IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, CHARLESTON WATERKEEPER, AMERICAN RIVERS, CHATTAHOOCHEE RIVERKEEPER, CLEAN WATER ACTION, DEFENDERS OF WILDLIFE, ENVIRONMENT AMERICA, FRIENDS OF THE RAPPAHANNOCK, JAMES RIVER ASSOCIATION, NATIONAL WILDLIFE FEDERATION, NORTH CAROLINA COASTAL FEDERATION, NORTH CAROLINA WILDLIFE FEDERATION, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, and ROANOKE RIVER BASIN ASSOCIATION,	)	
Plaintiffs,	)	Case No. _____
v.	)	
ANDREW R. WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency; the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; RICKEY DALE "R.D." JAMES, in his official capacity as Assistant Secretary of the Army (Civil Works); and the UNITED STATES ARMY CORPS OF ENGINEERS,	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1. Federal law prohibits agencies from reversing national rules based on shifting "political winds and currents" without "measure[d] deliberation" and a "fair grounding in statutory text and evidence." N.C. Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755,

772 (4th Cir. 2012) (Wilkinson, J., concurring); S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 967 (D.S.C. 2018) ("To allow th[is] type of administrative evasiveness . . . would allow government to become a matter of the whim and caprice of the bureaucracy." (citations and quotations omitted)), appeal dismissed, No. 18-1964 (4th Cir. Feb. 4, 2019).

2. The regulation at the heart of this case haphazardly reverses decades of agency policy in violation of the Administrative Procedure Act, the Clean Water Act, and United States Supreme Court precedent. Rather than address the consequences of rejecting that well-established policy—reaffirmed as recently as last October—the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") (collectively, "agencies") have neglected fundamental rulemaking requirements meant to constrain whimsical agency action.

3. The rulemaking challenged here radically revises the regulatory definition of the Clean Water Act's pivotal jurisdictional term—"waters of the United States" —and, for the first time, concocts a definition of the term that is substantially narrower than "the Nation's waters" protected by the Act. See Final Rule, "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 Fed. Reg. 22,250 (April 21, 2020) ("Replacement Rule" or "Rule"). Whether a river, stream, lake, or wetland meets that definition determines whether developers, industry, or anyone else can pollute or pave over these waters without federal permit protections provided by the Clean Water Act. By dramatically reducing the universe of waters protected by the Act, the new definition ushers in an era of unprecedented, unlawful degradation and destruction of the Nation's most precious natural resource.

4. The Replacement Rule is the culmination of the administration's plan to, first, repeal the 2015 Clean Water Rule's scientifically drawn "waters of the United States" definition

that was based on the Supreme Court's "significant nexus" test, and, second, replace it with an unprecedented, novel definition that strips away clean water protections that have been in place for more than 40 years.

5. The administration's official plan to repeal and replace the Clean Water Rule began in February 2017, when President Trump issued Executive Order 13,778 directing the agencies to conduct this multistep rulemaking. See Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule, Exec. Order No. 13,778, § 2(a) (Feb. 28, 2017).

6. On July 27, 2017, the agencies published their "proposed rule to initiate the *first step* in a comprehensive, two-step process intended to review and revise the definition of 'waters of the United States' consistent with [President Trump's] Executive Order." Proposed Rule, Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,899 (July 27, 2017) ("Proposed Repeal Rule") (emphasis added). The agencies then explained that "[i]n a *second step*, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of 'waters of the United States,'" during which they would "consider interpreting the term . . . in a manner consistent with Justice Scalia's plurality opinion in Rapanos[v. United States, 547 U.S. 715 (2006),]" as mandated by President Trump's order. Id. at 34,899, 34,901 (emphasis added).

7. As this Court is aware, before completing their two-step program, the agencies switched course and in February 2018 hastily finalized a proposal to retroactively delay the effective date of the Clean Water Rule. See Final Rule, Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018) ("Suspension Rule"). On August 16, 2018, this Court vacated and issued a nationwide

injunction of the Suspension Rule, holding "that the agencies' refusal to consider or receive public comments on the substance of the [Clean Water] Rule or the 1980s regulation did not provide a 'meaningful opportunity for comment' as set forth in N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012)." S.C. Coastal Conservation League, 318 F. Supp. 3d at 963.

8. After abandoning their appeal of this Court's order on the Suspension Rule, the agencies finalized their "first step" Repeal Rule in October 2019. See Final Rule, Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,661 (Oct. 22, 2019) ("Repeal Rule" or "2019 Rule"). A challenge to that rule was filed with this Court in October 2019 and is now pending. See S.C. Coastal Conservation League v. Wheeler, No. 2:19-cv-03006-DCN, ECF No. 1 (D.S.C. Oct. 23, 2019).

9. The agencies have now completed their "second step" with the Replacement Rule. Rather than merely revoking the Clean Water Rule, this latest regulation abandons multiple decades of agency practice, and in its place adopts unintelligible and inconsistent definitions detached from science and wholly unmoored from the Clean Water Act's explicit objective: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act § 101(a), 33 U.S.C. § 1251(a).

10. Although the Replacement Rule is cast in federalist tones, the Rule upsets the carefully crafted federal-state partnership at the core of the Clean Water Act's comprehensive national program to protect water quality. Indeed, in a related rulemaking, the EPA seeks to cripple the states' authority under section 401 of the Clean Water Act to protect waters within their borders. See Proposed Rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (proposing to strip states' ability to condition federally-issued

permits for projects that pollute waters within state boundaries). The unifying theme of the two rulemakings is not a concern for state sovereignty; it is dismantling the Clean Water Act's intended cooperative federalism structure so that both federal and state barriers to pollution are crippled.

11. In the present rulemaking, the agencies have executed an about-face, abandoning the "significant nexus" test and prior regulations implementing it. The result will remove protections for more than a million stream miles, over half of the Nation's wetlands, and public lakes across the country, including in South Carolina and near this Court.

12. For decades, the agencies have protected streams and wetlands with a "significant nexus" to traditional navigable waters as "waters of the United States." Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001) ("SWANCC"); Rapanos, 547 U.S. at 759 (Kennedy, J., concurring) (quoting SWANCC, 531 U.S. at 167, 172); see also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134–35 & n9 (1985). As articulated by Justice Kennedy in Rapanos, a water has a "significant nexus," and is thus jurisdictional, if it, or its functions, "significantly affect the chemical, physical, and biological integrity" of traditional navigable waters. See 547 U.S. at 759, 779–80, 787 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a)).

13. Just last October, the agencies justified their Repeal Rule by claiming the 2015 Clean Water Rule ran afoul of Justice Kennedy's "significant nexus" standard. See Repeal Rule, 84 Fed. Reg. at 56,643 ("The 2015 Rule's Definition of 'Significant Nexus' Was Inconsistent With the Limiting Nature of Justice Kennedy's Significant Nexus Standard.").

14. Yet the 2015 Rule, and prior regulatory guidance, all acknowledged that the "significant nexus" test is controlling. See, e.g., Final Rule, Clean Water Rule: Definition of

"Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015); Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (EPA-HQ-OW-2007-0282-0001) (Dec. 2, 2008), at 1, https://perma.cc/56W8-KNXJ (permanent link) ("Rapanos Guidance"). So has the Fourth Circuit. See, e.g., Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288–89 (4th Cir. 2011) (stating that Kennedy test "undisputedly controls" and reserving question of whether jurisdiction may be established under plurality's standard as well).

15. Past and current definitions have also protected ecologically-important ephemeral streams—prevalent waters that flow only in response to precipitation. This Rule categorically excludes them. It also removes protections for some intermittent streams—which flow continuously during part of the year—and some perennial streams. U.S. EPA & Dep't of the Army, Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States" (Jan. 22, 2020), at 10-11, 22-23, https://perma.cc/5LHN-UUG4 (permanent link) ("Final Economic Analysis").

16. Remarkably, the agencies have also erased protections for all otherwise jurisdictional waters, including traditional navigable waters and the territorial seas, if they fit within the Rule's exclusions. See Replacement Rule, 85 Fed. Reg. at 22,325 ("If the water meets any of the[] exclusions, the water is excluded *even if the water satisfies one or more conditions to be a [jurisdictional] water*." (emphasis added)), 22,338 (stating that the jurisdictional categories are "subject to" the non-jurisdictional categories). For example, the agencies have dramatically expanded the scope of the "waste treatment system" exclusion, such that important public lakes that are used for fishing, boating, and/or drinking water—e.g., Lake Keowee and Lake Monticello Reservoir in South Carolina, Woods Reservoir in Tennessee, Lake Juliette in

Georgia, and Hyco Lake and Sutton Lake in North Carolina—are set to lose clean water protections simply because they were created to provide cooling water for power plants or other facilities. For the first time, the agencies say that all waters used as "cooling ponds" are waste treatment systems that are excluded from Clean Water Act jurisdiction, even if they are traditional navigable waters used for boating, swimming, fishing, and in interstate commerce.

17. Presidents and agencies can depart from earlier administrations' regulatory choices, but clear legal standards govern such reversals. In changing course, agencies must offer "good reasons" for their reversal in policy. Encino Motorcars, LLC v. Navarro,—— U.S. ——, 136 S.Ct. 2117, 2126, 195 L.Ed.2d 382 (2016) (citations and quotations omitted); N.C. Growers' Ass'n, 702 F.3d at 772 (Wilkinson, J., concurring) ("[T]he [Administrative Procedure Act] contemplates what is essentially a hybrid of politics and law—change yes, but only with a measure of deliberation and, hopefully, some fair grounding in statutory text and evidence."). Here, the agencies have rejected the reach of the Clean Water Act accepted by every administration since the Act was passed without providing any "good reasons" for the change.

18. When policy reversal "rests upon factual findings that contradict those which underlay [the] prior policy," or where prior policy "engendered serious reliance interest[s]," agencies must provide "more detailed justification than what would suffice for a new policy created on a blank slate." FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515, (2009). An agency must not "rel[y] on factors which Congress has not intended it to consider," or "offer[] an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). They must provide a meaningful opportunity for the public to comment on their proposed decisions. 5 U.S.C. § 553(b), (c); N.C. Growers' Ass'n, 702 F.3d at 769. And they must not undercut the very

purpose of the underlying statute nor ignore controlling Supreme Court precedent interpreting it. See Fox, 556 U.S. at 514–15 (noting that new policy must be "permissible under the statute").

19. In the present rulemaking, the agencies failed every one of these requirements because they rely on a faulty premise: that every administration, including this one, previously misunderstood the scope of the Clean Water Act. But the agency's new legal understanding of the Clean Water Act is wrong. Even if it were not, the manner in which the agencies promulgated the Replacement Rule—in violation of required procedure and in disregard of requisite factual and scientific considerations—is arbitrary, capricious, and unlawful. This Court should declare the Replacement Rule unlawful and set it aside.

JURISDICTION AND VENUE

20. This action is brought pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, which waive the defendant agencies' sovereign immunity, City of New York v. U.S. Dep't of Def., 913 F.3d 423, 430 (4th Cir. 2019). This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331 (federal question), and may issue a declaratory judgment and further relief pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201, 2202, see generally Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S.Ct. 617, 623 (2018) (holding that district courts have jurisdiction over challenges to "waters of the United States" rulemakings under the Administrative Procedure Act).

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

PLAINTIFFS

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

23. Plaintiffs include local, regional, and national non-profit environmental organizations with offices and members across the country, including in states that will be particularly hard-hit by the Replacement Rule: South Carolina, North Carolina, Georgia, and Virginia, which have large numbers of wetlands not directly on riverbanks that will lose protection under the Rule, and arid Southwestern states with extensive intermittent and ephemeral stream networks that will also lose coverage.

24. South Carolina Coastal Conservation League (the "League") is a non-profit organization incorporated under the laws of South Carolina. Its mission is to protect the natural environment of South Carolina's coastal plain, including its wetlands and aquatic habitat, and to enhance the quality of life in the state's communities. The League has commented opposing proposals for, and participated in litigation challenging, the Suspension Rule and the Repeal Rule. The League also monitors and publically comments on development projects across the South Carolina coast. Because the Replacement Rule eliminates Clean Water Act permitting and mitigation requirements for wetland types prevalent in the area, countless projects will pollute and fill more waters than they would under the rules currently in place, and many would-be permit applicants will dredge, fill, and pollute without seeking a permit. This will undercut the League's protection of coastal water quality, cripple its monitoring of harmful projects and participation in the permitting process, and deprive the League of information that it relies on to educate its members, propose legislation, and consider litigation.

25. The Replacement Rule will also harm the aesthetic, recreational, and financial interests of the League's members. The League has approximately 2,675 active members, many of whom regularly visit the state's rivers, streams, and wetlands, for birding, wildlife observation, fishing, paddling, hiking, and photography. These waters include Carolina Bays and other waters that the Replacement Rule generally deems non-jurisdictional, as well as jurisdictional waters that are connected to and affected by waters and wetlands that will lose protection under the Replacement Rule. League members own eco-tourism businesses in the Lowcountry, including in the Charleston Harbor watershed, that economically depend on clean water from nearby streams and wetlands subject to increased pollution and development under the Replacement Rule. Given the extensive presence of small but ecologically important streams, wetlands separated from navigable waters, and industry and development pressures in wetlands and along waterfronts, the Replacement Rule will degrade South Carolina's coastal water resources, destroy habitat and recreational opportunities, and increase flooding in the region—harming members' activities and businesses.

26. Charleston Waterkeeper is a Charleston, South Carolina-based organization whose mission is to protect, promote, and restore the quality of Charleston's waterways while engaging the public through education and outreach. The Charleston Harbor watershed contains significant numbers of headwater streams and wetlands that are vulnerable under the Replacement Rule, and the health of the harbor is tied to the health of these upstream waters. The watershed faces significant threats of pollution from developers and industry, including to wetlands and streams that the Replacement Rule strips of permitting and mitigation protections. Charleston Waterkeeper is particularly concerned because South Carolina has expressed its lack of time and resources to protect waters left vulnerable by the Replacement Rule. The Rule will

thus force the Waterkeeper to divert limited resources from key programs to assess the Rule's harms and defend Charleston's waters. For these reasons, Charleston Waterkeeper has participated in litigation challenging the Suspension Rule and the Repeal Rule, and submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule.

27. Charleston Waterkeeper has approximately 350 members in the Charleston area. Members care about clean water in the region and regularly visit rivers, streams, wetlands, and other aquatic habitat throughout the area for recreational activities, including hiking, paddling, swimming, surfing, kayaking, fishing, and wildlife viewing. They also rely on clean water for their livelihoods, including for businesses that provide kayak tours, paddleboard rentals, and boat charters. Waters they use and rely on include wetlands and streams left vulnerable under the Replacement Rule and rivers that are connected to, and whose water quality depends on, wetlands and streams that will be degraded. Water pollution has forced members to avoid recreating in certain of the city's waterways, such as Shem Creek, the lower Ashley River, and the Cooper River below the conjunction of its east and west branches. The Replacement Rule is sure to lengthen that list.

