IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHESAPEAKE BAY FOUNDATION, INC., *et al.*, Plaintiffs, v. ANDREW R. WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency, *et al.*, Defendants.	Case Nos. 1:20-cv-01063-RDB; 1:20-cv-01064-RDB

MEMORANDUM IN SUPPORT OF PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs, the Chesapeake Bay Foundation, Inc., and ShoreRivers, respectfully file this memorandum of law in support of their Joint Motion for Summary Judgment in their consolidated suit against Andrew Wheeler, Administrator of the Environmental Protection Agency ("EPA"); the EPA; Rickey Dale "R.D." James, Assistant Secretary of the Army (Civil Works); and the Army Corps of Engineers for issuing Clean Water Act regulations in violation of the Administrative Procedure Act. 5 U.S.C. § 706.

In 1972, Congress directed EPA and the Corps to "restore and maintain … the Nation's waters" and established a national goal that the discharge of pollutants "into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). "Navigable waters" was defined as "waters of the United States." 33 U.S.C. § 1362(7). That phrase has been interpreted to cover "waters" in its broadest sense. However, in rulemakings undertaken in 2019 and 2020, the Defendants arbitrarily altered the meaning of that phrase to reduce the jurisdiction of the Clean Water Act and thereby eliminated the possibility of achieving the directives of Congress. Final Rule, Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("Repeal Rule"); Final Rule, The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22,250 (Apr. 21, 2020) (" Replacement Rule"). Plaintiffs challenged these actions in this Court.[1]

The Clean Water Act prohibits the discharge of pollution into "waters of the United States," but the statute does not define "waters of the United States." After decades of judicial interpretation and agency guidance providing some clarity but not regulatory certainty, the

[1] *Chesapeake Bay Found., Inc., et al. v. Wheeler, et al.*, No. 20-1063-RDB (D. Md. filed Apr. 27, 2020) (ECF No. 1); *Chesapeake Bay Found., Inc., et al. v. Wheeler, et al.*, No. 20-1064-RDB (D. Md. filed Apr. 27, 2020) (ECF No. 1); Order Granting Motion to Consolidate (Case No. 20-1063-RDB, ECF No. 19).

Agencies engaged in a years-long process to promulgate regulations defining "waters of the United States," culminating in the 2015 Clean Water Rule. Final Rule, Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015) ("Clean Water Rule"). But beginning in 2017, the Agencies reversed course and began a faulty rulemaking process to repeal the Clean Water Rule and replace it with the Navigable Waters Protection Rule, resulting in the legally and factually insufficient regulations at issue in this case. Repeal Rule, 84 Fed. Reg. 56,625; Replacement Rule, 85 Fed. Reg. 22,250. Contrary to the purpose of the Clean Water Act, the Agencies repealed the Clean Water Rule – a rule rooted in science that protected waters and wetlands in order to achieve the purpose of the Act. In repealing and replacing the Clean Water Rule, the Agencies misapplied controlling Supreme Court precedent and ignored available science to draw the line for Clean Water Act jurisdiction devoid of any scientific rationale. As such, neither rule passes muster under the standards for rational rulemaking and must be vacated as arbitrary and capricious under the Administrative Procedure Act.

LEGAL AND FACTUAL BACKGROUND

I. The Clean Water Act

Congress passed the Clean Water Act ("the Act") in order to restore and maintain the chemical, physical, and biological integrity of our Nation's waters. 33 U.S.C. § 1251(a). To achieve this goal, Congress prohibited the discharge of pollutants into navigable waters without a permit. 33 U.S.C. §§ 1311(a), 1342(a). Pollutants include "dredged spoil… sewage sludge… chemical wastes, biological materials … rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). Congress defined "navigable waters" broadly as "waters of the United States." 33 U.S.C. § 1362(7). Congress intended "waters of the United States" to be "given the broadest possible constitutional interpretation" in

order to achieve the goal of restoring water quality. S. Rept. No. 92-1236, at 144 (1972) (Conf. Rep.); H.R. Rep. No. 92-911, at 131 (1972); *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132–33 (1985) ("Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" (citing S. Rep. No. 92-414, at 77 (1971)).

The Supreme Court has been asked in several prior cases to determine the scope of the Act by interpreting the definition of "waters of the United States," and in each case the Court confirmed that waters that significantly affect the quality of traditional navigable waters are "waters of the United States." *Riverside Bayview*, 474 U.S. at 134–35 & n.9; *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) ("*SWANCC*"); *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring) (quoting *SWANCC*, 531 U.S. at 167, 172).

The Supreme Court last considered the definition of "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). In the plurality opinion, which is not controlling, Justice Scalia proffered an interpretation of the Clean Water Act that would only protect "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as streams, oceans, rivers, and lakes." *Id.* at 739 (internal quotations and alterations omitted). Justice Scalia's interpretation of "waters of the United States" would not include "channels through which waters flow intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* Only "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own

right, so that there is no clear demarcation between 'waters' and wetlands" would be considered jurisdictional under the Act. *Id.* at 742. Five members of the Court rejected this narrow reading.

In a concurring opinion, Justice Kennedy concluded that wetlands are "waters of the United States" if the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Justice Kennedy's decision came to be known as the "significant nexus" test. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) ("Justice Kennedy thus established a [significant] nexus test for the applicability of the Act, concluding that 'absent a significant nexus, jurisdiction under the Act is lacking.'") (citing *Rapanos*, 547 U.S. at 767.). Because his test garnered more support than the plurality or dissenting opinions, Justice Kennedy's significant nexus test has been accepted as the governing opinion to determine jurisdiction under the Clean Water Act. *See Precon Dev. Corp. v. U.S. Army Corps of Eng'rs (Precon I)*, 633 F.3d 278, 288 (4th Cir. 2011) (holding that Justice Kennedy's "significant nexus" test "governs and provides the formula for determining whether the Corps has jurisdiction over the … [w]etlands.").

Importantly, Justice Roberts remarked in a concurrence that "no opinion command[ed] a majority of the Court on how precisely to read Congress' limits on the reach of the Clean Water Act." *Rapanos*, 547 U.S. at 758 (Roberts, J., concurring). This necessitated clarification from the Agencies, attempted first through guidance, and then through the 2015 Clean Water Rule. Clean Water Rule, 80 Fed. Reg. at 37,056–7 ("Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. … [T]he agencies are responding to those requests … to make the process of identifying waters protected

under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.")

II. Regulations Defining "Waters of the United States"

A. The Clean Water Rule

The Agencies developed a definition of "waters of the United States" by first undertaking a thorough scientific analysis of the relationship of streams and wetlands to downstream waters. The EPA prepared a synthesis of the published, peer-reviewed scientific literature assessing the nature of watershed connectivity and the effects of streams and wetlands on downstream waters. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (2015) Docket ID No. EPA-HQ-OW-2018-0149-11691 ("Connectivity Report"). The Connectivity Report determined that all tributary streams, be it perennial, intermittent, or ephemeral, are "*chemically, physically, and biologically connected* to downstream rivers." Connectivity Report, at 6-1. The Connectivity Report also established that wetlands both in and out of floodplains benefit downstream water quality through floodwater storages, nutrient retention and transformation, and groundwater recharge. Connectivity Report, at 4-1–4-2. The Connectivity Report served as the scientific basis for the Clean Water Rule's definition of "waters of the United States."

On April 21, 2014, the Agencies published the proposed Clean Water Rule to "enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of 'waters of the United States' protected under the Act." Proposed Rule, Definition of "Waters of the United States" under the Clean Water Act, 79 Fed. Reg. 22,187, 22,188 (Apr. 21, 2014). Through an extensive rulemaking process, including 400 public meetings held nationwide and more than 200-days for

public comment, the Agencies received over 1 million comments on the Clean Water Rule, the majority of which supported the proposal. Clean Water Rule, 80 Fed. Reg. at 37,057.

The Clean Water Rule aimed to protect waters that "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*. at 37,060. The Clean Water Rule identified clear categories of jurisdictional and non-jurisdictional waters based on whether the waters "significantly affect" traditional navigable waters, as well as a small category of waters subject to a case-specific analysis. *Id.* at 37,057–58. The Rule deemed traditional navigable waters, interstate waters, territorial seas, and impoundments of such waters to be jurisdictional. *Id.* at 37,058. The Rule extended jurisdiction to "tributaries" and "adjacent" waters because science confirms that they have a "significant nexus to traditional navigable waters, interstate waters, and territorial seas and therefore are 'waters of the United States.'" *Id.* at 37,060. The Rule also included a small category of waters that would be jurisdictional subject to a significant nexus test, which included Delmarva Bays (seasonal freshwater wetlands) and pocosins (a wetland bog with sandy, peat soil) found within the Chesapeake Bay watershed. *Id.* at 37,059.

B. The Repeal of the Clean Water Rule

The Agencies' process to repeal and replace the Clean Water Rule began on February 28, 2017, when President Trump issued Executive Order Number 13,778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." 82 Fed. Reg. 12,497 (Feb. 28, 2017). The Executive Order directed the Agencies to "publish for notice and comment a proposed rule rescinding or revising the [Clean Water Rule]." *Id*. at § 2(a). Further, the Executive Order instructed the Agencies to "consider interpreting the term

'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)." *Id*. at § 3.

Only a few months after the Executive Order was issued, the Agencies proposed to repeal the Clean Water Rule. Proposed Rule, Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) ("Proposed Repeal Rule"). The Agencies proposed to repeal the Clean Water Rule and reinstate the prior regulations from 1986, and then issue a second regulation to replace the Clean Water Rule. *Id.* at 34,899-900. Critically, in the Proposed Repeal, the Agencies expressly stated that they "do not intend to engage in substantive reevaluation of the definition of 'waters of the United States' until the second step of the rulemaking." *Id*. at 34,903. Only after numerous commenters noted that this restriction violated the rulemaking requirements of administrative law did the Agencies issue a Supplemental Notice accepting substantive comments related to the pre-2015 regime and Clean Water Rule. Supplemental Notice of Proposed Rulemaking, Definition of "waters of the United States" – Recodification of Preexisting Rules, 83 Fed. Reg. 32,227 (July 12, 2018). Even then, the Agencies only provided a 30-day comment period. After accepting comments for a combined 90 days, the Agencies finalized the Repeal Rule in October of 2019, reinstating the prior regulatory regime ("pre-2015 regime") without substantively evaluating the effects of resorting to 1986 rules or explaining the reversal from the Clean Water Rule and its scientific and factual record. Repeal Rule, 84 Fed. Reg. at 56,626, 56,630.

C. The Replacement Rule

While still in the process of repealing the Clean Water Rule, the Agencies proposed their new definition of "waters of the United States." *See* Proposed Rule, Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (Feb. 14, 2019) ("Proposed Replacement

Rule"). The new definition proposed by the Agencies was a vast departure from the prior regulations, agency practice, and Supreme Court precedent. The Agencies proposed to limit "waters of the United States" to traditionally navigable waters, perennial or intermittent tributaries of navigable waters, and wetlands adjacent to other jurisdictional waters. *Id.* at 4,155. The Agencies expressly excluded ephemeral streams, non-adjacent wetlands, and other waters like Delmarva Bays and pocosins. *Id.* These waters had been protected under the Clean Water Rule, long-standing agency practice, and Supreme Court precedent.

The Agencies provided merely 60 days for public comment on the Proposed Replacement Rule and received over 620,000 comments. Replacement Rule, 85 Fed. Reg. at 22,261. The Agencies finalized the Navigable Waters Protection Rule on April 21, 2020. *Id.* The Replacement Rule went into effect on June 22, 2020 in every state except Colorado, where a federal district court preliminarily enjoined the Rule, after holding that the State of Colorado was likely to succeed on the merits of its challenge that the Rule unlawfully adopts the *Rapanos* plurality opinion rejected by the majority of the Supreme Court. *Colorado v. EPA*, 445 F. Supp. 3d 1295, 1312 (D. Colo. 2020).

