



June 5, 2019

Thomas Armitage Ph.D.
Designated Federal Officer
EPA Science Advisory Board Office
USEPA Science Advisory Board (1400R)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Dr. Armitage:

Pursuant to our email exchange of June 3, this letter provides written comment on the Science Advisory Board's discussion of EPA's proposed re-definition of "waters of the United States." Thank you for the opportunity to submit these views and for sharing them with the SAB members.

NRDC appreciates the SAB's investigation into the scientific and technical basis for the proposed rule. Such an inquiry is critical, especially in light of EPA's wholesale failure to meaningfully consider the subject itself.

EPA's answers to the SAB Work Group's questions are disappointingly non-responsive and NRDC urges the SAB not to accept that stonewalling. Even if one accepts the agency's premise – which NRDC emphatically does not – that it has the ability to adopt a radically different definition than the agency historically has had, EPA must have a reasoned basis for its regulatory choice. The Work Group's dialogue with the agency, together with the record allegedly supporting the proposed rule, reveal that EPA either lacks or has failed to disclose critical scientific and technical information about the proposal. Specifically, the agency cannot say whether the definitional distinctions it proposes to draw make any rational sense in view of the scientific record, nor has it done any meaningful analysis of the impact the proposal would have on aquatic resources, or on the public health and safety and the environment, or on sectors of the economy dependent on clean water protections. Consequently, EPA is entirely unable to say why the proposal represents sound clean water policy, much less compare it to other potential options the agency might consider.

NRDC strongly encourages the SAB to explore this concern further. As our comment letter on the proposal (attached to this letter for the SAB's convenience) illustrates, EPA's "analysis" of the proposed rule is laughably short on actual analysis. Instead, the agency declares its inability to assess the impact of the rule at virtually every turn, starting with a complete failure to estimate what amount of the nation's streams, ponds, wetlands, and other waters will be excluded from Clean Water Act protection by the proposal. From that baseline of ignorance, EPA fails to quantify the pollution consequences of the proposal, despite acknowledging that such

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consequences are entirely predictable. And, without estimating the increased pollution its proposal will cause, EPA also fails to estimate the adverse consequences to the national economy due to diminished recreational opportunities, harms to businesses whose product relies on a clean water supply, worsened flood damages, increased drinking water treatment costs, and more. However, as our comments also stress, EPA has copious information and data sources at its disposal to at least make estimates of the actual impacts of the proposal, such that the agency and stakeholders can assess the reasonableness of various policy options.

If you have any questions about this submission, please contact me at jdevine@nrdc.org or 202-289-2361.

Sincerely,

Jon Devine
Senior Attorney & Director of Federal Water Policy
Nature Program
Natural Resources Defense Council



April 15, 2019

Michael McDavit
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Jennifer A. Moyer
Regulatory Community of Practice (CECW-CO-R)
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

Via regulations.gov

Re: Docket ID No. EPA-HQ-OW- 2018-0149

Dear Mr. McDavit and Ms. Moyer:

Enclosed please find a comment letter concerning the above-captioned proposed rulemaking, filed on behalf of the Natural Resources Defense Council, the Alliance for the Great Lakes, the Environmental Law & Policy Center, and the New Jersey Conservation Foundation.

If you have any questions about this submission, please contact me at jdevine@nrdc.org or 202-289-2361.

Sincerely,

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Nature Program
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I. The Proposed Rule

The agencies' proposal marks the consummation of a years-long crusade – first by polluting industries and now by the federal government – against the Clean Water Rule, adopted in 2015. That Rule clarified that numerous streams, wetlands, and other waters qualified for federal protection under a variety of pollution control and cleanup programs in the Clean Water Act. It was based on a robust and still uncontroverted scientific record that showed that water quality in navigable and interstate waters depends on the condition of tributary streams, floodplain wetlands and other waters, and many non-floodplain water bodies.

The proposed rule would make the following major changes to these existing regulations:

- Eliminate decades-old protections for interstate waters;
- Exclude rain-dependent streams from Clean Water Act protection (plus likely other streams);
- Exclude so-called “isolated” waters which current rules would protect when they significantly impact the condition of downstream waters;
- Exclude adjacent wetlands and ponds except a narrow set of ones with specified surface water connections to other covered waters; and
- Expand a pre-existing exclusion for “prior converted cropland” so that wetlands on land that has ceased to be used for agriculture can still qualify for the exclusion.

The proposal also invites comment on a host of other changes, some of which would represent a massive cut in federal protections on top of the already enormous reduction proposed. For instance, the proposal asks whether the agencies should exclude all non-perennial streams from the Clean Water Act's coverage.

At first glance, this proposal might appear to be a legitimate rulemaking. The proposed regulations are accompanied by a Federal Register notice arguing that the new rules are good policy; the record contains 100+ supporting documents, including lengthy materials purportedly analyzing the effects of the rule on aquatic resources, regulatory programs, and the economy; and the agencies cite provisions of the Clean Water Act and Supreme Court cases that they claim to honor in their new rules.

In truth, this proposal is a sham, apparently designed to mislead the public and reviewing courts. Close inspection reveals that it lacks any basis in the law or in the copious evidence supporting the rules that the agencies propose to replace. The “analysis” of the rule’s impacts is nothing of the sort and instead amounts to a labyrinthine discussion ultimately revealing that the agencies failed to do any meaningful evaluation. And, the rule represents terrible and confusing policy choices that would leave America’s water dirtier, its people more at risk, and its economy weaker. It must be rescinded.

II. Overview of Comments

The agencies propose to exclude from the Clean Water Act broad categories of water bodies long protected by the law. Doing so violates the law in numerous ways. First, it unlawfully limits federal safeguards by adopting an interpretation of the Clean Water Act inconsistent with the law’s text and Congressional intent and by ignoring the legal framework that Supreme Court precedent establishes as a core component of identifying protected waters. Second, the proposal runs counter to the evidence the agencies have about the operation of the various “waters of the United States” definitional approaches and about the importance of the aquatic features it would exclude, as conclusively established by an extensive scientific record. Third, the proposal entirely fails to consider critical elements of the problem, namely: the extent

of waters left unprotected by the proposed scheme; how much the weaker rules will limit the application of the Act’s pollution prevention, control, and cleanup programs; the degree to which curtailing these safeguards will worsen public health, flooding, and environmental conditions; and the consequent economic harms. Fourth, the proposal relies on a factor – wholesale speculation about what states might do in the absence of a federal program – that Congress did not intend to be considered. Finally, the agencies flouted basic procedural requirements in their haste to undo longstanding clean water safeguards.

III. Legal Standard

As relevant to this rulemaking, the Administrative Procedure Act requires courts to “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law.”¹

An agency rule is arbitrary and capricious if, among other things, “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²

¹ 5 U.S.C. §§ 706(2)(A), (C) & (D).

² *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983).

IV. The Proposed Rule’s Limitations on Protecting Tributaries and Adjacent Waters Are Inconsistent with the Statute and thus Violate the Clean Water Act and the APA.

The proposed rule implements the cramped interpretation of the phrase “waters of the United States” that originated with the *Rapanos* plurality opinion.³ The proposed rule eliminates for the first time the protection of ephemeral streams. The only published authority for such an approach is the *Rapanos* plurality opinion.⁴ The proposed rule also regulates only wetlands with a continuous surface connection, or that “abut,” other covered waters. This likewise is supported only by the *Rapanos* plurality opinion.⁵

The Agencies assert that the *Rapanos* plurality opinion and Justice Kennedy’s opinion have “substantial similarities.”⁶ That is false. There may be insignificant similarities, but there are plainly no “substantial” ones,⁷ and the opinions actually interpret two different statutory

³ The agencies also argue that because the Act contains non-regulatory and watershed programs, a narrow definition of “waters of the United States” that curtails the scope of the regulatory programs respects Congress’s design. *See* 84 Fed. Reg. at 4,169 (“Controlling all waters using the Act’s federal regulatory mechanisms would significantly reduce the need for the more holistic planning provisions of the Act and the state partnerships they entail.”). This notion does not comport with decades of case law and federal agency practice interpreting the Act and is manifestly wrong. At most, these programs’ use of the term “any waters” rather than “navigable waters” or “waters of the United States” indicates that the latter does not mean all areas where water accumulates, but that has always been true under the regulations, and is certainly true under the Clean Water Rule. Most obviously, for instance, groundwater is not considered a “water of the United States,” so to the extent that the occasional use of “any waters” or similar terms has any relationship to the term “waters of the United States,” the simplest explanation is that excluded features like groundwater make up the portion of all waters not covered by “waters of the United States.” Moreover, the agencies’ implication that a broad understanding of “waters of the United States” would make the regulatory programs all-encompassing is clearly incorrect in view of the numerous types of exempt discharges under the law (e.g., non-point discharges, agricultural stormwater, irrigation return flows, discharges associated with activities identified in section 404(f)).

⁴ *See Rapanos*, 547 U.S. at 739 (plurality opinion) (“waters of the United States” includes only “relatively permanent, standing or continuously flowing bodies of water”); *see also* 84 Fed. Reg. at 4174 (tributary definition is “consistent with the *Rapanos* plurality’s position”).

⁵ *See Rapanos*, 547 U.S. at 742 (only wetlands with a “continuous surface connection” to other waters of the United States are “adjacent” and covered by the Act); *see also* 84 Fed. Reg. at 4,185 (“The concepts of ‘abutting’ and a ‘direct hydrologic surface connection’ in this proposal are consistent with the *Rapanos* plurality’s continuous surface connection requirement.”).

⁶ 84 Fed. Reg. at 4,167.

⁷ *See In re: EPA*, No. 15-3751, Brief for Respondents, at 48 n.8 (6th Cir. Jan. 13, 2017) (noting broad commonalities but saying, “[b]eyond that, Business Petitioners are wrong that any common denominator of consequence exists between the plurality and concurring opinions.”) (included with NRDC April 5, 2019 submission of electronic files).

terms.⁸ The core holdings of each opinion are mutually inconsistent—as courts struggling to interpret the case have noted.⁹ Indeed, each opinions’ treatment of the other is evidence of this: Justice Scalia, writing for the plurality, wrote that “[o]nly by ignoring the text of the statute and by assuming that the phrase of *SWANCC* (‘significant nexus’) can properly be interpreted in isolation from that text does Justice Kennedy reach the conclusion he has arrived at.”¹⁰ And Justice Kennedy described the plurality opinion as “inconsistent with the Act’s text, structure, and purpose,” wrote that the plurality’s “permanent standing water or continuous flow” requirement made “little practical sense,” and found no support for the plurality’s “surface-connection requirement.”¹¹

The agencies nonetheless claim that the proposed rule “incorporates the important aspects of Justice Kennedy’s opinion.”¹² Again, that is untrue. The principal holding of Justice Kennedy’s opinion is that “the Corps’ jurisdiction . . . depends upon the existence of a significant nexus” between the water at issue and a traditional navigable water.¹³ The proposed rule completely jettisons this central requirement. The rule does not use a water’s significant nexus to downstream waters in determining whether it is a “water of the United States,” and makes no real attempt to assess whether it will lead to the exclusion of waters that do have such a

⁸ The plurality focuses on the term “waters,” whereas Justice Kennedy focuses on the term “navigable.” *Compare Rapanos*, 547 U.S. at 731 (plurality opinion) (“We need not decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over ‘waters.’”) *with id.* at 779 (Kennedy, J., concurring) (“Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term ‘navigable’ some meaning, the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”).

⁹ *See, e.g., United States v. Donovan*, 661 F.3d 174, 180 (3d Cir. 2011) (“the three opinions [in *Rapanos*] articulate three different views as to how courts should determine whether wetlands are subject to the [Clean Water Act]”); *United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009) (“there is little overlap between the plurality’s and Justice Kennedy’s opinions”).

¹⁰ 547 U.S. at 755.

¹¹ 547 U.S. at 776, 769 & 773-74.

¹² 84 Fed. Reg. at 4,175.

¹³ 547 U.S. at 779 (Kennedy, J.).

significant impact. And the Agencies' Science Report—which unequivocally finds that ephemeral streams and wetlands and other waters without “surface connections” do have a significant impact on downstream waters—makes clear that the proposed rule will do exactly that.¹⁴ The proposal thus does not incorporate “the important aspects” of Justice Kennedy's opinion. Elsewhere, the Agencies effectively concede that the *Rapanos* plurality opinion is the foundation for the proposed rule.¹⁵

The proposed rule's constrained interpretation of “waters of the United States” is inconsistent with the Clean Water Act. First, it was rejected by five members of the Supreme Court as an unreasonable interpretation of the Act. Justice Kennedy's concurring opinion found the plurality's opinion to be “inconsistent with the Act's text, structure, and purpose.”¹⁶ He went on to explain that “the plurality's opinion is not a correct reading of the [statutory] text,” because the limits it would impose—the same that are in the proposed rule—gave insufficient deference not only to the agency interpretation in that case but also to “Congress' purposes in enacting the Clean Water Act.”¹⁷ Four other Justices in dissent similarly found that the plurality imposed “two novel conditions on the exercise of the Corps' jurisdiction,”¹⁸ and specifically found that the requirement of relatively permanent standing water or a continuous surface connection were “arbitrary” lines.¹⁹

¹⁴ U.S. EPA, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, at pp. ES-1 to ES-15 (Jan. 2015) (hereinafter “Connectivity Report”)

¹⁵ *See, e.g.*, 84 Fed. Reg. at 4162 (noting President Trump's Executive Order directing the agencies to “consider interpreting the term ‘navigable waters’ . . . in a manner consistent with” Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).”).

¹⁶ 547 U.S. at 776.

¹⁷ 547 U.S. at 778.

¹⁸ 547 U.S. at 800.

¹⁹ 547 U.S. at 802, 804 (describing the surface-connection requirement as the “second statutory invention,” which is “as arbitrary as [the] first”)

As pointed out by these five Supreme Court Justices, the proposed rule’s limitations are unmoored from the statute and result from purely arbitrary line-drawing. The statute’s governing principle is to preserve water quality.²⁰ Because the statute uses the broad phrase “waters of the United States,” rather than spelling out all of the waters subsumed within that term, the Act’s purpose should be an important if not overriding consideration in defining the term. Yet the proposed rule largely ignores that purpose. Instead, it focuses on illegitimate and unsupported rationales—debunked below—to restrict the definition in a way that will impede the protection of water quality.

While the “significant nexus” test may not be strictly “mandatory” in defining “waters of the United States,”²¹ any definition must be consonant with the purposes of the Act. The significant nexus standard meets this test; the proposed rule does not.

The Agencies are not free to protect only a subset of what Congress has required them to protect.²² Because the proposed rule will protect only a subset of “waters of the United States” under the Clean Water Act, it is a violation of the Act and the APA.²³

V. The Proposed Rule Is Arbitrary and Capricious Because the Agencies’ Explanation for It Runs Counter to the Evidence Before Them.

The agencies’ explanation for why they want to adopt the proposed rule contradicts the record evidence they possess in two critical respects. First, they argue that the new definition is superior to the 2015 Clean Water Rule (as well as to the hodgepodge of agency regulations,

²⁰ See 33 U.S.C. § 1251(a).

²¹ See 84 Fed. Reg. at 4,177.

²² See *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (finding the Corps “without authority to amend or change the statutory definition of navigable waters,” and ordering the agency to adopt regulations “recognizing the full regulatory mandate” of the Act); *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (invalidating a rule on the basis that, under the Clean Water Act, EPA lacked discretion to exempt entire categories of point sources from certain permitting requirements); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230-32 (1994) (ruling that an agency’s loosening of tariff filing requirements was an unlawful failure to exercise authority and implement regulatory requirements integral to the governing statute).

²³ 5 U.S.C. § 706(2).

guidance, and policies the Clean Water Rule replaced), but the agencies do not substantively compare their new proposal to any alternative and available evidence indicates that the Clean Water Rule is substantially better. Second, they claim that their proposal respects the scientific record developed in support of the Clean Water Rule, but that is blatantly false, considering that the agencies propose to exclude from the Clean Water Act vast swaths of the nation's water resources that the science demonstrates to be vitally important to protect in order to fulfill the purpose of the Act.

A. The Agencies' Explanation for Preferring the Proposal to the Clean Water Rule Lack Evidentiary Support.

In explaining why they propose to replace the Clean Water Rule with this new scheme, the agencies say they are replacing it for several reasons, which ultimately collapse into two categories – explanations used to justify the supplemental repeal proposal and a new claim of increased clarity and ease of implementation. Echoing the supplemental repeal, the agencies say now that they “consider this proposal to adhere more closely than the 2015 Rule to the text of the CWA and its legislative history, to the scope of Congress’ authority in promulgating the CWA, to the guiding principles that the Supreme Court has articulated in *Riverside Bayview*, *SWANCC*, and *Rapanos* for interpreting the reach of the CWA...”²⁴ In addition, they claim that the new proposal “provides a straightforward definition that would be easier to implement than the 2015 Rule.”²⁵ Both of these explanations fly in the face of the evidence in this rulemaking.

First, the agencies offer no new arguments in support of their claim that the Clean Water Rule failed to honor the language and intent of the Clean Water Act and the Supreme Court's rulings on the law's scope. Rather, they state that they “propose to replace the 2015 Rule for the

²⁴ 84 Fed. Reg. at 4,196.

²⁵ *Id.*

reasons discussed in the Step 1 proposal and supplemental notice of proposed rulemaking (SNPRM).²⁶ Those reasons are no better today than they were when the agencies advanced them previously. As our comments on the supplemental repeal illustrate, the Clean Water Rule follows the direction of the courts in the aftermath of *Rapanos* by protecting those features that the science shows to be significant for downstream water quality. In turn, this approach is fully consistent with Congress’s intention to broadly protect waters in service of the Act’s objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁷ In addition, as we explained, there is nothing to support the supplemental repeal’s novel, but makeweight, suggestions that the Clean Water Rule ran afoul of an as-yet-unarticulated limitation in section 101(b) of the Act by protecting too many water resources. Specifically, we showed that the agencies were simply wrong to suggest that the Clean Water Rule greatly expanded the Act’s coverage for water bodies over pre-Rule conditions, much less in a way that Congress intended to prohibit by enacting the unremarkable language of section 101(b) recognizing states’ primary role in implementing the Act. Because the agencies are relying on their prior arguments for repealing the Clean Water Rule in support of the current rulemaking, we reiterate all of our comments on the proposed repeal and enclose them with this comment letter.²⁸

Second, the agencies add a new argument in the current proposal but it fares no better. They claim that the proposed rule’s definitions and categories of included and excluded waters will make it easier to understand and implement in day-to-day practice than the Clean Water Rule. Administrator Wheeler, in announcing the proposal, went even farther and said that the

²⁶ *Id.* at 4,195-96.

²⁷ 33 U.S.C. § 1251(a).

²⁸ Letter from Jon Devine, NRDC, to Docket EPA-HQ-OW-2017-0203 (Aug. 13, 2018) (included in Appendix A of these comments).

proposal was designed so that “property owners should be able to stand on their property and be able to tell whether or not they have water that is a federal water without having to hire outside professionals.”²⁹ However, the evidence before the agencies strongly contradicts this claim.

The agencies entirely fail to compare the clarity of the Clean Water Rule to their new proposal.³⁰ For example, the agencies do not examine whether it would be more difficult to identify tributaries as defined in the Clean Water Rule compared to tributaries as defined in the proposal, nor do they do so for other categories of waters. Rather, throughout the proposal, the agencies’ discussions of “clarity” amount to announcing that they “believe” or “intend” that certain provisions will provide clarity or requesting comment on whether certain choices will do so. Had the agencies wanted to assess whether the Clean Water Rule actually was unclear, they have a substantial factual record to consider, namely actual Army Corps’ jurisdictional determinations using that rule. Because the Clean Water Rule has been in force in numerous states since August 2018, and because it was used in the vast majority of states for approximately six weeks in 2015, there are more than 650 approved jurisdictional determinations posted on the Corps’ website;³¹ because individual determinations often evaluate multiple waters, these determinations likely address the status of a far greater number of waters. However, the agencies specifically refused to consider this highly relevant evidence of how the Clean Water Rule has been implemented in practice, saying:

²⁹ Letter from Jon Devine, NRDC, to Docket ID No. EPA–HQ–OW– 2018–0149 (Apr. 15, 2019) (submitting electronic copy of video available at <https://www.youtube.com/watch?v=3lXA1VH6mUw>).

³⁰ The proposal does claim that it would be clearer than the Clean Water Rule and says that the supplemental repeal proposal “described the widespread confusion regarding the reach of the 2015 Rule,” 84 Fed. Reg. at 4,197, but that is not remotely evidence of the rules’ respective clarity, because the supplemental repeal proposal does nothing more than report that opponents of the Clean Water Rule, in litigation, made hyperbolic statements about its potential impact. As we commented at the time, litigating positions are not facts, and as we discuss in these comments, the real-world implementation of the Rule (which the agencies have chosen to ignore) shows that it is providing clear answers in cases where jurisdiction is in question.

