

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW  
FOUNDATION, et al.,

Plaintiffs,

v.

U.S. ENVIRONMENTAL  
PROTECTION AGENCY, et al.,

Defendants.

**AMENDED COMPLAINT**

Case No. 20-cv-10820-DPW

**INTRODUCTION**

1. The Clean Water Act is one of the most important environmental laws in the country. The law protects rivers, lakes, and streams that millions of Americans rely on for drinking water and for activities like swimming, fishing, and wildlife viewing. The law also protects millions of acres of wetlands that keep those rivers, lakes, and streams clean, while reducing flood damage.

2. Waters historically protected by the Clean Water Act also provide invaluable habitat to countless plants and animals, including many species listed as threatened or endangered under the Endangered Species Act (ESA).

3. Congress passed the Clean Water Act in 1972 after decades of failed efforts to protect and clean up the country's waters. Before the Act, most waters in the United States were so dirty that they were unsafe for fishing or swimming. Waterways like Ohio's Cuyahoga River were catching fire due to industrial pollution. Fish and

other wildlife in polluted waters were dying en masse. Wetlands were being filled and destroyed at an alarming rate.

4. Congress declared a single objective for the Clean Water Act: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve that objective, the Act, among other things, regulates the discharge of pollutants into “navigable waters,” which the Act defines broadly as “the waters of the United States.” *Id.* § 1362(7).

5. Congress chose to define waters protected by the Clean Water Act broadly, intending to regulate all waters within its Commerce Clause power. The Act protects, at a minimum, traditionally navigable waters and waters that significantly impact those waters, such as rivers and streams that flow into navigable waters, as well as wetlands that play an important role in protecting the quality of navigable waters.

6. Although water pollution is still a serious problem in the United States, our water quality has improved significantly over the past several decades due in large part to the Clean Water Act’s pollution-control protections. The Trump administration, however, has now issued a regulation that threatens to reverse that progress by severely limiting the waters that the federal government can protect under the Act.

7. The so-called “Navigable Waters Protection Rule” (Navigable Waters Rule) was promulgated by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (together, the Agencies) on April 21, 2020, and became

effective on June 22, 2020.<sup>1</sup> The Rule purports to define the phrase “waters of the United States,” and thus, the scope of the Clean Water Act’s reach.

8. At President Trump’s direction, the Rule adopts an unreasonably narrow interpretation of the Clean Water Act, largely modeled after a plurality opinion in the Supreme Court case *Rapanos v. United States*, 547 U.S. 715 (2006). The Rule concludes that streams fed only by rain or snowfall are not “waters of the United States,” and thus, are no longer protected under the Act. The Rule also concludes that wetlands, lakes, and ponds are not “waters of the United States” unless they directly touch other “waters of the United States” or are otherwise connected to them via certain types of surface-water flow.

9. Many of the streams, wetlands, and other waters excluded from the Rule’s new definition of “waters of the United States” have been protected by the Clean Water Act for decades. These excluded waters are critically important to downstream water quality. The Rule is thus a significant and unprecedented rollback of the protections afforded by the statute.

10. The waters excluded from the Rule’s new definition of “waters of the United States” are also critically important to the conservation of myriad federally listed threatened and endangered species. Congress enacted the ESA to protect these species, as well as the ecosystems on which they depend. *See* 16 U.S.C. § 1531(b).

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<sup>1</sup> The Rule is currently enjoined from taking effect in Colorado. *See Order, Colorado v. EPA*, 20-cv-1461-WJM-NRN (D. Colo. June 19, 2020), ECF No. 61.

11. By removing Clean Water Act protections from all ephemeral streams and many wetlands across the country, the Rule will likely harm countless threatened and endangered species that depend on these waters, undermining the purpose of the ESA. These likely impacts to ESA-listed species also frustrate the Clean Water Act's goal to "provide[] for the protection and propagation of . . . wildlife," 33 U.S.C. § 1251(a)(2), and aquatic ecosystems, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985).

12. The Agencies violated the Administrative Procedure Act (APA), the Clean Water Act, and the ESA when promulgating the Navigable Waters Rule.

13. First, the Agencies promulgated the Navigable Waters Rule without meaningfully considering the Rule's impacts on the "integrity of the Nation's waters," the protection of which is the sole objective of the Clean Water Act. *See* 33 U.S.C. § 1251(a). The Agencies' preliminary estimates from earlier in the rulemaking process show that the Rule may remove federal protections for nearly a fifth of the country's streams and about half of our wetlands. The Agencies now disavow that preliminary analysis, but those figures and other evidence show that the Rule will likely have devastating consequences on water quality across the country. The Agencies failed to adequately consider those water quality impacts when they decided to radically narrow the definition of "waters of the United States."

14. The Agencies had sufficient information to assess the potential water quality impacts of the Rule. But even if they did not, the Agencies fail to explain why it was reasonable to promulgate the Rule now in the face of such uncertainty, rather than

gather more information that would allow the Agencies to conduct a meaningful analysis of the Rule's water quality impacts.

15. Second, the Agencies assert that the Navigable Waters Rule is "informed" by the same scientific evidence that underlay a prior policy, the Clean Water Rule. However, the Agencies in fact disregard – without explanation – the science-based findings they made in promulgating the Clean Water Rule. Most significantly, the Agencies claim that the Navigable Waters Rule protects waters with substantial connections to downstream navigable waters. They likewise suggest that the Rule excludes waters with less substantial connections. But the undisputed scientific evidence, and the Agencies' prior findings based on that evidence, show that the Navigable Waters Rule removes protections for waters that can have equally substantial impacts on downstream water quality as those that the Navigable Waters Rule continues to protect.

16. Third, the Agencies misrepresent and ignore relevant parts of the scientific record on which they claim to have relied. EPA's own Science Advisory Board – a group of independent scientists charged with providing advice to the agency – advised EPA that the Rule contradicts well-established science and lacks any scientific justification. The Agencies ignored that advice and failed to adequately respond to numerous public comments raising concerns about the lack of scientific support for the Navigable Waters Rule.

17. Fourth, the Agencies' line-drawing between protected and unprotected waters is arbitrary and not reasonably explained. For instance, the Agencies assert that

streams that flow ephemerally (i.e., only after rain or snowfall) are not protected under the Clean Water Act because, according to the Agencies, these streams have insufficient connections to downstream waters and do not fall within the ordinary meaning of “waters.” At the same time, the Agencies conclude that permanently flowing streams *are* protected under the Act even when they are separated from a downstream water by an ephemeral stream, because the ephemeral stream provides a sufficiently substantial connection downstream and can make the waters “indistinguishable when flowing (i.e., they look like one water).” The Agencies do not adequately explain these inconsistencies.

18. Fifth, the Agencies untenably try to defend the rulemaking in part on the grounds that it will provide “clarity,” “certainty,” and “predictability” for developers, farmers, and landowners. That claim is belied by the record. The Rule is filled with unclear terms and will be nearly impossible to implement.

19. The Navigable Waters Rule also violates the Clean Water Act. Like the *Rapanos* plurality opinion upon which the Rule is modeled, the Rule is inconsistent with the Clean Water Act’s text, structure, and purpose. Indeed, five Justices in *Rapanos* concluded that the *Rapanos* plurality’s narrow test for determining whether a water is a “water of the United States” had no statutory support. And all federal circuits that have decided the issue, including the First Circuit, have held that the Clean Water Act’s reach extends beyond waters that satisfy only the *Rapanos* plurality’s narrow test, which the Agencies have largely adopted in the Navigable Waters Rule.

20. The Rule does not advance the Clean Water Act's purpose to protect the "integrity of the Nation's waters." 33 U.S.C. § 1251(a). Instead, the Rule advances the Trump administration's deregulatory agenda, protecting those who want to pollute the nation's waters.

21. Finally, the Agencies violated the ESA in promulgating the Navigable Waters Rule. Section 7 of the ESA and its implementing regulations required the Agencies to determine whether the Rule "may affect" threatened or endangered species or their designated critical habitat and, if there "may" be an effect, consult with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service before promulgating the Rule. The Agencies failed to comply with their section 7 obligations, despite the low threshold for this consultation requirement and the evidence indicating that the Navigable Waters Rule will likely harm numerous species protected by the ESA.

22. The Rule violates the APA, the Clean Water Act, and the ESA. Plaintiffs seek an order from the Court vacating and setting aside the Rule and ordering the Agencies to comply with their obligations under section 7 of the ESA.

### **JURISDICTION AND VENUE**

23. The Court has jurisdiction over the claims set forth in this Complaint pursuant to 16 U.S.C. § 1540(c) and (g) (ESA), 28 U.S.C. § 1331 (federal question jurisdiction), and 5 U.S.C. §§ 702, 704 (APA). *See also Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 623 (2018) (holding that challenges to the Agencies' regulations defining "waters of the United States" must be brought in federal district courts). The relief

sought is authorized by 16 U.S.C. § 1540(g) (ESA), 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief), and 5 U.S.C. § 706 (APA).

24. Plaintiffs provided Defendants with written notice of Plaintiffs' intent to sue Defendants for violating the ESA more than sixty days prior to filing their ESA claim. Plaintiffs' written notice is attached as Exhibit A to this Complaint.

25. Defendants have not remedied their violations of the ESA in response to Plaintiffs' written notice.

26. Venue is proper in the District of Massachusetts under 28 U.S.C. § 1391(e)(1)(C) because Defendants are officers or agencies of the United States and because Plaintiffs Conservation Law Foundation, Connecticut River Conservancy, Massachusetts Audubon Society, and Merrimack River Watershed Council reside in this judicial district and maintain their principal places of business in this judicial district. *See* 28 U.S.C. § 1391(c)(2).

