WATERKEEPER® ALLIANCE

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Via email to ow-docket@epa.gov and online submission to www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Definition of Waters of United States - Recodification of Pre-Existing Rules: Docket ID No. EPA-HQ-OW-2017-0203

To Whom it May Concern:

Waterkeeper Alliance, Center for Biological Diversity, Center for Food Safety, Turtle Island Restoration Network, and the Waterkeeper Member Organizations and Affiliates identified below ("Commenters") submit the following comments on the United States Environmental Protection Agency ("EPA") and Department of Defense, Department of the Army, Corps of Engineers ("Corps") proposed rule entitled "Definition of Waters of United States - Recodification of Pre-Existing Rules," 82 Federal Register 34899 (July 27, 2017) (hereinafter "Proposed Rule").

INTERESTS OF THE COMMENTING ORGANIZATIONS

Waterkeeper Alliance ("Waterkeeper") is a not-for-profit corporation dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. Waterkeeper comprises 328 Waterkeeper Member Organizations and Affiliates that are working in 35 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 174 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in waterways across the country – many of which are severely impaired by pollution. The federal Clean Water Act ("CWA")[1] is the bedrock of Waterkeeper Alliance's and its Member Organizations' and Affiliates', work to protect rivers,

[1] 33 U.S.C. §1251 *et seq.*

streams, lakes, wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate Organizations and our respective individual supporting members, as well as to protect the people and communities that depend on clean water for their survival. Our work – in which we have answered Congress's call for "private attorneys general" to enforce the CWA when government entities lack the time, willingness or resources to do so themselves – requires us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues. We understand and have seen firsthand how important a clear definition of the "waters of the United States" is to the functionality and effectiveness of the CWA. A broad definition of "waters of the United States," consistent with the language, purpose and intent of the CWA, is critical to our collective work to protect the nation's waterways.

The Center for Biological Diversity ("Center") is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.5 million members and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life.

Turtle Island Restoration Network (TIRN) is an environmental non-profit, which includes the Salmon Protection and Watershed Network (SPAWN). TIRN and SPAWN's work is to protect endangered, threatened, and vulnerable marine and anadromous salmonid and other species. Working on behalf of its members and with volunteers and staff, SPAWN promotes the continued survival and recovery of anadromous salmonid species in the Lagunitas Watershed in Marin County, California, through education, advocacy, and direct action. SPAWN's activities include: conducting spawning surveys and collecting other biological and scientific data; holding workshops, training, and volunteer opportunities for our members where participants learn about salmonid habitat and physiology, and ways that they can promote their survival and recovery; conducting educational programs for children under the direction of our in-house educational specialist; an ongoing initiative to restore salmonid habitat by planting 10,000 redwoods; and partnering with the National Park Service in Point Reyes, to restore salmon habitat in the Lagunitas Watershed. TIRN and SPAWN believe that the "waters of the United States" rule and the CWA are vital components of protection for marine and freshwater-dependent species and their habitats.

The Commenters and their members have substantial interests in clean water for drinking, recreation, fishing, economic growth, food production, and other

beneficial uses. These interests will be injured if EPA and the Corps adopt this Proposed Rule redefining "waters of the United States" under the CWA because, as explained below, the regulation: (1) Is substantively and procedurally contrary to law, (2) Reduces jurisdiction over the nation's historically protected waters contrary to the CWA, and (3) Does not comply with the federal Administrative Procedure Act ("APA"),[2] National Environmental Policy Act ("NEPA") [3] and the Endangered Species Act ("ESA").[4]

INTRODUCTION

This Proposed Rule constitutes the latest effort by EPA and the Corps (the "Agencies") to define the statutory phrase "waters of the United States," as set forth in 33 U.S.C. § 1362(7), for the purpose of identifying the waters subject to federal CWA jurisdiction. The Federal Register Notice (the "Notice") for this Proposed Rule attempts to avoid compliance with the CWA, APA, NEPA, and ESA by characterizing this Proposed Rule as a non-substantive "temporary, interim measure," that is simply codifying the "current legal status quo" as "[t]he first step in a comprehensive, two-step process intended to review and revise" this definition.[5]

Contrary to the Agencies' specious characterizations of this action, however, the Proposed Rule is indisputably a legislative rulemaking that, if finalized, will substantively revise federal law by (1) formally withdrawing the Agencies' 2015 regulatory definition of "waters of the United States," dubbed the Clean Water Rule ("CWR")[6] and (2) replacing it with different regulatory definitions that will be codified in the Code of Federal Regulations ("Re-Codified Definitions"). Accordingly, the Agencies actions must fully comply with the CWA and all of the federal laws that govern formal rulemaking by the Agencies. As explained in detail below, the Agencies have neither provided for meaningful public participation under the CWA nor followed the APA in the development and revision of this Proposed Rule. The Proposed Rule is also contrary to the CWA and violates the requirements of the ESA, NEPA and Executive Order 13778.

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[2] Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

[3] National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.

[4] Endangered Species Act, 16 U.S.C. § 1531 *et seq*.

[5] Definition of ''Waters of the United States''— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899, 34899 and 34903 (July 27, 2017).

[6] Clean Water Rule: Definition of 'Waters of the United States" 80 Fed. Reg. 37054 (June 29, 2015).

These failures are not mere technicalities and, if unaddressed, will severely undermine or eliminate fundamental CWA protections across the country – endangering our nation's water resources.

In this action, using a severely inadequate administrative process, the Agencies propose to revoke a clear, if imperfect,[7] regulation defining "waters of the United States" under the CWA and replace it with what amounts to a vague, moving target subject to nearly unlimited agency discretion. Under the guise of a simple "return to the status quo," the Proposed Rule would have far-reaching effects that have not been disclosed by the Agencies and cannot be discerned from the information provided. The Proposed Rule is the epitome of the illegal and arbitrary, discretion-abusing agency practices that Administrator Pruitt so often decries, including accusations against the EPA itself under the previous administration. In March of this year, Administrator Pruitt addressed this very issue in a speech at an international conference for energy interests in Houston, Texas stating:

> Process matters. I think over the last several years the way that agencies at the federal level have conducted themselves, there's been a disregard, kind of a, a lack of commitment to process. I'm gonna give you a couple examples. In the environment and energy space, we've seen litigation actually drive the regulatory agenda in a way of regulations occurring outside of the Administrative Procedures Act where you take comment and you take information, the sue and settle practice through consent decrees has been something that the EPA and other agencies have used, I think to the detriment of the people that we serve. There's a reason why Congress has set up the Administrative Procedures Act, and the reason it has done so is because as rules are adopted and the Executive Branch, it's important that we hear from people on how it impacts them at the local level and state level, industry, citizens, consumers. And as those, as that information comes in, as you propose rules and comments are offered, the agency's responsible to evaluate that and make an informed decision before it finalizes the rule. That's a process that matters to having good, effective rules at the end. That's been abused over the last several years, and will need, will change under our administration . . . And then

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[7] Several of the Commenters are petitioners in litigation challenging several provisions of the Clean Water Rule. *See In re U.S. Dep't of Def. & U.S. Envtl. Prot. Agency Final Rule: Clean Water Rule: Definition of "Waters of United States"*, 817 F.3d 261 (6th Cir. 2016); *cert. granted sub nom. Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 137 S. Ct. 811, 196 L. Ed. 2d 595 (2017).

> secondly, and many of you know this in the room, agencies whether it's the EPA or other agencies in the finance sector, healthcare sector, have used guidance documents to engage in substantive rulemaking because you don't have to take comment. You don't have to respond to the comment and go through an elongated process. That's something, again, that is abusive of the process that Congress has set up.[8]

The Commenters urge the Agencies to consider the Administrator's remarks in relation to the Proposed Rule, which would (1) grant regulatory relief identical to that currently sought by certain parties opposing the CWR in litigation (2) employ a deficient administrative process with a clearly evident pre-determined outcome and severely limited public comment and (3) result in a rule that will be substantively interpreted based on agency guidance documents and other inadequately disclosed Agency views. We are confident that, if the Agencies do so in good faith, they will determine that the Proposed Rule must be withdrawn.

It would be difficult to overstate the critical importance of the CWA regulatory definition of "waters of the United States," and thus this Proposed Rule, to the protection of human health, the wellbeing of communities, the success of local, state and national economies, and the functioning of our nation's vast, interconnected aquatic ecosystems, as well as the many threatened and endangered species that depend upon those resources. If a stream, river, lake, or wetland is not included in the definition of "waters of the United States," untreated toxic, biological, chemical, and radiological pollution can be discharged directly into those waters without meeting any of the CWA's permitting and treatment requirements.[9] Excluded waterways could be dredged, filled and polluted with impunity because the CWA's most fundamental human health and environmental safeguard – the prohibition on unauthorized discharges in 33 U.S.C. § 1311(a) – would no longer apply. Because "isolated" waterways do not exist in reality but are merely a legal fiction of recent vintage, unregulated pollution discharged into waterways that fall outside the Agencies' definition will not only harm those receiving waters, but will often travel through well-known

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[8] EPA Administrator Scott Pruitt, *CERAWeek Environmental Policy Dialogue with Scott Pruitt*, (March 9, 2017) *available at:* http://ondemand.ceraweek.com/detail/videos/featured-videos/video/5358092032001/environmental-policy-dialogue-with-scott-pruitt?autoStart=true (last accessed on Sept. 24, 2017).

[9] For example, the CWA contains the following core water quality protections: point sources discharging pollutants into waters must have a permit, 33 U.S.C. §§ 1311(a) & 1342; the absolute prohibition against discharging "any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste," *id.* § 1311(f); protections against the discharge of oil or hazardous substances, *id.* § 1321; and restrictions on the disposal of sewage sludge, *id.* § 1345.

hydrologic processes before harming other water resources, drinking water supplies, recreational waters, fisheries, industries, agriculture, and, ultimately, human beings.

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain severely polluted, and by some indications, pollution appears to be increasing. For example, while water quality in a large percentage of our nation's waters has not been assessed, the most recent available data from EPA shows water pollution in assessed waters has impaired 581,305 river/stream miles, 12,917,748 lake acres, 44,618 sq. miles of estuarine waters, 3,311 square miles of coastal waters, 665,494 wetland acres, and 39,230 sq. miles of the Great Lakes Open Water.[10] By comparison, EPA's 2004 CWA Section 305b Report showed that there were 246,002 miles of impaired rivers/ streams and 10,451,401 acres of impaired lakes as of 2004.[11] As noted in the 2013 Draft Connectivity Report and the 2014 Science Advisory Board ("SAB") Review of that Report for the CWR, there is strong scientific evidence to support the conclusion that ephemeral streams, intermittent streams, perennial streams, floodplain wetlands, non-floodplain wetlands, and other waters are either connected to downstream waters or sustain the physical, chemical, and/or biological integrity of downstream waters.[12] Thus, it is imperative that these waters remain protected under the CWA.

Clean water is important to nearly every aspect of our lives and livelihoods but most importantly is it essential to life itself. As a nation, we cannot have clean water unless we control pollution at its source – wherever that source may be. This entails protecting waters throughout the entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are connected to traditionally navigable waterways. With regard to the CWA, "[p]rotection of

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[10] EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, *available at* http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last accessed on Sept. 25, 2017). **(Attachment 1).**

[11] EPA, Findings on the National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle, *available at:* https://www.epa.gov/sites/production/files/2015-09/documents/2009_01_22_305b_2004report_2004_305breport.pdf (last accessed on Sept. 25, 2017) **(Attachment 2).**

[12] U.S. Environmental Protection Agency, Office of Research and Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence - External Review Draft - EPA/600/R-11/098B (Sept. 2013) (hereinafter "Connectivity Report"); U.S. Environmental Protection Agency, Science Advisory Board, Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 (Oct. 17, 2014) (hereinafter "SAB Report"). Both available at: https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf (last accessed on Sept. 25, 2017). **(Attachment 3).**

aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." This is precisely why "Congress chose to define the waters covered by the Act broadly."[13] The breadth of the waters protected under the CWA, and the reasons therefore, were firmly established with the passage of the CWA in 1972 and are reflected in the Agency definitions of "waters of the United States" in 1973 (EPA) and 1977 (Corps), which protected navigable-in-fact waters, interstate waters, the territorial seas, impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and "[a]ll other waters … the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.[14] If we can ever hope to restore the chemical, physical and biological integrity of our nation's waters – which was the bedrock objective of Congress with it passed the CWA – it is essential that the definition of "waters of the United States" under the CWA protect traditionally navigable waters, interstate waters, tributaries, adjacent waters, wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes, lakes, estuaries, and other waterbodies that either provide important functions themselves or have an influence on downstream waters.

