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

PUGET SOUNDKEEPER ALLIANCE,  
SIERRA CLUB, IDAHO CONSERVATION  
LEAGUE, and MI FAMILIA VOTA,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, ANDREW  
WHEELER, in his official capacity as  
Administrator of the United States  
Environmental Protection Agency, UNITED  
STATES ARMY CORPS OF ENGINEERS,  
and R.D. JAMES, in his official capacity as  
Assistant Secretary of the Army for Civil  
Works,

Defendants,

and

AMERICAN FOREST & PAPER  
ASSOCIATION, AMERICAN PETROLEUM  
INSTITUTE, EDISON ELECTRIC  
INSTITUTE, and NATIONAL MINING  
ASSOCIATION, NATIONAL STONE, SAND,  
& GRAVEL ASSOCIATION,

Intervenor-Defendants.

Case No. 2:20-cv-950 JCC

FIRST AMENDED COMPLAINT

**INTRODUCTION**

1  
2 1. Congress declared a single objective for the Clean Water Act: “to restore and  
3 maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C.  
4 § 1251(a). To achieve that objective, the Act prohibits and regulates the discharge of pollutants  
5 into “navigable waters,” which the Act defines broadly as “the waters of the United States.” *Id.*  
6 § 1362(7).

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

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16 “Repeal Rule”), repealed the 2015 “Clean Water Rule” which defined the term “waters of the  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

22 4. The Navigable Waters Rule exceeds the Agencies’ statutory authority and is  
23 contrary to the Clean Water Act’s text, structure, objectives, and legislative history requiring  
24

1 broad protection of all the Nation’s waters, because its provisions exclude waters from the  
2 protections required and afforded by the Act.

3 5. Plaintiffs also challenge the Repeal Rule and the Navigable Waters Rule as  
4 arbitrary and capricious because both rules are contrary to the evidence before the Agencies,  
5 including vast volumes of science and technical evidence in the administrative record and the  
6 uncontroverted findings made by the EPA and its own Science Advisory Board. The Agencies  
7 also failed to explain their decision to reverse prior regulations and failed to consider important  
8 aspects of the problem, including the effects on water quality and aquatic ecosystems of stripping  
9 protections for large numbers of waters, the ecological importance of protecting the excluded  
10 waters, and the effects of the reversal on the objectives of the Clean Water Act. These decisions  
11 are arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act  
12 (“APA”), 5 U.S.C. § 706(2). The Agencies also violated Section 7 of the Endangered Species  
13 Act. 16 U.S.C. § 1536.

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

### 16 **PARTIES**

17 7. Plaintiff Puget Soundkeeper Alliance is a nonprofit corporation organized and  
18 existing under the laws of Washington, with its headquarters in Seattle. Its mission is to protect  
19 and preserve the waters of Puget Sound by detecting and reporting pollution, engaging  
20 government agencies and businesses to regulate pollution discharges, and enforcing requirements  
21 under the CWA to control or halt pollution and other adverse impacts to waters from sewage-  
22 treatment plants, industrial facilities, construction sites, municipal storm sewers, and other  
23 sources. Puget Soundkeeper Alliance has nearly 1,500 members who reside throughout the  
24 Puget Sound watershed. Some of its members participate in volunteer boat or kayak patrols to

1 observe water-quality conditions, check for abnormal discharges and pollution, and remove  
2 floating trash and debris. Puget Soundkeeper Alliance also accomplishes its work, in part, by  
3 working to enforce the permitting requirements of the Act throughout the Puget Sound  
4 watershed. Puget Soundkeeper's members use and recreate on the Sound and the waters  
5 throughout the Puget Sound watershed. Puget Soundkeeper and its members have significant  
6 interest in preserving the full reach of the Clean Water Act's protections.

