



December 12, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Office of Policy Regulatory Reform
Mail Code 1803A
1200 Pennsylvania Ave NW
Washington, DC 20460

The Honorable Ryan A. Fisher
Acting Assistant Secretary of the Army for
Civil Works
Department of the Army
104 Army Pentagon
Washington, DC 20310-0104

**RE: Docket ID Number EPA-HQ-OW-2017-0644: Comments on Definition of
“Waters of the United States” – Addition of an Applicability Date to the 2015
Clean Water Rule, 82 Fed. Reg. 55542.**

Dear Administrator Pruitt and Mr. Fisher:

On behalf of the National Wildlife Federation, our six million members and supporters—including millions of conservation-minded hunters, anglers, and outdoor enthusiasts—and more than fifty state and territorial affiliates, I write in strong opposition to the Environmental Protection Agency’s (EPA) and Army Corps of Engineers’ (Corps) proposal to delay the 2015 Clean Water Rule – a popular, much-needed, and carefully-developed action taken to protect the nation’s waters from pollution and destruction. We also oppose your plan to weaken decades-old safeguards via a subsequent rulemaking action. These rollbacks, which President Trump initiated by signing Executive Order 13,778 on February 28, 2017, recklessly target waterways upon which we all rely.

We respectfully request your careful consideration of our comments on this proposed rule, highlighting the strong technical, scientific, legal, and public support for the Clean Water Rule – and the lack of public support and supporting rationale for this latest proposal to delay the Clean Water Rule by retroactively adding an applicability date to the 2015 Clean Water Rule. We urge you to withdraw this latest proposal for many of

the same reasons that we urge your withdrawal of the proposed repeal of the Clean Water Rule as well as the proposed codification of the failed 2008 *Rapanos* guidance.

Comment Overview

The Clean Water Act cannot achieve its important goals without a clear, inclusive definition of the waters protected by the Act. Since the passage of the Clean Water Act, the EPA, together with the Corps, has used sound science, transparent processes with robust public input, and the law to guide and enforce protective rules that safeguard drinking water, communities, wildlife, and natural resources. To further these Clean Water Act goals, a lengthy, deliberate, and inclusive process led to the 2015 Clean Water Rule, a rule protective of vital waterways and based in sound law and sound science. The Clean Water Rule was developed by the EPA and the Army Corps of Engineers after several years of stakeholder engagement and after a state-of-the-art evaluation of the science on the connectivity of wetlands and headwater streams. Sportsmen, conservation groups, and many other stakeholders submitted over one million public comments that helped to shape the final rule, which was broadly celebrated for restoring guaranteed protections to headwater streams and millions of acres of wetlands previously at greater risk of being polluted or destroyed because of legal confusion. We believe the rule that was developed was legally sound, scientifically supported, and represented an appropriate jurisdictional balance consistent with the Clean Water Act.

By comparison, the Administration's 2017 scheme to repeal, delay, and eviscerate the 2015 Clean Water Rule has been increasingly haphazard, ignoring the strong legal and scientific basis for the Rule, violating the basic tenets of the Administrative Procedure Act, disrespecting its broad public support, and providing little opportunity for the many clean water stakeholders to voice their interest in inclusive Clean Water Act coverage to protect the nation's waters. The agencies' July 2017 proposal to repeal the Clean Water Rule and reinstate the 2008 *Rapanos* guidance is unlawful because:

- The proposal fails to provide the notice and meaningful opportunity to comment required by the APA with respect to the substance of the proposed Clean Water Rule repeal and codification of the *Rapanos* guidance;
- The proposal mischaracterizes the repeal and replace proposed rule as "codify[ing] the legal *status quo*," precluding meaningful examination of the proposal as *changing* the legal status quo;
- The proposal to codify the 2008 *Rapanos* guidance without the required notice and meaningful opportunity to comment on the substance of the guidance or the rule it would replace;
- Administrator Pruitt's active promotion of the Clean Water Rule repeal based on false and misleading statements undermines public comment and demonstrates the agencies' refusal to consider and respond to all relevant information with an open mind;
- The proposal fails to provide any reasoned explanation for its Clean Water Rule repeal and codification of the *Rapanos* guidance, particularly because

the repeal-and-replace rule will increase – not decrease – regulatory uncertainty; and

- The agencies’ economic analysis arbitrarily writes off more than \$300 million in annual wetland economic benefits in a misplaced attempt to justify the clean water rule repeal.

The agencies now come forth with an equally flawed proposal – this time to delay the implementation of the final, promulgated, still-in-effect, 2015 Clean Water Rule by retroactively adding an applicability date to the 2015 Clean Water Rule as it is codified in the Code of Federal Regulations. As set forth in more detail below, this delayed implementation of the final Clean Water Rule constitutes substantive rulemaking subject to the requirements of the APA. The agencies’ hasty proposal, with its 21-day comment period, failure to provide meaningful notice and opportunity to comment on the substance of the proposal, lack of reasoned explanation, and failure to account for the annual wetland economic benefits of the Clean Water Rule, suffers from the same legal defects as the repeal rule – and more.

The agencies ask narrowly:

- Is it “desirable and appropriate to add an applicability date to the 2015 Rule?”
The answer, explained further below, is a resounding “No.”
- Will “adding an applicability date contribute[] to regulatory certainty?”
The answer, explained further below, is a resounding “No.”

The National Wildlife Federation urges EPA and the Corps to withdraw these proposals to delay implementation and/or repeal the Clean Water Rule. To rescind the Rule and instead use former Supreme Court Justice Antonin Scalia’s plurality opinion in *Rapanos v. United States* as a basis for revision could harm the drinking water supplies of more than 117 million Americans by leaving nearly as many as 60% of U.S. streams without the protection of the Clean Water Act.¹ At least 20 million acres of wetlands, many of which provide essential water quality, flood protection, and fish and wildlife habitat, are at risk as well.² In fact, the rate of wetlands loss increased by 140% during the 2004-2009 period – the years immediately following the Supreme Court decisions.³ This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more

¹ U.S. Environmental Protection Agency, Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S. [hereinafter EPA, GIA Analysis], available at http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm (last visited September 25, 2017).

² Eric Pianin, *Administration Establishes New Wetlands Guidelines; 20 Million Acres Could Lose Protected Status, Groups Say*, Washington Post, at A.5 (Jan. 11, 2003) (“The new regulation would shift responsibility from the federal government to the states for protecting up to 20 percent of the 100 million acres of wetlands in the lower 48 states, according to official estimates.” Responding to the 2001 SWANCC decision, this estimate focused on the geographically isolated wetlands that would lose CWA protections after SWANCC).

³ USFWS, Status and trends of wetlands in the coterminous United States 2004-2009 Report to Congress, at p. 16, available at <https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf>.

than 40 years ago during the Nixon administration. Such a rollback of stream and wetland protections will cause irreparable harm for fish and wildlife, hunting and fishing, the outdoor recreation economy, and clean drinking water, and put communities at increased risk from storms and floods.

We strongly oppose this flawed proposal to delay implementation of the Clean Water Rule for the reasons set forth below. We also reiterate our strong opposition to the July proposal to repeal and replace the Clean Water Rule and incorporate by reference (and attached) our September 26, 2017 comments in opposition to that proposal.

Detailed Comments

I. The Agencies' Proposal To Delay Implementation of The Clean Water Rule Fails To Satisfy The Most Basic Requirements Of The Administrative Procedure Act.

The 2015 Clean Water Rule is a final rule that is binding law, having been promulgated through rulemaking as required by the Administrative Procedure Act (APA).⁴ The suspension or delayed implementation of this final rule is an agency action that itself must undergo rulemaking pursuant to the APA.⁵ To comply with the APA in promulgating, amending, or rescinding a final rule, an agency must: 1) publish a notice of proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved;" 2) provide the public a meaningful opportunity to comment on the merits of the rulemaking action; and 3) consider and respond to all of the "relevant matter presented" during the rulemaking process.⁶ The agencies must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."⁷ Where the agencies propose to reverse course on an agency policy based in large part on "factual findings that contradict those which underlay [their] prior policy," the agencies must also provide "a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy."⁸

Any final rulemaking action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" violates the APA and must be set aside by the

⁴ 5 U.S.C. 553; *White v. Shalala*, 7 F.3d 296, 303-04 (2d Cir. 1993); *Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir.2000).

⁵ See 5 U.S.C. 551(5) ("rulemaking' means agency process for formulating, amending, or repealing a rule."); see e.g., *EDF v. EPA*, 716 F. 2d 915, 920 (D.C. Cir. 1983); *EDF v. Gorsuch*, 713 F. 2d 802, 816 (D.C. Cir. 1983); see also, *Sierra Club v. Jackson*, 833 F. Supp. 2d 11 (D.D.C. 2012).

⁶ 5 USC 553 (b) and (c).

⁷ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16. The agencies themselves acknowledge that that their proposed repeal and replace rule must be "based on a reasoned explanation," citing *FCC v. Fox* (2009). *Fox* requires that the agencies provide a rationale for changing its position about what is in the public interest, and specifically states that agencies should provide support for the change where there is "empirical data that can readily be obtained."

federal courts.⁹ As explained in detail below, the agencies' proposed two year delay of Clean Water Rule implementation must be withdrawn or, if finalized, invalidated as arbitrary and capricious and in violation of the APA because the agencies have failed to provide the required notice and meaningful opportunity for comment, refused to consider all relevant information, and offer no reasoned explanation to justify their implementation delay rulemaking action.

A. The Agencies' Proposal Fails To Provide The Required Notice And Meaningful Opportunity To Comment On The Substance Of The Clean Water Rule Delay in Implementation.

The APA public notice and comment requirements "serve important purposes of agency accountability and reasoned decision-making."¹⁰ The process helps to ensure that agencies keep "an open-minded attitude" toward their rulemaking.¹¹ Here, however, EPA has failed to provide for such meaningful public comment in several respects, including the following:

- By providing only 14 business days – 21 days in all – to analyze and comment on the Clean Water Rule delay proposal;
- By mischaracterizing the proposal as restoring the legal status quo;
- By expressly limiting public comment to the "desirability and appropriateness" of delaying implementation of the Clean Water Rule for at least two years to allow time to the agencies to write a new and different definition of waters of the U.S.; and
- By refusing to consider public comment on the specific content of the Clean Water Rule definition it is proposing to delay, derail, and then re-write, as well as the environmental and economic benefits of the Clean Water Rule and costs of delaying and then re-writing it.¹² "The agencies do not intend to engage in substantive reevaluation of the definition of 'waters of the United States' until the second step of the rulemaking."¹³

Substantive information and comments on the content of the Clean Water Rule, including which waters are covered and not covered by the Clean Water Act under the Rule, the rationale for the Rule, and the implications of the Rule and the delay of its implementation, is all clearly relevant information essential to determining whether amending the Rule in order to substantially delay its implementation has any rational basis. The agencies refusal to allow for meaningful opportunity to comment on this substance¹⁴ or to consider such information¹⁵ is contrary to the APA. This most recent

⁹ See 5 U.S.C. §706(2)(A).

¹⁰ *Am. Med. Ass'n v. Reno*, 57 F. 3d 1129, 1132 (D.C. Cir. 1995).

¹¹ *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012) (internal citations omitted).

