

**Attorney Generals of New York, California, Maine,
Maryland, Massachusetts, Oregon, Vermont,
Washington, and the District of Columbia**

September 27, 2017

By Electronic Transmission

E. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Douglas W. Lamont, Deputy Assistant Secretary of the Army,
performing the duties of the Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, D.C. 20310-0108

**Attention: Docket ID No. EPA-HQ-OW-2017-0203
Definition of “Waters of the United States” – Recodification
of Pre-Existing Rules**

Dear Administrator Pruitt and Deputy Assistant Secretary Lamont,

We are the Attorneys General of New York, California, Maine, Maryland, Massachusetts, Oregon, Vermont, Washington and the District of Columbia (the States). We write to comment upon and strongly oppose the rule proposed by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively, “the agencies”) that would repeal the Clean Water Rule, promulgated by them in 2015, and re-promulgate earlier regulations from 1977 that the Clean Water Rule superseded (hereinafter, the repeal rule).¹ See 80 Fed. Reg. 37054 (June 29, 2015); 82 Fed. Reg. 34899, 34900 (July 27, 2017). The Clean Water Rule and the 1977 regulations the agencies want to re-promulgate each defines the “waters of the United States” protected by the Clean Water Act. 33 U.S.C. § 1251 *et seq.* (the CWA or Act). In promulgating the Clean Water Rule the agencies considered an extensive factual record and legal precedent, and applied their experience developed since 1977 as well as their technical expertise.

As discussed below, the rescission of the Clean Water Rule and the promulgation of the repeal rule would be arbitrary and capricious and not in

¹ These comments are filed by the Attorneys General as *parens patriae* on behalf of the citizens and residents of the States, see *Missouri v. Illinois*, 200 U.S. 496 (1906), and to further the States’ proprietary interests.

accordance with law. We respectfully urge the agencies to revise the rule addressing the deficiencies discussed below or proceed no further with it.

I. BACKGROUND

A. The States' Interests

The undersigned Attorneys General serve eight states and the District of Columbia. The States are situated on or near the shores of the Atlantic and Pacific Oceans and the Great Lakes, and are downstream from, or otherwise hydrologically connected with, many of the Nation's waters. As such, the States are recipients of water pollution generated not only within their borders but also from sources outside their borders over which they lack jurisdiction. The States support a protective, clear, practical, and science-based definition of "waters of the United States" under the CWA in order to maintain a strong federal foundation for water pollution control that preserves the integrity of their waters. Not only does the definition of "waters of the United States" implicate the water quality and economic interests of the States and their citizens, it also affects the administrative burdens the States would need to bear in operating water quality programs should there be inadequate or ineffective protection of waters under the Act.

The Act is the primary mechanism for establishing a federal floor for maintaining water quality and for protecting downstream states from the effects of out-of-state pollution. A protective science-based definition of the Act's scope is essential for the States to avoid having to impose disproportionate limits on their in-state pollution sources to offset upstream pollution discharges that might otherwise go unregulated. A cramped, unclear, or difficult to administer definition of the waters protected by the Act would not only make water quality protection harder for the States, but would put them at an economic disadvantage in competition with other states. This would promote a "race to the bottom" in which states compete with each other by eliminating pollution controls, a situation which the CWA was intended to prevent. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977).

B. The Clean Water Rule

The Clean Water Rule was promulgated in 2015 in response to widespread and longstanding concerns about the lack of clarity and consistency in the definition of "waters of the United States" under the 1977 regulations as interpreted by the agencies. Indeed, as the agencies previously made clear, "[m]embers of Congress, developers, farmers, state and local governments, environmental organizations, energy companies" and others sought new regulations to replace the 1977 regulations for the purpose of achieving "clarity and certainty on the scope of the waters protected by the CWA." 82 Fed. Reg. 34899, 34901; *see* 80 Fed. Reg. at

37054. The application of the 1977 regulations which the agencies seek to re-promulgate in this rulemaking resulted in many complex case-by-case determinations by the agencies throughout the country, and led to confusing and inconsistent interpretations by the agencies and the federal courts as to which waters are “waters of the United States,” and therefore within the Act’s protections, and which are not.

