Attorneys General of California, New York, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, Wisconsin, the District of Columbia, and the City of New York, and the California State Water Resources Control Board

September 3, 2021

Via Electronic Submission

Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Jaime Pinkham
Acting Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

RE: Notice of Public Meetings Regarding "Waters of the United States"; Establishment of Public Docket; Request for Recommendations, 86 Fed. Reg. 41,911 (Aug. 4, 2021) Docket ID No. EPA–HQ–OW–2021–0328

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

The Attorneys General of California, New York, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, Wisconsin, the District of Columbia, and the City of New York, and the California State Water Resources Control Board (the States) submit these comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Army Corps) (collectively, Agencies) notice announcing plans to initiate two new rulemakings related to the regulatory definition of "waters of the United States" under the Clean Water Act. *See* 86 Fed. Reg. 41,911 (Aug. 4, 2021) (hereinafter, Notice). The States strongly support the Agencies' decision referenced in the Notice to replace *The Navigable Waters Protection Rule: Definition of "Waters of the United States"*, 85 Fed. Reg. 22,250 (Apr. 21, 2020) (2020 Rule or Rule).

As the States have consistently explained, the 2020 Rule is arbitrary and capricious and otherwise unlawful because it impermissibly removes Clean Water Act protections for vast numbers of important waters, undermines and ignores the Act's water quality objective, contradicts well-established science, and fails to adequately consider the States' reliance on the prior long-standing regulatory framework. Moreover, the 2020 Rule has caused and will continue to cause significant and potentially irreversible harms to water quality and the States' interests. These are the reasons why the States have sued the Agencies to vacate the Rule.

The Agencies themselves have now recognized the significant deficiencies of the 2020 Rule and have acknowledged the severe impacts on the Nation's waters that have resulted from application of the Rule during the little more than a year it has been in effect. Accordingly, the Agencies have indicated that they intend to first replace the Rule with the regulatory definition of "waters of United States" that existed prior to 2015, as amended to be consistent with Supreme Court decisions interpreting that definition. 86 Fed. Reg. at 41,911. Following this first rulemaking, the Agencies state they will initiate a second rulemaking that "further refines and builds upon that regulatory foundation." *Id.*

On August 30, 2021, the United States District Court for the District of Arizona remanded and vacated the 2020 Rule. *Pasqua Yaqui Tribe v. U.S. EPA*, ___F. Supp. 3d___, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021) (*Pasqua Yaqui Tribe*). The court concluded that the "seriousness of the Agencies' errors in enacting the [2020 Rule], the likelihood that the Agencies will alter the [2020 Rule's] definition of 'waters of the United States,' and the possibility of serious environmental harm if the [Rule] remains in place upon remand" all support vacatur of the Rule. *Id.*, at *5. Consistent with the vacatur of the 2020 Rule, the States urge the Agencies to immediately start applying the pre-2015 regulatory definition of "waters of the United States" which was codified in the *Definition of "Waters of the United States" – Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (2019 Rule). The restoration of the 2019 Rule as a result of the 2020 Rule's vacatur is in line with the Agencies' stated plans in the Notice to reinstate the pre-2015 regulatory framework and will thus save the significant time and resources that would have been otherwise dedicated to a rulemaking to repeal the 2020 Rule. Moreover, because the pre-2015 regulatory regime is more protective than the 2020 Rule, implementation of that regime for a limited time until the Agencies develop a new, broader definition of "waters of the United States" is an appropriate interim measure to start the reversal of the water quality degradation caused by the 2020 Rule.

The States ask the Agencies to begin working without delay on their second proposed rulemaking to develop and promulgate a new definition of "waters of the United States." In accord with the Clean Water Act's objective, legislative intent, and applicable caselaw, this definition should be broad, protective, and science-based. The new definition also must take into account climate change and environmental justice concerns. The Agencies should complete this second rulemaking expeditiously, and certainly within the next 12 months.

I. The Clean Water Act Was Enacted with A Broad Water Quality Objective to Safeguard and Restore the Nation's Waters.

The Clean Water Act's "objective . . . is to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, the Act provided the federal government and the states with expanded tools to address water pollution, which, in the words of Senator Edmund Muskie:

> "threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived in our half-hearted attempts to control it;

and like any other disease, it can kill us."[1]

The Act's objective, therefore, "is not merely the pious declarations that Congress so often makes in passing laws; on the contrary, this is literally a life or death proposition for the Nation."[2]

Through the Act, Congress created a uniform "national floor" of water quality regulation by establishing minimum pollution controls for "waters of the United States." *Arkansas v. Oklahoma,* 503 U.S. 91, 110 (1992) (the Clean Water Act authorizes EPA "to create and manage a uniform system of interstate water pollution regulation"). Nationwide controls are critical to protecting water quality in downstream states because many of the Nation's waters cross state boundaries and downstream states have limited ability to control water pollution sources in upstream states. *See Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 490-91 (1987). Those controls "prevent the 'Tragedy of the Commons' that might result if jurisdictions [could] compete for industry and development by providing more liberal limitations than their neighboring states." *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977). Downstream states are disadvantaged if they have to impose more stringent controls to address pollution from upstream states to safeguard public health and welfare within their own borders. *See United States v. Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1326 (6th Cir. 1974).

Section 101(b) of the Act expresses Congress's policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution," and "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). One of the primary purposes of Section 101(b) is to provide for state implementation of the Clean Water Act's permit programs. *See A Legislative History of the Water Pollution Control Act Amendments of 1972*, Committee Print Compiled for the Senate Committee on Public Works by the Library of Congress, Ser. No. 93–1, p. 403 (1973) (referencing Section 101(b) and the "responsibility of states to prevent and abate pollution by assigning them a large role in the national discharge permit system established by the Act"). Accordingly, within the Act's framework, state rights and responsibilities are carried out as part of "a regulatory partnership," *Ouellette,* 479 U.S. at 499, "between the States and the Federal Government animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas*, 503 U.S. at 101.

A. The Definition of "Waters of the United States" Is the Basis for the Act's Protections.

The scope of waters encompassed by the term "waters of the United States" is of enormous significance as the term delineates whether the Clean Water Act's most important pollution control programs apply to protect and restore the quality and integrity of rivers, streams, wetlands, lakes, bays, and oceans.

To achieve its objective, the Clean Water Act prohibits discharges of pollutants from point sources to "navigable waters" without a permit or in violation of a permit. *Id.* §§ 1311(a), 1342, 1344, 1362(12). "Navigable waters" are "the waters of the United States, including the

[1] Statement of Senator Muskie, *reproduced in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 161 (1973).
[2] *Id.* at 164.

territorial seas." *Id*. § 1362(7). "Waters of the United States" encompass interstate waters. *Id.* § 1313(a) (specifying that protections for interstate waters under the Clean Water Act "shall remain in effect" without regard to navigability). The Act requires permits for two categories of discharges to "waters of the United States": (1) discharges of pollutants from point sources under Section 402; and (2) discharge of dredged or fill material under Section 404. 33 U.S.C. §§ 1342, 1344, 1362(6), (14). Nearly all states are authorized by EPA to operate the Section 402 permit program, and nearly all states rely on the Army Corps to operate the Section 404 permit program.

The Clean Water Act provides additional mechanisms for protecting "waters of the United States." Under Section 303, states must establish water quality standards for "waters of the United States" within their borders and impose additional pollution limits for waters that fall below these standards. 33 U.S.C. § 1313. Section 401 specifically provides that states are authorized to issue water quality certifications for projects that require a federal license or permit and that may result in a discharge to "waters of the United States." *Id.* § 1341.