¹² 82 FR at 55544.

¹³ *Id.* at 55545.

¹⁴ *North Carolina Growers' Ass'n at 770*. (The 4th Circuit held that suspending a regulation, reinstating the prior regulation, and limiting public comment to the "suspension itself" but not the substance of either regulation was a limitation "so severe in scope, by preventing any discussion of the 'substance or merits' of either set of regulations, that the opportunity for comment cannot be said to have been 'a meaningful opportunity.'")

proposal to delay implementation of the Clean Water Rule must not proceed unless and until the public is provided the opportunity to engage in “robust deliberations” on the substance of the delay action and its impacts, and those comments are considered and addressed *before* the agencies make a final rulemaking decision.¹⁶

1. The agencies preclude meaningful notice and opportunity to comment by providing only 21 days for public comment, contrary to Executive Order 12866, the APA, and the public interest.

The agencies acknowledge that their delay proposal is a “significant regulatory action” subject to Executive Order 12866.¹⁷ They also acknowledge the “great national interest” in the Clean Water Rule and their “step one” proposal to repeal it, as evidenced by the fact that “there were more than 680,000 public comments on the Step One proposed rule.”¹⁸ The public’s interest in understanding and commenting on this delay rule, its rationale, its costs and benefits (if any), and its practical, legal alternatives, is obvious. These are reasons to provide for robust public comment on this Clean Water Rule delay rule; not to provide such limited opportunity for review as to render it meaningless. Indeed, Executive Order 12866 indicates that a 60-day comment is typically a minimum comment period to ensure meaningful public input.

The agencies disingenuously attempt to justify rushing this proposal through with a 21-day comment period by suggesting that their action will “simply add the applicability date” and “is a temporary, interim measure pending substantive rulemaking.”¹⁹ But the agencies’ only real rationale for rushing this proposal through with a 21-day comment period is that “a Supreme Court ruling could come at any time.”²⁰ The agencies’ proposed delay of the Clean Water Rule is arbitrary and capricious and contrary to E.O. 12866, the APA, and the public interest.

2. The agencies mischaracterize their delay proposal as maintaining the “legal status quo,” precluding meaningful examination of the action as *changing* the legal status quo.

The agencies mischaracterize *both* their latest “step zero” delay proposed rule and their “step one” repeal and replace proposed rule as maintaining or – in the case of the repeal rule – codifying the “legal status quo.”²¹ In fact, the legal status quo is the 2015 Clean Water Rule, subject to the 6th Circuit of Appeals’ stay of the Rule pending judicial review. To delay the Clean Water Rule (step zero) or repeal the Clean Water Rule and affirmatively re-promulgate the 1986 definition of waters of the U.S. as interpreted in the 2008 *Rapanos* guidance (step one) is to significantly change the legal status quo.

¹⁵ See *Motor Vehicle Mfrs. Ass'n* at footnote 7, *supra*.

¹⁶ *Consumer Energy Council of Am. v. FERC*, 673 F. 2d 425, 446 (D.D.Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

¹⁷ 82 Fed. Reg. 55545.

¹⁸ *Id.* at 55544.

¹⁹ *Id.* at 55544-45.

²⁰ *Id.*

²¹ *Id.* at 55544-45; 80 Fed. Reg. at 34902.

With respect to the instant delay proposal, it is our understanding that the Clean Water Rule's rescission of the pre-existing definition of waters of the U.S. remains in effect, subject only to judicial stays, pending judicial review of the Clean Water Rule's definition of "waters of the U.S." The agencies apparently recognize as much, since their "step one" rulemaking involved both the repeal of the Clean Water Rule and the "re-codification" of the pre-existing rule, as interpreted by the 2008 guidance in order to maintain, in their view, the legal status quo. Given the rescission of the pre-existing definition that is apparently still in effect, we believe delaying the implementation of the Clean Water Rule's revised definition of "waters of the U.S." leaves a legal vacuum in which there is **no enforceable regulation in place** to authorize agency jurisdictional determinations. Contrary to the agencies' representation in their proposal, postponing the application of the Clean Water Rule's revised definition of "waters of the U.S." does not automatically restore the definition of waters of the U.S. that existed prior to promulgation of the 2015 Rule, and does not maintain the legal status quo.²²

With respect to the step one repeal rule, armed with a final action repealing and replacing the Clean Water Rule, the government will seek to dismiss litigation seeking judicial review of the Rule and its robust record, dramatically shifting the legal status quo and foreclosing robust deliberation that includes the Clean Water Rule, premised on Justice Kennedy's widely accepted "significant nexus" test.

The APA does not permit agencies to "simply disregard rules that are still on the books."²³ By mischaracterizing the proposed delay of the Clean Water Rule, and the proposed repeal and replacement of the Clean Water Rule, and refusing to acknowledge that both of these rulemaking actions significantly change the legal status quo, the agencies fail to provide the legally required notice of the substance of the rulemaking, fail to provide meaningful opportunity for public comment, and fail to provide for development and examination of a sufficient administrative rationale and record upon which to hold the agencies accountable for their disregard and dismissal of binding law.

3. Administrator Pruitt's active promotion of the Clean Water Rule repeal based on false and misleading statements undermines public comment and demonstrates the agencies' refusal to consider and respond to all relevant information with an open mind.

Not only does EPA refuse to consider public comment relevant to the decision to delay and/or repeal the Clean Water Rule and codify the *Rapanos* guidance, EPA Administrator Pruitt is actively promoting the repeal of the Clean Water Rule in the media and in select, sometimes by invitation only, forums during the course of the 60-day public comment period. His statements consistently and misleadingly characterize the Clean Water Rule as unlawful and overreaching, at times embracing the Farm Bureau's "Ditch the Rule" media pitch. The Administrator's consistent opposition to the rule and refusal to rationally consider all relevant information and arguments violate

²² See 82 Fed. Reg. 55542.

²³ *Fox Television Stations*, 556 U.S. at 515.

core rulemaking requirements of the APA, 5 USC 553 (b) and (c), and the Constitution's guarantee of Due Process.²⁴

Examples of Administrator Pruitt's closed mind and complete unwillingness to consider contrary views include the following:

- February 2017: Administrator Pruitt discussed the President's Executive Order to roll back the Clean Water Rule in a speech to the American Farm Bureau Federation (Farm Bureau), a longtime opponent of the Rule which sued the agencies over their adoption of the Rule.²⁵ Administrator Pruitt told his audience that "relief is on the way with respect to withdrawing the Waters of the United States Rule. It's already started." He derided the Rule as a vast overreach, and lied about "puddles" being covered by the Rule.²⁶
- March 2017: Administrator Pruitt sets out a clear position in a newspaper interview opposing the Clean Water Rule and advancing a roll back of Clean Water Act jurisdiction.²⁷ He said the Rule "so expanded jurisdiction of the Clean Water Act that it just made it a statute like Congress never intended it to be. They never intended the EPA to have ... jurisdiction over puddles and dry creek beds across the country...."²⁸ He also said "Federal jurisdiction usurped and displaced state jurisdiction. So that needs to be fixed." He labeled the basis for the Rule – the significant nexus analysis from *Rapanos* – as "the poorest form of rule-making," and said, "[t]hat has to be fixed going forward, and that means the Kennedy definition is something that doesn't provide" clarity.²⁹
- May 2017: Administrator Pruitt vehemently argued on radio that the Clean Water Rule violated the law. His justification for his lawsuits against EPA prior to leading the agency demonstrate his close-minded opposition to the Clean Water Rule:

"[T]hey deserved it because they exceeded their statutory authority, they exceeded their constitutional authority, and when they got outside of their lane, they got sued and they got stopped.... that was all about power. They wanted to make land use decisions in place of private property owners and the states."³⁰

²⁴ See NRDC Comments, EPA-HQ-OW-2017-0203 (September 27, 2017) citing *Air Transport Ass'n of America, Inc. v. National Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (citing *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979)).

²⁵ <https://www.youtube.com/watch?v=yVzz3lYrpac>

²⁶ *Id.* The Clean Water Rule expressly exempts "puddles". See, e.g., 80 Fed. Reg. at 37,105 (to be codified at 33 C.F.R. § 328.3(b)(4)(vii)) ("The following are not 'waters of the United States' even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section. ... (4) The following features: (vii) Puddles.")

²⁷ Philip Brasher, "Pruitt: EPA rewrite will limit reach of WOTUS rule," *Agri-Pulse* (Mar. 1, 2017), available at <https://www.agri-pulse.com/articles/8981-pruitt-epa-rewrite-will-limit-reach-of-wotus-rule>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Rob Port, WDAY, "Audio: EPA Administrator Scott Pruitt Touts Friendlier, More Cooperative Relationship With States" (May 10, 2017), available at <https://www.sayanythingblog.com/entry/audio-epa-administrator-scott-pruitt-touts-friendlier-cooperative-relationship-states/>.

- June 2017: On Fox News, Administrator Pruitt misleadingly suggested that the Clean Water Rule’s inclusion of non-navigable waters violated the law because “[t]he only authority we have under the Clean Water Act is the authority that Congress gives us. And historically, as you know, that’s navigable streams and waters, interstate commerce clause of the Constitution.”³¹
- July 2017: Administrator Pruitt tweeted that he wants EPA to “work with farmers to protect the environment w/o overreaching with rules like #WOTUS.”³²
- July 2017: Among other misstatements panning the Clean Water Rule, Administrator Pruitt repeated on radio the falsehood that the Clean Water Rule covered puddles, insisting his claim is “not hyperbole....”³³
- July 2017: Administrator Pruitt re-tweeted a message from Speaker Ryan treating the repeal as a foregone conclusion: “The West has finally won in the battle over the Obama administration’s WOTUS rule. ... I applaud the Trump administration for siding with American jobs and *rescinding this harmful rule.*”³⁴
- Summer 2017: Administrator Pruitt toured the country to meet with select organizations and officials opposed to the Clean Water Rule. In Iowa he was photographed holding up a Farm Bureau sign that said “It’s Time to Ditch the Rule,” clearly endorsing the Farm Bureau’s anti-Clean Water Rule campaign.
- August 2017: Administrator Pruitt repeated on Iowa television his false claim that the Clean Water Rule inappropriately covers puddles, dry creek beds, and ephemeral drainage ditches, adding the equally false allegation that the Rule “would’ve covered 97 percent of the state of Iowa as a water of the United States.”^{35 36}
- September 2017: At the Concordia Annual Summit, Administrator Pruitt repeated his false claim about the Rule applying to “a dry creek bed, a puddle, an ephemeral ditch,” and definitively declared the result of the present rulemaking:

³¹ Fox News: America’s Newsroom, available at <http://video.foxnews.com/v/5489092917001/?sp=show-clips>.

³² <https://twitter.com/EPAScottPruitt/status/887350781749284864>.

³³ WCCO Morning News with Dave Lee, available at <https://omny.fm/shows/dave-lee/7-19-17-epa-administrator-scott-pruitt>

³⁴ <https://twitter.com/SpeakerRyan/status/879769583263076356> (emphasis added).

³⁵ KCCI Des Moines, “KCCI Close Up: The Environmental Protection Agency” (Aug. 23, 2017), available at <http://www.kcci.com/article/kcci-close-up-the-environmental-protection-agency/12005746>.