7         8. Plaintiff Sierra Club is a nonprofit corporation organized and existing under the  
8 laws of California, with its headquarters in San Francisco. It is a national organization dedicated  
9 to protecting public health and the environment. The Sierra Club has long worked to protect  
10 clean water. In particular, local chapters of the Sierra Club have defended treasured waterbodies  
11 throughout the U.S. from pollution, development, and destruction. The Sierra Club has more  
12 than 630,000 members who reside in all fifty states and the District of Columbia. Some Sierra  
13 Club chapters and groups run local Water Sentinels programs that train member volunteers to  
14 test their local waterbodies for contamination and present the results to local regulatory officials,  
15 to organize cleanups, and to advocate before government agencies to help improve water quality.  
16 Sierra Club members use and recreate on waters and own property that contains waters that will  
17 be affected by the rules challenged here. Sierra Club and its members have an interest in  
18 preserving the full protections of the Clean Water Act.

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

5 10. Mi Familia Vota is a nonprofit public-interest advocacy organization working to  
6 advance and protect the interests of Latino communities in areas of immigration, voting,  
7 environment, workers' rights, education, and healthcare. Mi Familia Vota works for the  
8 community through offices located in Arizona, California, Colorado, Texas, Nevada, and  
9 Florida, with members throughout those states. Mi Familia Vota's members and their  
10 communities are adversely affected by the Repeal Rule and the Navigable Waters Rule, as they  
11 rely on waters throughout the West for drinking water and their livelihoods. Mi Familia Vota  
12 also works on issues for and with its members involving housing and development policies in  
13 places like Houston, Texas, that have been made more vulnerable to storms like Hurricane  
14 Harvey as a result of the destruction of wetlands.

15 11. Defendant U.S. Environmental Protection Agency is a federal agency charged  
16 with administering the Clean Water Act through its Administrator, Andrew Wheeler. 33 U.S.C.  
17 § 1251(d). It co-promulgated the Navigable Waters Rule and the Repeal Rule, the rules  
18 challenged here.

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

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

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

18           15.     Plaintiff Idaho Conservation League has been actively engaged in a variety of  
19 educational and advocacy efforts to protect what had previously been recognized as "waters of  
20 the United States" for going on 20 years. Defendants' adoption of the Repeal Rule and  
21 Navigable Waters Rule has made it more difficult to achieve Idaho Conservation League's  
22 institutional objectives in protecting its members, the public, and aquatic environments from the  
23 harms associated with unpermitted activities that harm or destroy waters. Idaho Conservation  
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1 League has had to dedicate additional research and mapping capabilities in order to research  
2 whether threatened Idaho waters remain protected as “waters of the United States,” and it is now  
3 dedicating additional staff time to compile evidence and draft documents needed to prove a water  
4 is protected under the Clean Water Act, whereas previously it could rely on application of the  
5 2015 Clean Water Rule to determine jurisdiction and then move to the next steps of advocacy of  
6 enforcing the law and advocating for permits.

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

9 **JURISDICTION AND VENUE**

10 17. This action is brought under the Administrative Procedure Act, 5 U.S.C. § 702;  
11 *Nat’l Assoc. of Manufacturers v. Dep’t of Defense*, 138 S.Ct. 617 (2018), and the Endangered  
12 Species Act, 16 U.S.C. § 1540(g)(1)(A), which waive Defendants’ sovereign immunity. This  
13 Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and the  
14 Endangered Species Act, 16 U.S.C. § 1540(g). The Court is authorized to grant relief under the  
15 Administrative Procedure Act, 5 U.S.C. § 706; the Endangered Species Act, 16 U.S.C. §  
16 1540(g)(1)(A); and 28 U.S.C. § 2202 (further necessary or proper relief).

17 18. As required under 16 U.S.C. § 1540(g)(2)(A)(i), Plaintiffs Idaho Conservation  
18 League, Puget Soundkeeper Alliance, and Sierra Club provided the Defendants, the Secretary of  
19 the Interior, and the Secretary of Commerce with sixty days’ notice of the Endangered Species  
20 Act violations outlined below.