In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), the Supreme Court took issue with the assertion by the Corps of jurisdiction over certain waters under the 1977 regulations. In *SWANCC*, the Court introduced the concept of “significant nexus” between non-navigable and navigable waters as the basis for including non-navigable waters within the definition of “waters of the United States.” *SWANCC*, 531 U.S. at 167. The *Rapanos* Court announced two distinct tests for establishing jurisdiction under the Act. Justice Scalia’s plurality test in *Rapanos* defined waters covered by the statute to include relatively permanent, standing or continuously flowing bodies of water connected to traditional navigable waters, as well as wetlands with a continuous surface connection to traditional navigable waters. *Rapanos*, 547 U.S. at 739. Justice Kennedy’s concurring opinion in *Rapanos* set forth the “significant-nexus” test. Under that test, a “significant nexus” required for protection under the Act “must be assessed in terms of the statute’s goals and purposes . . . ‘to restore and maintain the chemical, physical and biological integrity of the Nation’s waters’” *Id.* at 779-80 (*quoting* 33 U.S.C. § 1251(a)). If a wetland or water significantly affects the integrity of other waters “more readily understood as ‘navigable,’” it possesses that nexus and is protected by the Act. *Id.* at 780.

Since *Rapanos*, the lower federal courts have grappled with how to apply the 1977 regulations in instances of uncertain jurisdiction under the Act. The majority of federal courts have adopted Justice Kennedy’s “significant nexus” test. Other courts have found waters to be protected by the CWA if they satisfy *either* Justice Kennedy’s test *or* Justice Scalia’s plurality test in *Rapanos*, *see, e.g., United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011), an approach endorsed by the four dissenting Justices in *Rapanos*, *see* 547 U.S. at 810 (Stevens, J., dissenting). However *no* court has held, and the agencies have never before advocated, that only Justice Scalia’s test may be used to determine whether a waterbody is protected by the Act.

To remedy the difficulties with the 1977 regulations, the Clean Water Rule defined “waters of the United States” under the Act based on “the goals, objectives and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies’ technical expertise and experience” to establish clear categories of waters within CWA jurisdiction and thereby reduce the need for case-specific jurisdictional determinations. 80 Fed. Reg. at 37056. The Clean Water Rule adopted Justice Kennedy’s “significant-nexus” test to establish these specific

categories. The agencies relied on a large peer-reviewed scientific record to define jurisdictional waters to include those waters that have a “significant nexus” with the integrity of navigable-in-fact waters. *See* 80 Fed. Reg. at 37057. In doing so, the Clean Water Rule clarified and tightened the definition’s “fit” to cover waters with significant effects on the integrity of downstream waters and to exclude others lacking such effects.

Following publication of the final Clean Water Rule on June 29, 2015, parties, including industry groups, other states, and environmental groups, challenged it in federal district and circuit courts. The circuit court petitions were consolidated in the U.S. Court of Appeals for the Sixth Circuit, and that court issued a nationwide stay of the Clean Water Rule pending resolution of those petitions.² *In re Environmental Protection Agency and Department of Defense Final Rule; Clean Water Rule Definition of Waters of the United States*, 803 F.3d 804 (6th Cir. 2015) (hereinafter, *Clean Water Rule Petitions*). The Sixth Circuit subsequently determined that it had jurisdiction over the petitions. *Clean Water Rule Petitions*, 817 F.3d 261 (6th Cir. 2016). The Supreme Court granted certiorari on that issue, which is now fully briefed, and set argument for October 11, 2017. *National Association of Manufacturers v. Department of Defense*, 137 S. Ct. 811 (2017). In the meantime, the district court actions challenging the Clean Water Rule have been stayed pending resolution of proceedings in the Sixth Circuit and Supreme Court. The Sixth Circuit’s stay of the Clean Water Rule remains in place pending resolution of the Supreme Court proceeding.

C. The Repeal Rule

The agencies characterize the proposed repeal rule as a first-step “interim rule.” However, not only would the rule repeal the Clean Water Rule without any substantive analysis of its merits, but it would also re-promulgate the 1977 regulations without substantive analysis of their merits, and once finalized the repeal rule would have the force of law and remain in place indefinitely. 82 Fed. Reg. 34899, 34903. The agencies state that in a second step at some later unspecified time they intend to engage in notice and comment rulemaking to consider the definition of “waters of the United States.” 82 Fed. Reg. at 34901. But nothing in the repeal rule requires that they do so, or limits the duration that the repeal rule would remain in effect. Moreover, the agencies have made clear that the proposed repeal rule was not drafted based on a substantive review by them of the law or the facts. And, in that regard, they have made clear that they will not entertain any substantive public comments concerning the repeal rule, even though the science and factual findings underlying that rule are now over forty years old. 82 Fed. Reg. 34899, 34903 (agencies “are not soliciting comment on the specific content of those longstanding [1977] regulations”).