In the Proposed Rule, the Agencies requested comment on "whether it is desirable and appropriate to re-codify in regulation the status quo as an interim first step pending a substantive rulemaking to reconsider the definition of 'waters of the United States' and the best way to accomplish it."[15] However, the Agencies also state that the Re-codified Definition will be "implemented" based on "applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the SWANCC and Rapanos Supreme Court decisions, applicable case law, and longstanding agency practice."[16] Although we do not restrict our comments to this narrow issue, the Commenters do oppose the Agencies' proposal, "as an interim first step," to adopt the pre-2015 CWR regulatory definitions, as modified by the Agencies' undisclosed interpretations of guidance documents, Supreme Court precedent, relevant caselaw, and agency

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[13] *U.S. v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 132-33 (1985); *see also* H.R.Rep. No. 92–911, p. 76 (1972); S.Rep. No. 92–414, p. 77 (1972); U.S.Code Cong. & Admin. News 1972, pp. 3668, 3742).

[14] 40 C.F.R. § 122.3 (1981) (45 Fed. Reg. 33,290, 33,424 (May 19, 1980)); *see also* 33 C.F.R. § 323.2 (1983) (47 Fed. Reg. 31,794, 31,810 (July 22, 1982)).

[15] Proposed Rule Notice, 82 Fed. Reg. at 34903.

[16] *Id*. at 34902.

memoranda. The Agencies are neither codifying the legal status quo nor taking a temporary, "interim step." Instead, by adopting the Proposed Rule, the Agencies are adopting a substantive rule in violation of the CWA, APA, NEPA, the ESA, and Executive Order 13778. The Commenters urge the Agencies to withdraw the Proposed Rule, and provide a meaningful opportunity for the public to have input into the Agencies' review of the definition of "waters of the United States" under the CWA – prior to determining whether to proceed to withdraw the CWR and replace it with a different definition. Any definition of "waters of the United States" must ensure broad jurisdiction to control pollution consistent with the intent of Congress when it enacted the CWA. The Proposed Rule does not meet this standard.

I. THE PROPOSED RULE VIOLATES THE CLEAN WATER ACT AND THE ADMINISTRATIVE PROCEDURE ACT

Courts at all levels have stressed the importance of public participation in rulemaking, and the D.C. Circuit has determined that notice and comment works "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[17] These considerations are especially pressing in the context of redefining "waters of the United States" for the purposes of the CWA, yet the Agencies have failed to provide even basic information about this Proposed Rule and the bases for the Agencies' decision-making that would allow the public to meaningfully participate. Accordingly, the Proposed Rule constitutes an abuse of agency discretion and is arbitrary, capricious and contrary to law.

The CWA requires 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.[18] Additionally, the APA requires agencies to provide notice of a proposed rule and the opportunity for comment.[19] These requirements apply to both the CWR withdrawal and the

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[17] *International Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[18] 33 U.S.C. § 1251(e) (*emphasis added*).

[19] 5 U.S.C. § 553.

recodification of the previous definition.[20] The Agencies must comply with the APA and provide for public participation in all agency actions that create (or eliminate) law, *i.e.* promulgation of legislative or substantive rules.[21]

It is beyond dispute that the Agencies are developing and revising substantive legislative regulations in this Proposed Rule and, thus, the Agencies must comply with the CWA and APA requirements for agency rulemaking. "To determine whether a regulatory action constitutes promulgation of a regulation, [courts] look to three factors: (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency."[22] In the Proposed Rule, the Agencies expressly identify this action as a proposed rule, and the rulemaking action was published in the Federal Register.[23] The Proposed Rule will have a binding effect on dischargers, the broader regulated community, the public, the states, and the Agencies because it will withdraw and redefine the scope of federal jurisdiction over waters under the CWA.

The Proposed Rule will also have significant impacts on the Agencies and the public. For example, it will determine which point source water pollution discharges require an NPDES permit under CWA Section 402,[24] which bodies of water may be destroyed through dredging or filling without a permit issued under Section 404, and whether citizens or the EPA can bring an enforcement action to address unpermitted pollution discharges to a particular water body.[25] The withdrawal and replacement of the CWR with different regulatory definitions will necessarily alter CWA jurisdiction by either increasing or reducing jurisdiction over different types of water bodies. Thus, the Proposed Rule will confer rights or obligations on private parties and the Agencies, and both the withdrawal of the CWR and the "re-codification" of the prior definition of WOTUS are subject to the CWA and APA requirements. Accordingly, the Agencies cannot withdraw the

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[20] *See Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009); *Pub. Citizen v. Steed*, 733 F.2d 93, 97–98 (D.C. Cir. 1984) (citing *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 430 U.S., 29, 41, (1983)).

[21] *See, e.g.*, *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

[22] *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999).

[23] Proposed Rule Notice, 82 Fed. Reg. at 34899.

[24] 33 U.S.C. § 1342.

[25] 33 U.S.C. §§ 1319 & 1369.

CWR and "recodify" the previous definitions of "waters of the United States" without allowing for full public participation under the CWA, and without complying with the APA.

A. The Agencies Failed to Engage in a Substantive Evaluation of this Proposed Rule, Do Not Articulate a Reasoned Basis for these Actions and Are Improperly Denying the Public an Adequate Notice and Opportunity to Comment.

Despite the significance of this regulatory action and its impacts on the public,[26] the Notice for the Proposed Rule is a mere eleven pages long, including the actual text of the CWR and Re-codified Definitions. The Notice does not contain meaningful information regarding the Agencies' rationale and legal justification for withdrawing the CWR or replacing the CWR with different definitions of 'waters of the United States. Other than citing to *FCC v. Fox Television Stations, Inc.* ("*Fox*")[27] and *Nat'l Ass'n of Home Builders v. EPA* ("*Home Builders*"),[28] which articulate some of the applicable legal standards for rescinding agency regulations, the Notice provides virtually no information regarding the legal or factual bases for the Agencies actions or even how Proposed Rule complies with the standards articulated in *Fox* or *Home Builders*.

Under the APA, the Agencies are required to "provide reasoned explanation" for their action, and "must show that there are good reasons" for withdrawing the CWR and replacing it with the previous definition of "waters of the United States."[29] The Agencies must also demonstrate that their action is a "permissible construction," of the CWA, *i.e.* that the Agencies' action is not "arbitrary, capricious, or manifestly contrary to the statute."[30] The Agencies are also required provide a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" the CWR.[31] The Agencies utterly failed to meet these requirements in the Proposed Rule.

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[26] The Agencies acknowledge that the Proposed Rule is a "significant regulatory action" in their Economic Analysis for this rulemaking. *See* Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, at p. 1 (June 2017). *available at:* https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0002 (last accessed Sept. 27, 2017).

[27] 556 U.S. 502, 515 (2009).

[28] 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012).

[29] *Fox*, 556 U.S. at 516.

[30] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

[31] *Fox*, 556 U.S. at 516.

In essence, the Agencies state, with varying degrees of clarity, three justifications or explanations for this action: (1) The Proposed Rule is "the first step in a two-step response to [Executive Order 13778], intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to engage in the second step: A substantive review of the appropriate scope of ''waters of the United States,''[32] (2) "In the two-step rulemaking process commencing with today's notice, the agencies will more fully consider the policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction,"[33] and (3) To meet the Agencies perceived need to withdraw the CWR and recodify the prior definition "as an interim step for regulatory continuity and clarity" given the possibility that "the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order."[34]

However, when closely evaluated, these tautological statements are not reasoned explanations for why the Agencies have proposed this rulemaking. The statements do little more than restate the fact that the Agencies are taking this two-step action to implement their interpretation of Executive Order 13878[35] – a foregone conclusion upon which the Agencies seek no input from the public. Because the Agencies have already decided upon taking this two-step action, they simply presume without explanation that they must withdraw the CWR and consider replacing it with the prior definition for the purpose of ensuring "continuity and clarity" and avoiding "inconsistencies, uncertainty, and confusion." This is truly no explanation or justification at all, and worse, this Proposed Rule will only engender, rather than resolve, inconsistencies, uncertainty, and confusion.

Additionally, the Agencies do not articulate how CWA Section 101(b)[36] figures into the basis for this Proposed Rule, but the Notice does discuss the subsection

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[32] Proposed Rule Notice, 82 Fed. Reg. at 34901.

[33] *Id.* at 34902.

[34] *Id.*

[35] Executive Order 13778 – Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ''Waters of the United States'' Rule, 82 Fed. Reg. 12497 (2017).

[36] 33 U.S.C. §1251(b).

in a manner that indicates the Agencies believe it to be of central importance to "the scope of the definition of 'waters of the United States'." However, because "the scope of the definition of 'waters of the United States' is an issue the Agencies have declined to evaluate, explain or accept public comment on, and because the agencies do not explain why Section 101(b) would lead them to the conclusion that the CWR should be withdrawn and replaced by the prior regulatory definitions, the agencies discussion of Section 101(b) does not provide any justification for the Proposed Rule.

The Agencies' entire justification for this Proposed Rule hinges on the assertion that their actions are mandated by Executive Order 13778, however as explained in detail below, the Executive Order does not mandate, or even authorize, this action. The Agencies do not explain why they believe Executive Order 13778 requires any action at all, let alone why it requires the two-step process they decided upon outside of any rulemaking process. The Agencies do not explain why they are withdrawing the CWR, other than it may go into effect if the Sixth Circuit Court of Appeals lifts the current stay - but the mere existence of litigation and the potential for lifting of a stay is not a legitimate reason to revoke a final rule.[37] Similarly, the Agencies do not explain why the CWR becoming operable would be contrary to the CWA or even why it would be a better policy[38] to avoid that, nor do they explain why the CWR should be replaced with an interim definition, or ultimately a permanent definition based on Justice Scalia's opinion in *Rapanos v. United States*.[39] The Agencies simply proceed as if their two-step process is only choice available, and since they are going to conduct their two-step process, the Agencies are withdrawing the CWR leaving only one issue on the table for evaluation under the APA – "whether it is desirable and appropriate to re-codify in regulation the status quo as an interim first step pending a

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[37] *See e.g.*, *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1015 (9th Cir. 2009).

[38] *See e.g.*, *American Petroleum Institute v. EPA*, No. 09-1038 (D.C. Cir. 2017); *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009); *Cement Kiln Recycling Coal. v. E.P.A.*, 493 F.3d 207, 224–25 (D.C. Cir. 2007).

[39] *Rapanos v. United States*, 547 U.S. 715 (2006). The Agencies actually misconstrue the Justice Scalia's Opinion in *Rapanos* in the Notice for the Proposed Rule. The Notice states "a four-Justice plurality opinion in Rapanos, authored by Justice Scalia, interpreted the term 'waters of the United States' as covering 'relatively permanent, standing or continuously flowing bodies of water … ,' *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a 'continuous surface connection …' to such water bodies, *id.* (Scalia, J., plurality opinion)." Proposed Rule, 82 Fed. Reg. 34900. In the Proposed Rule Notice, the Agencies' mischaracterize Justice Scalia's test by including selective quotations from Scalia's opinion and inserting their own language in between, distorting and oversimplifying what Scalia actually wrote. Justice Scalia's Opinion is far more complex and nuanced than the Agencies' description would indicate. The Agencies also misconstrue the Justice Kennedy's and the four dissenting Justices' Opinions in the Notice for this Proposed Rule. *Id.*

substantive rulemaking to reconsider the definition of 'waters of the United States' and the best way to accomplish it."[40]

However, the Agencies have not articulated any meaningful substantive bases for withdrawing the CWR or codifying a different definition. In fact the Notice specifically states that the Agencies are not soliciting comments on the substance of what the definition of "waters of the United States" should be under the CWA.[41] Despite the fact that the Agencies are withdrawing one definition and replacing it with several different definitions of a term that is fundamental to the functioning of the CWA, the Agencies did not engage in a substantive evaluation of the CWR, which they propose to withdraw, or the prior definition, which they propose to "re-codify." In fact, the Notice actually contains an admission that the Agencies are withdrawing the CWR before they have even re-evaluated the definition of "water of the United States," which they say they will do in the future "as appropriate."[42] In so doing, the Agencies are attempting to avoid meaningful public notice and opportunity for comment on the substance of the action they are taking by providing the public with inadequate information about the bases for their action and by discouraging comment on the substance of the definition of "waters of the United States." This is also in violation of the CWA and APA.