II. Pre-2020 Regulations Defining "Waters of the United States," the 2020 Rule, and the Agencies' Review and Plans to Replace the Rule.

The Act does not define "waters of the United States," and the Agencies have defined those waters by regulation and guidance.

A. Pre-2020 Regulatory Definitions of "Waters of the United States."

The Agencies defined "waters of the United States" in regulations issued in the 1970s and 1980s (1980s definition). 42 Fed. Reg. 37,144 (July 19, 1977); 45 Fed. Reg. 85,336 (Dec. 24, 1980); 47 Fed. Reg. 31,794 (July 22, 1982); 51 Fed. Reg. 41,206 (Nov. 13, 1986); 53 Fed. Reg. 20,764 (June 6, 1988). The Supreme Court considered the 1980s definition in three decisions: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*); and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). Following *SWANCC* and *Rapanos*, the Agencies issued guidance in 2003 and 2008, respectively. *See* 68 Fed. Reg. 1995 (Jan. 15, 2003); *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) (*Rapanos* Guidance), Administrative Record (AR) EPA-HQ-OW-2018-0149-11695.[3]

In 2015, the Agencies issued the Clean Water Rule (2015 Rule), which revised the definition of "waters of the United States." 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. § 328.3 (2015)). In promulgating the 2015 Rule, the Agencies considered and relied upon a report prepared by EPA's Office of Research and Development, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Connectivity Report), which accounted for more than 1,200 peer-reviewed publications. 80 Fed. Reg. at 37,057; Connectivity Report, AR 11691. The Agencies also relied

[3] The Administrative Record (AR) Index for the 2020 Rule is provided as Attachment A. Documents in the AR for the Rule contain the prefix EPA-HQ-OW-2018-0149 followed by the Docket Document ID. Citations to the AR herein omit the prefix and cite only to the Docket Document ID. All AR citations hyperlink to the www.regulations.gov URL provided in the AR Index set forth in Attachment A.

on independent review of the Connectivity Report by an expert panel of EPA's Science Advisory Board (Science Board). *Id*. The 2015 Rule relied on the "significant nexus" standard developed by the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos*. *See* 80 Fed. Reg. at 37,057.

In 2019, the Agencies issued a regulation (2019 Rule) that repealed the 2015 Rule and reinstated the 1980s definition. 84 Fed. Reg. 56,626. As the Agencies explained, the 2019 Rule recodified the pre-2015 regulatory definition to be applied "consistent with Supreme Court decisions and longstanding practice, as informed by applicable guidance documents." *Id*. at 56,664.

All pre-2020 regulatory definitions of "waters of the United States" included navigable-in-fact or "traditionally navigable waters," interstate waters, and the territorial seas. Those regulations did not exclude all ephemeral streams and did not require wetlands to have a surface water connection to other covered waters.

B. The 2020 Rule.

The 2020 Rule was promulgated in April 2020 and became effective on June 22, 2020. The 2020 Rule repealed the 2019 Rule.

At the direction of President Trump's Executive Order 13778, 82 Fed. Reg. 12,497 (Mar. 3, 2017), the 2020 Rule adopted a definition of "waters of the United States" grounded in Justice Scalia's plurality opinion in *Rapanos*. The Rule continued defining "waters of the United States" to include traditionally navigable waters and the territorial seas, but excluded many of the non-navigable tributaries and wetlands that were protected under every prior rule and guidance. By the Agencies' own estimates prepared before promulgation, the Rule excluded from the Act's protections 18% of the nation's streams (encompassing more than a third of streams in the arid west) and over 50% of the nation's wetlands. AR 11767 at 2-4, 9. The Rule also, for the first time in the history of the Agencies' interpretation of "waters of the United States," excluded interstate waters as an independent category of jurisdictional waters.

The 2020 Rule expressly excluded "ephemeral" streams from the scope of protected waters, defining "ephemeral" as "surface water flowing or pooling only in direct response to precipitation (e.g., rain or snowfall)." 85 Fed. Reg. at 22,338. The Agencies claimed that the 2020 Rule's categorical exclusion of ephemeral streams from "waters of the United States" was justified by a "connectivity gradient," 85 Fed. Reg. at 22,288, asserting that the Connectivity Report and the Science Board supported this conclusion by recognizing that the connections between waters vary in degree based on multiple factors. AR 386 at 64-65 (enumerated as 53-54). That assertion is incorrect: the Science Board and its members determined that the Agencies ignored the actual conclusions of the Connectivity Report and misrepresented both the Science Board's review and the Connectivity Report's explanation of the import of the connectivity gradient. *See* AR 3825 at 2-3; AR 8909 at 5; AR 3291 at 9; AR 11589, Attachment 1.

The 2020 Rule also limited the scope of wetlands protected by the Clean Water Act. The Rule included only those wetlands that qualify as "adjacent wetlands," defined primarily as wetlands either touching another covered water or inundated by flooding from another covered water in a typical year. 85 Fed. Reg. at 22,338. Thus, the Rule, ignoring the robust scientific

evidence before the Agencies that dictated a contrary conclusion, excluded most wetlands that do not touch or otherwise have a surface water connection to other covered waters.

The 2020 Rule included non-navigable tributaries only if they carry perennial or intermittent flows to otherwise covered waters in a "typical year." 85 Fed. Reg. at 22,286. Similarly, to be "waters of the United States" under the Rule, wetlands must generally have a surface water connection to jurisdictional waters in a "typical year." *See id.* at 22,274. "Typical year" is defined as "when precipitation and other climatic variables are within the normal periodic range . . . for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." *Id.* at 22,339.

The Agencies asserted that they analyzed the effects and impacts of the 2020 Rule on water quality by preparing a "Resource and Programmatic Assessment" (RPA) and an "Economic Analysis" (EA). *See* 85 Fed. Reg. at 22,331. But when they promulgated the Rule, the Agencies expressly disavowed the RPA and EA as bases for it. *Id.* at 22,332 ("the final rule is not based on the information in the agencies [EA] or [RPA]"), 22,335; EA, AR 11572 at 12 (enumerated as xi); RPA, AR 11573 at 8 (enumerated as 6). By their own admission, the Agencies' reworking of the "waters of the United States" definition in the 2020 Rule was not tethered to any findings about the effects and likely consequences of the Rule on the Act's objective to protect and restore the quality and integrity of waters nationwide.

The essential characteristics of the 2020 Rule are based not on an application of scientific principles or a consideration of harms to impacted waters, but instead on a "unifying legal theory for federal jurisdiction over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas." 85 Fed. Reg. at 22,252. The Rule's exclusion of non-navigable waters—including streams and wetlands—that lack a specific surface water connection to other jurisdictional waters is drawn directly from the *Rapanos* plurality opinion, which commanded only a minority of the Justices of the Supreme Court. *See, e.g.*, 85 Fed. Reg. at 22,273 (citing "plurality decision in *Rapanos*" for "specific surface water connection" requirement); *id.* at 22,289 ("the requirement that a tributary be perennial or intermittent . . . reflects the [*Rapanos*] plurality's" opinion); *see also id*. at 22,266, 22,278-79, 22,309 (same).

