

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

February 7, 2022

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: Revised Definition of “Waters of the United States”, 86 Fed. Reg. 69,372 (Dec. 7, 2021)
Docket ID No. EPA–HQ–OW–2021–0602**

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

The Attorneys General of California, New York, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Mexico, North Carolina, Oregon, Vermont, 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) proposed *Revised Definition of “Waters of the United States”* (Proposed Rule). *See* 86 Fed. Reg. 69,372 (Dec. 7, 2021). The States support the Agencies’ initial rulemaking proposal to formally replace the destructive and unlawful *Navigable Waters Protection Rule: Definition of “Waters of the United States”*, 85 Fed. Reg. 22,250 (Apr. 21, 2020) (2020 Rule) with a regulatory definition of “waters of the United States” that conforms with the Clean Water Act’s text and objective, adheres to Congressional intent and applicable case law, and follows the science. The Proposed Rule, which seeks to restore the pre-2015 definition, subject to certain amendments reflecting Supreme Court precedent, will return to the Agencies’ long-standing regulatory position that Clean Water Act pollution control programs apply to a wide range of waters to safeguard water quality and integrity across the Nation. The States support the Proposed Rule, including its codification of protections for interstate waters as a category, and its protections for numerous other intrastate waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. In addition, we urge the Agencies in their subsequent rulemaking to quickly finalize an even clearer and more environmentally protective definition of “waters of the United States” that is

based on the law and the best available science, that recognizes and addresses the impacts of climate change, and that serves environmental justice communities.

I. Statutory and Regulatory Background

A. The Clean Water Act Was Enacted with the 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) (Clean Water Act authorizes EPA "to create and manage a uniform system of interstate water pollution regulation"). Nationwide pollution 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 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).

The responsibility to implement the Act and enforce its national floor of protectiveness is 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. 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

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.

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").

B. 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. *See* 86 Fed. Reg. at 69,376.

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. 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12). "Navigable waters" are "the waters of the United States, including the 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) discharges 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 pollutant 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 may result in a discharge to "waters of the United States" and that through such certification the states may impose conditions that must be included in the federal license or permit. *Id.* § 1341; *Am. Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997). Similarly, the oil and hazardous substances spill prevention and response program under Section 311 and the "Total Maximum Daily Load" program designed to impose additional measures to achieve water quality standards in impaired waters under Section 303, are also limited to "waters of the United States." *Id.*, §§ 1313, 1321.

C. Pre-2020 Regulations Defining "Waters of the United States"

The Act does not define "waters of the United States," and the Agencies have defined those waters by regulation and guidance. The Agencies initially 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 Engineers, 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, to implement those decisions. 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).

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 drew on more than 1,200 peer-reviewed publications. 80 Fed. Reg. at 37,057. The Agencies also relied 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 and implemented the “significant nexus” standard developed by the Supreme Court’s decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos*. See *id.*

In 2019, the Agencies issued a regulation (2019 Rule) that repealed the 2015 Rule and reinstated the 1980s definition.³ 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. Until 2020, no regulatory definition excluded all ephemeral streams or required wetlands to have a surface water connection to other covered waters in order to be considered “waters of the United States.”

D. The 2020 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 to define “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, 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.⁴ 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

³ The Agencies also promulgated a rule in 2018 to add an “applicability date” to the 2015 Rule in order to unlawfully suspend the application of the 2015 Rule. 83 Fed. Reg. 5200 (Feb. 6, 2018.) That rule was challenged in several district courts and was vacated and enjoined nationwide. See *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. Aug. 16, 2018); see also *Puget Soundkeeper All. v. Wheeler*, No. 15-01342 (W.D. Wash. Nov. 26, 2018).

⁴ Preliminary Results Of Attempted Analyses Of The National Hydrography Dataset And The National Wetlands Inventory at 2-4, 9, available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11767>.

jurisdictional waters. 85 Fed. Reg. at 22,282-83.

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,” 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. 85 Fed. Reg. at 22,288. That assertion was 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 understanding of the connectivity gradient.⁵

The 2020 Rule also limited the scope of wetlands protected by the Clean Water Act. The Rule included only “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 excluded most wetlands that do not touch or otherwise have a surface water connection to other covered waters, despite the robust scientific evidence before the Agencies that confirmed the importance of such wetlands to the health of the Nation’s 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 were generally required to have a surface water connection to jurisdictional waters in a “typical year.” *See id.* at 22,274. “Typical year” was 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 any reliance on the RPA and EA. *Id.* at 22,332 (“the final rule is not based on the information in the agencies [EA] or [RPA]”), 22,335.⁶ By their own

⁵ *See* Comment submitted by M.P. Sullivan, et al. at 2-3, available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-3825>; Comment submitted by Jennifer Tank, President, Society for Freshwater Science, at 5, available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-8909>; Comment submitted by Jamison Colburn, Professor of Law, Joseph H. Goldstein, Faculty Scholar, Penn State Law and Robert P. Brooks, Professor Emeritus of Geography and Ecology, Director Emeritus of Riparia, The Pennsylvania State University, at 9, available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-3291>; Memorandum to the Record on Science Advisory Board Draft Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, Attachment 1, available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11589>.

