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Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont,
Washington, and the District of Columbia**

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By Electronic Transmission

Andrew Wheeler, Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

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

Dear Acting Administrator Wheeler and Assistant Secretary James,

The Attorneys General of New York, California, Connecticut, Maine, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia (the States) write to comment upon the Supplemental Notice of Proposed Rulemaking issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, “the Agencies”). *See* 83 Fed. Reg. 32,227 (July 12, 2018). These comments supplement the comments submitted by the Attorneys General of New York, California, Maine, Maryland, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia on September 27, 2017, in response to the Agencies’ July 27, 2017 notice of proposed rulemaking (82 Fed. Reg. 34,899). The States remain strongly opposed to the Agencies’ proposed rule (hereinafter, the proposed repeal rule) that would repeal the Clean Water Rule (80 Fed. Reg. 37,054 (June 29, 2015)) and replace it with regulations dating back to at least the 1980s (1980s regulations).¹

¹ In addition to the reasons stated herein why the proposed repeal rule is contrary to law, the States further note that the Agencies have violated the Administrative Procedure Act by allowing only 30 days for public comment in their Supplemental Notice, thereby denying the public a meaningful opportunity to participate in this rulemaking. *See* Exec. Order 13563, at §2(b), 76 Fed. Reg. 3821, 3821-22 (Jan. 21,

In the proposed repeal rule the Agencies have failed to assess its impact on the Clean Water Act's objective, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Instead the Agencies assert that the proposed repeal rule would promote regulatory certainty. They also assert that the 2015 Clean Water Rule is inconsistent with the Clean Water Act and Supreme Court precedent, and attempt to call into question the scientific record supporting the 2015 Rule. These assertions are without merit. The proposed repeal rule fails to consider important issues, lacks factual and legal support, and ignores and directly contradicts the Agencies' previous findings and conclusions without a reasoned basis.

As explained in our previous comments and further discussed below, repeal of the 2015 Clean Water Rule and recodification of dated, problematic regulations that the 2015 Rule replaced would be arbitrary and capricious and not in accordance with law. We respectfully request that the Agencies proceed no further with the proposed repeal rule.

I. The Agencies Failed to Consider the Clean Water Act's Overarching Objective to Restore and Maintain Water Quality.

Because the proposed repeal rule would establish which waters are protected by the Clean Water Act, its effects on water quality are of central importance. Indeed, when EPA issues a regulation under the Clean Water Act, it cannot "ignore the directive given to [EPA] by Congress in the . . . Act, which is to protect water quality." *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009). In *National Cotton Council*, the Sixth Circuit held that a rule interpreting the Act to exclude prohibitions against discharges of certain pesticides was invalid because, among other reasons, EPA ignored the rule's water quality impacts. *Id.* at 939-40. The Agencies have done the same here by failing to consider the proposed repeal rule's effect on water quality and whether that rule is consistent with and furthers the Clean Water Act's objective to "restore and maintain" water quality.

When the Agencies issued the Clean Water Rule, they enhanced water quality protection by relying upon an extensive record comprised of the most current scientific evidence in accordance with Justice Kennedy's significant nexus standard, which includes wetlands and other non-navigable waters as "waters of the United States" if they significantly affect the water quality of traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 780 (2006); *see also* 80 Fed. Reg. at 37,055-56, 37,060-61. The proposed repeal rule, in sharp contrast,

2011) (establishing that "to provide the public with an opportunity to participate in the regulatory process," the notice and comment period for agency rulemakings "should generally be at least 60 days").

removes the specific protections of the Clean Water Rule without *any* consideration of either scientific evidence or the Agencies' mandate under the Clean Water Act to protect water quality. *See* 33 U.S.C. § 1251(a). Because the Agencies "entirely failed to consider" water quality impacts in their proposal to redefine "waters of the United States," and have ignored and countermanded their prior scientific findings without a reasoned basis, the proposed repeal rule is arbitrary and capricious and would violate the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, if finalized. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009).

II. The Agencies Failed to Consider the Problems with the 1980s Regulations and How the Clean Water Rule Addressed Them.

In 2015, the Agencies replaced the 1980s regulations with the Clean Water Rule after having found that developments in the law had rendered the preexisting regulatory regime problematic, leading to case-specific jurisdictional determinations "far more frequently than is best for clear and efficient implementation of the CWA . . . result[ing] in confusion and uncertainty to the regulated public." 79 Fed. Reg. 22,188 (April 21, 2014). The Agencies also found that the 1980s regulations "did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations." 80 Fed. Reg. at 37,056. Replacement of the 1980s regulations with the Clean Water Rule was necessary, in the Agencies' view, "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 [Clean Water] [R]ule achieves these goals by increasing CWA program transparency, predictability, and consistency . . . with increased certainty and less litigation." 79 Fed. Reg. at 22,190.

Yet the Agencies now propose to reinstate the 1980s regulations without any consideration of their previous findings. Indeed, the Agencies claim they are reinstating those regulations to "provide for greater regulatory predictability, consistency, and certainty," 83 Fed. Reg. at 32,240, but they fail to explain how that squares with their replacement of the 1980s regulations with the Clean Water Rule in 2015 based on those very same concerns. This "decision to change course . . . ignor[ing] [and] countermand[ing] earlier factual findings without reasoned explanation," *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 537, and without consideration of "an important aspect of the problem," *State Farm*, 463 U.S. at 43, is arbitrary and capricious and violates the APA.

In the proposed repeal rule the Agencies avoid any meaningful analysis of either the problematic 1980s regulations or the benefits of the Clean Water Rule that replaced them, and instead simply conclude that the proposed repeal rule "retain[s] the status quo." 83 Fed. Reg. at 32,250. This ignores the fact the Clean

Water Rule became effective on August 28, 2015 and was the law, subject only to judicial stays that do not repeal or promulgate legal requirements and by their nature are temporary. *Cf.* 83 Fed. Reg. at 83,250 (conceding that Agencies issued 540 jurisdictional determinations under the 2015 Rule before it was stayed by the Sixth Circuit). Indeed, the Sixth Circuit’s stay of the Clean Water Rule, issued after the Rule became effective, was vacated on February 28, 2018, following the Supreme Court’s ruling that the Sixth Circuit lacked jurisdiction. A government agency may not pretend that a regulation was “never really in effect” because it had been subject to a temporary court injunction where, as here, the Agencies seek to “substantively repeal[] . . . protections that the agenc[ies] had found essential in a lengthy rulemaking . . . and reinstate[] less protective” regulations. *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459 F. Supp. 2d 874, 898 (N.D. Cal. 2006), *aff’d*, 575 F.3d 999 (9th Cir. 2009).

Further, the Agencies are wrong in attempting to rewrite history by suggesting (83 Fed. Reg. at 32,239-40) that the 1980s regulations, together with previous agency guidance documents, are superior to the Clean Water Rule and would “provide for greater regulatory predictability, consistency and certainty.” This is directly contrary to the Agencies’ findings in 2015 that the Clean Water Rule reduced uncertainty as to which waters are protected as compared to the previous 1980s regulatory regime. 80 Fed. Reg. at 37,054, 37,057, 37,100. *See also* Plaintiffs’ Br. at 3-5 (May 3, 2018) in *NRDC v. EPA*, Case No. 1:18-cv-01048 (S.D.N.Y.) (Dkt. 55) (documenting that 1980s regulations, together with agency guidance documents issued after decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (*SWANCC*) and *Rapanos v. United States*, 547 U.S. 715 (2006), resulted in confusion, inconsistency, and under-enforcement of the Clean Water Act). And as the Agencies themselves made clear, they promulgated the Clean Water Rule to address these very issues: to “more effectively focus . . . on identifying waters that are clearly covered by the Clean Water Act and those that are clearly not covered, making the rule easier to understand, consistent, *and environmentally more protective.*” 80 Fed. Reg. at 37,057 (emphasis added). *See* additional comments in Section III.E. below on the Agencies’ claims regarding “regulatory certainty” and the proposed repeal rule.

III. The Proposed Repeal Rule Provides No Legitimate Basis to Repeal the Clean Water Rule, Which Lawfully Serves the Clean Waters Act’s Objective, “To Restore and Maintain the Chemical, Physical and Biological Integrity of the Nation’s Waters.”