STANDARD OF REVIEW

Plaintiffs have filed a motion for summary judgment. Summary judgment is appropriate when the pleadings and evidence demonstrate that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a case brought under the Administrative Procedure Act, the Court is asked on summary judgment to decide "whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Ctr. for Sci. in the Pub. Interest v. Perdue*, 438 F. Supp. 3d 546, 556-57 (D. Md. 2020).

When reviewing agency actions under the Administrative Procedure Act, courts are required to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; … [or] without observance of procedures required by law." 5 U.S.C § 706(2)(A), (D). A rulemaking is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). While the court's review under the Administrative Procedure Act is generally deferential to the agency, the agency must establish that it analyzed the relevant data and provide an explanation of its decision that includes a "rational connection between the facts found and the choice made." *Id.* at 43. Courts "will vacate agency action if it is not based on a consideration of the relevant factors or where there has been a clear error of judgment." *Perdue*, 438 F. Supp. 3d at 557 (internal quotations omitted).

ARGUMENT

I. THE AGENCIES ARBITRARILY REPEALED THE CLEAN WATER RULE.

A. The Repeal of the Clean Water Rule is Inconsistent with the Clean Water Act.

In passing the Clean Water Act, Congress envisioned broad protections for our Nation's waters in order to achieve the restoration goals of the Act. Repealing the Clean Water Rule—which broadly protected waters based on science—is inconsistent with the purpose of the Clean Water Act and was fundamentally arbitrary.

The Clean Water Act was developed in response to decades of unmitigated pollution entering our Nation's waterways. Congress had long attempted to address the national water quality crisis by passing a series of laws that placed much of the responsibility for restoring water quality in the hands of the States.[2] Congress eventually recognized that this approach had failed, as the "national effort to abate and control water pollution ha[d] been inadequate in every vital aspect[.]" S. Rep. No. 92-414, at 7. It is against this backdrop that Congress passed the Clean Water Act of 1972 with an unequivocal objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

To achieve this goal, Congress prohibited the discharge of pollution into "navigable waters" without a permit, and defined the waters covered by the Act broadly with the term "waters of the United States." 33 U.S.C. §§ 1342, 1362(12). As courts have recognized, "[I]t is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some." *Quivira Mining Co. v. United States E.P.A.*, 765 F.2d 126, 129 (10th Cir. 1985) (citing *Deltona Corp. v. United States*, 657 F.2d 1184, 1186 (1981)). Congress recognized that the "narrow interpretations of the definition of interstate waters... was severely limited." S. Rept. 92-414, at 77. "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the sources. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries." *Id.* Congress intended the Clean Water Act to apply to waters beyond the merely traditionally navigable waters. *Riverside Bayview*, 474 U.S. at 133.

[2] Federal Water Pollution Control Act of 1948. See H.R. Rep. No. 92-911, at 1; Pub. L. No. 80-845, 62 Stat. 1155 (1948). Other statutes followed, including the Federal Water Pollution Control Act of 1956, Pub. L. No. 84-660, 70 Stat. 498 (1956); the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (1966); and the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970).

The legislative history of the Clean Water Act is clear – restoring water quality requires broad protection for waterbodies and wetlands because of the hydrological connections between upstream and downstream waters. S. Rep. No. 92-414, at 77; H.R.Rep. No. 92-911, at 131; S. Rep. No. 92-1236, at 144; *Riverside Bayview*, 474 U.S. at 132–34. Supreme Court precedent recognizes this as the fundamental purpose of the Clean Water Act and encapsulated that purpose in the "significant nexus" test. *Rapanos*, 574 U.S. at 779 ("the required nexus must be assessed in terms of the statute's goals and purpose."). The Clean Water Rule incorporated these principles by clearly covering waterbodies that affect downstream water quality, in line with the "significant nexus" test. *See* Clean Water Rule, 80 Fed. Reg. at 37,056.

Contrary to Congressional intent, in repealing the Clean Water Rule, the Agencies incorrectly focused their analysis on the policy articulated in section 101(b) of the Clean Water Act to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b); *see* Repeal Rule, 84 Fed. Reg. at 56,639. The Agencies concluded that the Clean Water Rule "did not adequately consider and accord due weight to the policy directive of the Congress in section 101(b) of the Act. *Id.* at 56,654. However, this focus on the States' obligations is misplaced and contrary to the true purpose of the Clean Water Act—a federal statute aimed at protecting national water quality. *See Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020) ("Congress' purpose as reflected in the language of the Clean Water Act is to 'restore and maintain the … integrity of the Nation's waters[.]'") (citing 33 U.S.C. § 1251(a)). The Agencies' interpretation must comply with the "purpose and intent of the statute… however no amount of deference can justify an interpretation of the statute that is contrary to law." *Nat. Res. Def. Council, Inc. v. Envtl. Prot. Agency*, 656 F.2d 768, 774 (D.C. Cir. 1981).

As discussed in Section I. B., below, the Clean Water Rule complied with the purpose of the Clean Water Act to restore water quality by delineating jurisdiction based on the interconnectivity of upstream waters to downstream water quality. Repealing a rule that met the statutory goals, using a flawed interpretation of the purpose of the Act, is arbitrary. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding that an "agency must show that … [a] new policy is permissible under the statute" it is implementing.)

B. The Agencies' Repeal Rule Failed to Meaningfully Consider Science, in Violation of the Clean Water Act and Supreme Court Precedent.

The Clean Water Rule fully embraced the objective of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" while remaining consistent with Supreme Court precedent and relying on the best available peer reviewed science. 33 U.S.C. § 1251; Clean Water Rule, 80 Fed. Reg. 37,055. In repealing the Clean Water Rule, the Agencies clung to the Supreme Court's plurality decision in *Rapanos v. United States* and incorrectly read Justice Kennedy's concurring opinion, leaving no room for the type of scientific evidence that is central to the Clean Water Act and its implementation.

The majority of Clean Water Act jurisprudence begins by recognizing section 101(a) and its mandate to restore the integrity of the Nation's waters. In pursuit of this directive, Agencies require, and have often relied on, scientific evidence to ground their reasoning and decision making. *See* 33 U.S.C. § 1314(a)(1) (requiring the Administrator to develop and publish "criteria for water quality accurately reflecting the latest scientific knowledge."). Courts have evidenced an understanding of this relationship by granting deference to Agencies' scientific analyses. *See Lockhart v. Kenops*, 927 F.2d 1028, 1034 (8th Cir. 1991) ("Our deference to the agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology...where... the agency presents scientifically

respectable conclusions... we will not displace the administrative choice.") (citing *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988)); *see also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 910–11 (5th Cir. 1983) (identifying "the degree of scientific or technical agency expertise necessarily drawn on in reaching the interpretation" as a factor influencing the degree of deference given to an agency). In the present case, the Agencies refused to grapple with scientific evidence and found that the Clean Water Rule was flawed, largely because of its reliance on scientific data, as opposed to the Agencies' recently manufactured legal analysis. *See, e.g.*, Repeal Rule, 84 Fed. Reg. at 56,644–45 (evaluating the role of the Connectivity Report in the 2015 Rule). Where, such as here, Agencies construe statutes in a way that contradicts congressional intent, they are not entitled to deference. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447–48 (1987).

i. The Agencies summarily dismissed the Connectivity Report and its findings.

The Agencies chose to ignore a thorough compendium of scientific knowledge that assessed the chemical, physical, and biological relationship of the waters they sought to regulate. EPA released the Connectivity Report in January of 2015 to "inform rulemaking by the U.S. EPA and U.S. Army Corps of Engineers on the definition of 'waters of the United States' under the [Act]." Connectivity Report, at ES-1. The Report summarizes "current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters." *Id.* In reviewing existing scientific data, the report found strong evidence for the "central roles of the physical, chemical and biological connectivity of streams, wetlands and open waters—encompassing varying degrees of both connection and isolation—in maintaining the structure and function of downstream waters, including rivers, lakes, estuaries and oceans." *Id.* at ES-6.

Notably, the Report found that the "incremental effects of individual streams and wetlands are cumulative across entire watersheds[3] and therefore must be evaluated in context with other streams and wetlands." *Id.* at ES-5. In stark contrast to the Clean Water Rule, the Repeal Rule dismissed the Connectivity Report and its major conclusions in favor of alleged deference to Supreme Court precedent in *Rapanos*. While *Rapanos* and Justice Kennedy's "significant nexus" standard is instructive, relying on this decision, without reckoning with the ample scientific evidence available, is in direct contravention of the Act.

As the Court noted in *Riverside Bayview*, "the transition from water to solid ground is not necessarily or even typically an abrupt one," making the decision of where to draw the jurisdictional line "far from obvious." *Riverside Bayview*, 474 U.S. at 132. Identifying jurisdictional boundaries that account for the interconnected chemical, physical, and biological features of the Nation's waters necessitates an "ecological judgement" as much as a legal one. *See* Clean Water Rule, 80 Fed. Reg at 37,055 ("Peer-reviewed science … demonstrate[s] that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters [.]"). The limits of jurisdictional waters cannot be determined on a purely legal basis and the Agencies' attempt to do so is arbitrary and capricious.

The Connectivity Report endeavored to address the "inherent ambiguity in drawing the boundaries of any 'waters'" through its review and summary of more than 1,200 publications from the peer-reviewed scientific literature. *Rapanos*, 547 U.S. at 740; Connectivity Report, at ES-2. When faced with this information, rather than engaging in a meaningful analysis of the

[3] A watershed refers to "an area of lands that drains all the streams and rainfall to a common outlet such as the outflow of a reservoir, mouth of a bay, or any point along a stream channel." *Watershed and Drainage Basins*, USGS, https://www.usgs.gov/special-topic/water-science-school/science/watersheds-and-drainage-basins?qt-science_center_objects=0#qt-science_center_objects.

Connectivity Report and its conclusions,[4] the Agencies chose to minimize its importance, concluding that the Report's findings could not be "dispositive in interpreting the statutory reach of 'waters of the United States.'" Repeal Rule, 84 Fed. Reg. at 56,652. This is a role, the Agencies assert, that is reserved for the Supreme Court. *Id.* (concluding that the definition of waters of the United States "must be grounded in a legal analysis of the limits on CWA jurisdiction that Congress intended… and a faithful understanding and application of the limits expressed in Supreme Court opinions interpreting that term"). The Agencies attempted to further minimize the role of the Connectivity Report by emphasizing that the Report is a "science, not policy, document." *Id*. Importantly, the Connectivity Report seeks only to inform policy, not to create it, an invitation which the Agencies expressly rejected. The Agencies' failure to integrate the Connectivity Report, or any cognizable scientific evidence, in the Repeal Rule marks a fundamental departure from the purpose and goals of the Clean Water Act and is far from the sort of "ecological judgment about the relationship between waters and their adjacent wetlands" that has previously encouraged courts to defer to the Agencies' judgment in this realm. *Riverside Bayview*, 474 U.S. at 134.

ii. The Agencies incorrectly relied on Justice Kennedy's concurrence in Rapanos as the sole barometer for determining jurisdiction under the Act.

The Repeal Rule purportedly relies on the Supreme Court's decision in *Rapanos* to resolve the legal and scientific inadequacies of its decision to repeal the Clean Water Rule.