28. American Rivers works to protect wild rivers, restore damaged rivers, and conserve clean water for people and nature. Among other projects, American Rivers works to secure protections for rivers across the country under the Wild and Scenic Rivers Act ("WSRA"), including rivers in arid western states fed by large numbers of ephemeral streams that lose protection under the Replacement Rule. American Rivers works to adopt and implement river basin restoration plans across the country, including in the Yakima River basin in Washington State which contains numerous ephemeral streams. By removing Clean Water Act protections from millions of miles of streams and wetlands, the Replacement Rule will degrade

rivers nationwide, making it more costly for American Rivers to obtain WSRA protections, develop and implement river basin restoration programs, and successfully implement its Clean Water Program. The Rule will force American Rivers to divert limited resources from other projects to shore up these programs. For these reasons, American Rivers has participated in litigation challenging the Suspension Rule and the Repeal Rule, and submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule.

29. Headquartered in Washington, D.C., American Rivers has offices across the country, including two in South Carolina, throughout the Southeast, and in the arid west, as well as more than 355,000 members, supporters, and volunteers nationwide. American Rivers' members fish, swim, canoe, hike along, drink from, observe wildlife, and financially depend on waters that will lose protection or be degraded as a result of the Replacement Rule. Members fish across the country, including in South Carolina, Colorado, California, Montana, and Texas, in rivers where good fishing depends on the health of ephemeral streams and wetlands left unprotected by this Rule. Members also fish in lakes that furnish cooling water for power plants, such as Lake Monticello Reservoir in Jenkinsville, South Carolina, that risk losing protection under the Rule's expanded "waste treatment system" exclusion. Members own businesses that rely on clean water, such as selling and renting kayaks, canoes, and paddleboards, and leading guided tours on rivers across South Carolina, including the Congaree, Edisto and Ashepoo. These rivers are fed by streams and wetlands that will lose protection under the Rule. Members also own businesses that restore wetlands, and the Replacement Rule is likely to reduce demand for their services by narrowing the number of wetlands subject to the Clean Water Act's mitigation requirements. The Replacement Rule will impair the myriad of recreational, aesthetic, and business interests that American Rivers' members have in waters across the country.

30. Chattahoochee Riverkeeper is a non-profit Georgia corporation dedicated to protecting the Chattahoochee River watershed—including its lakes, tributaries, and wetlands. From the north Georgia mountains to the Florida border, the Chattahoochee is impacted by development; storm runoff and trash from roads, construction sites, and industrial activity; and discharges from sewage treatment plants. The Riverkeeper monitors the Corps' jurisdictional determinations to ensure the protection of important streams and wetlands in the watershed. Due to the vagaries of the Replacement Rule, particularly the "typical year" construct, the Riverkeeper will be forced to expend more time and resources to determine the jurisdictional status of waters and wetlands, to the detriment of its other programs. And, without the public notice mechanisms of the Clean Water Act for newly non-jurisdictional streams and wetlands in the watershed, integral water resources will be destroyed or polluted before Chattahoochee Riverkeeper can learn of the impacts or advocate for mitigation. For these reasons, Chattahoochee Riverkeeper has participated in litigation challenging the Suspension Rule and the Repeal Rule, and submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule.

31. Headquartered in Atlanta, Chattahoochee Riverkeeper has more than 10,000 members committed to protecting and restoring the Chattahoochee River Basin—a drinking-water source for nearly four million people in several states. Chattahoochee Riverkeeper's members regularly swim and paddle in the Chattahoochee River. The River's intermittent and ephemeral tributaries are already threatened by pollution, particularly in the Atlanta area, and the Replacement Rule gives developers and industry a free pass to pollute or fill many of these waters without a federal permit. Because the River's water quality depends on the health of its tributaries, these lost protections will harm members' activities on the River.

32. Clean Water Action is a national, non-profit organization devoted to preventing pollution in the Nation's waters, protecting natural resources, and creating environmentally safe jobs and businesses. Clean Water Action's core programs include efforts to ensure broad clean water protections for wetlands and streams, as well as strong implementation and enforcement to meet the Act's goal of zero discharge of pollution into the Nation's waters. To that end, Clean Water Action has challenged the Suspension Rule and the Repeal Rule, and submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule. By stripping protections from many if not most wetlands and small streams across the country, the Replacement Rule will force Clean Water Action to mobilize to address the Rule's unprecedented threat to clean water, impairing its ability to address other emerging threats to water quality.

33. Based in Washington, D.C., Clean Water Action has over 650,000 members in all 50 states, and over a dozen offices around the country. At least 50,000 Clean Water Action members in Virginia, Maryland, and the District of Columbia get their drinking water from the Potomac, the Susquehanna, or other nearby rivers that are fed by ephemeral headwaters. These members are among the 117 million people in the United States who rely on drinking water systems that draw supply from ephemeral, intermittent, or other headwater streams. By reducing or eliminating protections for these waters, the Replacement Rule will threaten members' drinking water sources. Clean Water Action's members also canoe, kayak, boat, fish, hike along, and work on rivers and streams across the country whose water quality depends upon the health of ephemeral headwaters and/or nearby wetlands. By stripping protections from these waters, the Replacement Rule will impair members' recreational and economic interests in downstream waters across the country.

34. Defenders of Wildlife ("Defenders") is dedicated to protecting the Nation's native plants and wildlife and the habitats upon which they depend. In the Southeast, for example, Defenders works to protect vulnerable or endangered species of mussels, reptiles, birds, and mammals that depend on healthy ephemeral streams and/or wetlands that are not "adjacent" (under the Rule) to navigable waters for their habitat. The Replacement Rule removes protections from these waters, and will force Defenders to divert resources from advocating for other endangered species to ensure state and local protections for this and other threatened habitat across the country. Defenders often participates in the Clean Water Act permitting process by submitting comments to ensure the protection of aquatic habitat. By drastically reducing the scope of covered waters, the Replacement Rule will force Defenders to spend more resources monitoring proposed developments to ensure that aquatic habitat is protected. And, because permitting will not be required for projects that target waters that are no longer jurisdictional, Defenders will be deprived of information typically disclosed in the permitting process—information that it crucially relies on to educate its members, monitor damaging development, oppose harmful projects, advocate for more stream and wetland protections, and litigate when necessary. For these reasons, Defenders has participated in litigation challenging the Suspension Rule and the Repeal Rule, and submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule.

35. Founded in 1947, Defenders has nearly two million members and supporters nationwide, including members in every state, over 17,500 of whom live in South Carolina. Defenders' members fish, boat, paddleboard, canoe, and live near (or on) headwater streams, rivers, lakes, and wetlands that will be polluted, filled, or degraded as a result of lost protections under the Replacement Rule—reducing the enjoyment the members take in those activities. One

or more members paddles, observes wildlife, and hikes along the Lake Monticello Reservoir, which is used by the public for boating and recreation and which furnishes cooling water for a nearby nuclear plant. Under the Replacement Rule, Monticello Reservoir is now vulnerable to losing Clean Water Act protection, which would allow the adjacent nuclear plant or any other operation to pollute the reservoir without a federal permit. If that happens, it will degrade the aesthetic and recreational interests of Defenders' members.

36. Environment America is a member-supported non-profit organization dedicated to making the world a greener and healthier place. Environment America works to protect the Nation's rivers, lakes, streams, and drinking water sources through organizing grassroots campaigns, educating the public, participating in government rulemakings, and advocating before agencies and legislative bodies. When necessary, the organization has brought citizen suits to stop excessive pollution of the Nation's waterways, including Florida's Suwannee River. Because the Replacement Rule narrows jurisdiction under the Act so severely, it will impair the organization's ability to stop polluters, and will likely force the organization to divert resources away from other projects into advocacy campaigns for cleanup funding or state protections for waterways no longer covered by the Act. For these reasons, Environment America submitted comments and amicus briefs in support of the Clean Water Rule and comments in opposition to the current administration's proposals to suspend, repeal, and replace the Clean Water Rule.

37. Environment America has over 180,000 members in all 50 states, over 20,000 in the Southeast, and offices in 29 states. Members in arid states like Colorado and New Mexico, where intermittent and ephemeral streams predominate, draw their drinking water from utilities that crucially depend on those streams. The Replacement Rule strips protections from many of these source waters, and states such as New Mexico lack the capacity to fill the considerable

gaps. As a result of the Rule, Environment America's members will experience degraded drinking water, inflated utility bills, or both. The Rule will also impair members' recreational activities by increasing pollution of waters they use. For example, one or more members in arid states fish just downstream of ephemeral headwaters, including a stretch where ephemeral streams join the Pecos River in New Mexico. These ephemeral headwaters are threatened by development and industrial activity, including a proposed mining project. The Replacement Rule allows pollution of these ephemeral headwaters without a federal permit, and increases the risk that the proposed mine will pollute more waters and implement fewer mitigation techniques than it would under the Repeal Rule or Clean Water Rule. This increased pollution and degradation would lessen members' enjoyment of fishing or force them to find a new fishing spot.

38. Friends of the Rappahannock ("Friends"), founded in 1985, is a non-profit, grassroots conservation organization. It works at the local, state, and federal levels to ensure the maximum protections for the Rappahannock River, which flows from the Blue Ridge Mountains to the Chesapeake Bay. Friends reviews and comments on local, state, and federal regulations that bear on water quality issues; works to restore the natural functioning of waterways, including through reconstructing riparian buffers and stream banks; and educates youth on water quality protection. When federal clean water protections are strong, Friends can focus on more concentrated pollution threats to the Rappahannock River. But the Replacement Rule greatly weakens protections for streams and wetlands that the River depends on for its health, which will force Friends to shift focus to obtaining state water quality protections to make up for lost federal protections. For these reasons, Friends has participated in litigation challenging the Suspension Rule and the Repeal Rule, and submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule.

39. Friends is based in Fredericksburg, Virginia, and has approximately 1,800 active members. Its members regularly use waters within the Rappahannock River basin for paddling, swimming, canoeing, painting, drinking, fishing, and hiking along. The Rappahannock has an extensive headwater system that stretches into the Blue Ridge Mountains, and upstream development has harmed water quality and reduced members' enjoyment of canoeing near Fredericksburg. The Replacement Rule will likely strip many headwater streams and wetlands in the Rappahannock River basin of clean water protections, which will amplify the impacts of industry and development on the River and its tributaries. This will harm members' interests in the Rappahannock River and other waters in its basin, degrading their usability for canoeing, fishing, drinking, and other activities. Members depend on Friends for news and information about proposed threats to waters they rely on in the Rappahannock River basin and for opportunities to make their voices heard on impactful development projects in the basin. Because the Replacement Rule strips permitting requirements for streams and wetlands in the basin, members worry that they and Friends will lose out on information about pollution threats disclosed in the permitting process and the chance to participate in decision making on proposed permits.

40. James River Association is a member-supported nonprofit founded in 1976 to serve as a guardian and voice for the James River watershed. The James River flows nearly 350 miles from its Appalachian headwaters through rural and forested areas and major population centers, including Richmond, Virginia, to the Chesapeake Bay. The James River Association works to protect and restore the watershed by monitoring river pollution, educating children, building riparian buffers and green infrastructure, and working with governments. Decades of progress are at risk because ephemeral (and even some intermittent and perennial) streams within

the watershed lose jurisdictional status under the Replacement Rule and industries need not obtain permits for discharging into them. The Association is concerned that Virginia lacks the resources to protect these newly non-jurisdictional waters, and increased pollution in the James River basin would undercut the Association's central mission and core programs. For example, the Association would not take children out on the River for field lessons or summer camp if the water were to pose a risk to them.

41. The Replacement Rule will also impair the aesthetic and recreational interests of the James River Association's members. Headquartered in Richmond, Virginia, the Association has four offices in Virginia and over 6,000 members. Members rely on clean water in the James River for swimming, paddling, drinking, competing in triathlons, and other uses. The Replacement Rule will allow unimpeded pollution of upstream waters, degrading water quality in the James River and making it hard or impossible for members to enjoy all these activities. Members recognize that the River is only as healthy as the waters that flow into it; they are worried that under the Replacement Rule streams and wetlands that flow into the River will be degraded—including in and around Richmond, where industrial activity and development are prevalent. For these reasons, the Association submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule.

42. National Wildlife Federation ("NWF") is a national non-profit membership organization dedicated to protecting the environment and natural resources. Among other projects, NWF restores and advocates for protecting streams, wetlands, and rivers across the country, including in the Chesapeake Bay watershed, Michigan's Upper Peninsula, Florida's Everglades, and the Mississippi River Delta. By reducing Clean Water Act protections for streams and wetlands in these areas, the Replacement Rule will force NWF to expend more

resources to restore waters facing increased pollution and to advocate before Congress, state legislatures, and state and federal agencies to fill the gap in federal protections. The Rule will also require NWF to expend more resources on litigation to challenge potentially damaging projects and Clean Water Act permits nationwide. These efforts will all come at the expense of NWF's other activities. NWF has worked on behalf of its members for the last nineteen years to ensure that vulnerable waters receive the full protection of the Clean Water Act, including participating in the rulemaking that produced the Clean Water Rule. Since that Rule was finalized, NWF has litigated to defend the Clean Water Rule and to challenge the Suspension and Repeal Rules. NWF has also submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule.

43. Founded in 1936, NWF is a member-supported organization with over six million members, partners, and supporters nationwide, and affiliate organizations in fifty-one states and territories. NWF's members swim, fish, canoe, and hike along streams, wetlands, and other water bodies across the country that face increased pollution, destruction, or degradation as a result of the Replacement Rule. The Rule's removal of protections will injure members' varied recreational interests in these waters. For example, an NWF member lives along and paddleboards in South Carolina's Lake Keowee, which furnishes cooling water for a Duke Energy power plant and is at risk of losing protection under the Rule's expanded "waste treatment system" exclusion. Another member lives near, explores, and works to protect the wetlands, karst sinkholes, sloughs, and streams of the St. Marks and Wakulla watersheds in Florida. The member observes birds, manatees, and other fish and wildlife and canoes in the Wakulla River and nearby wetlands. By allowing the pollution and destruction of small headwaters and interconnected wetlands, the Replacement Rule threatens to undo hard-fought

protections and return industrial and nutrient pollution to the watershed, harming aquatic wildlife and making the member's birdwatching and canoeing less enjoyable.