A. The Clean Water Rule Raises No Serious Federalism or Constitutional Concerns.

The Agencies’ suggestions in the proposed repeal rule that the Clean Water Rule “did not draw the appropriate line” between federal and state regulation (83

Fed. Reg. at 32,247), or may violate the Constitution including the Commerce Clause (*id.* at 32,248-49), are without merit. In *Rapanos* Justice Kennedy made clear that compliance with the “significant nexus” standard “will raise no serious constitutional or federalism difficulty” and “prevents problematic applications of the statute” that could raise such concerns. *Rapanos*, 547 U.S. at 782-83 (Kennedy, J., concurring in the judgment). As discussed below, the Clean Water Rule is based on the significant nexus standard. *See* 80 Fed. Reg. at 37,056.

The States support the Clean Water Rule, as explained in our previous comments, and repealing it harms the States. By establishing a strong federal “floor” for water pollution control, the 2015 Rule protects the State’s environmental, public health, and proprietary interests in their waters by controlling water pollution not only within their borders but also in upstream areas outside their borders over which they lack jurisdiction. *See* States’ Local Rule 56.1 Statement of Material Facts with accompanying declarations and exhibits (May 1, 2018) in *New York v. Pruitt*, Case No. 1:18-cv-01030 (S.D.N.Y.) (Dkt. 62-2 through 62-13) (detailing States’ interests in protections afforded by Clean Water Rule and explaining how its repeal makes States’ administration of water programs more difficult and costly). The Agencies’ assertions in the proposed repeal rule that the Clean Water Rule is not appropriately solicitous of the responsibilities and rights of states under 33 U.S.C. § 1251(b) (*see* 83 Fed. Reg. at 32,247-48) are wrong. Indeed, as Justice Kennedy further explained in *Rapanos*, the Act’s policy of respecting “States’ responsibilities and rights [under 42 U.S.C.] § 1251(b)” encompasses respect for State water pollution policies that rely on the Act to “protect[] downstream States from out-of-state pollution that they themselves cannot regulate.” *Rapanos*, 547 U.S. at 777 (internal quotation and citation omitted). The proposed repeal rule ignores these important state interests.

Accordingly, the Agencies’ statement in the proposed repeal rule that there are “Minimal Reliance Interests Implicated by a Repeal of the 2015 Rule” (83 Fed. Reg. at 32,250) lacks merit. In this rulemaking the Agencies neither acknowledge nor address the documented harms described herein that the proposed repeal rule would cause. Similarly, the Agencies have chosen to ignore the previous position on which they relied when they promulgated the Clean Water Rule, that the 2015 Rule is “consistent with the law and peer-reviewed science,” and “protect[s] the streams and wetlands that form the foundation of our nation’s water resources.” 80 Fed. Reg. at 37,055.

The Supreme Court has made clear that federal laws like the Clean Water Act that prescribe minimum federal standards through a valid exercise of the commerce power do not violate the Tenth Amendment. “The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause.” *Hodel v. Va. Surface Min. & Reclamation Assn.*, 452 U.S. 264, 291 (1981) (upholding

the constitutionality of the Surface Mining Control and Reclamation Act of 1977). And it is clear that the Clean Water Rule satisfies the Commerce Clause.

The polluting activities controlled by the Clean Water Act, such as point source discharges of waste, are economic in nature and subject to regulation under the Commerce Clause. *See, e.g., Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 340 n.3 (1992) (solid waste is an “article of commerce”). The Clean Water Rule, by protecting both traditional navigable waters and the waters that significantly affect them, provides “appropriate and needful control of activities and agencies which, though intrastate, affect that [interstate] commerce.” *Rapanos*, 547 U.S. at 783 (Kennedy, J., concurring in the judgment) (quoting *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-26 (1941)); *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (noting Congress’ intent under the Clean Water Act 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”). Indeed, the 2015 Rule supports our federal system by helping to maintain a level playing field while advancing the water quality and economies of all states. The scope of the Clean Water Rule does not render it unconstitutional because “the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.” *Hodel*, 452 U.S. at 282.

B. The Clean Water Rule Systematically Carries Out the Act’s Objective By Applying the Controlling Legal Standard to a Strong Scientific Record.

It is indisputable that downstream waters are profoundly influenced by upstream waters. Downstream waters are significantly dependent upon upstream waters through a myriad of functional connections that transcend political boundaries. In order to implement a statute focused on “the chemical, physical and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), the Agencies responsibly grounded the Clean Water Rule in a vast scientific record detailing how downstream waters are physically, chemically and biologically connected to different kinds of streams, wetlands, and open waters in both floodplain and non-floodplain settings.

The Clean Water Rule provides needed clarity on the scope of “waters of the United States” that are protected under the Act, thereby reducing time-consuming, inefficient and potentially inconsistent case-by-case jurisdictional determinations. 80 Fed. Reg. 37,057. In issuing the 2015 Rule, the Agencies relied on “the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies’ technical expertise and experience in implementing the statute.” *Id.* at 37,055. The Agencies assessed whether upstream waters have a

“significant nexus” to downstream waters “in terms of the Act’s objective to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Id.* In doing so the Agencies relied substantially on a comprehensive report prepared by EPA’s Office of Research and Development, entitled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (Science Report or SR), and review of the report by EPA’s Science Advisory Board (SAB Review). *Id.* at 37,057.

The Science Report itself is based on a review of more than 1200 peer-reviewed publications. The Report’s “purpose is to summarize current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in the aggregate, affect the physical, chemical, and biological integrity of downstream waters.” SR Executive Summary-1. The Science Report and SAB Review concluded that tributary streams, and wetlands and open waters in floodplains and riparian areas, 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. 37,057.

With the Supreme Court’s “significant nexus” standard guiding their rulemaking, *see* U.S. EPA, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* 92 (May 27, 2015) (TSD)², the Agencies examined what are “similarly situated” waters in a “region” that “significantly affect” the “chemical, physical and biological integrity” of other covered waters. *Rapanos*, 547 U.S. at 780. The Agencies determined that “waters are ‘similarly situated’ when they function alike and are sufficiently close to function together in affecting downstream waters.” TSD 164. This is common sense and consistent with the scientific consensus that waters in particular landscapes are functionally connected and produce combined effects on downstream water quality. TSD 164-171. Science also supports the Agencies’ determination that the “region” for best evaluating whether there is a significant nexus is “the watershed that drains to the nearest traditional navigable water, interstate water or territorial sea.” TSD 175. Contrary to the Agencies’ more recent questioning of “the watershed” as used in the 2015 Rule (*see* 83 Fed. Reg. at 32,240), utilizing the “point of entry watershed” as the geographic region for assessing significant effects is consistent with decades of scientific literature, and with the Agencies’ longstanding approach for addressing water resources management issues. TSD 174-177. Moreover, the Agencies’ contention in the proposed repeal rule that “they previously placed too much emphasis on the information and conclusions of the [Science Report],” 83 Fed. Reg. at 32,241, is irrational, contradicted by their own findings, and contrary to the Clean Water Act. The Agencies fail to explain why they should now deemphasize

² Available at <https://archive.epa.gov/epa/cleanwaterrule/technical-support-document-clean-water-rule-definition-waters-united-states.html> (last accessed July 24, 2018).

science when it is in fact essential for assessing the proposed repeal rule's effect on the Act's objective to restore and maintain water quality.

Consistent with the Act's objective, in the Clean Water Rule the Agencies evaluated a water's significance by assessing its effects on the chemical, physical or biological integrity of other covered waters. Whether or not a water has a significant effect on downstream water quality was evaluated considering the "functions by which streams, wetlands, and open waters influence the timing, quantity, and quality of resources available to downstream waters." SR Executive Summary-6; *see* TSD 103. The Science Report identified five categories of functions that these waters serve: as a "source" of water and food; a "sink" removing contaminants; a "refuge" protecting organisms; allowing "transformation" of nutrients and chemical contaminants; and creating a "lag" or delayed release of stormwater and other materials. SR Executive Summary-6. The Agencies used these categories to identify the specific aquatic functions that can significantly affect the chemical, physical or biological integrity of a primary water. TSD 177-78. Despite the Agencies' current "concern[s] about broad reliance on biological functions" in the 2015 Rule, 83 Fed. Reg. at 32,241, this functional framework for analysis is consistent with the Clean Water Act and the significant nexus standard, and is firmly grounded in accepted science and agency expertise. TSD 178-89; 80 Fed. Reg. 37,067-68. Indeed, Congress directed the Agencies to implement the Act in just this way. 33 U.S.C. §1251(a) ("restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). By using this science-based framework the Agencies appropriately demarcated in the Clean Water Rule the "waters of the United States" protected by the Clean Water Act.

