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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WATERKEEPER ALLIANCE, INC.; CENTER FOR BIOLOGICAL DIVERSITY; CENTER FOR FOOD SAFETY; HUMBOLDT BAYKEEPER, a program of Northcoast Environmental Center; RUSSIAN RIVERKEEPER; MONTEREY COASTKEEPER, a program of The Otter Project, Inc.; SNAKE RIVER WATERKEEPER, INC.; UPPER MISSOURI WATERKEEPER, INC.; and TURTLE ISLAND RESTORATION NETWORK, Plaintiffs, v. E. SCOTT PRUITT, in his official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. ENVIRONMENTAL PROTECTION AGENCY; RICKY DALE JAMES, in his official capacity as Assistant Secretary of the Army for Civil Works; and U.S. ARMY CORPS OF ENGINEERS, Defendants.	Case No.18-cv-3521 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Water sustains all life on earth. Our nation's rivers, streams, lakes, and wetlands provide food to eat and water to drink for millions of Americans; serve as habitat for thousands of species of fish and wildlife, including scores of threatened or endangered species; and give the public aesthetic, recreational, commercial, and spiritual benefits too numerous to count. It is for the protection of these waters that congress passed the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq*., commonly known as the Clean Water Act ("CWA" or the "Act").

2. Plaintiffs are regional and national public-interest environmental organizations with a combined membership numbering hundreds of thousands of members nationwide. On behalf of these members, Plaintiffs advocate for the protection of oceans, rivers, streams, lakes, and wetlands, and for the people and animal and plant species that depend on clean water.

3. By this action, Plaintiffs challenge two closely related final rules issued by Defendants regarding the statutory phrase "waters of the United States," a phrase that proscribes the jurisdictional reach of the CWA. The first is the June 29, 2015 "Clean Water Rule," which identifies those waters that are subject to the CWA's critical safeguards. *Clean Water Rule: Definition of 'Waters of the United States'*, 80 Fed. Reg. 37054 (June 29, 2015). Waters that do not meet the regulatory definition of "waters of the United States" will be unprotected as a matter of federal law, subject to myriad abuses by those who have long seen our nation's waters as either a convenient means to dispose of waste and debris or as a resource to be dredged or filled to further their economic objectives.

4. The second is the February 6, 2018 "Delay Rule," which makes no substantive changes to the Agencies' regulatory definition, but delays the applicability of the Clean Water Rule by two years. *See Definition of "Waters of the*

United States"–Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

5. Plaintiffs filed a similar action in August 2015, challenging the Clean Water Rule only. *Waterkeeper Alliance et al. v. U.S. Envt'l Protection Agency*, N.D. Cal. No. 3:15-cv-03927 (filed August 27, 2015). That suit was among many filed around the country in both the federal district courts and the courts of appeals; and like most other litigants, Plaintiffs voluntarily dismissed their earlier suit after the Sixth Circuit asserted jurisdiction over all challenges to the Clean Water Rule under 33 U.S.C. § 1369(b). *See In re Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 264 (6th Cir. 2016). Plaintiffs are filing again in this Court because the U.S. Supreme Court subsequently held that review of the Clean Water Rule belongs in the district courts, not the courts of appeals. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

6. The Clean Water Rule, in part, reaffirms CWA jurisdiction over waters historically protected by the Agencies, such as many tributaries and their adjacent wetlands; for this reason, Plaintiffs do not seek vacatur of the Clean Water Rule in its entirety, but instead seek vacatur of the Delay Rule so that the lawful parts of the Clean Water Rule may take immediate effect.

7. However, a number of provisions of the Clean Water Rule are legally or scientifically indefensible, and must therefore be excised from the rule, vacated, and remanded to the Agencies. These flawed provisions impermissibly abandon waters that must be protected under the CWA as a matter of law; unreasonably exclude waters over which the Agencies have historically asserted jurisdiction based on their commerce clause authority; arbitrarily deviate from the best available science; or were promulgated without compliance with the Agencies' notice and comment obligations.

8. By this complaint plaintiffs allege that the Agencies violated the CWA, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. ("APA"), the National

Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. ("NEPA"), and the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. ("ESA") when they promulgated both the Clean Water Rule and the Delay Rule. Among other remedies, plaintiffs seek an order holding the Delay Rule and specific portions of the Clean Water Rule unlawful and setting them aside because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations," and/or were promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

JURISDICTION & VENUE

9. This Court has jurisdiction over the claims set forth herein pursuant to 5 U.S.C. § 702 (APA), 16 U.S.C. § 1540(g) (ESA citizen suit jurisdiction), and 28 U.S.C. § 1331 (federal question jurisdiction). The relief sought is authorized by 5 U.S.C. § 706(1), 16 U.S.C. § 1540(g), and 28 U.S.C. §§ 2201(a) and 2202.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1)(A) because the Agencies are officers or agencies of the United States, and one or more plaintiffs reside in the district within the meaning of 28 U.S.C. § 1391(d).

11. As required by the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(2)(a)(i), Plaintiffs provided Defendants and the required federal wildlife management agencies with written notice of the ESA violations alleged herein by letters dated August 5, 2015 (for claims related to the Clean Water Rule) and February 14, 2018 (for claims related to the Delay Rule). More than 60 days have passed since Plaintiffs provided their notice of intent to sue.

INTRADISTRICT ASSIGNMENT

12. Assignment to the San Francisco Division is appropriate because several of the plaintiffs (including Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, and Turtle Island Restoration Network) have their primary place of business within this Division.

PARTIES

13. Plaintiff **Waterkeeper Alliance, Inc.** ("Waterkeeper") is a global not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. Waterkeeper is comprised of more than 300 Waterkeeper Member Organizations and Affiliates working in 44 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 174 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in and near waterways across the country – many of which are severely impaired by pollution. The CWA is the bedrock of Waterkeeper Alliance's and its Member Organizations' and Affiliates' work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate Organizations and our respective individual supporting members, as well as to protect the people and communities that depend on clean water for their survival. In many ways, Waterkeeper and its members depend on the CWA to protect waterways, and the people who depend on clean water for drinking water, recreation, fishing, economic growth, food production, and all of the other water uses that sustain our way of life, health, and well being. Waterkeeper has thousands of members worldwide, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

14. Plaintiff **Center for Biological Diversity** (the "Center") is a national nonprofit organization dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. The Center was founded in 1989 and is based in Tuscon, Arizona, with offices throughout the country. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues and has more than 63,000 members throughout the United

States and the world, including over 5,900 members in this District. The Center has advocated for species protection and recovery, as well as habitat protection, for species existing throughout the United States, including water-dependent species. The Center brings this action on its own institutional behalf and on behalf of its members. Many of the Center's members and staff reside in, explore, and enjoy recreating in and around numerous waters within this District that are affected by the Clean Water Rule and the Delay Rule.

15. Plaintiff **Center for Food Safety** ("CFS") is a national non-profit public interest and environmental advocacy organization working to protect human health and the environment by curbing the use of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. CFS uses legal actions, groundbreaking scientific and policy reports, books, and other educational materials, market pressure, and grass roots campaigns. CFS has over 950,000 members through the United States, including nearly 60,000 members who reside within this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

16. Plaintiff **Humboldt Baykeeper** is a program of Northcoast Environmental Center, a California non-profit public interest and environmental advocacy organization committed to safeguarding the coastal resources of Humboldt Bay, California, for the health, enjoyment, and economic strength of the Humboldt Bay community. Humboldt Baykeeper uses community education, scientific research, water-quality monitoring, pollution control, and enforcement of laws to protect and enhance Humboldt Bay and near-shore waters of the Pacific Ocean. Humboldt Baykeeper has over 1,000 members residing within this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

17. Plaintiff **Russian Riverkeeper** is a California non-profit public interest and environmental advocacy organization committed to the conservation

and protection of the Russian River, its tributaries, and the broader watershed through education, citizen action, scientific research, and expert advocacy. Russian Riverkeeper has over 1,400 members residing within this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

18. Plaintiff **Monterey Coastkeeper** is a project of the Otter Project, Inc., a California non-profit public interest and environmental advocacy organization committed to the protection and restoration of the central California coast. Monterey Coastkeeper has over 2,000 members residing within this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

19. Plaintiff **Snake River Waterkeeper, Inc.** is an Idaho non-profit public interest and environmental advocacy organization committed to protecting water quality and fish habitat in the Snake River and surrounding watershed. Snake River Waterkeeper uses water-quality monitoring, investigation of citizen concerns, and advocacy for enforcement of environmental laws. Snake River Waterkeeper has more than 50 members, including members who reside, explore, and enjoy recreating on or near waters affected by the Clean Water Rule and the Delay Rule.

20. Plaintiff **Upper Missouri Waterkeeper, Inc.** is a Montana non-profit public interest and environmental advocacy organization committed to protecting and improving ecological and community health throughout Montana's Upper Missouri River Basin. Upper Missouri Waterkeeper uses a combination of strong science, community action, and legal expertise to defend the Upper Missouri River, its tributaries, and communities against threats to clean water and healthy rivers. Upper Missouri Waterkeeper has over 70 members, including members who reside, explore, and enjoy recreating on or near waters affected by the Clean Water Rule and the Delay Rule.

21. Plaintiff **Turtle Island Restoration Network, Inc.** is a national non-profit public interest and environmental advocacy organization committed to the protection of the world's oceans and marine wildlife. Turtle Island Restoration Network works with people and communities to accomplish its mission, using grassroots empowerment, consumer action, strategic litigation, hands-on restoration, and environmental education. Turtle Island Restoration Network has over 80,000 members worldwide, including hundreds of members who reside in this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

22. Each Plaintiff has one or more members who reside in, explore, or recreate in areas impacted by the Final Rule's definition of "waters of the United States." Some of Plaintiffs' members will suffer recreational, aesthetic, or other environmental injuries due to the Agencies' final action. Specifically, the Agencies' promulgation of the Clean Water Rule and Delay Rule will result in the loss of Clean Water Act protections for many thousands of miles of ephemeral streams, tributaries, ditches, wetlands, and other waters used and enjoyed by some of Plaintiffs' members, ultimately facilitating the degradation or destruction of those waters.

23. Defendant United States Environmental Protection Agency ("EPA") is the agency of the United States Government with primary responsibility for implementing the CWA. Along with the Army Corps of Engineers, EPA promulgated both the Clean Water Rule and the Delay Rule.

24. Defendant United States Army Corps of Engineers ("Corps") has responsibility for implementing certain aspects of CWA, most notably the dredge and fill permitting program under CWA § 404, 33 U.S.C. § 1344. Along with EPA, the Corps promulgated both the Clean Water Rule and the Delay Rule.

25. Defendant E. Scott Pruitt is the Administrator of the EPA, acting in his official capacity. Administrator Pruitt signed the Delay Rule. In his role as the

EPA Administrator, Mr. Pruitt oversees the EPA's implementation of the CWA.