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

1 **LEGAL FRAMEWORK**

2 I. THE CLEAN WATER ACT

3 20. The objective of the Clean Water Act “is to restore and maintain the chemical,  
4 physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

5 21. The Act protects waters from pollution, and from damage or destruction from  
6 dredging or filling, by prohibiting “the discharge of any pollutant by any person” except in  
7 compliance with the Act’s permitting requirements and other pollution-prevention programs. *Id.*  
8 § 1311(a) (incorporating *id.* §§ 1312, 1316, 1317, 1328, 1342, and 1344). These programs  
9 include the National Pollutant Discharge Elimination System (“NPDES”), *id.* § 1342; the section  
10 404 permitting program for discharges of dredged or fill material, *id.* § 1344; and the section 311  
11 oil-spill prevention and response programs, *id.* § 1321.

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

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

18 24. The Act’s legislative history confirms that Congress adopted the “broadest  
19 possible” definition of “navigable waters” of the United States, unencumbered by earlier and  
20 narrower administrative interpretations. H.R. Rep. No. 92-911 at 76-77 (1972). As the  
21 conference report emphasized, “the conferees fully intend that the term ‘navigable waters’ be  
22 given the broadest possible constitutional interpretation unencumbered by agency determinations  
23 which have been made or may be made for administrative purposes.” Clean Water Act

24 Legislative History, Senate Consideration of the Rpt. of the Conference Committee, Oct. 4,



1 1972, at 178. The Senate Committee on Public Works “was reluctant to define” the term  
2 “navigable waters” based “on the fear that any interpretation would be read narrowly[,]” and it  
3 reiterated that it “fully intend[ed] that the term ‘navigable waters’ be given the broadest possible  
4 constitutional interpretation.” Clean Water Act Legislative History at 818.

5 25. In directing the broadest possible protection, Congress relied on science  
6 demonstrating the interconnectedness of waters and the need to ensure that aquatic ecosystems as  
7 a whole are protected in order to fulfill the Act’s purpose, especially waters upstream of  
8 “traditionally navigable waters.” Congress recognized that “[w]ater moves in hydrological  
9 cycles and it is essential that discharge of pollutants be *controlled at the source*.” S. Rep. No.  
10 92-414 at 77 (1971) (emphasis added).

11 26. The core provisions of the regulatory definition of “waters of the United States”  
12 remained largely unchanged for a long period of time, from 1979 until fairly recently. *See* 44  
13 Fed. Reg. 32,854, 32,901 (June 7, 1979) (defining “waters of the United States” to include,  
14 among other things, “(1) All waters which are currently used, were used in the past, or may be  
15 susceptible to use in interstate or foreign commerce, including all waters which are subject to the  
16 ebb and flow of the tide; (2) Interstate waters, including interstate wetlands; (3) All other waters  
17 such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats and  
18 wetlands the use, degradation or destruction of which would affect or could affect interstate or  
19 foreign commerce ...; (4) All impoundments of waters otherwise defined as navigable waters...;  
20 (5) Tributaries of waters identified in paragraphs (1)-(4) ..., including adjacent wetlands; and (6)  
21 Wetlands adjacent to waters identified in paragraphs (1)-(5)”).

22 27. In general, federal courts, including the Supreme Court, have affirmed that the  
23 Act’s protective reach must be interpreted and applied to waters broadly in order to ensure that  
24

1 the purpose of restoring and maintaining the biological, physical, and chemical integrity of our  
2 Nation’s waters is fulfilled. *See Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.8 (1987)  
3 (noting that “navigable waters” “has been construed expansively to cover waters that are not  
4 navigable in the traditional sense”); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S.  
5 121, 136-39 (1985) (affirming the Corps’ application of jurisdiction to wetlands adjacent to  
6 navigable waters).