C. The Clean Water Rule Complies with the Supreme Court's Significant Nexus Standard.

The Clean Water Rule fully complies with applicable Supreme Court authority, and is a reasonable, responsible interpretation of the scope of "waters of the United States" under the Act. As discussed above, the Agencies defined the term "waters of the United States" based on the application of Justice Kennedy's "significant nexus" test in *Rapanos* to a robust body of scientific evidence. That analysis demonstrated how waters covered by the Rule's definition "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780. Notwithstanding the Agencies' recent claim that the 2015 Rule "took an expansive reading" of the significant nexus test that "exceeds the agencies' authority," 83 Fed. Reg. at 32,240, their reliance on the "significant nexus" test in the Clean Water Rule was entirely consistent with Justice Kennedy's explanation of that test and each major component of the 2015 Rule fully satisfies this standard.

1. **The significant nexus standard provides the appropriate framework for the Clean Water Rule.**

The Clean Water Rule properly utilized the significant nexus standard to define the categories of waters subject to the Clean Water Act. As explained herein, the “significant nexus” framework is supported by a robust scientific record that demonstrates the interconnectedness between the regulated tributaries, adjacent waters, and case-specific waters, and the waters more traditionally understood as navigable.

In *Rapanos*, the five Justices who voted in favor of remanding the proceeding disagreed as to the jurisdictional test that should be applied on remand. The four-Justice plurality would find the wetlands adjacent to non-navigable tributaries subject to jurisdiction under the Act if the tributaries were “relatively permanent” waters that connected to traditional navigable waters, and the wetlands had a “continuous surface connection” to those relatively permanent waters. *Rapanos*, 547 U.S. at 742. Justice Kennedy, in contrast, did not focus on permanence or surface connections, but concluded that the subject wetlands would fall within the scope of the Act, if, either alone or in combination with “similarly situated lands in the region,” they had a “significant nexus” to traditional navigable waters. *Id.* at 779-80. And Justice Kennedy recognized that “the absence of hydrologic connection (in the sense of interchange of waters)” can “show[] the wetlands’ significance for the aquatic system” and thereby satisfy the “significant nexus” standard. *Id.* at 786.

The four-Justice dissent would have affirmed the finding of jurisdiction. In particular, the dissent found it significant that the agencies had concluded that wetlands adjacent to tributaries of navigable waters “play important roles in maintaining the quality of their adjacent waters, and consequently in the waters downstream” and that such waters are “integral to the ‘chemical, physical, and biological integrity of the Nation’s waters.’” *Id.* at 796 (quoting 33 U.S.C. § 1251(a)). Finally, recognizing that the case presented a uniquely difficult situation for remand—because no specific mandate garnered a majority of the votes—the dissent instructed that the judgments should be reinstated on remand (*i.e.*, jurisdiction under the Act should be found) if *either* the plurality’s or Justice Kennedy’s test was met. *Id.* at 810.

Justice Kennedy’s “significant nexus” test was appropriately chosen by the Agencies in the Clean Water Rule because a majority of the Justices (the dissenters and Justice Kennedy) agreed with its underlying principle, that the Act extends to waters that “serve important water quality roles” for downstream, navigable waters. *Rapanos*, 547 U.S. at 796 (Stevens, J., dissenting); *id.* at 780 (Kennedy, J., concurring) (wetlands possess the required significant nexus if they “significantly affect the chemical, physical, and biological integrity of other covered waters more

readily understood as ‘navigable’”). Moreover, both Justice Kennedy and the dissent strongly disagreed with the plurality’s approach.³ *See id.* at 800 (Stevens, J., dissenting) (agreeing with Justice Kennedy that the plurality’s limitations “are without support in the language and purposes of the Act or in [the Court’s] cases interpreting it”) (quoting *id.* at 768 (Kennedy, J., concurring))). The dissent found the “significant nexus” test was met on the facts before it and declined to adopt this jurisdictional standard not because it disagreed with its rationale, but because it believed a case-by-case approach was unnecessary given the deferential standard it would apply to the agencies’ expertise. *See id.* at 797, 810.

Under these circumstances, the Agencies were correct to conclude in the Clean Water Rule that a majority of the Justices would apply the “significant nexus” standard. The Agencies themselves have acknowledged that “[t]he [Clean Water] Rule’s use of the significant nexus standard is consistent with every circuit decision . . .” Agencies’ Br. at 49 (Jan. 13, 2017) in *In re Dep’t of Defense & EPA Clean Water Rule*, No. 15-3751 (and consolidated cases) (6th Cir.) (Dkt. No. 149-1) (hereinafter, Agencies’ Br. in No. 15-3751). In the proposed repeal rule the Agencies have provided no reasonable basis to depart from the significant nexus standard, which they have for more than a decade urged courts around the country to use and apply as the controlling rule of law on the issue.

2. Tributaries covered under the Clean Water Rule significantly affect downstream waters.

Contrary to the Agencies’ recent assertions, the Clean Water Rule’s categorical protection of tributaries, 33 C.F.R. § 328.3(a)(5), complies with Justice Kennedy’s “significant nexus” test. As an initial matter, in *Rapanos* the entire Court agreed that navigable-in-fact waters are within the Clean Water Act’s reach in accordance with longstanding precedent, including navigable-in-fact tributaries. Justice Kennedy explained in *Rapanos* that non-navigable tributaries are also reasonably within the Act’s jurisdiction: “Through regulations or adjudication the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough” to be protected under the Act. *Rapanos*, 547 U.S. at 780-81. Under the 1980s regulations applicable when *Rapanos* was decided, a water was classified as a covered tributary if it had an ordinary high water mark (OHWM). Justice Kennedy explained that this “presumably provides a rough measure of the volume and regularity of flow . . . [and] may well provide a reasonable measure of whether specific minor tributaries

³ The dissenters not only agreed with that portion of Justice Kennedy’s opinion in which he explained why the plurality’s test made no sense, *see Rapanos*, 547 U.S. at 808, but included their own seven-page explanation of why the plurality’s test was wrong, *id.* at 800-07.

bear a sufficient nexus with other regulated waters to constitute ‘navigable’ waters under the Act.” *Id.* at 781.

The Clean Water Rule satisfies the “significant nexus” test because it correctly relies on science to define the category of tributaries subject to the Act’s reach. As recognized by the Agencies, because streams function together in a watershed, and the effects of individual streams are cumulative, they must be evaluated in combination with other streams in a watershed. TSD 245; SR Executive Summary 5, 13. Downstream waters are nothing less than the integrated result of their tributaries, which are protected by the Act. *Id.*

The Clean Water Rule requires that a tributary contribute flow and possess both an OHWM *and* a bed and bank, 33 C.F.R. § 328.3(c)(3), thus adding to the requirements of the 1980s regulations. As the Agencies found in their 2015 rulemaking, the OHWM and bed and bank requirements “demonstrate volume, frequency and duration of flow,” *id.*, and in the Agencies’ experience are accurate indicators of active water channels. TSD 235-43. The “presence of physical channels,” which are in fact bed and bank structures, “is a compelling line of evidence for surface water connections from tributaries.” SR Executive Summary-15.

The Clean Water Rule’s protection of tributaries with “intermittent” or “ephemeral” flow, provided they have a bed and bank and OHWM, is also supported by strong science documenting the many important functions these waters perform. “The great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, pollutants, nutrients, and organisms to downstream environments.” TSD 233. In fact, peer-reviewed studies relied upon in the Science Report demonstrate that intermittent and ephemeral streams comprise approximately 59% of total stream length in the United States. *See* Nadeau, T.L., and M.C. Rains. 2007. Hydrological connectivity between headwater streams and downstream waters: How science can inform policy. *Journal of the American Water Resources Association* 43: 118-133.⁴ Accordingly, the protected tributaries have a

⁴ The Clean Water Rule’s protection of intermittent and ephemeral streams in the arid Southwest is similarly consistent with sound science. As recognized by the Agencies, “these streams nonetheless perform the same important ecological and hydrological functions documented in the scientific literature as perennial streams, through the movement of water, nutrients and sediment to downstream waters.” TSD 259, 265-267. Notably, 94% of total stream length in Arizona is intermittent and ephemeral. Nadeau and Rains 2007. Although such flow can be over short time periods, “these episodic connections . . . provide a large portion of the mass, momentum, energy, and organisms delivered annually to the downstream waters.” *Id.*

significant nexus to traditional jurisdictional waters because they affect the physical, chemical, and biological integrity of downstream waters.