³¹ U.S. Army Corps of Eng’rs, ORM Jurisdictional Determinations and Permit Decisions, available at http://corpsmapu.usace.army.mil/cm_apex/f?p=340:11:0::NO:::

The relatively small number of AJDs made under the 2015 Rule before it was stayed by the courts or in states where the stay was recently lifted is not a representative sample when compared to the large numbers of AJDs documented in ORM2 under pre-2015 practice.... The agencies were also concerned about using AJD information reflecting the categories of waters that the agencies would have found jurisdictional or non-jurisdictional under the 2015 Rule because a disproportionate number of the AJDs finalized under the 2015 Rule involve exclusions and non-significant nexus determination categories.³²

This is a complete non-sequitur. That there are many more records in the Corps' system using the pre-Clean Water Rule regime says nothing about whether the records concerning the Clean Water Rule are representative of *that rule's* actual implementation, and the fact that the determinations using the Clean Water Rule are largely categorical (*i.e.*, not case-by-case significant nexus assessments) just means that the Rule functions as intended and provides clear direction in most cases. Indeed, NRDC and the National Wildlife Federation examined hundreds of these determinations and found that the Corps had no problem implementing the Rule, likely due to its significantly improved clarity. Our analysis of these determinations is included with these comments.³³

The agencies' explanation based on the proposal's alleged clarity primarily fails because the proposal is thoroughly unclear. Multiple key provisions and definitions are completely opaque and will inevitably confuse Clean Water Act professionals, to say nothing of the average landowner for whom Administrator Wheeler claimed the proposal was designed.

First, the proposed definition of "intermittent" introduces substantial confusion. The proposed regulatory language says it means "flowing continuously during certain times of a typical year,"³⁴ but several components of that phrase are vague. For instance, does

³² U.S. EPA & U.S. Army Corps of Eng'rs, Economic Analysis for the Proposed Revised Definition of "Waters of the United States," at 8-9 (Dec. 14, 2018) (hereinafter "2018 Economic Analysis").

³³ Letter from Jon Devine, NRDC & Jan Goldman-Carter, NWF, to Docket EPA-HQ-OW-2017-0203 (Dec. 19, 2018) (included in Appendix A of these comments). Notably, the analysis also contradicts the agencies' suggestion in the supplemental repeal proposal – and, by extension, this proposal – that the Clean Water Rule extended protections to many waters previously unprotected.

³⁴ 84 Fed. Reg. at 4,204 (proposed 33 C.F.R. § 328.3(c)(5)).

“continuously” require 24-hour-a-day flow and can it include subsurface flow over any distance? The agencies do not say. Likewise, what are “certain times”? The agencies state that “[t]he phrase ‘certain times of a typical year’ is intended to include extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year,” but resist further identifying a specific duration of flow because “the agencies believe the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions.”³⁵ This attempted clarification only makes the definition more confusing; stating that it includes “extended” periods while saying that the proper period “can vary widely” leaves one wondering how to even begin to identify the relevant period, and the fact that the phrase “extended periods” also appears in the definition of “snowpack” renders this definition entirely unclear.³⁶

In addition, when the definition of “intermittent” is compared to the definition of “ephemeral,” which the agencies propose to define as “surface water flowing or pooling only in direct response to precipitation,” it becomes evident that the agencies propose to – or will inadvertently – create an added category of streams; those that flow more often than in response to precipitation, but less often than the agencies’ incomprehensible notion of what duration of flow is sufficient to deem a stream “intermittent.” Because the proposal has a catch-all exemption which denies protection to any feature not specifically identified as covered,³⁷ this more-than-ephemeral but not-quite-intermittent category of streams will also be abandoned. Perhaps it was this haziness in the proposal, or the fact that the agencies have encouraged

³⁵ 84 Fed. Reg. at 4,173.

³⁶ Perhaps recognizing that this definition is so uncertain, the agencies throw the question open to commenters to resolve for them, but the potential alternatives are similarly confusing (changing from “certain times” to “seasonal”), all but impossible to implement (identifying times of the year when a stream is groundwater-fed, which the agencies say “may be challenging to accomplish in the field, ... time consuming, and could require new tools and training of field staff”), or irrational (set duration, which ignores regional variability). *See* 84 Fed. Reg. at 4,178.

³⁷ 84 Fed. Reg. at 4,204 (proposed 33 C.F.R. § 328.3(b)(1)).

commenters to ask for intermittent streams to be excluded as well as ephemeral ones and may intend to pursue that radical outcome in a final rule,³⁸ or his own lack of understanding of what the government was doing, that led former Interior Secretary Zinke to remark – at the EPA-hosted event trumpeting this proposal – that the “Constitution never anticipated the federal government would be making decisions on intermittent streams, ponds, and ditches.”³⁹

Second, the agencies’ definition of “tributary” is also extremely confusing. The agencies say it means a “naturally occurring surface water channel but do not explain how one is to determine a feature’s “natural” origin, and also indicates that a tributary can have significant human alteration. Specifically, the “alteration or relocation of a tributary does not modify its status,” nor does flow “through a culvert, dam, or other similar artificial break.”⁴⁰ Can a feature be engineered along the entirety of its run, confined in underground tunnels for portions, and be considered “naturally occurring” in the agencies’ new terminology? Likewise, if a feature flows in a surface channel, without apparent alteration, but the source of its flow is discharge from an upland point source, such as a stormwater system or wastewater treatment plant, is that “naturally occurring”? In addition, because the definition says it requires a “surface water channel,” and does not seem to include natural passage through underground channels for part of a stream’s length, the proposal leaves uncertain the status of streams, such as those occurring in karst topography, that flow underground, even though such features have long been protected.⁴¹

³⁸ 84 Fed. Reg. at 4,177 (“The agencies also solicit comment on whether the definition of “tributary” should be limited to perennial waters only.”).

³⁹ <https://www.youtube.com/watch?v=3lXA1VH6mUw>.

⁴⁰ 84 Fed. Reg. at 4,204 (proposed 33 C.F.R. § 328.3(c)(11)).

⁴¹ See, e.g., U.S. EPA, *Batie Creek Restoration Helps to Protect Unique Karst Habitats* (Sept. 2007) (describing water quality improvements in tributary to the Powell River in Virginia that has underground flow) (included in Appendix A of these comments).

By contrast, existing law – that is, the Clean Water Rule – expressly makes clear that a tributary does not lose its status if, among other things, it flows underground for part of its reach.⁴²

Third, although a “typical year” is a linchpin concept in the proposal, it is vague, could depend on data that may be hard to obtain, raises numerous implementation concerns, and is fundamentally irrational in the face of climate change. The new regulation would rely on the “typical year” in the provision allowing limited protection of lakes and ponds,⁴³ the provision defining which wetlands count as “adjacent” and are thus entitled to protection,⁴⁴ the definitions of “intermittent” and “perennial,” which are the only tributary categories the agencies intend to protect,⁴⁵ and in the definition of “tributary.”⁴⁶ Despite this central function in the rule, the agencies’ definition of “typical year” is entirely incomprehensible; the proposal would define it to mean “within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.”⁴⁷ As proposed, however, the agencies do not provide any required methodology, much less a clear one, by which “the normal range of precipitation” or “a particular geographic area” will be identified. Moreover, the various methodologies the agencies identify as possibly being relevant raise more questions than answers:

- The agencies say that they “presently use observed rainfall amount and compare it to tables developed by the Corps using data from the National Oceanic and Atmospheric Administration (NOAA). The agencies consider a year to be ‘typical’ when the observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average generated at NOAA weather stations.”⁴⁸ The

⁴² 33 C.F.R. 328.3(c)(3).

⁴³ 84 Fed. Reg. at 4,203 (proposed 33 C.F.R. § 328.3(a)(4)).

⁴⁴ 84 Fed. Reg. at 4,204 (proposed 33 C.F.R. § 328.3(c)(1)).

⁴⁵ 84 Fed. Reg. at 4,204 (proposed 33 C.F.R. §§ 328.3(c)(5) & (7)).

⁴⁶ 84 Fed. Reg. at 4,204 (proposed 33 C.F.R. § 328.3(c)(11)).

⁴⁷ 84 Fed. Reg. at 4,204 (proposed 33 C.F.R. § 328.3(c)(12)).

⁴⁸ 84 Fed. Reg. at 4,177.

agencies provide no information by which to access the Corps’ tables, no explanation why only the 30th to 70th percentiles would be considered (given that the value appears already to represent a 30-year average), how one would assess a year’s typicality by considering only the previous three months when the nine months previous to that could be much different, and what they mean when they say these data would be gathered “on a watershed-scale basis....”

- The agencies also suggest using the Water-Budget Interactive Modeling Program (WebWIMP).⁴⁹ That program requires a user to input the latitude and longitude of a location and provides an output like the table below.⁵⁰ The agencies, however, offer no information about how these outputs would be used. How close to these values would a year, or a month, or some other period, need to be in order to be “typical”? If a given year has roughly the same annual precipitation as the average, but contains wildly-fluctuating months of dry and wet periods that are far outside the average, is that year “typical”?

Information Needed by *WebWIMP*
Project: None

Longitude (λ) and latitude (ϕ):

The λ and ϕ coordinates for your point, as well as its elevation, are:
 Longitude: Latitude: Elevation: 80 m
 Note: you may revise λ and ϕ , if you wish.
 If you wish to change the values, revise the values within the boxes above and then click here

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann
Air Temperature (°C)	0.9	2.3	6.7	12.6	17.7	22.4	25.1	24.1	20.3	13.9	8.1	2.8	13.1
Precipitation (mm)	74.3	72.3	91.1	74.7	95.5	82.7	92.2	93.2	88.0	77.7	79.1	81.5	1002.3

⁴⁹ 84 Fed. Reg. at 4,177.

⁵⁰ The latitude and longitude values input were for NRDC’s Washington, DC, office; however, we question this program’s locational accuracy because, when the author of these comments input the latitude and longitude of his home address, the program provided no results and reported that the location was on a large water body, which it decidedly is not.

- Another alternative approach the agencies suggest involves “WETS tables (or similar tools) which are provided by the NRCS National Water and Climate Center....”⁵¹ The hyperlink in the proposal takes one to a site that says: “This product is no longer supported.”⁵² If one follows a link that appears on that site, it brings up a page providing three methods for accessing climate data.⁵³ However, none of these options seems to provide particularly relevant information, at least for the location (Arlington, Virginia) we attempted to examine. Method 1 takes one to a hard-to-navigate page titled “Field Office Technical Guide,” from which – after some trial and error to find a rainfall report – provides a link to the Virginia State Climatology Office. That Office’s page has a number of links, including one for “General Climate,” but that page provides only a monthly average precipitation figure for the years 1895-1998 (in other words, missing 20 of the 30 years that the agencies’ “typical year” definition would require. The other two methods are no more helpful, as they require a county code to be entered and do not appear to have comprehensive coverage for all locations and over all the relevant time periods, at least based on the output result below.

⁵¹ 84 Fed. Reg. at 4,177.

⁵² <https://www.wcc.nrcs.usda.gov/climate/wetlands.html>

⁵³ https://www.wcc.nrcs.usda.gov/climate/navigate_wets.html

AgACIS for Arlington County

AgACIS

WETS Station: ARLINGTON 0.3 E, VA (CoCoRaHS)
Requested years: 1971 - 2000

Month	Temperature (°F)			Precipitation (inches)				
	Avg daily max	Avg daily min	Avg daily mean	Avg	30% chance will have		Avg number of days with 0.10 inch or more	Average total snowfall
					less than	more than		
Jan	-	-	-	-	-	-	-	-
Feb	-	-	-	-	-	-	-	-
Mar	-	-	-	-	-	-	-	-
Apr	-	-	-	-	-	-	-	-
May	-	-	-	-	-	-	-	-
Jun	-	-	-	-	-	-	-	-
Jul	-	-	-	-	-	-	-	-
Aug	-	-	-	-	-	-	-	-
Sep	-	-	-	-	-	-	-	-
Oct	-	-	-	-	-	-	-	-
Nov	-	-	-	-	-	-	-	-
Dec	-	-	-	-	-	-	-	-
Annual:								
Average	-	-	-	-	-	-	-	-
Total	-	-	-	-	-	-	-	-

Error: Station has insufficient data for this product

- The agencies finally suggest that “drought indices, such as the Palmer Drought Severity Index (PDSI) (Sprecher and Warne 2000), where timeseries plots of PDSI values by month or year are available from the National Climatic Data Center (<http://www.ncdc.noaa.gov/oa/climate/onlineprod/drought/xmgr.html#ds>)” could be used to identify a typical year. However, the link in the agencies’ proposal returns an error screen.⁵⁴

In addition to all of these questions, one is left to wonder what to do with the “typical year” information. If a water body is being assessed in a “typical year,” how often must its flow be examined in order to ascertain if it is connected at least intermittently to other waters? If a water body is being assessed in a non-“typical year,” what are water quality officials and other stakeholders to do – wait until the next “typical year”? What should one do if these different tools provide different answers as to whether a given year is “typical”? Because the agencies

⁵⁴ We were able to find some information about the PDSI online, which indicated it is an estimate of “relative dryness,” but how such information would be used to identify a typical year was in no way evident.

would use a rolling average approach for assessing a “typical year,” would a water body’s protection under the Clean Water Act be subject to change on a monthly basis (perhaps during the evaluation of a request for a jurisdictional determination) and, if so, how would it be possible to achieve the agencies’ expressed interest in “a regulatory framework that would authorize interested States, Tribes, and Federal agencies to develop for the agencies’ approval geospatial datasets representing ‘waters of the United States,’ as well as waters excluded from the definition and ‘waters of the State’ or ‘waters of the Tribe’ within their respective borders”?⁵⁵

Perhaps worst of all, the agencies proposal ignores the effects of climate change in assessing whether a year is “typical.” As the National Climate Assessment observes, what has been typical in the past will not reflect what the future holds:

Significant changes in water quantity and quality are evident across the country. These changes, which are expected to persist, present an ongoing risk to coupled human and natural systems and related ecosystem services. Variable precipitation and rising temperature are intensifying droughts, increasing heavy downpours, and reducing snowpack. Reduced snow-to-rain ratios are leading to significant differences between the timing of water supply and demand. Groundwater depletion is exacerbating drought risk. Surface water quality is declining as water temperature increases and more frequent high-intensity rainfall events mobilize pollutants such as sediments and nutrients.⁵⁶

Because of these changes, a backward-looking approach to identifying “typical” conditions will irrationally misrepresent reality.

Despite claiming – without any evidence – that “it is a commonly understood term in field application,”⁵⁷ the agencies’ concept of a “typical year” is wholly uncertain and more importantly lacks relevance to the future conditions in the real world to which this proposal

⁵⁵ 84 Fed. Reg. at 4,198.

⁵⁶ U.S. Global Change Research Program, Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States, Chapter 3: Water (2018), available at <https://nca2018.globalchange.gov/chapter/3/> (included in Appendix A of these comments).

⁵⁷ 84 Fed. Reg. at 4,178.

would apply. Because the proposal relies so comprehensively on this factor, the entire proposed framework for regulation is irrational.

In total, the agencies' proposal is confused and confusing, which entirely negates the agencies' claim that the rule will promote clarity.⁵⁸ In fact, the agencies essentially concede that their claim of clarity and ease of implementation has no record support, as they admit that they "are unable to predict if the workload associated with issuing approved jurisdictional determinations (JDs) would increase or decrease as a result of a change in the definition of 'waters of the United States.'"⁵⁹ Remarkably, the agencies make this concession when comparing their proposal to the notoriously unclear pre-2015 regime, not the Clean Water Rule; if they cannot even say with confidence that their proposal would lead to increased predictability and less need for as much work on jurisdictional determinations than the hodgepodge of rules, policies, and informal practices that preceded the far clearer Clean Water Rule, the evidence contradicts their puffery about clarity.

An analysis of the relative clarity of the protected-tributary definition as between the Clean Water Rule and this proposal – an analysis the agencies have conspicuously declined to perform – reveals that the former is much clearer and easier for an individual landowner. A landowner is in a much better position to evaluate, for instance, whether a potential tributary has a bed and banks and ordinary high water mark—which are physical determinations that can be made by examining one's property— than whether the potential tributary is "naturally occurring" (an unexplained phrase); flows at least "intermittently" (which is subject to a complicated, opaque definition that may require consultation of multiple conflicting databases) in a "typical

⁵⁸ Other ways in which the proposal creates vagueness concerning different categories of waters is discussed in section VIII, below.

⁵⁹ 2018 Economic Analysis at 99.

year” (similarly confusing) through certain other features that themselves should contribute less than “intermittent” flow downstream (which potentially requires the landowner to know the flow regime of every stream reach between her property and the downstream navigable water). The notion that the latter inquiry will be clearer and easier for individual landowners to implement is preposterous, utterly belying that “clarity” is the true rationale for this new definition. The only rationale consistent with this new definition is a simple desire to slash Clean Water Act protections, And that, by itself, is plainly insufficient justification under the Clean Water Act and the APA.

B. The Agencies’ Explanation of the Proposal’s Use of Science Contradicts the Evidence.

Although the agencies claim that their “proposed definition is ... informed by the science,”⁶⁰ the record belies that argument. In particular, the agencies claim that the exclusion of ephemeral streams “would appropriately limit federal jurisdiction to those rivers and streams that due to their relatively permanent flow regime and contribution of flow to navigable waters are ‘significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.’”⁶¹ Similarly, they argue that “[w]etlands that do not abut or have a direct hydrologic surface connection to other waters of the United States in a typical year are not inseparably bound up with the waters of the United States and are more appropriately regulated as land and water resources of the States and Tribes pursuant to their own authorities.”⁶² Neither of these claims has support. The scientific record is unambiguous: ephemeral streams *are* “significant enough” that adjacent wetlands are likely to perform important functions downstream, and non-surface-connected or abutting

⁶⁰ 84 Fed. Reg. at 4,175.

⁶¹ 84 Fed. Reg. at 4,186.

⁶² 84 Fed. Reg. at 4,187.

wetlands *are* “inseparably bound up,” in many cases, with downstream waters because such wetlands significantly influence such waters chemically, physically, or biologically.

However, by excluding ephemeral streams (plus, as discussed above, possibly additional streams), numerous floodplain waters, and all so-called “isolated” waters, the agencies ignore the clear import of the unrebutted scientific record, which is reflected in the “Connectivity Report” finalized in 2015. That report finds:

- The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.
- The literature clearly shows that wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter.
- Wetlands and open waters in non-floodplain landscape settings ... provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and ground-water flows and through biological and chemical connections.⁶³

Together, these findings represent the government’s conclusion that all kinds of streams and floodplain waters significantly impact the physical, chemical, and biological condition of downstream waters and that non-floodplain waters often can be as well.

Perhaps because the agencies never rescinded these findings or questioned their basis, the agencies try now to imply that their proposal can be squared with the Connectivity Report. They

⁶³ Connectivity Report at pp. ES-2 to ES-3.

argue that the Science Advisory Board’s review of the draft report indicates that ephemeral flows are less important than intermittent or perennial ones. In particular, they cite one passage – a “conceptual model” lifted without context from the SAB review – to support their conclusion now that “the SAB found perennial and intermittent streams have a greater probability to impact downstream waters compared to ephemeral streams.”⁶⁴ However, the implication that the agencies have formulated these rules based in any way on the degree to which upstream waters influence downstream waters’ condition is clearly untrue; the rules draw distinctions based on the regularity of flow, not the importance of the connections between waterways. Thus, ephemeral rivers with enormous but sporadic flows in response to rain (to say nothing of other important functions) are excluded no matter how impactful that flow is to downstream waters, but intermittent and perennial creeks, no matter how miniscule their flow contribution to downstream waters might be, are included.⁶⁵

Moreover, the notion that the proposal reflects the science of connectivity, the SAB’s review, or the specific argument the agencies make concerning ephemeral streams, is false, according to scientists intimately familiar with that report. Thirteen members of the Science Advisory Board panel that reviewed the Connectivity Report submitted comments on the current proposal, and state:

- The 2015 CWR is based on an established science of waterbody connectivity supported by the Connectivity Report and buttressed by recent literature. The proposed Rule is not based on sound science, nor does it provide any comparable body of peer-reviewed science to support the proposed changes.

⁶⁴ 84 Fed. Reg. at 4,176; *see also id.* at 4186 (agencies’ claim that the tributary definition rests on a “reasonable inference of ecological interconnection”).

⁶⁵ This observation is not a justification for the agencies to go further in their radical rewrite and exclude additional waters, which would be even *less* justified by the record. Rather, it speaks to the arbitrariness of the agencies’ new distinctions, and to the reasonability of the Clean Water Rule’s focus on tributaries that, as a class, have a significant impact on waters downstream.

