

February 7, 2022

*Via [www.regulations.gov](http://www.regulations.gov)*

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

The Honorable Michael Connor  
Assistant Secretary of the Army for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310

**Re: Comments on Proposed Revised Definition of “Waters of the United States”  
Docket ID No. EPA-HQ-OW-2021-0602<sup>1</sup>**

Dear Administrator Regan and Assistant Secretary Connor:

Together, our 91 organizations write to ask you to promptly finalize the present rulemaking 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. We commend the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (together, the “Agencies”) for permanently rejecting the prior administration’s unlawful Navigable Waters Protection Rule (“NWPR”), which needlessly put the nation’s waters at serious risk. We urge the Agencies to promptly restore and implement the longstanding regulatory framework that is reflected in the Proposed Rule,<sup>2</sup> with revisions to the current proposal as set forth in these comments to better reflect Supreme Court precedent and the Clean Water Act’s (“Act’s”) objective. Finally, we ask the Agencies to move forward expeditiously in promulgating a new definition of “waters of the United States” that is similarly rooted in science, consistent with Supreme Court precedent, and faithful to the objective of the Act, while fulfilling Congress’s intent that the term be given the broadest possible constitutional interpretation.

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<sup>1</sup> The documents cited herein (aside from case law, executive orders, statutes, and regulations) were submitted to the EPA Docket Center via ShareFile on February 7, 2022. A list of documents submitted is attached as Appendix A.

<sup>2</sup> Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69,372 (Dec. 7, 2021) (“Proposed Rule”).

The term “waters of the United States” is the jurisdictional “linchpin” for virtually every one of the Clean Water Act’s critical safeguards,<sup>3</sup> including the Act’s core prohibition established by Section 301 against the discharge of pollutants without a National Pollutant Discharge Elimination System permit, the prohibition against the discharge of dredge and fill material without a Section 404 permit, and the obligation that states develop water quality standards. A robust definition of “waters of the United States” also helps to ensure a strong federal baseline of clean water protections, to ensure that states and tribes are not unfairly harmed by pollution carried downstream from neighboring jurisdictions.

The prior administration’s removal of federal clean water protections through its promulgation of the NWPR has opened the door for pollution to enter our rivers, lakes, and drinking water sources—waters that are only as clean as the upstream waters that feed them. Reviewing even a small sample of NWPR-era jurisdictional determinations reveals the rule’s devastating effect on the nation’s waters: a mere 563 of those determinations—less than 6% of all approved jurisdictional determinations issued under the NWPR—resulted in the elimination of Clean Water Act protections from 11,371 acres of wetlands and 580 miles of streams.<sup>4</sup>

Many of these losses were felt in low-income communities and communities of color already facing disproportionate burdens from water pollution and the impacts of climate change. The NWPR’s drastic reductions in wetland protections threatened to decimate resources critical to guarding against flooding on the southeastern coast and in many other parts of the country. And as shown on the map attached as Appendix C, the NWPR generated hundreds of non-jurisdictional determinations for waters located within watersheds that flow across state boundaries, threatening downstream states with out-of-state pollution that they are powerless to regulate.<sup>5</sup>

The unlawful NWPR has now been vacated by two federal district courts,<sup>6</sup> and the Agencies have rightly decided to permanently reject it. In its place, the Proposed Rule’s reinstatement of the pre-NWPR regulatory framework will help to better protect the nation’s waters, which remain far from meeting the Clean Water Act’s objective. In particular, we commend the Agencies for reestablishing categorical protections for interstate waters, to ensure that downstream states and tribes are protected from upstream pollution originating outside their borders; for incorporating the “significant nexus” standard and its functional, scientific approach to jurisdiction; for restoring protections for small streams, non-floodplain wetlands, and other waters based on the scientific reality that they, too, can significantly affect the integrity of nation’s waters; and for adhering to the cooperative federalism approach outlined in Sections 101(a) and 101(b) of the Act.

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<sup>3</sup> Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att’y Gen. 197, 200–01 (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.”).

<sup>4</sup> See SELC et al., Sample Negative Jurisdictional Determinations Made Under the NWPR (“NJD Spreadsheet”) (attached as Appendix B).

<sup>5</sup> See SELC, Sample NWPR Non-Jurisdictional Determinations (NJDs) (“NJD Map”) (attached as Appendix C).

<sup>6</sup> *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021); *Navajo Nation v. Regan*, No. 20-CV-00602-MV/GJF, 2021 WL 4430466 (D.N.M. Sept. 27, 2021).

However, as detailed in Section III of these comments, we also urge the Agencies to adopt several revisions to the Proposed Rule in order to better align with the Clean Water Act's objective and with Supreme Court precedent, including the following:

- clarifying that a traditional navigable water's "navigability" may be established through its use by recreational watercraft like kayaks and canoes;
- treating waters as "similarly situated" where they function similarly, and function together, in affecting downstream waters;
- interpreting "the region" as no smaller than the relevant watershed when analyzing the aggregate effects of similarly situated waters;
- rejecting a sequential approach in conducting case-by-case significant nexus analyses, and instead considering the functions of wetlands and streams in tandem;
- clarifying that the "relatively permanent" standard includes coverage for intermittent streams and recognizes connections through human-made features;
- providing categorical protections for tributary streams with a bed, banks, and another indicator of flow;
- clarifying that all wetlands with a significant nexus to traditional navigable waters, interstate waters, and the territorial seas ("foundational waters") are protected;
- providing categorical protections for certain types of non-floodplain wetlands that science demonstrates have a significant nexus to foundational waters;
- clarifying that traditional navigable waters are not subject to the Proposed Rule's exclusions, including the waste treatment system exclusion;
- modifying the waste treatment exclusion so that it does not apply to public cooling lakes that are also traditional navigable waters;
- revising the prior converted cropland exclusion to cover only land that has been used to grow crops within the applicable period; and
- more accurately quantifying the benefits of adopting and implementing the Proposed Rule in the Economic Analysis.

With these changes, the Proposed Rule would represent an important step towards restoring and maintaining the health of the nation's waters and of the communities that rely on them. In addition, to assist in the Agencies' rulemaking processes, we request that the Agencies populate the administrative records for the current rulemaking and the anticipated second rulemaking with the records for the 2015 Clean Water Rule,<sup>7</sup> the 2018 Suspension Rule,<sup>8</sup> the 2019 Repeal Rule,<sup>9</sup> the 2020 NWPR,<sup>10</sup> and the Agencies' 2021 Request for Recommendations on Defining "Waters of the United States."<sup>11</sup>

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<sup>7</sup> Docket ID No. EPA-HQ-OW-2011-0880: Clean Water Rule: Definition of "Waters of the United States."

<sup>8</sup> Docket ID No. EPA-HQ-OW-2017-0644: Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule.

<sup>9</sup> Docket ID No. EPA-HQ-OW-2017-0203: Definition of "Waters of the United States"—Recodification of Preexisting Rule.

<sup>10</sup> Docket ID No. EPA-HQ-OW-2018-0149: Revised Definition of "Waters of the United States."

<sup>11</sup> Docket ID No. EPA-HQ-OW-2021-0328: Request for Recommendations on Defining "Waters of the United States."

The Southern Environmental Law Center (“SELC”) submits these comments on behalf of itself and the following organizations:

Alabama Interfaith Power and Light	Great Egg Harbor Watershed Association
Alabama Rivers Alliance	Harpeth Conservancy
American Rivers	Haw River Assembly
American Whitewater	James River Association
Appalachian Voices	League of Conservation Voters
Atchafalaya Basinkeeper	Lynnhaven River NOW
Audubon Society of Northern Virginia	Mill Creek Alliance
Black Warrior Riverkeeper	Mobile Baykeeper
Buffalo River Watershed Alliance	MountainTrue
Cahaba River Society	National Wildlife Federation
Cahaba Riverkeeper	National Wildlife Refuge Association
Cape Fear River Watch	Nature Adventures, LLC
Carolina Wetlands Association	Nebraska Wildlife Federation
Catawba Riverkeeper Foundation	Neuse Riverkeeper
Center for a Sustainable Coast	North Carolina Coastal Federation
Charleston Waterkeeper	North Carolina Conservation Network
Chattahoochee Riverkeeper, Inc.	North Carolina Public Interest Research Group
Choctawhatchee Riverkeeper	North Carolina Wildlife Federation
Clean Water Action/Clean Water Fund	Obed Watershed Community Association
Congaree Riverkeeper	Ogeechee Riverkeeper
Coosa River Basin Initiative	One Hundred Miles
Coosa Riverkeeper	Pamlico-Tar Riverkeeper
Cumberland River Compact	Potomac Riverkeeper Network
Defenders of Wildlife	Protect Our Aquifer
Dogwood Alliance	Public Employees for Environmental Responsibility
Environment America	Rappahannock Tribe
Environment Georgia	River Guardian Foundation
Environment North Carolina	Rockbridge Area Conservation Council
Environmental Law & Policy Center	Satilla Riverkeeper
Flint River Conservation Association	Savannah Riverkeeper
Freshwater Future	Save Our Saluda
Friends of Dyke Marsh	Science for Georgia, Inc.
Friends of the Rivers of Virginia	Shoals Environmental Alliance
Friends of the Rappahannock	Sierra Club
Friends of Turkey Creek Nature Preserve	Sound Rivers
Georgia Audubon	South Carolina Coastal Conservation League
Georgia Interfaith Power and Light	St. Marys Earthkeepers
Georgia River Network	Tennessee Citizens for Wilderness Planning
Georgia Women (And Those Who Stand With Us)	Tennessee Environmental Council
Glynn Environmental Coalition	The People’s Justice Council
Good Stewards of Rockingham	
Goose Creek Association	

Tree Fredericksburg  
Upstate Forever  
Virginia Aquarium & Marine Science  
Center  
Virginia Conservation Network

Waterkeepers Chesapeake  
Wetlands Watch  
WWALS Watershed Coalition, Inc.  
Yadkin Riverkeeper

**I. Strong Clean Water Protections Promote Healthy Communities, Strengthen Local Economies, Bolster the Nation’s Infrastructure Investments, and Combat the Effects of Climate Change.**

Nearly 50 years after Congress announced its objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”<sup>12</sup> the Clean Water Act’s mandate remains unfulfilled. Pollution, storms, droughts, algal blooms, and other stressors continue to threaten the nation’s waters. Over 55% of the nation’s miles of rivers and streams are impaired, as well as over 70% of the acreage of lakes, ponds, and reservoirs, nearly 80% of the square miles of bays and estuaries, over 90% of ocean and near-coastal waters, and almost 100% of the Great Lakes’ shoreline and open waters.<sup>13</sup> These waters suffer from industrial contamination, harmful bacteria, nutrient pollution, and sediment overload that suffocate fish and other aquatic wildlife.<sup>14</sup>

The health of the Southeast’s rivers and streams is especially poor. Toxic contaminants dumped into our waterways by industry, development, and agriculture seep into our drinking water sources and our homes.<sup>15</sup> Out of nearly 40,000 assessed miles of North Carolina’s rivers and streams, only two miles were in “good” condition as of 2014 such that they could be used for recreation, drinking water, and habitat.<sup>16</sup> Similarly, more than 65% of the rivers and streams studied in Virginia were impaired,<sup>17</sup> and in Georgia, nearly 60% of the rivers and streams studied were impaired.<sup>18</sup> Not surprisingly, given the health of the region’s rivers and streams, 100% of North Carolina’s lakes, reservoirs, and ponds assessed were impaired<sup>19</sup>; in Virginia, over 80% were impaired.<sup>20</sup>

The nation’s wetlands are struggling, too. Between 2004 and 2009, the country lost 630,000 acres of forested wetlands, primarily in the Southeast.<sup>21</sup> And largely due to silviculture

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<sup>12</sup> 33 U.S.C. § 1251(a).

<sup>13</sup> See EPA, EPA 841-R-16-011, National Water Quality Inventory: Report to Congress 8, 11, 14, 15 (2017), <https://perma.cc/RMK8-SSEE>.

<sup>14</sup> See generally *id.*

<sup>15</sup> *Editorial: We Need More State Help with Water Quality*, Fayetteville Observer (Apr. 7, 2019).

<sup>16</sup> EPA, North Carolina Water Quality Assessment Report (2014) (“North Carolina Water Quality Report”), <https://perma.cc/6A4H-NQNZ>.

<sup>17</sup> EPA, Virginia Water Quality Assessment Report (2014) (“Virginia Water Quality Report”), <https://perma.cc/8T62-YYFC>.

<sup>18</sup> EPA, Georgia Water Quality Assessment Report (2014), <https://perma.cc/T646-EVRL>.

<sup>19</sup> North Carolina Water Quality Report.

<sup>20</sup> Virginia Water Quality Report.

<sup>21</sup> Press Release, U.S. Fish & Wildlife Serv., Five-Year Survey Shows Wetlands Losses are Slowing, Marking Conservation Gains and Need for Continued Investment in Habitat (Oct. 6, 2011), <https://perma.cc/552R-STRZ>.

and development, remaining wetlands are also suffering.<sup>22</sup> Some 32% of the nation’s wetlands are in poor condition, harming fish and wildlife species, reducing recreational opportunities, diminishing water quality, and hindering flood prevention.<sup>23</sup> Previously teeming with mammals, birds, fish, and invertebrates, over half of the remaining wetlands are now unsuitable for habitat, threatened by severe oxygen depletion and heavy metal pollution.<sup>24</sup>

As a nation, we are far from achieving the Clean Water Act’s objective. It is thus critical that the Agencies act to effectuate Congress’s “broad, systemic view of the goal of maintaining and improving water quality.”<sup>25</sup>

**A. Communities hit hardest by environmental threats need strong clean water protections.**

It is well established that the burdens of environmental contamination and industrial pollution fall disproportionately on low-income communities and communities of color.<sup>26</sup> Water pollution is no exception. Low-income, minority communities often face severe and persistent drinking water contamination<sup>27</sup> and limited access to clean water.<sup>28</sup> Low-income populations and people of color are more likely to live in areas with inadequate water infrastructure.<sup>29</sup> According to a 2019 analysis, greater rates of violations of laws protecting safe drinking water occurred in counties with higher racial, ethnic, and language vulnerability.<sup>30</sup> 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%).<sup>31</sup>

Further, because low-income communities and many communities of color—including Native American and Alaskan Native communities, as well as African American, Latino, and

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<sup>22</sup> See U.S. Fish and Wildlife Serv., Status and Trends of Wetlands in the Coastal Watersheds of the Conterminous United States 2004-2009, 31 (2013).

<sup>23</sup> See EPA, National Water Quality Inventory: Report to Congress 16 (2017), <https://perma.cc/RMK8-SSEE>.

<sup>24</sup> See EPA, National Summary of State Information – Water Quality Attainment in Assessed Wetlands, <https://perma.cc/DHF7-FE8Z>.

<sup>25</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

<sup>26</sup> See generally, 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 *Env’t Rsch. 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).

<sup>27</sup> Gary W. Evans & Elyse Kantrowitz, *Socioeconomic Status and Health: The Potential Role of Environmental Risk Exposure*, 23 *Ann. Rev. Pub. Health* 303, 307–11 (2002).

<sup>28</sup> James VanDerslice, *Drinking Water Infrastructure and Environmental Disparities: Evidence and Methodological Considerations*, 101 *Am. J. Pub. Health* S109, S113 (2011), <https://perma.cc/S79Z-DHHA>.

<sup>29</sup> Sacoby M. Wilson et al., *Built Environment Issues in Unserved and Underserved African-American Neighborhoods in North Carolina*, 1 *Env’t 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 (2014), <https://perma.cc/2G6G-9GUW>.

<sup>30</sup> Nat. Res. Def. Council et al., R:19-09-A, *Watered Down Justice* 18 (2019), <https://perma.cc/G6KD-NJR2>.

<sup>31</sup> EPA, 2006 National Public Water System Compliance Report 4, 15 (2009), <https://perma.cc/HE3L-KS5Q>.

Asian American communities—have some of the highest rates of fish consumption,<sup>32</sup> they also disproportionately bear the harms of fish contamination from polluted water. Indeed, for communities that rely on subsistence fishing for their way of life, increased pollution and loss of fish habitat threaten a food source and a means of social bonding.<sup>33</sup>

The impacts of climate change—including sea level rise, flooding, and drought—are also more likely to adversely affect low-income communities and communities of color. Many such communities experience climate-change impacts most acutely because they lack the resources to mitigate and adapt to climate-related changes.<sup>34</sup> For communities that rely on fish and other aquatic life for income, changing water temperatures and flows can drastically affect their livelihoods.<sup>35</sup> Low-income communities and communities of color also 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 likely to have the resources to readily recover from the damage flooding causes.<sup>36</sup> And the disproportionate burden on communities of color is only expected to worsen in the coming decades, as such communities face disproportionate increases in flooding caused by climate change. A recent study estimates that communities in which at least 20% of the population is Black will see a 40% increase in flood risk by 2050.<sup>37</sup> This projected increase in risk for the communities with the proportionally largest Black populations is nearly double the projected increase for communities with the proportionally smallest Black populations.<sup>38</sup> As discussed in Section I.D, below, wetlands are our

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<sup>32</sup> Nat'l Env't Just. Advisory Council, *Fish Consumption and Environmental Justice 2* (2002), <https://perma.cc/VF2M-UL7B>; see generally Off. of Env't 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 *Env't Health Persps.* 241 (2002); Laura Hunter et al., *Env't 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 L.Q.* 205 (2009), <https://perma.cc/3563-NBHZ>; Linda Silka, *The Southeast Asian Environmental Justice Partnership: Citizens Revive a New England Mill Town River*, *New Vill. J.*, <https://perma.cc/DT2Y-ABCY>; Rebecca L. Williams et al., *An Examination of Fish Consumption by Indiana Recreational Anglers: An On-Site Survey*, Technical Report 99-D-HDFW-2 (2000), <https://perma.cc/D5FA-P7WU>; AMAP Working Grp., *AMAP Assessment 2009: Human Health in the Arctic* (2009), <https://perma.cc/43S9-7KFD>.

<sup>33</sup> 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, 104–05 (2001), <https://perma.cc/EJ5Z-JXPP>; Susan A.R. Colvin et al., *Headwater Streams and Wetlands Are Critical for Sustaining Fish, Fisheries, and Ecosystem Services*, 44 *Fisheries* 73, 85 (2019).

<sup>34</sup> 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*, in *Understanding Katrina: Perspectives from the Social Sciences*, Items (2006), <https://perma.cc/H9BU-DCZS>.

<sup>35</sup> Food & Agric. Org. of the United Nations, *Climate Change Adaptation and Mitigation in the Food and Agriculture Sector* (2008), <https://perma.cc/P9DF-5Q9C>.

<sup>36</sup> Dalbyul Lee & Juchul Jung, *The Growth of Low-Income Population in Floodplains: A Case Study of Austin, TX*, 18 *KSCE J. Civ. Eng'g* 683, 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>.

<sup>37</sup> Oliver E.J. Wing et al., *Inequitable Patterns of US Flood Risk in the Anthropocene*, *Nature Climate Change* 4 (2022).

<sup>38</sup> *Id.*

most effective natural guards against flooding and other impacts of climate change.<sup>39</sup> They must be preserved.

Environmental justice concerns should be at the forefront of the Agencies' consideration in adopting strong clean water protections. 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."<sup>40</sup> 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."<sup>41</sup> In 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."<sup>42</sup> It is essential that the Agencies act to restore robust clean water protections and defend clean water for the nation's most vulnerable populations.

## **B. Clean water protections are critical to local economies, including in the Southeast.**

Throughout the nation—and especially in the Southeast—communities rely on industries that cannot thrive without clean water. From commercial and recreational fishing to coastal tourism to seafood, the Southeast is particularly well suited to support these valuable industries. The six states in which SELC works—Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee—have a combined 12,517 miles of shoreline,<sup>43</sup> 324,965 miles of rivers,<sup>44</sup> and myriad streams, lakes, and wetlands. The region is a hotspot for vital species of plants and animals, containing some of the most species-rich amphibian, reptilian, and freshwater fish communities in North America.<sup>45</sup> Freshwater biodiversity in the region is the highest in the nation. Alabama alone supports 38% of native freshwater fish species and 60% of native mussel species.<sup>46</sup>

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<sup>39</sup> 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 EPA & Dep't of the Army, Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States," EPA-HQ-OW-2018-0149-11572, 133 (Jan. 22, 2020) ("NWPR EA").

<sup>40</sup> Exec. Order No. 12,898, § 1-101, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994).

<sup>41</sup> EPA, *Environmental Justice*, <https://perma.cc/L6FK-9W3A>.

<sup>42</sup> Exec. Order No. 14,008, §§ 220(d), 222(b)(i), 86 Fed. Reg. 7619, 7630, 7631 (Jan. 27, 2021).

<sup>43</sup> Nat'l Oceanic & Atmospheric Admin. Off. for Coastal Mgmt., *Shoreline Mileage of the United States*, <https://perma.cc/KZ7K-C93C>.

<sup>44</sup> Nat'l Wild & Scenic Rivers Sys., *Georgia*, <https://perma.cc/T5JR-LVCM>; Nat'l Wild & Scenic Rivers Sys., *North Carolina*, <https://perma.cc/HPL8-M5SA>; Nat'l Wild & Scenic Rivers Sys., *South Carolina*, <https://perma.cc/KY4K-VDV2>; Nat'l Wild & Scenic Rivers Sys., *Alabama*, <https://perma.cc/67BC-MGU2>; Nat'l Wild & Scenic Rivers Sys., *Tennessee*, <https://perma.cc/TB92-UGEG>; Nat'l Wild & Scenic Rivers Sys., *Virginia*, <https://perma.cc/MQH4-4ZZS>.

<sup>45</sup> Clinton N. Jenkins et al., *US Protected Lands Mismatch Biodiversity Priorities*, Proc. Nat'l Acad. Scis. 5081, 5082 (2015); Elizabeth Guinessey et al., A Literature Review: The Chemical, Physical and Biological Significance of Geographically Isolated Wetlands and Non-Perennial Streams in the Southeast 11, 12, 28 (2019) ("Literature Review") (attached as Appendix D).

<sup>46</sup> Charles Lydeard & Richard L. Mayden, *A Diverse and Endangered Aquatic Ecosystem of the Southeast United*

The commercial and recreational fisheries enabled by the region’s abundant biodiversity benefit when small streams and wetlands—integral for fish and wildlife habitat—are protected. In 2011, in the six states where SELC works, the U.S. Fish and Wildlife Service reported that a total of \$19 billion was spent on wildlife recreation, including \$5.7 billion on fishing; more than 15.9 million people participated in these recreational activities throughout the six-state region.<sup>47</sup> Recreational anglers catch trout in our mountain streams, bass in our piedmont lakes and streams, and any number of saltwater fish in our extensive estuaries and beaches. Commercial fishers fish our estuaries and ocean waters, landing more than \$300 million worth of catch in 2017.<sup>48</sup>

The waters of the Southeast also support a thriving tourism industry. Each year, visitors from across the country vacation on southern beaches. In 2016 alone, tourism around our beaches generated nearly \$8 billion in gross domestic product and over 190,000 jobs.<sup>49</sup> Our populations are growing as people move to our expanding cities and our developing retirement communities. Visitors to the region also patronize the businesses comprising the Southeast’s flourishing brewing industry—which contributed over \$6.9 billion to the economy and supported over 48,000 jobs in 2020<sup>50</sup>—as well as our wineries and distilleries, all of which depend on clean water to thrive.

Without robust clean water protections, these industries suffer. For example, harmful algal blooms—such as the infamous “red tide” that frequently plagues the Gulf of Mexico<sup>51</sup>—sometimes result when waters receive excess nutrients.<sup>52</sup> These events can lead to beach and fisheries closures, often resulting in millions of dollars in losses to local tourism, seafood, and recreation industries<sup>53</sup>—not to mention their potentially devastating effects on wildlife. By contrast, strong clean water protections are good for business: the Ecological Economics Journal estimates that the Clean Water Act has been responsible for adding as much as \$15.8 billion in economic benefits for Virginia alone.<sup>54</sup> Restoring clean water protections uplifts our region’s—and our nation’s—local economies.

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*States*, 9 Conservation Biology 800, 802 (1995); Literature Review at 28.

<sup>47</sup> See U.S. Fish & Wildlife Serv., *2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* 95–97 (2014); see also Literature Review at 22.

<sup>48</sup> See Nat’l Marine Fisheries Serv., *Annual Commercial Landings Statistics* (based on 2017 data for Alabama, Georgia, North Carolina, South Carolina, and Virginia) (2017), <https://perma.cc/VM6R-PGP8>.

<sup>49</sup> See Nat’l Ocean Econ. Program, *Ocean Economy Data* (based on 2016 data for Georgia, North Carolina, South Carolina, and Virginia), <https://perma.cc/A5CA-QNQY>.

<sup>50</sup> Brewers Ass’n, *Economic Impact*, <https://perma.cc/QFH4-NAZN>; Brewers Ass’n, *Total Economic Impact 2020*, <https://perma.cc/C995-LUWS> (based on data for Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia).

<sup>51</sup> Nat’l Ocean Service, Nat’l Oceanic & Atmospheric Admin. (“NOAA”), *Gulf of Mexico/Florida: Harmful Algal Blooms*, <https://perma.cc/SC83-XXGL>.

<sup>52</sup> EPA, *The Effects: Dead Zones and Harmful Algal Blooms*, <https://perma.cc/72CK-Q627>.

<sup>53</sup> See NOAA Fisheries, *Hitting Us Where It Hurts: The Untold Story of Harmful Algal Blooms* (Nov. 7, 2021), <https://perma.cc/7LUY-AB2E>.

<sup>54</sup> See Jim Epstein, Letter to the Editor, *Clean Water Is Vital for Business in Virginia*, *The Progress-Index* (Oct. 16, 2014), <https://perma.cc/L8AF-EJR2>.

**C. Protecting clean water supports historic investments in the nation’s infrastructure.**

Restoring the pre-NWPR regulatory framework is critical to effectuating key priorities of Congress and this administration. In November 2021, Congress passed the Infrastructure Investment and Jobs Act—providing, among other important funding, the “single largest investment in water that the federal government has ever made.”<sup>55</sup> The law included \$55 billion to expand access to clean water, including funds to replace lead service lines, address PFAS contamination, and bolster wastewater infrastructure.<sup>56</sup> A similarly sizeable investment—\$47 billion—was allocated to climate resilience measures, including those aimed at helping communities prepare for worsening floods.<sup>57</sup>

As discussed in Section I.D, below, wetlands naturally provide many of the functions pursued as water quality improvement and climate resilience measures in the infrastructure law: filtering excess nutrients and other pollutants,<sup>58</sup> slowing and absorbing floodwaters,<sup>59</sup> and providing a buffer against storm surges generated by tropical storms and hurricanes.<sup>60</sup> Returning to the longstanding definition of “waters of the United States,” updated to reflect Supreme Court precedent, and then moving swiftly to adopt a new rule that is rooted in science and more broadly protects the country’s waterways, as Congress intended, reinforces these historic investments in clean water. By contrast, declining to adopt stronger clean water protections would undercut the aims of this “once-in-a-generation investment”<sup>61</sup> and weaken the impact of these critically needed funds.

**D. Strong clean water protections are necessary to mitigate and adapt to the effects of a changing climate.**

President Biden has announced that his administration “will take swift action to tackle the climate change emergency.”<sup>62</sup> EPA, for its part, has announced several initiatives to support environmental justice and climate action.<sup>63</sup> To fulfill this administration’s commitment to these initiatives and to “build[ing] resiliency and develop[ing] tools to respond to climate change,”<sup>64</sup> the Agencies must act to restore clean water protections that will bolster communities’ ability to withstand the effects of a changing climate.

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<sup>55</sup> EPA, FACT SHEET: EPA & The Bipartisan Infrastructure Law (Nov. 6, 2021), <https://perma.cc/7UKC-XF3P>.

<sup>56</sup> *Id.*

<sup>57</sup> Coral Davenport & Christopher Flavelle, *Infrastructure Bill Makes First Major U.S. Investment in Climate Resilience*, N.Y. Times (Nov. 6, 2021), <https://perma.cc/7FKU-H6KJ>.

<sup>58</sup> EPA & Dep’t of the Army, Technical Support Document for the Proposed “Revised Definition of ‘Waters of the United States’” Rule, EPA-HQ-OW-2021-0602-0081, 119 (Dec. 7, 2021) (“Proposed Rule Technical Support Document”).

<sup>59</sup> EPA, Wetlands: Protecting Life and Property from Flooding, EPA843-F-06-001 (2006), <https://perma.cc/5LL5-ANMD>.

<sup>60</sup> *Id.*

<sup>61</sup> The White House, *President Biden’s Bipartisan Infrastructure Law*, <https://perma.cc/TY6F-GK63>

<sup>62</sup> The White House, *The Biden-Harris Administration Immediate Priorities*, <https://perma.cc/48B8-NCTS>.

<sup>63</sup> EPA, *EPA Administrator Regan Announces New Initiatives to Support Environmental Justice and Climate Action* (Apr. 23, 2021), <https://perma.cc/86M4-T5RR>.

<sup>64</sup> EPA, *Addressing Climate Change in the Water Sector*, <https://perma.cc/CYA9-SXXU>.

1. *Climate change is already causing widespread and varied harm to the nation's water resources.*

Studies have shown that climate change has affected and will continue to affect the quality and surface flow of our nation's waters.<sup>65</sup> 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 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.<sup>66</sup>

Broadly, “[r]ising 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.”<sup>67</sup> More frequent high-intensity rainfall events mobilize pollutants such as sediments and nutrients.<sup>68</sup> Future warming will add to the stress on water supplies and adversely affect the availability of water in parts of the United States, especially the already water-strapped West.<sup>69</sup>

Climate change is already altering water supply timing in many parts of the country, especially those areas that rely on snowmelt for late-spring, summer, and early-fall flows. Increasing temperatures will both reduce the amount of snowpack and cause it to melt earlier, more quickly, and more extensively.<sup>70</sup> 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.”<sup>71</sup>

In the southwestern United States, drought and wildfire caused by climate change are adversely affecting water resources, wildlife habitat, and jobs. For example, as the climate warms, more of New Mexico's waters are drying up. As waters become stressed by drought, overuse, and the changing climate, 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, and Rio Hondo),

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<sup>65</sup> See S. Mažeika P. Sullivan et al., Comment Letter on Proposed Rule: Revised Definition of “Waters of the U.S.” 7 (Apr. 5, 2019) (“SAB Members Comment Letter”); Colvin et al., *supra* note 33, at 76.

<sup>66</sup> EPA, *Addressing Climate Change in the Water Sector*, <https://perma.cc/CYA9-SXXU>.

<sup>67</sup> U.S. Global Change Rsch. 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>.

<sup>68</sup> *Id.* at 152.

<sup>69</sup> See U.S. Global Change Rsch. Program, National Assessment Synthesis Team, *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change*, Overview 11 (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.”); see also *id.* at 98.

<sup>70</sup> *Id.* at 96.

<sup>71</sup> *Id.* at 11.

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.<sup>72</sup>

Meanwhile, changing rainfall patterns, increased storms, and sea level rise induced by climate change are increasing flooding in many parts of the country.<sup>73</sup> Flood losses in the United States—currently estimated at \$32.1 billion on average—are projected to increase by over 25% in the next thirty years.<sup>74</sup> EPA has attributed the likelihood of larger and more frequent river floods in certain regions to changes in the size and frequency of storms, streamflow, snowmelt, and snowpack accumulation.<sup>75</sup> National Oceanic and Atmospheric Administration (“NOAA”) officials referred to the Spring 2019 flood season as “potentially unprecedented,”<sup>76</sup> with floods causing multiple deaths and billions of dollars in damage throughout the Midwest that year.<sup>77</sup> EPA has reported that it would cost \$1.5 million annually to replace the natural flood-control functions of a single 5,000-acre tract of drained Minnesota wetlands.<sup>78</sup> The Midwest’s flooding has only risen in recent years, in both frequency and severity.<sup>79</sup> In Tennessee, 2021 brought the deadliest flash flooding on record and one of the worst natural disasters in the history of the state.<sup>80</sup> Historically high rainfall—as many as seventeen inches in one day in some places—led to flooding that killed at least twenty people and inflicted devastating damage to communities across Middle Tennessee.<sup>81</sup> Experts expect these types of catastrophic flooding events to increase in frequency in the coming decades due to climate change.<sup>82</sup> And elsewhere in the Southeast, the number of days marked by high tide flooding—sometimes called “sunny-day flooding,” resulting from rising sea levels—has increased by over 400% since 2000.<sup>83</sup>

In just the last six years, North Carolina and other southern states have been hit with several devastating 500-year storms, including Hurricane Matthew, Hurricane Florence, and

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<sup>72</sup> James Kenney, N.M. Env’t Dep’t, Comment Letter on Proposed Revised Definition of Waters of the United States 5 (Apr. 15, 2019), <https://perma.cc/D2FZ-7KV9>.

<sup>73</sup> 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.”); NOAA, 2021 State of High Tide Flooding and Annual Outlook 6–10 (2021) (“High Tide Flooding”), <https://perma.cc/ST29-ZS2P>.

<sup>74</sup> Wing et al., *supra* note 37, at 2.

<sup>75</sup> EPA, Climate Change Indicators: River Flooding, <https://perma.cc/XN9R-35FS>.

<sup>76</sup> NOAA, Spring Outlook: *Historic, Widespread Flooding to Continue Through May* (Mar. 21, 2019), <https://perma.cc/6D3U-UEYT>.

<sup>77</sup> 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>.

<sup>78</sup> EPA, EPA843-F-06-001, Wetlands: Protecting Life and Property from Flooding (May 2006).

<sup>79</sup> Gary Galluzzo, *Study Finds Midwest Flooding More Frequent*, Iowa Now (Feb. 9, 2015), <https://perma.cc/S49KVTX9>.

<sup>80</sup> Nat’l Weather Serv., *August 21, 2021 Flash Flooding* (Sept. 28, 2021), <https://perma.cc/G2MW-EURC>.

<sup>81</sup> Bob Henson, Yale Climate Connections, *Henri Drenches Northeast; Death Toll at 21 in Catastrophic Tennessee Flash Flood* (Aug. 23, 2021), <https://perma.cc/6D8V-56WU>; see also Michael Levenson, *At Least 22 Dead and 50 Missing in Tennessee Floods, Officials Say*, N.Y. Times (Aug. 24, 2021), <https://perma.cc/65MG-K2Y9>.

<sup>82</sup> See Vanderbilt Sch. of Eng’g, *Tennessee Flash Floods are an Example of Climate Change Impacts to Come* (Aug. 25, 2021), <https://perma.cc/5YQ8-WHVY>.

<sup>83</sup> Nat’l Oceanic and Atmospheric Admin. Off. for Coastal Mgmt., *High Tide Flooding*, <https://perma.cc/22TW-56ER>; see also generally High Tide Flooding.