⁶ *See also* Economic Analysis for the Navigable Waters Protection Rule: Definition of Waters of the United States, at 12 (enumerated at xi), available at

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 were 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 all ephemeral streams and many wetlands—lacking a surface water connection to other jurisdictional waters was drawn directly from the *Rapanos* plurality opinion, whose reasoning was adopted by only four 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 across the country. 86 Fed. Reg. at 69,382.

Following the change in federal administrations in January 2021, President Biden directed the Agencies to review the 2020 Rule, determine if it protects the environment and ensures clean water, and 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 issued by the Trump Administration. *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.”⁷ The Agencies sought a remand of the 2020 Rule in the pending legal challenges.⁸

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). 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. Subsequently, the 2020 Rule was similarly remanded and vacated by the United States District Court for the District of New Mexico. *Navajo Nation v. Regan*, __ F. Supp. 3d __, 2021 WL 4430466 (D. N. M. Sept. 27, 2021). That court found that vacatur was warranted based on the “seriousness of the [2020 Rule’s] deficiencies.” *Id.*, at *4.

<https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11572>; Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of Waters of the United States, at 8 (enumerated as 6), available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11573>.

⁷ News Release, EPA, Army Corps Announce Intent to Revise Definition of WOTUS, <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus> (June 9, 2021) (last accessed Feb. 5, 2022).

⁸ *Id.*

II. The 2020 Rule Severely Impacted the States' Water Quality and Other Important State Interests

The 2020 Rule caused and threatened to cause continued substantial harms to the States' water quality and wildlife. The Rule also increased administrative burdens on the States and impacted the States' economic and proprietary interests.

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

By leaving ephemeral streams, interstate waters, and over half of the Nation's wetlands unprotected by the Clean Water Act, the 2020 Rule threatened entire watersheds.⁹ The Rule removed the Act's protections from 4.8 million miles of streams¹⁰ and 16.3 million acres of non-floodplain wetlands.¹¹ The arid West—where several of the States are located—were particularly hard-hit; for example, more than 85 percent of stream miles in New Mexico's key watersheds were no longer protected¹² and 40 percent of wetland acres in New Mexico were at risk of destruction.¹³ Because of the 2020 Rule, 25 to 45 percent of New Mexico's stormwater general permits and 50 percent of its individual permits were no longer required.¹⁴ As a result, pesticides, paint solvents, acidic wastewater, and other pollutants could be discharged into New Mexico waters—including the Tijeras Arroyo, Gila River, and Rio Hondo watersheds—without regulatory limit or oversight.¹⁵

The 2020 Rule endangered downstream States by increasing the risks of pollution from upstream states. By excluding numerous waters from Clean Water Act jurisdiction, the 2020 Rule significantly curtailed the Section 402 and 404 permit programs that previously protected the States' natural resources and residents from upstream pollution.¹⁶ For example, upstream pollution may have affected 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.¹⁷ As another 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 worked to expand its state programs to fill the regulatory gap created by the 2020 Rule, many of New York's

⁹ In their challenge to the 2020 Rule, *California v. Regan*, Case No. 3:20-cv-03005-RS (N.D. Cal.), the States submitted numerous declarations attesting to the serious harms that were caused and threatened by the Rule. Those declarations are provided as Attachment A to this letter and are cited herein by their docket numbers.

¹⁰ Dkt. No. 30-18. (Sullivan Decl.) ¶¶ 3-5, 14, 21-22, 24, 34.

¹¹ *Id.* ¶¶ 5, 16, 34-43.

¹² *Id.* ¶¶ 3, 24.

¹³ *Id.* ¶¶ 3, 38-39.

¹⁴ Dkt. No. 30-16 (Roose Decl.) ¶ 20.

¹⁵ *Id.* ¶¶ 9, 15-17.

¹⁶ Dkt. No. 30-8 (Wetherill Decl.) ¶ 9.

¹⁷ Dkt. No. 30-14 (Currey Decl.) ¶¶ 5-7 (explaining that 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).

wetlands could be subject to filling and, if filled, would no longer function as filters to reduce pollution before water flows from New York into New Jersey.¹⁸

Many states upstream of the States have laws preventing the imposition of stricter water pollution controls than the minimum standards required under the Clean Water Act. Therefore, the 2020 Rule allowed increased upstream pollution threatening to significantly degrade water quality in the States.¹⁹ For example, California was subject to harm from increased pollution in upstream states flowing to California via interstate waters, such as the Colorado River, which is an important source of drinking water,²⁰ 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.²¹ The 2020 Rule likewise subjected Michigan to harm given that its water quality depends on adequate protection in other Great Lakes states.²² Indeed, following the promulgation of the 2020 Rule, at least two states, Ohio and Indiana, initiated legislative action to further reduce water quality protections for waters excluded by the Rule.²³

B. The 2020 Rule Harmed Wildlife

The States were also injured by the 2020 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.²⁴ For example, habitats for scores of threatened and endangered species in California and other states faced increased degradation under the Rule.²⁵

¹⁸ 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).

