IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, CHARLESTON WATERKEEPER, AMERICAN RIVERS, CHATTAHOOCHEE RIVERKEEPER, CLEAN WATER ACTION, DEFENDERS OF WILDLIFE, FRIENDS OF THE RAPPAHANNOCK, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, NORTH CAROLINA COASTAL FEDERATION, and NORTH CAROLINA WILDLIFE FEDERATION, Plaintiffs, v. ANDREW R. WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency; the U.S. ENVIRONMENTAL PROTECTION AGENCY; RICKEY DALE "R.D." JAMES, in his official capacity as Assistant Secretary of the Army (Civil Works); and the U.S ARMY CORPS OF ENGINEERS, Defendants.	)	Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case arises from the defendant agencies' latest arbitrary and unlawful attempt to repeal the clear protections of the Clean Water Rule. Final Rule, Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("Final Repeal Rule" or "Final Rule"). The agencies' actions challenged in this case remove

crucial protections from the nation's waters, including streams, marshes, and bays across South Carolina and near this honorable Court. Like the Suspension Rule earlier invalidated by this Court—*see* Order at 1, *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (2018) (No. 2-18-cv-330-DCN) (Order Vacating Rule and Issuing a Nationwide Injunction)—the present rulemaking violates fundamental provisions of administrative law in furtherance of an ongoing campaign to diminish and impair the protections of the Clean Water Act—a bedrock federal statute that protects America's waters from pollution.

2. The very first sentence of the Clean Water Act states the law's unequivocal purpose: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Pub. L. No. 92-500, § 101(a), 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251(a)). While the Clean Water Act established a number of programs aimed at achieving this objective, many critical requirements depend on a single prohibition. Under the statute, no one is allowed to discharge pollutants into the "waters of the United States" without statutory authorization. 33 U.S.C. §§ 1311(a), 1362(12) (prohibiting the unauthorized "discharge of any pollutant" into "navigable waters"); *id.* § 1362(7) (defining "navigable waters" as "the waters of the United States").

3. For decades, the meaning of "waters of the United States"—and the resulting reach of the Clean Water Act—proved a persistent source of contention. Although the Supreme Court repeatedly affirmed that federal protections extend to wetlands and streams that are not "navigable in fact[,]"—that is, "used, or . . . susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water," *The Daniel Ball*, 77 U.S. 557, 563 (1870), the Court also issued decisions that spawned disagreement about the regulatory line between

"jurisdictional" and "non-jurisdictional" waters. *See Rapanos v. United States*, 547 U.S. 715, 730-31 (2006) (citing *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) ("SWANNC"), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)). As a result, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers —the agencies charged with carrying out the Clean Water Act at the federal level, and defendants in this case—evaluated "the jurisdiction of waters on a case-specific basis far more frequently than [wa]s best for clear and efficient implementation of the [Clean Water Act]." Proposed Rule, Definition of "Waters of the U.S." under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014). This uneven, case-by-case approach also deprived many waters of the protections they were owed under the Clean Water Act.

4. The Clean Water Rule, finalized by the agencies in 2015, remedied both problems by setting forth clearer lines that "ensure protection for the nation's public health and aquatic resources, and increase [Clean Water Act] program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act." Final Rule, Clean Water Rule: Definition of "Waters of the U.S.," 80 Fed. Reg. 37,054 (June 29, 2015) ("Clean Water Rule"). The regulation confirmed that the protective reach of the Clean Water Act extends to wetlands and tributaries "that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters[.]" *Id.* at 37,055. At the same time, it "clarif[ied] and simplif[ied]" the implementation of the statute "through clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdictional by rule"—"limit[ing] the need for case-specific analysis." *Id.* In establishing these definitions and boundaries, the agencies were "guided by the best available peer-reviewed science" and

"over 1 million public comments . . . , the substantial majority of which supported the [agencies'] proposed rule[.]" *Id.* at 37,057.

5. This case challenges the administration's arbitrary and unlawful attempt to repeal the protections of the Clean Water Rule. Proposed Rule, Definition of "Waters of the U.S."—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,901 (July 27, 2017) ("Proposed Repeal Rule"); Final Repeal Rule, 84 Fed. Reg. 56,626. As shown below, the manner in which the repeal has been carried out—in essence, by executive fiat—betrays an extraordinary disregard for federal rulemaking requirements and the views of the American public. The Final Repeal Rule also reinstates an illegal regime—the regulations that pre-dated the Clean Water Rule as limited by guidance, *see* Final Repeal Rule, 84 Fed. Reg. at 56, 626, 56,659-62—that runs contrary to Supreme Court precedent, unlawfully leaving certain waters of the United States unprotected due to the guidance's unduly narrow interpretation of Justice Kennedy's significant-nexus test.

6. The administration's attack on the Clean Water Rule did not come as a surprise, given former U.S. Environmental Protection Agency Administrator Scott Pruitt's multi-year campaign to eradicate the Clean Water Rule—a campaign that began when Mr. Pruitt was the Attorney General of Oklahoma. Weeks before Inauguration Day, President Trump announced he would place Mr. Pruitt at the helm of the Environmental Protection Agency, where he could continue his efforts to dismantle clean water protections from inside the agency.

7. Less than two weeks after Mr. Pruitt's confirmation, the agencies' official efforts to eliminate the Clean Water Rule began when, on February 28, 2017, President Trump issued an executive order directing former Administrator Pruitt and the Assistant Secretary of the Army for Civil Works to "review the . . . Clean Water Rule . . . for consistency with the [Administration's

deregulatory] policy . . . and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule,'' Exec. Order No. 13,778, § 2(a) (Feb. 28, 2017). In his order, President Trump also instructed "the Administrator and the Assistant Secretary . . . [to] consider interpreting the term 'navigable waters[]' . . . in a manner consistent with the opinion of Justice Antonin Scalia in [*Rapanos*]." *Id*. § 3.

8. In response to President Trump's order, the agencies proposed to repeal the Clean Water Rule and promised to issue a new definition following a "substantive review of the appropriate scope of 'waters of the United States.'" Proposed Repeal Rule, 82 Fed. Reg. 34,901. With the repeal, the agencies proposed to revive the case-by-case regime that pre-dated the Clean Water Rule and runs contrary to Justice Kennedy's controlling *Rapanos* opinion. *Id.* at 34,900.

9. The Proposed Repeal Rule did not consider the relative merits of the Clean Water Rule or the pre-2015 regime the agencies proposed to adopt, and the agencies discouraged public comment on those subjects. Numerous commenters objected to the Proposed Repeal Rule, in part due to the agencies' refusal to consider the substance of the Clean Water Rule and the pre-2015 regulations it replaced (and that the proposal would adopt anew).

10. After receiving more than 680,000 comments on the Proposed Repeal Rule, the agencies changed course and announced a new proposal to achieve the result directed by the Executive Order—by suspending the Clean Water Rule for two years. Proposed Rule, Definition of "Waters of the U.S."—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017) ("Proposed Suspension Rule"). According to the agencies, the suspension would ensure that the United States Environmental Protection Agency and the U.S.

Army Corps of Engineers would have "sufficient time" to undertake the "regulatory process for reconsidering the definition of 'waters of the United States[.]'" *Id.* at 55,544. The agencies claimed that the Suspension Rule—which became effective on February 6, 2018—would have replaced the Clean Water Rule for two years with the case-by-case regulatory regime that existed prior to the Clean Water Rule. Final Rule, Definition of ''Waters of the United States''—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5200 (Feb. 6, 2018) ("Suspension Rule").

11. This Court vacated and issued a nationwide injunction of the Suspension Rule because the agencies "violated the APA by refusing to solicit or consider any substantive comments on the change of [the] regulatory definition to 'waters of the United States'" that would result from suspending the Clean Water Rule and implementing the pre-Clean Water Rule regulatory regime. *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 963.

12. Perhaps recognizing that the Suspension Rule's fatal flaws were contained in the Proposed Repeal Rule as well, the agencies published a supplemental repeal notice on July 12, 2018 setting forth a post-hoc rationale to support their pre-determined effort to repeal the Clean Water Rule. *See* Supplemental Notice of Proposed Rulemaking, Definition of "Waters of the U.S."—Recodification of Pre-Existing Rules, 83 Fed. Reg. 32,227, 32,227-28 (July 12, 2018). In the supplemental notice, the agencies did not add to or otherwise alter the language of the Proposed Repeal Rule; they instead gave new but belated justifications for their desire to "permanently repeal" the Clean Water Rule. *See id.* at 32,227-28. Rather than providing their "reasoned explanation" for the repeal, the agencies offered various conclusions they "proposed" to reach about the supposed flaws of the Clean Water Rule, with no supporting agency analysis, and invited the public to provide information supporting those conclusions. *E.g.*, *id.* at 32,228.

Again the agencies did not consider or seek comment on the actual protections provided by the Clean Water Rule (or the pre-existing case-by-case regime) for the nation's waters; instead, they directed public comment to legal and administrative issues said to justify the Clean Water Rule repeal. *E.g.*, *id.* at 32,227-28, 32,231, 32,238. Despite the importance of the rulemaking, the novelty of the approach taken by the agencies, and multiple requests for extension, the agencies limited public comment to 30 days.

13. The agencies finalized the Repeal Rule on October 22, 2019, 84 Fed. Reg. 56,626 (Oct. 22, 2019). Although these same agencies rejected the pre-2015 case-by-case regime just four years ago in promulgating the Clean Water Rule and again recently in proposing a revised definition of "waters of the United States," *see* Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (Feb. 14, 2019) ("Replacement Rule"), they adopted that same case-by-case regime by repealing the Clean Water Rule.

14. The Final Repeal Rule does not discuss the Clean Water Rule's four-year process of outreach and analysis that considered "over 1 million public comments . . . , as well as input provided through . . . over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others." Clean Water Rule, 80 Fed. Reg. at 37,057.

15. The agencies' Repeal Rule, proposed in gross violation of the Administrative Procedure Act, is both arbitrary and unlawful. It also violates the Due Process Clause of the Constitution. This Court should set the regulation aside to protect the integrity of the nation's waters and the rule of law.