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.<sup>84</sup> These types of “back-to-back hurricanes” are only “projected to increase in frequency, power, and duration,”<sup>85</sup> making it more important than ever to preserve the nation’s water resources in order to mitigate the damage from climate change.

2. *Protecting our water resources will help communities mitigate and adapt to the effects of climate change.*

Our natural water resources are among the best defenses against the effects of climate change. A single acre of wetlands can store up to one million gallons of water; when that acre of wetland is removed, those one million gallons flow unimpeded downstream, increasing the risk of flooding.<sup>86</sup> During the Southeast’s devastating hurricanes and tropical storms of recent years, the storage capacity of North Carolina’s wetlands prevented even more catastrophic damage from befalling the state.<sup>87</sup> Similarly, during Hurricane Sandy in 2012, wetlands prevented \$625 million in flood damage by shielding property in twelve states.<sup>88</sup> It is therefore critically important that wetlands are protected.

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<sup>89</sup>—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,<sup>90</sup> 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 streams, including ephemeral streams, are also becoming more important due to the effects of climate change. 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.<sup>91</sup> Small streams transform and store carbon before it can be transported downstream.<sup>92</sup>

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<sup>84</sup> N.C. Dep’t of Env’t Quality & Off. of N.C. Attorney Gen., Comment Letter on Proposed Revised Definition of Waters of the United States 3–4 (Apr. 15, 2019) (“NCDEQ Comment Letter”), <https://perma.cc/VE4P-T72E>.

<sup>85</sup> *Id.* at 4.

<sup>86</sup> EPA, EPA843-F-06-001, Wetlands: Protecting Life and Property from Flooding (2006); *see also* N.C. Dept. of Env’t Quality, 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).

<sup>87</sup> NCDEQ Comment Letter at 3–4.

<sup>88</sup> Siddharth Narayan et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, 7 *Sci. Reps.* 9463 (2017), <https://perma.cc/UGJ5-RCP5>.

<sup>89</sup> Proposed Rule Technical Support Document at 119.

<sup>90</sup> N.C. Dep’t of Env’t Quality, *North Carolina Coastal Habitat Protection Plan*, 2021 Amendment 87 (2021), <https://perma.cc/3XGJ-YMPP>.

<sup>91</sup> Literature Review at 30–31.

<sup>92</sup> *Id.*

These streams break down leaf litter and other organic matter, releasing it downstream in pulses during storm events.<sup>93</sup> The pulses provide an important source of carbon for downstream animals.<sup>94</sup>

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. As described in Section I.A, above, people who are already vulnerable, including low-income populations and communities of color, have fewer resources to prepare for and cope with extreme weather and climate-related events and are expected to experience greater impacts.<sup>95</sup> To fulfill the Biden Administration’s commitment to protecting vulnerable communities and tackling climate change, the Agencies must restore broad protections to waters that assist in combating the effects of a warming climate.

## **II. The Agencies’ Rejection of the NWPR and Restoration of the More Protective and Familiar Pre-2015 Regime Is a Necessary Step Towards Restoring and Maintaining the Integrity of the Nation’s Waters.**

As summarized below—and as the Agencies have now acknowledged—the NWPR and its sweeping elimination of Clean Water Act protections were both unlawfully adopted and uniquely harmful to the nation’s waters. The rule’s failings provide both a compelling basis to replace it and ample support for the Agencies’ determination that the NWPR is not a suitable alternative to the Proposed Rule.<sup>96</sup>

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

#### *1. The NWPR left vast swaths of integral water resources open to pollution and destruction.*

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 precipitation<sup>97</sup>—which comprise millions of the nation’s stream miles.<sup>98</sup> It also excluded tens of millions of wetland acres,<sup>99</sup> some untold number of intermittent streams (which flow continuously during

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<sup>93</sup> *Id.* at 30.

<sup>94</sup> *Id.*

<sup>95</sup> 2018 National Climate Assessment at 25.

<sup>96</sup> *See* 86 Fed. Reg. at 69,407–16.

<sup>97</sup> Proposed Rule, 86 Fed. Reg. at 69,381.

<sup>98</sup> Steve Moyer, Trout Unlimited, Comment Letter on Proposed Revised Definition of Waters of the United States 5, 13 (Apr. 15, 2019) (“Trout Unlimited Comments”), <https://perma.cc/A7T9-2VTR>.

<sup>99</sup> 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.”).

part of the year), and many perennial streams, lakes, ponds, and other waters across the country.<sup>100</sup>

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.<sup>101</sup> In the months after the NWPR took force, these concerns were borne out. The Agencies now warn that the “absence of protections for such resources and any subsequent unregulated and unmitigated impacts . . . would have caused cascading, cumulative, and substantial downstream harm, including damage connected to water supplies, water quality, flooding, drought, erosion, and habitat integrity,” undermining the objective of the Clean Water Act[.]<sup>102</sup> 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.’”<sup>103</sup>

Developers and other project proponents applied for safe harbor under the NWPR at a record-setting pace. Applying the NWPR, the Agencies issued approved jurisdictional determinations that excluded entire categories of waters from the Clean Water Act’s safeguards against pollution or destruction.<sup>104</sup> For example, as of July 21, 2021, Georgia’s Savannah Army Corps District had received over 400 requests for approved jurisdictional determinations since the NWPR went into effect on June 22, 2020.<sup>105</sup> Prior to implementation of the NWPR, the Savannah District typically received approximately 50 requests for approved jurisdictional determinations per year.<sup>106</sup> And just in the Coastal Branch, Savannah District staff 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.<sup>107</sup>

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.<sup>108</sup> As planned, the mine would destroy hundreds of acres of wetlands formerly protected under the Act.<sup>109</sup> Shortly after the NWPR took effect, the mine’s operator, Twin Pines Minerals, sought and quickly obtained a new jurisdictional determination in October 2020; the new determination excluded close to 400 acres of wetlands in the project area from Clean Water Act protections based on the

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<sup>100</sup> See NWPR EA at 22–23 (describing NWPR as maintaining jurisdiction over “most perennial and many intermittent streams relative to” prior policy); see also *id.* at 9–17.

<sup>101</sup> *Id.* at 105–06.

<sup>102</sup> Proposed Rule, 86 Fed. Reg. at 69,415–16.

<sup>103</sup> *Pascua Yaqui Tribe*, 2021 WL 3855977, at \*5 (quoting Fox Decl. ¶ 15 and Pinkham Decl. ¶ 15).

<sup>104</sup> See, e.g., Amena H. Saiyid, *Companies Eager to ‘Lock In’ Trump-Era Water Rule Exemptions*, Env’t & Energy Rep. (Sept. 10, 2020), <https://perma.cc/8LU4-YM9G>.

<sup>105</sup> U.S. Army Corps of Eng’rs, Savannah Dist., Regulatory Update (July 21, 2021).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 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>.

<sup>109</sup> *Id.*

NWPR’s unlawful “adjacent wetlands” definition and found *zero* jurisdictional waters.<sup>110</sup> As a result, Twin Pines Minerals withdrew its permit application.<sup>111</sup> Twin Pines also applied for, and received, a *second* jurisdictional determination under the NWPR, this time removing protections from close to 180 acres of wetlands near the Refuge.<sup>112</sup> With these determinations, the company may now destroy these hundreds of acres of wetlands without federal protections or oversight. This destruction is likely to irreparably damage the hydrology and quality of the refuge and the plants and animals that rely on it.<sup>113</sup> SELC,<sup>114</sup> Senator Ossoff,<sup>115</sup> and the U.S. Fish and Wildlife Service<sup>116</sup> have since requested that the Corps, or EPA by exercising its “special cases” authority, restore federal clean water protections to these critical wetlands.

The Twin Pines mine is hardly the only example of a destructive project allowed to proceed under the NWPR with little or no Clean Water Act protection for the waters that would be affected. 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].”<sup>117</sup> 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,<sup>118</sup> including “an oil pipeline which will cause discharges into nearly 100 ephemeral streams that are no longer jurisdictional.”<sup>119</sup> As the Agencies have recognized, “indicators of a substantial reduction in waters protected” by the NWPR “account for only a fraction of the NWPR’s impacts because many project proponents do not need to seek any form of jurisdictional determinations for waters that the NWPR categorically excludes . . . and the Corps does not have purview over such projects and does not track them.”<sup>120</sup> The Agencies also found that under the NWPR there was an increase of 183% to 326% in determinations carried out as approved jurisdictional determinations (“AJDs”) rather than preliminary jurisdictional determinations (“PJDs”), indicating that “fewer project proponents [were] requesting that aquatic resources on their project

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<sup>110</sup> See U.S. Army Corps of Eng’rs, Approved Jurisdictional Determination, No. SAS-2018-00554 (Oct. 14, 2020), <https://perma.cc/J4JZ-6TA9>.

<sup>111</sup> Letter from Christopher Terrell et al., TTL, Inc., to Holly Ross, U.S. Army Corps of Eng’rs (Oct. 21, 2020).

<sup>112</sup> See U.S. Army Corps of Eng’rs, Approved Jurisdictional Determination, No. SAS-2018-00554-ACM (Mar. 24, 2021), <https://perma.cc/B5PN-NMWY>.

<sup>113</sup> 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).

<sup>114</sup> Letter from Megan Hinkle Huynh et al., SELC, to Radhika Fox, EPA (Oct. 25, 2021); Letter from Megan Hinkle Huynh et al., SELC, to Michael Connor, U.S. Army Corps of Eng’rs (Dec. 20, 2021).

<sup>115</sup> Letter from Sen. Jon Ossoff to Michael Connor, U.S. Army Corps of Eng’rs (Dec. 20, 2021); Letter from Sen. Jon Ossoff to Michael Regan, EPA (Dec. 20, 2021).

<sup>116</sup> Letter from Leopoldo Miranda-Castro, U.S. Fish & Wildlife Serv., to Brig. Gen. Jason E. Kelly, U.S. Army Corps of Eng’rs (Dec. 21, 2021) (emphasizing damage mine would likely cause to Okefenokee National Wildlife Refuge); Letter from Leopoldo Miranda-Castro, U.S. Fish & Wildlife Serv., to Radhika Fox, EPA (Dec. 21, 2021) (same).

<sup>117</sup> 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) (“Memorandum for the Record”), <https://perma.cc/Y66K-ESHC>.

<sup>118</sup> Decl. of Radhika Fox ¶ 15, *Conservation Law Found. v. Regan*, No. 1:20-cv-10820-DPW (D. Mass. June 9, 2021) (“Fox Decl.”), <https://perma.cc/G8RL-L7S5>; Decl. of Jaime A. Pinkham ¶ 15, *Conservation Law Found. v. Regan*, No. 1:20-cv-10820-DPW (D. Mass. June 9, 2021) (“Pinkham Decl.”), <https://perma.cc/NVB7-KLQC>.

<sup>119</sup> Memorandum for the Record at 3–4.

<sup>120</sup> Proposed Rule Technical Support Document at 94.

site be treated as if they are jurisdictional.”<sup>121</sup> The Agencies concluded that “there were proportionally fewer PJDs and more AJDs being carried out under the NWPR, there were fewer resources being found to be jurisdictional when AJDs were being carried out, and there were elevated findings of no section 404 permits being needed” for projects under the NWPR’s definition of “waters of the United States.”<sup>122</sup>

Looking at individual water resources, the statistics are similarly staggering. Of the 48,313 wetlands, streams, and other waters evaluated by the Corps under the NWPR between June 22, 2020 and June 21, 2021, at least 75% were found to be non-jurisdictional.<sup>123</sup> Based on EPA’s data, that number may actually be substantially higher.<sup>124</sup> In all, only 25% of AJDs identified any streams, wetlands, or other waters afforded protection under the NWPR<sup>125</sup>— compared with 54% of AJDs that afforded protections to similar waters under the 2015 Clean Water Rule and the pre-2015 regulatory framework.<sup>126</sup> 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.*”<sup>127</sup> The Agencies found a tenfold increase in non-jurisdictional findings for individual streams in Arizona, and a thirtyfold increase in New Mexico.<sup>128</sup> And “[c]ompounding potential resource losses, eliminating ephemeral streams from jurisdiction under the NWPR also typically eliminates jurisdiction over any nearby wetlands.”<sup>129</sup> In one example of the marked effects of the NWPR in the arid Southwest, during a storm event considered likely to occur annually, the ephemeral Rio Puerco accounted for 76% of the flow in the Rio Grande but could have been excluded from Clean Water Act protection under the NWPR.<sup>130</sup> The Agencies found that the categorical exclusion of ephemeral streams from jurisdiction by the NWPR “disproportionately impacts tribes and population groups of concern in the arid West[,]” and “may have disproportionately exposed tribes to increased pollution and health risks.”<sup>131</sup>

Indeed, reviewing even a small sample of NWPR-era jurisdictional determinations makes clear that the Rule’s effects on the nation’s waters were devastating. Over 9,399 AJDs were issued under the NWPR, with 75% of those AJDs finding at least some resources to be non-jurisdictional.<sup>132</sup> Together with the National Wildlife Federal and the Natural Resources Defense Council, SELC reviewed a subset of those determinations posted on the Corps’ website and compiled a list of 563 that, based only on the minimal information made available in the publicly

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<sup>121</sup> *Id.* at 99.

<sup>122</sup> *Id.* at 100.

<sup>123</sup> *Id.* at 100–01.

<sup>124</sup> 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 (reporting that EPA data from June 22, 2020, to April 15, 2021, suggested that over that period 92% of waters had been found to be non-jurisdictional).

<sup>125</sup> Proposed Rule Technical Support Document at 101 tbl. 1.

<sup>126</sup> Memorandum for the Record at 2.

<sup>127</sup> Fox Decl. ¶ 16 (emphasis added); Pinkham Decl. ¶ 16 (emphasis added).

<sup>128</sup> Proposed Rule Technical Support Document at 107.

<sup>129</sup> Memorandum for the Record at 3.

<sup>130</sup> Proposed Rule Technical Support Document at 128.

<sup>131</sup> Proposed Rule, 86 Fed. Reg. at 69,383.

<sup>132</sup> Proposed Rule Technical Support Document at 101 (listing number of AJDs issued from June 22, 2020, to June 21, 2021).

accessible AJD forms, are troubling, considering the extent of the wetlands and streams excluded, the kind of project that would avoid review under the Clean Water Act, the location of the resources, and more. As a result of just those 563 determinations—less than 6% of all AJDs issued under the rule—11,371 acres of wetlands and 580 miles of streams (3,067,121 linear feet) were excluded from the Clean Water Act’s protections.<sup>133</sup> These losses resulted from only a fraction of AJDs issued under the NWPR, providing a mere snapshot of the extent of harm to the nation’s water resources.

The NWPR also left substantial 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, with 60,000 acres of wetlands left vulnerable in the Caluda and Congaree River watersheds alone.<sup>134</sup> In North Carolina’s Cape Fear and Neuse River watersheds, more than 800,000 acres of wetlands were vulnerable to losing coverage.<sup>135</sup> Some 162,149 acres of wetlands were similarly vulnerable in Georgia’s Chattahoochee River watershed, as were over 100,000 acres in Virginia’s James River and Rappahannock River watersheds, which are vital to water quality in the Chesapeake Bay.<sup>136</sup> In Alabama’s Black Warrior River basin, over 121,000 acres of wetlands most likely lost coverage, as did nearly 54,000 acres in the Cahaba River watershed.<sup>137</sup> Over 23,400 acres were made vulnerable in Tennessee’s Wolf River basin, as were more than 17,000 acres in the Duck River watershed.<sup>138</sup> More than 217 million Americans depend for their drinking water on sources threatened by the NWPR, including 35 million people in the South, or three out of four Southerners.<sup>139</sup>

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 . . . .”<sup>140</sup> In fact, given these alarming statistics, Administrator Regan has cautioned that the NWPR “is leading to significant environmental degradation.”<sup>141</sup> The Agencies have determined that the NWPR “threatened the loss or degradation of waters critical to the protection of traditional navigable waters, among other concerns.”<sup>142</sup> Having concluded their review of the NWPR, the Agencies confessed that the rule was “causing significant, ongoing and *irreversible* environmental damage.”<sup>143</sup> Despite this concerning damage, it is extremely difficult, if not impossible, for members of the public to track

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<sup>133</sup> See NJD Spreadsheet (attached as Appendix B).

<sup>134</sup> Sackett Decl. ¶¶ 23–24.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Calculations performed by Jovian Sackett, SELC, based on methodology and precursor analysis described in Decl. of Jovian Sackett at 8–10, *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687-BHH (D.S.C. May 21, 2021), ECF No. 119-50.

<sup>138</sup> *Id.*

<sup>139</sup> Calculations performed by Jovian Sackett, SELC, based on methodology described in SELC, Population Served by Drinking Water Supplies from Surface Waters: Methodology of Drinking Water Population Statistics Used by Southern Environmental Law Center in Clean Water Fact Sheets (2021) (attached as Appendix E).

<sup>140</sup> Memorandum for the Record at 1–2.

<sup>141</sup> Press Release, EPA, EPA, Army Announce Intent to Revise Definition of WOTUS (June 9, 2021), <https://perma.cc/R6M7-Q572>.

<sup>142</sup> Proposed Rule, 86 Fed. Reg. at 69,383.

<sup>143</sup> Email from Karen Gude, EPA, to Tribal Partners (June 9, 2021) (emphasis added); Decl. of Ronnie Ben, Ex. 1, *Navajo Nation*, No. 20-CV-602-MV/GJF, 2021 WL 4430466, ECF No. 34-2 (emphasis added).

these on-the-ground losses where the Corps has given projects a pass from federal oversight, as it did at a record pace under the NWPR. Given Congress’s “broad, systemic view of the goal of maintaining and improving water quality”<sup>144</sup> 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.<sup>145</sup>

2. *States cannot—and did not—fill the gap in federal clean water protections 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.<sup>146</sup> Worse, 36 of the 50 states have laws in place that substantially hinder them from protecting waters left unprotected by the federal government.<sup>147</sup> Numerous states raised serious concerns in their comments on the proposed NWPR about legal and practical constraints on their ability to make up for the removal of federal protections from many waters:

- In their comments on the NWPR, 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.”<sup>148</sup> 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.<sup>149</sup>

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<sup>144</sup> *Riverside Bayview*, 474 U.S. at 132.

<sup>145</sup> See 33 U.S.C. § 1251(a)(2).

<sup>146</sup> See The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,270 (Apr. 21, 2020) (“NWPR”) (“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 . . .”).

<sup>147</sup> Env’t 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.” 46 (Jan. 23, 2020) (“NWPR RPA”), <https://perma.cc/A6H4-SCA6>. 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.

<sup>148</sup> Barbara D. Underwood et al., Comment Letter on Revised Definition of “Waters of the United States” 3 (Apr. 15, 2019) (“AG Comments”), <https://perma.cc/7CL5-9TML>.

<sup>149</sup> NWPR 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, 1276–81 (1995); Lance D. Wood, *The ECOS Proposal for Expanded State Assumption of the CWA § 404 Program: Unnecessary, Unwise, and Unworkable*, 39 Env’t L. Rep. News & Analysis 10,209, 10,213 (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.<sup>150</sup> Maine officials were concerned that the weakening of federal jurisdiction would incentivize legislative action to erode state jurisdiction as well.<sup>151</sup>
- California 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.”<sup>152</sup> 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.<sup>153</sup>
- New York reported that only about half of its 2.4 million acres of wetlands are freshwater wetlands subject to its state regulation.<sup>154</sup> New York relies on the federal Clean Water Act to protect the many floodplain, riparian, and headwater wetlands falling outside of its state protections.<sup>155</sup>
- Maryland officials observed that narrowing the scope of federal jurisdiction, “thus 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,” due to pollution from other states flowing downstream and into Maryland.<sup>156</sup>
- Virginia echoed the concern conceded in the Economic Analysis issued with the NWPR: that many states could not afford to assume responsibility for regulating fill activities in the millions of acres of wetlands left unprotected at the federal level by the NWPR.<sup>157</sup> Virginia’s Department of Environmental Quality wrote 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.<sup>158</sup> In 2012, Virginia studied what would be required if it chose to assume the Section 404 permitting program, and concluded that administering a program

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<sup>150</sup> AG Comments Attach. A, at 6.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* Attach. A, at 4 (emphasis added).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Attach. A, at 31.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* Attach. A, at 7.

<sup>157</sup> NWPR EA at 44 (reporting that many states do not “have the resources to staff and manage the new or expanded programs”).

<sup>158</sup> David K. Paylor, Director, Va. Dep’t of Env’t Quality, Comment Letter on Proposed Revised Definition of Waters of the United States,” Attach. A, at 8 (Apr. 12, 2019), <https://perma.cc/9T9F-NTZR>.

as robust as the federal program would cost \$18 million up front to implement, and \$3.4 million annually afterward.<sup>159</sup> In deciding against assumption, Virginia identified losing the Corps' knowledge base as a critical cost.<sup>160</sup>

Many of the states' concerns were in fact borne out by state action—or inaction—in response to the NWPR's withdrawal of federal protections from many streams, wetlands, and other waters. Many states have laws prohibiting their regulation of water from exceeding the federal “floor”<sup>161</sup> or other limitations on their ability to adopt regulations to protect state waters. One study found of the 31 states the Agencies deemed likely to regulate wetlands that would newly be left unprotected by the NWPR, at least 16 were unlikely to do so, due to the special legislative or administrative approval required in those states to pass environmental rules that are more stringent than corresponding federal law, or similar obstacles.<sup>162</sup> Even in states that adopted or sought to develop additional protections for state waters outside the NWPR's scope, the months following the NWPR's promulgation saw efforts to limit or undo these protections. Below are examples of state responses to the NWPR that help to illustrate the fallacy that states could, and would, fill the gap in clean water protections created by the rule:

- On June 25, 2020, Ohio issued a general permit for filling isolated streams and wetlands.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup> The bill would also redefine “ephemeral feature” to exclude reference to the groundwater table.

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<sup>159</sup> Va. Dep't of Env't Quality, Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program: A Report to the Honorable Robert F. McDonnell, Governor and the General Assembly of Virginia 2 (2012), <https://perma.cc/MBW8-4P8B>.

<sup>160</sup> *Id.* at 3.

<sup>161</sup> *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; *see also* EPA & Dep't of the Army, Economic Analysis for the Proposed “Revised Definition of ‘Waters of the United States’” Rule, EPA-HQ-OW-2021-0602-0083, ch. II (Nov. 17, 2021) (“Proposed Rule EA”).

<sup>162</sup> David A. Keiser et al., *A Water Rule that Turns a Blind Eye to Transboundary Pollution*, 372 Science 241, 242 (2021), <https://perma.cc/T9HH-SYP6>.

<sup>163</sup> State of Ohio, Ohio General Permit for Filling Category 1 and Category 2 Isolated Wetlands and Ephemeral Stream 1 (June 25, 2020), <https://perma.cc/Q7F7-T2QH>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 3.

<sup>166</sup> H.B. 175, 134th Gen. Assemb., Reg. Sess. (Ohio 2021), <https://perma.cc/9VME-G986>; *see* H.B. 175 as introduced, <https://perma.cc/NYA5-2BZK>.

- 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 potential need for additional staff to write permits and enforce state water quality requirements.<sup>167</sup> 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.”<sup>168</sup> 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.<sup>169</sup>
- Colorado asserted that 25–50% of its waters would need state-level protection as long as the NWPR was in effect, because there are no existing state laws or regulations to permit the filling of state waters, and because “Colorado has relied on the federal government to protect these waters[.]”<sup>170</sup> Colorado began the process of developing a state dredge-and-fill permitting program to fill the permitting gap.<sup>171</sup> In June 2020, the Colorado Association of Home Builders announced it had helped to stop introduction of legislation establishing such a program.<sup>172</sup>
- 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.<sup>173</sup> The law eliminated the requirement that industry and other project proponents must obtain a permit for impacts to any ephemeral features (wetlands or streams) and removed the requirement to obtain a permit or perform compensatory mitigation for impacts to “isolated” wetlands on certain former agricultural lands.<sup>174</sup>
- Even after the NWPR was vacated by two federal district courts—and contrary to clear guidance provided by the Agencies—Florida has persisted in applying the NWPR’s definition of “waters of the United States” in implementing its delegated Section 404

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<sup>167</sup> 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).

<sup>168</sup> 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>.

<sup>169</sup> *Id.*

<sup>170</sup> Colo. Dep’t of Pub. Health & Env’t, “Waters of the United States and the Navigable Waters Protection Rule,” <https://perma.cc/WG3E-S3AM>.

<sup>171</sup> Colo. Dep’t of Pub. Health & Env’t, *WOTUS – Dredge and Fill Handout*, <https://perma.cc/6JJW-BPHM> (select “Dredge and fill handout” on main page).

<sup>172</sup> 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>.

<sup>173</sup> Casey Smith, *Indiana Governor Signs Wetland Repeal Bill, Despite Pushback*, Associated Press (Apr. 29, 2021), <https://perma.cc/U9NJ-6ZN4>.

<sup>174</sup> 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>.

permitting program.<sup>175</sup> In at least one case, Florida’s Department of Environmental Protection has applied the NWPR’s previously invalidated definition and formally determined that no Section 404 permit is required to fill a three-acre wetland.<sup>176</sup>

The Agencies’ decision to permanently reject the NWPR and restore the preexisting regime reflects an understanding that the health of our nation’s waters depends on strong federal protections.

3. *The NWPR’s removal of federal clean water protections placed a particularly heavy burden on the health and safety of environmental justice communities.*

Although weak clean water protections—like those in the NWPR—threatened waters across the United States, the potential harms did not fall equally on all populations. Because, as discussed in Section I.A, above, water pollution and climate-change impacts disproportionately affect communities of color and low-income communities, removing safeguards against these effects posed a special risk to the health and safety of such communities. The Agencies note in their Economic Analysis accompanying the Proposed Rule that, on average, the greater the difference in Clean Water Act protection for waters and wetlands between the regulatory regime that preceded the NWPR and the NWPR, the greater the percentage of individuals living in those watersheds that are people of color.<sup>177</sup> The Agencies also found that the areas experiencing the greatest loss of federal protection for wetlands under the NWPR had far higher percentages of low-income individuals and people of color than the national average.<sup>178</sup>

Of particular concern, many of the Corps’ approved jurisdictional determinations that removed protections from streams, wetlands, and other critical waters—as well as the “significant, actual environmental harms” they enabled<sup>179</sup>—took place in low-income communities or communities of color. Highlighted below are just ten of the numerous 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, South Carolina.* 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.<sup>180</sup> Without Clean Water Act protections, the wetlands could be destroyed to create the Riverport Development, a 6,000-acre mixed-use development bordering the Savannah National Wildlife Refuge.<sup>181</sup> Seventy percent of the population in the immediate vicinity are people of color and 35%

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<sup>175</sup> Hannah Northey, *EPA Clashes with Fla. Over Use of Trump WOTUS Rule*, Greenwire (Feb. 4, 2022), <https://bit.ly/3opggg8>.

<sup>176</sup> *Id.*

<sup>177</sup> Proposed Rule EA at 92–94 & tbls. IV-1, IV-2.

<sup>178</sup> *Id.*

<sup>179</sup> Fox Decl. ¶ 17; Pinkham Decl. ¶ 17.

<sup>180</sup> Approved Jurisdictional Determination, SAC-2010-00064 (Oct. 5, 2020), <https://perma.cc/C5HJ-EFX4>.

<sup>181</sup> Coastal Conservation League, *Riverport Development Along the Savannah River*, <https://perma.cc/9Z8X-F6N7>.

are low-income.<sup>182</sup> The area surrounding the proposed project site already has a Wastewater Discharge Indicator EJ Index in the 77th percentile, indicating the area's population is already disproportionately burdened with industrial water pollution.<sup>183</sup>

- *Weyerhaeuser Site, Winnsboro, South Carolina.* In January 2021, the Corps issued an approved jurisdictional determination to Weyerhaeuser, finding over 3,000 linear feet of ephemeral streams near Winnsboro in Fairfield County, South Carolina, to be non-jurisdictional.<sup>184</sup> Weyerhaeuser is attempting to sell the property for redevelopment.<sup>185</sup> The immediate area is 62% people of color and 45% low-income,<sup>186</sup> while Winnsboro as a whole is nearly 70% African American, with almost 40% of the population living below the poverty line.<sup>187</sup> Fairfield County has already experienced issues with water pollution, including high levels of radioactivity and E. coli.<sup>188</sup>
- *Saxe Gotha Industrial Park, Cayce, South Carolina.* In August 2021, the Corps issued an approved jurisdictional determination finding 28.3 acres of wetlands and 2.92 acres of ponds to be non-jurisdictional.<sup>189</sup> The project area is an industrial park situated less than a mile from the Congaree River and a few miles downstream from the Columbia Sewage Treatment Plant. The project area has a Wastewater Discharge Indicator in the 81st percentile.<sup>190</sup> Further, the project area is mere miles from the Lexington County Landfill Superfund site,<sup>191</sup> putting the area in the 99th percentile for the Superfund Proximity Indicator.<sup>192</sup> The area immediately surrounding the project is in the 86th percentile for percentage of the population comprised of people of color and in the 84th percentile for portion of the population that is low-income.<sup>193</sup>
- *Burke Business Park, Waynesboro, Georgia.* Just outside of Waynesboro, Georgia, the Corps in September 2020 excluded from Clean Water Act coverage 13 separate wetlands

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<sup>182</sup> EPA, Riverport Development EJSCREEN Report 3 (last visited Feb. 2, 2022). 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>.

<sup>183</sup> EPA, Riverport Development EJSCREEN Report 1. 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>. The EJ Index for a given environmental indicator combines demographic information with the environmental indicator to “identify communities that may have a high combination of environmental burdens and vulnerable populations.” *Id.*

<sup>184</sup> Approved Jurisdictional Determination, SAC-2020-01254 (Jan. 7, 2021), <https://perma.cc/Y99R-F358>.

<sup>185</sup> South Carolina I-77 Alliance, *Weyerhaeuser Site*, <https://perma.cc/2BEE-BQNZ>.

<sup>186</sup> EPA, Weyerhaeuser Site EJSCREEN Report 3 (last visited Feb. 7, 2022).

<sup>187</sup> U.S. Census Bureau, *ACS Demographic and Housing Estimates for Winnsboro town, SC*, <https://perma.cc/3XSD-UDU6>; U.S. Census Bureau, *Poverty Status in the Past 12 Months for Winnsboro town, SC*, <https://perma.cc/4NZH-C2CZ>.

<sup>188</sup> 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://perma.cc/FY5Z-6TBM>.

<sup>189</sup> Approved Jurisdictional Determination, SAC-2012-01169 (Aug. 4, 2021), <https://perma.cc/XAK9-XM5C>.

<sup>190</sup> EPA, Saxe Gotha II EJSCREEN Report 3 (last visited Feb. 1, 2022).

<sup>191</sup> EPA, *Lexington County Landfill Area*, <https://perma.cc/9DAL-JQC7>.

<sup>192</sup> EPA, Saxe Gotha II EJSCREEN Report 3.

<sup>193</sup> *Id.*

totaling over 30 acres in an approved jurisdictional determination for the development of a nearly 500-acre industrial park.<sup>194</sup> The site includes portions of the watersheds for both the Ogeechee River and Savannah River—two of the largest rivers in Georgia.<sup>195</sup> Sixty-nine percent of the population in the project area are people of color; 49% are low-income.<sup>196</sup> The project area already has a Wastewater Discharge Indicator in the 70th percentile.<sup>197</sup>

- *Brantley County Development, Waynesville, Georgia.* In May 2021, the Corps issued an approved jurisdictional determination to Brantley County Development Partners, finding that 34.55 acres of wetlands were non-jurisdictional under the Act.<sup>198</sup> The project area in question is located in Georgia’s lower coastal plain, just a few miles from the Satilla River. Nearly 20% of the population of Brantley County falls below the poverty line<sup>199</sup>; the project area is in the 92nd percentile for portion of the population that is low-income.<sup>200</sup> The apparent project site will include an industrial park as well as a landfill<sup>201</sup> that has been the subject of ongoing litigation with the county<sup>202</sup> and strident opposition from the community.<sup>203</sup>
- *Cocoa Apartment Complex, Cocoa, Florida.* In issuing an approved jurisdictional determination for a 268-unit apartment complex in July 2020,<sup>204</sup> 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.”<sup>205</sup> In contrast to Cocoa as a whole, where less than half the population is people of color,<sup>206</sup> the area where the proposed development would occur—and where over 50 acres of flood-preventing wetlands are left open to destruction—has a population that is predominantly people of color (74%) and low-income (70%).<sup>207</sup> 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.”<sup>208</sup>

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<sup>194</sup> 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>.

<sup>195</sup> Georgia River Networks, *Georgia Rivers*, <https://perma.cc/9MHD-BRKK> (including map of Georgia river watersheds).

<sup>196</sup> EPA, Burke Business Park EJSCREEN Report 3 (last visited Feb. 2, 2022).

<sup>197</sup> *Id.*

<sup>198</sup> Approved Jurisdictional Determination, SAS-2015-00746 (May 13, 2021), <https://perma.cc/5GCH-HQSB>.

<sup>199</sup> Census Rep., *Brantley County, GA*, <https://perma.cc/M8Z8-9DNJ>.

<sup>200</sup> EPA, Brantley County Development EJSCREEN Report 3 (last visited Feb. 1, 2022).

<sup>201</sup> Coastal Terrace Green Energy Park, *New Industrial Park*, <https://perma.cc/3LNA-A6B2>.

<sup>202</sup> See *Brantley Cnty. Dev. Partners v. Brantley Cnty.*, 540 F.Supp.3d 1291 (S.D. Ga. 2021).

<sup>203</sup> See Ga. Env’t Prot. Div., *Site Suitability Notice for US 82 Solid Waste Handling Facility – South, Brantley County* (May 28, 2020), <https://perma.cc/F49Z-DH7X> (indicating that the Environmental Protection Division received 9,514 comments opposing the siting of the landfill and 3 comments in support); Satilla Riverkeeper, *Brantley County is Not a Suitable Place for a Landfill*, <https://perma.cc/7SZU-645Z>.

<sup>204</sup> Jack Withaus, *New \$50.9M Residential Project Proposed*, Orlando Bus. J. (Feb. 24, 2020), <https://perma.cc/DDA7-6G9U>.

<sup>205</sup> Approved Jurisdictional Determination, SAJ-2020-00352 (July 14, 2020), <https://perma.cc/Q6BD-QVXR>.

<sup>206</sup> U.S. Census Bureau, *QuickFacts Cocoa City, Florida*, <https://perma.cc/N37K-FBP2>.

<sup>207</sup> EPA, Cocoa Apartment Complex EJSCREEN Report 3 (last visited Feb. 2, 2022).

<sup>208</sup> City of Cocoa, 2020 Annual Water Quality Report (2021), <https://perma.cc/K9K7-99FH>.