## **THE PARTIES**

### **The Plaintiffs**

27. Plaintiff Conservation Law Foundation (CLF) is a nonprofit member-supported organization dedicated to protecting New England's environment. It is incorporated under the laws of Massachusetts with its principal place of business at 62 Summer Street, Boston, MA, 02110. CLF has over 4,000 members, including more than 1,600 members in Massachusetts. CLF has long worked to protect the health of New England's waterways, from its larger crown jewel waterbodies like Lake Champlain, the Charles River, and Narragansett Bay, to smaller, seasonal and rain-dependent streams,



as well as wetlands and other waters. CLF's members use and enjoy New England's waterways for recreational, aesthetic, and other purposes, including but not limited to boating, swimming, fishing, birdwatching, sightseeing, and drinking water. CLF's members also have interests in threatened and endangered species in New England that live in or otherwise depend on the region's wetlands, streams, and larger water bodies at substantial risk of pollution or destruction as a result of the Rule.

28. Plaintiff Connecticut River Conservancy (CRC) is a nonprofit membership organization incorporated in Massachusetts with approximately 1,100 household memberships. It has served as the voice for the Connecticut River watershed, from source to sea, since 1952. CRC is headquartered in Greenfield, Massachusetts, with additional offices in Connecticut and Vermont. CRC collaborates with partners across Vermont, New Hampshire, Massachusetts, and Connecticut to protect and advocate for the Connecticut River and its tributaries and to educate and engage communities. CRC brings people together to prevent pollution, improve habitat, and promote enjoyment of the Connecticut River and its tributary streams. The Navigable Waters Rule removes protections for streams and wetlands that feed into and directly impact the water quality of the Connecticut River and therefore harms CRC's members who use and enjoy the River. The risks to threatened and endangered species posed by the Rule and the Agencies' failure to comply with their ESA obligations also harm CRC's members with interests in federally protected species that live in or otherwise depend on waters at substantial risk of pollution or destruction as a result of the Rule.

29. Plaintiff Clean Wisconsin is a nonprofit membership organization dedicated to environmental education, advocacy, and legal action to protect air quality, water quality, and natural resources in the State of Wisconsin. Clean Wisconsin represents over 16,000 members and supporters throughout the state. Wisconsin is uniquely blessed with water resources. In addition to being bordered by the Mississippi River to the West and two of the Great Lakes to the North and East, Wisconsin is home to 15,000 lakes, millions of acres of wetland, and over 12,000 rivers and streams that run over 84,000 miles. Most of Wisconsin's streams run intermittently, or seasonally, and many flow only in response to rain or snowfall. Wisconsin's waters provide habitat for waterfowl like duck and geese, as well as many endangered and threatened plant and animal species. Founded in 1970, Clean Wisconsin has been fighting to protect these waters for fifty years. The Navigable Waters Rule and the Agencies' failure to comply with their ESA obligations harm Clean Wisconsin's members, who depend on Wisconsin's lakes, rivers, streams, and wetlands for their livelihood and enjoyment, and who enjoy observing threatened and endangered species that live in or otherwise depend on waters at substantial risk of pollution or destruction as a result of the Rule.

30. Plaintiff Massachusetts Audubon Society (Mass Audubon), founded in 1896, is among the oldest and largest private nonprofit, membership-based conservation organizations in New England. Mass Audubon is headquartered in Lincoln, Massachusetts. Mass Audubon's mission is to protect the nature of Massachusetts for people and wildlife. With 125,000 members, 225 full-time staff, and 14,000 volunteers, Mass Audubon stewards nearly 38,000 acres of conservation land,

including 7,330 acres of wetlands; provides educational programs for 225,000 children and adults annually; and advocates for sound environmental policies at the local, state, and federal levels of government. Mass Audubon's statewide network of 100 wildlife sanctuaries welcomes visitors of all ages and serves as the base for its conservation, education, and advocacy work. The Navigable Waters Rule and the Agencies' failure to comply with their ESA obligations harm Mass Audubon's members who enjoy viewing wildlife, including threatened and endangered species, and engaging in other recreational activities in and around wetlands, streams, and other waters in Massachusetts at substantial risk of destruction or degradation as a result of the Rule.

31. Plaintiff Merrimack River Watershed Council (MRWC) is a member-supported nonprofit organization based in Lawrence, Massachusetts. MRWC's mission is to improve and conserve the Merrimack River watershed for people and wildlife through advocacy, education, recreation, and science. The Merrimack River, at 117 miles in length, drains a watershed of 5,000 square miles that sustains a population of over 2.5 million people, while furnishing drinking water to over 600,000 people. Home to more than 200 New Hampshire and Massachusetts communities, the Merrimack River watershed provides major recreational opportunities, diverse fish and wildlife habitat, and stunning scenic beauty. The members of MRWC who rely on the Merrimack River for recreational, aesthetic, and other purposes, and who regularly enjoy viewing threatened and endangered species in and around the Merrimack River, are harmed by the Navigable Waters Rule and the Agencies' failure to comply with their ESA obligations.

32. Plaintiff Natural Resources Defense Council (NRDC) is a national environmental advocacy group organized as a nonprofit membership corporation, with hundreds of thousands of members nationwide, including approximately 14,800 members in Massachusetts. 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 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 EPA and the Army Corps' prior "waters of the United States" rulemaking – the Clean Water Rule – provided robust protections for these vital resources, on which NRDC's members and many other Americans depend. NRDC's members get their drinking water from and frequently use and enjoy waters at substantial risk of being polluted or degraded as a result of the Navigable Waters Rule, and they derive recreational, conservation, aesthetic, and professional benefits from threatened and endangered species that live in or otherwise depend on those waters.

33. Plaintiff New Mexico Wilderness Alliance (New Mexico Wild) is a statewide nonprofit organization dedicated to the protection, restoration, and continued enjoyment of New Mexico's wild lands and wilderness areas. As such, New Mexico Wild advocates for increased protections for, and the prevention of damage to, permanent, intermittent, and ephemeral streams, as well as wetlands. The Navigable Waters Rule harms New Mexico Wild's members who recreate in and depend upon clean water for their daily lives as well as their wilderness adventures, and who derive

enjoyment from threatened and endangered species that live in or otherwise depend on waters at substantial risk of degradation and destruction as a result of the Rule.

34. Plaintiff Prairie Rivers Network (PRN) is a nonprofit organization incorporated under the laws of Illinois. PRN has approximately 1,200 members. Its mission is to protect water, heal land, and inspire change. For more than fifty years, PRN has used the creative powers of science, law, and collective action to protect and restore rivers, lakes, and wetlands. The Navigable Waters Rule harms PRN's members who regularly visit and enjoy the rivers, streams, and wetlands of Illinois for recreational activities, and who depend on rivers and lakes for their drinking water. The Agencies' failure to comply with their ESA obligations also harms PRN's members with interests in threatened and endangered species in Illinois that live in or otherwise depend on waters at substantial risk of degradation and destruction as a result of the Rule.

35. The harm to Plaintiffs' members caused by the Navigable Waters Rule is described further *infra* ¶¶ 159-93.

### **The Defendants**

36. Defendant EPA is an agency of the U.S. government. EPA is responsible for implementing and enforcing most of the Clean Water Act's pollution-control programs. The EPA Administrator has ultimate responsibility for determining the definition of "waters of the United States" under the Act. Together with the Army Corps, EPA issued the Navigable Waters Rule.

37. Defendant Andrew R. Wheeler, EPA Administrator, is the highest-ranking official in the EPA. Administrator Wheeler signed the Navigable Waters Rule. Plaintiffs sue Administrator Wheeler in his official capacity.

38. Defendant Army Corps of Engineers is an agency of the U.S. government and a branch of the Department of the Army. The Army Corps is responsible for implementing and enforcing one of the Clean Water Act's pollution-control programs. Together with EPA, the Army Corps issued the Navigable Waters Rule.

39. Defendant Rickey Dale "R.D." James is the Assistant Secretary of the Army for Civil Works. In that position, Assistant Secretary James supervises the Army Corps' Civil Works program, including its implementation of the Clean Water Act. Assistant Secretary James signed the Navigable Waters Rule. Plaintiffs sue Assistant Secretary James in his official capacity.

## BACKGROUND

### Congress enacted the Clean Water Act to restore and maintain the integrity of the nation's waters

40. Congress enacted the Clean Water Act with a single objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In drafting this provision, Congress took a "broad, systemic view" of maintaining and improving water quality, with the key word "integrity" referring "'to a condition in which the natural structure and function of ecosystems [are] maintained.'" *Riverside Bayview Homes*, 474 U.S. at 132 (quoting H.R. Rep. No. 92-911, at 76 (1972)).

41. In order to achieve the Clean Water Act's objective to protect water quality, Congress also declared as a goal "the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2).

42. When Congress passed the Clean Water Act in 1972, it represented a "total restructuring" and "complete rewriting" of federal law governing water pollution. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981) (quoting the Act's legislative history). Before the Clean Water Act, the states were primarily responsible for controlling water pollution. S. Rep. No. 92-414, at 3669 (1971). By the 1970s, Congress recognized that this state-led scheme had been "inadequate in every vital respect," leaving many of the nation's waters "severely polluted" and major waterways "unfit for most purposes," including swimming and fishing. *Id.* at 3674.

43. To address this water quality crisis, Congress replaced the ineffective patchwork of state laws with the Clean Water Act—"an all-encompassing program of water pollution regulation." *Milwaukee*, 451 U.S. at 318.

44. The Clean Water Act, among other things, regulates the discharge of pollutants into "navigable waters," which the Act defines broadly as the "waters of the United States." 33 U.S.C. § 1362(7). Under the Act, a "water of the United States" cannot be polluted or destroyed without a permit. The Act also requires the establishment of water quality standards for "waters of the United States." States may administer the Act's permitting programs and establish water quality standards for waters within their borders, so long as the state programs comply with federal law. *See id.* §§ 1313(c), 1342(b), 1344(g). States thus retain a pivotal role in administering the Clean Water Act.

But the Act serves as a crucial federal floor that guards against a state-by-state race to the bottom.

45. The legislative history of the Clean Water Act shows that Congress chose to define “navigable waters” broadly as “waters of the United States” in order to protect all waters within its Commerce Clause power. However, the Act itself does not further define “waters of the United States.” As a result, for nearly 50 years, EPA and the Army Corps have issued regulations defining this phrase – and thus, the scope of the Act’s reach.

46. Between the 1970s and early 2000s, the Agencies and courts interpreted the scope of the Clean Water Act broadly to cover “virtually all bodies of water,” *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987), including navigable waters and their tributaries, wetlands neighboring those waters, and other waters that affect interstate commerce.