26. Defendant Ricky Dale James is the Assistant Secretary of the Army for Civil Works, acting in his official capacity. Mr. James' predecessor, former Acting Assistant Secretary of the Army for Civil Works Ryan A. Fisher, signed the Delay Rule. In his role as Assistant Secretary of the Army for Civil Works, Mr. James oversees the Corps' implementation of the CWA.

LEGAL BACKGROUND

I. Overview of the Clean Water Act

27. In 1972 Congress adopted amendments to the Clean Water Act in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The 1972 amendments established, among other things, a national goal "of eliminating all discharges of pollutants into navigable waters by 1985" and an "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water . . . by 1983." *Id.* § 1251(a).

28. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person, unless such discharge complies with the terms of any applicable permits, and sections 301, 302, 306, 307, 318, 402, and 404 of the Act. 33 U.S.C. § 1311(a). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). "Navigable waters" are broadly defined as "the waters of the United States." *Id.* § 1362(7).

29. While Congress left the term "waters of the United States" undefined, the accompanying Conference Report indicates that it intended the phrase to "be given the broadest possible constitutional interpretation." S. Rep. No. 92-1236, p.144 (1972).

30. CWA section 402, 33 U.S.C. § 1342, establishes the statutory permitting framework for regulating pollutant discharges under the National Pollutant Discharge Elimination System ("NPDES") program. CWA section 404, 33

U.S.C. § 1344, establishes the permitting framework for regulating the discharge of dredged or fill material into waters of the United States.

II. Case Law Interpreting "Waters of the United States"

31. The definition of "waters of the United States" significantly impacts the Agencies' and the States' implementation of the CWA, as it circumscribes which waters are within the Agencies' regulatory authority under the Act, *i.e.,* which waters are jurisdictional. The Act does not protect waters that are not "waters of the United States" from pollution, degradation, or destruction, and it is not unlawful under the Act to dredge and fill them or discharge pollutants into them without a permit.

32. The Agencies last addressed the definition of "waters of the United States" by promulgating essentially identical rules in the mid-1970s. Those regulations asserted jurisdiction over traditionally navigable waters, non-navigable tributaries to those (and other) waters, wetlands adjacent to other jurisdictional waters, and any "other waters," the use, degradation, or destruction of which could affect interstate or foreign commerce. *See, e.g.*, 33 C.F.R. § 328.3(a)(1), (5), (7), and (3) (2014), respectively.

33. The Clean Water Rule is the Agencies' most recent attempt to define "waters of the United States." The impact of the Rule is sweeping; it will result in a massive net loss of CWA jurisdiction as compared to the Agencies' historic interpretation of the Act under their prior rule.

34. The Agencies' efforts were undertaken against the backdrop of three Supreme Court cases addressing this statutory phrase. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); and *Rapanos v. United States*, 547 U.S. 715 (2006).

35. In *Riverside Bayview*, the Court upheld the Corps' broad interpretation of the phrase "water of the United States" to include wetlands adjacent to

traditionally navigable waters. 474 U.S. at 139.

36. In *SWANCC*, the Court rejected the Corps' assertion of CWA jurisdiction over isolated intrastate waters where the sole asserted basis for jurisdiction was the use of the relevant waters by migratory birds under the Migratory Bird Rule, 51 Fed. Reg. 41217 (1986). *See* 531 U.S. at 163–64.

37. In *Rapanos*, a divided Court announced widely divergent standards for determining CWA Act jurisdiction over wetlands adjacent to non-navigable tributaries. Justice Scalia, writing for the four-justice plurality, held that the Corps could not categorically assert jurisdiction over all wetlands adjacent to ditches or man-made drains that discharge into traditional navigable waters. 547 U.S. at 725, 757 (Scalia, J.) In his concurring opinion, Justice Kennedy indicated that only those waters possessing "a significant nexus with navigable waters" are subject to CWA jurisdiction. *Id.* at 759. He further explained that

> wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, 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 780. Justice Kennedy also recognized that the Agencies had authority under the Act to "identify categories of tributaries that, due to their volume or 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." *Id.* at 781.

38. Writing for the four dissenters in *Rapanos*, just as he had done in *SWANCC*, Justice Stevens recognized the "comprehensive nature" of the CWA as well as "Congress' deliberate acquiescence" to the Agencies' long-standing definition of "waters of the United States," and thus would have deferred to that definition and the Corps' assertion of jurisdiction over the wetlands and ditches at issue in the

case. 547 U.S. at 797, 803. Justice Breyer joined the dissenting opinion by Justice Stevens, but also wrote separately to emphasize that "the authority of the Army Corps of Engineers under the CWA extends to the limits of congressional power to regulate interstate commerce." 547 U.S. at 811.

39. As Justice Stevens noted in his Rapanos dissent,

> Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice KENNEDY's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.

547 U.S. at 810. Thus, every federal court of appeals to consider the scope of CWA jurisdiction following *Rapanos* has held that a water is jurisdictional *at least* whenever Justice Kennedy's "significant nexus" test is satisfied.[1] No Circuit has held that the Justice Scalia's approach is the exclusive method for establishing CWA jurisdiction.

III. The Clean Water Act's Permit Exclusion for Farming Activities

40. Clean Water Act section 404(f)(1) excludes certain activities from regulation under the Act. 33 U.S.C. § 1344(f)(1). As relevant here, section 404(f)(1)(A) states that "the discharge of dredged or fill material [] from normal

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[1] *See Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 1225 (2008); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S.Ct. 375 (2007); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 128 S.Ct. 45 (2007); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); and *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *reh'g denied*, 521 F.3d 1319 (2008), *cert. den. sub nom United States v. McWane, Inc.*, 129 S.Ct. 627 (2008); *see also Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011) (where the parties stipulated that Justice Kennedy's test was the appropriate test).

farming, silviculture, and ranching activities … is not prohibited by or otherwise subject to regulation under" CWA sections 402, 404, or 301(a). 33 U.S.C. § 1344(f)(1)(A).

41. CWA section 404(f)(2) provides an exception to this exclusion, commonly referred to as the "Recapture Provision":

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

42. Notably, section 404(f) does not affect the jurisdictional status of waters under the CWA. Rather, sections 404(f)(1) and (2), read together, mean that a person does not need a CWA section 404 permit to discharge dredged or fill material from normal farming, silviculture, and ranching activities into a jurisdictional water *unless* (1) such discharge brings the water "into a use to which it was not previously subject", *e.g.*, a new use; and (2) the discharge impairs the flow or circulation of the navigable water or the reach of the water.

43. The fact that the Recapture Provision refers several times to "navigable waters," a term which the Act defines to mean waters of the United States, further demonstrates that waters in which activities subject to the 404(f)(1) permit exemption take place are still jurisdictional. This interpretation is borne out by the Agencies' long-standing policies as well as the legislative history of CWA section 404(f). *See, e.g.,* CONG. REC. S19654 (daily ed. Dec. 15, 1977) (Senator Muskie noting that the section 404(f)(1) exemption was only intended to eliminate permitting requirements for certain "narrowly defined activities that cause little or no adverse effects either individually or cumulatively.")

IV. The National Environmental Policy Act

44. The National Environmental Policy Act ("NEPA"), enacted by Congress in 1969, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). One of the core goals of NEPA is to "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. As such, NEPA directs all federal agencies to assess the environmental impacts of proposed actions that significantly affect the quality of the human environment.

45. The Council on Environmental Quality ("CEQ") promulgated uniform regulations to implement NEPA that are binding on all federal agencies. Those regulations designed to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken" and to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(b)–(c). The Corps has its own NEPA regulations, codified at 33 C.F.R. Part 230, which the Corps uses in conjunction with the CEQ regulations.

46. NEPA requires all federal agencies to prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This statement is known as an Environmental Impact Statement ("EIS"). CEQ's regulations establish a standard format for EISs, including a summary, purpose and need for action, alternatives, affected environment, and environmental consequences. 40 C.F.R. § 1502.10.

47. A "major Federal action" is an action "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Promulgation of a rule is an expressly identified "Federal action" under NEPA. *Id.* § 1508.18(b)(1).

48. NEPA regulations define significance in terms of an action's context

and intensity. *See* 40 C.F.R. § 1508.27. An action's context must be analyzed nationally, regionally, and locally. *See id.* § 1508.27(a). An action's intensity must be analyzed on the basis of at least 10 factors, any one of which can indicate that an EIS is required. *See id.* § 1508.27(b). For example, an EIS may be required if a major action is in proximity of "wetlands, wild and scenic rivers, or ecologically critical areas," "likely to be highly controversial," "establish[es] a precedent for future actions with significant effects," or "may adversely affect an endangered or threatened species." *See id.* Moreover, a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." *Id.* § 1508.27(b)(1).

49. An agency that is uncertain whether an EIS is required may first develop an Environmental Assessment ("EA"). An EA is a "concise public document" that "provide[s] sufficient evidence and analysis" for determining whether to prepare an EIS or issue a finding of no significant impact ("FONSI"). 40 C.F.R. § 1508.9(a). The EA must discuss the need for the proposed project, as well as environmental impacts and alternatives, *see* 40 C.F.R. § 1508.9(b); it must provide sufficient evidence and analysis for determining whether an EIS is appropriate; and it must include a discussion of "appropriate alternatives if there are unresolved conflicts concerning alternative uses of available resources[.] 33 C.F.R. § 230.10. If, after preparing an EA, the federal agency determines that the proposed action is not likely to significantly affect the environment, it may issue a "finding of no significant impacts" ("FONSI").

50. NEPA requires an agency to take a "hard look" at the environmental consequences of the agency's proposed action, and to base its decision not to prepare an EIS on a "a convincing statement of reasons why potential effects are insignificant." *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

51. The information presented in an EA or an EIS must be of high quality. NEPA regulations provide that "[a]ccurate scientific analysis, expert agency

comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

52. Although the CWA exempts most actions taken by the EPA Administrator under the Act from NEPA, 33 U.S.C. § 1372(c)(1), it contains no such exemption for actions taken by the Corps.

V. The Endangered Species Act

53. Section 2(c) of the Endangered Species Act ("ESA") states that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." *Id.* § 1532(3).

54. To fulfill the purposes of the ESA, each federal agency is required to engage in consultation with the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively "the Services"), as appropriate, to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species … determined … to be critical." 16 U.S.C. § 1536(a)(2).

55. Such consultation is required for "any action [that] may affect listed species or critical habitat." 50 C.F.R. § 402.14. Agency "action" is broadly defined in the ESA's implementing regulations to include, *inter alia*, "the promulgation of regulations." *Id.* § 402.02 (emphasis added).

56. At the completion of consultation, the Services are required to issue a Biological Opinion that determines if the agency action is likely to jeopardize any affected species. If so, the Biological Opinion must specify "Reasonable and Prudent Alternatives" that will avoid jeopardy and allow the agency to proceed with the

action. The Services may also "suggest modifications" to the action (called Reasonable and Prudent Measures) during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy. 50 C.F.R. § 402.13.

57. The ESA further provides that after federal agencies initiate consultation, the agencies "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." 16 U.S.C. § 1536(d). The purpose of this prohibition is to maintain the environmental status quo pending the completion of consultation.