In *Rapanos*, Justice Kennedy attempted to reconcile the plurality's limitations on the Act with the necessary role of scientific analysis in identifying waters of the United States by articulating the significant nexus test. *See Rapanos*, 547 U.S. at 768–69 (Kennedy, J.,

[4] The Connectivity Report Summarizes its findings in five "major conclusions." The categories include: (1) Streams; (2) Riparian/Floodplain Wetlands and Open Waters; (3) Non-Floodplains Wetlands and Open Waters; (4) Degrees and Determinants of Connectivity, and (5) Cumulative Effects. *See e.g.*, Connectivity Report, ES-2–ES-6.

concurring). Justice Kennedy argued that the "Corps' jurisdiction over wetlands depends upon the existence of a *significant nexus* between wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (emphasis added). In articulating the significant nexus standard Justice Kennedy contemplated: (i) the scientific mandate of the Act, and (ii) the contradiction of regulating the "merest trickle, if continuous" while failing to consider "torrents thundering at irregular intervals through otherwise dry channels." *Id.* at 769. Though the Repeal Rule seeks to emulate Justice Kennedy's concurrence, the Agencies make no effort to engage with the scientific evidence available in a similar manner or accurately apply the significant nexus standard.

The Agencies fail to acknowledge the role of scientific analysis in identifying jurisdictional waters. In his concurrence, Justice Kennedy held that the "required nexus must be assessed in terms of the statute's goals and purposes" as articulated in section 101(a) of the Act. *Id.* at 779. This led to the consideration that wetlands perform "critical functions related to the integrity of other waters -- functions such as pollutant trapping, flood control, and runoff storage," and thus possess the requisite nexus. *Id.* In contrast, the Agencies' analysis of adjacent wetlands is guided entirely by Supreme Court precedent. *See* Repeal Rule, 84 Fed. Reg. at 56,647. Moreover, where Justice Kennedy found section 101(a) instructive and essential to the analysis, the Agencies spend the bulk of the Repeal Rule discussing the role of section 101(b) and its recognition of the rights of States to manage water resources. In discussing the purpose of the Act, the Agencies repeatedly highlight the need to preserve the ability of States and Tribes to regulate land and water within their borders, at the expense of undertaking any scientific analysis. *See* Repeal Rule, 84 Fed. Reg. at 56,653–54.

The Agencies concluded that the Clean Water Rule's definition of "tributaries" was invalid, solely because it "exceeded the jurisdictional limits envisioned in Justice Kennedy's significant nexus standard." *Id.* at 56,646. In support of their conclusion, the Agencies take Justice Kennedy's discussion of "the merest trickle" completely out of context and attempt to establish it as a standard for evaluating the definition of tributaries in the Clean Water Rule. *Id.*

The 2015 Rule defined tributaries as "waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high-water mark – and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas." Clean Water Rule, 80 Fed. Reg. at 37,058. This definition acknowledges that "streams are structurally connected to rivers through the network of continuous channels (bed and banks) that make these systems physically contiguous, and the very existence of a continuous bed and bank structure provides strong geomorphologic evidence for connectivity." Connectivity Report, at 3-45. These are precisely the "critical functions related to the integrity of other waters" that Justice Kennedy contemplated in articulating the significant nexus standard. *Rapanos,* 547 U.S. at 779 (Kennedy, J., concurring).

In contrast, the Agencies now summarize the complex ecological functions of tributaries as a "mere contribution of flow." Repeal Rule, 84 Fed. Reg. at 56,646. The Agencies' disregard of the breadth of scientific evidence contained in the Connectivity Report, and the resulting misapplication of the significant nexus standard, demonstrates the lack of "rational connection between the facts found and the choice made" that is necessary to withstand the court's review of its decision under the arbitrary and capricious standard. *State Farm,* 463 U.S. at 43, 56.

C. The Repeal Rule Violated Fundamental Principles of Administrative Law.

i. The Agencies provided no reasoned explanation for abandoning the Clean Water Rule and its vast scientific record.

The Administrative Procedure Act requires agencies to articulate a reasonable explanation for its decisions, including in deregulatory actions for which "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515–16; *see also State Farm*, 463 U.S. at 57 ("An agency's view… may change…[b]ut an agency changing its course must supply a reasoned analysis."). An "'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

In the Preamble to the Repeal Rule, the Agencies cite *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) to support their sudden reversal of position. Repeal Rule, 84 Fed. Reg. at 56,642. However, the Agencies misuse *Fox*. The Court there clarified that no "heightened standard" applies when an agency reverses course, but reaffirmed *State Farm*'s well-established principle that agencies must provide reasoned analysis supported by the record. *See Fox*, 556 U.S. at 514–16. And while "the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," the current situation is far from a blank slate and still requires the baseline "detailed justification." *Id*. at 515; *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (an agency can reevaluate policy "*in light of the facts*") (emphasis added).

In the Repeal Rule, the Agencies provided no reasoned explanation or factual basis for abandoning the vast scientific record and factual findings that "underlay" and were "engendered

by" the Clean Water Rule—in essence, repealing the Rule without actually engaging with the Rule. *See Fox*, 556 U.S. at 515–16. Nor have the Agencies suggested that these underlying scientific and factual circumstances have changed, or provided any updated information that contradicts the prior record. The comprehensive, multi-year development process supporting the Clean Water Rule considered the science, law, policy, and agency technical expertise. Clean Water Rule, 80 Fed. Reg. at 37,056. Conversely, the Repeal Rule only focused on the aspects of the record the Agencies believe support reversal: a narrow set of legal and policy positions with which they disagree. *See supra* section I.A, I.B. This myopic analysis is arbitrary and capricious. *See State Farm*, 463 U.S. at 42 (noting a presumption "*against* changes in current policy that are not justified by the rulemaking record").

The Agencies claim to be repealing the Clean Water Rule for four primary reasons, none of which address the scientific and factual basis for the Clean Water Rule. First, the Agencies argue that the Clean Water Rule did not properly limit the scope of agency authority under the Clean Water Act, and in particular, Justice Kennedy's significant nexus test. Repeal Rule, 84 Fed. Reg. at 56,626, 56,639.[5] This argument is based on a flawed interpretation of Supreme Court case law and the Clean Water Act. *See supra* sections I.A, I.B.ii. Critically, the Repeal Rule's heavy reliance on the Agencies' (flawed) interpretation of Justice Kennedy's significant nexus test is contradicted by the Replacement Rule, in which the Agencies *reject* the significant nexus test for the even narrower and impermissible approach in Justice Scalia's plurality

[5] In the Preamble to the Repeal Rule, the Agencies claim to "tak[e] no position" on whether Justice Kennedy's significant nexus test "is or should be the controlling authority regarding the scope of federal jurisdiction under the CWA." 84 Fed. Reg. 56,639, n.27. In this way, the Agencies attempt to both rely on their (flawed) interpretation of the Kennedy test to repeal the Clean Water Rule while simultaneously taking 'no position." This contradictory reasoning is arbitrary and capricious and the Agencies' footnote is no remedy.

decision. *See infra* section II.A.ii. These conflicting views, in simultaneous rulemakings, reveal the arbitrary nature of the Agencies' justification for the Repeal Rule.

Second, the Agencies suggest the Clean Water Rule did not accord "due weight" to section 101(b) of the Clean Water Act, to "recognize, preserve, and protect" the role of States in furthering the objective of the Act. Repeal Rule, 84 Fed. Reg. at 56,626 (citing 33 U.S.C. § 1251(b)). But the Clean Water Rule *did* consider States' rights and acknowledged the role of section 101(b) in context with the water quality objectives of the Act in section 101(a). *See, e.g.*, Clean Water Rule, 80 Fed. Reg. at 37,060 ("Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes … to make jurisdictional determinations on a case-specific basis."). The Agencies now ignore the Clean Water Act's legislative history and the record demonstrating how the Clean Water Rule balanced both section 101(a) *and* 101(b) of the Act, and arbitrarily place disproportionate emphasis on section 101(b). *See supra* section I.A, I.B.ii.

Third, the Agencies claim that the Repeal Rule seeks to avoid interpretations of the Clean Water Act that push the envelope of their constitutional authority. Repeal Rule, 84 Fed. Reg. at 56,626. This claim simply repackages the first two flawed justifications above and does nothing to remedy the Agencies' failure to grapple with the underlying factual and scientific record.

Fourth, the Agencies suggest that the Clean Water Rule's distance-based limitations suffered from procedural errors and a lack of adequate record support. However, the Agencies did not once mention this concern in the Proposed Repeal; mentioned it only fleetingly in the Supplemental Proposed Repeal by soliciting comment without taking a position, 83 Fed. Reg. at

32,241, and then suddenly identified it as one of the "primary reasons" for the Final Repeal. Repeal Rule, 84 Fed. Reg. at 56,626, 56,639-40. Indeed, grasping for support, the Agencies point to two district court decisions issued "*[a]fter* the public comment period on the [Supplemental Proposed Repeal] had closed"—cases in which the agencies had taken the *opposite* position they now take. *Id.* at 56,657 (emphasis added). This kind of belated, post hoc rationalization frustrates the notice-and-comment process and cannot constitute a reasoned explanation for the final Repeal. *See McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322–23 (D.C. Cir. 1988) (finding agency action violated the APA because notice was vague and "would not have alerted a reader to the stakes").

In their failure to provide a reasoned explanation for abandoning the underlying factual record of the Clean Water Rule, the Agencies also omit a defensible analysis of the consequences of moving from the Clean Water Rule to the pre-2015 regime they impose. *See Air Alliance Houston v. EPA*, 906 F.3d 1049, 1064, 1067–68 (D.C. Cir. 2018) (agency's failure to address earlier "determinations and findings" and analyze the forgone benefits of a rule it sought to delay was arbitrary and capricious). In particular, the economic analysis informing the Clean Water Rule found the benefits of moving away from the pre-2015 regime exceeded the costs. EPA and Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule, ix-xi, (May 20, 2015) Docket ID No. EPA-HQ-OW-2017-0203-15648. The Agencies' Repeal Rule failed to explain how taking the exact opposite action would not result in a loss of societal benefits—particularly in the form of environmental degradation. The Agencies' solitary attempt to consider these impacts was a misguided economic analysis issued with the Proposed Repeal, *see, e.g.*, Comments of Jeffrey Shrader, Economics Fellow and Jason Schwartz, Legal Director, Institute for Policy Integrity (Sept. 27, 2017), Docket ID No. EPA-HQ-OW-2017-0203-10362 (detailing

errors in the Agencies' methodology), and the Agencies make clear that the Repeal Rule "is not based on the information in the agencies' [updated] economic analysis," which was provided for the first time with the final Repeal Rule. Repeal Rule, 84 Fed. Reg. at 56,662.

In light of record evidence and the Agencies' own statements illustrating concerns with the pre-2015 regime, it was arbitrary for the Agencies to omit meaningful analysis of the water quality protections (i.e., benefits) that would be lost by reverting from the Clean Water Rule to the pre-2015 regime. S*ee Air Alliance Houston*, 906 F.3d at 1067 (faulting EPA for not "explain[ing] why the detailed factual findings regarding the harm that would be prevented...are now only speculative.") (internal quotations and citation omitted).

In another attempt to support the reversal in the Repeal, the Agencies repeatedly suggest that the pre-2015 regime is preferable because it is the "longstanding regulatory framework that is familiar to and well-understood by the agencies, States, Tribes, local governments, regulated entities, and the public," Repeal Rule, 84 Fed. Reg. at 56,661, but this conclusory statement is unsupported. The Agencies admitted that there was wide consensus as to the uncertainty implementing the pre-2015 regime, Proposed Repeal Rule, 82 Fed. Reg. at 34,901, that the pre-2015 regulations "pose certain implementation challenges," Repeal Rule, 84 Fed. Reg. at 56,627, 56,660, 56,662, and that a primary motivation behind the Clean Water Rule was to provide clarity. *Id*. And the Agencies provided no substantive analysis to show that the Clean Water Rule would have provided more regulatory uncertainty than the pre-2015 regime. *See North Carolina Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012) (finding the reasons for suspending an existing rule were "significant, substantive matters, which raised questions whether the review process provided in the [new] regulations was more or less efficient than the review process

provided in the [old] regulations", and holding that the rule thus violated the APA's notice and comment requirements for failure to allow meaningful comment on these questions).

