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STAKEHOLDER REACTIONS: THE NAVIGABLE WATERS PROTECTION RULE UNDER THE CLEAN WATER ACT

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 16, 2020

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ONE HUNDRED SIXTEENTH CONGRESS
SECOND SESSION

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STAKEHOLDER REACTIONS: THE NAVIGABLE WATERS PROTECTION RULE UNDER THE CLEAN WATER ACT

WEDNESDAY, SEPTEMBER 16, 2020

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee, met, pursuant to notice, at 10:08 a.m. in room 406, Dirksen Senate Office Building, Hon. John Barrasso (chairman of the committee) presiding.

Present: Senators Barrasso, Carper, Braun, Rounds, Sullivan, Boozman, Ernst, Cardin, Whitehouse, Booker, Van Hollen.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING

Senator BARRASSO. Good morning. I call this hearing to order.

Today, the committee will examine the Trump Administration's Navigable Waters Protection Rule, defining waters of the United States under the Clean Water Act. The new rule went into effect in June 2020. The 2020 rule replaces the Obama administration's illegal rule issued in 2015. That rule gave Washington almost boundless control over what Americans can do on their own property.

The Senate opposed the 2015 rule. We passed a congressional Review Act Resolution in 2015, sponsored by Senator Ernst, who is a valued member of the committee and who is here with us again today. President Obama vetoed that resolution after it passed the House in 2016.

President Trump signed an executive order during the first months of his presidency directing his Administration to do away with the 2015 rule. The Trump Administration repealed the Obama-era rule last year.

In April of this year, the Trump Administration published its replacement, the Navigable Waters Protection Rule. The new rule is clear, and it is limited. It is broadly supported by landowners, by businesses, and by States. Twenty-three States are supporting the rule in court, including my home State of Wyoming.

President Trump's rule will not regulate puddles or prairie potholes or dry land. It follows congressional intent, and it recognizes that landowners and States, not Washington, should lead the protection of most water and property in our Country. Washington should have a limited role grounded in interState commerce.

Federal regulations, which are overly broad, can actually discourage innovative practices to protect our land and water. In addition, confusing and punishing regulation serves as a drag on our economy without environmental benefit. We can have clean water and a growing economy at the same time.

The Trump Administration also worked to ensure that its agencies collaborated on the new rule. This contrasts sharply with how the Obama administration operated.

In 2017, our committee held a hearing on the old Waters of the U.S. Rule. We heard from retired Major General John Peabody, a former commanding general of the Civil and Emergency Operations at the Corps of Engineers. He testified that the Obama administration's rule wasn't based on the Army Corps' expertise and experience. In fact, he said, the Army Corps was shut out of the process of writing the final rule and the support documents.

The Army Corps is the agency that performs the inspections that identify what water is federally regulated. If the rule wasn't based on the Army Corps' experience, that means it has no technical basis. It was a blatant government power grab by Washington's unelected bureaucrats.

By contrast, the Trump Administration has shown a collaborative approach in developing the Navigable Waters Protection Rule. Together, the Environmental Protection Agency and the Army Corps of Engineers developed a simplified, clear definition of waters of the U.S. that respects the law and the constitution.

The Trump Administration's replacement rule restores balance between the States and Washington. The new Waters of the U.S. Rule avoids needless duplication that provides no additional environmental benefit. I applaud the Administration for its recognition that clear rules also require consistent application.

Now that the new rule is out, EPA and the Army Corps are working on fostering consistent application of the rule. The Administration has already issued documents and tools to guide implementation in key areas. To ensure consistency, the Administration plans to conduct internal reviews at regular intervals to check that decisions are consistent, no matter what region of the Country they impact.

This is a good start. The Navigable Waters Protection Rule is a great example of Washington listening to the people to develop clear rules that result in clean water.

I will now turn to Ranking Member Carper for his opening statement.

OPENING STATEMENT OF HON. THOMAS R. CARPER, U.S. SENATOR FROM THE STATE OF DELAWARE

Senator CARPER. Mr. Chairman, thanks so much. I want to welcome with us here this morning, Douglas Davis, Jr., nice meeting you sir, and all the way from St. Augustine, Florida. We are happy that you are here. I understand Ray Gaesser is down in Corning, is it Iowa? Is it Iowa? Yes? OK. We are happy to have one of your constituents here, Joni. I also want to welcome, all the way from Santa Fe, Rebecca Roose. You have come a long way, or almost, you are coming a long way from a long distance, Rebecca, so welcome aboard.

I really appreciate the opportunity, I think we appreciate the opportunity afforded by this hearing to discuss the role of the Federal Government in protecting our Nation's waters and in providing our States and our businesses with greater certainty and predictability. It is interesting; I think it is what everybody wants, greater certainty, predictability. So the question has always been, how do actually get to that goal?

Throughout what we call the Delmarva Peninsula, in our part of the world, throughout the peninsula can be found something called "whale wallows." These shallow, freshwater depressions dot and weave through the landscape of the Eastern Shore of Virginia, the Eastern Shore of Maryland, and my State of Delaware.

Believed by some to be shallow imprints made by ancient whales that were beached by great biblical floods, today these iconic wetlands are commonly known as the Delaware Bays. They are home to the greatest diversity of plant and animal species on the Peninsula, many of which are rare, even endangered. These wetlands are also attractive rest stops for pollinators and migratory birds alike.

These unique wetlands also act as a natural filter, helping to reduce high levels of nutrients and sediments in the soil that result from agricultural production in nearby communities. I have mentioned this before, I said to our witnesses and my colleagues, you have heard this, there are 400 chickens for every person who lives in Delaware, and probably almost as many in Maryland on the Eastern Shore, and in Virginia. Our State bird is a chicken.

For decades, as generations of Delmarva farmers have produced the poultry and crops that feed our Nation, this natural filtration system has helped to keep harmful pollutants out of our estuaries, including the Chesapeake Bay in our neighboring Maryland.

Sadly, on April 22 of this year, all of these treasured waters throughout the Delmarva ecosystem lost Federal protection under the Clean Water Act protection that for years ensured that no one could legally dredge them, fill them, or otherwise degrade them without a permit. Having relied on Federal protection, Delaware does not have a law on the books today that prevents anyone from altering or destroying these resources.

Now the Delmarva Bays, those legendary whale wallows that provide important habitats, filter harmful nutrients, and act as a flood barrier against worsening coastal storms can be dredged, developed, or otherwise degraded without consequence.

The high mountain wetlands of Colorado known as the fens, not from Finland, but the fens, F-E-N-S, now face a similar fate as does Crater Lake in Oregon, nearly 90 percent of the river miles in New Mexico, and hundreds of thousands of miles of streams and millions of acres of wetlands across our Country.

Protecting our Nation's waters and ensuring clean water for all has long been a shared responsibility between States and the Federal Government. However, Congress gave the EPA a clear directive in the Clean Water Act "to ensure the chemical, biological, and physical health of our waters."

The Trump Administration's rule represents an abdication of that responsibility, in my view. We know that from the view of a lot of people. We know that the extraordinary science, including more than 1,000 peer-reviewed studies that served as the founda-

tion of the Obama-era rule that these water bodies are critically interconnected.

When snow melts or rain falls, eventually the water in the farthest upper reaches of our river systems will flow downward, downhill, and feed into our rivers and also into our oceans. When these waters flow, no matter for how long or how frequently, they will carry every leaf, every twig, bit of dirt, and pollutant that they meet along the way.

Now that these headwaters can be developed or degraded without consequence, this rule, this new rule will ensure more pollution and higher costs for families and businesses everywhere, especially those in disadvantaged communities located downstream, which will see higher utility bills as a result. At the same time, the rivers and streams now left unprotected feed into drinking water sources for more than 100 million Americans, jeopardizing clean water for approximately one in three Americans.

I think it is worth asking who truly benefits from Federal rules that allow industrial facilities, mining operations, and animal feedlots to spill their waste into our Nation's headwaters and streams. Certainly, it is not our farmers located downstream, who will need to install water treatment facilities to have clean water to raise healthy crops and livestock. It is certainly not our fishermen and our hunters, who will see the quality of outdoor recreation decline.

Despite the Trump Administration's promises otherwise, States are not the real winners of this rule either, far from it. For many reasons, including the hardship brought by the COVID pandemic, most States are unable to step up and cover the costs associated with losing Federal protections of these waters.

As we will hear in greater detail shortly, New Mexico just recently lost its only protection for almost 90 percent, almost 90 percent, of its stream miles. Right now, New Mexico is one of several States with no law, no funding, and not enough staff to handle this huge influx of orphaned waterways.

As a former State treasurer and a recovering Governor, I don't see how most States will be able to devote additional resources to shoulder this new burden, especially given the budgetary challenges posed by this pandemic. To complicate these financial challenges, 27 States have laws on the books that limit, if not prohibit, taking actions that are more stringent than Federal regulations.

I will close by saying that for years, the Trump Administration promised its proposal would provide greater clarity for our constituents. Clearly, that has not proven to be true. Instead, this rule has created more uncertainty and higher costs for State, communities, and families, while putting the drinking water for over 100 million Americans at risk. At no time is this the right thing to do, and it is certainly not now.

Again, I will close with thanking our witnesses. We welcome you up here, close, and personal, and far away, as far away as New Mexico and Iowa. Thank you, Mr. Chairman.

Senator BARRASSO. Well, thank you so much, Senator Carper.

We do have, as you mentioned, three witnesses: Rebecca Roose, who is the Director of the Water Protection Division at the New

Mexico Environmental Department. She is visiting with us remotely from Santa Fe.

We have with us in the room Douglas Davis, who is the President and CEO of Fletcher Davis in St. Augustine, Florida. He is testifying on behalf of the National Association of Homebuilders.

We also have, and I am going, in a second, ask Senator Ernst to introduce our witness, who will be coming to us directly from Iowa, and that is Mr. Ray Gaesser. He is joining us remotely from Corning, Iowa.

So with that, I would like to turn to Senator Ernst to make that introduction, and then to Mr. Gaesser for his testimony.

Senator ERNST. Yes. Thank you, Mr. Chair. I have the great privilege of introducing to the committee a fellow Iowan, Mr. Ray Gaesser. Today, Mr. Gaesser is here in his capacity as owner-operator of Gaesser Farms in Corning, Iowa, where he farms corn and soybeans on 5,400 acres. He has more than 50 years of farming experience and has advocated locally, nationally, and globally for agriculture in Iowa and the United States as President of both the Iowa Soybean Association and the American Soybean Association.

Mr. Gaesser received the American Soybean Association Distinguished Leader Award in 2018, the Iowa Master Farmer Award in 2012, the Adams County Conservation Award, and the Lenox Rotary Good Citizen Award.

On a personal note, I do want to say thank you so much to Ray and his wonderful wife, Elaine. They are well-known, not just through Southwest Iowa where I am from, but through the State of Iowa, as good citizens, and good members of their community. So thank you Ray, so very much, and I look forward to hearing your testimony today.

Thank you, Mr. Chair.

Senator BARRASSO. Thank you, Senator Ernst. Mr. Gaesser, welcome to the committee. We look forward to your comments right now, as you are ready.

STATEMENT OF RAY GAESSER, OWNER-OPERATOR, GAESSER FARMS

Mr. GAESSER. Good morning. Can you all hear me?

Senator BARRASSO. Very well, thank you.

Mr. GAESSER. So, good morning Chairman Barrasso and Ranking Member Carper and members of the committee. A sincere thank you to Senator Ernst for inviting me to speak about the Navigable Waters Protection Rule. It is an honor to share my perspective on behalf of Iowa's hard-working family farms.

My name is Mr. Gaesser. I join you today from my family farm in Southwest Iowa. Growing up, I always knew I wanted to farm, to grow food we eat, the fiber we wear, and the renewable fuels that we use. Forty-three years ago, my wife Elaine and I moved here, put down roots, and began growing corn and soybeans.

Ever since we planted our first seed, our mission and everything we have done to support it has been to protect our greatest asset: the soil. The conservation practices we have implemented have allowed us to grow more from less, sequester carbon, reduce nutrient runoff, and clean our water. We have invested time, energy, and

hard-earned money into building the conservation infrastructure needed to accomplish our mission.

We cared tirelessly for our land in hopes that our next generation would share the same passion for agriculture. That hope became a reality in 2009 when our son, Chris, came home and said, "You know, all I really want to do is farm with you." It was a great day.

Our farm's mission and partnership with Chris were thrown in jeopardy when the Obama administration muddied the waters with its 2015 WOTUS Rule. The EPA wrote a rule that threatened my farm with jaw-dropping penalties and even criminal prosecution for tilling, spraying, or disturbing a water of the U.S.

The only certainty for farmers today is uncertainty. We do our best to manage our farms through unpredictable weather and market volatility, which can spoil the best-laid environmental plans. Our landscapes are diverse, so there is no perfect model. Instead, we need to ability to make the best decision possible to successfully manage and mitigate what is out of our control.

The 2015 WOTUS Rule made every small wetland, ditch, or stream on my farm a regulatory land mine. The rule's broad definition expanded Federal jurisdiction far beyond what was authorized by Congress, resulting in burdensome requirements, widespread uncertainty, and legal risk for farmers. It would have given the Federal Government control over 97 percent of Iowa's land, forcing farmers to obtain costly permits or pay fines for doing normal activities like spraying weeds or even installing fences.

Farmers care about clean water and preserving the land. That is why we support the Navigable Waters Protection Rule. This rule brings certainty and predictability into focus, giving farmers like me and my son Chris the freedom to farm, all while achieving important regulatory oversight.

This new rule does not change who oversees permanent waterways. Instead, it ensures that States can enforce their own environmental laws to position farmers and rural communities for long-term success. It is a very reasonable definition of waters of the U.S. within the limits set by Congress.

I like to say, the rain falls on all of us. By the same token, clean water matters to all of us. Just like we all want access to safe water for ourselves and our families, we all have a role to play in protecting our environment. Farmers have been calling for clean water and clear rules for years, and now, with the Navigable Waters Protection Rule, we know it is possible to have both.

Rather than force a square peg in a round hole with a one-size-fits-all approach, it is our government's best interest to provide research, technical assistance, and incentives encouraging innovation. This approach will help farmers grow more food using fewer resources, protect the soil, improve soil health, clean our water, and restore wildlife habitat. That is why I remain hopeful that the 2015 WOTUS Rule is forever relegated to the archives of history.

Common sense policy, paired with smart agriculture practices, will allow me and my son Chris to meet our mission and give us the opportunity to be a part of the solution to growing more resilient food, fiber, and fuel. That is why the Navigable Waters Protec-

tion Rule is the right approach to improving the livelihood of American farm families, rural communities, and businesses.

Thank you again for allowing me to share my story, thoughts, and values on behalf of Iowa farmers. I am happy to answer any questions you might have.

[The prepared statement of Mr. Gaesser follows:]

GAESSER FARMS

WRITTEN TESTIMONY OF RAY GAESSER
OWNER/OPERATOR OF GAESSER FARMS
CORNING, IA

BEFORE THE

UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

HEARING ENTITLED
"STAKEHOLDER REACTIONS: THE NAVIGABLE WATERS PROTECTION RULE UNDER THE CLEAN WATER ACT"

WEDNESDAY, SEPTEMBER 16, 2020 AT 10:00AM

Good morning, Chairman Barrasso, Ranking Member Carper, and Members of the Committee. A sincere 'thank you' to Senator Ernst for inviting me to speak on the Navigable Waters Protection Rule under the Clean Water Act. It's truly an honor to share my perspectives on behalf of Iowa's hard-working farm families.

My name is Ray Gaesser and I join you today from my family farm located near Corning in southwest Iowa. Born and raised on a farm in southern Indiana, I always knew what I wanted to do when I grew up. I wanted to farm – grow the food we eat, the fiber we wear, and the renewable fuel we use. Almost 43 years ago, my wife, Elaine, and I set out on our own. Our journey brought us here to southern Iowa where we put down roots and began growing soybean and corn. Like so many American farmers, we have survived, and sometimes thrived, through the many uncertainties that come with the business. Maybe we're stubborn. Maybe we're hard-headed. But I think we're just passionate. Passionate about producing a healthy food supply, improving the quality of life for rural communities, and leaving this Earth better than we found it for the next generation to enjoy and prosper. Through it all, Elaine and I have raised a loving family, supported those around us, and given back to an industry that's given us so much.

Ever since we planted our first seed, our mission, and everything we do to support it, has been to protect our greatest asset – the soil. The conservation practices we've adopted and implemented have allowed us to grow more from less, sequester carbon, reduce nutrient runoff, and clean our water. We have invested our time, energy and hard-earned money into building the conservation infrastructure, including waterways and terraces, needed to accomplish our mission. In 1991, we transitioned our entire operation from conventional tillage to no-till or zero tillage, meaning we now grow crops with minimal disturbance to our fields and the organisms that call them home. Today, we also seed cover crops on more than half our farmland, with a goal to reach one-hundred percent cover crop coverage and protection in the near future.

We have cared tirelessly for the soil that we have been blessed with and built our business on, with the hope that our next generation would share the same passion for agriculture, care for the land, our values, and someday, carry on the family farm. That hope became a reality in 2009 when our son, Chris, after earning his agronomy degree from Iowa State University and obtaining gainful employment off the farm, came home and said, "You know, all I really want to do is to farm with you."

Our farm's mission and partnership with Chris were soon thrown into jeopardy when the Obama Administration muddied the waters with its 2015 WOTUS rule. The EPA wrote a rule that threatened my farm with jaw-dropping penalties and even criminal prosecution for plowing or spraying a "water of the U.S." But it was so broad and vague that under the "water of the U.S." definition, most any land where water sometimes flowed or ponded after a rain, would be regulated by the federal government.

I'm here today, not to complain or make excuses, but to share the realities of farming and why a one-size-fits-all regulation does not effectively or efficiently mitigate what's out of our control.