JURISDICTION AND VENUE

16. This action is brought pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, which waive the defendants' sovereign immunity. *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019). This Court has jurisdiction over the plaintiffs' claims under 28 U.S.C. § 1331 (federal question), and may issue a declaratory judgment and further relief pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201 and 2202. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, ---U.S.---, 138 S. Ct. 617, 623 (2018).

17. Venue is proper in this District and Division under 28 U.S.C. § 1391(e)(1) and Local Civ. Rule 3.01(A) (D.S.C.) because the South Carolina Coastal Conservation League and Charleston Waterkeeper, two of the plaintiffs in this action, reside within the District and the Charleston Division.

PLAINTIFFS

18. The plaintiff organizations in this case, along with their members, are committed to protecting "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

19. Plaintiff South Carolina Coastal Conservation League is a nonprofit organization incorporated under the laws of South Carolina. The League maintains its headquarters office in Charleston, South Carolina, and currently has approximately 2,500 members. Its mission is to protect the natural environment of South Carolina's coastal plain, and to enhance the quality of life in the state's communities by working with individuals, businesses, and government to ensure balanced solutions to environmental problems. Protecting wetlands and aquatic habitat in the Lowcountry of South Carolina has been an important goal of the League since it was first established in 1989. Many of the League's members regularly visit rivers, streams, wetlands, and

other aquatic habitats for recreational activities, such as birding, wildlife observation, fishing, paddling, hiking, photography, and other uses. They own businesses that rely on eco-tourism in the Lowcountry, and any threat to clean water is a threat to their livelihood.

20. Plaintiff Charleston Waterkeeper is a Charleston, South Carolina based organization whose mission is to protect, promote, and restore the quality of Charleston's waterways while creating a more engaged public through education, outreach, and celebration of our collective right to clean water. As a result of its focus on water-quality issues in the Charleston Harbor Watershed, which includes both the Ashley and Cooper river basins, Charleston Waterkeeper operates on the front lines, working with the community to patrol and monitor the region's waterways. The organization relies on strict empirical evidence to identify water-quality issues and reach pragmatic solutions. Charleston Waterkeeper's goal is to protect the public's right under the Clean Water Act to clean, swimmable, fishable, and enjoyable water. Members of Charleston Waterkeeper care about clean water in the region and regularly visit rivers, streams, wetlands, and other aquatic habitats throughout the area for recreational activities, including hiking, paddling, swimming, fishing, and wildlife viewing. They also rely on clean water for their livelihoods.

21. Plaintiff American Rivers works to protect wild rivers, restore damaged rivers, and conserve clean water for people and nature. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through educational and advocacy efforts, on-the-ground projects, and an annual America's Most Endangered Rivers campaign. Headquartered in Washington, D.C., American Rivers has offices across the country—including two in South Carolina—and more than 275,000 members, supporters, and volunteers. American Rivers' members fish, swim, and canoe in rivers that will be directly affected by this rule. In addition to

actively using the rivers, the members enjoy hiking along their banks, but are fearful that dirty, polluted water will disturb their enjoyment.

22. Plaintiff Chattahoochee Riverkeeper is dedicated to securing the protection and stewardship of the Chattahoochee River watershed—including its lakes, tributaries, and wetlands—in order to restore and conserve the watershed's ecological health for the people and wildlife that depend upon it. Based in Georgia, Chattahoochee Riverkeeper is an advocacy organization with more than 8,700 members committed to protecting and restoring the Chattahoochee River Basin—a drinking-water source for nearly four million people in Georgia, Alabama, and Florida. From the north Georgia mountains to the Florida border, the Chattahoochee River is impacted by unplanned development; storm runoff and trash from roads, construction sites, and industries; and discharges from sewage-treatment plants. While significant improvements have been made in the river, much remains to be accomplished. Chattahoochee Riverkeeper uses advocacy, education, research, communication, cooperation, monitoring, and legal actions to protect and preserve the Chattahoochee and its watershed. Chattahoochee Riverkeeper's members regularly swim and paddle in the Chattahoochee River and are fearful that increased water pollution allowed under this rule could prevent them from enjoying the river.

23. Plaintiff Clean Water Action is a national, non-profit membership organization incorporated under the laws of the District of Columbia, with its principal place of business in Washington, D.C. Clean Water Action conducts campaigns on the national level, as well as state and local campaigns in over a dozen offices around the country. Clean Water Action's mission includes the prevention of pollution in the nation's waters, the protection of natural resources, the creation of environmentally safe jobs and businesses, and the empowerment of people to make

democracy work. Its activities include policy research and advocacy, public education, and grassroots mobilization. Clean Water Action has been involved with the Clean Water Act since its founding in 1972, and has also been involved in implementation activities throughout its history. Clean Water Action's core programs have always included efforts to ensure broad jurisdiction under the Clean Water Act to include wetlands and streams, as well as efforts to strengthen the Act's implementation and enforcement and to work toward the Act's goal of zero discharge of pollution into the waters of the United States. Since 2002, advocating to ensure that wetlands, streams, and other vital water resources are protected by the Clean Water Act's pollution-prevention programs has been a priority campaign for Clean Water Action. In addition to using rivers across the country for recreation, Clean Water Action's members are concerned about the effects of the rule on their drinking water.

24. Plaintiff Defenders of Wildlife is dedicated to protecting the nation's native plants and wildlife and the habitats upon which they depend. Founded in 1947, Defenders has more than a million members and supporters nationwide, over 4,500 of whom live in South Carolina. Defenders works to protect and restore the fragile aquatic habitats that freshwater and marine species require to survive. Defenders' commitment to science-based policies informs its conservation work at the local, state, and national levels. Defenders focuses on the conservation of threatened and endangered species and on preventing other species from becoming similarly imperiled. Defenders' members live near, fish, boat and otherwise enjoy rivers and streams that will be impacted by the rule. They also worry that the rule will threaten wildlife dependent on the health of those rivers and streams.

25. Plaintiff Friends of the Rappahannock was founded in 1985 as a non-profit, grassroots conservation organization based in Fredericksburg, Virginia. It works at the local,

state, and federal levels to ensure the maximum protections for the Rappahannock River, which flows from the Blue Ridge Mountains to the Chesapeake Bay. Friends of the Rappahannock's members regularly use waters within the Rappahannock River Basin for paddling, swimming, and walking along. They are concerned that this rule will degrade the health of these waters and of their drinking water.

26. Plaintiff National Wildlife Federation ("NWF") is a national non-profit membership organization dedicated to the protection of the environment and natural resources. Founded in 1936, NWF is a member-supported nonprofit conservation, advocacy, and education organization. NWF has more than six million members, partners, and supporters nationwide, and has affiliate organizations in fifty-two states and territories. NWF's mission is to educate, mobilize, and advocate for preserving and strengthening protection for wildlife and wild places. Among other things, this includes advocating for the protection of vital resources such as the wetlands, streams, and river s upon which wildlife depends. As a result, NWF has a strong interest in ensuring that these waters are protected by the Clean Water Act, and has worked on behalf of its members and affiliates for the last eighteen years—including participating in the rulemaking that resulted in the Clean Water Rule—to ensure that vulnerable waters receive the full protection of the Clean Water Act. NWF's members frequently use and enjoy rivers and streams, and enjoy observing the wildlife they sustain. NWF's members also have made critical life decisions based on their beliefs that clean water would be protected, from buying homes nearby rivers to creating businesses that rely on clean water.

27. Plaintiff Natural Resources Defense Council ("NRDC") is a national environmental advocacy group organized as a New York non-profit membership corporation. NRDC has hundreds of thousands of members nationwide, over 2,500 of whom live in South

Carolina. NRDC's mission is to safeguard the Earth, its people, its plants and animals, and the natural systems on which all life depends. NRDC staff members work to secure Clean Water Act protections for a broad range of aquatic resources, including small, seasonal, and rain-dependent streams, as well as wetlands, ponds, and other waters. In furtherance of these goals, NRDC worked to ensure that the administrative action that culminated in the Clean Water Rule provided robust protections for these vital water resources, on which NRDC's members and many other Americans depend. NRDC's members live near, get their drinking water from, enjoy hiking and birdwatching nearby rivers and other waters that will be negatively impacted by this rule.

28. Plaintiff North Carolina Coastal Federation is a member-supported organization that focuses on protecting and restoring the North Carolina coast. For over 35 years, the Coastal Federation has been in the field restoring miles of coastline; training and educating students, adults, and communities to take actions that result in cleaner coastal waters; and advocating for an accessible, healthy, and productive coast. The Coastal Federation's members work, live and play in and around North Carolina's coastal ecosystems, whether through fishing, boating, swimming, surfing, or other activities. Those activities depend on clean water and are threatened by this rule.

29. Plaintiff North Carolina Wildlife Federation has worked for all wildlife and wildlife habitat since 1945, bringing together citizens, outdoor enthusiasts, hunters and anglers, government, and industry to protect North Carolina's natural resources. From the Great Smoky Mountains to the Outer Banks, the Wildlife Federation is made up of people who value wildlife and wild places, and the many ways to enjoy them. Through its policy and protection work, research and education, and direct hands-on conservation projects, the Wildlife Federation works collectively for the places and species that have no voice. Water conservation is a critical part of

the Federation's efforts. Many of the Wildlife Federation's members are wildlife enthusiasts who enjoy canoeing, kayaking, and fishing in waters that will be impacted by this rule.

30. If the defendant agencies' unlawful repeal of the Clean Water Rule is allowed to stand, the plaintiff organizations and their members will be irreparably injured.