States, tribes, environmental and community organizations, business groups, and individuals challenged the 2020 Rule in more than 10 separate lawsuits filed in district courts across the country.[4]

[4] *California v. Regan*, Case No. 3:20-cv-03005-RS (N.D. Cal.); *Colorado v. U.S. EPA*, Case No. 1:20-cv-01461-WJM (D. Colo.); *Waterkeeper Alliance, Inc. v. Regan*, Case No. 3:18-cv-03521-RS (N.D. Cal.); *Pasqua Yaqui Tribe v. U.S. EPA*, Case No. 4:20-cv-00266-TUC-RM (D. Ariz.), *Conservation Law Foundation v. U.S. EPA*, Case No. 1:20-cv-10820-DPW (D. Mass.); *South Carolina Coastal Conservation League v. Regan*, Case No. 2:20-cv-01687-BHH (D.S.C.); *Navajo Nation v. Regan*, Case No. 2:20-cv-602-MV-GJF (D.N.M.); *New Mexico Cattle Growers' Assn. v. U.S. EPA*, Case No. 1:19-cv-00988-RB-SCY (D.N.M.); *Puget Soundkeeper Alliance v. U.S. EPA*, Case No. 2:20-cv-0950-JCC (W.D. Wash.); *Washington Cattlemen's Assn. v. U.S. EPA*, Case No. 2:19-cv-0569-JCC (W.D. Wash.); *Oregon Cattlemen's Assn. v. U.S. EPA*, Case No. 3:19-cv-00564-AC (D. Or.); *Pueblo of Laguna v. Regan*, Case No. 1:21-cv-277-JFR-KK (D.N.M.); *Murray v. Regan*, Case No. 1:19-cv- 01498-LEK/TWD (N.D.N.Y.).

C. The Agencies' Review of the 2020 Rule and Plans to Replace It.

Following the change in federal administration in January 2021, President Biden directed the Agencies to review the 2020 Rule and determine if it protects the environment and ensures clean water, and to decide whether the Rule should be modified, rescinded, or maintained. 86 Fed. Reg. 7037 (Jan. 25, 2021). In addition, President Biden revoked Executive Order 13778. *Id.* at 7041.

On June 9, 2021, the Agencies announced that they had completed their review of the 2020 Rule and "have determined that the rule is significantly reducing clean water protections."[5] The Agencies further acknowledged the serious legal deficiencies of the 2020 Rule as well as its staggering impacts on water quality.[6] On August 4, 2021, the Agencies published the Notice, stating that they plan to engage in two new rulemakings, the first of which will reinstate the prior long-standing regulations that existed before 2015(as revised to be consistent with Supreme Court caselaw), and the second of which will propose a new definition of "waters of the United States" based on the pre-2015 regulatory foundation. 86 Fed. Reg. at 41,912. The Notice requested public input and recommendations on various issues related to the regulatory definitions of "waters of the United States," including: implementation; regional, state, and tribal interests; identification of relevant science related to the importance of streams, wetlands, and other waters to "restore and maintain the chemical physical, and biological integrity of the nation's waters"; environmental justice interests affected by the jurisdictional status of waters under the Clean Water Act; climate implications; the scope of jurisdictional tributaries, including ephemeral, intermittent, and perennial streams; the scope of jurisdictional ditches; the scope of adjacency; and exclusions from the definition. *Id.* at 41,913-14. Below the States provide input regarding many of these issues.

III. The 2020 Rule Is Fundamentally Flawed

The 2020 Rule excludes from the scope of "waters of United States" many of the non-navigable tributaries and wetlands that have been protected under the Agencies' prior rules and guidance. And for the first time in the history of the Agencies' interpretation of "waters of the United States," the Rule excludes interstate waters as an independent category of jurisdictional waters.

A. The 2020 Rule Is Arbitrary and Capricious.

An agency's decisionmaking process is arbitrary and capricious when the agency has "failed to consider an important aspect of the problem" or failed to "examine the relevant data and

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[5] News Release, EPA, Army Corps Announce Intent to Revise Definition of WOTUS, https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus (last accessed September 3, 2021).

[6] Declaration of EPA Assistant Administrator for Water Radhika Fox (Fox Decl.) ¶¶ 8-20 and Declaration of Acting Assistant Secretary of the United States Army for Civil Works Jaime Pinkham (Pinkham Decl.) ¶¶ 8-20, provided in Attachment B to this letter; *see Memorandum for the Record, Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule*, https://www.epa.gov/sites/default/files/2021-06/documents/3_final_memorandum_for_record_on_review_of_data_web_508c.pdf (last accessed September 3, 2021).

articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S.A, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*). An agency's decisionmaking also is flawed if the agency disregards or countermands its earlier factual findings without a reasoned explanation, "even when reversing a policy after an election," and that explanation must be "more substantial" when the agency's decision "rests on factual findings contradicting those" made previously. *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 967-68 (9th Cir. 2015); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 538 (2009). An agency issuing a rule that abandons prior policy or practice must also take into account the "serious reliance interests" engendered by the agency's prior position. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

The Agencies' decisionmaking process for the 2020 Rule was arbitrary and capricious in at least five principal ways.

1. The 2020 Rule Undermines the Clean Water Act's Objective.

Contrary to the Agencies' claim under the prior administration that they redefined "waters of the United States" based on the Act's objective, 85 Fed. Reg. at 22,250, the Agencies did not in fact give any meaningful consideration whatsoever to that objective—"to restore and maintain the integrity of the nation's waters"—and failed to provide reasoned explanation for their conclusion that the Rule's new exclusions would further the Act's objective. In response to public comments on the proposed 2020 Rule, the Agencies stated that they had assessed the Rule's impacts in their RPA and EA. AR 11574, Topic 1 at 112-13. Yet they ignored the ways in which those assessments fatally undermined the Rule when they declared that "the final rule is not based on" and "the agencies are not relying on" either the EA or the RPA. 85 Fed. Reg. at 22,332, 22,335. Because those impact assessments assessed the Rule's consequences for water quality, the Agencies' refusal to rely on them is a concession that the Rule was adopted in explicit disregard for the foundational purpose of the Act.

In fact, following their review of the 2020 Rule earlier this year, the Agencies acknowledged that the Rule was adopted without taking into account the water quality objective set forth in Section 101(a) of the Act, 33 U.S.C. § 1251(a). Fox Decl. ¶¶ 10, 11 (explaining that the Agencies "did not appropriately consider the effect" of the 2020 Rule "on the integrity of the nation's waters"); Pinkham Decl. ¶¶ 10, 11 (same). As the Agencies now concede, "consideration of the effects [of the Rule] on the integrity of the nation's waters is a critical element in assuring consistency with the statutory objective of the CWA." Fox Decl. ¶ 13; Pinkham Decl. ¶ 13 (citing to *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468-69 (2020)). And, by the Agencies' own admission, the 2020 Rule's preamble itself demonstrates that the Agencies' consideration of the "science and water quality impacts in developing the rule" was insufficient to determine that the Rule was consistent with the Act's objective. Fox Decl. ¶¶ 11, 13, 14; Pinkham Decl. ¶¶ 11, 13, 14.

2. The 2020 Rule Disregarded and Contradicted the Science Establishing the Importance of Excluded Streams and Wetlands for Downstream Water Quality.

The Agencies also entirely disregarded science and the factual findings they made in

2015 regarding the impacts on downstream water quality of the streams and wetlands excluded by the 2020 Rule. The Agencies claimed that the 2020 Rule's exclusion of ephemeral streams "relied on the available science" and "rests upon a reasonable inference of ecological interconnection" with navigable waters. 85 Fed. Reg. at 22,288, 22,310. But they offered no explanation or support for that "inference." Moreover, the "available science" was the Connectivity Report, the scientific studies assessed in it, and the Science Board's review of it, each of which contradict any inference that ephemeral streams are categorically not important for restoring or maintaining downstream water quality.