³⁶ See, e.g., Iowa Dept. of Natl. Resources, Iowa’s Wetlands (“Prior to European settlement, wetland basins covered 4 to 6 million acres, or approximately 11% of Iowa’s surface area. Wetlands were part of every watershed in the state, but nearly 95% of them have been drained.”), available at <http://www.iowadnr.gov/Environmental-Protection/Water-Quality/Water-Monitoring/Wetlands>.

*“we’re withdrawing the bad rule – the one in 2015 that created uncertainty; that enlarged the definition inconsistent with the text and the legislative history.”*³⁷

In light of the Administrator’s consistent opposition to the Clean Water Rule, false characterizations of the Rule and of the waters covered by the Rule, and refusal to rationally consider all relevant information and arguments, the agencies’ delay proposal cannot be seen in any other light than as a means to ensure a clear path forward to impose a much narrower definition of the “waters of the U.S.” in violation of the APA and the Constitution’s guarantee of Due Process.

II. The Agencies’ Proposal Fails To Provide Any Reasoned Explanation For Its Two-Year Delay of the Clean Water Rule.

A. A Judicial Stay Pending Review On The Merits Is Not A Basis For Rule Delay or Repeal.

The agencies’ “rationale” acknowledges that “the scope of CWA jurisdiction is an issue of great national importance” warranting “robust deliberations,” but proposes to foreclose those robust deliberations by delaying and/or repealing the Clean Water Rule and sweeping aside its record of “robust deliberations” grounded in extensive scientific, legal, and economic analysis.

The reason offered for both the delay and the repeal is that the agencies cannot “control” the 6th Circuit stay of the Clean Water Rule in the course of the agencies’ rulemaking to develop “a new definition of ‘waters of the United States’” premised on Justice Scalia’s minority opinion in the 4-1-4 split *Rapanos* decision.³⁸ The agencies themselves admit that they have options, but are choosing to delay and/or repeal the Clean Water Rule as, in their view, the most effective and efficient means of ensuring a swift revision of the definition of waters of the U.S. based on the Scalia minority opinion in *Rapanos*.³⁹ The truth is that the agencies seek to foreclose robust deliberation that includes the Clean Water Rule and its record, premised on Justice Kennedy’s much more widely accepted “significant nexus” test.

If robust deliberation on the proper scope of Clean Water Act jurisdiction is indeed the objective, as it should be if the Clean Water Rule is to be reconsidered, then the most rational starting point is the significant nexus-based Clean Water Rule and its robust record, as well as the 6th Circuit judicial review of that Rule that was in progress when stayed in January 2017 pending Supreme Court review of the proper forum for that judicial review. Even if the 6th Circuit stay of the Rule is lifted, the agencies themselves acknowledge that the 6th Circuit or the district courts reviewing the Clean Water Rule may stay the effect of the Rule pending its judicial review if such a stay is warranted.⁴⁰

³⁷ <https://www.youtube.com/watch?v=dnq-D-DIQcQ> (emphasis added) (Administrator Pruitt’s appearance begins at approximately the 4 hour, 7 minute mark).

³⁸ See 82 Fed. Reg. 55543-44; 80 Fed. Reg. 34902.

³⁹ *Id.* at 34903.

⁴⁰ *Id.*

B. The Delay Rule, Like the Repeal And Replace Rule, Will Increase – Not Decrease – Regulatory Uncertainty.

1. The Clean Water Rule minimizes regulatory uncertainty.

The agencies seek comment on “whether adding the applicability date contributes to regulatory certainty.”⁴¹ It does not. The agencies themselves acknowledge that their overlapping step zero, one, and two rulemakings are confusing the public.⁴² It is the 2015 Clean Water Rule that minimizes regulatory uncertainty. As noted previously, postponing the application of the Clean Water Rule’s revised definition of “waters of the U.S.” does not automatically restore the definition of waters of the U.S. that existed prior to promulgation of the 2015 Rule, and does not maintain the legal status quo.⁴³ Given the rescission of the pre-existing definition that is apparently still in effect, we believe delaying the implementation of the Clean Water Rule’s revised definition of “waters of the U.S.” leaves a legal vacuum in which there is ***no enforceable regulation in place*** to authorize agency jurisdictional determinations.

The proposed repeal and replace rule also returns us to regulatory muddy waters. The Clean Water Rule revises the longstanding definition of “waters of the United States” subject to the Clean Water Act in response to the Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”),⁴⁴ and *Rapanos v. United States*.⁴⁵ The EPA and the Corps took on this historic rulemaking because at least two of the Supreme Court Justices clearly called for it in their *Rapanos* concurring opinions: Chief Justice Roberts⁴⁶ and Justice Breyer,⁴⁷ and a majority in *Rapanos* embraced the role of expert agency regulations to clarify which waters are – and are not – “waters of the United States.”

In 2006, in *Rapanos*, the Supreme Court issued a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. Importantly, the Court issued five opinions, none of which garnered a majority. In the ensuing litigation implementing the Court’s opinions, Justice Kennedy’s opinion establishing the “significant nexus” analysis has been widely accepted by the U.S. Courts of Appeals. Justice Kennedy’s “significant nexus” test requires a showing – through regulation or case-by-case review – that the ecological linkages between smaller or more remote waterbodies and navigable waters, “alone or in combination,” must be more than “speculative or insubstantial.”

The Clean Water Rule closely tracks Kennedy’s pivotal significant nexus standard, grounding its definition of which waters are protected in science-based findings of significant nexus to traditionally navigable and interstate waters. The Federal Register preambles to the proposed and final versions of the Clean Water Rule include an

⁴¹ 82 Fed. Reg. 55544.

⁴² *Id.*

⁴³ See 82 Fed. Reg. 55542.

⁴⁴ 531 U.S.159 (2001).

⁴⁵ 126 S. Ct. 2208 (2006).

⁴⁶ 547 U.S. at 757-58.

⁴⁷ 547 U.S. at 812.

extensive legal analysis documenting the rule's reliance on the significant nexus test.⁴⁸

A key attribute of the Clean Water Rule is its additional clarity, relieving federal and state agencies and landowners alike of the confusing and burdensome case-by-case jurisdictional determinations required under the guidance for plans to discharge pollutants into most wetlands and streams. As a binding rule, promulgated through a rigorous, transparent, and extended rulemaking process, and codified in the code of federal regulations, the rule's revised definition of "waters of the United States" provides greater certainty and consistency in jurisdictional determinations for landowners, federal and state agency field staff, and the courts. It will also ensure that longstanding clean water protections continue to safeguard millions of wetland acres and stream miles that have been in legal limbo for more than a decade.

Ironically, the Clean Water Rule litigation and the current stay of the final rule not only extend but actually contribute to confusion and delay by discouraging EPA, the Corps, and the states from providing workshops and field level training and guidance supporting clarification and consistent implementation of the Rule. Delaying implementation, and/or rescinding the Clean Water Rule and replacing it with 2008 *Rapanos* guidance will only extend the confusion, delay, and inconsistencies in Clean Water Act jurisdictional determinations. If the agencies were sincere in their quest to increase certainty, they would engage with state resource managers and stakeholders in an open and objective effort to clarify and ensure consistent implementation of the Clean Water Rule.

2. The delay rule, like the repeal and replace rule, maximizes regulatory uncertainty.

The proposed delay rule, like the repeal and replace rule, maximizes regulatory uncertainty on several levels. First, the delay rule, like the repeal rule, creates uncertainty because it leaves no enforceable regulation in place for consistent determinations of which waters are - and are not - subject to the Clean Water Act.

On a practical level, the 4-1-4 *Rapanos* decision, followed by 2007 and 2008 *Rapanos* guidance documents, has resulted in an untenable status quo of delays, confusion, and uncertainty for applicants seeking permits, along with increased workloads for Corps and EPA officials. EPA's costs to enforce CWA §§402, 404, and 311 have increased significantly due to the incremental resources required to assert jurisdiction on a case-by-case basis post-SWANCC and *Rapanos*.⁴⁹ For years following *Rapanos*, litigation increased as courts grappled with the threshold question of which jurisdictional test to apply in the wake of the splintered *Rapanos* decision. Because it can be difficult to

⁴⁸ Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22188 et seq and Appendix B. Legal Analysis at 22252-22262 (April 21, 2014), incorporated by reference; Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37054 et seq (June 29, 2015), and the U.S. EPA and U.S. Army Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015) cited therein, both incorporated by reference.

⁴⁹ See 2014 EPA Economic Analysis at 30-31, at: http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

establish where the CWA applies after the Supreme Court's decisions in *SWANCC* and *Rapanos*, enforcement efforts have shifted away from small streams high in the watershed where jurisdiction is a potential issue. Post-*Rapanos* uncertainty and added time and expense is undermining Clean Water Act enforcement and the overall effectiveness of the Clean Water Act in maintaining and restoring the nation's waters.

In light of this uncertainty and its attendant costs, regulated industry and clean water stakeholders alike criticized the 2008 *Rapanos* guidance status quo and called on the agencies to clarify the "waters of the United States" through rulemaking. It is irrational and unreasonable for the agencies to undo the rulemaking that provided clarity and codify a failed system that all parties agree is not working. Indeed, the agencies fail to even consider the very real economic costs associated with the uncertainty they create by each step of their now 3-step rulemaking process.

The agencies provide no evidence or sound rationale for their statements that the proposed interim delay rule "would establish a clear regulatory framework."⁵⁰ Their unfounded assumption that they are reducing uncertainty and that their actions result in economic benefits from reduced uncertainty is arbitrary and capricious.⁵¹ It is arbitrary and capricious to delay or repeal the Clean Water Rule – which does in fact promote regulatory certainty – without any evidence-based rationale. Where the agencies propose to reverse course on the definition of waters of the U.S. by delaying or repealing the Clean Water Rule, based in large part on "factual findings that contradict those which underlay [their] prior policy" – here with respect to regulatory certainty -- the agencies must provide "a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy."⁵²

The agencies create additional, protracted uncertainty and waste scarce federal and state resources by proposing yet a third change in the definition of waters of the U.S. The agencies propose – again without justification – to shift the definition of waters of the U.S. from Justice Kennedy's widely accepted "significant nexus" jurisdictional test, grounded in the law and the science, to a definition based on Justice Scalia's "relatively permanent" jurisdictional test, which lacks both legal and scientific foundation. This dramatic shift in defining the scope of the Clean Water Act ensures on-going uncertainty and litigation challenging such an unprecedented rollback, and is sure to muddy the regulatory waters for years to come.

C. The Agencies' Economic Analysis Arbitrarily Writes Off More Than \$300 Million In Annual Wetland Economic Benefits In A Misguided Effort To Justify Both The Clean Water Rule Delay and the Clean Water Rule Repeal.

⁵⁰ 82 Fed. Reg. 55544.

⁵¹ See November 15, 2017 Memorandum For the Record: Consideration of Potential Economic Impacts for the Proposed Rule: *Definition of "Waters of the United States" – Amendment of Effective Date of 2015 Clean Water Rule* at 2-3; 2017 EPA Economic Analysis at 12, at https://www.epa.gov/sites/production/files/2017-06/documents/economic_analysis_proposed_step1_rule.pdf

⁵² See footnote 8, *supra*.

