “some effects of non-floodplain wetlands on downstream waters are due to their isolation, rather than their connectivity. Wetland ‘sink’ functions that trap materials and prevent their export to downstream waters (e.g., sediment and entrained pollutant removal, water storage) result because of the wetland’s ability to isolate material fluxes.”³⁹⁶ Accordingly, the loss of chemically, physically, or biologically connected, yet geographically isolated, wetlands would have negative effects on the quality of downstream waters and on the human and ecological communities that rely on them.³⁹⁷

In sum, the Agencies should continue, and further develop, the functional approach to wetland jurisdiction, as articulated in *Riverside Bayview* and *SWANCC* and reaffirmed by a majority in *Rapanos*, employing a non-exclusive list of factors denoting the requisite ecological connection to other jurisdictional waters. Those factors include wetlands’ filtration, purification, flood-prevention, erosion-control, and sediment and pollution-trapping functions with respect to traditional navigable waters.³⁹⁸ The Agencies must assess and supplement these factors consistent with the latest science and the Science Report, which confirmed not only that floodplain wetlands significantly affect navigable waters, but that many non-floodplain wetlands are integral to downstream water quality.³⁹⁹

I. Exclusions from the definition. To ensure consistency with the statute, the Agencies should modify the exclusions for waste treatment systems and prior converted cropland, and eliminate the exclusions for ephemeral streams and ditches.

In order to restore consistency with the Clean Water Act’s statutory objective and longstanding implementation, the Agencies should modify or eliminate four exclusions that appeared in the NWPR: waste treatment systems, prior converted cropland, ephemeral streams, and ditches. The Agencies should accomplish this by (1) promptly restoring the regulatory framework that preceded the NWPR; and (2) modifying or eliminating these four exclusions as set forth below as part of the Agencies’ intended substantive rule to define “waters of the United States.”

³⁹³ RTI International, Inc., *Assessing Geographically Isolated Wetlands in North and South Carolina: The Southeast Isolated Wetlands Assessment (SEIWA)*, Final Report, Prepared for EPA (Feb. 11, 2011).

³⁹⁴ Science Report at 4-39.

³⁹⁵ *Id.* at 4-41.

³⁹⁶ *Id.* at ES-4.

³⁹⁷ Whigham et al., *supra* note 387, at 541–49.

³⁹⁸ See, e.g., *Rapanos*, 547 U.S. at 775 (Kennedy, J., concurring in the judgment); *id.* at 788 (Stevens, J., dissenting).

³⁹⁹ See, e.g., Science Report at ES-2 to ES-4, 2-22 to 2-30, 3-1 to 3-45, 4-20 to 4-39.

1. *Large public lakes that are also “cooling ponds” cannot lawfully be excluded from the definition of “waters of the United States.”*

The NWPR excluded a class of waters that had been protected since the passage of the Clean Water Act: “cooling ponds,” or large public lakes that also provide cooling water to power plants or other facilities. The prior administration accomplished this unprecedented exclusion through two revisions. First, traditional navigable waters—waters that are navigable, used in interstate commerce, or otherwise jurisdictional—were left *unprotected* if they fit into any of the NWPR’s exclusions.⁴⁰⁰ Second, the NWPR newly extended the preexisting waste treatment exclusion to cooling ponds.⁴⁰¹ With these two revisions, important public lakes—including Lake Keowee and Lake Monticello Reservoir in South Carolina, Woods Reservoir in Tennessee, and Hyco Lake and Sutton Lake in North Carolina—lost clean water protections simply because they were created to provide cooling water for power plants or other facilities in addition to their intended public uses. This reversal violated the Clean Water Act’s central protection of traditional navigable waters—“waters navigable in fact.”⁴⁰² Yet far from offering any justification for this unprecedented change, the prior administration’s rulemaking did not even acknowledge it.

When EPA first promulgated the waste treatment exclusion in 1979, it explained that public lakes used as cooling ponds should remain protected:

Such ponds are frequently extremely large in size and some harbor fish populations which invite recreational uses *EPA believes this use should remain subject to control under the Act’s regulatory provisions, and that such broad jurisdiction is consistent with the thrust of the Act and its legislative history.*⁴⁰³

That remained true under the regulations adopted in the 1980s and was re-adopted by the Agencies in 2019 with the Repeal Rule.⁴⁰⁴ The Agencies also preserved jurisdiction over such waters in the 2015 Clean Water Rule.⁴⁰⁵ Indeed, these public lakes remained jurisdictional through all administrations since 1979—until the promulgation of the NWPR.

Because the NWPR’s policy change eliminated the Clean Water Act permitting requirements for discharges into an excluded lake, its revised definition allows the unpermitted dumping of not just heat (a pollutant under the Act⁴⁰⁶), but also of any other pollutant discharged from power plants or other sources, including such toxic pollutants as mercury, arsenic, and lead.