² Six of the States intervened in those petitions in support of the Clean Water Rule: New York, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

The agencies provide two main rationales for the repeal rule. First, they state that the repeal rule “will provide continuity and certainty for regulated entities, the States, agency staff, and the public.” 82 Fed. Reg. 34899 and 34902 (the repeal rule is “an interim step for regulatory clarity for the many stakeholders affected”). The agencies contend that the repeal rule is justified by the possibility that the Sixth Circuit’s temporary nationwide stay of the Clean Water Rule will expire if the Supreme Court holds the Sixth Circuit lacked jurisdiction. 82 Fed. Reg. 34899, 34902. They assert that this possibility could lead to “inconsistencies, uncertainty, and confusion,” which the repeal rule would prevent. *Id.* at 34902. They state that if the Sixth Circuit’s temporary stay were to dissolve, a similar stay would remain in thirteen states pursuant to a preliminary injunction previously issued by the district court in North Dakota. In addition, the agencies state that actions challenging the Clean Water Rule presently stayed in various district courts “would likely be reactivated” if the nationwide stay dissolves.

Second, the agencies assert that the Clean Water Rule failed to discuss “the meaning and importance of section 101(b)” of the CWA when defining “waters of the United States,” and that they intend to “more fully consider” this section in the yet-to-be determined second step rulemaking.³ 82 Fed. Reg. at 34902.

II. THE REPEAL RULE IS ARBITRARY, CAPRICIOUS, AND NOT IN ACCORDANCE WITH LAW

Rulemaking under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA) is intended to “ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage.” *United States v. Utesch*, 596 F.3d 302, 308 (6th Cir. 2010) (citation omitted). Besides allowing for public participation in the administrative process, the notice-and-comment procedure is intended to “educate[] the agency, thereby helping to ensure informed agency decisionmaking.” *Chocolate Mfrs. Ass’n. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985).

Agency rulemaking must be “based on a consideration of the relevant factors.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) (*State Farm*). An agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (internal quotation and citation omitted). A regulation is arbitrary and capricious “if the

³ Section 101(b) states Congress’s policy to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. § 1251(b).

agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* An agency may not promulgate a regulation under the CWA “without supportable facts,” *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992), and cannot “ignore the directive given to it by Congress in the Clean Water Act, which is to protect water quality,” *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009).

Additional strictures apply where, as here, an agency proposes to rescind a regulation and replace it in connection with a new administration’s different policy choices.

Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, *an agency’s decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation* for doing so. *An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.*

FCC v. Fox TV Stations, Inc., 556 U.S. 502, 537 (2009) (Kennedy, J., concurring) (emphasis added); *see id.*, 556 U.S. at 515 (Scalia, J., for the plurality) (A more detailed justification is needed for an agency’s new policy “than what would suffice for a new policy created on a blank slate . . . when its new policy rests upon factual findings that contradict those which underlay its prior policy.”).

Here the agencies are in wholesale breach of foundational administrative law principles, and the repeal rule is arbitrary, capricious and not in accordance with law. Specifically, the agencies: (1) failed to provide a meaningful opportunity for public comment on the substance of the repeal rule; (2) failed to consider important aspects of defining “waters of the United States;” (3) disregarded the prior factual findings of the Clean Water Rule; (4) failed to provide a rational basis or reasoned analysis for the repeal rule; and (5) improperly allowed EPA Administrator Pruitt’s involvement in the rulemaking. These deficiencies are discussed in detail below.

A. The Agencies Have Not Provided the Public with A Meaningful Opportunity to Comment on the Repeal Rule.

“The process of notice and comment rule-making . . . is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules.” *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 528 (D.C. Cir. 1982). “[A] chance to comment ... [enables] ‘the agency [to] maintain[] a flexible and open-minded attitude towards its own rules.’” *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (internal citation omitted). Failure to comply with the APA’s notice and comment requirements is grounds for vacating an unlawfully promulgated agency rule. *Sprint Corp v. FCC*, 315 F.3d 369, 376-377 (D.C. Cir. 2003). And rules cannot be repealed without completing a notice and comment procedure in accordance with the APA. *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff’d sub. nom.*, *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983).

