UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE, SIERRA CLUB, IDAHO CONSERVATION LEAGUE, and MI FAMILIA VOTA, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and R.D. JAMES, in his official capacity as Assistant Secretary of the Army for Civil Works, Defendants.	Case No. COMPLAINT

INTRODUCTION

1. 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 prohibits and regulates the discharge of pollutants into "navigable waters," which the Act defines broadly as "the waters of the United States." *Id.* § 1362(7).

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2. Congress adopted the Clean Water Act as a uniform and comprehensive national approach to water protection to replace decades of fragmented approaches that had relied on the states and had failed to protect the nation's waters. It is one of the nation's most important and successful environmental laws.

3. Plaintiffs challenge two final rules promulgated by the United States Environmental Protection Agency ("EPA"); Andrew Wheeler, Administrator of the EPA; the United States Army Corps of Engineers ("Corps"); and R.D. James, Assistant Secretary of the Army for Civil Works (collectively, "the Agencies"). The first, entitled "Definition of Waters of the U.S.: Recodification of Pre-Existing Rules," 84 Fed. Reg. 56,626 (October 22, 2019) (the "Repeal Rule"), repealed the 2015 "Clean Water Rule" which defined the term "waters of the United States" in the Clean Water Act. The second, entitled "The Navigable Waters Protection Rule: Definition of Waters of the United States," 85 Fed. Reg. 22,250 (April 21, 2020) (the "Navigable Waters Rule"), replaced the Clean Water Rule and its predecessor rules with a definition of "waters of the United States" that substantially narrows the waters protected by the Act.

4. The Navigable Waters Rule exceeds the Agencies' statutory authority and is contrary to the Clean Water Act's text, structure, objectives, and legislative history requiring broad protection of all the Nation's waters, because its provisions exclude waters from the protections required and afforded by the Act.

5. Plaintiffs also challenge the Repeal Rule and the Navigable Waters Rule as arbitrary and capricious because both rules are contrary to the evidence before the Agencies, including vast volumes of science and technical evidence in the administrative record and the uncontroverted findings made by the EPA and its own Science Advisory Board. The Agencies also failed to explain their decision to reverse prior regulations and failed to consider important

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aspects of the problem, including the effects on water quality and aquatic ecosystems of stripping protections for large numbers of waters, the ecological importance of protecting the excluded waters, and the effects of the reversal on the objectives of the Clean Water Act. These decisions are arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2).

6. Plaintiffs ask the Court to vacate and set aside the Repeal Rule and the Navigable Waters Rule, and to reinstate the Clean Water Rule.

PARTIES

7. Plaintiff Puget Soundkeeper Alliance is a nonprofit corporation organized and existing under the laws of Washington, with its headquarters in Seattle. Its mission is to protect and preserve the waters of Puget Sound by detecting and reporting pollution, engaging government agencies and businesses to regulate pollution discharges, and enforcing requirements under the CWA to control or halt pollution and other adverse impacts to waters from sewage-treatment plants, industrial facilities, construction sites, municipal storm sewers, and other sources. Puget Soundkeeper Alliance has nearly 1,500 members who reside throughout the Puget Sound watershed. Some of its members participate in volunteer boat or kayak patrols to observe water-quality conditions, check for abnormal discharges and pollution, and remove floating trash and debris. Puget Soundkeeper Alliance also accomplishes its work, in part, by working to enforce the permitting requirements of the Act throughout the Puget Sound watershed. Puget Soundkeeper's members use and recreate on the Sound and the waters throughout the Puget Sound watershed. Puget Soundkeeper and its members have significant interest in preserving the full reach of the Clean Water Act's protections.

8. Plaintiff Sierra Club is a nonprofit corporation organized and existing under the laws of California, with its headquarters in San Francisco. It is a national organization dedicated to

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protecting public health and the environment. The Sierra Club has long worked to protect clean water. In particular, local chapters of the Sierra Club have defended treasured waterbodies throughout the U.S. from pollution, development, and destruction. The Sierra Club has more than 630,000 members who reside in all fifty states and the District of Columbia. Some Sierra Club chapters and groups run local Water Sentinels programs that train member volunteers to test their local waterbodies for contamination and present the results to local regulatory officials, to organize cleanups, and to advocate before government agencies to help improve water quality. Sierra Club members use and recreate on waters and own property that contains waters that will be affected by the rules challenged here. Sierra Club and its members have an interest in preserving the full protections of the Clean Water Act.

9. Plaintiff Idaho Conservation League is an Idaho non-profit membership conservation organization. The Idaho Conservation League and its approximately 10,000 members are dedicated to protecting and conserving Idaho's natural resources, including its water quality and native fish. The Idaho Conservation League's mission is to protect Idaho's clean water, clean air, healthy families, and unique way of life. The Idaho Conservation League, its staff, and its members are active in public education, administration, and legislative advocacy on conservation issues in Idaho, including advocacy aimed at addressing the impacts of pollution on water quality and native fish. The Idaho Conservation League's members use and enjoy waters in Idaho for recreational, scientific, aesthetic, cultural, and commercial purposes.