The Agencies similarly failed to explain how the exclusion of wetlands without direct surface connections to other waters was consistent with the science. Here again, the Agencies claimed that their decision to redefine adjacent wetlands covered by the Act was "informed by science." *Id.* at 22,314. However, the Agencies merely referred to statements in the Connectivity Report and the Science Board Review that wetlands closer to streams tend to have more obvious connections to streams; they did not explain how they concluded that some wetlands should be excluded. *See id.* Moreover, the Science Board in its official capacity, and its members separately in their professional capacities, have stated that the Agencies' line-drawing with respect to wetlands "departs from established science," AR 11589, Attachment 1 at 3, and disregarded "[m]ultiple lines of evidence point[ing] to the importance of chemical and biological connectivity between wetlands and downstream waters." AR 3825 at 5.

The Agencies have now acknowledged that their consideration of the "science and water quality impacts in developing the [2020 Rule]" was insufficient and that they did not "look closely enough at the effect ephemeral waters have on traditional navigable waters" when they categorically excluded all ephemeral streams in the 2020 Rule. Fox Decl. ¶¶ 11, 13, 14; Pinkham Decl. ¶¶ 11, 13, 14.

3. The "Typical Year" Requirement Is Arbitrary and Capricious.

The typical year requirement excludes from the Act's protections waters that are essential to restore and maintain downstream waters' integrity and thus is contrary to the evidence before the Agencies when they promulgated the 2020 Rule. Although the Agencies purport to use this requirement to identify "times when it is not too wet and not too dry," 85 Fed. Reg. at 22,274, the Agencies offered no factual support forwhy it is appropriate to do so in this manner. By focusing on the preceding thirty-year period in crafting the "typical year" requirement, the Agencies ignored significant comments and evidence about the substantial connectivity between waters during what are increasingly atypical years (when compared to 30 years of historical data) resulting from climate change. *See* pp. 13- 14, *supra*. Wetlands that would otherwise function to trap pollutants and mitigate downstream flooding, regardless of their surface water connection in a typical year, lost protection under the 2020 Rule because of this arbitrary requirement. *See* AR 4389 at 3; AR 5061 at 19; AR 5126 at 4-5; *see also* Dkt. No. 30-22 at 10-13; Dkt. No. 30-15 at 12-13.[7] The Rule also fails to explain the meaning of the "other climatic variables" and "geographic area" components of the typical year definition, 85 Fed. Reg.

[7] The States' numerous declarations attesting to the serious harms that have resulted and will continue to flow from the 2020 Rule filed in their challenge of the Rule, *California v. Regan*, Case No. 3:20-cv-03005-RS (N.D. Cal.) are provided in Attachment C. The declarations are cited in this letter by their docket numbers.

at 22,341, leaving identification of protected waters subject to "vague and uncertain analysis." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 869 (9th Cir. 2005). The Agencies thus failed in promulgating the 2020 Rule to "articulate a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43.

4. The Agencies Failed to Examine and Explain How the 2020 Rule Is Consistent with the Clean Water Act's Policy Regarding the Responsibilities and Rights of States.

While the Agencies claimed that they considered "the primary responsibilities and rights of States" under the Act in promulgating the 2020 Rule, *see id.* at 22,252, 33 U.S.C. § 1251(b), they simply repeated the statutory phrase without explanation or analysis of how the 2020 Rule's exclusion of waters from the Act's protections serves that policy. Instead, the Agencies merely asserted that they balanced the Clean Water Act's objective against the Act's policy to preserve and protect the "responsibilities and rights of states to prevent, reduce, and eliminate pollution." *See* 85 Fed. Reg. at 22,252, citing 33 U.S.C. § 1251(b).

That policy does not support the Agencies' decision to narrow the scope of the Act's jurisdiction in the 2020 Rule: the policy reflects Congress's intent that the states are authorized to adopt and enforce water pollution controls that are more stringent than federal ones and to implement the Act's permitting programs in lieu of EPA. *See* 33 U.S.C. § 1370 (states are prohibited from "adopt[ing] or enforc[ing]" any water pollution control standard that is "*less* stringent" than an existing federal standard) (emphasis added); *EPA v. California ex. rel. State Water Resources Control Board*, 426 U.S. 200, 207 (1976) ("[c]onsonant with its policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,' Congress also provided that a State may issue [Section 402] permits 'for discharges into navigable waters within its jurisdiction,' but only upon EPA approval of the State's proposal to administer its own program."). Thus, the Act's policy to preserve states' rights and responsibilities under Section 101(b) does not provide any textual basis for narrowing the scope of "waters of the United States" in deference to state-only regulation.

But even if the policy were an appropriate basis for excluding some waters from "waters of the United States," the Agencies did nothing more when they promulgated the 2020 Rule than invoke the policy as a basis for narrowing the definition of "waters of the United States." *See, e.g.*, 85 Fed. Reg at 22,250, 22,269, 22,273, 22,296. They offered no analysis or explanation of whether or how excluding interstate waters as an independent category, as well as ephemeral streams and wetlands without surface water connections, preserves or protects the "responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

5. The Agencies Failed to Consider the States' Reliance Interests.

"When an agency changes course . . . it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (*DACA*) (quoting *Encino Motorcars*; internal quotation marks omitted); *see also California v. Azar*, 950 F.3d 1067, 1113 (9th Cir. 2020). In particular, an agency revising its prior policy is "required to assess whether

there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *DACA*, 140 S. Ct. at 1915.

The Agencies entirely failed to assess whether states have reliance interests based on the prior definitions of "waters of the United States" and then weigh those interests against the other factors the Agencies considered in deciding to change their longstanding policy. The 2020 Rule excludes (1) all ephemeral streams, and any other streams that do not contribute flow to a covered water in a "typical year"; (2) many wetlands that do not have a surface water connection to another covered water; and (3) interstate waters as an independent category. In contrast, the 1980s regulations defined "waters of the United States" broadly, and the 2008 *Rapanos* Guidance explained that the 1980s regulations include (1) ephemeral streams with a "significant nexus" to traditionally navigable waters; (2) wetlands that satisfy one of several physical or ecological factors in relation to traditionally navigable waters; and (3) all interstate waters. *Rapanos* Guidance, AR 11695 at 4-11. The 2015 Rule confirmed that "waters of the United States" include (1) ephemeral streams with bed and banks and ordinary high-water marks; (2) wetlands with important functional connections to covered waters other than surface water connections; and (3) all interstate waters. 80 Fed. Reg. at 37,055, 37,068, 37,079, 37,080-81. The 2019 Rule reinstated the 1980s regulations and the *Rapanos* Guidance. 84 Fed. Reg. at 56,626.

Rather than recognize and consider the States' reliance on these prior broader, long-standing definitions, the Agencies took the position that the States did not have reliance interests in the 2015 Rule because it was the subject of substantial litigation or in the 2019 Rule because it was in place only for a short period of time. AR 11574, Topic 1 at 29; Topic 11 at 12-25. The Agencies, however, ignored the fact that for many decades their regulations consistently covered a far wider scope of waters than are covered under the 2020 Rule. And the Agencies refused to meaningfully consider and weigh the States' significant reliance interests in the development of the 2020 Rule, instead simply stating that "Congress envisioned a major role for the states in implementing the CWA" and "[t]he ultimate response of states and tribes to this rule would not change the agencies' interpretation of the scope of their legal authority." *Id.* at 28.