44. North Carolina Coastal Federation ("Coastal Federation") is a member-supported non-profit organization founded in 1982 to protect and restore North Carolina's coastal water resources. Among other programs, Coastal Federation acquires and restores degraded wetlands and headwater systems, much of which had previously been converted to cropland. The Replacement Rule threatens to strip protections from nearly two million acres of North Carolina coastal plain wetlands, which will increase pollution and flooding across the region—particularly given the increase in severe hurricanes and new development. Based on Coastal Federation's experience and North Carolina's own admission, the state lacks the time and resources to protect the important waters left vulnerable by the Replacement Rule. The Rule will thus harm Coastal Federation's restoration and other work and require it to shift resources to train staff on the Rule and mitigate its water quality effects. The Rule also makes it easier for wetlands previously converted to cropland to be developed or polluted without a permit, which will increase the value of those lands and force Coastal Federation to pay more to acquire them for restoration or else drive it out of the market. For these and other reasons, Coastal Federation has participated in litigation challenging the Suspension Rule and the Repeal Rule, and submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule.

45. Based in Ocean, North Carolina, Coastal Federation has over 16,000 members and supporters. Coastal Federation's members work, live, swim, boat, and surf in and around North Carolina coastal plain wetlands and streams that will lose protection under the Replacement Rule, as well as waters downstream that will be degraded by increased upstream pollution. Members depend on these waters and the coastal estuaries for their livelihoods, like

oyster farming—a delicate process that can be destroyed by upstream pollution. Members enjoy rare and endangered species of birds and plants that depend on wetlands in areas facing development pressures, where the dredging and filling of wetlands has already reduced the numbers of such species. Members also know that the quality of North Carolina's coastal waters is tied to the preservation of at-risk wetlands because they have seen the development of such areas wreak havoc downstream. The Replacement Rule will impair members' varied activities that depend on clean water and preserved wetlands in the North Carolina coastal region.

46. North Carolina Wildlife Federation ("Wildlife Federation") has advocated for all wildlife and wildlife habitat since 1945, bringing together citizens, outdoor enthusiasts, hunters and anglers, government, and industry to protect North Carolina's natural resources. Through its policy and protection work, research, education, and direct hands-on conservation projects, the Wildlife Federation works collectively for the places and species that have no voice. Because water conservation is a critical part of its efforts, the Wildlife Federation has participated in litigation challenging the Suspension Rule and the Repeal Rule, and submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule. The Replacement Rule will force the Wildlife Federation to divert resources from its other activities to advocate for local water quality protections to mitigate the harms to members and wildlife that the Federation strives to protect.

47. Headquartered in Raleigh, North Carolina, the Wildlife Federation has approximately 10,000 members and supporters in addition to 15 local community chapters and four dozen affiliates. Many of the Wildlife Federation's members are wildlife enthusiasts who enjoy canoeing, kayaking, and fishing in waters whose quality depends on headwaters and upstream wetlands that the Replacement Rule leaves vulnerable. Members also directly use and

enjoy waters that the Replacement Rule leaves unprotected, including Carolina Bays and pocosins. By removing protections for upstream waters, the Replacement Rule will also worsen sedimentation, pollution, and development harms to the waters members live on and enjoy. The Rule's harms will also potentially decrease members' property values.

48. Public Employees for Environmental Responsibility ("PEER") is a national non-profit, non-partisan public interest organization based in Washington, D.C., with field offices across the country. PEER serves and protects public employees working on environmental issues, including those at EPA and the Corps, and represents thousands of local, state, and federal government employees nationwide. PEER's staff, clients, and supporters have a long history of engagement in water quality and Clean Water Act issues. PEER's Florida, Tennessee, and Pacific field offices have reported violations of federal discharge standards numerous times and sought federal enforcement, as well as challenged improper degradation of wetlands and other water sources.

49. Many of PEER's clients and supporters have serious substantive and procedural concerns about the Replacement Rule, particularly the Rule's ignorance of science and gross underestimation of its water quality impacts. PEER's officers and countless of its clients and supporters use waters across the country that will be degraded as a result of the Rule for canoeing, boating, wildlife viewing, fishing, swimming, and other recreational activities. For these reasons, PEER submitted comments opposing the agencies' plans to suspend, repeal, and replace the Clean Water Rule and a complaint to the Office of the Inspector General on behalf of dozens of current and former employees of the agencies, including three former regional administrators and agency experts, alleging systematic violations of EPA's Scientific Integrity Policy during the replacement rulemaking by EPA political appointees.

50. Roanoke River Basin Association (the "Association") is a nonprofit organization whose mission is to establish and carry out a strategy for the development, use, preservation, and enhancement of the resources of the Roanoke River basin in the best interest of present and future generations. The Association is headquartered in Danville, Virginia, and its membership in North Carolina and Virginia includes local governments; regional government entities; the Sappony Tribe; non-profit, civic, and community organizations; businesses; and individuals. As part of its mission, the Association monitors activities that might harm the water resources within the basin. The Association has filed state and federal litigation to stop unlawful coal ash pollution from Duke Energy's coal-fired power plants into Hyco Lake, Belews Lake, and other waterways within the Roanoke River basin. The Association and its members also attend public hearings and comment on Clean Water Act permits regulating discharges of pollution into these waters. The Replacement Rule expands the waste treatment exclusion from the definition of "waters of the United States" to risk eliminating the protections of the Clean Water Act for large, traditionally navigable impounded waters used for cooling, such as Hyco Lake and Belews Lake. The Association has fought for years to remove leaking coal ash impoundments from the banks of these large public lakes, and to strengthen the pollution limits on Clean Water Act permits regulating discharges into them. The Replacement Rule's new waste treatment exclusion would for the first time attempt to remove these lakes from the "waters of the United States" protected by the Act, undermining these gains and potentially eliminating the Association's ability to enforce water quality protections for these important public resources in the future, to the detriment of these lakes, downstream waterways, and the economy of the Roanoke River basin.

51. Members of the Association live near and use public lakes created to provide cooling water, such as Hyco Lake, for activities including paddling, boating, fishing, and

swimming. These members will be harmed by the Replacement Rule's new waste treatment exclusion. They fear damage to the waterways, wildlife, and the natural environment they use and enjoy if Clean Water Act protections are removed from these lakes. For example, Duke Energy's coal plant wastewater discharges contain toxic pollutants including arsenic, mercury, and many other harmful contaminants. If Duke Energy and other dischargers are allowed to dump unregulated amounts of pollutants into these lakes without a permit, the water and wildlife that the Association's members enjoy will be damaged, injuring members' enjoyment, recreation, and property values.

52. Plaintiffs bring this action on their own behalf and on behalf of their members.

53. The harms to Plaintiffs and their members will be particularly pronounced in the Southeast, which is marked by wetlands—such as Carolina Bays, pocosins, hardwood flats, pine savannahs, and cypress domes—that often exist outside the floodplain of traditional navigable waters and significantly impact water quality through groundwater connections, filtration of pollutants, storage of runoff water, and other ecological functions. See generally U.S. EPA Office of Research and Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Docket ID No. EPA-HQ-OW-2011-0880-20858 (Jan. 2015) ("Science Report"), at 4-28–4-45, https://perma.cc/5KDU-HP4W (permanent link). The Clean Water Rule clarified protections for these integral wetlands. The Repeal Rule left them vulnerable, but the Replacement Rule goes further still, decimating protections for these wetlands.

54. The Rule will also have particularly devastating consequences for Plaintiffs and their members in the arid Southwest, where—according to EPA's own data—over 81% of

streams are intermittent or ephemeral[1] and over 98% of residents depend on public drinking water systems that rely on intermittent, ephemeral, and headwater streams.[2] The Replacement Rule leaves intermittent streams vulnerable and—for the first time since the passage of the Clean Water Act—categorically excludes ephemeral streams from coverage.

55. The waters left vulnerable or excluded under the Replacement Rule face a significantly heightened risk of contamination and destruction, which would increase health risks and lessen Plaintiffs' members use and enjoyment of waters across the country.

56. Plaintiffs are also injured by the agencies' failure to provide a meaningful opportunity to comment on a rule that so significantly impacts the Nation's waterways and Plaintiffs' use and enjoyment of those waterways. The amount of time provided for comment was insufficient for a major rulemaking that reverses decades of agency policy and clean water protections, much less for the numerous issues presented by the agencies for comment. The short comment period interfered with Plaintiffs' public education and advocacy surrounding the Rule. Had the agencies allowed more time for comment, Plaintiffs would have been able to more thoroughly address the Rule's numerous deficiencies, develop a factual record for the rulemaking, and educate the public about the dangers of the Rule.

57. Although many Plaintiffs have challenged the agencies' repeal of the Clean Water Rule as weakening the Clean Water Rule's protections, the Replacement Rule goes much further, such as categorically excluding ephemeral streams, narrowing the number of jurisdictional

[1] EPA, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest at iii, Nov. 2008, https://perma.cc/7QA4-QBGF (permanent link).

[2] EPA, Analysis of Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S. at 1, July 2009, https://perma.cc/SKG4-AFM7 (permanent link).

wetlands, and removing protections from large public lakes. Even if vacatur of the Replacement Rule does not revive the clear clean water protections provided under the Clean Water Rule, returning to the status quo will eliminate the risk of the widespread destruction posed by the Replacement Rule. Thus, Plaintiffs' injuries will be redressed by an order vacating the Replacement Rule.

DEFENDANTS

58. Defendant United States Environmental Protection Agency is the federal agency responsible for implementing most of the Clean Water Act's pollution-control programs. Despite its recent turn toward eliminating essential environmental protections, the EPA was established with the "mission" of "protect[ing] human health and the environment." U.S. EPA, Our Mission and What We Do, https://perma.cc/QYH6-SWER (permanent link); see also Reorganization Plan No. 3 of 1970, https://perma.cc/U5UN-XNKF (permanent link) (providing that the first of the EPA's "principal roles and functions" is "[t]he establishment and enforcement of environmental protection standards consistent with national environmental goals"). Consistent with this mission, the agency has historically worked to ensure:

> That . . . Americans have clean air, land and water; . . . [that] National efforts to reduce environmental risk are based on the best available scientific information; . . . [and that] Federal laws protecting human health and the environment are administered and enforced fairly [and] effectively[.]

U.S. EPA, Our Mission and What We Do. More recently, the EPA has abdicated this charge, and together with the United States Army Corps of Engineers, issued the Replacement Rule that Plaintiffs challenge in this action.

59. Defendant Andrew R. Wheeler, EPA Administrator, is the highest-ranking official in the EPA. Administrator Wheeler signed the Replacement Rule on January 23, 2020. Plaintiffs sue Administrator Wheeler in his official capacity.

60. Defendant United States Army Corps of Engineers is a federal agency and a branch of the Department of the Army. The Corps is responsible for implementing and enforcing regulations governing the discharge of dredged and fill material into the waters of the United States. 33 U.S.C. § 1344(a). Together with EPA, the Corps issued the Replacement Rule that Plaintiffs challenge in this action.

61. Defendant Rickey Dale "R.D." James supervises the Corps' Civil Works program, including its implementation of the Clean Water Act. Assistant Secretary James signed the challenged rule on behalf of the Corps. Plaintiffs sue Assistant Secretary James in his official capacity.

STATUTORY BACKGROUND

I. The Administrative Procedure Act

62. Congress enacted the Administrative Procedure Act to ensure stability in agency action by mandating reasoned decision-making and to guard against agencies' pursuit of a political agenda without adherence to legal process. See N.C. Growers' Ass'n, 702 F.3d at 772 (Wilkinson, J., concurring) (noting the Administrative Procedure Act prohibits policy change based on "political winds and currents" without adherence to "law and legal process"); see also U.S. v. Morton Salt Co., 338 U.S. 632, 644 (1950) (describing the Administrative Procedure Act as "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices," which "create[s] safeguards even narrower than the constitutional ones [] against arbitrary" agency action).

63. By requiring courts to review challenged agency actions, the Administrative Procedure Act embraces the duty of the judiciary "to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803); see City of Arlington v. FCC, 569 U.S. 290, 316–17 (2013) (Roberts, C.J., joined by Kennedy and Alito, JJ., dissenting) ("Indeed, the [APA], governing

judicial review of most agency action, instructs reviewing courts to decide 'all relevant questions of law.'" (quoting 5 U.S.C. § 706)).

64. Judicial scrutiny of agency action thus protects the people by preventing the executive branch from subverting the rule of law to meet its political whims. See N.C. Growers' Ass'n, 702 F.3d at 772 (Wilkinson, J., concurring) ("The [APA] requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process. Otherwise, government becomes a matter of the whim and caprice of the bureaucracy . . . ."); S.C. Coastal Conservation League, 318 F. Supp. 3d at 963 (same) (quoting id.).

65. Consistent with our government's checks and balances, the Administrative Procedure Act requires a court 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; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D).

66. Agency action is arbitrary and capricious, and must be set aside, where, among other things: the agency "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," State Farm, 463 U.S. at 43; the agency's action is not based on a "reasoned analysis," id. at 42–43; the agency failed to "treat similar cases in a similar manner" without providing "legitimate reason[s] for failing to do so," Indep. Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1258 (D.C. Cir. 1996); or the agency failed to adequately justify a departure from past

practice by, for example, leaving an "[u]nexplained inconsistency" between new and prior policy, Encino Motorcars, 136 S.Ct. at 2126; accord Mfrs. Ry. Co. v. Surface Transp. Bd., 676 F.3d 1094, 1096 (D.C. Cir. 2012).

67. When an agency departs from past practice, particularly when it disregards previous expert determinations, the burden is higher. The agency must:

a. acknowledge the change in policy and provide "good reasons" for it; Fox, 556 U.S. at 515;

b. provide a "reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance;" State Farm, 463 U.S. at 43;

c. demonstrate that the new policy is itself consistent with the governing statute, Fox, 556 U.S. at 515;

d. ensure that the new policy is itself supported by substantial record evidence, "based upon a consideration of the relevant factors," and supported with "rational connection[s] between the facts found and the choice made," State Farm, 463 U.S. at 43–44 (citations and quotations omitted); accord Cablevision Sys. Corp. v. FCC, 597 F.3d 1306, 1310 (D.C. Cir. 2010);

e. provide a reasoned explanation for "disregarding facts and circumstances that underlay" the prior policy, Fox, 556 U.S. at 516;

f. consider the relevant alternatives to wholesale departure, and explain why the agency is not adopting them in the new rule, State Farm, 463 U.S. at 51; Public Citizen v. Steed, 733 F.2d 93, 100 (D.C. Cir. 1984); and

g. address "'serious reliance interests'" grounded on the prior policy, Encino Motorcars, 136 S. Ct. at 2126 (quoting Fox, at 515).

68. In short, the Administrative Procedure Act demands that agency action is "reasonable and reasonably explained." Mfrs. Ry. Co., 676 F.3d at 1096.

69. The Administrative Procedure Act requires courts to vacate an agency rule if it does not comport with these principles. 5 U.S.C. §§ 706(2)(A) (reviewing courts "shall . . . set aside" unlawful agency action); Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs., 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that when a reviewing court determines that the agency regulations are unlawful, the ordinary result is that the rules are vacated . . . ." (citations and quotations omitted)).