¹⁹ Dkt. No. 30-10 (Bishop Decl.) ¶ 20; Dkt. No. 30-18 ¶ 23; Dkt. No. 30-13 (Driscoll Decl.) ¶ 12; Dkt. No. 30-9 (Seltzer Decl.) ¶¶ 17, 21-26; Dkt. No. 30-22 (Nechamen Decl.) ¶ 20; Ariz. Rev. Stat. Ann. § 49-104(A)(16); Utah Code Ann. § 19-5-105.

²⁰ Dkt. No. 30-10 ¶¶ 21, 23.

²¹ Dkt. No. 30-20 (Parmenter Decl.) ¶¶ 5-6, 12-13.

²² Dkt. No. 30-21 (Seidel Decl.) ¶ 4

²³ *See Supplementary Material to the Economic Analysis for the Proposed “Revised Definition of Waters of the United States” Rule*, November 18, 2021, at 32, 67 (summarizing legislation reducing protections for wetlands and ephemeral streams in Indiana and proposed legislation to exclude ephemeral streams from definition of “waters of the State” in Ohio).

²⁴ Dkt. 30-18 ¶¶ 4, 16, 27-33, 38; Dkt. No. 30-6 (Siebert Decl.) ¶ 10; Dkt. No. 214-4 (Ferranti Decl.) ¶¶ 9-15; Dkt. No. 30-12 (Greene Decl.) ¶¶ 10-12; Dkt. No. 30-20 ¶¶ 13-17; Dkt. 256-1 (Siebert Decl.) ¶ 2-6 (summarizing impacts on Wisconsin’s wetlands and water quality protection programs resulting the 2020 Rule and expected future detrimental effects). 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.

²⁵ 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.

Likewise, North Carolina was faced with a potentially large loss of wetlands under the 2020 Rule. The resulting decline in in-state water quality and loss of wildlife habitat put at risk both the 70 percent of rare and endangered plants and animals statewide that rely on these wetlands, as well as North Carolina’s valuable commercial and recreational fish stocks.²⁶

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

The 2020 Rule forced the States to expend significant money and resources to fill the regulatory gaps and threatened continued, ongoing costs associated with the implementation of state measures and programs in the future. For example, to mitigate the harm caused by the Rule, the District of Columbia developed local regulations for dredge and fill activities in wetlands and streams no longer subject to the Act’s protection and diverted approximately 2,520 hours of staff time from other activities to accomplish this task.²⁷ In addition, the District of Columbia had to hire new staff to implement a new permitting program and to assign enforcement responsibilities for its new regulations to existing staff, thereby diverting staff resources from other natural resource protection activities.²⁸ Similarly, New York has devoted staff time and funding to identify and map wetlands removed from Clean Water Act protections by the Rule.²⁹ Oregon likewise devoted tens of thousands of dollars in staff time to filling the regulatory gap created by the Rule and would expect to incur significant additional costs in the future if the 2020 Rule continued to be applied.³⁰ California, Massachusetts, Wisconsin, and Virginia were also subject to costs from increased staffing and training to address the regulatory gaps left by the Rule.³¹ In addition, because of the regulatory gap left by the 2020 Rule, New Mexico faced the formidable task of having to overhaul its groundwater and surface water quality protection regulations to create a new permitting program—at an estimated cost of over \$7.5 million annually, a 115% increase in New Mexico’s budget for all surface water programs.³² As an initial measure, New Mexico 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 drastically reduced federal protections.³³

Moreover, some government entities 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 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.³⁴ Maryland already spent over \$5 billion in Chesapeake Bay restoration.³⁵

²⁶ Dkt. No. 30-5 (Smith Decl.) ¶¶ 12-13, 17-18.

²⁷ *Id.* ¶¶ 11-14; Dkt. 214-9 (Seltzer Decl.) ¶ 14; Dkt. No. 256-2 (Upchurch Decl.) ¶ 2.

²⁸ Dkt. No. 214-9 ¶ 14; Dkt. 256-2 ¶ 3.

²⁹ Dkt. No. 214-5 (Jacobson Decl.) ¶¶ 13-14.

³⁰ Dkt. No. 214-6 (Mrazik Decl.) ¶ 8.

³¹ Dkt. No. 214-2 (Bishop Decl.) ¶¶ 26-29, 38, 40, 43-44; Dkt. No. 214-1 (Baskin Decl.) ¶¶ 20-23; Dkt. No. 214-3 (Davis Decl.) ¶¶ 6-7; Dkt. No. 214-10 (Siebert Decl.) ¶ 2.

³² Dkt. No. 214-7 (Roose Decl.) ¶¶ 20, 22.