The only certainty for farmers and ranchers today is uncertainty. We do our very best to manage our farms through unpredictable weather and market volatility. Our landscapes and environments are so diverse, there is no one perfect model. Instead, we need the ability to operate and make the best decisions possible. This includes targeting specific areas of the field, to innovate cropping systems, to successfully manage and mitigate the uncontrollable factors I've mentioned is paramount. After all, my livelihood depends on it, my family's livelihood depends on it, my son's livelihood depends on it.

The 2015 WOTUS rule made every small wetland, ditch or ephemeral stream on my farm a regulatory landmine. It was an enormous overreach by an administration that prevented me from being able to fully use my land. As I stated earlier, the rule's broad definition expanded federal jurisdiction far beyond what was authorized by Congress, resulting in burdensome requirements, widespread uncertainty, and legal risk for farmers and ranchers. It would have given the federal government jurisdiction over 97 percent of the land across Iowa. The rule was so expansive that farmers would have had to obtain costly permits or pay fines for conducting normal activities like spraying weeds or installing fence.

When the federal government regulates other industries, those added regulatory costs can be passed on to consumers, so the costs are spread out and everyone pays. In a commodity business like agriculture, our prices are subject to the global marketplace, with no opportunity to pass regulatory costs or permitting to anyone else. Let us not forget the weather uncertainty that has created havoc and spoiled the best-laid local, environmental plans. Over the years, we've dealt with drought, floods, blizzards, and most recently, an inland hurricane with winds topping 130 miles per hour impacting nearly one-third of Iowa's cropland.

Farmers and ranchers care about clean water and preserving the land, which are essential to producing healthy food and fiber and ensuring future generations can do the same. That's why we support the new clean water rule – the Navigable Waters Protection Rule. This rule provides clarity, certainty and commonsense allowing farmers like me and my son Chris the freedom to farm, all while achieving important regulatory oversight. This new rule does not change who oversees permanent waterways, such as lakes, rivers and streams. Instead, it ensures that states can enforce their own robust environmental laws to position farmers and rural communities for long-term success. It's a very reasonable definition of "waters of the U.S." within the limits set by Congress.

I like to say, "The rain falls on all of us." By the same token, clean water matters to all of us. Just like we all want – and need – access to safe water for ourselves and our families, we ALL have a role to play in protecting our soil, cleaning our water, and mitigating unpredictable weather events. Farmers have been calling for clean water and clear rules for years, and now, with the Navigable Waters Protection Rule, we know it's possible to have both.

These are sometimes personal responsibilities, sometimes public. Rather than force a square peg into a round hole with a one-size-fits-all approach, it's in our country's best interest to provide research, technical assistance, and incentives encouraging innovation. This continuous improvement is the catalyst for allowing U.S. farmers the ability to grow more food using fewer resources, protecting our soil, improving soil health, cleaning our water, and restoring wildlife habitat. That's why I remain hopeful that the 2015 WOTUS rule is forever relegated to the archives of history.

It's evident that when we work together, we all benefit. Commonsense policy, paired with Smart Agriculture practices, will allow me and my son Chris to meet our mission of protecting the soil we farm. Together, they will allow farmers to be a part of the solution to growing more resilient food, fiber, and fuel. That seems practical to me. That's why the Navigable Waters Protection Rule is the best approach to improving the livelihood of American farm families, rural communities and businesses.

Thank you again for allowing me to share my story, thoughts and values on behalf of Iowa's farmers. I am happy to answer any questions you have.

Senate Committee on Environment and Public Works
Hearing entitled, *"Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean Water Act."*
September 16, 2020
Questions for the Record for Ray Gaesser

Senator Carper:

1. You have taken commendable steps to reduce the environmental impact of your farming practices—and as a Senator from a state whose number one industry is agriculture and whose water resources are suffering mightily, I salute you.

    a. Now that so many of our waters and wetlands now have no federal Clean Water Act protections, how do we get farmers and industries to be as careful with their and our water resources as you are with yours?

    The agricultural commodities produced in Iowa and across the United States are grown globally. As farmers, we must compete with producers around the world to market our product and feed, fuel and clothe a growing population. Therefore, our businesses and livelihoods rely on successfully managing the land on which we farm.

    In my 47 years of farming, I've come to realize that farmers learn best directly from each other, and then by doing with technical support and assistance. That's why I support policies that foster peer-to-peer learning, as well as those that incentivize and encourage innovation. The Iowa Soybean Association (ISA) has also played an important role in the development of my farm's nutrient management and soil health plan. The ISA has worked actively to engage farmers by taking a holistic approach to developing systems and practices that are more profitable, resilient and sustainable. These systems allow farmers to not only build soil health and prevent nutrient runoff, but also retain and sequester carbon and reduce greenhouse gas emissions, all while helping to improve profitability.

    I believe that conserving our natural resources is in the best interest of every citizen. The policies and opportunities mentioned above would enhance a farmer's ability to deploy conservation practices rather than threaten penalty for natural occurrences that are beyond our control. As I like to say, "The rain falls on all of us."

    We must continue working diligently with farmers, landowners, businesses and municipalities to spearhead soil and water quality efforts with a collaborative, integrated approach.

    b. Should all farmers do what you are doing with no-till and cover crops?

    Farming diversity is the foundation of agriculture, enabling the soil and ecosystem to evolve and adapt to meet the never-ending challenges of sustainable production. Every farm is different, from the visible terrain all the way down to the soil type, profile, and nutrient composition, so the conservation practices that I've implemented

to help keep soil and water in place are different than those for a farmer in another geography or climate. Rather than a one-size-fits-all policy or regulatory approach, conservation and nutrient stewardship require flexibility to determine and target the best management practices specific to local watersheds. Great consideration must be given at the farm level based on many variables, including but not limited to the desired outcome, geography, soil type, cropping system, and the weather.

I believe it's in our country's best interest to provide research, technical assistance, and incentives encouraging innovation and practice implementation. This continuous improvement will address the challenges of today and tomorrow and serve the catalyst for allowing U.S. farmers the ability to grow more food using fewer resources, protecting our soil, improving soil health, cleaning our water, and restoring wildlife habitat.

Today, farmers are taking many different approaches to maintaining and improving soil and water quality, which increases farming diversity and brings more safe and affordable choices for consumers.

c. And if not, why not—at least in the name of good water and soil stewardship?

Farmers and ranchers care about clean water and preserving the land, which are essential to producing healthy food and fiber and ensuring future generations can do the same. U.S. agriculture is extremely diverse. The approach to addressing soil health and water quality in Adams County, Iowa might not work in Sussex County, Delaware, let alone another part of the same field or across the fence row.

Continued investment in research, technical assistance and conservation programming are needed to allow for better soil health and land stewardship, and in turn, will lead to better decisions at the farm gate. As the Enabling Policy Chairman of the North American Climate Smart Agriculture Alliance (NACSAA), I helped develop and submit a series of recommendations to raise up the importance of the climate smart agriculture (CSA) framework and NACSAA's Guiding Principles in policy development. I believe these recommendations provide a pathway for future policy that will help further soil health, water quality, and climate solutions that truly come from the land.

Together, commonsense policy, Smart Agriculture practices, and a needs-based approach that fosters collaboration, innovation, and incentivizes stewardship will help reach the outcomes we all desire and allow farmers to be a part of the solution to growing more resilient food, fiber and fuel supplies.

Senator BARRASSO. Well, thank you so much, Mr. Gaesser. Thanks for joining us remotely from Corning, Iowa.

Thank you, Senator Ernst, for bringing such a wonderful witness to the committee and identifying Mr. Gaesser to help us in our deliberations today. Thank you both.

I would now like to welcome Douglas Davis, the President and CEO of Fletcher Davis, St. Augustine, Florida, who is testifying on behalf of the National Association of Homebuilders.

Mr. Davis, welcome.

STATEMENT OF DOUGLAS DAVIS, JR., PRESIDENT AND CHIEF EXECUTIVE OFFICER, FLETCHER DAVIS COMPANY

Mr. DAVIS. Chairman Barrasso, Ranking Member Carper, members of the committee, I am humbled and honored to be here today. I am a little overwhelmed. This is such a treat to get to be here with you guys and to share a little bit about my family, about my business, and the impacts of this.

Again, my name is Doug Davis. I am the President and CEO of Fletcher Davis. We are a small, family owned business based in St. Augustine, Florida. We focus on development of large, conservation-based master plan communities and resorts.

I commend the committee's desire to highlight the stakeholder experience with Clean Water Act compliance. Our company has been creating sustainable communities for over 50 years, that is 5–0 years, and I am proud of the fact that we have prioritized environmental protection. In fact, the environmental community, NGO's, and others alike, frequently applaud our efforts and our methods.

Over the years, the Federal Government has expanded the scope of the regulatory authority, and it frequently changed the requirements needed to obtain Federal wetland permits. The Obama administration's attempt to clarify Clean Water Act jurisdiction would have been especially harmful to my business. It would have increased Federal regulatory power over private property, led to additional permitting requirements, and lengthy delays for any business trying to comply. It was so convoluted that even professional wetland consultants with decades of experience struggled to determine what is jurisdictional.

My business has fallen victim to an uncertain permitting regime. One of our projects was delayed for a decade as we sought to obtain the necessary 404 permit. Every step of the process offered arduous obstacles, and as the rules changed and new requirements were added, it only got more difficult.

We were left at the mercy of the Federal agencies because there was little recourse for landowners in this position. Federal agencies have the ability to hold up a project for any reason, and nothing can be done to expedite the process.

I also want to offer one more example. This is an instance where stringent Federal regulations almost prevented my business from contributing to the preservation of our natural resources. In this case, it took us 10 years, a different 10 years, to navigate the red tape of setting up a wetlands mitigation bank. This would have allowed for the creation and preservation of over 1,000 acres in one case, and another case, 6,000 acres. So to be clear, the Federal Gov-

ernment has held up the creation and preservation of wetlands for 10 years.

Thankfully, the Trump Administration finalized the Navigable Waters Protection Rule. This new rule provides straightforward regulatory requirements, clear jurisdictional line, and makes compliance easier. It eliminates ambiguous tests to determine jurisdiction and provides landowners with greater certainty and focuses on conditions that are more easily observable, making it easier to implement in the field. The distinction of what is jurisdictional is clear enough to allow landowners to determine for themselves what would require a Federal permit.

One of the biggest misconceptions surrounding the Navigable Waters Protection Rule is that waters no longer fall under Federal jurisdiction will go unprotected. Now, I can tell you from my perspective, that is not true. State and local governments have the authority to regulate waters, and there are a number of environmental requirements that builders and developers must comply with.

In Florida, again, where I live, when creating a development, I must consult with the Florida Department of Environmental Protection. I have to comply with various State wetland laws and regulations, and obtain stormwater permits to manage all of my runoff. The State permitting process is far easier to navigate because they operate under reasonable deadlines and with a greater degree of accountability.

Homebuilders are especially sensitive to the cost of regulations because we have no choice but to pass these costs on to the home buyer, which directly affects housing affordability, and I know that is big to all of us. NAHB estimates that nearly 25 percent, that is 25 percent the cost of a single-family home, is due to government regulations, and as a result, owning or renting suitable homes is increasingly out of financial reach for many households. Due to the COVID–19 pandemic, many parts of the U.S. economy are likely to experience long-lasting economic suffering.

However, housing has been the bright spot. Housing has experienced the strongest rebound among the individual sectors in the economy. Construction has remained an essential service in most States, and consumer confidence remains strong. Single-family permits are now up 8 percent year to date, and housing share of GDP rose to a 13-year high.

Despite all of these successes, many continue to suggest that the additional regulatory requirements are necessary. Housing has led our Nation out of virtually all economic downturns over the last several decades, but it will be unable to help lead this economic recovery unless we continue to repeal onerous regulations and promote sensible replacements.

The Navigable Waters Protection Rule is a perfect example of the regulatory actions needed to get our economy moving again. Our goal is to create more affordable housing. My company wants to do this. We want to do it for all Americans, but we also want to protect our communities, and we want to protect the environment; that is important to us.

So again, I am humbled to be here today. I look forward to answering any questions that I can. Thank you so much.

[The prepared statement of Mr. Davis follows:]

Testimony of Douglas Davis, Jr.
President and Chief Executive Officer,
The Fletcher- Davis Company

Before the Senate Environment and Public Works Committee

"*Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean Water Act*"

September 16, 2020

Chairman Barrasso, Ranking Member Carper, members of the Committee, on behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Douglas Davis, Jr. and I am the President and Chief Executive Officer of the Fletcher Davis Company. The Fletcher Davis Company is a family owned development, building, and management company based in St. Augustine, Florida. Starting in 1961, founding brothers, Paul and Jerome Fletcher, began developing conservation based master-planned communities throughout the Southeastern United States. Since then ingenuity and insights have helped to steadily grow our business, relationships and reputation.

The word "green" or "sustainable" may be relatively recent terminology within the residential construction industry but our company has been creating sustainable communities for over fifty years. I am proud of the fact that our business has prioritized environmental protection by using new and innovative design methods. However, this goal becomes more elusive when the federal government attempts to increase regulatory red tape and relies on a failed permitting regime that makes it extremely difficult for any business to provide housing at a price point that middle-class American families can afford.

I commend the Committee's desire to highlight the stakeholder experience with Clean Water Act (CWA) compliance, and I appreciate the opportunity to share my perspective. Recognizing and supporting the need for a clean environment and the benefits that it brings to our nation's communities, home builders and land developers have a vested interest in preserving and protecting our nation's water resources. Since its inception in 1972, the CWA has helped to make significant strides in improving the quality of our water resources and improving the quality of our lives.

Under the CWA, home builders must often obtain and comply with section 402 storm water and 404 wetland permits to complete their projects. We understand we have a responsibility to protect our water resources, especially in Florida where many residents are attracted to the state by our beaches, lakes, and rivers. But what is missing in these compliance efforts is a regulatory scheme and permitting process that is consistent, predictable, timely, and focused on protecting true aquatic resources.

The home building community knows all too well the frustration of a broken permitting process. Over the years, the federal government has expanded the scope of their regulatory authority and have frequently changed the requirements needed to obtain a federal wetland permit. These changes have made the permitting process virtually impossible to navigate and have caused many land use projects to come to a grinding halt, putting more people on unemployment. It is impossible for home builders and developers to support the needs of our community under an ever-changing regulatory system. With property rights being jeopardized by federal regulatory overreach, it is increasingly difficult to attract new companies into our industry. Unfortunately, our company has fallen victim to this broken system.

The regulatory requirements we face as builders do not just come from the federal government. At the local level, jurisdictions may charge permit, hook-up, and impact fees, and establish development and construction standards that either directly or indirectly increase costs to builders and developers. A key component of effective regulation is ensuring that local, state and federal agencies are cooperating with the goal of streamlining permitting requirements in order to remove duplication. The federal government must also respect the regulatory responsibilities of state and local governments.

Impacts of onerous permitting requirements

The CWA grants the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) statutory jurisdiction over the "waters of the United States" (WOTUS) but does not define that phrase. The definition is of critical importance to builders and developers because conducting certain activities within these designated areas, such as land clearing, grading, and earth moving, can trigger CWA permitting and mitigation requirements.

In 2015, the Obama Administration attempted to draw a bright line by adding new terms, definitions, and interpretations of federal authority over private property that are more subjective and provided the agencies with greater discretionary latitude to expand their regulatory authority. The rule fell well short of providing the clarity and certainty sought by the regulated community. It increased federal regulatory power over private property and lead to increased litigation, more permit requirements, and lengthy delays for any business trying to comply. It was so convoluted that even professional wetland consultants with decades of experience struggled to determine what is jurisdictional. Additionally, various district courts have ruled that the rule was illegal and have ordered the rule be remanded back to the agencies.

Under the 2015 rule, builders and developers were ill-equipped to make their own determinations and had to hire outside environmental consultants and wetland delineators to conduct jurisdictional determinations to determine whether CWA permits were necessary. This takes time and money. Delays often lead to greater risks and higher costs, which many developers would rather avoid given tight budgets and timeframes. Onerous permitting requirements could delay or eventually kill a real estate deal.

As a builder and developer who lives in and around the communities I build, I go to great lengths to minimize our environmental footprint. Our projects are carefully designed to protect the environment, honor native culture and heritage, and promote local economies. After we acquire a piece of land, we work with our environmental consultants to determine a building plan that has the smallest environmental impact. We create maps that identify the environmentally sensitive areas and lay them on top of each other in order to easily locate the most buildable parcels of land. Often this means changing development plans or deviating from more profitable construction layouts. The environmental community frequently applauds our efforts and methods.

Although we go to great lengths to minimize our environmental impact, our projects have been derailed because the federal government's jurisdiction has gone too far and the permitting process has been convoluted and complicated. The most frustrating aspect of CWA permitting is the fact that the requirements are always changing. Simply put, even with the best environmental planning and making every effort to comply, we often are forced to give up and walk away.

These pitfalls are perfectly illustrated by one of our projects that was delayed for 10 years as we sought to obtain the necessary 404 permit. Every step of the process offered arduous obstacles, as the rules changed and new requirements were added along the way. These years were spent responding to the Corps constant requests for additional information, studies, and data. When we responded with the requested information and data, we were often met with follow-up requests to reformat the information in a painstakingly specific way. The numerous requests appeared to be nothing other than an intentional stalling mechanism, as we swiftly complied with every request only to be faced with another. We had to hire additional environmental consultants to conduct more wetland delineations and functional assessments. In addition, the Corps staff assigned to our project continually changed over the years, and we struggled to keep them appropriately educated on our project. Over the years we have had dozens of field visits from Corps and EPA staff in order to survey and assess the land. We complied every step of the way, but this is not how the system should function.

Another example is a project where we were hung up in the permitting process and forced to negotiate a programmatic agreement with the Corps that would allow us to break ground only on specific areas of land. It took eleven years to reach this agreement because the Corps were unable to provide a definitive answer to our requests. Under the agreement, we were strictly forbidden from touching specific areas and were left with a fragmented development plan that we were unable to meaningfully execute**.** Nonetheless, the system is clearly broken if it takes more than a decade to resolve these issues.