58. The ESA's citizen suit provision authorizes citizens to commence suit against, *inter alia*, federal agencies that are alleged to be in violation of any provision of the Act. 16 U.S.C. § 1540(g)(1)(A).

VI. The Administrative Procedure Act

59. The Administrative Procedure Act ("APA") imposes procedural requirements on federal agency rulemaking. 5 U.S.C. § 553. Under the APA, agencies are required to publish notice of proposed rules in the Federal Register, including "the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* § 553(b)(3).

60. Following notice of a proposed rulemaking, agencies are required to provide the public with the opportunity to submit "written data, views, or arguments" which must then be considered and responded to by the agency. 5 U.S.C. § 554(c).

61. APA section 702 provides a private cause of action to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

62. Only final agency actions are reviewable under the APA. 5 U.S.C. §

704. Promulgation of a final rule is a "final agency action" for APA purposes.

63. Under the APA, a court must "hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D).

GENERAL FACTUAL ALLEGATIONS

I. General Factual Background

64. As the Agencies correctly noted in the preamble to the Proposed Clean Water Rule,

> "Waters of the United States," which include wetlands, rivers, streams, lakes, ponds and the territorial seas, provide many functions and services critical for our nation's economic and environmental health. In addition to providing habitat, rivers, lakes, ponds and wetlands cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits.

79 Fed. Reg. at 22,191.

65. Many types of waters are connected in a hydrologic cycle, and a key purpose of the CWA is to ensure protections for waters that may not themselves be navigable in fact, but which affect such waters. As EPA's own Office of Research and Development has summarized,[2]

- "The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream

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[2] U.S. EPA, Office of Research and Development, Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence (January 2015) at ES-3, 4, *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414.

rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."

- "The literature clearly shows that wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter."

- Wetlands and open waters in non-floodplain landscape settings (hereafter called "non-floodplain wetlands") provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and ground-water flows and through biological and chemical connections."

66. In addition, EPA's own Scientific Advisory Board (SAB) has concluded that "groundwater connections, particularly via shallow flow paths in unconfined aquifers, can be critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also can connect waters and wetlands that have no visible surface connections."[3]

67. Many types of waters excluded from CWA jurisdiction by the Clean Water Rule provide important habitat for fish, wildlife and threatened and

[3] Letter from Dr. David T. Allen, Chair, EPA Science Advisory Board, to EPA Administrator Gina McCarthy, *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the Untied States under the Clean Water Act"* (Sept. 30, 2014), at 2-3, *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf.

endangered species. For example, salmon and steelhead in the Pacific Northwest regularly use and require certain types of streams, ditches and ditched or channelized streams during their life cycle. Small wetlands and ponds are important habitat for numerous amphibians and reptiles. Moreover, fish, wildlife, and threatened and endangered species found within traditionally navigable waters are often very sensitive to pollution are harmed from the cumulative impacts to headwater tributaries and wetlands upstream. These species have the potential to receive less or no protection against pollution or destruction under the Clean Water Rule than they did under the Agencies' prior definition of "waters of the United States."

68. At the same time, other types of waters which are afforded greater protection under the Clean Water Rule than under the prior regulatory definition also provide habitat for numerous ESA-listed species. For example, several categories of wetlands, including prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands provide habitat for endangered species such as whooping cranes, Northern Great Plains piping plovers, and prairie shrimp, among others.

II. The Clean Water Rule

69. On April 21, 2014, the Agencies published in the Federal Register a proposed rule entitled *Definition of 'Waters of the United States' Under the Clean Water Act* ("Proposed Clean Water Rule"). 79 Fed. Reg. 21,188–22,274 (Apr. 21, 2014).

70. The Proposed Clean Water Rule provided the public with an opportunity to file comments until July 21, 2014. The comment period was extended twice, ultimately requiring comments to be filed not later than November 14, 2014. *See* 79 Fed. Reg. 35,712 (June 24, 2014); 79 Fed. Reg. 61,590 (Oct. 14, 2014).

71. Each plaintiff in this action submitted written comments on the Proposed Clean Water Rule during the public comment period, including at least

the following: a letter dated November 14, 2014 and submitted electronically to EPA Docket No. EPA-HQ-OW-2011-0880 on behalf of Waterkeeper Alliance, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Upper Missouri Waterkeeper, and others; a letter dated November 14, 2014 and submitted electronically to EPA Docket No. EPA-HQ-OW-2011-0880 on behalf of Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network; and a letter dated November 14, 2014 and submitted electronically to EPA Docket No. EPA-HQ-OW-2011-0880 on behalf of Center for Biological Diversity and others.

72. On June 29, 2015, the Agencies issued the final Clean Water Rule. 80 Fed. Reg. 37054 (June 29, 2015). The Clean Water Rule revised eleven regulatory provisions where the phrase "waters of the United States" is defined, 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 301, and 401, which govern various regulatory programs implemented by EPA or the Corps under their CWA authorities.

73. The Clean Water Rule effectively placed all of the nation's waters into one of three categories for purposes of CWA jurisdiction:

(1) Waters that are ***per se jurisdictional***, including traditional navigable waters; interstate waters; the territorial seas; tributaries (as defined elsewhere in the rule) of traditional navigable waters, interstate waters, and territorial seas; impoundments of other jurisdictional waters; and all waters that are adjacent to (as defined elsewhere in the rule) the waters described above;

(2) Waters that are ***per se non-jurisdictional***, including (among others) waters converted to waste treatment systems; certain types of ditches; ephemeral features that do not meet the definition of a tributary; groundwater; and waters outside the 100-year floodplain and more than 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment of other jurisdictional waters, or tributary; and

> (3) Waters which will be assessed for jurisdiction on a case-specific basis by applying a ***significant nexus analysis***, including (among others) all adjacent waters being used for established normal farming, ranching, and silviculture activities; all of certain categories of waters, including prairie potholes, pocosins, and western vernal pools; all waters within the 100-year floodplain of a traditional navigable water, interstate waters, or the territorial seas; and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment of other jurisdictional waters, or tributary.

See 80 Fed. Reg. at 37,104. Substantially the same definition of waters of the United States was incorporated into the relevant definition sections of eleven separate regulations implementing the CWA. *See id.* at 37,104-127.

74. On July 13, 2015, the Clean Water Rule became a "final agency action" within the meaning of 5 U.S.C. § 704.

75. On May 26, 2015, the Corps issued a Final EA on the Clean Water Rule.[4] As part of its EA, the Corps issued a FONSI after concluding "that adoption of the rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act for which an environmental impact statement is required." *Id.*

III. Tributaries under the Final Clean Water Rules

76. The Clean Water Rule defines "tributary" as "a water that contributes flow, either directly or through another water" to a traditional navigable water, interstate water, or territorial seas, and "that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 80 Fed. Reg. at 37,105; 33 C.F.R. § 328.3(c)(3). As the Agencies explain in the preamble to the Clean Water Rule, this definition "requires the presence of a bed and banks

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[4] *See* Finding of No Significant Impact: Adoption of the Clean Water Rule: Definition of Waters of the United States (May 26, 2015), *available at* http://www2.epa.gov/sites/production/files/2015-05/documents/finding_of_no_significant_impact_the_clean_water_rule_52715.pdf. (hereinafter, "FONSI").

and an additional indicator of ordinary high water mark such as staining, debris deposits, or other indicator[.]" 80 Fed. Reg. at 37,076 (emphasis added).

77. As EPA has noted, the definition of tributary in the Clean Water Rule "narrows the waters that meet the definition of tributary compared to current practice that simply requires one indicator of ordinary high water mark"—e.g., the presence of defined bed and banks.[5]

78. The Clean Water Rule's definition of tributary, which includes only those waters that have a bed and banks *and* an additional indicator of an ordinary high water mark, lacks legal and scientific support. EPA's Scientific Advisory Board "advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks" and urged EPA to change the definition's wording to "bed, bank, and other evidence of flow." 80 Fed. Reg. at 37,064. The Scientific Advisory Board explained that "[a]n ordinary high water mark may be absent in ephemeral streams within arid and semi-arid environments or in low gradient landscapes where the flow of water is unlikely to cause an ordinary high water mark."[6]

79. EPA's own scientific analyses underpinning the Clean Water Rule do not provide support for the requirement that a tributary have both bed and banks and an ordinary high water mark to have a significant nexus with downstream waters and thus be per se jurisdictional under the CWA. While EPA noted that available science "supports the conclusion that sufficient volume, duration, and frequency of flow are required to create a bed and banks and ordinary high water mark" within a tributary, TSD at 171, this self-evident conclusion has no bearing on whether a particular tributary (or group of similarly situated tributaries)

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[5] U.S. EPA and U.S. Dept. of the Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015) at 67 (hereinafter, "TSD").

[6] Letter from Dr. David T. Allen, *supra* note 3, at 2.

"provide[s] many common vital functions important to the chemical, physical, and biological integrity of downstream waters" and should thus be per se jurisdictional. *Id*. at 235. Indeed, the TSD explicitly recognized, and did not dispute, the SAB's view that "from a scientific perspective there are tributaries that do not have an ordinary high water mark but still affect downstream waters." *Id*. at 242.

IV. Ditches and Ephemeral Features under the Proposed and Final Clean Water Rules

80. In its Proposed Clean Water Rule, EPA stated that certain ditches meet the definition of "tributary," and are therefore "waters of the United States," if they satisfy the following criteria: "they have a bed and banks and ordinary high water mark and they contribute flow directly or indirectly through another water to (a)(1) through (a)(4) waters." 79 Fed. Reg. at 22,203.

81. Under the Proposed Clean Water Rule, two types of ditches were *per se* excluded, regardless of whether they satisfied the requirements of another category of "water of the United States": (1) "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and (2) "[d]itches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water." 79 Fed. Reg. at 22,273–74. The Proposed Rule also exempted gullies, rills, and "non-wetland swales." *Id.* at 22,263.

82. The SAB provided comments on this aspect of the Proposed Clean Water Rule, and specifically rejected the Rule's exclusion of ditches as "not justified by science." The SAB explained: "There is . . . a lack of scientific knowledge to determine whether ditches should be categorically excluded. Many ditches in the Midwest would be excluded under the proposed rule because they were excavated wholly in uplands, drain only uplands, and have less than perennial flow. However, these ditches may drain areas that would be identified as wetlands under the

Cowardin classification system and may provide certain ecosystem services." SAB Report at 3.

83. Members of the SAB panel also expressed concerns regarding the Proposed Clean Water Rule's exclusion of ephemeral streams, noting for example that such waters are ecologically important to downstream water quality (especially in the arid southwest), *see supra* paragraph 66 and n.5; can deliver nutrients and other agricultural pollutants to downstream waters when tiled;[7] and may provide valuable habitat for certain organisms that have adapted to them.[8]

84. In the final Clean Water Rule, the Agencies significantly altered the provision regarding ditches, changing the exclusion to include: "[d]itches with ephemeral flow that are not a relocated tributary or excavated in a tributary"; "[d]itches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands"; and, "[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section." 80 Fed. Reg. 37,105.