- The proposed Rule rests on physical, hydrologic connectivity, and ignores chemical and biological connectivity, which is in direct contrast with the intent of the CWA to protect chemical, physical, *and* biological integrity.
- The proposed Rule misinterprets recommendations made by the SAB, and fails to recognize that even low levels of connectivity can be important relative to impacts on the chemical, physical, and biological integrity of downstream waters.
- The proposed Rule’s grounding in structural connectivity is weak and its treatment of functional connectivity is non-existent.
- The proposed Rule ignores groundwater connectivity and fails to account for broad watershed processes and the cumulative, aggregate effects of waterbodies.⁶⁶

These scientists also address the proposal’s use of an isolated element of the SAB review – the “conceptual model.” They say that “the proposed Rule misrepresents the conceptual model and arrives at an erroneous conclusion not supported by the science, and opposite the intent of the SAB.” That is so because upstream waters can significantly impact downstream ones by virtue of their relative hydrologic separation and because features that might be individually less connected to downstream waters “are often extremely abundant and widespread,” and thus cumulatively highly connected.⁶⁷

The SAB review itself directly rebuts the agencies’ attempt to suggest the science supports a conclusion that ephemeral streams are less important, largely because of the aggregate effects of those streams. It states: “Important cumulative effects are exemplified by ephemeral flows in arid landscapes, low-frequency events that may nevertheless provide most of the subsidies to downgradient waters.”⁶⁸ Similarly, the review notes that seasonal precipitation after low-frequency rainfall events is “no less important to the integrity of the downgradient waters,

⁶⁶ Letter from S. Mažeika P. Sullivan et. al, to Docket ID No. EPA-HQ-OW-2018-0149, at 2-3 (Apr. 5, 2019).

⁶⁷ *Id.* at 3.

⁶⁸ Letter from Dr. David T. Allen & Dr. Amanda D. Rodewald, to EPA 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*, at 22 (hereinafter “SAB Review”).

even though their frequency and duration may be negligible in comparison,” and that “even ephemeral and intermittent streams and short duration surface water connections in source water areas may have substantial effects on the chemical and biological integrity of downstream waters.”⁶⁹

The Connectivity Report reinforces these important conclusions. It says: “For example, the amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters.”⁷⁰ Likewise, the Report notes, “[a]lthough less abundant, the evidence for connectivity and downstream effects of ephemeral streams was strong and compelling, particularly in context with the large body of evidence supporting the physical connectivity and cumulative effects of channelized flows that form and maintain stream networks.”⁷¹

In addition, the agencies contradict the scientific evidence in claiming that their exclusion of non-abutting wetlands or those not having a continuous surface connection is “informed by” science. The agencies cite the SAB review of the Connectivity Report and the Report itself as describing how connections between wetlands and flowing water become “less obvious” as the distance between them increases, and that wetlands “closer” to flowing water are more likely to be connected.⁷² However, these citations do not remotely support the proposed rule’s definition of “adjacency.” The proposal does not protect wetlands “close in distance” to flowing water – it protects only wetlands that literally “abut” a protected water or have a continuous surface

⁶⁹ SAB Review at 23 & 34.

⁷⁰ Connectivity Report at ES-5.

⁷¹ Connectivity Report at ES-7.

⁷² 84 Fed. Reg. at 4187.

connection to it. Neither of these considerations is mentioned by the SAB or the Connectivity Report as being relevant to the degree of connection. Moreover, the sections of the SAB report and Connectivity Report cited in the proposed rule relate to non-floodplain wetlands.⁷³ The SAB noted that for non-floodplain wetlands, distance is relevant to the degree of connectivity. But the proposed rule will likely exclude most if not all non-floodplain wetlands entirely—so the gradient of connectivity among them is irrelevant to the proposed rule, and certainly does nothing to support it. And, even as to non-floodplain wetlands, the scientific record contradicts the idea that they can be ignored; for instance, the SAB pointed out that “[w]etlands that are not contained within river floodplains or stream riparian zones and that lack a permanent surface water connection may still be connected to downstream waters through groundwater flowpaths and through the exchange of organisms. These water bodies can become connected to downstream waters during floods or as a result of rising water tables.”⁷⁴ Likewise, the Connectivity Report contradicts the reasonableness of the current proposed rule in multiple ways. As noted above, it confirms that non-floodplain wetlands “provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species.”⁷⁵ Yet the proposed rule will likely exclude most such waters from protection. The Science Report nowhere supports the idea that the most significant factor in determining connectivity is whether the wetland “abuts” the water or has a “surface connection” to it.

⁷³ Connectivity Report ES-3 to 4; SAB Review at 55, 60.

⁷⁴ SAB Review at 55.

⁷⁵ Connectivity Report at ES-3.

Finally, seven scientific organizations, representing a “collective 200,000+ members and 130+ professional societies and research organizations,” wrote to President Trump almost immediately after he signed the Executive Order on which this proposal is based, urging its repeal. The Society of Wetland Scientists, the American Fisheries Society, the American Institute of Biological Sciences, the Ecological Society of America, the Phycological Society of America, the Society for Ecological Restoration, and the Society for Freshwater Science confirmed the importance of the streams, wetlands, and other waters that the Clean Water Rule protects, many of which would be excluded from protection under the current proposal.⁷⁶

VI. The Proposed Rule Is Arbitrary and Capricious Because It Fails to Consider Critical Elements of the Problem – Water Quality and the Actual Consequences of the Rule.

Perhaps the most astonishing part of the proposal is that it seeks to make national water pollution policy yet ignores water quality and fails to evaluate, in any real sense, the impacts it will have on various kinds of aquatic resources, on the application of numerous Clean Water Act programs to those resources, on public health and the environment resulting from undoing the Act’s protections, and on the economy. It is hard to imagine an agency knowing less (or professing to know less) about such a dramatic alteration of nationwide policies that have been in place for decades. Wanting to reach a given result is not itself a reasonable basis for pursuing it, yet when the patently unsubstantiated rationales (e.g., “clarity” are stripped away, the agencies offer little more than their desire to adopt certain restrictions on the protections of the Clean Water Act in support of the proposal.

⁷⁶ Letter from Gillian T. Davies, President, Society of Wetland Scientists, et. al, to President Trump (Mar. 1, 2017) (included in Appendix A of these comments).

A. The Agencies Ignored Water Quality In Developing the Proposal.

By their own admission, the agencies ignore what ought to be the centerpiece of the issue, namely whether the proposal would advance the Act’s water quality objective. Section 101(a) of the Act declares, “[t]he objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷⁷ Despite this Congressional directive, the proposal contains absolutely no discussion of how water quality will be advanced – or even just maintained – by this proposal. To the contrary, the agencies’ rulemaking goal is ambivalent about water quality; it states: “In developing this proposed rule, the agencies have re-evaluated their legal authority and those policies that they deem most important in shaping the jurisdiction of the CWA: Prioritizing the text of the statute, adherence to constitutional limitations, including the autonomy of States, and providing clarity for the regulated community.”⁷⁸ As discussed elsewhere in these comments, the proposal will not even advance the goals the agencies “deem most important,” but failing to consider water quality outcomes in the context of a Clean Water Act rulemaking is the height of unreasonableness.

B. The Agencies Ignored Predictable Impacts of the Proposed Rule.

The proposal does not meaningfully evaluate any of the consequences of the change in policy. As discussed in detail below, the agencies have tried to paper over – literally – their refusal to consider the proposal’s impacts by drafting a pair of documents that discuss the potential resource, programmatic, and economic impacts of the proposal at length but that declare their inability to accurately assess those impacts at virtually every turn.⁷⁹ Without this

⁷⁷ See 33 U.S.C. § 1251(a).

⁷⁸ 84 Fed. Reg. at 4,169.

⁷⁹ Ironically, though the agencies give up on numerous occasions when they say the available information is uncertain, they adopt a brand-new, wholly speculative approach to discounting the economic impacts of the rule, which is based on their supposition about states’ reaction to the loss of federal protection, and about which the agencies admit: “[q]uantifying the frequency in which the scenarios [of different state responses to a reduction in

kind of basic analysis, the agencies' decision is fundamentally irrational. It is as though a person decided to jump out of an airplane after discarding previously-tested parachutes in favor of a new one, while admitting total ignorance about when or whether the new parachute would even open.

1. The Agencies Ignore Predictable Impacts on Aquatic Resources.

The agencies refuse to attempt to quantify or otherwise understand the impacts of the proposal by first arguing that the national datasets of stream and wetland resources do not precisely match the categories of protected and unprotected waters they wish to adopt. The agencies fault these datasets, the National Hydrography Dataset and the National Wetlands Inventory, as “neither designed nor able to portray jurisdictional waters under the CWA,” and say that they are unaware of “any means to quantify changes in CWA jurisdiction with any precision that may or may not occur as a result of this proposed rule.”⁸⁰ Similarly, they claim, “the agencies’ ability to make quantitative estimates of potential changes in CWA jurisdiction under the proposed rule relative to either baseline is severely limited by available data.”⁸¹

Additionally, the agencies refuse to attempt to quantify or otherwise understand the resource impacts of the proposal by arguing that their records of implementing the Clean Water Act under the pre-Clean Water Rule regime and under the Clean Water Rule are insufficiently precise and not representative, respectively. Because the agencies describe the potential effects of the proposal in two steps – first eliminating the Clean Water Rule, then replacing the pre-2015 approach with this proposal – the agencies could examine how their new proposal would apply to specific water bodies that they had previously assessed under those other frameworks. In the

coverage] take place, not to mention the magnitude of any resulting costs and benefits, is extremely difficult.” 2018 Economic Analysis at 30.

⁸⁰ 84 Fed. Reg. at 4,200.

⁸¹ U.S. EPA & U.S. Army Corps of Eng’rs, Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States,” at 52 (Dec. 11, 2018) (hereinafter “2018 RPA”).

present context, however, the agencies repeatedly do not use pre-2015 decisions in the Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database to assess the proposal because the way that ORM2 categorizes water bodies does not “directly correlate with the terms used in the proposed rule, with limited exceptions.”⁸² As discussed above, the agencies likewise do not compare the proposal to determinations made using the Clean Water Rule, arguing:

The agencies are not using data from ORM2 for approved jurisdictional determinations (AJDs) that were made under the 2015 Rule for this analysis. The relatively small number of AJDs made under the 2015 Rule before it was stayed by the courts or in states where the stay was recently lifted is not a representative sample when compared to the large numbers of AJDs documented in ORM2 under pre-2015 practice, which the agencies continued to implement nationwide from October 2015 to August 2018 and currently continue to implement in certain states during the various judicial stays of the 2015 Rule. The agencies were also concerned about using AJD information reflecting the categories of waters that the agencies would have found jurisdictional or non-jurisdictional under the 2015 Rule because a disproportionate number of the AJDs finalized under the 2015 Rule involve exclusions and non-significant nexus determination categories.⁸³

⁸² 84 Fed. Reg. at 4,200. One example of the agencies' professed attempt—but ultimate abandonment without good reason—of the use of this database is in the context of assessing adjacent wetlands. The agencies note that 45% of wetlands adjacent to TNWs were not “abutting” and at least 10% of those do not have certain kinds of surface connections. 2018 Economic Analysis at 17-18. But instead of drawing the reasonable conclusion that 10% of 45% is around 5%, such that of waters adjacent to TNWs, around 40% (45% minus another 5%) would be excluded, the agencies say that because they don't have information about whether *more* than 10% have *other* kinds of surface connections, they simply skip the analysis. This is unreasonable. Similarly, the agencies could do a rough, conservative estimate for wetlands adjacent to relatively permanent waters that will lose protection, even if they cannot pinpoint exactly which waters would be uncovered. They say there were approximately 15,000 wetlands analyzed as adjacent to RPW in ORM2, with only 11,000 directly abutting; without further information about “surface connections,” one could conservatively estimate that the remaining 4,000 – about 27% -- would lose protection. Finally, the agencies say that 92% of wetlands adjacent to *non*-RPWs were found jurisdictional under the pre-2015 rule. If one layers onto that the rough estimate of ephemeral streams from the NHD, as noted above (18%), you could say that of those 1,800 AJDs at least 18% would have been near ephemeral streams and thus newly excluded under the proposal. The total numbers, using these estimates, would be this: pre-2015 wetlands found protected would be 5,261 plus 11,203 plus 3,834 plus 1,681 = 21,979. Of those, the wetlands conservatively knocked out by proposed rule would be 2,104 plus 3,834 plus 324 = 6,262. Because 6,262 is 29% of 21,979, the proposal could cause roughly 30% of wetlands to lose protection, according to just these examples pulled from the ORM2 database (and ONLY as compared to the pre-2015 rule, not even the more protective 2015 rule). This number is obviously imperfect, but it is better than no estimate at all, and the fact that the agencies refuse to draw these rough conclusions from the data they have shows the lengths to which they are going to obscure the facts.

⁸³ 2018 Economic Analysis at 8-9.

The agencies' refusal to consider well-established and high-quality national databases as tools to assess the resource impact of the proposal is unreasonable. Although the limitations of the national datasets might prevent the NHD and NWI from being used as conclusive regulatory tools to implement the rule, they could enable a high-level assessment of the proposal. For instance, the NHD could be used to describe a range of impacts on stream resources. The NHD's mapping of ephemeral streams could be used as a lower bound of the streams affected, given that "many ephemeral streams are not mapped, those that are mapped are primarily mapped in NHD at high resolution," and that "even in the high-resolution dataset, many ephemeral streams are included in the 'intermittent' category, particularly those outside of the arid West."⁸⁴ As an upper bound on potential stream impacts, the agencies could use those streams identified as non-perennial (both because many ephemeral streams are labeled intermittent and because the agencies invite comment on excluding non-perennial streams). Similarly, the NWI could be used to identify wetlands more likely to meet the regulatory definition and that intersect different types of streams in a set of representative locations.

The agencies acknowledge that they initiated such an analysis, but "prior to finalizing the exploratory analysis, the agencies determined that there were too many confounders introduced at each step of the analysis such that the analytical results were inconclusive for purposes of indicating potential changes in federal jurisdiction."⁸⁵ When the results of that analysis were made public by the press, however, they were highly informative, if politically inconvenient for an administration hellbent on rolling back the Clean Water Act. In response to a Freedom of Information Act request, EPA produced to E&E News a slideshow describing the NHD and NWI

⁸⁴ 2018 RPA at 22.

⁸⁵ 2018 RPA at 24.

(including their limitations), but also summarizing the results overlaying those two datasets.⁸⁶

The slideshow indicated that 18 percent of mapped NHD streams are ephemeral and that approximately 51 percent of the wetland acreage in the NWI does not intersect with a NWI stream feature, meaning they could be considered non-adjacent.⁸⁷ The agencies must make this and any other analysis they conducted available in the docket, and must evaluate how such analysis can be used to provide information about the proposal.⁸⁸

A specific example helps illustrate how these datasets could be used to meaningfully inform the public about the potential consequences of the agencies' proposal. NRDC used these datasets to map the Lower Salt watershed near Phoenix, Arizona. Although the maps do not precisely reveal the water body-by-water body jurisdictional consequences of different regulatory regimes, they reveal the range of outcomes that one might expect to result from a final rule based on the agencies' proposal. Our maps depict four sets of parameters. Slide 1 shows all waters mapped in the watershed; slide 2 removes so-called "isolated" waters (ones that do not intersect any stream feature); slide 3 removes ephemeral streams and waters they intersect; and slide 4 removes intermittent streams and waters they intersect. Consequently, as one scrolls through the slides, one can see the scope of the waters that would be made vulnerable to pollution if the agencies adopted the proposal's plans to exclude wetlands and ponds except under a very restrictive notion of adjacency, ephemeral streams, and potentially intermittent

⁸⁶ Ariel Wittenberg & Kevin Bogardus, EPA falsely claims 'no data' on waters in WOTUS rule, Greenwire (Dec. 11, 2018) (publishing EPA slideshow), available at <https://www.eenews.net/stories/1060109323>.

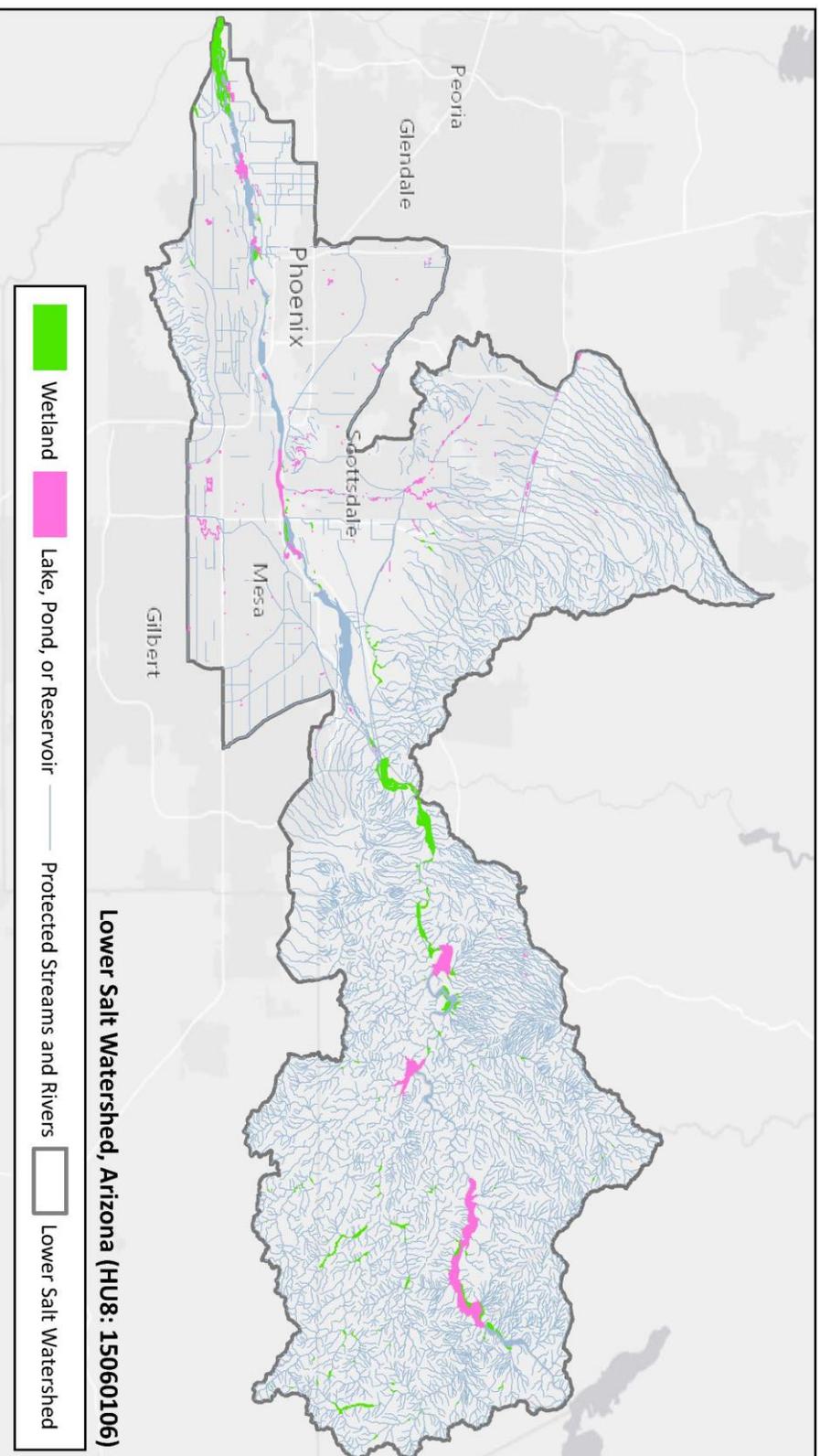
⁸⁷ Email from Stacy Jensen, U.S. Army Corps of Eng'rs, to John Goodin, EPA (Sept. 5, 2017) (attaching slideshow) (included in Appendix A of these comments).

⁸⁸ See, e.g., *Fund for Animals v. Williams*, 391 F.Supp.2d 191, 196-97 (D.D.C. 2005) ("To ensure that the administrative record contains 'neither more nor less' information than was before the agency, courts in this circuit have directed agencies to collect those materials 'that were compiled by the agency that were before the agency at the time the decision was made.' More specifically, the record must include all documents that the agency 'directly or indirectly considered.'" (citations omitted)).

streams. The agencies could perform a similar analysis for other watersheds nationwide in order to provide a useful guidepost to the public about the proposal's on-the-ground impacts.

Lower Salt Watershed, Arizona: All Wetlands and Waterbodies

There are a total of 5,934.1 km of streams and rivers in the Lower Salt Watershed.
5% (315.9 km) of the total streams and rivers are intermittent streams.
79% (4,698.2 km) of the total streams and rivers are ephemeral streams.
16% (920 km) of the total streams and rivers are perennial or uncatagorized.