10. Mi Familia Vota is a nonprofit public-interest advocacy organization working to advance and protect the interests of Latino communities in areas of immigration, voting, environment, workers' rights, education, and healthcare. Mi Familia Vota works for the community through offices located in Arizona, California, Colorado, Texas, Nevada, and

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Florida, with members throughout those states. Mi Familia Vota's members and their communities are adversely affected by the Repeal Rule and the Navigable Waters Rule, as they rely on waters throughout the West for drinking water and their livelihoods. Mi Familia Vota also works on issues for and with its members involving housing and development policies in places like Houston, Texas, that have been made more vulnerable to storms like Hurricane Harvey as a result of the destruction of wetlands.

11. Defendant U.S. Environmental Protection Agency is a federal agency charged with administering the Clean Water Act through its Administrator, Andrew Wheeler. 33 U.S.C. § 1251(d). It co-promulgated the Navigable Waters Rule and the Repeal Rule, the rules challenged here.

12. Defendant U.S. Army Corps of Engineers is a federal agency within the Department of the Army. It is authorized to issue permits for the discharge of dredged or fill material into the waters of the United States, through the Assistant Secretary of the Army for Civil Works, R.D. James. *Id.* §§ 1344, 1362(7). It co-promulgated the Navigable Waters Rule and the Repeal Rule, the rules challenged here.

13. If the Repeal Rule and the Navigable Waters Rule are allowed to stand, the Plaintiff organizations and their members will suffer significant harm. The challenged rules strip Clean Water Act protections from wetlands and streams across the country, leaving many previously protected wetlands vulnerable to degradation and destruction and entirely eliminating protections for ephemeral streams. Because members of the Plaintiff organizations rely on waters that have lost Clean Water Act protections as a result of the Agencies' rules, and also rely on downstream waters that will be harmed by the pollution of unprotected waters upstream, Plaintiffs and their members will be injured by the regulations.

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14. Members of the Plaintiff organizations, for example, routinely enjoy bird watching, taking photographs, and searching for other wildlife and wildflowers both in and along wetlands, ephemeral streams, and other upstream waters that have lost Clean Water Act protections under the Repeal Rule and the Navigable Waters Rule. Many of these waters are now imminently threatened by agricultural, mining, and development activities that could destroy or pollute the waters in the absence of the limits or mitigation required by Clean Water Act permits. Members of the Plaintiff organizations also fish, kayak, canoe, and swim in downstream rivers, streams, and lakes that face a threat of being polluted as a result of the loss of Clean Waters Act protections for upstream waters under the challenged regulations.

15. Plaintiff Idaho Conservation League has been actively engaged in a variety of educational and advocacy efforts to protect what had previously been recognized as "waters of the United States" for going on 20 years. Defendants' adoption of the Repeal Rule and Navigable Waters Rule has made it more difficult to achieve Idaho Conservation League's institutional objectives in protecting its members, the public, and aquatic environments from the harms associated with unpermitted activities that harm or destroy waters. Idaho Conservation League has had to dedicate additional research and mapping capabilities in order to research whether threatened Idaho waters remain protected as "waters of the United States," and it is now dedicating additional staff time to compile evidence and draft documents needed to prove a water is protected under the Clean Water Act, whereas previously it could rely on application of the 2015 Clean Water Rule to determine jurisdiction and then move to the next steps of advocacy of enforcing the law and advocating for permits.

16. Each of these injuries are fairly traceable to the challenged regulations and are capable of redress by an order of this Court vacating the rules.

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JURISDICTION AND VENUE

17. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), and the Clean Water Act, 33 U.S.C. § 1369(b); *Nat'l Assoc. of Manufacturers v. Dep't of Defense*, 138 S.Ct. 617 (2018). The Court is authorized to grant relief under 5 U.S.C. § 706 (Administrative Procedure Act), and 28 U.S.C. § 2202 (further necessary or proper relief).

18. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, because one of the Plaintiffs, Puget Soundkeeper Alliance, resides in this district.

LEGAL FRAMEWORK

I. THE CLEAN WATER ACT

19. The 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).

20. The Act protects waters from pollution, and from damage or destruction from dredging or filling, by prohibiting "the discharge of any pollutant by any person" except in compliance with the Act's permitting requirements and other pollution-prevention programs. *Id*. § 1311(a) (incorporating *id*. §§ 1312, 1316, 1317, 1328, 1342, and 1344). These programs include the National Pollutant Discharge Elimination System ("NPDES"), *id*. § 1342; the section 404 permitting program for discharges of dredged or fill material, *id*. § 1344; and the section 311 oil-spill prevention and response programs, *id*. § 1321.

21. The protections of the Clean Water Act extend to "navigable waters," which the Act broadly defines as including all of the "waters of the United States, including the territorial seas." *See id*. §§ 1251, 1321, 1342, 1344; 1362(7).

22. The Act followed and sought to reverse years of failed efforts to protect and clean up the Nation's waters through the implementation of state-based water-quality standards. S. Rep. No. 92-414 at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672.

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23. The Act's legislative history confirms that Congress adopted the "broadest possible" definition of "navigable waters" of the United States, unencumbered by earlier and narrower administrative interpretations. H.R. Rep. No. 92-911 at 76-77 (1972). As the conference report emphasized, "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." Clean Water Act Legislative History, Senate Consideration of the Rpt. of the Conference Committee, Oct. 4, 1972, at 178. The Senate Committee on Public Works "was reluctant to define" the term "navigable waters" based "on the fear that any interpretation would be read narrowly[,]" and it reiterated that it "fully intend[ed] that the term 'navigable waters' be given the broadest possible constitutional interpretation." Clean Water Act Legislative History at 818.