47. In *Riverside Bayview*, for example, the Supreme Court held in 1985 that the Army Corps had reasonably interpreted the phrase “waters of the United States” to include “adjacent” wetlands, which the Army Corps had defined as wetlands next to or reasonably close to other protected waters. 474 U.S. at 133-35. In upholding the Corps’ interpretation, the Court recognized “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems.” *Id.* at 133; *see also United States v. Marathon Dev. Corp.*, 867 F.2d 96, 98 (1st Cir. 1989) (noting that *Riverside Bayview* construed “waters protected by the Act . . . broadly . . . to include wetlands”).



48. In addition to finding that “waters of the United States” includes certain wetlands, the Agencies and courts have consistently found that tributaries of navigable waters qualify as “waters of the United States.” *See, e.g., United States v. TGR Corp.*, 171 F.3d 762, 764-65 (2d Cir. 1999) (per curiam) (citing and agreeing with other circuits’ holdings); *see also United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974) (finding it necessary to regulate tributaries of navigable waters, lest the navigable waters become “mere conduit[s] for upstream waste”).

**Two Supreme Court cases in the 2000s engendered uncertainty over the scope of the Clean Water Act**

49. In the 2000s, a pair of Supreme Court decisions — *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006) — created uncertainty about the scope of the Clean Water Act, although neither case invalidated the Agencies’ regulations.

50. In *SWANCC*, the Supreme Court held that the phrase “waters of the United States” did not include “nonnavigable, isolated, intrastate” ponds if the only basis for inclusion was that, as habitat for migratory birds, the ponds affected interstate commerce. 531 U.S. at 162, 166-67. The Court distinguished its opinion in *Riverside Bayview*, explaining that “[i]t was the *significant nexus* between the wetlands and ‘navigable waters’ that informed” the Court’s conclusion that adjacent wetlands were “waters of the United States.” *Id.* at 167 (emphasis added).

51. The Supreme Court next addressed the scope of the Clean Water Act in *Rapanos*, a case that produced splintered opinions with no majority. In *Rapanos*, the

Court evaluated whether the Clean Water Act protects wetlands lying near ditches or tributaries “that eventually empty into traditional navigable waters.” 547 U.S. at 729. In a plurality opinion authored by Justice Scalia, four Justices adopted an extremely narrow view of the Clean Water Act. In their view, the phrase “waters of the United States” includes only “relatively permanent, standing or continuously flowing bodies of water.” *Id.* at 739. The plurality further found that only “those wetlands with a continuous surface connection” to other “waters of the United States” are covered by the Act. *Id.* at 742.

52. The other five Supreme Court Justices rejected the *Rapanos* plurality’s interpretation of “waters of the United States” as untethered from the text, structure, and purpose of the Clean Water Act. *See id.* at 768-97 (Kennedy, J., concurring in the judgment), 800 (Stevens, J., dissenting).

53. In an opinion concurring only in the judgment, Justice Kennedy explained that the plurality’s first requirement – standing water or continuous flow, at least for a period of “some months” – made “little practical sense in a statute concerned with water quality.” *Id.* at 769. He noted that “nothing in the statute” suggests that Congress intended to exclude waterways that flow irregularly, such as in response to rainfall. *Id.* Justice Kennedy also rejected the plurality’s “continuous surface connection” requirement for wetlands, *id.* at 772, noting that it “may be the absence of an interchange of waters . . . that makes protection of wetlands critical to the statutory scheme,” *id.* at 775. According to Justice Kennedy, wetlands “come within the statutory phrase ‘navigable waters’” if they share a “significant nexus” with a traditionally

navigable water – meaning the wetlands, “either alone or in combination with” other similarly situated wetlands, “significantly affect the chemical, physical, and biological integrity” of a traditionally navigable water. *Id.* at 779-80.

54. The four dissenting Justices in *Rapanos* similarly rejected the plurality’s “revisionist reading” of the Clean Water Act. *Id.* at 793 (Stevens, J., dissenting). For instance, the dissent dismissed the plurality’s purportedly textual argument that the Act protects streams that flow year-round but not streams that flow ephemerally, because “common sense and common usage” demonstrate that both are “streams” and thus “waters.” *Id.* at 801. The dissent also pointed out that the plain meaning of “adjacent” – defined as “[l]ying near, close, or contiguous; neighboring; bordering on” – contradicted the plurality’s assertion that wetlands can only be “adjacent” if they have “a continuous surface connection” to another water. *Id.* at 805-06 (quoting Webster’s New Int’l Dictionary at 32 (2d ed.) and adding emphasis).

55. Since *Rapanos*, circuit courts either have held that Justice Kennedy’s test alone controls whether a water is a “water of the United States,” or have held that a water is a “water of the United States” if it satisfies *either* Justice Kennedy’s significant-nexus standard *or* the plurality’s test. The First Circuit has adopted the latter approach. *See United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006). Not one federal circuit court has limited the Clean Water Act’s protections to waters that satisfy only the plurality’s narrow test.

56. In the wake of *Rapanos*, EPA and the Army Corps issued guidance (the *Rapanos* Guidance) to agency staff explaining that they would assert jurisdiction over

waters that satisfied either the *Rapanos* plurality opinion or Justice Kennedy's "significant nexus" test. According to the Agencies, this meant that they would categorically assert jurisdiction over traditional navigable waters, "relatively permanent" tributaries of traditional navigable waters, and "adjacent" wetlands that directly abut those waters.

57. The *Rapanos* Guidance also required the Agencies to assert jurisdiction over non-"relatively permanent" waters and non-abutting "adjacent" wetlands on a case-by-case basis if the Agencies determined that they "significantly affect the chemical, physical, and biological integrity" of downstream navigable waters, using hydrological and ecological considerations.

**The Clean Water Rule clarified which waters qualify as "waters of the United States" based on their "significant nexus" to navigable waters**

58. Although the *Rapanos* Guidance was intended to provide more clarity following the Supreme Court's opinion in that case, the Agencies' heavy reliance on case-by-case determinations to assess Clean Water Act coverage created uncertainty as well as the potential for inconsistent findings regarding the Act's application. *See* 80 Fed. Reg. 37,054, 37,057 (June 29, 2015). These fact-bound determinations were also time consuming and resulted in underenforcement of the law.

59. The Agencies responded to this confusion by promulgating the Clean Water Rule in June 2015 to clarify the definition of "waters of the United States." The rulemaking began in 2011 and took four years to complete. The public comment period

resulted in more than one million comments, the substantial majority of which supported the rule. *Id.*

60. The Clean Water Rule identified Justice Kennedy's "significant nexus" test as the "key" to the Agencies' interpretation of the Act. *Id.* at 37,060. The Clean Water Rule thus concluded that waters were "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." *Id.*

61. As part of the rulemaking, the Agencies prepared a voluminous report (the Connectivity Report) that summarized over one thousand peer-reviewed scientific publications on the connections between streams, wetlands, and downstream waters. *Id.* at 37,057. The draft Connectivity Report was peer reviewed by an expert panel created by EPA's Science Advisory Board. *Id.* The Science Advisory Board was highly supportive of the Report's conclusions. *Id.* at 37,062.

62. The Connectivity Report reached a number of "major conclusions" that informed the Agencies' interpretation of the phrase "waters of the United States." *Id.*

63. First, the Report concluded that "[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers" and "exert a strong influence on the integrity" of those waters. Connectivity Report at ES-2. According to the Report, the scientific evidence of the downstream effects of ephemeral streams was "strong and compelling." *Id.* at ES-7.

64. Second, the Connectivity Report concluded that the literature shows that wetlands, lakes, and ponds located in floodplains are “highly connected to streams and rivers,” because they perform functions that “improve downstream water quality,” even if there is an infrequent surface connection between the waters. *Id.* at 4-39, ES-2. According to the Report, even wetlands “that rarely flood can be important because of long-lasting effects on streams and rivers.” *Id.* at 4-39. Floodplain wetlands also store large amounts of stormwater, sediment, and contaminants that could otherwise harm downstream water quality. *Id.* at ES-3.

65. Finally, the Connectivity Report concluded that non-floodplain wetlands, lakes, and ponds can influence downstream water quality by storing floodwater and serving as “sinks” that stop and transform pollutants that would otherwise flow into downstream waters. *Id.* at ES-3 to ES-4, ES-10 to ES-11; *see also id.* at 4-42 to 4-43 (noting that where wetlands perform this sink function, their impact on downstream waters stems from their “isolation, rather than their connectivity” to those waters).

66. Based on this scientific evidence of the substantial connections between streams, wetlands, and downstream waters, the Clean Water Rule restored categorical protections for all “tributaries” and for all waters, including wetlands, “adjacent” to other jurisdictional waters. 33 C.F.R. § 328.3(a)(1)-(6) (2015). Tributaries were defined as waters – whether perennial, intermittent, or ephemeral – that contribute flow to a navigable water and that have a “bed and banks and an ordinary high water mark.” *Id.* § 328.3(c)(3) (2015). Adjacent waters included those located within 100 feet of, or within the 100-year floodplain and 1,500 feet of, a protected water. *Id.* § 328.3(c)(1)-(2) (2015).

67. The Agencies determined that the science showed these waters had the requisite “significant nexus” to downstream navigable waters and thus qualified as “waters of the United States” under the Clean Water Act. 80 Fed. Reg. at 37,055, 37,058, 37,068-71. For instance, the Agencies found that a bed, banks, and an ordinary high water mark – required by the Clean Water Rule’s definition of “tributary” – demonstrate “sufficient volume, frequency, and flow” to establish that the connection to downstream waters is “significant.” *Id.* at 37,058, 37,076. Likewise, the Agencies found that “adjacent” waters, as defined by the rule, function together to “significantly affect the chemical, physical, or biological integrity” of traditionally navigable waters. *Id.* at 37,069-70; *see id.* at 37,058.

68. In addition to waters within the categories described above, the Clean Water Rule allowed certain other waters to qualify as “waters of the United States” if a case-specific analysis showed that they had a “significant nexus” to downstream navigable waters. 33 C.F.R. § 328.3(a)(7)-(8) (2015).