7 28. While the Supreme Court has established that the Act’s protections do not extend  
8 to each and every wet area, such as the water-filled abandoned gravel mining pits at issue in  
9 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159,  
10 164-65 (2001), the Court has consistently affirmed that the EPA and the Corps have broad  
11 authority under the Clean Water Act to protect both navigable and non-navigable waters that are  
12 adjacent, connected, or have a significant nexus to navigable waters. *See id.* at 167-68; *Rapanos*  
13 *v. United States*, 547 U.S. 715, 740-42 (2006); *id.* at 759 (Kennedy, J., concurring in judgment).

14 29. The Supreme Court’s 2006 decision in *Rapanos v. United States*, 547 U.S. at 715,  
15 involved disputes over whether certain wetlands fall within the protections of the Clean Water  
16 Act. While a plurality of the justices agreed to the result—a remand to address whether the  
17 Corps’ assertion of jurisdiction was supported by facts in the record—all three of the opinions  
18 directly disagreed with some aspects of one another, resulting in no controlling decision or  
19 precedent. Further, the points agreed upon by a majority of the justices were few. A majority of  
20 five justices interpreted the Act as protecting all waters, including wetlands, that “possess a  
21 ‘significant nexus’—a science-based inquiry designed to meet and fulfill the objections of the  
22 Act—to waters that are or were navigable in fact or that could reasonably be so made,” including  
23 Justice Kennedy and the four dissenting justices. *Id.* at 759 (Kennedy, J., concurring in  
24

1 judgment); *id.* at 810 (Stevens, J., dissenting). The four dissenting justices, led by Justice  
2 Stevens, would have upheld the Corps' authority to regulate the wetlands at issue outright, based  
3 on the Clean Water Act and the Corps' existing regulations. *Id.* at 787-99 (Stevens, J.,  
4 dissenting). Overall, a majority of the Court decided that the Corps may have jurisdiction to  
5 protect and regulate the waters in question in the case, but must further examine and justify  
6 jurisdiction in light of the Court's discussion in the case.

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

## 13 II. THE ADMINISTRATIVE PROCEDURE ACT

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

16 32. In reviewing a final agency action, the court shall hold unlawful and set aside  
17 agency action, findings, and conclusions that are found to be arbitrary, capricious, an abuse of  
18 agency discretion or otherwise not in accordance with the law, *id.* § 706(2)(A), or agency actions  
19 that are in excess of statutory jurisdiction, authority or limitations, or short of statutory right, *id.*  
20 § 706(2)(C), or agency actions that are not in observance of procedure required by law. *Id.* §  
21 706(2)(D).

**STATEMENT OF FACTS**

I. THE CLEAN WATER RULE

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

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

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

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

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

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

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

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

16           A.     Categorically Protected Waters

17           41.     Under the Clean Water Rule, the following waters would be categorically  
18 protected under the Clean Water Act in all instances: “(i) All waters which are currently used,  
19 were used in the past, or may be susceptible to use in interstate or foreign commerce, including  
20 all waters which are subject to the ebb and flow of the tide; (ii) All interstate waters, including  
21 interstate wetlands; (iii) The territorial seas; (iv) All impoundments of waters otherwise  
22 identified as waters of the United States under ... [the rule]; (v) All tributaries ... of waters  
23 identified in ... [the preceding sections of the rule]; [and] (vi) All waters adjacent to a water

1 identified in ... [the preceding sections of the rule], including wetlands, ponds, lakes, oxbows,  
2 impoundments, and similar waters.” *See, e.g.*, 80 Fed. Reg. at 37,114.

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

15 43. Based on the findings of the Science Report and the Agencies, the Clean Water  
16 Rule categorically protected tributaries and defined the term “tributary” as “a water that  
17 contributes flow, either directly or through another water[,]” to traditional navigable waters,  
18 interstate waters, or the territorial seas, and that “is characterized by the presence of the physical  
19 indicators of a bed and banks and an ordinary high water mark.” 79 Fed. Reg. at 22,189, 22,199;  
20 80 Fed. Reg. at 37,058-59, 37,065, and 37,115.