⁴⁰⁰ NWPR, 85 Fed. Reg. at 22,325, 22,338.

⁴⁰¹ *Id.* at 22,339 (§ 328.3(c)(15)).

⁴⁰² *Riverside Bayview*, 474 U.S. at 123; *see also* 33 U.S.C. §§ 1311(a), 1362(12) (defining “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters”).

⁴⁰³ National Pollutant Discharge Elimination System; Revision of Regulations, 44 Fed. Reg. 32,854, 32,858 (June 7, 1979) (emphasis added).

⁴⁰⁴ *See* 33 C.F.R. § 328.3(a)(8) (1986); Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. at 56,667.

⁴⁰⁵ *See* Clean Water Rule, 80 Fed. Reg. at 37,096.

⁴⁰⁶ 33 U.S.C. § 1362(6).

And because the application of other Clean Water Act protections depends on a lake being a water of the United States, these public lakes no longer had federal protections against the dumping of fill materials.

Hyco Lake in North Carolina, for example, is a large public lake of some 3,800 acres created in the mid-1960s by damming the Hyco River to provide cooling water for Duke Energy's Roxboro power plant.⁴⁰⁷ Like other cooling lakes, it is used for fishing, boating, and swimming; many families also own homes on the lake.⁴⁰⁸ Prior to the NWPR, entities needed an NPDES permit before discharging pollutants into the lake.⁴⁰⁹ However, Duke Energy has asserted to state regulators that the entire lake is a "cooling pond."⁴¹⁰ With the new exclusion in place, Duke Energy—or any other polluter—could claim the Clean Water Act no longer applied to Hyco or other public cooling lakes.

Accordingly, the Agencies should promptly return to the longstanding Clean Water Act protection of public lakes used as cooling ponds. Any new substantive rule defining of "waters of the United States" (1) should not include "cooling ponds" in any definition of "waste treatment systems"; and (2) should not include the NWPR's unlawful provision stating that otherwise jurisdictional waters are deemed non-jurisdictional if they fit into any of the new rule's exclusions.

2. *Prior converted cropland should not be excluded from Clean Water Act protection unless it has been used to grow crops within the applicable period.*

While the Agencies had long excluded prior converted cropland—wetlands drained and used for growing crops prior to December 23, 1985—from the definition of "waters of the United States," the NWPR added a definition of "prior converted cropland" that created a substantial loophole in the Clean Water Act.

Prior to the NWPR, prior converted cropland would lose its status as an excluded water when it was sold or when it had not been used "once in every five years . . . for the production of an agricultural commodity."⁴¹¹ This agency practice preserved the exclusion for prior converted cropland that still constituted "cropland," while allowing former wetlands no longer serving the express purpose of the exclusion—the growing of crops—to regain Clean Water Act protection. Such wetlands could be degraded or developed only after obtaining a Section 404 permit.

⁴⁰⁷ Letter from E. Shannon Langley, Duke Energy, to Julie Grzyb, N.C. Dep't of Env'tl. Quality 3 (Mar. 29, 2019), <https://perma.cc/3M53-ZMH6> ("Duke Energy Letter").

⁴⁰⁸ Decl. of Kristina Wiggins ¶¶ 3–10, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. May 21, 2021), ECF No. 119-45; Decl. of Mike Pucci ¶ 4, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. May 21, 2021), ECF No. 119-46.

⁴⁰⁹ See Letter from S. Daniel Smith, N.C. Dep't of Env'tl. Quality, to Paul Draovitch, Duke Energy Carolinas, LLC (May 29, 2020), <https://perma.cc/84KV-4QNP> (attaching NPDES permit for Roxboro Steam Electric Generating Plant authorizing discharges to "receiving waters designated as Hyco Reservoir").

⁴¹⁰ Duke Energy Letter at 2.

⁴¹¹ Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,034 (Aug. 25, 1993).

Under the NWPR, however, prior converted cropland lost its status as an excluded water under the Act only when two restrictive conditions were met. First, the land had to be abandoned—i.e., not in the previous five years “used for, or in support of, agricultural purposes.”⁴¹² What constituted “agricultural purposes” was not defined under the NWPR, but the Agencies provided several examples, including idling for conservation purposes; leaving land fallow; providing habitat for bees and other wildlife; providing water storage supply, storage, and flood management; preparing beds for crawfish farming; and idling land for soil recovery.⁴¹³ Applying such a broad interpretation of “agricultural purposes,” prior converted cropland was rarely, if ever, considered “abandoned” under the NWPR.