- *White Mesa Mine, Zia Pueblo, New Mexico*. 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.<sup>209</sup> Applying the NWPR, the Corps excluded nearly 5,000 linear feet of ephemeral streams from jurisdiction just outside the Zia Pueblo,<sup>210</sup> a reservation in central New Mexico whose population is entirely people of color and 65% low-income. The newly excluded streams included the headwaters of the Arroyo Piedra Parada, a tributary to the Jemez River.<sup>211</sup> Zia Pueblo's Wastewater Discharge Indicator is in the 83rd percentile, indicating the surrounding tribal communities are already burdened with industrial water pollution.<sup>212</sup>
- *Houston Fuel Oil Terminal Company, Harris County, Texas*. In August 2021, the Corps issued an approved jurisdictional determination to the Houston Fuel Oil Terminal Company, which provides fuel and crude oil storage and transport services, finding that 28.56 acres of wetlands were not jurisdictional under the Act.<sup>213</sup> The project is located along Houston's Ship Channel in Harris County, an area already known for posing environmental hazards to nearby residents, including increased risk of childhood cancer<sup>214</sup> and levels of cancer-causing formaldehyde in the air well above EPA's chronic health screening level.<sup>215</sup> The project area in particular has a Wastewater Discharge Indicator in the 91st percentile, indicating it is already burdened by water pollution, as well as a Cancer Risk Indicator in the 95th-100th percentile, reflecting heightened risk of cancer from air toxics.<sup>216</sup> Further, the project area is in the 90th percentile for portion of the population comprised of people of color: 44% of the population of Harris County is Hispanic and 19% is Black.<sup>217</sup>
- *Robert Brothers Farm, Wallace, Louisiana*. In June 2021, the Corps issued an approved jurisdictional determination that excluded 23.5 acres of wetlands and 44,580 feet of ditches from Clean Water Act jurisdiction.<sup>218</sup> Wallace, where the project site is located, is a majority Black community with a substantial low-income population.<sup>219</sup> Wallace is known in part for the important role it plays in educating the public on Louisiana's history, including presenting the history and legacy of slavery in the South, through

<sup>209</sup> Approved Jurisdictional Determination, SPA2016-139 (Jan. 22, 2021), <https://perma.cc/P4A7-ZREU>.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> EPA, Zia Pueblo EJS SCREEN Report 3 (last visited Feb. 2, 2022).

<sup>213</sup> Approved Jurisdictional Determination, SWG-2020-00471 (Aug. 18, 2021), <https://perma.cc/D3K7-5V8Y>.

<sup>214</sup> See Kristina W. Whitworth et al., *Childhood Lymphohematopoietic Cancer Incidence and Hazardous Air Pollutants in Southeast Texas, 1995-2004*, 116 *Env't Health Persps.* 1576, 1576 (2008), <https://perma.cc/T7DP-ZZ7U>.

<sup>215</sup> See One Breath Partnership, *Formaldehyde Air Pollution in Houston* (2021), <https://perma.cc/H6FX-TN5H>.

<sup>216</sup> EPA, Houston Fuel Oil Terminal Company EJS SCREEN Report 3 (last visited Feb. 7, 2022). The Cancer Risk Indicator reflects lifetime cancer risk from inhalation of air toxics. EPA, *Overview of Environmental Indicators in EJS SCREEN*, <https://perma.cc/9YXS-SGGD>.

<sup>217</sup> Census Rep., *Harris County, TX*, <https://perma.cc/E3GV-FQZ7>.

<sup>218</sup> Approved Jurisdictional Determination, MVN-2020-00838-SK (June 2, 2021), <https://perma.cc/XCZ3-4N92>.

<sup>219</sup> Census Rep., *Wallace, LA*, <https://perma.cc/3ZDG-5R32>.

several historic sites.<sup>220</sup> The stretch of the Mississippi River where Wallace is located is already threatened by a high concentration of polluting industrial facilities, earning the area the nickname “Cancer Alley.”<sup>221</sup> The project area, located less than a mile from the Mississippi River, has a Cancer Risk Indicator in the 95th-99th percentile, as well as a Wastewater Discharge Indicator in the 78th percentile.<sup>222</sup>

- *Former Hollybrook Plantation, East Carroll Parish, Louisiana.* 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.”<sup>223</sup> Over 70% of the population in the area immediately surrounding the project are people of color and 51% are low-income.<sup>224</sup> Less than five miles away is a community situated on Lake Providence, 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.<sup>225</sup> 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.”<sup>226</sup>

While this list of approved jurisdictional determinations under the NWPR is far from exhaustive, it illustrates the significant adverse effects that implementation of the NWPR’s unduly restrictive definition of “waters of the United States” has had on environmental justice communities.

4. *The NWPR’s elimination of federal protections for many wetlands and for other waters turned a blind eye to the impacts of our changing climate.*

As discussed in Section I.D, above, as the climate warms, protecting the nation’s wetlands and small streams is critical to the health of our waters and safety of our communities. Among other benefits, wetlands guard against flooding and filter upstream pollution, while small streams play an important role in carbon sequestration. Yet far from enhancing federal protections for these critical water resources, the NWPR took the opposite approach, categorically excluding large categories of wetlands and all ephemeral streams from the

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<sup>220</sup> See, e.g., *Whitney Plantation History*, <https://perma.cc/KYT8-YMA3> (“Today, Whitney Plantation educates the public about the history of slavery and its legacies.”); Nat’l Park Serv., *Evergreen Plantation*, <https://perma.cc/5A77-ZD9J> (describing Evergreen Plantation as “one of only a handful of plantations that evoke what major plantations resembled in the antebellum period of America’s history”).

<sup>221</sup> Tristan Baurick et al., ProPublica, *Welcome to Cancer Alley, Where Toxic Air is About to Get Worse* (Oct. 30, 2019), <https://perma.cc/NU4W-4Q2G>.

<sup>222</sup> EPA, Robert Brothers Farm EJSCEEN Report 3 (last visited Feb. 2, 2022).

<sup>223</sup> Approved Jurisdictional Determination, MVK-2017-00854-JLD (Mar. 18, 2021), <https://perma.cc/38AB-TSZL>.

<sup>224</sup> EPA, Former Hollybrook Plantation EJSCEEN Report 3 (last visited Feb. 2, 2022).

<sup>225</sup> U.S. Geological Survey, *Water Resources of East Carroll Parish, Louisiana* (2019), <https://perma.cc/6RHURTSC>.

<sup>226</sup> Stephenson Disaster Management Institute, *East Carroll Parish Hazard Mitigation Plan Update – 2016 at 2-28* (2016), <https://perma.cc/T5YL-SA92>.

definition of “waters of the United States.”<sup>227</sup> Replacing the NWPR—and restoring protections to these waters—is thus critical to combating the effects of climate change.

5. *The NWPR’s primary beneficiaries were industrial dischargers and developers, not farmers.*

The Agencies’ leadership during the prior administration frequently justified the NWPR’s drastic reduction in the number of waters subject to federal protection as providing “regulatory certainty and predictability for American farmers,”<sup>228</sup> and as “ensur[ing] that land use decisions are not improperly constrained, which will enable our farmers to continue feeding our Nation and the world.”<sup>229</sup> But this rhetoric, which the Agencies will likely hear again in comments on the current Proposed Rule, did not reflect the reality of the NWPR. The NWPR primarily benefited industrial dischargers and developers—not farmers.

As the Agencies are well aware, most ordinary agriculture operations do not require permits under the Clean Water Act. The Act excludes “agricultural stormwater discharges and return flows from irrigated agriculture” from its permitting programs.<sup>230</sup> Moreover, the dredge-and-fill permit program generally does not apply to discharges associated with normal agricultural practices—including farming, building or maintaining stock ponds or irrigation ditches, maintaining drainage ditches, and building farm roads using best management practices.<sup>231</sup>

Likely as a result of these exclusions, from 2011 to 2020, a mere 0.6% of Section 404 permits went to agriculture projects.<sup>232</sup> The most frequent recipients of Section 404 permits included the building, oil and gas, and other industries—not farmers.<sup>233</sup> Data compiled by the prior administration during the NWPR rulemaking painted a similar picture: from 2011 to 2015, agricultural discharges accounted for less than 1% of the wetland area and only about 2% of the stream length for which the Corps issued permits.<sup>234</sup>

**B. The Agencies’ decision to permanently reject the NWPR is warranted because the rule—already vacated by two federal district courts—was patently unlawful.**

In addition to recognizing the significant, actual environmental harms the NWPR has caused over a year of its implementation, the Agencies have now made findings confirming that the NWPR was adopted in violation of the Administrative Procedure Act and the Clean Water Act. The Agencies acknowledge that, among other flaws, the NWPR “failed to advance the

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<sup>227</sup> See Proposed Rule, 86 Fed. Reg. at 69,408–09.

<sup>228</sup> Press Release, EPA, EPA and Army Deliver on President Trump’s Promise to Issue the Navigable Waters Protection Rule – A New Definition of WOTUS (Jan. 23, 2020), <https://perma.cc/RK7Q-AHKL> (statement by EPA Administrator Andrew Wheeler).

<sup>229</sup> *Id.* (statement by Assistant Secretary of the Army for Civil Works R.D. James).

<sup>230</sup> 33 U.S.C. § 1362(14) (defining “point source”).

<sup>231</sup> See *id.* § 1344(f)(1) (identifying discharges not requiring Section 404 permits).

<sup>232</sup> See Proposed Rule EA at 101–02 & tbl. VI-1.

<sup>233</sup> See *id.*

<sup>234</sup> NWPR EA at 68–69.

objective of the [Clean Water] Act,”<sup>235</sup> as the rule “did not appropriately consider the effect of the revised definition of ‘waters of the United States’ on the integrity of the nation’s waters.”<sup>236</sup>

As both courts found in vacating the rule, 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.’”<sup>237</sup> Given the seriousness of the NWPR’s deficiencies<sup>238</sup> and the substantial harms it has caused in its implementation, the Agencies are on firm legal ground in replacing the NWPR.<sup>239</sup>

*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.”<sup>240</sup> 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,<sup>241</sup> leave no “unexplained inconsistency in agency policy,”<sup>242</sup> and address “important aspect[s] of the problem” aired in a rulemaking.<sup>243</sup> These deficiencies give the Agencies ample justification to quickly restore the regulatory framework that preceded the NWPR.

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<sup>235</sup> Proposed Rule, 86 Fed. Reg. at 69,416.

<sup>236</sup> *Id.* at 69,383.

<sup>237</sup> *Pascua Yaqui Tribe*, 2021 WL 3855977, at \*5 (internal citation omitted); *Navajo Nation*, 2021 WL 4430466, at \*3.

<sup>238</sup> 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 (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).

<sup>239</sup> The legal infirmities of the NWPR are detailed at greater length in the motion for summary judgment filed by the plaintiffs in *South Carolina Coastal Conservation League v. Regan*, a copy of which is submitted with these comments. Mem. in Supp. of Pls.’ 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.

<sup>240</sup> 33 U.S.C. § 1251(a).

<sup>241</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>242</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (citation and quotations omitted).

<sup>243</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

- a. The NWPR rulemaking failed to justify the NWPR’s 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 waters<sup>244</sup>—all without providing “good reasons” for their dramatic change of course.<sup>245</sup> As the Supreme Court has explained, “an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”<sup>246</sup> 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,<sup>247</sup> and extending the preexisting waste treatment exclusion to cooling ponds,<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup> The Agencies stated only that they “provided clear exclusions for many water features *that traditionally have not been regulated*,”<sup>251</sup>—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

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<sup>244</sup> 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) (“Clean Water Rule”) (regulating impermanent streams and wetlands shown to significantly affect navigable water quality).

<sup>245</sup> *Fox*, 556 U.S. at 515.

<sup>246</sup> *Encino Motorcars*, 579 U.S. at 222 (citation and quotations omitted).

<sup>247</sup> NWPR, 85 Fed. Reg. at 22,325, 22,338.

<sup>248</sup> *Id.* at 22,339 (§ 328.3(c)(15)).

<sup>249</sup> *Fox*, 556 U.S. at 515.

<sup>250</sup> 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* . . .”).

<sup>251</sup> NWPR, 85 Fed. Reg. at 22,270 (emphasis added).

and again in 2019 that such waters were integral to protecting water quality. EPA’s 2015 Science Report,<sup>252</sup> reviewed and approved by a panel of 27 of the nation’s top scientists,<sup>253</sup> confirmed that ephemeral streams and many non-floodplain wetlands exert a significant effect on the quality of downstream waterways.<sup>254</sup> 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.<sup>255</sup> Then, in 2019, the Agencies in promulgating the “Repeal Rule” announced that they would apply the 2008 *Rapanos* Guidance,<sup>256</sup> which deems streams and wetlands jurisdictional if they have a “significant nexus” to traditional navigable waters based on “the functions” they provide.<sup>257</sup> Yet without pointing to any “change[d] circumstances” that would warrant such an abrupt reversal<sup>258</sup> or disputing the factual conclusions of the Science Report, the Clean Water Rule, or the *Rapanos* Guidance, the prior administration 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.<sup>259</sup>

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

As the Agencies now acknowledge, the NWPR rulemaking did not consider or explain the effects of the NWPR’s jurisdictional boundaries on the integrity of the nation’s waters.<sup>260</sup> 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.”<sup>261</sup> The rulemaking record demonstrated that the exclusion of ephemeral streams and many wetlands would significantly degrade water quality.<sup>262</sup> Yet, as the Agencies now 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

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<sup>252</sup> 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”).

<sup>253</sup> Clean Water Rule, 80 Fed. Reg. at 37,062.

<sup>254</sup> *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.

<sup>255</sup> *See, e.g.*, Clean Water Rule, 80 Fed. Reg. at 37,055, 37,104–06.

<sup>256</sup> Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,642–44 (Oct. 22, 2019) (“Repeal Rule”).

<sup>257</sup> *Rapanos* Guidance at 11.

<sup>258</sup> *State Farm*, 463 U.S. at 42.

<sup>259</sup> *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).

<sup>260</sup> Proposed Rule, 86 Fed. Reg. at 69,383.

<sup>261</sup> 33 U.S.C. § 1251(a).

<sup>262</sup> *See, e.g.*, NWPR EA at 105–06; Trout Unlimited Comments at 5–7; EPA, Preliminary Results of Attempted Analyses of the National Hydrography Dataset and the National Wetlands Inventory, EPA-HQ-OW-2018-0149-11767, 2–5, 9 (2017), <https://perma.cc/BK8X-MNW9>; Science Report at ES-2 to ES-4, 2-22 to 2-30, 3-1 to 3-45, 4-20 to 4-39.

documents in the record that provided some limited assessment of the effects of the rule on water quality . . . .”<sup>263</sup> The Agencies’ concession that they failed to adequately evaluate the NWPR’s effects on water quality evinces a clear APA violation.

- c. The NWPR rulemaking 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 harms to the thousands of immigrants who had relied on the program to go about their lives.<sup>264</sup> 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.”<sup>265</sup> The agency’s failure to do so was an obvious violation of the APA.<sup>266</sup>

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.<sup>267</sup> 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.<sup>268</sup>

- d. The NWPR 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.”<sup>269</sup> 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. 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

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<sup>263</sup> Fox Decl. ¶ 12 (emphasis added); Pinkham Decl. ¶ 12 (emphasis added); *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.”).

<sup>264</sup> 140 S. Ct. 1891, 1913–16 (2020).

<sup>265</sup> *Id.* at 1915.

<sup>266</sup> *Id.* at 1914–16.

<sup>267</sup> *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.

<sup>268</sup> *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 & Dep’t of the Army, Navigable Waters Protection Rule—Public Comment Summary Document, Topic 1: Legal Arguments 29, <https://perma.cc/563U-9PPM>.

<sup>269</sup> *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

to wildlife,” and “supporting biodiversity.”<sup>270</sup> As a result, as the Agencies now acknowledge, “ephemeral streams ‘are no less important to the integrity of the downgradient waters’ than perennial or intermittent streams.”<sup>271</sup> Yet the NWPR categorically excluded ephemeral streams from jurisdiction without adequate justification.<sup>272</sup> 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.<sup>273</sup> As the Agencies now acknowledge, “[t]his discrepancy bears no relationship to the actual connections between the features and makes no scientific or practical sense.”<sup>274</sup> And a wetland flooded *from* jurisdictional waters 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.<sup>275</sup> The Agencies now conclude that there is “no compelling scientific or legal basis” for this distinction.<sup>276</sup> 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.”<sup>277</sup> This affront to the Clean Water Act and implementing Supreme Court precedent should never return.

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<sup>270</sup> NWPR EA at 107.

<sup>271</sup> Proposed Rule, 86 Fed. Reg. at 69,408 (citing 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” 22–23, 54 fig. 3 (Oct. 17, 2014) (“SAB Review”).

<sup>272</sup> See NWPR, 85 Fed. Reg. at 22,338.

<sup>273</sup> Compare *id.* at 22,311 with *id.* at 22,312.

<sup>274</sup> Proposed Rule, 86 Fed. Reg. at 69,412.

<sup>275</sup> NWPR, 85 Fed. Reg. at 22,310.

<sup>276</sup> Proposed Rule, 86 Fed. Reg. at 69,412.

<sup>277</sup> *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).

- 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,”<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup>

Emphasizing the Clean Water Act’s objective, the Supreme Court held 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.”<sup>281</sup> The Court explained that statutory interpretations should not “creat[e] loopholes that undermine the statute’s basic federal regulatory objectives.”<sup>282</sup> 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,”<sup>283</sup> 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.<sup>284</sup> But that deference does not extend so far as to permit the Agencies to disregard science and the Act’s objective or to strip

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<sup>278</sup> 33 U.S.C. § 1251(a).

<sup>279</sup> 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 NWPR “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”).

<sup>280</sup> 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 *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167, 172 (2001) (“*SWANCC*”)); *SWANCC*, 531 U.S. at 167 (“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.”).

<sup>281</sup> 140 S. Ct. 1462, 1477 (2020) (rejecting construction that would preclude EPA from regulating discharges to groundwater that reach navigable waters).

<sup>282</sup> *Id.* at 1477.

<sup>283</sup> *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

<sup>284</sup> 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.”).

protections from streams, wetlands, and lakes that undisputed science shows are integral to water quality. Indeed, as the Agencies have now concluded, “the NWPR did not appropriately consider the water quality impacts of its approach to defining ‘waters of the United States,’ in contravention of Congress’s objective in the Clean Water Act ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters’ . . . .”<sup>285</sup>

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.”<sup>286</sup> 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,”<sup>287</sup> bringing about a “total restructuring” that assigned the federal government the predominant role.<sup>288</sup> 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.” The Proposed Rule’s reasoned interpretation of the relationship between Sections 101(a) and (b) and the relationship between the two sections<sup>289</sup> further erodes the legal justification for the NWPR.

- 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.”<sup>290</sup> Indeed, that was President Trump’s directive,<sup>291</sup> which the Agencies dutifully followed.<sup>292</sup> The NWPR adopted the two main jurisdictional tests of Justice Scalia’s plurality opinion, declaring that “waters of the United

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<sup>285</sup> Proposed Rule, 86 Fed. Reg. at 69,373.

<sup>286</sup> 33 U.S.C. § 1251(b).

<sup>287</sup> S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674, 1971 WL 11307.

<sup>288</sup> *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).

<sup>289</sup> *See* Proposed Rule, 86 Fed. Reg. at 69,400–04.

<sup>290</sup> *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).

<sup>291</sup> *See* Exec. Order No. 13,778, § 3, 82 Fed. Reg. 12,497, 12,497 (Feb. 28, 2017), *revoked by* Exec. Order No. 13,990 § 7(a), 86 Fed. Reg. 7037, 7041 (Jan. 20, 2021).

<sup>292</sup> *See, e.g., NWPR*, 85 Fed. Reg. at 22,261, 22,288–89.

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.”<sup>293</sup>

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.”<sup>294</sup> 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.”<sup>295</sup> 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.”<sup>296</sup>

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.<sup>297</sup> Indeed, several circuit courts interpreting the *Rapanos* decision itself have looked to the opinions of all the Justices to ascertain majority-supported rules of law.<sup>298</sup> 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.”<sup>299</sup> 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.”<sup>300</sup> 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 replacing the NWPR.

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<sup>293</sup> *Id.* at 22,273 (emphasis added); compare *Rapanos*, 547 U.S. at 739, 742.

<sup>294</sup> See 547 U.S. at 770–71 (Kennedy, J., concurring in the judgment); *id.* at 801, 805 (Stevens, J., joined by three Justices, dissenting).

<sup>295</sup> *Id.* at 769, 776 (Kennedy, J., concurring in the judgment).

<sup>296</sup> *Id.* at 800 (Stevens, J., joined by three Justices, dissenting).

<sup>297</sup> See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 253 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) (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, 261 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’l 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.”).

<sup>298</sup> *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.

<sup>299</sup> *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)).

<sup>300</sup> *Id.* at 611, 618.

### C. The NWPR was confusing and difficult to implement.

According to its preamble, the NWPR was “intended to establish categorical bright lines that provide clarity and predictability for regulators and the regulated community.”<sup>301</sup> Of course, even if the NWPR achieved these purported goals, regulatory certainty cannot justify a departure from the sole objective of the Clean Water Act. As the Supreme Court observed in *County of Maui*, “a more absolute position . . . may be easier to administer,” but when “those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute’s language, structure, and purposes,” they must be rejected.<sup>302</sup> In any event, the NWPR’s core test for identifying jurisdictional waters fell far short of achieving either clarity or certainty. Instead, the “typical year” test 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”<sup>303</sup>; adjacent wetlands were jurisdictional if a jurisdictional water flowed into them in a “typical year”<sup>304</sup>; and lakes, ponds, and impoundments could be jurisdictional if they contributed flow to a jurisdictional water in a “typical year.”<sup>305</sup> The Agencies’ “typical year” concept was supposed to delimit these and nearly every other category of jurisdictional waters, but the concept was fundamentally indeterminate.

“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.”<sup>306</sup> 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.”<sup>307</sup> 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 NOAA weather stations.<sup>308</sup> 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

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<sup>301</sup> NWPR, 85 Fed. Reg. at 22,325; *see also id.* at 22,273.

<sup>302</sup> 140 S. Ct. at 1477.

<sup>303</sup> NWPR, 85 Fed. Reg. at 22,339 (33 C.F.R. § 328.3(c)(12)).

<sup>304</sup> *Id.* at 22,338 (33 C.F.R. § 328.3(c)(1)(ii)).

<sup>305</sup> *Id.* at 22,338 (33 C.F.R. § 328.3(c)(6)).

<sup>306</sup> *Id.* at 22,339 (33 C.F.R. § 328.3(c)(13)).

<sup>307</sup> *Id.* at 22,274. *But see* EPA & Dep’t of the Army, The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 9: Typical Year 5, <https://perma.cc/563U-9PPM> (“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.

<sup>308</sup> *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>.

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 was 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. And in many cases, critical information that the rule required the property owner to know—such as whether a wetland is inundated by flooding from a jurisdictional water in a typical year—is not normally recorded.<sup>309</sup> Therefore, as the Agencies conceded during the NWPR rulemaking, making these types of determinations “can be challenging.”<sup>310</sup>

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 NWPR provided no underlying principle to guide agency discretion, inadequately accounted for changing climatic conditions, and inserted case-by-case analyses for every jurisdictional determination despite the rule’s claim that it “*provide[s] a predictable framework* in which to establish federal jurisdiction.”<sup>311</sup> The uncertainty and implementation challenges generated by the NWPR’s foundational typical year test is yet another basis to replace the NWPR.

For all of these reasons, and the reasons set forth by the federal courts vacating the NWPR, the Agencies are correct to permanently reject the unlawful and harmful NWPR and to refrain from readopting it, in any form, in the present rulemaking.

### **III. Comments on the Proposed Rule**

The Agencies are to be commended for abandoning the NWPR and reviving the more protective regulatory regime that predated the NWPR. The Proposed Rule’s restoration of protections for interstate waters, “other waters,” and many streams and wetlands left unprotected by the NWPR are welcome changes that respect Congress’s stated objective in passing the Clean Water Act.

In particular, we applaud the Agencies for restoring Congress’ sole “objective” in Section 101(a) of the Act to a central role in defining protected “waters of the United States.” Whereas the prior administration contorted the Act’s discussion of state authority in Section 101(b) to override the Act’s water quality objective, the Proposed Rule reads those provisions in harmony,

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<sup>309</sup> Proposed Rule, 86 Fed. Reg. at 69,412.

<sup>310</sup> Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 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.”).

<sup>311</sup> NWPR, 85 Fed. Reg. at 22,273–74 (emphasis added).

recognizing that robust water quality protections do not come at the cost of state authority, but advance it.

The Proposed Rule correctly observes that the federal interest is “indisputable” in traditional navigable waters, interstate waters, and the territorial seas.<sup>312</sup> From that starting point, the Agencies begin to draw a proper line around federal waters—those that “significantly affect the integrity of . . . these foundational waters.”<sup>313</sup> Consistent with Sections 101(a) and 101(b), the Proposed Rule reserves to states the regulation of all other waters that do not implicate federal interests or undermine the Act’s water quality objective. The Proposed Rule further corrects the NWPR’s misunderstanding that Section 101(b) is “agnostic (or even in opposition) to preventing pollution and meeting the objective of the Act.”<sup>314</sup> To the contrary, Section 101(b) recognizes states’ authority to “*prevent, reduce, and eliminate pollution*,”<sup>315</sup> not to “weigh the costs and benefits of doing so,” as the NWPR claimed.<sup>316</sup>

The Proposed Rule in no way impinges on the state authority reserved in Section 101(b). States retain the right to regulate non-point sources of pollution in federal and non-federal waters. Moreover, as Section 101(b) itself provides, states retain the right to “manage the construction grant programs under [the] Act and implement the permit programs under sections 402 and 404” in federal waters.<sup>317</sup> Section 101(b)’s reference to states’ “primary” role in preventing pollution underscores that Congress intended overlapping state and federal authority—rather than the ousting of federal protections in waters implicating federal interests.

As the Agencies now acknowledge, and as the Supreme Court has long recognized, Section 101(b) “creat[es] a partnership between the federal and state governments, in which the states administer programs under federally mandated standards and are allowed to set even more stringent standards.”<sup>318</sup> By protecting all waters that significantly affect foundational waters of federal interest, the Proposed Rule properly implements Sections 101(a) and 101(b) of the Act.

Although the Proposed Rule is far more protective than the NWPR, the proposal requires some revisions to properly reflect the Clean Water Act’s scope and to further the Act’s objective. In this section, we highlight the areas where we support the provisions of the Proposed Rule, address many of the Agencies’ specific requests for comments, and identify revisions that need to be made in the final rule. Our comments in this section are organized into the following broad topics: (A) traditional navigable waters; (B) waste treatment exclusion; (C) interstate waters; (D) “significant nexus” standard; (E) “relatively permanent” standard; (F) tributaries; (G) adjacent wetlands; (H) other waters; (I) prior converted cropland; and (J) economic analysis.

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<sup>312</sup> Proposed Rule, 86 Fed. Reg. at 69,399.

<sup>313</sup> *Id.* at 69,399–400.

<sup>314</sup> *Id.* at 69,400.

<sup>315</sup> 33 U.S.C. § 1251(b).

<sup>316</sup> NWPR, 85 Fed. Reg. at 22,270 (emphasis added).

<sup>317</sup> Proposed Rule, 86 Fed. Reg. at 69,401.

<sup>318</sup> *Id.* (collecting cases).

**A. Traditional Navigable Waters: The Agencies must ensure that the term “traditional navigable waters” is properly interpreted.**

Traditional navigable waters are central to the Clean Water Act’s purpose and regulatory scheme. These and other foundational waters are part of the much broader category of “waters of the United States,”<sup>319</sup> and they affect the bounds of nearly every type of jurisdictional water feature under the Proposed Rule. The Agencies’ task here is “to decide how far coverage must extend in order to protect the [nation’s waters].”<sup>320</sup> This, in turn, requires a clear definition of those traditional navigable waters that largely drive the Proposed Rule’s broader protections. Here, as with every other category of jurisdictional water, the Agencies are guided by the Act’s objective to protect the nation’s water quality<sup>321</sup> and Congress’s concomitant “inten[t] 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.”<sup>322</sup>

We support the Agencies’ proposal to retain the longstanding definition of traditional navigable waters as “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”<sup>323</sup> Consistent with Supreme Court precedent, this definition includes all waters which (1) were navigable-in-fact but are no longer,<sup>324</sup> (2) are presently navigable-in-fact,<sup>325</sup> and (3) are not and were never navigable-in-fact, but may, through the construction of reasonable improvements, become navigable in the future.<sup>326</sup>

Although we generally support the proposed regulatory definition of traditional navigable waters, the Agencies must ensure that this definition is properly interpreted and applied. Any failure to properly identify the nearest traditional navigable water could mean a significant nexus or relatively permanent analysis is improperly conducted by focusing on a water that is farther away—and where the significant nexus or relatively permanent connection between the waters

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<sup>319</sup> *Riverside Bayview*, 474 U.S. at 133 (“[T]he Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import,” and that “Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes”).

<sup>320</sup> *Deaton*, 332 F.3d at 711.

<sup>321</sup> As the Supreme Court has observed, defining the term “navigable waters,” which is found in multiple federal statutes, “must be predicated upon careful appraisal of the *purpose* for which the concept of ‘navigability’ was invoked in a particular case,” *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (citation and quotations omitted)— here, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

<sup>322</sup> S. Rep. No. 92-1236 (1972) (Conf. Rep.), reprinted in 1972 U.S.C.C.A.N. 3776, 3822, 1972 WL 12735.

<sup>323</sup> Proposed Rule, 86 Fed. Reg. at 69,449–50 (proposed 33 C.F.R. § 328.3(a)(1), 40 C.F.R. § 120.2(a)(1)).

<sup>324</sup> See, e.g., *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (“[W]hen once found to be navigable, a waterway remains so.”). This is the concept of “‘indelible navigability,’ that is, if a water was ever navigable-in-fact, it will always be at least navigable-in-law and subject to federal regulatory power.” William W. Sapp et al., *The Float a Boat Test: How to Use It to Advantage in This Post-Rapanos World*, 38 Env’t L. Rep. 10,439, 10,445 (2008).

<sup>325</sup> See, e.g., *The Daniel Ball*, 77 U.S. 557, 563 (1870).

<sup>326</sup> See, e.g., *The Montello*, 87 U.S. 430, 441–42 (1874); *The Daniel Ball*, 77 U.S. at 563; *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (“[J]ust because a body of water has not been used for commercial use does not mean that it is not *susceptible* to commercial use.”).

may be less apparent. To ensure the accurate interpretation of the proposal’s touchstone term, we outline several issues that require clarification in the preamble to the final rule, in guidance, or elsewhere in the codified text.

*1. The Agencies must reiterate that a water’s capacity for use by recreational watercraft establishes navigability.*

We applaud the Agencies for rescinding the prior administration’s needless and confusing guidance that called into question navigability determinations based solely on evidence of recreational commerce.<sup>327</sup> However, the preamble needs further clarification on this point.

The Agencies must reiterate that there is nothing suspect about navigability determinations based on evidence that a river, stream, or lake can support navigation by recreational watercraft such as canoes, kayaks, or rafts. The Supreme Court has made clear that the concept of navigability is not restricted to large vessels or any particular type of commercial navigation:

*The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.*<sup>328</sup>

The Court has since reaffirmed “that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats,”<sup>329</sup> and that the “lack of commercial traffic [is not] a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”<sup>330</sup>

Applying these principles, numerous lower courts have held that “the use of a river by canoeists demonstrates the stream’s availability for commercial navigation.”<sup>331</sup> As Corps regulations confirm, “the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past time.”<sup>332</sup> Such use shows that a water is presently navigated, or susceptible to navigation, by craft used in the

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<sup>327</sup> See Proposed Rule, 86 Fed. Reg. at 69,417.

<sup>328</sup> *The Montello*, 87 U.S. at 441–42 (emphasis added).

<sup>329</sup> *United States v. Utah*, 283 U.S. 64, 76 (1931).

<sup>330</sup> *Appalachian Elec. Power*, 311 U.S. at 416.

<sup>331</sup> *New York ex rel. New York State Dep’t of Env’t Conservation v. FERC*, 954 F.2d 56, 61 (2d Cir. 1991) (citation and quotations omitted); *accord FPL Energy Me. Hydro LLC*, 287 F.3d at 1157 (affirming finding of navigability where “the only evidence indicating actual use of the Stream comes from the three [canoe] trips made for the purpose of litigation”); *Knott v. FERC*, 386 F.3d 368, 373 (1st Cir. 2004) (holding the same based on test canoe trip); *Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas Cnty. Water & Sewer Auth.*, 981 F. Supp. 1469, 1473 (N.D. Ga. 1997) (“[P]laintiffs have a substantial likelihood of success on the finding that the Dog River is navigable under federal law because of the ability of kayaks and canoes to travel down the river and for [Plaintiff] and the School of Kayaking to travel down the river with students for pay.”).

<sup>332</sup> 33 C.F.R. § 329.6(a).

burgeoning water-based recreation, sport, and ecotourism industries, thus supporting a finding of navigability. If a water can support recreational craft, the question of whether it is or was *actually* used for recreational commerce is immaterial to its navigability. “The question of . . . susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. . . . The extent of existing commerce is not the test.”<sup>333</sup>

The prior administration’s rejection of this view was based on two faulty premises. First, the prior administration appeared to draw a line between transporting commercial goods and navigation that is *itself* commerce—e.g., commercial recreation. Yet the Court has repeatedly held that the particular mode of commerce is irrelevant to the question of navigability.<sup>334</sup> “It is not essential that the river be used for the transportation of water-borne freight by a carrier whose purpose is to make money from the transportation. . . . To deny that this use of the River is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity.”<sup>335</sup>

Second, the prior administration claimed that “[s]imply driving across a State line and using a waterbody, or having the potential to use a waterbody, is similar to the theory of jurisdiction that the Supreme Court specifically rejected in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”).<sup>336</sup> That argument is a straw man. The question is not whether a water can support *any* use by out-of-state visitors, but *commercial recreational navigation*. *SWANCC* supports the navigability of waters amenable to such use, highlighting Congress’ intent to exercise its “commerce power over navigation.”<sup>337</sup> Though mere use of an isolated pit by migratory birds was held to fall outside such power, this says nothing of *commercial navigation*, which falls squarely within Congress’ traditional authority over navigable waters. Indeed, post-*SWANCC*, the Supreme Court has reaffirmed that “[e]vidence of recreational use” is relevant to a river’s “susceptibility to commercial use.”<sup>338</sup>

Notably, the Agencies’ longstanding approach (before deviation by the prior administration) was that waters capable of supporting recreational craft could support interstate commercial recreational navigation, and thus are traditionally navigable—regardless of whether the river presently or historically supported commercial navigation.<sup>339</sup> To address the confusion created by the prior administration, the Agencies should reaffirm this longstanding approach in the preamble to the final rule. This approach is also consistent with Appendix D to the 2007 *Jurisdictional Determination Form Instruction Guidebook* prepared jointly by the Corps and EPA, which we also support retaining.