Tributaries exert a strong influence on the physical integrity of downstream waters. Even when seasonal, they are the dominant source of water in most rivers. TSD 246. As recognized by the Agencies and peer-reviewed science, even distant headwaters significantly affect downstream rivers, either by storing water through infiltration of channel bed and banks, thereby minimizing downstream flooding, or by contributing flow. TSD 246-47; *see* Alexander, R.B., E.W. Boyer, R.A. Smith, G.E. Schwarz, and R.B. Moore. 2007. The role of headwater streams in downstream water quality. *Journal of American Water Resources Association* 43: 41-59 (rivers and other “higher-order” streams receive over half of their mean-annual water volume from “first-order” headwater streams). Tributaries trap and store sediment, regulating sediment transport and thereby reducing harmful over-sedimentation effects on downstream waters. TSD 247-48. Tributaries also help buffer temperatures in river networks, often affecting downstream water temperature many kilometers away. TSD 248-49.

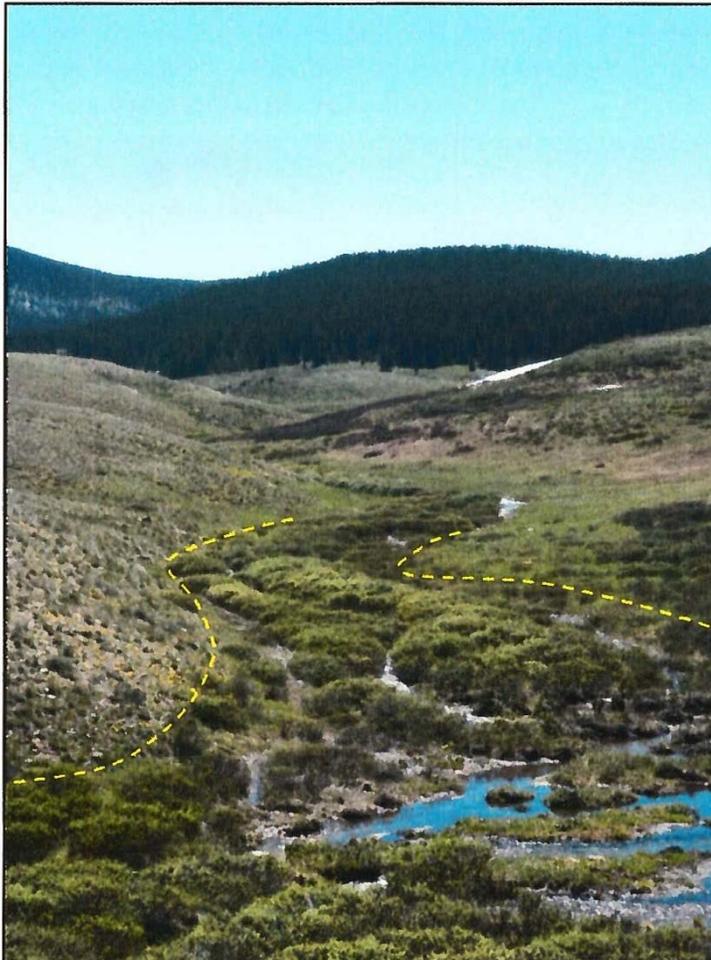
Tributaries significantly affect the chemical integrity of downstream waters in multiple ways. Organic carbon is altered chemically within tributary streams and then exported downstream to support biological activity. TSD 249. Excess nutrients such as nitrogen and phosphorus from surface runoff are stored and transformed in tributaries, having a large positive effect on downstream water quality by preventing reduced dissolved oxygen levels, eutrophication⁵ and turbidity. TSD 249-52. Similarly, tributaries serve as a sink for other contaminants such as metals, thereby reducing pollutant amounts that reach downstream waters. TSD 252.

Tributaries significantly affect the biological integrity of downstream waters by moving living organisms and their reproductive eggs or seeds downstream. TSD 254. Upstream-originating food sources like plankton, vegetation, and invertebrates also are transported downstream to be consumed by other animals. TSD 254-56. Headwater tributaries, in particular, provide important habitat to many aquatic organisms and are used by salmon and other anadromous fish for spawning. *Id.*

In the proposed repeal rule the Agencies have not pointed to any scientific evidence that supports their assertion that the Clean Water Rule goes too far in its protection of tributaries. *See* 83 Fed. Reg. at 32,242. Upon issuing the 2015 Rule the Agencies found that “the scope of waters covered by the Act [under the Clean Water Rule] today is considerably smaller than the scope of waters historically

⁵ Eutrophication is the state that results from the presence of excess nutrients, which depletes oxygen in the water. *See* TSD 211.

covered prior to the 2001 and 2006 Supreme Court decisions (*SWANCC* and *Rapanos*).” TSD 33. The bed and bank requirement excludes tributaries which lack well-defined physical channels and are therefore less likely to convey significant flow. This requirement also excludes many intermittent and ephemeral rills and gullies. TSD 269. For example, the administrative record for the Clean Water Rule contains an Army Corps Guide showing the photograph below of a non-perennial stream in Gunnison County, Colorado, that may have an OHWM but is now categorically excluded under the 2015 Rule for lack of a bed and bank. TSD 235.⁶



The Clean Water Rule also establishes exclusions from the definition of tributaries including, among others, ditches with ephemeral or intermittent flow; ditches that do not flow directly or through another water into navigable-in-fact waters, interstate waters, or territorial seas; gullies and rills; and certain stormwater control features constructed to convey stormwater. 33 C.F.R. §§ 328.3(b)(3), (b)(4), (b)(6). Like the narrower definition of tributary, the exclusion of

⁶ M.K. Mersel and R.W. Lichvar, *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States* (US Army Corps of Engineers August 2014) at 34-35.

ephemeral and intermittent ditches also removes tributaries without significant flow. And ditches that may be tributaries to other waters, but not to navigable-in-fact waters, are now excluded because they lack a “significant nexus” to navigable-in-fact waters. Further refining regulatory coverage, stormwater conveyances created in dry land are excluded as covered tributaries since they are designed for the precise purpose of reducing adverse impacts to downstream waters. *See, e.g., Final National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Construction Activities*, 77 Fed. Reg. 12286-01, 12289 (Feb. 19, 2012).

3. Adjacent waters covered under the Clean Water Rule significantly affect downstream waters.

The Clean Water Rule defines adjacent waters to include wetlands in proximity to tributaries, 33 C.F.R. §§ 328.3(a)(1), (a)(6), satisfying the significant nexus requirement. Again, in his opinion in *Rapanos*, Justice Kennedy explained that the “required nexus must be assessed in terms of the statute’s goals and purposes.” *Rapanos*, 547 U.S. at 779. In light of the Army Corps’ recognition “that wetlands can perform critical functions related to the integrity of other waters – functions such as pollutant trapping, flood control, and runoff storage,” Justice Kennedy stated that “wetlands possess the requisite nexus if [they] either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 779-80.

First, there is no question that wetlands adjacent to navigable-in-fact waters are properly included within the “waters of the United States.” Relying on the Supreme Court’s earlier decision in *Riverside Bayview*, Justice Kennedy found that these wetlands satisfy the significant nexus requirement because their proximity gives rise to a “reasonable inference of ecologic interconnection,” *Rapanos*, 547 U.S. at 780.

In *Rapanos*, Justice Kennedy took issue with the dissent because it “would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.” *Rapanos*, 547 U.S. at 778-79. However, as explained above, the Clean Water Rule addresses this concern by excluding from covered tributaries waters with “insubstantial” flow characteristics, *i.e.*, those ditches and streams lacking a bed and bank, and other insignificant ditches. 33 C.F.R. § 328.3(b)(3). By excluding these tributaries, the 2015 Rule also excludes their adjacent wetlands.

The administrative record for the Clean Water Rule strongly supports the Rule’s protection of adjacent waters, including wetlands and other waters consisting of ponds, lakes, oxbows, and impoundments. 33 C.F.R. § 328.3(a)(6). Adjacent

waters include those in close physical proximity to primary waters, *i.e.*, that are “bordering” or “contiguous” and integrally linked to them. TSD 277-89. The 2015 Rule also protects as adjacent waters those within 100 feet of the OHWM of primary waters. Science demonstrates that these “neighboring” waters perform a myriad of critical functions associated with downstream water quality, and thus have a significant nexus to such waters. TSD 295-99; SR 4-7.

The Clean Water Rule’s protection of adjacent waters in addition to wetlands is consistent with *Rapanos* and serves the water quality objective of the Clean Water Act. The issue in *Rapanos* was whether wetlands adjacent to tributaries could be reasonably defined as waters of the United States. While *Rapanos* did not directly address whether other significant adjacent waters are also protected waters, categorically excluding such waters would be inconsistent with Justice Kennedy’s elaboration of the “significant nexus” standard, the Act’s objective, and scientific evidence. The Agencies appropriately defined adjacent waters by applying the “significant nexus” requirement to adjacent waters, because science shows that various similarly situated adjacent waters, not just wetlands, significantly affect the chemical, physical, or biological integrity of the waters to which they are adjacent. TSD 281-82.