These anecdotes demonstrate how we have been left at the mercy of the federal agencies because there is little recourse for landowners in this position. Federal agencies have the ability to hold up a project for any reason and nothing can be done to expedite the process. While the Corps has never officially vetoed any of our permit requests, their delays and stalling techniques have effectively accomplished that. In many cases it would be more beneficial for the agencies to deny my permit because in that instance, I would have an opportunity to challenge that decision. Failing to approve or deny a permit creates a regulatory and legal limbo with few options.

I want to offer one more example of the unintended consequences that stringent federal regulations have on protecting our environment. For example, in the event that mitigation is not an option, builders will pay into a mitigation bank. The goal of a mitigation bank is to protect the environment by preserving, enhancing, or re-creating wetlands.

In an effort to contribute to the preservation of the natural resources in our community, my company set up a mitigation bank to help collect these offsets. We were met with many layers of red tape, and it took us over ten years to navigate the interagency review process in order to get our bank approved. To be clear, the federal government held up the creation of wetlands for 10 years.

We were motivated to set up this bank because we were trying to do something positive for our business, our community and our environment. Once again, we were met with difficulties due to an inefficient federal approval process. It is frustrating to be met with so many regulatory hurdles, and it disincentives businesses from taking proactive steps to protect the environment.

Navigable Waters Protection Rule

Clarification of CWA jurisdiction and creating a streamlined permitting system have been top environmental priorities of the Trump Administration. On January 23, 2020 the Trump Administration finalized the Navigable Waters Protection Rule (NWPR). The NWPR presents a unifying theory for extending federal jurisdiction to only those waters and wetlands that "maintain a sufficient surface water connection to traditional navigable waters of the territorial seas." It intends to clearly distinguish federal waters, based on commonly agreed upon standards for CWA jurisdiction that are supported by statutory text and Supreme Court decisions, from state waters that may be broader than those covered by the federal WOTUS definition. The NWPR respects the cooperative federalism outlined in the CWA, by allowing state and local governments to maintain jurisdiction over many of their waters.

The NWPR provides many benefits to builders and developers. For example, it exempts ephemeral features that form only in response to rainfall, eliminates ambiguous tests to determine jurisdiction, and removes many isolated features from federal jurisdiction. As a result, builders and developers should require fewer federal wetland permits and have greater ability to determine their permitting needs for themselves. In general, compared to prior rules, the NWPR subjects less area to federal oversight, eliminates ambiguous tests and provides landowners with greater certainty, and focuses on conditions that are more easily observable, making it easier to implement in the field.

The examples that I previously provided show the challenges that the NWPR can solve for the regulated community. The NWPR provides a bright line for jurisdiction and no longer allows for a troublesome "gray area." The distinction of what is jurisdictional is clear enough to allow landowners to determine for themselves what features would require a federal permit. This rule provides fewer opportunities for the goal posts to be moved and the rules to be changed. The

NWPR provides straightforward regulatory requirements, clear jurisdictional lines, and makes CWA compliance easier for any business trying to comply.

One of the biggest misconceptions surrounding the NWPR is that waters that no longer fall under federal jurisdiction will go unprotected. This is untrue. State and local governments play an important role in protecting waters because they have a better understanding of the landscape and the needs of their community. The 2015 rule attempted to eliminate the role of state and local governments, which goes against the cooperative federalism construct that Congress intended.

State and local governments have the authority to regulate waters and there are a number of environmental requirements that builders and developers in Florida must comply with. For instance, when creating a development, I must consult with the Florida Department of Environmental Protection, comply with the various state wetland laws and regulations and obtain stormwater permits to manage any runoff. The greatest difference between federal permitting and state permitting is that we have generally found state agencies to operate under reasonable deadlines and with a greater degree of accountability.

Implementation of NWPR

NAHB members recognize that the work needed to realize the full potential of the NWPR is far from over. Proper implementation of this rule is extremely important because failure to do so could actually be harmful to our businesses and the overall economy. Efforts to ensure consistency between EPA and the Corps and their respective regional and district offices are of paramount concern to the regulated community. We are also interested in how field staff will be trained and how they will operate on the ground to interpret and apply the NWPR's provisions. We realize that new technology and emerging data may be available to assist with determining jurisdiction in certain cases, but special care will be needed by those on the ground to ensure that such methods are deployed in a way that does not jeopardize effective implementation of the rule.

We really appreciate the initial steps that the agencies have already taken to implement the NWPR. They recently proposed three different memorandums designed to help facilitate implementation. We encourage the agencies to finalize these memorandums and other relevant directives, guidance documents, and manuals as quickly as possible.

We all share your goal that the NWPR be implemented swiftly and consistently across the country. One way to facilitate this goal is for the agencies to host a series of workshops where the public and key stakeholders can share their diverse experiences and perspectives and discuss potential alternatives to any implementation challenges. Such workshops have been successfully held in locales across the country to assist with the rollout of other regulations.

Cost of permitting on home builders

Home building is one of the most regulated industries. As costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the industry must adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation. All of these adaptations must be financed by the builder and ultimately arrive in the market as a combination of higher prices for the consumers and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future home buying public to absorb the multitude of costs associated with overregulation.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to essentially finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult realities that home builders face every day.

The picture becomes more stark when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and $271,596 to obtain an individual permit and 313 days and $28,915 for a "streamlined" NWP. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.[1] Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant. When considering these excesses, it becomes clear that we need to find a necessary balance between protecting our nation's water resources and allowing citizens to build and develop their land.

Housing Affordability and COVID-19 recovery

Home builders are especially sensitive to the cost of regulations because we have no choice but to pass these costs on to the home buyer, which directly impacts housing affordability. According to a nationwide survey conducted for NAHB in August 2019, four out of five American households believe the nation is suffering a housing affordability crisis and at least 75 percent report this is a problem at the state and local level as well. Other NAHB research shows that housing affordability in the single-family market is near a 10-year low. Only 59.6 percent of new and existing homes sold between the beginning of April and end of June were affordable to families earning the U.S. median income of $72,900, and if the median U.S. new home price goes up by $1,000, more than 158,857 households would be priced out of the housing market nationwide.

As a result, owning or renting a suitable home is increasingly out of financial reach for many households. In fact, almost a third of the nation's households are cost burdened and pay more than 30 percent of their income for housing. At the same time, net new households are being

[1] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002

formed faster than new single-family and multifamily homes are coming on line, so there is both a surge in need and not nearly enough supply.

Making things worse, NAHB estimates that nearly 25 percent of the final cost of a single-family home and more than 30 percent of the cost of a multifamily home is due to government regulations at all levels of government. This is further exacerbating the supply/demand curve and making the housing market even more challenging.

Clearly, the nation is experiencing a regulatory and housing affordability crisis. President Trump recognized this earlier this year when he issued an Executive Order establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing where he directed federal agencies and others to address, reduce and remove the multitude of overly burdensome regulatory barriers that artificially raise the cost of housing development and contribute to the lack of housing supply.

Additionally, the COVID-19 pandemic has greatly affected almost every facet of our lives. Elevated unemployment numbers have dominated headlines, state and local governments are struggling to remain solvent and the U.S. economy is in economic distress. Many parts of the U.S. economy are likely to experience long-lasting economic suffering, with job losses and business failures. However, housing has been a bright spot for the U.S. economy. Housing has experienced the strongest rebound among the individual sectors of the economy. Construction has remained an essential service in most states, despite "stay-at-home" orders and consumer confidence remains strong. Single-family permits are now up 8 percent year to date. As a result of the gains for housing demand and a slowing in the rate of improvement for the overall economy, the housing share of GDP rose to a 13-year high. This calculation further demonstrates the strength and perseverance of the housing industry, despite the overall economy's sluggish recovery.

Except for the Great Recession, housing has led our nation out of virtually all economic downturns over the last several decades. However, unnecessary regulatory red tape will hamper the residential construction industry's ability to contribute to an economic recovery. The ramifications for job growth are significant. Building 1,000 average single-family homes creates 2,900 full-time jobs and generates $110.96 million in taxes and fees for all levels of government to support police, firefighters and schools. Similarly, building 1,000 average rental apartments generates 1,250 jobs and $55.91 million in taxes and revenue for local, state and federal government.

Despite these real challenges, many continue to suggest that additional regulatory requirements are necessary. Housing will be unable to help lead the economic recovery unless we repeal onerous regulations and promote sensible replacements. The NWPR is a perfect example of the regulatory actions we need to get our economy moving again. Our goal is to create more affordable housing options for all Americans while also protecting the communities we call home.

NAHB commends the Trump Administration for rolling back the 2015 Obama rule and putting forward a replacement that respects Congressional intent, follows Supreme Court precedent and

provides clarity and predictability to the permitting process. The NWPR achieves the goal of improving compliance while protecting our aquatic environment. This will go a long way towards helping housing lead the way in our economic recovery from COVID-19 and will help many families in their pursuit of the American dream.

Senator Carper:

1. You state in your testimony that, and I quote, "State and local governments have the authority to regulate waters." The implication of that statement is that states and localities will protect our water now that the Federal government has backed away.

    a. Are you aware that seven states prohibit any requirements more stringent than federal requirements—and that another 19 have restricted authority to take additional steps to protect their waters?

    b. Shouldn't the federal government have acted to protect the waters in those 26 states under this rule?

Doug Davis:

Thank you for the question and I appreciate the opportunity to provide answers.

A. State and local governments do have the power and ability to regulate any waters that fall inside their state. I believe that state and local officials are better equipped to make regulatory decisions because they have a more intimate understanding of their local environments, ecosystems and landscapes, but also the needs of their communities.

   According to the Economic Analysis for the Navigable Waters Protection Rule (pg 40-41), twenty-five states have laws on the books that regulate waters more broadly than the Clean Water Act (CWA) requires. Of the states that do not exceed CWA requirements, twenty currently do not have any broad legal limitations-- meaning there is nothing that prohibits these states from expanding their water regulations to address any perceived gaps in protection. That leaves five states that do not have laws that are more stringent than federal requirements and have legal limitations to expanding their regulatory reach. However, these states still have the ability to regulate their waters through legislative approval. For example, Arizona falls into this category and Governor Ducey and the Arizona Department of Environmental Quality are leading a stakeholder process to develop a state surface water protection program. Upon finalization and legislative approval, the state can extend protections to waters that need protection.

B. The federal government is protecting waters in every state in the country. The CWA clearly requires many water bodies to receive protection at the federal level. However, Congress never intended for the federal government to assert authority over all waters. The CWA intentionally created a partnership between the federal government and state and local governments in protecting our nation's waters and that cannot be ignored.

   As I mentioned in my testimony, it is far easier for the regulated community to navigate the permitting process at the state level. I am pleased that 47 states have assumed control of their National Pollutant Discharge Elimination System permitting responsibilities. I am also pleased that many states are looking into assuming their 404 permitting obligations, including my home state of Florida.

Senator BARRASSO. Well, thank you for your testimony, Mr. Davis. Welcome to you, and thank you for being here with us in the committee room today.

The committee is now going to be moving to New Mexico for a witness who is visiting us from Santa Fe, and that is Rebecca Roose, who is the Director of the Water Protection Division at the New Mexico Environment Department. Thank you so much for taking time to be with us today, and sharing your thoughts with the committee.

Please proceed, Ms. Roose.

STATEMENT OF REBECCA ROOSE, DIRECTOR, WATER PROTECTION DIVISION, NEW MEXICO ENVIRONMENT DEPARTMENT

Ms. ROOSE. Thank you. Mr. Chairman, Ranking Member Carper, members of the committee, my name is Rebecca Roose, and I oversee implementation of the Clean Water Act programs for the New Mexico Environment Department. Thank you for the opportunity to provide testimony today on the impact of the Navigable Waters Protection Rule in New Mexico.

My testimony draws on my nearly 15 years of Clean Water Act experience at the State and Federal levels. Despite being one of the driest States, New Mexico is rich with iconic rivers, such as the Rio Grande, stream networks that support multi-generational farms, and wetlands, lakes, and reservoirs that are critical for drinking water supplies and growing economy.

The impact of the rule on Clean Water Act jurisdiction in New Mexico is severe. As Ranking Member Carper noted in his opening statements, under the new rule, ephemeral streams, those that flow in response to precipitation, are not protected. Nearly 90 percent of New Mexico's rivers and streams could be left out of Clean Water Act protections as a result. Ephemeral waters are the capillaries of watersheds, recharging aquifers and delivering water downstream for beneficial uses.

In addition, the new definition of adjacent wetland results in the loss of protections for many wetlands in New Mexico, for example, affecting up to 20 to 70 percent in one particular watershed.

The interplay between fewer enforceable water quality requirements and climate change does not bode well for our Nation's waters. More intense droughts and shifting precipitation patters due to climate change result in lower water levels in rivers, lakes, and streams. More frequent and powerful storms increase polluted runoff from urban and disturbed areas to nearby waterways. These changes stress aquatic ecosystems and dramatically impact communities throughout the U.S.

In short, our precious surface waters are more in need of protection than ever before. A core argument by those in favor of the rule is that it returns control to States, while maintaining strong water protections nationwide. It may be true that some States will utilize existing authorities to close the regulatory gap and retain the critical water quality accomplishments of the last 50 years. But meanwhile, in New Mexico and many other States, as well as across Tribal lands, it could take years and millions of unavailable, unap-

propriated dollars to prevent water quality and watershed degradation.

Most States today are working through complex steps that involve evaluating how the new definition affects their waters, analyzing existing authorities to protect State waters, and then identifying and prioritizing actions to close any regulatory gaps. Simply put, New Mexico has no ready substitute under State laws and budget to maintain the critical surface water protections achieved through the Clean Water Act. Establishing such a program requires significant time, funding, and staff, a high hurdle in the best economic times, let alone an economic recession.

This loss of jurisdictional waters could lead to hundreds of fewer Federal permits in New Mexico alone. Without an established State program to pick up the slack, we could see thousands of pounds of additional pollutant discharged into our surface waters in New Mexico every year. The value of clean water in New Mexico is both cultural and economic.

Tribes, Pueblos, and traditional rural communities rely on fresh water for ceremonial purposes and to feed their families. Not only are polluted waters costly for drinking water, utilities, farmers, and the outdoor recreation industry, we also see implementation of the rule as creating new areas of regulatory uncertainty that will burden New Mexico businesses and communities.

The rule significantly changes the national regulatory landscape, cutting away at the Clean Water Act authors' goal of establishing a level playing field from State to State. In addition, determining whether water bodies are perennial or intermittent in a typical year is a key provision of the new rule, and a task that demands site-specific analysis. In some areas, the rule will create a patchwork of WOTUS and non-WOTUS segments along the path of a single river, making it extremely difficult for landowners to know what is required.

A final example of new regulatory uncertainty flows from the agency's failure to address implications for entities that could find themselves newly subject to waste management requirements under the Resource Conservation and Recovery Act due to revised Clean Water Act jurisdiction.

I appreciate the opportunity today to provide the Environment Department's reaction to the Navigable Waters Protection Rule. We now face a perfect storm of water quality devastation and economic harm from the rule itself and its rushed implementation by EPA and the Army Corps of Engineers, which precludes any opportunity for New Mexico to cover the regulatory gap before our precious waterways degrade.

Thank you, and I welcome your questions.

[The prepared statement of Ms. Roose follows:]

Testimony of Rebecca Roose

Water Protection Division Director, New Mexico Environment Department

To the United States Senate

Committee on Environment and Public Works

Regarding a hearing on

"Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean Water Act"

September 16, 2020

Mr. Chairman, Ranking Member Carper, members of the Committee, my name is Rebecca Roose and I currently serve the State of New Mexico as Director of the Water Protection Division at the New Mexico Environment Department. The Environment Department certifies federal Clean Water Act (CWA) permits issued in New Mexico and has primary responsibility for implementing the activities of the New Mexico Water Quality Control Commission, which is the state water pollution control agency for purposes of the CWA. I appreciate the opportunity to provide testimony today on the impact of the Navigable Waters Protection Rule (NWPR) in New Mexico. My testimony draws on my nearly 15 years of experience implementing the CWA at the state and federal level.

My testimony focuses on three primary issues related to the new definition of Waters of the United States (WOTUS) that was finalized by the Environmental Protection Agency (EPA) and Army Corps of Engineers (ACE) (collectively the "Agencies") and took effect earlier this year: 1) New Mexico's rivers, streams, lakes and wetlands are at risk like never before; 2) the NWPR and its implementation by the Agencies leave a huge regulatory gap in New Mexico; and 3) the NWPR and its implementation by the Agencies fail to deliver on the promise of regulatory certainty and will hurt state and local economies. The stakes in New Mexico are incredibly high as we look to mitigate the of loss of CWA protections for the majority of surface waters, which are relied upon by New Mexicans for drinking water, cultural uses and economic vitality.

THE NWPR'S HARM TO NEW MEXICO WATERS

New Mexico is home to high mountains, expansive plains and plateaus, river gorges, and broad valleys. Land surface elevations in New Mexico vary from just under 3,000 feet above sea level at the Texas border to just over 13,000 feet in the northern mountains. New Mexico is the fifth largest of the fifty states, with a total area of 121,607 square miles. Of this, approximately 34% is Federal land, 12% is State land, 10% is Native American land, and 44% is privately owned. New Mexico is also one of the driest states, averaging less than twenty inches of annual precipitation. About half of annual precipitation is received during the summer months with brief but intense, localized summer storms, commonly referred to as "monsoons." Much of the winter precipitation falls as snow in the high mountains and as snow or rain at lower elevations in more widely distributed, regional storm fronts.

Nevertheless, the State is rich with iconic rivers, such as the Rio Grande, Pecos and Gila; stream and acequia networks that support multi-generational farms; and wetlands, lakes and reservoirs that are critical for drinking water supplies, crop production, a vibrant outdoor recreation economy and interstate compact agreements. Table 1 below provides a summary of New Mexico's surface water resources.