85. In the Clean Water Rule, the Agencies also significantly expanded the exclusion for ephemeral features so that it applies to "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways." *Id.* In the Preamble to the Clean Water Rule, the Agencies explained that the term "ephemeral features" broadly encompasses "ephemeral streams that do not have a bed and banks and ordinary high water mark." *Id.* at 37,058.

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[7] Memorandum from Dr. Amanda D. Rodewald, Chair of the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair of the EPA Science Advisory Board, Comments to the Chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act" (Sep. 2, 2014) at 8.

[8] *Id.* at 25, Revised Comments by Kurt D. Fausch on the proposed rule "Definition of 'Waters of the United States' Under the Clean Water Act."

86. EPA's own scientific analyses underpinning the Clean Water Rule do not provide support for its categorical exemptions of certain types of ditches and ephemeral features. According to EPA, "[t]he scientific literature documents that tributary streams, *including perennial, intermittent, and ephemeral streams*, and certain categories of ditches are integral parts of river networks." TSD at 243 (emphasis added). In the preamble to the Proposed Clean Water Rule, EPA noted that "tributary streams, *including perennial, intermittent, and ephemeral streams*, are chemically, physically, or biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported." 79 Fed. Reg. at 22224.

87. In the preamble to the final Clean Water Rule, EPA explained that the effects tributaries exert on downstream waters "occur even when the covered tributaries flow infrequently (such as ephemeral covered tributaries), and even when the covered tributaries are great distances from the traditional navigable water, interstate water, or the territorial sea." 80 Fed. Reg. at 37,069.

88. EPA has also noted that man-made and man-altered tributaries—such as "ditches, canals, channelized streams, piped streams, and the like," TSD at 256—"likely enhance the extent of connectivity" between streams and downstream rivers, "because such structures can reduce water losses from evapotranspiration and seepage." In other words, to the extent perennial, intermittent, and ephemeral tributaries have significant impacts on downstream waters, the increased flow associated with man-made or man-altered ditches may actually exacerbate these effects.

89. Despite noting the significant impacts that ditches and ephemeral streams have on downstream waters, the Agencies have provided no legal or scientific basis for excluding ditches that are ephemeral, intermittent, or indirectly connected to traditional navigable waters, interstate waters, or the territorial seas, nor have the Agencies provided a legal or scientific basis for *per se* excluding

ephemeral features such as ephemeral streams that do not meet the definition of tributary.

90. The Agencies provided no justification, legal, scientific or otherwise, for concluding that all tributaries are "waters of the United States," yet categorically exempting certain types of ditches—a category of tributary under the Clean Water Rule—and other ephemeral waters that may have a significant nexus with traditional navigable waters, interstate waters, or the territorial seas.

91. Finally, the Agencies have provided no legal or scientific basis for exempting ditches that flow into traditional navigable waters, interstate waters, or the territorial seas, despite concluding that such waters are "waters of the United States" in the Proposed Rule. *Compare* 79 Fed. Reg. 22,273–74 (excluding "[d]itches that do not contribute flow . . . to water identified in paragraphs (l)(1)(i) through (iv) of this section"), *with* 80 Fed. Reg. 37,105 (excluding "[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section").

V. Limits on the Application of the Significant Nexus Test under the Proposed and Final Clean Water Rules

92. In the final Clean Water Rule, the Agencies defined waters of the United States to include "all waters located within 4,000 feet of the high tide line or ordinary high water mark of" a per se jurisdictional water (other than adjacent waters), "where they are determined on a case-specific basis to have a significant nexus" with such water. 80 Fed. Reg. at 37,114.

93. Under the Clean Water Rule, most waters located *more than* 4,000 feet of the high tide line or ordinary high water mark of a per se jurisdictional water other than an adjacent water (hereinafter collectively referred to as "qualifying per se jurisdictional waters") are automatically excluded from CWA jurisdiction, even if those waters have or may possess a significant nexus with the jurisdictional water

or otherwise have a significant affect on interstate commerce.[9] *See* 80 Fed. Reg. at 37,086 (describing the "exclusive" and "narrowly targeted circumstances" under which case-specific significant nexus determinations can be made under the Clean Water Rule).

94. The Proposed Clean Water Rule did not include the 4,000-foot limitation—or any other distance limitation—on the application of the significant nexus test to other waters. Instead, the Proposed Rule would have extended CWA jurisdiction to all "other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to" traditional navigable waters, interstate waters, and the territorial seas. 79 Fed. Reg. at 22,268. For example, under the Proposed Rule, a wetland complex located 5,000 feet from a qualifying per se jurisdictional water could be subject to CWA jurisdiction if it was shown to possess a significant nexus with a traditional navigable water, an interstate water, or a territorial sea.

95. In the preamble to the Proposed Clean Water Rule, the Agencies identified and solicited public comment on several alternatives to their proposal to codify the significant nexus test as the basis for determining jurisdiction over all other non-adjacent waters. *See* 79 Fed. Reg. at 22214-17. None of these alternatives suggested the possibility that the Agencies might establish an outermost limit on the application of the significant nexus test at 4,000 feet, or might use any other distance as the basis for excluding waters from CWA jurisdiction.

96. In establishing the "4,000 foot bright line boundaries for these case-

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[9] Under the Clean Water Rule, a case-by-case significant nexus analysis also applies to five categories of waters that the Agencies "have determined are 'similarly situated' for purposes of a significant nexus determination" (such as prairie potholes and western vernal pools), as well as to waters within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea. 80 Fed. Reg. at 37,086.

specific significant nexus determinations" in the Clean Water Rule, the Agencies purport to be "carefully applying the available science." 80 Fed. Reg. at 37,059. But the opposite is true; indeed, as noted in the preamble to the Clean Water Rule, EPA's own Scientific Advisory Board "found that distance could not be the sole indicator used to evaluate the connection of 'other waters' to jurisdictional waters." *Id*. at 37,064.

VI. Adjacent Waters and Normal Farming Activities under the Proposed and Final Clean Water Rules

97. Prior to the Clean Water Rule, the Agencies considered all wetlands adjacent to a traditional navigable water to have a "significant nexus" to that water, in recognition of the fact that waters and their adjacent wetlands are properly viewed as one system due to their hydrological connection with one another. Thus, prior to the Proposed or Final Clean Water Rule, the Agencies considered all adjacent wetlands to be jurisdictional under the CWA.

98. Under both the Proposed and the Final Clean Water Rule, "waters of the United States" include all waters that are "adjacent" to a traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary. *See* 79 Fed. Reg. at 22,206-07; 80 Fed. Reg. at 37,058.

99. In the Proposed Clean Water Rule the Agencies proposed to define "adjacent" as follows:

> The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

79 Fed. Reg. at 22,270 (citing proposed 40 C.F.R. § 232.2).

100. In the preamble to the Proposed Clean Water Rule, the Agencies stated that the rule "does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for

normal farming, silviculture, and ranching activities." 79 Fed. Reg. at 22,199 (citing 33 U.S.C. § 1344(f); 40 CFR 232.3; 33 CFR 323.4).

101. In the final Clean Water Rule, however, the Agencies added the following language to the definition of adjacent: "Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent." *See, e.g.*, 80 Fed. Reg. at 37,105; 33 C.F.R. § 328(c)(1).

102. This addition was made by EPA on "the day that the draft final rule was sent to OMB to begin the inter-agency review process"[10] and was not subjected to the Agencies' scientific review or the Corps' NEPA evaluation.

103. In the preamble to the Clean Water Rule, the Agencies state that the language added to the definition of adjacent "interprets the intent of Congress[.]" 80 Fed. Reg. at 37,080. But by enacting section 404(f) of the CWA, Congress sought to exempt discharges from certain types of *activities* from the requirement to obtain a permit pursuant section 404; it did not intend to remove any category of waters from the Act's jurisdiction.

104. As a result of this addition to the definition of "adjacent" from the Proposed Clean Water Rule to the final Clean Water Rule, waters being used for established normal farming, ranching, and silviculture activities now must satisfy the significant nexus test in order to be jurisdictional—even if they are physically adjacent to a traditional navigable water would therefore have been *per se* jurisdictional under the Proposed Clean Water Rule or prior agency practice.

105. The Agencies' only stated reasoning for this last-minute addition to the Rule is that farmers play a "vital role" in providing the United States with food, fiber, and fuel, and thus the Agencies wanted to "minimize potential regulatory

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[10] Memorandum from Lance Wood, Assistant Chief Counsel for Environmental Law and Regulatory Programs, U.S. Army Corps of Engineers, to Maj. Gen. John Peabody, Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, *Legal Analysis of Draft Final Rule on Definition of "Waters of the United States"* (Apr. 24, 2015) at 5.

burdens on the nation's agriculture community." 80 Fed. Reg. at 37,080. The Agencies do not attempt to explain how the CWA section 404(f)(1) exemption is related to "adjacent" waters; nor do the Agencies provide any scientific justification for changing how they treat waters adjacent to traditionally navigable waters.

106. In addition, in the preamble to the Clean Water Rule, the Agencies purport to include all waters "adjacent" to traditional navigable waters, interstate waters, and the territorial seas as waters of the United States "based upon their hydrological and ecological connections to, and interactions with, those waters." 80 Fed. Reg. at 37,058. But in the preamble to the Clean Water Rule the Agencies state that a wetland "being used for established normal farming, ranching, and silviculture activities" "shall not be combined" with other adjacent wetlands when conducting the significant nexus analysis, regardless of the hydrological connection between the wetlands or the effects that the entire wetlands system, as a whole, have on the chemical, physical, or biological integrity of adjacent traditional navigable waters, interstate waters, territorial seas, or tributaries.

107. Nothing in the record or the available science suggests that the mere presence established normal farming, ranching, and silviculture activities affects a water's hydrological and ecological connections to other waters.[11]

108. Moreover, nothing in the preamble to the Proposed Clean Water Rule suggested that the Agencies were considering the creation of an entirely new concept of adjacency that excludes all waters in which established normal farming, ranching, and silvicultural activities occur—even when those waters are bordering, contiguous, or neighboring another jurisdictional water as a matter of geographic fact. *See* 79 Fed. Reg. at 22,207-11.

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[11] *See* Wood Memorandum, *supra* note 8, at 5 (describing the addition of this sentence "indefensible," "a textbook example of rulemaking that cannot withstand judicial review," and "highly problematic, both as a matter of science and for purposes of implementing the final rule").

109. Indeed, nothing in the preamble to the Proposed Clean Water Rule even hinted that Agencies might conclude that established farming practices played any role whatsoever in identifying which waters are subject to CWA jurisdiction. *See, e.g., id*. at 22,210 ("The agencies proposal to determine 'adjacent waters' to be jurisdictional by rule is supported by the substantial physical, chemical, and biological relationship between adjacent waters" and other jurisdictional waters.) Instead, the Agencies noted that the "existing definition of 'adjacent' would be generally retained under" the Proposed Clean Water Rule. *Id*. at 22,207.