The claim of regulatory certainty is also belied by the fact that the Agencies were already developing a drastic about-face definition of "waters of the United States" that would—and has[6]—predictably introduced a wave of district court litigation and the uncertainties associated with such unknown outcomes. *See* Repeal Rule, 84 Fed. Reg. at 56,661 ("The agencies recognize that this final [Repeal] rule may itself be subject to legal challenges, and that this gives rise to the possibility of a return to the application of different regulatory definitions in different States.").

The Agencies repealed the Clean Water Rule without reasoned explanation and without adequately addressing the Rule, its record, or the real-world environmental consequences of abandoning it in its entirety. S*ee Fox*, 556 U.S. at 515 ("And of course the agency must show that there are good reasons for the new policy.").

ii. The Repeal Rule was based on a predetermined outcome and deprived the public of meaningful notice and opportunity to comment.

A basic tenet of administrative law requires agencies to meaningfully consider their actions through a notice and comment rulemaking process that incorporates public input and differing perspectives. *See* 5 U.S.C. § 553(b), (c). For the process to be meaningful, agencies must remain open-minded. *See McLouth Steel Products Corp.*, 838 F.2d at 1323 (finding EPA's response to comments evidenced "too closed a mind" and that "[c]onsideration of comments as a matter of grace is not enough."). If agencies do not provide adequate evidence of the reasoning behind a proposed rule, the public's ability to comment on the proposal is significantly hindered.

[6] *See, e.g.*, *Colorado v. EPA*, 445 F. Supp. 3d 1295 (D. Colo. 2020) (granting preliminary injunction of Agencies' Replacement Rule in Colorado); *California v. Wheeler*, 2020 U.S. Dist. LEXIS 107949 (June 19, 2020) (denying preliminary injunction of Agencies' Replacement Rule nationwide); *Conservation Law Found. et al. v. EPA*, No. 20-cv-10820 (D. Ma. filed Apr. 29, 2020); *S.C. Coastal Conservation League et al. v. EPA*, No. 20-cv-01687 (D.S.C. filed Apr. 29, 2020).

See Prometheus Radio Project v. FCC, 652 F.3d 431, 449, 453 (3d Cir. 2011) (noting agency obligation "to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible") (quoting *Home Box Office Inc. v FCC*, 567 F.2d 9, at 35–36 (D.C. Cir. 1977)).

The decision to repeal the Clean Water Rule was made by the Administration before the Agencies began the rulemaking process. The President himself stated that his Executive Order was "directing the EPA to take action, paving the way *for the elimination* of this very destructive and horrible rule." *See* Comments of Jon P. Devine, Jr., Senior Attorney, Natural Resources Defense Council, 21 (Sept. 27, 2017) Docket ID No. EPA-HQ-OW-2017-0203-11645 (emphasis added). On that same day, then-EPA Administrator Pruitt publicly stated that the Order would "withdraw the waters of the United States Rule" and that the withdrawal process was "already started." *See id*. at 49–50. These and other statements, *see e.g.*, *id*. at 49–53, reveal that the Agencies' rulemaking was not based on a true weighing of *whether* to "rescind[ ] or revis[e]" the Clean Water Rule, but rather a forgone decision to withdraw the Clean Water Rule at any cost. *See Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (agencies must provide a "reasoned explanation…to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by the courts and interested public.").

The Agencies' closed mind—and consequently flawed comment process—is evidenced by the sloppy and rushed rulemaking process that commenced shortly after the President issued the Executive Order. *See, e.g.*, *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 966, 969 (D.S.C. 2018) (invalidating Agencies' "hastily enacted" rule attempting to suspend effective date of the Clean Water Rule). The Proposed Repeal bluntly refused comments on the merits of the Clean Water Rule, the pre-2015 regime, or any future changes to the definition of

"waters of the United States." Proposed Repeal Rule, 82 Fed. Reg. at 34,903. Only after numerous commenters warned that this restriction was clearly unlawful, *see, e.g., North Carolina Growers' Ass'n*, 702 F.3d at 770, did the Agencies issue a Supplemental Notice accepting substantive comments related to the pre-2015 regime and Clean Water Rule. Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. at 32,231. Even then, the Agencies only provided a 30-day comment period, compared to the more than 200-day comment period provided for the Clean Water Rule. Clean Water Rule, 80 Fed. Reg. at 37,057.[7] The Agencies' belated offer to accept substantive comments on the rules they sought to repeal and impose was hollow, and merely a call for information to support the conclusions they had already reached. *See McLouth Steel Prods. Corp.*, 838 F.2d at 1323 (while "defects in an original notice may be cured by an adequate later notice…that curative effect depends on the agency's mind remaining open enough at the later stage.").

The Agencies also issued a new economic analysis along with the final Repeal Rule that was so dramatically altered from the indefensible version issued with the Proposed Repeal that it deprived the public of a meaningful opportunity to review and provide comment. 84 Fed. Reg. at 56,663 ("The agencies have therefore made changes to their methodologies in support of this final rule. As a result of these changes, the economic analysis for this final rule explores in greater depth the role the States play in regulating their water resources, corrects and updates the wetland valuation methodology, and more clearly acknowledges the uncertainties in the agencies' calculations."); *see Nat'l Ass'n of Home Builders*, 682 F.3d at 1039–50 (noting that the quality of an agency's economic analysis can be tested under the APA if the "agency decides to

[7] *See* Exec. Order No. 12,866, 58 Fed. Reg. 190, § 6(a)(1) (Oct. 4, 1993) ("each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*") (emphasis added).

rely on a cost-benefit analysis as part of its rulemaking" and "a serious flaw undermining that analysis can render the rule unreasonable"). To the extent the Agencies now try to point to the updated, but still fundamentally flawed[8], economic analysis released along with the Repeal Rule, the reliance is improper as the Agencies deprived the public of an opportunity to review and comment on the new analysis. *See Conn. Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.").

Furthermore, by segmenting the rulemaking into two separate rulemakings, the Agencies created a false choice: between the Clean Water Rule and the pre-2015 regime; in reality, the Agencies were already making a choice between the Clean Water Rule and the far less protective Replacement Rule. *See* EPA and Dep't of Army, Response to Comments for Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 156 (Sept. 5, 2019) Docket ID No. EPA-HQ-OW-2017-0203-15694 (noting that pre-2015 "regulations pose certain implementation challenges and acknowledg[ing] criticisms," but then excusing this by pointing to the Agencies' future replacement rule and failing to substantively respond to the "challenges" and "criticisms") (internal citations omitted). This segmentation was an impermissible narrowing of the issue that the Agencies claimed to be addressing in the Repeal Rule. *See Home Box Office*, 567 F.2d at 36 (an "artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal.").

[8] *See, e.g.*, Comments of Southern Envtl. Law Center on Proposed Repeal, 11-12, Docket ID No. EPA-HQ-OW-2017-0203-13464 (Sep. 27, 2017) (describing former EPA Administrator Pruitt's directive to EPA staff to create a new cost-benefit analysis for the Repeal Rule that removed quantifiable benefits of preserving wetlands) (quoting Coral Davenport and Eric Lipton, Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say, N.Y. Times, Aug. 11, 2017)).

With a predetermined conclusion to repeal, the Agencies failed to reckon with or clearly communicate a substantive position on the scientific record supporting the Clean Water Rule and impermissibly foreclosed the public's ability to meaningfully review and comment on a reasoned explanation for abandoning it in full and the consequences thereof. *See North Carolina Growers' Ass'n*, 702 F.3d at 770 ("because the Department did not provide a meaningful opportunity for comment, and did not solicit or receive relevant comments regarding the substance or merits of either set of regulations, we have no difficulty in concluding that the Department ignored important aspects of the problem.") (internal quotation and citation omitted).

II. THE REPLACEMENT RULE IS ARBITRARY AND CAPRICIOUS.

The Agencies' Replacement Rule suffers from a similar plethora of legal and scientific flaws as the Repeal Rule and goes far beyond any prior interpretation of the Clean Water Act. The Replacement Rule disregards the well-established wetlands science supporting the Clean Water Rule and creates confusion instead of the promised regulatory clarity. The Replacement Rule is fundamentally arbitrary and capricious and should be vacated and remanded by this court.

A. The Replacement Rule is in direct conflict with the Clean Water Act and its purpose.

i. The Agencies adopted a rule inconsistent with the purpose of the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of our Nation's waters.

Just as repealing the Clean Water Rule ran counter to the purpose of the Clean Water Act, so too does the Navigable Waters Protection Rule.

The purpose of the Clean Water Act is clear – restore and maintain the integrity of our Nation's waters. To do so, the Act's jurisdiction must protect the Nation's waters from pollution discharges from industry and municipalities, for example, and from filling wetlands critical to

protecting water quality. Streams and wetlands play an integral role in improving water quality by trapping, storing, and transforming excess nutrients, buffering the effects of flooding, and serving as habitat for aquatic species. Connectivity Report, at ES-2–ES-3. It was Congress' intent to extend Clean Water Act jurisdiction as broadly as possible because of the interconnectedness of water and aquatic ecosystems. *See supra* section I.A. The Supreme Court confirmed this interpretation, holding that "navigable waters" clearly extends beyond waters that are navigable in the traditional sense, in order to fulfill the obligations of the Clean Water Act. *Riverside Bayview*, 474 U.S. at 133. The Clean Water Act, therefore, demands broad federal authority to control pollution. *Id.* The Replacement Rule is directly contrary to the purpose of the Clean Water Act and is not in accordance with law, which violates the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

The Agencies fundamentally disregard their obligations under the Clean Water Act by removing waters and wetlands from protection that are critical to restoring downstream water quality. The Replacement Rule removes ephemeral streams from the definition of tributaries, Replacement Rule, 85 Fed. Reg. at 22,286, despite the fact that the Clean Water Rule and best available science established that ephemeral streams are sufficiently connected to downstream waters to affect water quality. *See* Connectivity Report, at ES-2, 3-1; Clean Water Rule, 80 Fed. Reg. at 37,057, 35,063, 35,065. The Replacement Rule also removes jurisdiction for non-adjacent wetlands, despite the science showing that even without a surface water connection, wetlands improve downstream water quality by storing excess nutrients and reducing flood risk. Connectivity Report, at 4-1–4-2. The exclusion of these features prevents the Agencies from achieving the goals of the Clean Water Act – to restore and maintain water quality. The Agencies

cannot adopt a regulation that "directly conflicts with the governing statute." *Maislin Indus. U.S. Inc. v. Primary Steel*, 497 U.S. 116, 134–35 (1990).

ii. The Agencies adopted a rule with a rejected interpretation of the Clean Water Act.

The Replacement Rule significantly reduces the scope of the Clean Water Act beyond any prior interpretation of the phrase by adopting a reading of the Clean Water Act rejected by the Supreme Court. For the first time, the Agencies directly adopt Justice Scalia's definition of "waters of the United States" from the *Rapanos* plurality opinion – an opinion that five justices on the Court rejected and thus, is not a proper interpretation of the Act. Justice Scalia stated that waters of the United States "includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes." *Rapanos*, 547 U.S. at 739 (internal quotations omitted). The Replacement Rule adopts the *Rapanos* plurality to define "waters of the United States" to "encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters." Replacement Rule, 85 Fed. Reg. at 22,273. Because it conflicts with the Congressional intent and judicial precedent, this is an impermissible definition of "waters of the United States" to adopt in a regulation.