The Clean Water Rule’s distance limitations reflect agency experience and also further the Act’s objective. Administrative agencies may “employ bright-line rules for reasons of administrative convenience, so long as those rules fall within a zone of reasonableness and are reasonably explained.” *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 22 n.20 (D.C. Cir. 2009). Setting appropriate distance limitations for adjacent waters entails an exercise of judgment as to the geographic boundary beyond which waters, in the majority of cases, no longer have a “significant nexus” to downstream waters. The Clean Water Rule is a practical rule that draws reasonable boundaries and clarifies the scope of coverage under the Act.

The scientific record supports the Clean Water Rule’s distance-based limitations. “Spatial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters.” Science Report Executive Summary-11; *see* 80 Fed. Reg. 37,085-86 (discussing scientific basis for including waters located within distance limitations). “Distance also affects connectivity between non-floodplain and riparian/floodplain wetlands and downstream waters,” and the limits selected in the Clean Water Rule “ensure that the waters are providing similar functions to downstream waters and ... are located comparably in the landscape such that the agencies reasonably judged them to be similarly situated.” TSD 150, 172. Rather than ignoring functional relationships, the Clean Water Rule appropriately employs distance thresholds for adjacent waters, relying on science and agency experience showing that crucial functions enhancing downstream water integrity typically

occur *within* these lateral limits. TSD 297-305.

In addressing adjacent wetlands, Justice Kennedy made clear that they need not lie literally next to tributaries, because in some cases it is the wetlands' geographic *separation* from them "that makes protection of wetlands critical to the statutory scheme," allowing them to store "floodwater, impurities, or runoff," thereby preventing harmful discharges to downstream waters. *Rapanos*, 547 U.S. at 775. Accordingly, "it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system." *Id.* at 786. Other adjacent waters covered by the Clean Water Rule (ponds, lakes, oxbows, impoundments) serve similar purposes when they have this separation from jurisdictional waters, storing floodwater and runoff that cause downstream erosion, and filtering pollutants by allowing sediment and other potential contaminants to settle to the bottom. TSD 275-76.

Additionally, the Clean Water Rule administrative record supports protection of adjacent waters "separated by constructed dikes or barriers, natural river berms, beach dunes, and the like," 33 C.F.R. § 328.3(c)(1), documenting that seepage through such barriers is "a normal condition . . . because water seeks the path of least resistance," and that these structures are "subject to breaches and breaks . . . [and] to failure." TSD 286. Many engineered berms and levees are designed to allow hydrologic connections, and studies confirm that natural barriers do not prevent hydrologic connections between waters on either side. TSD 287-88. Furthermore, numerous ecological connections have been proven to exist between waters separated by barriers, and those connections serve important chemical and biological functions. TSD 289-293.

Science "does not provide bright lines with respect to where 'water ends' for purposes of the Act." TSD 93. Accordingly, proper implementation of the Clean Water Act requires the application of agency expertise and experience to the available scientific information. And the Clean Water Rule does so, consistent with the "significant nexus" test and the Act's objective. Congress intended "the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some." *Quivira Mining Co. v. U.S. Envtl. Prot. Agency*, 765 F.2d 126, 129 (10th Cir. 1985).

By establishing distance limitations for adjacent waters, the Clean Water Rule gives the regulated community clear notice about whether their proposed activities are covered by the Act, a clarity that the Agencies and industry alike previously acknowledged was absent. This promotes the Act's objectives while easing administrative burdens of case-specific jurisdictional determinations. In addition, the 100-foot limit measured from the OHWM of a jurisdictional water is, if anything, conservative as to the presence of a significant nexus. "Many studies indicate that the primary water quality and habitat benefits will generally occur

within a several-hundred-foot zone of a water.” 80 Fed. Reg. at 37,085 (clear evidence that waters located close to jurisdictional waters perform critical processes and functions).

The Clean Water Rule’s distance limit defined by the 100-year floodplain measured from the OHWM of a jurisdictional water, but no further than 1500 feet from that mark, is also appropriate and supported by science. The Agencies’ complaint in the proposed repeal rule about the floodplain as a regulatory concept (*see* 83 Fed. Reg. at 32,248) ignores strong scientific evidence that they relied on themselves in promulgating the Clean Water Rule. 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.” SR A-4. Because adjacent floodplain waters store water during these high flow events, they reduce the frequency of flooding by systematically retaining and releasing large volumes of stormwater and runoff. TSD 300, 307. “[W]etlands and open waters in floodplains of streams and rivers and in riparian areas ... have a strong influence on downstream waters.” 79 Fed. Reg. at 22,196. “The body of literature documenting connectivity and downstream effects was most abundant for . . . riparian/floodplain wetlands.” TSD 104.

The Agencies’ reliance on the 100-year floodplain is consistent with its use in other contexts under the Act, and in other federal programs intended to preserve the functions of floodplain waters. *See* 40 C.F.R. § 257.8 (under the Resource Conservation and Recovery Act and the Clean Water Act owners of solid waste management units located in 100–year floodplains “must demonstrate that the unit will not restrict the flow of the 100–year flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste so as to pose a hazard to human health and the environment”); 44 C.F.R. Part 9 (Federal Emergency Management Agency uses 100-year floodplain as base flood for avoiding and mitigating harm to floodplain waters); 24 C.F.R. §§ 55.20(d)(1)(i), (2)(ii) (Department of Housing and Urban Development’s process avoids or mitigates harm from construction of housing in 100-year flood plain to preserve functions of “water resources such as natural moderation of floods, water quality maintenance, and groundwater recharge [and] maintenance of natural systems [including] natural hydrologic function”); New York State Department of Environmental Conservation SPDES General Permit for Stormwater Discharges From Construction Activity, Permit No. GP-0-15-002 (2015), § I.C.2.a(v) (100-year floodplain used in stormwater pollution prevention permit to control extreme floods); “The 100 Year Flood Myth,” FEMA Region 10, at 3 (National Flood Insurance Program uses 100-year floodplain because it represents an in-between geographic area – smaller than the one used by the Army Corps in designs for building dams and levees, but larger than the geographic area municipalities use in

designing their stormwater systems).⁷ The ready availability of maps delineating the 100-year floodplain further demonstrates that it was a practical and sensible choice for defining adjacent waters.

Moreover, truncating the 100-year floodplain to 1500 feet is appropriate because the resulting covered area lies within a range of possibilities disclosed in the Clean Water Rule rulemaking. *See* Comments of Nat'l Lime Ass'n at 15 (supporting 5-year floodplain); Comments of Ky. Oil & Gas Ass'n at 8 (recommending 100-year floodplain for larger order streams without any further distance limitation); Comments of Ass'n of Cal. Water Agencies at 13 (recommending that references to floodplain in the Rule specify the 100-year floodplain); Comments of Wash. Cnty. Water Conservancy Dist. at 19 (same). Limiting the distance within a floodplain's outer reach further ensures that the jurisdictionally adjacent waters will be close enough to the tributary or navigable water to impact its physical, chemical, or biological integrity.

Protected adjacent waters under the Clean Water Rule also include waters within 1500 feet of tidally-influenced traditional navigable waters, the territorial seas, or the Great Lakes. The scientific literature describes how such wetlands and other similar waters provide functions that significantly affect these primary waters, such as "improv[ing] water quality through assimilation, transformation, or sequestration of nutrients, sediment, and other pollutants that can affect downstream water quality. These waters also provide important habitat for aquatic-associated species to forage, breed, and rest in." 80 Fed. Reg. at 37,086; TSD 302-05.

4. Case-specific waters covered under the Clean Water Rule significantly affect downstream waters.

Agencies generally may employ discretion in choosing whether to regulate categorically or to employ case-specific procedures. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The Clean Water Rule's provision for case-specific review does so in a lawful manner.

The Clean Water Rule sets forth a list of potentially covered waters subject to case-by-case review for satisfaction of the significant nexus requirement. They include: (1) Prairie potholes, Carolina and Delmarva bays, Western vernal pools, and Texas coastal prairie wetlands; (2) waters in the 100-year floodplain of a navigable-in-fact water, interstate water or the territorial seas; and (3) waters within 4000 feet of the OHWM or high tide line of waters within the Act's jurisdiction. 33 C.F.R. §§ 323.3(a)(7), (a)(8).

⁷ *See* <https://training.fema.gov/hiedu/docs/hazrm/handout%203-5.pdf>.