B. The 2020 Rule Is an Impermissible Interpretation of the Clean Water Act.

The 2020 Rule adopted an impermissible and unreasonable interpretation of "waters of the United States" because it categorically excluded all ephemeral streams, many wetlands, and interstate waters as an independent category. That interpretation is untethered from and conflicts with the Act's text, structure, and essential objective, and contradicts Supreme Court precedent.

The Agencies' exclusion of ephemeral streams in the Rule relied on the *Rapanos* plurality's conclusion that ephemeral waters are not within the scope of "waters of the United States." *Rapanos,* 547 U.S. at 733-34. The Rule repeatedly cited "the plurality decision in *Rapanos*," 547 U.S. at 732, as the basis for exclusion of ephemeral streams, explaining that, "[a]ccording to the *Rapanos* plurality . . . the ordinary meaning of the term 'waters' does not include areas that are dry most of the year, and which may occasionally contain 'transitory puddles or ephemeral flows of water.' 547 U.S. at 733." 85 Fed. Reg. at 22,273. That interpretation is impermissible because a majority of the Supreme Court Justices in *Rapanos* (namely, Justice Kennedy and the four dissenting Justices) agreed that interpreting the term "waters of the United States" to categorically remove ephemeral streams from its scope is

contrary to the Clean Water Act's text, structure, and purpose. *Id.* at 769-70, 800. *See Vasquez v. Hillery*, 474 U.S. 254, 262 n.4 (1986) (agreement of five justices, even when not joining each other's opinions, constitutes a majority whose opinion carries "precedential weight"); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (four dissenting Justices and a Justice concurring in the judgment who agree on a particular legal conclusion "form[] a majority to require application" of that legal conclusion); *see also Sackett v. EPA*, ___ F.4th ___, No. 19-35469, 2021 WL 3611779, at *9-12 (9th Cir. Aug. 16, 2021) (reaffirming that Justice Kennedy's concurrent is the controlling opinion from *Rapanos*).

Justice Kennedy's concurring opinion in *Rapanos* flatly rejected the plurality's "relatively permanent waters" test, explaining that "[t]he plurality's first requirement—permanent standing water or continuous flow, at least for a period of 'some months,'—makes little practical sense in a statute concerned with downstream water quality." *Rapanos*, at 769 (internal citations omitted). "Congress could draw a line to exclude irregular waterways," e.g., ephemeral streams, "but nothing in the statute suggests that it has done so." *Id.* at 769-770. "Quite the opposite, a full reading of the dictionary definition *precludes* the plurality's emphasis on permanence . . ." *Id*. (emphasis added). The four-Justice dissent, led by Justice Stevens, agreed that the plurality's "relatively permanent waters" standard was "without support in the language and purposes of the Act or in [the Court's] cases interpreting it." *Id.* at 800 (quoting Justice Kennedy's concurrence). For these and other reasons, both Justice Kennedy and the four-Justice dissent rejected the plurality's "relatively permanent waters" test as "inconsistent with the Act's text, structure, and purpose." *Rapanos*, 547 U.S. at 769-770, 800. This conclusion is the controlling rule of law from *Rapanos. See Vasquez*, 474 U.S. at 262 n.4; *Moses H. Cone Mem. Hosp.*, 460 U.S. at 17; *see also Sackett*, 2021 WL 3611779, at *9-12.

C. The 2020 Rule's Removal of Interstate Waters as a Category of Protected Waters Contradicts the Clean Water Act.

The Agencies' decision in the 2020 Rule that interstate waters as a category are not "waters of the United States" contradicts clear Congressional intent as reflected in the Act's text and structure and therefore fails under *Chevron* step one. See *Wilderness Society*, 353 F.3d at 1059. Federal jurisdiction over interstate waters under the Act, regardless of their navigability, has been longstanding and essential. In the Clean Water Act, Congress intended to prevent harms to downstream states from such detrimental upstream activities. In a departure from all previous agency definitions, the Rule no longer includes interstate waters as an independent category of "waters of the United States." Instead, interstate waters are protected only if they otherwise meet the new, narrower definition of "waters of the United States." AR 11574, Topic 1 at 26. The Agencies' failure to protect all interstate waters is contrary to the plain language, structure, and history of the Act and defies controlling precedent. Interstate waters are unquestionably subject to federal jurisdiction under the Act and the Agencies must include them as a category under any definition of the "waters of the United States." Failure to do so is an abdication of a core premise of the Act's cooperative federalism policy.

The Act's language clearly demonstrates that the Act protects all interstate waters. Enacted in 1972, Section 303(a) of the Act provides, in pertinent part, that any pre-existing "water quality standard applicable to interstate waters . . . shall remain in effect," unless determined by EPA to be inconsistent with any applicable requirements in effect prior to 1972. 33 U.S.C. §1313(a) (emphasis added). That express preservation of preexisting protections for interstate waters demonstrates that such waters are categorically protected by the Act. Without

reasoned explanation and in conflict with bedrock rules of statutory interpretation, *see Lowe v. S.E.C.*, 472 U.S. 181, 219 (1985) ("fundamental axiom of statutory interpretation that a statute is to be construed so as to give effect to all its language."), in the 2020 Rule the Agencies stated that Section 303(a) "was referring to interstate navigable waters," despite the fact that the word "navigable" is not in Section 303(a). 85 Fed. Reg. at 22,284.

In addition to conflicting with the Act's plain language, the Agencies' exclusion of interstate waters also ignored that the "Federal Water Pollution Control Act as it existed prior to the 1972 Amendments …. 'ma[de] it clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.'" *Illinois v. City of Milwaukee*, 731 F.2d 403, 408 (7th Cir. 1984) (emphasis added) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 (1972)). The prior administration's removal of protections for interstate waters, also ignores the purpose of the 1972 Amendments, which was to expand, not narrow, federal protection of waters. See S. Rep. No. 92-414, at 7 (1971) (1971 WL 11307, at *3674) (prior mechanisms for abating water pollution "ha[d] been inadequate in every vital respect"); *City of Milwaukee*, 451 U.S. at 317 (in passing the Clean Water Act, Congress "occupied the field by establishment of a comprehensive regulatory program . . . not merely another law 'touching interstate waters'" (emphasis added)). As a means to protect interstate waters, the 1972 Amendments superseded the federal common law of nuisance in favor of a statutory "all-encompassing program of water pollution regulation." *City of Milwaukee*, 451 U.S. at 318. Given that Congress's purpose in the 1972 Amendments was to expand federal protections for waters, and that prior to those Amendments, the Act already protected navigable *and* interstate waters as separate categories, the Act necessarily continued to protect interstate waters after 1972.

IV. The 2020 Rule Severely Impacts the States' Water Quality and Other Related Interests

A. The 2020 Rule Severely Undermines the Water Quality of the States.

By leaving ephemeral streams, interstate waters, and over half of the wetlands nationwide unprotected by the Act, the 2020 Rule threatens entire watersheds, including 4.8 million miles of streams[8] and 16.3 million acres of non-floodplain wetlands.[9] The arid West—where several of the States are located—will be particularly hard hit; for example, more than 85 percent of stream miles in New Mexico's key watersheds are no longer protected[10] and 40 percent of wetland acres in New Mexico are at risk of destruction.[11] Because of the Rule, 25 to 45 percent of New Mexico's stormwater general permits and 50 percent of its individual permits are no longer required.[12] As a result, pesticides, paint solvents, acidic wastewater, and other pollutants will discharge into New Mexico waters—including the Tijeras Arroyo, Gila River, and Rio Hondo watersheds—without regulatory limit or oversight.[13]

[8] Dkt. No. 30-18. (Sullivan Decl.) ¶¶ 3-5, 14, 21-22, 24, 34.
[9] *Id.* ¶¶ 5, 16, 34-43.
[10] *Id.* ¶¶ 3, 24.
[11] *Id.* ¶¶ 3, 38-39.
[12] Dkt. No. 30-16 (Roose Decl.) ¶ 20.
[13] *Id.* ¶¶ 9, 15-17.