24. In directing the broadest possible protection, Congress relied on science demonstrating the interconnectedness of waters and the need to ensure that aquatic ecosystems as a whole are protected in order to fulfill the Act's purpose, especially waters upstream of "traditionally navigable waters." Congress recognized that "[w]ater moves in hydrological cycles and it is essential that discharge of pollutants be *controlled at the source*." S. Rep. No. 92-414 at 77 (1971) (emphasis added).

25. The core provisions of the regulatory definition of "waters of the United States" remained largely unchanged for a long period of time, from 1979 until fairly recently. *See* 44 Fed. Reg. 32,854, 32,901 (June 7, 1979) (defining "waters of the United States" to include, among other things, "(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) Interstate waters, including interstate wetlands; (3) All other waters

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such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats and wetlands the use, degradation or destruction of which would affect or could affect interstate or foreign commerce …; (4) All impoundments of waters otherwise defined as navigable waters…; (5) Tributaries of waters identified in paragraphs (1)-(4) …, including adjacent wetlands; and (6) Wetlands adjacent to waters identified in paragraphs (1)-(5)").

26. In general, federal courts, including the Supreme Court, have affirmed that the Act's protective reach must be interpreted and applied to waters broadly in order to ensure that the purpose of restoring and maintaining the biological, physical, and chemical integrity of our Nation's waters is fulfilled. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.8 (1987) (noting that "navigable waters" "has been construed expansively to cover waters that are not navigable in the traditional sense"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136-39 (1985) (affirming the Corps' application of jurisdiction to wetlands adjacent to navigable waters).

27. While the Supreme Court has established that the Act's protections do not extend to each and every wet area, such as the water-filled abandoned gravel mining pits at issue in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 164-65 (2001), the Court has consistently affirmed that the EPA and the Corps have broad authority under the Clean Water Act to protect both navigable and non-navigable waters that are adjacent, connected, or have a significant nexus to navigable waters. *See id*. at 167-68; *Rapanos v. United States*, 547 U.S. 715, 740-42 (2006); *id.* at 759 (Kennedy, J., concurring in judgment).

28. The Supreme Court's 2006 decision in *Rapanos v. United States*, 547 U.S. at 715, involved disputes over whether certain wetlands fall within the protections of the Clean Water Act. While a plurality of the justices agreed to the result—a remand to address whether the

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Corps' assertion of jurisdiction was supported by facts in the record—all three of the opinions directly disagreed with some aspects of one another, resulting in no controlling decision or precedent. Further, the points agreed upon by a majority of the justices were few. A majority of five justices interpreted the Act as protecting all waters, including wetlands, that "possess a 'significant nexus'—a science-based inquiry designed to meet and fulfill the objections of the Act—to waters that are or were navigable in fact or that could reasonably be so made," including Justice Kennedy and the four dissenting justices. *Id*. at 759 (Kennedy, J., concurring in judgment); *id*. at 810 (Stevens, J., dissenting). The four dissenting justices, led by Justice Stevens, would have upheld the Corps' authority to regulate the wetlands at issue outright, based on the Clean Water Act and the Corps' existing regulations. *Id*. at 787-99 (Stevens, J., dissenting). Overall, a majority of the Court decided that the Corps may have jurisdiction to protect and regulate the waters in question in the case, but must further examine and justify jurisdiction in light of the Court's discussion in the case.

29. Following *Rapanos*, most Circuit Courts have interpreted and applied the decision, and all of the Circuit Courts that have applied *Rapanos* have either adopted Justice Kennedy's "significant nexus" test or found that a waterbody that meets either the "significant nexus" test or the plurality's test is protected under the Act. No Circuit Court has ruled that only the Justice Scalia plurality opinion provides the proper test for application of the Clean Water Act.

II. THE ADMINISTRATIVE PROCEDURE ACT

30. Final agency actions are subject to judicial review under the Administrative Procedure Act. 5 U.S.C. § 704.

31. In reviewing a final agency action, the court shall hold unlawful and set aside agency action, findings, and conclusions that are found to be arbitrary, capricious, an abuse of agency discretion or otherwise not in accordance with the law, *id.* § 706(2)(A), or agency actions that are

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in excess of statutory jurisdiction, authority or limitations, or short of statutory right, *id.* § 706(2)(C), or agency actions that are not in observance of procedure required by law. *Id.* § 706(2)(D).

STATEMENT OF FACTS

I. THE CLEAN WATER RULE

32. On April 21, 2014, EPA and the Corps published a proposed rule to define "waters of the United States" under the Clean Water Act. 79 Fed. Reg. 22,188 (Apr. 21, 2014) ("Proposed Rule").

33. The Agencies stated their intention in the Proposed Rule to "retain[] much of the structure of the [A]gencies' longstanding definition of 'waters of the United States,' and many of the existing provisions of that definition where revisions were not required in light of Supreme Court decisions or other bases for revision." *Id*. at 22,192.