31. First, the challenged regulation strips Clean Water Act protections from some of the most important wetlands and streams across the country, allowing them to be degraded and destroyed. *See, e.g.*, U.S. EPA and Dep't of the Army, Economic Analysis for the Proposed Definition of "Waters of the U.S."—Recodification of Pre-existing Rules (EPA-HQ-OW-2017-0203-0002) (June 2017) ("Economic Analysis I"), at 2 (stating that the elimination of the Clean Water Rule's protections would "result[] in an overall reduction in positive jurisdictional determinations" under the Clean Water Act). These impacts will be particularly pronounced along the Southeastern coastal plain, which is marked by two types of wetlands for which the Clean Water Rule clarified protection—Carolina Bays and pocosins. *See, e.g.*, Clean Water Rule, 80 Fed. Reg. at 37,071-37,073. The challenged Repeal Rule would also weaken protections for headwater streams in the Blue Ridge Mountains of South Carolina and other states, harming the water quality and integrity of vulnerable water resources, including southern trout streams and the headwaters of major rivers and drinking water sources.

32. Because the plaintiff conservation groups and their members have significant, particularized, and concrete interests in maintaining the integrity of Carolina Bays, pocosins, headwater streams, wetlands, and similar waters, they will be injured by the challenged Repeal Rule. Unless the regulation is vacated, the recreational use and enjoyment of wetlands and streams by the groups' members will be significantly impaired. The groups and their members will also be burdened by legitimate concerns about the future loss of wetlands and streams as a

result of the Clean Water Rule's repeal. They are also injured by the agencies' failure to provide a meaningful opportunity to comment on a rule that so significantly impacts the nation's waterways and plaintiffs' ability to use and enjoy those waterways.

33. Second, in stripping Clean Water Act protections from wetlands and streams, the challenged regulation will also harm the nation's downstream waters. As the defendant agencies acknowledged in adopting the Clean Water Rule, both "[p]eer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes." Clean Water Rule, 80 Fed. Reg. at 37,055. By limiting the extent of upstream protections, the Repeal Rule will harm the integrity of "traditional navigable waters," "the territorial seas[,]" and other downstream waters. *Id.*

34. Because the plaintiff conservation groups and their members have substantial interests in the integrity of downstream waters, they will be irreparably injured by the challenged regulation. The quality of the nation's waters is of fundamental importance to each of the groups. The groups' members use and rely on downstream waters for recreation, drinking water, and other needs. The repeal of the Clean Water Rule's protections will irreparably harm these interests.

35. Finally, in unlawfully narrowing the reach of the Clean Water Act, the challenged regulation will require the plaintiff groups and their members to advocate for local water-quality protections before a multitude of agencies in jurisdictions across the United States. This jurisdiction-by-jurisdiction fight for protections that are owed to upstream waters under federal

law will be extremely resource intensive and would divert resources from the groups' other programs and activities.

DEFENDANTS

36. Defendant Andrew R. Wheeler, who signed the challenged regulation, is sued in his official capacity as the Administrator of the United States Environmental Protection Agency.

37. Defendant United States Environmental Protection Agency ("EPA") is the federal agency responsible for implementing most of the Clean Water Act's provisions. Despite its recent turn toward eliminating essential environmental protections, the EPA was established with the "mission" of "protect[ing] human health and the environment." U.S. EPA, Our Mission and What We Do, https://19january2017snapshot.epa.gov/aboutepa/our-mission-and-what-we-do_.html (last visited Aug. 8, 2019), and https://perma.cc/M23S-MUUC (permanent link); *see also* Reorganization Plan No. 3 of 1970, 3 C.F.R. § 1072 (1970), *reprinted in* 5 U.S.C. app., at 214, 217 (2016) (providing that the first of the EPA's "principal roles and functions" is "[t]he establishment and enforcement of environmental protection standards consistent with national environmental goals"). Consistent with this mission, the primary "purpose[s]" of the agency are to ensure:

> that . . . all Americans are protected from significant risks to human health and the environment where they live, learn and work; . . . [that] national efforts to reduce environmental risk are based on the best available scientific information; . . . [and that] federal laws protecting human health and the environment are enforced fairly and effectively[.]

U.S. EPA, Our Mission and What We Do.

38. Defendant Rickey Dale "R.D." James is sued in his official capacity as Assistant Secretary of the Army (Civil Works). Mr. James signed the challenged rule on behalf of the United States Army Corps of Engineers.

39. Defendant United States Army Corps of Engineers ("Corps") is a federal agency housed within the United States Army, which is part of the United States Department of Defense. Under the Clean Water Act, the Corps implements the permit program for the discharge of dredged and fill material into the waters of the United States. *See* 33 U.S.C. § 1344(a).

BACKGROUND

40. By the early 1970s, the nation's water-quality crisis could no longer be denied. As the House Committee on Public Works concluded in 1972, "America's waters [we]re in serious trouble, thanks to years of neglect, ignorance and public indifference." H.R. Rep. No. 92-911, at 1 (1972). "Many of the Nation's navigable waters [we]re severely polluted[,]" "major waterways near the industrial and urban areas [we]re unfit for most purposes[,]" and "many lakes and confined waterways [we]re aging rapidly under the impact of increased pollution[.]" S. Rep. No. 92-414, at 7 (1971). "Rivers, lakes, and streams [we]re being used[,]" in short, "to dispose of man's wastes rather than to support man's life and health[.]" *Id.*

41. The state of the nation's waters was all the more troubling given the history of congressional efforts to address water pollution. More than twenty years before, Congress had adopted the Federal Water Pollution Control Act of 1948. *See* H.R. Rep. No. 92-911, at 1; Pub. L. No. 80-845, 62 Stat. 1155 (1948). Other statutes followed, including the Federal Water Pollution Control Act of 1956, Pub. L. No. 84-660, 70 Stat. 498 (1956); the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (1966); and the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970). This legislation, however, largely limited "the Federal role . . . to support of, and assistance to, the States[,]" which were charged with "lead[ing] the national effort to prevent, control and abate water pollution." S. Rep. No. 92-414, at 1. This approach

failed. After assessing the condition of the nation's waters during a series of hearings in 1970 and 1971, the Senate Committee on Public Works was forced to conclude that "the national effort to abate and control water pollution ha[d] been inadequate in every vital aspect[.]" *Id.* at 7.

I. The Clean Water Act and the "Waters of the United States"

42. With the passage of the Clean Water Act in 1972, a bipartisan Congress fundamentally transformed the nation's water-quality program. Unlike previous federal statutes, the Clean Water Act was enacted to achieve an unequivocal objective: "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "This objective[,]" the Supreme Court later affirmed,

> incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems . . . [are] maintained." H.R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972)[.]

Riverside Bayview Homes, 474 U.S. at 132-33.

43. The Clean Water Act established this "broad federal authority" by "defin[ing] the waters covered by the Act broadly." *Riverside Bayview Homes*, 474 U.S. at 133. Under the statute, the discharge of pollutants into "navigable waters" is generally prohibited in the absence of a permit issued by the EPA, the Corps, or an authorized state—a system known as cooperative federalism. 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12). Before the Act, the term "navigable waters" was interpreted to include only those waters that are "navigable in fact"—that is, "used, or . . . susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on

water." *The Daniel Ball*, 77 U.S. at 563. With the Clean Water Act, however, Congress expanded the phrase "navigable waters" to include "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). "In adopting this definition of 'navigable waters,'" the Supreme Court has said, "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview Homes*, 474 U.S. at 133.

44. The Supreme Court's most recent decision regarding "the waters of the United States" was issued more than 13 years ago in *Rapanos v. United States*, 547 U.S. at 715. The case raised the question of whether the Clean Water Act's protections could be extended to wetlands that "are not adjacent to waters that are navigable in fact." *Id.* at 759 (Kennedy, J., concurring). As Chief Justice Roberts noted in a brief concurrence that emphasized the need for clarification through agency rulemaking, "no opinion command[ed] a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act." *Id.* at 758.

45. In an opinion joined by three other members of the Court, Justice Scalia acknowledged that "the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term[.]" *Rapanos*, 547 U.S. at 731. He argued, however, that the statute's protections only reached wetlands with "a continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water[.]" *Id.* at 739, 742.

46. Justice Scalia's narrow reading of the Clean Water Act was rejected by five members of the Court. In a concurring opinion, Justice Kennedy explained that the limits imposed by Justice Scalia's standard would give "insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory

mandate." *Rapanos*, 547 U.S. at 777-78. According to Justice Kennedy, "a water or wetland" is a "water of the United States" whenever it "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (quoting *SWANCC*, 531 U.S. at 167. "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,'" he concluded, "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.

47. The Court's four remaining justices declared in a dissent that they would affirm an assertion of federal jurisdiction at least "in all . . . cases in which either the [Scalia or Kennedy] . . . test is satisfied[.]" *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting). As a result, Justice Kennedy's "significant nexus" standard is plainly a basis for finding a water to be protected. This confirms that the more restrictive limitations Justice Scalia would have imposed on the protections of the Clean Water Act are not permitted by the Act, i*d.* at 739, 742, 759, and waters satisfying Justice Kennedy's significant-nexus test are waters of the United States. Every court of appeals to consider the issue has agreed. *See, e.g.*, *United States v. Gerke Excavating, Inc*., 464 F.3d 723, 724-25 (7th Cir. 2006); *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007); *United States v. Moses*, 496 F.3d 984, 989-91 (9th Cir. 2007); *N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Bailey*, 571 F.3d 791, 798-800 (8th Cir. 2009); *United States v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir. 2009); *United States v. Lucas*, 516 F.3d 316, 325-27 (5th Cir. 2008); *United States v. Donovan*, 661 F.3d 174, 183-84 (3d Cir. 2011); *Precon Dev. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 289 (4th Cir. 2011); and *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs, Charleston Dist*., 501 F. Appx. 268, 275 (4th Cir. 2012).

48. In 2008, the EPA and the Corps issued a guidance memorandum aimed at "ensur[ing] that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions [we]re consistent with the *Rapanos* decision[.]" *See* Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos v. United States* (EPA-HQ-OW-2007-0282-0001) (Dec. 2, 2008), at 4 ("2008 Guidance"), https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (last visited Aug. 20, 2019), and https://perma.cc/56W8-KNXJ (permanent link). The guidance was never codified or subjected to judicial review; as explained below, it was also contrary to Supreme Court precedent.