21 44. The Science Report also found clear evidence that wetlands and open waters in  
22 floodplains are “highly connected” to tributaries and rivers “through surface water, shallow  
23 groundwater, and biological connectivity.” Science Report at ES-2 and 4-1 et seq., especially  
24

1 4-39. The Science Report found, too, that wetlands and open waters located outside of  
2 floodplains serve numerous functions that can benefit downstream water integrity, such as  
3 floodwater storage. Based on the Science Report, the Agencies found wetlands and waters in  
4 floodplains should be categorically protected, and broadly defined adjacent wetlands to include  
5 “bordering, contiguous, or neighboring a water [otherwise protected under the regulation],  
6 including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and  
7 the like.” 80 Fed. Reg. at 37,058 and 37,105.

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

13 B. Case-By-Case Protections

14 46. Based upon the findings in the Science Report, the Agencies found that certain  
15 categories of waters should be protected on a case-by-case basis when necessary to protect the  
16 physical, chemical or biological integrity of downstream waters and to serve the objectives of the  
17 Act. The first category of waters eligible for case-specific determinations were enumerated,  
18 ecologically specific types of wetlands—namely, prairie potholes, Carolina bays and Delmarva  
19 bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands that were to be  
20 considered ecologically similarly situated and combined within a watershed for the purposes of  
21 determining significant nexus. *See, e.g.*, 80 Fed. Reg. at 37,114. Such waters would meet the  
22 definition of “waters of the United States” under the rule if they were “determined, on a case-  
23 specific basis, to have a significant nexus to a water” otherwise protected under the rule. *Id.*

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

6           C.     Excluded Waters—Waste Treatment Exclusion

7           48.     The Clean Water Rule identified waters that the Agencies would categorically  
8 deem “not jurisdictional.” One such exclusion is for “waste treatment systems,” *id.* at 22,189,  
9 22,192, essentially waste dumps created in waters, including sometimes in protected waters.

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

22          50.     In July 1980, after “[c]ertain industry petitioners wrote to EPA expressing  
23 objections to the language,” EPA announced its decision to “suspend” the limiting language it  
24 had lawfully promulgated two months earlier. 45 Fed. Reg. 48,620, 48,620 (July 21, 1980).



1 EPA indicated that it planned “promptly to develop a revised definition and to publish it as a  
2 proposed rule for public comment.” *Id.* at 48,620.

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

## 5 II. THE REPEAL RULE

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

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

11 54. On October 22, 2019, the Agencies published a final regulation repealing the  
12 Clean Water Rule and readopting the Agencies’ 1986 regulation and related guidance. 84 Fed.  
13 Reg. 56,626 (Oct. 22, 2019) (“The Repeal Rule”). As it relates to the waste treatment system  
14 exclusion, the Repeal Rule purports to “continue[]” the modification expanding the waste  
15 treatment system exclusion to waste systems created in jurisdictional waters of the United States.  
16 83 Fed. Reg. at 34,907.

17 55. The Repeal Rule became effective on December 23, 2019. 84 Fed. Reg. at  
18 56,626.

19 56. In adopting the Repeal Rule, the Agencies provided no explanation, analysis,  
20 discussion, or refutation of the Science Report or any of the research and studies in the  
21 administrative record for the Clean Water Rule. The Agencies identified no different or new  
22 scientific evidence, and provided no discussion of or explanation for how or why the Science  
23 Report and the technical information in the administrative record support the Repeal Rule. The  
24

1 Agencies also failed to explain why they disregarded the Science Report and their earlier  
2 findings and conclusions based upon it.

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

### 8 III. THE NAVIGABLE WATERS RULE

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

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

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

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

23 62. The Navigable Waters Rule has no provision for case-by-case jurisdictional  
24 determinations, meaning that waters not expressly identified as protected will be excluded from

1 protection, even if they have a significant nexus to and impact on the water quality and aquatic  
2 ecosystems in other waters protected under the Act.