The part of this action that is important to the public, i.e. what the definition should be and why, is deferred to some unknown point in the future despite the fact the Agencies are actually changing the definition now, in this Proposed Rulemaking. Specifically, the Agencies state that they:

> [A]re not at this time soliciting comment on the scope of the definition of ''waters of the United States'' that the agencies should ultimately adopt in the second step of this two-step process, as the agencies will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking to adopt a revised definition of ''waters of the United States'' in light of the February 28, 2017, Executive Order. The agencies do not intend to engage in substantive reevaluation of the definition of ''waters of the United States'' until the second step of the

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[40] Id. at 34903.

[41] Proposed Rule Notice, 82 Fed. Reg. at 34903-34904.

[42] *Id.* at 34903 ("A stable regulatory foundation for the status quo would facilitate the agencies' considered re-evaluation, as appropriate, of the definition of 'waters of the United States' that best effectuates the language, structure, and purposes of the Clean Water Act.")

rulemaking. See P&V, 516 F.3d at 1025–26.[43]

Thus, the Agencies are actually attempting to withdraw the CWR, a final rule, without conducting (or disclosing as the case may be) any substantive evaluation of their action and without allowing the public to have any substantive input into their decision. Despite the misleading characterization in the Notice, as a legal matter, withdrawing the CWR is making a substantive evaluation and decision on the definition of "waters of the United States." The Notice, however, states that the Agencies will be considering substantive issues "related to the 2015 rule" in a different rulemaking that they have not yet initiated and give no timeline for initiating. This plainly violates the CWA and the APA, and it is extremely disingenuous because the decision would be final before the justification and opportunity for public input is provided – rendering any future justification and comment opportunity meaningless from a legal perspective. Even worse, there is no guarantee that justification and opportunity for comment will ever materialize and, even if it does, the burden for justifying the legal basis for the CWR would be shifted to the public as opposed to the Agencies having to justify the repeal as required by law. In other words, the Agencies cannot avoid complying with the APA by simply advising the public about plans they may have for the future.

The Agencies are also attempting to adopt different definitions of "waters of the United States" as final rules to replace with CWR without providing any substantive justification for why those definitions are consistent with the CWA, and without allowing the public to have any input into the substance of those definitions. The Agencies explicitly state that they do not want any comment from the public on "the specific content" of those definitions – definitions that will have the force of law if adopted pursuant to this rulemaking. Instead, the Agencies seek comment only as to "whether it is desirable and appropriate to re-codify in regulation the status quo as an interim first step pending a substantive rulemaking to reconsider the definition of 'waters of the United States' and the best way to accomplish it." Yet, what basis would one have for deciding whether it is "desirable and appropriate" without considering the "specific content" of those rules? This action violates the APA and CWA.

The Agencies' are also attempting to lessen their obligations under the CWA and the APA and avoid substantive public input by falsely characterizing this Proposed Rule as codifying the "current legal status quo" and codification of a

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[43] Proposed Rule Notice, 82 Fed. Reg. at 34903.

"interim, temporary measure, pending substantive rulemaking."[44] The framing is clever perhaps, but it is not legally accurate. It is indisputable that this action would be unnecessary and duplicative if it already constituted the legal status quo. And this Proposed Rule is not temporary, interim, non-substantive, or even a "measure." While there are procedures for adoption of interim rules that are available in limited circumstances not present here,[45] the Agencies in this rulemaking have elected to adopt a permanent, rather than an interim, rule.[46] If the Agencies adopt the Proposed Rule, it will result in the promulgation of a final, permanent substantive rule. Period. The Agencies' characterization of the proposed Re-codified Definitions as "interim" and "temporary," and the assertion in the Notice that another rulemaking may take place at some point in the future, does not change this fact. Neither these misleading labels nor Executive Order 13778 exempts the Agencies from fully complying with the legal requirements for rulemaking under the CWA or APA. Additionally, the terms of the Executive Order under which the Agencies purport to be operating explicitly require that the "order shall be implemented consistent with applicable law," which of course includes the CWA and APA.[47]

In sum, the Agencies propose to change the law now without evaluating, or letting the public have input into, whether that change is a good idea and consistent with the CWA. The Agencies want the evaluation of their action to take place at some unknown point in the future – after the law has already been changed. This is plainly prohibited under the APA and the CWA. And as explained below, these violations are especially egregious and injurious to the public here because it is apparent that the Agencies have already made a substantive decision on the CWR, which is based on Supreme Court Justice Anthony Kennedy's opinion in *Rapanos v. United States*.[48] The Agencies intend to ultimately replace the CWR with a definition based on Supreme Court Justice Antonin Scalia's opinion in *Rapanos v. United States*.[49] The withdrawal of the CWR from the Code of Federal Regulations without the burden of justifying it or

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[44] Proposed Rule Notice, 82 Fed. Reg. at 34903.

[45] *See, eg., Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 95 (D.C. Cir. 2012).

[46] *See* 82 Fed. Reg. 34899 (denominating this action as a "Proposed Rule"); 34900

[47] Executive Order 13778, 82 Fed. Reg. at 12497.

[48] 547 U.S. at 759-87 (Kennedy, J. concurring).

[49] *See Rapanos v. United States*, 547 U.S. at 719-57 (Scalia, J. et al plurality opinion); Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (Mar. 6, 2017).

allowing substantive public input into that decision is an improper and transparent attempt to pave the way for them to do that without complying with the CWA and the APA.

Lastly, the Supreme Court in *Fox* held that a more detailed justification is required when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy" and that "[i]t would be arbitrary or capricious to ignore such matters … [because] a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[50] This Proposed Rule is an abuse of discretion, arbitrary, capricious and contrary to law because the Agencies have not provided even a basic justification for the Proposed Rule, let alone a detailed justification for withdrawing and replacing the CWR, which is based on findings derived from years of legal and scientific evaluation, and extensive public input.[51] Although some Commenters have identified legal shortcomings with several distinct provisions of the 2015 CWR,[52] it is a critically important regulation codified in the Code of Federal Regulations, and the Agencies cannot simply withdraw and replace it without engaging in full notice and comment rulemaking under the APA. By electing to avoid any substantive discussion of the CWR and the associated factual findings, limiting public comment and failing to set of a reasoned explanation for the CWR withdrawal and Re-codified Definitions in the Notice, the Agencies have violated the APA and the CWA. Accordingly, if the Agencies wish to proceed, they must publish another Proposed Rule that meets these requirements.

B. The Notice is Misleading, Vague and Lacks Adequate Information to Evaluate or Provide Meaningful Comments on the Definition the Agency is Actually Adopting

The Agencies state in the Notice that they are proposing to "re-codify the regulatory definitions (at 33 CFR part 328 and 40 CFR parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401) in the Code of Federal Regulations (CFR) as

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[50] 556 U.S. at 515-16 (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, (1996)).

[51] See e.g., Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37056 (June 29, 2015); Definition of "Waters of the United States" Under the Clean Water Act and Supporting Documents, Docket Id. No. EPA-HQ-OW-2011-0880, *available at*: https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880

[52] *See* Final Waterkeeper Comments on EPA-HQ-OW-2011-0880 (Nov. 14, 2014) **(Attachment 4)**; Opening Brief of Petitioners Waterkeeper Alliance, *et al.*, 6th Circuit Court of Appeals (Nov. 1, 2016) **(Attachment 5)**.

they existed prior to the promulgation of the stayed 2015 CWR definition."[53] Prior to the 2015 CWR, these definitions had remained in place largely unchanged since the 1970s, broadly encompassed jurisdiction over the nation's waters consistent with the CWA[54] and had never been overturned by a court.[55]

However, the Agencies do not intend to implement those regulatory definitions of "waters of the United States" as written and interpreted by the courts over the last several decades. Instead the Agencies state that they will "implement those prior regulatory definitions) [sic], informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice."[56] Although the meaning of this statement is incredibly vague given the history of these definitions, the Agencies manage to make their intentions even more opaque later in the Notice by adding additional interpretative materials to the list and indicating that they are only examples of what the Agencies will use to implement the Proposed Rule after it is finalized. This second list includes "applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the SWANCC and Rapanos Supreme Court decisions, applicable case law, and longstanding agency practice."[57]

With the addition of these vague and wide-ranging provisos, it is quite literally impossible to determine how the Agencies will define and interpret "waters of the United States" if the Proposed Rule is finalized. What do the Agencies understand the practice, guidance and Supreme Court decisions to mean about these definitions of "waters of the United States?" There are certainly widely divergent views on those topics, but the Agencies do not explain theirs. Further,

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[53] 82 Fed. Reg. at 34900.

[54] This is true with the exception of the illegal waste treatment exclusion described elsewhere in these comments.

[55] Neither the Supreme Court's decision in *SWANCC* nor its decision in *Rapanos* invalidated any provision in the Agencies' regulatory definitions of "waters of the United States" under the CWA. As the Agencies acknowledge in the Notice, in *SWANCC*, the "Supreme Court held that the use of ''isolated'' non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA." 82 Fed. Reg. at 34900. SWANCC dealt only with an administrative interpretation of 33 C.F.R. § 328.3(a)(3) (1999), dubbed the "Migratory Bird Rule," that purported to assert jurisdiction based on the mere fact that particular waters were or could be used by migratory birds, and the Court did not vacate 33 C.F.R. § 328.3(a)(3). Nothing in Rapanos is to the contrary. See 80 Fed. Reg. at 37,061 (recognizing that nothing in *Rapanos* "invalidated any of the current regulatory provisions defining 'waters of the United States'").

[56] Notice, 82 Fed. Reg. at 34900.

[57] *Id*. at 34902.

it is impossible to understand what the Agencies mean when they say the definitions will be "informed" by agency practice, "relevant memoranda and regulatory guidance letters," guidance documents, and Supreme Court decisions. Does this mean they will strictly follow them or does it mean they will just consider them? Which other Supreme Court decisions and case law do the Agencies believe are "applicable" and which will they disregard? How will they deal with split jurisdictions? What are the "relevant memoranda and regulatory guidance letters," and what criteria did the Agencies employ to determine their relevance? And what does it mean to be informed by an agency's longstanding practice, especially in the context of these specific definitions, which have been subjected to varying agency practices over time depending on any number of factors? These questions reflect only a few of the uncertainties associated with the Agencies decision to modify the meaning of the Re-codified Definitions' plain language through these vaguely described, external materials.

Perhaps most importantly, anyone that has even a passing familiarity with the definition of "waters of the United States" under the CWA understands that there is a long-history of disagreement regarding the meaning of and applicability of the Agencies' guidance documents, and that there is a wide range of opinion on the meaning of the Supreme Court's decisions in *SWANCC* and *Rapanos*. The Agencies' addition of the provisos to the Notice only further underscores that this Proposed Rule would not simply codify the legal status quo.

For example, the Sixth Circuit Court of Appeals recognized in *United States v. Cundiff* that extracting law from the *Rapanos* decision is problematic because "there is quite little common ground between Justice Kennedy's and the plurality's [Scalia's] conceptions of jurisdiction under the Act, and both flatly reject the other's view."[58] This interpretive struggle is not confined to the Sixth Circuit. Every other Circuit to consider the question has determined that CWA jurisdiction exists at least whenever Justice Kennedy's test is met – but with some applying both the Scalia and Kennedy tests and others finding that only Justice Kennedy's

[58] 555 F.3d 200, 210 (6th Cir. 2009).

test applies.[59] Importantly, none of these Circuits has determined that Justice Scalia's test alone should be employed to determine CWA jurisdiction as the Agencies indicated they intend to do in the as-yet-to-be-undertaken "second step" of this rulemaking. As to the Agencies' interpretations of Supreme Court precedent, the Agencies provided only general and incomplete summaries of *Bayview*, *SWANCC* and *Rapanos* in the Notice, and those summaries do nothing to illuminate if or how the Agencies view those decisions as altering the plain language of the definitions they proposed to adopt (assuming these are the Supreme Court decisions they are referencing). However, the Agencies do not even attempt to explain how those Supreme Court decisions will "inform" their implementation of the definitions.