The impact of the NWPR on CWA jurisdiction in New Mexico could not be more dramatic. In its review of the National Hydrography Dataset, the Environment Department determined that approximately 89% of the State's rivers and streams are ephemeral, 7% are perennial, and 4% are intermittent. Under the NWPR, none of the ephemeral streams are protected by the CWA. Let me be clear on this point: Nearly 90% of New Mexico's rivers and streams are left out of CWA protections even though water quality in these waterbodies is just as important today as it was on June 21, 2020, the day before the NWPR's effective date.

Table 1. Summary of New Mexico's Surface Water Resources

Topic	Value
State population	2,096,829
Population dependent on surface water for drinking water	878,765
State surface area	121,607 mi
Total miles of perennial non-tribal rivers/streams	6,362 miles
Total miles of non-perennial non-tribal rivers/streams	88,810 miles
Number of significant public lakes/reservoirs	196
Acres of significant public lakes/reservoirs	89,042 acres
Acres of freshwater wetlands	845,213 acres

Science clearly demonstrates that ephemeral waters are ecologically and hydrologically significant in the arid southwestern United States. Ephemeral streams are the capillaries of watersheds, recharging aquifers and delivering water downstream for aquatic life, wildlife, and human use. Ephemeral streams may be the headwaters or major tributaries of perennial streams in New Mexico. Over time, pollutant discharges unregulated under CWA Section 402 and development activities unregulated under CWA Section 404 as a result of the NPWR will adversely impact downstream water quality in waters that are jurisdictional. For example, in New Mexico, ephemeral tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream waters, such as the Rio Grande. The cumulative impacts of these non-jurisdictional ephemeral stormflows will be detrimental to downstream water quality and threaten human health and the environment. This hydrologic and ecologic connection between ephemeral waters and downstream NWPR jurisdictional waters is well-established in EPA's own scientific record, which the Agencies flatly ignored in the final rule that excludes all ephemeral streams from the definition of WOTUS.

Ephemeral flows need CWA protection because when they are functioning properly they provide important hydrologic connections across the landscape and across geopolitical boundaries; they dissipate stream energy during high flow events to reduce erosion, thus improving water quality; they recharge aquifers where water can be stored for current and future drinking water supplies; they transport, store and deposit sediment to help maintain floodplains; they transport, store and cycle nutrients for vegetation, wildlife and aquatic life; and they support and provide migration corridors. Given the distribution of ephemeral streams in New Mexico (89% of streams) and their important hydrological and ecological functions, cumulative impacts of ephemeral streams throughout a watershed must be considered in order to protect and maintain water quality and watershed health. Indiscriminately removing protections from ephemeral streams degrades water quality in the watershed and, most notably, the jurisdictional waters that they feed.

The NWPR also results in the loss of many wetlands in New Mexico. Saint Mary's University of Minnesota's Geospatial Services, with input from the Environment Department, created a model to evaluate the extent of federally protected wetlands and other surface waters in the Cimarron River Watershed located in northeastern New Mexico.[1] The results of this case study show that

[1] For details of the Saint Mary's University of Minnesota model, visit https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33.

by narrowing the scope of federal jurisdiction, the number of wetlands protected by the CWA is substantially decreased, likely leading to a loss of benefits provided by wetlands such as flood control and attenuation, pollution control, wildlife habitat, and recreation. The Cimarron River Watershed is known for its special trout waters, cross country and downhill skiing, boating, ice fishing, and other recreational opportunities that contribute to an important outdoor recreation economy for the communities in and near the watershed. Depending on how the WOTUS definition in the NWPR is applied, 20-70% of the wetlands in the Cimarron River Watershed lose federal protections, threatening the livelihoods of these small, rural towns.

Because of the ephemeral exemption and new definition of "adjacent wetland," the NWPR creates a significant gap in regulation under CWA Section 402 general permits (i.e., construction and industrial stormwater discharges) and CWA Section 404 dredge and fill permits in ephemeral streams and non-abutting wetlands. The Agencies considered the potential effect of the NWPR on issuance of CWA Section 402 permits for stormwater from construction activities. Overall, the Agencies concluded that the ephemeral exemption would likely change circumstances in arid and semi-arid states where many streams are ephemeral, and CWA protections would be removed from the vast majority of waters in these states.[2] The water quality impacts associated with construction and development activities are well-known and firmly established in the scientific record. Besides excess sediment, which can smother bottom-dwelling organisms, fill deep pools that are critical refugia during summer and drought, and clog or injure gills of fish, stormwater carries other harmful pollutants. Construction, industrial, and urban sites generate pollutants such as phosphorus and nitrogen from the application of fertilizer, bacteria, various metals (arsenic, cadmium, chromium, copper, zinc), acidic wastewaters, pesticides, phenols, paints, solvents, phthalates, petroleum products, and solid wastes that attach to sediment and/or get washed into streams and wetlands during overland stormflows. Sediment loading rates from construction sites are typically 10 to 20 times that of agricultural lands and 1000 to 2000 times that of forest lands. Even a small amount of construction or industrial activity can have a significant negative impact on water quality in localized areas if permits are not required and proper management practices are not implemented to reduce or eliminate pollutants in stormwater. New Mexico has over 1000 facilities covered by CWA stormwater general permits. As a result of the NWPR, we estimate that 25-45% of these facilities are no longer subject to federal stormwater management requirements and, as I explain below, the State does not have an established program to promptly ensure the requisite protections in lieu of EPA and ACE permits.

The NWPR also creates a significant gap in regulation of individual permits issued by EPA under CWA Section 402 in New Mexico. The Agencies did not sufficiently consider the potential effect of the NWPR on issuance of CWA Section 402 individual permits for discharges to ephemeral or other non-jurisdictional waters under the NWPR. New Mexico currently has 115 individual, EPA-issued NPDES permits in the State, including permits issued in Indian Country. Under the NWPR, Environment Department experts estimate that approximately 50% of these current permittees will no longer be required to obtain an NPDES permit because they discharge to receiving streams that are not within the new narrow WOTUS definition. Examples of facilities in New Mexico that discharge to NWPR non-jurisdictional waters include: municipal

[2] *Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States."* U.S. Environmental Protection Agency and Department of the Army (January 22, 2020).

and private domestic wastewater treatment plants; tribal and Bureau of Indian Affairs wastewater treatment plants; multiple types of mines, both active and in reclamation (coal, uranium, cement, rock, minerals and metals); national laboratories and other federal facilities; fish hatcheries; and oilfield sanitary waste treatment plants. Eliminating CWA protections and federal regulation of these dischargers degrades water quality of ephemeral receiving streams as well as the downstream Traditional Navigable Waters (TNWs) and other jurisdictional waters that they feed.

Three specific examples of NWPR impacts follow:

> **The Rio Grande.** Tijeras Arroyo presents an example of the devastating effects of the NWPR on water quality. This waterway winds for 26 miles from its headwaters in the Sandia and Manzano Mountains east of Albuquerque, New Mexico through developed and undeveloped areas of Albuquerque in the foothills, including Kirtland Air Force Base, before entering the Rio Grande. The waterway is perennial in the headwaters but is ephemeral for 11 miles as it flows out of the mountains and into the Rio Grande. Tijeras Arroyo is a major tributary of the Rio Grande in the Albuquerque area and carries stormwater, and any pollutants mobilized by stormwater, to the Rio Grande during significant rain events, but maybe not in a "typical year" as defined in the NWPR. It is the subject of (1) a Watershed Restoration Action Strategy under CWA Section 319 to address excess *E. coli* bacteria and sedimentation through stormwater management and erosion controls; (2) a Total Maximum Daily Load (TMDL) under CWA Section 303(d) to reduce watershed nutrient loading during both low-flow and high-flow events; and (3) federal permits including several CWA Section 404 permits, an individual CWA Section 402 NPDES permit for Kirtland Air Force Base, and the Municipal Separate Storm Sewer System (MS4) permit for the Albuquerque-Bernalillo County area under CWA Section 402. These various permits and requirements limit and/or monitor the discharge of the following pollutants into Tijeras Arroyo: nitrate-nitrogen, ammonia-nitrogen, total nitrogen, total phosphorus, *E. coli* bacteria, sediment, ethylene dibromide (EDB), heptachlor, per- and polyfluoroalkyl substances (PFAS), total residual chlorine, total suspended solids, biological oxygen demand, and oil and grease. In addition, the Rio Grande downstream of Tijeras Arroyo is impaired for *E. coli* bacteria, polychlorinated biphenyls (PCBs) in fish tissue, and dissolved oxygen. Tijeras Arroyo was jurisdictional under the 1980s regulations and the 2008 *Rapanos* Guidance but is not jurisdictional under the NWPR. Surface water quality is also a major concern for the two acequia associations in the Tijeras watershed and the Pueblo of Isleta, which is downstream of Tijeras Arroyo and the City of Albuquerque. Under the NWPR, these CWA protections (e.g., *E. coli* strategy, TMDL, NPDES permits) are not enforceable as is. Depending on how the NWPR is implemented, they will either be modified to move the point of discharge to a jurisdictional water and consequently change the limitations and requirements, or they will be terminated.

> **The Pecos River and Rio Ruidoso.** The Rio Hondo Watershed in south-central New Mexico is yet another example of the irreparable harm the NWPR will have on New Mexico. As the perennial headwaters of the Rio Ruidoso and Rio Bonito flow downstream, they become interrupted and eventually go underground along several ephemeral segments. Because the ephemeral segments are substantially long (over 50

miles), it is highly unlikely that the Rio Ruidoso, Rio Bonito or upstream portions of the Rio Hondo have a surface connection to the Pecos River (a jurisdictional water) in a "typical year." Therefore, everything upstream of these ephemeral breaks/segments is considered non-jurisdictional under the NWPR. In this watershed there are several facilities discharging to the river, including the Village of Ruidoso Regional Wastewater Treatment Plant and the Ruidoso Downs Race Track. The Rio Ruidoso already exceeds water quality standards for total nitrogen and total phosphorus, two pollutants that are currently controlled by NPDES permits. Historically, excess nitrogen and phosphorus have negatively impacted downstream irrigation uses, hurting family farms. Further, construction and industrial sites are no longer required to obtain NPDES permit coverage for their stormwater discharges. This means industrial facilities and construction sites could discharge pollutants into the river without consequence under federal law. Loss of federal pollution control for the Rio Ruidoso will result in polluted water conveyed to local farms via the 82 acequias, or community ditches, in this area. Acequias have important historical and cultural value in New Mexico, with many dating to the 17th and 18th Centuries, and provide essential water for agriculture. Public health and the environment are directly impacted by the NWPR and unregulated pollutant discharges in the Rio Hondo Watershed.

The Gila River. Another example of the NWPR's harm and regulatory uncertainty is the Gila River, which originates in the Nation's first designated wilderness area (the Gila National Wilderness) and is the last major wild and free-flowing river in New Mexico. The Gila River supports a remarkable abundance of aquatic life and wildlife, provides significant economic value to the region through plentiful outdoor recreation opportunities, and is culturally important to indigenous peoples whose ancestors have lived in southwestern New Mexico for thousands of years. Under prior definitions of WOTUS, the Gila River was covered by the CWA because it is an interstate water, flowing from New Mexico into Arizona. Some segments of the Gila River in Arizona have been designated as TNWs, while the Gila River in New Mexico is designated through an Approved Jurisdictional Determination through 2023. New Mexico's Gila River was named by American Rivers as the country's most endangered river in 2019 because of threats from water diversions and climate change.[3] The temporary designation of the Gila River in New Mexico creates uncertainty surrounding federal protection under the CWA that did not exist prior to the NWPR and results in a precarious future for this precious resource.

The NWPR will have a profoundly adverse effect on water quality in the State. More frequent droughts and shifting precipitation patterns due to climate change result in lower water levels in rivers, lakes, and streams, leaving less water to dilute pollutants. In addition, more frequent and more powerful storms increase polluted runoff from urban and disturbed areas, which transports pollutants from the landscape to nearby waterways. These changes stress aquatic ecosystems and dramatically impact communities throughout the United States, especially in the Southwest. Community impacts include threats to public health, economic strain, and decreased quality of

[3] See https://www.americanrivers.org/2019/04/americas-most-endangered-rivers-of-2019-spotlights-climate-change-threats/.

life. In short, our precious surface waters are more in need of protection than ever before. The effects of climate change in New Mexico amplify the complexities of western water management and contribute to greater regulatory uncertainty surrounding CWA jurisdiction under the NWPR, as discussed further below.

EXISTING STATE PROGRAMS CAN'T CLOSE THE FEDERAL REGULATORY GAP

A core argument by those in favor of the NWPR is that it "ensures that America's water protections – among the best in the world – remain strong, while giving our states and tribes the certainty to manage their waters in ways that best protect their natural resources and local economies."[4] However, this promise relies on a false premise that the roll-back of federal jurisdiction will not actually weaken water quality protections at the state, tribal and local level. In some parts of the country it may be true that states and tribes will pick-up where the CWA leaves off, utilizing existing authorities to close the regulatory gap and retain the critical water quality accomplishments of the past 50 years. Meanwhile, in New Mexico and a number of other states, as well as across tribal lands, it could take years and millions of unavailable, unappropriated dollars to prevent water quality and watershed degradation as the Agencies rush to implement the NWPR coast to coast.

Furthermore, the same federal agency leaders touting the rule as maintaining strong water protections in the U.S. are simultaneously touting the rule for "accelerat[ing] critical infrastructure projects," and "ensur[ing] that land use decisions are not improperly constrained."[5] These purported benefits are actually premised on an assumption that states and tribes will not close the regulatory gap. In other words, the federal agencies cannot take credit for ensuring ongoing strong protections while simultaneously celebrating the lack of those protections. Decisions by the EPA and the Army Corps of Engineers to begin implementing the narrow definition of WOTUS, regardless of a state's readiness to protect the excluded waters, further undermines the Agencies' assertions that the rule is intended to maintain strong water quality protections. In fact, the NWPR and its early implementation by the Agencies preclude ongoing protection of all surface waters in the State of New Mexico that were jurisdictional under prior WOTUS definitions.

New Mexico cannot, as a practical matter, immediately fill the burdensome federal regulatory gap created by the NWPR. New Mexico is one of only three states without NPDES authority, and the only such state in the arid west. The NPDES program is the primary mechanism under the CWA for regulating and limiting discharges of pollutants into the "waters of the United States." Developing, adopting and implementing such a program requires significant time, funding, and staff. Unlike most states with established NPDES programs, New Mexico does not have the legal and procedural program infrastructure to issue and enforce NPDES-like permits to regulate discharges of pollutants to surface waters of the state that are not WOTUS under the new definition. As laid out above, the Environment Department estimates that 50% of NPDES individual permits and 25-45% of stormwater general permits are no longer required, which could amount to hundreds of unregulated discharges and thousands of pounds of pollutants

[4] EPA Headquarters News Release (January 23, 2020), available at https://www.epa.gov/newsreleases/epa-and-army-deliver-president-trumps-promise-issue-navigable-waters-protection-rule-0.
[5] Id.

entering New Mexico's surface waters every year as a result of the NWPR federal rollback.

The NWPR imposes significant resource burdens on the Environment Department while putting the health of New Mexico waters and citizens at great risk. The premise that all states are capable of addressing water quality issues in their state is false. Not all states can implement a robust and successful water quality program without significant federal assistance. Recurring federal and state funds need to be identified to support a New Mexico surface water discharge permitting program because reasonable permit fees would not cover the costs of the program in New Mexico. To exacerbate this issue, federal financial support for water pollution control programs has been steadily declining over the past decade, making it more and more difficult to establish an effective and viable permitting program, to the detriment of New Mexico's precious surface waters. Many other states face challenges associated with existing laws that limit those states' ability to protect wetlands, streams and other water resources more broadly than federal law.[6]

A preliminary analysis performed this year by an Environment Department contractor indicates that establishing and operating a surface water discharge permitting program may cost New Mexico taxpayers, including working families and small businesses, as much as $15 million in the first year alone. For context, the current budget for all the Environment Department's surface water quality programs is approximately $6.5 million annually. Meanwhile, New Mexico, like many other states, faces a budget shortfall amid the current economic recession.

The NWPR introduces great uncertainty into the Environment Department's regulatory efforts and burdens the Environment Department with the onerous task of interpreting and applying the NWPR. When the NWPR became effective, previous guidance documents, memoranda, and materials were rendered inoperative. In addition, the Environment Department is unaware of a firm commitment by EPA and ACE to provide guidance and training to assist with early implementation of the NWPR. With no new federal or state funding associated with this substantial shift in CWA jurisdiction, any Environment Department involvement in NWPR implementation will strain available resources for other priorities and programs, such as ambient water quality monitoring, assessment and reporting on the status of the State's surface waters, water quality standards revisions, water quality management and watershed-based planning, watershed and wetland restoration, groundwater protection, and program and project effectiveness monitoring. For example, on-the-ground investigations are needed to delineate, for compliance and enforcement purposes, which waters are truly intermittent and which are ephemeral. Considering New Mexico has over 88,000 miles of non-perennial streams, and the vast majority of streams in the State do not have active gages to measure stream flows, these stream-specific investigations will be extremely resource-intensive. The Environment Department already has received inquiries from various stakeholders, including the regulated community, about scope and implementation of the NWPR that cannot be answered due to uncertainties related to jurisdictional interpretation and enforcement.

For decades the Environment Department has relied on close coordination with EPA and ACE on CWA permitting actions in furtherance of our mission to preserve, protect and improve

[6] *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* (2013), available at https://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters.

surface water quality across our state. Simply put, there is no ready substitute under State laws and budgets to maintain the critical surface water protections achieved through CWA Section 402 and 404 permits. The decision of federal agencies to proceed with NWPR implementation without consideration of state and tribal coverage will allow hydrologically connected ephemeral tributaries to be permanently filled or degraded, to the detriment of the downstream jurisdictional waters the NWPR purports to protect.