34. As the scientific foundation for the Clean Water Rule, the Agencies relied on a published "synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters," prepared by EPA's Office of Research and Development, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (2015) ("Science Report"). *Id*. at 22,189.

35. In preparing the Science Report and the Proposed Rule, EPA reviewed more than 1,200 peer-reviewed scientific papers as well as other data and information including jurisdictional determinations, relevant agency guidance and implementation manuals, and federal and state reports that address connectivity of aquatic resources and effects on downstream waters.

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36. The Science Report documented the extensive evidence demonstrating that tributaries and wetlands play critical roles in maintaining the physical, chemical, and biological integrity of downstream waters.

37. EPA's Science Advisory Board conducted a peer review of the Science Report, largely endorsing its analysis and conclusions. EPA, "Technical Support Document for the Clean Water Rule: Definition of Waters of the U.S." (May 27, 2015), at 93-94. The only critique came from members of the Board who believed the rule may not provide protections for enough waters.

38. In their Proposed Rule, the Agencies stated their intent to "interpret[] the scope of 'waters of the United States' in the Clean Water Act based on the information and conclusions in the [Science] Report, other relevant scientific literature, the [A]gencies' technical expertise, and the objectives and requirements of the Clean Water Act." *Id.* at 22,196. The final Clean Water Rule's findings cite to and rely upon the Science Report.

39. The Agencies finalized and published the Clean Water Rule on June 29, 2015, with three basic categories of waters identified: (1) waters categorically protected under the Clean Water Act in all instances; (2) waters protected under the Clean Water Act on a case-by-case showing of significant nexus; and (3) waters categorically excluded from protection. 80 Fed. Reg. 37,054 (June 29, 2015).

A. Categorically Protected Waters

40. Under the Clean Water Rule, the following waters would be categorically protected under the Clean Water Act in all instances: "(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) All interstate waters, including interstate wetlands; (iii) The territorial seas; (iv) All impoundments of waters otherwise identified as

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waters of the United States under … [the rule]; (v) All tributaries … of waters identified in … [the preceding sections of the rule]; [and] (vi) All waters adjacent to a water identified in … [the preceding sections of the rule], including wetlands, ponds, lakes, oxbows, impoundments, and similar waters." *See, e.g.*, 80 Fed. Reg. at 37,114.

41. The Science Report found unequivocal consensus evidence that all tributaries, including perennial, intermittent, and ephemeral streams, "exert a strong influence on the integrity of downstream waters," and that all tributaries have a significant nexus to navigable-in-fact waters, interstate waters, and the territorial sea (navigable-in-fact waters, interstate waters, and the territorial sea collectively referred to as, "traditional navigable waters"). Science Report at ES-2. The Science Report documented the many ways that streams affect the physical, chemical and biological integrity of downstream waters and served as the foundation for the Clean Water Rule's Technical Support Document to specify markers to be used to identify tributaries on the landscape, including indicators of bed, banks, high water marks and flow. EPA, "Technical Support Document for the Clean Water Rule: Definition of Waters of the United States" (May 27, 2015), at 234-35. Based on the Science Report, the Agencies found that all tributaries should be protected by the Clean Water Act.

42. Based on the findings of the Science Report and the Agencies, the Clean Water Rule categorically protected tributaries and defined the term "tributary" as "a water that contributes flow, either directly or through another water[,]" to traditional navigable waters, interstate waters, or the territorial seas, and that "is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 79 Fed. Reg. at 22,189, 22,199; 80 Fed. Reg. at 37,058-59, 37,065, and 37,115.

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43. The Science Report also found clear evidence that wetlands and open waters in floodplains are "highly connected" to tributaries and rivers "through surface water, shallow groundwater, and biological connectivity." Science Report at ES-2 and 4-1 et seq., especially 4-39. The Science Report found, too, that wetlands and open waters located outside of floodplains serve numerous functions that can benefit downstream water integrity, such as floodwater storage. Based on the Science Report, the Agencies found wetlands and waters in floodplains should be categorically protected, and broadly defined adjacent wetlands to include "bordering, contiguous, or neighboring a water [otherwise protected under the regulation], including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." 80 Fed. Reg. at 37,058 and 37,105.

44. Finally, the Science Report also found that non-adjacent wetlands and waters located outside of floodplains may also provide valuable physical, chemical, or biological functions such as storage of flood waters, replenishing or cleansing of water supplies, or biological functions for species dependent upon certain hydrologic ecosystems, all benefitting downstream water integrity. Science Report at ES-3, 4-20, and 4-38.

B. Case-By-Case Protections

45. Based upon the findings in the Science Report, the Agencies found that certain categories of waters should be protected on a case-by-case basis when necessary to protect the physical, chemical or biological integrity of downstream waters and to serve the objectives of the Act. The first category of waters eligible for case-specific determinations were enumerated, ecologically specific types of wetlands—namely, prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands that were to be considered ecologically similarly situated and combined within a watershed for the purposes of determining significant nexus. *See, e.g.*, 80 Fed. Reg. at 37,114. Such waters would meet the

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definition of "waters of the United States" under the rule if they were "determined, on a case-specific basis, to have a significant nexus to a water" otherwise protected under the rule. *Id*.