Service Layer Credits: Esri, HERE, Garmin, © OpenStreetMap contributors, and the GIS user community

Created by Susan Lee on 2/25/2019

Lower Salt Watershed, Arizona:

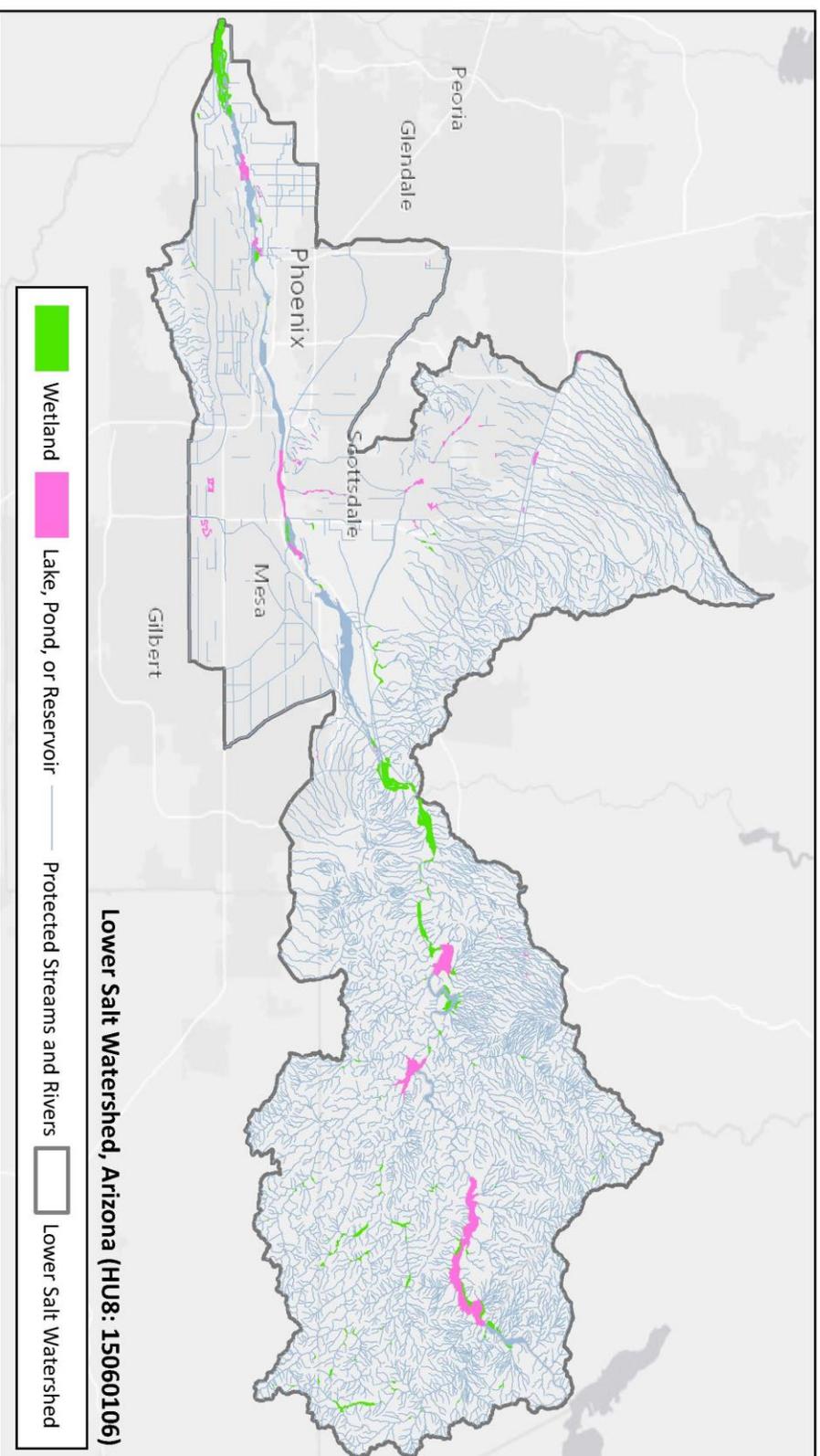
88.5% of Lakes, Ponds, and Reservoirs and 94.9% Wetlands Remaining

There are a total of 4,722 acres of lakes, ponds, and reservoirs and a total of 3,049.4 acres of wetlands in the watershed.

88.5% (4,180.94 acres) of lakes, ponds, and reservoirs and

94.9% (2,892.91 acres) of wetlands intersect with at least one stream of any kind.

This map shows the watersheds with non-intersecting waters removed.



Service Layer Credits: Esri, HERE, Garmin, © OpenStreetMap contributors, and the GIS user community

Created by Susan Lee on 2/25/2019

Lower Salt Watershed, Arizona:

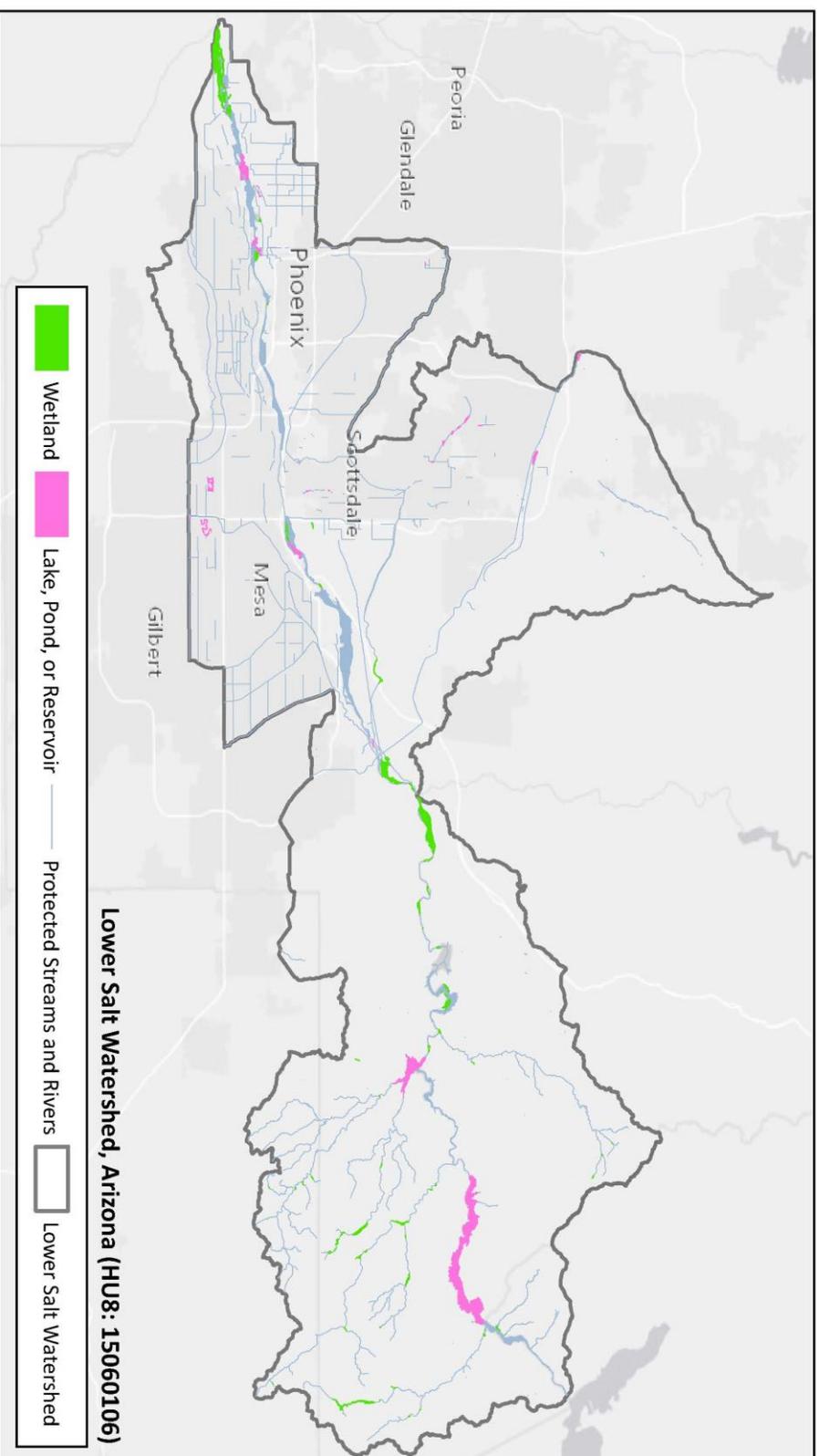
65.7% of Lakes, Ponds, and Reservoirs and 61.5% Wetlands Remaining

There are a total of 4,722 acres of lakes, ponds, and reservoirs and a total of 3,049.4 acres of wetlands in the watershed.

65.7% (3,104.34 acres) of lakes, ponds, and reservoirs and

61.5% (1,874.78 acres) of wetlands intersect with at least one stream that is not ephemeral.

This map shows the watershed with ephemeral streams and waters only intersecting with ephemeral streams removed.



Service Layer Credits: Esri, HERE, Garmin, © OpenStreetMap contributors, and the GIS user community

Created by Susan Lee on 2/25/2019

Lower Salt Watershed, Arizona:

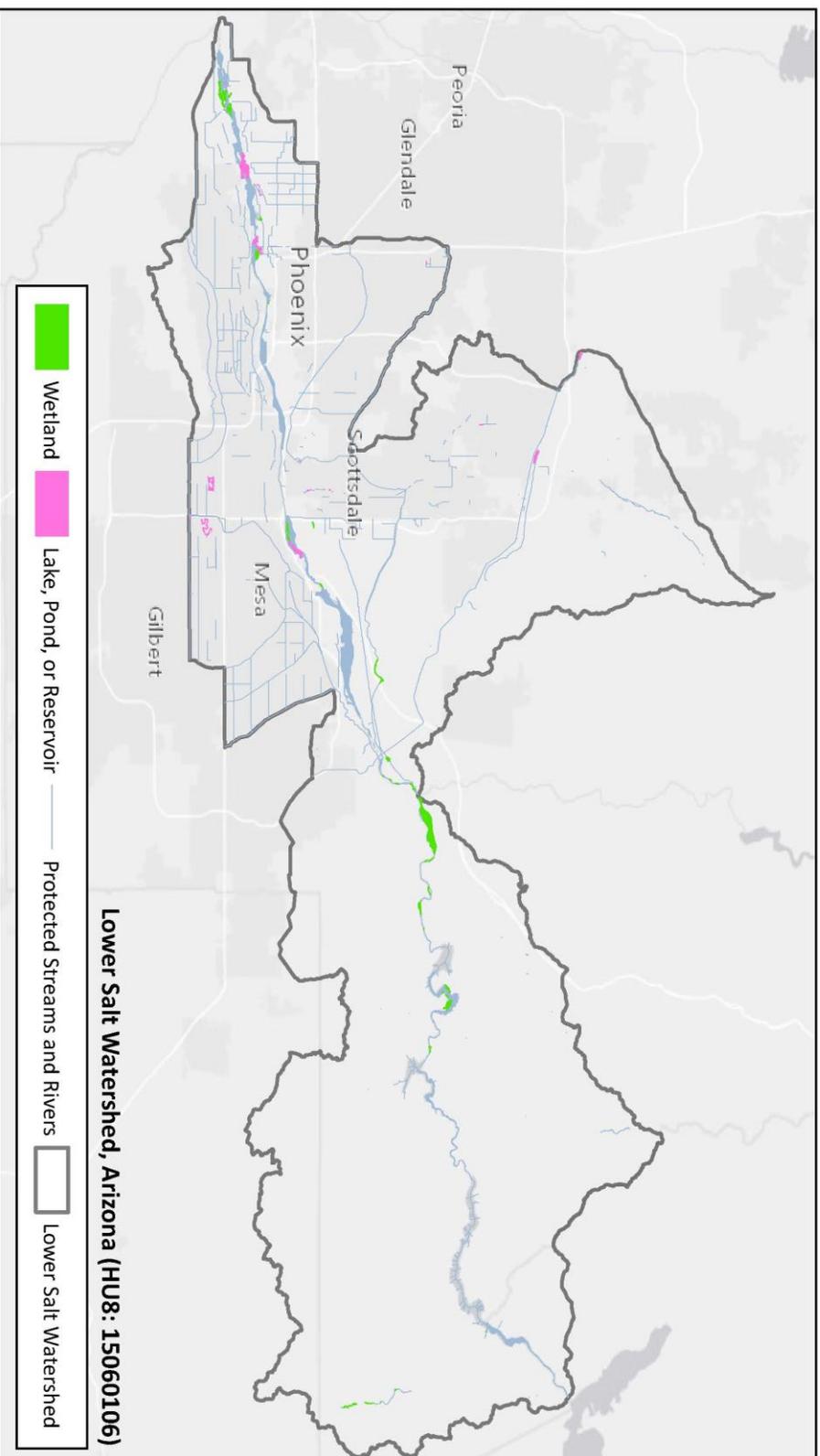
11.3% of Lakes, Ponds, and Reservoirs and 30.1% Wetlands Remaining

There are a total of 4,722 acres of lakes, ponds, and reservoirs, and a total of 3,049.4 acres of wetlands in the watershed.

11.3% (532.79 acres) of lakes, ponds, and reservoirs and

30.1% (919.09 acres) of wetlands intersect with at least one stream that is not ephemeral or intermittent.

This map shows the watershed with intermittent streams and waters that intersect with them removed.



Service Layer Credits: Esri, HERE, Garmin, © OpenStreetMap contributors, and the GIS user community

Created by Susan Lee on 2/25/2019

The agencies' refusal to use these datasets is particularly unreasonable in view of their prior experience in using them as tools to gauge the impacts of certain policy decisions at a large scale. For example, EPA examined available information on public drinking water systems' source water protection areas and overlaid the NHD stream information to estimate the number of people served by drinking water systems – at a state and county level – whose supply was drawn from headwater, intermittent, and ephemeral streams.⁸⁹ Similarly, in 2007, EPA developed an analysis linking the NHD to National Pollutant Discharge Elimination System permit information, which enabled the agency to estimate the number and type of permitted sources that discharged to start reaches and intermittent/ephemeral streams.⁹⁰ In the same vein, independent spatial analysis experts have used these datasets to not only quantify the potential impact on aquatic resources, but also to evaluate how such changes could affect ecologic functioning.⁹¹

The agencies' failure to consider their own decisions concerning particular water bodies is likewise unreasonable. Notably, in analyzing the impact of the Clean Water Rule, the agencies assessed its impact by examining how its provisions would apply to jurisdictional determinations made under the pre-Rule regime.⁹² They should be able to do the same by applying their staff's expertise to evaluate the new proposal as compared to prior determinations. Likewise, the agencies' refusal to consider determinations made using the Clean Water Rule because there are many more determinations made using the pre-2015 regime and because the Clean Water Rule

⁸⁹ U.S. EPA, Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral and Headwater Streams in the U.S. (July 2009) (plus state and county tables) (included in Appendix A of these comments).

⁹⁰ Letter from Linda Boornazian, EPA, to Joan Mulhern, Earthjustice (May 18, 2007) (plus attachments) (included in Appendix A of these comments).

⁹¹ Roger Meyer & Andrew Robertson, GeoSpatial Services, Saint Mary's University of Minnesota, Clean Water Rule Spatial Analysis: A GIS-based scenario model for comparative analysis of the potential spatial extent of jurisdictional and non-jurisdictional wetlands (Jan. 16, 2019) (included in Appendix A of these comments).

⁹² See 80 Fed. Reg. 37,054, 37,101 (June 29, 2015) (summarizing comparative analysis).

determinations did not include many significant nexus-based decisions makes no sense. These records represent the only information on how the Clean Water Rule works in practice and thus what it protects and does not. To the extent that many of these records include exclusions and non-significant nexus determinations, that just shows that the Clean Water Rule leads to more clear and categorical decisions thanks to the bright lines it contains.

The agencies' refusal to engage in a meaningful national resource assessment is also unreasonable given other tools available to them. For instance, through the National Aquatic Resource Surveys initiative that EPA has pursued for many years, it has significant experience in using probability surveys to make nationwide extrapolations of the condition of aquatic resources based on randomly-sampled sites.⁹³

The agencies' failure to consider available information that would enable them to assess the resource effects of their proposal infects their "analysis" of numerous specific categories of aquatic features. For virtually every category of waters, the agencies declare their ignorance as to how their proposal may cause impacts. Many of these statements describing the agencies' knowledge gaps are included below.

Interstate waters

- The agencies speculate that this will not cause major impacts, but admit they have no idea. They say they "anticipate that most waters ... would likely remain jurisdictional under this proposal as they would likely fall within the proposed traditional navigable waters category or one of the other proposed categories, such as tributaries or lakes and ponds." But then the agencies concede they "are not aware of any database that identifies the jurisdictional status of interstate waters based solely on the fact that they cross state lines or any other resource that would identify these waters and therefore lack the analytical ability to perform a comparative analysis with precision."⁹⁴
- "The agencies are unable to quantify the potential change in jurisdiction under the proposed rule relative to the 2015 Rule or pre-2015 practice with respect to interstate

⁹³ U.S. EPA, National Aquatic Resource Surveys, available at <https://www.epa.gov/national-aquatic-resource-surveys>.

⁹⁴ 84 Fed. Reg. at 4,171.

waters, because interstate waters are not identified as a distinct category in publicly available data sets or ORM2.”⁹⁵

- “The Corps added ‘interstate waters’ as a category that could be documented for AJDs conducted under the 2015 Rule, but the agencies have not analyzed the 2015 Rule AJDs for the reasons previously discussed. In addition, because the *Rapanos* AJD form does not indicate whether a water is jurisdictional because it is an ‘interstate water,’ the agencies are unable to quantify the potential change in jurisdiction under the proposed rule relative to the pre-2015 baseline with respect to interstate waters.”⁹⁶

Impoundments

- “[T]he agencies have not analyzed AJDs for the 2015 Rule and are unable to quantify the potential change in jurisdiction of impoundments as compared to the 2015 Rule baseline.”⁹⁷
- “ORM2 data are not available for impoundments of interstate waters that might not be jurisdictional under the proposed rule, or for impoundments of tributaries of such interstate waters and wetlands adjacent to such waters. Thus, the agencies cannot quantify the potential change in jurisdiction of impoundments as compared to pre-2015 practice based on ORM2 data.”⁹⁸
- “[T]he agencies have not analyzed AJDs for the 2015 Rule and are unable to quantify the potential change in jurisdiction of impoundments as compared to the 2015 Rule baseline.”⁹⁹
- “ORM2 data are not available for impoundments of interstate waters that might not be jurisdictional under the proposed rule, or for impoundments of tributaries of such interstate waters and wetlands adjacent to such waters. Thus, the agencies cannot quantify at this time the potential change in jurisdiction of impoundments as compared to pre-2015 practice based on ORM2 data.”¹⁰⁰

Tributaries

- “The agencies are unable to quantify what the change in jurisdiction for tributaries would be as compared to the 2015 Rule or pre-2015 practice on a national scale due to the lack of information on the extent of ephemeral streams and the fact that ephemeral streams are not categorically jurisdictional under pre-2015 practice.”¹⁰¹

⁹⁵ 2018 Economic Analysis at 10.

⁹⁶ RPA at 36.

⁹⁷ 2018 Economic Analysis at 10.

⁹⁸ 2018 Economic Analysis at 11.

⁹⁹ RPA at 37.

¹⁰⁰ RPA at 38.

¹⁰¹ 2018 Economic Analysis at 12 (footnote omitted).

- “The agencies are also unable to quantify how many perennial or intermittent streams have ephemeral reaches that would render such waters non-jurisdictional under the proposed rule.”¹⁰²
- “Although the agencies are unable to quantify what the change in jurisdiction for tributaries would be as compared to the 2015 Rule or pre-2015 practice on a national scale due to the lack of information on the extent of ephemeral streams and the fact that ephemeral streams are not categorically jurisdictional under pre-2015 practice, the agencies expect that in portions of the country where ephemeral streams are more prevalent (e.g., the arid West), the change might be greater relative to other parts of the country. The agencies are also unable to quantify how many perennial or intermittent streams have ephemeral reaches that would render such waters non-jurisdictional under the proposed rule.”¹⁰³
- “[T]he NHD cannot be relied upon to represent jurisdictional waters. It does not map many ephemeral streams outside of the arid West. In addition, RPWs and non-RPWs cannot be neatly split into the categories of perennial, intermittent, and ephemeral flow regime that the NHD uses, and the proposed rule’s definition of intermittent and ephemeral do not align with the NHD’s definition of those terms. Thus, it is not possible to use the NHD to describe the potential change in CWA jurisdiction from both the 2015 Rule and from pre-2015 practice.”¹⁰⁴

Ditches

- “The agencies are unable to estimate the potential change in jurisdiction for ditches using either the ORM2 data or the NHD and NWI data. As previously discussed, the agencies have not analyzed ORM2 data for the 2015 Rule AJDs. ORM2 does not track ditches separately as a category for jurisdiction, so the data cannot be used to determine which ditches the agencies have found to be jurisdictional under pre-2015 practice that would not be jurisdictional under the proposed rule.”¹⁰⁵
- “[T]here may be some non-RPW intermittent ditches that ... would be jurisdictional under the proposal but are not jurisdictional under pre-2015 practice because they do not have a case specific significant nexus. However, the agencies are unable to quantify this potential change.”¹⁰⁶
- “[U]nder the proposed rule, no ephemeral ditches would be jurisdictional, which is a change from both baselines. The agencies are not able to quantify these differences, however, for reasons already discussed.”¹⁰⁷

¹⁰² 2018 Economic Analysis at 12.

¹⁰³ RPA at 39 (footnote omitted).

¹⁰⁴ RPA at 40.

¹⁰⁵ 2018 Economic Analysis at 14.

¹⁰⁶ RPA at 41.