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<sup>333</sup> *Utah*, 283 U.S. at 82.

<sup>334</sup> See, e.g., *id.* at 75–76 (quoting *The Montello*, 87 U.S. at 441–42, and *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926)).

<sup>335</sup> *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404–05 (9th Cir. 1989).

<sup>336</sup> NWPR, 85 Fed. Reg. at 22,282.

<sup>337</sup> 531 U.S. at 173.

<sup>338</sup> *PPL Mont., LLC v. Montana*, 565 U.S. 576, 600–01 (2012).

<sup>339</sup> See, e.g., Sapp et al., *supra* note 324, at 10,450–51 (collecting navigability determinations).

2. *The Agencies must clarify that “traditional navigable waters” need not flow across state boundaries.*

Next, the Agencies must clarify that traditional navigability does not turn on whether a boater can navigate *by water* over state lines. For example, the Great Salt Lake in Utah is a closed system that does not flow into any other water or state. Yet as the Supreme Court held, “the fact that the Great Salt Lake is not part of a [waterborne] navigable interstate or international commercial highway in no way interferes with [its navigability].”<sup>340</sup> The Lake formed a “‘link in the chain’ of interstate commerce as it flow[ed] through various channels of transportation, such as railroads or highways,” and that established navigability.<sup>341</sup> As the prior administration acknowledged, “the legislative history suggests that Congress had in mind [an] expanded notion of interstate commerce when enacting the CWA, including overland links to commercial navigation on navigable-in-fact waters.”<sup>342</sup> Because courts do not discriminate between types of commerce<sup>343</sup> or “water courses”<sup>344</sup>—e.g., rivers vs. lakes—in determining navigability, it follows that the capacity of an enclosed lake to support recreational watercraft establishes its susceptibility to interstate commercial navigation—i.e., that it is a traditional navigable water.

3. *The Agencies may not lawfully exclude any traditional navigable water.*

Relatedly, the Agencies must clarify that traditional navigable waters are jurisdictional regardless of whether they qualify for one or more of the Proposed Rule’s exclusions for non-jurisdictional waters. The prior administration took the opposite approach, making each category of jurisdictional water “subject to the exclusions.”<sup>345</sup> This meant that “[i]f the water [met] any of the[] exclusions, the water [was] excluded even if the water satisfie[d] one or more of the conditions to be a [jurisdictional] water.”<sup>346</sup> As we explain in Section III.B, below, this approach was potentially catastrophic, excluding large navigable lakes used by the public for recreation and commerce from the Clean Water Act’s protections if the lakes happened to have been impounded to furnish cooling water for power plants and thus qualified as excluded “waste treatment systems.” The text of the Proposed Rule’s waste treatment exclusion leaves open the same risk.<sup>347</sup>

To be clear, the Agencies lack authority to exclude *any* traditional navigable waters from the “waters of the United States” protected under the Act.<sup>348</sup> In the final rule, the Agencies must amend the regulatory text to clarify that traditional navigable waters are not subject to the exclusions.

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<sup>340</sup> *Utah v. United States*, 403 U.S. 9, 10 (1971).

<sup>341</sup> NWPR, 85 Fed. Reg. at 22,263 (quoting 118 Cong. Rec. 33756–57 (1972) (statement of Rep. Dingell) and 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie)).

<sup>342</sup> NWPR, 85 Fed. Reg. at 22,283.

<sup>343</sup> *Utah*, 283 U.S. at 75–76 (quoting *The Montello*, 87 U.S. at 441–42, and *Holt State Bank*, 270 U.S. at 56).

<sup>344</sup> *Utah*, 403 U.S. at 11 (“While [the test for navigability] was addressed to the navigability of ‘rivers’ it applies to all water courses.”).

<sup>345</sup> NWPR, 85 Fed. Reg. at 22,338.

<sup>346</sup> *Id.* at 22,235.

<sup>347</sup> *See infra* Section III.B.2.

<sup>348</sup> *Id.*

4. *If the Agencies combine all foundational waters into one category, they must clarify that the territorial seas represent a distinct basis for jurisdiction and not a type of traditional navigable water.*

In response to the Agencies' solicitation of comment "on whether it would be useful to [] streamline the proposed rule by consolidating the traditional navigable waters, interstate waters, and the territorial seas provisions into one provision,"<sup>349</sup> we currently view such consolidation as unlikely to substantively change the scope of protected waters.

However, if the Agencies are to combine these provisions into one, they must not make the same mistake as the proposed NWPR, which "included the territorial seas as a type of traditional navigable water" rather than as a distinct basis for jurisdiction.<sup>350</sup> The Clean Water Act defines the term "territorial seas"<sup>351</sup> in a way that typically (if not always) entails a finding of traditional navigability. However, it is conceivable that some portion of the territorial seas are too shallow or frozen to support a finding of navigability, creating the risk that such portions would not be deemed jurisdictional if included as a subset of traditional navigable waters. So as not "to exclude any portion of the territorial seas," the final NWPR distinguished between such waters and traditional navigable waters within a consolidated provision.<sup>352</sup> Interstate waters are at an even greater risk of being excluded if treated as a type of traditional navigable water. If the Agencies are to consolidate these provisions, they must clarify that the three categories of waters still represent distinct bases for jurisdiction.

5. *In implementing the Proposed Rule, the Agencies must ensure that "traditional navigable waters" are not limited to waters that the Corps has determined to be "navigable waters of the United States" under Section 10 of the Rivers and Harbors Act of 1899.*

In identifying traditional navigable waters, the Agencies have at times limited their inquiry to whether Corps districts have determined that such waters qualify as "navigable waters of the United States" under Section 10 of the Rivers and Harbors Act of 1899. In practice, such "Section 10 waters" are often poorly defined, with determinations based on outdated Corps studies that underestimate the upstream extent of navigation on many rivers. Consequently, it is important that the Agencies faithfully apply the approach set forth in Appendix D to the Corps' *Jurisdictional Determination Form Instructional Guidebook* (2007), which reaffirms that traditional navigable waters under the Clean Water Act "include, *but are not limited to*, the 'navigable waters of the United States' under the Rivers and Harbors Act of 1899."<sup>353</sup> In implementing the Proposed Rule, the Agencies cannot rely exclusively on the Corps' lists of Section 10 waters to identify traditional navigable waters.

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<sup>349</sup> Proposed Rule, 86 Fed. Reg. at 69,416.

<sup>350</sup> NWPR, 85 Fed. Reg. at 22,281.

<sup>351</sup> 33 U.S.C. § 1362(8).

<sup>352</sup> NWPR, 85 Fed. Reg. at 22,281, 22,338.

<sup>353</sup> U.S. Army Corps of Eng'rs & EPA, *Jurisdictional Determination Form Instructional Guidebook* App. D, at 2 (2007), <https://perma.cc/3PU3-UXWW> (emphasis added).

**B. Waste Treatment Exclusion: The Proposed Rule must be revised to expressly protect traditional navigable waters from being subject to the waste treatment exclusion.**

The Proposed Rule contains a grave error that must be corrected immediately: as drafted, the proposal fails to protect important public lakes throughout the Southeast and the nation. Impounded lakes that previously have been protected as “waters of the United States”—and are used by the public for boating, fishing, swimming, and drinking water—would be subject to exclusion from Clean Water Act coverage if power plants use their water for cooling. As a result, electric utilities and others (such as other industries, marinas, restaurants, or anyone else) could dump toxic pollutants, as well as heat, into these lakes or fill into coves of lakes with no NPDES or Section 404 limitations. In order to ensure that existing Clean Water Act protections remain in place at these lakes, the final rule must include a provision that expressly protects traditional navigable waters from being subject to the waste treatment exclusion, as set out below.

*1. Public lakes are not waste treatment systems.*

The Clean Water Act was enacted in response to the threat that lakes and other public waterways were being turned into waste treatment systems. As the Senate Public Works Committee explained, “[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable.”<sup>354</sup> But that is exactly what the Proposed Rule would allow.

There has never been any question that the Act protects “waters navigable in fact.”<sup>355</sup> Even the unduly restrictive interpretation of “waters of the United States” set out in Justice Scalia’s opinion in *Rapanos* includes “relatively permanent, standing or flowing bodies of water . . . [including] ‘lakes’ . . . .”<sup>356</sup>

However, the Proposed Rule continues the NWPR’s approach of allowing previously protected public lakes that are considered “cooling ponds” to be excluded from the Clean Water Act as waste treatment systems. The NWPR excluded such lakes expressly, by (1) defining waste treatment systems to include “cooling ponds,”<sup>357</sup> and (2) excluding such cooling ponds even if they are traditional navigable waters.<sup>358</sup> But the Proposed Rule has the same effect, by failing to protect traditional navigable waters from the scope of the waste treatment exclusion. This means large public lakes in the Southeast—such as Lake Keowee and Lake Monticello Reservoir in South Carolina, Hyco Lake and Sutton Lake in North Carolina, and Woods Reservoir in Tennessee—and throughout the country could be considered “waste treatment systems,” even though thousands of people use them for swimming, boating, and fishing; have homes on them; and rely on them for drinking water.

Because the Proposed Rule would allow for the elimination of Clean Water Act permitting requirements for utility discharges into an excluded lake, it would allow the

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<sup>354</sup> S. Rep. No. 92-414, 1972 U.S.C.C.A.N. at 3674 (emphasis added).

<sup>355</sup> *Riverside Bayview*, 474 U.S. at 123.

<sup>356</sup> 547 U.S. at 732–33 (quoting Webster’s New International Dictionary).

<sup>357</sup> NWPR, 85 Fed. Reg. at 22,339,

<sup>358</sup> *Id.* at 22,325, 22,328

unpermitted dumping of not just heat (a pollutant under the Act)<sup>359</sup> but also all other pollutants discharged from power plants, including such toxins as mercury, arsenic, and lead. This would have the effect of negating EPA's work to revise and put in place vitally important Effluent Limitation Guidelines for steam electric power plants at these lakes, along with eliminating many other important pollution limits currently contained in the NPDES permits that protect these waterbodies. And because the application of other Clean Water Act protections depends on a lake being a water of the United States, these public lakes would also lose federal protections against the dumping of fill.

The risk of utilities claiming large public lakes are "cooling ponds" is not speculative; it is already happening. Hyco Lake in North Carolina, for example, is a large public lake of some 3,800 acres created by damming the Hyco River to provide cooling water for Duke Energy's Roxboro power plant.<sup>360</sup> Like other cooling lakes, it is used for fishing, boating, and swimming; many families also own homes on the lake. Duke Energy is currently required to comply with an NPDES permit before discharging pollutants into the lake.<sup>361</sup> However, Duke Energy has asserted to state regulators that the entire lake is a "cooling pond."<sup>362</sup> If Duke Energy could claim the waste treatment exclusion, and chose to do so, thousands of people, from homeowners to visitors to those who depend on the lake for fishing, would be denied the protections of the Clean Water Act, reversing decades of consistent agency practice. The same is true for cooling lakes throughout the Southeast and the country.

## 2. *The Proposed Rule fails to protect these lakes and must be corrected.*

The Proposed Rule perpetuates the prior administration's unlawful approach to the waste treatment exclusion by failing to ensure that previously protected public cooling lakes remain protected by the Clean Water Act. It does so by subjecting all categories of waters of the United States, including traditional navigable waters, to the exclusion.<sup>363</sup> While this approach does not strip protections from these lakes expressly, as the prior administration's rule did, the result would be the same: opening up these lakes for utilities to claim they no longer have to comply with NPDES permitting requirements and pollution limits for their toxic wastewater pollution and heat.

In its proposed Clean Water Rule, the Obama Administration made the same mistake when it made all categories of jurisdictional waters subject to the exclusions, but it fixed the error in the final rule: "The proposed rule referenced paragraphs (a)(1) through (a)(8) [*i.e.*, all waters including traditional navigable waters were subject to exclusions from the CWA], but the agencies did not intend to exclude any traditional navigable waters, for example, and the revision

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<sup>359</sup> 33 U.S.C. § 1362(6).

<sup>360</sup> Letter from E. Shannon Langley, Duke Energy, to Julie Grzyb, N.C. Dep't of Env't Quality 3 (Mar. 29, 2019), <https://perma.cc/3M53-ZMH6> ("Duke Energy Letter").

<sup>361</sup> 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").

<sup>362</sup> Duke Energy Letter at 2.

<sup>363</sup> Proposed Rule, 86 Fed. Reg. at 69449 (proposed 33 C.F.R. § 323.3(a)(8)).

clarifies that.”<sup>364</sup> The Obama Administration’s final rule correctly limited the waste treatment exclusion to a subset of jurisdictional waters listed in paragraphs (a)(4) through (8).<sup>365</sup>

This administration must put in place a similar fix. The final rule must correct the regulatory text to specify that the waste treatment exclusion does not apply to jurisdictional categories (a)(1) (traditional navigable waters) and (a)(2) (interstate waters). Among other changes, outlined in the immediately following subsection, the text of paragraph (a)(8) should be revised to specify: “*This exclusion is applicable only to waters listed in paragraphs (a)(3)-(7).*” This revision is needed to ensure that traditional navigable waters, including navigable public lakes, remain protected under the Clean Water Act. Additional clarity would be added by specifying in the preamble that the Agencies do not intend to increase the scope of the waste treatment exclusion and that waterbodies currently subject to NPDES permitting remain protected by the Act.

3. *Other, positive features of the Proposed Rule’s approach to the waste treatment exclusion should be retained and incorporated in the final rule.*

The Proposed Rule contains positive changes from the prior administration’s approach that should be retained in the final rule:

- The text of the exclusion correctly includes a comma to clarify that the exclusion applies only to systems created in accordance with the Clean Water Act. The prior administration’s rule expressly applied the exclusion to pre-Clean Water Act impoundments, which many public cooling lakes are. The proposed waste treatment exclusion, with its clarifying punctuation, ensures that impoundments are eligible for the exclusion only if they are designed, permitted, and—importantly—subject to mitigation for their impacts under the Clean Water Act’s Section 404 program.<sup>366</sup> The final rule should further clarify that the exclusion applies only when the permittee is using the system for the approved treatment process.
- The Proposed Rule correctly restores the prior text of the waste treatment exclusion, removing the prior administration’s definition that expressly excluded all “cooling ponds” from the protections of the Act.
- The Proposed Rule’s preamble includes several important statements that should be added to the text of the final Rule:
  - Upstream waters remain jurisdictional.

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<sup>364</sup> Clean Water Rule, 80 Fed. Reg. at 37,096.

<sup>365</sup> See, e.g., 33 C.F.R. 328.3(b) (2015).

<sup>366</sup> See *Ohio Valley Env’t Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (stream segments that had never been protected under the Clean Water Act may be used for mining waste treatment only “[w]hen the Corps exercises its § 404 authority”).

- A waste treatment system that is abandoned or otherwise ceases to serve the treatment function for which it was designed does not continue to qualify for the exclusion.
- The waste treatment exclusion is available only to the permittee.

Accordingly, the waste treatment exclusion in the final Rule should read (additions shown in italics):

(8) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States, *subject to the following:*

*(a) This exclusion is applicable only to waters listed in paragraphs (a)(3)-(7);*

*(b) Only the permittee using the system for the treatment function for which such system was designed may qualify for this exclusion;*

*(c) This exclusion does not affect the status of jurisdictional waters upstream of a waste treatment system; and*

*(d) A waste treatment system that is abandoned or otherwise ceases to serve the treatment function for which it was designed does not continue to qualify for this exclusion.*

With these changes and suggested text incorporated, the final rule will appropriately confirm that public lakes and drinking water reservoirs that also happen to provide cooling water to industrial facilities are appropriately protected under the Clean Water Act.

**C. Interstate Waters: The Proposed Rule appropriately restores categorical protections for all interstate waters, consistent with longstanding practice and the objective of the Clean Water Act.**

An “interstate water” is generally 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 for certain ponds, lakes, rivers, and streams that cross state lines but 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.

The Agencies now properly recognize that interstate waters should receive categorical protection, as they have for decades. Interstate waters include “all waters that Congress has sought to protect since 1948,” including “all rivers, lakes, and other waters that flow across, or form part of, state boundaries,” regardless of whether these waters meet the relatively permanent

or significant nexus standards.<sup>367</sup> Categorically protecting interstate waters also warrants protecting waters that significantly affect the chemical, physical, or biological integrity of those interstate waters, to foster consistency with the objective of the Act and restore the Agencies' longstanding interpretation. We support the Agencies' restoration of protections for interstate waters, for their adjacent wetlands, and for all tributaries, non-adjacent wetlands, and other waters that significantly affect interstate waters.

1. *From the Water Pollution Control Act of 1948 on, Congress has affirmed that all navigable and non-navigable 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 and Harbors Act of 1899, through a section known as the Refuse Act, 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.<sup>368</sup> Congress realized that to be effective, the jurisdiction of the Refuse Act had to be extensive.

Congress enacted the Water Pollution Control Act of 1948 to address the nation's mounting water pollution problem.<sup>369</sup> Instead of focusing on navigation, the Water Pollution Control Act 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.”<sup>370</sup> Unlike the Refuse Act, the Water Pollution Control Act 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.<sup>371</sup> Through this change, Congress established two independent bases for federal jurisdiction: (1) all navigable waters; and (2) all interstate waters, whether navigable or not. 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.<sup>372</sup> 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 water quality problem.<sup>373</sup> Although the program commenced in July 1971,<sup>374</sup> it suffered a significant setback later that year when a

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<sup>367</sup> Proposed Rule, 86 Fed. Reg. at 69,418.

<sup>368</sup> Ch. 425, § 13, 30 Stat. 1152 (1899).

<sup>369</sup> See Pub. L. No. 80-845, 62 Stat. 1155 (1948).

<sup>370</sup> *Id.* § 10, 62 Stat. at 1161.

<sup>371</sup> See Pub. L. No. 87-88, § 8(b), 75 Stat. 204, 208 (1961); see 33 U.S.C. §§ 466a, 466g, 466i (1964).

<sup>372</sup> Pub. L. No. 89-234, § 5(c)(1), (c)(2), (c)(5), 79 Stat. 903, 908, 909 (1965).

<sup>373</sup> 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).

<sup>374</sup> H.R. Rep. No. 92-911, at 398 (1972).

federal district court held that the Corps lacked authority under the Refuse Act’s narrow scope to issue permits on non-navigable waters.<sup>375</sup>

It is telling 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 thus expanded federal protections to the streams, wetlands, and other waters that affect the chemical, physical, or biological integrity of the nation’s waters.

2. *The legislative history, plain language, and regulatory interpretations of the Clean Water Act, as well as Supreme Court case law, 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 apparent that Congress did not intend to abandon any waters already protected under the Water Pollution Control Act and its pre-Clean Water Act amendments. For instance, in an early draft of the Clean Water Act, the reach of the Act was based on the limits of the Rivers and Harbors Act of 1899—that is, the “navigable waters of the United States.”<sup>376</sup> It was not long before the word “navigable” was removed from this provision, clarifying Congress’s intent that “waters of the United States” under the Clean Water Act encompassed more waters than the Rivers and 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’”; rather, the Act was “viewed by Congress as a ‘total restructuring’ and ‘complete rewriting’ of the existing water pollution legislation.”<sup>377</sup> In the Conference Report, the conferees stated that they “fully intend[ed] 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.”<sup>378</sup> In enacting the Clean Water Act, Congress thus expanded federal jurisdiction over the nation’s waters, including interstate waters.

The Act’s text also supports this interpretation. As explained above, prior to the passage of the Clean Water Act, states were required to establish water quality standards for all *interstate waters*,<sup>379</sup> whether navigable or non-navigable. Then, when Congress passed the Clean Water Act, Section 303(a) of the Act provided that these water quality standards would remain in effect and that EPA would actively assess the standards and promulgate revised standards if

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<sup>375</sup> 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).

<sup>376</sup> Compare S. Rep. No. 92-1236, at 144, 1972 U.S.C.C.A.N. at 3822, with H.R. Rep. No. 92-911, at 356.

<sup>377</sup> See *City of Milwaukee*, 451 U.S. at 317; see also *id.* at 318 (“Congress’ intent in enacting the [Act] 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).

<sup>378</sup> See S. Rep. No. 92-1236, 1972 U.S.C.C.A.N. at 3822.

<sup>379</sup> Pub. L. No. 89-234, § 5(c)(1), (c)(2), (c)(5), 79 Stat. at 908, 909; see also Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,745 (July 7, 1998) (discussing the statutory and regulatory history of water quality standards under the Clean Water Act and preceding water quality laws).

necessary.<sup>380</sup> If Congress meant to exclude non-navigable interstate waters from the Act’s protections, Congress would have had to include language signaling a departure from the ongoing requirement that states enact water quality standards for these waters. Congress included no such language limiting the standards to navigable interstate waters,<sup>381</sup> confirming their continued coverage under the Act.

Further, 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 “waters of the United States,” in which the agency defined its jurisdiction under the Act to cover “interstate waters” in addition to “navigable waters of the United States.”<sup>382</sup> Although the Corps initially attempted to confine the Act’s jurisdiction to only cover 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.”<sup>383</sup> 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 or runs along a state boundary could cause adverse water quality effects to all of the states that the water touches.

The Supreme Court has also repeatedly affirmed the importance—and the breadth—of federal protections for interstate waters and has never limited the scope of those protections based on navigability. As the Court pointed out in *City of Milwaukee v. Illinois*, the Clean Water Act “occupied the field” of water pollution regulation.<sup>384</sup> In particular, the Court noted that the Act displaced the “often vague and indeterminate”<sup>385</sup> federal common law to provide a crucial forum for the resolution of interstate water disputes.<sup>386</sup> This statutory program was intended to be “comprehensive,” “far-reaching,” and “all-encompassing,” leaving “no room for courts to attempt to improve on that program.”<sup>387</sup> Thus, finding that the Act implicitly excludes a large category of interstate waters—those that are not navigable—is contrary to the Court’s clear affirmance of the Act’s breadth and the importance of the Act’s creation of a statutory program for resolving interstate disputes.

Nor do the Court’s subsequent decisions limit the Clean Water Act’s applicability to interstate waters based on navigability.<sup>388</sup> It is well established that “the term ‘navigable’ as used in the Act is of limited import.”<sup>389</sup> And of the Court’s key decisions interpreting the scope of

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<sup>380</sup> 33 U.S.C. § 1313(a).

<sup>381</sup> 33 U.S.C. § 1313(a).

<sup>382</sup> National Pollutant Discharge Elimination System, 38 Fed. Reg. at 13,529.

<sup>383</sup> Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 37,127.

<sup>384</sup> 451 U.S. at 317.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 325–26.

<sup>387</sup> *Id.* at 318–19 (internal citations omitted).

<sup>388</sup> See *Riverside Bayview*, 474 U.S. at 133; *SWANCC*, 531 U.S. 159; *Rapanos*, 547 U.S. 715.

<sup>389</sup> *Riverside Bayview*, 474 U.S. at 133.

“waters of the United States” since *City of Milwaukee*, none have squarely dealt with interstate waters. *SWANCC* and *Rapanos* both dealt with wholly intrastate waters and contained no analysis of the proper scope of jurisdiction over interstate waters with respect to navigability.<sup>390</sup> *United States v. Riverside Bayview Homes* similarly did not contend with the Act’s coverage of interstate waters.<sup>391</sup> Finding that “waters of the United States” excludes non-navigable interstate waters—despite a lack of any such suggestion by the Supreme Court and given the Court’s clear instruction that the Act should be interpreted as comprehensive—would contradict the Court’s precedent.

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, longstanding regulatory interpretations that have been scrutinized by the public and by Congress and have survived statutory amendments should be presumed to be correct.<sup>392</sup> The Supreme Court’s repeated recognition of the Act’s breadth, including its coverage of interstate waters, further affirms that the Agencies’ longstanding interpretation is the right one.

The Act’s protections extend to interstate waters, and the Agencies have properly recognized this fact by restoring protections to these critical waters—regardless of navigability—in the Proposed Rule.

3. *Broad protection of interstate waters is required to give full effect to the Clean Water Act and to protect downstream states and tribes from out-of-state pollution.*

As discussed immediately above, in enacting the Clean Water Act pursuant to its Commerce Clause authority, Congress intended that “waters of the United States” be given the “broadest possible constitutional interpretation,”<sup>393</sup> consistent with the goal of “establish[ing] an all-encompassing program of water pollution regulation.”<sup>394</sup> Thus, the interpretation of “waters of the United States” most faithful to the Act is one that extends jurisdiction to the broadest reaches of Congress’s Commerce Clause authority. Because regulating interstate waters is an essential component of protecting the nation’s waters and is well within the scope of what the Commerce Clause allows, the Agencies are correct to interpret “waters of the United States” to encompass all interstate waters.

The Supreme Court has “recognized . . . that ‘[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states,’ but extends to activities that ‘have a substantial effect on interstate commerce,’”<sup>395</sup> including “activities that do so only when aggregated with similar activities of others.”<sup>396</sup> Industries throughout the economy

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<sup>390</sup> See *SWANCC*, 531 U.S. 159; *Rapanos*, 547 U.S. 715.

<sup>391</sup> See *Riverside Bayview*, 474 U.S. 121.

<sup>392</sup> *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

<sup>393</sup> See S. Rep. No. 92-1236, 1972 U.S.C.C.A.N. at 3822.

<sup>394</sup> *City of Milwaukee*, 451 U.S. at 318.

<sup>395</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (“*NFIB*”) (opinion of Roberts, C.J.) (quoting *United States v. Darby*, 312 U.S. 100, 118–19 (1941)); see *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

<sup>396</sup> *NFIB*, 567 U.S. at 549 (opinion of Roberts, C.J.) (citing *Wickard*, 317 U.S. at 127-28).

contribute to water pollution, and water pollution in turn negatively affects sectors throughout the economy and across the nation.

Thus, preventing water pollution—including pollution of interstate waters—has a substantial effect on interstate commerce. Farmers—who produce food and fiber products worth at least \$197 billion per year for consumers across the nation—rely heavily on clean water for irrigation.<sup>397</sup> The nation’s fishing industry contributes over \$89 billion to the economy per year<sup>398</sup> but suffers millions of dollars in losses when water is polluted.<sup>399</sup> The tourism industry, reliant on clean water to draw travelers to the nation’s beaches, rivers, and lakes, loses close to \$1 billion each year as a result of nutrient pollution and harmful algal blooms alone.<sup>400</sup> The real estate industry suffers, too, when water is polluted: Property values are up to 25% higher when nearby waters are clean.<sup>401</sup> All of these industries rely on clean water drawn from rivers, streams, lakes, and wetlands that extend throughout the nation and across state lines.

Additionally, as the Agencies have recognized for many years and reaffirmed in the Proposed Rule, the degradation of water in one state may affect other states.<sup>402</sup> And despite the fact that states may share a waterway, they may not share equal levels of concern for preserving the quality of the resource. Downstream states cannot control the actions of their upstream neighbors, who have strong incentives to choose growth over resource protection because much of the cost of resource destruction is borne downstream. Voters in upstream states likely would reject regulatory measures that impose costs where they live but deliver benefits to communities downstream<sup>403</sup>; likewise, voters in downstream states may conclude that regulation in their state is not worthwhile because it cannot solve the water pollution problem in light of the lack of protections upstream.<sup>404</sup> As the Supreme Court clarified in *Hodel v. Virginia Surface Mining & Reclamation Association*, “prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause.”<sup>405</sup> Accordingly, as Justice Kennedy observed in *Rapanos*, “the [Clean Water Act] protects downstream States from out-of-state pollution that they cannot themselves regulate.”<sup>406</sup> So, too, must the Clean Water Act protect downstream tribes from upstream pollution that they cannot control; protection of “interstate waters” must include protection of waters that cross or form the boundaries of federally recognized tribes.

The jurisdictional determinations made under the NWPR provide a stark illustration of the potential for destruction or pollution of waters in one state to harm waters in another state. As shown on the map attached as Appendix C to these comments, our review of a mere sample of

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<sup>397</sup> EPA, *Liquid Assets 2000*, 6-7 (2000).

<sup>398</sup> Melissa S. Kearney et al., *The Hamilton Project*, *What’s the Catch? Challenges and Opportunities of the U.S. Fishing Industry 2* (2014), <https://perma.cc/C679-8E4E>.

<sup>399</sup> *See, e.g.*, EPA, *Nutrient Pollution, The Effects: Economy*, <https://perma.cc/VC6H-G9LJ>.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> Proposed Rule, 86 Fed. Reg. at 69,417.

<sup>403</sup> Br. of the Ass’n of State and Interstate Water Pollution Control Adm’rs as Amicus Curiae in Support of Resp., *Rapanos v. U.S.*, 574 U.S. 715 (Jan. 2006) (Nos. 04-1034 & 04-1384) at 25.

<sup>404</sup> *Id.*

<sup>405</sup> 452 U.S. 264, 282 (1981).

<sup>406</sup> 547 U.S. at 777 (Kennedy, J., concurring in the judgment) (citation omitted).

NWPR-era jurisdictional determinations revealed hundreds of non-jurisdictional determinations for streams, wetlands, and other aquatic resources located within watersheds that flow downstream across state boundaries.<sup>407</sup> Because this map covers only a fraction of all AJDs issued under the NWPR—less than 6%—the number of instances in which waters within watersheds that cross state lines were excluded from Clean Water Act protection under the NWPR is likely much higher.

4. *The Agencies' proposed methods for determining the scope of jurisdictional interstate waters are easily administrable, align with the text and objective of the Clean Water Act, and should be adopted.*

Giving effect to the Clean Water Act as Congress intended it to be construed, the Proposed Rule properly provides that all interstate waters are waters of the United States. The Agencies similarly extend protections to waters that significantly affect the integrity of interstate waters. Each approach is consistent with the objective of the Clean Water Act, its text, longstanding agency practice, and relevant case law.

Accordingly, lakes, ponds, similar still water features, and wetlands that cross state or tribal boundaries should be considered jurisdictional interstate waters in their entirety.<sup>408</sup> Waters significantly affecting the integrity of these interstate waters, therefore, will also properly be considered jurisdictional under the significant nexus analysis, including streams flowing into the interstate water bodies, wetlands, and other waters.

In determining the relevant reach of an interstate water or stream that will be considered jurisdictional, the Agencies should utilize stream order. As the Agencies note, stream order is a common, established classification system for differentiating the branches of a stream network<sup>409</sup> and is a familiar tool to the Agencies themselves.<sup>410</sup> Thus, where a river crosses a boundary between states, or between a state and tribal land, the entire length designated as the same stream order as the boundary crossing should be considered a jurisdictional interstate water. And where a river or stream itself forms the boundary, the entire length of stream forming the boundary is, by definition, an interstate water; the entire length of stream forming the boundary should therefore be jurisdictional, along with any additional reach of the stream that is of the same stream order as the portion forming the boundary. This approach to delineating the extent of interstate waters protects downstream states by ensuring that the length of a stream or river they share with other states will not fall prey to the interstate collective action problems described above.

Additionally, under the Proposed Rule, waters upstream of a lake, pond, wetland, or stretch of river or stream designated as an interstate water will properly benefit from protections as waters that significantly affect the chemical, physical, or biological integrity of the interstate

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<sup>407</sup> See NJD Map (attached as Appendix C).

<sup>408</sup> See Proposed Rule, 86 Fed. Reg. at 69,418.

<sup>409</sup> *Id.*

<sup>410</sup> The *Rapanos* Guidance, for instance, relied on stream order in delineating the relevant reach of a stream for purposes of applying the significant nexus analysis. *Rapanos* Guidance at 10. Although the Agencies should depart from case-by-case approaches for determining the jurisdiction of tributaries, the Agencies have experience analyzing stream order as part of the application of the significant nexus analysis set forth in the *Rapanos* Guidance.

waters. This approach also consequently provides benefits to the downstream waters that flow from any interstate stretch, further protecting downstream states and effectuating the Clean Water Act’s objective.

**D. “Significant Nexus” Standard: The Agencies rightly propose to rely on a functional, scientific standard for jurisdiction, yet the “significant nexus” standard must be applied consistent with the Act’s objective, Congress’s intent, Supreme Court precedent, and science.**

Determining the reach of a statute enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” is inherently a science-based question that considers the functional relationship among waters. Congress’s definition of “navigable waters” as “waters of the United States” incorporates the scientific reality that waters are interconnected.<sup>411</sup> The Supreme Court and lower courts across the country have consistently looked to the significant effects waters may have on other waters and have used the phrase “significant nexus” to describe this connection. And for decades, the Agencies faithfully honored this statutory mandate to consider science by protecting as “waters of the United States” not only foundational waters, but also those streams, wetlands, and other waters whose degradation would harm such foundational waters.

By ignoring the recommendations of their own experts<sup>412</sup> and adopting a non-scientific approach that ignores streams’ and wetlands’ significant effects on water quality, the prior administration in adopting the NWPR defied the Clean Water Act’s mandate to protect the *chemical, physical, and biological* integrity of the nation’s waters. Now, the Agencies appropriately correct course; as proposed,

when the agencies are conducting a case-specific evaluation for significant nexus, they examine the connections between the water (including any similarly situated waters in the region) and downstream foundational waters and determine if those connections significantly affect the chemical, physical, or biological integrity of the downstream foundational water . . . .<sup>413</sup>

The Agencies’ final rule should incorporate this functional, scientific approach to jurisdiction, implemented consistent with the Act’s clear objective, congressional intent, Supreme Court precedent, and science.

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<sup>411</sup> See S. Rep. No. 92-414, 1972 U.S.C.C.A.N. at 3742 (“Water moves in hydrologic cycles . . .”).

<sup>412</sup> See generally SAB Members Comment Letter; SAB, Final Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act (Feb. 27, 2020) (“SAB Final Commentary”), <https://perma.cc/6J5F-GR6A>.

<sup>413</sup> Proposed Rule Technical Support Document at 209.

1. *Congress intended for Clean Water Act protections to be driven by science and consideration of the connectivity of waterbodies and their functions as embodied in the “significant nexus” test.*

Congress’s intent in enacting the Clean Water Act is clear. Set out in the first section of the statute, the Clean Water Act’s objective “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>414</sup> As a unanimous United States Supreme Court acknowledged in *Riverside Bayview*, this unequivocal “objective incorporate[s] a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, the word ‘integrity’ . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.”<sup>415</sup> “Protection of aquatic ecosystems, Congress recognized, demand[s] broad federal authority to control pollution because ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’”<sup>416</sup> According to Congress, the Clean Water Act’s protections must extend to “navigable waters, portions thereof, and their tributaries,” for the health of the “aquatic ecosystem” and “well-being of human society.”<sup>417</sup> It was “in view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, [that the *Riverside Bayview* Court found] the Corps’ [exercise of its] 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 [of the United States] under the Act.”<sup>418</sup>

The significant nexus test heeds the objective and framework that Congress established in passing the Clean Water Act: protecting the nation’s waters requires a regulatory regime driven by the science of waterbody functions and connectivity. It would be impossible to ensure the comprehensive protection and steady progress required by the Act without an approach that accounts for the importance of streams, wetlands, and other waterbodies—and their functions—to the chemical, physical, and biological integrity of downstream and other jurisdictional waters. Any such alternative approach would “have consequences that are inconsistent with major congressional objectives” in enacting the Clean Water Act.<sup>419</sup>

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<sup>414</sup> 33 U.S.C. § 1251(a).