The 2020 Rule severely harms downstream States because it increases the risks of pollution from upstream states. By excluding numerous waters from Clean Water Act jurisdiction, the 2020 Rule significantly curtails the Section 402 and 404 permit programs that previously protected the States' natural resources and residents from upstream pollution.[14] For example, New York State does not regulate smaller wetlands because it relies on the Army Corps' operation of the Section 404 program; while New York works to expand its state programs to fill the regulatory gap created by the 2020 Rule, many of New York's wetlands could be filled and therefore would no longer function as filters to reduce pollution before water flows from New York into New Jersey.[15] As another example, upstream harms will affect Maryland because the health of Maryland's Chesapeake Bay relies upon water protections in six upstream jurisdictions—including the States suffering from a regulatory gap in protections as well as other states such as West Virginia and Delaware.[16]

Many states upstream of the States have laws preventing the imposition of stricter water pollution controls than those under the Clean Water Act. Therefore, the Rule allows increased upstream pollution that threatens to significantly degrade water quality in the States.[17] For example, California will be harmed by increased pollution in upstream states that will flow to California via interstate waters, such as the Colorado River, which is an important source of drinking water,[18] and the Amargosa River, which is ephemeral for the majority of its length and subject to land use activities—such as Nevada's largest working dairy farm and hazardous waste disposal—that may discharge pollutants.[19] The 2020 Rule will likewise harm Michigan given that its water quality depends on adequate protection in other Great Lakes states.[20] Indeed, following the promulgation of the 2020 Rule, at least two states, Ohio and Indiana, have initiated legislative action to further reduce water quality protections for waters excluded by the Rule.[21]

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[14] Dkt. No. 30-8 (Witherill Decl.) ¶ 9.
[15] Dkt. No. 30-17 (Jacobson Decl.) ¶¶ 7-14, 25, 28-30, 32-33; Dkt. No. 30-7 (Dow Decl.) ¶¶ 13-15; *see also* Dkt. No. 30-11 (Baskin Decl.) ¶¶ 13-14 (discussing a similar regulatory gap in Massachusetts, and identifying specific projects involving fill of wetlands that are no longer protected by either federal or state law).
[16] Dkt. No. 30-14 (Currey Decl.) ¶¶ 5-7 (The 2020 Rule will also harm Maryland by removing protection for an estimated 10,000 acres of wetlands in the Nanticoke River watershed (a tributary to Chesapeake Bay) within Delaware, thus eliminating the flood protection functions these wetlands provide to communities downstream in Maryland).
[17] Dkt. No. 30-10 (Bishop Decl.) ¶ 20; Dkt. No. 30-18 ¶ 23; Dkt. No. 30-13 (Driscoll Decl.) ¶ 12; Seltzer Decl. (Dkt. No. 30-9) ¶¶ 17, 21-26; Dkt. No. 30-22 (Nechamen Decl.) ¶ 20; Ariz. Rev. Stat. Ann. § 49-104(A)(16); Utah Code Ann. § 19-5-105.
[18] Dkt. No. 30-10 ¶¶ 21, 23.
[19] Dkt. No. 30-20 (Parmenter Decl.) ¶ 5-6, 12-13.
[20] Dkt. No. 30-21 (Seidel Decl.) ¶ 4
[21] *See* https://www.hecweb.org/bill-watch-2021/ (Hoosier Environmental Council Bill Watch 2021 summarizing Indiana Senate Bill 389's elimination of state protections for wetlands that do not qualify as federal wetlands; the bill was signed into law on April 29, 2021) (last visited on August 9, 2021); https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-

B. The 2020 Rule Harms Wildlife.

The States are also injured by the Rule's exclusion from Clean Water Act protection of many waters that serve as important habitat for fish and other animals owned, regulated, or held in trust by the States.[22] For example, habitats for scores of threatened and endangered species in California and other states face increased degradation under the Rule.[23] Likewise, North Carolina will suffer a large loss of wetlands under the 2020 Rule. The resulting decline in in-state water quality and loss of wildlife habitat will impact both the 70 percent of rare and endangered plants and animals statewide that rely on these wetlands, as well as North Carolina's $430 million commercial and $3.9 billion recreational fisheries.[24]

C. The 2020 Rule Has Increased Administrative Burdens on the States.

The States have already expended and will increasingly need to expend money and resources to fill the regulatory gaps created by the Rule. For example, to mitigate the harm caused by the Rule, the District of Columbia has developed local regulations for dredge and fill activities in wetlands and streams no longer subject to the Act's protection and has diverted approximately 2,520 hours of staff time from other activities to accomplish this task.[25] In addition, the District of Columbia has had to hire new staff to implement a new permitting program and has to assign enforcement responsibilities for the its new regulations to existing staff, thereby diverting staff resources from other natural resource protection activities.[26] Similarly, New York has devoted staff time and funding to identify and map wetlands no longer protected by the Act that will need to be protected under new state efforts.[27] Oregon has likewise devoted tens of thousands of dollars in staff time to filling the regulatory gap created by the Rule and expects to incur significant additional costs in the future if the 2020 Rule continues to be applied.[28] California, Massachusetts, Wisconsin, and Virginia will also incur costs from increased staffing and staff training to address the regulatory gaps left by the Rule.[29] In addition,

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HB-175 (Ohio's legislature is currently considering House Bill 175 to deregulate ephemeral features excluded by the 2020 Rule; the bill was proposed on March 4, 2021).

[22] Dkt. 30-18 ¶¶ 4, 16, 27-33, 38; Siebert Decl. (Dkt. No. 30-6) ¶ 10; Dkt. No. 214-4 (Ferranti Decl.) ¶¶ 9-15; Dkt. No. 30-12 (Greene Decl.) ¶¶ 10-12; Dkt. No. 30-20 ¶¶ 13-17; Siebert Declaration in Support of Plaintiffs' Partial Opposition to Defendants' Motion for Remand Without Vacatur ¶ 2-6 (summarizing impacts on Wisconsin's wetlands and water quality protection programs resulting the 2020 Rule and expected future detrimental effects if the Rule is left in effect). For example, California wildlife are "publicly owned" and it is the "state's policy to conserve and maintain wildlife for citizens' use and enjoyment [and] for their intrinsic and ecological values." *Betchart v. Department of Fish & Game*, 158 Cal.App.3d 1104, 1106 (1984); Cal. Fish & Game Code, § 1801.

[23] Dkt. No. 30-18 ¶¶ 4, 27, 40-41, 49; Dkt. No. 30-20 ¶¶ 14-16; Dkt. No. 30-12 ¶¶ 8-10; Dkt. No. 214-4 ¶¶ 11, 14-19.

[24] Dkt. No. 30-5 (Smith Decl.) ¶¶ 12-13, 17-18.

[25] *Id*. ¶¶ 11-14; Upchurch Decl. ¶ 2.