¹⁰⁷ RPA at 41.

- “The agencies are unable to estimate the potential change in jurisdiction for ditches using either the ORM2 data or the NHD and NWI data. As previously discussed, the agencies have not analyzed ORM2 data for the 2015 Rule AJDs. ORM2 does not track ditches separately as a category for jurisdiction, so the data cannot be used to determine which ditches the agencies have found to be jurisdictional under pre-2015 practice that would not be jurisdictional under the proposed rule.”¹⁰⁸

Lakes & Ponds

- Econ analysis at 15: “[T]he agencies assume that there may be a change in jurisdiction between pre-2015 practice and the proposed rule for such non-seasonal intermittent lakes and ponds that are tributaries, but this change cannot be quantified. In addition, certain lakes and ponds would be jurisdictional under the pre-2015 practice (e.g., where they are RPWs or have a significant nexus) that would not be jurisdictional under the proposed rule if such waters do not convey perennial or intermittent flow to a TNW in a typical year.”¹⁰⁹
- “[T]he proposed rule would include fewer lakes and ponds as jurisdictional than the 2015 Rule, but this change cannot be quantified.”¹¹⁰
- “[T]he agencies assume that there may be a change in jurisdiction between pre-2015 practice and the proposed rule for such non-seasonal intermittent lakes and ponds that are tributaries, but this change cannot be quantified.”¹¹¹
- “Thus, the agencies are not able to estimate the percentage of non-relatively permanent lake and pond tributaries which are deemed jurisdictional under pre-2015 practice.”
- “The agencies are also unable to quantify how many lakes and ponds are connected to TNWs through ephemeral reaches that would render those lakes and ponds non-jurisdictional under the proposed rule.”¹¹²
- RPA at 43: “[T]he agencies are unable to use NHD or NWI to estimate the potential change in CWA jurisdiction for lakes and ponds under the proposed rule, as compared to either baseline.”¹¹³

Adjacent wetlands

- “[T]he proposed rule would include fewer wetlands as ‘waters of the United States’ than the 2015 Rule. The agencies are unable to quantify the proposed rule’s reduction in

¹⁰⁸ RPA at 42.

¹⁰⁹ 2018 Economic Analysis at 15.

¹¹⁰ RPA at 42.

¹¹¹ RPA at 43.

¹¹² RPA at 43.

¹¹³ RPA at 43.

jurisdiction of adjacent wetlands compared to the 2015 Rule.”¹¹⁴

- “Because the proposed rule would include as adjacent wetlands only those non-abutting wetlands that have a direct hydrologic surface connection, fewer wetlands adjacent to TNWs would be considered jurisdictional as compared to both baselines. The agencies are unable to quantify this change.”¹¹⁵
- “As compared to the proposed rule, wetlands [near relatively permanent waters] would not be jurisdictional unless they have a direct hydrologic surface connection to the jurisdictional water in a typical year. The agencies have no additional information about the extent of such wetlands, but anticipate that many such wetlands would lack such a connection. Thus, compared to both baselines, fewer wetlands would be jurisdictional under the proposed rule for this category of wetlands where they do not abut the RPW and lack a direct hydrologic surface connection to the RPW in a typical year.”¹¹⁶
- “[T]he proposed rule would include fewer wetlands as ‘waters of the United States’ than the 2015 Rule. The agencies are unable to quantify the proposed rule’s reduction in jurisdiction of adjacent wetlands compared to the 2015 Rule.”¹¹⁷
- “Because the proposed rule would include as adjacent wetlands only those non-abutting wetlands that have a direct hydrologic surface connection, fewer wetlands adjacent to TNWs would be considered jurisdictional as compared to both baselines. The agencies are unable to quantify this change.”¹¹⁸
- States, without quantification, “compared to both baselines, fewer wetlands would be jurisdictional under the proposed rule for this category of wetlands where they do not abut the RPW and lack a direct hydrologic surface connection to the RPW in a typical year.”¹¹⁹
- For wetlands adjacent to non-relatively permanent waters, “[t]he agencies are not able to further parse out which of these non-RPWs were intermittent or ephemeral or to parse out which adjacent wetlands are abutting. Thus, the agencies are unable to quantify what the change in jurisdiction would be for this category of wetlands as compared to the proposed rule.”¹²⁰

“Isolated” waters

- “As compared to pre-2015 practice, the agencies do not anticipate that there will be a change in jurisdiction for nonnavigable, isolated, intrastate waters. There may be a

¹¹⁴ 2018 Economic Analysis at 16.

¹¹⁵ 2018 Economic Analysis at 17.

¹¹⁶ 2018 Economic Analysis at 18.

¹¹⁷ RPA at 44.

¹¹⁸ RPA at 46.

¹¹⁹ RPA at 46.

¹²⁰ RPA at 46.

change as compared to the 2015 Rule baseline, but the agencies are not able to quantify that change and have not analyzed data from ORM2 for AJDs conducting using the 2015 Rule.”¹²¹

- For these “isolated” wetlands, the agencies also claim not to know what coverage exists at the state level; “at least 20 states have programs to cover all or some ‘isolated’ wetlands. The agencies do not have sufficient information at this time to conclude that only those 20 states cover some or all ‘isolated’ wetlands.”¹²²
- “There may be a change as compared to the 2015 Rule baseline, but the agencies are not able to quantify that change and have not analyzed data from ORM2 for AJDs conducting using the 2015 Rule. These features are not mapped in NHD/NWI as their own category. The agencies have not attempted to assess them further.”¹²³

Exemptions

The agencies similarly lack information about the extent to which their changes to longstanding exclusions will impact water resources. In general, they admit they “are unable to query ORM2 to determine how many waters have been determined to meet an exclusion from the definition of ‘waters of the United States’ under pre-2015 practice.”¹²⁴ Moreover, although “[a]fter the 2015 Rule was finalized, the ORM2 database was updated to track when waters were determined not to be “waters of the United States” due to the exclusions under the 2015 Rule, but the agencies have not analyzed the 2015 Rule AJDs for the reasons previously stated.”¹²⁵ And the agencies repeat their claims as to the NHD and NWI, saying they “are unable to use the NHD or the NWI to estimate the extent of excluded waters under pre-2015 practice, the 2015 Rule, or the proposed rule...”¹²⁶

- With respect to ephemeral features, “the exclusion for all ephemeral features represents a change from both pre-2015 practice and the 2015 Rule. *** The agencies are unable to estimate the change in jurisdiction from either baseline due to this portion of the

¹²¹ 2018 Economic Analysis at 19.

¹²² 2018 Economic Analysis at 34.

¹²³ RPA at 47.

¹²⁴ RPA at 48.

¹²⁵ RPA at 48.

¹²⁶ RPA at 48.

exclusion in the proposed rule.”¹²⁷

- For prior converted cropland, “the agencies do not document in ORM2 when waters meet the prior converted cropland exclusion under pre-2015 practice, so no agency data exist to provide estimates on the current extent of prior converted cropland.” This means the agencies have no baseline against which to assess the impact of their new abandonment provision, discussed below. They acknowledge that because “fewer wetlands would likely be jurisdictional under the proposed rule compared to both baselines, it is therefore likely that there would be fewer wetlands that would now be considered ‘abandoned’ and also subject to the CWA under the proposed rule,” but do not estimate how much.¹²⁸ Similarly, “[t]he agencies anticipate that there could potentially be a change from both baselines for the exclusion for prior converted cropland but are unable to quantify what that potential change could be.”¹²⁹
- With respect to stormwater control features, the agencies acknowledge that the proposed exclusion is more expansive than 2015 Rule, as it includes infiltration features, and there was no similar exclusion prior to 2015, but then say, “[t]he agencies are unable to quantify the magnitude, if any, of such a change.”¹³⁰
- For artificial water storage reservoirs, the agencies say they “are not specifically excluded in the 2015 Rule and are not specifically listed as a category of water that is generally not jurisdictional in the 1986 preamble. Therefore, there could be waters excluded under the proposed rule that would not be excluded under either baseline. The agencies are unable to quantify that change.”¹³¹

In combination, the litany of unknowns that the agencies acknowledge about the impact of their proposal on aquatic resources is overwhelming. Unless the agencies intentionally misled the public or failed to disclose significant factual information, no reasonable observer could conclude that the agencies have any idea what their proposal would accomplish. Barreling forward in the face of this crushing ignorance – with no textual support from the statute and without even any statutorily-relevant policy rationales – is arbitrary and capricious.

¹²⁷ RPA at 48.

¹²⁸ 2018 Economic Analysis at 21.

¹²⁹ RPA at 48.

¹³⁰ RPA at 51.

¹³¹ 2018 Economic Analysis at 21.

2. The Agencies Ignored Predictable Impacts on Clean Water Act Programs.

Compounding the agencies' refusal to meaningfully assess the resource impacts of the proposed rule, they also fail to analyze how Clean Water Act programs will be affected by their plans. Some of this failure is attributable to the self-imposed ignorance about what aquatic resources will be impacted discussed in the prior section, but some is attributable to a refusal to examine information the agencies possess about these programs.

First, although the proposal would curb the applicability of the section 404 permitting program concerning dredged and fill material, the agencies do not analyze several obvious consequences of restricting the program's scope. In particular, the agencies do not assess how removing federal limits on discharging dredged or fill material will impact one of the key ways that the 404 program reduces water pollution and other harms – avoidance and minimization. As the agencies describe, before a discharge of dredged or fill material into “waters of the United States” is permitted, the discharger must first demonstrate they have “taken all steps to avoid impacts to wetlands and other aquatic resources, minimized potential impacts, and compensated for remaining unavoidable impacts if required.”¹³² If fewer waters are subject to these safeguards, fewer dischargers will need to avoid or minimize projects' impacts. The agencies acknowledge that “as a result of projects shifting to non-jurisdictional waters, the number of projects requiring avoidance measures would decrease,” but claim “[t]he net change in impact area reductions resulting from avoidance measures is ... uncertain,” and similarly say that “[i]t is not possible to assess the potential impacts of removing the minimization requirements on the types of activities that developers may pursue in the future, or on project specifications.”¹³³

¹³² 2018 Economic Analysis at 94.

¹³³ 2018 Economic Analysis at 96 & 99.

Second, the agencies fail to assess the effects the proposal will have on the Clean Water Act’s safeguards regarding oil spills. For instance, the Spill Prevention, Control, and Countermeasure program overseen by EPA is triggered when a facility stores oil in certain quantities and a spill reasonably could be expected to reach “waters of the United States.” Facilities subject to the SPCC program must generally employ secondary containment to guard against spills and develop prevention plans, which commonly must be certified by a professional engineer. The agencies say they know approximately how many facilities are subject to the SPCC program – 540,000 sites – but that their “estimate does not explicitly account for the location of the facilities and reasonable potential for a discharge to a ‘water of the United States;’ it is therefore not possible to assess the degree to which a change in the scope of jurisdictional waters will affect the number of regulated facilities.”¹³⁴ Furthermore, they admit that they initiated, but abandoned, an effort that might have provided relevant information; they planned to overlay the location of the subset of SPCC facilities required to submit worst-case federal response plans with the NHD, but stopped:

Before finalizing the results of this exploratory analysis, however, the agencies determined that this estimate cannot be used to extrapolate the number of SPCC-subject facilities nationally that could potentially be affected by the proposed change in the definition of “waters of the United States” because the NHD even at high resolution does not sufficiently map ephemeral streams nationwide so as to support an estimate of potential jurisdictional change.¹³⁵

Moreover, the agencies claim that they cannot assess the impact of the proposal on this program because they “do not have sufficient information at this time to assess how state and tribal programs and funding mechanisms might respond following potential changes in federal [oil spill] programs linked to a revised definition of ‘waters of the United States.’”¹³⁶

¹³⁴ 2018 Economic Analysis at xviii.

¹³⁵ RPA at 80.

¹³⁶ RPA at 83.

Third, the agencies admit that the proposal could impact – perhaps dramatically – the program in the law by which states develop and EPA approves water quality standards and total maximum daily loads establishing cleanup metrics for impaired water bodies, but ultimately fail to assess whether and to what extent they believe their proposal would impact this program. Under the Act, what features qualify as “waters of the United States” directly affects the obligation that states develop water quality standards protecting designated uses and that EPA review them to ensure they are adequately protective,¹³⁷ and EPA’s review of total maximum daily load cleanup plans to restore impaired waters.¹³⁸ If states no longer must have water quality standards for certain categories of waters, or if EPA will stop overseeing the implementation of any water quality standards on such waters, they can easily degrade. For instance, the agencies admit that leaving waters not protected could lead to those waters not being assessed, meaning their pollution levels would not be compared to applicable standards, which “could result in reduced protection for aquatic ecosystems if other mechanisms for restoration are not available or utilized....”¹³⁹ Likewise, the agencies acknowledge:

Changes in CWA jurisdiction could also lead to requests for changes in TMDL waste load allocations (WLAs) for point sources and load allocations (LAs) for nonpoint sources and its margin of safety. TMDL allocation revisions could shift additional pollutant reduction responsibility to those sources discharging to jurisdictional waters downstream. Given that there are currently more than 73,000 completed TMDLs nationwide, requests to revise even a small percentage of them would require significant resources to complete.¹⁴⁰

Indeed, the agencies even concede that undoing the status of waters subject to a TMDL could raise “uncertainty regarding the legal validity” of TMDL waste load allocations and Clean Water

¹³⁷ 33 U.S.C. §§ 1313(c)(2)(A) & (c)(4).

¹³⁸ *Id.* § 1313(e)(3)(c) (“The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include . . . total maximum daily load for pollutants in accordance with subsection (d) of this section”).

¹³⁹ RPA at 74.

¹⁴⁰ 2018 Economic Analysis at xix (citation omitted).

Act discharge permit limits based on those allocations, all but inviting future legal challenges to those requirements.¹⁴¹ Given these important potential consequences, and the possibility that the agencies might be exposing states to new demands to expend “significant resources,” one would think the agencies would seriously investigate how the water quality standards and TMDL programs would be impacted; instead, as with so many aspects of this proposal, the agencies did a half-hearted inquiry that they ultimately scrapped and from which they present no data. They say:

The agencies attempted to analyze the potential effects by comparing the locations of streams currently listed as impaired as well as the locations of established TMDLs to categories of streams mapped in the NHD at high resolution. However, due to data limitations of the NHD, the agencies have concluded that such an analysis does not appropriately or accurately assess the potential effects of the proposed rule on the 303(d) and TMDL programs.¹⁴²

Needless to say, “attempting” to analyze something, then not doing so, is not analysis.

Fourth, although states’ authority to authorize, condition, or deny federally-permitted discharges depends on the presence of a “water of the United States,” the agencies likewise fail to assess the impact on this Clean Water Act safeguard. Under section 401 of the Act, applicants for federal permits must first obtain a state’s certification that the discharge will comply with various provisions of the Act, including state water quality standards and other appropriate state requirements, and must abide by conditions imposed by the state on any such discharge.¹⁴³ This provides states with an important tool to protect their waters from projects when the federal government might not adequately take account of important risks and it is the mechanism by which many states ensure that discharges of dredged or fill material permitted by the Army Corps receive scrutiny by state pollution control experts. As a result, if “a reduction in the scope

¹⁴¹ RPA at 73.

¹⁴² RPA at 73.

¹⁴³ *Id.* § 1341.

of jurisdictional waters reduces the number of federal permits, availability of section 401 as a water quality tool similarly will be reduced.”¹⁴⁴ Nevertheless, the agencies’ rulemaking record lacks any attempt to assess what this loss of authority would mean for the implementation of the Act by states.

Fifth, one of the principal ways in which the Clean Water Act helps keep our waters safe is by directing industrial and municipal point source dischargers to have pollution-limiting permits that require such sources to meet both technology- and water quality-based effluent limitations and monitor and report on their compliance. The obligation to have such permits arises when a source discharges to a “water of the United States.”¹⁴⁵ Consequently, by slashing what might be considered a “water of the United States,” the proposal could have far-reaching effects on this key program. Unfortunately, the agencies utterly fail to assess the extent to which facilities will be able to avoid their permitting and pollution control obligations due to their restrictions on the federal law. Rather, they simply wish away the problem, saying, “[t]he agencies assume that the proposed rule would not greatly affect NPDES permitted facilities,” while seeking “comment and information on this conclusion.”¹⁴⁶ Astonishingly, the agencies admit that this is another area in which they considered doing a meaningful analysis, but abandoned it; they say they initiated “an exploratory effort,” which consisted of “a geospatial analysis of outfall coordinates from the ICIS-NPDES database and high resolution NHD water feature location in an attempt to estimate the potential effects of the proposed rule on the section 402 program.”¹⁴⁷ In the end, the agencies called it quits, saying, “[b]ecause the NHD does not

¹⁴⁴ RPA at 86.

¹⁴⁵ See 33 U.S.C. §§ 1311(a) (generally prohibiting the “discharge of any pollutant” without compliance with other requirements of the Act); 1342(a)(1) (authorizing the Administrator to “issue a permit for the discharge of any pollutant”); 1362(12) (defining “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source”).

¹⁴⁶ RPA at 94.

¹⁴⁷ RPA at 92.

distinguish intermittent from ephemeral streams at a national level and because ephemeral streams are not per se jurisdictional under pre-2015 practice, however, the agencies determined that such an analysis was not appropriate for estimating the potential effects of the proposed rule on the section 402 program at a national level.”¹⁴⁸

Sixth, the agencies admit that reducing which water bodies are considered “waters of the United States” would mean that activities that otherwise would have violated the Clean Water Act in such waters “would no longer be subject to the EPA (or the Corps for section 404; or the [Coast Guard] for section 311) enforcement authority.”¹⁴⁹ However, the agencies completely fail to assess, much less quantify, how frequently this might occur and what the programmatic impacts would be.

In total, although their discussion of the Act’s provisions potentially affected by the proposal spans many pages in their economic and resource documents,¹⁵⁰ the agencies have done nothing to actually evaluate the impacts their proposal would have on the Clean Water Act’s myriad pollution control and cleanup programs. This is inexcusable, especially because the agencies undoubtedly have scores of relevant records by which to examine these effects. By way of example, as noted above, EPA overlaid its records of the location of permitted facilities on the NHD data to see whether permitted sources discharged into start reaches or intermittent or ephemeral streams. Similarly, in response to a Freedom of Information Act request NRDC filed with the Army Corps seeking records of jurisdictional determinations where the water body in question was an ephemeral stream (or other kinds of features this proposal suggests could be

¹⁴⁸ RPA at 92.

¹⁴⁹ RPA at 105.

¹⁵⁰ Despite their lengthy, but ultimately insubstantial, discussion, the agencies still managed to leave unaddressed other programs in the Clean Water Act that will be curtailed by their proposal, including the Act’s absolute prohibition on discharging “any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste,” into “waters of the United States,” 3 U.S.C. § 1311(f), and the Act’s restrictions on the disposal of sewage sludge when a pollutant from sludge disposal can enter such waters. *Id.* § 1345.

excluded), the Corps acknowledged that it has records that, if actually examined, could reveal how the section 404 program has been applied to waters the proposal would exclude, but that the agency could not accomplish it easily.¹⁵¹ And EPA has significant information collection authority under the Act, allowing it to require any point source to gather and report information and to enter any premises where “an effluent source is located”;¹⁵² the agency could have directed sources to provide information about the water bodies impacted by their discharges, such that the programmatic impacts of the proposal – such as which facilities would likely be relieved of pollution control requirements – could have been assessed.