Case-specific review of the specified waters is consistent with Justice Kennedy's *Rapanos* opinion because such waters are covered under the Clean Water Rule only if they have a "significant nexus" to navigable-in-fact waters, interstate waters, or the territorial seas. 33 C.F.R. §§ 323.3(a)(7), (a)(8); 323.3(c)(5). In addition, the Science Report makes clear that connections between wetlands and open waters, and downstream waters, occur on a continuum, and that the functions performed by these upstream waters vary in significance across different terrains and climates. SR 6-5. Allowing case-specific review of the waters in the prescribed categories is appropriate because their regional status or location makes it likely that some of them will satisfy the significant nexus test.⁸ Thus, based on the scientific record and the Agencies' experience implementing the Act, the 2015 Rule correctly identifies waters eligible for case-specific determinations of significant nexus to downstream waters, and the aquatic functions used to make that evaluation. 80 Fed. Reg. 37,091; TSD 327-30.

As stated by the Agencies, there is "adequate scientific evidence to support the determination that certain subcategories and types of 'other waters' in particular regions of the United States [listing the regional waters] are similarly situated (i.e., they have a similar influence on the physical, chemical and biological integrity of downstream waters and are similarly situated on the landscape) and thus could be considered waters of the United States." TSD 162-63. The record for the Clean Water Rule amply demonstrates that these subcategories of regional waters are unique and can, on a case-specific basis, function to significantly affect the integrity of traditional navigable waters, interstate waters or the territorial seas. TSD 330-49.

That record also supports the Clean Water Rule's case-specific protection for some waters located within the 100-year floodplain of primary waters. The Science Report documents how wetlands and open waters in floodplains can be functionally integrated with and affect the integrity of downstream waters. SR 6-3, 6-4. Case-by-case analyses of the physical, chemical and biological functions performed by these waters, and their significance to downstream waters, is consistent with the SAB's view that "these connections should be considered in terms of a connectivity

⁸The Agencies' suggestions in this rulemaking that the Clean Water Rule somehow resurrects jurisdictional issues found problematic in *SWANCC* (see 83 Fed. Reg. at 32,242, 32,249) are wrong. If anything, the 2015 Rule over-complies with *SWANCC* by excluding from the Act's coverage sand and gravel pits and other water-filled depressions incidental to mining or construction activity, regardless of whether they are hydrologically isolated as was the case in *SWANCC*. 33 C.F.R. § 328.3(b)(4)(v). The Clean Water Rule employs the "significant nexus" requirement in a conservative fashion and does not rely on migratory bird habitat as the basis for coverage under the Act. TSD 77-78.

gradient.” SAB Review 1.

The Clean Water Rule’s case-specific treatment of waters within 4000 feet of the high tide line or OHWM of other covered waters is likewise consistent with science and the Agencies’ expertise. The Agencies have made over 400,000 significant nexus determinations across all 50 states. 80 Fed. Reg. 37,065. This extensive agency experience across varied settings in this country has shown that the vast majority of waters found to significantly affect other jurisdictional waters are located within 4000 feet of that water. 80 Fed. Reg. 37,065; TSD 356, 379-80. Scientific studies cited in the Science Report confirm that such wetlands and open waters can and do perform a variety of functions that significantly affect downstream waters’ integrity. TSD 360-67; *see e.g.*, Kao, C.M., W.J.Y., K.F. Chen, H.Y. Lee, and M.J. Wu. 2002. Non-point source pesticide removal by a mountainous wetland. *Water Science and Technology* 46: 199-206 (non-floodplain North Carolina wetland captures pesticide runoff from upgradient agricultural lands preventing downstream pollution). Faced with the reality that available science does not allow precise line-drawing for functional connectivity across varying watersheds, the Clean Water Rule reasonably established a framework for these case-specific determinations, while at the same time addressing public concerns about jurisdictional uncertainty. TSD 357-58, 361.

D. The Agencies’ Purported “Concerns Regarding the 2015 Rule’s Effect on the Scope of CWA Jurisdiction” are Unfounded.

When the Agencies promulgated the Clean Water Rule in 2015 they appropriately and accurately characterized the potential changes in Clean Water Act jurisdiction. The Agencies’ current attempt in the proposed repeal rule to disparage that analysis, based on re-invented calculations and several cherry-picked examples, is misleading and appears disingenuous. 83 Fed. Reg. at 32,242-47. Equally misguided is the Agencies effort to couch that attack in what they characterize as the “overarching Congressional 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 . . . of land and water resources.’” *Id.* at 32,243 (quoting 33 U.S.C. § 1251(b)). That policy simply reflects both the Act’s structure, which calls on the Agencies to establish national standards and for states to implement them through delegated programs, and the difficulty of establishing national standards for, among other things, non-point sources.⁹ It does

⁹ The U.S. Court of Appeals for the Fourth Circuit long ago rejected a similar attempt to distort § 1251(b) beyond its clear import. *Shanty Town Assocs. Ltd v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988). There, the court noted that “Congress was forced to shift primary control for the control of nonpoint source pollution to the states” due not to “concern for state autonomy,” but instead to the “practical difficulties” associated with establishment of “uniform federal regulation” of

not, as the Agencies now repeatedly and wrongly suggest, call on the Agencies to “balance” the Act’s “objective” to “restore and maintain . . . the Nation’s waters” against the States’ traditional role to regulate land-use. Indeed, as noted above, in *Rapanos* Justice Kennedy acknowledged states’ significant interests in ensuring that Congress’ unambiguous objective to protect water quality is fulfilled, which requires protecting states “from out-of-state pollution,” not just protecting their right to police their own backyards. *See Rapanos*, 547 U.S. at 777.

The Agencies indicate that they are “reconsidering the validity of” their prior conclusion that the 2015 Rule “would have no or ‘marginal at most’ impacts on jurisdictional determinations,” and “solicit[ing] comment on whether the agencies appropriately characterized or estimated the potential CWA jurisdiction that could change under the 2015 Rule.” 83 Fed. Reg. at 32,243. But the Agencies’ previous analysis estimated whether the Clean Water Rule would increase the scope of Clean Water Act jurisdiction. By merely “reconsidering” those estimates in the proposed repeal rule through an artificially circumscribed lens without producing new ones based on a new study, the Agencies are denying the public a meaningful opportunity to comment on the scope of jurisdictional waters if the 2015 Rule is repealed.

Moreover, the Agencies’ have inaccurately stated their prior position, which was, in fact, that they “estimated that the [2015] Rule will result in a small overall increase in positive jurisdictional determinations compared to those made under the *Rapanos* Guidance.” Agencies’ Br. in No. 15-3571 at 32. The Agencies then isolate from their prior analysis on the 2015 Rule’s potential nationwide impact a potential 34.5% increase in jurisdictional findings for “other waters” (83 Fed. Reg. at 32,244)—a category that represents only 6% of one category (i.e., the isolated waters category) that is itself only an un-identified percentage of another narrow category of all previously covered waters—to suggest that the Agencies’ prior calculation of a potential 2.84 to 4.65% annual increase due to the 2015 Rule obscured the Rule’s actual impact. *Id.* at 32,243-44. Isolating the potential increase in other waters jurisdictional findings, however, is inappropriate, because it misleadingly suggests that the 2015 Rule’s overall impact is far greater than what the data shows. In other words, rather than being “relevant to measuring the impacts of the 2015 Rule,” the Agencies’ premise represents an inaccurate characterization of the data. *See id.* at 32,244.

The Agencies similarly seek comment on “whether the final rule could expand overall CWA positive jurisdictional determinations by a material amount inconsistent with the findings and conclusions that justified the 2015 Rule.” 83

nonpoint source pollution. *Id.* Even then, however, Congress, tellingly, “retain[ed] substantial control over the regulation of nonpoint source pollution” by requiring EPA to review State nonpoint source controls. *Id.* at 791-92.

Fed. Reg. at 32,244. This question is based on flawed assumptions. The Agencies have not presented any new data that contravenes their prior conclusion that the 2015 Rule may lead to a net potential 2.84 to 4.65% increase in jurisdictional findings. *Id.* at 32,243-44. Instead, as noted above, they have extracted from that data the potential impact on one narrow category of affected waters and unduly inflated its significance. *Id.* In addition, it is inappropriate to rely on this data to suggest that the Agencies' prior analysis misrepresented the potential impact of the 2015 Rule. The Agencies' prior analysis was "based on conservative assumptions that looked *only* at the potential for *increases* in CWA jurisdiction, without assessing any *reductions* in jurisdiction." Agencies' Br. in No. 15-3571 at 217. If the Agencies are going to use this data to justify the repeal of the 2015 Rule, then they must consider all of the relevant factors, which necessarily includes both negative-to-positive and positive-to-negative jurisdictional determinations that may result from the 2015 Rule. *Cf. id.* at 217 ("The Economic Analysis did not consider how the limitations in the Rule might result in certain waters no longer being jurisdictional.").¹⁰ Finally, the Agencies simply did not rely on the potential 2.84 to 4.65% jurisdictional-findings-increase to justify the 2015 Rule, as their question in the proposed repeal rule inaccurately suggests. Instead, the Agencies prepared it "for informational purposes." 80 Fed. Reg. at 37,101.