II. The Clean Water Act

70. By the early 1970s, after decades of federal deference to state efforts, the Nation's waters were "in serious trouble, thanks to years of neglect, ignorance and public indifference." H.R. Rep. No. 92-911, at 66 (1972). "Many of the Nation's navigable waters [we]re severely polluted[,]" "major waterways near the industrial and urban areas [we]re unfit for most purposes[,]" and "many lakes and confined waterways [we]re aging rapidly under the impact of increased pollution[.]" S. Rep. No. 92-414, at 3674 (1971). "Rivers, lakes, and streams [we]re being used[,]" in short, "to dispose of man's wastes rather than to support man's life and health[.]" Id.

71. More than twenty years before, Congress had adopted the Federal Water Pollution Control Act of 1948. See H.R. Rep. No. 92-911, at 66; 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). All of this

legislation, however, limited "the Federal role … to support of, and assistance to, the States[,]" which had been charged with "lead[ing] the national effort to prevent, control and abate water pollution." S. Rep. No. 92-414, at 3669.

72. After assessing the condition of the Nation's waters during a series of hearings in 1970 and 1971, the Senate Committee on Public Works was forced to conclude that, under the states' leadership, "the national effort to abate and control water pollution ha[d] been inadequate in every vital aspect[.]" Id. at 3674.

73. In 1972, a bipartisan Congress responded, passing the Clean Water Act as a "total restructuring," placing the federal government in the primary role of implementing the new water pollution control system. See City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981) (explaining that the Clean Water Act was "not merely another law 'touching interstate waters'" but was "viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation.'" (citations omitted)); see also Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (noting the existing water pollution control scheme "was completely revised" by the enactment of the Clean Water Act).

74. In the Clean Water Act, Congress announced an unequivocal objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act § 101(a), 33 U.S.C. § 1251(a). "This objective[,]" the Supreme Court later affirmed,

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

Riverside Bayview, 474 U.S. at 132–33 (emphasis added).

75. To achieve its objective, Congress made it "the national goal" to eliminate the discharge of pollutants into the Nation's waters by 1985 and to make the Nation's waters fishable and swimmable by 1983. 33 U.S.C. § 1251(a)(1) and (2).

76. The Act's suite of water pollution controls applies to "navigable waters," 33 U.S.C. §§ 1311(a), 1362(12), which "Congress chose to define . . . broadly" as "the waters of the United States." Riverside Bayview, 474 U.S. at 133; see also 33 U.S.C. § 1362(7). The EPA and Corps are charged with applying the Act's protections to the "waters of the United States." See, e.g., Nat. Res. Def. Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (vacating Corps' regulatory definition of "navigable waters" that was "limited to the traditional tests of navigability" because Corps had "derogat[ed] [its] responsibilities" to regulate "waters of the United States" more broadly).

REGULATORY BACKGROUND

I. Scope of Federal Jurisdiction under the Clean Water Act: "Waters of the United States"

77. Under the Clean Water Act, the discharge of pollutants into "navigable waters," defined as "waters of the United States," 33 U.S.C. § 1362(7), is prohibited in the absence of a permit issued by the EPA, the Corps, or an authorized state. Id. §§ 1311(a), 1342, 1344, 1362(12). Under this system of cooperative federalism, states—unless hamstrung by their own legislatures, agencies, or resource constraints—are able to implement stricter standards while the Clean Water Act serves as a federal backstop.

78. Between the late-1970s and early 2000s, the courts and the agencies applied the Act broadly to protect many kinds of water bodies, including streams and wetlands. See, e.g., Riverside Bayview, 474 U.S. at 123–24, 131–39.

79. Beginning in 1985, the United States Supreme Court recognized that the Clean Water Act appropriately extended jurisdiction over waters and wetlands that "have significant effects on water quality and the aquatic ecosystem." Id. at 135 n.9.

80. In SWANCC, decided in 2001, the Court rejected the Corps' attempt to assert jurisdiction over an "isolated," "abandoned sand and gravel pit" solely on the basis that the pit served as a habitat for migratory birds. 531 U.S. at 162, 164, 171–72, 174. The Court recognized that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [its] reading of the [Clean Water Act] in Riverside Bayview Homes," but found such a nexus lacking. Id. at 167.

81. The Court's latest opinion on point, Rapanos v. United States, raised the question of whether the Clean Water Act's protections could be extended to wetlands that "are not adjacent to waters that are navigable in fact." 547 U.S. at 759 (Kennedy, J., concurring). As Chief Justice Roberts noted in a brief concurrence, "no opinion command[ed] a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act." Id. at 758. In an opinion joined by three other members of the Court, Justice Scalia conceded that the term "'navigable waters' in the Act is broader than the traditional understanding of that term," id. at 731, but maintained that it only extends to waters with "a continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water." Id. at 739, 742. Five Justices rejected Justice Scalia's limitations. Id. at 759–86 (Kennedy, J. concurring), 786–812 (Stevens, J., joined by Souter, Breyer, and Ginsburg, JJ., dissenting).

82. Justice Kennedy concurred in the judgment and applied the Court's prior decisions, which recognized that "a water or wetland" must be given federal protections whenever it "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that

could reasonably be so made." Id. at 759 (quoting SWANCC, 531 U.S. at 167). As every court of appeals to have considered the issue has held, waters that meet Justice Kennedy's test but not Justice Scalia's test are protected under the Clean Water Act.[3]

83. Following SWANCC and Rapanos, the agencies issued the 2008 Rapanos Guidance with guidelines describing which waters were covered by the Act, including those with a significant nexus to downstream waters. See Replacement Rule, 85 Fed. Reg. at 22,256, 22,333 (noting the 2008 Rapanos "guidance" stated that the agencies would assert jurisdiction over, *inter alia*, certain tributaries and wetlands with a "significant nexus with traditional navigable waters"). The 2008 Rapanos Guidance gives agency staff the option not to follow the guidance "depending on the circumstances"—leading to uncertainty and inconsistent application of the term "waters of the United States." 2008 Rapanos Guidance at 4 n. 17.

II. The Clean Water Rule

84. In 2015, the agencies promulgated the Clean Water Rule to clarify the scope of the Clean Water Act's coverage and to ensure "predictability," "consistency," and "protection for

[3] Compare, e.g., Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288–89 (4th Cir. 2011) (noting that the Kennedy test "undisputedly controls" and reserving the question of whether jurisdiction may alternatively be established under the plurality's standard), and N. Cal. River Watch v. Wilcox, 633 F.3d 766, 781 (9th Cir. 2011) (same), with United States v. Donovan, 661 F.3d 174, 183–84 (3d Cir. 2011) (agreeing with Justice Stevens' view in his dissenting opinion in Rapanos that wetlands and waters are jurisdictional if they satisfy either Justice Kennedy's or the plurality's standards), United States v. Bailey, 571 F.3d 791, 798–800 (8th Cir. 2009) (same), United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (same), and with United States v. Robison, 505 F.3d 1208, 1222 (11th Cir. 2007) (holding Justice Kennedy's significant nexus standard is controlling rule from Rapanos), and United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006) (same). Other circuits have not established a clear interpretation of Rapanos, but none has adopted the plurality's test alone or rejected Justice Kennedy's standard. See, e.g., United States v. Cundiff, 555 F.3d 200, 208, 210–13 (6th Cir. 2009) (finding evidence to support jurisdiction under both Justice Kennedy's and the plurality's standards and reserving question of "which test controls in all future cases"); United States v. Lucas, 516 F.3d 316, 325–27 (5th Cir. 2008) (finding evidence presented at trial "supports all three of the Rapanos standards.").

the nation's public health and aquatic resources," Final Rule, Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,054, 37,056–57 (June 29, 2015). In developing the regulation, the agencies reviewed and relied on the "best available peer-reviewed science[,]" the decisions of the Supreme Court, and the clear "objective" of the Clean Water Act. See id. at 37,056–57. Ultimately, the agencies rested their interpretation of the statute on the "significant nexus" standard, as most recently articulated by Justice Kennedy in Rapanos. Id. at 37,060–61. Consistent with the Clean Water Act and Supreme Court precedent, the Clean Water Rule applied the Act's safeguards to wetlands and tributaries if they, "either alone or in combination with similarly situated [waters] in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." Id. at 37,060.

85. To answer the question of which waters satisfied the "significant nexus" standard, the agencies undertook more than four years of research, analysis, and public outreach. The agencies' extensive public outreach began in 2011 and continued through the end of the rulemaking process. That consultation included outreach to state and local governments, more than 40 Native American tribes, the National Governors Association, the National Conference of State Legislatures, the Council of State Governors, the National Association of Counties, and the Environmental Council for the States. E.g., Clean Water Rule, 80 Fed. Reg. 37,102–03. The agencies documented this extensive voluntary outreach in a report that it included in the record. See Report on the Discretionary Consultation and Outreach for State, Local, and County Governments on the Clean Water Rule: Definition of "Waters of the United States," Final Rule, Docket ID No. EPA-HQ-OW-2011-0880-20864.

86. The agencies also compiled a considerable scientific record that supported the approach taken in the Clean Water Rule, including its application of the "significant nexus" test as described by Justice Kennedy. See U.S. EPA Office of Research and Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Docket ID No. EPA-HQ-OW-2011-0880-20858 (Jan. 2015) ("Science Report"), https://perma.cc/5KDU-HP4W (permanent link).

87. In 2015, the EPA's Office of Research and Development published the results of the comprehensive Science Report. Science Report at ES-1. After synthesizing more than 1,200 peer-reviewed studies, the Science Report reached "major conclusions" that would serve as the foundation of the Clean Water Rule. Id. at ES-2. First, the report confirmed that "'streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters.'" Id; see Clean Water Rule, 80 Fed. Reg. at 37,076 (quoting Science Report at ES-2). Tributary streams, the agency declared, "including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers . . . ." Clean Water Rule, 80 Fed. Reg. at 37,063; Science Report at ES-2. The report also concluded that "[w]etlands and open waters in non-floodplain landscape settings . . . provide numerous functions that benefit downstream water integrity"—including "storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species." Science Report at ES-3. Thus, evaluation "of the degree of connectivity for specific groups or classes of wetlands (e.g., prairie potholes or vernal pools)" required a science-based "case-by-case analysis." Id. at ES-4; see also Clean Water Rule, 80 Fed. Reg. at 37,057, 37,063 (summarizing report).

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

89. The class of waters deemed "jurisdictional in all instances" includes traditional navigable waters, interstate waters, and the territorial seas, along with "impoundments" of such waterbodies. Clean Water Rule, 80 Fed. Reg. at 37,057–58. To this list of waters, the Clean Water Rule adds both "tributaries" that contribute flow to a primary water and have "a bed and banks and an ordinary high water mark[,]" and "waters adjacent" to other jurisdictional waters, "including wetlands, ponds, lakes, oxbows, impoundments, and similar waters[.]" Id. at 37,104. According to the agencies, "[t]he great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters." Id. at 37,058. As to "adjacent waters," the regulation uses "bright line boundaries" to target only "those waters that . . . possess the requisite connection to downstream waters and function as a system to protect the chemical, physical, or biological integrity of those waters." Id.; see also id. at 37,105 (defining "adjacent" to include waters within defined distances from the "ordinary high water mark" of other jurisdictional waters).

90. In outlining the "narrow category of waters subject to case-specific analysis" under the Clean Water Rule, the agencies "identified . . . five specific types of waters in specific

regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they function alike and are sufficiently close to function together in affecting downstream waters." Id. at 37,059. "Consistent with Justice Kennedy's opinion in Rapanos, the agencies determined that . . . [these] waters"—"Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands"—"should be analyzed 'in combination' (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus" to such downstream waters. Id. at 37,059.

91. In the 2015 Clean Water Rule, the agencies clarified but did not change the scope of the waste treatment system exclusion. 80 Fed. Reg. at 37,097. The Clean Water Rule stated that impounded navigable waters could be excluded as waste treatment systems if they were created pursuant to a section 404 permit or if they were "created to serve as part of a cooling water system with a valid state permit constructed in waters of the United States prior to enactment of the Clean Water Act *and currently excluded from jurisdiction*." Id. at 37,099 (emphasis added). In other words, the agencies explained that they were not removing any additional waters from Clean Water Act jurisdiction.

92. The agencies also made clear that the waste treatment system exclusion could not apply to traditional navigable waters that are "used, were used in the past, or may be susceptible to use in interstate or foreign commerce." Id. at 37,104. In the preamble to the final Clean Water Rule, the agencies stated that they "*did not intend to exclude any traditional navigable waters*." Id. at 37,096 (emphasis added).

93. Under the Clean Water Rule, as with the preceding regulation and the 2019 Repeal Rule, a public lake created to provide cooling water by impounding a jurisdictional river or stream, used by the public for boating, fishing, recreation, or other activities related to interstate commerce, and currently protected by the Clean Water Act, would not have fit within the waste treatment system exclusion. That is, it would be a "water of the United States."

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

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

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

95. The opportunity for public comment was not limited to the rulemaking process. Following the preparation of its draft Science Report, the EPA asked the public to assist the Science Advisory Board in its "comprehensive technical review" of the document. Request for Nominations of Experts for a Science Advisory Bd. Panel to Review EPA's Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters, 78 Fed. Reg. 15,012 (Mar. 8, 2013) ("Request for SAB Nominations"); Clean Water Rule, 80 Fed. Reg. at 37,057. In early 2013, the agency encouraged members of the public to nominate "recognized

experts" in hydrology, ecology, and other disciplines for the Board's review panel. Request for SAB Nominations, 78 Fed. Reg. at 15,012. After the panel had been selected, the public was repeatedly invited to submit comments and attend hearings. Clean Water Rule, 80 Fed. Reg. at 37,062. All told, "[o]ver 133,000 public comments were received" by the panel, and "[e]very meeting [it held] was open to the public, noticed in the Federal Register, and had time allotted for the public to present their views." Id.

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

III. The Agencies' Haphazard Efforts to Erase and Replace the Clean Water Rule

97. In contrast to the Clean Water Rule, which relied on science to improve prior agency practice of protecting waters that significantly affect the chemical, physical, and biological integrity of navigable waters, the Replacement Rule purports to codify the first correct interpretation of "waters of the United States" in the agencies' history based purely on (flawed) legal analysis. The agencies' prior efforts to dismantle the Clean Water Rule are equally flawed.

A. The Proposed Repeal and Suspension of the Clean Water Rule

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

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

100. Despite being confronted with the well-developed record supporting the Clean Water Rule, the agencies did nothing to address the facts in that record. The only record document that the agencies produced in support of their Proposed Repeal Rule was an indefensible economic report that directly conflicted with the economic analysis prepared to back the Clean Water Rule. See Letter from B. Holman, SELC, to S. Pruitt, EPA, pp. 47–52 (Sept. 27, 2017) (Submitted to EPA Docket Center EPA-HQ-2017-0203) (discussing Repeal Rule Economic Analysis).