3. The Agencies Ignore Predictable Impacts on Public Health, Safety, and the Environment.

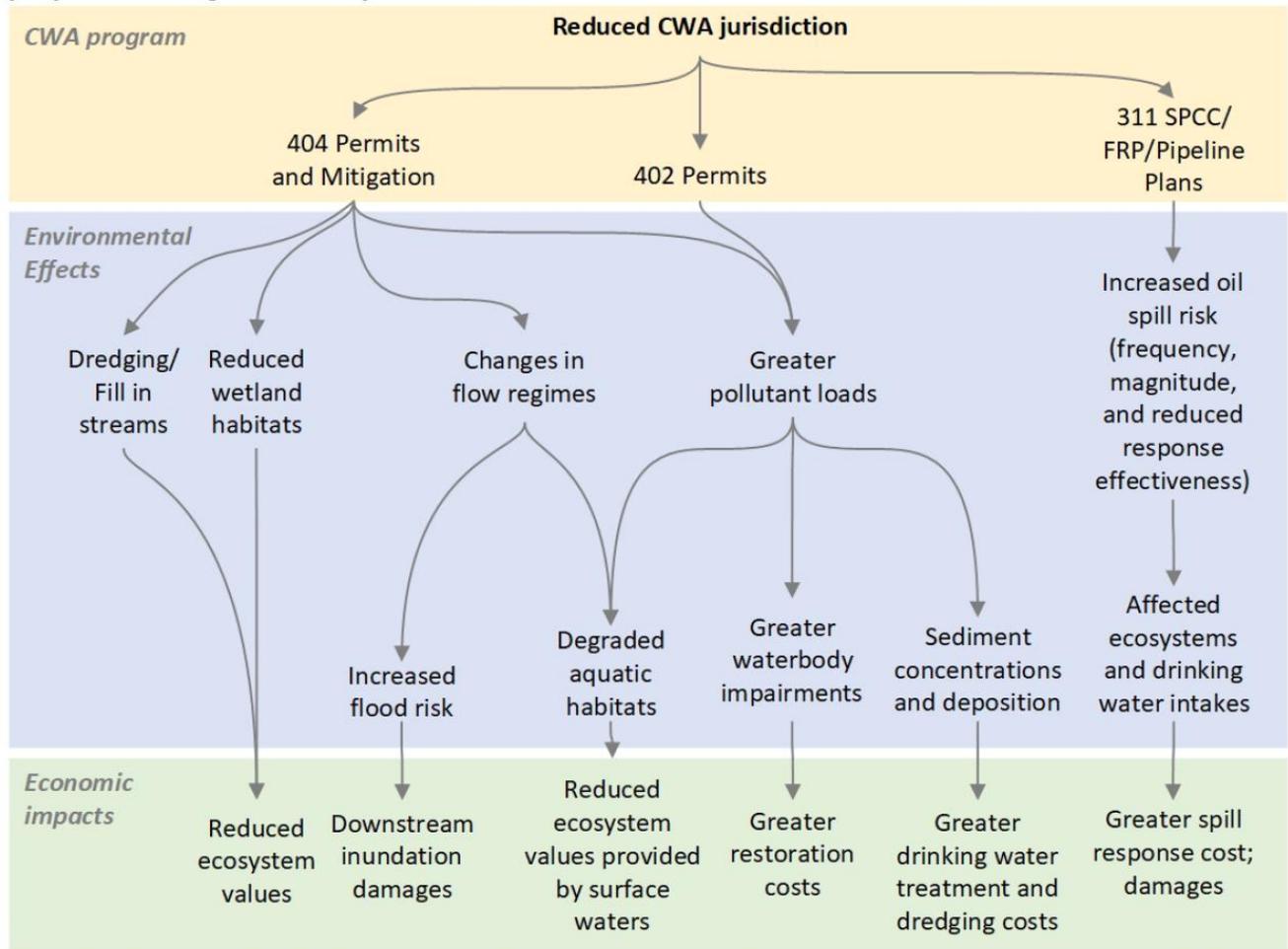
Buried deep in the agencies’ economic document is a damning admission – the agencies’ confession that numerous adverse impacts could flow directly from the proposal. By excluding various water bodies from the Clean Water Act’s coverage and thereby disabling numerous pollution control and cleanup requirements under the law, the proposal could harm people’s drinking water supplies, subject them to increased flooding risks, and leave waterways in which they swim and from which they fish more contaminated. Specifically, as the figure below from the economic document indicates, the potential effects from curtailing the scope of just three of the programs identified above are enormous.¹⁵³

¹⁵¹ Email from Michelle Bartlett, U.S. Army Corps of Eng’rs, to Rebecca Hammer, NRDC (Apr. 5, 2019) (included in Appendix A of these comments).

¹⁵² 33 U.S.C. § 1318(a).

¹⁵³ 2018 Economic Analysis at 133.

Figure IV-9: Overview of potential environmental impacts to selected CWA programs from proposed changes in CWA jurisdiction for certain waters.



Note: This figure assumes no state responses to changes in CWA jurisdiction. The analysis in Section II.A suggests that many states will continue to regulate newly non-jurisdictional waters, thereby reducing any potential impacts from the changes in CWA jurisdiction.

Despite these acknowledged risks, the agencies remarkably do nothing to meaningfully assess their likelihood or extent across the country. Failing to do so further contributes to the arbitrary and capricious nature of this rulemaking.

For example, the agencies do not provide information on the drinking water impacts of their proposal. The agencies say that “a change in the scope of CWA jurisdiction may affect sediment loading within source water protection areas and could require some [public water systems] to add treatment. The agencies are unable to assess the magnitude, if any, of potential

sediment loading changes or additional treatment needed as a result of the proposed definition.”¹⁵⁴ This failure is true both at the national scale and even for the small number of case studies the agencies present.¹⁵⁵ Likewise, the agencies say they conducted an “exploratory effort” using the NHD and overlaying public water systems’ source protection areas, but “concluded that the exploratory analysis cannot appropriately or accurately assess the potential effects of the proposed rule on PWSs.”¹⁵⁶

The agencies likewise fail to assess flood risks associated with the proposal. The agencies acknowledge that “[l]oss of wetland area may also increase downstream flood risk,”¹⁵⁷ but do not attempt to predict where such flooding will occur or estimate how much more severe flooding will be due to the loss of protection the rule will cause.

And, the agencies do not assess the impacts on human health from degraded waters. They admit that “water quality in rivers, streams, and lakes may degrade as a result of pollutant loading from newly non-jurisdictional waters; loss of wetlands and streams without corresponding mitigation; or loss of impact reduction, minimization, and other requirements,” and that such degradation could harm “human uses of downstream water resources (*e.g.*, fishing).”¹⁵⁸ What that means is that waters downstream of those sacrificed by this proposal will be at risk of contamination that can cause illness when people are exposed as they swim; it also means that those waters are more likely to have fish with unhealthy pollutant levels, posing particular dangers to people who subsistence fish. However, neither the economic document nor the resource and programmatic document attempts any kind of analysis or estimation of the risks

¹⁵⁴ RPA at 108.

¹⁵⁵ *See, e.g.*, 2018 Economic Analysis at 194 (increased turbidity-related treatment impacts “Not quantified”).

¹⁵⁶ RPA at 109.

¹⁵⁷ 2018 Economic Analysis at 134.

¹⁵⁸ 2018 Economic Analysis at 134.

to people from pollution exacerbated by the proposal's reduced protection. This refusal to consider key values provided by the waters the agencies would put at risk runs directly counter to the Act's "national goal" that "wherever attainable, ... water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."¹⁵⁹

4. The Agencies Ignore Predictable Effects on the Economy and Distort the Limited Effects they Consider.

The length of the agencies' roughly 300-page economic document, its inexplicable two-stage discussion, and its seemingly deliberate failure to present clear results all serve one obvious goal – obscuring the fact that the document is completely devoid of meaningful economic analysis of the proposed rule. Perhaps the agencies think this gimmick will help them act as though they engaged in reasoned decision-making when this rule is inevitably challenged in court, but any reasonably careful consideration of their document reveals just how little the agencies have cared to inquire into the economic costs their proposal would inflict on the country.

The agencies' approach to discussing the economic effects of the proposal is beyond perplexing. Rather than simply comparing the regulations currently on the books – namely, the Clean Water Rule – to the rules the agencies propose to codify, the agencies add an interim step and break the discussion into two stages, both of which involve the notoriously unclear pre-2015 scheme:

The first stage (hereinafter Stage 1) assesses the potential impacts of moving from the 2015 Rule to the pre-2015 baseline (i.e., repealing the 2015 Rule and recodifying the prior regulations). For the Stage 1 analysis, the agencies used the original 2015 Rule economic analysis as a starting point, and thus pursued a quantitative assessment limited to Stage 1. However, several significant changes to the 2015 Rule analysis have been made in the Stage 1 analysis to account for the incorporation of existing state laws and programs that regulate

¹⁵⁹ 33 U.S.C. § 1251(a)(2).

water and potential state governance responses, as well as other analytic changes incorporating better information in assessing the potential benefits and costs of the Stage 1 effects.

The second stage (hereafter Stage 2) examines the potential impacts of moving to a new definition under the proposed rule from the pre-2015 baseline. Due to the analytic and data challenges discussed throughout, the agencies provide a series of qualitative analyses, three detailed case studies, and a national analysis of the avoided costs and forgone benefits of the proposed change on the CWA 404 program in the Stage 2 analysis.¹⁶⁰

This approach raises an obvious question: if the analysis the agencies did in support of the Clean Water Rule, whereby they examined a sample of jurisdictional determinations and assessed how they would be resolved under different regulatory regimes, was a reasonable method for assessing how the Clean Water Rule would change then-current practice and remains a reasonable method for Stage 1 of this document, why would the agencies not simply compare how the Clean Water Rule and this proposal would each apply to the facts presented in a sample of jurisdictional determinations? We suspect that the reason is that such a straightforward analysis would reveal that the proposal would leave many resources vulnerable that the Clean Water Rule would protect.

Below, we summarize several fatal flaws with the economic document.

a. The Economic Document Ignores the Bulk of Economic Impacts: Those Associated with the Proposed Rule.

One major flaw with the agencies' economic document is that it takes a quantitative approach for only a small fraction of the economic impacts, leaving the overall economic consequences completely unknown. This problem arises because the agencies quantified and monetized some of the impacts from what they call "Stage 1" (eliminating the Clean Water Rule and going back to pre-2015 regime) and because they included only a qualitative discussion of

¹⁶⁰ 2018 Economic Analysis at xi-xii.

“Stage 2” (moving from the pre-2015 regime to the proposal).¹⁶¹ Stage 2 is certain to be orders of magnitude more impactful. The difference between the Clean Water Rule and pre-2015 practice was reasonably estimated to be “between 2.84 percent and 4.65 percent in total.”¹⁶² Moreover, the difference was much smaller with respect to waters at the heart of the current rulemaking; applying the pre-Rule regime, the Corps found 99.3% of streams presented for analysis to be jurisdictional, and it found 98.9% of adjacent wetlands to be jurisdictional, such that even if one assumes the Clean Water Rule would have protected 100% of both categories, the difference would be 0.7% and 1.1%, respectively.¹⁶³ By contrast, the available information indicates that the proposal would have enormous impacts as compared to either baseline, as the proposal will prevent the federal protection of at least 18 percent of streams (and potentially far more than that) and 51 percent of wetlands. Failing to assess the very substantial economic impacts sure to flow from adopting the proposal, while considering effects associated with a far less extensive change, is akin to buying a house while only knowing how much the cable bill will be – entirely irrational.

The agencies’ “case study” approach to reviewing the “Stage 2” impacts of the proposal does not rescue the analysis from its irrationality. That fact the agencies discussed, almost entirely in qualitative terms, three specific watersheds does not remotely qualify as analyzing the economic impacts of the nationwide proposal. The three case studies are for HUC-4 watersheds, which represents the subregion level, and of which there are 221 nationwide.¹⁶⁴ The agencies do

¹⁶¹ The one exception to this rule for Stage 2 is that the agencies purport to assess the wetland mitigation impacts quantitatively and nationally; however, as discussed below, that analysis is plagued by errors.

¹⁶² 2018 Economic Analysis at 52.

¹⁶³ See 83 Fed. Reg. at 32,243 (“These assumptions resulted in a relatively minor projected increase in positive jurisdictional determinations under the final rule for these categories: 99.3 to 100 percent for the streams category, and 98.9 to 100 percent for the wetlands category.”).

¹⁶⁴ Natural Resources Conservation Service, Watersheds, Hydrologic Units, Hydrologic Unit Codes, Watershed Approach, and Rapid Watershed Assessments, at 1 (June 18, 2007), available at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1042207.pdf.

not argue that these watersheds are representative or that the very few impacts they choose to describe could be used to extrapolate nationwide effects.

b. The Economic Document Ignores Recognized Economic Impacts the Proposal Will Cause.

A second critical defect in the agencies' economic discussion is that it fails to substantively assess numerous known and potentially major economic impacts from the proposal.

First, although the agencies recognize that the proposal could lead to pollution upstream of drinking water suppliers that would necessitate additional treatment costs in order to comply with the Safe Drinking Water Act, they do not assess those costs at all. Rather, they only estimate the potential increases in only one contaminant – sediment – for just the three “case study” watersheds, and do not even attempt to translate that increased pollution into treatment costs. Consequently, the agencies' approach utterly fails to assess the likely nationwide economic impacts of the additional contaminant load that their proposal will cause drinking water utilities to have to manage.

Second, the agencies note that “loss of wetlands can increase the risk of property damage due to flooding,”¹⁶⁵ but do not at all attempt to estimate flooding-related property damages that are likely due to the loss of wetlands their proposal will undoubtedly cause. Yet the economic risks from flooding are very substantial. As discussed in the Pew Charitable Trusts' comment letter on this proposal and its attached literature review by Dr. Samuel Brody, there is a statistically significant relationship between permitted wetland impacts and flooding damage:

This body of research, with little variation, found Section 404 permits to have positive and statistically significant effects on flooding and flood impacts. The results hold despite varying units of analysis, changing study periods, and different forms of measuring both flooding and the number of Section 404 permits. Most importantly, these results continue

¹⁶⁵ 2018 Economic Analysis at 212.

to hold after statistically controlling for additional climatic, hydrologic, socio-economic, and policy related variables.¹⁶⁶

The agencies therefore could and should have estimated property damage as a predictable cost of the proposal's plan to end Clean Water Act safeguards for a majority of the nation's wetlands.

Third, the agencies fail to analyze the proposal's likely impact on the recreational economy. That is not because the agencies are unaware of the importance of the resources this proposal would target to the outdoor economy, or the scope of that economy. To the contrary, the agencies acknowledge:

Habitat loss can have a direct effect on recreational activities such as hunting, fishing, and bird watching, depending on the type of ecosystem and species affected (e.g., NAICS Code: 114210- Hunting and Trapping). Businesses that serve hunters or anglers, localities that collect admission fees or licenses, and non-profit organizations that focus on recreating within or preserving natural habitats are examples of sectors that could be affected by habitat loss, many of which could be categorized as small. Changes in water quality can also impact recreational activities and by extension those businesses and localities that support these activities (e.g., NAICS Code: 423910-Sporting and Recreational Goods and Supplies Merchant Wholesalers).¹⁶⁷

Meanwhile, EPA knows – indeed, recently touted – the enormity of the outdoor recreational economy. As Administrator Wheeler said on April 11: “Outdoor recreation not only plays an important role in the health and wellbeing of millions of Americans, but it also generates billions in economic activity and supports millions of jobs.”¹⁶⁸ Specifically, EPA cited a recreational industry report:

According to the Outdoor Industry Association's 2017 report on The National Outdoor Recreation Economy, outdoor activities – including hiking, biking, boating, fishing, hunting, birdwatching, off-road vehicle riding, skiing, snowmobiling, and viewing historic places – generated \$887 billion in annual spending and created more than seven million jobs. These activities can bring new investment to local economies, heighten

¹⁶⁶ Samuel D. Brody, The Role of Freshwater Wetlands in Reducing the Adverse Impact of Floods: Literature Review and Commentary, at 4-5 (Mar. 2019) (attached to comments of Pew Charitable Trusts to Docket ID EPA-HQ-OW-2018-0149).

¹⁶⁷ 2018 Economic Analysis at 212.

¹⁶⁸ U.S. EPA, News Release: Trump Administration to Help Rural Communities Grow Recreation Economy (Apr. 11, 2019), available at <https://www.epa.gov/newsreleases/trump-administration-help-rural-communities-grow-recreation-economy> (included in Appendix A of these comments).

interest in conservation of forests and other natural resources, and improve quality of life for residents and visitors.

Notwithstanding the extent of outdoor recreation’s impact on the national economy and the plain linkage between the waters for which the agencies plan to weaken Clean Water Act protections, the economic document does not at all estimate the economic effects of the proposal with respect to recreation.

Fourth, the agencies recognize that “increased pollutant loadings can lead to higher drinking water treatment costs for localities, and for businesses that require water treatment for their production process.”¹⁶⁹ Accordingly, commercial producers of goods with water, such as beer brewers, could experience adverse economic effects as they contend with increasingly contaminated feedstocks resulting from upstream pollution made easier by this proposal. The impacts on craft brewers alone could be enormous; according to 59 craft brewing companies commenting on this proposal:

Unexpected changes in water quality—due to pollution in our source water, or a change in the treatment process at our local drinking water plant—can threaten our brewing process and our bottom line. We need reliable sources of clean water to consistently produce the great beer that is key to our success. It is thanks in part to this important natural resource that the craft brewing industry contributes about \$76.2 billion to the U.S. economy each year, along with more than 500,000 jobs.¹⁷⁰

Despite these significant economic stakes, the agencies’ economic document lacks any assessment of the impact on companies manufacturing water-based products.

Fifth, the proposal could adversely affect resource mitigation and ecological markets. As the agencies acknowledge, “[b]ecause fewer waters would be subject to CWA jurisdiction under

¹⁶⁹ 2018 Economic Analysis at 212.

¹⁷⁰ Letter from Jason Perkins, Allagash Brewing Co., et al., to Andrew Wheeler, U.S. EPA & R.D. James, U.S. Dept. of Army, Docket Item EPA-HQ-OW-2018-0149-0895, at 2 (Mar. 7, 2019), available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0895> (citing <https://www.brewersassociation.org/statistics/economic-impact-data/>).

the proposed rule than are subject to regulation under the 2015 Rule or current practice, there would be a reduction in demand for mitigation and restoration services, under the section 404 permitting program and a corresponding reduction in revenue for the businesses.”¹⁷¹ However, the agencies only address the lost revenue for this industry in their discussion of the impact of the rule on small entities and, even in that context, declare that “assessing impacts to this sector is problematic,” and fail to further estimate the proposal’s effects on mitigation banking and related restoration businesses. Remarkably, although the agencies’ record contains research on the size of, and employment in, the ecological restoration sector, they do not attempt to use that work to assess the economic impact that their rollback would cause. That study finds “that the domestic ecological restoration sector directly employs ~ 126,000 workers and generates ~ \$9.5 billion in economic output (sales) annually. This activity supports an additional 95,000 jobs and \$15 billion in economic output through indirect (business-to-business) linkages and increased household spending.”¹⁷² The agencies do not even bother to explain why they ignore the conclusions of this analysis in assessing the proposal’s overall economic impact.

Sixth, although the agencies admit that their proposal could create legal questions about the status of many previously-developed TMDL plans and discharge permit limits based on those TMDLs, and that “requests to revise even a small percentage of them would require significant resources to complete,”¹⁷³ they utterly fail to account for the costs to states and EPA of managing such requests.

¹⁷¹ 2018 Economic Analysis at 213.

¹⁷² Todd BenDor et al., Estimating the Size and Impact of the Ecological Restoration Economy, PLoS ONE, at 1 (June 17, 2105), Docket Item EPA-HQ-OW-2018-0149-0007, available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0007>.

¹⁷³ 2018 Economic Analysis at xix.

c. The Economic Document Ignores Basic Practices for Economic Analysis.

The one area in which the agencies seem to have used a nationwide, quantitative approach for both costs and benefits associated with moving from the Clean Water Rule to the pre-Rule regime, and then to the proposal, is in their assessment of the impacts arising from wetland mitigation. However, because this element of the agencies' document is so fraught with methodological errors, unexplained steps, and obvious inaccuracies, it is so unreliable that it amounts to no analysis at all.

Expert reviews identified numerous problems with the agencies' document. The Southern Environmental Law Center and NRDC secured reviews of the agencies' economic document by Dr. John Whitehead, Professor of Economics, Appalachian State University, and Dr. Jeffrey Mullen, Associate Professor, Agricultural and Applied Economics, University of Georgia.¹⁷⁴ Major significant concerns that Dr. Whitehead and Dr. Mullen identified are summarized below.

First, both experts noted that the agencies wrongly constrained the geographic scope of their willingness to pay estimates, such that only households in the same state as the impacted wetlands were included. This approach is strongly contradicted by economic research revealing that wetland benefits cross state boundaries. Dr. Whitehead, for instance, notes that the approach the agencies used in 2015 to estimate potential wetland benefits over an entire region is roughly consistent with Loomis (2000), which found that 82 percent of wetland benefits accrued to out-of-state residents and would yield estimates many times more than the agencies now calculate.¹⁷⁵ Similarly, Dr. Mullen reports that “[e]xpanding the scope of the analysis to include adjacent

¹⁷⁴ John C. Whitehead, Comments on “Economic Analysis for the Proposed Revised Definition of ‘Waters of the United States’” (Apr. 9, 2019) (hereinafter “Whitehead”) (included in Appendix A of these comments); Jeffrey D. Mullen, Review of the 2018 EPA Economic Analysis for the Proposed Revised Definition of “Waters of the United States” (Apr. 11, 2019) (hereinafter “Mullen”) (included in Appendix A of these comments).

¹⁷⁵ Whitehead at 10.

states increases annual foregone benefits by *three- to ten-*fold, under all four scenarios and both foregone benefits levels.”¹⁷⁶

Second, both experts also identified numerous ambiguities in the meta-analysis used to generate the willingness to pay, making it difficult to comprehend and replicate. For instance, Dr. Whitehead notes that willingness to pay studies involving voluntary payment vehicles (as compared to compulsory ones, like a tax) leads to an underestimate of true benefits, yet the agencies do not explain whether they valued such studies equally or not.¹⁷⁷ Dr. Mullen reports that, “despite extensive attempts to do so, the [state-specific benefit transfer] results presented in Table III-9 (p. 77) and Table F-5 (p. 285) could not be replicated using the mean variable values and model coefficient estimates presented This should be a straight-forward exercise. The lack of replicability raises the possibility that the December 2018 EA is missing important information.”¹⁷⁸

Third, both experts object to the agencies’ use of “federalism scenarios” to discount the economic impacts of the proposal. Dr. Whitehead considers it “a highly speculative and not a defensible component of this economic analysis.”¹⁷⁹ Dr. Mullen concludes that it is “unlikely to be true” that there will be no additional costs to states that the agencies predict will continue to protect waters left unprotected by the proposal. He writes: “States may require significant additional resources to fill the regulatory void left by the federal government. Additionally, there are likely to be economies of scale related to regulatory scope so that the total regulatory costs of

¹⁷⁶ Mullen at 15.