49. In identifying the "waters over which the agencies w[ould] assert jurisdiction categorically and on a case-by-case basis," the 2008 guidance interpreted Justice Kennedy's "significant nexus" test as allowing the agencies to ignore the collective importance of many similarly situated waters, 2008 Guidance at 4, 8-12, despite Justice Kennedy's conclusion that the Clean Water Act protects wetlands and other upstream waters with a collectively significant impact on downstream waters, *Rapanos*, 547 U.S. at 780-81. With respect to wetlands, in particular, Justice Kennedy had noted that "the requisite nexus" can be found whenever the wetland at issue "significantly affect[s] the chemical, physical, and biological integrity" of a navigable-in-fact water "either alone or in combination with similarly situated lands in the region[.]" *Id.* at 780. "Where an adequate nexus is established for a particular wetland," he added, "it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." *Id.* at 782. As a number of the plaintiff conservation groups noted in their comments on the post-*Rapanos* guidance:

> [t]he natural reading of [Justice Kennedy's] passages is that EPA and the Corps, using their expert judgment, can evaluate available information about specific wetlands, establish that a "significant nexus" is present, and then notify the regulated community and the public that wetlands of the same type over a specified geographic area will be considered protected waters. The agencies also can make . . . similar jurisdictional judgments about wetlands adjacent to categories of tributaries which are important enough . . . that the adjacent wetlands will likely have a significant water quality effect (physical, chemical, or biological) on downstream traditionally navigable waters.

American Rivers, *et al.*, Comments on the Joint Guidance Regarding Clean Water Act Jurisdiction After *Rapanos* (EPA-HQ-OW-2007-0282) (Jan. 21, 2008), at 21, https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2007-0282-0227&attachmentNumber=2&contentType=pdf (last visited Aug. 22, 2019), and https://perma.cc/R5T3-H9QT (permanent link).

50. Rather than establishing a mechanism for making categorical determinations regarding the collective significance of wetlands in a given area, however, the agencies' 2008 guidance largely relied on a narrow, "case-by-case" approach. 2008 Guidance at 4. Most notably, the guidance eliminated the required evaluation of all "similarly situated [wet]lands *in the region*," *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added), replacing it with a more limited analysis of "all wetlands *adjacent to the same tributary*[,]" 2008 Guidance at 10 (emphasis added). Under this scheme, as the agencies have acknowledged, "almost all waters and wetlands across the country [were] theoretically . . . subject to a case-specific jurisdictional determination[,]" which "result[ed] in inconsistent interpretation of [Clean Water Act] jurisdiction and perpetuate[d] ambiguity over where the [Clean Water Act] applies. " Clean Water Rule, 80 Fed. Reg. at 37,056.

51. To add to the inconsistency, and illegality, of the pre-2015 regime, so-called geographically "isolated" waters effectively lacked federal protection from the agencies, *even if* they had a significant nexus to traditional navigable waters. *See* Testimony of Benjamin H. Grumbles, EPA Assistant Administrator for Water, Hearing of House Transportation & Infrastructure Committee: "The 35th Anniversary of the Clean Water Act: Successes and Future Challenges" (Oct. 18, 2007), http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg38565/html/CHRG-110hhrg38565.htm (last visited Aug. 9, 2019) and https://perma.cc/N3WN-WHQP (permanent link). Moreover, the 2008 Guidance gives field staff the option not to follow the guidance "depending on the circumstances"—leading to further uncertainty and inconsistent application. 2008 Guidance at 4 n. 17.

III. The Clean Water Rule

52. Given the significant shortcomings of their prior regulations and guidance, and at the prompting of "[m]embers of Congress, developers, farmers, state and local governments, and energy companies," the EPA and the Corps promulgated the Clean Water Rule to "ensure protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act." Clean Water Rule, 80 Fed. Reg. at 37,054, 37,056-57. In developing the regulation, the agencies reviewed and relied on the "best available peer-reviewed science[,]" the decisions of the Supreme Court, and the clear "objective" of the Clean Water Act. *See id.* at 37,056, 37,057. Ultimately, the agencies appropriately rested their interpretation of the statute on Justice Kennedy's controlling *Rapanos* opinion and the "significant nexus" standard. *Id.* at 37,060. Under the Clean Water Rule, "[w]aters are 'waters of the United States' if they, either alone or in combination with similarly situated waters in the region, significantly affect the

chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." *Id.*

53. To answer the question of which waters satisfied the "significant nexus" standard, the agencies undertook more than four years of research, analysis, and public outreach.

54. The agencies' extensive public outreach on the Clean Water Rule began in 2011 and continued through the end of the rulemaking process. That consultation included outreach to state and local governments, more than 40 Native American tribes, the National Governors Association, the National Conference of State Legislatures, the Council of State Governors, the National Association of Counties, the National Association of Towns and Townships, the International City/County Management Association, and the Environmental Council for the States. Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States," Under the Clean Water Act, Final Rule (Docket ID No. EPA-HQ-OW-2011-0880) (Submitted by NRDC to EPA Docket Center, Docket No. EPA-HQ-OW-2017-0203, August 11, 2017); Clean Water Rule, 80 Fed. Reg. 37,102. The EPA documented this extensive voluntary outreach in a report that it included in the record. *See* Report on the Discretionary Consultation and Outreach to State, Local, and County Governments on the Clean Water Rule: Definition of "Waters of the United States," Final Rule (Docket ID No. EPA-HQ-OW-2011-0880) (Submitted by NRDC to EPA Docket Center, Docket No. EPA-HQ-OW-2017-0203, August 11, 2017).

55. It was also during this time that the agencies built a considerable scientific record in support of the Clean Water Rule. *See* U.S. EPA Office of Research and Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (EPA/600/R-14/475F) (Jan. 2015) ("Science Report"), at xii,

http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id= 523020 (last visited Aug. 22, 2019), and https://perma.cc/5KDU-HP4W (permanent link).

56. In 2015, the EPA's Office of Research and Development published the results of a comprehensive inquiry into the chemical, physical, and biological connections between upstream and downstream waters. Science Report at ES-1. After synthesizing more than 1,200 peer-reviewed publications, the agency's report reached a series of "major conclusions" that would serve as the foundation of the Clean Water Rule. *Id.* at ES-2. First, the report confirmed that "streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters." *Id.*; *see* Clean Water Rule, 80 Fed. Reg. at 37,057, 37,063 (summarizing report). "All tributary streams," the agency declared, "including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported." Science Report at ES-2. Second, in addressing "wetlands and open waters in riparian areas and floodplains[,]" the report determined that they "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." *Id.* at ES-2 to ES-3; *see* Clean Water Rule, 80 Fed. Reg. at 37,057, 37,063 (summarizing report). Finally, it noted that "[w]etlands and open waters in non-floodplain landscape settings . . . provide numerous functions that benefit downstream water integrity"—including "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." Science Report at ES-3 to ES-4; *see also* Clean Water Rule, 80 Fed. Reg. at 37,057, 37,063 (summarizing report).

57. With the Clean Water Rule, the EPA and the Corps translated this science into clear regulatory standards that are "easier to understand, consistent, and environmentally more protective" than the agencies' prior regulations and guidance. Clean Water Rule, 80 Fed. Reg. at 37,057. The regulation, which became effective on August 28, 2015, organizes the nation's waters into three classes: "[w]aters that are jurisdictional in all instances, waters that are excluded from jurisdiction, and a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional." *Id.*

58. The class of waters deemed "jurisdictional in all instances" is centered around traditional navigable waters, interstate waters, and the territorial seas, along with "impoundments" of such waterbodies. Clean Water Rule, 80 Fed. Reg. at 37,057-58; *see also* 33 C.F.R. § 328.3(a)(1)-(4) (2015). The Clean Water Rule also includes "tributaries" that contribute flow to a primary water and have "a bed and banks and an ordinary high water mark[,]" and "waters adjacent" to other jurisdictional waters, "including wetlands, ponds, lakes, oxbows, impoundments, and similar waters[.]" 33 C.F.R. § 328.3(a)(5)-(6), (c)(3) (2015). According to the agencies, "[t]he great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters." Clean Water Rule, 80 Fed. Reg. at 37,058. As to "adjacent waters," the regulation uses "bright line boundaries" to target "those waters that . . . possess the requisite connection to downstream waters and function as a system to protect the chemical, physical, or biological integrity of those waters." *Id.*; *see also* 33 C.F.R. § 328.3(c)(1)-(2) (2015) (defining "adjacent" to include "[a]ll waters located within 100 feet of the ordinary high water

mark" of another jurisdictional water; "[a]ll waters located within the 100-year floodplain of . . . [another jurisdictional] water . . . and not more than 1,500 feet from the ordinary high water mark of such water[;]" "[a]ll waters located within 1,500 feet of the high tide line of . . . [another jurisdictional] water[;]" and "all waters within 1,500 feet of the ordinary high water mark of the Great Lakes").

59. In delineating the "narrow category of waters subject to case-specific analysis" under the Clean Water Rule, the EPA and the Corps specifically "identified . . . five specific types of waters in specific regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they function alike and are sufficiently close to function together in affecting downstream waters." Clean Water Rule, 80 Fed. Reg. at 37,057, 37,059. "Consistent with Justice Kennedy's opinion in *Rapanos*, the agencies determined that . . . [these] waters"—"Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands"—"should be analyzed 'in combination' (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus" to such downstream waters. *Id.* at 37,059; 33 C.F.R. § 328.3(a)(7) (2015). By providing for watershed-wide assessments of "similarly situated" waters, 33 C.F.R. § 328.3(a)(7), the Clean Water Rule eliminated the 2008 guidance's narrow and improper focus on waters "adjacent to the same tributary[.]" 2008 Guidance at 10.

60. The Clean Water Rule also identified a geographic scope within which waters may be assessed, either alone or in combination with other similarly situated waters, for purposes of Justice Kennedy's "significant nexus" determination. In addition to waters falling into one of

the five subcategories described above, the significant nexus analysis is applied to those waters that are not categorically protected and are located within the 100-year floodplain of a primary water or within 4,000 feet of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8).