<sup>415</sup> *Riverside Bayview*, 474 U.S. at 132–33 (quoting H.R. Rep. No. 92-911, at 76 (ellipses in original)).

<sup>416</sup> *Id.* (quoting S. Rep. No. 92-414, at 77).

<sup>417</sup> S. Rep. No. 92-414, 1972 U.S.C.C.A.N. at 3742 (emphasis added); *see also* H.R. Rep. No. 92-911, at 76–79 (discussing goal of the legislation as preserving natural ecosystem structure and function).

<sup>418</sup> *Riverside Bayview*, 474 U.S. at 134.

<sup>419</sup> *Cnty. of Maui*, 140 S. Ct. at 1477.

2. *For decades, the Supreme Court, lower courts, and the Agencies have protected waters that significantly affect downstream waters as “waters of the United States.”*

Over several decades and multiple decisions, the Supreme Court confirmed the Clean Water Act’s broad scope, holding that waters that significantly affect the quality of foundational waters are “waters of the United States.”<sup>420</sup>

Beginning in 1985, the Court in *Riverside Bayview* upheld the Corps’ exercise of jurisdiction over wetlands whose functions the Corps concluded “*may affect* the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands.”<sup>421</sup> In *SWANCC*, decided in 2001, the Court rejected the Corps’ attempt to assert jurisdiction over an “isolated,” “abandoned sand and gravel pit” solely on the basis that the pit served as a habitat for migratory birds.<sup>422</sup> The Court recognized that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed [its] reading of the [Clean Water Act] in *Riverside Bayview Homes*,” but found such a nexus lacking.<sup>423</sup>

Most recently, in *Rapanos*, Justice Kennedy followed the Court’s prior decisions when he demanded that the Corps demonstrate an ecological nexus between the wetlands it sought to regulate and other jurisdictional waters. As Justice Kennedy articulated, a water has a “significant nexus,” and is thus jurisdictional under the Clean Water Act, if the water or its functions, “significantly affect the chemical, physical, and biological integrity” of traditional navigable waters.<sup>424</sup> Every federal court of appeals to consider the issue has also held that waters satisfying the “significant nexus” standard are “waters of the United States.”<sup>425</sup>

Consistent with this Supreme Court precedent and the objective of the Act, the Agencies have for decades protected streams, wetlands, and other waterbodies that significantly affect other jurisdictional waters<sup>426</sup>—with the exception of the brief period in which the prior administration’s now-invalidated NWPR was in effect. The Agencies should continue their longstanding practice of applying the Court’s significant nexus analysis under this rule.

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<sup>420</sup> *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)).

<sup>421</sup> *Riverside Bayview*, 474 U.S. at 134 (emphasis added); *see id.* at 135 n.9 (valid jurisdiction based on whether covered wetlands “have *significant effects* on water quality and the aquatic ecosystem” (emphasis added)).

<sup>422</sup> 531 U.S. at 162, 164, 171–72, 174.

<sup>423</sup> *Id.* at 167.

<sup>424</sup> *See* 547 U.S. at 759, 779–80 (Kennedy, J., concurring in the judgment) (quoting 33 U.S.C. § 1251(a)).

<sup>425</sup> *See supra* note 280.

<sup>426</sup> *See, e.g.*, Repeal Rule, 84 Fed. Reg. at 56,626 (reviving “Justice Kennedy’s articulation of the significant nexus test in *Rapanos*”); Clean Water Rule, 80 Fed. Reg. at 37,056; *Rapanos* Guidance at 1; 33 C.F.R. § 328.3 (2014) (including as “waters of the United States” tributaries of and wetlands adjacent to other jurisdictional waters.).

3. *The Agencies must apply the significant nexus standard consistent with the Clean Water Act objective, Supreme Court precedent, the Agencies' technical expertise and experience, and science.*

Consistent with the science of connectivity, a water has the requisite “significant nexus” if the water “either alone or in combination with *similarly situated* [waters] *in the region*, significantly affect the chemical, physical, or biological integrity of other covered waters more readily understood as ‘navigable.’”<sup>427</sup> As the Agencies recognize, the Proposed Rule does not define several terms contained in this standard. Therefore, the following subsections recommend approaches for determining (1) which waters are “similarly situated,” and thus should be analyzed in combination, (2) in the “region,” and (3) the types of functions that should be analyzed to determine if waters significantly affect the chemical, physical, or biological integrity of foundational waters.

In addition, we recommend that the Agencies more completely incorporate the science of connectivity as described in the Science Report to further guide decisionmakers’ analyses. The extensive body of literature that supported the 2015 Clean Water Rule is more than sufficient to support protecting “waters of the United States” based on the connectivity of waters within an aquatic system. And that body of research has only grown since 2015. Appendix F to these comments contains a list of more recent relevant literature, the majority of which we have submitted to the EPA Docket Center to accompany these comments.

The recommendations provided below, if followed, will ensure the implementation of the “significant nexus” standard is consistent with the Clean Water Act’s scientific objective, scientific literature, Supreme Court precedent, and lawful past agency practice.

- a. The Agencies should treat waters as “similarly situated” where they function similarly and function together in affecting downstream waters.

As the Agencies correctly acknowledge in their proposal, “[s]cience supports analyzing the contributions of ‘similarly situated’ waters in combination with each other for their effect on downstream foundational waters.”<sup>428</sup> Despite this conclusion, the Agencies do not define an approach to implementing this term.

In finalizing their rule, the Agencies should treat waters as “similarly situated” where they *function* similarly and function together in affecting foundational waters. This means that the Agencies should not treat tributaries similarly situated only with other tributaries or only with other tributaries within the same stream order or flow regime, adjacent wetlands similarly situated only with other adjacent wetlands, or “other waters” as similarly situated only with “other waters.”<sup>429</sup> It also means that the Agencies should depart from the overly narrow approach taken in the *Rapanos* Guidance to limit “similarly situated” waters to “a tributary and its adjacent

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<sup>427</sup> *Rapanos*, 547 U.S. at 740 (Kennedy, J., concurring in the judgment) (emphasis added); see Clean Water Rule, 80 Fed. Reg. at 37,060.

<sup>428</sup> Proposed Rule Technical Support Document at 211.

<sup>429</sup> See Proposed Rule, 86 Fed. Reg. at 69,439.

wetlands.”<sup>430</sup> The Agencies should instead follow the best available science, by considering streams, wetlands, and other waters “similarly situated” based on their functions and cumulative effect on the chemical, physical, or biological integrity of downstream waters.<sup>431</sup>

Assessing the functions of streams, wetlands, and other waters in combination where they function together to affect downstream waters is consistent not only with Justice Kennedy’s articulation of the “significant nexus” standard, but also with the best available science.

Scientists regularly aggregate the effects of groups of waters, multiplying the known effect of one water by the number of similar waters in a specific geographic area, or to a certain scale.<sup>432</sup> This kind of functional aggregation of tributaries, wetlands, non-adjacent, and other types of waters is well-supported in the scientific literature,<sup>433</sup> and by the Agencies’ conclusions summarized in their record here<sup>434</sup> and in the Science Report. In the Science Report, the Agencies concluded that “[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.”<sup>435</sup> For example, “the amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed . . . can have substantial consequences on the integrity of the downstream waters.”<sup>436</sup>

Different types of waters are regularly aggregated to estimate their combined effect on downstream waters in the same watershed. This is because chemical, physical, or biological integrity of downstream waters is directly related to the *collective* contribution of upstream waters that flow into them, including any tributaries and adjacent wetlands. As a result, the health of larger downstream waters is directly related to the collective health of waters located upstream, including waters such as wetlands that may not be hydrologically connected but function together to prevent floodwaters and contaminants from reaching downstream waters.<sup>437</sup>

When considering the effect of an individual stream or wetland, including the cumulative effect of all the contributions and functions that a stream or wetland provides is also essential. “For example, the same stream transports water, removes excess nutrients, mitigates flooding,

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<sup>430</sup> See *Rapanos* Guidance; Proposed Rule, 86 Fed. Reg. at 69,439.

<sup>431</sup> See Proposed Rule, 86 Fed. Reg. at 69,439.

<sup>432</sup> Proposed Rule Technical Support Document at 211–12; EPA & Dep’t of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, EPA-HQ-OW-2011-0880-20869, 166 (May 27, 2015) (“Clean Water Rule Technical Support Document”).

<sup>433</sup> See, e.g., Scott G. Leibowitz, *Isolated Wetlands and Their Functions: An Ecological Perspective*, 23 Wetlands 517 (2003); Charles R. Lane & Ellen D’Amico, *Calculating the Ecosystem Service of Water Storage in Isolated Wetlands Using LiDAR in North Central Florida*, 30 Wetlands 967 (2010); see also Proposed Rule Technical Support Document at 211–12.

<sup>434</sup> See Proposed Rule, 86 Fed. Reg. at 69,408, 69,431, 69,439.

<sup>435</sup> Science Report at ES-5.

<sup>436</sup> Science Report at ES-5; see also *id.* at ES-13 to ES-14.

<sup>437</sup> Proposed Rule Technical Support Document at 211–14; Clean Water Rule Technical Support Document at 166–71; Science Report at 1-10 to 1-11, 6-10 to 6-11.

and provides refuge for fish when conditions downstream are unfavorable; ignoring any of these functions would underestimate the overall effect of that stream.”<sup>438</sup>

EPA’s Science Advisory Board has endorsed this approach: “aggregating ‘similarly situated’ waters is scientifically justified, given that the combined effects of these waters on downstream waters are often only measurable in aggregate.”<sup>439</sup> “At times, the effects of one small system on a much larger downstream waterbody may be challenging to ascertain, but many small systems in aggregate can have a large effect on the biological and chemical integrity of the larger downstream water bodies.”<sup>440</sup> This aggregation, the Board explained, should “be based on functional attributes and flowpaths.”<sup>441</sup> The Agencies should adopt this approach in the final rule.

The Agencies have previously considered waters as “similarly situated” “where they perform similar functions that affect downstream waters and function together within the watershed that drains to the nearest [foundational water].”<sup>442</sup> Since the focus of the “significant nexus” standard is on protecting and restoring the chemical, physical, and biological integrity of the nations’ waters, the Agencies should likewise interpret the phrase “similarly situated” in the final rule here in terms of “whether particular waters are providing common, or similar, functions for downstream waters such that it is reasonable to consider their effect together.”<sup>443</sup>

- b. For the purpose of analyzing the aggregate effects of similarly situated waters and their functions, “the region” should be no smaller than the watershed.

Because “[t]he incremental effects of individual streams and wetlands are cumulative across entire watersheds,”<sup>444</sup> the “region” for purposes of assessing the aggregate effects of similarly situated waters should be no smaller than the relevant watershed. That is, in conducting their functional analysis, the Agencies should aggregate the downstream effects of similarly situated waters, at minimum, across the relevant watershed in determining whether the requisite nexus is present.

The Science Report supports evaluating waters on a watershed scale, concluding “[c]umulative effects *across a watershed* must be considered when quantifying the frequency, duration, and magnitude of connectivity, to evaluate the downstream effects of streams and wetlands.”<sup>445</sup> Indeed, it is the incremental contributions of individual streams and wetlands that accumulate *across entire watersheds*, and their effects on downstream waters “must be evaluated

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<sup>438</sup> Science Report at ES-6.

<sup>439</sup> SAB, Comments to the Chartered SAB on the Adequacy of the Scientific and Technical Basis of the Clean Water Rule, EPA-HQ-OW-2011-0880-7617, at 4–5 (Sept. 2, 2014) (“SAB Clean Water Rule Commentary”).

<sup>440</sup> *Id.* at 114.

<sup>441</sup> *Id.* at 5.

<sup>442</sup> EPA & Dep’t of the Army, Clean Water Rule Response to Comments – Topic 5: Significant Nexus 13 (“Clean Water Rule Response to Comments – Significant Nexus”), <https://perma.cc/FW8Z-53TD>.

<sup>443</sup> *Id.* at 13–14.

<sup>444</sup> Science Report at ES-5.

<sup>445</sup> *Id.* at ES-14 (emphasis added).

in context of other streams and wetlands” *in that watershed*.<sup>446</sup> For example, “[t]he amount of nutrients removed by any one stream over multiple years or by all headwater streams in a watershed in a given year can have substantial consequences for downstream waters.”<sup>447</sup> Similarly, “the amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters.”<sup>448</sup> Cumulative effects of streams, wetlands, and open waters across a watershed must be considered because “[t]he downstream consequences,” such as “the amount and quality of materials that eventually reach a river” or other foundational water, “are determined by the aggregate effect of contributions and sequential alterations that begin at the source waters and function along continuous flowpaths to the watershed outlet.”<sup>449</sup>

Despite this scientific reality, and Justice Kennedy’s admonition to consider the cumulative effects of “similarly situated” waters “*in the region*,” the *Rapanos* Guidance limited the inquiry to within a “stream reach”—“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.” The Agencies should reject this approach and adopt the scientifically valid interpretation of “in the region”: in most cases, in the watershed.

Watersheds are generally regarded by governmental, academic, scientific, and other entities as the most appropriate spatial unit for water resource management.<sup>450</sup> To restore or maintain the health of a downstream affected water, it is standard practice is to evaluate the condition of the waters that are in the contributing watersheds and to develop a plan to address the issues of concern.<sup>451</sup> Scientists utilize watersheds to evaluate the connections and strength of those connections that are fundamental to the significant nexus inquiry.<sup>452</sup> Indeed, “[n]umerous modeling and simulation tools can now be modified and applied to investigate *watershed*-scale hydrologic connectivity dynamics” (both functional and structural connectivity) from non-adjacent wetlands and headwaters to downstream surface-water systems.<sup>453</sup> For example, at the *watershed* scale, hydrological models can quantify the effect of non-adjacent wetlands on streamflow.<sup>454</sup>

Moreover, the *functions* of contributing waters across a watershed are inextricably linked and have a cumulative effect on the integrity of the downstream traditional navigable water, interstate water, or the territorial sea.<sup>455</sup> For these reasons, as the Agencies have previously

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<sup>446</sup> *Id.* at 6-10.

<sup>447</sup> *Id.* at 1-10.

<sup>448</sup> *Id.* at 6-10.

<sup>449</sup> *Id.* at 1-19.

<sup>450</sup> See Proposed Rule Technical Support Document at 214; see also U.S. Environmental Protection Agency. 1996. *Why Watersheds?* EPA 800-F-96-001, <https://perma.cc/LR8H-DZLW>.

<sup>451</sup> Clean Water Rule Technical Support Document at 174; Clean Water Rule Response to Comments – Significant Nexus at 107.

<sup>452</sup> See Science Report at 6-8; Clean Water Rule Technical Support Document at 174.

<sup>453</sup> Leibowitz, *supra* note 433, at 313–14 (emphasis added).

<sup>454</sup> *Id.* at 314.

<sup>455</sup> Clean Water Rule Technical Support Document at 174.

determined, it is more appropriate to conduct a “significant nexus” analysis at the watershed scale than to focus on a specific site, such as an individual stream segment.<sup>456</sup> And once the jurisdictional status for a particular water within a watershed has been established, field staff should apply the significant nexus analysis for that water to any subsequent determinations if they establish (and document) that the water at issue is the same type and in the same watershed as the jurisdictional water. This approach is consistent with Justice Kennedy’s conclusion 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.”<sup>457</sup>

In terms of defining the scope of the watershed, a logical and scientifically valid approach is the watershed that drains to the nearest foundational water through a single point of entry. A “single point of entry watershed” is the “drainage basin within whose boundaries all precipitation ultimately flows to the nearest single traditional navigable water, interstate water, or the territorial sea.”<sup>458</sup> It includes all streams, wetlands, lakes, and open waters within its boundaries.<sup>459</sup> Since the objective is to ensure the quality of receiving coastal waters, rivers, lakes, and other foundational waters, the “region” for the purpose of a “significant nexus” analysis should be the watershed (perhaps, watersheds) that includes all of the streams, wetlands, and other critical waters that are contributing to the receiving water since the cumulative effect of these streams, wetlands, and other critical waters will primarily determine its quality.<sup>460</sup>

Although in many instances a single point of entry watershed will be appropriate, there may be times when a single point of entry watershed is too small. Take the case of prairie potholes, for example, where multiple single point of entry watersheds or even an eco-region may be the best scale to examine the aggregate effect of these critical wetlands. In addition, there may be instances in which the Agencies should review neighboring watersheds to determine whether they are sufficiently similar to the watershed at issue to warrant aggregation of wetlands in more than one watershed in conducting the significant nexus analysis. Where watersheds exhibit strong similarities, aggregating wetlands from multiple watersheds could lead to greater administrative efficiencies, improved clarity and certainty, and more scientifically sound analyses.

In sum, a “similarly situated” analysis should be conducted where it is determined that there is a likelihood that there are waters that function *as a system* to affect downstream water integrity. Therefore, the watershed is the most reasonable region within which to assess whether a significant nexus exists, because the quality of downstream waters is dependent on the condition of the contributing upstream waters, including streams, lakes, and wetlands, within the watershed.

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<sup>456</sup> Clean Water Rule Response to Comments – Significant Nexus at 107.

<sup>457</sup> *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment).

<sup>458</sup> Clean Water Rule Response to Comments – Significant Nexus at 106.

<sup>459</sup> *Id.*

<sup>460</sup> *See* Clean Water Rule Technical Support Document at 176.

- c. In determining whether waters are “similarly situated,” and whether they alone or in combination significantly affect the integrity of downstream waters, the Agencies should consider a broad range of functions.

As demonstrated above, waters and wetlands should be considered “similarly situated” if they function similarly and function together to affect the integrity of downstream waters. These functions should also inform whether these waters, either alone or in combination, significantly affect the chemical, physical, or biological integrity of downstream waters.

In the preamble to the Proposed Rule, the Agencies identify several specific functions that waters can provide that can significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.<sup>461</sup> Currently, however, the rule proposal does not incorporate into the rule text the types of functions that should be considered in the significant nexus analysis.

In finalizing the rule text, the Agencies should provide more detail in the rule’s definition of significant nexus as to the functions to be considered, including those identified in the *Rapanos* Guidance and others justified by the best available science: temperature regulation; sediment trapping and transport; nutrient retention, recycling, and transport; pollutant trapping, sequestration, transformation, filtering, and transport; retention and attenuation of floodwaters and runoff; erosion control; contribution of flow; export of organic matter; provision and export of food resources; or provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas.<sup>462</sup>

These functions are consistent with Supreme Court decisions<sup>463</sup> and with the scientific understanding of how aquatic ecosystems work.<sup>464</sup> They are also consistent with Congress’s interim national goal set forth in the Clean Water Act, to achieve wherever possible “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the nation’s waters.”<sup>465</sup> To ensure appropriate guidance to field staff and others conducting “significant nexus” analyses, the Agencies should provide a non-exclusive list of functions in the final rule. But, because the science continues to evolve, the Agencies should make clear that any list of functions is not exhaustive and that field staff should consider all functions recognized by the current, best available science to have a nexus with the chemical, physical, or biological integrity of downstream waters.

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<sup>461</sup> Proposed Rule, 86 Fed. Reg. at 69,437–38.

<sup>462</sup> See *Rapanos* Guidance at 9–11; Clean Water Rule, 80 Fed. Reg. at 37,067–68.

<sup>463</sup> See, e.g., *Riverside Bayview*, 474 U.S. at 134–35 (recognizing that “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, . . . [and] may ‘serve significant natural biological functions, including food chain position, general habitat, and nesting, spawning, rearing and resting sites for aquatic species.’”); see also *Rapanos*, 547 U.S. at 775, 779–80 (Kennedy, J. concurring in the judgment).

<sup>464</sup> See, e.g., Clean Water Rule Technical Support Document at 181; Science Report at ES-2 to ES-12, 2-26 to 2-31, 3-1 to 6-14; see also *infra* Sections III.F.1, III.F.2, III.F.4, III.G.1.

<sup>465</sup> 33 U.S.C. § 1251(a)(2).

The Agencies should also confirm in the final rule that a water does not need to perform all of these functions to have a significant nexus,<sup>466</sup> nor do waters have to share all of these functions to be considered “similarly situated.” If multiple waters (streams, wetlands, or other waters) share one or more functions that could affect the integrity of downstream waters, they should be “similarly situated” for the purpose of a “significant nexus” test. And, the effect of an upstream water can be significant even when a water, alone or in combination, is providing a subset, or even just one, of the functions listed.<sup>467</sup> Therefore, depending on the particular water and the function(s) it provides, if the water, either alone or in combination with similarly situated waters, performs just one function, and that function has a significant effect on the integrity of downstream waters, then the “significant nexus” test should be satisfied.

4. *To assist decisionmakers in assessing whether the effect of a function is sufficiently significant, the Agencies should more fully incorporate the science of connectivity into the final rule or its preamble.*

In their Proposed Rule, the Agencies appropriately define the term “significantly affect” for purposes of determining whether a water meets the significant nexus standard to mean “more than speculative or insubstantial effects on the chemical, physical, or biological integrity of” a traditional navigable water, interstate water, or the territorial seas.<sup>468</sup> The proposal also identifies specific “factors” that will be considered when assessing whether the “functions” provided by a water, alone or in combination, are more than speculative or insubstantial. While these factors are consistent with the Agencies’ practice in the *Rapanos* guidance, the Agencies should provide additional detail in the final rule’s preamble or rule text based on the science of connectivity to clarify the scope of the required inquiry.

First, Justice Kennedy was clear that to be covered under a significant nexus analysis, the requisite nexus must be more than “speculative or insubstantial.”<sup>469</sup> The Agencies define significant nexus in precisely those terms. The federal courts of appeals have agreed that the term “significant” does not require statistical significance<sup>470</sup> or particular quantitative data. Although these courts have accepted laboratory analysis or quantitative or empirical data,<sup>471</sup> they have not

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<sup>466</sup> Even under its constrained reading of the Clean Water Act, the court in *Georgia v. Wheeler* that remanded the Clean Water Rule to the Agencies rejected as “absurd” and “inconsistent with the text and purpose of the CWA” the argument that significant physical, chemical, or biological effects alone do not establish jurisdiction. 418 F. Supp. 3d 1336, 1369 (S.D. Ga. 2019) (“Justice Kennedy . . . was not saying that all three conditions [physical, chemical, and biological] must be present for a significant nexus to exist.”).

<sup>467</sup> Clean Water Rule Technical Support Document at 181.

<sup>468</sup> Proposed Rule, 86 Fed. Reg. at 69,449, 69,450.

<sup>469</sup> *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

<sup>470</sup> *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 294 (4th Cir. 2011).

<sup>471</sup> *Donovan*, 661 F.3d at 186; *N. Cal. Riverwatch*, 496 F.3d at 1000–01.

required such quantitative evidence.<sup>472</sup> Rather, it is intended to be a “flexible ecological inquiry,”<sup>473</sup> and should be so applied in the final rule.

Next, the Agencies propose to incorporate a list of factors to be considered when assessing whether an effect that a function or functions have on downstream waters is more than speculative or unsubstantial. These factors include the distance from a foundational water; hydrologic factors, including shallow subsurface flow; the size, density, and/or number of waters that have been determined to be similarly situated; and climatological variables such as temperature, rainfall, and snowpack.<sup>474</sup> Although these factors appear to be at least related to the science of connectivity, the Agencies should provide more detail on how these and other factors should influence a significant nexus analysis.

As the Science Report exhaustively documented and explained, connectivity is the degree to which components of a system are joined, or connected, by various transport mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system. Connectivity for purposes of interpreting the scope of “waters of the United States” under the Clean Water Act serves to demonstrate the “nexus” between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea. The scientific literature does not use the term “significant,” but it does provide information on the strength of the effect on the chemical, physical, and biological functioning of the downstream water bodies from the connections among tributaries, adjacent waters, and case-specific waters and those downstream waters.

As explained in the Science Report, connectivity of streams and wetlands to downstream waters occurs along a gradient that can be described in terms of the frequency, duration, magnitude, timing, and rate of exchange of water, material, and biotic fluxes to downstream waters.<sup>475</sup> These terms, referred to as “connectivity descriptors,” “characterize the range over which streams and wetlands vary and shift along the connectivity gradient in response to changes in natural and anthropogenic factors and, when considered in a watershed context, can be used to predict probable effects of different degrees of connectivity over time.”<sup>476</sup>

In the preamble to the Proposed Rule and in the Technical Support Document,<sup>477</sup> the Agencies describe these connectivity descriptors as applied to hydrologic factors; however, that oversimplifies the analysis, ignoring their application to other types of connections, and could suggest that hydrologic connections are the most important. However, these demonstrated connectivity descriptors can, and should be, applied to other types of functional connections<sup>478</sup>:

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<sup>472</sup> See, e.g., *Precon*, 633 F.3d at 294 (“We agree that the significant nexus test does not require laboratory tests or any particular quantitative measurements in order to establish significance”); *United States v. Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009) (“Though no doubt a district court could find such evidence persuasive, the Cundiffs point to nothing – no expert opinion, no research report or article, and nothing in any of the various *Rapanos* opinions – to indicate that [laboratory analysis] is the sole method by which a significant nexus may be proved”).

<sup>473</sup> *Precon*, 633 F.3d at 29.

<sup>474</sup> Proposed Rule, 86 Fed. Reg. at 69,450.

<sup>475</sup> Science Report at 1-4.

<sup>476</sup> *Id.*

<sup>477</sup> Proposed Rule Technical Support Document at 218.

<sup>478</sup> Science Report at 1-4.

short- and long-term storage of water and sediment, transformation or sequestration of contaminants, recycling of excess nutrients, provision of habitat for aquatic and semiaquatic species, recharge of river baseflow, and provision of drinking water for humans and wildlife,<sup>479</sup> to name a few. For example, “[t]he number of individuals immigrating or emigrating during a dispersal event . . . could be used to determine the magnitude of the event; the probability, length, and predictability of similar events could be expressed in terms of their frequency, duration, and timing; and fluctuations in dispersal could be described as the rate of change through time (e.g., across seasons or years).”<sup>480</sup>

According to the Science Report:

Ultimately, differences in the frequency, duration, magnitude, timing, and rate of change of physical, chemical, and biological connections describe different positions along the connectivity gradient and produce different types of downstream effects. For example, highly connected stream channels convey water and channel-forming sediment to rivers, whereas highly isolated wetlands can reduce flooding and store excess sediment. Connections with low values of one or more descriptors (e.g., low-frequency, short-duration flooding) can have important downstream effects when values for other descriptors are high (e.g., large-magnitude downstream transfer of floodwaters, sediment, large woody debris, and organisms). At the other end of the frequency gradient, high-frequency, low-magnitude vertical and lateral flows . . . contribute to aquatic biogeochemical processes, including nutrient and contaminant transformation and organic matter accumulation . . . .<sup>481</sup>

In addition to the factors proposed by the Agencies, there are other factors that science shows affect the strength of connectivity including climate-watershed characteristics, spatial distribution patterns, biota, and human activities and alterations.<sup>482</sup> The Agencies should further describe the analysis required for determining when a connection is sufficiently “significant” in their final rule, including clarifying that hydrologic factors are just one of several types of factors and functions to be considered, clarifying that the connectivity descriptors should apply to functions other than just hydrologic functions, incorporating more guidance on the science of connectivity and how it should be applied, and ensuring that the factors that affect the strength of connectivity be included in the analysis.

5. *The Agencies appropriately propose that a water can demonstrate a “significant nexus” if the water alone, or combined with similarly situated waters, significantly affects the biological, physical, or chemical integrity of foundational waters.*

In characterizing the Court’s “significant nexus” standard, Justice Kennedy stated: “[t]he required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted

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<sup>479</sup> *Id.* at 1-4, 1-8.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.* at 1-8.

<sup>482</sup> Science Report at 2-31 to 2-38.

the Act to ‘restore and maintain the chemical, physical, *and* biological integrity of the Nation’s waters’ . . . .”<sup>483</sup> It is therefore clear that Congress intended the Clean Water Act to “restore and maintain” all three forms of “integrity,”<sup>484</sup> so allowing *any one* to be compromised would undercut the statute’s stated objective.<sup>485</sup> As the Agencies correctly conclude, “[i]t would subvert the objective if the [Clean Water Act] only protected waters upon a showing that they had effects on every attribute of the integrity of a traditional navigable water, interstate water, or territorial sea.”<sup>486</sup> We therefore urge the Agencies to continue to reject the notion that in order to have a significant nexus, a water must significantly affect all three forms of integrity – chemical, physical, and biological. We support the Agencies’ proposal to find a “significant nexus” if a water, either alone or combined with similarly situated waters, significantly affects the biological, physical, *or* chemical integrity of foundational waters.

We provide additional information on the proper application of the “significant nexus” standard in the sections below discussing tributaries (Section III.F), adjacent wetlands (Section III.G), and other waters (Section III.H).

**E. “Relatively Permanent” Standard: The Agencies’ proposed use of the *Rapanos* plurality’s test as an *alternative* to the “significant nexus” analysis is acceptable, as long as the test is not too narrowly applied.**

The prior administration made the cardinal mistake of delimiting Clean Water Act jurisdiction based *solely* on the *Rapanos* plurality’s “relatively permanent” and “continuous surface connection” requirements. In so doing, the NWPR violated multiple Supreme Court decisions (including the rejection of those requirements as the sole jurisdictional test by a majority of Justices in *Rapanos* itself) and unanimous circuit court precedent, all of which hold that the Act’s protections extend at least to waters that significantly affect the quality of traditional navigable waters. As established science shows, impermanent streams and wetlands with sub-surface connections to downstream waters are integral to the Act’s objective and must be protected. We applaud the Agencies for restoring this scientific approach.

This is not to say that the plurality’s test may not—or should not—be used as an “administratively useful . . . subset of waters that will virtually always have the requisite nexus.”<sup>487</sup> That is, the plurality’s test can streamline implementation of the significant nexus test, which serves as a backstop for jurisdiction where the plurality’s test is not met. Courts sanction use of the plurality’s test in this manner, and we support the Agencies’ proposal to do so here. However, the Agencies should clarify several aspects of how they intend to implement the plurality’s test in the final rule preamble.

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<sup>483</sup> *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in the judgment) (emphasis added).

<sup>484</sup> 33 U.S.C. § 1251(a).

<sup>485</sup> Proposed Rule Technical Support Document at 217.

<sup>486</sup> *Id.*; *cf. Cnty. of Maui*, 140 S. Ct. at 1477 (rejecting interpretation of Clean Water Act that would have “consequences that are inconsistent with major congressional objectives”).

<sup>487</sup> Proposed Rule, 86 Fed. Reg. at 69,395.

1. *Using the plurality’s test as the sole basis for jurisdiction is incompatible with the Clean Water Act’s objective and with decades of precedent, policy, and science.*

Consistent with the Act’s objective to protect the nation’s water quality,<sup>488</sup> the Supreme Court has long held that Clean Water Act jurisdiction extends to all waters and wetlands that significantly affect the quality of traditional navigable waters. Starting with *Riverside Bayview*, the Court affirmed jurisdiction over wetlands that “form the border of or are in reasonable proximity to other waters of the United States,” even when those waters “do not inundate the wetlands,” holding that “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.”<sup>489</sup> Then in *SWANCC*, the Court made clear that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.”<sup>490</sup> Finally in *Rapanos*, five Justices agreed that jurisdiction extends, at the very least, to wetlands and waters that, either “alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense.”<sup>491</sup>

Against this backdrop, the contrary view of a four-justice plurality in *Rapanos* is plainly *not* the law. As discussed in Section II.B.2.b, above, the plurality opinion’s restriction of Clean Water Act jurisdiction to “relatively permanent, standing, or continuously flowing bodies of water” and wetlands with a “continuous surface connection” to such waters<sup>492</sup> was unambiguously rejected by a majority in *Rapanos* itself as “inconsistent with the Act’s text, structure, and purpose”<sup>493</sup> and “without support in the language and purposes of the Act or in our cases interpreting it.”<sup>494</sup> As such, post-*Rapanos*, circuits have unanimously held that (1) all waters that significantly affect traditional navigable waters are jurisdictional, and (2) the Act is not limited to waters satisfying the plurality’s “relatively permanent” standard.<sup>495</sup>

For decades, the Agencies heeded the mandate of courts and the Act to protect integral streams and wetlands that are impermanent and lack surface water connections to navigable waters.<sup>496</sup> The NWPR’s codification of the *Rapanos* plurality’s “relatively permanent” standard

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<sup>488</sup> 33 U.S.C. § 1251(a).

<sup>489</sup> 474 U.S. at 134.

<sup>490</sup> 531 U.S. at 167.

<sup>491</sup> 547 U.S. at 780 (Kennedy, J., concurring in the judgment); *see id.* at 810 (Stevens, J., dissenting) (“Given that all four Justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.”).

<sup>492</sup> *Id.* at 739, 742.

<sup>493</sup> *Id.* at 776 (Kennedy, J., concurring in the judgment).

<sup>494</sup> *Id.* at 800 (Stevens, J., dissenting) (citation and quotations omitted).

<sup>495</sup> *Donovan*, 661 F.3d at 183–84; *Bailey*, 571 F.3d at 798–99; *N. Cal. River Watch*, 496 F.3d at 999–1000; *Robison*, 505 F.3d at 1221–22; *Gerke Excavating*, 464 F.3d at 724–25; *Johnson*, 467 F.3d at 64–66.

<sup>496</sup> *See, e.g.*, National Pollutant Discharge Elimination System, 38 Fed. Reg. at 13,529 (regulating all “[t]ributaries of navigable waters of the United States”); Regulatory Program of the Corps of Engineers, 42 Fed. Reg. at 37,128 (regulating all “adjacent wetlands that form the border of or are in reasonable proximity to other waters of the

alone “[did] not incorporate best available science” and was inconsistent with the objectives of the Act, as EPA’s own Science Advisory Board observed at the time.<sup>497</sup> Indeed, as the Agencies now recognize:

The science is clear that aggregate effects of ephemeral streams ‘can have substantial consequences on the integrity of the downstream waters’ and that the evidence of such downstream effects is ‘strong and compelling.’ EPA’s Science Advisory Board (SAB) Review of the draft Science Report explained that ephemeral streams ‘are no less important to the integrity of the downgradient waters’ than perennial or intermittent streams. . . . The science is also clear that wetlands may significantly affect downstream waters when they have other types of surface connections, such as wetlands that overflow and flood jurisdictional waters or wetlands with less frequent surface water connections due to long-term drought; wetlands with shallow subsurface connections to other protected waters; or other wetlands proximate to jurisdictional waters.<sup>498</sup>

Yet the NWPR categorically excluded these waters, flouting science, the Act’s objective, and decades of precedent and policy through an embrace of the *Rapanos* plurality’s test. The Proposed Rule properly departs from the NWPR’s approach.