¹⁷⁷ Whitehead at 6-7.

¹⁷⁸ Mullen at 3.

¹⁷⁹ Whitehead at 13.

a federal regulation are lower than the sum of the regulatory costs of implementing the same regulation at the state level in every state.”¹⁸⁰

Fourth, both experts explain that the agencies present uncertainty in the calculations poorly. And fifth, Dr. Mullen identifies several concerns with one of the principal papers on which the agencies base their estimated wetland permitting costs.¹⁸¹

In addition to the problems Dr. Whitehead and Dr. Mullen identified above, one of the most important flaws in this part of the agencies’ document is that they articulate no reasonable basis for the wetland acreage they use in considering the economic effects attributable to wetlands affected the by proposal’s changes to the Clean Water Act’s protections. It is extremely difficult to determine what numbers the agencies used in the first instance; we believe that it is based on the number of mitigation acres required in permits issued between 2011-2015 that required any mitigation and that involved ephemeral streams or wetlands judged to be adjacent to, but not abutting, relatively permanent waters under the pre-Clean Water Rule regime.¹⁸² If we are understanding this approach correctly, it would appear that the agencies are assuming that the section 404 program only generates benefits on those acres that trigger mitigation and are also assuming that the average number of acres triggering mitigation between 2011-15 will be representative of the number of acres of ephemeral streams and non-surface-water connected wetlands impacted by dredged and fill discharges after this proposal takes effect. Both of these assumptions lack any support and are almost certainly wrong. For one, the permit program creates benefits before mitigation is required and even when it is not required; as dischargers avoid aquatic resources and minimize their impacts to those resources, wetland benefits are

¹⁸⁰ Mullen at 17.

¹⁸¹ Mullen at 39-41.

¹⁸² 2018 Economic Analysis at 208, table IV-62.

preserved. That occurs on many more acres than are covered by mitigation requirements. Secondly, it is irrational to assume dischargers will undertake projects affecting ephemeral streams and wetlands left unprotected by the proposal at the same rate they did when those features were protected by the law. The absence of federal protection will incentivize developers to seek out such locations, such that any reasonable assessment of the affected area must include expected increases following the proposal.¹⁸³

VII. The Proposal Relies on Wild Speculation About States' Ability and Willingness to Protect Waters the Agencies Abandoned – A Factor Congress Did Not Intend the Agencies to Consider.

The agencies' proposal relies on a factor that Congress did not intend to be considered, which is their supposition about how states might react to a federal retreat from full implementation of the Clean Water Act. Specifically, the agencies discount the few economic impacts for which they have estimates by assuming that certain states will implement programs that protect waters as well as the Clean Water Act even in the absence of a federal mandate.¹⁸⁴ This approach contradicts both the history of pollution in the country that compelled Congress to act and Congress's design, which is premised on states implementing minimum standards established by the federal government and backed by federal oversight and enforcement.

In adopting the Clean Water Act in 1972, Congress repudiated the prior approach to water pollution control – relying on state action without the backing of a strong federal baseline. The law's comprehensive nature was largely in recognition that existing water pollution laws

¹⁸³ See also Mullen at 3-4 (“The Stage 2 analysis uses permitting activity from 2011 through 2015 to estimate the number of affected acres. As such, it is likely to have under-estimated the number of acres impacted by moving from the pre-2015 Rule to the 2019 Rule. This is because, in addition to actual permit applications, the permitting and mitigation costs may have deterred some wetland conversion activity, activity that may arise under the 2019 Rule.”).

¹⁸⁴ The agencies do include a “Scenario 0,” which supposedly represents the proposal's requirements becoming the rule for all states but declare that they think it unlikely and focus their analysis on scenarios that assume at least some subset of states will indefinitely regulate non-federally protected waters as stringently as the Clean Water Act would have otherwise. See 84 Fed. Reg. at 4,201 (“Under the scenario that assumes no States will regulate newly non-jurisdictional waters, an outcome the agencies believe would be unlikely, the agencies estimate...”).

were a failure. As Senator Edmund Muskie told the Senate when introducing the bill that was to become the new Act, “The committee on Public Works, after 2 years of study of the Federal water pollution control program, concludes that the national effort to abate and control water pollution is *inadequate in every vital aspect*.”¹⁸⁵ To remedy this inadequacy, the basic framework of the Act is that the federal government establishes baseline requirements that states must follow; if a state fails to do so, the federal government must act.¹⁸⁶ By way of example, as the Supreme Court described:

The amendments also recognize that the States should have a significant role in protecting their own natural resources. 33 U.S.C. § 1251(b). The Act provides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U.S.C. § 1342(b). The Administrator retains authority, however, to block the issuance of any permit to which he objects. § 1342(d). Even if the Federal Government administers the permit program, the source State may require discharge limitations more stringent than those required by the Federal Government. *** Before the Federal Government may issue an NPDES permit, the Administrator must obtain certification from the source State that the proposed discharge complies with the State's technology-based standards and water-quality-based standards. 33 U.S.C. § 1341(a)(1). The CWA therefore establishes a regulatory “partnership” between the Federal Government and the source State.¹⁸⁷

To be sure, the Act also recognizes that states will typically be responsible for the primary day-to-day implementation of the Act’s requirements and it expressly preserves states’ authority to have more protective clean water safeguards than are minimally required.¹⁸⁸ But nothing in the

¹⁸⁵ Comm. on Pub. Works, Committee Print 93d Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 1253 (1973) (emphasis added).

¹⁸⁶ See, e.g., 33 U.S.C. § 1313(c)(2) (requiring states to submit new water quality standards to EPA for review and providing that if EPA determines the standards are “not consistent with the applicable requirements” of the Act, states must make specified changes or EPA must develop regulations)

¹⁸⁷ *International Paper Co. v. Ouellette*, 479 U.S. 481, 489-90 (1987).

¹⁸⁸ See 33 U.S.C. § 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.”); *id.* § 1370 (“if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less

Act suggests that states will be the final arbiters of what pollution control requirements are minimally necessary. Accordingly, the agencies' approach of undervaluing federal protections simply because some states have state law analogs is directly contrary to Congress's view of the federal-state balance in water pollution control.

Even if this "federalism" screen did not flout Congress's will, which it does, it is so riddled with vagueness and so untethered to available evidence that it would be irrational to consider. For starters, we note that it is nonsensical to punish states that adopt strong clean water safeguards by relying on those states' laws to discount the need for, and value of, protections in *other states*. Ironically, this approach would allow the states with weaker laws to authorize increased pollution that could harm more responsible states downstream.

Also, though the agencies purport to be guided in developing predictions about state responses by a literature review they commissioned,¹⁸⁹ that document does not remotely support the agencies' approach. For instance, it acknowledges "that insights derived based on a literature review are general in scope, are plagued by uncertainty, and do not necessarily transfer perfectly to another policy issue."¹⁹⁰ Moreover, whereas the agencies claim that "the best indication of how states will exercise their authority as the federal government retracts its jurisdiction is how they have exercised existing authority in the past and whether the infrastructure to manage the regulatory programs already exists,"¹⁹¹ the literature review reports:

[T]he following measures will influence the state policy making. The direction of the expected effect on environmental protection is given in parenthesis:

stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter").

¹⁸⁹ See 2018 Economic Analysis at 39 ("The commissioned literature review (Fredriksson (2018)) identified the variables most commonly used in the federalism literature that are useful in anticipating how states could respond to the proposed definition of 'waters of the United States.'"); Per G. Fredriksson, Environmental Federalism: Lessons Learned from the Literature (Feb. 28, 2018) (hereinafter "Federalism Literature Review", Docket No. EPA-HQ-OW-2018-0149-0011, available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0011>).

¹⁹⁰ Federalism Literature Review at 14.

¹⁹¹ 2018 Economic Analysis at 37.

- State income per capita (+).
- State per capita income growth rate (+).
- State fiscal (budget and debt) conditions (+).
- State environmental agency budget (+).
- The number of environmental groups (+).
- Average member of Congress League of Conservation Voters (LCV) score (+)
- Political party of U.S. House and Senate members.
- Higher weight on business growth (-).
- Agricultural lobby strength (measured as share of agriculture in state GDP) (-).
- Absentee land owner, share of total (-)
- Higher than average corruption (-).
- Limitations on state waters provisions (-).
- State regulates waters more broadly than required by the CWA (+).
- State Legislative Review provisions in place (-).
- State government cost-benefit provision for new state regulations (-)
- Sunset provisions for state regulations (-).
- Professionalized legislatures (+).¹⁹²

This document thus provides no basis for the agencies to select the fraction of factors they do, though we are not surprised that the agencies are not eager to publicize the document's suggestion that states with a powerful agribusiness lobby will be less likely to protect their waterways than states with a strong network of environmental organizations.

Additionally, though the agencies acknowledge that “there could be significant short-run, and possibly long run, costs to states and tribal governments to build, expand, and maintain the necessary regulatory infrastructure,”¹⁹³ necessary to fill the gaps left by the proposal, their federalism scenarios fail to consider the financial capacity of states to take on the additional responsibility if the federal government walks away.

The agencies also fail to analyze in any way the actual stringency of the programs states have, even if they have programs addressing the same general concerns. For example, with respect to dredged/fill discharges, they admit: “The agencies have identified the presence of

¹⁹² Federalism Literature Review at 15.

¹⁹³ 2018 Economic Analysis at 29.

these programs in state laws and regulations, but did not attempt to characterize how the states implement these programs or what effects these programs have on a state’s aquatic resources.”¹⁹⁴

Similarly, they admit they ignore how well states enforce their water programs: “State enforcement capabilities would also possibly be important in determining state responses, however no measure of enforcement capability was available for use in this analysis.”¹⁹⁵

Finally, the agencies’ record contains strong evidence of how states view the importance of federal safeguards for tributary streams, nearby waters, and so-called “isolated” wetlands. In the early 2000s, the agencies considered changing their regulations to potentially exclude some waters in the wake of *SWANCC*, but abandoned that effort after enormous stakeholder pushback, including from numerous states. NRDC has submitted comments on that initiative to the docket of this rulemaking, including those of many states opposed to dropping federal protections for waters lacking a surface water connection to other covered waters.¹⁹⁶ Similarly, more than 30 states submitted a brief in *Rapanos*, urging the Supreme Court to uphold federal protections for wetlands adjacent to non-navigable tributaries; that brief is also in the record for this rulemaking.¹⁹⁷ If the agencies are going to attempt to predict state responses to their proposal – which, again, they should not do – it is irrational to focus exclusively on a few data points and ignore information such as these on-point prior state documents.

¹⁹⁴ 2018 Economic Analysis at 32, n. 33.

¹⁹⁵ 2018 Economic Analysis at 39, n. 47.

¹⁹⁶ Letter from Jon Devine, NRDC, to Docket ID No. EPA–HQ–OW– 2018–0149 (Apr. 5, 2019) (delivering electronic copies of numerous documents relevant to current proposal).

¹⁹⁷ *Id.*

VIII. The Proposal Raises Additional Problematic Legal, Policy, and Practical Issues that Exacerbate the Rule’s Arbitrary and Capricious Nature.

As discussed below, the proposal is littered with numerous elements that make the agencies’ scheme more difficult to understand, less compliant with the law, or simply more irresponsible water policy.

A. The Agencies Must Consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Concerning Adverse Impacts on Endangered or Threatened Species.

Section 7(a)(2) of the Endangered Species Act requires that “[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction ... of such species” or critical habitat.¹⁹⁸ Thus, section 7(a)(2) imposes two obligations on all agencies. The first is the duty to insure that any action the agency funds, authorizes, or carries out is not likely to jeopardize listed species or adversely modify critical habitat. The second duty is the duty to consult with the appropriate Secretary—Interior for terrestrial and freshwater species and Commerce for marine species—in carrying out the first duty to insure.

Applicable regulations provide that the trigger for the consultation process is whether a federal action “may affect” listed species or their critical habitats.¹⁹⁹ The rules state: “Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.”²⁰⁰

¹⁹⁸ 16 U.S.C. § 1536(a)(2).

¹⁹⁹ For the consultation requirement under Section 7(a)(2) of the Endangered Species Act to apply, a federal “agency action” must be involved, 16 U.S.C. § 1536(a)(2), but that threshold is easily met in this instance, as the regulations define “action” to include requires “the promulgation of regulations.” 50 C.F.R. § 402.02.

²⁰⁰ 50 C.F.R. § 402.14(a).

This agency action absolutely “may affect” endangered or threatened species, because it would abandon federal protections for vast amounts of streams, wetlands, and other waters, thereby enabling their pollution or destruction, in some cases without any controls. Because, as the agencies acknowledge, “more than one-third of the United States’ threatened and endangered species live only in wetlands, and nearly half use wetlands at some point in their lifecycle (U.S. EPA, 2017),” this proposal inevitably will affect, much less “may” affect, such species. Accordingly, the agencies need to consult with the Services about the impacts of this rulemaking.

B. The Agencies Must Not Revisit Established Understanding of Waters Considered Traditionally Navigable.

The proposal hints at a potential major overhaul of protections by seeking comment on whether they should revise guidance or rules regarding what is considered a “traditionally navigable” water, which of course is the cornerstone of protection for all other waters under the proposal.²⁰¹ The agencies justify potentially weakening the law further because they say they have heard “that determinations made by the agencies using the *Rapanos* Guidance, and in particular Appendix D to that guidance, may have allowed for the regulation of waters that are not navigable-in-fact within the legal construct established for such waters by the courts.”²⁰² Although they claim these complaints came during the agencies’ pre-proposal interactions with various entities, we are only able to identify one such comment, from the Arizona Mining Association.²⁰³ The Association argues that the existing approach to identifying traditionally navigable waters is flawed because it allows for the inclusion of waters that are navigable-in-fact

²⁰¹ By eliminating the decades-old requirement that interstate waters be considered foundational along with traditionally navigable waters, the proposal would make a water’s status wholly dependent on linkages to traditionally navigable waters.

²⁰² 84 Fed. Reg. at 4,170.

²⁰³ Letter from Steve Trussell, AZ Mining Assoc., to Docket No. EPA-HQ-OW-2017-0480, at 6-9 (Nov. 28, 2017), available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0480-0637>.

but are not demonstrated to be part of an interstate “highway” of commerce, and because it allows navigability to be established by small recreational craft.

The agencies must not make this terrible proposal even worse by endorsing additional limitations on how waters can qualify as “traditionally navigable,” and therefore foundational, waters. The agencies must not abandon the approach they have been using, which considers whether a water is susceptible to use in commerce and which also considers whether recreational craft – which, after all, indicates whether a water has potential commercial use – can navigate it. That approach is founded in the law, as the agencies have explained on multiple occasions,²⁰⁴ and enables the proper protection of such waters as the Los Angeles River.²⁰⁵ Moreover, because further weakening the regulations would have untold ripple effects on what waters would be covered nationwide, yet the proposal has not remotely considered what those impacts might be, finalizing any change in the longstanding interpretation would be arbitrary and capricious in the same way that so much of the rest of this proposal is.

C. The Agencies Must Not Undo the Longstanding Definition of “Wetlands.”

The agencies invite comment on whether they should make changes to how wetlands are identified.²⁰⁶ They must not. Wetland delineation using established criteria is well-understood and adopting new regulations or policies would undoubtedly cause enormous upheaval for wetlands professionals throughout the country. In addition, without providing – in a notice of proposed rulemaking with an opportunity for public comment – significantly more specificity

²⁰⁴ See, e.g., U.S. EPA & U.S. Army Corps of Eng’rs, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, at 190-96 (May 27, 2015) (included with NRDC April 5, 2019 submission of electronic files).

²⁰⁵ Letter from Jared Blumenfeld, U.S. EPA Region 9, to Colonel Mark Toy, Los Angeles District, U.S. Army Corps of Eng’rs (July 6, 2010) (finding the entire mainstem of the Los Angeles River to be a traditional navigable water based, in part, on recreational kayak trip organized to demonstrate navigability of river), (included in Appendix A of these comments), available at <https://archive.epa.gov/region9/mediacenter/web/pdf/laspecialcaseletterandevaluation.pdf>.

²⁰⁶ 84 Fed. Reg. at 4,189.

about what changes the agencies might make, what the reasons for doing so would be, and what the consequences of doing so would be, finalizing any change to this longstanding, and centrally important, definition would be procedurally infirm.

D. The Exclusion of Ephemeral Streams is Unreasonable.

In addition to the myriad problems noted above about the plan to exclude ephemeral streams, the agencies' plan is both inconsistent with their legal explanation for the proposal and introduces a host of implementation concerns.

First, the agencies claim that the exclusion is intended “to balance Congress’ intent to interpret the term ‘navigable waters’ broadly ... with the notion that nothing in the legislative history of the Act ‘signifies that Congress intended to exert anything more than its commerce power over navigation.’”²⁰⁷ But this is nonsensical; the proposal does not evaluate whether ephemeral streams actually influence the condition of traditionally navigable waters and the Clean Water Rule record definitively proves that they do.

Second, the proposal will confuse stakeholders and prevent clear implementation by saying “an ephemeral feature may constitute a point source that discharges pollutants to a ‘water of the United States.’”²⁰⁸ It is entirely unexplained when such a feature “may” qualify as a point source, much less who bears the responsibility for a discharge from such a feature – the polluter that introduces the pollutant into the ephemeral feature, the property owner at the point of discharge into a covered feature, or someone else (such as property owners along the stream). This ambiguity also raises questions about where one is to judge compliance with any effluent limitation – does a toxic discharge standard only apply at the confluence with something the

²⁰⁷ 84 Fed. Reg. at 4,174.

²⁰⁸ 84 Fed. Reg. at 4,176.

agencies propose to recognize as a “water of the United States,” or where the point source discharges the pollutant?

Third, excluding ephemeral streams belies the agencies’ claim that the proposal will be clear enough for landowners to be able to easily determine whether features on their property are covered. For instance, they expect that landowners will need to rely on technical consultants;²⁰⁹ they point to a handful of different “remote and field-based tools” that could inform assessments of flow regime, but do not identify any as preferred or speak to their accuracy, much less say that any of them will be sufficient for purposes of a jurisdictional determination;²¹⁰ and they admit that, because “less than intermittent flow in a channel breaks jurisdiction of upstream perennial or intermittent flow” under the proposal, “the proposed definition may present a challenge for certain landowners upstream of an ephemeral feature.”²¹¹

Fourth, the exclusion of ephemeral streams, without any animating principle for doing so, causes the agencies to suggest even additional rollbacks for “streams that flow year-round based on wastewater treatment plant discharges” that would otherwise flow less often; this would be completely antithetical to the Clean Water Act, as it would authorize sewage treatment plants to discharge into waters used for a variety of purposes without implementing the secondary treatment the law requires.

Fifth, this exclusion would create incentives for dischargers wishing to develop in areas with tributary streams to withdraw or divert water from non-ephemeral streams to make their flows less regular. Doing so could then enable the discharger to claim that the feature is excluded.

²⁰⁹ 84 Fed. Reg. at 4,176.

²¹⁰ 84 Fed. Reg. at 4,176.

²¹¹ 84 Fed. Reg at 4,177.

E. The Exclusion for Most Ditches is Unreasonable.

The agencies propose to include any ditch that qualifies as a traditionally navigable water or that was constructed in a feature that would be considered a tributary or an adjacent wetland, so long as the ditch otherwise meets the tributary definition. As an initial matter, the provision is internally contradictory because it requires features to “satisfy the conditions of the tributary definition,” while the tributary definition requires a “naturally occurring surface water channel,” and “ditch” is defined to mean “an artificial channel used to convey water.”²¹² Additionally, the ditch provision suffers the same ambiguity as the ephemeral stream exclusion above – namely, that treating tributary ditches exclusively as point sources raises confusing questions about which entities are responsible for discharges that reach protected waters and where compliance with any applicable discharge standards should be measured.

Furthermore, the agencies make it nearly impossible to enforce their proposed rule against unpermitted dischargers into manmade channels. First, they begin with a presumption that ditches are unprotected unless it is shown otherwise: “if the evidence does not demonstrate whether a ditch was constructed in a tributary as defined in the proposed rule, that ditch would be considered to be non-jurisdictional by the agencies under this proposal.”²¹³ Then, they require proof of what a feature in which a ditch was constructed looked like *before* the construction.²¹⁴

Finally, the agencies invite polluters to ask for one of their long-sought rollbacks – an interpretation of the law whereby ditches and “waters of the United States” are mutually exclusive, such that a ditch can never be considered a protected water.²¹⁵ The agencies must not

²¹² 84 Fed. Reg. at 4,203-04 (proposed 33 C.F.R. §§ 328.3(a)(3), (c)(2) & (c)(11)).