1. The agencies’ delay proposal is devoid of economic analysis and fails to acknowledge that it comes at an estimated net cost of \$110-\$185 million annually.

In support of their proposal to delay implementation of the Clean Water Rule for two years, the agencies conclude, without supporting rationale or analysis, that “there are no economic costs or benefits associated with this action.”⁵³ To reach this conclusion, the agencies improperly define the economic baseline as the pre-2015 regulatory regime in effect as a result of the 6th Circuit stay, rather than using the 2015 Clean Water Rule – as codified in the current Code of Federal Regulations – as the baseline, as it did in the Step one repeal rule.⁵⁴

The agencies provide no rational basis for this departure. As they note in their economic memorandum for the record, even assuming the costs are limited to a two year “temporary” delay, a consistent and reasonable approach would be “a slight variation on the economic analysis conducted for the Step 1 proposed rule” that considered the annualized cost savings and foregone benefits for a two year period.⁵⁵ As explained below, if the agencies had conducted the step 1 repeal rule analysis properly, and applied that analysis to the 2-year delay rule, they would have concluded that, accounting for the foregone wetland benefits (in accordance with the agencies’ 2015 economic analysis in the administrative record for the Clean Water Rule), the delay rule, like the repeal rule, would forego \$110-\$185 million more in annual benefits than it would avoid in annual costs. In other words, accounting for the annual benefits of conserved and restored wetlands, this proposed delay rule – like the *repeal* of the Clean Water Rule -- comes at an estimated cost of \$110-\$185 million annually.

2. The agencies’ repeal rule economic analysis arbitrarily writes off more than \$300 million in annual wetland economic benefits.

As explained in NWF comments on the proposed repeal, the agencies rely on the 2015 Clean Water Rule economic analysis in an attempt to comply with the regulatory review dictates of Executive Orders 12866 and 13563, and Office of Management and Budget (OMB) Circular A-4 – with one very significant omission. The 2017 Clean Water Rule Repeal economic analysis literally zeros out \$313 to \$513 million dollars in annual wetland benefits foregone by repealing the Clean Water Rule.⁵⁶ The agencies describe the economic effect of repealing the Clean Water Rule in terms of avoiding the Clean Water Rule’s costs and foregoing the Rule’s benefits. By zeroing out the \$313-\$513 million in wetland benefits foregone, the agencies estimate that the repeal of the Clean Water Rule annually avoids about \$128-\$403 million more in costs than it foregoes in benefits. In contrast, accounting for the foregone wetland benefits (in accordance with the agencies’ 2015 economic analysis in the administrative record for the Clean Water Rule), the agencies’ estimate would show that the repeal of the Clean Water Rule would

⁵³ 82 Fed. Reg. 55544; November 15, 2017 Memorandum for the Record, *supra* at footnote 50.

⁵⁴ *Id.* at 2-3.

⁵⁵ *Id.*

⁵⁶ 2017 Waters of the U.S. Economic Analysis at pp. 8-11 (Compare Tables 1 and 2 with Tables A-3 and A-4).

forego \$110-\$185 million more in annual benefits than it would avoid in annual costs. In other words, accounting for the annual benefits of conserved and restored wetlands, the *repeal* of the Clean Water Rule comes at an estimated cost of \$110-\$185 million annually.

The agencies have no sound rationale for writing off these wetland benefits. First, the agencies indicate the studies EPA and the Corps utilized in the 2015 economic analysis are too uncertain because the public's value for wetlands may have changed since the latest of those studies was completed in 2000, and valuation methodologies have improved. Neither of these flawed rationales support zeroing out all wetland benefits to support the delay or repeal of the Clean Water Rule.

a. If anything, the public's valuation of wetlands has increased over time, raising the economic value of conserved wetlands.

The agencies acknowledge that the willingness to pay studies they used to estimate wetland benefits in 2015 were based on the most recent studies available.⁵⁷ Yet they dismiss the studies, without any supporting evidence, because “public attitudes toward nature protection *could* have changed” since the studies were done in the 1990s and 2000.⁵⁸ This rationale rings hollow because multiple studies and polls demonstrate that, if anything, the value the public places on wetlands has increased over time, raising the economic value of conserved wetlands.

A 2010 meta-analysis of the values of wetlands⁵⁹ suggests no dramatic differences in wetlands values over the years or across methods, supporting the agencies' use of the older valuation studies. Costanza et al., estimating the global value of ecosystem services between 1997 and 2011, confirms the trend of increasing – rather than decreasing -- value of wetlands.⁶⁰ The agencies' 2015 estimate of the economic benefit of conserved wetlands is likely a conservative estimate of their current value. It is arbitrary and capricious for the agencies to now zero out those wetland benefits to justify the repeal of the Clean Water Rule.

While there may be no recent contingent value study of Americans and wetlands, polls consistently show that the public highly values aquatic resources. For example, the 2017 TRCP/Public Opinion Strategies poll of 1000 sportsmen confirmed overwhelming support for protecting water quality, including in small streams and wetlands.⁶¹ NWF sponsored a bi-partisan poll in 2015 that similarly confirmed overwhelming support

⁵⁷ 2017 EA at 8.

⁵⁸ *Id.* at 8-9.

⁵⁹ Ghermandi, A., J. van den Bergh, L. Brander, H. de Groot and P. Nunes. 2010. Values of Natural and Human-made Wetlands: A Meta-analysis. *Water Resources Research* 46: (W12516).

⁶⁰ Costanza, R., R. de Groot, P. Sutton, S. van der Ploeg, S. Anderson, I. Kubiszewski, S. Farber, and R. K. Turner. 2014. Changes in the global value of ecosystem services. *Global Environmental Change* 26:152–158.

⁶¹ TRCP and Public Opinion Strategies, TRCP National Sportsmen's Survey (June 2017) available at http://www.trcp.org/wp-content/uploads/2017/06/TRCP-Natl-Sportsmens-Poll_Complete.pdf.

across the political spectrum for federally protecting small streams and wetlands.⁶² In addition, the administrative record for the Clean Water Rule is replete with citations supporting the strong and consistent public value placed on wetland benefits and the conservative estimate of wetland benefits in the 2015 economic analysis.

For example, the comments of Ducks Unlimited summarize the following results:

- A nationwide survey (Responsive Management 2001) documented that there were 15 times the number of citizens who believed there were too few wetlands compared to the number that thought there were too many. The same survey showed that 91% of the public thought that it was “very” (64%) or “somewhat” (27%) important to protect or conserve wetlands. Only 3% were neutral or considered it unimportant.
- Water pollution was identified as the most important environmental issue facing Florida (Responsive Management 1998a);
- 65% of Idaho residents thought more time and money should be spent on protecting Idaho’s water resources (Responsive Management 1994);
- 89% of Indiana residents thought that improving water quality was very important (Responsive Management 1998b);
- 75% of West Virginia residents thought much more effort should be spent on restoring streams that have been damaged by acid rain or acid mine drainage (Responsive Management 1998c).
- Kaplowitz and Kerr (2003) noted that 75% of Michigan residents viewed the flood control services provided by wetlands as very or extremely important, and 87% viewed the wildlife habitat functions provided by wetlands similarly.
- A 2010 survey of Minnesota residents found that 83% of the electorate is concerned about the pollution of drinking water (Fairbank, Maslin, Maulin, Metz and Assoc. and Public Opinion Strategies 2010).
- Duda et al. (2010) describes how survey after survey of sportsmen and of the general public shows significant concern regarding safe, abundant, high quality water resources.

In a strong critique of the agencies dismissal of wetland benefits, the Association of State Wetland Managers also catalogues state and local government actions that provide additional evidence of public support for investments in the protection of aquatic

⁶² Public Opinion Strategies and Greenberg Quinlan Rosner Research, National Survey of Hunters and Anglers – Key Findings (June/July 2015) available at <http://www.nwf.org/~media/PDFs/Water/2015/2015-Sportsmen-Poll/NWF-National-Survey-Hunters-Anglers-PP.pdf>.

resources.⁶³ This information alone is sufficient to establish that relying on solid, if older data is far more accurate than using no data at all.

b. If better valuation methodologies exist, then use them to account for wetland benefits.

The agencies also dismiss their own 2015 wetland benefits estimates on grounds that better valuation methodologies *may* exist that might produce more accurate results than the older contingent valuation studies. This rationale is also unsound. First, as the Association of State Wetland Managers notes, “[c]ontingent valuation was well-developed” when studies cited in the 2015 economic analysis was conducted.⁶⁴

Second, there are alternative valuation methodologies and EPA could use them rather than simply zero out wetland benefits. The Association of State Wetland Managers identifies four contingent valuation studies of wetland value published between 2005 and 2012, and 5 willingness to pay studies published between 2009 and 2016.⁶⁵ EPA’s National Center for Environmental Economics, or one of the consulting firms it has hired for other economic analyses, could complete a non-market valuation study for wetlands values in two years if they wanted a reliable, up-to-date valuation by the newest methods. Short of a new non-market valuation study, the agencies could perform a benefit transfer study using the recent wetlands meta-analysis cited above.⁶⁶ Alternatively, the agencies could obtain the raw data from the 2010 meta-analysis cited and re-estimate the valuation specific for this rulemaking. The agencies could also use data gathered in wetland mitigation credit markets to calculate a value per wetland acre. Relying on actual market values would eliminate any concern about the specific valuation methodology.⁶⁷

Any of these options would give the agencies an alternative path for calculating the value of the incremental number of wetlands the 2015 Rule would protect in comparison to the “status quo.” The 2015 Clean Water Rule Economic Analysis wetland benefit information as well as other wetland benefit information in the Clean Water Rule administrative record is clearly relevant to the agencies’ decision whether to delay or repeal the Clean Water Rule and it must be taken into account to ensure a rational rulemaking decision.

c. The economic benefit of conserved wetlands is irrefutable and must be accounted for in the Repeal Rule economic analysis.

The economic literature, the 2015 economic analysis, and the administrative record for the 2015 Clean Water Rule are all replete with studies demonstrating the economic

⁶³ Association of State Wetland Managers Comments at 4-6, Docket No. EPA-HQ-OW-2017-0203 (September 11, 2017).

⁶⁴ *Id.* at 8.

⁶⁵ *Id.* at 6-7

⁶⁶ See *e.g.*, TRCP Comments Docket No. EPA-HQ-OW-2017-0203 (September 27, 2017) *citing* Rosenberger, R. and J. Loomis. 2017. Benefit Transfer. Chapter 11. in *A Primer for Nonmarket Valuation*, eds. P. Champ, K. Boyle and T. Brown. Springer, The Netherlands.