VII. Groundwater under the Proposed and Final Clean Water Rule

110. The Agencies have a longstanding and consistent interpretation that the CWA may cover discharges to groundwater that has a direct hydrological connection to surface waters. *See, e.g.*, *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47990-01 (Nov. 16, 1990). This interpretation has been upheld by numerous courts.[12]

111. The Agencies proposed definition of "waters of the United States" excluded all "groundwater, including groundwater drained through subsurface drainage systems." 79 Fed. Reg. at 22,193. In the preamble to the Proposed Clean Water Rule, EPA explained that the reasoning behind this exclusion was that the agencies had never interpreted "waters of the United States" to include groundwater. *Id.* at 22,218.

112. The SAB provided comments on the proposed definition and specifically noted that there was no scientific justification for the groundwater

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[12] *See, e.g.*, *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1357-58 (D.N.M. 1995); *Washington Wilderness Coalition v. Hecla Mining Co.,* 870 F.Supp. 983, 990 (E.D. Wash.1994); *Sierra Club v. Colo. Ref. Co.,* 838 F.Supp. 1428, 1433–34 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Weinberger,* 707 F.Supp. 1182, 1195–96 (E.D. Cal.1988), *vacated on other grounds,* 47 F.3d 325 (9th Cir.1995), *cert. denied,* 516 U.S. 807, 116 S.Ct. 51, 133 L.Ed.2d 16 (1995); *New York v. United States,* 620 F.Supp. 374, 381 (E.D.N.Y.1985).

exclusion. *See* Letter from Dr. David T. Allen, *supra* note 3, at 3. The SAB went on to comment:

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

Id.

113. Several individual members of the SAB further explained their concerns regarding the Proposed Clean Water Rule's categorical exclusion of all groundwater to EPA. For example, Dr. David Allen, chair of the SAB, questioned the exclusion because "an important pathway for some nutrients and contaminants is via subsurface drainage systems to ditches that may not have perennial flow, but which may deliver much of the nonpoint runoff to downstream waters", and concluded that "this exclusion is a concern, and should be recognized as such."[13]

114. Similarly, SAB member Dr. Robert Brooks stated that the groundwater exclusion "seems ill-advised because of the likely connectivity of surface flows into features such as karst sinkholes, with a potential to contaminate groundwater aquifers used for human water supplies, plus the possibility of reconnections to surface water a reasonable distance away." *Id.* at 17. And SAB member Dr. Kenneth Kolm concluded that "[i]n no cases should groundwater that is shown to be connected to 'waters of the US' be exempt." *Id.* at 49.

115. The Agencies ignored the expert advice of their scientific advisors, and included the *per se* exclusion of all "[g]roundwater, including groundwater drained through subsurface drainage systems" in the Final Clean Water Rule. *See* 80 Fed. Reg at 37,104, 37,114.

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[13] U.S. EPA, Compilation of Preliminary Comments from Individual Panel Members on the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act" (August 14, 2014) at 14.

116. Pursuant to this exclusion, groundwater that that has a significant nexus to a traditional navigable water, interstate water, or a territorial sea is not a water of the United States, even if it is immediately adjacent to and is directly connected that water.

117. In the preamble to the Clean Water Rule, the Agencies explained that their reasoning for categorically excluding all groundwater from the definition of "waters of the United States" is that they have never interpreted groundwater to fall within this definition, and that "[c]odifying these longstanding practices supports the agencies' goals of providing clarity, certainty, and predictability for the regulated public and regulators, and makes rule implementation clear and practical." 80 Fed. Reg at 37,073. Yet the Agencies categorically regulate all other waters that are adjacent to traditional navigable waters, interstate waters, the territorial seas, or their tributaries. The Agencies provided no legal or scientific basis for categorically excluding all groundwater from the definition of "waters of the United States."

VIII. Waste Treatment Systems under the Proposed and Final Clean Water Rule.

118. On May 19, 1980, EPA promulgated a rule establishing the requirements for several environmental permitting programs, including the NPDES program. *See* 45 Fed. Reg. 33,290 (May 19, 1980). As part of this action, EPA promulgated a definition of the term "waters of the United States." That rule stated that:

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

45 Fed. Reg. 33,290, 33,424 (emphasis added); *see also* 40 C.F.R. § 122.3 (1980). The

preamble to this 1980 rule explains that the second sentence of this regulation was included "[b]ecause CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems[.]" 45 Fed. Reg. 33,290, 33,298.

119. Two months later EPA suspended the second sentence of this regulation (italicized above) by removing it from the regulation entirely. In its place, EPA inserted a footnote stating that the sentence was "suspended until further notice." 45 Fed. Reg. 48,620 (July 21, 1980). EPA explained in a Federal Register notice that it was suspending this sentence due to industry's objections that the regulation "would require them to obtain permits for discharges into existing waste water treatment systems, such as power plant ash ponds, which had been in existence for many years." *Id.*

120. EPA did not provide the public with an opportunity to comment on the suspension at the time the action was taken in 1980. Instead, EPA noted its intent to "promptly develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension." *Id.*

121. EPA never developed a revised definition, and thus never submitted a proposed rule regarding this limitation on the waste treatment system exclusion for notice and comment. The public has therefore never had the opportunity to comment on or legally challenge the suspension of the sentence.

122. Due to the "suspension" of the second sentence of the waste treatment system exclusion found at 40 C.F.R. § 122.3 in 1980, subsequently promulgated regulatory definitions of "waters of the United States" did not include that sentence. As such, this suspension—and the Agencies' obligation to take action to resolve it—has seemingly been forgotten, as the Agencies continue to promulgate definitions of "waters of the United States" that do not, because of the ongoing suspension, contain this limitation on the exclusion for waste treatment systems.

123. The Proposed Clean Water Rule included the "suspended" second sentence of the waste treatment system exclusion, but noted in a footnote that the suspension was still in effect. *See* 79 Fed. Reg. at 22,268. In addition, in the preamble to the Proposed Clean Water Rule the Agencies purport to make only "ministerial" changes to the waste treatment system exclusion, and thus stated that were not seeking comment on this exclusion. *Id.* at 22,190, 22,217. However, these "ministerial" changes included the addition of a comma not in the existing exclusion.

124. The definition of "waters of the United States" in 40 C.F.R. § 122.2, as revised by the Clean Water Rule, provides that "[t]he following are not 'waters of the United States' even where they otherwise meet the terms of (1)(iv) through (viii) of the definition" [i.e., even if they are otherwise jurisdictional as impoundments, tributaries, adjacent waters, or waters with a significant nexus to traditional navigable waters, interstate waters, or the territorial seas]:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

80 Fed. Reg. at 37,114. As it did before, "Note 1" of the revised 40 C.F.R. § 122.2 purports to continue the suspension of the last sentence of the waste treatment system exclusion.

125. In the Clean Water Rule, the Agencies lifted the suspension of the last sentence in 40 C.F.R. § 122.2's exclusion for waste treatment system, and then reinstated the suspension. *See* 80 Fed. Reg. at 37,114. The preamble to the Clean Water Rule describes the changes to the waste treatment system exclusion as "ministerial" and notes that "[b]ecause the agencies are not making any substantive changes to the waste treatment system exclusion, the final rule does not reflect changes suggested in public comments." *Id.* at 37,097.

126. However, the Agencies note in the preamble to the Clean Water Rule that they did, in fact, respond to comments that the addition of the comma narrowed the exclusion, by removing the comma. 80 Fed. Reg. at 37,114. Thus, the agencies responded to some substantive comments on the scope of the exclusion, but not others. Several plaintiffs submitted comments on the Proposed Clean Water Rule that were not addressed by the Agencies. And, moreover, in responding to some of the comments, the Agencies adopted a *broader* exclusion (e.g., excluding more waste treatment systems) than had been contemplated by the Proposed Rule.

127. The Clean Water Rule does not define "waste treatment systems." Thus, under the waste treatment system exclusion in the Final Rule (including the ongoing suspension of the last sentence of that exclusion), certain types of waters such as adjacent wetlands, ponds, or tributaries are not subject to CWA jurisdiction if they are deemed to be part of a "waste treatment system"— *even if* they are themselves naturally occurring waters, were created entirely within a naturally occurring water, or were created by impounding another water of the United States. For example, under the Clean Water Rule an industrial facility could unilaterally destroy CWA jurisdiction over a naturally occurring wetland or tributary merely by using that wetland or tributary as part of its on-site "waste treatment system." This exemption is contrary to the fundamental purposes of the CWA and flies in the face of any permissible reading of "waters of the United States." *See* 33 U.S.C. § 1251(a).

128. In the Preamble to the Clean Water Rule, the Agencies unambiguously recognize that adjacent waters, tributaries, and impoundments are jurisdictional by rule because "the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas." 80 Fed. Reg. at 37,058, 37,075. Thus, the Agencies construe the Clean Water Rule as making these waters jurisdictional "in all cases" and suggest that "no additional analysis is required" to assert CWA jurisdiction over them. *Id.* at 37,058. These statements, however, are flatly contradicted by the waste treatment system exclusion, which excludes

adjacent waters, tributaries, and impoundments of jurisdictional waters (among others) that are deemed to be part of a "waste treatment system."

IX. Abandonment of "Other Waters" under the Clean Water Rule

129. For decades prior to the Clean Water Rule, the Agencies asserted jurisdiction over all other waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." *See, e.g.*, 33 C.F.R. § 328.3(a)(3) (2014). Under this regulatory definition, many waters of regional or national importance were properly afforded CWA protections, consistent with stated Congressional policy.

130. Among these previously protected "other waters" are closed basins in New Mexico that include many non-tributary rivers, streams and wetlands; wholly intrastate waters such as the Little Lost River in southern Idaho that does not flow into a traditionally navigable water but instead flows into the Snake River Plain Aquifer; and hundreds of "isolated" glacial kettle ponds such as those found on Cape Cod in Massachusetts that, in addition to being tourist attractions, are vital to protecting that region's drinking water.

131. Purportedly on the basis of a single sentence from the Supreme Court's decision in *SWANCC*, in the Clean Water Rule the Agencies "concluded that the general other waters provision in the existing regulation based on [Commerce Clause effects unrelated to navigation] was not consistent with Supreme Court precedent." TSD at 78 (citing SWANCC, 531 U.S. at 172). Thus, in the Clean Water Rule the Agencies rely almost exclusively on the significant nexus test. As a result, because many of these "other waters" are not themselves navigable in fact, and lie beyond 4,000 feet from otherwise jurisdictional navigable waters, tributaries, or adjacent wetlands, they are *per se* non-jurisdictional under the Clean Water Rule.

132. Elsewhere in the rulemaking record, however, the Agencies recognize that the Supreme Court in SWANCC "did not vacate (a)(3) of the existing

regulation" and that "[n]o Circuit Court has interpreted SWANCC to have vacated the other waters provision of the existing regulation." TSD at 77-78.

133. The Agencies do not provide any further factual, scientific, legal, or policy reasons for their change of course with respect to these other waters that are abandoned by the Clean Water Rule, notwithstanding the Agencies' decades-old practice of asserting jurisdiction over them.