The repeal rule does not comply with the APA’s notice and comment requirements. As the agencies correctly point out, “[t]he scope of CWA jurisdiction is an issue of great national importance.” 82 Fed. Reg. at 34902. Yet the agencies seek to rescind and replace the Clean Water Rule without accepting or considering any substantive public comments. *Id.* at 34903 (“[T]he agencies are 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), 34902 (“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 these long standing regulations.”), and 34901 (leaving to the second step rulemaking the “substantive review of the appropriate scope of ‘waters of the United States.’”). Moreover, public input and analysis of the content of the Clean Water Rule and the 1977 regulations which would replace it may never occur as the agencies are not bound under the repeal rule to implement the “second step” rulemaking at all. While the agencies treat this first step as a simple housekeeping measure, the proposed repeal rule would effect a substantive change in the law by repealing the Clean Water Rule and promulgating a new set of rules to govern jurisdiction under the Act.

This cavalier approach plainly violates the APA by seeking an end-run around the APA’s important protections. It is contrary to the fundamentals of notice-and-comment rulemaking because it expressly prevents the public, states,

and other interested parties from being heard on the very substantive issues that must underlie any regulatory definition of the “waters of the United States,” amounting to a bureaucratic *fait accompli*. In addition, the agencies’ refusal to solicit public comments on the substance of the repeal rule demonstrates that the agencies are not participating in the rulemaking process with an open mind. By not taking comments on the substantive issues, the agencies “treat what should be a genuine interchange as mere bureaucratic sport” in that the purpose of the comment period is “to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process.” *Connecticut Light & Power Co. v.*, 673 F.2d at 530-31.

B. The Agencies Failed to Consider Important Aspects of the Problem of Defining “Waters of the United States.”

In proposing the repeal rule, the agencies “entirely failed to consider important aspect[s] of the problem” of defining the scope of waters protected under the Act. *See State Farm, supra*. In particular, the agencies have failed to consider the well-known ambiguities and inconsistencies in applying the 1977 regulations, and the further complications arising from Supreme Court and other federal case law interpreting “waters of the United States”—concerns that were central to the agencies’ promulgation of the Clean Water Rule. 80 Fed. Reg. 37054, 37056. As Chief Justice Roberts observed in *Rapanos*, “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.” *Rapanos*, 547 U.S. at 758. The Chief Justice’s concern was justified. *See, e.g., U.S. v. Cundiff*, 555 F.3d 200, 207-08 (6th Cir. 2009) (“Parsing out any one of *Rapanos*’s lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which – if any – of the . . . main opinions lower courts should look to for guidance.”). Again, this ambiguity, confusion and the unpredictable results in determining CWA jurisdiction were recognized by the agencies as the key reason for the Clean Water Rule. 80 Fed. Reg. 37054, 37056. There is no doubt that re-promulgating the 1977 regulations will perpetuate the confusion and inconsistencies that have long-plagued CWA jurisdictional determinations, problems that were recognized in and even compounded by the split decision in *Rapanos*. Yet the agencies have not considered in the repeal rule this important aspect of the problem.

The agencies have not explained how the 1977 regulations comport with *Rapanos*. For example, the 1977 regulations included within the “waters of the United States” certain “intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, slough, prairie potholes, wet meadows, playa lakes or natural ponds,” 33 C.F.R. § 328.3(a)(3), regardless of whether they have a “significant nexus” with navigable waters under Justice Kennedy’s test, or are relatively permanent/continuous waters under Justice Scalia’s test. Further,

those regulations cover waters to the extent they have a nexus with interstate or foreign commerce, rather than a nexus with navigable waters. *Id.* And while the 1977 regulations do not specifically include seasonal rivers as “waters of the United States,” Justice Scalia’s test specifically refers to seasonal rivers as encompassed within the definition. *Rapanos*, 547 U.S. at 733.

Moreover, in proposing the repeal rule, the agencies have entirely failed to consider the CWA’s overarching goal to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In fact, the repeal rule provides no analysis demonstrating how it would meet this goal. *See Nat’l Cotton Council*, 553 F.3d at 939.