⁶⁷ See *e.g.*, *Id.* *citing* Eco-Asset Solutions and Innovations Mitigation Credit Price report *available at* <http://www.easillc.com/mitigation-credit-price-report-mcpr/>.

benefits and avoided costs of conserving wetlands. These studies must be accounted for in the repeal rule economic analysis. Below we summarize a sampling of these studies, many of which are documented in the administrative record for the Clean Water Rule:

- In a 2016 study, The Nature Conservancy, in partnership with Risk Management Solutions, a global leading risk modeler for the insurance industry, Guy Carpenter & Company, and others showed that marsh wetlands saved over \$650 million in property damages during Hurricane Sandy and reduced annual property losses by nearly 20 percent in Ocean County, New Jersey.⁶⁸
- BenDor et al.⁶⁹ measures the economic output and employment resulting from environmental restoration, restoration-related conservation, and mitigation actions. For instance, they found that wetland restoration and aquatic and riparian restoration were the most common types of restoration work conducted, likely indicating the role of the Clean Water Act's 404 compensatory mitigation requirements in inducing this type of economic activity.
- Costanza et al.⁷⁰ provides an estimate of the global value of ecosystem services between 1997 and 2011. Terrestrial wetlands increase in value over that period from \$20,404 per hectare per year to \$140,174 per hectare per year—providing far greater value than any other ecosystem. The agencies can use the underlying data and models from this study to estimate wetlands benefits in the specific case of the proposed rule. In addition, the trend of increasing value of wetlands indicates that the agencies 2015 estimate of the economic benefit is likely a conservative estimate of their current value.
- In the Prairie Pothole region, the estimated net benefit of artificially storing water in the Red River valley as described by exceeded \$800 million over 50 years in some scenarios as a result of reduced flood stages in the Red River and avoided damages and other benefits.⁷¹
- Hey and Phillipi (1995) documented that mean annual flood damage in the Upper Mississippi River basin had increased 140% over the previous 90 years (in adjusted dollars). Given the extent of increasingly frequent damaging floods along rivers in and flowing out of the Prairie Pothole region (as well as in other areas around the country), the economics associated with avoided damages through wetland protection and

⁶⁸ Narayan, S., Beck, M.W., Wilson, P., Thomas, C., Guerrero, A., Shepard, C., Reguero, B.G., Franco, G., Ingram, C.J., Trespalacios, D., 2016b. Coastal Wetlands and Flood Damage Reduction: Using Risk Industry-based Models to Assess Natural Defenses in the Northeastern USA. London.

⁶⁹ BenDor T, Lester TW, Livengood A, Davis A, Yonavjak L (2015) Estimating the Size and Impact of the Ecological Restoration Economy. PLoS ONE 10(6): e0128339. doi:10.1371/journal.pone.0128339

⁷⁰ Costanza, R., R. de Groot, P. Sutton, S. van der Ploeg, S. Anderson, I. Kubiszewski, S. Farber, and R. K. Turner. 2014. Changes in the global value of ecosystem services. *Global Environmental Change* 26:152–158.

⁷¹ Kurz et al. 2007. *An evaluation of basinwide, distributed storage in the Red River Basin: The Waffle Concept*. Energy & Environmental Research Center.

maintenance of flood water storage functions should also be an important component of economic analysis.⁷²

- Brody et al (2014) looked at an individual watershed in this ecoregion near Houston, and found that the presence of wetlands was the second-most important land-use-land-cover factor related to flood damages totaling \$356 million over 11 years. Of all variables, being surrounded by wetlands had the strongest influence on reducing flood damages.⁷³
- Brody et al (2011) looked at more than \$13 billion in insured property losses across 144 coastal counties in all five Gulf coast states (plus several counties in extreme southwest Georgia) over the 2001-2005 period. They again found that wetland alteration was a significant factor in explaining flood damages.⁷⁴
- In 2006, more than 1.3 million waterfowl hunters expended approximately \$900 million with a total related industry output of \$2.3 billion (Carver 2008).⁷⁵ This analysis also calculated that waterfowl hunting created approximately 28,000 jobs in 2006. Birding, much of it also water-related as evidenced by waterfowl accounting for the type of bird observed by 77% of away-from-home birders, supported total trip-related and equipment expenditures of \$36 billion in 2006 (Carver 2009). These direct expenditures resulted in a total industry output of \$82 billion and created 671,000 jobs (with an average annual salary of \$41,000; Carver 2009).⁷⁶
- Another indication of the economic implications of protecting the Nation's water resources is revealed in the example of the actions taken by New York City to initiate a \$250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskill Mountains (Daily et al. 1999). The city viewed this as a way to protect the quality of its water supply as an alternative to constructing water treatment plants which could cost as much as \$6-8 billion.⁷⁷
- The algal blooms that cause health problems also come at high economic costs. For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was \$2.2 billion. This estimate included recreational and angling costs, property values, drinking water treatment costs, and

⁷² Hey, D.L. and N.S. Phillipi. 1995. Flood Reduction through wetland restoration: The Upper Mississippi River basin as a case study. *Restoration Ecology* 3:4-17.

⁷³ Brody, S.D. et al. 2014. *Examining the impact of land use/land cover characteristics on flood losses*. *Journal of Environmental Planning and Management* 57: 1252-1265.

⁷⁴ Brody, S.D. et al. 2011. *Examining the influence of development patterns on flood damages along the Gulf of Mexico*. *Journal of Planning and Education Research*: 31:438-448.

⁷⁵ Carver, E. 2008. *Economic impact of waterfowl hunting in the United States. Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*. U.S. Fish and Wildlife Service, Report 2006-2, 13 pp.

⁷⁶ Carver, E. 2009. *Birding in the United States. Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*. U.S. Fish and Wildlife Service, Report 2006-4, 15 pp.

⁷⁷ Daily, G.C. et al. 1999. *Ecosystem Services: benefits supplied to human societies by natural ecosystems*. *Issues in Ecology*. Ecological Society of America available at http://www.hillcountryalliance.org/uploads/HCA/Ecosystem_Services_Daily.pdf.

a conservative estimate of the costs of the loss of biodiversity.⁷⁸

- Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between \$50 and \$100 million.⁷⁹
- Southwick Associates (2006) estimated that the present value of Saginaw Bay coastal marshes for active recreational use was \$239 million, or approximately \$10,000 per acre.⁸⁰

A timely 2014 study of the recent loss of Texas coastal prairie wetlands in the Greater Houston area confirms the economic value of wetlands for flood storage and the economic cost of unregulated dredging and filling of those wetlands. According to the study, between 1992 and 2010, 30 percent of Harris County (which includes the city of Houston) freshwater wetlands were developed primarily for commercial and residential purposes. These are wetlands that would be better protected under the 2015 Clean Water Rule than without it. This wetland loss translates to an estimated loss of 4 billion gallons of storm water detention capacity. The authors estimated that, at an average cost of \$50,000 per acre-foot of stormwater detention (based on the cost of Harris County flood control figures), this wetland loss in the Houston area comes at a cost of \$600 million for stormwater detention benefits alone. Counting water filtration and other benefits of these wetlands, the authors estimate the cost of this wetland loss to be “clearly in the billions.”⁸¹

As the Association of State Wetland Managers notes in their comments on this proposed repeal rule,

Under multiple scenarios, the narrowing of jurisdiction would have negative consequences for local, state/tribal, and federal governments in terms of increased costs for water quality enhancements and associated costs....

In short, the economic losses that would arise from a reduction in federal protection of water resources is enormous, and it is both incorrect and a disservice to the public to exclude consideration of these factors from the cost-benefit analysis. Potential economic losses include those arising from a reduction in the supply of safe, clean, useable water for drinking and domestic use,

⁷⁸ Dodds, W.F., et al. 2009. *Eutrophication of U.S. freshwaters: Analysis of potential economic damages*. Environmental Science and Technology 43:12-19.

⁷⁹ Polasky, S. and B. Ren. 2010. *Minnesota water sustainability framework water valuation technical work team report*.

⁸⁰ Southwick Associates, Inc. 2006. *Economic values of Saginaw Bay Coastal Marshes with a focus on recreational values*. Report to USEPA Great Lakes and Ducks Unlimited. 65 pp.

⁸¹ Jacob, John S., et al, *Houston-Area Freshwater Wetland Loss, 1992-2010* (2014) at <http://tcwp.tamu.edu/files/2015/06/WetlandLossPub.pdf>.

industrial use, agricultural use, recreation, and fish and wildlife habitat. Each of these uses is important to a healthy economy and the increased cost of treatment over time should be carefully evaluated in an economic analysis of lost federal protection arising from a change in federal CWA jurisdiction....

The potential loss of federal protection of wetlands and small and mid-sized streams is likely to result in an increase in unregulated dredge and fill activities which would in turn lead to future increased costs at the federal, state, and local level for engineered infrastructure to store flood waters, purify nonpoint source runoff, treat drinking water, sustain recreation opportunities and stabilize shorelines. The loss of protection for wetlands and small streams would likely lead to cumulative impacts reflected in human health threats, as well as increased property damage from natural hazards including intense storms, drought, and flooding.⁸²

d. The agencies arbitrarily write off the estimated wetland benefits based on the completely unsubstantiated possibility of independent state wetland protections.

The agencies also attempt to justify their omission of wetland benefits based on the unsupported claim that, without the 2015 Clean Water Rule, states might step in to protect wetlands through state regulatory programs. They claim that because they “were unable to factor the magnitude of this effect,” the “cumulative uncertainty in this context is too large to include quantitative estimates in the main analysis for this proposed rule.”⁸³ This basis for zeroing out wetland benefits is arbitrary and capricious on its face.

In fact, there is a good deal less uncertainty around how the states will respond to the Clean Water Rule repeal than to many other assumptions in the economic analysis. The agencies even cite to substantial evidence that most states *will not* respond to their Clean Water Rule repeal “by continuing to regulate as waters of the state those waters that are no longer considered ‘waters of the United States.’”⁸⁴ The agencies conclude that “such a response is less likely” in the two-thirds of all the states that have legal limits on the ability of state and local governments to adopt aquatic resource protections more stringent than the CWA definition of “waters of the U.S.”⁸⁵ The Association of State Wetland Managers comments quoted above leave no doubt that the states will not respond in a manner that avoids the costs of reduced federal CWA protections for wetlands and small streams.

In addition, as noted previously, the agencies need only look to the states’ track record since the Clean Water Act passed in 1972. Over the last 45 years, while 46 states have sought –and obtained – delegation of the §402 point source discharge program, only two states have assumed the CWA §404 permit program. It has been 17 years since

⁸² Association of State Wetland Managers Comments at 8.

⁸³ 2017 Economic Analysis at 9.

⁸⁴ *Id.* at 22.

⁸⁵ *Id.*

the U.S. Supreme Court issued its *SWANCC* decision and over a decade since the *Rapanos* decision, yet very few states have moved proactively to fill the gaps in wetlands and stream protections in the wake of those two decisions. In the few that did, many of those programs were subsequently weakened by lack of resources and/or industry pressure.

As noted previously, cost is a primary obstacle for states considering assuming responsibility for the § 404 program.⁸⁶ Absent more robust federal funding and technical support, states are not likely to start regulating wetlands and the repeal of the Clean Water Rule will indeed come at the cost of millions of dollars in wetland benefits lost each year. Coupling the Clean Water Rule repeal with significant cuts in federal Clean Water Act funding to states makes the agencies reliance on the possibility of enhanced state wetland protections unsound.

Lacking any sound rationale for stripping from the analysis the wetland benefits secured through the Clean Water Rule, the agencies must use the estimate from the 2015 analysis or conduct additional analyses, as suggested above. The agencies are proposing to delay and/or repeal a final rule that would add more than \$300 billion annually in wetland benefits and a net \$110 to \$185 billion annually in value considering all costs and benefits. Doing so makes the cost of both of these proposed actions too substantial to proceed. The agencies' proposals must be withdrawn.