³³ *Id.* ¶ 23.

³⁴ Dkt. No. 30-9 ¶ 25.

³⁵ Dkt. 30-14 ¶ 5.

The 2020 Rule placed these investments at risk as the threat of increased upstream pollution undermined such local efforts.³⁶

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

By harming wildlife and wildlife habitat, the 2020 Rule threatened 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.³⁷ The Rule's reduced federal protections not only imperiled wetland habitat for waterfowl, migratory birds, and fish such as trout and northern pike, but also threatened the quality of recreational experiences related to these species, and in turn reduced economic activity.³⁸ 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 faced harm from the weakened federal protections under the 2020 Rule.³⁹ In North Carolina, the loss of protections for wetlands, and the resulting decline of water quality and loss of wildlife habitat, threatened 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.⁴⁰

Under the 2020 Rule, more than half of the nation's wetlands faced the loss of Clean Water Act protections, which will likely result in the filling of wetlands and the loss of their essential flood mitigation functions. Between 1984 and 2014, floods in the United States caused an estimated \$8 billion in property damage and over 80 fatalities annually.⁴¹ Wetlands protect lives and property from floodwaters by retaining large volumes of stormwater that would otherwise inundate downstream waters.⁴² Reduced protections under the 2020 Rule threatened flooding of many properties owned by the States.⁴³ For example, New York owns 658 facilities with replacement value of over \$254 million located in 100-year floodplains, properties that were directly at risk from the Rule.⁴⁴ This does not include State-owned or managed roads, bridges, culverts, rail lines, airports and marine facilities that are also located in flood zones.⁴⁵ In the District of Columbia, more than \$1 billion in District-owned property and approximately 10,000

³⁶ *Id.*

³⁷ 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 (Riexinger Decl.) ¶ 13.

³⁸ *Id.*

³⁹ 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.

⁴⁰ Dkt. No. 30-5 ¶ 13.

⁴¹ Dkt. No. 30-22 ¶ 35.

⁴² *Id.* ¶¶ 12-18.

⁴³ Dkt. No. 30-3 (Horbert Decl.) ¶ 11; Dkt. No. 30-7 ¶ 4.

⁴⁴ Dkt. No. 30-22 ¶ 38

⁴⁵ *Id.*

District residents are located within floodplains.⁴⁶ The total economic loss from a 100-year storm along the Potomac and Anacostia Rivers is estimated at \$316 million.⁴⁷

III. The Proposed Rule Will Ensure Crucial Protections for Numerous Important Waters and Is Consistent with the Clean Water Act, Case Law, and Science

The States support the Agencies' recognition in the Proposed Rule of the significant deficiencies of the 2020 Rule, including the severe impacts on the Nation's waters that resulted from the Rule's application during the 14 months it was in effect and that could have occurred had the Rule not been vacated. 86 Fed. Reg. at 69,373, 69,383, 69,412, 69,413-16, 69,446. The States further support the Agencies' explanation for how respect for and application of accepted science is essential for restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. *Id.* at 69,390-98; *Technical Support Document for the Proposed "Revised Definition of 'Waters of the United States' Rule,"* EPA and Army Corps, November 18, 2021, at 248 (2021 Technical Support Document), Section II. The Proposed Rule is an appropriate interim measure to guide the Agencies' Clean Water Act implementation while they work to develop an updated definition of "waters of the United States."

A. The Proposed Rule Considers the Clean Water Act's Objective and the Critical Importance of Science in Achieving that Objective

Following their review of the 2020 Rule, the Agencies have now concluded that the Rule was adopted without appropriate consideration of water quality impacts and "in contravention of Congress's objective in the Clean Water Act." 86 Fed. Reg. at 69,373, 69,382. The Agencies have also acknowledged that the 2020 Rule "did not properly consider the extensive scientific evidence demonstrating the interconnectedness of waters and their downstream effects" and "the way pollution moves through waters or the way filling in a wetland affects downstream water resources." *Id.* at 69,382. The Agencies' assessment of the 2020 Rule is correct, and the Proposed Rule is a rational interim definition of "waters of the United States."

A rule is arbitrary and capricious if it "frustrates the regulatory goal" of the agency. *Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 156 (3d Cir. 2004). "Rational decision making also dictates that the agency simply cannot employ means that actually undercut its purported goals." *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir.1985). The objective of the statute is an important aspect that the agency must consider in its rulemaking. *See Gresham v. Azar*, 950 F.3d 93, 102-104 (D.C. Cir. 2020).

Under the prior administration, the Agencies claimed that the 2020 Rule defined "waters of the United States" based on the Act's objective, 85 Fed. Reg. at 22,250. That claim was unfounded. The Agencies did not in fact give any meaningful consideration to that objective—"to restore and maintain the integrity of the nation's waters"—and failed to provide any reasoned explanation for their conclusion that the 2020 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 its impacts in their RPA and EA.⁴⁸ Yet they ignored the ways in which those

⁴⁶ Dkt. No. 30-9 ¶ 3.