Second, the land must have reverted to a wetland meeting the regulatory definition of “wetlands.”⁴¹⁴ That meant, according to the Agencies themselves, that even for the rare prior converted cropland that can be considered “abandoned” under the NWPR, the “majority” of these converted wetlands would still never regain protection because of their “altered nature.”⁴¹⁵

Together, these two conditions opened the door to unfettered development of converted wetlands that in no way resemble “cropland.” To cite one example, in Orange, Texas, the Corps has applied the NWPR to exclude numerous wetlands from jurisdiction as “prior converted cropland” even though the cropland was cleared to make way for the construction of a chemical manufacturing facility.⁴¹⁶ While making it easier for degraded wetlands to be sold to developers, the NWPR’s “prior converted cropland” definition also made it virtually impossible for non-profit conservation groups such as the North Carolina Coastal Federation to compete financially to acquire, restore, and conserve such critical resources, further degrading the nation’s waters.⁴¹⁷

In the interest of restoring and preserving wetlands, the Agencies should promptly return to longstanding agency practice—the application in place prior to the NWPR—under which prior converted cropland loses its status as an excluded water when it is sold or has not been used as cropland once in every five years.

3. *The exclusion for “ephemeral streams” should be eliminated.*

As described in Section II.F, above, in order to fulfill the objective of the Clean Water Act, the Agencies must employ a functional approach to determine which streams merit protection as “waters of the United States.” Categorically excluding ephemeral streams, as the NWPR did, runs counter to that objective, for two overarching reasons. First, individual

⁴¹² NWPR, 85 Fed. Reg. at 22,320 (33 C.F.R. § 328.3(c)(9)).

⁴¹³ *Id.* at 22,320-21.

⁴¹⁴ *Id.* at 22,320 (33 C.F.R. § 328.3(c)(9)).

⁴¹⁵ *Id.* at 22,327 (“The altered nature of prior converted cropland and its conditions constitute the ‘normal circumstances’ of such areas. The agencies expect the majority of prior converted cropland in the nation to fall into this category and not to be subject to CWA regulation, even after it is abandoned.”).

⁴¹⁶ Approved Jurisdictional Determination, SWG-2018-00957 (Dec. 23, 2020), <https://perma.cc/CL74-KYDV>; Dave Rogers, *CP Chem Preps Land, But No Decision*, *The Record* (Orange County, TX) (Apr. 20, 2021), <https://perma.cc/R6J5-KXTD>.

⁴¹⁷ Decl. of Todd Miller ¶¶ 3–5, 11, 15–18, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. May 21, 2021), ECF No. 119-31.

headwater streams—whether perennial, intermittent, *or ephemeral*—can affect the chemical, physical, and biological structure and function of downstream traditional navigable waters.⁴¹⁸ As the Agencies previously concluded, ephemeral streams “perform similar hydrological and ecological functions” as perennial and intermittent streams, “including moving water, sediments, and nutrients, providing connectivity within the watershed and habitat to wildlife,” and “supporting biodiversity.”⁴¹⁹ Second, intermittent and ephemeral streams and headwaters cumulatively make up a majority of the stream miles in the United States, with ephemeral streams particularly prevalent in the arid West.⁴²⁰ Leaving such a huge percentage of the nation’s stream miles open to pollution and destruction threatens the integrity of entire river networks. The Agencies must ensure that the ephemeral streams are not excluded from any future definition of “waters of the United States.”

4. *The exclusion for “ditches” should be eliminated.*

As set forth in Section II.G, above, categorically excluding ditches from the definition of “waters of the United States” is inconsistent with the Clean Water Act, as some ditches flow to traditional navigable waters and contribute to their integrity. Even if an exclusion for ditches could be said to promote “certainty,” any such certainty cannot come at the cost of consistency with the objective of the statute.⁴²¹ Ditches should be treated no differently than streams; to the extent that a ditch qualifies as a “tributary” (as defined by the rule), it should be jurisdictional.

III. Conclusion

The Agencies, and now the courts, have appropriately raised concerns about the NWPR’s serious legal deficiencies and the substantial harms the rule caused to the nation’s streams, wetlands, and other waters. The Agencies must act—first to promptly restore the longstanding clean water protections that preceded the NWPR, and next to craft a definition of “waters of the United States” that is rooted in science, consistent with Supreme Court precedent, and faithful to the objective of the Clean Water Act. The integrity of the nation’s waters depends on it.

Sincerely,



Kelly F. Moser
Senior Attorney



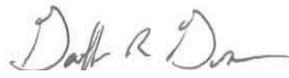
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⁴¹⁸ See generally *supra* Section II.F.

⁴¹⁹ EA at 107.

⁴²⁰ See, e.g., Colvin et al., *supra* note 231, at 74, 77, 86; EPA, *supra* note 321; Goodrich et al., *supra* note 321.

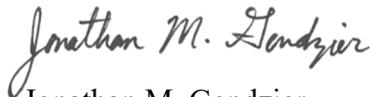
⁴²¹ See *Cnty. of Maui*, 140 S. Ct. at 1477.



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Appendix A: List of Documents Submitted in Support of Comments

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