Case law has long established that agencies cannot adopt a statutory interpretation that has been rejected by the Supreme Court. While the decision in *Rapanos* was split, the one thing that is clear from that decision is that Justice Scalia's plurality reading of "waters of the United States" was rejected by a majority of the justices on the Court. *See Rapanos*, 474 U.S. at 787, 793 (Stevens, J., dissenting) (joined by Justice Souter, Justice Ginsburg, and Justice Breyer); 474

U.S. at 759, 768–69, 787 (Kennedy, J., concurring) (concurring in the decision to vacate the Court of Appeals decisions, but would "remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters."). The Supreme Court has established that the agreement of five justices, even when not joining each other's opinions, "carries the force of law." *Vasquez v. Hillery*, 474 U.S. 254, 261 n.4 (1986). Therefore, the five justices in rejecting Justice Scalia's reading of "waters of the United States" foreclosed the interpretation adopted in the final rule. As the District of Colorado held in preliminarily enjoining the Rule, the Agencies lack the authority to adopt an interpretation rejected by the majority of Supreme Court justices. *Colorado v. EPA*, 445 F. Supp. 3d 1295, 1311–12 (D. Colo. 2020).

Further, the definition of "waters of the United States" in the Replacement Rule directly contradicts the significant nexus standard and the resulting case law across the country that applies the significant nexus standard. Every appellate court that has since considered the issue of "waters of the United States" has applied Justice Kennedy's interpretation and the resulting significant nexus test.[9] The Replacement Rule rejects the well-settled precedent established by the federal courts applying the significant nexus test to determine Clean Water Act jurisdiction.

iii. The Agencies relied on factors Congress did not intend the Agencies to consider.

An agency rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43. The Agencies fundamentally erred when adopting the Replacement Rule by improperly relying on States and

[9] *See, e.g., United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007); *United States v. Moses*, 496 F.3d 984, 989–91 (9th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Lucas*, 516 F.3d 316, 325–27 (5th Cir. 2008); *United States v. Bailey*, 571 F.3d 791, 798–800 (8th Cir. 2009); *United States v. Cundiff*, 555 F.3d 200, 210–13 (6th Cir. 2009); *United States v. Donovan*, 661 F.3d 174, 183–84 (3d Cir. 2011); *Precon Dev. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288-89 (4th Cir. 2011).

Tribes to fill the gaps in water protection left after the Rule reduced the jurisdictional scope of the Act. The Replacement Rule leans too heavily on section 101(b) and fails to further the primary purpose of the Clean Water Act found in section 101(a). *See supra* section I.A, II.A; s*ee also Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007) (agency action was arbitrary and capricious when neglecting statutory purpose and relevant science).

When passing the Clean Water Act, Congress created a comprehensive approach to water quality protection that directly rejected the prior tactic of relying on state actions without strong federal support. *Riverside Bayview*, 474 U.S. at 133 (Congress granted "broad federal authority to control pollution"). Congress highlighted that the prior regime of states leading the national effort to fight pollution with the Federal government limited to assisting the states had been "inadequate in every vital aspect." *See* S. Rept. 92-414 at 1, 7. Clearly Congress did not intend the Agencies to revert to the prior practice of relying on states to protect water quality. By over-emphasizing section 101(b)--to the detriment of section 101(a)--and relying on states to be solely responsible for stream and wetland protections, the Agencies have relied on factors Congress did not intend the Agencies to consider. *State Farm*, 463 U.S. at 43.

In the Replacement Rule, the Agencies expressly rely on states to step in and regulate the water features removed from CWA coverage in order to justify removing such waters from the definition of "waters of the United States." *See* EPA, The Definition of "Waters of the U.S.": Update Webinar, 30 (Dec. 12, 2017), Docket ID No. EPA-HQ-OW-2018-0149-0056 ("The agencies will consider how and whether states and tribes might regulate waters whose federal CWA jurisdiction could change under Step 2 by compiling information on current programs, laws, regulations and other programmatic measures."). The Agencies determined that interstate waters without surface water connection to traditionally navigable waters, ephemeral streams,

and non-adjacent wetlands "are more appropriately regulated by States and Tribes pursuant to their own authority." Replacement Rule, 85 Fed. Reg. at 22,284, 22,287–88, 22,308. This assumes that states can and will implement programs to protect these waters in the wake of a federal retreat from Clean Water Act protections. This unsupported assumption ignores record evidence to the contrary.

Commenters explained that a significant reduction in federal Clean Water Act protection will inhibit State's efforts to meet their Clean Water Act obligations. *See* Comments of Marla J. Stelk, Executive Director, The Association of State Wetlands Managers, Inc., 3–5 (Apr. 15, 2019), Docket ID No. EPA-HQ-OW-2018-0149-4897 ("ASWM Comments"). Many states have enacted laws preventing the state from regulating waters not protected by federal law. *Id.* at 4; Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal CWA, 1–2 (2013) Docket ID No. EPA-HQ-OW-2018-0149-0010, (Exh. A).[10] The Agencies cannot rely on these states to protect waters where federal jurisdiction is abandoned because state law expressly forecloses such a program. Within the Chesapeake Bay watershed, Delaware and the District of Columbia do not regulate waters broader than the federal definition. Comments of Lisa Feldt, Vice President of Environmental Protection and Restoration, Chesapeake Bay Foundation, 5 (Apr. 15, 2020) Docket ID No. EPA-HQ-OW-2018-0149-4878 ("CBF Comments"). These jurisdictions would need to expend significant resources to attempt to amend their state programs to cover waters no longer protected under their existing programs.[11]

[10] Publicly available at: https://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters. Excerpt attached as Exhibit A.

[11] The Replacement Rule also impacts other programs of the Clean Water Act, like Section 401 Water Quality Certifications and Section 303 Total Maximum Daily Loads, as waters removed from the Act would no longer be subject to these regulatory programs. *See* ASWM Comments, at 4; CBF Comments, at 5. This severely hampers the ability of states to protect local water quality.

The Agencies claim to create consistency with the Replacement Rule, but in fact the rule creates disparity across states that have more protective local programs and those that only follow the federal definition. This in turn creates a race to the bottom, as states with lax protections attract heavily polluting industries. *See* ASWM Comments, at 5. Additionally, downstream states are left with no recourse if upstream states do not protect the excluded waters, as upstream impacts would no longer be regulated by the Clean Water Act, to the detriment of downstream states and waters. *See* Comments of Ben Grumbles, Secretary, Maryland Department of the Environment, 2 (Apr. 15, 2019), Docket ID No. EPA-HQ-OW-2018-0149-4901 ("MDE Comments") (describing how implementation of the rule upstream in Pennsylvania and New York detriments the health of the waters in Maryland); *see also Rapanos*, 547 U.S. at 777 ("As for States' 'responsibilities and rights,' § 1251(b), it is noteworthy that 33 States plus the District of Columbia have filed an *amici* brief…[noting,] among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate.") (Kennedy, J., concurring) (internal citations omitted). To rely solely on States to protect ephemeral streams, non-adjacent wetlands, and other waters excluded by the Replacement Rule adopts an interpretation of the Clean Water Act that Congress did not intend when structuring a national approach to water quality.

iv. The Agencies create a faulty distinction between the regulatory and non-regulatory provisions of the Act to support the Replacement Rule.

In order to support their decision to weaken federal regulations in favor of state action, the Agencies attempt to draw a distinction between the different regulatory programs of the Act. The Agencies have fundamentally misunderstood the roles of those programs and the states in the Clean Water Act regulatory scheme.

In the Replacement Rule, the Agencies state that the "non-regulatory sections of the CWA reveal Congress's intent to restore and maintain the integrity of the nation's waters using federal assistance to support State, tribal, and local partnerships to control pollution of the nation's waters in addition to a federal regulatory prohibition on the discharge of pollutions to its navigable waters." Replacement Rule, 85 Fed. Reg. at 22,269. But the Agencies make the wrong distinction between these programs by focusing on the "waters" and not the "pollutants." States do have ample authority to control specific sources of pollution – non-point source pollution that often flows across many miles of land before entering waters, and not through a "discrete conveyance." *See* 33 U.S.C. § 1362(12), (14) (defining the discharge of a pollutant as the addition of pollution from "any point source", defining "point source" as "any discernable, confined, and discrete conveyance"); *Cty. of Maui*, 140 S.Ct. at 1471 ("as to... nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States."). These programs for stormwater pollution, agricultural runoff, and other sources of non-point source pollution rely heavily on State authority because it is the States who control land use decisions that are more effective at abating *non-point source pollution. See, e.g.*, 33 U.S.C. § 1342(p) (program for municipal and industrial stormwater discharges); 33 U.S.C. § 1329 (vesting authority in the States to develop non-point source management programs).

When addressing point source pollution, pollution entering the water from a "discrete conveyance" (i.e. a pipe, an outfall, a man-made ditch), the states' authority over "land use" bears little on the question of reducing pollution because that pollution is generated by a specific permitted entity. The state maintains the authority to issue a discharge permit to control point source pollution and set pollution limits to achieve water quality standards. This authority was not in jeopardy of being trampled on when the Clean Water Rule was in place, because the Clean

Water Rule only clarified what bodies of water and wetlands required discharge and fill permits. Such a rule did not infringe on state land use authority, nor does the Replacement Rule truly give back state land use authority because it was never at issue to begin with for point source pollution permits. Clearly, the Agencies have relied on the wrong section of the Clean Water Act and created a problem not in existence when issuing the Replacement Rule, such that the rule is arbitrary and capricious.

B. The Agencies Exclude Waters from Jurisdiction that Have a Chemical, Physical and Biological Impact on Downstream Water Quality and Traditionally Navigable Waters

In promulgating the Replacement Rule, the Agencies consistently disregarded the scientific evidence available in the Connectivity Report, a decision that is in direct conflict with the Clean Water Act and its mandate. The Agencies' departure from science is evidenced in its description of the Replacement Rule, which indicates that the Agencies formulated the scope of waters subject to federal regulation "in light of the U.S. Supreme Court cases … and consistent with Executive Order 13778[.]" Replacement Rule, 85 Fed. Reg. at 22,251. In comparison, the Clean Water Rule contemplated all of these factors (with the exception of E.O. 13778) *and* the catalogued findings of over 1,200 peer-reviewed studies compiled in the Connectivity Report. *See* Clean Water Rule, 80 Fed. Reg. at 37,057. In the Replacement Rule, the Agencies further state that "science cannot dictate where to draw the line between Federal and State waters, as [it] is a legal question..." Replacement Rule, 85 Fed. Reg. at 22,261. This conclusion is fundamentally flawed and the Agencies' resulting exclusion of ephemeral streams and non-adjacent wetlands directly conflicts with judicial precedent and the goals of the Clean Water Act.

i. Ephemeral streams are excluded despite their direct impacts on downstream water quality.

The Replacement Rule expressly excludes "ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills and pools" from the definition of "water of the United States." Replacement Rule, 85 Fed. Reg. at 22,251. As justification for this decision, the Agencies argue that although the *Rapanos* plurality and Justice Kennedy's concurrence would have included some seasonal streams, neither of them "defined with precision where to draw the line." *Id*. at 22,268. Despite the fact that the *Rapanos* Court did provide dispositive guidance in this respect, the Agencies chose to look no further than the four corners of the opinion in fashioning their approach. This decision was fundamentally flawed and resulted in the exclusion of waters that are inextricably linked to permanent features and traditionally navigable waters and thus essential to the implementation of the Clean Water Act.

Section 101(a) supports and requires the inclusion of ephemeral streams in the definition of "waters of the United States." Section 101(a) provides that the objective of the Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Connectivity Report plainly states that "[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported." *Connectivity Report* at ES-2. Streams have the ability to "transport sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers." *Id.* The EPA expanded on the importance of ephemeral streams noting that "they perform the same critical hydrologic functions as perennial streams: they move water, sediment, nutrients, and debris through the stream network and provide connectivity within the watershed." *See, e.g.*, EPA, The Ecological

and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest, 13 (Nov. 2008), Docket ID No. EPA-HQ-OW-2018-0149-0037. Without accounting for this interconnection and developing a definition of "waters of the United States" that ensures the protection of ephemeral streams, neither the Agencies nor States can effectively achieve the goals of the Act.