The agencies claim without merit that their failure to address substance in the proposed rule is somehow supported by *P&V Enterprises v. U.S. Army Corps of Engineers*, 516 F. 3d 1021 (D.C. Cir. 2008). *See* 82 Fed. Reg. at 34093. But it is not. *P&V Enterprises* concerned an Army Corps Advance Notice of Proposed Rulemaking (ANPRM) requesting from interested parties information on the implications of SWANCC, 531 U.S. 159 (2001), for Corps’ jurisdictional determinations under the Act. The court in *P&V Enterprises* stated that the ANPRM “at most indicated that a substantive proposal for review might follow consideration of public input” and did not itself “offer[] a proposed rule,” but instead “was no more than a broadly stated request for information and comment” to help the agency fashion such a proposed rule if it chose to do so. *P&V Enterprises*, 516 F.3d at 1024 (internal quotation omitted). By contrast, here the agencies have not issued a broadly stated request for information to aid them in possibly proposing a rule. Rather they have already proposed a rule that would substantively change the scope of waters protected by the Act. The agencies’ reliance on *P&V Enterprises* to avoid addressing the substance of the repeal rule is unjustified.

In sum, the agencies have violated the APA by failing to consider in the repeal rule the important aspects of the problem of defining the scope of waters protected by the Act.

C. The Agencies Disregarded Prior Factual Findings Supporting the Clean Water Rule.

“[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change” and must address the prior factual findings that justify the rule it seeks to rescind. *State Farm*, 463 U.S. at 42, 47-51. In proposing the repeal rule, the agencies disregard both their prior factual findings regarding the science supporting the promulgation of the Clean Water Rule, and the inadequacies they previously identified in regard to the 1977 regulations. The agencies offer no facts contradicting the massive record that formed the basis of the 2015 Clean Water Rule. This dramatic about-face by the agencies, in total

disregard of their factual findings made just two years earlier, is arbitrary and capricious. *See Fox TV Stations, Inc.*, 556 U.S. at 515, 537.

i. The Agencies Have Disregarded and Failed to Address the Science Supporting the Clean Water Rule.

The repeal rule does not discuss the agencies' findings in promulgating the Clean Water Rule that many waters not specifically listed in the 1977 regulations, such as ephemeral and intermittent streams and floodplains, have a significant nexus to downstream waters and must be explicitly included within the definition of "waters of the United States." In making these findings, the agencies relied on a comprehensive report prepared by EPA's Office of Research and Development, which reviewed more than 1200 peer-reviewed publications, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Science Report).⁴ The agencies also relied on EPA's Science Advisory Board that independently reviewed the Science Report. 80 Fed. Reg. at 37057.

In promulgating the Clean Water Rule, the agencies relied on robust science supporting the Act's coverage for waters not specifically identified in the prior regulations. For example, the agencies found strong scientific evidence that wetlands and open waters in floodplains significantly impact the chemical, physical and biological integrity of primary waters. By definition a floodplain becomes "inundated during moderate to high flow events." Science Report at A-4. Because floodplain waters store water during these high flow events, they reduce the frequency of flooding by systematically retaining and more slowly releasing large volumes of stormwater runoff. Technical Support Document (TSD), Docket Id. No. EPA-HQ-OW-2011-0880 at 280, 300, 307. Accordingly, the agencies found that "wetlands and open waters in floodplains of streams and rivers and in riparian areas ... have a strong influence on downstream waters." 79 Fed. Reg. at 22196. "The body of literature documenting connectivity and downstream effects was most abundant for riparian/floodplain wetlands." TSD at 104. Similarly, the 1977 regulations did not provide for explicit inclusion of the category of tributaries, as defined and limited by the Clean Water Rule, within the Act's jurisdiction. The Science Report and the Scientific Advisory Board review confirmed that such tributary streams are connected to and strongly affect the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. 80 Fed. Reg. at 37057.

The repeal rule violates the APA because the agencies have completely ignored without explanation their prior science-based findings relating to protection

⁴ U.S. EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)*, EPA/600/R-14/475F (Washington, D.C. 2015), available at <https://cfpub.epa.gov/ncea/risk/recorddisplay.cfm?deid=296414>.

of waters' integrity (such as those discussed above) that are the foundation of the Clean Water Rule. *FCC v. Fox TV Stations, Inc.*, 556 U.S. at 537 (Kennedy, J., concurring) (in changing policy an agency cannot ignore or countermand its prior factual findings without reasoned explanation); *Nat'l Cotton Council of Am.*, 553 F.3d at 939 (EPA may not "ignore the directive given to it by Congress in the Clean Water Act, which is to protect water quality."); *United States v. Nixon*, 418 U.S. 683, 696 (1974) ("An Agency may not . . . depart from a prior policy *sub silentio*.").

ii. The Agencies Have Failed to Address the Clean Water Rule's Findings That the 1977 Regulations Are Confusing and Inconsistently Applied.