69. After the Agencies published the Clean Water Rule, various parties challenged the rule in different district courts across the country. Two of those district courts denied motions to preliminarily enjoin the Clean Water Rule, *see Ohio v. EPA*, No. 15-cv-2467, 2019 WL 1368850, at \*1 (S.D. Ohio Mar. 26, 2019); *Oklahoma ex rel. Hunter v. EPA*, No. 15-cv-0381, 2019 WL 2288446, at \*7 (N.D. Okla. May 29, 2019), while three district courts entered regionally limited preliminary injunctions of the rule, *see North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018); *Texas v. EPA*, No. 15-cv-00162, 2018 WL 4518230, at \*1-2

(S.D. Tex. Sept. 12, 2018). Two of those courts subsequently granted summary judgment to the plaintiffs on certain claims, but both courts declined to vacate the rule. *See Texas v. EPA*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1382-83 (S.D. Ga. 2019).

**The Trump administration has made multiple illegal attempts to dismantle the Clean Water Rule and curtail the Clean Water Act’s protections**

70. As soon as President Trump took office, his administration moved to dismantle the Clean Water Rule and replace it with a new rule that would appease industry groups long opposed to strong federal protections for the country’s waters.

71. In February 2017, President Trump signed an executive order requiring EPA and the Army Corps to propose a rule “rescinding or revising” the Clean Water Rule. Exec. Order No. 13,778 § 2(a) (Feb. 28, 2017). The order directed the Agencies to “consider interpreting the term ‘navigable waters’ . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*.” *Id.* § 3.

72. Following President Trump’s directive, the Agencies began to dismantle the Clean Water Rule on multiple illegal fronts.

73. First, the Agencies proposed repealing the Clean Water Rule and replacing it with the pre-2015 regulatory regime. *See* 82 Fed. Reg. 34,899, 34,900 (July 27, 2017). The final rule repealing the Clean Water Rule became effective two years later on December 23, 2019. *See* 84 Fed. Reg. 56,626 (Oct. 22, 2019). Many parties have brought legal challenges to the repeal rule, including Plaintiff NRDC. *See, e.g., Compl., S.C. Coastal Conservation League v. Wheeler*, 2:19-cv-03006-DCN (D.S.C. Oct. 23, 2019).



74. Second, while the Agencies' repeal proposal was pending, the Agencies issued a regulation suspending the Clean Water Rule for two years. *See* 83 Fed. Reg. 5200 (Feb. 6, 2018). But two different courts struck down and vacated that suspension as illegal. *See Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196, at \*7 (W.D. Wash. Nov. 26, 2018); *Order, S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-00330-DCN (D.S.C. Dec. 4, 2018), ECF No. 89.

75. Third, the Agencies proposed replacing the Clean Water Rule with an entirely new rule – the Navigable Waters Rule. When proposing the Navigable Waters Rule, EPA Administrator Wheeler announced that the Agencies had “fulfill[ed] the president’s objective”: to get rid of federal regulations so that “Americans,” i.e., businesses, can more easily “develop, build, and invest in projects.” In other words, the Rule makes it easier for developers to pave over and pollute waters by removing the federal government’s authority to protect those waters.

### **The Proposed Rule and the Comment Process**

76. The Agencies published the proposed Rule on February 14, 2019. 84 Fed. Reg. 4154 (Feb. 14, 2019). Public comments on the proposal were due 60 days later, on April 15, 2019. *Id.*

77. The Agencies' proposal was a significant departure from their prior policies, including the Clean Water Rule. The proposal categorically removed Clean Water Act protections for many waters, such as ephemeral (i.e., rain- or snowfall-dependent) streams and many floodplain wetlands, that the Agencies had protected under the Act for decades.

78. Preliminary estimates conducted by the Agencies in 2017 suggested that the proposed Rule could result in a large proportion of streams and wetlands across the country losing Clean Water Act protections. Specifically, the Agencies estimated (according to national datasets) that at least 18 percent of the country's streams are ephemeral, and thus would no longer be protected under the Agencies' proposal. Other record documents indicated that this was an underestimate of the amount of streams that would lose protection under the Agencies' proposal "because the actual percentage of ephemeral streams across the country is likely higher than 18 percent." Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States," at 40 (Dec. 11, 2018). In their 2017 preliminary analysis, the Agencies also estimated that removing protections for wetlands not directly touching another "water of the United States" would exclude about half of the country's wetlands.

79. Despite these indications that a significant proportion of the country's waters could lose protection under the Agencies' proposal, the Agencies did not meaningfully assess, or take into account, the water quality impacts of their unprecedented narrowing of the Clean Water Act when redefining "waters of the United States."

80. Many public comments expressed concern about the Agencies' failure to adequately assess the proposed Rule's impacts on water quality, citing evidence indicating that those impacts could be significant. Comments expressed particular concern about the proposed Rule's consequences in the arid West, where the Agencies

had previously estimated (based on national datasets) that about 39 percent of streams are ephemeral.

81. Numerous public comments also expressed concern about the lack of scientific support for the proposed Rule. For instance, these comments explained that interpreting the phrase “waters of the United States” as excluding ephemeral streams and many floodplain wetlands would be inconsistent with the 2015 Connectivity Report’s conclusions that these waterbodies significantly impact the quality of navigable waters.

82. Concerns about the lack of scientific support for the proposed Rule also came from former members of the Science Advisory Board’s panel that had reviewed the Connectivity Report. These scientists informed the Agencies that the proposed Rule “ignores or misrepresents much of the Connectivity Report and subsequent [Science Advisory Board] review” and “draws incomplete or incorrect conclusions,” and is therefore “inconsistent with the best available and most current science.” As a result, they cautioned that the proposed Rule “would have severe and long-lasting negative consequences for water protection and environmental conditions throughout the U.S.”

83. EPA’s current Science Advisory Board similarly advised EPA that the Agencies’ proposed rulemaking both neglected and departed from established science. In October 2019, the Science Advisory Board provided Administrator Wheeler with a draft commentary on the proposed Rule, which concluded that the proposal was not “consistent with established EPA recognized science” because, among other things, the

proposal “fail[ed] to protect ephemeral streams and wetlands which connect to navigable waters below the surface.”

84. At a public meeting on January 17, 2020, the Science Advisory Board announced that it planned to revise its commentary on the proposed Rule the following week. However, the Agencies did not wait for the Science Advisory Board’s revised commentary. Instead, Defendants Wheeler and James signed the final Rule on January 23, 2020, before the Board provided EPA with their final commentary.

85. The Science Advisory Board’s final comments on the proposed Rule concluded that it “does not incorporate the best available science,” is “inconsistent with the body of science previously reviewed by [the Board],” and “lacks a scientific justification, while potentially introducing new risks to human and environmental health.”

86. Numerous public comments also explained that section 7 of the ESA required the Agencies to consult with the U.S. Fish & Wildlife Service and National Marine Fisheries Service on the proposed Rule’s effects on threatened and endangered species and their critical habitat.

### **The Navigable Waters Rule**

87. The Navigable Waters Rule defines “waters of the United States” as: (1) the “territorial seas” and other traditionally navigable waters; (2) “[t]ributaries” of such waters; (3) certain “[l]akes and ponds, and impoundments of jurisdictional waters”; and (4) wetlands “[a]djacent” to other jurisdictional waters (other than waters that are themselves wetlands). 33 C.F.R. § 328.3(a); 85 Fed. Reg. 22,250, 22,273 (Apr. 21, 2020).

All other waters are categorically excluded from the definition of “waters of the United States.” 33 C.F.R. § 328.3(b).

### *Tributaries*

88. The Rule defines a “tributary” as a “river, stream, or similar naturally occurring surface water channel that contributes surface water flow to [a traditionally navigable water] in a typical year either directly or through one or more [jurisdictional] waters.” *Id.* § 328.3(c)(12).

89. A “tributary” must be “perennial or intermittent” in a “typical year.” *Id.*

90. A stream is “perennial” under the Rule if it flows “continuously year-round.” *Id.* § 328.3(c)(8).

91. A stream is “intermittent” under the Rule if it flows “continuously during certain times of the year and more than in direct response to precipitation.” *Id.* § 328.3(c)(5). The Rule says that an example of an “intermittent” stream is one that flows “seasonally when the groundwater table is elevated or when snowpack melts.” *Id.*

92. A stream is “ephemeral” and therefore not considered a “tributary” under the Rule if it flows “only in direct response to precipitation,” such as “rain” or “snow fall.” *Id.* § 328.3(c)(3).

93. An “intermittent” or “perennial” stream remains a protected “tributary” under the Rule if it contributes surface flow to a downstream navigable water in a “typical year” through certain types of non-jurisdictional features, such as ephemeral streams, debris piles, boulder fields, or certain underground features like tunnels or subterranean rivers. *Id.* § 328.3(c)(12); 85 Fed. Reg. at 22,277.

*Adjacent Wetlands*

94. Under the Rule, wetlands are “waters of the United States” only if they are “[a]djacent” to other jurisdictional waters (except waters that are themselves wetlands). 33 C.F.R. § 328.3(a)(4).

95. The Rule defines “adjacent wetlands” as wetlands that: (i) “abut,” meaning they “touch at least at one point or side of,” another jurisdictional water (other than a wetland); (ii) “are inundated by flooding from” another jurisdictional water (other than a wetland) in a “typical year”; (iii) are separated from another jurisdictional water (other than a wetland) “only by a natural berm, bank, dune, or similar natural feature”; or (iv) are separated from another jurisdictional water (other than a wetland) by an “artificial dike, barrier, or similar artificial structure,” but only if the structure allows for a “direct hydrologic surface connection” between the waters in a “typical year.” *Id.* § 328.3(c)(1).

96. The preamble to the Rule contends that wetlands separated from another jurisdictional water by a “natural berm, bank, dune, or other similar natural feature” are “adjacent” wetlands because those natural features “are evidence of a dynamic and regular direct hydrologic surface connection” between the jurisdictional water and the wetland. 85 Fed. Reg. at 22,307.