POLLUTED WATERS HURT THE NEW MEXICO ECONOMY

The value of healthy surface waters in New Mexico is both cultural and economic. New Mexico's diverse waters recharge aquifers, support an amazing variety of wildlife and aquatic life, maintain drinking water resources for over 40 percent of the population, and sustain critical economic activity. The Environment Department is concerned about the economic costs associated with the regulatory vacuum created by the NWPR for the majority of New Mexico surface waters. Not only are polluted waters costly for drinking water utilities, farmers and the thriving tourism industry, we see implementation of the rule as creating new areas of regulatory uncertainty that will burden New Mexico businesses and communities.

The regulatory gaps created by the ephemeral waters exemption and loss of wetlands protections resulting from the NWPR will result in decreased water quality, as explained above. As a result, the cost to treat drinking water and maintain drinking water infrastructure will increase. The cost to treat surface water to drinking water standards depends on the quality of water coming into the treatment plant, the technologies used, the size of the system, and the energy source. Municipalities will likely need to invest in water treatment infrastructure and other costly technologies, such as desalination and ultrafiltration, to provide clean, safe water for drinking. Degraded water quality coming into the treatment plant, the need for improved and more costly treatment technologies and the less populated, rural nature of New Mexico as a whole will cause water treatment costs to increase substantially for many in the state and may force municipalities to choose lower water quality over necessary investments for clean and safe drinking water. In addition, enhanced treatment to remove pollutants causes increased water loss during treatment, which translates to less potable water in an increasingly arid State.

Outdoor recreation is among New Mexico's largest economic sectors, representing the lifeblood of communities across the state and providing livelihoods for tens of thousands of New Mexicans. More than twice as many jobs in New Mexico depend on outdoor recreation than on the energy and mining sectors combined. The NWPR does not take into account the recreational economy impacts associated with poorer water quality. In addition to tourism dollars spent by New Mexicans in New Mexico, the Tourism Department reports that the State also has a high percentage of out-of-state visitors who come to New Mexico for outdoor recreation activities, such as river rafting, fly fishing, camping, boating and wildlife viewing along the State's scenic waters. Visitors spent $846 million on recreation in the State in 2017, supporting 13,000 direct jobs. In addition, the New Mexico Department of Game and Fish reports there are 160,000 anglers who fish in New Mexico, spending $268 million on their activities annually. The New Mexico Outdoor Recreation Division, created by legislation in 2019, is tasked with increasing outdoor recreation-based economic development, tourism and ecotourism, recruiting new outdoor recreation business to New Mexico, and promoting education about outdoor recreation's benefits to enhance public health. People do not want to recreate on polluted waters that cannot

sustain healthy fish, bird and wildlife populations. The outdoor recreation industry in New Mexico will be adversely impacted by the regulatory gap created by the NWPR, to the detriment of jobs and revenue in New Mexico.

Agriculture is part of New Mexico's cultural and economic identity. We are the top state in the country in chile production, third in pecans and in the top 10 for number of dairy cows. According to the New Mexico Economic Development Department, there are 24,800 farms in the State and agriculture and food products are among the State's top five exports.[7] As a rural state with a poverty rate nearly twice the national average, many family farms grow crops and raise livestock for their own families and neighbors, as well as to contribute to the local economy. The Environment Department's surface water quality programs are designed and implemented to identify waters used for irrigation/irrigation storage and livestock watering and to then take actions to protect and restore those waters to support that use. Based on the scope of the NWPR and New Mexico's inability to close the regulatory gap, waters that farmers rely on to irrigate crops and water livestock to feed New Mexicans and export to other states and nations will be vulnerable to increased pollutant loads from dischargers and detrimental impacts from dredge and fill activities.

To represent benefit-cost analyses of the NWPR, EPA and ACE relied on three case studies in the supporting Economic Analysis, "to explore potential changes and resulting forgone benefits and avoided costs."[8] The case studies focused on three geographical regions – the Ohio River Basin, the Lower Missouri River Basin, and the Rio Grande River [sic] Basin – that intersect 10 states. The Rio Grande River Basin was divided into two major watersheds, the Upper Pecos (HUC 1306) and Lower Pecos (HUC 1307) River Basins, which contain a combined 44,300 square miles in New Mexico and Texas from east of Santa Fe, New Mexico to the confluence of the Pecos River and Rio Grande at the Texas-Mexico border. This case study found 85% of stream miles within the Upper Pecos River Basin in New Mexico are ephemeral, and 34% of all wetland acres to be "non-abutting" wetlands. These ephemeral waters and non-abutting wetlands in the Upper Pecos River Basin are clearly not federally protected under the NWPR, whereas many other waters in the Upper Pecos River Basin *may* no longer be protected under the NWPR because they likely do not contribute surface flow to a downstream jurisdictional water in a "typical year." The cost analysis for the Rio Grande/Pecos River case study shows benefits of the NWPR to be minimal or negligible; however, the Agencies did not quantify or monetize the environmental effects and forgone benefits of the NWPR for this case study, blaming this deficiency on limitations in the data. Again, the Agencies chose to ignore their own research and data by disregarding the 2015 *Economic Analysis of the EPA-Army Clean Water Rule,* which monetized the ecosystem services and benefits from wetlands.[9] In fact, the estimation of nonmarket environmental values is not new – one notable example is compensation for the 1989 Exxon Valdez oil spill in the Gulf of Alaska. It is well known that wetlands provide many ecological and economic benefits to watersheds, such as filtering and improving water quality,

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[7] See https://gonm.biz/uploads/documents/publications/AgricultureWEB.pdf.
[8] *Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States."* U.S. Environmental Protection Agency and U.S. Department of the Army (January 22, 2020).
[9] *Economic Analysis of the EPA-Army Clean Water Rule.* U.S. Environmental Protection Agency and U.S. Department of the Army (May 20, 2015), available at https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

flood attenuation, erosion control, carbon sequestration, aquifer recharge, and providing fish and wildlife habitat and nurseries.[10] It is also known that ephemeral waters are ecologically and hydrologically significant in arid and semi-arid watersheds of the southwestern United States, and transport nutrients and sediment to downstream ecosystems, provide habitat for wildlife, and recharge aquifers used for drinking water.[11] The NWPR fails to account for the economic costs of degraded ephemeral streams and unprotected wetlands.

Beyond these intersections between New Mexico's economic engines and clean water, I will provide a few examples of why grandiose claims of an era of regulatory certainty made possible by the NWPR are false. First, the NWPR significantly changes the national regulatory landscape, cutting away at the CWA authors' goal of establishing a level playing field to regulate discharges from state to state. In our 21st Century economy, hundreds of businesses that operate in multiple states will have the added burden of navigating state surface water regulatory regimes that once shared a common baseline through CWA program implementation.

Another area of regulatory uncertainty is the reliance in the NWPR on determining whether waterbodies are perennial or intermittent in a "typical year." A lack of connectivity or perenniality today or in a "typical year" is not a suitable feature that EPA, ACE and New Mexico can rely upon to define a jurisdictional water. Under the NWPR, ephemeral waters, such as the Santa Fe River, Rio Hondo, Jemez River, Rio Puerco, Tijeras Arroyo, and Rio Grande tributaries on the Pajarito Plateau (which contain legacy contamination from the Manhattan Project), will have severed and interrupted jurisdiction in the middle and lower reaches. This creates a patchwork of jurisdictional and non-jurisdictional segments along the path of a river that make it nearly impossible to implement an effective water quality protection program, and likewise make it difficult for the regulated community to be certain of what is required of them.

Finally, the Agencies failed to address cross-media implications of the NWPR, thereby adding regulatory uncertainty for municipalities and businesses. The federal Resource Conservation and Recovery Act (RCRA) exempts wastewater treatment units from regulation under RCRA if, in addition to a number of other conditions, those units discharge effluent pursuant to an NPDES permit.[12] Under the NWPR in New Mexico, many facilities currently discharging pursuant to an NPDES permit are no longer required to have such a permit due to changed jurisdictional status of the receiving waterbody. As a result, these facilities may be subject to regulation under RCRA for the first time, are likely to not have performed an analysis of whether they are subject to RCRA and will likely be operating in violation of RCRA requirements as a result. Given that a number of these facilities are industrial or municipal facilities that have not contemplated regulation as a RCRA treatment, storage or disposal facility (TSDF), this will present an additional economic hardship on these facilities in New Mexico. If the industrial or municipal facilities discharging to an ephemeral stream lose NPDES permit coverage, these newly regulated TSDFs may also be deemed as land disposing of waste – or hazardous waste – as an implication of WOTUS.

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[10] See https://www.epa.gov/sites/production/files/2016-02/documents/wetlandfunctionsvalues.pdf.
[11] Levick, L., et al. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.
[12] 42 U.S.C. § 6903(27).

CONCLUSION

Enactment of the CWA is one of our nation's great successes. Waters that fifty years ago were thick with pollutants from point and nonpoint sources now support thriving recreational and economic activities and improved ecological conditions for aquatic species and wildlife. Our quality of life has improved as a result.

I appreciate the opportunity today to provide the New Mexico Environment Department's reaction to the NWPR. As illustrated by all of the evidence above, our reaction, in short, is that we now face a perfect storm of water quality devastation and economic harm from the rule itself and its rushed and reckless implementation by EPA and ACE, which precludes any opportunity for New Mexico to cover the regulatory gap before irreversible degradation unfolds.

Senate Committee on Environment and Public Works
Hearing entitled, *"Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean Water Act."*
September 16, 2020
Questions for the Record for Rebecca Roose

Chairman Barrasso

1. **During the hearing, Ranking Member Carper asked you to provide "an example of the kind of facilities that would be subject to fewer pollution controls as a result of the Trump Administration's Navigable Waters Protection Rule." In response, you provided "hard rock mines that are disturbing significant amounts of land using chemicals to extract materials." My understanding is that most hard rock mines in the State of New Mexico fully contain water that comes in contact with mine process operations and do not discharge into surface waters. Similarly, my understanding is that National Effluent Limitations Guidelines and Standards applied to National Pollutant Discharge Elimination System (NPDES) permits for hard rock mines do not allow discharges of wastewater into waters of the United States. Given these protections, can you explain how you determined that hard rock mines in particular will be subject to fewer pollution controls as a result of the Navigable Waters Protection Rule? Please provide any source data used to inform your assertion.**

There are several different ways water pollutants can be generated during the mining process: dewatering/groundwater production, equipment cooling, dust suppression, extraction and leaching, and contaminated stormwater runoff. Surface water discharges from mining operations in New Mexico are regulated under individual NPDES permits and EPA's Multi-Sector General Permit for Stormwater Discharges associated with Industrial Activity (MSGP). Both types of permits require discharges to meet sector-specific technology-based and/or water quality-based effluent limitations to protect water quality in the receiving water in accordance with State water quality standards. NPDES permits issued by EPA to hard-rock mines in New Mexico are subject to applicable technology-based limitations set forth in the Effluent Limitations Guidelines for the Ore Mining and Dressing Point Source Category, 40 CFR part 440. The MSGP and other individual stormwater permits also require the permittee to prepare and implement a Stormwater Pollution Prevention Plan (SWPPP). The SWPPP describes the selection, design, and installation of control measures to meet the permit's effluent limits, such as erosion and sediment control and stabilization structures and other pollution prevention measures.

In New Mexico there are five mines subject to either an individual permit, the MSGP to control pollutant discharges from wastewater and stormwater (see EPA's Enforcement and Compliance History Online search tool at https://echo.epa.gov/). The New Mexico Environment Department (Department) is concerned about water quality impacts if, as a result of the Navigable Waters Protection Rule (NWPR), these permits are no longer required. Per my written and oral testimony, New Mexico does not presently have a surface water discharge permitting program to cover this regulatory gap.

2. **New Mexico regulates hard rock mines under state groundwater discharge and mined land reclamation rules. Can you clarify why you believe these existing protections are inadequate pollution control measures?**

It is true that New Mexico regulates hard rock mines via groundwater discharge permits issued pursuant to the State's Water Quality Act and implementing regulations, as well as through abatement regulations to address groundwater contamination. However, mines discharging treated wastewater and/or stormwater to waterbodies that are no longer protected under the Clean Water Act, per the NWPR, will no longer be required to maintain NPDES permit coverage. Given that New Mexico's current state regulatory authorities are designed to protect groundwater, the Department is not necessarily able to ensure the same surface water quality protections that are achieved through NPDES permits. The Department will evaluate this on a case by case basis and apply existing authorities wherever possible to protect surface waters, but we fully expect there will be regulatory gaps that lead to the potential for more surface water pollution from these facilities.

Senator Carper:

3. **How does the Trump Administration's Navigable Waters Protection Rule burden states, including states that do not have Clean Water Act Section 402 and Clean Water Act Section 404 program authority?**

    a. **If you know them, will you also share any budgetary and staff implications.**

There are only two states, Michigan and New Jersey, that implement the Section 404 program. New Mexico is one of only three states without Section 402 NPDES program authority, and the only such state in the arid southwest. While the New Mexico Environment Department (Department) is interested in having EPA authorize New Mexico to implement the NPDES program, adopting and implementing such a program requires significant time, funding, and staff. At the very least, statutory authority under the State's Water Quality Act will need to be amended or developed to cover federal NPDES requirements. Also, unlike most states with established NPDES programs, New Mexico does not have the legal and procedural program infrastructure to issue and enforce NPDES-like permits to regulate discharges of pollutants to surface waters of the state that are not waters of the United States under the Navigable Waters Protection Rule (NWPR). New Mexico will have to significantly overhaul its ground and surface water quality protection regulations in order to facilitate a state surface water permitting program. The last time these regulations were significantly amended the entire process took over three years from the initial scoping efforts until the regulations went into effect. Thirteen parties participated in that often-adversarial proceeding, which included a four-day hearing before the State's Water Quality Control Commission. An appeal of one of the amendments is still pending in the New Mexico Court of Appeals, nearly two years after the regulations went into effect. Furthermore, creating a reasonable fee structure to support an effective permitting program will add to the time consuming and resource intensive nature of the rulemaking process. The Department estimates that 50% of NPDES individual permits and 25-45% of stormwater general permits are no longer required, amounting to hundreds of unregulated discharges and thousands of pounds of pollutants entering New Mexico's surface waters every year as a result of the

NWPR. Add to that further water quality effects from unregulated dredge and fill activities in 89% of New Mexico's waterways, and these cumulative impacts create a burdensome federal regulatory gap that the EPA and Army Corps of Engineers unreasonably expect the State to fill to protect its surface waters and its citizens.

To prevent water quality degradation in State surface waters from the rollback of Clean Water Act protections, the Department must expand its Surface Water Quality Bureau and develop a State surface water permitting program. The Department lacks sufficient funding at this time to expand the Bureau and implement a permitting program in response to the NWPR. In addition, expansion and funding requests are dependent on approval from the State legislature. *A preliminary estimate from the Department's contractor indicates the cost of such a program could be in excess of $7.5 million annually, a 115% increase in the budget for the Department's surface water programs.* This estimate excludes costs associated with assuming the Section 404 program. The estimate includes costs associated with permitting, compliance and assistance, enforcement, and data management, which would be phased in over a five to ten-year time period. This estimate also includes recurring annual costs such as training, contractor support, office space, etc. This estimate assumes permits are or would be required for existing dischargers to surface waters of the state. At present this represents 109 individual permits (of which 51 are Publicly Owned Treatment Works), 26 Municipal Separate Storm Sewer System (MS4) permits, 814 facilities covered under the Multi-Sector General Permit for industrial stormwater, 2774 facilities covered under the Construction General Permit, and 200 entities subject to other general permits. Furthermore, in contrast to stagnated and declining state and federal funding, this estimated cost is expected to increase annually due to inflation, developing, defending and enforcing regulatory requirements, and identification of new dischargers. Reasonable permit fees will cover some of the estimated cost but will not be able to cover the majority.

With no new federal or state funding associated with this substantial shift in Clean Water Act jurisdiction amidst an economic recession, any meaningful oversight of implementation will force the Department to pull resources from other priorities and programs. For example, the Department has already shifted portions of four Ground Water Quality Bureau and three Surface Water Quality Bureau staff members' time to investigating and pursuing coverage of surface water protection for waters that may no longer be jurisdictional. The Department also diverted $50,000 for a small professional services contract to conduct an NPDES gap analysis and reallocated portions of two Surface Water Quality Bureau staff members' time to work with the contractor. Redirection of staff time and money weakens, delays or possibly prevents the Department from implementing other critical water quality programs, such as ambient water quality monitoring, assessment and reporting on the status of the State's surface waters, water quality standards revisions, water quality management and watershed-based planning, watershed and wetland restoration, groundwater discharge permit issuance and enforcement, and program and project effectiveness monitoring. In fulfilling its mission to preserve, protect and improve surface water quality across our State, the Department is harmed by the NWPR due to wholly inadequate resources to implement an effective permitting program, uncertain legislative and federal support, and redirection of already strained resources.

4. **You emphasized the importance of ephemeral streams in your testimony.**

a. Are you asserting that all ephemeral waters should automatically fall within the CWA jurisdiction?

Not at all. My assertion is that the NWPR's categorical exclusion of ephemeral waters is fundamentally counter to science, including the federal agencies' own science, which they ignored in promulgating the Rule. A CWA jurisdiction rule based in sound science would include waters that contribute flow to other jurisdictional waters. My written testimony is replete with examples of the importance of ephemeral waters, so I will not repeat that testimony here. However, I will draw your attention to two examples of the harm caused by the Rule's categorical exclusion of ephemerals.

First, pollutant discharges unregulated under Section 402 of the Clean Water Act and development activities unregulated under Section 404 of the Clean Water Act as a result of the NWPR will adversely impact downstream water quality in waters that are jurisdictional. For example, in New Mexico, ephemeral tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream waters, such as the Rio Grande. The cumulative impacts of these non-jurisdictional ephemeral stormflows will be detrimental to downstream water quality and threaten human health and the environment.