The agencies also have ignored previous findings regarding the numerous other inadequacies of the 1977 regulations. In promulgating the Clean Water Rule, the agencies determined that in light of the Supreme Court's *SWANCC* and *Rapanos* decisions, they had to make case-specific jurisdictional determinations under those regulations "far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public." 79 Fed. Reg. at 22188. The agencies found that the 1977 regulations (and guidance documents):

did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case specific jurisdictional analysis to determine whether a 'significant' nexus' exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. As a result of the ambiguity that exists under current regulations and practice following these recent decisions, almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination.

80 Fed. Reg. 37054, 37056.

The agencies further found that contributing to the confusion and uncertainty was frequent litigation arising from the case-by-case determinations in which the federal courts would apply varying standards. 79 Fed. Reg. at 22252. "The purposes of the [Clean Water Rule] are to ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency . . . with increased certainty and less litigation." *Id.* at 22190.

Yet, in this rulemaking, the agencies have said nothing about their previous findings that the 1977 regulations sow ongoing confusion, inconsistency, uncertainty, administrative inefficiency, and frequent case-specific litigation. Instead, in direct conflict with their findings in the Clean Water Rule, the agencies now claim that rescinding it and promulgating the 1977 regulations will provide “clarity for the many stakeholders affected by the definition of ‘waters of the United States.’” 82 Fed. Reg. at 34092. They have not explained, nor can they, how their prior findings of dysfunction in the 1977 regulations square with the rationale they have articulated for the re-promulgation of those rules: that they would prevent “inconsistencies, uncertainty, and confusion” *if* the Supreme Court dissolved the Sixth Circuit’s nationwide stay of the Clean Water Rule. 82 Fed. Reg. 34899, 34902. This disregard of the agencies’ prior factual findings violates the APA.

D. The Agencies Have Failed to Provide a Rational Basis or Reasoned Analysis for the Repeal Rule.

An agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (internal quotation and citation omitted). A regulation is arbitrary and capricious “if the agency ... offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

Here, the agencies’ assertion that the repeal rule will prevent “inconsistencies, uncertainty, and confusion” has no rational basis. 82 Fed. Reg. 34899, 34902. The repeal rule would not end confusion and uncertainty associated with determining the scope of CWA jurisdiction. In fact, as discussed above, by returning the regulatory regime back to the 1977 regulations and *Rapanos*, the repeal rule will restore the well-known systemic problems in making jurisdictional determinations under that definition of “waters of the United States.” The repeal rule will not clarify uncertainty or confusion in the courts. At most it could result in the resolution of one set of court cases challenging the Clean Water Rule and the commencement of other cases challenging the repeal rule. There is no doubt that such lawsuits will be brought given the importance of the definition of “waters of the United States” and the multiplicity of parties already litigating about it. Thus the agencies can have no rational expectation that the repeal rule will prevent further litigation of this issue, and their deliberate trading of one set of lawsuits for another provides no basis for promulgation of the repeal rule. *See Organized Village of Kake v. United States Department of Agriculture*, 795 F.3d 956, 970 (9th Cir. 2015) (*en banc*).

The agencies' explanations that ongoing litigation about the Clean Water Rule require its summary rescission are contrived and cannot justify the repeal rule. Their assertion that repeal of the Clean Water Rule is necessary because the current stay by the Sixth Circuit could expire (*see* 82 Fed. Reg. at 34902) ignores the fact that by its terms the Sixth Circuit's stay is temporary. *See Ohio v. United States Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804, 808 (6th Cir. 2015) (the stay is temporary "pending judicial review"). The agencies cannot rely on the existence of an injunction as a basis for summary repeal and replacement of a rule. *See California ex rel. Lockyer v. USDA*, 575 F.3d 999, 1013-16 (9th Cir. 2009). In addition, the agencies' stated concern about potential resumption of the North Dakota District Court's temporary thirteen-state stay of the Clean Water Rule is belied by the proceedings in that case. The North Dakota District Court limited the geographic scope of its stay out of respect for other courts considering the Clean Water Rule, respect for states supporting the rule (including many of the States), and with the *express support* of the agencies, consistent with their longstanding practice favoring non-uniform geographic application of their rules when a court issues an adverse decision concerning a rule. *See* court order in *North Dakota v. EPA*, Case 3:15-cv-00059-RRE-ARS, Document No. 79 (D.N.D. Sept. 4, 2015, and Document No. 76 (Federal Defendants' Brief, dated Sept.1, 2015)). The agencies have not provided a reasoned explanation for their about-face on that issue.