III. The 2015 Clean Water Rule And Its Robust Record Constitute Relevant Information That Must Be Meaningfully Considered In Any Delay, Repeal, Replacement, Or Reconsideration Of The Definition Of Waters Of The US.

A. Unlike The Proposed Delay, Repeal, And Replace Rulemakings, The 2015 Clean Water Rule Is The Product Of An Extended, Rigorous, And Robust Rulemaking Process That Addresses Many Of The Concerns Raised By State, Agricultural, And Small Business Stakeholders.

The final Clean Water Rule is the product of four years of rigorous and transparent scientific and public policy deliberation. In 2011, in the face of congressional inaction, EPA and the Corps formally launched an administrative effort to clarify the "waters of the U.S." Unlike the 2007 and 2008 *Rapanos* guidance, the 2011 Proposed Guidance was itself the subject of extensive interagency review, economic analysis, and public notice and comment. Approximately 250,000 comments were submitted on the guidance, and these overwhelmingly supported the revised guidance.

In 2011-2012, on a parallel track, the EPA Office of Research and Development compiled a draft science report, [*The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*](#) (Connectivity Report).⁸⁷ This scientific report, based on peer-reviewed literature and an additional review by independent scientists, was prepared to inform the Administration's proposed

⁸⁶ See footnote 62, *supra*.

⁸⁷ See

<https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=56176401&CFTOKEN=47329782>

rule clarifying which waters are protected under the Clean Water Act. In July 2013, the EPA Science Advisory Board (SAB) launched an SAB Expert Scientific Peer Review of the Connectivity Report.⁸⁸ In September 2013, the agencies released the Draft Connectivity of Streams and Wetlands Science Report for public comment. EPA received 130,000 public comments on science report. Also in September 2013, after holding up action on the Clean Water guidance in the OMB for almost two years, the Administration sent its draft proposed Clean Water Rule to OMB for interagency review.

In March 25, 2014, after months of interagency review, the EPA and the Army Corps of Engineers jointly proposed the formal rule clarifying and partially restoring the historic scope of waters protected under the Clean Water Act. The 2-page proposed rule text in the federal register was thoroughly explained and supported by a lengthy preamble, including both scientific and legal appendices, the publicly available Connectivity Science Report, and a thorough Economic Analysis. The 200-day public comment period ended November 14, 2014.⁸⁹ Americans submitted over 1 million comments on the proposed Clean Water Rule. More than 80% of these comments were in support of the proposed Clean Water Rule.

In September-early October 2014, the SAB issued reports affirming the scientific basis for the proposed rule (SAB Rule Letter)⁹⁰ and affirming – with recommendations for enhancing – the scientific accuracy of the Connectivity Report (SAB Connectivity Peer Review Letter).⁹¹ The Connectivity Report was revised and strengthened in accordance with the SAB recommendations and was released in final form in January 2015.⁹² Both the SAB report and the Final Connectivity Report inform the agencies’ final “waters of the U.S.” rule.

Throughout the 2014 public comment period, EPA held hundreds of stakeholder meetings, including repeated meetings with agricultural, municipal, small business entities, and other stakeholders seeking improved clarity in the rulemaking. The final Clean Water Rule reflects several clarified exclusions from CWA jurisdiction called for by these stakeholders. The final Clean Water Rule is founded on extensive public

⁸⁸ See SAB Peer Review process at:

http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report!OpenDocument&TableRow=2.1#2.

⁸⁹ See EPA Waters of the U.S. rulemaking process materials at: <http://www2.epa.gov/uswaters>.

⁹⁰ EPA SAB letter to Administrator 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”* (September 30, 2014) (SAB Rule Letter) at:

[http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf)

⁹¹ EPA SAB letter to Administrator McCarthy, *SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (October 17, 2014) (SAB Connectivity Peer Review Letter) at:

[http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/\\$File/EPA-SAB-15-001+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf)

⁹² *Final EPA Report: Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (January 2015) at:

<http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414#Download>

comment, a strong scientific record, and on the Supreme Court’s direction about the kinds of waters the Clean Water Act protects. It is the Clean Water Rule based on this rigorous and transparent rulemaking process that offers the best opportunity in a generation to clarify which waters are – and are not – waters of the U.S. subject to the Clean Water Act in a manner that provides significantly more clarity. The agencies unfounded proposals to delay and/or repeal the Clean Water Rule and codify the *Rapanos* guidance are arbitrary, capricious, an abuse of discretion, and contrary to law.

B. The Clean Water Rule Responds To – And Is Consistent With – The Supreme Court’s Direction In *SWANCC* And *Rapanos*, Relying On The Widely Accepted “Significant Nexus” Test For Clean Water Act Jurisdiction.

The Clean Water Rule revises the longstanding definition of “waters of the United States” subject to the Clean Water Act in response to the Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”),⁹³ and *Rapanos v. United States*.⁹⁴ The EPA and the Corps took on this historic rulemaking because at least two of the Supreme Court Justices clearly called for it in their *Rapanos* concurring opinions: Chief Justice Roberts⁹⁵ and Justice Breyer,⁹⁶ and a majority in *Rapanos* embraced the role of expert agency regulations to clarify which waters are – and are not – “waters of the United States.”

The 2001 *SWANCC* decision was narrow. It simply precluded the Corps from asserting jurisdiction over certain ponds based solely on their use by migratory birds. It did not overturn any aspect of the existing waters of the U.S. regulatory definition, including the provision protecting waters beyond those that qualify as tributaries or adjacent wetlands. In 2006, in *Rapanos*, the Supreme Court issued a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. Importantly, the Court issued five opinions, none of which garnered a majority. In the ensuing litigation implementing the Court’s opinions, Justice Kennedy’s opinion establishing the “significant nexus” analysis has been widely accepted by the U.S. Courts of Appeals. Justice Kennedy’s “significant nexus” test requires a showing – through regulation or case-by-case review – that the ecological linkages between smaller or more remote waterbodies and navigable waters, “alone or in combination,” must be more than “speculative or insubstantial.” No U.S. Circuit Court has held that only Justice Scalia’s “relatively permanent waters” plurality test applies to determine Clean Water Act jurisdiction.⁹⁷

The Clean Water Rule closely tracks Kennedy’s pivotal significant nexus test, grounding its definition of which waters are protected in science-based findings of significant nexus

⁹³ 531 U.S.159 (2001).

⁹⁴ 126 S. Ct. 2208 (2006).

⁹⁵ 547 U.S. at 757-58.

⁹⁶ 547 U.S. at 812.

⁹⁷ Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22188, Appendix B. Legal Analysis at 22252 (April 21, 2014), incorporated by reference; see U.S. EPA and U.S. Army Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015) cited therein, both incorporated herein by reference.

to traditionally navigable and interstate waters. The Federal Register preambles to the proposed and final rules include an extensive legal analysis documenting the rule's reliance on the significant nexus test.⁹⁸ The Clean Water Rule also reflects some seven years of EPA and Corps experience grappling with how to apply the significant nexus test in the field, consistent with the underlying science and law.

As a binding rule, promulgated through a rigorous, transparent, and extended rulemaking process, and based on extensive agency experience and expertise, the Clean Water Rule must logically and rationally remain in effect and form the basis for any further revisions to the definition of waters of the U.S. The Clean Water Rule will provide greater certainty and consistency in jurisdictional determinations for landowners, federal and state agency field staff, and the courts. It will also ensure that longstanding clean water protections continue to safeguard millions of wetland acres and stream miles that have been in legal limbo for more than a decade. In contrast, the delay of the Clean Water Rule, repeal of the Clean Water Rule, codification of the failed *Rapanos* guidance, and proposal of narrower definition of waters of the U.S., based on a different jurisdictional test that is not grounded in either law or science, will significantly increase both regulatory uncertainty and costly impacts to the nation's waters.

C. The Final Clean Water Rule Clarifies And Limits -- But Does Not Expand – The Historic Scope Of Clean Water Act Jurisdiction.

The final rule clarifies and definitively restores Clean Water Act protection to two major categories of waters, while drawing clarifying and limiting boundaries:

1. Tributaries to traditionally navigable and interstate waters and the territorial seas. For example, intermittently-flowing headwater streams that have a defined bed and bank and ordinary high water mark, and flow to a traditionally navigable or interstate water body; and

2. Wetlands, lakes, and other water bodies located adjacent to these tributaries (including those within the 100-yr floodplain up to a maximum distance of 1,500 ft.).⁹⁹

Based on a careful review of the wetland science and the “significant nexus” test, the final rule also authorizes protections for waters that are “similarly situated” and located beyond river floodplains when they significantly affect downstream waters’ condition. As independent scientific advisors recommended, the rule also finds that specified wetlands -- prairie potholes in the Dakotas, western vernal pools in California, Carolina and Delmarva bays and pocosins along the Atlantic coastal plain, and Texas coastal prairie wetlands along the Gulf of Mexico -- are “similarly situated” in how they provide

⁹⁸ Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22188 et seq and Appendix B. Legal Analysis at 22252-22262 (April 21, 2014), incorporated by reference; Clean Water Rule: Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37054 et seq (June 29, 2015), and the U.S. EPA and U.S. Army Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015) cited therein, both incorporated by reference.

⁹⁹ 80 Fed. Reg. 37104-37106 (codified at 33 C.F.R. 328.3 (a)-(c)).

fish and wildlife habitat, especially for waterfowl, important flood storage and drought resistance, and critical pollution filtration.¹⁰⁰

While these clarifications remove uncertainty, and better protect many wetlands and streams that have been at risk for the last decade, the fact is that the final Clean Water Rule actually *narrows* the historic scope of Clean Water Act jurisdiction, excluding protections for some wetlands and other waters protected for almost 30 years prior to 2001. Indeed, in our view, a couple of the 2015 Clean Water Rule's waters of the U.S. exclusions go too far, removing protections for wetlands and other waters that the science indicates are likely to have a significant nexus to downstream traditionally navigable or interstate waters.¹⁰¹

First and foremost, the rule deletes the pre-existing and longstanding “other waters provision that provided Clean Water Act jurisdiction over many types of waters based on their potential effect on interstate commerce. Given the breadth of the federal commerce clause power, and the Clean Water Act legislative intent to regulate to the full extent of that power, this provision provided for Clean Water Act coverage for over millions of wetland acres protected for almost 30 years prior to 2001. In response to the Court's consideration of waters' ecological links to downstream waters, EPA and the Corps deleted this section and instead expressly linked all jurisdictional “waters of the U.S.” determinations to science-based findings of significant nexus to downstream waters. As a result, many of the intrastate, non-navigable, geographically “isolated” wetlands, lakes, and ponds previously covered by the Clean Water Act regulations will no longer be covered under the final Clean Water Rule.¹⁰²

Second, the definition of “waters of the U.S.” includes – for the first time -- a clear definition of “tributary” that both clarifies and limits Clean Water Act jurisdiction over streams, ditches, and other tributaries. To be guaranteed protection as a

¹⁰⁰ *Id.* at 37104-105 (codified at 33 C.F.R. 328.3 (a)(7) and (8)); Clean Water Rule: Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37054 et seq (June 29, 2015), and the U.S. EPA and U.S. Army Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015) cited therein; U.S. EPA. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)*. U.S. Environmental Protection Agency, Washington, D.C. EPA/600/R-14/475F, 2015 at <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414> and U.S. Environmental Protection Agency. 2014. 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.” EPA-SAB-14-007, U.S. Environmental Protection Agency, Washington, D.C., both cited in the Final Clean Water Rule preamble and the EPA Technical Support Document, all incorporated by reference; Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22188 et seq and Appendix A. Scientific Analysis at 22222 (April 21, 2014), incorporated by reference; Letter from David Allen, Chair U.S. Environmental Protection Agency Science Advisory Board to Gina McCarthy, Administrator, U.S. Environmental Protection Agency (September 30, 2014), *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007%2Bunsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007%2Bunsigned.pdf), incorporated herein by reference and attached.