⁴⁷ *Id.*

⁴⁸ The Navigable Waters Protection Rule – Public Comment Summary Document, Topic 1 at 112-13, available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574>.

assessments fatally undermined the 2020 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.

The Agencies previously 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.” In fact, the “available science” was the Connectivity Report, the scientific studies assessed in it, and the Science Board’s review of it, each of which contradicted 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 most wetlands without direct surface connections to other waters was consistent with 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 from protection. *See id.* Moreover, the Science Board in its official capacity, and its members separately in their professional capacities, stated that the Agencies’ prior line-drawing with respect to wetlands “departs from established science,”⁴⁹ and disregarded “[m]ultiple lines of evidence point[ing] to the importance of chemical and biological connectivity between wetlands and downstream waters.”⁵⁰

As the Agencies now recognize, “[t]o ... adequately consider the Act’s statutory objective, a rule defining ‘waters of the United States’ must consider its effects on the chemical, physical, and biological integrity of the nation’s waters” which “refers to water quality.” 86 Fed. Reg. at 69,387. And the Agencies are correct to conclude that “science is critical to attaining Congress’s objective to restore and maintain the chemical, physical, and biological integrity of the nation’s waters” because “[o]nly by relying upon scientific principles to understand the way waters affect one another can the agencies know whether they are achieving that objective.” *Id.* at 69,393. More importantly, the Proposed Rule is based on the current best available science regarding the functions provided by numerous upstream waters to safeguard and improve the quality and integrity of downstream waters. *Id.* at 69,387-94; 2021 Technical Support Document, Section II. Science supports the conclusion that the scope of “waters of the United States” must be expanded beyond the limited range of waters in the 2020 Rule in order to achieve the Clean Water Act’s objective. *Id.* Accordingly, the Agencies’ Proposed Rule, which restores Clean Water Act protections for tributaries, wetlands, and “other waters” that significantly affect the integrity of traditional navigable waters, interstate waters and the territorial seas, supports the Act’s objective. *See* 86 Fed. Reg. at 69,395-98.

⁴⁹ Memorandum to the Record on Science Advisory Board Draft Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, Attachment 1 at 3, available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0148-11589>.

⁵⁰ Comment submitted by S. M. P. Sullivan, et al., at 5, available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0148-3825>.

B. The Proposed Rule Appropriately Includes Interstate Waters as a Category of “Waters of the United States”

Federal jurisdiction over interstate waters under the Act, regardless of their navigability, has long been recognized and is essential. In the Clean Water Act, Congress intended to prevent harms to downstream states from detrimental upstream activities. In a departure from all previous agency definitions, the 2020 Rule no longer included interstate waters as an independent category of “waters of the United States.” The Agencies’ failure to protect all interstate waters in the 2020 Rule was an abdication of a core premise of the Act’s cooperative federalism.

The statutory language clearly demonstrates that the Clean Water 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). That express preservation of preexisting protections for interstate waters presupposes (and thus demonstrates) that such waters are categorically protected by the Act. 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. The Agencies’ decision to exclude interstate waters as a category was without reasoned explanation and in conflict with bedrock rules of statutory interpretation, *see Lowe v. SEC*, 472 U.S. 181, 219 (1985) (“fundamental axiom of statutory interpretation [is] that a statute is to be construed so as to give effect to all its language”).

In addition to conflicting with the Act’s plain language, the Agencies’ exclusion of interstate waters in the 2020 Rule ignored the importance of federal law in addressing cross-border pollution. 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) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 (1972)). The prior administration’s removal of protections for interstate waters also ignored 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’”). 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. Congress’s purpose in the 1972 Amendments was to expand federal protections for waters and prior to those Amendments the Act already protected navigable *and* interstate waters as separate categories. Therefore, the Act necessarily continued to protect interstate waters after the 1972 Amendments.

As the Proposed Rule concludes, categorical protection of interstate waters as “waters of the United States” without regard to navigability is “most consistent with the text of the statute, including section 303(a), its purpose and history, Supreme Court case law, and the agencies’ charge to implement a ‘comprehensive regulatory program’ that protects the chemical, physical, and biological integrity of the nation’s waters.” 86 Fed. Reg. at 69,417. Accordingly, the States

support the Proposed Rule’s protection of interstate waters, whether rivers, streams, lakes, or wetlands, in their entirety. *See id.* at 69,418. Moreover, jurisdictional protections should include those waters that significantly affect each interstate water’s integrity.

C. The Agencies’ Decision to Codify the “Significant Nexus” Standard as a Basis for Clean Water Act Jurisdiction Is Consistent with the Clean Water Act, Applicable Case Law, and the Science

The States support the Proposed Rule’s reliance on the “significant nexus” standard as a principal ground for determining whether a specific water body is a “water of the United States.” As the Agencies explain in the Proposed Rule, the “significant nexus” test is not only based on Supreme Court precedent; it is also consistent with the science, the Clean Water Act’s objective, and common sense. 86 Fed. Reg. at 69,394-97.