The 2003 and 2008 Guidance Documents referenced and briefly described in the Notice certainly do not make the Agencies' intentions any more transparent. Additionally, those Guidance Documents are inconsistent with the CWA, the Supreme Court precedent cited by the Agencies and the plain language of the very definitions that Agencies are proposing to adopt. In years preceding the 2015 CWR, the 2003 and 2008 Guidance Documents implemented by the Agencies reduced protections for our nation's waters by limiting jurisdiction in a manner that was not justified by science or law.[60] The Guidance Documents were issued by the Agencies in response to the *SWANCC* and *Rapanos* opinions, but interpreted those decisions more broadly than the decisions allow or require. The Guidance Documents also imposed limitations on assertions of jurisdiction that were inconsistent with those decisions resulting in decreased jurisdiction over historically protected waters and inconsistent application by the

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[59] *Compare United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) ("The federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*.")., *United States v. Donovan*, 661 F.3d 174, 184 (3d Cir. 2011) ("We hold that federal jurisdiction to regulate wetlands under the CWA exists if the wetlands meet either the plurality's test or Justice Kennedy's test from *Rapanos*."); ; and *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 200) ("[W]e join the First Circuit in holding that the Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy's test."); *with United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) ("Justice Kennedy's proposed standard … must govern the further stages of this litigation); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) ("Justice Kennedy's concurrence provides the controlling rule of law for our case"); and *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("we join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's "significant nexus" test provides the governing rule of *Rapanos*.").

[60] *See Summary of Objections to Guidance in:* Congressional Research Service Report R43455, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States" at 6 (June 10, 2014) **(Attachment 6)**

Agencies.[61] For example, the 2008 Rapanos Guidance[62] inappropriately provided tributary stream less-than categorical protection although the existing regulatory definition protected, without any limitation, all tributaries to other specified jurisdictional waters and despite the fact that the Supreme Court has not issued any holding limiting the jurisdictional status of tributaries.[63] The 2003 and 2008 Guidance has left many categories of waters that had previously been protected vulnerable to pollution and destruction, and hindered regulatory and enforcement actions.[64]

Lastly, it appears the Agencies do not intend to approach implementation and enforcement of the Re-codified Definitions in a manner consistent with Justice Kennedy's significant nexus test or a combination of both tests consistent with every Circuit Court that has considered the issue, but instead intend to approach implementation and enforcement of the Re-codified Definitions based solely on the Scalia plurality interpretation.[65] This would be a substantial departure from long-standing agency practice, and is contrary to the case law interpreting the *Rapanos* decision. Further, because no opinion commanded a majority of the court in *Rapanos*, the Agencies should not adopt the reasoning of any of the various opinions in the *Rapanos* decisions as the sole basis for asserting or relinquishing jurisdiction over any waterbody, and the Agencies should not implement or promulgate a definition of "waters of the United States" in a manner that removes the broad Commerce Clause grounds for covering tributaries, wetlands, adjacent waters, or other waters.

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[61] In support of our comments, we hereby incorporate by reference the comments submitted by national environmental organizations on the 2011 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the CWA, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0001, which are a part of the official public docket in 2011 at EPA-HQ-OW-2011-0409-3608 (hereinafter "2011 Comments").

[62] U.S. Environmental Protection Agency and Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (2008) (hereinafter "Jurisdiction Following *Rapanos v. United States* and *Carabell v. United States"*) *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (providing for "significant nexus" analysis for "[n]on- navigable tributaries that are not relatively permanent").

[63] *Id.* at p. 13-14.

[64] *See generally*, Earthjustice et al., ABANDON: HOW THE BUSH ADMINISTRATION IS EXPOSING AMERICA'S WATERS TO HARM (2004), *available at* http://ocw.tufts.edu/data/32/386826.pdf. (hereinafter "Reckless Abandon").

[65] InsideEPA, April 5, 2017. EPA May End CWA Enforcement Using Kennedy Test Ahead Of New Rule, https://insideepa.com/daily-news/epa-may-end-cwa-enforcement-using-kennedy-test-ahead-new-rule (last accessed September 22, 2017) (Attachment 7).

II. THE PROPOSED RULE IS INCONSISTENT WITH EXECUTIVE ORDER 13778

The Notice for this Proposed Rule relies on Executive Order 13778[66] as the impetus and basis for this rulemaking. However, Executive Order 13778 does not mandate the withdrawal of the CWR, the recodification of the prior definition of "waters of the United States or initiation of a two-step process for revising the CWA definition of "waters of the United States." The Executive Order simply directs the Agencies to "**review"** the CWR "for consistency with the policy set forth in section 1 of this order and **publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law**."[67]

Thus, the Agencies were directed to review CWR for consistent with the policy set forth in the Executive Order and rescind or revise it only if was appropriate and consistent with law. The CWA and APA are chief among the laws the Agencies are required to consider in determining whether rescission and revision of the CWR would be appropriate and consistent with law. However, despite this direction to review the rule based on a policy articulated for the first time in the Executive Order, and to revise it as appropriate and consistent with the law, EPA Administrator Pruitt signed a one-page *Notice of Intention to Review and Revise the Clean Water Rule* ("Notice of Intention") – eight minutes after the Executive Order was signed[68] – citing concerns raised by opponents of the CWR in the pending litigation and the policy articulated in the Executive Order.[69] Notably, Mr. Pruitt was one of the opponents asserting the views cited in the Notice of Intention in opposition to the CWR in his role as Attorney General of the State of Oklahoma.[70]

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[66] 82 Fed. Reg. 12497.

[67] 82 Fed. Reg. at 12497 [emphasis added].

[68] *See* EPA Administrator Scott Pruitt, *CERAWeek Environmental Policy Dialogue with Scott Pruitt*, (March 9, 2017) *available at:* http://ondemand.ceraweek.com/detail/videos/featured-videos/video/5358092032001/environmental-policy-dialogue-with-scott-pruitt?autoStart=true (last accessed on Sept. 24, 2017).

[69] U.S. EPA and U.S. Army Corps, Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (Mar. 6, 2017).

[70] *See* 6th Circuit Brief of the States **(Attachment 8)**; N.D. Oklahoma **(Attachment 9)**; Scott Pruitt & Rand Paul, *EPA water rule is blow to Americans' private property rights*, http://thehill.com/opinion/op-ed/234685-epa-water-rule-is-blow-to-americans-private-property-rights (last accessed Sept. 27, 2017) **(Attachment 10)**.

Perhaps even more concerning is the fact that the Notice of Intention does not indicate that the Agencies intended to evaluate the definition in relation to the CWA or the APA, let alone consider public input in their review. To the contrary, it is clear from the Notice of Intention that the Agencies had already determined their course of action when they informed the public of the review, which for Administrator Pruitt was almost simultaneous with the signing of the Executive Order directing the Agency to consider the issue.

Administrator Pruitt has also made this clear in a speech he gave on March 9, 2017 at CERAWeek Conference – "the premier annual international gathering of energy industry leaders, experts, government officials and policymakers, as well as top executives from the technology and financial sectors."[71] After decrying litigation driving the regulatory agenda, emphasizing the importance of following the administrative process to prevent abuse, discussing the lawsuit he filed against EPA over the CWR, and vowing not to utilize guidance documents to establish substantive regulations, Administrator Pruitt stated that the CWR:

> [L]iterally regulated puddles and dry creek beds across the country … to the point that thirty-one states, Democrat and Republican states, sued the EPA to say what you've done is create a problem as far as what constitutes a 'water of the United States' and not provide clarity. And so the President last week did something very important. The President issued an Executive Order directing the EPA to fix that. And within eight minutes of that Executive Order being signed by the President, we started the rulemaking process to do just that. And at the end of that process, we're gonna have a rule that provides clarity, objective criteria so that we know when federal and state jurisdiction starts and ends."[72]

Putting aside the fact that the CWR explicitly exempts "puddles" from regulation, and the importance of regulating the pollution discharges into creeks whether they have water in them at the time or not, Administrator Pruitt's statement makes clear that the Agencies had decided to withdraw the CWR before conducting any review. The Notice of Intention, which is the "start of the rulemaking process" referenced by Administrator Pruitt, does not describe the Agencies' review as an effort to determine whether a rulemaking should be undertaken to rescind or

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[71] https://ceraweek.com/

[72] EPA Administrator Scott Pruitt, *CERAWeek Environmental Policy Dialogue with Scott Pruitt*, (March 9, 2017) *available at:* http://ondemand.ceraweek.com/detail/videos/featured-videos/video/5358092032001/environmental-policy-dialogue-with-scott-pruitt?autoStart=true (last accessed on Sept. 24, 2017).

revise the CWR consistent with the CWA and APA.

But, as EPA Administrator, Mr. Pruitt has an obligation to evaluate this issue objectively from the perspective of his role in implementing what Congress intended in the CWA – not from the perspective of an advocate for "state's rights" or the State of Oklahoma – and to allow the public to have actual, meaningful input into the decision-making process rather than pursuing a pre-determined outcome. However, the Notice of Intention explicitly states "[t]hrough new rulemaking, the EPA and the Army seek to provide greater clarity and regulatory certainty concerning the definition of 'waters of the United States,' consistent with the principles outlined in the Executive Order and the agencies' legal authority."[73] It describes the Agencies' intention to review the CWR in accordance with the Executive Order and undertake a rulemaking that "will consider interpreting the term 'navigable waters,' as defined in the CWA in a manner consistent with the opinion of Justice Scalia in Rapanos." The Notice of Intention does not identify anything else that Agencies intended to consider in the rulemaking they already decided to undertake.

The fact that the Agencies, several months ago, had already predetermined the outcome of this rulemaking, as well as a separate "second-step" rulemaking at some unknown point in the future, is apparent in a May 5, 2017 News Release from the Agencies. Prior to any publicly announced end of their "review," and prior to the present rulemaking to withdraw and replace the CWR, Administrator Pruitt and Douglas Lamont, a senior official performing the duties of the Assistant Secretary of the Army for Civil Works, announced that the Agencies were soliciting input from the states on "a new definition of protected waters that is in-line *with a Supreme Court Justice Antonin Scalia's opinion in the 2006 Rapanos v. United States case***.**"[74] In keeping with the litigation position of certain states, but prior to actually consulting with the states to obtain their views on the definition of "waters of the United States," the News Release also contained this telling quote from Administrator Pruitt:

> EPA is restoring states' important role in the regulation of water," said EPA Administrator Scott Pruitt. "Like President Trump, I believe that we need to work with our state governments to

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[73] *See* Notice of Intention, 82 Fed. Reg. at 12532.

[74] U.S. EPA and U.S. Army News Release, "EPA and U.S. Army Solicit State Input on Redefining 'Waters of the U.S." "EPA is restoring states' important role in the regulation of water" – Administrator Pruitt'" (May 9, 2017) *available at* https://www.epa.gov/newsreleases/epa-and-us-army-solicit-state-input-redefining-waters-us-0 **(Attachment 11)**.

> understand what they think is the best way to protect their waters, and what actions they are already taking to do so. We want to return to a regulatory partnership, rather than regulate by executive fiat.[75]

However, determining what the Agencies will to do before soliciting input from the states actually usurps the states' roles, and is more closely resembles "executive fiat" than anything factually associated with the CWR.