46. The second category of waters eligible for a case-specific determination included "waters located within the 100-year floodplain of a water identified … [in a preceding section of the rule] and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified … [in a preceding section of the rule] where they are determined on a case-specific basis to have a significant nexus to [such] a water[.]" *See, e.g.*, *id*. at 37,114.

C. Excluded Waters—Waste Treatment Exclusion

47. The Clean Water Rule identified waters that the Agencies would categorically deem "not jurisdictional." One such exclusion is for "waste treatment systems," *id.* at 22,189, 22,192, essentially waste dumps created in waters, including sometimes in protected waters.

48. In May 1980, through notice-and-comment rulemaking, EPA had removed a provision that excluded "waste treatment systems" from where it was within the more limited definition of "wetlands," and instead excluded waste treatment systems from the larger overarching definition of "waters of the United States," potentially improperly expanding the exclusion for waste treatment and allowing any waters traditionally protected under the Clean Water Act to be used as waste dumps. In the same rulemaking, however, EPA ensured that expansion would not occur by adding limiting language stating that "[t]his exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." 45 Fed. Reg. 33,290, 33,424 (May 19, 1980). In so doing, EPA ensured that polluters would not be able to use the waste treatment exclusion to "convert" a water of the United States into a waste dump. *Id.*

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49. In July 1980, after "[c]ertain industry petitioners wrote to EPA expressing objections to the language," EPA announced its decision to "suspend" the limiting language it had lawfully promulgated two months earlier. 45 Fed. Reg. 48,620, 48,620 (July 21, 1980). EPA indicated that it planned "promptly to develop a revised definition and to publish it as a proposed rule for public comment." *Id*. at 48,620.

50. In the 2015 Clean Water Rulemaking, the Agencies included the waste treatment exclusion without the limiting language. 80 Fed. Reg. at 37,097.

II. THE REPEAL RULE

51. On February 28, 2017, President Trump issued Executive Order 13,778, which directed the Agencies to repeal the Clean Water Rule and consider replacing it with a regulation employing the approach and reasoning of Justice Scalia's plurality opinion in *Rapanos*.

52. In 2017, the Agencies proposed to repeal the Clean Water Rule and revert to and recodify the previous regulation and guidance. 82 Fed. Reg. 34,903 (July 27, 2017).

53. On October 22, 2019, the Agencies published a final regulation repealing the Clean Water Rule and readopting the Agencies' 1986 regulation and related guidance. 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("The Repeal Rule"). As it relates to the waste treatment system exclusion, the Repeal Rule purports to "continue[]" the modification expanding the waste treatment system exclusion to waste systems created in jurisdictional waters of the United States. 83 Fed. Reg. at 34,907.

54. The Repeal Rule became effective on December 23, 2019. 84 Fed. Reg. at 56,626.

55. In adopting the Repeal Rule, the Agencies provided no explanation, analysis, discussion, or refutation of the Science Report or any of the research and studies in the administrative record for the Clean Water Rule. The Agencies identified no different or new scientific evidence, and provided no discussion of or explanation for how or why the Science

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Report and the technical information in the administrative record support the Repeal Rule. The Agencies also failed to explain why they disregarded the Science Report and their earlier findings and conclusions based upon it.

56. Prior to the adoption of the Repeal Rule with its reversion back to the 1986 regulations, the Agencies had already published the proposed Navigable Waters Rule meant to replace the Clean Water Rule. The Agencies did not explain how reinstating the pre-2015 regulation and guidance was consistent with their stated intention to replace it with a far narrower definition of "waters of the United States."

III. THE NAVIGABLE WATERS RULE

57. On February 14, 2019, the Agencies published the proposed Navigable Waters Rule for public comment. 84 Fed. Reg. 4154 (Feb. 14, 2019).

58. The defects in the proposed Navigable Waters Rule were presented to the Agencies in extensive comments submitted by Plaintiffs and others.

59. On April 21, 2020, the Agencies published the final Navigable Waters Rule and made it effective on June 22, 2020. 85 Fed. Reg. 22,250 (Apr. 21, 2020).

60. The Navigable Waters Rule redefines the waters that are jurisdictional waters of the United States protected by the Clean Water Act, limiting them to: (i) the territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use, in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (ii) tributaries; (iii) lakes and ponds, and impoundments of jurisdictional waters; and (iv) adjacent wetlands. *Id*. at 22, 338. The definition categorically excludes interstate waters from protection for the first time in the Act's history and removes protections for many tributaries and adjacent wetlands through its narrow definitions of those terms.

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61. The Navigable Waters Rule has no provision for case-by-case jurisdictional determinations, meaning that waters not expressly identified as protected will be excluded from protection, even if they have a significant nexus to and impact on the water quality and aquatic ecosystems in other waters protected under the Act.

62. The Navigable Waters Rule also no longer provides for the case-by-case protection for waters the Science Report and the Agencies previously found may have a significant nexus to the physical, chemical, or biological functions of specific downstream waters, including prairie potholes, pocosins, Carolina Bay, or Texas coastal wetlands or Western vernal pools.

63. The Navigable Waters Rule defines waters that are categorically not protected by the Clean Water Act as (i) waters or water features that are not specifically identified in the rule as categorically jurisdictional; (ii) groundwater, including groundwater drained through subsurface drainage systems; (iii) "ephemeral" features, including ephemeral streams, swales, gullies, rills, and pools; (iv) diffuse stormwater run-off and directional sheet flow over uplands; (v) ditches that are not waters identified elsewhere in the definition; and (xii) waste treatment systems, among other waters. *Id*.