101. While the agencies also admitted that the proposed repeal would "define the scope of 'waters of the United States' that are protected under the Clean Water Act[,]" they affirmatively refused to "undertake any substantive reconsideration" of the issue. Proposed Repeal Rule, 82 Fed. Reg. at 34,900, 34,903 ("[B]ecause [the repeal rulemaking] is a temporary, interim measure pending substantive rulemaking, the agencies . . . do[] not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations").

102. Despite their acknowledgment that "[t]he scope of [Clean Water Act] jurisdiction is an issue of great national importance[,]" the agencies instructed the public to withhold their comments on the issue, 82 Fed. Reg. at 34,902–03, including on the suitability of the Clean Water Rule or the pre-2015 definition that the Repeal Rule would revive, id. at 34,903.

103. Rather than awaiting the outcome of the repeal rulemaking, the agencies switched course and published a hastily devised proposal to retroactively delay the effective date of the

Clean Water Rule in November 2017. Proposed Rule, Definition of 'Waters of the United States' —Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017) ("Proposed Suspension Rule"). In February 2018, the agencies published their final rule retroactively suspending the Clean Water Rule in the Federal Register. Final Rule, Definition of 'Waters of the United States'—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018) ("Suspension Rule").

104. The Proposed Suspension Rule contained many of same flaws as the Proposed Repeal Rule, such as its suppression of public comment on the rule's substantive impact on the chemical, physical, and biological integrity of the Nation's waters. See, e.g., Proposed Suspension Rule, 82 Fed. Reg. at 55,545 ("The agencies do not intend to engage in substantive re-evaluation of the definition of 'waters of the United States' until the Step Two rulemaking"). On August 16, 2018, this Court vacated and issued a nationwide injunction of the Suspension Rule, holding "that the agencies' refusal to consider or receive public comments on the substance of the [Clean Water] Rule or the 1980s regulation did not provide a 'meaningful opportunity for comment' as set forth in N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012)." S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d at 963.

105. On November 26, 2018, the United States District Court for the Western District of Washington also vacated the Suspension Rule, holding that "the Agencies deprived the public of a meaningful opportunity to comment on relevant and significant issues in violation of the APA's notice and comment requirements" for similar reasons. Puget Soundkeeper Alliance v. Wheeler, No. 15-01342, 2018 WL 6169196, at *5 (W.D. Wash. Nov. 26, 2018).

106. Following the court orders vacating the Suspension Rule, the Clean Water Rule was in effect, though it was enjoined in several states and remanded to the agencies as a result of

litigation challenges. See Georgia v. Wheeler, 418 F. Supp. 3d 1336, 1343–44 (S.D. Ga. 2019), dismissed as moot, No. 2:15-cv-79, Doc. 294 (S.D. Ga. January 7, 2020); Texas v. EPA, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019); see also Replacement Rule, 85 Fed. Reg. at 22,258–59 (summarizing litigation in other states that resulted in the denial or grant of injunctive relief against the Clean Water Rule).

B. The Repeal of the Clean Water Rule

107. While the Suspension Rule was being challenged in this Court, the agencies published a supplemental notice for the Proposed Repeal Rule—their second attempt at offering some rationale to support their repeal of the Clean Water Rule. See Supplemental Notice of Proposed Rulemaking, Definition of "Waters of the U.S."—Recodification of Pre-Existing Rules, 83 Fed. Reg. 32,227, 32,227 (July 12, 2018) ("Supplemental Notice").

108. Like the Proposed Repeal Rule and the Suspension Rule, the Supplemental Notice did not compare, or solicit comment on, the relative merits of the Clean Water Rule and the pre-existing case-by-case regime; analyze, or seek comment on, the effects on our Nation's waters of reviving the pre-existing regime; or publish additional materials intended to guide the implementation of the pre-existing regime.

109. The agencies finalized the Repeal Rule on October 22, 2019. Repeal Rule, 84 Fed. Reg. 56,626. The result was the adoption of the same case-by-case regime that the agencies rejected just four years earlier in promulgating the Clean Water Rule and again in their Proposed Replacement Rule, see Proposed Rule, Revised Definition of "Waters of the United States," 84 ed. Reg. 4,154. 4,195, 4,197–98 (February 14, 2019) ("Proposed Replacement Rule") (stating the regime revived by the Repeal Rule "cannot be [lawfully] implemented as promulgated . . . .").

110. Reversing the lawful order of things, the agencies provided no "justification" for the repeal until they issued the final rule in October of 2019. In that belated rationalization, they relied almost wholesale on two 2019 district court opinions, issued *after* the close of the Repeal Rule's comment period, that found aspects of the Clean Water Rule unlawful. See id. at 56,627–30, 56,639–40, 56,647–51, 56,653–54, 56,656–59 (citing Georgia, 418 F. Supp. 3d at 1343–44, and Texas, 389 F. Supp. 3d at 506). Defendants state that they were "*responding to these court orders* . . . [b]y repealing the 2015 Rule," id. at 56,640 (emphasis added), even though both cases were decided *nearly two years after* the agencies proposed and initiated the repeal rulemaking process.

111. Most relevant for this case, the final Repeal Rule purports to adopt district court findings that the Clean Water Rule did not comply with the "significant nexus" requirement in Justice Kennedy's Rapanos opinion. Id. at 56,626 (citing the primary reason for repealing the Clean Water Rule as its purported failure to "implement the legal limits . . . reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in Rapanos"). That is, in October 2019 the agencies repealed the Clean Water Rule on grounds that it did not comply with the significant nexus test—the same test the agencies reject in the Replacement Rule challenged here.

112. Various lawsuits have been filed by Plaintiffs here and others challenging the legality of the Repeal Rule, including one currently stayed in this Court. See S.C. Coastal Conservation League v. Wheeler, No. 2:19-cv-03006-DCN, ECF No. 32 (D.S.C. Feb. 18, 2020).

C. The Proposed Replacement Rule

113. The agencies introduced their unprecedented restriction of "waters of the United States" on February 14, 2019. See Proposed Replacement Rule, 84 Fed. Reg. at 4,154.

114. The agencies proposed a definition of "waters of the United States" that purportedly adhered to Justice Scalia's opinion in Rapanos and overtly discarded the significant nexus test at the core of Justice Kennedy's opinion and prior Court opinions. See, e.g., Proposed Replacement Rule, 84 Fed. Reg. at 4,170 (claiming the proposal's adherence to Justice Scalia's plurality opinion in Rapanos), 4,178 (downplaying the significant nexus test as the view of a "single justice" despite the fact that a majority of the Court in Rapanos voted to affirm jurisdiction if the test is satisfied).

115. The agencies' proposal introduced a new, false distinction between the Act's purpose of protecting the "chemical, physical, and biological integrity of the *Nation's waters*" and "waters of the United States." See 84 Fed. Reg. at 4,157 (emphasis added). Under the agencies proposal, "waters of the United States" represent a narrow subset of "the Nation's waters," the remainder of which fall outside the Act's protections.

116. The agencies proposed these changes without acknowledging the major reductions that their new definition would cause in the scope of Clean Water Act protections throughout the nation, and without meaningfully accounting for the significant harms to water quality that would result. Such analysis was unnecessary, the agencies contend, because the novel, severe restrictions proposed were required by the Clean Water Act.

117. By failing to analyze the impacts of their Rule on the health of the Nation's waters, the agencies once again denied the public a clear picture of the impacts of the proposed change. In suspension rulemaking, the agencies improperly foreclosed the public from commenting on the merits of the Clean Water Rule or prior regulations on the grounds that they were only implementing a temporary suspension. S.C. Coastal Conservation League, 318 F. Supp. 3d at 963–67. Now, at the culmination of their multi-step "Suspension"/"Repeal"/

"Replacement" process, they have stymied the public yet again by refusing to consider the merits of permanently abandoning existing protections for wetlands, streams, and other waterways.

118. At the same time as they elided notice and comment on substantive water quality issues, the agencies requested comment on dozens of disparate questions that made it impossible for the public to predict with any confidence what the agencies were actually considering or have time to meaningfully comment on the agencies' proposal. For example, just as to tributaries, the agencies asked for comment on:

a. whether to exclude protections for intermittent streams, redefine intermittent streams, require that flow originate from particular source (e.g., "groundwater interface, snowpack, or lower stream orders that contribute flow"), or last for a particular duration (e.g., "seasonal," "at least one month of the calendar year," "typically three months"), or require certain flow characteristics ("e.g., timing, duration, frequency, or magnitude"), id. at 4,177–78;

b. potential "flow values or ranges of values (including supporting rationale)," including on "for example, an average annual flow volume of five or more cubic feet per second in a typical year and/or that a river or stream flow continuously for a certain number of days (e.g., 30, 60, or 90 days) in a typical year," and on the "methods, tools, or data [that] could be used to determine that value," id. at 4,178;

c. whether ephemeral reaches, man-made breaks, and natural breaks should sever jurisdiction; whether to define the lateral extent of jurisdiction; and whether and how the presence of a bed, banks, and an ordinary high water mark should factor into the tributary definition, id. at 4,177–78;

d. the "typical year" definition, the scope of "typical year" analysis (i.e., watershed scale vs. regional), and on alternative methods for excluding drought and flood years and for distinguishing between intermittent and ephemeral flow, id. at 4,178–79.

119. For the options listed above—and the numerous others presented for comment related to tributaries, other types of water features, and various additional aspects of the Rule—the agencies failed to state the scientific or legal basis, discuss how each option would be implemented, explain how each option related to the boundary between "waters of the United States" and what the agencies refer to as state "waters," or explain how each option would impact water quality. Without shedding light on these basic details, it was impossible for the public to meaningfully comment on the proposed Replacement Rule.

120. The agencies also failed to provide the evidence and basis to support their proposed approach in the Replacement Rule. In an attempt to support their Rule, the agencies produced an Economics Analysis that provided little useful information and was flawed and fundamentally incomplete. See U.S. EPA and Dep't of Army, Economic Analysis for the Proposed Revised Definition of "Waters of the United States," EPA Docket ID No. EPA-HQ-OW-2018-0149-0004 (Dec. 14, 2018) ("Draft Economic Analysis").

121. Despite proposing a definition of "waters of the United States" that reverses more than 40 years of protections for waters across the country and discards the agencies' long-standing interpretations of Supreme Court case law, and receiving requests for extension from members of Congress, industry groups, and hundreds of citizen groups, the agencies gave only 60 days to comment on the Proposed Replacement Rule compared to the 200 days of public comment provided for the Clean Water Rule.

D. The Final Replacement Rule

122. After receiving over 600,000 comments, which overwhelmingly opposed the Proposed Replacement Rule, the agencies published the Replacement Rule in the Federal Register on April 21, 2020—adopting for the first time a final rule that found that significant portions of the "Nation's waters" are not "waters of the United States," 85 Fed. Reg. at 22,253, but are left exclusively to state whims.

123. Rather than using science to implement the Supreme Court's "significant nexus" test, or even making a superficial effort to protect water quality, the agencies rejected any analysis of whether the Rule would meet the Clean Water Act's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). They omitted any such analysis because the radical re-interpretation of the scope of the Act adopted in the final Rule is, purportedly, the first correct interpretation of "waters of the United States" in the Act's history. As a result, the agencies removed waters from Clean Water Act jurisdiction that robust scientific studies in the record demonstrate are essential to the integrity of the Nation's waters without analyzing the effect of that action on the ability to achieve the Act's purpose.

124. The agencies' approach depends on a novel and incorrect reading of Clean Water Act section 101(b); assumes contrary to the evidence that state agencies will fill the gaps in clean water protections left open by the Replacement Rule; and erroneously prioritizes claimed regulatory certainty and states' theoretical ability to *voluntarily* protect waters within their borders over the national clean water mandates of the Clean Water Act. The manner in which the Replacement Rule has been carried out—in essence, by executive fiat, with no meaningful

opportunity to comment or consideration of science—betrays an extraordinary disregard for bedrock rulemaking requirements and the views of the American public.

i. The agencies abandon the Supreme Court's "significant nexus" test and science.

125. Central to the historic contraction of jurisdiction in the Replacement Rule is the agencies' abandonment of the Supreme Court's "significant nexus" standard. This standard formed the basis for the agencies' definition of "waters of the United States" (a) before the 2015 Clean Water Rule; (b) in the Clean Water Rule; and (c) in the agencies' 2019 Repeal Rule. In contrast, the agencies' new definition of "waters of the United States" in the Replacement Rule is not based on—indeed, openly rejects—science and the "significant nexus" test it informs. See, e.g., Replacement Rule, 85 Fed. Reg. 22,261 (claiming the agencies can ignore science because it "cannot dictate where to draw the line between Federal and State waters" or else presenting cherry-picked statements from the Clean Water Rule's Science Report to excuse their narrowing of federal jurisdiction under the Replacement Rule).

126. Under the Final Replacement Rule, "waters of the United States" encompasses only "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.

127. Critically, the basis for this definition is not science. For example, the tributary definition includes waters that "flow[ ] continuously during certain times of [a typical] year," but categorically excludes waters that flow ephemerally, id. at 22,275—despite the agencies'

concession and clear record evidence showing that such waters have significant downstream impacts on navigable waters.[4]

ii. The agencies unlawfully restrict the categories of jurisdictional waters.

128. The Replacement Rule establishes four types of jurisdictional waters—each of which is narrower than prior definitions of "waters of the United States." All other streams, wetlands, and other waters beyond the four categories are deemed not jurisdictional. The four categories that remain jurisdictional—if not subject to exceptions—are (1) territorial seas and traditional navigable waters; (2) tributaries to those waters; (3) lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to jurisdictional waters. Replacement Rule, 85 Fed. Reg. at 22,273. None of the four categorical jurisdictional lines was drawn based on scientific or other empirical information regarding the chemical, physical, or biological integrity of the Nation's navigable waters.

129. Remarkably, for the first time ever, the agencies relinquish protections for listed categories of *all* otherwise jurisdictional waters, including traditional navigable waters and the territorial seas, if they possess characteristics that place them within *any* of the excluded categories of waters. Compare Replacement Rule, 85 Fed. Reg. at 22,325 ("If the water meets any of the[] exclusions, the water is excluded *even if the water satisfies one or more conditions to be a [jurisdictional] water*." (emphasis added)), 22,338 (stating that the jurisdictional

[4] See Final Economic Analysis at 107 (quoting EPA Science Advisory Board's finding that "[t]he literature review provides strong scientific support for the conclusion that ephemeral . . . streams exert a strong influence on the character and functioning of downstream waters . . . ." (quotations omitted)); see also, e.g., Science Report at ES-5 ("[T]he aggregate contribution of [a specific ephemeral stream] over multiple years, or by all ephemeral streams draining [a] watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters."), ES-7 ("[T]he evidence for connectivity and downstream effects of ephemeral streams was strong and compelling . . . .").

categories are "subject to" the non-jurisdictional categories), with Clean Water Rule, 80 Fed. Reg. at 37, 054, and Repeal Rule, 84 Fed. Reg. at 56,667.