61. The final category of waters—those expressly "excluded from jurisdiction"—is expanded under the Clean Water Rule. Clean Water Rule, 80 Fed. Reg. at 37,057, 37,059. The rule established additional exclusions for a variety of ditches and artificial waters, as well as "erosional features[.]" Clean Water Rule, 80 Fed. Reg. at 37,059; 33 C.F.R. § 328.3(b)(3)-(4) (2015). While the agencies had "never considered puddles to meet the minimum standard for being a 'water of the United States,'" they also honored the request of "numerous commenters" who had asked for an express puddle exclusion. Clean Water Rule, 80 Fed. Reg. at 37,099; 33 C.F.R. § 328.3(b)(4)(vii) (2015).

62. After publishing the proposed Clean Water Rule in April 2014, the EPA and the Corps invited members of the public to submit substantive comments for more than 200 days. Clean Water Rule, 80 Fed. Reg. at 37,057; Extension of Comment Period for the Definition of "Waters of the U.S." under the Clean Water Act Proposed Rule and Notice of Availability, 79 Fed. Reg. 61,590, 61,590-91 (Oct. 14, 2014) (extending the comment period on the agencies' proposal until November 14, 2014). The agencies' final regulation:

> reflect[ed] the over 1 million public comments on the proposal, the substantial majority of which supported the proposed rule, as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others.

Clean Water Rule, 80 Fed. Reg. at 37,057.

63. The opportunity for public comment was not limited to the rulemaking process. Following the preparation of its draft Science Report on "the effects that small streams, wetlands, and open waters have on larger downstream waters[,]" the EPA asked the public to assist the Science Advisory Board in its "comprehensive technical review" of the document. Request for Nominations of Experts for a Science Advisory Bd. Panel to Review EPA's Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters, 78 Fed. Reg. 15,012 (Mar. 8, 2013) ("Request for Nominations"); Clean Water Rule, 80 Fed. Reg. at 37,057. In early 2013, the agency encouraged members of the public to nominate "recognized experts" in hydrology, ecology, and other disciplines for the Board's review panel. Request for Nominations, 78 Fed. Reg. at 15,012. After the panel had been selected, the public was repeatedly invited to submit comments and attend meetings. Clean Water Rule, 80 Fed. Reg. at 37,062. All told, "[o]ver 133,000 public comments were received" by the panel, and "[e]very meeting [it held] was open to the public, noticed in the Federal Register, and had time allotted for the public to present their views." *Id.*

64. The Clean Water Rule, in short, was the product of extensive public outreach and thorough scientific analysis that included application of agency expertise in making factual and scientific findings. In seeking to eliminate the regulation's protections, the new administration took a decidedly different approach.

IV. The Agencies' Efforts to Eliminate the Clean Water Rule

65. This administration's plans for the Clean Water Rule became clear before Inauguration Day. On December 8, 2016, President-elect Trump announced that he would nominate Scott Pruitt, the Attorney General of Oklahoma, to serve as the Administrator of the U.S. Environmental Protection Agency. *See* Press Release (Dec. 8, 2016), http://

www.presidency.ucsb.edu/ws/index.php?pid=119781 (last visited Aug. 8, 2019), *and* https://perma.cc/24UR-CSKM (permanent link). At the time of the announcement, Mr. Pruitt had been waging an assault on the Clean Water Rule for more than two years.

66. As Oklahoma Attorney General, Mr. Pruitt formally declared his opposition to the proposed Clean Water Rule in 2014, when he joined a comment letter calling for its withdrawal. Comments of the Attorneys General of West Virginia, *et al.*, on the Proposed Definition of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880) (Oct. 8, 2014), https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2011-0880-7988&attachmentNumber=1&contentType=pdf (last visited Aug. 8, 2019), *and* https://perma.cc/CDD2-RXTC (permanent link). In subsequent testimony before two congressional committees, Mr. Pruitt described the proposed rule as "a naked power grab by the EPA" and "a classic case of overreach"—one "flatly contrary to the will of Congress, who, with the passing of the Clean Water Act, decided that it was the States who should plan the development and use of local land and water resources." Impacts of the Proposed "Waters of the United States" Rule on State and Local Governments: Joint Hearing before the Comm. on Transp. and Infra., U.S. House of Representatives, and the Comm. on Envt. and Pub. Works, U.S. Senate, 114th Cong. 70 (2015). He went on to accuse his future agency of being "generally . . . unresponsive to concerns expressed by States, local governments, and individual citizens," and complained that the EPA had engaged in "a public relations campaign designed to sway opinion and rule America." *Id*. According to Mr. Pruitt, the proposed Clean Water Rule was "unlawful and should be withdrawn." *Id*. at 71.

67. When the Clean Water Rule was not withdrawn, Attorney General Pruitt sued. *See* Compl. for Declaratory and Injunctive Relief, *State of Oklahoma ex rel. E. Scott Pruitt v.*

U.S. EPA, No. 15-CV-381-CVE-FHM (N.D. Okla. July 8, 2015). In responding to a consolidated set of challenges by Mr. Pruitt and others, the United States Court of Appeals for the Sixth Circuit entered an order temporarily staying the regulation on October 9, 2015, to "allow[] for a more deliberate determination whether th[e] exercise of Executive power, enabled by Congress and explicated by the Supreme Court, [wa]s proper under the dictates of federal law." *In re: EPA and Dep't of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, 803 F.3d 804, 808 (6th Cir. 2015).

68. The agencies' official efforts to eliminate the Clean Water Rule began less than two weeks after Mr. Pruitt's confirmation. On February 28, 2017, President Trump issued an executive order directing former Administrator Pruitt and the Assistant Secretary of the Army for Civil Works to "review the . . . Clean Water Rule . . . for consistency with the [Administration's] policy . . . and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, Exec. Order No. 13,778, § 2(a) (Feb. 28, 2017). Remarkably, the order also instructed "the Administrator and the Assistant Secretary . . . [to] consider interpreting the term 'navigable waters[]' . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*," *id.* § 3—an opinion whose limitations had been rejected by a majority of the Supreme Court.

A. The Proposed Repeal of the Clean Water Rule

69. Though President Trump's order called for a "review" of the Clean Water Rule before any action was taken, Exec. Order No. 13,778, § 2(a), former Administrator Pruitt decided to move more quickly and with little information. On July 27, 2017, the EPA and the Corps proposed to repeal the Clean Water Rule. Proposed Repeal Rule, 82 Fed. Reg. at 34,899.

70. According to the agencies, the repeal would serve as "the first step in a comprehensive, two-step process intended to review and revise the definition of 'waters of the United States' consistent with the Executive Order signed on February 28, 2017[.]" *Id*. The proposed rule, the agencies explained,

> would rescind the 2015 Clean Water Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule and that the agencies [we]re currently implementing under the . . . [Sixth Circuit's] stay, informed by applicable guidance documents . . . , and consistent with the *SWANCC* and *Rapanos* Supreme Court decisions, applicable case law, and longstanding agency practice.

Id. at 34,901-02. The regulation would, in other words, revive the agencies' case-by-case approach by adopting the text of prior regulations, further limited by their guidance outlined in 2003 and 2008 and other unidentified agency materials, that pre-dated the Clean Water Rule.

71. Despite being confronted with a well-developed record supporting the Clean Water Rule, the agencies effectively did nothing to address the facts in that record. The only record document that the agencies produced in support of their Proposed Repeal Rule was an economic report that was not supported by analysis and directly conflicted with the economic analysis prepared to back the Clean Water Rule. *See* Letter from B. Holman, SELC, to S. Pruitt, EPA, pp. 47-52 (Sept. 27, 2017) (Submitted by SELC to EPA Docket Center EPA-HQ-2017-0203 on September 27, 2018) (discussing Economic Analysis I). In fact, former Administrator Pruitt went so far as to dictate the results of the economic analysis to support the desired repeal of the Clean Water Rule. Coral Davenport and Eric Lipton, Scott Pruitt is Carrying Out His E.P.A. Agenda in Secret, Critics Say, N.Y. Times, Aug. 11, 2017, https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html (last visited Aug. 12, 2019) and https://perma.cc/T2PK-FTK8 (permanent link). When the agencies' initial economic

analysis showed that the Clean Water Rule's benefits outweighed its costs, former Administrator Pruitt's deputies directed agency employees to remove the wetland protection benefits they had attributed to the Clean Water Rule. *Id.*

72. The agencies admitted that the revived case-by-case approach would not follow the regulatory text they proposed to codify, but instead would be "informed by applicable guidance documents (*e.g.*, the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters)." Proposed Repeal Rule, 82 Fed. Reg. at 34,902. Moreover, the text of these guidance documents, memoranda, and letters was not set forth in the preamble to the proposed Repeal Rule, in the text of the proposed rule itself, or otherwise presented to the public to allow for a meaningful opportunity for comment.

73. While the EPA and the Corps also admitted that the proposed repeal would "define the scope of 'waters of the United States' that are protected under the Clean Water Act[,]" they affirmatively refused to "undertake any substantive reconsideration" of the issue. Proposed Repeal Rule, 82 Fed. Reg. at 34,900, 34,903. In attempting to defend their reliance on such an arbitrary approach, the agencies repeatedly argued that repealing the Clean Water Rule would do nothing at all, eliminating any need for informed deliberation. In the words of the agencies, because the Clean Water Rule "ha[d] already been stayed by the Sixth Circuit," the proposed repeal would "simply codify the legal *status quo* . . . [as] a temporary, interim measure pending substantive rulemaking[.]" *Id.* at 34,903. In truth, however, the agencies' proposed rule was designed to permanently remove the Clean Water Rule from the Code of Federal Regulations—a significant, and intended, change to the "legal *status quo*." *See id.* at 34,899-34,900 (emphasis added).

74. In addition to disregarding and disavowing the substantive implications of the proposed repeal, the agencies insisted that members of the public do the same. With their notice of proposed rulemaking, the agencies declared that they:

> [we]re not at this time soliciting comment on the scope of the definition of "waters of the United States" that the agencies should ultimately adopt in the second step of th[eir] two-step process, as the agencies w[ould] address all of those issues, including those related to the . . . [Clean Water Rule], in the second notice and comment rulemaking to adopt a revised definition of "waters of the United States" in light of the February 28, 2017, Executive Order.