97. A wetland is not “adjacent” under the Rule if it contributes surface flow to a navigable water only via flooding or “sheet flow,” such as surface runoff during storm events, even if those surface connections occur in a “typical year.” *Id.* at 22,310. A

wetland is also not “adjacent” under the Rule if it is connected to a jurisdictional water only via groundwater or subsurface flow. *Id.* at 22,313.

### ***Lakes and Ponds***

98. Lakes, ponds, and impoundments of jurisdictional waters are “waters of the United States” under the Rule if they “contribute surface water flow to a [navigable] water” through another jurisdictional water in a “typical year,” or are “inundated by flooding from” another jurisdictional water (except wetlands) in a “typical year.” 33 C.F.R. § 328.3(c)(6).

99. Lakes, ponds, and impoundments of jurisdictional waters remain “waters of the United States” if they contribute surface flow to a downstream jurisdictional water in a “typical year” through certain types of non-jurisdictional features, such as ephemeral streams, debris piles, boulder fields, or certain underground features like tunnels or subterranean rivers. *Id.*; 85 Fed. Reg. at 22,277.

### **The Navigable Waters Rule is arbitrary and capricious**

#### ***The Agencies failed to meaningfully consider the impacts of the Navigable Waters Rule on the nation’s water quality***

100. The record evidence, including the Agencies’ own preliminary analysis, shows that the Navigable Waters Rule removes Clean Water Act protections from a significant number of streams and wetlands across the country. *See supra* ¶¶ 77-79.

101. The undisputed scientific evidence in the record also shows that the streams and wetlands no longer protected under the Rule significantly impact the quality of downstream navigable waters. *See supra* ¶¶ 62-65.

102. Thus, as many commenters emphasized, the Rule is likely to have significant detrimental impacts on the quality of waters across the country, which in turn will have negative consequences for members of the public who rely on these waters for drinking water, recreational activities, or other purposes, or who live near waters that will be at increased risk of flooding due to the Rule. Loss of wetlands and poorer water quality as a result of the Rule will also have negative impacts on fish, birds, and other wildlife that depend on these waters for food or habitat.

103. The Agencies failed to adequately consider these potential water quality impacts when redefining the phrase “waters of the United States” in the Navigable Waters Rule.

104. The Agencies claim that the Rule “strikes a better balance” between the Clean Water Act’s objective to protect water quality and other purported policy goals of the statute. But the Agencies do not explain how they could strike this “balance” without adequately evaluating the Rule’s harm to water quality that they were supposedly “balancing” against other priorities.

105. Because the sole objective of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), the Rule’s impact on water quality is the most important factor that the Agencies were required to consider when promulgating the Rule. The Agencies’ failure to meaningfully consider this factor was arbitrary and capricious.



*The Agencies' findings in the Navigable Waters Rule contradict their prior findings without justification*

106. The definition of “waters of the United States” in the Navigable Waters Rule excludes many waters that the Agencies previously found to have significant effects on downstream water quality. The Agencies do not reasonably explain why they ignored those prior findings, and drew conclusions that directly contradict those prior findings without justification.

107. For example, the Rule declares that ephemeral streams (i.e., streams that flow only in response to rain or snowfall) are not “waters of the United States.” In justifying this exclusion, the Agencies suggest that ephemeral streams provide only “speculative or insubstantial functions” to downstream navigable waters and that their “consequences” for downstream water quality are not significant enough to warrant federal protection. 85 Fed. Reg. at 22,288 (quoting 80 Fed. Reg. at 37,090).

108. However, excluding ephemeral streams on these grounds directly contradicts, with no reasoned explanation, findings that the Agencies made in promulgating the Clean Water Rule. For example, when promulgating the Clean Water Rule, the Agencies found that ephemeral streams can have “substantial consequences” on the integrity of downstream waters, 80 Fed. Reg. at 37,064, and “if these waters are polluted or destroyed, there is a significant effect downstream,” *id.* at 37,056. These factual findings were supported by scientific evidence. The Agencies do not dispute that scientific evidence or reasonably explain why they are disregarding their prior

findings, which were based on that scientific evidence. The Agencies' failure to provide a reasoned explanation for disregarding prior findings is arbitrary and capricious.

109. The Navigable Waters Rule also declares that wetlands are not "waters of the United States" if they are inundated by flooding from a jurisdictional water less frequently than a "typical year." The Agencies explain that they have adopted this policy in part to "ensure[]" that a sufficient surface water connection occurs and that the connection is not merely 'possible' or 'speculative.'" 85 Fed. Reg. at 22,310. However, that conclusion again contradicts the Agencies' science-based findings in promulgating the Clean Water Rule that wetlands lying near jurisdictional waters have "significant" connections to such waters even if they lack a regular surface-water connection. 80 Fed. Reg. at 37,058. The Agencies do not explain why these "significant" connections, based on undisputed scientific evidence, are now too "speculative."

110. Elsewhere in the Navigable Waters Rule, the Agencies similarly exclude waters from the definition of "waters of the United States" based on the Agencies' findings that they have "insubstantial" or "speculative" connections to navigable waters, which directly contradict the Agencies' prior findings made in support of the Clean Water Rule without justification.

*The Agencies' claim that the Navigable Waters Rule is "informed" by science runs counter to the evidence*

111. The Agencies claim that they "relied on" science to "inform" their new definition of "waters of the United States" in the Navigable Waters Rule, 85 Fed. Reg. at 22,288, but that claim is contradicted by the record.

112. For example, contrary to the Agencies' assertions, there is no scientific support for their decision to categorically exclude all ephemeral streams from the Rule's definition of "waters of the United States." The Agencies assert that their decision is based in part on the "connectivity gradient" between waters – a conceptual model developed by EPA's Science Advisory Board as part of its review of the draft Connectivity Report in 2014. According to the Agencies, the "connectivity gradient" supports their decision to remove protections from all ephemeral streams because it "depicts a decreased 'probability that changes . . . will be transmitted to downstream waters' at flow regimes less than perennial and intermittent." *Id.* at 22,288 (alteration in original) (citation omitted). However, the evidence belies the Agencies' assertion.

113. More than a dozen former members of the Science Advisory Board panel responsible for reviewing the Connectivity Report publicly denounced the Agencies as "misrepresenting" the connectivity gradient concept to draw conclusions "not supported by the science."

114. As those scientists explained in their comments to the proposed Rule, the Agencies ignore the fact that ephemeral streams, while individually less likely to transmit pollutants to downstream waters compared to perennial streams, are "often extremely abundant and widespread." Because of their aggregate effects, the science shows that "destroying or degrading . . . ephemeral streams can have drastic effects for watersheds, water quality, water supply, and key organisms like fish."

115. The Agencies similarly assert that the Rule's definition of protected "adjacent" wetlands – which excludes wetlands unless they "abut" or have other

limited surface-water connections to jurisdictional waters in a “typical year” – is “informed” by science. But, again, the undisputed scientific evidence contradicts that assertion.

116. For example, the Agencies claim that their decision is supported by scientific evidence that wetlands “closer to rivers and streams” are more likely to be connected to those waters than wetlands that are farther away. *Id.* at 22,314 (quoting Connectivity Report at ES-4). However, this evidence does not provide support for the Rule that the Agencies promulgated. The Rule protects *only* wetlands that directly “abut” or have specified surface-water connections to streams and rivers – not all wetlands that are close to those waters. In fact, the Agencies’ “abutting” and surface-water-connection requirements are inconsistent with the established scientific evidence that wetlands that do not satisfy those requirements – such as wetlands that connect to streams and rivers below the surface – are significantly connected to those waters because they improve water quality.

117. The Agencies also claim that they used science to “inform” other parts of the Navigable Waters Rule, but there is no scientific support for many of their conclusions. For instance, the Agencies claim that science supports their decision to protect wetlands separated from jurisdictional waters by a single natural feature, like a dune, as “inseparably bound up with” those waters. *Id.* at 22,271. But the Agencies give no support for their implicit, corollary conclusion that similarly-situated but excluded wetlands – like those separated by *two* dunes – are not just as “inseparably bound up.”

118. EPA's Science Advisory Board expressed significant concern about the lack of scientific support for the Rule, as well as the Agencies' decision to disregard the established science.

119. Many members of the public also expressed concern about the Rule's lack of scientific justification and the Agencies' misrepresentations of well-established science. However, the Agencies did not adequately address or respond to those significant and relevant comments.

*The Agencies do not reasonably explain their decision to exclude certain waters from the definition of "waters of the United States"*

120. The Agencies' decisions to exclude certain waters from the Rule's definition of "waters of the United States" are not reasonably explained because they are internally inconsistent, conclusory, and/or illogical.

121. For instance, the Agencies declare that wetlands are "waters of the United States" if they are inundated by flooding from another jurisdictional water in a "typical year," because these wetlands have a "direct hydrologic surface connection" to the jurisdictional water "during the flood event." *Id.* at 22,310. However, if a direct hydrological surface connection in a "typical year" occurs in the opposite direction – *from* the wetland *to* the jurisdictional water – the Agencies conclude that the wetland does not qualify as a "water of the United States." *Id.* The Agencies do not provide a reasonable explanation for treating these wetlands differently.

122. There is also no reasonable explanation for the Agencies' decision that ephemeral streams are not "waters of the United States," given, for instance, the

Agencies' conclusion that other jurisdictional waters are protected under the Clean Water Act when they are connected to navigable waters via ephemeral streams. The Agencies explain that an ephemeral stream does not sever the jurisdiction of an upstream water because ephemeral streams provide a "regular and predictable surface water connection" and "allow[] such waters to connect and become indistinguishable when flowing (*i.e.*, they look like one water)." *Id.* at 22,302, 22,278. The Agencies do not explain how these findings are consistent with their conclusion that ephemeral streams do not qualify as "waters" under the Act and supposedly have insufficient connections to downstream navigable waters.

123. The Agencies further claim that it makes "practical sense" to exclude waters connected to navigable waters via groundwater because "groundwater [itself] is not jurisdictional." *Id.* at 22,278. Yet the Agencies do not explain how that rationale is consistent with their finding that waters connected to navigable waters via other non-jurisdictional features, such as ephemeral streams, boulder fields, debris piles, and certain "subsurface connections," are protected by the Act.