¹⁰¹ See NWF et al Comments on Proposed Rule Definition of “Waters of the United States” under the Clean Water Act, EPA-HQ-OW-2011-0880, dated November 14, 2014, incorporated by reference.

¹⁰² See Clean Water Rule: Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37054 et seq (June 29, 2015).

tributary, a waterway must have a bed, bank, and ordinary high water mark.¹⁰³ To further clarify what is *not* a protected tributary, the final rule expressly excludes – again for the first time – several types of ditches, as well as gullies, rills, non-wetland swales, and lawfully constructed grassed waterways.¹⁰⁴

In further response to concerns from agricultural and water treatment and delivery sectors, and in addition to existing exemptions for prior converted cropland and waste treatment systems, **the final rule also explicitly excludes from the definition of waters of the U.S. other water features in dry land, including artificially irrigated areas, storm water control features and wastewater recycling systems.**¹⁰⁵

In addition, the final rule adds physical and measurable distance limits to define adjacent waters, further narrowing jurisdiction and excluding wetlands and other waterbodies previously covered by the Clean Water Act.¹⁰⁶

And, of course, the final rule does not alter the Clean Water Act provisions excluding several activities from applicable permitting requirements (unless they destroy waterbodies):

- Common farming and ranching practices, including “**plowing, cultivating, seeding, minor drainage, harvesting** for the production of food, fiber, and forest products;”
- “Construction or maintenance of **farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;**”
- “**Agricultural stormwater discharges and return flows from irrigated agriculture;**”
- “Construction of **temporary sediment basins** on a construction site;” and
- “Construction or maintenance of **farm or forest roads or temporary roads for moving mining equipment.**”¹⁰⁷

The agencies proposed Clean Water Rule delay and repeal fails to satisfy even the most basic rulemaking requirements of the APA by failing to provide meaningful public notice and comment on this substance of the Clean Water Rule. The EPA Administrator further undermines public comment on the Clean Water Rule by falsely claiming, in effect, that the Rule does not exclude, for example, puddles, and many ditches. The Clean Water Rule should remain in effect, and applicable except by judicial stay pending judicial review, and form the basis for any further revisions to the definition of waters of the U.S.

D. The Clean Water Rule Is Based On A State-Of-The-Art Review Of The Science, Incorporating The Basic Principles And Findings Of Connectivity Science In Order To Meet The Goals Of The Clean Water Act.

¹⁰³ 80 Fed. Reg. at 37058, 37075-76, 37099, 37105 (codified at 33 C.F.R. 328.3 (c)(3) and (6)).

¹⁰⁴ *Id.* at 37058, 37075-76, 37099, 37105 (codified at 33 C.F.R. 328.3 (b)(3) and (4)).

¹⁰⁵ *Id.* at 37058, 37075-76, 37100, 37105 (codified at 33 C.F.R. 328.3 (b)(6) and (7)).

¹⁰⁶ *Id.* at 37105 (codified at 33 C.F.R. 328.3 (a)(6) and (8), (c)(1) and (2)).

¹⁰⁷ 33 U.S.C. 1344(f).

Closely tracking Justice Kennedy's pivotal significant nexus test, the Clean Water Rule definition of which waters are protected is grounded in the agencies' science-based findings of significant nexus to traditionally navigable and interstate waters and EPA's Connectivity Report, [*The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*](#).¹⁰⁸ The SAB peer review affirmed not only the findings and conclusions of EPA's unparalleled compilation of the connectivity science, but the scientific basis for the Clean Water Rule itself. Below are excerpted and summarized some of the key principles and findings of wetland and stream scientists derived from the Connectivity Report that form the scientific foundation for the Clean Water Rule.¹⁰⁹

Rivers are networks, and their downstream navigable portions are inextricably linked to small headwaters just as fine roots are an essential part of the root structure of a tree or our own circulatory system is dependent on the function of healthy capillaries. Longstanding and robust scientific research (like those studies included in EPA's Connectivity Report) has demonstrated that ecological processes in navigable rivers reflect what is occurring in their headwaters as well as in associated geographically isolated wetlands, floodplains, and tributaries.

A sizable portion of a river network is in intermittent and headwater streams. In arid states such as Arizona, Utah, and Colorado, from 71 to 96% of stream miles have been classified as ephemeral or intermittent. Intermittent streams are also significant in states that receive more rainfall. In Alabama, 80% of stream miles in the National Forests are considered intermittent because they go dry during late summer or autumn; intermittent streams in Michigan comprise 48% of the length of stream channels in the state. These examples illustrate the extent of intermittent streams in river networks throughout the Nation.

As the SAB concluded from the 2014 *Connectivity Report*:

There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.¹¹⁰

¹⁰⁸ See

<https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=56176401&CFTOKEN=47329782>

¹⁰⁹ See Connectivity Report; Scientists Letter to the Chair and Ranking Member of the Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Water, and Wildlife *re: Scientists Strongly Oppose S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters*, dated May 18, 2015; and the Amicus Curiae Brief of Dr. M. Siobhan Fennessy, Dr. Carol A. Johnston, Dr. Marinus L. Otte, Dr. Margaret Palmer, Dr. James E. Perry, Professor Charles Simenstad, Dr. Benjamin R. Tanner, Dr. Dan Tufford, Dr. R. Eugene Turner, Dr. Kirsten Work, Dr. Scott C. Yaich, and Dr. Joy B. Zedler in Support of Upholding the Clean Water Rule in *Murray Energy Corporation et al v. U.S. EPA, et al* (6th Cir. January 20, 2017).

¹¹⁰ Letter from David Allen, Chair U.S. Environmental Protection Agency Science Advisory Board to Gina McCarthy, Administrator, U.S. Environmental Protection Agency (September 30, 2014), *available at*

Small streams and wetlands contribute to the physical integrity of navigable rivers – they help retain water during storms and can decrease the intensity of floods. They also help recharge groundwater and other sources of water for drinking, irrigation, and industry.

Small streams and wetlands also contribute to the chemical integrity of navigable rivers –they help reduce contaminants and help with nutrient removal. For example, Delmarva bay wetlands help protect water quality and improve functions for water that flows through them to the Chesapeake Bay.

Small streams and wetlands contribute to the biological integrity of navigable rivers. They supply food resources to riparian and downstream ecosystems. Small streams are a refuge at critical life history stages or during critical times of the year for many fish species. They also serve as vital spawning and nursery habitats for many fish species including many prized sport fishes. Small streams and wetlands also provide critical habitat for a number of species.

As the SAB concluded from the 2014 *Connectivity Report*:

The available science supports the EPA’s proposal to include adjacent waters and wetlands as waters of the United States. This is because adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters.¹¹¹

The SAB also advised EPA:

The available science, however, shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections.¹¹²

The SAB also concluded:

The scientific literature has established that “other waters” can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define “other waters” as waters of the United States on a case-by-case basis, either alone or in combination with similarly-situated waters in the same region.¹¹³

The SAB further concluded:

[https://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007%2Bunsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007%2Bunsigned.pdf), incorporated herein by reference and attached.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

There is also adequate scientific evidence to support a determination that certain subcategories and types of “other waters” in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, biological, and chemical integrity of downstream waters and are similarly situated on the landscape) and thus are waters of the United States. ¹¹⁴

The agencies proposals to delay and/or repeal of the Clean Water Rule ignore the scientific record that must form the foundation for the definition of waters of the U.S. in order to be consistent with Supreme Court case law as well as the Clean Water Act itself. By failing to incorporate the science into its proposal, the agencies fail to provide for meaningful public notice and comment on the repeal and replacement of the Clean Water Rule. They also fail to consider information that is not only relevant but fundamental to their rulemaking decisions. The Clean Water Rule and the scientific record on which it is founded must logically and rationally form the basis for any further revisions to the definition of waters of the U.S.

E. The Clean Water Rule Strengthens The Clean Water Act’s Federal-State Cooperative Federalism Framework And Empowers States To Better Protect State Waters Within This Framework.

In 2006, more than 30 state attorneys general filed an amicus brief in *Rapanos* recognizing the essential Federal-State cooperative federalism framework for protecting the Nation’s waters and supporting the Bush Administration’s inclusive view of Clean Water Act coverage to meet the goals of the Clean Water Act.¹¹⁵ In September 2014 and again in 2015 State Attorneys General reiterated the importance of inclusive Clean Water Act jurisdiction to protecting the waters of their states and the health and welfare of their citizens, most recently when they moved to intervene in court in support of the Clean Water Rule.

The reasoning of the state attorneys general bears repeating:

“First.... The health and integrity of watersheds, with their networks of tributaries and wetlands that feed downstream waters, depend upon protecting the quality of upstream headwaters and adjacent wetlands. Moreover, watersheds frequently do not obey state boundaries, with all of the lower forty-eight states having waters that are downstream of the waters of other states. Thus, coverage under the Act of ecologically connected waters secured by the Rule is essential to achieve the water quality protection purpose of the Act, and to protect Proposed Intervenor States from upstream pollution occurring outside their borders.

¹¹⁴ *Id.*

¹¹⁵ See Amicus Curiae Brief of the States in Support of Respondents in *Rapanos et al v. U.S.* (S.Ct. 2006).

“*Second*, by clarifying the scope of “waters of the United States,” the rule promotes predictability and consistency in the application of the law, and in turn helps clear up the confusing body of case law that has emerged in the wake of the Supreme Court’s *Rapanos* decision. The Rule accomplishes this by reducing the need for case-by-case jurisdictional determinations and, where such determinations are needed, by clarifying the standards for conducting them. Each of the Proposed Intervenor States implements programs under the Act. Thus, the rule is of direct benefit to movants because it helps alleviate administrative burdens and inefficiencies in carrying out those programs. In addition, the rule would help the States in administering the federal dredge-and-fill program if they choose to do so. See 33 U.S.C. §1344 (allowing States to implement a permitting program for dredge and fill material).

“*Third*, the rule advances the Act’s goal of securing a strong federal “floor” for water pollution control, thereby protecting the economic interests of Proposed Intervenor States and other downstream states. The Rule allows movants to avoid having to impose costly, disproportionate, and economically harmful limits on in-state pollution sources to waters within their borders, in order to offset upstream discharges that would otherwise go unregulated if the upstream waters are deemed to fall outside the Act’s jurisdiction and are not otherwise regulated by upstream states. The Rule protects the economies of Proposed Intervenor States because it serves to “prevent the ‘Tragedy of the Commons’ that might result if jurisdictions can compete industry and development by providing more liberal limitations than their neighboring states.” *NRDC*, 568 F.2d at 1378 (quoting *Train*, 510 F.2d at 709).¹¹⁶

As noted previously, the state of play that preceded the Clean Water Rule (reflected in EPA/Army Corps guidance from 2008) has resulted in delays, confusion and uncertainty for applicants seeking permits along with increased workloads for Corps and EPA officials. Post-*Rapanos* uncertainty and added time and expense is undermining Clean Water Act enforcement and the overall effectiveness of the Clean Water Act in maintaining and restoring the nation’s waters.