The Agencies' Replacement Rule also endangers the health of the traditionally navigable waters and those who rely on them. For example, there are roughly 25,000 miles of rivers and streams in the James River watershed, which "provide[s] clean drinking water to 2.7 million Virginians and critical refuge for trophy species like brook trout." Comments of Jamie Brunkow, Senior Advocacy Manager, James River Association, 2 (Apr. 15, 2019) Docket ID No. EPA-HQ-OW-2018-0149-4561. Of those 25,000 miles, 16,500 or 65% are rain dependent or seasonal and thus no longer protected under the Replacement Rule. *Id.* On the Delmarva Peninsula[12], the Chester/Sassafras/Miles-Wye watershed covers approximately 3,377 square kilometers, which includes a total of 2,390 kilometers of streams. Comments of Jeff Horstman, Executive Director, ShoreRivers, 4 (Apr. 15, 2019) Docket ID No. EPA-HQ-OW-2018-0149-5331. In the Choptank River watershed of 2,849 kilometers, there are over 2,150 kilometers of streams. *Id.* The Replacement Rule threatens to remove protections for 20% to 40% of the streams in these watersheds. *Id.* at 5. In articulating a bright line rule that ignores science and fact, the Agencies are placing entire ecosystems in the Bay watershed at risk.

In the Replacement Rule, the Agencies stated that "the line between Federal and State waters is a legal distinction, not a scientific one, that reflects the overall framework and construct of the CWA." Replacement Rule, 85 Fed. Reg. at 22,314. This finding is fundamentally flawed

[12] The Delmarva Peninsula encompasses portions of the state of Delaware, Maryland, and Virginia. The Peninsula is part of the Chesapeake Bay watershed.

as the regulation of waterbodies and aquatic features is an inherently scientific exercise. This is a fact that the Supreme Court has consistently recognized in its jurisprudence *See Riverside Bayview,* 474 U.S. at 134 ("In view of the breadth of federal authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides and adequate basis for a legal judgment…); *see also Rapanos,* 547 U.S. at 768 (Kennedy, J., concurring) (finding that the plurality's limitations on "waters of the United States" failed to recognize the scientific realities of watershed in the United States and are thus "without support in the language and purpose of the act or in [the Court's] cases interpreting it). The purpose of the Clean Water Act is to stem the distribution of pollution, whether by human intervention or through biological processes, throughout the waters of the United States. This goal simply cannot be achieved if the Agencies insist on applying a purely legal standard to complex ecological functions. *See Mississippi v. EPA,* 744 F.3d 1334-1345 (D.C. Cir. 2013) (EPA's rejection of a previous regime's standards was proper, "given the reasonableness of [its] interpretation of the science" and the "broad array of scientific studies" that it considered.)

ii. Non-adjacent wetlands without a direct surface water connection impact downstream water quality.

The Replacement Rule also excludes non-adjacent wetlands from its definition of "waters of the United States." In categorizing jurisdictional waters, the Agencies consider the term "waters of the United States" to include "wetlands adjacent to other jurisdictional waters." Replacement Rule 85 Fed. Reg. at 22,251. Adjacent wetlands are further defined as "wetlands that *abut* a territorial sea or traditionally navigable water, a tributary or a lake, pond or impoundment of a jurisdictional water" or are physically separated by such features. *Id.* (emphasis added). The inclusion of a bright-line test of proximity as a metric for jurisdictional

determinations ignores the interconnectivity of wetlands described in the Connectivity Report and disregards the chemical, physical, and biological factors contemplated by the Clean Water Act and the Supreme Court.

The Agencies' limitation of jurisdictional waters to adjacent wetlands fails to recognize that "[d]ownstream waters are the time-integrated result of all waters contributing to them[,]" which has detrimental implications for downstream and traditionally navigable waters. Connectivity Report, at 6-10. The Agencies specifically exclude ""[w]etlands abutting an ephemeral stream or other non-jurisdictional feature[.]" Replacement Rule, 85 Fed. Reg. 22,315. As discussed above, ephemeral streams are unequivocally connected to downstream waters. Severing the connection to wetlands based on the relationship to ephemeral streams threatens the existence of approximately 51% of wetland acreage across the country. Comments of Jon Devine, Senior Attorney and Director of Federal Water Policy, Natural Resources Defense Council, 31 (Apr. 15, 2019) ("NRDC Replacement Rule Comments") Docket ID No. EPA-HQ-OW-2018-0149-7673. As Commenters have noted, "[g]iven the numerous well-documented benefits of wetland systems in the protection of downstream water quality, storage of precipitation and floodwaters, recharge of streams and groundwater during dry periods, provision of habitat and nursery areas for fish and numerous other organisms that depend upon the wetland component of aquatic systems, in addition to recreational and quality of life benefits, losses resulting from the proposed rule would extend well beyond even the significant reduction in acreage of protected waters alone." ASWM Comments, at 12. The failure of the agencies to regulate these wetlands would most likely lead to the "draining and filling of wetland systems – that is, to the permanent loss of the resource itself." *Id.* Analysis by commenters determined that in the Nanticoke River Watershed, which drains through Delaware and Maryland into the

Chesapeake Bay, the "rule would result in deregulation of an estimated 20% of wetlands in the watershed, some 21,266 acres. *Id.* Wetland functions associated with these wetlands include surface water detention (15,000 acres); wildlife habitat (16,000 acres); and nutrient transformation – protecting water quality (9,187 acres)." *Id.* A loss of wetlands of this magnitude would greatly harm water quality in the river and consequently the Chesapeake Bay.

The Agencies claim to be guided by Supreme Court precedent, yet they do not address or consider Justice Kennedy's articulation of the role of wetlands in his *Rapanos* concurrence. As stated in the concurrence "wetlands are not simply moist patches of earth. They are defined as 'those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.'" *Rapanos,* 547 U.S. at 761, (Kennedy, J., concurring). Justice Kennedy also recognized that "[i]mportant public interests are served by the Clean Water Act in general and by the protection of wetlands in particular." *Id.* at 777. Wetlands that abut ephemeral features play an equally important role in watershed ecosystems. As noted in the Connectivity Report, "non-floodplain wetlands that are connected to the river network through surface water will have an influence on downstream waters, regardless of whether the outflow is permanent, intermittent, or ephemeral." Connectivity Report, at 4-40. Supreme Court precedent and an extensive body of scientific analysis in the record acknowledge the role of non-adjacent wetlands in protecting downstream water quality. For the Agencies to set aside this evidence in favor of a purely legal standard is unlawful, arbitrary, and capricious.

C. The Replacement Rule Threatens the Achievability of the Chesapeake Bay Total Maximum Daily Load.

The many pollution-reducing provisions of the Clean Water Act all relate back to whether waters are deemed "waters of the United States" and therefore covered by the Act.

Changing this key definitional term reverberates throughout the rest of the Act, in ways the Agencies did not fully analyze, *see Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910, 1913 (2020); *State Farm*, 463 U.S. at 43, and which are inconsistent with the purpose of the statute. *See Massachusetts v. EPA*, 549 U.S. at 532–35 (requiring EPA to adhere to the statutory objective when issuing regulations). Specifically, reducing the number of waters covered by the Clean Water Act fundamentally weakens the Chesapeake Bay Total Maximum Daily Load and the multi-state efforts to restore the physical, chemical, and biological integrity of the Chesapeake Bay and its tributaries.

The Chesapeake Bay is the largest estuary in the United States—encompassing six states and the District of Columbia, covering over 64,000 square miles of land—and is a national treasure. CBF Comments, at 1. The Bay receives half of its water from an intricate network of creeks, streams, and rivers and millions of acres of wetlands, many of which are non-navigable tributaries, non-tidal wetlands, and ephemeral and intermittent streams. *Id.* at 4. Wetlands play a critical role in improving water quality by trapping pollutants, which slows the flow of nutrients, sediment and other chemicals into rivers, streams, and the Bay. *Id.* at 4–5 (citing Chesapeake Bay Watershed Agreement, 5 (2014), https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignaturesHIres.pdf). That is one of the key reasons the Bay jurisdictions have committed to restoring wetlands in the region through the Chesapeake Bay Watershed Agreement. *Id.*

The Chesapeake Bay has long struggled with excess nutrient and sediment pollution and is subject to a Total Maximum Daily Load or "TMDL" clean-up plan pursuant to section 303(d) of the Clean Water Act. Clean Water Act Section 303(d): Notice for the Establishment of the Total Maximum Daily Load (TMDL) for the Chesapeake Bay, 76 Fed. Reg. 549 (Jan. 5, 2011).

The TMDL is based on EPA's authority to set limits on the amounts of nitrogen, phosphorus, and sediment that can be discharged into the Bay and its tributaries from both point sources and non-point sources of pollution. *Id.*; 33 U.S.C. §§ 1267, 1313(d). These limits must be reflected in National Pollutant Elimination Discharge System (or "NPDES") permits and Section 404 "dredge and fill" permits for wetlands. 33 U.S.C. §§1342, 1344. Critically, removing waters from the permitting scope of the Clean Water Act–NPDES and 404 dredge and fill permits—means these waters are removed from the scope of the Bay TMDL. Ephemeral streams, many of which are the headwaters where rivers begin, can be polluted without requiring a federal discharge permit. Non-adjacent wetlands, which reduce the flow of pollution and sediment into traditionally navigable waters even without a surface water connection, can be filled without needing a federal 404 dredge and fill permit. The area of the watershed covered by discharge permits is now greatly reduced, leading to more harmful pollution entering the Bay and its tributaries, which impacts the success of the Bay TMDL.

The Agencies fundamentally mischaracterize the scope of the cleanup programs in the Replacement Rule and the impact such a rule will have on the TMDL efforts. In the Replacement Rule, the Agencies claim that "broad pollution control programs" like Section 117 of the Clean Water Act, "address all bodies of water in the watershed[]… of the Chesapeake Bay,… regardless of the jurisdictional status of the waters." Replacement Rule, 85 Fed. Reg. at 22,253. The Agencies' focus on these critical and complementary non-regulatory programs is beside the point and merely distracts from the harmful effects these watersheds will suffer due to loss of protections under the Replacement Rule. The means of achieving restoration of the Chesapeake Bay—the Bay TMDL and state Watershed Implementation Plans—rely in large measure on the permitting provisions of the Clean Water Act to achieve pollution reductions. TMDLs

themselves are not self-executing; the limits of the TMDL must be incorporated into discharge permits, wetland dredge and fill permits, stormwater permits, and nutrient management plans issued under the Clean Water Act. *Am. Farm Bureau Fed'n v. United States*, 792 F.3d 281, 291 (3d Cir. 2015). These permits only apply to jurisdictional waters. The Agencies again fundamentally misread the Clean Water Act, and the importance of broad protections in cleanup efforts. It is of little importance if the non-regulatory provisions of section 117 apply to all waters in the Bay watershed when industrial polluters can now discharge nutrients and sediment into streams and developers are able to fill wetlands across the watershed – all without needing a permit to control and limit the nutrients entering the Bay's waterways.

In Maryland, the impact of removing wetlands from Clean Water Act protections has massive implications for meeting the goals of the Blueprint. The Maryland Department of the Environment analyzed how the Replacement Rule would impact the Bay TMDL if the definition is applied in the Susquehanna River watershed upstream of the State. MDE Comments, at 2. The analysis indicated that up to "an additional 2.3 million pounds of nitrogen per year and up to an additional 57,000 pounds of phosphorus per year could enter the Chesapeake Bay" under the new definition of "waters of the United States." *Id*. According to the Department, the cost of offsetting that pollution to Marylanders "over 20 years could be over $1 billion." *Id.*

In Virginia, over 1,000 local TMDLs have been created using a watershed approach, meaning ephemeral streams have been included in the TMDL calculations for existing sources of pollution. Comments of David K. Paylor, Director, Virginia Department of Environmental Quality, Attachment A, 7 (Apr. 15, 2019), Docket ID No. EPA-HQ-OW-2018-0149-5186. These streams would no longer be considered jurisdictional, and for permitted facilities discharging to these waters that load would need to be reassigned from a "waste load allocation" for point-

sources to a "load allocation" for non-point sources of pollution. *Id.* at 8. As a result, Virginia would no longer be able to effectively protect downstream waters from pollution originating upstream, ephemeral streams, hampering their ability to achieve the goals of the Bay TMDL.