Proposed Repeal Rule, 82 Fed. Reg. at 34,903. In place of a meaningful opportunity for comment, the agencies invited members of the public to submit their views on "whether it . . . [would be] desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rulemaking to reconsider the definition of 'waters of the United States'" and, if so, how "best . . . to accomplish it." *Id.* (emphasis added).

Despite their acknowledgment that "[t]he scope of CWA jurisdiction is an issue of great national importance[,]" the EPA and the Corps seemed unprepared for the public's response to the proposed repeal. Proposed Repeal Rule, 82 Fed. Reg. at 34,902. In a memorandum published nearly two months after the close of the comment period, the agencies reported that they had received "more than 680,000 public comments" on the Proposed Repeal Rule. Memorandum for the Record, Rulemaking Process for Proposed Rule: Definition of "Waters of the U.S."—Addition of an Applicability Date to 2015 Clean Water Rule (EPA-HQ-OW-2017-0644-0003) (Nov. 20, 2017) ("Rulemaking Memorandum"), at 4, https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0644-0003 (last visited Aug. 22, 2019). As the Rulemaking Memorandum acknowledged, these comments "require[d] sufficient time to process . . . before

the agencies c[ould] review [them] and develop appropriate responses." *Id.* The agencies, however, appeared uninterested in waiting.

B. The Suspension of the Clean Water Rule

75. On November 16, 2017, the agencies signed a hastily devised proposal to amend the effective date of the Clean Water Rule—retroactively—from August 28, 2015 to "two years from the date" of the proposed rule's finalization. Upon publication in the Federal Register, the action was styled as a proposal to "add an applicability date" to the Rule. Proposed Suspension Rule, 82 Fed. Reg. at 55,542.

76. On February 6, 2018, the agencies published the final Suspension Rule in the Federal Register. 83 Fed. Reg. 5,200 (Feb. 6, 2018).

77. On August 16, 2018, this Court vacated and issued a nationwide injunction of the Suspension Rule, holding "that the agencies' refusal to consider or receive public comments on the substance of the [Clean Water] Rule or the 1980s regulation did not provide a 'meaningful opportunity for comment' as set forth in *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012)." *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 963. After the agencies and intervenors noted appeals, they then moved to dismiss them, and the Fourth Circuit entered an order dismissing the appeals on March 8, 2019. Rule 42(b) Mandate, *South Carolina Coastal Conservation League v. Wheeler*, No. 18-1964 (4th Cir. Feb. 4, 2019). Because of this Court's vacatur of the Suspension Rule, the Clean Water Rule is in effect, though it is enjoined in several states and has been remanded to the agencies as a result of litigation challenging the Rule. *See Georgia v. Wheeler*, No. 2:15-cv-00079, 2019 WL 3949922, at *1 (S.D. Ga. Aug. 21, 2019) (finding Clean Water Rule violated Administrative Procedure Act and extended agencies' jurisdiction beyond that permitted by Clean Water Act, remanding Rule to

agencies, and maintaining regional injunction of Rule); *Texas v. EPA*, 389 F. Supp. 3d 497, 500, 506 (S.D. Tex. May 28, 2019) (finding that Clean Water Rule violated Administrative Procedure Act, remanding Rule to the agencies, and maintaining regional injunction of Rule).

78. On November 26, 2018, the United States District Court for the Western District of Washington also vacated the Suspension Rule, similarly holding that "the Agencies deprived the public of a meaningful opportunity to comment on relevant and significant issues in violation of the APA's notice and comment requirements," by "expressly exclud[ing] substantive comments on either the pre-2015 definition of 'waters of the United States' or the scope of the definition that the Agencies should adopt if they repealed and revised the WOTUS Rule" and restricting "the content of the comments considered to the issue of 'whether it is desirable and appropriate to add an applicability date to the [WOTUS Rule].'" Order, *Puget Soundkeeper Alliance v. Wheeler*, No. 15-01342, 2018 WL 6169196, at *5 (W.D. Wash. Nov. 26, 2018) (internal citations omitted).

C. The Supplemental Notice of the Proposed Repeal of the Clean Water Rule

79. While the Suspension Rule was being challenged in this Court, the agencies published a supplemental notice of proposed rulemaking for the Proposed Repeal Rule—the agencies' second attempt at offering some rationale to support the decision to repeal the Clean Water Rule. *See* Supplemental Notice of Proposed Rulemaking, Definition of "Waters of the U.S."—Recodification of Pre-Existing Rules, 83 Fed. Reg. 32,227 (July 12, 2018) ("Supplemental Notice"). Instead of curing the multiple flaws in the original Proposed Repeal Rule, the supplemental notice repeated them and added several others.

80. The Supplemental Notice confirmed that the Proposed Repeal Rule is intended to "*permanently repeal* the 2015 [Clean Water Rule] in its entirety," and reiterated that the agencies

intended to "recodify the regulatory definitions of 'waters of the United States' that existed prior to the [Clean Water Rule]." *Id.* (emphasis added). Yet nowhere in the Supplemental Notice did the agencies compare, or solicit comment on, the relative merits of the Clean Water Rule and the pre-existing case-by-case regime, as supplemented by various guidance memoranda. Nor did the agencies analyze, or seek comment on, the effects of reviving the pre-existing definition of the "waters of the United States." Additionally, the Supplemental Notice did not correct the agencies' earlier failure to publish the actual rules the agencies proposed to implement.

81. The agencies again failed to account for the loss of significant economic benefits provided by the Clean Water Rule. Rather than conduct a legitimate analysis in place of the arbitrary and capricious economic analysis submitted with the initial Proposed Repeal Rule, the agencies simply abandoned Economic Analysis I altogether. *Id.* at 32,250 ("While economic analyses are informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 . . . as a basis for this proposed action. *See, e.g.*, *Nat'l Assn'n of Home Builders ("NAHB") v. EPA*, 682 F.3d 1032, 1039-50 (noting that the quality of an agency's economic analysis can be tested under the APA *if* the 'agency decides to rely on a cost-benefit analysis as part of its rulemaking.')" (emphasis in original).

82. Finally, the supplemental notice reversed the lawful order of things: rather than providing the agencies' rationale for repealing the Clean Water Rule, it set forth the agencies' "proposed" conclusions regarding perceived flaws in the Clean Water Rule, and solicited comments in a way to confirm the agencies' pre-ordained conclusions. *See* 82 Fed. Reg. at 32,228. For example, the agencies proposed "to conclude that the 2015 Rule exceeded the agencies' authority under the CWA," *id.*, yet omitted any meaningful reasoning behind that

conclusion. The agencies deprived the public of a meaningful opportunity to comment by requesting support for the conclusions they wish to reach, rather than presenting the reasons behind the conclusions for public consideration and input. In other words, the agencies solicited comments to support their desired outcome—the repeal of the Clean Water Rule.

D. The Final Repeal Rule

83. The Final Repeal Rule confirms that the outcome of this rulemaking was pre-ordained.

84. In the Final Rule, the agencies rely almost wholesale on the Southern District of Georgia's decision in *Georgia v. Wheeler* to bolster their repeal of the Clean Water Rule. *See* 84 Fed. Reg. at 56,627-29, 56,639-40, 56,647-51, 56,653-54, 56,656-59. This reliance is improper, and demonstrates the agencies' grasping for some rationale to support their rulemaking. The Final Repeal Rule was sent to the Office of Management & Budget ("OMB") on July 12, 2019, *see* OMB, *OIRA Conclusion of EO 12866 Regulatory Review*, https://www.reginfo.gov/public/do/eoDetails?rrid=129319 (last visited Oct. 22, 2019), and https://perma.cc/5FNM-2ZFM (permanent link), signifying the end of the agencies' decisionmaking process. Yet the Southern District of Georgia did not issue its decision in *Georgia v. Wheeler* until over a month later, on August 21, 2019. *See* No. 2:15-cv-079, 2019 WL 3949922. That court decision, therefore, cannot properly be said to have informed the agencies' decision to repeal the Clean Water Rule.

85. Equally suspect is the agencies' attempt to augment the rulemaking record with a new economics analysis. After disavowing Economic Analysis I produced with the Proposed Repeal Rule, the agencies produced a *new* economic analysis for the first time with their Final Rule. U.S. EPA and Dep't of the Army, Economic Analysis for the Final Rule: Definition of

"Waters of the United States"—Recodification of Pre-Existing Rules (Docket ID No. EPA-HQ-OW-2017-0203-15695) (September 5, 2019) ("Economic Analysis II"). Seemingly to skirt any APA challenge to that analysis, the agencies try to pass Economic Analysis II off as "informational" only. *Compare* Supplemental Notice, 83 Fed. Reg. at 32,250 ("*See, NAHB*, 682 F.3d at 1039-40 (noting that the quality of an agency's economic analysis can be tested under the APA *if* the 'agency decides to rely on a cost-benefit analysis as part of its rulemaking.')"), *with* Final Repeal Rule, 84 Fed. Reg. at 56,662 ("The agencies note that the final decision to repeal the 2015 Rule and recodify the pre-existing regulations in this rulemaking is not based on the information in the agencies' economic analysis. *See, e.g.*, *NAHB*, 682 F.3d at 1039-40."). Notwithstanding this claim, the agencies true intention is clear: they offer Economic Analysis II to *support* their predetermined result.

86. As if these issues were not alone enough to invalidate this rulemaking as arbitrary, the administration published a new, separate proposed rule re-defining "the scope of waters federally regulated under the Clean Water Act," Replacement Rule, 84 Fed. Reg. at 4,154, prior to finalizing the Repeal Rule. In their Replacement Rule notice, the agencies reject as inferior, confusing, and in excess of their authority the pre-2015 regime they seek to revive with this Repeal Rule. *See id*. at 4,195, 4,197-98. By attempting to revive the pre-2015 regime as appropriate in this rulemaking and, at the same time, describing it as inferior, confusing, and in excess of authority in the Replacement Rule notice, the agencies demonstrate the arbitrary nature of their actions.