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

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

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

22 66. The Navigable Waters Rule also narrows the definition of wetlands that are  
23 waters of the United States, limiting protected wetlands to those that are directly connected on  
24

1 the surface on at least one side to another protected water under the rule. A wetland that is  
2 separated from a protected water only by an artificial dike, barrier, or similar artificial structure,  
3 may be protected but only if the barrier allows for a direct surface water connection to the  
4 protected water in a typical year through a culvert, flood or tide gate, or pump. The Navigable  
5 Waters Rule excludes wetlands from protection under the Act if the wetland is inundated by  
6 flooding from a protected water but that flooding does not occur in a “typical year.” *Id.* at  
7 22,338.

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

13 68. The term “typical year” is defined to mean “when precipitation and other climatic  
14 variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area  
15 of the applicable aquatic resource based on a rolling thirty-year period.” *Id.* at 22, 339. The  
16 Navigable Waters Rule does not define “normal periodic range,” and does not define or provide  
17 guidance on the relevant size or type of geographic area for jurisdictional determinations.

18 69. The Navigable Waters Rule retained the waste treatment exclusion allowing  
19 historic waste treatment impoundments originally created in waters of the U.S. to be excluded  
20 from jurisdiction, but defined “waste treatment systems” for the first time. The definition  
21 includes all components of the waste treatment system, including lagoons and treatment ponds  
22 (such as settling or cooling ponds) designed to either convey or retain, concentrate, settle, reduce,  
23 or remove pollutants, either actively or passively, from wastewater prior to discharge (or  
24

1 eliminating any such discharge). *Id.* at 22,328-39. The Agencies stated that they were  
2 continuing longstanding practice without acknowledging or addressing the limiting language in  
3 the promulgated 1980 rule.

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

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

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

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

21 74. The Agencies failed to address or consider the earlier findings in the Science  
22 Report and by the Agencies that isolated wetlands and unconnected waters within a floodplain  
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1 can and do have a significant nexus to downstream waters, and can and do affect the chemical,  
2 physical, and biological integrity of those waters.

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

6 76. The Agencies released the final Navigable Waters Rule for publication on January  
7 23, 2020.

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

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

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

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

14 *Id.* at 2 (footnote omitted).

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

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

### 21 CAUSES OF ACTION

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

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

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

84. Restates and realleges all preceding paragraphs.

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

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

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

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

- a. Exclusion of all interstate waters;
- b. Definition of tributaries that excludes ephemeral waters;
- c. Definition of adjacent wetlands that excludes “isolated” wetlands, wetland ecosystems such as prairie potholes, and wetlands connected by non-surface or ephemeral connections between wetlands and protected traditional navigable waters;



- d. Definition of “typical year” that is vague, unclear, and contrary to science and the record which will result in waters in significant nexus to traditional navigable waters being excluded; and
- e. Exclusion of waters separated from traditional navigable waters that lack a surface connection in a “typical year,” but have an effect on or connection to downstream traditional navigable waters.

5 U.S.C. § 706(2)(A).

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

89. Restates and realleges all preceding paragraphs.

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

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

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

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

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

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

10 95. The Agencies’ decision to remove the Clean Water Act’s protections for  
11 ephemeral streams and many other streams, as well as many wetlands and other waters, without  
12 analyzing the extensive scientific evidence of the ecological importance of protecting these  
13 waters and their connectivity to and effects on downstream waters, is arbitrary, capricious, an  
14 abuse of discretion, or otherwise not in accordance with law, in violation of the APA. 5 U.S.C. §  
15 706(2)(A).

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

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

**COUNT III—THE NAVIGABLE WATERS RULE’S WASTE TREATMENT EXCLUSION IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW**

98. Restates and realleges all preceding paragraphs.

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

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

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

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

102. Restates and realleges all preceding paragraphs.

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

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

3 105. In the Navigable Waters Rule, the Agencies adopted the first definition “waste  
4 treatment systems” subject to the exclusion as including all components of the waste treatment  
5 impoundments in waters of the United States. The Agencies expressly stated that they were not  
6 seeking comment on the definition, including its explicit acknowledgement that such systems  
7 could be in waters of the United States. The Agencies also did not seek comment on these  
8 regulatory changes, which conflict with the limiting language in 1980 waste treatment exclusion.