In *Riverside Bayview*, the Court concluded that the “breadth of federal regulatory authority contemplated by the [Clean Water Act]” allows the Army Corps to use its “ecological judgment about the relationship between waters and their adjacent wetlands [which] provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” 474 U.S. at 134. The Court in *SWANCC* explained that its decision in *Riverside Bayview* relied on the “significant nexus between the wetlands and ‘navigable waters.’” 531 U.S. at 167.

In *Rapanos*, a majority of the Court—Justice Kennedy, concurring, plus the four dissenting justices—agreed that water quality is the determining factor in defining the jurisdictional reach of the Clean Water Act. The plurality opinion did not consider the impacts on water quality and integrity. Instead, the plurality concluded non-navigable waters are protected by the Act only if they are “relatively permanent, standing or continuously flowing bodies of water” that are connected to traditional navigable waters or waters that have “continuous surface connection” to such “relatively permanent waters.” *Rapanos*, 547 U.S. at 739, 742.

Justice Kennedy, in his concurring opinion, recognized prior Supreme Court precedent and relied on the Clean Water Act’s objective, Congressional intent, and the science to find that adjacent wetlands would fall within the scope of the Act, if, either alone or in combination with “similarly situated lands in the region,” they had a “significant nexus” to traditional navigable waters. *Id.* at 779-80 (Kennedy, J., concurring). Wetlands possess the required significant nexus if they “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. To be significant, the nexus must be more than “speculative or insubstantial.” *Id.* Moreover, Justice Kennedy explained that adjacent wetlands need not have a direct hydrologic surface water connection to a jurisdictional water to meet the significant nexus test. *Id.* at 786.

Importantly, a majority of the Supreme Court Justices in *Rapanos* (namely, Justice Kennedy and the four dissenting Justices) agreed that, because water quality concerns should guide the scope of the term “waters of the United States,” limiting that term only to relatively permanent waters connected to traditional navigable waters and to wetlands with continuous surface connection with those waters is contrary to the Clean Water Act’s text, structure, and purpose. *Id.* at 769-70, 776, 788, 797, 800. This formed a majority on the issue, and therefore has precedential effect. *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).

Following *Rapanos*, every circuit court that has considered the issue has held that if a wetland or other water satisfies the “significant nexus” standard, then it is a “water of the United States.” *See id.* at 69,380 (listing federal circuit court cases applying *Rapanos*).⁵¹

The Proposed Rule includes as protected waters listed intrastate waters, as well as certain tributaries and wetlands, “[t]hat either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical or biological integrity of [traditional navigable waters, all interstate waters and the territorial seas].” 86 Fed. Reg. at 66,449. The Proposed Rule correctly abandons the “typical year” requirement because that requirement was arbitrary, inconsistent with the science, it failed to account for the impacts of climate change, and was difficult to implement. *Id.* at 69,383, 69,410-12.

As to “similarly situated waters,” the States endorse the Agencies’ observation that “the best available science supports evaluating the connectivity and effects of streams, wetlands, and open waters to downstream waters in a cumulative manner in context with other streams, wetlands, and open waters.” 2021 Technical Support Document at 248. Similar to what the Agencies did in 2015, the Agencies should include in the final rule a list of functions performed by those upstream waters and should provide for consideration of any single function or combination of functions as a basis to determine whether such similarly situated waters “significantly affect the chemical, or physical or biological integrity” of downstream waters. *See* 80 Fed. Reg. at 37,126.

As to the “region” for best evaluating whether similarly situated waters significantly affect downstream water integrity, the States support the Agencies’ previous science-based determination in 2015 that such region is “the watershed that drains to the nearest traditional navigable water, interstate water or territorial sea.” *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States*, EPA and Army Corps, May 27, 2015 (2015 Technical Support Document) at 175. That decision to utilize the “point of entry” watershed as the geographic region for assessing downstream water quality impacts remains consistent with science and with the Agencies’ traditional approach for addressing water resources management issues, including water quality and quantity. *Id.* at 174-77. The States further support environmentally protective, refined science-based approaches by the Agencies that are adaptable to changing landscapes driven by climate change.

The Agencies, the States, and the regulated community were familiar with, and have significant experience with implementing, the “significant nexus” standard before the 2020 Rule became effective in June 2020, and have been applying that standard since the 2020 Rule was

⁵¹ The Supreme Court will consider the term “waters of the United States” in *Sackett v. Environmental Protection Agency*. *See Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), *cert. granted*, 90 U.S.L.W. 3220 (U.S. Jan. 24, 2022) (No. 21-454) (review limited to the question “Whether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act, 33 U.S.C. § 1362(7)”).

vacated in August 2021.⁵² Because of this familiarity and experience, and because the 2020 Rule was applied for a very limited time, the Agencies, the States, and regulated entities should be able to continue implementing the “significant nexus” standard relatively easily and with little disruption.