The Agencies took the same approach to obtaining comment from state regulatory agencies and local governments. For example, the EPA's charge to its Local Government Advisory Committee ("LGAC"), and the opportunity for comment the EPA provided to state Clean Water Agencies, both improperly constrain input to what the Agencies have already decided to do – i.e. withdraw the CWR and replace it with a rule based on Justice Scalia's opinion in *Rapanos*. With regard to the LGAC directive, on May 17, 2017, the EPA informed the advisory group that its role was to provide recommendations on a revised definition of "waters of the United States" that is described as follows:

> "[t]he agencies intend to follow an expeditious two-step process to provide certainty with the rule: 1) Establish the legal status quo by re-codifying the regulation that was in place prior to issuance of the CWR now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule. 2) Propose a new definition of Waters of the U.S. that would replace the 2015 CWR that reflects the principles outlined by Justice Scalia (Rapanos plurality opinion)."[76]

It is apparent from the LGAC's Report in response to this charge that the committee understood this approach as the only option available for them to evaluate and provide recommendations upon.[77]

The Association of Clean Water Agencies also understood their opportunity for comment was constrained to approach the Agencies had already determined,

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[75] *Id*.

[76] EPA's Local Government Advisory Committee (LGAC) Draft Charge On 'Waters of the U.S.' (WOTUS), *available at:* https://www.epa.gov/sites/production/files/2017-06/documents/lgac-wotus-charge-05-17-17-.pdf (last accessed Sept. 27, 2017) **(Attachment 12)**.

[77] EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE Waters of the United States 2017 Report, (July 14, 2017) *available at:* https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf **(Attachment 13)**; EPA'S Local Government Advisory Committee, Waters of the United States 2017 Report, (June 29, 2017) *available at* https://www.epa.gov/sites/production/files/2017-07/documents/lgac-meetingsummary-june29-2017.pdf (last accessed Sept. 27, 2017) **(Attachment 14)**.

stating in their response to EPA that:

> "We appreciate the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term "navigable waters" as defined in 33 U.S.C. 1362(7), *in a manner consistent with the opinion of Justice Antonin Scalia* in Rapanos v. United States, 547 U.S. 715 (2006) and as part of EPA's federalism consultation under Executive Order 13132 … Unfortunately, *states have received limited information in the way of draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule* …"[78]

These state regulatory agencies, like the public in this Proposed Rule, were asked to comment without adequate information about the Agencies intentions. These types of outreach do not constitute adequate federalism consultation with state and local governments under Executive Order 13132,[79] which is perhaps why the Agencies improperly claim the Notice that this Proposed Rule "has no federalism implications" and that no consultation is required because "[i]t will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[80] According to the Notice, the Agencies "will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of ''waters of the United States.''[81]

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[78] *See Letter from Association of Clean Water Agencies to The Honorable Scott Pruitt re: Federalism Process and WOTUS Rule Development* (June 19, 2017) *available at* https://www.epa.gov/sites/production/files/2017-09/documents/us-acwa_2017-06-19.pdf. ("We appreciate the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term "navigable waters" as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006) and as part of EPA's federalism consultation under Executive Order 13132 … Unfortunately, states have received limited information in the way of draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule; **therefore, states can only provide similarly broad guidelines and advice at this juncture. ACWA will be considerably more useful as a resource for the agencies, and be able to provide state perspectives crucial to drafting a practically sound and legally defensible rule, if EPA shares proposed regulatory text or more specific regulatory options that are under consideration before EPA begins drafting the anticipated proposed rule of 'step 2'."**) (emphasis added) **(Attachment 15)**.

[79] Federalism Executive Order, 64 Fed. Reg. 43255 (Aug. 4, 1999).

[80] Proposed Rule Notice, 82 Fed. Reg. 34904.

[81] *Id*.

By contrast, the CWR was adopted after a four-year administrative process that included an extensive scientific review and multiple opportunities for formal and informal input from the states and the public.[82] But almost simultaneously with Executive Order 13778, and prior to any consultation with or comment from the states and the public, the Agencies had already decided to withdraw the CWR and replace it with a definition based on Supreme Court Justice Antonin Scalia's opinion in the 2006 *Rapanos v. United States*. This action is not mandated by the Executive Order, which again only directs the Agencies to consider Justice Scalia's opinion during the Agencies' review and during any future notice and comment rulemaking process taken "as appropriate and consistent with law.[83] The Agencies were directed to employ agency expertise to evaluate the issue and determine what was appropriate and consistent with law, not blindly follow marching orders on a predetermined course of events. But even if Executive Order 13778 had mandated such an outcome, it would have violated myriad other laws, including the CWA and the APA.

On its face, Executive Order 13778 did not prejudge the result of the review of the CWR, but it is clear that the Agencies did. If the Agencies have a valid basis consistent with the CWA for withdrawing the CWR and re-codifying the previous definitions, the APA requires that they articulate those reasons during this rulemaking and provide the public with an opportunity to comment on them. Here, the Notice for the Proposed Rule is devoid of any cogent explanation for withdrawal of the CWR and re-codification of the prior regulatory definitions, and the public has not been provided a meaningful opportunity for input on whether to rescind or revise the CWR and what, if anything to replace it with. This is not consistent with the direction of the Executive Order 13778, let alone the APA or the CWA.

Additionally, while Executive Order 13778 directs the Agencies to review the CWR "for consistency with the policy" set forth in Section 1 of Executive Order, it also makes clear that they should only undertake rulemaking to rescind and revise "as appropriate and consistent with law.[84] This is a key provision in the Executive Order because policy set forth in an Executive Order cannot override

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[82] See Definition of "Waters of the United States" under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) and Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015).

[83] See Executive Order, 82 Fed. Reg. at 12497 sections 2 and 4.

[84] *Id*. at sections 1 and 2.

the policy that Congress established in the CWA or any other law.[85]

The policy set forth in Section 1 of Executive Order 13778 states "[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." [86] Based on the Notice for the Proposed Rule, it appears the Agencies rely on this policy as the primary, if not sole, basis for this Proposed Rule. For example, based on *Fox* and *Nat'l Ass'n of Home Builders v. EPA*,[87] the Agencies argue that "[a] revised rulemaking based 'on a reevaluation of which policy would be better in light of the facts' is 'well within an agency's discretion."[88]

The policy set forth in Section 1 of Executive Order 13778 is not, however consistent with the policy set forth in the CWA. In 1972 Congress adopted lengthy and complex amendments to the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). This is the central policy Congress established for the CWA that should drive the Agencies' review and rulemaking process. In contrast to the policy in Section 1 of Executive Order 13778, the policy Congress established in the CWA does not promote economic growth, minimize regulatory uncertainty or push a particular ideology regarding states' rights. Instead, Congress focused on, among other things, a national goal "of eliminating all discharges of pollutants into navigable waters by 1985" and an "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water … by 1983."[89]

Thus, rather than attempting to minimize industry's burden to stop polluting our

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[85] To the extent any provision of Executive Order 13778 would require a regulatory action that is inconsistent with or prohibited by a federal law, EPA must follow the law and comply with its requirements rather than follow the dictate of the Executive Order. *See, e.g., Building & Construction Trades Dept., AFL-CIO, et al. v. Allbaugh*, 295 F.3d 28, 32-33 (D.C. Cir. 2002); *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *21 (N.D. Cal. Apr. 25, 2017) (""[The President] cannot 'repeal[ ] or amend[ ] parts of duly enacted statutes' after they become law.'" citing City of New York , 524 U.S. at 438, 439 (1998)); *United States v. Rhode Island Dep't of Corr.*, 81 F. Supp. 3d 182, 188 (D.R.I.2015) ("Meanwhile, if an executive order conflicts with an existing statute, the executive order must fall. See Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1332–34 (D.C.Cir.1996)").

[86] *Id*. at sections 1 and 2.

[87] *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012).

[88] Proposed Rule Notice, 82 Fed. Reg. at 34901.

[89] 33 U.S.C. §1251(a).

nation's waterways or promoting economic growth, Congress intentionally imposed "on American industry (and the American public through passed-on product costs) the economic burden of ending all discharges of pollutants by the year 1985."[90] The policy of promoting "economic growth" and "minimizing regulatory uncertainty" announced in Executive Order 13778 does not, and cannot, supersede or modify any of the Congressional statements of policy and associated legal requirements set forth in the CWA. Similarly, as explained in detail below, Congress did not intend for CWA Section 101(b) to be a limitation on the jurisdictional reach of the CWA and, thus, should not be used as basis for doing so. These are irrelevant and impermissible considerations with regard to defining "waters of the United States" for the purpose of the CWA. Withdrawing the CWR and re-codifying the previous definition on the basis that it would achieve the policy objective in Section 1 of Executive Order 13778 is, thus, contrary to law.

III. The Agencies' Proposal to "Re-codify" the Waste Treatment Exclusion Violates the APA

In the Preamble to the Proposed Rule, the Agencies state "that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations."[91] Perhaps the Agencies (wrongly) believe it is permissible to not accept comments on the substance of the pre-2015 regulatory text because the previously existing regulatory text was adopted in the 1970s and 1980s pursuant to full notice-and-comment rulemaking process required by the APA.[92] While it is indisputable that the Agencies need to comply with the APA for the entire Proposed Rule, it is important to note that at least one substantial provision of the old rule – the so-called "waste treatment exclusion" – has never been subjected to notice-and-comment rulemaking. The provision authorizes indiscriminate pollution of certain "waters of the United States" wherever the discharger can assert that the water is being used to treat the waste before it is discharged into another "water of the United States." As detailed below, this provision was illegally inserted into the previously existing text in 1980, with no opportunity for public comment. The Agencies may not now

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[90] *Am. Frozen Food Inst. v. Train*, 539 F.2d 107,113 (D.C. Cir. 1976); 33 U.S.C. §1251(a)).

[91] 82 Fed. Reg. 34899, 34900; 34903 (July 27, 2017).

[92] *See, e.g.,* 45 Fed. Reg. 33290, 33,424 (May 19, 1980) (revising and consolidating permit regulations for various EPA programs, including Clean Water Act programs, at 40 C.F.R. § 122.2).

perpetuate the illegal waste-treatment system exclusion by re-adopting it and refusing to accept public comment.

On May 19, 1980, EPA issued a final rule that made clear that waste treatment systems created by impounding "waters of the United States" are not exempt from regulation under the CWA.[93] Specifically, the 1980 rule stated:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*[94]

However, just two months after this definition was finalized and published in the Federal Register, EPA announced it had made a unilateral decision to suspend the final sentence of the regulation, which states that "[t]he exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States".[95] By suspending this sentence, EPA purported to strip away CWA protections from waterways that were impounded and used as private waste dumps. EPA effectuated the suspension by inserting a post-hoc footnote at the end of the duly promulgated regulation, without affording the public an opportunity to comment on the significant revision to the final definition.

As part of its justification for creating this so-called waste treatment exclusion, EPA expressly cited the electric utility industry's concern that the duly-promulgated 1980 rule would require facilities to obtain a NPDES permit to discharge into existing coal ash dumps that were created by impounding "waters of the United States."[96] At that time, EPA claimed that this was a temporary suspension and promised to "promptly [] develop a revised definition and to

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[93] *Id.* at 33,424; *continued at* 48 Fed. Reg. 14153, 14157 (Apr. 1, 1983).

[94] *Id.* (emphasis added).

[95] See e.g. 45 Fed. Reg. 48620 (July 21, 1980); Memo from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, attach. B at 7 (Apr. 2, 1986).

[96] *Id.*

publish it as a proposed rule for public comment," and, "[a]t the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension."[97]

EPA never followed through on its promise to address this important issue, allow the public an opportunity to provide comments, and finalize a new regulation or terminate the suspension. In fact, EPA, along with the Corps, both lifted and re-incorporated the same suspension into the CWR, without allowing the public an opportunity for comment on the provision or adopting a new or amended language addressing the issue.[98] Even worse, despite the historic interpretation that the exclusion only applied to impoundments in "waters of the United States" constructed prior to the suspension,[99] the Agencies used the CWR to adopt an expansive interpretation of the exclusion that authorizes new impoundments of natural waterways, like rivers, lakes, streams and wetlands, for conversion by industry into private waste dumps.[100]

Now, 37 years after the initial "temporary" suspension of the language protecting waters of the United States against impoundment for the purpose of waste disposal, the Agencies again propose to formally codify the exemption and suspension language without providing the public an opportunity to make substantive comments.[101] Thus, instead of making good on the promise to address EPA's unlawful "temporary suspension" nearly four decades ago, the Agencies again attempt to evade compliance with the CWA and APA by claiming this is simply a temporary, interim measure – bootstrapping the illegal exemption and suspension language onto the definition of "waters of the United States" without substantive evaluation, and without allowing public comment on it. This is unacceptable. There is nothing temporary or interim about re-codifying an illegal exemption that has been in place, and shielded from substantive review and public comment, for nearly four decades.