130. The Replacement Rule's first category of jurisdictional waters includes "territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide." Replacement Rule, 85 Fed. Reg. at 22,338. These are commonly known as "traditional navigable waters."

131. Although the agencies insist that they "have not changed their interpretation of traditional navigable waters in this final rule," Replacement Rule, 85 Fed. Reg. at 22,281, they admit that the Rule could exclude waters that support "shallow draft vessels like canoes and kayaks," 85 Fed. Reg. at 22,282.

132. In addition, for the first time since 1973, interstate waters—that is, waters or wetlands that cross a state line or tribal boundary—are no longer considered jurisdictional. Compare Replacement Rule, 85 Fed. Reg. 22,282-83, with Repeal Rule, 84 Fed. Reg. at 56,669–70 (reinstating 1986 definition, including interstate waters); National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,529 (May 22, 1973) (EPA's first "navigable waters" definition, including interstate waters). Prior rules also provided protection for waters "[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes" as well as those waters "[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce." Repeal Rule, 84 Fed. Reg. at 56,670.

iii. The agencies categorically exclude ephemeral streams, and exclude some perennial and intermittent streams that have a "significant nexus" to jurisdictional waters.

133. Jurisdictional tributaries are defined to include "a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a [territorial sea or traditional navigable water] in a typical year either directly or through [another jurisdictional water]." Replacement Rule, 85 Fed. Reg. at 22,251 "A tributary must be perennial or intermittent in a typical year" to warrant protection. Id.

134. The agencies intend to implement this definition by using "many different methods and tools to identify and determine whether a feature meets the definition of tributary." Replacement Rule, 85 Fed. Reg. 22,292. Notably, the agencies state that numerous remote tools can be used, including "stream gage data, elevation data, historic or current water flow records, flood predictions, statistical evidence, aerial imagery, and USGS maps." Id. The agencies claim to have "substantial experience using . . . remote tools to determine flow classifications" and that, with respect to perennial, intermittent, and ephemeral streams, "the agencies have used these terms to evaluate the jurisdictional status of waters for more than a decade." Id. at 22,293.

135. Yet the agencies did not use these remote methods or any other methods to quantify the expected losses of perennial, intermittent, and ephemeral stream jurisdiction. As admitted (but not calculated) in the Final Economic Analysis, the agencies expect the new tributary definition to eliminate jurisdiction over streams in all three categories. The Rule expressly removes jurisdiction from all ephemeral streams, and the agencies claim that it would only maintain jurisdiction for "*most* perennial and *many* intermittent streams relative to" prior policy—meaning some substantial number of perennial and intermittent streams would lose protection. Final Economic Analysis at 23 (emphasis added); see also, e.g., id. 11 ("There may be some intermittent non-relatively permanent waters found to have a significant nexus under the

2019 Repeal Rule/Rapanos Guidance practice that will no longer be jurisdictional under the final rule because they do not contribute surface water flow to a territorial sea or TNW in a typical year.").

136. With its arbitrary focus on surface water flow, the agencies' definition of tributary would exclude some perennial and intermittent streams that have a "significant nexus" through chemical, physical, and biological connections to navigable waters and all ephemeral streams that have a significant nexus through chemical, physical, and biological connections to traditional navigable waters. Final Economic Analysis at 10–11, 22–23.

iv. The agencies substantially narrow the "adjacent wetlands" category, leaving wetlands with a significant nexus to jurisdictional waters unprotected.

137. Adjacent wetlands are defined to include "wetlands that: (i) abut, meaning to touch at least one point or side of, [another jurisdictional water]; (ii) are inundated by flooding from [another jurisdictional water]; (iii) are physically separated from [another jurisdictional water] only by a natural berm, bank, dune, or similar natural feature; or (iv) are physically separated from [another jurisdictional water] only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the [other jurisdictional water] in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature." Replacement Rule, 85 Fed. Reg. at 22,338.

138. The agencies intend to identify "abut[ting]" wetlands by determining whether "the wetland delineated boundary touches the delineated boundary of a" traditional navigable water, tributary, or lake, pond, or impoundment. Replacement Rule, 85 Fed. Reg.at 22,315. As in the

agencies' proposal, whether the abutting wetland ever has a surface water connection to the jurisdictional water it touches is irrelevant. Id.

139. For those wetlands "inundated by flooding," the agencies will not only require a demonstration of a surface water connection between the wetland and another jurisdictional water, but also a demonstration that the water creating the connection comes ***from*** the jurisdictional water body and ***not*** the wetland. Replacement Rule, 85 Fed. Reg. at 22,315-16. The agencies state they "may" use "USGS stream gage records, recurrence intervals of peak flows, wetland surface water level records, visual observation, aerial imagery, flood records, inundation modeling techniques and tools . . . , or engineering design records," and "may also need" to complete multiple site visits to determine if the requisite flooding has occurred. Id. at 22,315.

140. This portion of the Rule would likely eliminate from jurisdiction wetlands that are not flooded by a jurisdictional water in a typical year, including wetlands such as seeps, hardwood flats, non-riverine swamp forests, pocosins, Carolina bays, pine savannahs, pine flats, basin wetlands, bogs, floodplain pools, cypress domes, and many more.

141. Wetlands that are near jurisdictional waters but do not abut or receive annual floodwater from such waters may also be jurisdictional in some cases. Replacement Rule, 85 Fed. Reg. at 22,338. Whether those wetlands are jurisdictional depends on two factors: whether the feature separating the wetland from another jurisdictional water is natural and, if not, whether there is a surface hydrological connection through an artificial feature. Id.

142. Wetlands of an identical type, function, and proximity to a jurisdictional water are treated differently under the Rule. If separated by a single ***natural*** feature, the wetland is jurisdictional, even if there is no surface hydrologic connection between the wetland and the neighboring jurisdictional water. Replacement Rule, 85 Fed. Reg. at 22,338, 22,311. If separated

by an otherwise identical ***artificial*** feature, the wetland is only jurisdictional if there is a surface hydrologic connection that allows surface water to reach the wetland at least once in a typical year. Id. at 22,338, 22,312. Yet in other parts of the Rule, the agencies reject similar natural/artificial distinctions as baseless. See U.S. EPA, The Navigable Waters Protection Rule––Public Comment Summary Document, Topic 7: Lakes and Ponds at 15, EPA Docket ID No. EPA-HQ-OW-2018-0149-11574 (Apr. 21, 2020) ("[T]he agencies have not . . . identified[] a persuasive legal basis for distinguishing between natural and artificial flows.").

143. Although a wetland separated from a jurisdictional water by a ***single*** berm or dune is jurisdictional, a wetland separated by ***two or more*** berms or dunes is not. Replacement Rule, 85 Fed. Reg. at 22,312. Regardless of size or distance, "a single berm or dune" establishes jurisdiction, but a "series of natural berms or a foredune and a backdune" forecloses it. Id. Wetlands also fail to meet the adjacency standard if they are adjacent to a jurisdictional wetland but not to another jurisdictional water, or where "a 'chain' of wetlands [is] connected hydrologically via groundwater, shallow subsurface flow, [or] overland sheet flow." Id.

144. Roads sever jurisdiction over wetlands unless a surface hydrologic connection exists through culverts. Id.

145. None of these limitations is based on science evaluating the chemical, physical, or biological effects of wetlands on downstream jurisdictional waters.

v. The agencies employ a "typical year" test that is fundamentally indeterminate and provides no guiding criteria.

146. The "typical year" construct goes to the heart of the Replacement Rule and is used to delimit almost every category of jurisdictional waters. E.g., Replacement Rule, 85 Fed. Reg. at 22,307 ("adjacent wetlands" are jurisdictional if, e.g., they "are inundated by flooding from [other jurisdictional waters] in a **typical year**," or if they "are physically separated from [other

jurisdictional waters] only by an . . . artificial structure . . . that allows for a direct hydrologic surface connection between [them] in a **typical year**"), 22,286 ("tributar[ies]" are covered if, e.g., they "contribute[] surface water flow to a [traditional navigable water] in a **typical year**," directly or indirectly, and are "perennial or intermittent in a **typical year**.").

147. Typical year is defined as a year "when precipitation and other climatic variables are within the normal periodic range (e.g., *seasonally*, *annually*) for the geographic area of the applicable aquatic resource based on a rolling thirty-year average." Replacement Rule, 85 Fed. Reg. at 22,294 (emphasis added). Although not included in the codified text, the agencies describe the typical year in the preamble as having precipitation between the "30th and 70th percentiles for totals from the same date range over the preceding 30 years." Replacement Rule, 85 Fed. Reg. at 22,311. But see U.S. EPA, The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 9: Typical Year at 5 ("The agencies may also consider alternative methods . . . , *including different statistical percentiles*.") (emphasis added). The agencies provide no explanation for how the appropriate periodic range or statistical percentiles should be selected.

148. For their "typical year" construct, the agencies provide no underlying principle to guide agency discretion, inadequately account for changing climatic conditions, and insert case-by-case analyses for every jurisdictional determination despite their claim that it "*provide[s] a predictable framework* to establish federal jurisdiction . . . ." Replacement Rule, 85 Fed. Reg. at 22,274 (emphasis added).

149. Despite not knowing which tools the agencies will use to assess flow, and admitting that they "may need to use the multiple tools [*e.g.*, drought indices, web-based models, wetland climate analysis tables, Natural Resources Conservation Service soil maps, topographic

data , and other unidentified data sources,] to determine" whether a tributary is jurisdictional, Replacement Rule, 85 Fed. Reg. at 22,293–95, 22,274–75, "[t]he agencies expect that landowners will *often* have sufficient knowledge to understand how water moves through their properties" to determine jurisdiction and *will not need to contact local, state, or federal authorities*. Replacement Rule, 85 Fed. Reg. at 22,293 (emphasis added).

vi. The agencies expanded the waste treatment system exclusion so that navigable cooling lakes used by the public for drinking water and recreation and that play an important role in navigation and interstate commerce are at risk.

150. In the replacement rulemaking, the agencies claimed they were maintaining the status quo regarding whether cooling ponds could be excluded from "waters of the United States" as part of a "waste treatment system." Replacement Rule, 85 Fed. Reg. at 22,317. In fact, they significantly changed the definition of the exclusion.

151. The Replacement Rule defines waste treatment systems for the first time to include cooling ponds. Replacement Rule, 85 Fed. Reg. at 22,328, 22,339 ((c)(15)). And the rule applies the waste treatment system exclusion for the first time to any cooling pond that would otherwise be a jurisdictional water for any reason: "the water is excluded even if the water satisfies one or more of the conditions to be a paragraph (a)(1) through (4) water"—the sole bases for Clean Water Act jurisdiction under the Replacement Rule. Id. at 22,325; see also id. at 22,338 (describing "waters of United States," like traditional navigable waters and lakes, as jurisdictional "subject to" the exclusions).

152. As a result, for the first time, "waters of the United States" does not clearly encompass public lakes created to provide cooling water by impounding a jurisdictional river or stream and used by the public for boating, fishing, and recreation, or other activities of traditional navigable waters related to interstate commerce. Large and important public water resources are

potentially excluded from Clean Water Act jurisdiction by this new definition for the first time. Lake Keowee, for example, provides half the drinking water supplies for the Greenville Water System, one of South Carolina's largest water utilities, and drinking water for Seneca, South Carolina. It is the home of many lakeside developments and residences, has many boat docks and marinas, and is a popular fishing and recreational destination in South Carolina, but is threatened by this Rule's new "waste treatment" exclusion.

153. Nonetheless, the agencies insisted they were merely "clarify[ing]" and "[c]ontinuing the agencies' longstanding practice" regarding the exclusion of waste treatment systems. Replacement Rule, 85 Fed. Reg. at 22,324-25. They stated that the deletion of the cooling pond exception to the waste treatment system exclusion was only "ministerial." Id. at 22,325. And they stated that "the agencies are not changing the longstanding approach to implementing the waste treatment system exclusion." Id. at 22,328. But the changes they have made pave the way for industry to claim that cooling lakes throughout the Southeast and the country are no longer protected under the Clean Water Act.

vii. The agencies failed to meaningfully evaluate the impacts of the Replacement Rule on the quality of the Nation's waters.

154. Rather than account for the loss of clean water protections, the agencies finalized their Economic Analysis with the same errors that plagued their draft analysis and added more.

155. Even though misleadingly incomplete, the Final Economic Analysis concedes that the Replacement Rule would do considerable damage. For example, the agencies admit that the Replacement Rule would reduce ecosystem values provided by streams and wetlands, increase downstream flooding damages, increase pollution and sedimentation, require more expensive restoration efforts, increase costs for drinking water providers, and increase oil spill response

costs. Final Economic Analysis at 105; Draft Economic Analysis at 133.[5] Yet nowhere is this damage properly quantified.

156. Among additional errors, where the agencies did monetize the Rule's impacts—on the losses to wetlands—the agencies misleadingly excluded most of the benefits associated with wetlands. In valuing the lost wetland benefits under the Rule, the agencies assumed that wetland benefits are valued only by in-state residents, see Final Economic Analysis at 207; Draft Economic Analysis at 62–65, and dramatically undercounted the number of wetlands in each state, compare Final Economic Analysis at 210 (assuming 10,000 acres of wetlands in each state), with id. at 199 (stating that the fewest acres of wetlands in any state, according to the National Wetlands Inventory, is 57,052, with a high of 12.2 million). Correcting those errors shows that the Replacement Rule may cost more than $2.4 billion every year due to lost wetlands benefits alone and that the costs of the Replacement Rule significantly outweigh its benefits.[6]

157. Elsewhere, the agencies concede for every category of waters that they are unable to quantify the losses that will result from the reduction in federal jurisdiction under the Rule. E.g., Final Economic Analysis at xi ("[T]he final rule reduces the scope of federal CWA

[5] See also U.S. EPA and Dep't of Army, Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States," EPA Docket ID No. EPA-HQ-OW-2018-0149-11573 (Jan. 23, 2020) ("Final Resource and Programmatic Assessment"); U.S. EPA and Dep't of Army, Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States," EPA Docket ID No. EPA-HQ-OW-2018-0149-0005 (Dec. 11, 2018).