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

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

16 107. Restates and realleges all preceding paragraphs.

17 108. The Clean Water Act’s objective is to restore and protect the physical, chemical  
18 and biological integrity of the Nation’s waters and to do so as broadly as possible. 33 U.S.C.  
19 § 1251.

20 109. The Repeal Rule’s reversion to the 1986 regulations and guidance is arbitrary and  
21 capricious because it is contrary to the record for the Clean Water Rule and the Navigable  
22 Waters Rule, which was being developed as a package with the Repeal Rule. 5 U.S.C.  
23 § 706(2)(A).

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

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

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

10 **COUNT VI—THE NAVIGABLE WATERS RULE IS CONTRARY TO**  
11 **THE ENDANGERED SPECIES ACT**

12 113. Restates and realleges all preceding paragraphs.

13 114. In adopting the Navigable Waters Rule, the EPA and the Corps also violated  
14 Section 7 of the Endangered Species Act. 16 U.S.C. § 1536.

15 115. While the Agencies failed to provide the public with estimates of the Navigable  
16 Waters Rule’s ecological effects, internal agency documents have indicated that more than fifty  
17 percent of the nation’s wetlands and nearly twenty percent of its streams could be excluded from  
18 the Clean Water Act under the regulation.

19 116. Given the scale of this change, the rule’s impacts on listed species and their  
20 habitat promise to be profound. As the EPA and the Corps have acknowledged, “more than one-  
21 third of the United States’ threatened and endangered species live only in wetlands, and nearly  
22 half use wetlands at some point in their lifecycle[.]” EPA and Dep’t of the Army, Econ.

23 Analysis for the Proposed Revised Definition of “Waters of the United States” (Dec. 14, 2018)  
24 (EPA-HQ-OW-2018-0149-0004), at 49. The Agencies have admitted, too, that “[e]phemeral

1 waterbodies also provide habitat to threatened and endangered species.” *Id.* at 184. The  
2 Agencies recognized that these ephemeral-stream habitats thrive even during dry periods because  
3 their groundwater supports species, including federally listed plants like the Pecos sunflower,  
4 when there is no surface water. *Id.* at 195.

5 117. By opening the door to the degradation and destruction of wetlands, ephemeral  
6 streams, and downstream waters, the Navigable Waters Rule threatens listed species and their  
7 designated critical habitat with significant harm. As the American Fisheries Society concluded in  
8 its report on the Agencies’ proposal, “[m]any fish species currently listed as threatened or  
9 endangered w[ill] face increased risks” due to the loss of Clean Water Act protections under the  
10 rule, “and other taxa w[ill] become more vulnerable.” Am. Fisheries Soc’y, *Headwater Streams  
11 and Wetlands Are Critical for Sustaining Fish, Fisheries, and Ecosystem Services* (Dec. 2018)  
12 (EPA-HQ-OW-2018-0149-11451), at 2.

13 118. Despite the Navigable Waters Rule’s impacts on listed species and their habitat,  
14 the Agencies failed to fulfill the requirements of the Endangered Species Act when adopting the  
15 regulation.

16 119. Under Section 7(a)(2) of the statute, “[e]ach Federal agency” is required,  
17 in consultation with and with the assistance of the Secretary [of the  
18 Interior and the Secretary of Commerce], [to] insure that any action  
19 authorized, funded, or carried out by such agency ... is not likely to  
20 jeopardize the continued existence of any endangered species or  
21 threatened species or result in the destruction or adverse  
22 modification of [the critical] habitat of such species[.]  
23 16 U.S.C. § 1536(a)(2). This language establishes both substantive and procedural obligations.  
24 Substantively, agencies must make certain their actions—including “the promulgation of  
25 regulations”—are “not likely” to adversely modify critical habitat or leave an imperiled species  
26 in jeopardy. *Id.*; 50 C.F.R. § 402.02. Procedurally, agencies must evaluate the potential impacts

1 of their actions “in consultation with” the relevant expert agency—either the U.S. Fish and  
2 Wildlife Service, the National Marine Fisheries Service, or both. 16 U.S.C. § 1536(a)(2).