Second, under the Navigable Waters Protection Rule, ephemeral reaches of the Santa Fe River, Rio Hondo, Jemez River, Rio Puerco, Tijeras Arroyo, and Rio Grande tributaries on the Pajarito Plateau (which contain legacy contamination from the Manhattan Project) cause severed and interrupted jurisdiction at different points along these waterbodies. This creates a patchwork of jurisdictional and non-jurisdictional segments along the path of a river that make it nearly impossible to implement an effective water quality protection program, and likewise make it difficult for the regulated community to be certain of what is required of them.

Senator Markey

5. **As outlined in your testimony, the Navigable Waters Protection Rule (NWPR) creates a burdensome federal regulatory gap that New Mexico and other states cannot immediately fill. For example, New Mexico, my state of Massachusetts, and the neighboring state of New Hampshire are the only states in the United States that rely on the Environmental Protection Agency to issue National Pollutant Discharge Elimination System (NPDES) water quality permits. In your testimony, you highlight the fact that New Mexico does not have the program infrastructure to "issue and enforce NPDES-like permits to regulate discharges of pollutants to surface waters of the state that are not WOTUS under the new definition."**

    a. **Could you please elaborate on the consequences that this regulatory gap could have on waters in New Mexico, Massachusetts, and New Hampshire that are no longer considered Waters of the United States under the NWPR?**

Unlike many, if not most, states with approved NPDES programs, in New Mexico we do not have the regulations, policies, procedures and staff resources to issue a state surface water discharge permit to a facility that ceases to be covered by an NPDES permit. I can only speak authoritatively about waters in New Mexico, however my points below regarding regulatory uncertainty and the categorical exclusion of ephemeral tributaries to Traditional Navigable Waters should apply to all three states.

Pollutant discharges that go unregulated under Section 402 NPDES permits due to the narrow definition of Waters of the United States in the NWPR will adversely impact downstream water quality in waters that are jurisdictional. For example, in New Mexico, ephemeral tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream waters, such as the Rio Grande. The cumulative impacts of these non-jurisdictional ephemeral stormflows will be detrimental to downstream water quality and threaten human health and the environment.

Under the Navigable Waters Protection Rule, ephemeral reaches of the Santa Fe River, Rio Hondo, Jemez River, Rio Puerco, Tijeras Arroyo, and Rio Grande tributaries on the Pajarito Plateau (which contain legacy contamination from the Manhattan Project) cause severed and interrupted jurisdiction at different points along these waterbodies. This creates a patchwork of jurisdictional and non-jurisdictional segments along the path of a river that make it nearly impossible to implement an effective water quality protection program, and likewise make it difficult for the regulated community to be certain of what is required of them.

Without an existing NPDES program and the permitting procedures that come with it, New Mexico, Massachusetts and New Hampshire are less equipped to utilize state laws and resources to prevent water quality degradation as federal implementation of the NPWR continues to roll-back pollution controls in our watersheds.

b. Even if these states manage to quickly create a new state program to fill the regulatory gap, what would such a program look like, how onerous would it be on state resources, and how confident would you be that it would could rapidly protect state waters to the same extent as the Environmental Protection Agency?

Again, I can only speak authoritatively about New Mexico. Early estimates from the New Mexico Environment Department's contractor tasked with performing an NPDES gap analysis are that a state surface water permitting program would take five to ten years to fully implement and require at least a 115% increase in the current budget for the State's surface water program. Therefore, I am not at all confident that such a program could provide protections to state waters under any interpretation of the term "rapidly." Furthermore, in our analysis, we are unable to separate "quickly creating a new program" from the incredible burden on state resources. The sudden increase in demand for additional state resources is an undeniable barrier to New Mexico's ability to prevent a pollution control gap across our state. Furthermore, in contrast to stagnated and declining state and federal funding, this estimated cost is expected to increase annually due to inflation, developing, defending and enforcing regulatory requirements, and

identification of new dischargers. Reasonable permit fees will cover some of the estimated cost but will not be able to cover the majority.

6. **The NWPR created immense uncertainty for regulated communities and government resource managers. For example, in Massachusetts, our state Clean Waters Act (Mass CWA) uses the term "intermittent" to define streams that flow for only a portion of the year; however, the NWPR uses the term "ephemeral." The distinction between "ephemeral" and "intermittent" is not unclear, and state regulators face uncertainty as they try to ascertain which bodies of water are regulated by the federal Clean Water Act and which water bodies should now be regulated by Mass CWA. To your knowledge, has the Environmental Protection Agency or Army Corps of Engineers offered any trainings, briefings, or resources to help states understand these kinds of uncertainties?**

As of today, the EPA and Army Corps of Engineers (Agencies) have yet to clearly communicate how or whether they intend to enforce, modify, or terminate existing federal permits for waters that are no longer jurisdictional, or whether they intend to issue any modified or new permits to protect downstream jurisdictional water quality for discharges to non-jurisdictional waters (e.g., ephemeral waters) that have a surface connection to a jurisdictional water in a typical year. The Agencies' approach to early implementation continues to create a tremendous amount of uncertainty for states and tribes and the regulated community.

The Agencies hosted a series of short webinars in June and July to provide virtual training on the NWPR and posted the webinar recordings online. The webinar training format the Agencies used did not provide for meaningful interaction between state and tribal water quality professionals and Agency experts. Questions submitted by participants into the webinar platform were then hand-picked by Agency staff during the Question and Answer portion of each webinar. The Agencies also prepared and posted four implementation memos directed to Agency field staff. The New Mexico Environment Department (Department) is unaware of any concerted efforts to date by the Agencies to engage directly with state and tribal officials about the content of these memos, how they are being utilized by the Agencies' staff and near-term implementation impacts.

7. **Under the new rule, ephemeral water bodies, which are sometimes located upstream of jurisdictional water, are no longer regulated under the Clean Water Act. Could you please elaborate on the consequences that uncontrolled pollution discharged into ephemeral waters can have on jurisdictional downstream waters?**

Yes. Pollutant discharges unregulated under Section 402 of the Clean Water Act and development activities unregulated under Section 404 of the Clean Water Act as a result of the Navigable Waters Protection Rule will adversely impact downstream water quality in waters that are jurisdictional. For example, in New Mexico, ephemeral tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. These tributaries are categorically excluded from Clean Water Act jurisdiction by the NWPR. Where pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream waters, such as the Rio Grande in New

Mexico. The cumulative impacts of these non-jurisdictional ephemeral stormflows will be detrimental to downstream water quality and threaten human health and the environment. The Department estimates that 50% of NPDES individual permits, 25-45% of NPDES stormwater general permits, and 100% of Clean Water Act Section 404 dredge and fill permits in ephemeral waters are no longer required because of the ephemeral exclusion, amounting to hundreds of unregulated discharges and thousands of pounds of pollutants entering New Mexico's surface waters every year as a result of the NWPR.

Senator BARRASSO. Well, thank you so very much for your thoughtful testimony, and thanks for joining us from New Mexico.

I will start with questions. I know we have a number of votes starting at 11:30, but I think we will have plenty of time for all the members to ask questions.

My first is to Mr. Davis. Federal jurisdiction under the 2015 WOTUS Rule would have extended to isolated wetlands, to areas that flow only when it rains, to many man-made ditches. Can you discuss how overly broad regulations can really drive up permitting costs and how that impacts housing affordability?

Mr. DAVIS. Yes, thank you. Overly broad rules provide uncertainty, and each of the witnesses today, I have heard all of us say kind of the same thing. Uncertainty is challenging, and for us in the developing and home-building sector, uncertainty means delays, and delay means additional expenses related to reports, to consultants.

Additional financing costs, a lot of people don't realize that whenever you have attractive land or you are building a home, you are only paid when you are complete, so your debt service costs just go up and up and up, and these things are in return, they make their way into the price of a home. In fact, if I may just, for every $1,000 increase in a home price, for each time that home goes up $1,000, 158,000 people are displaced from the home market.

So thank you for that question.

Senator BARRASSO. Mr. Gaesser, I have been talking about this 2015 WOTUS Rule that I believe has been unclear and been overly broad. Certainly in Wyoming, I also saw this trampled on the property rights of farmers, ranchers, but not just in Wyoming, all across the Country.

You are there in Iowa. I have heard it was an illegal rule, extended Washington's authority well beyond the powers under the Clean Water Act. Could you explain a little bit how this new definition of waters of the U.S., how that works to respect your right to manage your land?

Mr. GAESSER. Yes, and thanks for the question. The old rule, was is really about uncertainty for us, and created uncertainty of what we could do and how we could do things, even to the practices of improving our water and our soil health, and all the other good things that we want to do.

The new rule allows us as farmers and at the State level to make recommendations and to help us to innovate, and it is about innovating. The old rule was uncertainty, and really, Federal oversight to that delayed everything we did. We were waiting on, we would have waited on the Federal Government to make any decisions, whether it was planting or applications or fertilizer or whatever it was. We could not make a living under those kind of conditions.

The new rule clarifies that and allows the States to help with that and make their own decisions on their area of responsibility for water. That is what I like about it. It allows farmers to have more certainty.

Senator BARRASSO. Thank you.

Mr. Davis then, with this new rule, the Trump Administration is focused on what we talked about as consistent implementation. In your testimony, you talked about how home-building is one of

the bright spots in our economic recovery at this point, and the housing sector's share of the economy has risen to a 13-year high. Do you anticipate the housing demand to remain high and help drive recovery out of this pandemic? Will this new rule and consistent implementation help with the recovery?

Mr. DAVIS. Yes, sir, great question. The answer is absolutely, on behalf of the homebuilders and developers, we stand absolutely ready to lead in this effort. We are already there.

You have seen housing routinely over the decades take the lead, leading us into economic recovery. The old guy and my mentor who started our company used to always remind me, he said, don't ever underestimate and forget the impact that we are having on our economy.

NAHB, kind of transitioning now to, he always said it as more of a saying, but now, as we look at the stats, NAHB says that for every 1,000 homes that we build, so every 1,000 single-family homes that we build, we create 3,000 full-time jobs. That same 1,000 homes also adds over $100 million to the tax rolls that support our first-line, defenders of police, firefighters, schoolteachers, along with our government.

So, yes, sir, the answer is absolutely, we stand ready.

Senator BARRASSO. Mr. Gaesser, going through your biography, I was really struck by your strong personal commitment to conservation in farming. I know Senator Ernst will have some questions in a second.

But along these lines, it does seem, the 2015 Rule seemed to doubt a farmer's commitment to environmental stewardship of the water resources located on your own property. It just seems that heavy-handed Federal regulations can prevent a farmer from using innovative conservation practices to protect their land and water. Am I right about that?

Mr. GAESSER. Yes, Senator, you are absolutely right about that. We do take it personally. And it is not, I am not the only farmer in Iowa, you know, that really does care for the land and the water. Most of us do, and we are all trying to do the best job we can under the uncertainty of the environmental conditions that we have with droughts and floods and winds, now, and hurricanes in the south part of the U.S.

But we live with uncertainty, and having a one-size-fits-all rule from the Federal Government will not fit agriculture. Because what we have learned with two decades of testing on farm network testing on environmental programs, and watersheds with the Iowa Soybean Association is that one size does not fit all, within a watershed or even within a farm.

We have areas on our farm that need to be managed separately or differently than other areas of our farm. Having to wait on someone from the Federal Government to give you an approval or not, means are you going to get your crops planted this year or not, are you going to get it fertilized or not, and are you going to make a living for your family or not.

Senator BARRASSO. Thank you so much for that answer.

Senator CARPER.

Senator CARPER. Thanks, Mr. Chairman.

Ms. Roose, your two Senators asked me to tell you hello, Tom Udall and Martin Heinrich. They are not members on this committee, but they are very much involved with us in a lot of issues, including the ones we are talking about here today, and they send their best.

Mr. Gaesser, you mentioned you have a son named Chris. We have three sons; one is named Chris. I call him Christopher, and he is a farmer.

[Laughter.]

Senator CARPER. No, he is not a farmer. He would like to be a farmer, but he is a mechanical engineer who lives and works out on the West Coast for a technology company.

He is also a biathlete, triathlete, and he has actually done Ironman before. He is a better athlete than I will ever be. But he went out to ride, he rides his bike a lot on weekends up in Marin County north, in the northern part of the State, north of San Francisco and couldn't really breathe, had to stop, and basically say, this is not a good thing, it is not helping my lungs.

As it turns out, it is not just the Bay Area, it is not just the northern part of California. It is California, it is Washington State, it is Oregon State, and the place is on fire. We have seen the footage, the destruction, loss of life, huge damage of housing and other property.

As we gather here today, I think there is landfall today as Hurricane Sally came ashore in Southern Alabama, Florida. Not huge winds, but listen to this: 15 inches of rain in some places. Something is happening here, and this comes on the heels of a huge hurricane, Category 4/Category 5 hurricane into Louisiana just about a week or two ago.

With that, that is the predicate. I just wanted to lay it out and say, Ms. Roose, I think we are all concerned about the impacts of hurricanes or wildfires, whether it is Sally or some other name, which I understand could dump up to, this latest hurricane, up to 35 inches of rain in some parts of Alabama and the Florida panhandle.

What impact would the Trump WOTUS Rule have on wetlands and their capacity to help mitigate the flooding associated with these massive storms?

Ms. ROOSE. Thank you, Senator Carper, for that question. And thank you for passing along the greetings from Senator Heinrich and Senator Udall. I appreciate that.

To your questions about wetlands impacts, there are well-known, well-established benefits of wetlands for a range of ecosystem services. Among them, helping to buffer our communities, our coastlines against the impacts of more intense storms brought on by changing climate.

This is a time when we, as a Country, should be coming together to, as one of the other witnesses said, innovate. And I would say innovate in the area of identifying all the ways in which we can better protect the natural resources that both, in protecting them, help to prevent the ongoing intensity of climate change and also increase our resiliency against the impacts of climate change.

This rule, in that it reduces protections for wetlands that nevertheless are critical to economic viability and climate change resil-

iency, that is going to make it harder for our State and local communities and Tribes to continue to put up the strongest fight that they can against the impacts of the changing climate.

Senator CARPER. All right, thanks so much.

One more question, if I could, Ms. Roose. Your testimony points out that Federal agencies overlook the rule's implications for hazardous waste compliance under the Federal Resources Conservation Recovery Act, we call it RCRA, our Nation's solid waste law.

My question would be, how does the rule's revised definition of Federal clean water jurisdiction potentially impact municipalities and industrial facilities under RCRA, under the Resources Conservation Recovery Act?

Ms. ROOSE. Thank you for that question, Senator.

It is a complicated interplay between two Federal statutes that are designed, by way of exemptions, one direction or the other, to avoid duplication of regulation for the regulated community, which makes a lot of sense.

In this instance, where we have the revision of Clean Water Act jurisdiction that is, in some parts of the Country, well, all across the Country and in some areas more than others, going to result in facilities that have been covered under Section Clean Water Act 402 permits, NPDES permits, that no longer are required to meet those programmatic requirements under the Clean Water Act.

That then, may remove an exemption from some of these industrial facilities that discharge directly to water bodies and those that discharge to municipal wastewater treatment plants through a pretreatment program that they now could be subject to RCRA requirements, Subtitle C, for hazardous waste.

This is an area that we were disappointed, here in New Mexico, that the EPA and the Army Corps of Engineers didn't pay more attention to this in the final rule to provide more regulatory certainty for both the regulated entities that could be impacted by this, what this means for their compliance requirements, and also for the State and Federal agencies that are charged with implementing the Resource Conservation and Recovery Act.

So it is unfolding, and we are concerned about the added uncertainty that it creates in terms of the interplay between these two Federal programs.

Senator CARPER. Ms. Roose, thanks very much for that response, and again, thank you very much for joining us from New Mexico. Thanks.

Senator BARRASSO. Senator Braun?

Senator BRAUN. Thank you, Mr. Chairman. This is a hearing important to me. I have been here a little over a year and a half, and I have probably had more input from constituents back in Indiana when it comes to developers, when it comes to farmers.

I would agree with Ms. Roose 100 percent, if we were talking about 48 years ago. I know back then, you couldn't fish in our local rivers because they were full of pollutants and hazardous waste material.

I think you have to acknowledge that, and what I disagree with 100 percent, is that the stewardship of landowners, the States themselves, have now had 48 years since the Clean Water Act to know what is best for their own properties and so forth. And I

think the amount of regulations that have accumulated over time have swamped the system, so to speak.

So I think this is a perfect pivot to where we will not forget about where we have come from and that idea that only the Federal Government can be the steward that takes, literally, micromanagement, whether it is on the part of Mr. Gaesser on his farm, or Mr. Davis and his developments. I think this is a perfect time to kind of go the other way and not let up or forget any of the things that we have accomplished along the way.

First question is for Mr. Davis. A couple developers that had to mitigate were shocked in terms of the dollar amount of the development when their alternative was a $2 million mitigation versus what ended up being a $200,000 mitigation.

I would like to hear some of the graphic things that you have run into along the lines of that, first of all, to know that from experts, there was a 90 percent difference in what a consultant said needed to be done to mitigate. If you could give us a few graphic instances like that, I think it would be good for the public to appreciate what you are up against.

Mr. DAVIS. Why, certainly, and thank you for the question, Senator.

My mind goes to kind of two things. No. 1, not only am I a developer, but I also do mitigation banks, and so you know, the concept behind a mitigation bank is that you go and you find land that is in distress; it is of regional consequence; it is land that hasn't been taken care of, and that through enhancement, creation, and preservation, you lift the environment up, and you create it back to the way it would have been kind of pre-industrial revolution, as it were.

When we do that, we create these mitigation banks, and then developers like your constituents will often buy credits from us. Part of the reason that is so expensive is, this goes to the second part of your question, I think, part of the reason it is so expensive, is one of the banks that I did, about 1,000 acres, it took me 10 years and over $1 million just to create, enhance, and preserve wetlands.

And so those dollars then have to bubble up to the cost of the mitigation credit. And that is the reason why these costs can be so egregious, as your constituents have noticed.