124. The Agencies similarly fail to provide reasoned explanations for excluding other waters from the definition of "waters of the United States." For example, the Agencies repeatedly assert that the Rule excludes certain waters because the Agencies have concluded that such waters are "more appropriately regulated by States and Tribes." However, these repeated assertions are conclusory, circular, and made without reasonable explanations.

*The Agencies claim that the Navigable Waters Rule promotes “clarity,” but the Rule is riddled with unclear terms that will create confusion, unpredictability, and uncertainty*

125. The Navigable Waters Rule also includes ambiguous and undefined terms that will create confusion and make the Rule extremely difficult to implement. These unclear terms and near-certain implementation problems contradict the Agencies’ assertion that their new definition of “waters of the United States” will promote “clarity,” “predictability,” and “certainty” for the Agencies and the regulated community. *Id.* at 22,318.

126. For example, the Agencies’ own statements demonstrate that it will be difficult to distinguish between “intermittent” streams (which are protected) and “ephemeral” streams (which are unprotected), undermining the Agencies’ claims that the Rule’s definitions of these terms provide a “clear regulatory line between jurisdictional and excluded waters.” *Id.* at 22,288.

127. According to the Agencies, the Rule’s definition of “ephemeral” streams means streams that flow in response to “individual precipitation events,” while the definition of “intermittent” means streams that flow in response to an “accumulation of precipitation.” However, the Agencies’ own attempt to differentiate between these types of streams shows that the “regulatory line” is far from “clear”: “A foot of new snow fall on the high plains of southern Wyoming in May will typically melt quickly under the intense sun of subsequent days, while a foot of snow in northern Wisconsin in January will likely contribute to seasonal snowpack that may not melt until spring

thaw. The first scenario *is more likely* to cause ephemeral flow, the second *is more likely* to cause intermittent flow.” *Id.* at 22,276 (emphases added).

128. Despite the lack of clarity as to whether a stream qualifies as “intermittent” or “ephemeral” under the Rule, the Agencies nonetheless dismiss concerns that it will be difficult to tell these waters apart, explaining that “scientists, environmental consultants, and other water resource professionals, including agency staff, have used the terms ‘perennial,’ ‘intermittent,’ and ‘ephemeral’ for decades in the field.” *Id.* at 22,293. However, the Agencies acknowledge that the Rule’s definitions of “intermittent” and “ephemeral” are *different* from the “generally-accepted scientific definitions,” as well as from how the Agencies have defined these waters in the past. *Id.* The Agencies do not explain how the Rule’s novel definitions of “ephemeral” and “intermittent” will be easy to implement.

129. The sheer number of tools and datasets that the Agencies intend to use to distinguish between “intermittent” and “ephemeral” streams also undermines the Agencies’ claims of efficiency, clarity, and predictability, and contradicts the Agencies’ claim that these tools are “generally available for the public to use” such that regulated parties can easily determine whether a water is protected without needing to involve the Agencies. *Id.* at 22,292. The tools identified by the Agencies include, among other things, “stream gage data,” “elevation data,” “historic or current water flow records,” “flood predictions,” “statistical evidence,” “aerial imagery,” “remote sensing information,” “local flow data collected by government agencies,” “trapezoidal flumes,” “pressure transducers,” “streamflow duration assessment methods,”



“mapping sources,” “photographs,” “regional regression analysis,” “topographic data,” and “modeling tools” developed by academia, the government, and other stakeholders. *Id.* at 22,292-94.

130. The Agencies do not make clear which of these tools are currently available and which of them will require the Agencies to rely on data that do not yet exist, raising further implementation challenges. While the Agencies assert that they will be able to distinguish between “intermittent” and “ephemeral” streams “using readily available resources,” they contradictorily acknowledge that implementation will involve “the development of new tools.” *Id.* at 22,293; *see also id.* at 22,294.

131. Also problematic is the “typical year” concept, which serves as the Rule’s lynchpin for deciding whether certain waters receive Clean Water Act protections. For instance, a stream must be “intermittent” in a “typical year” to qualify as a “water of the United States” under the Rule. 33 C.F.R. § 328.3(a)(2), (c)(12). Additionally, a wetland, lake, pond, or impoundment can be a “water of the United States” if it is inundated by flooding, but only if that flooding occurs in a “typical year.” *Id.* § 328.3(c)(1)(ii), (c)(6).

132. The Rule defines a “typical year” as “when precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.” *Id.* § 328.3(c)(13).

133. Although the Agencies claim that the “typical year” requirement will provide a “predictable framework” for implementing the Rule, 85 Fed. Reg. at 22,273-74, there is no support for that claim.

134. For instance, the Rule never defines “geographic area” in the “typical year” definition. Although the Agencies say that watershed boundaries “should be a consideration” in defining a “geographic area,” they provide no guidance on what other types of boundaries could be used, while conceding that climate records may not be available for certain watersheds. *Id.* at 22,275.

135. Another problematic aspect of the “typical year” definition is the Agencies’ reliance on a “rolling thirty-year period.” A thirty-year average means that the “typical year” will skew towards historical conditions that may no longer accurately represent today’s climate. The Agencies do not adequately consider whether they can reasonably determine a “typical year” based on a rolling thirty-year average of data, given that significant changes in the climate have occurred in recent years and are likely to continue, and even accelerate, in the future.

**The Navigable Waters Rule is inconsistent with the text, structure, and purpose of the Clean Water Act**

136. The definition of “waters of the United States” in the Navigable Waters Rule is inconsistent with the text, structure, and purpose of the Clean Water Act.

137. The Agencies justify their decision to remove Clean Water Act protections from ephemeral streams and various wetlands by claiming that their interpretation of “waters of the United States” is consistent with the Clean Water Act. However, that justification cannot stand. The Agencies’ interpretation of the Act is based almost entirely on the four-Justice plurality opinion in *Rapanos*. But five Supreme Court Justices held that the *Rapanos* plurality’s interpretation of the Clean Water Act was untethered

from the text, structure, and purpose of the statute. *See supra* ¶¶ 52-54. The Agencies' Rule violates the statute for the same reasons.

138. For example, the Agencies claim that they are removing Clean Water Act protections for all "ephemeral" streams because they have determined, based on the *Rapanos* plurality opinion, that streams must have "relatively permanent" flow to qualify as "waters" under the Act. 85 Fed. Reg. at 22,273, 22,288-89. But that reasoning was properly rejected by both Justice Kennedy and the four dissenting Justices in *Rapanos* because it has no statutory support. *See, e.g., Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment) (explaining that the "relatively permanent" requirement makes little sense, considering the "merest trickle, if continuous," would be protected, "while torrents thundering at irregular intervals" would not).

139. Similarly, based on the *Rapanos* plurality opinion, the Agencies conclude that non-abutting wetlands are excluded from the Act unless they have certain types of regular surface-water connections to other jurisdictional waters. Again, that reasoning has no statutory support.

140. The Agencies also unreasonably exclude streams and wetlands that "significantly affect the chemical, physical, and biological integrity" of downstream waters. *Id.* at 779-80 (Kennedy, J., concurring in the judgment). As Justice Kennedy made clear in *Rapanos*, and as the Court recognized in *SWANCC* and *Riverside Bayview*, because the purpose of the Clean Water Act is to protect the integrity of the nation's waters, it is unreasonable to interpret "waters of the United States" under the Act in a way that ignores impacts on water quality.

141. The Agencies also try to justify their narrow interpretation of the phrase “waters of the United States” by claiming that it effectuates the statute’s “policy” of recognizing and preserving the “primary responsibilities and rights” of states over their water resources. 85 Fed. Reg. at 22,287-88 (quoting 33 U.S.C. § 1251(b)). However, the Agencies misinterpret this “policy.” Section 1251(b) recognizes the states’ primary role in *implementing* the Clean Water Act; it does not limit the scope of the Act’s protections.

142. Further, the Agencies offer no principled way for this “policy” to divide “waters of the United States” from “state waters.” The “policy” of state responsibility in the abstract does not give the Agencies license to eliminate federal protections for certain categories of waters simply because the Agencies declare, arbitrarily, that those waters should be regulated by the states.

**The Agencies violated the ESA by (1) failing to properly determine whether the Rule “may affect” listed species or critical habitat, and (2) failing to engage in consultation**

143. Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). To achieve that objective, Congress declared that all federal agencies “shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes” of the ESA. *Id.* § 1531(c)(1).

144. The “heart” of the ESA is section 7. *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009). Under section 7, federal agencies must ensure, in consultation with the U.S. Fish & Wildlife Service and/or the National Marine

Fisheries Service, that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). An “action” under the ESA includes “the promulgation of regulations.” 50 C.F.R. § 402.02(b).

145. Section 7’s consultation requirement is easily triggered: A federal agency must determine “at the earliest possible time” whether a proposed action “may affect” any ESA-listed species or critical habitat. *Id.* § 402.14(a). If the agency determines that the proposed action “may affect” listed species or critical habitat, the agency must initiate formal consultation with the U.S. Fish & Wildlife Service (for terrestrial species) or the National Marine Fisheries Service (for marine and anadromous species), unless the agency and relevant Service agree in writing that the proposed action is “not likely to adversely affect” listed species or critical habitat. *Id.* § 402.14(a), (b).

146. An agency must complete the section 7 consultation process “before engaging in a discretionary action” that “may affect listed species.” *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969, 974 (9th Cir. 2003). At the end of the formal consultation process, the relevant Service issues a “biological opinion” on whether the proposed action is likely to jeopardize any ESA-listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(4), (h). If the Service concludes that a proposed agency action is likely to jeopardize a listed species or adversely affect its critical habitat, the Service must

propose measures that would avoid those results. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2).

147. The Agencies promulgated the Navigable Waters Rule, a discretionary agency action for purposes of the ESA, without properly determining whether the Rule “may affect” any threatened or endangered species or critical habitat.

148. The Agencies promulgated the Navigable Waters Rule without engaging in consultation with either the U.S. Fish & Wildlife Service or the National Marine Fisheries Service to ensure that the Rule would not jeopardize any threatened or endangered species or result in adverse modification or destruction of critical habitat.