3 120. In promulgating the Navigable Waters Rule, the Agencies violated both the  
4 substantive and procedural requirements of Section 7.

5 121. First, by stripping the essential protections of the Clean Water Act from wetlands,  
6 ephemeral streams, and downstream waters that sustain listed species, the Agencies failed to  
7 fulfill their statutory duty to “insure that any action authorized, funded, or carried out” by them  
8 “is not likely to jeopardize the continued existence of any endangered species or threatened  
9 species or result in the destruction or adverse modification of [critical] habitat[.]” 16 U.S.C. §  
10 1536(a)(2); 50 C.F.R. § 402.02. By the Agencies’ own admission, the “[r]educed CWA  
11 jurisdiction” that will result from their new rule could very well cause a “decline in wildlife  
12 habitat quantity and quality” by “[r]educ[ing] wetland habitats[.]” “[d]egrad[ing] aquatic  
13 habitats[.]” and “[r]educ[ing] ecosystem values provided by surface waters[.]” Economic  
14 Analysis for the Proposed Revised Definition of “Waters of the United States” at 133. As habitat  
15 loss and pollution are primary drivers of extinction, the Agencies’ decision to allow more of both  
16 cannot be squared with their obligations under Section 7.

17 122. Second, by failing to engage in formal consultation regarding the likely effects of  
18 the Navigable Waters Rule on listed species and critical habitat, the EPA and the Corps failed to  
19 fulfill their statutory duty to act “in consultation with and with the assistance of” the U.S. Fish  
20 and Wildlife Service and the National Marine Fisheries Service. 16 U.S.C. § 1536(a)(2). Given  
21 the habitat loss and degradation that is almost certain to result from a reduction in Clean Water  
22 Act protections, there can be no dispute that the Agencies’ decision “may affect listed species or  
23 critical habitat”—and that the effects of their action will be adverse. 50 C.F.R. §§ 402.14(a),  
24

1 402.14(b)(1). Consultation was accordingly required to ensure that imperiled species and their  
2 habitat do not suffer harm under the regulation.

3 123. Because the Agencies failed to fulfill the requirements of the Endangered Species  
4 Act, the Navigable Waters Rule is arbitrary and unlawful.

5 **REQUEST FOR RELIEF**

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

7 A. Adjudge and declare that the Navigable Waters Rule is arbitrary, capricious, an  
8 abuse of discretion, or otherwise not in accordance with law, in violation of the APA, the Clean  
9 Water Act, and the Endangered Species Act, 5 U.S.C. § 706(2)(A), 33 U.S.C. §§ 1251-388, 16  
10 U.S.C. § 1536;

11 B. Vacate, set aside, and enjoin the Navigable Waters Rule;

12 C. Adjudge and declare that the waste treatment system exclusion provisions of the  
13 Navigable Waters Rule were adopted “without observance of procedure required by law,”  
14 contrary to law and are arbitrary, capricious, and an abuse of discretion in violation of the APA,  
15 5 U.S.C. § 706(2);

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

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

19 F. Adjudge and declare that the Repeal Rule is arbitrary, capricious, an abuse of  
20 discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. §  
21 706(2)(A);

22 G. Vacate and set aside the Repeal Rule;

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



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

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

5 Dated this 24th day of September, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 24, 2020, I filed the foregoing using the Court’s  
CM/ECF system, which will electronically serve all counsel of record registered to use the  
CM/ECF system.

s/ Janette K. Brimmer  
Janette K. Brimmer, WSBA # 41271

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