FIRST CAUSE OF ACTION
Violation of Administrative Procedure Act and Due Process Clause—
Arbitrary and Unlawful Predetermination to Repeal the Clean Water Rule

87. The allegations of the preceding paragraphs are incorporated here by reference.

88. "The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (June 27, 2019). "Accepting contrived reasons would defeat the purpose for the enterprise[.]" *Id.* at 2576.

89. The Due Process Clause of the Constitution also requires rulemakings to be undertaken with an open mind. *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979). Decisionmakers violate the Due Process Clause and must be disqualified when they act with an unalterably closed mind and are unwilling to rationally consider arguments. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011).

90. Well before the Repeal Rule notice was published, the agencies "had already reached a prejudged political conclusion" to repeal the Clean Water Rule. *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004).

91. As Attorney General of Oklahoma, former EPA Administrator Scott Pruitt formally declared his opposition to the Clean Water Rule in 2014. The agencies' official efforts to eliminate the Clean Water Rule began less than two weeks after Mr. Pruitt's confirmation as EPA administrator. On February 28, 2017, President Trump issued his Executive Order directing the agencies to conduct this rulemaking. Since that time, the agencies have been set on achieving a pre-determined goal—repealing the Clean Water Rule and implementing a rule based on Justice Scalia's decision in *Rapanos*. Exec. Order No. 13,778.

92. On July 27, 2017, as directed by the President, the agencies announced their plan to repeal the Clean Water Rule. Proposed Repeal Rule, 82 Fed. Reg. at 34,901. Reflecting the

agencies' predetermination to repeal the rule, the agencies prohibited comment on the substance of either the Clean Water Rule or the prior case-by-case regime. *E.g.*, 82 Fed. Reg. at 34,903.

93. In the Supplemental Notice to justify the repeal, the agencies set forth the agencies' "proposed" conclusions, without any supporting analysis, and solicited comments to support those pre-ordained conclusions. 83 Fed. Reg. at 32,228.

94. Throughout the process, the outcome has been assured. The agencies have simply gone through the motions of giving notice and taking comment without providing any legitimate rationale to support the predetermined result.

95. Any rationale provided for the Repeal Rule was conceived well after the agencies' decision to repeal the Clean Water Rule had been made. Indeed, the agencies' "rationale" was first published with the Final Rule, with their almost wholesale reliance on the Southern District of Georgia's decision in *Georgia v. Wheeler*, which was decided over a month *after* the Final Repeal Rule had been sent to OMB, and their production of the new Economic Analysis II.

96. Because the agencies' operated with an unalterably closed mind, relying on contrived *post hoc* rationale, their repeal of the Clean Water Rule is arbitrary and unlawful.

SECOND CAUSE OF ACTION
Violation of Administrative Procedure Act—Arbitrary and Unlawful
Failure to Consider and Address the Effects of the Repeal Rule

97. The allegations of the preceding paragraphs are incorporated here by reference.

98. The EPA and the Corps further violated the Administrative Procedure Act, *see* 5 U.S.C. §§ 553(c), 706(2), by arbitrarily failing to analyze the implications of repealing the Clean Water Rule's protections.

99. When proposing a rule, federal agencies must "examine the relevant data and articulate . . . satisfactory explanation[s] for . . . [their] action[s]"—explanations that address

every "important aspect" of the problems at hand. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agencies here did neither.

100. The agencies failed to acknowledge or evaluate the effect of the rule on protections for the nation's waters. They failed to compare the effects of either the Clean Water Rule or the pre-2015 regime on the integrity of the nation's waters. In refusing to "undertake any substantive reconsideration" of either the Clean Water Rule or the prior regulatory scheme, Proposed Repeal Rule, 82 Fed. Reg. at 34,903; *accord* Final Repeal Rule, 84 Fed. Reg. at 56,659–60, the EPA and the Corps entirely omitted any meaningful analysis of the Clean Water Rule—an approach this Court has found to violate the Administrative Procedure Act.

101. In the supplemental notice, the agencies failed to do any better. Not only did they fail to address any of these issues, they chose to recite arguments made about the Clean Water Rule without acknowledging the agencies' own responses rejecting the very suppositions they now put forward. Moreover, the agencies ignored actual evidence—the Corps' decisions applying the Clean Water Rule to specific features—of the true impact of the Rule. Nowhere in the agencies' notices do they disclose the impact of the proposed action and change of position on the integrity of the nation's waters.

102. Because the EPA and the Corps failed to evaluate the effects of the Repeal Rule on the nation's waters, they violated the fundamental requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 553(c), 706(2). The Repeal Rule should be set aside.

THIRD CAUSE OF ACTION
Violation of Administrative Procedure Act—
Failing to Provide a "Reasoned Explanation" for Repealing the Clean Water Rule

103. The allegations of the preceding paragraphs are incorporated here by reference.

104. In *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 502 (2009), the Supreme Court expanded on the arbitrary and capricious test that it had previously established in the seminal case on the subject, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). In *State Farm*, the Court held that if an agency attempts to repeal an administrative rule, the agency must examine alternative ways of achieving the objectives of the controlling statute, address the alternatives, and give adequate reasons for abandoning the existing rule. *Id.* at 48. In *Fox Television Stations*, the Court confirmed that if an agency decides to change a policy, it must provide a "reasoned explanation" for doing so and provide a record that supports the change. 556 U.S. at 515-16. This is especially true when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy[.]" *Id.* at 515.

105. When an action reverses an agency's previous position, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515-16.

106. Here, the EPA and the Corps were confronted with an extremely well-developed record supporting the Clean Water Rule, yet the agencies did effectively nothing to address the facts developed in that record. The only document that they produced to support their rulemaking in advance of the Final Rule is an economic analysis that directly conflicts with the more extensive and better researched economic analysis prepared during the Clean Water Rule's development. *See generally* Economic Analysis I. They have since abandoned any reliance on that analysis. Supplemental Notice, 83 Fed. Reg. at 32,250 ("While economic analyses are

informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563.").

107. The only remaining "support" on which the agencies took public comment consisted of a series of conclusions the agencies proposed in the supplemental notice, with no meaningful rationale for reaching them. For example, the agencies "propose to conclude that the 2015 Rule exceeded the agencies' authority under the CWA." *Id.* at 32,228. In arbitrarily presenting conclusions they wished to reach and seeking public comment in support of those conclusions, the EPA and the Corps have failed to provide the reasoned explanation required by the Administrative Procedure Act. *See* 5 U.S.C. §§ 553(c), 706(2). Reliance on the decision in *Georgia v. Wheeler* does not salvage the rule—it could not have been the basis for the agencies' decisionmaking.

108. The notice-and-comment rulemaking process should be straightforward: an agency proposes a regulation and identifies the evidence that supports the proposed policy—and where applicable, for abandoning prior policy—enabling the public to comment on whether the policy is sensible and supported by facts.

109. Rather than providing "a reasoned explanation . . . for disregarding" the extensive record assembled in support of the Clean Water Rule, *Fox Television Stations*, 556 U.S. at 515-16, the agencies refused to give their prior action any substantive consideration at all. *See, e.g.*, Proposed Repeal Rule, 82 Fed. Reg. at 34,903 (declaring that "[t]he agencies do not intend to engage in substantive reevaluation of the definition of 'waters of the United States' until the second step of the rulemaking"); Supplemental Notice, 83 Fed. Reg. at 32,246-47. They failed to analyze or explain which regime is easier to understand and easier for the agencies to implement. And, they failed to compare which regime will cost more.

110. Indeed, rather than identifying evidence or a rationale to support their departure from the Clean Water Rule, the agencies repeatedly, and improperly, introduced conclusions they "proposed" to reach about the flaws of the Clean Water Rule and asked the public to provide the information to support those conclusions. *E.g.*, Supplemental Notice, 83 Fed. Reg. at 32,228.

111. This approach falls short of providing "a reasoned explanation" for repealing the Clean Water Rule. *See Encino Motorcars, LLC. v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

112. Because the agencies' rulemaking notices and supporting documents were completely devoid of any substantive analysis or explanation for changing the definition of "waters of the United States" to a prior contradictory definition, the Court should vacate the challenged rule as arbitrary and capricious. *See* 5 U.S.C. § 706(2).

FOURTH CAUSE OF ACTION

Violation of Administrative Procedure Act—Failure to Discuss Alternatives

113. "When considering revoking a rule, an agency must consider alternatives in lieu of a complete repeal, such as by addressing the deficiencies individually." *California ex rel. Becerra v. U.S. Dept. of the Interior*, 381 F. Supp. 3d 1153, 1168-69 (N.D. Cal. 2019) (citing *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal."); *Farmers Union Cent. Exch., Inc. v. F.E.R.C.*, 734 F.2d 1486, 1511 (D.C. Cir. 1984) ("It is well established that an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives."); *and Pub. Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984) (holding that the suspension of tire-grading regulation was arbitrary and capricious because agency failed to pursue available alternatives).

114. Here, the agencies failed to consider alternatives to repealing the Clean Water Rule in its entirety. They simply stated that "[t]he agencies have considered other alternatives that could have the effect of addressing some of the potential deficiencies identified, including proposing revisions to specific elements of the 2015 Rule . . . " and sought comment on whether that alternative "would fully address and ameliorate potential deficiencies in and litigation risk associated with the 2015 Rule." Supplemental Notice, 83 Fed. Reg. at 32,249.

115. In the Final Repeal Rule, the agencies simply state that "revising select provisions in the 2015 Rule would not resolve the fundamental flaws underlying the 2015 Rule and would result in the 2015 Rule remaining in place." 84 Fed. Reg. at 56,662. Such a cursory analysis is insufficient. *Becerra*, 381 F. Supp. 3d at 1166-68; *see also California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1066-67 (N.D. Cal. 2018) (finding that even if the agency had provided factual evidence to support its claim that the new waste reduction regulations at issue burdened small operators, a "blanket suspension" of the regulations was arbitrary and capricious because the suspension was "not properly tailored" to address the allegedly errant provision).