In the District of Columbia, nearly 30 acres of wetlands would lose protection under the Replacement Rule. Comments of Tommy Wells, Director, District of Columbia Department of Energy and Environment, 8 (Apr. 15, 2019), Docket ID No. EPA-HQ-OW-2018-0149-4744. Coupled with discharges into "ephemeral streams [that] are biologically, chemically, and physically connected to downstream waters, any unregulated discharge of pollutants to ephemeral streams upstream of the District will impact the District's rivers and ultimately the Chesapeake Bay." *Id.*

In Pennsylvania, the Department of Environmental Protection is concerned that the Replacement Rule will create an interstate disparity, as "[i]ndividual states, such as Pennsylvania, cannot directly regulate actions in upstream or adjacent states impacting waters flowing across or along their borders, or fully control pollution of large shared waters such as the Delaware River, Great Lakes, or the Chesapeake Bay." Comments of Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection, 4 (Apr. 15, 2019), Docket ID No. EPA-HQ-OW-2018-0149-4393. The Pennsylvania Department of Conservation and Natural Resources implements the Riparian Forest Buffer Initiative to "provide funding for partners to install the trees, shrubs and grasses along streams to maintain the health of Pennsylvania's waterways. Buffers play an important role in the cleanup of the Chesapeake Bay[.] Comments of Cindy Adams Dunn, Secretary, Pennsylvania Department of Conservation and Natural Resources, 2 (Apr. 15, 2019), Docket ID No. EPA-HQ-OW-2018-0149-4387. The Replacement

Rule "will negate this good work, making it more difficult for Pennsylvania to reach its water quality goals." *Id.*

In repealing the Clean Water Rule and replacing it with the Navigable Waters Protection Rule, the Agencies have adopted an interpretation of "waters of the United States" that is inconsistent with the purpose of the Clean Water Act and directly undermines clean-up efforts like the Chesapeake Bay TMDL. For example, the Clean Water Rule protected key waters in the Chesapeake Bay Watershed, including Delmarva Bays and pocosins with a significant nexus to downstream water quality. Clean Water Rule, 80 Fed. Reg. at 37,058–59. However, the Replacement Rule eliminated those waters from Clean Water Act jurisdiction. In doing so, the Agencies failed to consider the impact of that decision upon local water quality and the ability of the Bay states that contain such features to meet their Bay TMDL obligations.

When reviewing agency action, courts show no deference when "the agency has misinterpreted its statutory mandate." *Ass'n of American Railroads v. Costle*, 562 F.2d 1310, 1318–19 (1997). Instead, the court's "duty is to correct the legal error of the agency." *Id.* Specifically, with respect to the Chesapeake Bay, Congress amended the Clean Water Act to create the Chesapeake Bay Program and commit the states and federal agencies to achieving the nutrient reduction and restoration goals of the Chesapeake Bay Watershed Agreement and the Chesapeake Bay TMDL. *See* 33 U.S.C. § 1267(g); Estuaries and Clean Waters Act of 2000, Pub. L. No. 106–457, § 202(b)(2), 114 Stat. 1967 (2000). Stripping broad swaths of waters and wetlands from federal protection—which will fundamentally hamper the cleanup plans under the Act like the Chesapeake Bay TMDL—does not carry out the congressional mandate to restore and maintain the integrity of our Nation's waters.

D. The Replacement Rule Violated Fundamental Principles of Administrative Law.

i. The Agencies reversed course from the Clean Water Rule and longstanding practice without providing a reasoned explanation or adhering to the purpose of the Clean Water Act.

The Administrative Procedure Act requires an agency to articulate a reasoned explanation for its decision. "This foundational precept of administrative law is especially important where, as here, an agency changes course. Reasoned decision-making requires that when departing from precedents or practices, an agency must offer a reason to distinguish them or explain its apparent rejection of their approach." *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020) (internal citations omitted). An agency cannot "gloss[ ] over or swerve[ ] from prior precedents without discussion." *Id*. at 645 (internal citation omitted). And as always, an agency's actions must adhere to the statutory purpose. *See Nat'l Ass'n of Home Builders*, 682 F.3d at 1039. (in reviewing EPA's change of a rule, repeatedly connecting the action to the purpose of the human-health protective statute and noting EPA "reasonably believed [the amended rule] would be *more reliable, more effective, and safer* than the original rule.") (emphasis added).

In the Repeal Rule, the Agencies callously abandoned the vast scientific record supporting the Clean Water Rule in favor of the pre-2015 regime. *See supra* section I.C. Now, in the Replacement Rule, the Agencies compound that error by *also* rejecting the pre-2015 regime and decades of agency practice without a reasoned explanation.

One example of this arbitrary regulatory reversal is the Agencies' move to introduce the new concept of rainfall in a "typical year" as a determinative factor in evaluating streams and wetlands for jurisdiction. Replacement Rule, 85 Fed. Reg. at 22,273–74. The Clean Water Rule set clear standards by defining tributaries based on their geographic features, not the volume of

water in the stream at any given time, consistent with the findings of the Connectivity Report, at ES-2, and building on longstanding agency expertise recognizing "physical characteristics of [a] tributary to characterize its flow." EPA and Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabel v. United States*, 10 (Dec. 2, 2008) Docket ID No. EPA-HQ-OW-2018-0149-11695; Clean Water Rule, 80 Fed. Reg. at 37,068 ("Justice Kennedy noted that the requirement of a perceptible ordinary high water mark for tributaries, a measure that had been used by the Corps, 'may well provide a reasonable measure … significant nexus[.]'") (quoting *Rapanos*, 547 U.S. at 781). The Agencies now subjugate that approach in the Replacement Rule, which requires that to be covered under the Clean Water Act, a stream must flow at least intermittently in a "typical year" and wetlands are covered if a jurisdictional water flows into them in a "typical year." Replacement Rule, 85. Fed. Reg. at 22,274–75, 22,338–39. The Replacement 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 resources based on a rolling thirty-year period." *Id*. at 22,339. This vague definition will sow more confusion in the regulated community and thereby increase costs as well as harm water quality.

The Agencies' "typical year" approach is inconsistent with prior, science-based practice and does not include a methodology, omitting critical details like what period within each of the prior thirty years—i.e., only seasons or the entire year—will be included in the averaging calculation. Exacerbating this unclear standard, it will be difficult for landowners to determine the jurisdiction of water features on their property without sophisticated rainfall and stream flow data. Replacement Rule, 85 Fed. Reg. at 22,292; *see also* NRDC Replacement Rule Comments, at 14–19 (listing data questions raised by "typical year" definition). This hardly constitutes a

"clear regulatory line" and contradicts the Agencies' claimed intent in the Replacement Rule. Replacement Rule, 85 at 22,288, 22,273 (suggesting that "typical year" is used "to provide a predictable framework"); *see Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (courts "cannot ignore the disconnect between the decision made and the explanation given").

The Agencies' Replacement Rule is also inconsistent with the Clean Water Act and based on flawed interpretations of Supreme Court precedent. *See supra* sections II.A-B. The Agencies fail to explain whether or how the Replacement Rule will adequately execute the water quality objective of the statute compared to the Clean Water Rule or pre-2015 regime. *See Planned Parenthood of Md., Inc. v. Azar*, No. CCB-20-00361, 2020 U.S. Dist. LEXIS 121163, at *36 (D. Md. July 10, 2020) ("An adequate explanation of why the rule improves statutory alignment is especially important here, because improved alignment with the [statutory] language is the only justification that [the agency] gave for the rule change."). When an agency reverses course, it cannot stray from the purpose of the governing statute. *See Physicians for Soc. Responsibility*, 956 F.3d at 647 (in reviewing an EPA Directive, questioning "whether EPA has given an adequate explanation for its new policy" and finding that "in failing to grapple with how EPA's policy affected its statutory scientific mandates, the Directive 'failed to consider an important aspect of the problem.'") (internal citation omitted).

ii. <u>The Agencies did not consider the most important aspect of the problem—impacts to the Nation's water quality.</u>

The Agencies failed to meaningfully evaluate how the novel and restrictive contours of the Replacement Rule—and the abandonment of the prior science and approach—would impact water quality and the environment. An agency rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Protection and restoration of water quality is the stated purpose and most important aspect of the

Clean Water Act. 33 U.S.C. § 1251(a). Instead of supporting their reversal with a reasoned explanation grounded in science and the statutory objective, the Agencies repeatedly return to their argument that the Clean Water Rule exceeded its legal authority. *See supra* section II.B. But even if the Agencies erroneously believe the Clean Water Rule is unlawful, they must still consider important aspects of the problem and the consequences of their reversal. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020) (finding the Acting Secretary's action arbitrary and capricious for failing to address a key part of the invalidated program and the related consequences of complete rescission).

The Agencies concede that they did not evaluate the impacts of the jurisdictional changes of the Replacement Rule, because they "are not aware of any means to quantify changes in CWA jurisdiction with any precision that may or may not occur as a result of this final rule." Replacement Rule, 85 Fed. Reg. at 22,332. But this claim conflicts with the record evidence. In response to the Agencies' request for comment on this very topic, the Agencies received guidance and resources to evaluate the Rule's impacts on jurisdiction and water quality. *See, e.g.*, CBF Comments at 14-15; NRDC Replacement Rule Comments at 28-34 (explaining how the National Hydrography Dataset and National Wetlands Inventory could be used to assess impacts on stream and wetland resources). Regardless, lack of precision does not justify the Agencies' failure to grapple with how the removal of these streams and wetlands will impact water quality, which they are statutorily obligated to protect. 33 U.S.C. §§ 1251, 1267(g); s*ee State Farm*, 463 U.S. at 52 ("Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions.").

The record also hosts a wealth of information and analyses illustrating to the Agencies how the Replacement Rule would decrease protections and negatively impact the environment. *See, e.g., supra* sections II.B-C. For example, a 2017 analysis by the Army Corps estimated that 18% of all streams and 51% of wetlands across the country would not be jurisdictional under the Replacement Rule. NRDC Replacement Rule Comments, App. A – Part 2 at 72-82, Docket ID No. EPA-HQ-OW-2018-0148-7673. And the Agencies' own economic analysis summarily acknowledged the numerous environmental threats posed by a reduction in jurisdiction, including—but not limited to—"[g]reater waterbody impairments", "[i]ncreased flood risk", "[r]educed wetland habitats", "[g]reater pollutant loads", "[d]egraded aquatic habitats", and "[a]ffected ecosystems and drinking water intakes." *See* EPA and Dep't of the Army, Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States", 105 (Jan. 22, 2020) Docket ID No. EPA-HQ-OW-2018-0149-11572. But the Replacement Rule is clear that "it is not based on the information in the agencies' economic analysis or resource and programmatic assessment"—the Agencies' only two attempts at analyzing the consequences of their action. 85 Fed. Reg. 22,332.