2. *The relatively permanent standard may be used as an alternative to the significant nexus standard, but not as the sole test for jurisdiction.*

As noted, a majority of the Court in *Rapanos* voted to affirm jurisdiction “in all [] cases in which either the plurality’s or Justice Kennedy’s test is satisfied.”<sup>499</sup> As such, three circuits have held that jurisdiction extends to all waters that satisfy the significant nexus *or* relatively permanent test.<sup>500</sup> This is consistent with longstanding Supreme Court precedent that points of

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United States”); *Rapanos* Guidance (protecting streams and wetlands with a significant nexus to navigable waters); Clean Water Rule, 80 Fed. Reg. at 37,054 (same).

<sup>497</sup> SAB Final Commentary at 1.

<sup>498</sup> Proposed Rule, 86 Fed. Reg. at 69,398 (citations omitted).

<sup>499</sup> 547 U.S. at 810 (Stevens, J., dissenting).

<sup>500</sup> *Johnson*, 467 F.3d at 66; *Donovan*, 661 F.3d at 184; *Bailey*, 571 F.3d at 799.

law embraced by any five Justices constitute binding law,<sup>501</sup> the Department of Justice’s long-held litigation position,<sup>502</sup> and the position taken by the Agencies in the *Rapanos* Guidance.<sup>503</sup>

In the Proposed Rule, unlike the NWPR, the Agencies put the relatively permanent test in its proper place—as an *alternative* standard for jurisdiction but not as the *sole* standard. We agree with the Agencies that “it is the significant nexus standard that advances the objective of the Act because it is linked to effects on downstream water quality while establishing a reasonable limitation on the scope of jurisdiction by requiring those links to be significant.” We further agree that “[t]he relatively permanent standard is administratively useful as an example of a subset of waters that will virtually always have the requisite nexus, but, on its own, is insufficiently protective to meet the objective of the Clean Water Act.”<sup>504</sup> It is legal and reasonable to use the relatively permanent test in this manner, and we support this aspect of the Proposed Rule.

3. *The Agencies should clarify that the relatively permanent test includes coverage for intermittent streams and recognizes connections through human-made features.*

In the preamble to the final rule, the Agencies should clarify several aspects of how they will implement the plurality’s jurisdictional test—again, as an alternative basis to the significant nexus test.

- a. The Agencies should clarify that the relative permanent test does not require perennial or seasonal flow.

Consistent with Justice Scalia’s opinion, and prior agency practice, the Agencies should clarify that jurisdictional “relatively permanent” waters need not flow perennially and that the relatively permanent standard includes waters “which contain continuous flow during some months of the year but no flow during dry months.”<sup>505</sup> For administrative convenience, clarity for the public, and consistency with Justice Scalia’s opinion, the Agencies should implement the plurality’s test *at least* as broadly as in the NWPR, protecting all waters that flow at least

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<sup>501</sup> See *supra* note 297.

<sup>502</sup> As the United States argued in opposition to certiorari in *Johnson*,

Consideration of the dissenting Justices’ views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. *Cf. Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). The application of that approach here leads inexorably to the conclusion that regulatory jurisdiction exists whenever the legal standard of the plurality or of Justice Kennedy’s concurrence is satisfied, since a majority of the Court’s Members would find jurisdiction in either of those instances. *See id.* at 2265 (Stevens, J., dissenting).

Br. for U.S. in Opp’n to Certiorari, *Johnson v. United States*, No. 07-9, 2007 WL 2571688, at \*12–13 (Aug. 31, 2007).

<sup>503</sup> *Rapanos* Guidance at 3 & nn. 15–16.

<sup>504</sup> Proposed Rule, 86 Fed. Reg. at 69,395.

<sup>505</sup> *Rapanos* Guidance at 6–7 (citing *Rapanos*, 126 S. Ct. at 2221 n.5); *accord* 85 Fed. Reg. at 22,338–39.

intermittently—i.e., “continuously during certain times of the year,” which need not be for a whole season (i.e., three months). On this point, the Agencies should reject the *Rapanos* Guidance, which only protected some undefined subset of perennial and intermittent streams.<sup>506</sup> The test should protect *all* intermittent and perennial streams.

The final rule must *not* require that waters be fed by any particular source in order to satisfy the relative permanence requirement.<sup>507</sup> This add-on requirement has no basis in Justice Scalia’s plurality opinion, which focuses on the frequency of flow rather than its source. And it certainly has no basis in science or the significant nexus test, which recognize that relatively permanent streams significantly affect downstream waters regardless of the source of water that feeds the stream.<sup>508</sup>

- b. The Agencies should clarify that the requisite surface connection may be through a jurisdictional or non-jurisdictional feature, whether natural or human-made.

We agree with the Agencies that a continuous surface connection “does not require surface water to be continuously present between the wetland and the tributary,” and may be satisfied when the space between the two is “inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions.”<sup>509</sup> For this reason, we urge the Agencies to correct what appears to be an error in the preamble to the Proposed Rule; on page 69,398, the preamble mistakenly describes the relatively permanent standard as requiring a “continuous surface *water* connection,” rather than a “continuous surface connection.”<sup>510</sup>

In addition, we urge the Agencies to clarify that the requisite connection between a wetland and a stream or other water may occur through a jurisdictional *or* non-jurisdictional feature, whether natural or man-made. As the Fifth Circuit held in applying the *Rapanos* plurality’s test, “it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was human-made or formed naturally.”<sup>511</sup> The Agencies acknowledge that this was their historic approach to the surface connection requirement,<sup>512</sup> and they should explicitly retain it.

**F. Tributaries: Science dictates broad, categorical protections for tributary streams.**

Science demonstrates that tributaries, including ephemeral and intermittent streams, are connected to downstream waters and play important roles in maintaining the health and viability of those larger waters. Despite this well-documented conclusion, the prior administration’s rule stripped protections from critical tributaries: it categorically excluded ephemeral streams—

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<sup>506</sup> See Proposed Rule, 86 Fed. Reg. at 69,435.

<sup>507</sup> See *id.* at 69,436 (soliciting comment on this point).

<sup>508</sup> See, e.g., *id.* at 69,398.

<sup>509</sup> *Id.* at 69,435 (citation and quotations omitted).

<sup>510</sup> See *id.* at 69,398.

<sup>511</sup> *Cundiff*, 555 F.3d at 213.

<sup>512</sup> Proposed Rule, 86 Fed. Reg. at 69,435.

important waters that flow in response to precipitation, which comprise millions of the nation's stream miles.<sup>513</sup> It also excluded 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.<sup>514</sup> These waters have been protected under all past definitions of "waters of the United States."<sup>515</sup>

We commend the Agencies for rejecting the unfounded approach in the NWPR and for proposing to revive protections for these important waters, including ephemeral streams, lakes and ponds within tributary systems, and human-made features that function as tributaries (such as ditches and other channels), where they meet the relatively permanent standard or are otherwise shown to significantly affect the integrity of foundational waters. However, we urge the Agencies to adopt categorical protections for tributaries that have a bed, a bank, and another indication of flow consistent with Justice Kennedy's suggestion in *Rapanos*, their past practice, and science.

1. *Science requires broad protections for tributaries.*

Tributaries have a substantial impact on the chemical, physical, or biological integrity of waters into which they eventually flow—including traditional navigable waters, interstate waters, and the territorial seas.<sup>516</sup> A robust body of science "unequivocally demonstrates that tributaries exert a strong influence on the physical integrity of downstream waters."<sup>517</sup> As laid out in the Technical Support Document for the Agencies' proposal<sup>518</sup> and in the Science Report,<sup>519</sup> this science supports a broad reading of tributaries:

The scientific literature documents that tributary streams, including perennial, intermittent, and ephemeral streams, certain lakes and ponds, and certain categories of ditches are integral parts of river networks because they are directly connected to rivers via permanent surface features (channels and associated alluvial deposits) that concentrate, mix, transform, and transport water and other materials, including food resources, downstream.<sup>520</sup>

Tributaries not only *physically* convey flow downstream, they "transport, and often transform, *chemical* elements and compounds, such as nutrients, ions, dissolved and particulate organic matter and contaminants, influencing water quality, sediment deposition, nutrient availability, and biotic functions in rivers."<sup>521</sup> Tributaries are also "*biologically* connected to downstream waters by dispersal and migration, processes which have critical implications for

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<sup>513</sup> Trout Unlimited Comments at 5, 13.

<sup>514</sup> See NWPR EA at 22–23 (describing Rule as maintaining jurisdiction over "most perennial and many intermittent streams relative to" prior policy); see also *id.* at 9–17.

<sup>515</sup> See, e.g., Clean Water Rule, 80 Fed. Reg. at 37,076; Repeal Rule, 84 Fed. Reg. at 56,661; *Rapanos* Guidance at 1, 8, 12.

<sup>516</sup> Clean Water Rule Technical Support Document at 232–33.

<sup>517</sup> Proposed Rule Technical Support Document at 158.

<sup>518</sup> *Id.* at 157–73.

<sup>519</sup> Science Report at 3-5 to 3-21.

<sup>520</sup> Proposed Rule Technical Support Document at 158.

<sup>521</sup> *Id.* (emphasis added).

aquatic populations of organisms that use both headwater and river or open water habitats to complete their life cycles or maintain viable populations.”<sup>522</sup> This is true for tributaries both near and far from downstream foundational waters, and is also true for natural, human-altered, or human-made tributaries, including certain ditches and canals.<sup>523</sup> And it is true where a tributary flows underground for a portion of its length, through boulder fields, through a wetland, or where the indications of flow (such as a bed, bank, or ordinary high water mark) cease to exist for a stretch of the tributary’s length.<sup>524</sup>

Perennial, intermittent, and ephemeral tributaries, whether considered individually or cumulatively, impact downstream flooding, base flows, water quality, and the aquatic food chain.<sup>525</sup> The processes occurring upstream within these waters affect the entire river network’s chemical, physical, and biological structure and function.<sup>526</sup> For the health of downstream rivers, estuaries, and oceans, tributaries must be protected.

2. *The Agencies should eliminate case-by-case analyses by providing categorical protection for tributary streams.*

The scientific literature demonstrates that cumulatively, streams exert a strong influence on the character and functioning of rivers. In light of these well-documented connections and functions, the Agencies should provide for more categorical protections for tributaries, rather than require a case-by-case analysis for all tributaries that do not meet the relatively permanent test.

Congress recognized that protections under the Act must extend to “navigable waters, portions thereof, *and their tributaries*,” for the health of the “aquatic ecosystem” and “well-being of human society.”<sup>527</sup> Consistent with this mandate, the Agencies in the 1986 regulations broadly, and categorically, protected tributaries.<sup>528</sup> The 2015 definition of “waters of United States” categorically protected “tributaries” that contribute flow to a primary water and have “a bed and banks and an ordinary high water mark.”<sup>529</sup> According to the Agencies at that time, “[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.”<sup>530</sup>

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<sup>522</sup> *Id.* (emphasis added).

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

<sup>525</sup> See generally 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,” OW-2002-0050 (Apr. 10, 2003) (“AQ Scientists Comments”); David Goodrich et al., *Southwestern Intermittent and Ephemeral Stream Connectivity*, 54 J. Am. Water Res. Ass’n 400, 402 (2018); Richard B. Alexander et al., *Effect of Stream Channel Size on the Delivery of Nitrogen to the Gulf of Mexico*, 403 Nature 758 (2000); 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).

<sup>526</sup> AQ Scientists Comments at 2; Goodrich et al., *supra* note 525, at 402; Alexander et al., *supra* note 525, at 759.

<sup>527</sup> S. Rep. No. 92-414, 1972 U.S.C.C.A.N. at 3742 (emphasis added).

<sup>528</sup> See 33 C.F.R. § 328.3(a)(5) (2014); Final Rule for Regulatory Programs of the Corps of Engineers, 41 Fed. Reg. 41,206, 41,250 (Nov. 13, 1986).

<sup>529</sup> Clean Water Rule, 80 Fed. Reg. at 37,104–05.

<sup>530</sup> *Id.* at 37,058.

However, as with the Proposed Rule, the 2008 *Rapanos* guidance subjects tributaries—which were not at issue in *Rapanos*—to case-by-case “relatively permanent” and “significant nexus” tests.<sup>531</sup> This analysis is time- and resource-intensive and is not required under a lawful interpretation of the significant nexus test. It should not be adopted here.

Supreme Court precedent clearly establishes the Agencies’ authority to adopt science-based categorical protections for important tributaries. In *Riverside Bayview*, a unanimous Court explained as follows:

Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps’ decision to define all adjacent wetlands as ‘waters.’ If it is reasonable for the Corps to conclude that *in the majority of cases*, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.<sup>532</sup>

In *Rapanos*, Justice Kennedy and the four dissenting Justices reaffirmed the science-based “majority of cases” approach to categorical jurisdiction.<sup>533</sup> As Justice Kennedy explained:

Through regulations or adjudication, the Corps may choose to *identify categories of tributaries* that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.<sup>534</sup>

Although *Riverside Bayview* and *Rapanos* primarily addressed the jurisdictional status of wetlands at issue in those cases, the science-based approach applies to “a water or wetland,” including tributaries.<sup>535</sup>

Thus, the Agencies have clear authority to protect categories of tributaries that science shows significantly affect the quality of foundational waters in the majority of cases. They should exercise that authority “as a matter of administrative convenience or necessity,”<sup>536</sup> to avoid resource-intensive case-by-case analyses that leave important wetlands subject to

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<sup>531</sup> See *Rapanos* Guidance at 8.

<sup>532</sup> 474 U.S. at 135 n.9 (emphasis added).

<sup>533</sup> 547 U.S. at 780–81 (Kennedy, J., concurring in the judgment); *id.* at 793–96 (Stevens, J., dissenting) (quoting *Riverside Bayview*, 474 U.S. at 135 n.9).

<sup>534</sup> *Rapanos*, 547 U.S. at 780–81 (Kennedy, J., concurring in the judgment) (emphasis added).

<sup>535</sup> See, e.g., *Foster v. EPA*, No. CV 14-16744, 2017 WL 3485049, at \*5 (S.D. W. Va. Aug. 14, 2017) (“[T]he significant nexus test framed by Justice Kennedy is not limited solely to wetlands. In *Rapanos*, Justice Kennedy did not confine the significant nexus test to wetlands, stating that ‘a water or wetland’ that ‘possesses a ‘significant nexus’ to navigable waters is a jurisdictional water under the CWA.”); *United States v. HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1057 (C.D. Cal. 2018) (“[T]he court will apply Justice Kennedy’s significant nexus test in determining whether the tributaries at issue are navigable waters within the meaning of the CWA.”).

<sup>536</sup> See *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment).

inconsistent protections. Indeed, for similar reasons, the Agencies have effectively adopted categorical protections for two subsets of integral, non-navigable waters in the Proposed Rule: tributaries “[t]hat are relatively permanent, standing or continuously flowing bodies of water” and wetlands “with a continuous surface connection to such waters.”<sup>537</sup> As the Agencies explain in the preamble, “[w]aters that meet this standard are an example of a subset of waters that will virtually always have the requisite [significant nexus] to downstream [foundational waters], and therefore properly fall within the Clean Water Act’s scope.”<sup>538</sup> There are additional subsets of waters that significantly affect foundational waters. The Agencies should apply established science to identify them.

Finally, as explained, science demonstrates that tributaries within a watershed act together as a system in affecting downstream waters. “Structurally and functionally, stream-channel networks and the watersheds they drain are fundamentally cumulative in how they are formed and maintained.”<sup>539</sup> Downstream foundational waters “are the time-integrated result of all waters contributing to them.”<sup>540</sup> The incremental effects of individual streams are cumulative across entire watersheds and therefore must be evaluated in context with other streams in the watershed.<sup>541</sup> Thus, science supports that tributaries within a watershed can be similarly situated where they share physical characteristics of sufficient flow such that the covered tributaries are performing similar functions and tributaries located in a watershed are working together in the region to provide those functions to foundational waters. The Agencies should categorically protect these similarly situated tributaries here.

By proposing to require a case-by-case analyses for protecting tributaries, the Proposed Rule ignores prior agency practice and the scientific literature, which documents that tributary streams, including perennial, intermittent, and ephemeral streams, are integral parts of river networks.

3. *The Agencies should provide categorical protections for tributaries with a bed, a bank, and another indication of flow.*

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 Agencies should take a similar approach here, incorporating indicators of flow that represent regional variations more broadly than an ordinary high water mark.

In determining the presence of flow, the existence of a bed, banks, and an ordinary high water mark has often 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

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<sup>537</sup> Proposed Rule, 86 Fed. Reg. at 69,449.

<sup>538</sup> *Id.* at 69,397.

<sup>539</sup> Science Report at ES-13.

<sup>540</sup> *Id.* at ES-5.

<sup>541</sup> *Id.*

regulated waters to constitute ‘navigable waters’ under the Act.”<sup>542</sup> 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.<sup>543</sup> In the arid Southwest, for instance, typical ordinary high water mark indicators have been found to be an unreliable 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.<sup>544</sup> Although 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,<sup>545</sup> the ordinary high water mark is more variable and more difficult to ascertain.

Acknowledging these variations, the Science Advisory Board has recommended that tributaries be instead defined as streams or rivers with a “bed, bank, and other evidence of flow.”<sup>546</sup> “[F]rom a scientific perspective there are tributaries that do not have an ordinary high water mark but still affect downstream waters.”<sup>547</sup>

Requiring a bed, bank, and other indicator of flow ensures that categorical protections are appropriately limited to tributaries shown by science to significantly affect the quality of downstream foundational waters “in the majority of cases.”<sup>548</sup> With these constraints in place, there is no basis to impose additional limitations on tributary protections, like the NWPR’s perennial or intermittent flow requirements. Restricting tributary protections based on the regularity of flow is legally and scientifically baseless. As EPA’s Science Advisory Board has explained, “ephemeral streams ‘are no less important to the integrity of the downgradient waters’ than perennial or intermittent streams.”<sup>549</sup> A majority in *Rapanos* concurred that a regularity of flow requirement “makes little practical sense in a statute concerned with downstream water quality.”<sup>550</sup>

Consistent with this view, we recommend that the Agencies’ define covered tributaries and provide them with categorical protection. The Agencies should also make clear that tributaries can be defined by the presence of a bed and a bank and another indication of flow,

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<sup>542</sup> *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment); *see also id.* at 760–61.

<sup>543</sup> 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>.

<sup>544</sup> 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); *see also* Letter from Dr. David T. Allen, Chair, EPA Science Advisory Board, to EPA Administrator Gina McCarthy, Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA’s Proposed Rule Titled “Definition of Waters of the United States under the Clean Water Act” 2–3 (Sept. 30, 2014) (“SAB Allen Letter”), <https://perma.cc/5TWQ-CHB3>.

<sup>545</sup> Emily H. Stanley et al., *Ecosystem Expansion and Contraction in Streams*, 47 *BioScience* 427, 427–35 (1997).

<sup>546</sup> Clean Water Rule 80 Fed. Reg. at 37,064; *see also* SAB Allen Letter.

<sup>547</sup> Clean Water Rule Technical Support Document at 242.

<sup>548</sup> *See Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment); *id.* at 793–94 (Stevens, J., dissenting); *Riverside Bayview*, 474 U.S. at 135 n.9.

<sup>549</sup> Proposed Rule, 86 Fed. Reg. at 69,398 (citations omitted).

<sup>550</sup> 547 U.S. at 769 (Kennedy, J., concurring in the judgment); *id.* at 801 (Stevens, J., dissenting) (finding relative permanence requirement “arbitrary” and unlawful).

such as an ordinary high water mark or other indicator, to so that waters across a range of regional and climatic variations are protected.

4. *Streams that do not meet the categorical definition of tributary should be subject to the case-by-case “significant nexus” standard, properly applied.*

To the extent streams are subject to the significant nexus test, their contribution to the chemical, physical, or biological integrity of downstream waters must be considered in combination with similarly situated waters in the watershed.

Justice Kennedy’s concurrence in *Rapanos* 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.’”<sup>551</sup> Justice Kennedy was clear that the scope of “similarly situated” is *the region*.<sup>552</sup> 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)*<sup>553</sup> 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.”<sup>554</sup>

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,”<sup>555</sup> employ the functional analysis that the Supreme Court has affirmed over decades and multiple decisions.<sup>556</sup> Once EPA or the Corps makes a determination that a tributary stream has a significant nexus to a foundational water, all downstream stream segments by necessity must also be jurisdictional.

Where the Agencies must apply a site-specific significant nexus analysis, it is essential that they refrain from applying the analysis in a sequential manner that ignores how similarly situated waters function together. That is, if the Agencies are investigating whether a stream and an adjacent wetland are jurisdictional, the Agencies cannot make a determination about the

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<sup>551</sup> *Id.* at 780 (Kennedy, J., concurring in the judgment).

<sup>552</sup> *Id.*

<sup>553</sup> 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

<sup>554</sup> *Riverside Bayview*, 474 U.S. at 135 n.9.

<sup>555</sup> *Id.* at 133.

<sup>556</sup> *See id.* at 135 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).

stream without also considering the adjacent wetland. Because the goal under the Proposed Rule is to determine whether the relevant waters significantly affect downstream foundational waters, the Agencies must evaluate the functions that the waters cumulatively provide.

In the Proposed Rule, however, the Agencies appear to suggest the reverse: that “the determination of jurisdiction with regard to wetlands adjacent to tributaries ‘must be made using a basic two-step approach that considers (1) the connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream [foundational waters]’ . . . .”<sup>557</sup> Under this approach, the functions performed by the wetland may not be considered at all; the jurisdictional status of the waters would depend solely on whether *the tributary* alone significantly affects downstream foundational waters. Such an approach runs counter to (correct) statements that the Agencies make elsewhere in the Proposed Rule. For example, in the following passage, the Agencies explain how streams and their adjacent wetlands often work together to break down nutrients and store pollutants:

Stream and wetland ecosystems also process natural and human sources of nutrients, such as those found in leaves that fall into streams and those that may flow into creeks from agricultural fields. Some of this processing converts the nutrients into more biologically useful forms. Other aspects of the processing store nutrients, thereby allowing their slow and steady release and preventing the kind of short-term glut of nutrients that can cause algal blooms in downstream rivers or lakes. Small streams and their associated wetlands play a key role in both storing and modifying potential pollutants, ranging from chemical fertilizers to rotting salmon carcasses, in ways that maintain downstream water quality.<sup>558</sup>

The Agencies thus acknowledge the importance of considering the overlapping functions of streams and wetlands together. The Agencies go on to state that

[s]mall streams and wetlands are particularly effective at retaining and attenuating floodwaters. Streams, wetlands, and open waters supply downstream waters with organic matter which supports biological activity throughout the river network and provide life-cycle dependent aquatic habitat for species located in foundational waters.”<sup>559</sup>

Again, the Agencies aptly point out that streams and their adjacent wetlands function in tandem; neither set of functions should be ignored when the significant nexus test is applied.

The Agencies also recognized this principle when they issued the *Rapanos* Guidance in 2008. After explaining how streams and their adjacent wetlands work together to provide many functions, the Agencies summarized the proper inquiry as follows:

If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent

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<sup>557</sup> Proposed Rule, 86 Fed. Reg. at 69,395 (quoting NWPR, 85 Fed. Reg. at 22,267).

<sup>558</sup> Proposed Rule, 86 Fed. Reg. at 69,391.

<sup>559</sup> *Id.* at 69,431.

wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters. Therefore, the agencies will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present.<sup>560</sup>

It is critical that the Agencies do not stray from this approach when applying a case-specific significant analysis.

In certain circumstances, using the disfavored sequential approach could have a profound effect on the number of wetlands deemed jurisdictional. Consider, for example, the proposed Twin Pines titanium mine adjacent to the Okefenokee National Wildlife Refuge. As explained in Section II.A.1, above, prior to the NWPR, the Corps applied the *Rapanos* Guidance, considered the functions of streams and wetlands in tandem, and found the at-risk wetlands jurisdictional.<sup>561</sup> The wetlands—many of which are over 100 acres in size—are adjacent to ephemeral streams and ditches that function as streams.<sup>562</sup> When properly considered with their adjacent wetlands, the ephemeral waters clearly have a significant effect on downstream foundational waters such as the St. Marys River.<sup>563</sup> Were these ephemeral waters to be analyzed in isolation, however—under the sequential approach that the Agencies appear to contemplate in the Proposed Rule—they would likely fail the significant nexus test. This, the Agencies have acknowledged: “[c]ompounding potential resource losses [from the NWPR], eliminating ephemeral streams from jurisdiction under the NWPR also typically eliminates jurisdiction over any nearby wetlands.”<sup>564</sup> Such a result diverges from the Agencies’ prior practice and would result in reduced protections for critical water resources.

In short, applying the significant nexus test sequentially runs counter to the scientific reality that streams and wetlands *function together as part of the aquatic ecosystem* and should be considered together in determining whether these similarly situated waters significantly affect downstream waters.

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<sup>560</sup> *Rapanos* Guidance at 10.

<sup>561</sup> See Letter from Steven Metivier, U.S. Army Corps of Eng’rs Savannah Dist., to Steven R. Ingle, Twin Pines Minerals, LLC (Jan. 24, 2020) (“Twin Pines Jan. 2020 AJD”); Letter from Scott Guinn, U.S. Army Corps of Eng’rs Savannah Dist., to Steve Ingle, Twin Pines Minerals, LLC (Dec. 18, 2018) (“Twin Pines Dec. 2018 AJD”); see generally *Rapanos* Guidance.

<sup>562</sup> See Twin Pines Jan. 2020 AJD; Twin Pines Dec. 2018 AJD. The delineation reports provided by the applicant contain additional supporting information. See generally TTL, Inc., Waters of the United States Delineation Report: Approximately 551.1-Acre Adirondack Tract, Saint George, Charlton County, Georgia (July 3, 2019); TTL, Inc., Waters of the United States Delineation Report: Approximately 1,034-Acre Keystone Tract, Saint George, Charlton County, Georgia (Sept. 28, 2018); TTL, Inc., Waters of the United States Delineation Report: Approximately 1,012-Acre Loncala Tract, Saint George, Charlton County, Georgia (Aug. 3, 2018). All three delineation reports are available at <https://perma.cc/XUE5-EZ9V>.

<sup>563</sup> American Rivers, *America’s Most Endangered Rivers* 18–19 (2020), <https://perma.cc/2UPE-Y2BG>. American Rivers identifies St. Marys River as one of the country’s ten most endangered rivers based on the threat of the Twin Pines mine and notes that the destruction of wetlands on the mining site would “degrade the St. Marys River, which is renowned for its excellent water quality and habitat for endangered Atlantic and shortnose sturgeon.” *Id.*

<sup>564</sup> Memorandum for the Record at 3.

5. *Human-made features such as ditches and other channels are appropriately treated as tributaries in the Proposed Rule.*

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.<sup>565</sup> This definition is not consistent with the Clean Water Act. The Agencies are correct to extend the Act's protections to ditches that function as tributaries, conveying pollutants, nutrients, biota, and other media along with water to downstream waters, should be jurisdictional. This is support both by the law and science.

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,<sup>566</sup> 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.<sup>567</sup> In *Callaway*, the court berated the Corps for "act[ing] unlawfully and in derogation of their responsibilities under section 404 of the Water Act . . . ."<sup>568</sup> 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.<sup>569</sup> 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."<sup>570</sup> Although the Corps did not initially regulate upland ditches initially, by 1977 it did.

In *United States v. Eidson*,<sup>571</sup> the U.S. Court of Appeals for the Eleventh Circuit articulated the rationale for finding ditches that function as tributaries jurisdictional.<sup>572</sup> 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

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<sup>565</sup> NWPR, 85 Fed. Reg. at 22,338–39.

<sup>566</sup> 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).

<sup>567</sup> *Nat. Res. Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

<sup>568</sup> *Id.*

<sup>569</sup> *United States v. Holland*, 373 F. Supp. 665, 671 (M.D. Fla. 1974).

<sup>570</sup> *Id.* at 668.

<sup>571</sup> 108 F.3d 1336 (11th Cir. 1997).

<sup>572</sup> *Id.* at 1340.

used them to convey the pollutants without a permit is the matter of importance.<sup>573</sup>

Citing *Eidson*, the Ninth Circuit in *Headwaters, Inc. v. Talent Irrigation District*<sup>574</sup> 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.”<sup>575</sup> 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*,<sup>576</sup> 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.<sup>577</sup> 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 human-made, the [Clean Water Act’s] chief goal would be subverted.”<sup>578</sup> The remaining court of appeals have similarly held that, for purposes of the regulatory definition of “waters of the United States,” a man-made ditch can be a “tributary” of the downstream waters to which the ditch ultimately contributes flow.<sup>579</sup>

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.”<sup>580</sup> 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.<sup>581</sup> 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. The Agencies therefore appropriately propose to treat ditches as tributaries when they function as tributaries.

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<sup>573</sup> *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)).

<sup>574</sup> 243 F.3d 526 (9th Cir. 2001).

<sup>575</sup> *Id.* at 533.

<sup>576</sup> 305 F.3d 943, 954 (9th Cir. 2002).

<sup>577</sup> *Id.* at 954–55.

<sup>578</sup> *Treacy v. Newdunn Assocs.*, 344 F.3d 407, 417 (4th Cir. 2003), cert. denied sub nom. *Newdunn Assocs. v. U.S. Army Corps of Eng’rs*, 541 U.S. 972 (2004); *Deaton*, 332 F.3d at 710–11.

<sup>579</sup> See, e.g., *Gerke Excavating*, 412 F.3d at 805–06; *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *United States v. Rapanos*, 339 F.3d 447, 449, 451–452 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974).

<sup>580</sup> *Riverside Bayview*, 474 U.S. at 132–33 (citing S. Rep. No. 92-414, at 77).

<sup>581</sup> *SWANCC*, 531 U.S. at 167, 174.

**G. Adjacent Wetlands: The Agencies appropriately reject the NWPR’s treatment of “adjacent wetlands,” but must do more to protect these critical water resources.**

A robust body of law and science confirms that wetlands are critical to achieving the Clean Water Act’s objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>582</sup> The prior administration’s treatment of “adjacent wetlands” flouted the Act’s objective, Supreme Court precedent, and established wetland science. We commend the Agencies for their thorough and well-reasoned rejection of the prior approach. We comment here to highlight where the Act’s objective requires strengthening the Proposed Rule’s wetland protections.

*1. Floodplain and many non-floodplain wetlands are critical to the Clean Water Act’s objective.*

As the Agencies are well aware, the Science Report and latest research confirm that floodplain wetlands and many non-floodplain wetlands are integral to the quality of traditional navigable waters. Floodplain wetlands perform a myriad of functions that maintain the chemical, physical, and biological integrity of downstream waters, including trapping, storing, and filtering pollutants that would otherwise degrade downstream waters; temporarily retaining groundwater that supports baseflow in rivers; providing essential habitat for breeding fish, insects, and other species, thereby maintaining food river webs; and retaining large volumes of stormwater, floodwater, and contaminated runoff that would otherwise harm river quality and functioning.<sup>583</sup>

Non-floodplain wetlands perform similar functions. “[S]ubstantive” scientific advancements in the wake of the Science Report strengthen the case that these wetlands are critical to the health of navigable waters.<sup>584</sup> The latest science shows that non-floodplain wetlands are “unequivocally interconnected with stream and river networks” and “can affect the physical, chemical, and biological conditions and characteristics of downgradient . . . streams, rivers, and lakes.”<sup>585</sup> Science further “demonstrate[s] that non-floodplain wetlands, particularly when analyzed in the aggregate, . . . can exert a *substantive and important influence* on the integrity of downstream waters through notable functions affecting downgradient systems including hydrological lag and storage functions (*i.e.*, affecting baseflow and stormflows/flood-hazards in stream systems) and biogeochemical functions (*i.e.*, microbial, physical, or chemical functions transforming compounds, such as denitrification, carbon mineralization, and phosphorous sequestration).”<sup>586</sup> Moreover, “[n]on-floodplain wetlands are the flow-generating origins of many downgradient systems, . . . maintain[ing] and affect[ing] the physical, chemical, and biological integrity of those systems.”<sup>587</sup> In Florida, for example, nearly 90% of headwaters are sourced by non-floodplain wetlands.<sup>588</sup>

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<sup>582</sup> 33 U.S.C. § 1251(a).

<sup>583</sup> Proposed Rule Technical Support Document at 30.

<sup>584</sup> *Id.* at 77.

<sup>585</sup> *Id.*

<sup>586</sup> *Id.* at 78.

<sup>587</sup> *Id.*

<sup>588</sup> *Id.*

Other “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.”<sup>589</sup> Indeed, the “watershed-scale effects provided by surface water and groundwater ‘disconnected’ non-floodplain wetlands is demonstrated throughout the literature.”<sup>590</sup> As a result, studies show that non-floodplain wetlands play “an out-sized role in landscape nutrient dynamics.”<sup>591</sup> “With these concerns in mind,” Justice Kennedy observed in *Rapanos*, “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.”<sup>592</sup>

In short, science demonstrates that protecting floodplain and many non-floodplain wetlands is critical “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>593</sup>

2. *The prior administration’s myopic focus on wetlands’ surface water connections to downstream waters flouted science and the Act’s objective; the Agencies’ proposal correctly departs from the most objectionable aspects of the NWPR’s treatment of wetlands.*
  - a. The NWPR’s definition of “adjacent wetlands” was unscientific and incompatible with the Act.

As the Agencies correctly recognize, the prior administration’s definition of “adjacent wetlands” was unscientific and incompatible with the objective of the Clean Water Act.

The NWPR protected only those wetlands that abut a jurisdictional water, are inundated by flooding from a jurisdictional water in a typical year, or are physically separated from a jurisdictional water by a single natural feature or by an artificial structure that allows for a direct hydrologic surface connection between the wetland and jurisdictional water in a typical year.

The NWPR’s myopic focus on surface water connections<sup>594</sup> between wetlands and other waters ensured the undermining of the Act’s objective. Science shows that wetlands often exert significant effects on downstream waters through subsurface and groundwater connections, “even when lacking surface water connections.”<sup>595</sup> Moreover, many wetland functions critical to the health of downstream waters depend on the *lack* of a surface water connection between them.

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<sup>589</sup> *Id.* at 31.

<sup>590</sup> *Id.* at 79.

<sup>591</sup> *Id.* at 81.

<sup>592</sup> 547 U.S. at 775 (Kennedy, J., concurring in the judgment).