In sum, rather than seeking relief in the court cases in which they are parties, or abiding by their prior positions taken in those cases, the agencies proffer unreasoned explanations for the repeal rule that do not withstand scrutiny.

Furthermore, the "reasoned analysis" required by *State Farm*, 463 U.S. at 42, for an agency's reversal of policy should include consideration and discussion of alternatives. *Id.* at 46 (rescission of automobile passive restraint requirements found arbitrary and capricious for agency failure to consider alternative of modifying applicable standard); *Center for Science in the Public Interest v. Department of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) (analysis supporting agency reversal of position "should include an explanation for the reversal which is supported by the record and a discussion of what alternatives were considered and why they were rejected," citing *Int'l Ladies' Garment Workers' Union v. Donovan*, 772 F.2d 795, 817-18 (D.C. Cir. 1983)). Here the agencies' single conclusory sentence in the proposed repeal rule that they "considered other approaches . . . such as simply withdrawing or staying the Clean Water Rule" (*see* 82 Fed. Reg. at 34903) falls far short of the reasoned analysis that the law requires. First, instead of rescission, modification of the carefully developed Clean Water Rule (by, for example, taking into account the substantive issues) is an obvious alternative that the agencies have refused to consider. This failure by the agencies constitutes an "artificial narrowing of options" that "is antithetical to reasoned decisionmaking." *Int'l Ladies' Garment Workers' Union*, 772 F.2d at 817. Second, the alternatives

referred to by the agencies in passing are legally untenable on their face. “Withdrawing” the Clean Water Rule is no different than the instant proposed rescission, and therefore fails to meet the APA’s requirements. And “staying” the rule is not permitted under the APA, 5 U.S.C. § 705, because the rule’s effective date has already passed. *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. Lexis 2324, *2-3 (D.C. Cir. Jan 19, 1996) (*per curiam*).

Lastly, the agencies contend that the repeal rule is justified based on the purported failure to fully consider in the Clean Water Rule the implications of CWA section 101(b)’s policy to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,” *see* 82 Fed. Reg. at 34902. This is simply not supported by the factual record. As demonstrated by the hundreds of public comments from numerous states on the importance of Section 101(b), and the comprehensive responses to these comments drafted by the agencies in the process of developing the Clean Water Rule, Section 101(b) was fully considered. *See* Clean Water Rule Response to Comments – Topic 1: General Comments at 79-293. Moreover, the agencies do not explain how this thorough review and consideration of the Congressional policy is somehow deficient and justifies the repeal of the Clean Water Rule.

E. Administrator Pruitt’s Involvement in the Rulemaking is Illegal.

Administrator Pruitt’s refusal to recuse himself from this rulemaking is arbitrary, capricious, and contrary to law, thus rendering any final rule invalid.⁵ Administrator Pruitt and EPA acted contrary to law in failing to exclude his participation in this rulemaking in accordance with procedures set out under 5 C.F.R. § 2635.502, and because his involvement violates due process. Regulatory procedures provide for recusal from a matter if the government employee acted as an attorney during the last year for a specific party to the matter and if “circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.” *Id.*, §§ 2635.502(a), (c). Independent of these procedures, due process requires disqualification of a government official “when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.” *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

⁵ While in a May 2017 memorandum Mr. Pruitt recused himself from the Clean Water Rule litigation and other cases he previously brought against EPA, he has refused to recuse himself from any rulemakings such as the proposed rule here. My Ethics Obligations, Memorandum from E. Scott Pruitt (May 4, 2017), *available at* <https://foiaonline.regulations.gov/foia/action/public/view/record?objectId=090004d2812efc2b&fromSearch=true>.