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[97] *Id.*

[98] Clean Water Rule: Definition of ''Waters of the United States'', 80 Fed. Reg. 37114 (June 29, 2015) (simultaneously lifting suspension and suspending the same language).

[99] Consol. Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA Nat'l Pollutant Discharge Elimination Sys.; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration; 45 Fed. Reg. 33298 (May 19, 1980).

[100] Clean Water Rule: Definition of ''Waters of the United States'', 80 Fed. Reg. 37097 (June 29, 2015) (discussing waste treatment systems "built in a 'water of the United States'")

[101] *See D*efinition of ''Waters of the United States''— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34902 (July 27, 2017). ("The proposal retains exclusions from the definition of 'waters of the United States' for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued.")

In sum, as detailed below, the waste treatment exclusion violates the plain language of the CWA, endangers the public and the nation's water resources, 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, all without following the required public notice-and-comment process for rulemaking under the APA.

A. Continuation of the Waste Treatment Exclusion and Suspension will have Severe Consequences for the Public and the Nation's Water Resources

This exclusion has had, and will continue to have, serious consequences for our nation's waters if the agencies finalize the proposed waste treatment exclusion and suspension. The Agencies will perpetuate a slight of hand that has left a gaping hole in the CWA by authorizing utilities and industrial operators to use our nation's waters as their own private waste dumps.

For example, it has been a common practice for the utility industry to impound streams and rivers to create waste dumps for coal combustion residuals and other wastes associated with coal-fired power plants. In fact, EPA specifically cited the utility industry's concern about coal ash impoundments as one of the primary reasons EPA suspended the sentence that made clear that permits are required for discharges into a waste treatment system created by impounding waters of the United States.[102]

Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Coal-fired power plants generate billions of gallons of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. Due to the bio-accumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems. In short, coal plant water pollution has serious public health consequences and causes lasting harm to the environment.

This pollution is often discharged directly from the power plant into old, unlined surface impoundments or "ponds" that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge. It then seeps from these unlined ponds and landfills into groundwater and surface waters. Many of these ponds

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[102] 45 Fed. Reg. 48620 (July 21, 1980).

were created by impounding tributary streams that would otherwise clearly meet the definition of "waters of the United States." EPA estimates that *at least 2.2 billion pounds* of pollution are released into American waterways by coal-burning power plants every year.[103] Coal-burning power plants are responsible for 30 percent of the toxic pollutants discharged into waters of the United States.[104] These numbers would be even greater had EPA included pollution dumped into waters of the United States that fall under the waste treatment exclusion.

Utilities have effectively been allowed to appropriate our nation's waters to create these toxic lagoons in many cases. For example, a survey comparing locations of coal ash dumps in North Carolina with historical USGS topographic maps demonstrates that 31 blue-line streams in that state alone had been converted into, or buried beneath, industrial waste dumps.[105] Utilities in other states have also created coal ash dumps by impounding or burying "waters of the United States." For example, the nation's largest coal ash impoundment, at FirstEnergy's Bruce Mansfield Plant in Pennsylvania, was created by damming a stream called Little Blue Run. As a result, the Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment, and recently ordered a $169 million dollar cleanup and closure of Little Blue Run.[106]

B. The Agencies are Required to Substantively Evaluate and Provide the Public with an Opportunity for Comment Prior to Promulgating the Waste Treatment Exclusion and Suspension

In this proposed rulemaking, roughly 37 years after illegally inserting the waste treatment exclusion into the regulatory definition of "waters of the United States" and promising to "promptly develop a revised definition and to publish it as a proposed rule for public comment,"[107] the Agencies once again attempt to

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[103] EPA, Environmental Assessment for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Doc. No. EPA-821- R-15-006, Docket ID No. EPA-HQ-OW-2009-0819-6427, at 3-13. [hereinafter EA].

[104] *Id.* at 3-15.

[105] *See* Southern Environmental Law Center, *Buried Streams at Coal Ash Ponds in North Carolina*, *available at* https://www.southernenvironment.org/buried-streams-at-coal-ash-ponds-in-north-carolina (last accessed on Sept. 27, 2017) **(Attachment 16)**.

[106] Pa. Dep't of the Env't, DEP Issues Permit Requiring Closure of FirstEnergy's Little Blue Run Impoundment (Apr. 3, 2014), *available at* http://files.dep.state.pa.us/RegionalResources/SWRO/SWROPortalFiles/FinalClosurePlanPermitModification_LBR.pdf (last accessed on Sept. 22, 2017).

[107] Consol. Permit Regulations, 45 Fed. Reg. 48620 (July 21, 1980).

circumvent the APA and CWA by codifying the illegal waste treatment exclusion and suspension without substantively reviewing or allowing public comment on these provisions. Rather than comply with these requirements, the Agencies state "[b]ecause the agencies propose to simply codify the legal status quo and because it is a temporary, interim measure pending substantive rulemaking, the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations."[108] With regard to the waste treatment exclusion and suspension, the rulemaking notice simply states "[t]he proposal retains exclusions from the definition of ''waters of the United States'' for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued."[109]

It is beyond dispute that the proposed waste treatment exclusion and codification of the "temporary" suspension is a legislative rule subject to notice-and-comment under the CWA and the APA. For example, if the rule stands, industrial operators will have a right to discharge into waste treatment impoundments created by impounding "waters of the United States" without a NPDES permit, so long as the impoundments are "designed to meet the requirements of the Clean Water Act."[110] Accordingly, the Proposed Rule will confer rights or obligations on private parties and the Agencies, and is a legislative rule that requires full notice and opportunity for public comment.

With regard to the waste treatment exclusion, the Agencies have utterly failed to comply with the APA's notice-and-comment requirements despite having nearly 40 years to do so. The public was not provided that opportunity to comment in 1980, when EPA initially suspended the final rule language that limited the waste treatment exclusion to man-made systems – claiming then, as now, that the language was temporary. The public was not provided an opportunity to comment on the exclusion in the 2015 CWR. And in this Proposed Rule, two years later, the Agencies are again denying the public the opportunity to comment on the withdrawal of the 2015 CWR version of the waste treatment exclusion, the recodification of the 1980 version of the waste treatment exclusion, and the inclusion of the 37-year-old "temporary" exclusion footnote in the

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[108] *See* Definition of ''Waters of the United States''— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34903 (July 27, 2017).

[109] *See id.* at 34902.

[110] Consol. Permit Regulations, 45 Fed. Reg. 45 Fed. Reg. 48620 (July 21, 1980).

Proposed Rule. This action violates the APA and the CWA, and is being taken "without observance of procedure required by law."[111]

C. EPA Lacks Authority to Allow Conversion of "waters of the United States" into Waste Treatment Systems

It is clear from legislative history and decades of case law that Congress did not intend for EPA to allow our nation's rivers, streams, and lakes to be used as private sewers for the utility industry and other polluters. The fundamental objective of the CWA is to protect the "chemical, physical, and biological integrity" of all waters of the United States.[112] There is no exception in the CWA for industries or anyone else that may wish to appropriate and convert a water of the United States into a waste or wastewater impoundment, and the Agencies lack authority to eliminate "waters of the United States" from the protections of the CWA.[113] Rather, ending the practice of using rivers, lakes, streams or other waters as waste treatment systems was one of the primary reasons that Congress enacted the CWA.[114] That continues to be the national policy.[115]

In addition to legislative history that makes it clear that the waste treatment exclusion is contrary to Congressional intent, it is settled law that once a body of water is found to be "waters of the United States," it always remains "waters of the United States."[116] With regard to the waste treatment exclusion, there is no evidence Congress intended to depart from well settled law to allow EPA to remove bodies of water that fall squarely within the definition of "waters of the United States" from the reach of the CWA, especially where those "waters of the

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[111] 5 U.S.C. § 706(2)(D) (giving reviewing courts authority to hold unlawful and set aside agency action "without observance of procedure required by law").

[112] 33 U.S.C. § 1251; s*ee also NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C 1975).

[113] *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).

[114] *See e.g.* 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.").

[115] S. Rep. No. 95-370, at 4 (1977) *reprinted in* 1977 U.S.C.C.A.N. 4326, 4330.

[116] *See* Scott Snyder, Note, *The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA's Definition of "Waters of the United States"*, 21 N.Y.U. Envtl. L.J. 504, 522-23 (2014) (providing overview of federal cases prior to the enactment of the Clean Water Act holding that once a body of water has been classified as a waters of the U.S., it remains a waters of the U.S. forever).

United States" are impounded to create a private dump for a utility or other industrial operation.[117]

Further, even if the CWA was ambiguous, the Agencies' ability to define "waters of the United States" is not without bounds. Leaving aside the problems with the Agencies' withdrawal of the CWR and re-codification addressed elsewhere in these Comments, the Agencies definition of "waters of the United States" would only be permissible if it is not "arbitrary, capricious, or manifestly contrary to the statute."[118] In this case, the broad waste treatment exclusion is arbitrary and capricious and contrary to law because the legislative history and decades of common law make clear that the Agencies cannot carve out "waters of the United States" from the scope of the CWA to create waste disposal sites, which is precisely what the waste treatment exclusion does. Further, the Agencies have failed to explain their interpretation of the exclusion and have effectively transformed what was originally adopted as a temporary measure into a permanent exclusion without providing the public any explanation or opportunity for substantive input.

EPA cannot legitimately dispute that Congress intended the CWA to prohibit conversion of "waters of the United States" into waste treatment systems. When it first finalized the definition of waters of the United States in May of 1980, after full notice-and-comment rulemaking, EPA found that Congress did not intend for the CWA to exempt waste treatment systems created by impounding waters of the United States.[119] Specifically, EPA said:

> Because [the] CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting interstate or foreign commerce.[120]

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[117] *Id.* at 523.

[118] *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

[119] Consol. Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA Nat'l Pollutant Discharge Elimination Sys.; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration; 45 Fed. Reg. 33298 (May 19, 1980).

[120] *Id.*

Even when the EPA suspended the final sentence of the regulation two months later, without notice-and-comment, the Agency reiterated this, noting that "[t]he Agency's purpose in the new last sentence was to ensure that dischargers did not escape treatment requirement by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands."[121]

Additionally, rather than amending the rule through notice-and-comment rulemaking or removing the suspension, EPA issued a memorandum in 1986 stating that it evaluates what is an exempt waste treatment system on a case-by-case basis, treating "newly created impoundments of waters of the U.S. as 'waters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments as 'wastewater treatment systems designed to meet the requirements of the CWA' and therefore are not 'waters of the U.S."[122] EPA further stated that, in fact, it suspended the last sentence of the waste treatment system in order to allow for such case-by-case decisions.[123] EPA has also echoed the interpretation articulated in the 1986 memorandum in various other scenarios.[124]

However, the proposed waste treatment exemption and suspension language in the pre-2015 definition does not include any language limiting the exclusion to treatment systems created by impounding waters of the United States that have been in existence "for many years" or for any other time period. Further, it is illogical – and courts have held as much – to suggest that a waste impoundment created prior to the CWA has been designed to meet the requirements of the

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[121] Consol. Permit Regulations, 45 Fed. Reg. 45 Fed. Reg. 48620 (July 21, 1980).

[122] Memorandum from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, attach. B at 7 (Apr. 2, 1986) **(Attachment 17)**.

[123] *Id.* (noting that EPA suspended the sentence in order to "restor[e] the ambiguity of the earlier regulations, so that each case must be decided on its own facts"). This is, of course, contrary to the purpose EPA provided when it suspended the sentence. Consol. Permit Regulations, 45 Fed. Reg. 45 Fed. Reg. 48620 (July 21, 1980) (noting that EPA would re-examine the waste treatment system definition and "promptly … develop a revised definition and to publish it as a proposed rule for public comment").