<sup>593</sup> 33 U.S.C. § 1251(a).

<sup>594</sup> Even the provision of the NWPR allowing jurisdiction over wetlands separated from jurisdictional features by a natural feature was predicated on the surface connection requirement. NWPR, 85 Fed. Reg. at 22,311 (“[T]he agencies conclude that the presence of a . . . natural feature indicates that a sufficient surface water connection occurs between the jurisdictional water and the wetland.”).

<sup>595</sup> Proposed Rule Technical Support Document at 77.

Relatedly, the NWPR stripped protections from integrated complexes of wetlands that function collectively to maintain downstream water quality. Projects constructed in jurisdictional wetland complexes may sever the surface water connections among the wetlands. Under the NWPR, this would likely cause many of the wetlands to lose jurisdiction.<sup>596</sup> The NWPR ignored subsurface and groundwater connections between wetlands in integrated complexes, and the importance of those connections in maintaining the quality of downstream navigable waters.

As EPA’s Science Advisory Board has made clear, and consistent with the Court’s decisions in *Riverside Bayview*,<sup>597</sup> *SWANCC*,<sup>598</sup> and *Rapanos*,<sup>599</sup> wetlands 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.”<sup>600</sup> Wetlands “next to,” “near” or “close to” other “waters of the United States,” but not necessarily abutting or having a direct hydrologic surface connection (*e.g.*, many floodplain and non-floodplain wetlands), often exhibit critical functional connections to jurisdictional waters that require their protection under the Clean Water Act.<sup>601</sup>

In the September 2021 comments submitted by SELC in response to the Agencies’ pre-proposal Request for Recommendations, we detailed the legal and scientific failings of the NWPR’s adjacent wetlands definition and the resulting harm to the nation’s waters.<sup>602</sup> As the prior administration’s own Science Advisory Board concluded, 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.”<sup>603</sup> Excluding “wetlands which connect to navigable waters below the surface . . . lacks a scientific justification, while potentially introducing new risks to human and environmental health.”<sup>604</sup> Focusing solely on wetlands’ surface water connections was both unscientific and unlawful.

- b. The proposed definition of “adjacent wetlands” corrects the numerous flaws in the NWPR.

We support the Agencies’ proposal to reinstate the longstanding definition of “adjacent” as “bordering, contiguous, or neighboring,” including “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.”<sup>605</sup>

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<sup>596</sup> NWPR, 85 Fed. Reg. at 22,313.

<sup>597</sup> See 474 U.S. at 134 (affirming jurisdiction over wetlands “that form the border of *or are in reasonable proximity to* other waters of the United States” based on “the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands” (emphasis added)).

<sup>598</sup> See 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*.”).

<sup>599</sup> See 547 U.S. at 775 (Kennedy, J., concurring in the judgment) (“[I]t 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.”).

<sup>600</sup> SAB Members Comment Letter at 5.

<sup>601</sup> *Id.*

<sup>602</sup> See SELC et al., Comment Letter on Request for Recommendations on Defining “Waters of the United States,” EPA-HQ-OW-2021-0328, 4–16 (Sept. 2, 2021), <https://perma.cc/VE49-5HNN>.

<sup>603</sup> SAB Final Commentary at 1.

<sup>604</sup> *Id.* at 4.

<sup>605</sup> Proposed Rule, 86 Fed. Reg. at 69,449.

There is robust legal support for this definition. As the Supreme Court held in *Riverside Bayview*, federal jurisdiction extends to “wetlands that form the border of or are in *reasonable proximity* to other waters of the United States” based on the Agencies’ “ecological judgment about the relationship between waters and their adjacent wetlands . . . .”<sup>606</sup> The Court further held that adjacent wetlands are not limited to those created by “flooding or permeation by water having its source in adjacent bodies of open water,” and that wetlands may significantly affect the quality of adjacent bodies of water even when those waters do not inundate the wetlands.<sup>607</sup>

In *Rapanos*, Justice Kennedy (and the four dissenters) “explicitly approved of the Corps’ regulatory definition of ‘adjacent,’ which includes both wetlands that directly abut waters of the United States and those separated from other waters ‘by man-made dikes or barriers, natural river berms, beach dunes and the like.’”<sup>608</sup> “As Justice Kennedy explained, abutting wetlands are not necessarily any more important than other adjacent wetlands because ‘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.’”<sup>609</sup> Even the *Rapanos* plurality’s “preferred Webster’s Second defines [‘adjacent to’] as ‘lying near, close, *or* contiguous; neighboring; bordering on’ and acknowledges that ‘objects are ADJACENT when they lie close to each other, but not necessarily in actual contact.’”<sup>610</sup>

The NWPR flouted the case law, the Act’s objective, and science, excluding all wetlands from jurisdiction that did not directly abut or possess a surface connection to a jurisdictional water in a typical year. As the Agencies correctly recognize, the NWPR’s definition was “inconsistent with the scien[ce]” and has caused immense harm to the nation’s waters.<sup>611</sup> For example, the NWPR overlooked that “constructed dikes or barriers, natural river berms, beach dunes, and the like typically do not block all water flow” between wetlands and adjacent waters, including subsurface and groundwater connections.<sup>612</sup> Moreover, wetlands separated from other jurisdictional waters may have critical biological connections, such as “provid[ing] important habitat for aquatic and semi-aquatic species that utilize both the wetlands and the nearby water.”<sup>613</sup> In creating artificial distinctions, the NWPR excluded countless wetlands integral to achieving the Act’s objective. We support the Agencies’ proposal to correct this fatal deficiency.

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<sup>606</sup> 474 U.S. at 134 (emphasis added, citation and quotation omitted).

<sup>607</sup> *Id.* at 134–35.

<sup>608</sup> *See Precon*, 633 F.3d at 291 (quoting 33 C.F.R. § 328.3(c)).

<sup>609</sup> *Id.* (quoting *Rapanos*, 547 U.S. at 775 (Kennedy, J., concurring in the judgment)).

<sup>610</sup> 547 U.S. at 805 (Stevens, J., dissenting) (emphasis removed, citation omitted).

<sup>611</sup> 86 Fed. Reg. at 69,428.

<sup>612</sup> *Id.* at 69,430.

<sup>613</sup> *Id.*

3. *The proposed definition of “adjacent wetlands” is an improvement, but the Act’s objective requires more.*

a. All wetlands satisfying the significant nexus test must be protected.

We largely support the Agencies’ proposed “adjacent wetlands” definition, with the critical caveat that *all* wetlands with a significant nexus to traditional navigable waters, interstate waters, or the territorial seas must be protected under the “other waters” category where they do not qualify as adjacent wetlands. The Agencies have confirmed that this is the case<sup>614</sup> and must re-affirm it in the final rule. For example, wetlands that are not “bordering, contiguous, or neighboring” a foundational water must be protected as “other waters” if they meet the significant nexus or relative permanence tests. The same goes for integral wetlands adjacent to waters not specified in the adjacency definition, e.g., non-relatively permanent tributaries or “other waters.”

The Agencies, however, offer a problematic example of how this will work:

Thus, a wetland adjacent to . . . a lake that meets the significant nexus standard under the ‘other waters’ provision could not be determined to be jurisdictional simply because it significantly affects the physical integrity of the lake; rather, the wetland would need to be assessed under the ‘other waters’ provision for whether it significantly affects a traditional navigable water, interstate water, or the territorial seas.<sup>615</sup>

Under this scenario, the Agencies overlook that the lake may be a traditional navigable water—for example, based on navigability by recreational watercraft used in the interstate and international ecotourism industry.<sup>616</sup> A wetland adjacent to a navigable lake is *categorically* jurisdictional, without need for a case-specific significant nexus analysis. This categorical judgment, sanctioned by the Supreme Court, “rests upon a reasonable inference of ecologic interconnection”<sup>617</sup> between the wetland *and the lake*, not downstream waters.

In sum, due to the catch-all “other waters” category, we read the Proposed Rule to protect all wetlands that significantly affect foundational waters, as the Act’s objective, case law, and science require. But before assessing a wetland’s connection with waters further downstream under a case-by-case “other waters” analysis, the Agencies must first ensure that the wetland is not, in fact, adjacent to a water specified in the adjacency definition—for example, a navigable lake used by canoers and kayakers, and thus warranting categorical protection.

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<sup>614</sup> *Id.* at 69,419 (“Waters that do not fall within one of the more specific categories identified in the proposed rule may still meet either the relatively permanent or significant nexus standard [under the ‘other waters’ category].”).

<sup>615</sup> *Id.* at 69,423.

<sup>616</sup> *See infra* Section III.A.1.

<sup>617</sup> *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

- b. Based on the latest science, the Agencies should clarify that the case-by-case approach will be more protective than the approach taken under the *Rapanos* Guidance.

To the extent the Agencies do not specify additional wetland and water types that categorically satisfy the significant nexus test and thus warrant inclusion as “waters of the United States” in this rulemaking,<sup>618</sup> as requested in Section III.H, above, we urge the Agencies to do so in their subsequent rulemaking. Moreover, we reiterate that the case-by-case significant nexus approach revived by the Proposed Rule left many critical wetlands in the Southeast and across the country vulnerable to pollution and degradation, including seeps, hardwood flats, non-riverine swamp forests, pocosins, Carolina Bays, prairie potholes, vernal pools, pine savannahs, pine flats, basin wetlands, bogs, floodplain pools, cypress domes, and many more, despite the ecological benefits they provide to downstream waters. Addressing this failure was a central justification for the Clean Water Rule;<sup>619</sup> the Agencies should go further now.

Scientific advancements since the *Rapanos* Guidance and Clean Water Rule have strengthened the evidence that wetlands are critical to the health of downstream waters, particularly in the case of non-floodplain wetlands.<sup>620</sup> This should enable more protective implementation of the significant nexus test for wetlands than under the *Rapanos* Guidance. The Agencies have already summarized much of the latest science in the Technical Support Document accompanying the Proposed Rule. The Agencies should take the further step of clarifying how the latest science will inform more robust implementation of the significant nexus test, either in guidance or the final rule preamble.

In Section III.D of these comments, we provide detailed comments on implementation of the significant nexus test. In Section III.H.1, we urge the Agencies to adopt categorical protections for key non-floodplain wetlands, such as Carolina and Delmarva bays, pocosins, prairie potholes, vernal pools, and other non-floodplain wetlands, which are currently proposed to be considered as part of the “other waters” category. The critical point here is this: Without further guidance and categorical protection, critical wetlands will again be left to the whims of an inconsistent and under-protective case-by-case regime while the Agencies craft a more protective, second rule.

- c. The parenthetical in the definition of “adjacent wetlands” is needless, confusing, and potentially dangerous.

We strongly recommend removing the parenthetical in the provision asserting jurisdiction over “[w]etlands adjacent to the following waters (*other than waters that are themselves wetlands*) . . . .”<sup>621</sup>

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<sup>618</sup> Under the Proposed Rule, the only wetlands that are jurisdictional categorically, without a case-by-case analysis, are those adjacent to traditional navigable waters, interstate waters, and the territorial seas.

<sup>619</sup> See, e.g., Clean Water Rule, 80 Fed. Reg. at 37,056–57 (“The rule reflects the agencies’ goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA,” while “protecting the streams and wetlands that form the foundation of our nation’s water resources.”).

<sup>620</sup> See, e.g., Proposed Rule Technical Support Document at 77 (“[S]ubstantive scientific advances since the publication of the Science Report have focused on the connectivity and effects of non-floodplain wetlands . . . .”).

<sup>621</sup> *Id.* at 69,449.

The stated intent of the parenthetical is to underscore that “a wetland is not jurisdictional simply because it is adjacent to another adjacent wetland.”<sup>622</sup> If that is the intent, the parenthetical is surplusage. “Adjacent wetlands” are not specified in the enumerated list of waters to which wetlands may be adjacent in order to be jurisdictional. Generally, under “the *expressio unius* canon, [ ] a statute or regulation ‘expressing one item of an associated group or series’ means that the law intends to ‘exclude another left unmentioned.’”<sup>623</sup> Because mere adjacency to another adjacent wetland is already *not* a basis for jurisdiction, the parenthetical is needless and adds no meaning to the text.

Due to the presumption against surplusage,<sup>624</sup> there is a risk that polluters will read the parenthetical to do something more than exclude wetlands with no jurisdictional basis other than adjacency to an adjacent wetland. That risk is heightened because the parenthetical arguably sweeps broader than its intent. Read rigidly, the provision excludes from the adjacent wetlands category “wetlands adjacent to other wetlands,” unqualified. It does not limit the exclusion to wetlands adjacent to *no jurisdictional feature other than an adjacent* wetland. This creates a host of problems.

For one, “[a]ll interstate waters including interstate *wetlands*” comprise a separate jurisdictional category.<sup>625</sup> Polluters will likely argue that, under the parenthetical, a wetland’s adjacency to an interstate wetland is not a basis for jurisdiction, notwithstanding that wetlands adjacent to interstate wetlands are jurisdictional under sub-paragraph (i) of the adjacent wetlands definition. The problems run deeper than that. As the Agencies acknowledge, the parenthetical:

has created confusion, as some have argued that a wetland that is indeed adjacent to a jurisdictional tributary should not be determined to be a ‘water of the United States’ simply because another adjacent wetland was located between the adjacent wetland and the tributary. Some have even suggested that the parenthetical flatly excluded all wetlands that are adjacent to other wetlands, regardless of any other considerations.<sup>626</sup>

We appreciate the clarification in the preamble that “[t]hese interpretations are inconsistent with the agencies’ intent and longstanding interpretation of the parenthetical,” and that, “under the 1986 regulations and longstanding practice, wetlands adjacent to an interstate wetland or wetlands adjacent to tidal wetlands, which are traditional navigable waters, are jurisdictional.”<sup>627</sup> We urge the Agencies to revise the codified text to reflect that intent by deleting the parenthetical.

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<sup>622</sup> *Id.* at 69,423.

<sup>623</sup> *Jimenez-Rodriguez v. Garland*, 996 F.3d 190, 196 (4th Cir. 2021) (quoting *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017)).

<sup>624</sup> “[Under] the presumption against surplusage[,] we strive to give effect to every word and provision in a statute when possible.” *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008).

<sup>625</sup> Proposed Rule, 86 Fed. Reg. at 69,449 (emphasis added).

<sup>626</sup> *Id.* at 69,423.

<sup>627</sup> *Id.*

d. The Agencies must protect critical wetland mosaics.

The parenthetical also threatens functionally integrated complexes of wetlands. As explained above, wetland complexes integrated through surface, subsurface, and groundwater connections work collectively to maintain the integrity of downstream waters. The NWPR stripped protections from many such wetlands through its focus on surface water connections, even allowing such waters to lose jurisdiction where projects severed earlier surface water connections.

The Proposed Rule also leaves integral wetland complexes vulnerable, albeit to a lesser extent. Because such wetlands are adjacent to other wetlands, they are most likely to be targeted by polluters wishing to exploit the poorly worded parenthetical. In addition to removing the parenthetical, the Agencies should clarify that the functions of wetland complexes will be assessed in the aggregate, together with similarly situated wetlands in the watershed, in determining whether the wetlands possess a significant nexus with foundational waters downstream. To further protect wetland complexes, the Agencies should clarify that surface water connections are not prioritized over other forms of connections in the significant nexus inquiry. Finally, the Agencies should conduct significant nexus analyses based on wetland complexes in their *unimpaired* state—that is, ignoring any connectivity impairments caused by development. Otherwise, construction in or around wetlands could sever their jurisdictional status, allowing piecemeal, unmitigated destruction of critical wetlands, like under the NWPR. At the very least, the Agencies should require mitigation not only for filling wetlands, but also for activities that cause wetlands to lose their jurisdictional status. Even the NWPR required this.<sup>628</sup>

e. The Agencies must categorically protect wetlands that are adjacent to impounded traditional navigable waters or interstate waters.

Last, the proposed treatment of wetlands adjacent to impoundments of jurisdictional waters is deficient. Under the Proposed Rule, the Agencies would first “assess if the impoundment . . . itself is or is not a relatively permanent, standing, or continuously flowing body of water. If it is, the Agencies would assess if the adjacent wetlands have a continuous surface connection with the impoundment.”<sup>629</sup> If the wetland lacks such surface connection, or is adjacent to a non-relatively permanent impoundment, the Agencies will only assert jurisdiction over the wetland if it has a significant nexus to downstream traditional navigable waters, interstate waters, or the territorial seas.<sup>630</sup>

The Agencies omit a key threshold step: determining whether the impoundment forms a traditional navigable water (or interstate water). If so, wetlands adjacent to such impoundment are *categorically* jurisdictional under subparagraph (i) of the adjacent wetlands definition, even if they lack a surface connection to the impoundment or a significant nexus to downstream

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<sup>628</sup> NWPR, 85 Fed. Reg. at 22,303 (“[A] CWA section 404 permit may be issued with applicable mitigation requirements for a structure that does not allow for a direct hydrologic surface connection in a typical year and therefore severs jurisdiction of the wetland.”).

<sup>629</sup> Proposed Rule, 86 Fed. Reg. at 69,423.

<sup>630</sup> *Id.*

foundational waters. Only if the impoundment fails this threshold test should the Agencies proceed as proposed.

**H. Other Waters: The Agencies correctly propose to protect “other waters”; the final rule should contain categorical protections for Carolina and Delmarva bays, pocosins, vernal pools, and prairie potholes and should include other improvements.**

We commend the Agencies for reviving protections for “other waters”—i.e., those waters that do not fit within the other protected categories, including important non-adjacent wetlands and waters that do not satisfy the proposal’s test for tributary.<sup>631</sup> As the Science Report documented, these waters can provide a number of important hydrologic (e.g., flood control), water quality, and habitat functions, thus warranting their protection under the Clean Water Act. When considered cumulatively across a landscape or watershed with similarly situated waters, these “other waters” often significantly affect the integrity of downstream foundational waters.

The Agencies propose to apply the case-by-case “significant nexus” and “relatively permanent” analyses for all “other waters,” including “intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds.” Although we generally support this approach, there are certain categories of “other waters” that science demonstrates warrant categorical protection in the final rule. In addition, the Agencies should depart from the prior practice of requiring headquarters review of determinations finding “other waters” jurisdictional. They should also remove the reference to “intermittent streams” in the list of “other waters” subject to the case-by-case jurisdictional analyses under the final rule. Last, as we have explained,<sup>632</sup> the Agencies should clarify that intrastate lakes, rivers, streams and other waters navigable by recreational craft such as kayaks are traditional navigable waters and thus jurisdictional with no downstream inquiry; only *non-navigable* waters that are not protected under any other category should be assessed as “other waters.”

*1. The rule should categorically protect certain non-floodplain wetlands.*

Although we support the application of the significant nexus test to other waters, we urge the Agencies to adopt categorical protections for certain other waters, including several types of wetlands. First, because the science exists to demonstrate that these other waters have a significant nexus to foundational waters, they should be jurisdictional by rule. In addition, the Agencies can, and should, still rely on their Commerce Clause Authority to exercise jurisdiction

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<sup>631</sup> See *id.* at 69,419 (“Waters that do not fall within one of the more specific categories identified in the proposed rule may still meet either the relatively permanent or significant nexus standard [under the ‘other waters’ category].”).

<sup>632</sup> *Supra* Section III.A.1–2.

over “other waters” that substantially affect interstate commerce, even if they do not pass the “significant nexus” test.

- a. Some non-floodplain wetlands have a significant nexus to foundational waters and should be categorically protected under Supreme Court precedent.

The Agencies correctly interpret the Clean Water Act and Supreme Court opinions as supporting jurisdiction over “other waters” (including wetlands that do not meet the proposal’s definition of adjacent wetland) if they have a significant ecological and functional nexus to foundational waters. In many cases, substantial scientific evidence demonstrates that several types of “non-adjacent” wetlands (often referred to in science as “non-floodplain wetlands”) significantly affect downstream foundational waters “in the majority of cases;”<sup>633</sup> therefore, the Agencies should extend categorical protections to those waters, while relying on case-by-case analysis only for the “other waters” whose categorical nexus cannot yet be established (and those which cannot be protected under alternative rationales as discussed below).

Justice Kennedy’s opinion in *Rapanos* supports this approach. First, Justice Kennedy explicitly rejected the requirement that wetlands have a “continuous surface connection” to navigable waters,<sup>634</sup> and the four dissenters agreed with him,<sup>635</sup> forming a binding majority. He also noted that physical separation can provide the significant nexus he deemed to be the crux of Clean Water Act jurisdiction, saying, “[g]iven the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands’ significance for the aquatic system.”<sup>636</sup> Finally, 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.”<sup>637</sup>

As described in more detail in Section III.G, above, wetlands perform critical hydrological, physical, and biological functions affecting downstream systems.<sup>638</sup> They can be connected to downstream waters through ephemeral or intermittent streams, shallow subsurface-water, groundwater flows, and through biological and chemical connections.<sup>639</sup> Even where wetlands lack a visibly consistent surface water connection to a river network, they are connected to downstream waters. These non-floodplain wetlands are connected from an

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<sup>633</sup> See *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment); *id.* at 793–94 (Stevens, J., dissenting); *Riverside Bayview*, 474 U.S. at 135 n.9.

<sup>634</sup> *Rapanos*, 547 U.S. at 773–74 (Kennedy, J., concurring in the judgment).

<sup>635</sup> *Id.* at 804–05 (Stevens, J., dissenting).

<sup>636</sup> *Id.* at 786 (Kennedy, J., concurring in the judgment).

<sup>637</sup> *Id.* at 782 (Kennedy, J., concurring in the judgment); accord *Riverside Bayview*, 474 U.S. at 135 n.9

<sup>638</sup> See generally Dennis F. Whigham & Thomas E. Jordan, *Isolated Wetlands and Water Quality*, 23 *Wetlands* 541, 541-49 (2003); Charles R. Lane et al., *Hydrological, Physical, and Chemical Functions and Connectivity of Non-Floodplain Wetlands to Downstream Waters: A Review*, 54 *J. Am. Water Res. Ass’n* 346 (2018); Colvin et al., *supra* note 33; Ex. A, Literature Review.

<sup>639</sup> *Id.*

“ecological”<sup>640</sup> and functional perspective.<sup>641</sup> As the science and case law confirm, non-floodplain wetlands perform numerous functions critical to downstream water quality despite the lack of surface water connections, such as trapping and storing pollutants and floodwater that would otherwise reach navigable waters.<sup>642</sup> Moreover, even in the absence of surface hydrologic connections, non-floodplain wetlands are often connected by overland or aerial movements of aquatic and semiaquatic organisms and the materials that they retain and transport.<sup>643</sup>

The Science Advisory Board Panel previously urged the Agencies to apply a categorical approach to protecting certain types of non-floodplain wetlands that science shows are integral to downstream water quality

[T]here are certain subcategories / types of other waters in certain regions/areas where there is sufficient scientific evidence to categorically determine that these types of waters are jurisdictional (e.g., prairie potholes, Carolina and Delmarva Bays, pocosins, Texas coastal prairie wetlands, western vernal pools).<sup>644</sup>

According to the Agencies, “[c]urrently available peer-reviewed literature and scientific wetland classification systems *clearly document* the importance of . . . non-floodplain wetlands.”<sup>645</sup> In preparation for this rulemaking, the Agencies reviewed the abstracts over 12,000 scientific studies published after 2014,<sup>646</sup> and summarized the current scientific literature in the Technical Support Document.<sup>647</sup> In particular, the Agencies reported,

[b]ased on [their] analysis of 4,282 scientific peer-reviewed papers published ≥ 2014, it is evident that non-floodplain wetlands – individually and in the aggregate – are connected to and can affect the physical, chemical, and biological conditions and characteristics of downgradient waters (e.g., streams, rivers, and lakes). As noted in an updated 2018 analysis and synthesis on the connectivity and effects of non-floodplain wetlands, Lane et al. (2018) stated that peer-reviewed scientific research in hydrological modeling, remote sensing analyses, field-based observations, and coupled field and remote-sensing studies *were sufficiently advanced to conclude that all non-floodplain wetlands were unequivocally interconnected with stream and river networks*.<sup>648</sup>

Although the additional available science suggests that a case-by-case significant nexus analysis is appropriate for *some* non-floodplain wetlands, there is ample evidence to support a jurisdictional-by-rule treatment of several categories of non-floodplain wetlands. For example, two independently commissioned academic reports by students in the River Basin Center at the

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<sup>640</sup> Whigham & Jordan, *supra* note 638, at 23; *see generally*, Kate A. Schofield et al., *Biota Connect Aquatic Habitats Throughout Freshwater Ecosystem Mosaics*, 54 J. Am. Water Res. Ass’n 372 (2018).

<sup>641</sup> *See, e.g.*, Leibowitz et al., *supra* note 433, at 304.

<sup>642</sup> *See supra* Section III.G.

<sup>643</sup> Schofield et al., *supra* note 640, at 375–76; Alexander et al., *supra* note 525, at 294.

<sup>644</sup> SAB Clean Water Rule Commentary at 5.

<sup>645</sup> Proposed Rule Technical Support Document at 91 (emphasis added).

<sup>646</sup> *Id.* at 87.

<sup>647</sup> *Id.* at 62–92.

<sup>648</sup> *Id.* at 77 (emphasis added).

University of Georgia, which were reviewed and found highly credible by an independent expert,<sup>649</sup> demonstrate that Carolina and Delmarva bays, and other coastal plain depressional wetlands; pocosins; vernal pools, prairie potholes, and other categories of non-floodplain wetlands have a significant nexus to foundational waters and deserve categorical protection in the final rule.

- i. *Carolina and Delmarva bays and other coastal plain depressional wetlands have a significant nexus to downstream waters.*

Carolina and Delmarva bays are depressional wetlands found throughout the southeastern United States from Delaware to Florida, with most bays located in southeastern North Carolina, South Carolina, and northeastern Georgia. They occur in topographic depressions and are shallow and oval shaped, and their shape allows for surface water accumulation. They receive water from precipitation, surface water flow, streams, or groundwater, and water may exit bays through evapotranspiration, outlets, or to groundwater recharge.<sup>650</sup> Many bays hold water only during part of the year, and they often lack natural surface water outlets. These bays are home to a wide variety of plants and wildlife, including frogs, salamanders, turtles, snakes and alligators. Salamanders and frogs are prolific in the bays and are dependent on these wetlands for use as breeding sites.<sup>651</sup>

The Science Report identified several features of these bays that provide evidence of significant physical, chemical, and biological connections with traditionally navigable waters:

Both mineral-based and peat-based bays have shown connections to shallow groundwater. Bays typically are near each other or near permanent waters, providing the potential for surface-water connections in large rain events via overland flow. Fish are reported in bays that are known to dry out, indirectly demonstrating surficial connections. Amphibians and reptiles use bays extensively for breeding and for rearing young. These animals can disperse many meters on the landscape and can colonize, or serve as a food source to, downstream waters. Similarly, bays foster abundant insects that can become part of the downstream food web. Humans have ditched and channelized a high percentage of bays, creating new surface connections to other waters and allowing transfer of nutrients, sediment, and methylmercury.<sup>652</sup>

The SAB identifies Carolina and Delmarva Bays as “other waters” that should be protected as “waters of the United States.”<sup>653</sup>

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<sup>649</sup> Jon Devine, Nat. Res. Def. Council, & William Sapp, SELC, Letter on Proposed Definition of “Waters of the United States” Under the Clean Water Act, EPA-HQ-OW-2011-0880-10578 (Oct. 17, 2014), <https://perma.cc/NAG2-6GG7>.

<sup>650</sup> Savannah River Ecology Laboratory, Univ. of Ga., *Carolina Bays Fact Sheet* (2007), <https://perma.cc/V4XX-JCWK>.

<sup>651</sup> *Id.*

<sup>652</sup> Science Report at B-1.

<sup>653</sup> SAB Clean Water Rule Commentary at 5.

The University of Georgia report entitled “Evidence of Significant Impacts of Coastal Plain Depressional Wetlands on Navigable Waters” concluded that “enough evidence exists to presuppose that each [Coastal Plain Depressional Wetland],” a category including Carolina and Delmarva bays, “individually and/or as part of a wetland complex, significantly affects the biological, chemical, and/or physical integrity of federally jurisdictional waters.”<sup>654</sup>

Throughout most of the year Carolina and Delmarva bays exhibit limited physical connections to downstream navigable waterways, but several studies have shown groundwater and potential surface water connections.<sup>655</sup> For example, a study of Carolina Bays in western South Carolina “concluded that surface-water and ground-water connections were important to bay hydrology and the bay was not an isolated system.”<sup>656</sup> Several other studies “infer Carolina and Delmarva Bays are connected to other water bodies through surface-water connections.”<sup>657</sup> Indeed, “[t]idal marshes have encroached and entered these Carolina Bays, reflecting a direct link [to] the estuarine environment.”<sup>658</sup>

When these hydrologic connections are not (or are less) present, Carolina and Delmarva bays influence the physical integrity of downstream waters by acting as water and sediment storage on the landscape, and often as “water pumps” by allowing water entering the wetlands to leave through evapotranspiration.<sup>659</sup> Whether serving as water and sediment sources or sinks, Carolina and Delmarva bays have a significant effect on the integrity of downstream navigable waters.<sup>660</sup> Because most Carolina bays are linked through groundwater interactions or periodic, high surface water flows, these connections allow the depressional wetlands to function as a high quality water source, important water storage, and/or significant nutrient sink to navigable waters downstream. Because ephemeral wetland hydrology supports the bacteria necessary for denitrification, ephemeral Carolina bays likely reduce ammonia and nitrate levels in foundational waters and maintain ecosystem health. Studies have also shown that Carolina bay soils retain excess nutrients and heavy metals from long-term additions of agricultural water.<sup>661</sup>

Evidence of biological connections is also abundant. Many invertebrates have specific evolutionary adaptations that cause a significant transfer of energy and nutrients between isolated ephemeral wetlands and navigable waters. Cyclic colonizer insects, common in Carolina bays, can play an important role in the trophic dynamics, nutrient cycling, and ecological stability of the permanent waters they inhabit during a portion of the year, including large rivers and their tributaries, interstate waters, navigable lakes, and their adjacent wetlands. Carolina and Delmarva bays also have a substantial impact on the biological integrity of permanent waters due to the production of other insects such as midges and the migration of birds, including several duck species. Amphibians use Carolina and Delmarva bays, upland, and river networks for breeding, foraging, dispersal, and overwintering. Because they move among these habitats, they

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<sup>654</sup> Sam Woolford & Matt Carroll, Evidence of Significant Impacts of Coastal Plain Depressional Wetlands on Navigable Waters at 4 (2014) (“Coastal Wetlands”) (attached as Appendix G).

<sup>655</sup> *Id.*

<sup>656</sup> Science Report at B-5.

<sup>657</sup> *Id.*

<sup>658</sup> *Id.*

<sup>659</sup> Coastal Wetlands at 4.

<sup>660</sup> *Id.* at 4–5.

<sup>661</sup> *Id.* at 6–8.

facilitate critical flows of nutrients, energy, and genetic information, and serve as links in an interconnected food web.<sup>662</sup> As the Science Report acknowledged, “Carolina and Delmarva Bays are highly valuable for providing habitat and food web support for invertebrates and vertebrates,”<sup>663</sup> with “a high potential for [species] movement between bays and other water bodies.”<sup>664</sup>

Additionally, other coastal plain depressional wetlands beyond Carolina and Delmarva bays significantly affect downstream navigable waters. Coastal science suggests “that Carolina and Delmarva Bays should be grouped with other depressional wetlands of the Coastal Plain to form a broader class of wetlands called Coastal Plain Depressional Wetlands.”<sup>665</sup> Limiting the evaluation of coastal depressional wetlands to merely Carolina and Delmarva Bays excludes many depressional wetlands on the southeastern coastal plain that are similar ecologically, and perhaps more importantly, share similar connections to downstream waters. Wetlands that have regional names such as limesinks, citronelle ponds, cypress domes, oak domes, grady ponds, and flat-bottom ponds have been considered by many researchers as some variant of “Southeastern Depressional Wetlands” due to their ecological similarity. The University of Georgia report references numerous scientific studies explaining the physical, chemical, and biological connections that these other wetlands have with traditional navigable waters, similar to the connections found in Carolina and Delmarva bays.<sup>666</sup>

The Agencies have significant discretion to define the relevant “region” for purposes of assessing the collective nexus between similarly situated wetlands and foundational waters. Here, as SAB panelists acknowledged, science shows that depressional wetlands on the southeastern coastal plain, either alone or in combination, significantly affect foundational waters. Although there is variability among Coastal Plain Depressional Wetlands, this does not warrant a case-by-case or watershed-by-watershed approach, because science “show[s] that along every important gradient driving variability among [such wetlands], this class of wetlands significantly impacts the integrity of ‘waters more readily understood as navigable.’”<sup>667</sup> Thus, Coastal Plain Depressional Wetlands should be categorically jurisdictional in the final rule.

*ii. Pocosins have a significant nexus to downstream waters.*

Pocosins are bogs that naturally occur across the southeastern Coastal Plain from Virginia to North Florida.<sup>668</sup> They are the only true bogs in the Southeastern United States.<sup>669</sup> The “vast majority” of pocosins are found in North Carolina, which originally had over 2.2 million acres of pocosins. Widespread development, ditching, and draining has impaired over two-thirds of the

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<sup>662</sup> *Id.* at 10–14.

<sup>663</sup> Science Report at B-4.

<sup>664</sup> *Id.* at B-6.

<sup>665</sup> Coastal Wetlands at 2.

<sup>666</sup> *See id.* at 5–6, 8–9, 14–18.

<sup>667</sup> *Id.* at iii-2.

<sup>668</sup> Curtis J. Richardson, *Pocosins: Hydrologically Isolated or Integrated Wetlands on the Landscape?*, 23 *Wetlands* 563, 563–76 (2003).