The Agencies' reliance on just *six* examples from the hundreds of thousands available to them does not "illustrate the concerns expressed by the recent court decisions . . . that the 2015 Rule may have exceeded the significant nexus standard" or "create[] additional regulatory uncertainty over the waters that were previously thought beyond the scope of CWA jurisdiction." *See* 83 Fed. Reg. at 32,244. As the Agencies previously explained, Agencies Br. in No. 15-3571 at 25, Justice Kennedy's controlling view is that Clean Water Act jurisdiction extends to wetlands that "either alone or *in combination* with similarly situated lands *in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (emphasis added). "When, in contrast," he continued, "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable.'" *Id.* In later 2008 Guidance, the Agencies sought to implement, in part, the *Rapanos* decision, but, as the Agencies also previously

¹⁰ Indeed, it was in this context that the Agencies made the "marginal at most" statement that they now attempt to suggest mischaracterized the potential impact of the Rule. *Compare* 83 Fed. Reg. at 32,243, *with* Agencies' Br. in No. 15-3571 at 32 n.6. In that footnote, the Agencies noted that a partial analysis of positive determinations identified two instances where positive determinations would become negative ones under the 2015 Rule. Agencies' Br. in No. 15-3571 at 32 n.6. The Agencies then noted that "[t]he net effect of positive-to-negative and negative-to-positive jurisdiction *is uncertain*, but the Agencies believe it to be marginal at most." *Id.* at 32-33 n.6 (emphasis added).

acknowledged, the Guidance “was not binding and actual agency practice varied by region or district.” Agencies’ Br. in No. 15-3571 at 215. Given this acknowledgment, it is hardly surprising that the Agencies now have found in these cases some minor differences between the results of their prior case-by-case analysis and the certain answers provided by the 2015 Rule.

It is similarly unsurprising that the Agencies identified some cases that would change from negative to positive determinations based on the application of the Clean Water Rule. That is so because the 2015 Rule relied on, and was guided by, a robust scientific record containing a comprehensive evaluation of the best available scientific evidence. Based on that record and consistent with the “significant nexus” test, the Agencies considered not only whether waters by themselves possess a significant nexus, which was the focus of the jurisdictional determinations in the six examples, but instead whether waters “either alone *or in combination* with similarly situated lands *in the region*” have a requisite nexus. *Rapanos*, 547 U.S. at 780 (emphasis added). While it is true that some of those waters may have lacked a surface connection to nearby tributaries, that is not a basis for withholding jurisdiction. As Justice Kennedy made clear: “the absence of hydrologic connection” can also “show[] the wetlands’ significance for the aquatic system.” *Id.* at 786. Nor is it relevant that jurisdiction may have rested on the Migratory Bird Rule prior to *SWANCC* in some of those cases, since, as the Agencies also explained, jurisdiction under the Migratory Bird Rule was based *solely* on a water’s use by migratory birds and not, as is the case with the 2015 Rule, whether waters have a significant nexus to primary waters. Agencies’ Br. in No. 15-3571 at 10, 113, 130. Thus, any attempt by the Agencies to rely on these examples to justify repeal of the 2015 Rule must both (i) confront the science underlying the 2015 Rule and explain why it does not support the Agencies’ prior findings, and (ii) reconcile its potential new position with its clearly stated prior ones.

The six examples in the proposed repeal rule do not provide a reasoned basis for repealing the Clean Water Rule even assuming, *arguendo*, that subjecting the waters in each example to jurisdiction under the 2015 Rule would exceed the broad bounds of the “significant nexus” test. Absolute perfection need not be achieved in the context of a nationwide rule that applies to varying geographic regions of the country, each with their own unique geomorphological and ecological features. Justice Kennedy recognized this common-sense fact when he concluded that the Agencies:

may choose to identify categories of tributaries [in regulations] that, due to their volume of flow . . . , their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, *in the majority of cases*, to perform important functions for an aquatic system incorporating navigable waters.

Rapanos, 547 U.S. at 780-81 (emphasis added). Here, of course, there is absolutely no evidence that the 2015 Rule would not, *in the majority of cases*, properly subject wetlands to Clean Water Act jurisdiction. Indeed, as the Agencies recognize, they make many thousands of jurisdictional determinations each year. Six cherry-picked examples concerning the applicability of the Clean Water Rule are clearly an insufficient basis to support repealing the 2015 Rule. Nor do the Agencies provide a rational basis for concluding that the “2015 Rule may have had more than a marginal impact on CWA jurisdictional determinations” or somehow “impact” the Agencies’ current, distorted view of the “well-defined and longstanding relationships between the federal and State governments.” *See* 83 Fed. Reg. at 32,247.

E. The Proposed Repeal Rule Provides No Reasoned Explanation for the Agencies’ Conclusion That Repeal of the Clean Water Rule Is Necessary to Achieve Regulatory Certainty.

Agencies must “articulate a satisfactory explanation for [their] action including a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43. 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.* When an agency proposes to suspend or revoke a rule and replace it in connection with a new administration’s different policy choices, it may not “ignore[] or countermand[]” its earlier factual findings without reasoned explanation for doing so. *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 537.

The Agencies state that one of the reasons for the proposed repeal rule is their view “that regulatory certainty may be best served by repealing the 2015 Rule and recodifying the preexisting scope of the CWA jurisdiction.” 83 Fed. Reg. at 32,237. In particular, the Agencies conclude that the Clean Water Rule must be repealed and replaced with the 1980s regulations “because [the Rule] does not appear to achieve one of its primary goals of providing regulatory certainty and consistency.” *Id.* at 32,238. As discussed below, these conclusions are not supported by a reasoned explanation.

1. The Agencies Provide No Reasoned Explanation for Their Conclusion that Legal Challenges to the Clean Water Rule Demonstrate that the Repeal Rule is Necessary to Ensure Regulatory Certainty.

To support their position that Clean Water Rule repeal is necessary for regulatory certainty, the Agencies point to preliminary injunctions issued by the Georgia and North Dakota district courts, as well as the Sixth Circuit’s now-vacated

stay of the Rule which concluded that challenges to the Clean Water Rule may be successful. *Id.* According to the Agencies, these court rulings “indicate that the substantive or procedural challenges to the 2015 Rule are likely to be successful” and, if successful, “could result in a court order vacating the rule in all or part, in all or part of the country, and potentially resulting in different regulatory regimes being in effect in different parts of the country, which will likely lead to substantial regulatory confusion, uncertainty, and inconsistency.” *Id.* The Agencies, however, do not explain how their new-found concern regarding regulatory uniformity is consistent with their prior position that the Clean Water Rule need not be implemented uniformly throughout the country. *See North Dakota v. EPA*, Case No. 3:15-cv-00059, Dkt. 76 at 4 (D.N.D. Sept. 1, 2015) (Agencies argued that preliminary injunction sought by states challenging Clean Water Rule should not apply nationwide, and should not apply in states that have not challenged 2015 Rule or have unsuccessfully sought to enjoin it).¹¹ The Agencies’ failure to explain the contradiction between their recent support for national regulatory uniformity and their previous position supporting geographic limitations on an injunction of the Clean Water Rule makes the proposed repeal rule arbitrary and capricious. *See City of Phoenix v. Huerta*, 869 F.3d 963, 972-73 (D.C. Cir. 2017) (because “the agency said exactly the opposite and never explained its about-face,” the agency acted arbitrarily).