Then, second, the other thing I would say is it happens to us often when we are doing developments. The overreach that we experience from regulators interpreting the rule prior to the most recent clarifications is overwhelming. It is absolutely overwhelming. We spend hundreds of thousands of dollars with expert consultants in order to help us identify where the wetland line is, and even once we do, the regulators still pull it up the hill further.

When those impacts occur, we have to purchase these mitigation credits and do onsite conservation and preservation, and the cost just absolutely skyrockets. Finally, that is the bottom line. That is the reason why we are struggling with housing affordability.

Senator BRAUN. Thank you.

Next question is for Mr. Gaesser. Another reason to be hopeful that with this rule, we won't forget where we have come from. Less than a year ago, we started a climate caucus within the Senate, and I was proud to be the first Republican, as a life-long conserva-

tionist, to do that. And we have actually got a bill that came out of the gate, bipartisan, the Growing Climate Solutions Act, which basically is wanting to help farmers, ag and trade, to certify their ground to take advantage of voluntary and compliance markets that are out there.

So, Mr. Gaesser, my question would be for you, with this new rule, do you think you will still do the stewardship practices on your home farm, riparian buffers, grass waterways, or even further modify your practices to sequester carbon and do some of the things that would be rewarded by this bill, will this new adjustment from the Trump Administration help you do that?

Mr. GAESSER. Thank you, Senator, and yes. Farmers have always been innovative, and we have always been innovative on our farm, and that is not going to change. We really do love the land, and we want to do the best job that we can to protect the soil, clean our water, you know, be more resilient, and address the severe weather issues that we continue to have, and having more and more all the time.

So our practices aren't going to change. Our practice of innovation is not going to change. Our practices are changing. Just as an example in the last 30 years for us, or 40 years, you know, we have built terraces and waterways early on, and then we transitioned to a no-till 100 percent. Then 10 years ago, we began growing cover crops, and we are over half our land in cover crops now, owned or rented, is doesn't matter. We do it because it is the right thing to do, and it makes sense.

Farmers are going to continue to do that, and we have more and better technology all the time. We need to encourage that innovation and that adaptation. We need to encourage our companies, you know, to help us with that.

Our latest thing on our sprayer was exact apply. Each nozzle on our new sprayer shuts on and off at exactly the right time. There is basically zero overlap. It is just one of the things that we do, and we will continue to do that if we are allowed to.

Senator BRAUN. Thank you so much.

Senator BARRASSO. Thank you, Senator Braun. Senator Cardin?

Senator CARDIN. Thank you, Mr. Chairman, and let me thank all of our witnesses. The Clean Water Act for 48 years has been so critically important, not just to our environment, but to our economy. It is based upon the premise that we need to have a clean environment for our health, for our quality of life, but also for our economy.

The Clean Water Act, to me, is a critically important part of our legacy, and we need to make sure that it is preserved so that we can preserve, protect, and restore our Nation's waters.

I appreciate the testimony of all three of our witnesses, and I don't disagree with your passion and your assessment on how farmers or landowners respect the land and environment, because I agree with you on that. But I strongly disagree with two of you and your assessment of what the Trump Administration's regulation will do. Because I think it will move us in the wrong direction, and let me tell you why.

I believe that farmers, I could tell you that Maryland farmers do great things to protect the Chesapeake Bay, because they recognize

that the land is so critically important to their way of life. And they want it for future generations. So they do the right thing, and they want to do the right thing.

But when you see Maryland farmers stepping up to the plate and doing everything that they need to do, but to have upstream problems that counter a lot of the progress that we have made in cleaning up the Chesapeake Bay, that Maryland has no control over whatsoever. So the proper regulation of the Waters of the U.S. becomes a very important part of our commitment to achieve the environmental successes that science tells us that we can achieve.

My objection to the Trump regulation is that it is not based upon best science. It is a political statement that will make it more difficult for us to accomplish our objective for our environment.

Let me just give you one example. You have the nutrient goals that we need to achieve in the Chesapeake Bay Partnership by 2025. There are six States and D.C. that are all part of this coalition. The Chesapeake Bay Program is a program that was developed at the local level with buy-in from all stakeholders. It is not partisan at all. It is embraced by all stakeholders in Maryland. But it requires the Federal Government to be an objective umpire to make sure that we all achieve what we say we are going to achieve. Without establishing the right regulations of the waters that are impacted, it makes it more difficult.

My question to Ms. Roose is that, we have certain requirements that we need to accomplish under Section 303(d) of the Clean Water Act to restore impaired waters. How will this new regulation work? Will it make it more difficult for us to achieve those objectives, even though a State does everything it needs to do, it can't control what other States are doing?

Ms. ROOSE. Good morning, Senator Cardin. Thank you for that question. There is clear interplay between where the Clean Water Act jurisdiction stops and starts, and how our water bodies are going to respond. You are right, in terms of that the interState connections here under this rule, interState waters are not jurisdictional, just based on that fact alone, which is a change from the past. That can complicate cross-boundary regulation and protections and collaborative efforts along the lines of what you described in the Chesapeake Bay.

There is also this connection between, in the States that do not have the programs to fill the gaps, as I described for New Mexico, there's this connection between what happens in the meantime. If facilities that had been meeting certain pollutant limit requirements for their end-of-pipe discharge no longer have to do that under Federal law, and there is not a State law to pick it up, we could see more pollutant loads. That is going to impact streamwater quality, which is going to cause additional impairment.

So, one thing that that does, it strains already strained resources to tackle the existing impaired waters if we have to be redirecting and adding additional resources to address potentially increasing and new impairments over time as a result of fewer protections.

Senator CARDIN. Let me ask you one other question, which has not been brought up yet. Fresh streams are a critical source for our drinking water. Under this new rule, there will be less regulation

on some of those streamwaters that go into our drinking water, causing additional burdens on making sure that we have safe drinking water for the people of this Country.

I can tell you, in Maryland, we already have an affordability issue in regard to clean water and safe drinking water. What impact will this regulation have on the affordability of drinking water? Will it put more pressure on the rates in order to make sure that water is safe, again, putting pressure on those who perhaps, are least likely to be able to afford that increase?

Ms. ROOSE. That is a likely scenario, Senator, for a number of communities, that if in fact, streamwater quality degrades, dirtier water coming into a surface water intake at a drinking water utility is more costly to treat. They may need to upgrade their systems. We have seen examples of this in our State under existing requirements from major disasters and spills.

If the utility has to increase their treatment, they are going to have to incur costs. How do those costs get borne out? Many times, we do see it getting passed along to ratepayers, and that is absolutely one of the key economic concerns at the local level that we identified in our testimony.

Senator CARDIN. Thank you.

I know my time is expired. I just really want to make one last point, and that is, I really do think this new rule will provide less certainty rather than more certainty. It is not going to end this issue, and that is unfortunate.

We should have clarified from the Supreme Court decisions in regard to certainty. The Obama Rule did that; this rule will not. So I am afraid that the certainty that all of us want to see is not going to be there.

Thank you, Mr. Chairman. I appreciate it.

Senator BARRASSO. Thank you very much, Senator Cardin.

Senator Ernst.

Senator ERNST. Thank you, Mr. Chair, and as we heard in Mr. Gaesser's testimony, the Obama administration's flawed WOTUS Rule posed some serious challenges for Iowa's farmers in not knowing whether a ditch or a puddle could be subject to Federal regulation created confusion, fear, and additional costs.

In 2015, I was proud to introduce legislation that would have nullified the Obama Rule, which gave the Federal Government the authority to regulate 97 percent of Iowa's land. My bill passed both the House and the Senate with bipartisan support, but was ultimately vetoed by President Obama.

Getting this ill-conceived rule off the books has been one of my top priorities since entering office. I was delighted to see the Trump Administration finalize the Navigable Waters Protection Rule, which provides much-needed predictability and certainty for farmers by establishing clear and reasonable definitions of what actually qualifies as a Water of the U.S.

Mr. Gaesser, we will start with you. What challenges, and you have mentioned a couple of those, but what challenges did the Obama administration's WOTUS Rule cause for farmers like you, and can you provide a few more of those examples? You mentioned just simply putting in a new fence row would create difficulties with permitting. Can you provide some other examples?

Mr. GAESSER. Yes, thank you, Senator.

Yes, there are lots of examples, but doing, repairing drainage tile is one of them. Adding to a livestock facility is a big issue. But to me, it was, you know, and then for many of us, it was that uncertainty of a Federal overreaching rule that had a bureaucrat come and tell you exactly what you needed to do, which really did discourage the innovation that I talked about. And it has discouraged practices that really did work, rather, in lieu of a rule that wasn't practical for our conditions on our local farm, or in Iowa, in a lot of cases.

And we are doing so many things in Iowa and on our farm to encourage that innovation, but to clean the water. Our Department of Agriculture and Land Stewardship, we are working with the Iowa nutrient reduction strategy that has been in place for seven, 8 years now, we are making lots of progress there.

And part of that [indiscernible] that I cochaired with Secretary Naig is the conservation infrastructure. It is those incentives and encouraging for agriculture in our communities to clean the water, to protect the soil, to reduce nutrient load, all those things. We are making progress, and it allows States and local communities to make their decision on how to best make that happen.

Senator ERNST. Yes, thank you, Mr. Gaesser, and I do know that when this rule was put into place, I heard from farmers and contractors as well because they were in the process of actually doing conservation projects on various farms. And they didn't even know if they would be allowed to do those conservation projects because of the WOTUS Rule. So I appreciate your answer.

In your testimony, Mr. Gaesser, you express support of the Navigable Waters Protection Rule, and you did say that it provides more clarity, more certainty. How does the new rule eliminate that confusion and uncertainty caused by the Obama Rule?

Mr. GAESSER. Well, and overall, regulation from the Federal Government really never applies to local issues, you know, and that is what I keep coming back with. All these issues are local, you know, and if you have a one-size rule or a regulation, it doesn't allow us to adapt and to adopt our practices, or what we are doing to really address the issue. We need to encourage that, those local initiatives, those farm initiatives.

As I said before, one thing that we have learned with two decades now of studying with the environmental and the ARMFarm Network and Iowa soybeans is that no one size fits all, and every farm is different and every watershed. There are 1,600 HUC 12 watersheds in Iowa, and every watershed can have a different practice that works equally well for their water. Certainty is what we need, and innovation.

Senator ERNST. Yes. Thank you, Mr. Gaesser.

Just finally, very briefly, you know that this current rule put in place by the Trump Administration could be undone by future administrations, and then, once again, replaced by the Obama WOTUS Rule from 2015, or a more extreme version of it. Our Country is trying to rebound from COVID–19, and in Iowa, we are trying to recover from a devastating derecho. We need to be cognizant of the impact of regulations on our farms and businesses.

What would the reinstatement of the Obama WOTUS Rule mean for our ag economy?

Mr. GAESSER. Well, it would be the same uncertainty that we have, and you know, we do continue to live in uncertainty. Sometimes, you know, we need some help, you know, and we need incentives to offset that uncertainty, and create practices and learn new practices. So we need that research and we need that investment to help us, you know, advance, and address the issues that the uncertain weather and the climate issues that we are seeing all the time now. We need that help.

Senator ERNST. Thank you, Ray, very much for joining us today. Thank you, Mr. Chair.

Senator BARRASSO. Thank you very much, Senator Ernst.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

I have noticed we seem to be talking a lot more about regulatory burden here than we are about clean water. At the end of the day, what we really count on is actually having clean water.

Sometimes people like to pollute. Old as time, old as mankind. It is cheap, it is easy, it washes down, somebody else's problem. So I think that there remains a very important role in trying to keep waters clean.

I note that there is a doctrine, this will be, I guess, a question for Ms. Roose. There is a doctrine that once the Federal Government chooses to regulate in a certain area, that displaces the traditional common law nuisance doctrine that has been the law of the Anglo-American tradition back into the mists of time.

Ms. Roose, would it be your view that once that regulatory protection is withdrawn, the waters and wetlands that no longer enjoy Federal protection would revert to being protected by common law nuisance liability and that as a result, downstream injured riparian folks can sue for pollution and upstream mistreatment?

Ms. ROOSE. Thank you, Senator, for that question. It is something that I can't speak to definitively, as a legal matter, but I think, yes, there are going to be at least, as a general matter, people looking at all of the other legal availability, legal opportunities that they have to protect themselves, their families, their business, from any number of things that are out there coming against them, including upstream pollution that comes down and onto their property.

I know that certainly doesn't make up for preventing the pollution in the first place, and States that don't have readily available programs to roll out and implement to prevent the pollution, we are going to see more and more, probably, reliance on laws like nuisance laws and other provisions that allow people to seek damages when in fact, that is the situation they encounter.

Senator WHITEHOUSE. So let's talk about when that upstream problem crosses State lines. The theory of this is that the Federal Government will step back and that State regulators will step in, and that the water will be protected and we will all continue to have safe, clean drinking water. That is the theory of the case, but if the effect of a polluting source is primarily being felt in one State, but the source is in another, how does the polluted State reg-

ulate the upstream polluter in another State? If EPA won't step in, where do you go?

Ms. ROOSE. Again, Senator, I would point to, it is a complicated interplay between where Clean Water Act Jurisdiction comes into that pattern. I am not exactly sure what the downstream State, what the remedies would be. That is something that I would have to look into and get back to you on.

Senator WHITEHOUSE. But clearly, an individual whose water has been polluted in some way, or a municipality that has to redo its water treatment system to deal with upstream pollution coming from out of State, if they are in Rhode Island and they go to the Rhode Island Department of Environmental Management, they are not able to get from the Rhode Island Department of Environmental Management relief against a Massachusetts polluter, are they?

Ms. ROOSE. I believe that is true, yes.

Senator WHITEHOUSE. So that opens up a pretty serious problem for interState pollution, particularly if a polluter has a lot of clout in the State that has to regulate them and can stop that, but the local clean water agency can protect him. You could be in a real stuck situation where you can't defeat the politics of the polluting State, and you can't get relief from your own regulatory agencies, and so you are stuck.

Can I ask one more question? It is a little bit unrelated.

Senator BARRASSO. Yes, please proceed, Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

I see that Mr. Davis is here, and his testimony says that he represents the National Association of Homebuilders. We are right now, with Senator Barrasso's active assistance, and Senator Carper's, trying to put together an energy bill that we hope can get some agreement and move forward. The area of contention right now appears to be building efficiency measures. I keep hearing that the National Association of Homebuilders is actively in against those building efficiency measures.

I know builders in Rhode Island and around the world who actually are efficiency builders. That is their work. You have a whole group of contractors for whom this is their business. So it is strange that the organization would be against it.

Second, as you update building codes to meet new efficiency standards, it seems to me that that actually creates work for the industry as new windows, new forms of insulation, new, more efficient boilers and so forth, have to be installed.

So, I am a bit at a loss as to figuring out why the National Association of Homebuilders has been the enemy of this, when everything that I see about it makes me think that it is in your interest to have building efficiency standards.

Don't you want, as an association, to have America have the most efficient buildings? Don't you want the people who you serve who build these homes to have the lower utility bills and the more efficient outcomes? I am struggling to understand why I keep hearing that the National Association of Homebuilders is the impediment to that bill.

Mr. DAVIS. Yes, thank you for the question. Let me apologize ahead of time. I came today to testify about the Clean Water Act.

Senator WHITEHOUSE. I know, and I appreciate that. I said that this was off topic.

Mr. DAVIS. I appreciate that.

Senator WHITEHOUSE. I understand.

Mr. DAVIS. I just wanted to apologize to say that I am not really prepared to answer that. I think it is a great question; I think you deserve an answer. I am sure that the National Homebuilders can followup with you on that.

But I would love to just also speak to your other comment around clean water, because really, I mean, that is my passion, that is what I was here today to talk about. You brought up a couple of points about how the areas that would no longer be captured by the jurisdiction of the Corps and the EPA, how are they regulated.

So I just did want to speak to that, just real quickly, you know, I from Florida. I do work in Florida and Georgia and the Southeast. I can tell in emphatically that the State and local government is every bit on top of every square inch of wetlands, whether they are jurisdictional or not. So we go through the same rigorous processes at the State level with the water management districts, with the DEP, with local governments, we have to account for all of our runoff, 100 percent of our runoff. Not only do we have to account for it, but we have to attenuate it, and we have to treat it. So we are held accountable for what it looks like both pre-development and post-development.

So I came here to just share, all I can do is share from my perspective. I can't talk about the other witnesses, but from my perspective, clean water will be the in perpetuity in Florida. We have the appropriate measures in place outside of what the government needs to regulate. I believe that this new Trump Rule will actually, it will create some certainty for us. It will allow predictability and accountability now at the National level, as well.

Senator WHITEHOUSE. Thank you, Chairman.

Senator BARRASSO. Well, thank you, Senator Whitehouse, and thank you Senator Van Hollen. You have been patiently awaiting, and we look forward to your questions at this point. Thank you, Senator.

Senator Van Hollen. Thank you, Mr. Chairman, and to the Ranking Member, and to all our witnesses.

I would like to followup a little bit on the points made by Senator Cardin with respect to the Bay, and also really referenced by Senator Whitehouse and Senator Carper earlier regarding the impact of activity outside of one State on another.

The photograph behind me is of the Blackwater National Wildlife Refuge in Maryland, one of two national wildlife refuges near the Bay and its tributaries. We have an interState compact between Maryland and Virginia, the District of Columbia, and Pennsylvania, to protect the Bay. It can only work if all the parties to that agreement are really enforcing its provisions and complying with the nutrient reduction goals. The EPA is designated to enforce that.

We have been having trouble with the current EPA fully enforcing those provisions with respect to some of the States, especially,

right now, the State of Pennsylvania. The Susquehanna River runs through Pennsylvania, comes into the Chesapeake Bay.

What this change in the WOTUS Rule would do is take away important tools that are needed to help the Federal Government and local officials enforce that compact. I appreciate the testimony about Florida's active efforts at the State level to protect their waters. But when you have a really important and essential national estuary like the Chesapeake Bay with more than one State involved in its protection, these provisions are very important.