²¹³ 84 Fed. Reg. at 4,181.

²¹⁴ *See, e.g.*, 84 Fed. Reg. at 4,203-04 (proposed 33 C.F.R. §§ 328.3(a)(4) & (c)(11)) (ditch potentially included if constructed in a “tributary,” but “tributary” definition excludes at least ephemeral-flowing streams); *see also* 84 Fed. Reg. at 4,181 (“it may be challenging to identify the historic status of a wetland where a ditch has drained the wetland such that it would no longer meet the definition of ‘adjacent wetland’ under this proposed rule”).

²¹⁵ 84 Fed. Reg. at 4,182.

entertain such a radical retreat from the longstanding history of Clean Water Act implementation. From a legal perspective, many courts have recognized that ditches can be regulated as tributaries if they perform the same functions as tributaries – even if they are artificial.²¹⁶ Many of these decisions were issued before *SWANCC* and *Rapanos*, but the ability to regulate ditches was unaffected by those two cases, which did not hold in any way that the law distinguishes between natural and manmade tributaries.²¹⁷ Even if this were not contrary to years of settled law, the agencies offer no justification for changing their historical practice, much less any analysis of the consequences of exempting tributary ditches across the country.

F. The Agencies’ Approach to Lakes and Ponds is Unreasonable.

The only lakes and ponds the agencies propose to protect are those that are traditionally navigable, those that contribute perennial or intermittent flow to a traditionally navigable water, and those flooded by another jurisdictional water in a “typical year.” Although, as discussed above, the agencies do nothing to analyze the real-world impact of their proposal, this element is sure to confuse stakeholders. Critically, the proposal does not explain what the agencies mean by being “flooded” – that is, whether it has any volume or frequency component. Is any water flowing from another covered water sufficient? If a lake or pond connects by flooding once in a “typical year,” is it protected? The proposal adds ambiguity to the provision by noting that “[f]looding from a water of the United States to a jurisdictional lake or pond can occur as a result

²¹⁶ See *U.S. v. Holland*, 373 F. Supp. 665, 673-74 (M.D. Fla. 1974), *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001); Answering Brief of Defendants-Appellees, *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, No. 10-5169 (D.C. Cir., June 10, 2011) at 42 (“a ditch may be a tributary if it contributes flow to a larger body of water”), 42-43 (collecting cases “that have upheld regulatory authority pursuant to the Clean Water Act over channels, canals, drains, and ditches”) (included in Appendix A of these comments).

²¹⁷ See generally *Nat’l Assn. of Home Builders*, 663 F.3d 470, 475 (D.C. Cir. 2011) (noting “the Corps’s persistent view that some upland ditches may be jurisdictional”); 2008 *Rapanos* Guidance at 1 (indicating that some upland ditches with seasonal or perennial flow would be jurisdictional); Jon Devine et al., *The Historical Scope of Clean Water Act Jurisdiction*, Natl. Wetlands Newsletter, Vol. 3, No. 6, at 13 (discussing historical protections for a variety of disputed features, including ditches) (included with NRDC April 5, 2019 submission of electronic files).

of seasonal or permanent flooding,”²¹⁸ but does not say one way or the other whether flooding *must* be seasonal or permanent to confer protection on a nearby lake or pond. The agencies tacitly concede that this provision is confusing, as they request comment “on whether more specific parameters should be included for the type of flooding that should be included for lakes and ponds when flooded by an (a)(1)-(5) water in a typical year. For example, the agencies request comment as to whether to establish a specific flooding periodicity or magnitude or frequency.”²¹⁹

Furthermore, the proposal is facially arbitrary in that it treats identical situations differently. Under the proposal, a lake or pond deserves protection if another water body connects with it solely due to rain – that is, if a jurisdictional water body overflows its banks and floods the lake or pond because of heavy precipitation. However, the agencies would require more than just a rain-fed connection for a lake or pond to be protected when the direction of flow is from the pond to the other feature, because ephemeral flows from the lake or pond would not confer protection. The agencies offer no explanation why they think a rain-induced connection in one direction is insufficient to warrant protection when similar flow in the other direction is enough.

Finally, the proposal’s discussion of lakes and ponds is a perfect example of the agencies’ efforts to disguise their rollback agenda with circular logic dressed up in language cherry-picked from the statute. They claim that the new restrictions they propose to adopt (as to lakes and ponds but also other waters) would promote the role of states in implementing water policy reflected in section 101(b) of the Act and section 510 of the law’s reservation of rights to states to be more stringent than the federal government, and say that by defining newly-excluded

²¹⁸ 84 Fed. Reg. at 4,183.

²¹⁹ 84 Fed. Reg. at 4,184.

waters as not “waters of the United States,” they are making them “water resources of the States,” such that they can be protected, “to the extent they deem appropriate,” by states.²²⁰ The agencies’ tautology – these are waters the federal government cannot regulate because they are waters only the states can regulate – is absurd. Declaring that a feature is not federally regulated is supposed to be the conclusion of an analysis; it is not itself a reason for making that declaration. This cannot serve as a meaningful guide to what the Clean Water Act protects.²²¹ Likewise absurd is the notion that section 501 provides any support for their scheme to weaken federal safeguards, when its function in the statute is to ensure that states can adopt additional protections, but “may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent” than federal requirements established pursuant to the Act.²²² The agencies make similar arguments in attempting to justify their new limitations on protecting tributaries and wetlands, and they are similarly unavailing in those contexts.

G. The Agencies’ Approach to Wetlands is Unreasonable.

The proposal would exclude all wetlands except those that “abut or have a direct hydrologic surface connection to other ‘waters of the United States’ in a typical year.”²²³ This proposed exclusion suffers from many of the same problems as the lake and pond exclusion discussed above, creates numerous implementation concerns, and introduces unreasonable and unexplained elements.

²²⁰ 84 Fed. Reg. at 4,183; *see also id.* at 4174, 4176 (same statement as to ephemeral waters); *see also id.* at 4181 (same statement as to ditches); *see also id.* at 4185, 4187 (same statement as to wetlands).

²²¹ *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available”).

²²² 33 U.S.C. § 1370.

²²³ 84 Fed. Reg. at 4,184.

First, as it does with the concept of “flooding” in the lake and pond exclusion, the proposal depends on “inundation” to identify protected wetlands, but this element of the proposal is vague and arbitrary. The agencies do not say what magnitude or duration of connection from another jurisdictional water is sufficient to count as “inundation,” and instead create confusion by identifying “regular flooding” as a basis for protecting wetlands and by saying that “[i]nundation can occur as a result of seasonal or permanent flooding, for example, so long as inundation occurs in a typical year and has as its source a jurisdictional water.”²²⁴ The agencies do not explain what they mean by “regular” or “seasonal” or whether those frequencies are necessary requirements for protection. Likewise, although the agencies would apparently permit the protection of wetlands that are inundated from another protected water body because of rainfall, they clearly, but arbitrarily, intend to exclude wetlands from which flow to a protected water body is exclusively due to rainfall.

Similarly, the agencies arbitrarily refuse to consider the protection of wetlands connected to other covered waters via subsurface flow, even if such flow is substantial and obviously important to the nearby water, while allowing wetlands to be protected if small but intermittent flow occurs from a wetland via a culvert to another covered water.

H. The Proposed Waste Treatment Exclusion is Unlawful.

The proposal excludes “waste treatment systems” from the definition of “waters of the United States.”²²⁵ Although EPA duly promulgated the waste treatment system exclusion in 1980, the proposal would codify a specific understanding of that exclusion that is far more sweeping than originally intended. In 1980, EPA limited the exclusion to “manmade bodies of water” that “neither were originally created in waters of the United States (such as a disposal

²²⁴ 84 Fed. Reg. at 4,186 & 4,188.

²²⁵ 84 Fed. Reg. at 4,193.

area in wetlands) or resulted from the impoundment of waters of the United States.”²²⁶ When industry objected, EPA suspended the language limiting the exclusion to manmade systems, without opportunity for public comment, but explained that the suspension was temporary and that EPA would “promptly” amend the rule or “terminate the suspension.”²²⁷ It never did.

Now, the agencies propose to make the suspension permanent, by abandoning any intent to correct the problem through rulemaking and treating the suspension as a settled matter, and without offering any explanation for changing the prior commitment from the 1980s. The agencies have also affirmed an interpretation of the exclusion that authorizes new impoundments of natural waters, such as streams and wetlands, so that they can be pressed into service as industrial waste dumps. The waste treatment system exclusion violates the plain language of the Clean Water Act, lacks a reasoned basis in the record, and perpetuates a longstanding dereliction of the Agencies’ duty to protect all waters of the United States under the Act.

The fundamental purpose of the Clean Water Act is to protect the “chemical, physical, and biological integrity” of all waters of the United States.²²⁸ Congress spoke clearly: the Clean Water Act would apply to “the waters of the United States,”²²⁹ regardless of how those waters were used. The law contains no exceptions to that rule, much less for natural water bodies made into repositories for industrial waste. Indeed, that is the very practice Congress meant for the Act to end.²³⁰

The waste treatment system exclusion violates the plain language of the Act. Nowhere does the Act empower the agencies simply to remove waters of the United States from the Act’s

²²⁶ 45 Fed. Reg. 33,290, 33,424 (May 19, 1980).

²²⁷ 45 Fed. Reg. 48,620, 48,620 (July 21, 1980).

²²⁸ 33 U.S.C. § 1251; *see also* *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

²²⁹ 33 U.S.C. § 1362(7).

²³⁰ *See* S. Rep. No. 92-414, at 7 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3674 (“The use of any river, lake, stream or ocean as a waste treatment system is unacceptable.”).

protections.²³¹ Yet that is precisely what the waste treatment system exclusion does, contravening the clear intent of Congress. The exclusion cannot be reconciled with the Act’s purpose of controlling and eventually eliminating pollution discharges into our Nation’s waters.²³²

Even assuming that Congress actually intended to delegate to the agencies the discretion to allow the Nation’s waters to be used as waste dumps, the agencies have failed to exercise that discretion in a reasoned and consistent manner, have failed to explain their interpretation of the exclusion, and have changed what was originally adopted as a temporary measure into a permanent exclusion without explanation. Their latest action on the exclusion is thus arbitrary and capricious.²³³

Permanently adopting the waste treatment system exclusion, without the language limiting it to manmade systems, is arbitrary and capricious in two ways. First, the exclusion flies in the face of the agencies’ proposal to protect impoundments of waters of the United States. The Agencies provide no explanation—scientific, technical, or otherwise—for their decision to treat so-called “waste treatment systems” differently from other impoundments of waters of the United States.²³⁴ Second, EPA has never explained the shift from its 1980 position that only manmade waste treatment systems should be excluded from the definition of “waters of the United States,” to its present position permanently extending the exclusion to systems created in natural waters. When EPA promulgated the exclusion in 1980, it explained that the Act “was not

²³¹ Cf. *Nat’l Ass’n of Mfrs. v. Dep’t of Labor*, 159 F.3d 597, 600 (D.C. Cir. 1998) (“There is, of course, no such ‘except’ clause in the statute [at issue in that case], and we are without authority to insert one.”); *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (invalidating a rule on the basis that, under the Clean Water Act, EPA lacked discretion to exempt entire categories of point sources from certain permitting requirements).

²³² See 33 U.S.C. § 1251(a)(1).

²³³ See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

²³⁴ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency 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.” (internal quotation marks omitted)).

intended to license dischargers to freely use waters of the United States as waste treatment systems,”²³⁵ and that the exclusion was limited to manmade waters “to ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands.”²³⁶ Then, when EPA suspended the language limiting the exclusion to manmade systems, the agency said it was responding to complaints that the limitation would otherwise cover “existing waste treatment systems . . . which had been in existence for many years.”²³⁷ The agencies’ failure to explain their decision to convert a temporary, narrow suspension to a permanent, wholesale exclusion makes their action arbitrary.²³⁸

I. The Proposal’s Additional Expanded Exclusions Are Arbitrary and Capricious.

The agencies either propose, or seek comment on finalizing, new aspects of longstanding exclusions from the definition of “waters of the United States” which would fail to consider important aspects of the problem or run counter to the evidence before the agencies.

First, the agencies propose to expand the exclusion for “prior converted cropland” to waters where agricultural activity has been abandoned by re-defining abandonment to mean that an area is not abandoned if it has been used for agriculture at any point in the prior five-year period, even if the area has been permanently converted to another use. Current policy is that “[i]f the land changes to a non-agricultural use, the PC determination *is no longer applicable* and

²³⁵ 45 Fed. Reg. 33,290, 33,298 (May 19, 1980).

²³⁶ 45 Fed. Reg. 48,620, 48,620 (July 21, 1980).

²³⁷ 45 Fed. Reg. at 48,620 (emphasis added). For some time following the temporary suspension, the exclusion was not interpreted to authorize newly created waste impoundments in natural waters. *See W. Va. Coal Ass’n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989) (deferring to EPA’s interpretation that treatment ponds were regulated “impoundments,” not excluded “waste treatment systems”). Over time, however, the Agencies adopted a new interpretation that allowed newly created waste impoundments in natural waters. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 211-16 (4th Cir. 2009) (upholding the Agencies’ interpretation in the context of a permit challenge).

²³⁸ *See, e.g., Encino Motorcars*, 136 S. Ct. at 2125 (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”).

a new wetland determination is required for CWA purposes.”²³⁹ This language makes clear that abandoning agricultural use of the feature immediately ends the eligibility for the exclusion. By contrast, the proposal would not immediately end the exclusion if agricultural operations cease – if, for instance, the property is sold for commercial development. Rather, if the land was used for agriculture during the preceding five years, the area would still be eligible for the exclusion. The agencies’ lone justification for this change is promoting clarity and regulatory certainty, but this would not achieve that goal; instead, if the proposal is adopted, stakeholders facing jurisdictional questions on any given parcel will need to know whether or not it was used for agriculture in the last five years, even if it plainly is not being used in such a fashion at the time that a discharge of a pollutant occurs. It would also create a perverse incentive to convert agricultural land to non-agricultural land for development and to destroy wetlands on formerly agricultural land as soon as possible.

In addition, the agencies invite comment on whether certain exclusions (artificial lakes and ponds, water-filled depressions, stormwater control features, and wastewater recycling structures) should only apply when constructed *wholly* in uplands.²⁴⁰ Such a limitation is obviously essential; the basis for these exclusions is that there are features that were not meant to be considered waters (or historically had not been considered waters), but that is not the case with respect to features that are located in part in clearly natural water bodies. Allowing dischargers to create artificial lakes and ponds, for instance, only a fraction of which is in uplands and the remainder of which is part of a natural water, and then permitting these waters’ pollution without any Clean Water Act limits, would create an enormous loophole in the law and

²³⁹ Memorandum from Bruce Knight, NRCS & George Dunlop, U.S. Dept. of Army, to Field, at 4 (Feb. 25, 2005) (emphasis added) (included in Appendix A of these comments), available at https://prod.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007869.pdf.

²⁴⁰ 84 Fed. Reg. at 4,195.

perverse incentives. The agencies offer no policy justification for such a change, nor have they analyzed what the potential consequences of the expanded exclusion might be.

IX. The Proposal is Procedurally Deficient.

Finally, the agencies flouted basic procedural requirements in their haste to undo longstanding clean water safeguards.

A. The comment period on the proposal was too limited to allow a meaningful opportunity for public participation.

The agencies only allowed 60 days for public comment on this proposal. That abbreviated time is unlawful. Both the Administrative Procedure Act and the Clean Water Act require meaningful time and opportunity to comment on proposed rules. The APA directs that agencies undertaking rulemaking allow “interested persons an opportunity to participate,” and empowers courts to invalidate agency decisions where the length of the comment period is “arbitrary and capricious” or “an abuse of discretion.”²⁴¹ The Clean Water Act similarly provides that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.”²⁴²

The opportunity afforded stakeholders to comment on this proposal pales in comparison to that associated with the Clean Water Rule. The agencies published the Clean Water Rule proposal in the Federal Register on April 21, 2014, and the comment period ended on November 14, 2014 – a total of 207 days. Such a period is reasonable in view of the significance of the definition of “waters of the United States” to the proper implementation of the Clean Water Act.

²⁴¹ 5 U.S.C. §§ 553(c); 706(2)(A).

²⁴² 33 USC §1251(e).

The agencies' initial repeal proposal acknowledged as much, stating that the "scope of CWA jurisdiction is an issue of great national importance," one that warrants "robust deliberations" about the law's coverage.²⁴³ Nevertheless, they have provided an insufficient opportunity to participate in this rulemaking.²⁴⁴

As evidence of the inadequacy of the comment period, the agencies received numerous requests for a more meaningful opportunity to develop their input on the proposal. Requesters included:

- National Conference of State Legislatures, National Association of Counties, National League of Cities, and the U.S. Conference of Mayors;²⁴⁵
- 20 conservation and community organizations;²⁴⁶
- Southern Environmental Law Center for numerous groups;²⁴⁷
- Society of Wetland Scientists;²⁴⁸
- Ecological Restoration Business Association;²⁴⁹
- Nature Conservancy;²⁵⁰
- Association of State Floodplain Managers;²⁵¹
- North Dakota Department of Agriculture;²⁵²
- Nearly 200 House and Senate members;²⁵³
- Association of Clean Water Administrators, Environmental Council of the States, Association of State Wetlands Managers, and Association of Fish and Wildlife Agencies;²⁵⁴

²⁴³ 82 Fed. Reg. at 34,902.

²⁴⁴ See, e.g., *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (finding the length of the comment period and the number of comments received during a prior rulemaking relevant to determining that inadequate comment time had been given regarding the rule's suspension); *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 453 (3d Cir. 2011) (suggesting that 90 days is a "usual" comment period); see also *California v. Dep't of Interior*, Case No. C 17-5948 SBA, ECF No. 72 at 30-32 (finding that "a comparison between the [agency's] rulemaking process leading to the [rule at issue there]," which included a 120 day comment period, "and the process used to repeal it," which included a 30 day comment period, "exemplifies the [agency's] failure to provide for a meaningful rulemaking process") (Order dated 3/29/2019).

²⁴⁵ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0979>

²⁴⁶ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0084>

²⁴⁷ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0967>

²⁴⁸ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0978>

²⁴⁹ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0556>

²⁵⁰ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0611>

²⁵¹ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0584>

²⁵² <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0349>

²⁵³ U.S. House of Representatives Committee on Transportation & Infrastructure, Press Release, Over 160 Representatives and 36 Senators Urge EPA to Extend Comment Period for Proposed WOTUS Rule (Feb. 12, 2019), available at <https://transportation.house.gov/news/press-releases/over-160-representatives-and-36-senators-urge-epa-to-extend-comment-period-for-proposed-wotus-rule>.

²⁵⁴ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0079>

- Environmental Law & Policy Center on behalf of 30 Great Lakes regional groups;²⁵⁵
- American Society of Civil Engineers²⁵⁶

The agencies denied all of these requests but provided no explanation for doing so.

The 60-day comment period offered in the current rulemaking is not meaningful for several reasons. First, as discussed in detail above, the agencies have essentially done no analysis of the impacts likely to arise from their proposal, leaving concerned stakeholders to attempt to do so. Second, despite stakeholders' best efforts, key information in the agencies' possession has not been made public; for example, NRDC filed a Freedom of Information request with EPA in September, 2018, seeking records that could bear on the effects of the proposal on a variety of water bodies, but the agency has entirely failed to respond to that request.²⁵⁷ Third, as noted above, the agencies rely, at least in part, on speculation that state requirements will compensate for the federal government's abandonment of protections, but provides very little time for states and other stakeholders to evaluate the likelihood of states implementing comparable protections to federal law. Fourth, several materials the agencies have cited in support of their rulemaking were not made available in the rulemaking docket immediately when the proposal was published in the Federal Register.²⁵⁸

B. Key Implementation Details Have not Been Included in the Docket for the Proposed Rulemaking.

According to multiple attendees at meetings with state and tribal representatives, the agencies have answered hypothetical questions about how the rule would supposedly work in practice. Specifically, we understand states were informed that discharges from point sources

²⁵⁵ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0751>

²⁵⁶ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0078>

²⁵⁷ Letter from Jon Devine, NRDC, to FOIA Officer, EPA (Sept. 11, 2018) (included in Appendix A of these comments).

²⁵⁸ See Screenshot of list of Supporting Documents for Docket EPA-HQ-OW-2018-0149 (listing several documents with docket posting date after February 14, 2019 Federal Register publication date) (included in Appendix A of these comments).

that pass through ephemeral streams would be regulated at the location where the pollutant reaches a defined “water of the United States.” Because the proposal discusses potential implementation approaches at numerous places,²⁵⁹ the agencies obviously recognize that how this proposal will be implemented in the field is essential to understanding its provisions and potential impacts. For a comment opportunity to be meaningful, all stakeholders must have equal access to important information about the agencies’ proposal, so the agencies must make these implementation details available in the docket, and re-open the public comment period to enable comment on those issues.

²⁵⁹ *See, e.g.*, 84 Fed. Reg. 4,176, 4,181, 4,183, 4,187 & 4,193.