IV. The Agencies Should Develop a New, Environmentally Protective Regulatory Definition That Is Consistent with the Clean Water Act, Based on the Best Available 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 nationwide permit programs under which unauthorized pollutant discharges could be addressed at the source. Crucial to this enforcement scheme is a broadly protective 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 impairment of downstream water quality.

The States urge the Agencies to develop a new regulatory definition of “waters of the United States” that further advances the Act’s water quality objective; is consistent with the statutory text, legislative intent, and applicable case law; and is based on the best available science. Building on the lessons learned from the 2020 Rule, as well as previous rulemakings, the Agencies should adopt a new definition that protects 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 also should encompass wetlands and other waters that affect the quality and integrity of traditional navigable waters, interstate waters, and the territorial seas, whether alone or in the aggregate, and should not be limited to 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 protect all interstate waters, without qualification, as “waters of the United States.”

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:

⁵² Following the vacatur of the 2020 Rule, the Agencies announced in early September 2021 that they “are interpreting the ‘waters of the United States’ consistent with the pre-2015 regulatory regime,” including the Agencies’ *Rapanos* Guidance which incorporates the significant nexus test. See *Current Implementation of Waters of the United States*, <https://www.epa.gov/wotus/current-implementation-waters-united-states> (last visited on January 31, 2022).

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.⁵³

Indeed, many arid Southwestern states, including New Mexico, California, and Arizona, have been experiencing serious drought conditions,⁵⁴ while other parts of the country have been experiencing record flooding. These growing problems further demonstrate that water quality protections, including a protective definition of the “waters of the United States” under the Clean Water Act, should take into account the expected consequences of climate change.

The States also support the consideration of environmental justice concerns in developing the new definition, to the extent appropriate under the Clean Water Act. Climate change is estimated to increase the cost of flooding across the United States by at least 26% in the next three decades, with much of the economic burden concentrated along the Atlantic and Gulf coasts and borne disproportionately by disadvantaged communities.⁵⁵ 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 our most vulnerable and already overburdened communities continue to lack access to this fundamental resource. The rulemaking establishing the new definition should, as appropriate and authorized under the Act, recognize

⁵³ 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/>

⁵⁴ 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 Declarations* (Executive Orders 2020-084 and 2021-028), <https://www.governor.state.nm.us/wp-content/uploads/2021/06/Executive-Order-2021-028.pdf>; <https://www.governor.state.nm.us/wp-content/uploads/2020/12/Executive-Order-2020-084.pdf> (last visited on Feb. 7, 2022); *State of California Governor Drought Proclamation*, <https://www.gov.ca.gov/wp-content/uploads/2021/10/10.19.21-Drought-SOE-1.pdf>. (last visited on Feb. 4, 2022); *Arizona Drought Interagency Coordinating Group Recommendation to Maintain Drought Emergency Declaration*, https://new.azwater.gov/sites/default/files/media/Fall%2721_ICGRecommendationLetter.pdf (last visited on Feb. 7, 2022).

⁵⁵ The 2020 average annual economic losses from flooding (\$32.1 billion) are expected to rise to \$40.6 billion annually by 2050, even if certain greenhouse gas emission targets are met. Wing, O.E.J., Lehman, W., Bates, P.D. *et al.* Inequitable patterns of US flood risk in the Anthropocene. *Nat. Clim. Chang.* (2022). <https://doi.org/10.1038/s41558-021-01265-6>

and strive to eliminate these inequities, and it should provide a robust stakeholder process to solicit and incorporate feedback from environmental justice stakeholders.

In conclusion, the States support the Proposed Rule, because it will formally replace the harmful and illegal 2020 Rule with a protective definition of “waters of the United States” that includes interstate waters as a category, as well as ephemeral streams and wetlands that significantly affect the integrity of downstream waters. The States further urge the Agencies to swiftly build upon this interim rule by subsequently developing and finalizing a new, more environmentally protective definition of “waters of the United States.”

Respectfully submitted,

For the STATE OF CALIFORNIA and the
CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD

ROB BONTA
Attorney General of California

SARAH E. MORRISON
ERIC KATZ
Supervising Deputy Attorneys General
CATHERINE M. WIEMAN
JESSICA BARCLAY-STROBEL
BRYANT B. CANNON
Deputy Attorneys General

/s/ Tatiana K. Gaur

TATIANA K. GAUR
Deputy Attorney General
*Attorneys for Plaintiff State of California,
by and through Attorney General Rob Bonta
and California State Water Resources Control
Board*

For the STATE OF NEW YORK
LETITIA JAMES
Attorney General of the State of New York

/s/ Philip Bein

Philip Bein
Senior Counsel
Timothy Hoffman
Senior Counsel
Office of the Attorney General
Environmental Protection Bureau
28 Liberty Street
New York, NY 10005
Telephone: (716) 853-8465
Fax: (716) 853-8579
Email: Timothy.Hoffman@ag.ny.gov