X. The Corps' EA/FONSI for the Final Clean Water Rule

134. Concurrently with the issuance of the Clean Water Rule, the Corps released its Final EA and FONSI, in which the Corps concluded that the adoption of the Final Rule would not significantly affect the quality of the human environment and thus an EIS was not required. FONSI at 1.

135. The Corps based its FONSI largely upon an analysis in which it purported to review a random selection of 188 "negative jurisdictional determinations" made by Corps personnel in the years 2013 and 2014. Purportedly based upon this review, the Corps estimated that "there would be an increase of between 2.8 and 4.6 percent in the waters found to be jurisdictional with adoption of the rule." Final EA at 21. These assumptions echo statements found in the Agencies' economic analysis of the Final Rule, which states that "increases in jurisdictional determinations ranging from a 2.84 percent to a 4.65 percent relative to recent practice, utilizing the FY13 and FY14 jurisdictional determination dataset."[14]

136. However, the analyses referenced in the Final EA and the Economic Analysis were incomplete; they only looked at *negative* jurisdictional determinations that might become *positive* under the Clean Water Rule; they did not consider

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[14] U.S. EPA and U.S. Army Corps of Engineers, *Economic Analysis of the EPA-Army Clean Water Rule* (May 20, 2015) at 14 (hereinafter, "Economic Analysis").

whether any waters found to be jurisdictional under then-current policy might be found non-jurisdictional under the Final Rule:

> Reviewing how current positive JDs may become negative as a result of the final rule was determined to be outside the scope of this analysis. Analyzing only negative JDs allows for an estimation of only the potential increase in assertion of CWA jurisdiction, as viewed through the lens of CWA 404 activity during the baseline period of these fiscal years. The agencies recognize that the rule may result in some currently-jurisdictional waters being found to be non-jurisdictional.

Economic Analysis at 7-8.

137. The Final EA and the Economic Analysis, and in particular their reliance on the Agencies' analysis of prior negative jurisdictional determinations as the basis for a "no significant impact" finding, was deeply flawed. With respect to the Economic Analysis of the Clean Water Rule, one senior Corps officer stated:

> [T]he Corps data provided to EPA has been selectively applied out of context, and mixes terminology and disparate data sets. . . . In the Corps' judgment, the documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies, and logical inconsistencies.[15]

138. Other analyses in the record refute the Agencies' conclusion that there will be a net increase in the number of waters found to be jurisdictional under the Clean Water Rule. For example, a technical analysis performed by Jennifer Moyer, Acting Chief of the Corps' Regulatory Program, concluded that as many as 10% of wetlands previously found to be jurisdictional would *lose* their CWA protections as a result of the Clean Water Rule. In fact, the preamble to the Rule expressly recognizes that the scope of CWA jurisdiction under the Clean Water Rule "is narrower than that under the existing regulation." 80 Fed. Reg. at 37,054.

[15] Memorandum from Maj. Gen. John Peabody, Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, to Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works (May 15, 2015).

139. The Final EA barely mentions impacts to fish and wildlife resulting from promulgation of the Clean Water Rule, and gives no particular attention to threatened or endangered species protected by the Endangered Species Act ("ESA"). *See* Final EA at 24. In a cursory two-paragraph discussion, the Final EA merely references the dubious "additional protections associated with the incremental increase" in the amount of waters covered by the CWA as a result of the Clean Water Rule, and presumes that there would be an "expected . . . beneficial impact on fish and wildlife for which the protected waters provide habitat." *Id.*

140. The Corps undertook no NEPA analysis whatsoever for they Delay Rule. It did not consider or assess the likely impacts from delaying by two years the Clean Water Rule's *per se* protections for certain tributaries, adjacent wetlands, and other waters, nor did it consider or assess the impacts of delaying by two years the Agencies' ability to assert jurisdiction over categories of waters like prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands that provide important habitat for many aquatic species, including threatened and endangered species.

XI. The Agencies Failure to Consult under the ESA

141. Although the Clean Water Rule results in the loss of CWA protections for certain tributaries, potentially thousands of miles of ditches and ephemeral streams, thousands of acres of wetlands that lie more than 4,000 feet from a traditionally navigable water, and other waters that provide habitat for dozens of ESA-listed threatened and endangered species, the Agencies failed to consult with the Services under Section 7(a)(2) of the ESA prior to the promulgation of the Clean Water Rule.

142. Further, although the Delay Rule postpones the effective date of the Clean Water Rule by two years—effectively denying per se jurisdiction under the CWA to waters such as tributaries and adjacent wetlands, which provide vital habitat for numerous ESA-listed species—the Agencies failed to consult with the

Services under Section 7(a)(2) of the ESA prior to the promulgation of the Delay Rule.

XII. Litigation over the Clean Water Rule

143. Until recently, the question of which court has jurisdiction over challenges to the Clean Water Rule remained in dispute. In the wake of the rule's promulgation, more than a dozen suits were filed in various district courts under the Administrative Procedure Act, and 14 separate petitions for judicial review were filed under CWA section 509(b), 33 U.S.C. 1369(b). While the district court cases proceeded independently, the petitions for judicial review were consolidated and transferred to the Sixth Circuit, which held that it had exclusive jurisdiction over the matter. *In re Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 264 (6th Cir. 2016). However, the Supreme Court reversed that decision in a unanimous opinion, and remanded the case to the Sixth Circuit to dismiss the consolidated petitions for review. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

144. By order dated February 28, 2018, the Sixth Circuit dismissed the consolidated judicial review actions for lack of jurisdiction, and simultaneously dissolved the nationwide stay of the Clean Water Rule it had put in place on October 9, 2015. *In re Clean Water Rule*, 713 Fed. Appx. 489 (Feb. 28, 2018).

145. At least three other district court actions challenging the Clean Water Rule have been revived since the Supreme Court's decision in *National Association of Manufacturers*. All of those suits were filed by states opposed to the Clean Water Rule in its entirety, and none of them include ESA claims such as those Plaintiffs allege here. *North Dakota v. EPA*, No. 15-cv-00059 (D.N.D. filed June 29, 2015); *Georgia v. Pruitt*, No. 15-cv-00079 (S.D. Ga. filed June 30, 2015); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex. filed June 29, 2015).

XIII. The Delay Rule and the Agencies' Efforts to Roll Back Clean Water Act Protections

146. In the wake of the 2016 presidential election and the resulting change in administration, the Agencies' new leadership made clear their intent to

significantly curtail the jurisdictional reach of the CWA. On February 28, 2017, President Donald Trump signed Executive Order 13778, instructing the Agencies to review the Clean Water Rule and to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." 82 Fed. Reg. 12,497 (March 3, 2017). That Executive Order was immediately followed by the publication of the Agencies' Notice of Intention To Review and Rescind or Revise the Clean Water Rule, providing advance notice of their forthcoming rulemaking. 82 Fed. Reg. 12,532 (March 6, 2017).

147. The Agencies have described what they intend to be a two-step process to review and revise the definition of "waters of the United States": First, promulgation of a rule rescinding the Clean Water Rule and recodifiying the regulatory definition that existed before the 2015 Clean Water Rule, as modified by the Agencies' undisclosed interpretations of caselaw, agency practice and unidentified policy documents; and second, a rulemaking in which the Agencies will conduct a substantive reevaluation of the definition—and, presumably, attempt to narrow the reach of the CWA.

148. The Agencies initiated "step one" of their approach in July 2017 with a proposed rule which, if finalized, would effectively rescind the Clean Water Rule and replace it with the "exact same regulatory text that existed prior to" that rule, as modified by "applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the SWANCC and Rapanos Supreme Court decisions, applicable case law, and longstanding agency practice." Proposed Rule, *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34,899, 34,900, 34,903 (July 27, 2017) ("Proposed Repeal Rule"). The Agencies accepted comments on the Proposed Repeal Rule through September 27, 2017, but a final Repeal Rule has not been promulgated.

149. The Agencies claim to have initiated "step two" of their plan in late

2017 by engaging in stakeholder outreach, initiating consultation with state, local, and tribal governments, and soliciting recommendations on an entirely new definition of waters of the United States. The Agencies have not published a proposed rule as a result of this effort. *See* EPA, Waters of the United States: Rulemaking Process, at https://www.epa.gov/wotus-rule/rulemaking-process.

150. Struggling to find either a rational legal basis for the wholesale rescission of the Clean Water Rule or coherent and timely administrative process for their intended "step one" and "step two" rulemakings, the Agencies published the Proposed Delay Rule on November 22, 2017, and made it available for a 21-day public comment period. 82 Fed. Reg. 55,542 (Nov. 22, 2017). The Agencies sought comment only on "whether it is desirable and appropriate to add an applicability date" to the Clean Water Rule, and not on the underlying substantive definition of the statutory phrase "waters of the United States" or other matters the Agencies intend to address under their two-step process. *Id*. at 55544-45.

151. Plaintiffs submitted comments on the Proposed Delay Rule by letter dated December 13, 2017.

152. Less than eleven weeks after the proposed rule was published, the final Delay Rule was promulgated. *Definition of "Waters of the United States"–Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5200 (Feb. 6, 2018). The Agencies received approximately 4,600 comments on the proposed rule, which they claim to have "carefully considered" during the eight weeks between the close of the comment period and publication of the final Delay Rule. *Id*. at 5203.

153. As the Agencies note in the preamble to the Delay Rule, they are currently enjoined from enforcing the Clean Water Rule in thirteen states, due to a

preliminary injunction issued by the U.S. District Court for the District of North Dakota.[16]

154. This injunction, the Agencies contend, when combined with other litigation over the Clean Water Rule, is "likely to lead to uncertainty and confusion as to the regulatory regime applicable, and to inconsistencies between the regulatory regimes applicable in different States, pending further rulemaking by the agencies." 83 Fed. Reg. at 5202. Hence the Agencies' stated purpose for the Delay Rule is to establish an interim framework by which "the scope of CWA jurisdiction will be administered nationwide exactly as it is now being administered by the agencies, and as it was administered prior to the promulgation of the 2015 Rule." *Id*.

155. The Agencies contend that the Delay Rule will ensure that "the scope of the CWA remains consistent nationwide" and that, pending further rulemaking, they will

> administer the regulations in place prior to the 2015 [Clean Water] Rule, and will continue to interpret the statutory term "waters of the United States" to mean the waters covered by those regulations, as they are currently being implemented, consistent with Supreme Court decisions and practice, and as informed by applicable agency guidance documents.

83 Fed. Reg. at 5200.

156. Uncertainty and inconsistency is in fact greatly increased by the Delay Rule, which returns the Agencies, the regulated community, and the general public to a vague definition of "waters of the United States", apparently including the current Administration's undisclosed interpretation of the prior definition which would be premised on conflicting case law and inconsistent agency interpretations of unidentified agency guidance, practice, letters, and memoranda. *See, e.g.*,

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[16] *See North Dakota v. EPA*, D.N.D. No. 15-cv-00059, Mem. Op. and Order Granting Pls' Mot. for Prelim. Inj. (Dkt. #70, Aug. 27, 2015); Order Limiting the Scope of Prelim. Inj. to Plaintiffs (Dkt. #79, Sept. 4, 2015).