64. The Navigable Waters Rule additionally limits jurisdiction, and thereby protections under the Clean Water Act, by substantially narrowing the definition of tributaries and providing new definitions of "ephemeral" and "intermittent" tributaries. The Navigable Waters Rule, citing Justice Scalia's plurality opinion in *Rapanos* for support, narrows the definition of "tributaries" to exclude all waters that are considered "ephemeral," meaning waters that flow "only in direct response to precipitation in a typical year[,]" and includes only waters that are "relatively permanent" in a "typical" year. *Id*. at 22,338-39.

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65. The Navigable Waters Rule also narrows the definition of wetlands that are waters of the United States, limiting protected wetlands to those that are directly connected on the surface on at least one side to another protected water under the rule. A wetland that is separated from a protected water only by an artificial dike, barrier, or similar artificial structure, may be protected but only if the barrier allows for a direct surface water connection to the protected water in a typical year through a culvert, flood or tide gate, or pump. The Navigable Waters Rule excludes wetlands from protection under the Act if the wetland is inundated by flooding from a protected water but that flooding does not occur in a "typical year." *Id*. at 22,338.

66. The Navigable Waters Rule also provides that a waterbody may be severed and lose its status as a protected "water of the United States" by man-made alterations such as roads, dams, berms, or levees if those alterations result in loss of surface water connection between the upstream and downstream waters, or result in the loss of a surface water connection between a wetland and a waterbody, in a "typical" year. *See, e.g.*, *id*. at 22,338-39.

67. The term "typical year" is defined to mean "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*. at 22, 339. The Navigable Waters Rule does not define "normal periodic range," and does not define or provide guidance on the relevant size or type of geographic area for jurisdictional determinations.

68. The Navigable Waters Rule retained the waste treatment exclusion allowing historic waste treatment impoundments originally created in waters of the U.S. to be excluded from jurisdiction, but defined "waste treatment systems" for the first time. The definition includes all components of the waste treatment system, including lagoons and treatment ponds (such as settling or cooling ponds) designed to either convey or retain, concentrate, settle, reduce, or

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remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge). *Id*. at 22,328-39. The Agencies stated that they were continuing longstanding practice without acknowledging or addressing the limiting language in the promulgated 1980 rule.

69. The Navigable Waters Rule bases much of its more limited definition of protected waters on Justice Scalia's plurality opinion in *Rapanos.*

70. As with the Repeal Rule, the Agencies provided no explanation, analysis, or discussion of the Science Report, any of the research and studies in the administrative record for the Clean Water Rule, or any of the Agency findings and conclusions based upon the Science Report and other scientific evidence when they proposed or finalized the Navigable Waters Rule. The Agencies prepared no comparable analysis of the scientific evidence on how various waters that will now be excluded from protection affect physical, chemical or biological functions and integrity of downstream water quality or aquatic ecosystems.

71. The Agencies failed to address or consider their past findings regarding the effect of tributaries on downstream waters, the identifying features of tributaries, and the need to protect all tributaries under the Act.

72. The Agencies failed to address or consider the earlier findings in the Science Report and made by the Agencies, as well as Justice Kennedy's science-driven determination that ephemeral waters and certain types of wetland ecosystems, such as prairie potholes, can and do have a significant nexus to downstream waters and can and do affect the chemical, physical, and biological integrity of those waters.

73. The Agencies failed to address or consider the earlier findings in the Science Report and by the Agencies that isolated wetlands and unconnected waters within a floodplain can and

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do have a significant nexus to downstream waters, and can and do affect the chemical, physical, and biological integrity of those waters.

74. The Agencies provided no explanation for their exclusion of interstate waters, and failed to consider the effects that isolated or ephemeral interstate waters have on the physical, chemical or biological integrity of downstream waters.

75. The Agencies released the final Navigable Waters Rule for publication on January 23, 2020.

76. The Agencies' release of the final rule for publication occurred before the Agencies had received final feedback and comment from the Science Advisory Board, but after the Agencies had received preliminary feedback and comments from the Science Advisory Board on October 16, 2019, where the Science Advisory Board reiterated that the Science Report was sound, was still the best science, and that the Science Advisory Board was critical of the Navigable Waters Rule as "in conflict with established science, the existing WOTUS rule developed based on established science, and the objectives of the Clean Water Act."

77. The Science Advisory Board provided final comment on the Navigable Waters Rule on February 27, 2020. In comments "[t]he Board concluded that the … [Navigable Waters Rule] does not incorporate best available science and … that a scientific basis for the … Rule, and its consistency with the objectives of the Clean Water Act, is lacking." Science Advisory Board, Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, Feb. 27, 2020 at 1. The Science Advisory Board further found that the Navigable Waters Rule "decreases protection for our Nation's waters and does not provide a scientific basis in support of its consistency with the objective of restoring and maintaining 'the chemical, physical and biological integrity' of these waters." *Id.* at 2.