[6] Letter from K. Moser, SELC, to A. Wheeler, U.S. EPA, & R.D. James, Dep't of Army at 41, 45–46 (Apr. 15, 2019) (Submitted by SELC to EPA Docket Center EPA-HQ-OW-2018-0149-9717 on April 15, 2019) ("SELC Comments on Proposal"); see also John C. Whitehead, Comments on "Economic Analysis for the Proposed Revised Definition of 'Waters of the United States'" (EPA-Army 2018) (Apr. 9, 2019), attached as Ex. C to SELC Comments on Proposal; Jeffrey D. Mullen, Ph.D., Draft Review of the 2018 EPA Economic Analysis for the Proposed Definition of "Waters of the United States" (Apr. 10, 2019), attached as Ex. D to SELC Comments on Proposal.

jurisdiction over certain waters (e.g., some ephemeral streams, isolated wetlands, and ditches) compared to prior regulations, although the agencies are unable to quantify these changes with any reliable accuracy."), xviii (claiming "limitations of the data curtailed the agencies' ability to quantify or monetize some of the potential environmental effects and forgone benefits of the final rule"), 8-9 (interstate waters), 11 (tributaries); 11 (ditches), 12-13 (lakes and ponds), 14 (impoundments), 15-17 (wetlands).

158. Although the agencies list the Final Economic Analysis among the Rule's "Supporting Analyses," e.g., Replacement Rule, 85 Fed. Reg. at 22,331, the agencies disclaim any reliance on it and other record documents, passing them off as "informational" only in an apparent attempt to shield them from judicial review under the APA. Id. at 22,332 ("The agencies note that the final rule is not based on the information in the agencies' economic analysis or resource and programmatic assessment. See, e.g., [Nat'l Ass'n of Home Builders ('NAHB') v. EPA, 682 F.3d 1032,] 1039–40. This information was not used to establish the new regulatory text for the definition of 'waters of the United States.'"); id. at 22,335 ("While the economic analysis is informative in the rulemaking context, the agencies are not relying on the economic analysis . . . as a basis for this final rule. See, e.g., NAHB, 682 F.3d at 1039–40 (noting that the quality of an agency's economic analysis can be tested under the [Administrative Procedure Act] *if* the 'agency decides to rely on a cost-benefit analysis as part of its rulemaking').").

159. Regardless of how the agencies characterize the Final Economic Analysis, whether "informational" or as "support," they are left with absolutely no support for their Rule.

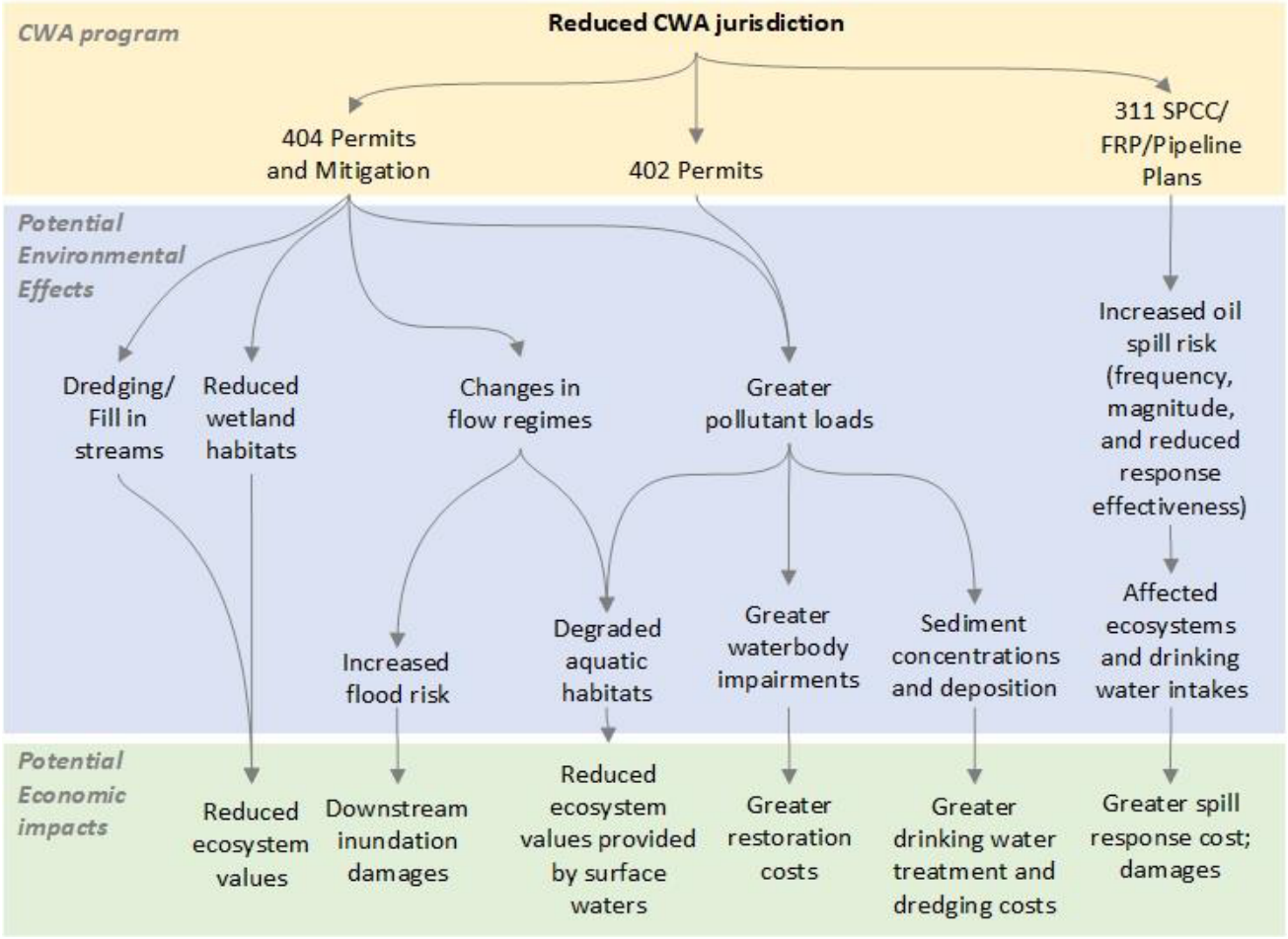
viii. The Replacement Rule is confusing, contrary to science, and antithetical to the Clean Water Act's objectives.

160. Rather than providing regulatory certainty, the agencies have created more confusion in their Replacement Rule by requiring highly complex, confusing analyses in identifying jurisdictional waters. The agencies have nonetheless encouraged landowners to make their own determination with respect to federal jurisdiction, Replacement Rule, 85 Fed. Reg. at 22,292, while simultaneously acknowledging that such an approach may result in an enforcement action. Id.

161. Significantly, EPA's own Science Advisory Board criticized the Replacement Rule, concluding that it "depart[s] . . . from EPA recognized science[, and] threatens to weaken protection of the Nation's waters by disregarding the established connectivity of groundwaters and by failing to protect ephemeral streams and wetlands which connect to navigable waters below the surface." EPA, Science Advisory Board, Draft Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 3 (Oct. 16, 2019), https://perma.cc/RBC7-V58V (permanent link). By proposing these changes "without a fully supportable scientific basis," the agencies have "introduc[ed] substantial new risks to human and environmental health." Id.; see also EPA, Science Advisory Board, Final Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 4 (Feb. 27, 2020) ("The proposed Rule does not present new science to support [its] definition, thus the SAB finds that the proposed Rule lacks a scientific justification, while potentially introducing new risks to human and environmental health.), https://perma.cc/76UW-LW9R (permanent link).

162. The culmination of the agency's rulemaking here is, as they admit, a rule that takes the country farther from reaching the objective of the Clean Water Act. The various ways

that the Rule degrades the chemical, physical, and biological integrity of the Nation's waters are summarized below in a graphic the agencies prepared.



Final Economic Analysis at 105.

163. In a rational rulemaking, agencies that recognize the numerous ways their proposal would undercut the central purpose of the statute they are entrusted to enforce would never finalize the offending rule. This is not a rational rulemaking. The agencies have not, after more than 40 years, suddenly discovered the correct interpretation of "waters of the United States." Instead, they have forced through an unlawful interpretation that contradicts the very purpose of the Clean Water Act and violates the Administrative Procedure Act. It must be set aside.

FIRST CLAIM FOR RELIEF
Violation of the Administrative Procedure Act—Arbitrary and Capricious Policy Reversal

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

165. The Administrative Procedure Act ensures that agencies do not change course based on the "whim and caprice of the bureaucracy," N.C. Growers' Ass'n, 702 F.3d at 772 (Wilkinson, J., concurring), and prevents agencies from subverting the rule of law by making policy based on shifting "political winds and currents." Id.

166. To support a reversal in policy, an agency must provide "good reasons" for it, Fox, 556 U.S. at 514–15; see also State Farm, 463 U.S. at 41–43; ensure that the new policy is itself supported by substantial record evidence, State Farm, 463 U.S. at 43–44; address the "facts and circumstances that underlay" the prior rule, Fox, 556 U.S. at 516; consider relevant alternatives to a wholesale repeal, State Farm, 463 U.S. at 51; address the "'serious reliance interests'" grounded on the prior policy, Encino Motorcars, 136 S. Ct. at 2126 (quoting Fox, at 515); and leave no "[u]nexplained inconsistency" between new and prior policy, id. (citations and quotations omitted).

167. The agencies here, in promulgating a rule that departs from prior practice in numerous ways, have failed to acknowledge and provide explanations for their inconsistent and capricious change of course.

168. The agencies failed to provide "good reasons" for abandoning the broader clean water protections embodied in all of the agencies' prior definitions of "waters of the United States."

169. The agencies also leave numerous inconsistencies between the Replacement Rule and the Clean Water Rule, as well as the Repeal Rule, unexplained. The agencies failed to provide a rational basis for treating wetlands and tributaries differently under the Replacement

Rule than under prior agency practice, including the Repeal Rule adopted by the agencies in October 2019.

170. The agencies failed to support the Replacement Rule's unprecedented restriction of Clean Water Act jurisdiction with "substantial record evidence" while simultaneously failing to address the "facts and circumstances that underlay" the agencies' prior rulemakings—including the thousands of pages of their prior responses to comments or their substantial Science Report that underlay the Clean Water Rule.

171. The agencies failed to consider any action less drastic than a wholesale repeal and replacement of the Clean Water Rule.

172. The agencies failed to evaluate the effect of the Replacement Rule on reliance interests, including, but not limited to, companies that restore streams and wetlands, the outdoor recreation industry, fishermen, swimmers, other outdoor enthusiasts, property owners, the shellfish industry, the fishing industry, drinking water utilities, and states and their ability to protect their citizens against pollution from upstream states.

173. The agencies failed to provide any "good reasons" for why the Replacement Rule better balances state and federal responsibilities or identify any reasonable criteria for determining the extent of federal jurisdiction even if the agencies' mistaken interpretation of section 101(b) were correct, which it is not.

174. For these reasons, the Replacement Rule is an unlawful reversal of agency policy under the Administrative Procedure Act.

SECOND CLAIM FOR RELIEF
Violation of the Administrative Procedure Act—Arbitrary and Capricious Failure to Acknowledge Changes in Policy

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

176. To support a change in policy, an agency must acknowledge the change and provide "good reasons" for it. Fox, 556 U.S. at 514–15.

177. The agencies did not acknowledge that their decision to exclude otherwise jurisdictional waters, including traditional navigable waters, if they possess characteristics that bring them within an excluded category of waters (rather than vice versa) is a change in policy, nor did they provide any "good reasons" for the change.

178. The agencies also did not acknowledge their expansion of the waste treatment system exclusion. Instead, in the preamble to the Replacement Rule, the agencies claim that they "are not changing the longstanding approach to implementing the waste treatment system exclusion," and describe the removal of the cooling pond exception to the waste treatment system exclusion as merely "ministerial." Replacement Rule, 85 Fed. Reg. at 22,328.

179. However, the combined effect of the agencies' changes to the exclusion—adding cooling ponds to the definition of waste treatment systems; eliminating any basis for jurisdiction over waters subject to the exclusion, even if they are traditional navigable waters, used in interstate commerce, and/or impounded jurisdictional waters; and applying the exclusion to all pre-Clean Water Act facilities—results in a tremendous expansion of the waste treatment system exclusion.

180. Nor did the agencies provide any "good reasons" for this change. The exclusion would now allow traditional, navigable-in-fact waters, including large and important public lakes

used for drinking water, fishing, swimming, and boating—and currently protected as jurisdictional waters with National Pollutant Discharge Elimination System permits regulating discharges of pollutants into them—to be claimed as waste treatment systems and excluded from the jurisdiction of the Clean Water Act, merely because they provide cooling water for power plants or other facilities. These changes would have tremendously harmful effects on water quality and important public water resources that thousands of people enjoy and depend on. The administration failed to acknowledge or consider any of these effects.

181. The agencies' unacknowledged, unsupported decisions to subject all jurisdictional waters to all exclusions and to expand the waste treatment system exclusion are arbitrary and unlawful.

THIRD CLAIM FOR RELIEF
Violation of the Administrative Procedure Act—Arbitrary and Capricious Rulemaking

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

183. The Administrative Procedure Act prohibits arbitrary and capricious rulemaking. 5 U.S.C. § 706(2)(A).

184. 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." State Farm, 463 U.S. at 43.

185. The agencies relied on multiple "factors which Congress has not intended [them] to consider," including speculation about voluntary actions of the regulated industry and states outside of the regulatory program, a supposedly predominant role for states under Clean Water Act section 101(b) at the expense of the Act's primary goal in section 101(a), and an artificial

distinction between "the Nation's waters" in section 101(a) and "waters of the United States" in section 112.

186. The agencies offered "an explanation for [their] 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." State Farm, 463 U.S. at 43. The Rule's content—specifically the "typical year" test and other criteria for determining whether a water is a "water of the United States"—is at direct odds with the agencies' stated objective of providing "predictability," "consistency," and "clarity," Replacement Rule, 85 Fed. Reg. at 22,250, 22,252.

187. The agencies also erroneously rely on state law to provide protection for newly non-jurisdictional waters, see id. at 22,253–54, despite record evidence demonstrating that states: do not have comparable programs; cannot adopt laws more stringent than federal standards; do not have adequate staffing to implement more robust programs[7]; and failed in every vital aspect to protect national water quality when, before the Clean Water Act, states were in charge of regulating water pollution.[8]

188. The agencies also "entirely failed to consider an important aspect of the problem," including the removal of jurisdiction from currently protected waters and the effects of that lost jurisdiction on the Act's water quality objectives and goals.

189. Despite being charged with a scientifically grounded goal—"restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters"—the agencies unlawfully reject the established science of hydrologic connectivity. See, e.g., Science

[7] See generally Letter from Attorneys General to A. Wheeler, U.S. EPA, & R.D. James, Dep't of Army at 41, 45–46 (Apr. 15, 2019) (Submitted to EPA Docket Center EPA-HQ-OW-2018-0149 on April 15, 2019); Final Resource and Programmatic Assessment.