Indeed, the Replacement Rule is *not based* in factual or scientific analysis of water quality impacts and fails to address the information in the record demonstrating such impacts. *See Fox*, 556 U.S. at 537 ("an agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.") (Kennedy, J., concurring in the judgment); *State Farm*, 463 U.S. at 43 ("agency rule would be arbitrary and capricious if the agency...offered an explanation for its decision that runs counter to the evidence before the agency"). EPA's own Science Advisory Board agreed in comments on the proposed Replacement Rule finding that it did not reflect the

"current scientific understanding of the connectivity of surface and ground water," 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." EPA Science Advisory Board, Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, EPA-SAB-20-002, at 3–4 (Feb. 27, 2020) (Exh. B).[13]

Further, by segmenting the Repeal and Replacement into two separate rulemakings, the Agencies neglected a meaningful comparison of—and public comment on—the true loss of water protection between the Clean Water Rule and the Replacement Rule. *See* Replacement Rule, 85 Fed Reg. at 22,332 ("The 2019 [Repeal] Rule was finalized between the proposed and final rulemaking phases of this [Replacement] rule and changed the baseline for the analyses and discussion of potential effects on aquatic resources."). Because the Replacement Rule provided inadequate scientific explanation and failed to consider the impacts to the Nation's waters, the Agencies did not provide the public with the opportunity to meaningfully comment on the Replacement Rule. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (an agency is required to "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.").

The Agencies did not consider how the Replacement Rule would impact the Nation's water quality and wetlands—the most important aspect of the problem—despite substantial record evidence illustrating the consequences of broadly removing Clean Water Act jurisdiction. This failure epitomizes arbitrary and capricious rulemaking.

[13] Fed. R. Evid. 201(b)(2) allows the court to judicially notice public records "from sources whose accuracy cannot reasonably be questioned," such as the EPA Advisory Board Commentary available on a government website (https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/729C61F75763B8878525851F00632D1C/$File/EPA-SAB-20-002+.pdf).

IV. PLAINTIFFS HAVE STANDING TO CHALLENGE THE UNLAWFUL CHANGES TO THE DEFINITION OF "WATERS OF THE UNITED STATES."

A. Plaintiffs have Organizational Standing to Challenge the Repeal Rule and Replacement Rule

The Chesapeake Bay Foundation and ShoreRivers ("Plaintiffs") have standing to challenge the Agencies' decision to repeal the Clean Water Rule on behalf of their members and in their own right, as individual organizations. Like any traditional plaintiffs, organizations must demonstrate an "actual or threatened injury in fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by a favorable court decision." *American Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't Inc.*, 659 F. 3d 13, 24 (2011). Plaintiffs are environmental organizations with a commitment to protecting the "chemical, physical, and biological integrity of the Nation's waters, specifically the Chesapeake Bay and the tributaries and wetlands in the watershed." Compl. at ¶ 19, Case No. 20-1063, ECF No. 1; Compl. at ¶ 18, Case No. 20-1064, ECF No. 1. The Agencies' unlawful repeal of the 2015 Clean Water Rule and subsequent promulgation of the Navigable Waters Protection Rule is in "direct conflict" with the Plaintiffs' mission and the activities that they undertake in pursuit of it.

Organizations may satisfy the injury requirement by demonstrating a "concrete and demonstrable injury to [its] activities" with a "consequent drain on its resources" that constitutes "more than simply a setback in the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The agencies repeal of the 2015 rule jeopardizes CBF's efforts in the Chesapeake Bay watershed. In pursuit of its mission, CBF has spent millions of dollars undertaking restoration and advocacy efforts aimed at protecting and preserving the Chesapeake Bay and its tributaries. William C. Baker Declaration, ¶ 9. Similarly, ShoreRivers conducts extensive restoration work across the Delmarva peninsula in order to reduce pollution

in local waterbodies. Isabel Hardesty Declaration, ¶ 6. Under the 2015 rule, aquatic features found within the Chesapeake Bay watershed *(*e.g. headwater and ephemeral streams, Delmarva Bays and pocosins, and non-adjacent wetlands) were categorized as jurisdictional waters under the Clean Water Act. The Agencies repeal of the 2015 Rule would render many areas in the watershed vulnerable to destruction or degradation and harm water quality in the Chesapeake Bay region and leave the Delmarva Bays of the Eastern Shore without protection. This harm is only exacerbated by the Navigable Waters Protection Rule's explicit exclusion the aforementioned features from protection under the Clean Water Act. Together, the Agencies' rulemaking cements the impending harm to the Chesapeake Bay watershed and represent a substantive conflict with the Plaintiffs' mission and activities.

The Agencies' actions in repealing the Clean Water Rule and promulgating the Replacement Rule require Plaintiffs to fundamentally alter their operations and expend resources in the process. Where a Plaintiff alleges "real, concrete obstacles" that result in "perceptible impair[ment]" of its activities, a court may confer standing. *See People for the Ethical Treatment of Animals, Inc. v. USDA*, 7 F. Supp. 3d 1, 8 (2013). CBF spends over $4 million a year operating its Education department throughout the watershed. Baker Decl., ¶ 18. CBF's educators lead students and teachers in trips in wetland areas, headwater streams and other seasonal waters and wetlands to investigate macroinvertebrates and conduct water quality sampling. *Id.* Similarly, ShoreRivers operates its education program on the Choptank River in 2019, reaching approximately 3,000 students. Hardesty Decl., ¶ 12. When waters are polluted the efficacy of educational trips are significantly impacted as educators and students must limit their contact with the water. Baker Decl., ¶ 19. What is more, certain features may be compromised to the point where they are no longer suitable for educational use. If Agencies'

rulemakings are allowed to stand, CBF and ShoreRivers would be forced to reformulate much of their respective educational models.

The restoration efforts of CBF and ShoreRivers are harmed by the changes to the definition of "waters of the United States. As of 2020, ShoreRivers has installed 162 pollution reduction projects across the Eastern Shore, aimed at reducing the amount of sediment and nutrients entering waterways in the Delmarva peninsula. Hardesty Decl., ¶ 6. Without the protection provided by the Clean Water Rule, the efficacy of these installations will be significantly reduced and necessitate a complete reimagining of the measures necessary, and the best management practices required, to reduce nutrient loads in the waters of the Eastern Shore. Hardesty Decl., ¶10–11. CBF's Environmental Protection and Restoration Department will also be harmed by the Agencies' replacement of the Clean Water Rule. CBF expends over one million dollars each year conducting extensive restoration projects throughout the Chesapeake Bay Watershed. Baker Decl., ¶ 12. CBF's restoration efforts include tree plantings to create streamside buffers (many of which occur in areas where streams run through farms) and wetlands restoration projects. *Id.*

Increased pollution in these waterways threatens the efficacy of Plaintiffs' restoration efforts and will require them to expend additional resources to develop restoration practices that can address the damage caused the Chesapeake Bay Watershed as a result of the Agencies' rulemakings. These "concrete and demonstrable injur[ies] to the [Plaintiffs'] activities -- with the consequent drain on the [Plaintiffs'] resources -- constitute far more than simply a setback in [their] abstract social interests." *Havens Realty Corp.*, 455 U.S. at 379. Plaintiffs' injuries would be adequately redressed by a decision to vacate the Repeal Rule and the Replacement Rule, and as result, Plaintiffs have standing.

B. Plaintiffs Have Representational Standing to Sue on Behalf of Their Members.

Plaintiffs have standing to sue on behalf of their members interests. An organization has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiffs must therefore show that their members have suffered an injury in fact, traceable to the challenged action, redressable by a favorable decision. *Lujan v. Defenders of Wildlife*¸ 504 U.S. 555, 560–6 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180–81 (2000).

Standing in environmental cases is not an onerous requirement, as plaintiff's establish injury in fact when they allege that they "use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Am. Canoe Ass'n v. Murphy Farm, Inc.*, 326 F.3d 505, 517 (4th. Cir. 2003) (citing *Laidlaw*, 528 U.S. at 183). Environmental plaintiffs need not prove harm to the environment, but reasonable concerns of the effects of pollution that directly affects the declarant's recreation, aesthetic, and economic interest. *Id.* at 518; *see also Cent. Delta Water Agency v. United States*, 306 F.3d 938, 949–50 (9th Cir. 2002) ("government action that creates a risk of environmental harm may be challenged before the potential harm occurs" as "the fouling of air and water are harms that are frequently difficult or impossible to remedy."). Plaintiff's members have standing to sue in their own right, as their property interests, economic interests, and recreational interests are harmed by the changes to the definition of "waters of the United States."

Chesapeake Bay Foundation member Bobby Whitescarver and ShoreRivers member Nick Carter own property with water features expressly protected by the Clean Water Rule. Mr. Whitescarver operates a cattle farm in central Virginia, where the Middle River runs through the property, along with two ephemeral tributaries of the Middle River. Robert "Bobby" Whitescarver Declaration, ¶¶ 3, 8. Mr. Whitescarver has invested significant resources into fencing cattle out of all streams on his property, including the ephemeral streams, in order to protect downstream water quality and comply with the Clean Water Act and local TMDLs. *Id.* at ¶¶ 9–13. Mr. Carter's property also contains ephemeral streams and wetlands, which he regularly takes students and other visitors on tours of to educate on the principles of water quality and protection. Worrall R. "Nick" Carter, III Declaration, ¶¶ 6–7. Mr. Whitescarver and Mr. Carter's property interests are threatened by the changes to the definition of "waters of the United States" in these rulemakings. Other members like ShoreRivers' Janet Ruhl and Dan Watson live along navigable waters but are concerned that upstream pollution will degrade the quality of the waters they live and recreate on. Janet Ruhl Declaration, ¶¶ 2, 9–11; Dan Watson Declaration, ¶¶ 5–6.

Other members rely on clean water for their livelihood, like ShoreRivers member Scott Budden. Mr. Budden owns and operates an oyster farm on the Eastern Shore of Maryland. Scott Budden Declaration, ¶ 6. Mr. Budden's business relies on clean water in order to grow and harvest oysters safe for human consumption. *Id.* at ¶¶ 6, 8. Mr. Budden's operations are threatened by upstream pollution that will occur if waters and wetlands feeding into the Chester River are no longer protected. *Id.* at ¶¶ 8–9.

Many members recreate on waters through the watershed that are impacted by the changes to the definition of "waters of the United States." Members kayak, sail, paddle board, and boat on rivers and streams in Maryland. Watson Decl., ¶ 5; Ruhl Decl., ¶ 9; Sarah Emrich

Declaration, ¶¶ 5–6. Members also recreationally trap crabs and fish on these waters. Watson Decl., ¶ 5; Budden Decl., ¶ 7. CBF member Sarah Emrich regularly runs along streams and waterways near her home in Baltimore, Maryland, but is concerned about the safety of swimming or allowing her dog to be in the water if waterways are removed from the Clean Water Act. Emrich Decl., ¶ 5. Plaintiffs members recreational activities are all dependent on clean water and threatened by the weakening of the scope of the Clean Water Act.

Many members also participate in restoration activities with the plaintiff organizations. Members engage in water quality monitoring and testing in streams and creeks, as well as surveying submerged aquatic vegetation along waterways on the Eastern Shore. Ruhl Decl., ¶ 6; Watson Decl., ¶ 4. Other members have participated in tree plantings, contributing to organizational efforts to improve local water quality. Emrich Decl., ¶ 4. Still others have participated in oyster gardening programs to grow oysters off their docks and encourage other community members to do the same. Watson Decl., ¶ 4. Plaintiffs' members engage in restoration work and contribute to efforts to reduce pollution from entering our nation's waters, which is germane to the work of the Chesapeake Bay Foundation and ShoreRivers.

The harm to Plaintiffs' members is traced to the defendant Agencies revocation of the Clean Water Rule, which protected members interest in clean water, and the issuance of the Replacement Rule, which strips protection for key waterbodies and wetlands that the members live near, recreate on, and care about. This Court can redress these members harm by finding the Navigable Waters Protection Rule invalid and reinstating the Clean Water Rule.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to grant summary judgment in favor of the Plaintiffs and vacate the Repeal of the Clean Water Rule and the Navigable Waters Protection Rule as arbitrary and capricious.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Motion for Summary Judgment and Memorandum in Support of Plaintiff's Motion for Summary Judgment were electronically filed with the Clerk using the CM/ECF system, which will send notification to registered counsel for all parties.

Dated: November 24, 2020

/s/ Brittany Wright
Brittany Wright