<sup>669</sup> Sam Woolford et al., Univ. of Ga., *Physical, Chemical, and Biological Impacts of Geographically Isolated Wetlands on Waters of the United States* 16 (2014) (“Isolated Wetlands Report”) (attached as Appendix H).

original pocosins area.<sup>670</sup> Due to their importance to downstream water quality, pocosins are among the types of “other waters” that SAB panelists concluded should be categorically protected as “waters of the United States.”<sup>671</sup> For that reason, and because of their vast extent, scientists suggest that pocosins are connected to regulated waters of the United States.<sup>672</sup>

Pocosins are rainfall-driven and defined by their vegetation communities. They are not usually physically connected to streams or major rivers. However, pocosins are often adjacent to estuaries and “have characteristic and important impacts on the hydrology, chemistry, and energy flow in coastal streams and estuaries because of their elevated positions on the landscape. Many of these effects are due to the lack of surface water connections to navigable waters, rather than because of them, and evidence of many of the most important impacts of pocosins is shown by changes in downstream waters following the creation of artificial surface water connections.”<sup>673</sup>

Physical impacts of pocosins on downstream waters include the determination of runoff patterns and volume, and changes in sediment loading in coastal and downstream waters.<sup>674</sup> Pocosins affect the quantity and pattern of water delivery to streams and coastal waters by sequestering and losing (through evapotranspiration) the majority of precipitation entering the systems, and exporting the remainder by overland sheet flow.<sup>675</sup> Studies have shown that natural pocosins regulate water flow and promote slow release of sheet-flow surface runoff to navigable waterways, while draining, developing, deforesting, and mining pocosins dramatically increases high-flow events.<sup>676</sup> “Given their proximity to estuaries,” the Agencies have acknowledged, “the ability [of pocosins] to retain floodwaters is particularly important because it gives estuaries time to absorb and process the freshwater runoff without rapid and drastic fluxes in water quality.”<sup>677</sup>

The increases in both overall runoff volume and peak flows following pocosin development sheds light on the physical impact of pocosins on downstream waters: they serve as water pumps, by sequestering water that is later exported by evapotranspiration instead of draining to navigable waterways, and they serve as water storage, slowing and diffusing water discharge to streams and coastal waters, especially after high precipitation events.<sup>678</sup>

The physical impacts of pocosins on navigable waters are inextricably linked to the chemical impacts they have: natural water storage and sequestration in these systems provides for nutrient retention and organic carbon export to streams and coastal waters.<sup>679</sup> “Pocosins impact the chemistry of downstream navigable waters in a multitude of significant ways.”<sup>680</sup> They are important sources of organic nitrogen and organic carbon to navigable waters, and they

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<sup>670</sup> *Id.* at 16.

<sup>671</sup> SAB Clean Water Rule Commentary at 5.

<sup>672</sup> *Id.*

<sup>673</sup> *See* Isolated Wetlands Report at 16–17.

<sup>674</sup> *Id.* at 17.

<sup>675</sup> *Id.*

<sup>676</sup> *Id.* at 17–18.

<sup>677</sup> Clean Water Rule Technical Support Document at 340.

<sup>678</sup> Isolated Wetlands Report at 18.

<sup>679</sup> *Id.* at 19.

<sup>680</sup> *Id.*

retain phosphorus that would otherwise be exported with runoff.<sup>681</sup> Pocosins also retain elevated concentrations of harmful bacteria, including fecal coliform, which instead flow into navigable waters when pocosins are developed.<sup>682</sup> “The slow movement of water through the dense organic matter in pocosins removes excess nutrients deposited by rainwater.”<sup>683</sup> As pocosins lose on average two thirds of their hydrologic input to evapotranspiration and export the remainder through sheet-flow surface runoff, they play a large role in maintaining the brackish salinity of coastal streams and estuaries. “High precipitation events in drained pocosins can have particularly severe consequences, reducing estuarine salinity as much as 12 parts per thousand and essentially changing brackish water to fresh.”<sup>684</sup>

“Pocosins provide habitat for many species that utilize both the wetlands and nearby streams for different life cycle needs.”<sup>685</sup> Mammals, birds, amphibians, reptiles, and fish are known to use both pocosins and riparian areas as habitat, and their movement between those two systems represents a transfer of energy and nutrients that affects the integrity of both.<sup>686</sup>

In sum, “[i]ntact pocosins are *extremely important* to water quality in downstream navigable waters because of their water and nutrient retention capabilities . . . .”<sup>687</sup> As the Agencies have acknowledged, “[t]he amount and timing of the runoff from these wetlands is critical to downstream flows and water quality, particularly in the estuaries.”<sup>688</sup> Developing pocosins causes “significantly more concentrated nutrients and ions in their drainage waters due to reduced retention and transformation capabilities”—harmful runoff that often reaches navigable waters as a result—while “high-flow point-source discharges from drainage ditches and canals can greatly impact navigable waters by leading to eutrophication and wildly fluctuating salinity levels.”<sup>689</sup> Filling and ditching pocosins has a significant deleterious effect on navigable water quality.<sup>690</sup>

This evidence shows that pocosins, either alone or in combination, significantly affect the chemical, physical, or biological integrity of foundational waters. These unique and important wetlands should not be left to inconsistent case-by-case protections and should be categorically jurisdictional in the final rule.

*iii. Prairie potholes have a significant nexus to downstream waters.*

Prairie potholes are a complex of glacially formed wetlands found in Iowa through western Minnesota, Montana, eastern South Dakota, and North Dakota, usually in depressions

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<sup>681</sup> *Id.*

<sup>682</sup> *Id.* at 20.

<sup>683</sup> Clean Water Rule Technical Support Document at 340.

<sup>684</sup> Isolated Wetlands Report at 19.

<sup>685</sup> Clean Water Rule Technical Support Document at 341.

<sup>686</sup> Isolated Wetlands Report at 25.

<sup>687</sup> *Id.* at 21 (emphasis added).

<sup>688</sup> Clean Water Rule Technical Support Document at 341.

<sup>689</sup> Isolated Wetlands Report at 21.

<sup>690</sup> *See* Clean Water Rule Technical Support Document at 342.

that lack permanent natural outlets.<sup>691</sup> Historically, the region comprised one of the largest grassland-wetland ecosystems on earth.<sup>692</sup> It is also one of the most significant, with SAB panelists recognizing the scientific basis for a categorical significant nexus finding as to prairie potholes.<sup>693</sup> In the years since the SAB's recommendation, the science supporting categorical jurisdiction over prairie potholes as "waters of the United States" has only strengthened.<sup>694</sup>

One of prairie potholes' most significant functions is flood abatement. Prairie potholes accumulate and retain water effectively and store it for long periods of time, thereby reducing flooding in downstream waters. Cumulatively, "these wetlands provide considerable surface-water capacity."<sup>695</sup> Conservative estimates place the precipitation storage capacity of prairie potholes on land enrolled in the federal Conservation Reserve and Wetland Reserve Programs alone at over 555 million cubic meters.<sup>696</sup> In North Dakota, prairie potholes have been shown to store up to 72% of total runoff from two-year frequency storms and about 41% from 100-year storms, controlling flooding that would otherwise swell rivers and streams.<sup>697</sup> In sub-basins across the north-central region with a long history of flooding, prairie potholes have consistently been estimated to hold tens of millions of cubic meters of water.<sup>698</sup> Developing or ditching prairie potholes significantly increases flooding, altering stream geomorphology, habitat, and ecology.<sup>699</sup>

Along with substantial floodwater retention, prairie potholes also provide nutrient removal and transformation, effectively maintaining the chemical and biological integrity of downstream waters.<sup>700</sup> The wetlands' denitrification function can transform up to 80% of nitrate that runs off into potholes.<sup>701</sup> Developing these wetlands will carry higher pollutant loads downstream.

Prairie potholes also provide high-value wildlife habitat to a diverse array of birds, invertebrates, amphibians, reptiles, and fish, who use the wetlands to feed or reproduce, moving between them and the river network.<sup>702</sup> The region provides stopover habitat for 36 of the 50 shorebird species that regularly occur in the United States, habitat for at least 40 species of waterfowl such as terns and gulls, and is believed to sustain up to 10 million ducks each year.<sup>703</sup>

Prairie potholes usually lack direct surface water connections to downstream waters.<sup>704</sup> However, they can be "highly connected" to other prairie potholes or the stream network via

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<sup>691</sup> *Id.* at 332.

<sup>692</sup> Prairie Pothole Joint Venture, *The Prairie Pothole Region* ("Prairie Pothole Region"), <https://perma.cc/RAH4-P9FC>.

<sup>693</sup> SAB Clean Water Rule Commentary at 5.

<sup>694</sup> *See* Proposed Rule Technical Support Document at 79–80.

<sup>695</sup> Clean Water Rule Technical Support Document at 332.

<sup>696</sup> Science Report at B-17.

<sup>697</sup> Clean Water Rule Technical Support Document at 333.

<sup>698</sup> Science Report at B-17.

<sup>699</sup> *See* Clean Water Rule Technical Support Document at 333; Science Report at B-17 to B-18.

<sup>700</sup> Clean Water Rule Technical Support Document at 333.

<sup>701</sup> Science Report at B-19.

<sup>702</sup> Clean Water Rule Technical Support Document at 334.

<sup>703</sup> Prairie Pothole Region.

<sup>704</sup> Science Report at B-17.

surface water connections during the wet season and via subsurface and groundwater connections.<sup>705</sup> These pathways strengthen the chemical, physical, and biological connections noted above.

More than half the wetlands in the prairie pothole region have already been lost, primarily by conversion to agriculture.<sup>706</sup> Continued loss of these valuable wetland resources would significantly impact ecosystem services and wildlife not just in the immediate region but also further afield. Flood storage and nutrient removal services affect the entire Mississippi River valley and migratory waterfowl travel throughout North America, affecting ecosystems and recreational hunting across the country.<sup>707</sup>

Although prairie potholes can vary across the north-central region, they “often act as a complex” and “have similar functions that can collectively impact downstream waters.”<sup>708</sup> As the Agencies have acknowledged, prairie potholes have “chemical, physical, and biological connections to downstream waters” and “str[ong] effects” on the integrity of foundational waters.<sup>709</sup> This was enough for SAB panelists to recommend categorical jurisdiction over prairie potholes. In the final rule, the Agencies should do just that, as science shows that these wetlands, either alone or in combination, significantly affect the quality of foundational waters.

*iv. Western vernal pools have a significant nexus to foundational waters.*

Western vernal pools are seasonally variable wetlands with “significant physical, chemical, and biological impacts” on downstream waters.<sup>710</sup> They are “shallow, seasonal wetlands that accumulate water during colder, wetter months and gradually dry down during warmer, dryer months.”<sup>711</sup> Western vernal pools are found from Washington state and Oregon in the north to northern Baja California in the south.<sup>712</sup> Prior practice has protected some of these integral and unique wetlands,<sup>713</sup> albeit inconsistently. The Agencies now have a firm scientific basis to make those protections categorical, as recommended by SAB panelists.<sup>714</sup>

Western vernal pools demonstrate the influence of cumulative effects over time. “These pools typically occur as complexes in which the hydrology and ecology are tightly coupled with the local and regional geological processes that formed them.”<sup>715</sup> “When seasonal precipitation exceeds wetland storage capacity and wetlands overflow into the river network and generate stream discharge, the vernal pool basins, swales, and seasonal streams function as a single

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<sup>705</sup> Clean Water Rule Technical Support Document at 334–35.

<sup>706</sup> Prairie Pothole Region.

<sup>707</sup> *Id.*

<sup>708</sup> Clean Water Rule Technical Support Document at 336.

<sup>709</sup> *Id.*

<sup>710</sup> Isolated Wetlands Report at 12.

<sup>711</sup> *Id.* at 4 (citations and quotations omitted).

<sup>712</sup> Clean Water Rule Technical Support Document at 342.

<sup>713</sup> Proposed Rule Technical Support Document at 137.

<sup>714</sup> SAB Clean Water Rule Commentary at 5.

<sup>715</sup> Proposed Rule Technical Support Document at 213.

surface-water and shallow ground-water system connected through the river network.”<sup>716</sup> For example, a study in California found that vernal pools “were fully surface-water connected into—and hence contributing to—an integrated and hydrologically dynamic headwater drainage network, often for months.”<sup>717</sup> During the wet season, particularly in early spring, surface and subsurface hydrologic connections between vernal pools and navigable waters are common.<sup>718</sup>

Western vernal pools also perform integral storm water, sediment, and nutrient storage functions, limiting erosion and polluted runoff that would otherwise reach and impair the quality of navigable waters.<sup>719</sup> Vernal pools trap and process carbon, nitrogen, and phosphorous, which is “important to sustaining viable populations and communities . . . .”<sup>720</sup> These common functions “contribute to both the physical and chemical health of downstream waterways.”<sup>721</sup>

Western vernal pools are highly biodiverse.<sup>722</sup> The ephemeral nature of vernal pools “allows for higher productivity compared to non-seasonal wetland habitats, due in part to aerobic microbial activities in the dry phase.”<sup>723</sup> The resulting “glut” of invertebrate production “attracts numerous species of birds, including waterfowl, shorebirds and wading birds, adding essential energy and nutrients to their diets.”<sup>724</sup> Migratory birds in particular depend on the “extensive nutrient- and energy-rich resources from these productive habitats,” with vernal pools maintaining the genetic and biological diversity of nearby navigable waters, including along the Pacific Flyway.<sup>725</sup> Western vernal pools “are considered ‘critical links’ between permanent waters on the Pacific Flyway,” providing a “crucial source of energy and nutrients necessary for recruitment, rest, and survival . . . .”<sup>726</sup> As the Agencies have acknowledged, the seasonal inundation and lack of permanent surface connections make Western vernal pools “important biological refuges, which has consequences on the biological health of downstream waters.”<sup>727</sup>

The Science Report emphasizes that “[t]he existence and connectivity of [Western vernal pools] are especially important at a time when changing climatic conditions are likely to increase intermittency of stream flows and decrease duration of wetland inundations in other areas.”<sup>728</sup> The imperative to protect Western vernal pools is even stronger now, as climate change wreaks havoc on the Western landscape.

In sum, the science shows that Western vernal pools, either alone or in combination, significantly affect foundational waters and should be categorically protected in the final rule. We urge the Agencies to adopt categorical protections for these wetlands and for others for

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<sup>716</sup> *Id.*

<sup>717</sup> *Id.* at 79.

<sup>718</sup> See Isolated Wetlands Report at 13, 15; Clean Water Rule Technical Support Document at 345–46.

<sup>719</sup> Isolated Wetlands Report at 15.

<sup>720</sup> *Id.* at 13.

<sup>721</sup> *Id.*

<sup>722</sup> *Id.* at 12.

<sup>723</sup> *Id.*

<sup>724</sup> *Id.* at 14.

<sup>725</sup> *Id.* at 12, 15.

<sup>726</sup> *Id.* at 14.

<sup>727</sup> Clean Water Rule Technical Support Document at 346.

<sup>728</sup> Science Report at B-65.

which the science demonstrates a significant nexus. Inconsistent case-by-case protections do not serve the Act's objective.

- b. "Other waters" that substantially affect interstate commerce should be protected under the Agencies' Commerce Clause authority.

The "significant nexus" and relatively permanent tests are not the only legitimate basis for exercising jurisdiction over a water body under the Clean Water Act. The 1986 regulations' definition of "waters of the U.S." as including "[a]ll other waters ... the use, degradation or destruction of which could affect interstate or foreign commerce" was not struck down by the Supreme Court, and it allows for the protection of resources even if they do not have a demonstrable "significant nexus" to navigable waters. The Agencies should continue to protect those categories of "other waters" that have substantial effects on interstate or foreign commerce, especially where it may be difficult to find that waters in the category have a significant nexus, either individually or in the aggregate<sup>729</sup>

For example, closed or terminal ("endorheic") basins in the Southwest—streams that do not reach other water bodies due to evaporation or percolation—may not have a clear connection to downstream waters, but they may serve as a source of irrigation water for crops that are sold in interstate commerce, or other similar commercial purposes.

2. *The final rule should expressly reject the policy of elevating determinations finding "other waters" jurisdictional to headquarters.*

The Agencies seek comment on whether and to what extent their headquarters should be involved in the assessment of "other waters," particularly when they are "isolated."<sup>730</sup> As the Agencies describe, however, following that requirement, "the Corps has not asserted jurisdiction over [isolated] other waters."<sup>731</sup> Apparently then, when headquarters approval is required, field offices from both Agencies are more hesitant to assert jurisdiction over many "others waters." The requirement should not be continued and more "other waters" determinations should be made by the field offices.

3. *The final rule should keep a non-exhaustive list of "other waters" but delete the specific reference to "intermittent streams."*

In the Proposed Rule, the Agencies provide a list of examples of "other waters," which includes "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds." Rather than include this list, which could be construed as either being exhaustive or signaling the intent that the listed waters cannot meet other jurisdictional categories, the Agencies should delete the list.

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<sup>729</sup> See *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) ("This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters.").

<sup>730</sup> Proposed Rule, 86 Fed. Reg. at 69,440.

<sup>731</sup> *Id.*

In the alternative, the Agencies should make clear that the rule is not exhaustive by revising the rule text to “All other waters, *including but not limited to*.” In addition, the Agencies should delete the parenthetical reference to intermittent streams, replacing it with “non-tributary streams.” Finally, the Agencies should replace the term “wetlands” in the “other waters” category with the term “non-adjacent wetlands.”

4. *In the final rule, the Agencies should clarify that “other waters” include a waters that have a continuous surface connection to a “relatively permanent” tributary.*

While the Proposed Rule extends jurisdiction to “other waters” with a continuous surface connection to a traditional navigable water, an interstate water, the territorial seas, *or* a “relatively permanent” tributary,<sup>732</sup> the preamble erroneously suggests that, under the Proposed Rule, “other waters” must have “a continuous surface connection to a traditional navigable water, interstate water, or the territorial seas”—omitting relatively permanent tributaries.<sup>733</sup> The Agencies should correct this error in their final rule.

**I. Prior Converted Cropland: In order to effectuate the objective of the Clean Water Act and enhance consistency with the Food Security Act, the Agencies should modify the prior converted cropland exclusion.**

1. *Retaining the NWPR’s approach to prior converted cropland would undermine the objective of the Clean Water Act.*

The Agencies should not retain the NWPR’s approach to the prior converted cropland exclusion. The definition of prior converted cropland included in the NWPR was vague, leaving open many questions about what qualified for the exclusion but clearly expanding the exclusion far beyond its previous reach under either the Clean Water Act or the Food Security Act.

Under the NWPR, as the Agencies have correctly pointed out, the chances of prior converted cropland ever regaining jurisdictional status were slim—even where land had reverted to wetland and remained idle for years. The NWPR provided that land would retain its excluded status if it had been used even once in the preceding five years “for, or in support of agricultural purposes.”<sup>734</sup> While “agricultural purposes” was undefined in the rule itself, the Agencies suggested it would include a broad range of uses that did not resemble using the land as cropland: idling land for conservation, providing wildlife habitat, and leaving land fallow, among others.<sup>735</sup>

If land had not been used for any of the countless potentially qualifying “agricultural purposes” for five years, and if it had reverted to a wetland state, *only then* would it become eligible to be jurisdictional again. This approach created a major loophole in the implementation of the Clean Water Act: prior converted cropland used once for an “agricultural purpose” could

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<sup>732</sup> 86 Fed. Reg. at 69,449–50 (providing proposed text of 33 C.F.R. § 328.3(a)(3)(i) and 40 C.F.R. § 120.2(a)(3)(i)).

<sup>733</sup> 86 Fed. Reg. at 69,418.

<sup>734</sup> NWPR, 85 Fed. Reg. at 22,339.

<sup>735</sup> *Id.* at 22,320–31.

then be sold to be developed—for an entirely non-agricultural purpose—with no Section 404 oversight for the next five years before the prior converted cropland was considered “abandoned” and therefore became potentially jurisdictional again.

Developers exploited this loophole. In one example in Orange, Texas, the Corps 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.<sup>736</sup> That the NWPR’s prior converted cropland provision opened the door for development of converted wetlands without a 404 permit is signaled by the fact that the National Association of Realtors listed “Discussions with the Environmental Protection Agency regarding the Waters of the U.S. (WOTUS) rule and the prior converted cropland exclusion” as one of its key lobbying interests for 2019, when the NWPR was being developed.<sup>737</sup> The “WOTUS rule” remained a lobbying priority for the group in 2020.<sup>738</sup>

In addition to being inconsistent with the objective of the Clean Water Act itself, the NWPR’s approach to prior converted cropland was also far removed from the exclusion’s original purpose: to maintain consistency across federal programs while furthering the objective of the Act. In codifying the prior converted cropland exclusion for the first time in 1993, the Agencies noted that the federal wetlands protection effort would be most effective if all federal agencies involved in that effort were acting in concert.<sup>739</sup> Thus, EPA and the Corps implemented the exclusion to enhance consistency with other federal programs affecting wetlands.<sup>740</sup> Further, the Agencies believed that codifying the prior converted cropland exclusion was consistent with their “paramount objective of protecting the nation’s aquatic resources” because, according to the Agencies’ view of the exclusion, only an area that was “significantly modified so that it no longer exhibits its natural hydrology and vegetation” and was “significantly degraded” would fall under the exclusion.<sup>741</sup>

Crucially, while the prior converted cropland exclusion was intended to cover lands that do not exhibit the full range of wetland functions that they would in a natural state, prior converted cropland often continues to exhibit some beneficial wetland functions.<sup>742</sup> Further, prior converted cropland often retains the potential to be restored to wetlands performing a fuller range of wetland functions or revert to such wetlands on its own.<sup>743</sup>

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<sup>736</sup> 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* (Apr. 20, 2021), <https://perma.cc/R6J5-KXTD>.

<sup>737</sup> Nat’l Ass’n of Realtors, LD-2 Disclosure Form 19 (2019); *cf.* NWPR RPA at 50 (under the proposed prior converted cropland exclusion “fewer wetlands may be identified as jurisdictional under the proposed rule compared to [the 2015 Clean Water Rule and the regulations that preceded it]”); *see also* Realtors Land Inst., *RLI Joins Coalition to Protect Prior Converted Cropland (PCC)* (Apr. 25, 2018), <https://perma.cc/LH87-DBD5>; Ariel Wittenberg, *Realtors Care About Cropland in WOTUS, Too. Here’s Why*, *Greenwire* (March 1, 2019), <https://perma.cc/K6QX-SYSW>.

<sup>738</sup> Nat’l Ass’n of Realtors, LD-2 Disclosure Form (2020), <https://perma.cc/GG5R-BGNW>.

<sup>739</sup> Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,031–32 (Aug. 25, 1993).

<sup>740</sup> *Id.* at 45,032.

<sup>741</sup> 58 Fed. Reg. 45,008, 45,032.

<sup>742</sup> *See* U.S. Dep’t of Agric., *Role of Prior Converted Croplands on Nitrate Processing in Mid-Atlantic Agricultural Landscapes* (2017), <https://perma.cc/S6VU-EFCM>

<sup>743</sup> *Id.*; *see also* W. Aaron Jenkins, et al., *Valuing Ecosystem Services from Wetlands Restoration in the Mississippi Alluvial Valley*, 69 *Ecological Econ.* 1051 (2010), <https://perma.cc/C5UQ-5HZW>.

Reinstating the NWPR version of the prior converted cropland exclusion would exclude from Clean Water Act jurisdiction even areas that *do* exhibit the “natural hydrology and vegetation” of a wetland and *do not* resemble the “significantly degraded” land the Agencies envisioned when codifying the exclusion.<sup>744</sup> Indeed, the area may have remained unused for years and fully reverted to wetland but, under the NWPR, could still qualify for the exclusion. Further, that wetland could then be sold to be filled and paved over for a non-agricultural use with no Clean Water Act oversight. In addition to stretching the prior converted cropland exclusion beyond its intended limits, this approach is at odds with the USDA’s approach to prior converted cropland under the Food Security Act, as discussed below. Thus, the NWPR’s approach should not be reinstated.

2. *Prior converted cropland should be eligible to be jurisdictional again once it is no longer being used for crop production.*

The prior converted cropland exclusion was intended to exempt from Clean Water Act jurisdiction cropland that was no longer performing wetland functions or providing wetland values, thereby fostering consistency with other federal programs affecting wetlands.<sup>745</sup> But when prior converted cropland goes unused and reverts to a wetland state, or when the land is put to a different, non-agricultural use, the land no longer falls under the intended scope of the exclusion and therefore should again become eligible to be jurisdictional under the Act.

Consistent with the Agencies’ longstanding practice originating in 1993, land that is no longer being used for crop production and that has reverted to a wetland state—in other words, land that has been “abandoned”—should cease to be classified as prior converted cropland for purposes of the Clean Water Act. This approach is familiar to farmers and to the Agencies alike. Under this approach, land loses its status as prior converted cropland when there has been no commodity crop production on the land for five years and the land has reverted to a wetland state.<sup>746</sup> In contrast to the NWPR, the agricultural uses that would qualify to prevent abandonment are narrowly defined and closely tied to the production of crops.<sup>747</sup> When the land has been abandoned as cropland and has reverted to wetland, the area no longer constitutes the degraded land incapable of performing wetland functions that the prior converted cropland exclusion was intended to encompass. The Agencies should restore the pre-NWPR abandonment approach, which has been in place for the better part of the past thirty years and which furthers the aims of the Clean Water Act.

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<sup>744</sup> *Id.*

<sup>745</sup> Proposed Rule, 86 Fed. Reg. at 69,424; Clean Water Act Regulatory Programs, 58 Fed. Reg. at 45,031.

<sup>746</sup> Proposed Rule, 86 Fed. Reg. at 69,426.

<sup>747</sup> *Id.* at 69,425 (quoting Clean Water Act Regulatory Programs, 58 Fed. Reg. at 45,034) (providing that prior converted cropland will be considered abandoned and therefore will be eligible to be jurisdictional again unless at least “once in every five years it has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production”); *see also* 7 C.F.R. § 12.2(a) (2020 (defining “agricultural commodity” for purposes of implementing the Food Security Act to mean “any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane”).

The abandonment approach alone, however, is not sufficient to ensure that the prior converted cropland exclusion is not abused. Thus, when prior converted cropland is put to any non-agricultural use, the land should immediately lose excluded status and become eligible to be jurisdictional under the Clean Water Act. As the Agencies have noted, applying this “change in use” approach would fulfill the goal of fostering consistency among federal programs affecting wetlands<sup>748</sup>: USDA has used the “change in use” approach in administering its prior converted cropland program since 1996. Additionally, as the Agencies have correctly explained, implementing *only* the “abandonment” approach described above—without also providing that land loses its excluded status when there is a change in use—leaves a gap in administration of the Act that allows developers to avoid regulation under Section 404.<sup>749</sup>

Although the gap created by the 1993 abandonment approach is small compared to the loophole created by the NWPR abandonment approach, it is still inconsistent with the aims of the Clean Water Act. At minimum, the Agencies should ensure that land does not retain its status as prior converted cropland when it is sold for development. Although prior converted cropland may not exhibit the full range of wetland values and functions that it would exhibit in its natural state, such land often retains the potential to be restored to valuable wetland in the future; if developers are able to take advantage of the exclusion to fill and pave prior converted cropland with no oversight, the potential future wetland benefits are lost. The exclusion was not intended to authorize these permanent wetland losses at the hands of industry and developers. When prior converted cropland is sold for a non-agricultural use—regardless of whether five years have elapsed since it was last used for crop production—the land should be reassessed as potentially jurisdictional under the Clean Water Act.

To effectuate the objective of the Clean Water Act and foster consistency with other federal programs affecting wetlands, the Agencies should restore the longstanding approach to abandonment of prior converted cropland while also providing that land cannot retain its excluded status when it is sold for or converted to a non-agricultural use.

**J. Economic Analysis: The Agencies should more accurately quantify the benefits of restoring clean water protections.**

In assessing the economic impacts of the Proposed Rule, the Agencies undervalue the benefits of the Proposed Rule relative to the pre-2015 regime and the NWPR. In addition to endorsing the comments on the Proposed Rule submitted by the Institute of Policy Integrity at New York University School of Law, we offer the following.

First, the Agencies wrongly assume that the Proposed Rule adds zero value to states with laws that nominally protect a broader scope of waters than the Proposed Rule would protect.<sup>750</sup> Even when states have authority to protect waters more broadly than the Clean Water Act, they do not (and cannot) always do so. The states may not have the programs in place, or the

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<sup>748</sup> Proposed Rule, 86 Fed. Reg. at 69,425–26.

<sup>749</sup> *See id.* at 69,426.

<sup>750</sup> Proposed Rule EA at 46 (“For this secondary baseline analysis, the agencies have attempted to identify which states already regulate as broadly as intended by this rule because those states will not experience benefits or costs from the rule.”).

resources or staff available to create clean water protection programs or otherwise provide protections similar to those under the Act.<sup>751</sup> There is also nothing to prevent states from reducing state protections for those waters that do not meet the federal definition of “waters of the United States.” As described in Section II.A.2, above, several states, including Indiana and Ohio, reduced state clean water protections in response to the weak requirements under the NWPR. These actions demonstrate that state laws are vulnerable to legislative or regulatory revision in the absence of a strong federal Clean Water Act baseline.<sup>752</sup>

Second, the Agencies undervalue the interstate benefits of the Proposed Rule, failing to recognize that states with inclusive definitions of state waters could still suffer harms from pollution from other states with weaker definitions. Indeed, downstream states cannot control the actions of upstream states, and upstream states have strong incentives to choose industry over strong clean water protections due to political pressure and because the burden of water pollution may largely be borne by the states downstream. SELC’s mapping of less than 6% of the approved jurisdictional determinations made under the NWPR illustrates how often this predicament can arise.<sup>753</sup>

Third, the Agencies do not appear to have considered all available information in assessing the value of stronger Clean Water Act protections. The Agencies should incorporate research assessing the value of wetlands, streams, and other waters, as that body of research is available and continues to grow.<sup>754</sup> The Agencies should also not limit their analysis to estimating the Proposed Rule’s benefits as to only the section 404 program.<sup>755</sup> Benefits accrue from federal protections provided under other Clean Water Act programs as well, including the Section 303(c) water quality standards program, the Section 311 oil spill prevention program, the Section 401 water quality certification program, and the Section 402 NPDES permit program.

Finally, the Agencies estimate that the Proposed Rule “would have zero impact” as compared to the pre-2015 regime.<sup>756</sup> This assumption would be true only if the Agencies finalize a rule that protects the same scope of waters as is covered under the pre-2015 regime. As we have urged throughout these comments, however, the Agencies should protect waters more fully in a final rule.

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<sup>751</sup> NWPR EA at 44 (conceding that “not all states have the resources to staff and manage the new or expanded programs”).

<sup>752</sup> *Id.* (noting that “decentralized programs are also more likely to be swayed by political influences which could distort the regulatory process in ways that are detrimental to social welfare.”).

<sup>753</sup> See NJD Map (attached as Appendix C).

<sup>754</sup> See, e.g., Charles A. Taylor & Hannah Druckenmiller, Resources for the Future, *Wetlands, Flooding, and the Clean Water Act* (2021), <https://perma.cc/2DWP-TXGP> (estimating wetlands’ flood mitigation value independent of other benefits and providing lower-bound estimate of economic value of wetlands); Narayan et al., *supra* note 88; Elaine F. Frey, *Spatial Hedonic Valuation of Multiuse Urban Wetland in Southern California*, 42 *Agric. & Res. Econ. Rev.* 387 (2013); Edward B. Barbier, *Valuing Ecosystem Services as Productive Inputs*, 22 *Econ. Pol’y* 177 (2007); Brent L. Mahan et. al., *Valuing Urban Wetlands: A Property Price Approach*, 76 *Land Econ.* 100 (2000).

<sup>755</sup> See, e.g., Proposed Rule EA at ix–xiii.

<sup>756</sup> *Id.* at 46.

#### **IV. In Their Anticipated Second Rulemaking to Define “Waters of the United States,” the Agencies Should Go Further in Protecting the Nation’s Waters.**

We support the Agencies’ plans to develop a second rule that builds upon the regulatory foundation of the Proposed Rule and more effectively serves the Clean Water Act’s objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>757</sup> We believe that the recommendations we offer in Section III of these comments are both warranted and fully within the Agencies’ authority in this rulemaking. To the extent the Agencies do not adopt any of our recommendations in connection with the Proposed Rule, we urge the Agencies to incorporate them in their second rule.

Adopting a broader definition of “waters of the United States” in the second rulemaking would be justified by the Clean Water Act’s broad Congressional directive and supported by the legislative history and case law implementing the Act. By the 1970s, after decades of ineffective state-led efforts, the nation’s waters were “in serious trouble, thanks to years of neglect, ignorance, and public indifference.”<sup>758</sup> In 1972, a bipartisan Congress responded by passing the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>759</sup> The Act “incorporated a *broad, systemic* view of the goal of maintaining and improving water quality,” one that “demanded broad federal authority to control pollution . . . .”<sup>760</sup> As the Supreme Court has acknowledged, the Act’s suite of water pollution controls applies to “navigable waters,”<sup>761</sup> which “Congress chose to define . . . *broadly*” as “the waters of the United States.”<sup>762</sup> The legislative history confirms that Congress intended that this term be “given the *broadest* possible constitutional interpretation.”<sup>763</sup> Thus, as set forth in Section III.C.3, above, Congress’s directive compels the Agencies to extend jurisdiction to the broadest reaches of Congress’s Commerce Clause authority. The Agencies’ second rulemaking must fulfill this obligation.

#### **V. Conclusion**

Permanently rejecting the harmful and unlawful NWPR and restoring longstanding clean water protections are critical elements as the Agencies strive to achieve the as-yet-unfulfilled objective of the Clean Water Act. With the revisions recommended in these comments, the Proposed Rule would represent an important step towards restoring and maintaining the health of the nation’s waters and of the communities that rely on them. We urge the Agencies to promptly strengthen and finalize the rule and then to move expeditiously in promulgating a new definition of “waters of the United States.”

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<sup>757</sup> 33 U.S.C. § 1251(a).

<sup>758</sup> H.R. Rep. No. 92-911, at 753.

<sup>759</sup> 33 U.S.C. § 1251(a).

<sup>760</sup> *Riverside Bayview*, 474 U.S. at 132–33 (emphasis added).

<sup>761</sup> 33 U.S.C. §§ 1311(a), 1362(12).

<sup>762</sup> *Riverside Bayview*, 474 U.S. at 133 (emphasis added).

<sup>763</sup> H.R. Rep. No. 92-911, at 131 (emphasis added); *accord* S. Rep. No. 92-1236, 1972 U.S.C.C.A.N. at 3822.

Thank you for considering these comments.

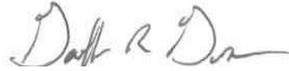
Sincerely,



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Attachments

**Appendices to Comments of SELC et al. on Proposed  
Revised Definition of “Waters of the United States”**

Appendix A	List of Documents Submitted in Support of Comments
Appendix B	SELC et al., Sample Negative Jurisdictional Determinations Made Under the NWPR
Appendix C	SELC, Sample NWPR Non-Jurisdictional Determinations (NJDs)
Appendix D	Elizabeth Guinessey et al., A Literature Review: The Chemical, Physical and Biological Significance of Geographically Isolated Wetlands and Non-Perennial Streams in the Southeast (2019)
Appendix E	SELC, Population Served by Drinking Water Supplies from Surface Waters: Methodology of Drinking Water Population Statistics Used by Southern Environmental Law Center in Clean Water Fact Sheets (2021)
Appendix F	Scientific Literature
Appendix G	Sam Woolford & Matt Carroll, Evidence of Significant Impacts of Coastal Plain Depressional Wetlands on Navigable Waters (2014)
Appendix H	Sam Woolford et al., Physical, Chemical, and Biological Impacts of Geographically Isolated Wetlands on Waters of the United States, Univ. of Ga. River Basin Ctr. (2014)