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78. The Science Advisory Board further criticized the Agencies' rejection of a sound scientific approach in designing the Navigable Waters Rule, and their disregard in particular of the Science Report, noting that

> "[t]he proposed Rule does not fully incorporate the body of science on connectivity of waters reviewed previously by the SAB and found to represent a scientific justification for including functional connectivity in rule making[,] … [including the] EPA's 2015 Connectivity Report[.] … The EPA's 2015 Connectivity Report emphasizes that functional connectivity is more than a matter of surface geography. The report illustrates that a systems approach is imperative when defining the connectivity of waters, and that functional relationships must be the basis of determining adjacency. The proposed Rule offers no comparable body of peer reviewed evidence, and no scientific justification for disregarding the connectivity of waters accepted by current hydrological science."

Id. at 2 (footnote omitted).

79. The Science Advisory Board also specifically criticized particular parts of the Navigable Waters Rule and definitions therein as contrary to the best science and contrary to the purpose and intent of the Clean Water Act. *Id.* at 2-3.

80. Because the Agencies finalized the Navigable Waters Rule before the Science Advisory Board could finish its comments, the Agencies failed to consider the final critique and comments of the Agencies' own expert advisory committee.

CAUSES OF ACTION

81. The Repeal Rule and the Navigable Waters Rule are final agency actions reviewable under the APA. 5 U.S.C. § 704.

82. Under the APA, a court shall hold unlawful, set aside, and vacate final agency actions that are arbitrary and capricious, contrary to law, an abuse of discretion or not otherwise in accordance with the law; that exceed the agency's authority; and that do not follow applicable procedures. 5 U.S.C. § 706(2)(A).

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COUNT I—THE NAVIGABLE WATERS RULE IS CONTRARY TO THE CLEAN WATER ACT

83. Restates and realleges all preceding paragraphs.

84. The Clean Water Act's single objective is to restore and protect the physical, chemical, and biological integrity of the Nation's waters and to do so as broadly as possible. 33 U.S.C. § 1251.

85. A majority of the Supreme Court and all Circuit Courts that have addressed the issue have recognized that the protections of the Clean Water Act extend to all traditional navigable waters, as well as to all waters that affect or are in connection with the physical, chemical, or biological integrity of traditional navigable waters.

86. The Navigable Waters Rule is contrary to law in that it fails to afford Clean Water Act protections to waters having an effect on or connection to the physical, chemical, and biological integrity of downstream traditional navigable waters as required by the statute, the Supreme Court's interpretation of the statute, and all circuit courts of appeal that have addressed the issue.

87. The Agencies exceeded their authority and acted contrary to the Clean Water Act, 33 U.S.C. §§ 1251-388, by adopting provisions in the Navigable Waters Rule that define waters of the U.S. to exclude waters having an effect on or connection to the physical, chemical, and biological integrity of downstream traditional navigable waters, including but not limited to:

a. Exclusion of all interstate waters;

b. Definition of tributaries that excludes ephemeral waters;

c. Definition of adjacent wetlands that excludes "isolated" wetlands, wetland ecosystems such as prairie potholes, and wetlands connected by non-surface or ephemeral connections between wetlands and protected traditional navigable waters;

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d. Definition of "typical year" that is vague, unclear, and contrary to science and the record which will result in waters in significant nexus to traditional navigable waters being excluded; and

e. Exclusion of waters separated from traditional navigable waters that lack a surface connection in a "typical year," but have an effect on or connection to downstream traditional navigable waters.

5 U.S.C. § 706(2)(A).

COUNT II—THE NAVIGABLE WATER RULE IS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

88. Restates and realleges all preceding paragraphs.

89. The Navigable Waters Rule is arbitrary and capricious because it is contrary to the entirety of the record. 5 U.S.C. § 706(2)(A).

90. The Navigable Waters Rule is arbitrary and capricious because it failed to consider the Science Report and the comments of the Science Advisory Board supporting the broader Clean Water Rule and criticizing the Navigable Waters Rule as affording inadequate protections. *Id.*

91. The Navigable Waters Rule is further arbitrary and capricious in that the Agencies failed to explain their change in position and their actions conflicting with the Science Report and record evidence. *Id.* The Navigable Waters Rule reverses findings the Agencies made in the Clean Water Rule, based on an extensive factual record of scientific support in the Science Report and related technical documents in support of the Clean Water Rule.

92. The Navigable Waters Rule is contrary to the Agencies' own scientific analysis, and the Agencies did not offer a rational explanation for this contradiction.

93. In the Navigable Waters Rule, the Agencies severely restricted the scope of the Clean Water Act, repeatedly admitting that "fewer waters would be subject to the CWA regulation" and that they are "narrowing the scope of CWA regulatory jurisdiction," but the Agencies failed

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to assess, consider and explain the effects on the physical, chemical, or biological integrity of the Nation's waters or the extent to which waters will lose Clean Water Act protections. Without support or further explanation, they claim that they are "unable to quantify" the changes. 85 Fed. Reg. 22, 335; Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States," Jan. 22, 2020. The Agencies' decision to significantly limit the scope of waters protected under the Clean Water Act without any analysis or quantification of the extent of waters losing protections and the impacts on both the newly excluded waters and traditional downstream waters, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

94. The Agencies' decision to remove the Clean Water Act's protections for ephemeral streams and many other streams, as well as many wetlands and other waters, without analyzing the extensive scientific evidence of the ecological importance of protecting these waters and their connectivity to and effects on downstream waters, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA. 5 U.S.C. § 706(2)(A).