[26] Upchurch Decl. ¶ 3.

[27] Dkt. No. 214-5 ¶¶ 13-14.

[28] Dkt. No. 214-6 ¶ 8.

[29] Dkt. No. 214-2 ¶¶ 26-29, 38, 40, 43-44; Dkt. No. 214-1 ¶¶ 20-23; Dkt. No. 214-3 ¶¶ 6-7; Dkt. No. 214-10 ¶ 2.

New Mexico will need to overhaul its groundwater and surface water quality protection regulations to create a new permitting program—at a cost of over $7.5 million annually, which is a 115% increase in New Mexico's budget for all surface water programs.[30] Until this new program is in place, New Mexico has sought to mitigate the removal of water protections by diverting funding from other areas and diverting work time from several staff members to address the federal regulatory gap.[31]

Moreover, some government entities have invested significant funds toward protecting water quality, relying on the baseline protections in prior definitions of "waters of the United States." The District of Columbia has already spent $26.4 million on clean-up of the Anacostia River and the District's water utility is in the process of implementing a $2.7 billion "Clean Rivers Project" to improve water quality.[32] Maryland has already spent over $5 billion in Chesapeake Bay restoration.[33] The Rule places these investments at risk as increased upstream pollution would undermine such local efforts.[34]

D. The 2020 Rule Adversely Impacts the States' Economic and Proprietary Interests.

By harming wildlife and wildlife habitat, the Rule threatens the States' economic interests**.** In Wisconsin, for example, waterfowl and migratory bird hunting, bird watching, and fishing are significant economic drivers, with fishing generating an annual $2.75 billion in spending and $200 million in state sales and income taxes.[35] The Rule's reduced federal protections imperil not only wetland habitat for waterfowl, migratory birds, and fish such as trout and northern pike, but also threaten the quality of recreational experiences related to these species, and in turn reduce economic activity.[36] In New Mexico, visitors spent $846 million on recreation in 2017, supporting 13,000 direct jobs. The recreational economies of New Mexico and other States will be harmed by the Rule's reduced protections.[37] In North Carolina, the loss of protections for wetlands, and the resulting decline of water quality and loss of wildlife habitat, would impact the State's commercial and recreational fisheries, which had an estimated revenue of $430 million and economic impact of $3.9 billion in 2017, respectively.[38]

Under the 2020 Rule, more than half of the nation's wetlands will lose Clean Water Act protections, paving the way for their filling and the loss of their essential flood mitigation

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[30] Dkt. No. 214-7 ¶¶ 20, 22.
[31] *Id.* ¶ 23.
[32] Dkt. No. 30-9 ¶ 25.
[33] Dkt. 30-14 ¶ 5.
[34] *Id.*
[35] Dkt. No. 30-6 ¶ 15. New York also currently has a strong recreational economy, ranking second in the nation in angler expenditures and sixth as a fishing destination for out-of-state visiting anglers. Dkt. No. 30-15 ¶ 13.
[36] *Id.*
[37] Dkt. No. 30-16 ¶ 24. California's water-dependent recreational economies would also suffer as a result of out-of-state pollution negatively impacting the State's water quality under the Rule. Dkt. No. 30-10 ¶ 30.
[38] Dkt. No. 30-5 ¶ 13.

functions. Between 1984 and 2014, floods in the United States caused an estimated $8 billion in property damage and over 80 fatalities annually.[39] Wetlands protect lives and property from floodwaters by retaining large volumes of stormwater that would otherwise inundate downstream waters.[40] Reduced protections under the Rule threaten flooding of many properties owned by the States.[41] For example, New York owns 658 facilities with replacement value of over $254 million located in 100-year floodplains that are directly at risk from the Rule.[42] This does not include State-owned or managed roads, bridges, culverts, rail lines, airports and marine facilities that are also located in flood zones.[43] In the District of Columbia, more than $1 billion in District-owned property and approximately 10,000 District residents are located within floodplains.[44] The total economic loss from a 100-year storm along the Potomac and Anacostia Rivers is estimated at $316 million.[45]

V. Consistent with the Vacatur of the 2020 Rule, the Agencies Should Immediately Restore Implementation of the Pre-2015 Regulatory Definition of "Waters of the United States."

Following the vacatur of the 2020 Rule on August 30, 2021, the Agencies must immediately start implementing the 2019 Rule, which is the regulatory definition of "waters of the United States" now in effect. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force.") This is not only mandated by the District of Arizona's vacatur order but is also consistent with the Agencies' own plans to propose a rule restoring the pre-2015 regulatory regime, as amended to be consistent with applicable Supreme Court case law. 86 Fed. Reg. at 41,911. Importantly, implementation of the 2019 Rule will help save the Agencies' time and resources as it makes a rulemaking to repeal the 2020 Rule and restore the pre-2015 regulatory definition unnecessary.

The States recognize that the 1980s regulations are less than perfect. Nevertheless, the States believe that these regulations are an appropriate interim measure to guide the implementation of the "waters of the United States" definition for the following reasons.

First, the 1980s regulations applied together with the Agencies' *Rapanos* Guidance will provide better protection of waters and halt the ongoing serious adverse impacts of the 2020 Rule. The 1980s regulations and the *Rapanos* Guidance defined "waters of the United States" to encompass within the scope of the Act's protections critical waters that are now excluded under the 2020 Rule. For example, in addition to defining "waters of the United States" to include traditionally navigable waters, interstate waters, and the territorial seas, the 1980s definition included tributaries of those waters and wetlands that were "adjacent to" them, defining "adjacent" to mean "bordering, contiguous, or neighboring." *See* 51 Fed. Reg. 41,206 (Nov. 13, 1986) (codified at 33 C.F.R. §22328.3 (c) (1987)). Following *Rapanos*, the Agencies issued the

[39] Dkt. No. 30-22 ¶ 35.
[40] *Id.* ¶¶ 12-18.
[41] Dkt. No. 30-3 ¶ 11; Dkt. No. 30-7 ¶4.
[42] Dkt. No. 30-22 ¶ 38
[43] Id.
[44] Dkt. No. 30-9 ¶ 3.
[45] *Id.*

Rapanos Guidance which explained that the "significant nexus" standard for identifying "waters of the United States" was the "controlling" standard, and required the Agencies to "focus[] on the integral relationship between the ecological characteristics" of tributaries and wetlands. *Rapanos Guidance*, AR 11695 at 3, 9. The Guidance also stated that, in addition to traditionally navigable waters, the territorial seas, and interstate waters, the "waters of the United States" include: (1) relatively permanent non-navigable tributaries of traditionally navigable waters; and (2) wetlands that are adjacent to traditionally navigable waters, including wetlands that have a shallow subsurface connection to them as well as wetlands that directly abut relatively permanent non-navigable tributaries. *Id.* at 4-7. The *Rapanos* Guidance further provided that the Agencies would rely on case-by-case "significant nexus" analyses to assess whether non-navigable tributaries that are not relatively permanent, including ephemeral streams, and their adjacent wetlands are "waters of the United States." *Id.* at 8-11.

Second, the Agencies, state regulators, and the regulated community are familiar with the 1980s regulations because they were the long-standing regulatory regime for several decades. *See* 84 Fed. Reg. at 56,664 ("the agencies and regulated public have significant experience operating under the longstanding regulations that were replaced by the 2015 Rule"). In fact, the 1980s regulations were applied in must the country as late as June 2020, when the 2020 Rule became effective. Because of this familiarity and experience with the 1980s regulations, and because the 2020 Rule has been applied for a very limited time, the Agencies, the states, and regulated entities should be able to revert back to implementing these regulations relatively easily and with little disruption.