149. The Agencies’ failure to make the required “effects determination” and engage in consultation with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service violated section 7 of the ESA.

150. The Agencies were required to engage in consultation on the effects of the Navigable Waters Rule because the evidence clearly shows that the Rule meets the low “may affect” threshold for triggering consultation. Indeed, the Rule will likely harm countless threatened and endangered species, because it removes Clean Water Act protections from waters that provide habitat for or otherwise support those species.

151. As described *supra* ¶ 78, the Agencies previously estimated that the Rule could remove Clean Water Act protections from about half of the country’s wetlands. According to the Agencies, “more than one-third of the United States’ threatened and endangered species live only in wetlands, and nearly half use wetlands at some point in

their lifecycle.” EPA & U.S. Army Corps of Engineers, *Economic Analysis for the Proposed Revised Definition of “Waters of the United States”* 49 (2018).

152. Wetlands no longer protected under the Rule support a diverse range of species by, for example, acting as integral components of food webs, and providing breeding sites for birds, nursery habitat for amphibians, colonization opportunities for invertebrates, and maturation habitat for insects.

153. By removing Clean Water Act protections from all wetlands that do not meet the Rule’s definition of “adjacent,” the Rule poses a risk to myriad threatened and endangered species that live in or otherwise depend on wetlands, including birds like the wood stork and Everglade snail kite; invertebrates like the vernal pool fairy shrimp and Hine’s emerald dragonfly; amphibians like the California tiger salamander; and plants like the mountain sweet pitcher plant and eastern prairie fringed orchid.

154. The Rule also removes federal protections from all ephemeral streams—more than 18 percent of the country’s streams and about 39 percent of streams in the arid west, according to the Agencies’ preliminary estimates. *See supra* ¶¶ 78, 80. EPA has acknowledged that ephemeral streams provide essential shelter and dispersal corridors for various animals, including reptiles, amphibians, birds, and mammals. EPA, *Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest* 48-49 (2008). The Rule poses a risk to listed species that live in or otherwise depend on ephemeral streams.

155. Countless threatened and endangered species also live in or otherwise rely on streams, rivers, and lakes that are downstream of waters that have lost Clean

Water Act protections under the Rule. The Rule will cause the quality of those downstream waters to degrade – and harm the species that depend on them – because, as the Agencies previously found and the evidence confirms, the wetlands and ephemeral streams excluded by the Rule significantly impact those waters. *See supra* ¶¶ 62-65, 67. The Rule therefore poses a risk to listed species like the shortnose sturgeon, Atlantic sturgeon, Gila topminnow, Florida manatee, piping plover, and southwestern willow flycatcher that live in or otherwise depend on downstream waters like rivers and lakes.

156. Threatened and endangered species impacted by the Rule play important roles in maintaining the aquatic ecosystems that Congress sought to protect when passing both the ESA and the Clean Water Act.

157. Despite the broad adverse impacts of the Navigable Waters Rule on threatened and endangered species and their critical habitat, the Agencies assert that these impacts do not “exceed the ESA’s ‘may affect’ threshold” because “any harm to listed species or designated critical habitat . . . would result from [future activities in non-jurisdictional waters], not this final rule.” However, that assertion is insufficient to satisfy the Agencies’ obligation to determine whether the Rule “may affect” ESA-listed species and critical habitat. *See Am. Fuel & Petrochem. Mfrs. v. EPA*, 937 F.3d 559, 597-98 (D.C. Cir. 2019).

158. Even if the Agencies’ statements could be construed as a “no effects” determination, that determination is arbitrary and capricious. The Rule allows these future third-party actions harming ESA-listed species to occur without federal



regulation, and thus renders their occurrence significantly more likely. The Rule's potential impacts on listed species and critical habitat clearly exceed the low threshold for triggering the section 7 consultation requirement.

**The Navigable Waters Rule harms Plaintiffs' members**

159. Plaintiffs bring this action on behalf of their members who enjoy, use, or otherwise benefit from waters that have lost Clean Water Act protections under the Navigable Waters Rule.

160. The Rule harms Plaintiffs' members because it denies the protection of the Clean Water Act to these water resources, creating a substantial risk that they will be polluted, destroyed, or otherwise degraded.

161. Plaintiffs' members use, enjoy, and benefit from waterbodies that have lost Clean Water Act protections under the Rule, including by using, enjoying, and benefitting from waterbodies, such as larger rivers and lakes, that are downstream from waters that have lost Clean Water Act protections. The Rule creates a substantial risk that these downstream waterbodies will be polluted or degraded. *See supra* ¶¶ 62-65, 80-81.

162. The quality of both the upstream and downstream waters is of fundamental importance to Plaintiffs' members who use and rely on these waters for their recreational enjoyment, drinking water, and livelihoods.

163. Plaintiffs' members also derive aesthetic, recreational, conservation, professional, and other benefits from threatened and endangered species that inhabit or otherwise rely, either directly or indirectly, on waters that have lost Clean Water Act

protections under the Rule. The Rule will likely adversely affect these species by allowing the destruction and degradation of their habitats, increasing their exposure to pollutants, and disrupting their food webs. Plaintiffs' members are harmed by the Agencies' failure to abide by their obligations under the ESA to assess the Rule's impacts on these protected species and their critical habitat, and to ensure that the Rule is not likely to jeopardize the continued existence of these species or result in the destruction or adverse modification of their critical habitat.

164. These harms to Plaintiffs' members will be redressed by an order vacating the Rule and requiring Defendants to comply with their ESA obligations.

*Harm to Recreational Interests*

165. The Navigable Waters Rule creates a substantial risk that waters on which Plaintiffs' members rely to view wildlife, swim, fish, kayak, canoe, row, raft, hike, and conduct other recreational activities will be destroyed, polluted, or degraded.

166. Ephemeral streams, wetlands, and downstream waterways provide and support breeding, feeding, and sheltering habitat for wildlife across the nation, including many federally threatened and endangered species.

167. Wetlands support a diverse range of animals by, for example, acting as integral components of food webs, and providing nesting sites for birds, nursery habitat for amphibians, colonization opportunities for invertebrates, and maturation habitat for insects.

168. Plaintiffs' members enjoy viewing birds, plants, and other wildlife that inhabit or otherwise depend on wetlands at substantial risk of being polluted,

degraded, or destroyed because of the Rule. These include threatened and endangered species like the wood stork, Everglade kite snail, California tiger salamander, vernal pool fairy shrimp, Hine's emerald dragonfly, eastern prairie fringed orchid, and mountain sweet pitcher plant. The Rule creates a substantial risk of harm to these species and Plaintiffs' members' enjoyment of them.

169. For example, Plaintiff NRDC has a member in Florida who derives aesthetic, recreational, and professional benefits from the wood stork, a federally threatened bird that nests in wetlands. He hopes and intends to view the wood stork in the future. The Rule substantially increases the risk that the wood stork's wetland habitat will be polluted or destroyed, and thus increases the risk of harm to the species.

170. Plaintiff NRDC also has a member in Florida who enjoys viewing the Everglade snail kite, a federally endangered bird that depends on lakes and wetlands for its habitat and for its primary source of food: apple snails. Because of the bird's unique diet, water quality is critical to the bird's survival. The Rule creates a substantial risk that the waters where the snail kite feeds and nests will be degraded or destroyed, which will negatively impact the Everglade snail kite, its critical habitat, and the member's ability to view the species in the future.

171. Plaintiff NRDC has a member in California who enjoys seeing the California tiger salamander and vernal pool fairy shrimp, both federally threatened species that live in vernal pools – a type of wetland excluded from the Rule's definition of "waters of the United States." This member hopes to see these two species during

future outings, but there is a substantial risk that these species' habitat will be polluted or destroyed as a result of the Rule.

172. Plaintiff Clean Wisconsin has a member with professional, educational, and recreational interests in the Hine's emerald dragonfly and the eastern prairie fringed orchid, both federally endangered species that depend on wetlands for their habitat. The Hine's emerald dragonfly exists only in the midwestern United States and relies on wetlands for its entire lifespan. The Rule removes federal protections from many of these wetlands, posing substantial risks to the dragonfly's habitat and the member's ability to enjoy the species. The Rule also poses a substantial risk of harm to the eastern prairie fringed orchid's habitat and the member's interests in the species, because the Rule removes federal protections from the type of wetlands where the orchid grows.

173. Plaintiff NRDC has a member who grows mountain sweet pitcher plants, a federally endangered plant species that grows in small wetlands in the Blue Ridge Mountains. He regularly goes on outings to look for native plant species, including the mountain sweet pitcher plant. Because the Rule is likely to cause greater pollution and loss of the plant's wetland habitat, the Rule creates a substantial risk to the member's interest in the species.

174. Plaintiffs' members also enjoy viewing wildlife, including threatened and endangered species, that inhabit or otherwise depend on ephemeral streams at substantial risk of being polluted, degraded, or destroyed because of the Rule.

175. For example, in Arizona and New Mexico, Plaintiffs' members enjoy hearing the calls of the western yellow-billed cuckoo, a federally threatened bird that nests along intermittent and ephemeral streams. Because the Rule creates a substantial risk that these streams will be destroyed or polluted, the Rule is likely to adversely affect the yellow-billed cuckoo's habitat, further endangering the species and the members' ability to hear them in the future.

176. Plaintiffs' members also enjoy viewing species that live in or depend on downstream waters, such as rivers, lakes, streams, and coastal waters, at risk of being polluted or degraded as a result of the Navigable Waters Rule.

177. For example, Plaintiffs CLF, CRC, and MRWC have members who enjoy viewing fish species, such as the federally endangered shortnose sturgeon and federally threatened Atlantic sturgeon, while recreating in the Merrimack and Connecticut Rivers and their tributaries. These members plan to continue recreating in these rivers and looking for shortnose and Atlantic sturgeon in the future. The Rule eliminates federal protections for wetlands and ephemeral streams that significantly impact the water quality of the Merrimack and Connecticut Rivers and their tributaries, and thus substantially increases the risk of harm to these downstream waters and the fish inhabiting them. These members' enjoyment of the rivers will be diminished if the shortnose and Atlantic sturgeon become further jeopardized or extinct.