95. The Agencies' decision to narrow the scope of waters protected under the Clean Water Act and to base the final rule on the permanence of surface flow in a typical year without considering the effects of climate change is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA. 5 U.S.C. § 706(2)(A).

96. The Agencies' decision to narrowly restrict the scope of waters protected by the Clean Water Act is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA. 5 U.S.C. § 706(2)(A).

COUNT III—THE NAVIGABLE WATER RULE'S WASTE TREATMENT EXCLUSION IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW

97. Restates and realleges all preceding paragraphs.

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98. The waste treatment exclusion will exclude waters of the United States from the protections of the Clean Water Act if they are newly impounded and used as waste dumps. The Navigable Waters Rule conversely defines "impoundments" of waters of the United States to categorically also be waters of the United States. 85 Fed. Reg. at 22,338.

99. In allowing waste impoundments in "waters of the United States" to be redefined as not jurisdictional and not protected under the Clean Water Act while also defining impoundments of waters of the United States to categorically be jurisdictional and protected, the waste treatment exclusion is arbitrary and capricious and an abuse of discretion. 5 U.S.C. § 706(2)(A).

100. The waste treatment exclusion exceeds the Agencies' authority because it unlawfully excludes traditional navigable waters from protection under the Clean Water Act and violates the objective of the Act to protect and restore the physical, chemical and biological integrity of all waters of the United States. 33 U.S.C. § 1251; 5 U.S.C. § 706(2)(A).

COUNT IV—THE AGENCIES ADOPTED THE NAVIGABLE WATER RULE'S WASTE TREATMENT EXCLUSION WITHOUT COMPLYING WITH NOTICE AND COMMENT REQUIREMENTS.

101. Restates and realleges all preceding paragraphs.

102. In 1980, without notice and comment rulemaking, the Agencies suspended the regulatory limitation of the waste treatment exclusion to manmade impoundments and impoundments created prior to 1972, which had ensured that waters of the United States would not be converted into waste dumps.

103. The 2015 Clean Water Rule continued the waste treatment system exclusion with the suspension of the limiting language and expressly did not seek comment on the exclusion.

104. In the Navigable Waters Rule, the Agencies adopted the first definition "waste treatment systems" subject to the exclusion as including all components of the waste treatment

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impoundments in waters of the United States. The Agencies expressly stated that they were not seeking comment on the definition, including its explicit acknowledgement that such systems could be in waters of the United States. The Agencies also did not seek comment on these regulatory changes, which conflict with the limiting language in 1980 waste treatment exclusion.

105. By taking action without comment on the legality or desirability of expressly defining waste treatment systems to include impoundments and systems in waters of the United States in the Navigable Waters Rule, the Agencies adopted the waste treatment exclusion provisions in the Navigable Water Rule "without observance of procedure required by law," in violation of the APA. 5 U.S.C. § 706(2)(D).

COUNT V—THE REPEAL RULE IS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION AND CONTRARY TO THE CLEAN WATER ACT

106. Restates and realleges all preceding paragraphs.

107. The Clean Water Act's objective is to restore and protect the physical, chemical and biological integrity of the Nation's waters and to do so as broadly as possible. 33 U.S.C. § 1251.

108. The Repeal Rule's reversion to the 1986 regulations and guidance is arbitrary and capricious because it is contrary to the record for the Clean Water Rule and the Navigable Waters Rule, which was being developed as a package with the Repeal Rule. 5 U.S.C. § 706(2)(A).

109. In particular, the Repeal Rule is arbitrary and capricious because it failed to consider and is contrary to the Science Report and Agency findings based upon the Science Report. *Id.*

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110. The Repeal Rule is further arbitrary and capricious because the Agencies failed to explain their change in position from the Clean Water Rule, and failed to address the fact that the Repeal Rule is contrary to the Science Report and related record evidence. *Id.*

111. The Repeal Rule is further arbitrary and capricious because the Agencies failed to consider the effects of reverting to an earlier system of regulation on the physical, chemical, or biological integrity of the Nation's waters. *Id.*

REQUEST FOR RELIEF

Based upon the foregoing, Plaintiffs request relief from the court as follows:

A. Adjudge and declare that the Navigable Waters Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), 33 U.S.C. §§ 1251-388;

B. Vacate and set aside the Navigable Waters Rule;

C. Adjudge and declare that the waste treatment system exclusion provisions of the Navigable Waters Rule were adopted "without observance of procedure required by law," contrary to law and are arbitrary, capricious, and an abuse of discretion in violation of the APA, 5 U.S.C. § 706(2);

D. Adjudge and declare that the waste treatment system exclusion improperly excludes waters of the United States from the protections of the Clean Water Act contrary to law;

E. Vacate and set aside the waste treatment system exclusion;

F. Adjudge and declare that the Repeal Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A);

G. Vacate and set aside the Repeal Rule;

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H. Reinstate the Clean Water Rule without the vacated waste treatment exclusion;

I. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorney's fees, associated with this litigation; and

J. Grant such additional and further relief as the Court may deem just, proper, and necessary.

Dated this 22nd day of June, 2020.

s/ Janette K. Brimmer
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