Lawrence Hurley, Supreme Court's murky CWA ruling created legal quagmire (Greewire, Feb. 7, 2011), at https://www.eenews.net/greenwire/stories/1059944930/.

157. As they readily admit, the Agencies now propose to identify and define waters of the United States primarily by following the prior regulatory definition of "waters of the United States," as interpreted by case law and their 2001 and 2008 guidance documents issued in the wake of the *SWANCC* and *Rapanos* decisions. 83 Fed. Reg. at 5201.[17] Those guidance documents require the Agencies' and their field staff to undertake a resource intensive, case-by-case assessment for a huge number of arguably jurisdictional waters such as intermittently flowing tributaries and wetlands adjacent to such tributaries. *See, e.g., Rapanos* Guidance at 4, 8 (explaining that for many waters the Agencies will assert jurisdiction "on a case-by-case basis, based on the reasoning of the *Rapanos* opinions."). The Agencies' also plan to use their unexplained interpretation of caselaw they deem relevant, as well as other undisclosed agency guidance, practice, letters, and memoranda.

158. In its review of the *Rapanos* Guidance the Agencies now propose to implement, the U.S. Fish and Wildlife Service expressed its concern that "Corps Districts may implement the guidance inconsistently across the Nation due to language that appears open to subjective interpretation, potentially leading to increased degradation/destruction of waters." Fish and Wildlife Service, Comments on EPA and Corps Guidance Regarding Clean Water Act Jurisdiction Following Rapanos/Carabel (Feb. 5, 2008), *available at*

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[17] Citing Joint Memorandum providing clarifying guidance regarding the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), available at 68 FR 1991, 1995 (Jan. 15, 2003) (hereinafter "*SWANCC* Guidance") and Joint Memorandum, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," (signed December 2, 2008), available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (hereinafter "*Rapanos* Guidance").

https://www.fws.gov/habitatconservation/rapanos_carabell/DOI_comments_on_post_Rapanos_Guidance.pdf.

159. The Agencies' intention to rely on undisclosed agency guidance, practice, letters, and memoranda and "relevant" post-*Rapanos* case law only adds to the uncertainty and confusion. As the Ninth Circuit has recently explained, the fractured decision in *Rapanos*

> paints a rather complex picture, and one where without more it might not be fair to expect a layman of normal intelligence to discern what was the proper standard to determine what are waters of the United States.

United States v. Robertson, 875 F.3d 1281, 1289 (9th Cir. 2017). The courts of appeals "have adopted different approaches" to CWA jurisdiction, giving rise to "competing precedents interpreting *Rapanos*, and further uncertainty engendered" by subsequent appellate decisions. *Id*. at 1289-90.

160. Within some circuits, absent a promulgated definition of "waters of the United States," CWA jurisdiction requires a showing of a significant nexus, consistent with Justice Kennedy's concurring opinion in *Rapanos*. Within others, jurisdiction may also be shown with a "continuous surface connection" as described in Justice Scalia's plurality opinion. Some courts have foresworn either test and have instead relied on the Agencies' prior regulatory definition or pre-*Rapanos* case law. In the words of Chief Justice Roberts, "[l]ower courts and regulated entities . . . now have to feel their way on a case-by-case basis." Rapanos, 547 U.S. at 758.

161. With the Delay Rule in place, therefore, CWA jurisdiction is potentially subject to eleven different formulations based on the caselaw alone, and the Agencies' intent to assert impermissible, unfettered discretion by relying on undisclosed agency guidance, practice, letters, and memoranda to establish the bounds of CWA jurisdiction will result in even greater confusion and conflict.

162. The Agencies themselves previously stated that a purpose of the Clean Water Rule was to place parameters "on waters requiring a case-specific determination" and to create a "clearer definition of significant nexus [to] address the concerns about uncertainty and inconsistencies" 80 Fed. Reg. at 37,095.

163. The Delay Rule does not adopt the Agencies' Proposed Repeal Rule. The Delay Rule does not recodify the prior regulatory definition of "waters of the United States", nor does it create any new regulatory definition that the Agencies will follow during the two-year delay period.

164. In promulgating the Delay Rule, the Agencies asserted that they "are under no obligation to address the merits of the [Clean Water] Rule because the addition of an applicability date to the [Clean Water] Rule does not implicate the merits of that rule." 88 Fed. Reg. at 5205. Thus, the Agencies did not respond to the substance of Plaintiffs' comments on the Proposed Delay Rule with respect to (a) the potential for the Delay Rule to result in the degradation or destruction of significant critical habitat for ESA-listed species; (b) the myriad flaws found in the Agencies' cursory, 5-page economic analysis of the costs and benefits of the Delay Rule; and (c) the Agencies' failure to comply with the CWA, APA, ESA and NEPA, among other comments.

165. Even though promulgation of the Delay Rule will significantly affect the quality of the human environment, the Corps did not engage in any sort of NEPA review prior to its promulgation. The Corps did not assess any alternatives to the Proposed Delay Rule; did not analyze any direct, indirect, or cumulative impacts of the rule's promulgation; and did not prepare either an environmental assessment or an environmental impact statement.

166. Even though promulgation of the Delay Rule is an action that may affect ESA-listed species, the Agencies did not engage in either formal or informal consultation with the Services under Section 7 of the ESA prior to promulgating the Delay Rule, nor did they take any further action to ensure that the Rule will not

jeopardize the continued existence of ESA-listed species or the lead to the destruction or adverse modification of critical habitat.

FIRST CLAIM FOR RELIEF
Clean Water Rule:
Violations of the National Environmental Policy Act and the Administrative Procedure Act

167. The preceding paragraphs are incorporated herein by reference as if fully set forth below.

168. NEPA regulations require that EAs include a "brief discussions of the need for the proposal, of alternatives as required by [NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9.

169. NEPA regulations require that a FONSI "present[] the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13.

170. NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

171. The Agencies' promulgation of the Clean Water Rule is a major Federal action significantly affecting the quality of the human environment because the Final Rule fundamentally alters the CWA's regulatory landscape and establishes regulatory exclusions from the protections of the Act where none existed before.

172. The Clean Water Rule's effects on the environment are significant for the additional reasons that it affects the regulation of myriad activities in the proximity of "wetlands, wild and scenic rivers, or ecologically critical areas;" is "highly controversial;" establishes "a precedent for future actions with significant effects;" and may adversely affect numerous endangered species or their critical

habitat. 40 C.F.R. § 1508.27(b)(3), (4), (6), and (9).

173. The Corps' EA and FONSI were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A), for at least the following reasons:

(a) The FONSI was based upon the incorrect assumption in the EA that the Clean Water Rule would increase jurisdictional determinations from 2.84 percent to 4.65 percent relative to recent agency practice, when in fact the Clean Water Rule is likely to lead to a *net decrease* in jurisdictional determinations of up to 10 percent;

(b) The FONSI was based largely upon the EPA's *Economic Analysis of the EPA-Army Clean Water Rule* (May 20, 2015), which in turn was based upon flawed, incomplete, or selectively-chosen data regarding waters found to be jurisdictional under current agency practice;

(c) The FONSI was reached without any consideration in the EA of several last-minute changes to the Clean Water Rule, including the exclusion of farmed wetlands from the definition of "adjacent" and the 4,000-foot distance limitation on the application of the case-by-case significant nexus analysis.

174. Moreover, the Corps' decision not to prepare an EIS for the Clean Water Rule was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A), because the Corps failed to take a "hard look" at the potential environmental impacts of the Clean Water Rule and failed to provide a convincing statement of reasons why the potential effects of the Rule are insignificant.

SECOND CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Failure to Provide Sufficient Notice and Comment Opportunities)

175. The preceding paragraphs are hereby incorporated by reference as if

fully set forth below.

176. The APA requires that "[g]eneral notice of proposed rule making shall be published in the Federal Register," and that the notice include "either the terms or substance of the proposed rule or a description of the subjects and issues involved[.]" 5 U.S.C. §§ 553(b), (b)(3).

177. Once notice of a proposed rule has been given, an agency is required to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

178. For the APA's notice requirements to be satisfied, a final rule need not be identical to the proposed rule, but it must at least be a "logical outgrowth" of the proposed rule. A final rule is a logical outgrowth of the proposed rule if "interested parties reasonably could have anticipated the final rulemaking" based on the proposed rule. *Natural Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002).

179. Multiple components of the Clean Water Rule were neither included in nor a logical outgrowth of the Proposed Rule, including at least the following:

A. The definition of "adjacent," which states that "[w]aters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent." *See, e.g.*, 80 Fed. Reg. at 37,105;

B. The 4,000-foot distance limit on the application of the significant nexus test included in subsection (a)(8) of the Clean Water Rule. *See, e.g.,* 80 Fed. Reg. at 37,105;

C. The per se exclusion of three categories of ditches from CWA jurisdiction. *See, e.g.,* 80 Fed. Reg. at 37,105;

D. The per se exclusion of "[e]rosional features, including . . . other ephemeral features that do not meet the definition of tributary." *See, e.g.,* 80 Fed. Reg. at 37,058, 37,099;

E. The suspension of the last sentence in the waste treatment system exclusion. *See, e.g.,* 80 Fed. Reg. at 37,097.

180. In addition, the Agencies responded to some substantive comments on the scope of the waste treatment exclusion system, but not others.

181. The Agencies' failure to provide sufficient notice and comment opportunities on these components of the Clean Water Rule violated the APA, 5 U.S.C. §§ 553(b), (b)(3), (c), and the Agencies' inclusion of these components in the Clean Water Rule was without observance of the procedures required by law. *Id.* § 706(2)(D).

THIRD CLAIM FOR RELIEF
Clean Water Rule: Violations of the Administrative Procedure Act
(Definition of "Tributary")

182. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

183. In the Clean Water Rule, the Agencies defined "tributary" as "a water that contributes flow, either directly or through another water" to a traditional navigable water, interstate water, or territorial seas, and "that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 80 Fed. Reg. at 37,105.

184. The Agencies' requirement that waters must have both bed and banks and an ordinary high water mark in order to meet the definition of "tributary" and therefore be jurisdictional under the CWA lacks scientific basis and is contrary to the recommendations of EPA's own Science Advisory Board.

185. The Agencies' requirement that tributaries must have both bed and banks and an ordinary high water mark in order to be jurisdictional under the CWA

is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

FOURTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Ditches and Ephemeral Features from Clean Water Act Jurisdiction)

186. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

187. In the Clean Water Rule, the Agencies defined waters of the United States to exclude "[d]itches with ephemeral flow that are not a relocated tributary or excavated in a tributary"; "[d]itches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands"; "[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section"; and "[e]rosional features, including . . . other ephemeral features that do not meet the definition of tributary." 80 Fed. Reg. at 37,105.