[124] Jon Devine et al., *The Intended Scope of Clean Water Act Jurisdiction*, 41 Envtl. L. Rep. News & Analysis 11,118, 11,125 (2011) (citing Letter from Lisa P. Jackson, Administrator, EPA, to Rep. James L. Oberstar at 1 (Apr. 30, 2010)). EPA has taken the same position in litigation. *See W. Va. Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991).

CWA.[125] The plain language of the Proposed Rule would arguably exempt all waste treatment systems designed to meet the requirements of the CWA created by impounding "waters of the United States" regardless of when the treatment systems are constructed, and this is prohibited by the plain terms of the CWA.[126]

The Agencies' decision to withdraw the CWR and "recodify" the waste treatment exclusion and suspension language that existed prior to that rule is highly likely to be used to allow construction of new waste treatment systems in "waters of the United States." In recent years, the Agencies have attempted to reverse their long-standing interpretation to exclude such *newly* created waste treatment systems from "waters of the United States."[127] Given the vagueness of the Notice with regard to how the Agencies will interpret the Re-codified Definition of "waters of the United States," i.e. as "informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice," it is impossible to know how the Agencies will proceed. This renders the Proposed Rule impermissibly vague and in direct contravention of unambiguous CWA requirements. Complying with the APA requirements for rulemaking by providing a reasoned explanation for the Agencies' Proposed Rule, and a public notice and opportunity for comment, is the only way to address this concern and allow for meaningful public input on this Proposed Rule.

For all of these reasons, Commenters strongly urge the Agencies to eliminate the exclusion or to publish a revised definition of waste treatment system that complies with the CWA. At a minimum, the Agencies must provide a reasoned explanation for their action, as well as full notice-and-comment rulemaking for the proposed waste treatment exclusion.

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[125] *See, e.g.*, *California Sportfishing Prot. Alliance v. Cal. Ammonia Co.*, 2007 WL 273847, *6 (E.D. Cal 2007) (noting that the fact that a waste treatment impoundment is created prior to the Clean Water Act is evidence that it is not "designed to meet the requirements of the Clean Water Act").

[126] Definition of ''Waters of the United States''— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34907 (July 27, 2017).

[127] *See, e.g.,* Jon Devine et al., *The Intended Scope of the Clean Water Act* (noting that the agencies have advanced this broader interpretation in a 1998 Federal Register notice, a 2000 guidance document, and by the Corps in recent litigation.)

IV. The Agencies Violated the National Environmental Policy Act and Endangered Species Act in the Promulgation of the Proposed Rule

A. The Agencies Must Comply with the Endangered Species Act's Consultation Requirements

The Agencies make a fundamental conceptual error in describing the Proposed Rule as a codification of the "legal status quo."[128] The Agencies' reversion to the old regulatory definitions that preceded the CWR is not a mere codification of the legal status quo, but is instead an attempt to codify the existing *factual* status quo. Regardless, the codification of the status quo does not represent a sufficient justification to advance a rulemaking that is so consequential to which waters are protected under the Clean Water Act.

Additionally, the characterization by the Agencies that the Proposed Rule will not "change current practice" is not accurate, or even legally relevant.[129] As an initial matter, it is apparent that the Agencies do not intend to apply the Re-codified Definitions as written, but rather in some other vaguely described manner in which the Agencies' implementation will be "informed" by agency practice, Supreme Court decisions and two Agency Guidance Documents. And there are also clear indications that Agencies actually intend to implement the Re-codified Definitions based solely on their undisclosed interpretation of Justice Scalia's opinion in *Rapanos*.[130] This would be a severe departure from long-standing agency practice, and would result in a significant reduction in covered waters. Thus, as soon as the Proposed Rule is finalized, it appears that there may be changes in actual protections for covered waters almost immediately as a practical, real-world matter. As a result, the entire purported rationale for this Proposed Rule is disingenuous at best, and fraudulent at worst.

Contrary to the APA, however, the Agencies make no legitimate effort to inform the public about the impact of their future interpretations on jurisdictional determinations in this rulemaking. Accordingly, there is no information available on the numbers or types of waterways that will be impacted by this Proposed Rule, as amended by the vague factors that will "inform" the Agencies

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[128] Definition of "Waters of the United States"— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34900 (July 27, 2017).

[129] *Id*. at 34903.

[130] *See* InsideEPA, *EPA May End CWA Enforcement Using Kennedy Test Ahead Of New Rule*(April 5, 2017) https://insideepa.com/daily-news/epa-may-end-cwa-enforcement-using-kennedy-test-ahead-new-rule.

implementation. For example, will the Agencies continue to protect wetlands that have a significant nexus to other covered waters, non-navigable, intrastate tributaries and other waters that may or may not have been protected under the CWR? These waters provide habitat for numerous endangered species across the nation, and the gain or loss of CWA jurisdiction under this Proposed Rule will have an impact on those species that has not been quantified or evaluated in this rulemaking. A loss of CWA jurisdiction means that a waterway can be subjected to unregulated pollution and even total destruction as a matter of federal law. Given the Proposed Rule's far-reaching impacts for these aquatic ecosystems, and the many threatened or endangered species that depend upon them, the Agencies are required to ensure that the Proposed Rule will not jeopardize the continued existence of any such species and to engage in interagency consultation under section 7(a)(2) of the ESA.

Even if the Agencies faithfully returned to every practice and policy from the years immediately preceding the CWR – and there is no indication that this will occur – it is apparent that there will still be significant changes to which specific waters are, and are not, protected under the CWA. In perhaps one of the most unhelpful and unclear statements in the Proposed Rule, the Agencies summarily state that "the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations."[131] This is a completely nonsensical assessment that is especially alarming given the scope and importance of both the CWR and the Proposed Rule.[132] The Agencies also state that "[t]here are no avoided costs or forgone benefits [to the changes in jurisdiction under the Proposed Rule] if similar state regulations exist and

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[131] Definition of "Waters of the United States"— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34903 (July 27, 2017).

[132] *See also* Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, at p. 1 (June 2017). *available at:* https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0002 (last accessed Sept. 27, 2017). The Agencies' Economic Analysis for the Proposed Rule is wholly inadequate to evaluate the costs and benefits of this rulemaking for the same reasons articulated in these comments. Because the Agencies haven't identified which waters will be protected under the Proposed Definition, it would be impossible for them to reliably evaluate the costs and benefits of it. The Agencies statement that "the consequence of a water being deemed non-jurisdictional is simply that CWA provisions no longer apply to that water. There are no avoided costs or forgone benefits if similar state regulations exist and continue to apply to that water" does not add anything meaningful to their analysis, or excuse their failure to do such an analysis, because this issue to be evaluated is the costs and benefits of losing or gaining federal CWA jurisdiction. The Agencies Economic Analysis is also flawed because it relies on the flawed analysis of associated with the CWR **(Attachment 18)**.

continue to apply to that water."[133] However, it is completely irrelevant to this Proposed Rule that similar state laws may continue to apply to a waterbody, and no effort is made by the Agencies to analyze or inform the public whether, and in which states, such "similar" regulatory programs exist. The issue in the Proposed Rule that the Agencies are required to evaluate relates solely to jurisdiction under the federal CWA.

These statements illustrate precisely why it is imperative that the Agencies comply with their mandatory legal obligations under the APA and the ESA prior to proceeding with the Proposed Rule. If the Proposed Rule will result in a decrease in positive jurisdictional determinations, the Agencies must explain to the public where those determinations would occur. For example, what types of wetlands would have continued to receive protection under the CWR but will no longer under the Proposed Rule? In what parts of the country will or would those positive jurisdictional findings have been made? What impacts, positive or negative, will or would have occurred in waters downstream of such wetlands? The Proposed Rule offers no answers to these questions. It would be impossible for the Agencies to have provided a more opaque explanation of how this Proposed Rule will impact CWA jurisdictional determinations.

Even if the Proposed Rule would result in the inclusion of a slightly larger number of waters within the scope of the CWA overall – which, again, is not supported by the Agencies with any data or explanation – the protection of waterways is not a simplistic zero-sum game where the only factor that is relevant is the nationwide aggregate area protected under the CWA. Such a simplistic assessment does evaluate the actual impacts of changes to CWA jurisdiction and, thus, does not represent reasoned decision-making by the Agencies. For example, the CWR categorically extended protections to vernal pools in California, prairie potholes, pocosins, Carolina and Delmarva bays, and Texas coastal prairie wetlands. Many of these unique ecosystems contain endangered species. The loss of CWA protections in these important ecosystems is not offset by the hypothetical addition of wetland or stream jurisdiction elsewhere in the country.

If the Proposed Rule eliminates protections for some wetlands and gives additional protections for other water bodies (or vice versa), the Proposed Rule, which is nationwide in its scope, will directly, indirectly, and cumulatively impact endangered species. As an obvious example, California vernal pool wetlands that support vernal pool fairy shrimp (*Branchinecta lynchi*) were clearly protected under the CWR. Will those same wetlands be protected under the Proposed

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[133] *Id.*

Rule as informed by the Agencies practical decision to only implement the rule for wetlands that meet the plurality test or as "informed" by other factors? It seems highly unlikely. If so, vernal pool fairy shrimp will be harmed by the Proposed Rule.

Consequently, the Agencies' action here easily crosses the "may affect" threshold requiring consultations under the Endangered Species Act. Section 7 of the Act requires each agency to engage in consultation with FWS and/or NMFS to "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 adverse modification of habitat of such species… determined… to be critical…."[134] ESA Section 7 "consultation" is required for "any action [that] may affect listed species or critical habitat."[135] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[136]

The CWA does not command EPA or the Army Corps to promulgate regulations setting forth either the general limits or specific exemptions to define which "waters of the United States" are protectable under the law. As a result, just like every other agency, EPA and the Army Corps must consult when they embark upon the discretionary task of developing regulations, if and when the effects of those regulations cross the "may affect" threshold set forth in the ESA. Indeed, case law is clear that when a regulation may affect endangered species it must be the subject of consultation.[137] Because the Proposed Rule will affect endangered species and their critical habitats as it is implemented in the future, consultations must occur before the Proposed Rule is finalized.

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[134] 16 U.S.C.§ 1536(a)(2).

[135] 50 C.F.R. § 402.14.

[136] *Id*. § 402.02 (emphasis added).

[137] *See*, *e.g.*, *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F.Supp.3d 7, 12 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F.Supp.2d 1059, 1095-97 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F.Supp.2d 1158, 1182-95 (W.D. Was. 2006).

B. The Agencies Must Comply With NEPA

Under NEPA, the Agencies must prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment."[138] Promulgation of a rule is a "Federal action" under NEPA,[139] and there little doubt that this Proposed Rule will significantly affect the quality of the human environment. However, the Agencies have not prepared either an Environmental Assessment or an Environmental Impact Statement for this action as required by NEPA.[140]

All loses and benefits associated with the withdrawal of the CWR and recodification of the prior regulatory definitions resulting from this Proposed Rule must be accounted for and evaluated in the NEPA process.[141] NEPA is designed to ensure that Agencies take a required "hard look" at the environmental consequences of their actions,[142] and there is no indication in the Notice that the Agencies conducted any NEPA analysis or engaged in reasoned decision-making regarding the environmental impacts as required by law.[143]

V. THE CWA MANDATES A BROAD DEFINITION OF "WATERS OF THE UNITED STATES" CONSISTENT WITH THE INTENT OF CONGRESS

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and the Act is a comprehensive water quality statute designed" to achieve that objective.[144] Accordingly, Congress provided that the CWA applies to all "waters of the United States, including the territorial seas."[145] The Conference Report accompanying the CWA confirms that Congress intended that the phrase "waters of the United States" to be given the

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[138] 42 U.S.C. § 4332(2)(C).

[139] 40 C.F.R. § 1508.18(b)(1).

[140] See 40 C.F.R. § 1508.9(a) and (b); 33 C.F.R. § 230.10(a); 40 C.F.R. § 1508.13.

[141] *See* 33 C.F.R. § 230.10(a).

[142] *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 350-54 (1989).

[143] *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotations omitted).