178. Plaintiffs CLF and MRWC also have members who enjoy viewing birds like bald eagles that nest along, and get their food from, the Connecticut and Merrimack Rivers. The bald eagle was previously endangered but has made a remarkable

comeback over the past several decades in part due to the Clean Water Act and decreased pollution in areas like the Connecticut and Merrimack River watersheds. The Rule will likely result in increased pollution in these rivers, which will negatively affect wildlife that depend on the rivers and Plaintiffs' members' enjoyment of the rivers.

179. In New England and Wisconsin, Plaintiffs' members enjoy viewing the piping plover, a bird species listed as endangered in the Great Lakes region and threatened along the Atlantic coast. Piping plovers get their food from and nest along the shores of downstream waters like the Merrimack River, New Hampshire's Great Bay, and Wisconsin's Green Bay. Increased exposure to pollutants from these waters reduces the likelihood that piping plover eggs will hatch and contaminates their food sources. Piping plovers are likely to be adversely impacted by increased pollution of the Merrimack River, Great Bay, and Green Bay watersheds caused by the Rule, and thus the Rule poses a substantial risk of harm to Plaintiffs' members' interests in the species.

180. In Florida, Plaintiff NRDC has a member who enjoys seeing the Florida manatee, a federally threatened subspecies of the West Indian manatee. The Florida manatee's habitat is at risk of further degradation and pollution as a result of the Rule's removal of Clean Water Act protections, which poses a substantial risk of harm to the member's ability to continue enjoying sightings of the manatee.

181. Plaintiffs' members in New Mexico enjoy hiking and viewing wildlife, such as bighorn sheep, beavers, porcupines, and federally endangered southwestern willow flycatchers, in and around the Rio Grande—a river fed by ephemeral streams that have lost federal protection under the Rule. The Rule's removal of federal

protections from ephemeral streams will likely cause degradation of the Rio Grande watershed, harming Plaintiffs' members' recreational interests in the river, as well as their interests in species like the southwestern willow flycatcher that rely on it.

182. Plaintiff NRDC has a member in Arizona who has been helping with the recovery of the Gila topminnow – a small endangered fish endemic to the Gila River watershed, which includes many ephemeral streams now at substantial risk of pollution and destruction because of the Rule. The Rule therefore poses a substantial risk of harm to the member's interest in the Gila topminnow.

183. In these regions and in other parts of the country, Plaintiffs' members also enjoy hiking along and swimming, rafting, canoeing, kayaking, rowing, and fishing in waters at substantial risk of being polluted and degraded as a result of the Rule.

184. The Navigable Waters Rule creates a substantial risk that Plaintiffs' members' enjoyment of viewing wildlife and conducting other recreational pursuits will be diminished.

#### *Harm to Drinking Water Sources*

185. The Rule also harms Plaintiffs' members because it creates a substantial risk that harm will occur to the rivers, lakes, aquifers, and reservoirs that Plaintiffs' members in New England and other regions of the country, including Illinois and New Mexico, rely on as sources of drinking water.

#### *Harm to Business Pursuits*

186. The Navigable Waters Rule also creates a substantial risk that harm will occur to waters on which Plaintiffs' members rely for various business pursuits.

187. Plaintiffs' members, for instance, are outdoor educators, outfitters, and fishing guides, work with the seafood industry, and own hiking and fishing lodges. Each of these businesses depends on safe and clean water.

188. By removing Clean Water Act protections from ephemeral streams, wetlands, and other waters, the Navigable Waters Rule creates a substantial risk of harm to Plaintiffs' members whose businesses and livelihoods rely on waters that are at risk of pollution or degradation as a result of the Rule.

*Harm to Property and Community Infrastructure*

189. The Navigable Waters Rule creates a substantial risk of harm to Plaintiffs' communities and properties, which will be negatively impacted by the pollution and destruction of ephemeral streams, wetlands, and downstream waters.

190. For instance, Plaintiffs' members in New Mexico rely on the state's unique acequias system – a series of aqueducts and canals – for irrigation and farming on their properties. The Rule creates a substantial risk of harm to these acequias, which are fed by ephemeral streams that are no longer protected by the Clean Water Act under the Rule.

191. Plaintiffs' members' properties and communities are located near waters that are at increased risk of flooding due to the loss of wetland protections as a result of the Rule. If these waters experience more severe flooding, Plaintiffs' members and their communities will suffer.



**FIRST CLAIM FOR RELIEF**  
**(Violation of the APA, 5 U.S.C. § 706)**

192. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs.

193. Under section 706(2)(A) of the APA, a reviewing court must set aside final agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The Navigable Waters Rule is arbitrary and capricious and not in accordance with law for a number of reasons.

194. First, the Agencies failed to meaningfully consider the most important aspect of the rulemaking: whether the Rule will frustrate the Clean Water Act’s sole objective, which is to protect the “chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Agencies’ failure to adequately consider this factor was arbitrary and capricious. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Even if, as the Agencies incorrectly claim, there was insufficient information to assess this crucial factor, it was arbitrary and capricious for the Agencies to promulgate the Rule in the face of such significant uncertainty.

195. The Agencies also do not reasonably explain how they could have “balanced” the Rule’s objective to protect water quality with other purported policy objectives without understanding, and thus weighing, the magnitude of the Rule’s negative impacts on water quality.

196. Second, the Agencies exclude many waters that, according to the Agencies’ own prior findings, significantly impact the quality of traditionally navigable

waters. The Agencies disregard those prior findings, while drawing contradictory conclusions about those waters' significance, without justification. Because the Agencies do not give a reasoned explanation for disregarding findings and undisputed facts that underlay a prior policy, the Rule is arbitrary and capricious. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

197. Third, the Agencies claim that the Rule is "informed" by the science, but misrepresent the evidence on which they purport to rely, while ignoring other relevant scientific evidence without any explanation. Although EPA's Science Advisory Board as well as many public commenters raised concerns about the lack of scientific support for the Rule, the Agencies did not adequately address or respond to those comments.

198. Fourth, the Agencies' decision to exclude certain waters from the definition of "waters of the United States" is neither reasonably explained nor rationally connected to the Agencies' findings.

199. Finally, there is no support for the Agencies' claim that the Rule will promote "clarity," "predictability," and "certainty." To the contrary, the record demonstrates that key aspects of the Rule will create uncertainty and unpredictability.

200. Accordingly, the Navigable Waters Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and must be vacated in accordance with section 706(2)(A) of the APA.

**SECOND CLAIM FOR RELIEF**  
**(Violation of the APA, 5 U.S.C. § 706, and**  
**the Clean Water Act, 33 U.S.C. § 1251 *et seq.*)**

201. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs.

202. At President Trump's behest, the Agencies largely modeled their interpretation of "waters of the United States" on the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). But as five Justices concluded, the plurality's constricted interpretation of "waters of the United States" is untethered from the text, structure, and purpose of the Clean Water Act. *Id.* at 776 (Kennedy, J., concurring in the judgment); *id.* at 800 (Stevens, J., dissenting). The Navigable Waters Rule is likewise inconsistent with the text, structure, and purpose of the statute.

203. All federal appellate courts that have decided the issue, including the First Circuit, have concluded that the scope of the Clean Water Act extends beyond waters that satisfy the plurality's narrow interpretation.

204. Congress required the Agencies to protect the "waters of the United States," but the Rule does not protect all "waters of the United States." The Navigable Waters Rule therefore violates the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, is "short of statutory right," and is "not in accordance with law" under the APA, 5 U.S.C. § 706(2)(A), (C).

**THIRD CLAIM FOR RELIEF**  
**(Violation of the APA, 5 U.S.C. § 706,**  
**and the ESA, 16 U.S.C. § 1536 *et seq.*)**

205. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs.

206. The Navigable Waters Rule removes Clean Water Act protections from broad categories of waters, including many wetlands and all ephemeral streams, thus allowing these waters to be polluted or destroyed. Numerous threatened and endangered species inhabit or otherwise depend on these now-unprotected waters.

207. The Rule's removal of Clean Water Act protections from broad categories of waters, including many wetlands and all ephemeral streams, will also result in the degradation of downstream waters like rivers and lakes. Numerous threatened and endangered species inhabit or otherwise depend on these downstream waters.

208. Accordingly, the Rule "may affect" threatened and endangered species and critical habitat, and the Agencies were required to initiate consultation with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service under section 7 of the ESA. *See* 50 C.F.R. § 402.14.

209. The Agencies promulgated the Navigable Waters Rule without properly determining whether the Rule "may affect" any threatened or endangered species and critical habitat, without properly finding in accordance with the evidence that the Rule in fact "may affect" such species and critical habitat, and without consulting with either the U.S. Fish & Wildlife Service or the National Marine Fisheries Service.

210. Defendants therefore failed to ensure that the Rule will not jeopardize threatened or endangered species or adversely modify or destroy their critical habitat, in violation of the ESA and its implementing regulations, 16 U.S.C. § 1536(a)(2), 40 C.F.R. § 402.14. The Agencies' failures to comply with the ESA are also "arbitrary, capricious," "short of statutory right," and "not in accordance with law," in violation of the APA, 5 U.S.C. § 706(2)(A), (C).

### **PRAYER FOR RELIEF**

Plaintiffs respectfully request that this Court:

1. Declare that Defendants are each in violation of the APA, the Clean Water Act, and the ESA because the Navigable Waters Rule is an arbitrary, capricious, and unlawful rule, and because the Agencies have failed to comply with section 7 of the ESA as described above;
2. Vacate and set aside the Navigable Waters Rule;
3. Order Defendants to initiate section 7 consultation on the effects of their new definition of "waters of the United States" on ESA-listed species and critical habitat, or alternatively, order Defendants to determine whether such definition "may affect" any ESA-listed species or critical habitat;
4. Grant Plaintiffs their costs of suit including reasonable attorneys' fees to the extent permitted by law; and
5. Grant Plaintiffs such further relief as the Court may deem necessary or appropriate.

Dated: August 3, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 2020, I caused the foregoing **AMENDED COMPLAINT**, with attached exhibit, to be filed and served upon counsel of record via the Court's CM/ECF filing system.

Dated: August 3, 2020

/s/ Jolie McLaughlin