As to the Clean Water Rule and its replacement by the 1977 regulations, a reasonable person would conclude that Administrator Pruitt is not impartial; and the evidence compels the conclusion that he has “unalterably closed” his mind on the matter. For two years before becoming EPA Administrator, as Oklahoma Attorney General, he and other state attorneys general challenged the Clean Water Rule on behalf of their states in the U.S. Court of Appeals for the Sixth Circuit and in other federal courts, claiming that it exceeded the agencies’ statutory and constitutional authority. As relief, Mr. Pruitt sought to annul the rule, thereby reinstating the prior 1977 regulations which the Clean Water Rule had superseded. *See* Opening Brief of State Petitioners, *Murray Energy Corp. v. EPA*, Case No. 15-3751, Document No. 128 (6th Circuit, Nov.1, 2016). Thus, this rulemaking involves the very same matter as his legal challenges to the Clean Water Rule and seeks to effect the same result as that litigation: annulment of the Clean Water Rule and its replacement with the prior 1977 regulations. *Compare Lead Industries Ass’n. Inc. v. EPA*, 647 F.2d 1130, 1174 (D.C. Cir. 1980) (EPA Administrator did not “prejudge” rulemaking on *how* lead should be regulated under the Clean Air Act because his pre-government advocacy as to *whether* lead should be regulated was a distinctly different matter).

Following his resignation as Oklahoma Attorney General, Mr. Pruitt continued his full-throttled advocacy for eliminating the Clean Water Rule. In his official EPA Administrator Twitter account, Mr. Pruitt explained that he sued EPA so many times because “[t]hey deserved it and they deserved it because they exceeded their statutory authority, they exceeded their constitutional authority.”⁶ Significantly, after publication of the proposed repeal rule, he met with various groups opposed to the Clean Water Rule to advocate for its repeal. He appeared in a promotional video for the National Cattlemen’s Beef Association, a party that challenged the Clean Water Rule alongside Mr. Pruitt. In the video he stated that “we want farmers and ranchers across the country to submit comments,” after explaining his strong opposition to the Clean Water Rule, which he wrongly stated “defined a water of the United States as being a puddle . . . and ephemeral draining ditches across the country” -- features that the rule expressly defines as *not* waters of the United States. *See* 33 C.F.R. § 328.3(b)(3), (4)(vii).⁷ Mr. Pruitt asserted during the repeal rule’s comment period that the Clean Water Rule was “an

⁶ *See* May 11, 2017, official Twitter statement directing the public to an article on The Daily Caller website, quoting him. Available at <https://twitter.com/EPAScottPruitt/status/862745467679121408>.

⁷ The video is available at <http://news.vice.com/story/epa-head-scott-pruitt-is-the-new-star-of-a-big-beef-industry-video>. *See* “EPA chief in Iowa to talk about recrafting ‘Waters of the U.S.’ rule,” *Radio Iowa*, Aug. 8, 2017 (making same incorrect assertion) at <http://www.radioiowa.com/2017/08/08/epa-chief-in-iowa-to-talk-about-recrafting-waters-of-the-us-rule/>.

overreach,” as he did in prior litigation on behalf of Oklahoma.⁸ And in his August 8, 2017 meeting with the Iowa Farm Bureau he held up a sign advocating that we “ditch” the Clean Water Rule.⁹

In summary, Administrator Pruitt’s involvement in this rulemaking renders a final rule invalid due to his illegal refusal to follow recusal procedures under 5 C.F.R. § 2635.502 in light of his lack of impartiality, and because the clear and convincing evidence demonstrates his closed mind on the matter in violation of due process. *See* 5 U.S.C. § 706(2).

CONCLUSION

For all of these reasons, the States strongly oppose the repeal rule and respectfully request that the agencies not proceed with or finalize it.

Very truly yours,



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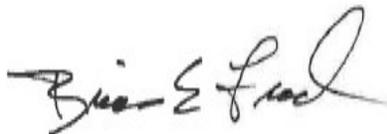
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⁸ *See* “EPA administrator in Utah to get input on water rule, other regulations,” *Desert News Utah*, July 18, 2017 at <https://www.deseretnews.com/article/865685042/EPA-administrator-in-Utah-to-get-input-on-water-rule-other-regulations.html>.

⁹ *See* “Clean Water Rule: Pruitt stars in industry video promoting WOTUS repeal,” *Environment & Energy News*, August 21, 2017 at <https://www.eenews.net/stories/1060058985>.



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