For the STATE OF CONNECTICUT
WILLIAM TONG
Attorney General

/s/ David H. Wrinn

David H. Wrinn
Matthew I. Levine
Assistant Attorneys General
Office of the Attorney General
165 Capitol Avenue
P.O. Box 120
Hartford, CT 06141-0120
Telephone: (860) 808-5250
Email: Matthew.Levine@ct.gov
Email: David.Wrinn@ct.gov

For the STATE OF ILLINOIS
KWAME RAOUL
Attorney General

/s/ Jason E. James

Jason E. James
Assistant Attorney General
Matthew J. Dunn
Chief, Environmental Enforcement/Asbestos
Litigation Division
Office of the Attorney General
Environmental Bureau
69 West Washington, 18th Floor
Chicago, IL 60602
Telephone: (312) 814-0660
Email: jason.james@ilag.us

For the STATE OF MAINE
AARON M. FREY
Maine Attorney General

/s/ Scott Boak

Scott Boak
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
Telephone: (207) 626-8800
Email: Jill.OBrien@maine.gov

For the STATE OF MARYLAND
BRIAN E. FROSH
Attorney General of Maryland

/s/ Joshua M. Segal

Joshua M. Segal
Special Assistant Attorney General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Telephone: (410) 576-6446
Email: jsegal@oag.state.md.us

For the COMMONWEALTH OF
MASSACHUSETTS
MAURA HEALEY
Attorney General

/s/ Seth Schofield

Seth Schofield
Senior Appellate Counsel
David S. Frankel
Special Assistant Attorney General
Energy and Environment Bureau
Office of the Attorney General
One Ashburton Place, 18th Flr.
Boston, MA 02108
Telephone: (617) 963-2436 / 2294
Email: seth.schofield@mass.gov
Email: david.frankel@mass.gov

For the STATE OF MICHIGAN
DANA NESSEL
Attorney General of Michigan

/s/ Daniel P. Bock

Daniel P. Bock
Assistant Attorney General
Michigan Department of Attorney General
Environment, Natural Resources and Agriculture
Division
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 335-7664
Email: bockd@michigan.gov

For the STATE OF NEW MEXICO
HECTOR BALDERAS
Attorney General of New Mexico

/s/ William Grantham

William Grantham
Assistant Attorney General
201 Third Street NW, Suite 300
Albuquerque, New Mexico 87102
Telephone: (505) 717-3520
Email: wgrantham@nmag.gov

For the STATE OF NORTH CAROLINA
JOSHUA H. STEIN
Attorney General

/s/ Daniel S. Hirschman

Daniel S. Hirschman
Senior Deputy Attorney General
Marc Bernstein
Amy L. Bircher
Special Deputy Attorneys General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6400
Email: dhirschman@ncdoj.gov;
mbernstein@ncdoj.gov;
abircher@ncdoj.gov

For the STATE OF OREGON
ELLEN R. ROSENBLUM
Attorney General of the State of Oregon

/s/ Paul Garrahan

Paul Garrahan
Attorney-in-Charge, Natural Resources
Section
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301-4096
Telephone: (503) 947-4593
Fax: (503) 378-3784
Email: paul.garrahan@doj.state.or.us

For the STATE OF VERMONT
THOMAS J. DONOVAN, JR.
Attorney General of Vermont

/s/ Laura B. Murphy

Laura B. Murphy
Assistant Attorney General
109 State Street
Montpelier, VT 05609
Telephone: (802) 828-3186
Email: laura.murphy@vermont.gov

For the STATE OF WASHINGTON
ROBERT W. FERGUSON
Attorney General

/s/ Ronald L. Lavigne

Ronald L. Lavigne
Senior Counsel
Office of the Attorney General
2425 Bristol Court SW, 2nd Fl.
Olympia, WA 98504
Telephone: (305) 586-6751
Email: ronald.lavigne@atg.wa.gov

For the STATE OF WISCONSIN
JOSHUA L. KAUL
Wisconsin Attorney General

For the DISTRICT OF COLUMBIA
KARL A. RACINE
Attorney General

/s/ Gabe Johnson-Karp

Gabe Johnson-Karp
Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707
Telephone: (608) 267-8904
Email: johnsonkarpg@doj.state.wi.us

/s/ Brian Caldwell

Brian Caldwell
Assistant Attorney General
Social Justice Section
Office of the Attorney General
for the District of Columbia
400 Sixth Street N.W., 10th Floor
Washington, D.C. 20001
Telephone: (202) 727-6211
Telephone: (202) 445-1952 (m)
Email: brian.caldwell@dc.gov

For the CITY OF NEW YORK
JAMES E. JOHNSON
Corporation Counsel of the City of New York

/s/ Nathan Taylor

Nathan Taylor
New York City Law Department
100 Church Street, Rm 6-144
New York, NY 10007
Telephone: (646) 940-0736 (m)
Telephone: (212) 356-2315
Email: NTaylor@law.nyc.gov