VI. The Agencies Should Develop a New, Protective Regulatory Definition That Is Consistent with the Clean Water Act, Based on the Science, and That Addresses Environmental Justice and Climate Change Concerns.

Before the Clean Water Act was enacted in 1972, states were primarily responsible for water pollution control, with the federal government playing a limited role. S. Rep. No. 92-414, at 2 (1971) (1971 WL 11307, at *3669). In passing the Act, however, Congress recognized that this state-led scheme had been "inadequate in every vital aspect," leaving many waters "severely polluted." Congress responded by deliberately replacing the ineffective patchwork of state laws with the Clean Water Act, "an all-encompassing program of water pollution regulation." *Id*. at 7 (1971 WL 11307, at *3674); *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981).

The Act enhanced enforcement by establishing permit programs under which unauthorized pollution could be addressed without any need to link that it to downstream water quality problems. Crucial to this enforcement scheme is a broad definition of "waters of the United States" – the waters that require permits for pollutant discharges. Without a broad definition of covered waters the permit enforcement scheme could readily be evaded, and pollutant discharges could go largely unabated, leading to downstream water quality impairments.

The States urge the Agencies to develop a new regulatory definition of "waters of the United States" that meets the Act's water quality objective; is consistent with the statutory text, legislative intent, and applicable caselaw; and is based on the established science. Building on the lessons learned from the 2020 Rule, as well as previous rulemakings, the Agencies' new

definition should protect all tributaries, including ephemeral streams and other non-permanent streams, that form the headwaters of larger waters or otherwise impact the quality and health of traditionally navigable waters. The new definition should also encompass wetlands or other waters that significantly affect traditional navigable waters, whether alone or in aggregate, and not only those wetlands that are abutting or hydrologically connected to other covered waters. Where possible, the Agencies should establish categories of waters that are automatically protected without the need to conduct a case-by-case analysis. In addition, any new definition should restore all interstate waters, without qualification, as "waters of the United States."

The Agencies already have much of the scientific evidence necessary to support a broad, protective definition of "waters of the United States." As the Connectivity Report and the Science Board Review concluded, tributary streams—the great majority of which are headwater streams (smaller tributaries that carry water to the main channel of a river)—are functionally connected to and strongly affect the chemical, physical, and biological integrity of downstream navigable waters, interstate waters, and the territorial seas. Connectivity Report at ES-2 to ES-3; *see* 80 Fed. Reg. at 37,057-58. The same is true for wetlands and open waters in floodplains and riparian areas. A water's impact on the quality of downstream navigable waters must be assessed by its effects on the chemical, physical or biological integrity of those waters: a water has a significant effect on downstream waters based on the "functions by which streams, wetlands, and open waters influence the timing, quantity, and quality of resources available to downstream waters." Connectivity Report at ES-6; *see* 2015 TSD at 103. The Connectivity Report identified five categories of functions: as a "source" of water and food; a "sink" removing contaminants; a "refuge" protecting organisms; allowing "transformation" of nutrients and contaminants; and creating a delayed release of storm water and other materials. Connectivity Report ES-6. These specific functions significantly affect the chemical, physical or biological integrity of downstream waters and are firmly grounded in science and agency expertise. 2015 TSD at 177-89.

Further, scientific evidence supports protection of non-abutting wetlands, recognizing that a wetland need not touch a downstream water, or have a direct surface water connection to it, for the wetland to significantly affect the chemical and biological integrity of that water. Connectivity Report at 4-2, 4-5, 6-6 to 6-7. Abundant evidence, previously recognized by the Agencies but ignored in promulgating the 2020 Rule, establishes that such wetlands perform myriad functions that are important to the integrity of downstream waters. These include acting as sources of key nutrients and dissolved organic compounds, and providing spawning and rearing habitat for multiple species of fish and other aquatic organisms. *Id.* at 4-4. Indeed, "relatively low levels of connectivity can be meaningful in terms of impacts on the chemical, physical, and biological integrity of downstream waters."[46] Moreover, in some instances it is the relative *lack* of physical connection between the wetlands and downstream waters that makes those wetlands important for improved downstream water quality. Connectivity Report at 4-26 to 4-27.

[46] *See* U.S. EPA Science Advisory Board, *SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Letter to EPA Administrator Gina McCarthy* 54 (Oct.17, 2014), EPA-HQ-OW-2018-0149-0386 (SAB Review) at 2.

More recent scientific research estimates that the Navigable Waters Protection Rule removes federal protection from ½ of all ephemeral and ~1/4 of all stream channels in the conterminous USA by length- non-perennial and non-navigable waters that are crucially important for safeguarding and improving the integrity and quality of downstream larger waterbodies and must be protected under the Clean Water Act.[47]

The States also urge the Agencies to develop a new definition that takes into account the effects of climate change. As the National Climate Assessment observes:

> Significant changes in water quantity and quality are evident across the country. These changes, which are expected to persist, present an ongoing risk to coupled human and natural systems and related ecosystem services. Variable precipitation and rising temperature are intensifying droughts, increasing heavy downpours, and reducing snowpack. Reduced snow-to-rain ratios are leading to significant differences between the timing of water supply and demand. Groundwater depletion is exacerbating drought risk. Surface water quality is declining as water temperature increases and more frequent high-intensity rainfall events mobilize pollutants such as sediments and nutrients.[48]

Indeed, many arid Southwestern states, including New Mexico, California, and Arizona, have experienced and are currently experiencing serious drought conditions[49], further demonstrating that water quality protections, including defining the scope of "waters of the United States" under the Clean Water Act, should take into account the expected consequences of climate change.

The States also strongly support the consideration of environmental justice concerns in developing the new definition. All people living in the United States are entitled to clean water for drinking, recreation, and countless other uses that sustain our life and economic activities, but many of the most vulnerable and already overburdened communities continue to lack access to this fundamental resource. The new definition should strive to eliminate these inequities.

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[47] K.A. Fesenmyer, et al. (2021) Ephemeral stream maps show policy implications. Freshwater Science. 40(1):252–258, provided in Attachment D.

[48] U.S. Global Change Research Program, Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States, Chapter 3: Water 152 (2018), *available at* https://nca2018.globalchange.gov/chapter/3/

[49] These impacts will likely be exacerbated during the current drought afflicting many arid Southwestern states, including New Mexico, California, and Arizona. *See State of New Mexico Governor Drought Declaration*, https://www.governor.state.nm.us/wp-content/uploads/2020/12/Executive-Order-2020-084.pdf (last visited on Aug. 9, 2021); *State of California Governor Drought Proclamation*, https://www.gov.ca.gov/wp-content/uploads/2021/05/5.10.2021-Drought-Proclamation.pdf (last visited on Aug. 9, 2021); *Arizona Drought Interagency Coordinating Group Recommendation to Maintain Drought Emergency Declaration*, https://new.azwater.gov/sites/default/files/media/Spring%2720_ICGLetter-signed.pdf (last visited on Aug. 9, 2021).

In conclusion, the States support the Agencies' plans to replace the detrimental and illegal 2020 Rule, and urge the Agencies to immediately start implementation of the pre-2015 regulatory regime, as required by the District of Arizona's order remanding and vacating the 2020 Rule. The States also urge the Agencies to swiftly develop and finalize a new, broadly protective definition of "waters of the United States" by mid to late 2022.

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