In addition, the Agencies do not explain why the proposed repeal rule is necessary to ensure regulatory certainty when the Suspension Rule, which they promulgated on February 6, 2018, already prevents the Clean Water Rule from being implemented until February 6, 2020. In fact, the Agencies admit that the Suspension Rule “ensures that the 2015 Rule will not go into effect until February 6, 2020” but, without any reasoning or support, conclude that “the prospect of a court order vacating the 2015 Rule creates additional regulatory uncertainty.” Moreover, although the Agencies are purporting to repeal the Clean Water Rule to moot the litigation concerning its validity that they claim is creating uncertainty, they ignore that a final rule repealing the 2015 Rule will quite likely face legal challenges as well. Of course, substituting new legal challenges for the existing ones does nothing to address this alleged uncertainty. *See Organized Village of Kake v. U.S. Dep’t of Agriculture*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc). Thus, the Agencies’ conclusions do not constitute a rational basis or reasoned explanation. *See State Farm*, 463 U.S. at 43 (agencies must “articulate a satisfactory explanation for [their] action including a rational connection between the facts found and the choice made”). “[C]onclusory statements will not do; an agency’s

¹¹ The North Dakota district court agreed with the Agencies and limited its preliminary injunction of the Clean Water Rule to the thirteen movant states in the lawsuit. *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. 79, p. 4 (D.N.D. Sept. 4, 2015).

statement must be one of *reasoning*.” *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (internal quotation marks omitted, emphasis in original).

2. The Agencies Provide No Reasoned Explanation for Their Position that Alleged Stakeholder Confusion about the Scope of the Clean Water Rule and its Impact on State Programs Necessitate a Repeal to Ensure Regulatory Certainty.

The Agencies’ reliance on alleged stakeholder confusion and impacts on state programs to support their conclusion that the proposed repeal rule is necessary to achieve regulatory certainty is similarly without rational basis and lacks reasoned explanation. *See* 83 Fed. Reg. at 32,239.

As an initial matter, following the North Dakota district court’s preliminary injunction in 13 states, the Clean Water Rule was applied for a limited period in the rest of the country between August 28, 2015, when the rule became effective, and October 9, 2015, when the Sixth Circuit issued its nationwide stay. The Agencies do not explain how, during that period, the Rule in fact caused any confusion among stakeholders. And to the extent some post-promulgation ambiguity arises (something the Agencies have not claimed), they can, as they have in the past, issue “memoranda, guidance, and question-and-answer documents” to “explain[] and clarify[]” the issue. 83 Fed. Reg. at 32,239. The Agencies have failed to explain why they cannot similarly explain and clarify any alleged ambiguity related to the Clean Water Rule, instead of repealing the 2015 Rule outright.

Further, it is unconvincing for the Agencies to rely on statements from litigants opposing the Clean Water Rule to conclude that there is in fact confusion regarding the 2015 Rule’s scope. Litigants in a rule challenge normally disagree with each other about the rule and its meaning. By pointing to such disagreements as justification for the proposed repeal rule the Agencies prove too much: by such logic the mere existence of litigation over a rule would justify its repeal. In fact, the Agencies acknowledge that these litigants’ statements may be inaccurate but, without any explanation, conclude that the statements “indicate continued widespread disagreement and confusion over the meaning of the 2015 Rule and extent of jurisdiction it entails.” *Id.* Given the recognition that the litigants’ statements may be inaccurate, it is implausible for the Agencies to rely upon them as a basis for concluding that the Clean Water Rule should be repealed to achieve regulatory certainty. *See State Farm*, 463 U.S. at 43 (a rule 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.”)

The Agencies' conclusion that repeal of the Clean Water Rule is justified because some states have expressed concerns that implementation of the 2015 Rule will cause confusion, divert resources and create permitting delays is also without a rational basis. *See* 83 Fed. Reg. at 32,239. As the Agencies recognize but apparently discount, a number of other states have expressed the exact opposite position, namely that the Clean Water Rule will alleviate long-standing confusion and unpredictability associated with the 1980s regulations. *Id.* Indeed, as the signatories to this letter have stated above, in their previous comments on the proposed repeal rule, and in litigation, implementation of the Clean Water Rule will better protect the States' interests by ensuring clarity and consistency in Clean Water Act jurisdictional determinations, a strong federal foundation for water pollution control, and lower expenditure of state resources. The Agencies have failed to explain why a repeal of the Clean Water Rule is necessary to prevent confusion and alleged impacts on state programs despite these clear statements from states that implementation of the rule will have no such impacts. Moreover, the Agencies have failed to explain their arbitrary decision to rely on statements from some states and ignore statements from other states.

3. The Agencies Provide No Reasoned Explanation for Their Conclusion That Recodification of the 1980s Regulations Will Ensure Regulatory Certainty.

Also without a rational basis or reasoned explanation are the Agencies' conclusions that "as between the 2015 Rule and the [1980s] regulations, the [1980s] regulations (as informed by applicable Supreme Court precedent and the agencies' guidance) would appear to provide for greater regulatory predictability, consistency, and certainty" and that the "longstanding nature of the [1980s regulations] – coupled with the agencies' and others' extensive experience with the regulatory scheme – make it preferable to the regulatory uncertainty posed by the 2015 rule." *See* 83 Fed. Reg. at 32,240.

The Clean Water Rule was developed precisely to address the unpredictability, inconsistencies and confusion arising from the implementation of the 1980s regulations. 80 Fed. Reg. at 37,056-57; *see also Rapanos*, 547 U.S. at 724-29. In fact, in promulgating the 2015 Rule the Agencies specifically found that the "ambiguity that exist[ed]" under those 1980s regulations had resulted in many complex case-by-case jurisdictional determinations throughout the country. 80 Fed.Reg. at 37,056. The Agencies attempt to reconcile this finding with their current contrary position by asserting that the 1980s regulations will lead to more regulatory certainty because agency staff has extensive experience and training in applying them, and by pointing to the large number of jurisdictional determinations issued between 2007 and 2018. 83 Fed. Reg. at 32,239. But the mere fact that the

Agencies have issued many jurisdictional determinations says nothing about the consistency and predictability of the underlying regulations.

Also, the Agencies do not explain how staff experience and training in implementing the 1980s regulations will translate into regulatory certainty. Indeed, it was precisely the Agencies' experience with applying the 1980s regulations that led them to issue the Clean Water Rule after finding that far too many case-specific jurisdictional determinations were required under the 1980s regulations, causing widespread uncertainty and confusion rather than predictability. *See* 80 Fed. Reg. at 37,056; 79 Fed. Reg. at 22,188. If the Agencies were correct when they issued the Clean Water Rule, their reinstatement of the 1980s regulations will promote, rather than ameliorate, regulatory uncertainty by extending it nationwide. Instead of addressing this issue in a reasoned manner, the Agencies merely conclude, without support or rational explanation, that the 1980s regulations are "preferable." 83 Fed. Reg. at 32,240.

Finally, while the Agencies point to numerous memoranda, guidance, and question-and-answer documents explaining and clarifying the 1980s regulations, and to court decisions analyzing the 1980s regulations, they do not explain how those guidance documents or the court decisions establish that the 1980s regulations will lead to regulatory certainty. In fact, those guidance documents led to confusion, inconsistency, and under-enforcement of the Clean Water Act (*see* Section II. above), and courts have repeatedly found that the 1980s regulations are difficult to implement and lead to inconsistencies. *See Rapanos*, 547 U.S. at 724-29. And as the Agencies have acknowledged, "actual agency practice [in implementing the *Rapanos* guidance] varied by region or district." Agencies' Br. in No. 15-3571 at 215.

F. The Clean Water Rule Was Lawfully Promulgated.

In the proposed repeal rule the Agencies suggest (83 Fed. Reg. at 32,229, 32,249) that the Clean Water Rule was not properly promulgated because the specific distance limitations in the Rule's "waters of the United States" definition were not in the proposed Clean Water Rule. But in fact distance-based limitations were plainly contemplated by the proposed Clean Water Rule and were thus a logical outgrowth of that proposed rule.

"Under the 'logical outgrowth' test . . . , the key question is whether commenters should have anticipated that EPA might issue the final rule it did." *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (internal quotations omitted). In the preamble to the proposed Clean Water Rule, the Agencies sought public input on how best to determine what are jurisdictional "adjacent waters," and specifically requested comments "on other reasonable options for providing clarity," including those "establishing specific geographic limits" such as "distance

limitations.” 79 Fed. Reg. 22,188, 22,208-09 (April 21, 2014); *see also* 80 Fed. Reg. at 37,088-91 (discussing public comments on distance limitations). The final Clean Water Rule encompassed adjacent waters within the Act’s protections, defined to include waters within specified distances from other waters. 33 C.F.R. § 328.3(a)(6), (c)(1), (2). It also included waters at longer specified distances from such other waters provided that they satisfy a case-by-case review. *Id.* § 328(a)(8). Given the Agencies’ express request for comment on the inclusion of specific distance limitations, commenters should have anticipated (and many in fact did, as the Agencies are aware) that the Agencies might adopt distance limitations.

Conclusion

For all of these reasons, in addition to the reasons stated in our comments submitted on September 27, 2017, the States strongly oppose the proposed repeal rule and respectfully request that the Agencies not proceed with or finalize it.

Sincerely,

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