A key attribute of the Clean Water Rule is its additional clarity, relieving federal and state agencies and landowners alike of the confusing and burdensome case-by-case jurisdictional determinations required under the guidance for plans to discharge pollutants into most wetlands and streams. Ironically, the Clean Water Rule litigation and the current stay of the final rule not only extend but actually contribute to confusion and delay by discouraging EPA and the Corps from providing field level training and workshops concerning the implementation of the rule.

It is the Clean Water Rule – not its repeal – that provides the necessary clarity and certainty to assist states in reducing pollution from upstream states, alleviate administrative burdens through increased clarity, and providing the minimum federal water quality standards necessary to protect the economic interests of the states. The agencies’ proposals to delay and to repeal the Clean Water Rule provide no evidence or reasoned explanation to the contrary. Delaying and/or rescinding the Clean Water Rule will only extend the confusion, delay, and inconsistencies in Clean Water Act

¹¹⁶ NY et al Motion to Intervene (6th Cir. August 28, 2015) (emphasis added).

jurisdictional determinations. The Clean Water Rule must logically and rationally remain in effect and form the basis for any further revisions to the definition of waters of the U.S.

F. The Clean Water Rule Fosters Strong Local Economies And Millions Of Jobs That Depend Upon Clean And Abundant Water And Healthy Wetlands And Waterways.

As outlined above and in the Clean Water Rule administrative record, EPA's 2015 economic analysis demonstrates that the Clean Water Rule to clarify and restore clean water protections is good for the economy. EPA estimated that the change in benefits of CWA programs exceeds the costs by a ratio of greater than 1:1. The economic analysis found that the rule will provide at least \$339 million and up to \$572 million annually in benefits to the public, including reducing flooding, filtering pollution, providing fish and wildlife habitat, supporting hunting and fishing, and recharging groundwater.¹¹⁷

Healthy wetlands and streams are economic engines for local recreation-based economies. The American Sportfishing Association reports that anglers generated more than \$201 billion in total economic activity in 2011, supporting more than 1.5 million jobs.¹¹⁸ The U.S. Fish and Wildlife Service estimated that duck hunting in 2006 had a positive economic impact of more than \$2.3 billion, supporting more than 27,000 private sector jobs.¹¹⁹

In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represent billions of dollars in commerce.¹²⁰ In the Colorado River Basin portion of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, 2.26 million people participated in water sports in 2011, spending \$1.7 billion that generated \$2.5 billion in total economic output.¹²¹

The kinds of waters for which the rule guarantees protection also help filter out pollution that fuels hazardous algae outbreaks. These algal "blooms" can cause health problems and inflict high economic costs. For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was \$2.2 billion. This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity. Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property

¹¹⁷ See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37101 (June 29, 2015); see also, detailed discussion of economic benefits of the Clean Water Rule, *supra* at 18-25.

¹¹⁸ American Sportfishing Association, *Sportfishing in America* (January 2013).

¹¹⁹ Economic Impact of Waterfowl Hunting in the United States, Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, November 2008. US Fish and Wildlife Service.

¹²⁰ Western Resource Advocates 2014 Rule Comments.

¹²¹ Southwick Assoc., Economic Contributions of Outdoor Recreation on the Colorado River and its Tributaries (May 3, 2012) (Table E-3), available at http://protectflows.com/wp-content/uploads/2013/09/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf.

owners would realize a benefit of between \$50 and \$100 million.

The record for the Clean Water Rule demonstrates that by any measure, clarifying and restoring clean water protections for America's waters is a good investment for healthy communities and a healthy economy. Lacking any sound rationale for stripping from the economic analysis the wetland benefits secured through the Clean Water Rule, the agencies must use the estimate from the 2015 analysis or conduct additional analyses, as suggested above. The agencies are proposing to delay and/or repeal a final rule that would add more than \$300 billion annually in wetland benefits and a net \$110 to \$185 billion annually in value considering all costs and benefits. Doing so makes the cost of the agencies' proposed actions too substantial to proceed.

G. The Clean Water Rule, Like The Clean Water Act, Enjoys Widespread, Bi-Partisan Support.

Poll after poll shows broad public support for clean water, the Clean Water Act, and the Clean Water Rule. In 2015, the bi-partisan team of Public Opinion Strategies and Greenberg Quinlan Rosner Research found that 83% of hunters and anglers supported using the Clean Water Act to protect small streams and wetlands.¹²² Due to the hunting and angling focus, the poll represented a conservative sample with 49% of the overall respondents identifying with the Tea Party. Duck hunters and anglers especially care about the health of waterways and wetlands, because they provide essential habitat for all species of ducks and freshwater fish. So it's not surprising that support for this policy was strong among sportsmen and women across the political spectrum with 77% of Republicans, 79% of Independents and 97% of Democrats in favor. Fully 89% said that the Clean Water Act has been "more of a good thing" for the country, with majorities of every single demographic sub-group echoing this sentiment. It comes as no surprise, then, that the Clean Water Rule enjoyed overwhelming public support through the extended rulemaking process.

It is worth remembering that in 2003, in the face of strong opposition, the Bush Administration's EPA was forced to withdraw an advanced notice of proposed rulemaking to potentially remove from Clean Water Act jurisdiction many non-navigable, intrastate wetlands, streams and other waters. That spring, 39 state agencies and hundreds of thousands of individuals and organizations submitted comments urging the EPA and the Corps not to reduce the historic scope of waters protected under the Clean Water Act. Later that year, over 200 members of Congress from both parties (including Rep. Paul Ryan among others) wrote a letter to President Bush urging him "not to pursue any policy or regulatory changes that would reduce the scope of waters protected under the Clean Water Act."

To ensure "robust deliberations" and rational rulemaking on the definition of waters of the U.S., the agencies must acknowledge the longstanding and broad support for clarifying and restoring Clean Water Act protections for wetlands, lakes, and streams.

¹²² Public Opinion Strategies and Greenberg Quinlan Rosner Research, National Survey of Hunters and Anglers – Key Findings (June/July 2015) available at <http://www.nwf.org/~media/PDFs/Water/2015/2015-Sportsmen-Poll/NWF-National-Survey-Hunters-Anglers-PP.pdf>.

The Clean Water Rule and its robust administrative record must remain in place and form the basis for any further revisions to the waters of the U.S. covered by the Clean Water Act.

Conclusion

Over the past few years we've seen toxic algal outbreaks in Lake Erie, which in 2014 poisoned the drinking water for more than 400,000 people in Toledo. We have experienced increasingly intense and damaging storms and floods that threaten communities upstream and down. In cities like Charleston, WV, we've seen the drinking water of more than 300,000 people contaminated with toxic chemicals spilled into the Elk River. As these crises come to light, we're reminded of just how important these bedrock Clean Water Act safeguards are for communities, fish and wildlife, and the outdoor recreation economy. Rule changes interpreting the scope of the Clean Water Act's safeguards must therefore not be taken lightly.

The agencies proposals to delay and/or repeal the Clean Water Rule and roll back Clean Water Act protections threatens the drinking water supplies of more than 117 million Americans and more than 20 million wetland acres remaining in the continental U.S. These remaining wetlands are increasingly important for filtering pollution from contaminated runoff, recharging groundwater supplies, and storing flood waters. An acre of wetlands can store upwards of a million gallons of flood water. Healthy wetlands and headwater streams provide the clean, cool flows and essential habitat for fish and wildlife populations that are essential for a thriving economy. Decades have shown that economic growth is not only compatible with, but benefits from, these protections.

Because the Clean Water Act and its programs are essential to cleaning up and protecting our nation's waters, the EPA and the Corps developed the Clean Water Rule over a period of several years, providing ample opportunities for stakeholders to evaluate the technical and legal basis for the rule and express their views.

The rulemaking process started in 2011, which itself followed many years of public debate about the proper scope of the Clean Water Act. A rulemaking on this issue was requested by numerous stakeholders on both sides of the issue. The agencies held open the comment period for more than 200 days, receiving more than 1.1 million comments, more than 80% of which were supportive of the rule. During that same time period, the rule was informed by an extensively peer-reviewed scientific report, including a peer review by the independent Science Advisory Board, during which the agency received more than 130,000 comments. During the comment period on the proposed rule, EPA met with more than 400 stakeholders. The agencies then developed a rule that relied on the public input, on a strong scientific record, and on the Supreme Court's direction about the kinds of waters the Clean Water Act protects.

Rather than solicit thoughtful, science-based, legally sound input on potential revisions to the 2015 Clean Water Rule, the summer rulemaking to rescind the 2015 Clean Water Rule ignored the robust record in support of the Clean Water Rule, and intentionally limited the opportunity for affected communities to express their views. Even so, some

680,000 citizens commented during the 60-day comment period, and the majority opposed the agencies repeal and replace proposal. The agencies openly disrespect this public support for the Clean Water Rule with their latest proposal to delay and derail implementation of the Rule, providing only 21 days to comment on a confusing and substantial regulatory action.

We strongly oppose these step zero, one, and two schemes to delay, derail, and/or repeal the 2015 Clean Water Rule, and to gut the protections that have prevented reckless pollution of the nation's waterways for decades. We urge the Administration to withdraw these proposals immediately. If the agencies decide to consider any potential revisions to the 2015 Clean Water Rule, they must engage in a thoughtful, inclusive, science-based, and legally sound process for doing so. And they should use the Clean Water Rule and its extensive administrative record as the starting point for those robust deliberations.

Respectfully Submitted,

Jan Goldman-Carter
Director, Wetlands and Water Resources
National Wildlife Federation

ATTACHMENTS:

NWF Comments on the Proposed Repeal of the Clean Water Rule (September 27, 2017), incorporating by reference its attachments:

- EPA SAB letter to Administrator 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"* (September 30, 2014) (SAB Rule Letter) at: [http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf)
- Amicus Curiae Brief of Dr. M. Siobhan Fennessy, Dr. Carol A. Johnston, Dr. Marinus L. Otte, Dr. Margaret Palmer, Dr. James E. Perry, Professor Charles Simenstad, Dr. Benjamin R. Tanner, Dr. Dan Tufford, Dr. R. Eugene Turner, Dr. Kirsten Work, Dr. Scott C. Yaich, and Dr. Joy B. Zedler in Support of Upholding the Clean Water Rule in *Murray Energy Corporation et al v. U.S EPA, et al* (6th Cir. January 20, 2017).
- Amicus Curiae Brief of the States in Support of Respondents in *Rapanos et al v. U.S.* (S.Ct. 2006).
- State Attorneys General Comment letter, Docket No. EPA-HQ-OW-2011-0880 (September 16, 2014).
- NY et al Motion to Intervene (6th Cir. August 28, 2015) (emphasis added).