[8] E.g., SELC Comments on Proposal at 11-14.

Advisory Board Final Commentary at 1 (criticizing the Replacement Rule for "lacking" a "scientific basis" and "consistency with the objectives of the Clean Water Act"); Science Advisory Board Draft Commentary at 4 (criticizing the "departure of the proposed Rule from EPA recognized science" and the lack of "fully supported scientific basis.").

190. Rather than establish that the Replacement Rule is consistent with the Clean Water Act, the agencies conceded that the Rule degrades the chemical, physical, and biological integrity of the Nation's waters, see, e.g., Final Replacement Rule Economic Analysis at 105, yet they avoided any meaningful analysis of the nationwide effects of the Rule. The agencies' failure to quantify those impacts, or to address the loss of the Clean Water Rule's clearer protections for vulnerable waters and the resulting degradation of those waters, is unlawful.

191. The agencies' reliance on unfounded speculation that some states may step up to create programs to protect newly non-jurisdictional waters is particularly glaring because of EPA's pending efforts in a separate rulemaking to restrict states' long-held authority under section 401 of the Clean Water Act to protect waters within their boundaries. See Proposed Rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019). The agencies fail to acknowledge, much less explain, this fundamental "tension" between the two rulemakings, see U.S. EPA, The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 11: Economic Analysis and Resource and Programmatic Assessment at 47–48 ("disagree[ing] . . . that there is tension"), and fail to address how crippling states' ability to protect their waters will magnify the water quality impacts of the Replacement Rule.

192. For these reasons, the Replacement Rule is "arbitrary," "capricious," an "abuse of discretion," and "not in accordance with law" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

FOURTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act—Arbitrary and Unexplained Boundary Between Jurisdictional and Non-jurisdictional Waters

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

194. A rule is arbitrary and capricious when agencies do not reasonably explain lines drawn by a rule. E.g., Dep't of Commerce v. New York,—— U.S. ——, 139 S. Ct. 2551, 2575, 204 L.Ed.2d 978 (2019) (noting "[t]he reasoned explanation requirement of administrative law" means that courts "cannot ignore the disconnect between the decision made and the explanation given."); Mfrs. Ry. Co., 676 F.3d at 1096 ("[T]he [Administrative Procedure Act] requires that an agency's exercise of its statutory authority be reasonable and reasonably explained.").

195. According to the agencies, the purpose of this rulemaking is to identify the boundary "between [federally] regulated 'waters of the United States' and the waters subject solely to State and tribal authority." Replacement Rule, 85 Fed. Reg. at 22,269 ("The purpose of this rulemaking is to establish the boundary between regulated 'waters of the United States' and the waters subject solely to State and tribal authority"); see also, e.g., id. at 22,270 ("Under this rule, the agencies . . . draw[] the boundary between those waters subject to federal requirements under the CWA and those waters that States and Tribes are free to manage under their independent authorities.").

196. The agencies have failed to provide a reasoned explanation for how or where they drew boundary between state and federal "waters," and they failed to demonstrate how or why their line-drawing makes sense on the ground. The agencies offer no reasonable criteria that could be used to differentiate between federal and state jurisdiction.

197. The agencies failed to provide a reasoned explanation for the application of the "typical year" test, which delimits nearly every category of federally jurisdictional waters, or for

the boundaries they draw between federal and state jurisdiction. The "typical year" test is fundamentally indeterminate and provides no underlying principle to guide agency discretion. Among other things, the typical year test is unclear on its face, contains inconsistent seasonal and annual elements, and suffers such inherent uncertainty that a water could be both jurisdictional and non-jurisdictional in the same year or even in the same minute.

198. The agencies have also failed to provide a reasoned explanation for treating wetlands that are *flooded by* a jurisdictional water as jurisdictional, but not those wetlands that *flood into* a jurisdictional water. Replacement Rule, 85 Fed. Reg. at 22,310.

199. Because the Administrative Procedure Act required the agencies' rulemaking to "be reasonable and reasonably explained," the Replacement Rule is invalid.

FIFTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act—Arbitrary Failure to Treat Similar Situations Similarly

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

201. A rulemaking is arbitrary if it violates the basic premise that "[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." Indep. Petroleum Ass'n, 92 F.3d at 1258. Because the Rule lacks any consistent principle for determining which streams and wetlands are jurisdictional and which are not, it fails to treat similar cases in a similar manner.

202. The agencies treat similarly-situated streams differently with no rational justification.

203. According to the agencies, the tributary definition "rests upon a reasonable inference of ecological interconnection" with navigable waters. Replacement Rule, 85 Fed. Reg. at 22,288. In their Final Economic Analysis, however, the agencies acknowledge that ephemeral

streams "perform similar hydrological and ecological functions, including moving water, sediments, and nutrients, providing connectivity within the watershed and habitat to wildlife." Final Economic Analysis at 107. Despite conceding that ephemeral streams have a "similar" ecological connection with jurisdictional waters as perennial and intermittent streams do, id., the agencies exclude them from jurisdiction, failing to "treat similar cases in a similar manner." Indep. Petroleum Ass'n, 92 F.3d at 1258.

204. The agencies' arbitrariness also extends to wetlands in close proximity to jurisdictional waters. Under the Rule, some wetlands must have a physical or surface hydrologic connection with jurisdictional waters to be considered jurisdictional, while others do not. For example, wetlands that are inundated by water from a jurisdictional stream or river in a typical year are jurisdictional because they have a hydrologic surface connection, at least ephemerally. Replacement Rule, 85 Fed. Reg. at 22,315. But wetlands that abut (or "touch") jurisdictional waters are considered jurisdictional, without any consideration of surface hydrologic connection, solely based on their location. Id. at 22,307. Other wetlands can be jurisdictional without either a physical connection or a surface hydrologic connection in a typical year if they are separated from a jurisdictional stream or wetland by a *single*, *natural* feature such as a berm or dune. Id. at 22,311. Yet if the same type of wetland, providing similar benefits to downstream waters, is separated from a jurisdictional water by any type of *artificial* berm or other man-made feature (or is separated from a jurisdictional water by *more than one natural* feature), regardless of size, then the wetland is non-jurisdictional.

205. Similarly, wetlands that are flooded by a jurisdictional water are jurisdictional, but wetlands that flood into a jurisdictional water are not. Replacement Rule, 85 Fed. Reg. at

22,310. There is no rational basis for the Rule's hodgepodge of wetland jurisdiction, and the agencies offer no consistent rationale for treating similarly situated wetlands differently.

206. In addition, the burden of the regulatory gap created by this Rule falls inequitably on states with varying levels of state resources and abilities to protect water quality. As a result, similarly situated traditional navigable waters will receive inequitable protection under the Rule.

207. Because the Rule fails to treat similarly situated waters similarly, it must be rejected.

SIXTH CLAIM FOR RELIEF

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

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

209. The Administrative Procedure Act requires agencies to provide public notice of a proposed rulemaking, give interested persons an opportunity to participate in the rulemaking by submitting comments, and consider the relevant comments submitted. 5 U.S.C. § 553(b), (c). The opportunity for comment during an agency rulemaking must be meaningful. Among other things, the agency must provide the reasoning for its proposed rulemaking, there must be enough time for the public to comment, and the agencies must meaningfully respond to relevant comments received.

210. "The important purposes of this notice and comment procedure cannot be overstated." N.C. Growers' Ass'n, 702 F.3d at 763. When, as here, a proposed regulation is aimed at eliminating protections that were previously adopted by an agency, notice and comment also "ensures that … [the] agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of [the removal of protections]." Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 446 (D.C. Cir. 1982),

aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am., 463 U.S. 1216 (1983).

211. "If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals." Connecticut Light and Power v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982); see also Nat'l Cable Television Ass'n, Inc. v. F.C.C., 747 F.2d 1503, 1507 (D.C. Cir. 1984) ("The purpose of the NPRM is to 'provide an accurate picture of the reasoning that has led the agency to the proposed rule,' so that interested parties can contest that reasoning if they wish.") (citing Connecticut Light, 673 F.2d at 530-31). Without that opportunity for comment, "the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making." Connecticut Light, 673 F.2d at 530.

212. Here, the agencies did not provide a meaningful opportunity to comment on the proposed Replacement Rule.

213. The approach outlined in the agencies' Replacement Rule proposal reverses decades of law and agency practice, but lacks any meaningful, valid explanation for the agencies' departure. By failing to consider the merits of abandoning existing protections or account for the dramatic reduction in water quality protections under the Replacement Rule, the agencies prevented the public from meaningfully commenting on the Rule, just as they did with the Suspension Rule vacated by this Court in 2018.

214. The agencies also provided an unreasonably short time period in which to comment.

215. By asking for comment on so many possibilities for further restricting jurisdiction in the final Rule, without stating the associated reasoning, the agencies made it impossible for

the public to predict with any confidence what the agencies were actually considering, much less the time to meaningfully comment on the agencies' proposal.

216. The agencies provided just 60 days for public comments despite proposing a definition that reverses more than 40 years of protections for waters across the country, discards the agencies' long-standing interpretations of Supreme Court case law, and introduces complex definitions that require technical expertise to analyze.

217. By refusing to extend the comment deadline as requested by members of Congress and hundreds of citizen groups, the agencies deprived the public of meaningful participation.

SEVENTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act and the Clean Water Act—Unlawful Rejection of "Significant Nexus" Test

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

219. The definition of "waters of the United States" must at least include jurisdiction over waters that have a "significant nexus" to downstream waters, as recognized in Riverside Bayview Homes, SWANCC, Rapanos, and every court of appeals to consider the issue. E.g., Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288–89 (4th Cir. 2011).

220. In the Replacement Rule, the agencies openly reject the binding "significant nexus" standard. E.g., Replacement Rule, 85 Fed. Reg. at 22,325 ("the final rule eliminates the case-specific application of Justice Kennedy's significant nexus test."); U.S. EPA, The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 7: Lakes and Ponds at 10 ("The agencies [believe] . . . that neither the [Clean Water Act] nor Supreme Court case law require the significant nexus test to implement the definition of 'waters of the United States.'"). That is, the agencies strip Clean Water Act protections from many if not most streams

and wetlands across the country and *admit* that they do so without regard to whether these waters significantly affect the chemical, physical, and biological integrity of the Nation's waters.

221. An agency charged with implementing a statute ordinarily lacks authority to deviate from or abdicate its statutory responsibilities. See Massachusetts v. EPA, 549 U.S. 497, 532–33 (2007) (emphasizing centrality of statutory criteria in guiding agency action).

222. Congress entrusted the agencies with the unequivocal goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and protecting the "waters of the United States."

223. The agencies cannot now undermine the very charge Congress gave them by stripping protections from the headwaters, streams, and wetlands needed to maintain the structure, function, and overall integrity of our rivers, lakes, estuaries, and oceans. See Jones Bros., Inc. v. Sec'y of Labor, 898 F.3d 669, 674 (6th Cir. 2018) (stating an agency "may not invalidate the statute from which it derives its existence and that it is charged with implementing.").

224. As recently as in their October 2019 Repeal Rule, the agencies affirmatively recognized that the Clean Water Act can be lawfully interpreted to cover streams, rivers, lakes, and wetlands excluded from protection under the Replacement Rule. The agencies cannot abdicate the authority Congress vested in them to protect those waters by dramatically limiting jurisdiction.

225. Because the Replacement Rule refuses to protect "waters of the United States," as defined by Supreme Court precedent, and because of the harmful effects that result from that abdication, the Replacement Rule runs directly counter to the "primary objective" of the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the

Nation's waters." Treacy v. Newdunn Assocs., LLP, 344 F.3d 407, 417 (4th Cir. 2003) (quoting 33 U.S.C. 1251(a)).

226. The Rule is therefore contrary to law and must be set aside.

EIGHTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act and the Clean Water Act—
Defining "Waters of the United States" to Exclude Traditional Navigable Waters

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

228. To comply with the Administrative Procedure Act, an agency must demonstrate that the new policy it adopts is consistent with the governing statute. Fox, 556 U.S. at 514–15.

229. By excluding otherwise jurisdictional waters, including traditional navigable waters, if they also meet the definition of any of the excluded categories of waters, see Replacement Rule, 85 Fed. Reg. 22,338 (stating that the jurisdictional categories are "subject to" the non-jurisdictional categories), the Replacement Rule violates the core principles and most longstanding water protections of the Clean Water Act.

230. This unlawful change, coupled with the agencies' new definition of "waste treatment system," appears to exclude large public lakes, also navigable waters, from the Act's jurisdiction contrary to Congress's intent. S. Rep. No. 92-414, at 7 (1971), reprinted in 1971 U.S.C.C.A.N. 3668, 3674 (finding the use of lakes, rivers, and streams as waste treatment systems "unacceptable.").

231. The Clean Water Act protects against discharges into "navigable waters," defined as "waters of the United States." 33 U.S.C. § 1362. The agencies cannot redefine "waters of the United States" to exclude traditional navigable waters, whether through the waste treatment exclusion or any other exclusion. Yet this is the unlawful result of making every category of jurisdictional waters "subject to" every exclusion. See Replacement Rule, 85 Fed. Reg. 22,338.

232. These changes would allow polluters to claim that the Clean Water Act no longer protects traditional, navigable-in-fact waters used for boating, swimming, subsistence fishing, regional fishing tournaments, and drinking water. They violate even the restrictive interpretation of "waters of the United States" set out in Justice Scalia's plurality opinion in Rapanos, which provides that "'the waters of the United States' include only relatively permanent, standing or flowing bodies of water. . . . as found in 'streams,' 'oceans,' rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Rapanos, 547 U.S. 715, 732–33 (quoting Webster's New Intl. Dictionary). And they would allow polluters claiming the exclusion to undo decades of protections for waters currently recognized as "waters of the United States" and currently protected by Clean Water Act pollutant discharge permits regulating the addition of pollutants into navigable waters, including many public lakes.

233. These changes deny protections to core waters of the United States, including traditional navigable waters such as public lakes, and violate the Clean Water Act's protection of "waters of the United States," as well as the Act's primary objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." These changes abdicate the agencies' statutory authority over lakes that have been considered "waters of the United States" for decades.

234. For these and other reasons, the Replacement Rule's provision making navigable waters "subject to" the exclusions and its waste treatment system exclusion violate the Clean Water Act. The Replacement Rule is thus "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 706(2)(A).

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court:

1. Declare that the agencies acted arbitrarily and unlawfully in promulgating the challenged rule, "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 Fed. Reg. 22,250 (April 21, 2020);

2. Vacate and set aside the challenged regulation;

3. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, associated with this litigation; and

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

Respectfully submitted this the 29th day of April 2020.

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**Pro hac vice* application forthcoming