116. Neither the agencies' conclusory statements nor solicitation of comments was supported "by facts, reasoning or analysis." *Becerra*, 381 F. Supp. 3d at 1169. Therefore, neither was legally sufficient. *Id; see also Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[C]onclusory statements will not do; an agency's statement must be one of *reasoning*."); *NetCoalition v. S.E.C.*, 615 F.3d 525, 539 (D.C. Cir. 2010) (holding that the court would not "defer to the agency's conclusory or unsupported suppositions") (internal quotation marks omitted).

117. The agencies' failure to adequately consider alternatives to repealing the Clean Water Rule in its entirety is arbitrary and capricious. *Becerra*, 381 F. Supp. 3d at 1169.

FIFTH CAUSE OF ACTION

Violation of Administrative Procedure Act— Failure to Provide A Meaningful Opportunity to Comment

118. For agencies to provide a meaningful opportunity to comment, three steps are required. First, an agency must publish a "[g]eneral notice of proposed rule making" that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). Second, the agency must give the public "an opportunity to participate in the rule making through submission of written data, views, or arguments[.]" *Id.* § 553(c). Finally, after considering all of the relevant comments received, the agency must respond to them on the record and "incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.*

119. "The important purposes of this notice and comment procedure cannot be overstated." *N.C. Growers' Ass'n*, 702 F.3d at 763. Rather than "erect[ing] arbitrary hoops through which federal agencies must jump without reason[,]" the process "improves the quality of agency rulemaking by exposing regulations to diverse public comment," "ensures fairness to affected parties," and "provides a well-developed record that enhances the quality of judicial review." *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (internal quotations omitted). When a proposed regulation is aimed at eliminating protections that were previously adopted by an agency, notice and comment also "ensures that . . . [the] agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983). The requirements of notice and comment, in short, "serve important purposes

of agency accountability and reasoned decisionmaking"—and they "impose a significant duty on the agency." *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

120. "If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals." *Connecticut Light and Power v. Nuclear Regulatory Comm.*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); *see also Nat'l Cable Television Ass'n, Inc. v. F.C.C.*, 747 F.2d 1503, 1507 (D.C. Cir. 1984) ("The purpose of the NPRM is to 'provide an accurate picture of the reasoning that has led the agency to the proposed rule,' so that interested parties can contest that reasoning if they wish.") (citing *Connecticut Light*, 673 F.2d at 530-31). As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making. *Connecticut Light*, 673 F.2d at 530-31.

121. Here, the agencies failed to provide any meaningful rationale for their action. They abandoned the economic analysis (Supplemental Notice, 83 Fed. Reg. at 32,250), and then relied on a series of conclusions the agencies proposed to reach, with no meaningful rationale for reaching them.

122. This approach unlawfully denied the public a meaningful opportunity to comment because the agencies first disclosed their rationale for the repeal in the Final Rule. It also proposed a reversal of long-held, reasoned agency positions, and then asked commenters to fill in the rationale—which was not subject to public comment. That does not meet the requirements of the APA. *See Fox Television Stations*, 556 U.S. at 515.

SIXTH CAUSE OF ACTION
Violation of Administrative Procedure Act—Arbitrary and Unlawful Failure to Publish the Text of the Proposed and Final Rules

123. The allegations of the preceding paragraphs are incorporated here by reference.

124. In order to provide "for the guidance of the public[,]" the Administrative Procedure Act requires federal agencies to publish the language of any substantive regulation that they intend to have legal effect. *See* 5 U.S.C. §§ 552(a)(1)(D)-(E), 553(b), (d). The agencies "propose[d] to replace the stayed 2015 definition of 'waters of the United States', and re-codify the exact same regulatory text that existed prior to the 2015 rule," *as "informed by applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters).*" Proposed Repeal Rule, 82 Fed. Reg. at 34,900, 34,902 (emphasis added); Supplemental Notice, 83 Fed. Reg. at 32,227. But, the text of the "2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters" which will "inform[]" the proposed regulatory scheme, is nowhere to be found in the preamble to the Proposed Repeal Rule or in the text of the proposed rule itself.

125. The 2003 and 2008 guidance, as well as the other "relevant memoranda and regulatory guidance letters" proposed to inform the new definition of "waters of the United States," are clearly intended to have legal effect: they are "agency statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe" the proposed new rule. 5 U.S.C. § 551(4). The agencies are accordingly required to publish, as part of their proposed action, "the terms or substance" of the referenced guidance and memoranda. *Id.* § 553(b)(3), (d).

126. The agencies' failure to incorporate the guidance text into the proposed rule made it impossible for the public to provide meaningful comment. Because the defendant agencies

provided no meaningful opportunity for comment, the Court should vacate the challenged rule. *See* 5 U.S.C. § 706(2).

127. The importance of that failure is clear. The agencies have proposed regulations that they do not intend to enforce according to the text in the Code of Federal Regulations. The agencies—in a rulemaking process—proposed to incorporate several documents, some that were identified and some that were not, but did not provide any rule language codifying relevant parts of those documents. Creating even more confusion, while the agencies purported to give "applicable guidance documents" the weight of regulations, the documents themselves contradict that effort—the 2008 guidance expressly states that it is not "a regulation itself" and "does not impose legally binding requirements." *See, e.g.*, 2008 Guidance at 4 n. 17. The APA's plain requirement that agencies must publish proposed regulatory text is designed to avoid such chaos.

128. The agencies' failure to include the specific regulatory language the agencies intend to implement in the Final Rule violates the agencies' obligation to publish their regulations in the Federal Register.

SEVENTH CAUSE OF ACTION
Violation of Administrative Procedure Act—Arbitrary and Unlawful Failure to Demonstrate that the Repeal Rule Is Consistent with the Clean Water Act

129. Section 101(a) of the CWA states the single "objective" of the Act—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress could not have declared a more encompassing approach to addressing the Nation's waters; the statute is aimed at addressing every aspect of the country's water-quality problem. Congress entrusted the agencies with achieving this unequivocal goal. S. Rep. No. 92-414, at 77 (1971).

130. The agencies made no effort to demonstrate that their action here is consistent with the Clean Water Act and its objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

131. Failure to make this showing is arbitrary and unlawful. *Fox Television Stations, Inc.*, 556 U.S. at 515 (noting that an "agency must show that . . . [a] new policy is permissible under the statute" it purports to be implementing); *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 ("an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem").

EIGHTH CAUSE OF ACTION
Violation of Administrative Procedure Act—Arbitrary
Reinstatement of the Unlawful Pre-Clean Water Rule Regulations

132. The allegations of the preceding paragraphs are incorporated herein by reference.

133. As every court of appeals to decide the issue has agreed, protections of waters of the United States under the Clean Water Act extend to waters that meet Justice Kennedy's significant-nexus test as announced in the *Rapanos* opinion. *See, e.g.*, *Precon*, 633 F.3d at 289; and *Deerfield Plantation*, 501 F. Appx. at 275.

134. In this rulemaking, the agencies permanently reinstate the regulations that pre-dated the Clean Water Rule as limited by the 2008 guidance, *see, e.g.*, Final Repeal Rule, 84 Fed. Reg. at 56, 626, 56,642, 56,659-60, which illegally departs from Justice Kennedy's *Rapanos* opinion and results in jurisdictional waters being left unprotected under the Act.

135. The agencies' reinstatement of this illegal, confusing case-by-case regime—which runs counter to Supreme Court precedent, unlawfully leaving certain waters of the United States unprotected due in part to the guidance's unduly narrow interpretation of Justice

Kennedy's significant-nexus test—is arbitrary, capricious, not in accordance with law, and in excess of statutory authority. 5 U.S.C. § 706(2)(A), (C).

NINTH CAUSE OF ACTION
Violation of Administrative Procedure Act—Failure to Provide a Meaningful Opportunity to Comment on the Economic Analysis

136. The allegations of the preceding paragraphs are incorporated herein by reference.

137. The Repeal Rule was promulgated "without observance of procedure required by law" in violation of 5 U.S.C. § 706(2)(D) because the agencies failed to disclose a key supporting document which contains analyses and evidence, the so-called "Economic Analysis II," during the notice and comment process in violation of 5 U.S.C. § 553.

138. Regardless of how the agencies describe Economic Analysis II, whether "informational" or as "support" for the Repeal Rule—*compare* Final Repeal Rule, 84 Fed. Reg. at 56,662-63 ("The agencies note that the final decision to repeal the 2015 Rule and recodify the pre-existing regulations in this rulemaking is not based on the information in the agencies' economic analysis. *See, e.g.*, *NAHB*, 682 F.3d at 1039–40."), *with id.* at 56,663 ("The agencies have therefore made changes to their methodologies [in Economic Analysis II] in support of this final rule. As a result of these changes, the economic analysis for this final rule explores in greater depth the role the States play in regulating their water resources, corrects and updates the wetland valuation methodology, and more clearly acknowledges the uncertainties in the agencies' calculations")—Economic Analysis II purports to contain a new justification and basis for the Final Repeal Rule.

139. The agencies' failure to provide the public with a copy of Economic Analysis II prior to publication of the Final Repeal Rule prevented the public from reviewing the new analysis, much less commenting on or refuting it. This is a violation of the Administrative Procedure Act. *See Owner-Operator Indep. Drivers Ass'n v. Fed Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (concluding that agency's failure to disclose methodology

for modeling used to justify rule in time for comment was prejudicial) (quoting *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991); *Idaho Farm Bureau Fed. v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (finding that under Administrative Procedure Act, at a minimum USFWS must provide opportunity for public comment on report referred to extensively in species listing); *Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110 (D. Haw. 2014) (when considering whether agency's failure to subject document to notice and comment violates Administrative Procedure Act, courts should consider whether the public was prejudiced by the inability to refute the document, whether the document contains critical or new information).

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court:

1. Declare that defendant agencies acted arbitrarily and unlawfully in promulgating the challenged rule, Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019);

2. Vacate and set aside the challenged rule;

3. Grant plaintiffs their costs of suit including reasonable attorney fees to the extent permitted by law; and

4. Grant plaintiffs such further relief as the Court may deem just and proper.

Respectfully submitted this the 23rd day of October, 2019.

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