[144] 33 U.S.C. § 1251(a); *PUD No. 1 of Jefferson County v. Wash. Dep't. of Ecology*, 511 U.S. 700, 704 (1994) (*quoting* 33 U.S.C. § 1251(a)).

[145] 33 U.S.C. § 1362(7).

broadest possible constitutional interpretation."[146]

The Supreme Court, in *United States v. Riverside Bayview Homes, Inc*., held that Congress took a "broad, systemic view of the goal of maintaining and improving water quality" with the word integrity referring to "a condition in which the natural structure and function of ecosystems [are] maintained" and, the "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[147] To accomplish these goals, the Supreme Court in *Bayview* concluded, Congress defined the "waters covered by the Act broadly" to encompass all "waters of the United States."[148] The intended breadth of the CWA is apparent in the comprehensive goals, programs and directives in the Act, as well as in the legislative history, administrative decisions and case law interpreting the CWA.[149]

Thus, unlike the Rivers and Harbors Act of 1899, the CWA was not focused on the prevention of "navigation-impeding" conduct in navigable waters.[150] Instead, as the Supreme Court held in *International Paper Co. v. Ouellette*, the CWA established "an all-encompassing program of water pollution regulation" that "applies to all point sources and virtually all bodies of water."[151] While it was clear that the Commerce Clause provided adequate authority for regulation of navigable waters as demonstrated by extensive Rivers and Harbors Act precedent, it was equally clear that Congress' Commerce Clause authority to control pollution was not limited to traditionally navigable waters or traditional

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[146] S. Rep. No. 92-1236, at 144 (1972).

[147] *U.S. v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 132-33 (1985) *(citing* H.R.Rep. No. 92–911, p. 76 (1972); S.Rep. No. 92–414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742). The Agencies' Notice for this Proposed Rule misconstrues *Bayview* by describing the Opinion as simply one that "deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." Definition of ''Waters of the United States''— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34900 (July 27, 2017). The unanimous Supreme Court Opinion in *Bayview* is far more significant in determining the definition of "waters of the United States" than indicated by the Agencies' description.

[148] *Id.*

[149] *See also, Quarles Petroleum Co. v. United States*, 551 F.2d 1201, 1206 (Ct. Cl. 1977) ("In addition, the overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States.").

[150] *See U.S. v. Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974).

[151] *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted).

tests of navigability.

For example, in invalidating portions of the Corps' 1974 regulations that limited their CWA jurisdiction to waters "which had been, are, or may be, used for interstate or foreign commerce," the U.S. District Court for the District of Columbia held that when Congress defined the term 'navigable waters' as 'the waters of the United States, including the territorial seas' it "*asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution*. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability."[152] This holding is consistent with the Conference Committee Report for the final bill which states "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation *unencumbered by agency determinations which have been made or may be made for administrative purposes*."[153]

When Representative John Dingell presented the Conference version of the bill to the House of Representatives, he explained that in defining "navigable waters" broadly for the purposes of the CWA as "waters of the United States, including the territorial seas":

> The Conference bill defined the term 'navigable waters' broadly for water quality purposes. It means 'all the waters of the United States' in a geographic sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws…. Thus, this new definition clearly encompasses *all water bodies, including main streams and their tributaries, for water quality purposes.* No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.[154]

The Supreme Court has explicitly recognized on at least three occasions that "navigable waters" under the CWA include "something more than traditional navigable waters."[155] In *Bayview*, the Supreme Court held that the "Act's

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[152] *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975); 39 Fed.Reg. 12119 (April 3, 1974).

[153] Conference Report, Senate Report No. 92-1236, Sept. 28, 1972 at 144, U.S.Code Cong. & Admin. News 1972, p. 3822; Reprinted in Legislative History, Committee on Public Works, Committee Print, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 327 (hereinafter "1972 Legislative History").

[154] 118 Cong. Rec. 33, 756 (1972); *id.* at 250-51.

[155] *Rapanos v. United States*, 547 U.S. 715, 731 (2006).

definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters, Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term."[156] The *Bayview* Court also noted that, while "it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional test of navigability, it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined."[157]

Consistent with Congressional intent, the EPA (1973)[158] and the Corps (1977)[159] adopted regulations further defining "waters of the United States" for the purposes of the CWA to include broad categories of waters beyond those protected by traditional navigability tests. When the Corps adopted its definition of "waters of the United States" in 1977, it recognized that "[t]he regulation of activities that cause water pollution cannot rely on … artificial lines … but must focus on all waters that together form the entire aquatic system."[160] In the Preamble to the Corps' 1977 rule defining "waters of the United States," the Corps stated:

> Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce. *Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have*

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[156] *Bayview*, 474 U.S. at 133 (emphasis added).

[157] *Id.*

[158] 38 Fed. Reg. 10834 (1973).

[159] 42 Fed. Reg. 37122 (1977).

[160] 42 Fed. Reg. 37128 (July 19, 1977).

> *an effect on interstate commerce.* The 1975 definition identified certain of these waters. These included waters used:
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> - By interstate travelers for water-related recreational purposes;
> - For the removal of fish that are sold in interstate commerce;
> - For industrial purposes by industries in interstate commerce; and
> - In the production of agricultural commodities sold or transported in interstate commerce.
>
> We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over 'other waters' such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.[161]

Under the 1977 Definition, waters in Categories 1, 2, and 3, over which jurisdiction was "obvious" under the Federal Government's broad powers to regulate interstate commerce, included: (1) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands; (2) Tributaries to navigable waters of the U.S., including adjacent wetlands; and (3) Interstate waters and their tributaries, including adjacent wetlands.[162] Additionally, based on reasoning set forth above, the Corps included "other waters" where the use or destruction of the waters could affect interstate commerce within the definition of "waters of the United States."[163]

Prior to the 2015 CWR, this basic approach to broadly defining "waters of the United States" had been in place since the mid-1970s, and is consistent with the intent of Congress announced in 1972. Accordingly, the longstanding definition

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[161] 42 Fed. Reg. 37127-37128 (1977) (emphasis added).

[162] 42 Fed. Reg. 37122 (1977).

[163] *Id*.

of "Waters of the United States" includes:[164]

A. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

B. All interstate waters, including interstate "wetlands."

C. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.

D. All impoundments of waters otherwise defined as waters of the United States under this definition.

E. Tributaries of waters identified in paragraphs (a) through (d) of this definition.

F. The territorial sea.

G. "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition

It is beyond dispute that Congress intended for the CWA to fully protect the nation's waters and aquatic ecosystems without regard to whether the waters could satisfy historic navigability tests under the Commerce Clause.

It is notable that, prior to the enactment of the CWA, both traditionally navigable waters and their non-navigable tributaries were believed to be well within the Commerce Clause powers of the federal government under traditional tests of navigability.[165] Congress intended to expand the number and nature of the waters covered under the CWA in order to protect water quality and aquatic ecosystems to the fullest extent permitted by the Commerce Clause. In other words, Congress intended to expand coverage under the CWA beyond traditionally navigable waters and their tributaries, and did not premise its expansion of jurisdiction on the manner in which waters were connected to

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[164] *See e.g.*, 40 C.F.R. §122.2; 33 C.F.R. § 328.3(a).

[165] The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to traditionally navigable waters and "into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. § 407.

traditionally navigable waters. To the contrary, Congress intended to repudiate the traditional navigability tests and limitations on federal authority and instead utilize the full authority of the federal government to regulate water pollution under the Commerce Clause.[166]

SWANCC and *Rapanos* do not limit or establish the outer bounds of this authority for purposes of the CWA, and neither of these decisions invalidated the definitions in effect prior to the 2015 CWR.[167] It is essential to the continued protection of our nation's waters that the Agencies continue to assert jurisdiction over waters to the fullest extent permitted by the Commerce Clause. As stated by the court in *U.S. v. Holland*:

> It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution. Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms … Congress is not limited by the 'navigable waters' test in its authority to control pollution under the Commerce Clause.[168]

Contrary to all of this regulatory history and caselaw, in this Proposed Rule, the Agencies have evidenced an intention to elevate the significance of a single provision of the CWA, Section 101(b), in defining "waters of the United States" under the CWA. Specifically, the Agencies assert that "[t]he statute's introductory purpose section … commands the Environmental Protection Agency (EPA) to pursue two policy goals simultaneously: (a) To restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility and right to prevent,

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[166] *See e.g.*, *Bayview,* 474 U.S. at 133.

[167] In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. *See* 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the Supreme Court "expressly declined to reach" the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, "in Rapanos it appears five justices had no constitutional concerns in any event … [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause …." *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), cert. denied sub nom., *Am. Farm Bureau Fed'n v. E.P.A.*, 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016) (citing *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring).

[168] *Holland*, 373 F. Supp. at 673.

reduce, and eliminate pollution."[169] Section 101 of the CWA does no such thing and, even if it did, this would have no bearing on the meaning of "waters of the United States."[170]

Additionally, the Agencies assert that "[r]e-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated to the agencies under the CWA."[171] Although Executive Order 13778 identifies "showing due regard for the roles of the Congress and the States under the Constitution" as one of the Administration's policy goals to be evaluated during the Agencies review of the CWR, it does not call upon or authorize the Agencies to balance the "goals" of Section 101(a) and 101(b) in withdrawing the CWR or in promulgating a different definition of "waters of the United States" under the CWA. Further, having due regard for the role of the states is not the same thing as defining "waters of the United States" in a manner that reduces federal, and increases state, jurisdiction – which is plainly the Agencies goal in elevating and contorting the meaning of CWA Section 101(b). The Agencies do not elaborate on their assertion that defining "waters of the United States" based on "balancing" Sections 101(a) and 101(b) is well "within the scope of authority that Congress has delegated to the agencies under the CWA." It is not. The CWA has many policy goals and objectives[172] – not just two – and the intent of Congress as to which waters would be protected under the CWA cannot be gleaned by balancing the national need for clean water against state's role in eliminating pollution. That is nonsensical. It is patently obvious that the states can take a primary role in eliminating pollution in waters that are protected by the federal CWA.[173] This is the system

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[169] Proposed Rule Notice, 82 Fed. Reg. at 34900.

[170] S*ee e.g., U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring).

[171] Proposed Rule Notice, 82 Fed. Reg. at 34901.

[172] Inexplicably, the Agencies also state in the Notice that "[t]he objectives, goals, and policies of the statute are detailed in sections 101(a)-(g) of the statute, and guide the agencies' interpretation and application of the Clean Water Act," but immediately thereafter, the Agencies focus their analysis solely on portions of Sections 101(a) and 101(b). *Id*. at 34902.

[173] Notably, the Agencies state that the Proposed Rule will not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Definition of ''Waters of the United States''— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34904 (July 27, 2017). This is despite the fact that the Agencies also acknowledge in the Notice that the Proposed Rule is changing the legal definition of "waters of the United States" in a manner that will alter federal jurisdiction. *Id*. at 34,903.

of cooperative federalism under the CWA that has been in place since 1972.[174]

The Agencies appear to be searching for a statutory basis to justify Administrator Pruitt's pre-determined mission to eliminate CWA protections, which he tries to characterize as "restoring states' important role in the regulation of water."[175] But the states' have never lost their important role in regulating water quality under the CWA, and even the most inclusive definition of "waters of the United States" would not usurp the state's roles in any event. Section 101(b) simply cannot, after roughly 40 years of dormancy on this issue, emerge now to bear the weight of the Agencies' determination to eliminate CWA protections for the nation's waters.

CONCLUSION

For the foregoing reasons, the Commenters urge the Agencies to withdraw the Proposed Rule and meaningfully engage the public and states in any process to review, rescind or revise the definition of "waters of the United States" prior to reaching any conclusions or taking any action.

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[174] *See e.g.*, *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 129 (D.C. Cir. 1976) ("Thus, without the national standards required by s 301, the fifty states would be free to set widely varying pollution limitations. These might arguably be different for every permit issued … The plainly expressed purpose of Congress to require nationally uniform interim limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.")

[175] *See* U.S. EPA and U.S. Army News Release, "EPA and U.S. Army Solicit State Input on Redefining 'Waters of the U.S." "EPA is restoring states' important role in the regulation of water" (May 9, 2017).

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