188. There is no legal or scientific basis for *per se* excluding these categories of waters from CWA jurisdiction.

189. At a minimum, to the extent that these types of waters, either alone or in combination with other waters similarly situated, possess a significant nexus with traditional navigable waters, interstate waters, or the territorial seas, they are "waters of the United States" and therefore must be subject to the Act's protections. *See Rapanos*, 547 U.S. at 780.

190. The *per se* exclusion of these three categories of ditches and ephemeral streams from CWA jurisdiction is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

FIFTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Waters More than 4,000 Feet Beyond the High Tide Line or Ordinary High Water Mark of Qualifying Waters from Clean Water Act Jurisdiction)

191. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

192. In the Clean Water Rule, the Agencies defined waters of the United States to include "all waters located within 4,000 feet of the high tide line or ordinary high water mark of" a qualifying per se jurisdiction water "where they are determined on a case-specific basis to have a significant nexus" with a traditional navigable water, an interstate waters, or a territorial sea. 80 Fed. Reg. at 37,114.

193. There is no legal or scientific basis for automatically excluding from CWA jurisdiction all waters more than 4,000 feet from a qualifying per se jurisdictional water.

194. At a minimum, to the extent that waters located more than 4,000 feet of the high tide line or ordinary high water mark of a qualifying per se jurisdiction water, either alone or in combination with other waters similarly situated, possess a significant nexus with traditional navigable waters, interstate waters, or the territorial seas, they are "waters of the United States" and therefore must be subject to the Act's protections. See *Rapanos*, 547 U.S. at 780.

195. The automatic exclusion from CWA jurisdiction of all waters more than 4,000 feet from a qualifying per se jurisdictional water is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

SIXTH CLAIM FOR RELIEF
Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Waters in Which 404(f) Activities Occur from the Definition of "Adjacent")

196. The preceding paragraphs are hereby incorporated by reference as if

fully set forth below.

197. The Clean Water Rule defines "adjacent" in a manner that excludes "[w]aters being used for established normal farming, ranching, and silviculture activities[.]" See 80 Fed. Reg. at 37,080, 37,118. In the Clean Water Rule, the Agencies cite CWA section 404(f), 33 U.S.C. 1344(f),

198. By defining "adjacent" in this manner in the Clean Water Rule, the Agencies changed their long-standing policy regarding their treatment of adjacent farmed wetlands without any legal, scientific, or technical justification or support for the change.

199. Moreover, the Agencies' exclusion of waters in which established normal farming, ranching, and silviculture activities occur from the definition of "adjacent" is inconsistent with CWA section 404(f)(1)(A); that provision creates a limited permitting exemption for discharges of dredged or fill material only that result from "normal farming, silviculture, and ranching acvities[.]" 33 U.S.C. § 1344(f)(1)(A). That permitting exemption not affect the jurisdictional status of the waters into which the exempted discharges occur.

200. The Agencies' definition of "adjacent" in the Clean Water Rule is thus arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

SEVENTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Groundwater from Clean Water Act Jurisdiction)

201. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

202. The Clean Water Rule excludes "[g]roundwater, including groundwater drained through subsurface drainage systems" from the definition of waters of the United States. The Agencies have not provided any legal, scientific or technical basis to support this exclusion. The Agencies' own in-house scientific experts have

stated that there is no scientific justification for this exclusion.

203. At a minimum, to the extent that groundwater, either alone or in combination with other waters similarly situated, possesses a significant nexus with traditional navigable waters, interstate waters, or the territorial seas, it is a "water of the United States" and therefore must be subject to the CWA's protections. *See Rapanos*, 547 U.S. at 780.

204. The Agencies' exclusion of groundwater from CWA jurisdiction is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

EIGHTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Waste Treatment Systems from Clean Water Act Jurisdiction)

205. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

206. The Clean Water Rule excludes "waste treatment systems" from the definition of waters of the United States, even where such systems would otherwise be jurisdictional as impoundments, tributaries, adjacent waters, or waters with a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. 80 Fed. Reg. at 37,114; 40 C.F.R. § 122.2.

207. This waste treatment system exclusion is not limited to man-made bodies of water, and indeed the Agencies expressly continued the suspension of such a limitation in the Clean Water Rule. Thus, the exclusion on its face applies equally to naturally occurring waters (such as adjacent waters, tributaries, or ponds) and impoundments that have been determined to be a "waste treatment system," or part of such a system.

208. To the extent the waste treatment system exclusion applies to waters (such as adjacent wetlands or permanently flowing tributaries) that are unambiguously "waters of the United States", the exclusion is contrary to the CWA.

209. There is no rational scientific or technical reason to exclude waters such as adjacent wetlands, tributaries, or impoundments from the definition of waters of the United States simply because they are part of a waste treatment systems. In fact, the Agencies' own conclusions are that such waters can "significantly affect the chemical, physical, or biological integrity of" downstream traditional navigable waters, interstate waters, and the territorial seas. 80 Fed. Reg. at 37,068, 37,075.

210. The waste treatment system exclusion in the Clean Water Rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

NINTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Abandonment of Clean Water Act Jurisdiction over "Other Waters")

211. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

212. Unlike the Agencies' prior definition of waters of the United States, the Clean Water Rule does not assert jurisdiction over other waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." Instead, the Agencies limit themselves in large part to waters that have a significant nexus to traditionally navigable waters.

213. The Agencies' only stated basis for abandoning CWA jurisdiction for other waters that may lack a significant nexus and yet which have other impacts on interstate commerce is a mis-reading of the Supreme Court's decision in *SWANCC*. As such, the Agencies have failed to supply a valid reason for their major shift in their interpretation of the Act.

214. Further, the Agencies' failure to assert jurisdiction over waters long protected on the basis of their interstate commerce impacts unrelated to navigation is contrary to the language and purpose of CWA and Congress' intent that waters be protected to the fullest extent allowed by the commerce clause.

215. To the extent it fails to assert jurisdiction over "other waters" that were previously protected on the basis of interstate commerce impacts unrelated to navigation, the Clean Water Rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

TENTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Endangered Species Act

216. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

217. Promulgation of the Clean Water Rule is an "an action [that] may affect listed species or critical habitat" under Section 7(a)(2) of the ESA and its implementing regulations, 50 C.F.R. § 402.02(b), because, *inter alia*, it significantly reduces CWA protections for waters such as intermittent and ephemeral streams, ditches, wetlands, and groundwater that are used as habitat for numerous ESA-listed species, thereby increasing the likelihood that such habitat will be destroyed and the species will be harmed.

218. The Agencies failed to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to prepare a Biological Opinion prior to the promulgation of the Clean Water Rule, as required by ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.14.

219. The Agencies failed to "insure" that promulgation of the Clean Water Rule "is not likely to jeopardize the continued existence of" any threatened or endangered species or "the destruction or adverse modification" of critical habitat, in violation of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2).

220. The ESA violations set forth above will continue until they are abated by an order of this Court. This Court has jurisdiction to enjoin the Agencies' violations of the ESA alleged above and such relief is warranted under 16 U.S.C. § 1540(g).

ELEVENTH CLAIM FOR RELIEF

Delay Rule: Violations of the National Environmental Policy Act and the Administrative Procedure Act

221. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

222. NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

223. While the CWA exempts most actions taken by the EPA Administrator under the Act from NEPA, 33 U.S.C. § 1372(c)(1), that exemption does not apply to actions taken by the Corps.

224. The Agencies' promulgation of the Delay Rule is a major Federal action significantly affecting the quality of the human environment because the Delay Rule fundamentally alters the Act's regulatory landscape by, *inter alia*, denying most tributaries and wetlands per se protections under the Act afforded by the now-suspended Clean Water Rule.

225. The Delay Rule's effects on the environment are significant for the additional reasons that it affects the regulation of myriad activities in the proximity of "wetlands, wild and scenic rivers, or ecologically critical areas;" is "highly controversial;" establishes "a precedent for future actions with significant effects;" and may adversely affect numerous endangered species or their critical habitat. 40 C.F.R. § 1508.27(b)(3), (4), (6), and (9).

226. Moreover, the Corps' decision not to prepare an EA or an EIS for the Delay Rule was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A), because the Corps failed

to take a "hard look" at the potential environmental impacts of the Delay Rule and failed to provide a convincing statement of reasons why the potential effects of the Rule are insignificant.

TWELFTH CLAIM FOR RELIEF

Delay Rule: Violations of the Administrative Procedure Act

227. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

228. The Delay Rule is a final agency action subject to judicial review under the APA.

229. An agency action is arbitrary and capricious if the agency failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

230. The Delay Rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706(2)(A), for at least the following reasons:

(A) The Agencies failed to consider an important aspect of the problem, including most importantly the environmental and economic costs of delaying implementation of the Clean Water Rule by two years;

(B) The Agencies' only stated basis for the Delay Rule—preserving the "status quo" to achieve certainty and predictability in assertion of CWA jurisdiction—has no support in, and in fact is contradicted by, the administrative record; and

(C) The Agencies failed to meaningfully and substantively respond to comments submitted on the Proposed Delay Rule by Plaintiffs and others regarding the Rule's likely impacts to the environment and

ESA-listed species.

THIRTEENTH CLAIM FOR RELIEF

Delay Rule: Violation of the Endangered Species Act

231. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

232. Promulgation of the Delay Rule is an "an action [that] may affect listed species or critical habitat" under Section 7(a)(2) of the ESA and its implementing regulations, 50 C.F.R. § 402.02(b), because, *inter alia*, it undermines CWA protections for waters afforded per-se protections under the Clean Water Rule such as tributaries and their adjacent wetlands, waters that are used as habitat for numerous ESA-listed species, thereby increasing the likelihood that such habitat will be destroyed and the listed species using them will be harmed.

233. The Agencies failed to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to prepare a Biological Opinion prior to the promulgation of the Delay Rule, as required by ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.14.

234. The Agencies failed to "insure" that promulgation of the Delay Rule "is not likely to jeopardize the continued existence of" any threatened or endangered species or "the destruction or adverse modification" of critical habitat, in violation of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2).

235. The ESA violations set forth above will continue until they are abated by an order of this Court. This Court has jurisdiction to enjoin the Agencies' violations of the ESA alleged above and such relief is warranted under 16 U.S.C. § 1540(g).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Declare that the Corps' issuance of the FONSI prepared along with the Clean Water Rule was arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law;

(2) Declare that portions of the Clean Water Rule, and the entirety of the Delay Rule, are unlawful because they are arbitrary, capricious, an abuse of discretion, not in accordance with law, or in excess of the Agencies' statutory authority;

(3) Declare that portions of the Clean Water Rule are unlawful because the were promulgated without observance of procedure required by law;

(4) Enter an order vacating the Corps' FONSI and instructing the Corps to comply with NEPA for both the Clean Water Rule and the Delay Rule;

(5) Enter an order vacating only those unlawful portions of the Clean Water Rule, leaving the remainder of the Rule in place;

(6) Enter an order vacating the Delay Rule;

(7) Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and the ESA, 16 U.S.C. § 1540(g)(4); and

(8) Grant Plaintiffs such additional and further relief as the Court may deem just, proper, and necessary.

Dated this 13th day of June, 2018.

s/ Adam Keats

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