I would just ask Ms. Roose to elaborate on that, because in your statement, in your written testimony, you say ephemeral streams are the capillaries of watersheds, recharging aquifers and delivering water downstream for aquatic life, wildlife, and human use. Well, the Chesapeake Bay is downstream from a lot of those sources.

Can you elaborate more on how these proposed changes to the rule would make it harder to enforce Clean Water standards in order to protect the Chesapeake Bay downstream?

Ms. ROOSE. Thank you, Senator. Yes, speaking to the interState issues is really important, and I will answer more generally. This would apply to the Chesapeake Bay Region and other areas.

One of the advantages of having Federal Clean Water Act permits in play, State to State to State, for common waterbodies and waterbodies that flow across States, watersheds that don't know State lines, is that a downstream State has an opportunity to review a permit before it is issued to see if that permit is going to put limits in place that will protect the downstream State use.

If the permit in the upstream State is no longer required under Federal law, it is maybe being issued under State law, then we aren't necessarily, as a downstream State, going to be able to be involved in that process, ensure that that permit, when issued, is strict and stringent enough to protect not just the State waters that it is in, but the waters as they flow down into the next State.

So, the more jurisdictions you have at play, like in the Chesapeake Bay Watershed, the more complicated that gets, the more interplays that may be lost of having those checks and balances to make sure that the protections are effective for the entire watershed.

Senator Van Hollen. Right. I just want to emphasize in the case of the Chesapeake Bay, even the existing authorities don't seem adequate if you have the Federal regulatory agency, in this case, the EPA, not fully using their authorities, which is why the State of Maryland, the Chesapeake Bay Foundation, and others have filed a lawsuit against the EPA for lack of enforcement, and that is with its existing toolbox. This would further diminish those tools available.

I want to point out, because we are talking about the intersection of the WOTUS Rules and economic interest, that the Maryland Watermen's Association is a party to that lawsuit, together with the State of Maryland and the Chesapeake Bay Foundation. Because obviously the degradation of the waters of the Chesapeake Bay very much harm the interests of the watermen and fisheries and oystermen.

So as we think about the environmental and economic impacts, it is important to remember that taking away some of these protections not only can result in more environmental degradation to the Bay, but have a very negative, harmful impact on important industries in the State of Maryland.

That is just one example. Obviously, you can extend that nationally, and the same holds true with respect to States trying to protect wetlands as buffers in general, and, as you said earlier, Ms. Roose, with respect to the impact of climate change.

This interState component is something that is very troubling. A lot of the testimony from the proponents of these changes have focused just on activities within a particular State. But there's a fundamental question about what recourse States like Maryland have without the tools available.

So, I want to thank all of you for your testimony. I look forward to continuing the conversation. I think we all would like to see more clarity. That is in everybody's interest. But we don't want changes that will take away very important tools to protect national and natural treasures like the Chesapeake Bay.

Senator BARRASSO. Thank you very much, Senator Van Hollen.

Senator Carper, do you have any additional questions?

Senator CARPER. Maybe two, if I could, Mr. Chairman.

Senator BARRASSO. Please.

Senator CARPER. Thanks so much.

The first question, this would be for Ms. Roose again. Ms. Roose, if you would, would you just give us an example of the kind of facilities that would be subject to fewer pollution controls as a result of the Trump Administration's Navigable Waters Protection Rule?

Ms. ROOSE. Yes, Senator. It is a variety. We will see, and speaking of New Mexico, down where we have a significant amount of waters that lose jurisdiction, we may have a wider range of facilities.

But we are talking about hard rock mines that are disturbing significant amounts of land using chemicals to extract materials, we are talking about municipal wastewater treatment plants, private wastewater treatment plants that may take on not just domestic sewage but industrial wastewater as well, manufacturing facilities, there is a wide range of types of facilities.

Senator CARPER. Let me just followup if I could. How would the increased pollution you have just described, impact the environment and human health?

Ms. ROOSE. Well, to name a few impacts, filling wetlands and ephemeral streams can degrade water quality throughout a watershed. Also, in the arid West, where there is a real connection between water quality and water quantity, we could see flows diminished that are critical for some of our interState compact agreements out here in New Mexico. We could see impacts from ephemeral waters that are no longer protected and pollutant discharges no longer restricted under Federal law, and without a State backup, would not be restricted, then causing impairments downstream in the waters that the Trump Rule does deem jurisdictional.

So we could actually see water quality impacts, and we expect to, in the State of New Mexico, as a result of this rule, where you have got impairments, waters and streams not meeting their designated

uses, whether that be for recreation, drinking water, irrigation for crops, as a result of upstream waters no longer having protection.

Senator CARPER. Let me make sure I understood this. How will the public know about the impacts that you have just described, over time?

Ms. ROOSE. That is a good question. One of the cornerstones of the Clean Water Act is a monitoring program, where States devote resources to get boots on the ground, go out, collect data about what the actual water quality in streams, rivers, and lakes is, and then assess that data to see whether or not those water bodies are meeting their intended uses.

So we will see over time through the data that is generated, these monitoring assessments. We will see whether or not impairments do, in fact, go up in certain parts of the Country and certain regions and certain localities. Wo we will be able to watch that data to understand what the actual water quality impacts are as the regulatory landscape comes full circle.

Senator CARPER. Thanks. One more last question, if I could, for Mr. Davis, again, on clarity under the new rule.

Administrator Wheeler has promised that this rule would enable property owners to make their own determination of what is in and what is out when it comes to jurisdictional determination. To me, the rule does more than that. It seems to put the responsibility on you and your staff to make the determination about whether a particular parcel of land you may want to develop requires a Federal permit.

Would you just think about that? My question I guess, would be, under this new rule, do you, and maybe even more importantly, your attorneys, feel confident that if you walked your property and determined whether a Federal permit is or is not required to develop some part of that land, that you may have gotten it right?

Mr. DAVIS. Yes, sir, great question, and thank you. My reaction to that would be, as a developer, I rely on consultants often. Some of my best friends are scientific consultants and so forth, and so under the new rule, we are still going to have scientists out there looking at the projects, because remember, not only are we concerned about jurisdictional wetlands, but we are also concerned about State wetlands as well.

So the DEP, the DNRs, the water management districts, they are still requiring that we go out there and we flag these wetlands, and we understand what resources that we have on our projects.

So for me personally, it is not that we are now going to not be concerned about certain wetlands that fall outside of the jurisdiction, but rather it is more about having certainty on where this jurisdictional line ends and where the State picks up. So for us, this rule is about clarity. So for me, I would have no intention on necessarily doing this without consultants, but it will absolutely provide the clarity that we need and avoid some of the delays that we are experiencing.

Senator CARPER. Thank you.

Thanks very much, and thanks to all of our witnesses. Let me just conclude, Mr. Chairman, I would ask unanimous consent that several items be included in the record, please.

Senator BARRASSO. Without objection.

[The referenced information follows:]

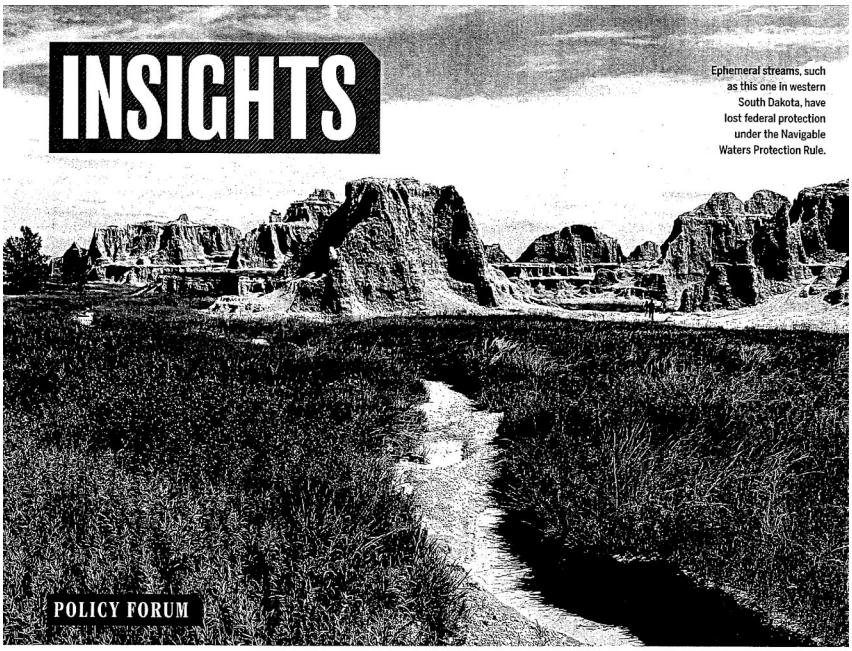
Environment and Public Works Committee
"Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean Water Act"

Statement for the Record:

Mr. INHOFE: Mr. Chairman, thank you for hosting this hearing on the Trump administration's Navigable Waters Protection Rule which, as you know, replaces the Obama administration's illegal Clean Water Rule. Since 2015, and as chairman of this Committee, I have led the charge against the Obama-era waters of the United States (WOTUS) rule. I am deeply grateful to President Trump and Environmental Protection Agency (EPA) Administrator Wheeler for their steadfast leadership and commitment to rectifying this important regulatory issue. For years, I have spoken with countless Oklahomans about their strong concerns and objections to the Obama-era rule, and I am pleased that the Trump administration has taken action to provide a clear and lawful definition of waters of the United States.

It is not an overstatement to say that the Obama-era WOTUS rule was the greatest regulatory burden facing farmers and ranchers in my state and other states across America. For generations, farmers and ranchers have been dedicated stewards of their land and water, but the Obama-era rule placed unprecedented and expanded power into the hands of the federal government which severely hampered the work of farmers and ranchers everywhere.

Unfortunately, the previous administration believed that Washington bureaucrats were better equipped than Oklahomans to keep our land and water clean and preserved for future generations. They were wrong, and I am proud that, with President Trump, we finally have a president that has the back of our farmers and ranchers. I look forward to continuing my work in the Senate to support this administration's bold agenda which will ensure we produce a greater future for all of our children and grandchildren.



INSIGHTS

Ephemeral streams, such as this one in western South Dakota, have lost federal protection under the Navigable Waters Protection Rule.

POLICY FORUM

WATER

Distorting science, putting water at risk

A recent rule is inconsistent with science and will compromise the integrity of U.S. waters.

By **S. Mažeika Patricio Sullivan[1], Mark C. Rains[2], Amanda D. Rodewald[3,4], William W. Buzbee[5], Amy D. Rosemond[6]**

The Navigable Waters Protection Rule (NWPR) (*1*), which was published in April by the U.S. Environmental Protection Agency (EPA) and the Department of the Army ("the Agencies"), has redefined "waters of the U.S." (WOTUS) to restrict federal protection of vulnerable waters (*2*). With its emphasis on "continuous surface connections" and "permanen[ce]," the NWPR removes or reduces protection for U.S. waters, including millions of miles of streams and acres of wetlands, many of which comprise headwaters that are critical for sustaining water quality and healthy watersheds (*3*) (see the figure). Although the Agencies claim to have "looked to scientific principles to inform" the NWPR, science has been largely ignored and oversimplified. These new exclusions are based on selective parsing of statutory language and earlier case law, rather than on previously established, science-based interpretations of the U.S. Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA) (*4*). The EPA's own Science Advisory Board (SAB) found sufficient evidence to conclude that "...the proposed Rule lacks a scientific justification, while potentially introducing new risks to human and environmental health" (*5*). Responding to this unprecedented distortion of science and rollback in water protections, which went into effect nationwide on 22 June, will require coordinated efforts among scientists, lawmakers, and resource managers.

Clearly articulated in the CWA is the intention "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (*4*). The CWA was explicit in protecting "navigable waters," which Congress defined broadly as WOTUS; however, the extent to which waters other than navigable rivers, lakes, and territorial seas [traditional navigable waters (TNWs)] are protected has repeatedly provoked legal skirmishing. Particularly contentious are determinations about which nontraditional waters, such as wetlands and small tributary streams, contribute to the integrity of TNWs.

PHOTO: S. M. P. SULLIVAN

The NWPR functionally ends the debate by elevating state over federal regulatory authority. Without federal law as a protective regulatory floor, states can and often do choose to leave waterbodies unprotected, making waters vulnerable to unregulated pollution, dredging, filling, and other activities that may profoundly erode water quality (*3*).

The NWPR downplays science by redefining protected "waters" and explicitly states that "science cannot dictate where to draw the line between Federal and State waters." The NWPR relies overwhelmingly (and arguably arbitrarily) upon the 2006 Supreme Court opinion by Justice Scalia in *Rapanos* v. *United States, Carabell* v. *United States Army Corps of Engineers* that lacked majority support. A more scientifically nuanced position was articulated by Justice Kennedy on the same case; the four dissenting Justices agreed with Kennedy's rationales for protecting waters, but would have protected even more.

The realized impacts are likely to be worse than projected, as ephemeral streams and nonfloodplain wetlands are usually underestimated by remotely sensed data (*3*). The economic analysis filed with the NWPR was largely silent about impacts, simply acknowledging that "the [A]gencies are unable to quantify [the scope] of these changes with any reliable accuracy" owing to geospatial data issues and uncertainty about government responses (*6*). Yet, in spite of this uncertainty and the potential for harm, the Agencies proceeded with a restrictive and risky rule.

CONNECTIVITY AND QUALITY

Connectivity is a cornerstone in understanding how freshwater ecosystem functions are sustained. In 2015, the Obama administration promulgated the Clean Water Rule (CWR) that included all tributaries and most wetlands as WOTUS (*7*). The scientific rationale for the CWR was reviewed in the EPA Connectivity Report (*8*), which synthesized >1200 peer-reviewed scientific publications and input from 49 technical experts. After a public review process, the 25-member EPA SAB confirmed the scientific underpinnings of both the Connectivity Report and the CWR.

Since then, the body of supporting evidence has grown (*3*, *9*), enhancing our understanding of how the integrity of freshwater ecosystems within a watershed relates to the biological, chemical, and hydrological connectivity among waterbodies, including wetlands and ephemeral streams. This understanding recognizes as critical to services derived from freshwater ecosystems gradients of connectivity (versus a binary property: connected, not connected) that operate as a function of frequency, magnitude, timing, and duration of biological, chemical, and physical connections among waterbodies (*10*). By disregarding or misinterpreting the science of waterbody connectivity, the NWPR draws scientifically unsupported boundaries to distinguish WOTUS, reaches conclusions contrary to current science, and asserts legal and scientific views substantially different from those of the Agencies under previous administrations of both political parties going back to the 1970s. The NWPR promotes regulations contrary to what science shows about effective water protection. Although agencies often have latitude to adjust regulatory choices when implementing longstanding statutes, they cannot do so arbitrarily and without reasoned justification and rationales in light of relevant law, facts, and science.

In contrast to the CWR's recognition of biological, chemical, and physical connectivity, the NWPR relies solely on direct hydrologic surface connectivity to determine wetland jurisdiction. Nonfloodplain wetlands and ephemeral streams are categorically excluded on the basis of lack of hydrological connectivity irrespective of their degree of biological or chemical connectivity. Also excluded are floodplain wetlands lacking a direct surface water connection to TNWs "in a typical year," and intermittent tributaries lacking relatively permanent surface flows.

Such exclusions are inconsistent with evidence demonstrating that these waters are functionally connected to and support the integrity of downstream waters. Removal of federal protection is likely to diminish numerous ecosystem services, such as safeguarding water quality and quantity, reducing or mitigating flood risk, conserving biodiversity, and maintaining recreationally and commercially valuable fisheries (*3*).

EPHEMERAL, ISOLATED

Just as tiny capillaries play critical roles in the human body, nonfloodplain wetlands (so-called "isolated") and ephemeral streams (that flow only after precipitation events) support an extensive suite of ecosystem services. Because nonfloodplain wetlands and ephemeral streams are connected to one another and downstream waters along a gradient of connectivity, they also provide substantial cumulative or aggregate ecosystem services (*10*).

Because these wetlands and streams will summarily lose federal protection, they will be vulnerable to outright destruction, fill, or unpermitted industrial pollution discharges that risk transporting pollutants throughout watersheds. Losses of nonfloodplain wetlands could include particularly vulnerable and often valuable waters (*2*), including some playa lakes, prairie potholes, Carolina and Delmarva Bays, pocosins, and vernal pools. A preliminary analysis predicts widespread losses of wetland functions, with particularly high impacts on wetlands in arid and semi-arid regions. For example, the CWR protected 72%, whereas the NWPR will only protect 28% of wetland acres, in New Mexico's Río Peñasco watershed (*11*).

The NWPR also categorically excludes subsurface hydrologic connectivity. To disregard groundwater connectivity is to disregard the scientific understanding of how natural waters function. The Agencies justify this exclusion by claiming that "A groundwater or subsurface connection could also be confusing and difficult to implement." Although implementation may be challenging in some cases, claimed implementation ease under the NWPR should not supersede an evidence-based determination of connectivity given the potential for economic and environmental harm.

A PATH FORWARD IN UNCERTAIN TIMES

The NWPR directly conflicts with a growing body of scientific evidence and with input and review by federal and nonfederal scientists. The rule narrows WOTUS in ways that are inconsistent with longstanding views about the CWA's mandate to safeguard access to clean water. The NWPR opens previously protected waters to filling, impairment, and industrial pollution, and will undermine decades of investments restoring water quality across the United States and lead to profound loss or impairment of ecosystems and the services they provide. For context, the economic value of ecosystem services provisioned by nonfloodplain wetlands alone has been estimated at $673 billion per year (*2*).

Congress has the power to strengthen the CWA by enacting new legislation to replace or repeal the NWPR. Future administrations can reassess and act to restore protections through new rulemaking, without the need for new legislation. Toward these ends, the scientific community has already spoken on the matter, proposing three frameworks for the development of renewed protections based on sound scientific merits (*2*).

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Meanwhile, litigation may present challenges to and perhaps enjoin implementation of the NWPR. The April 2020 *County of Maui v. Hawaii Wildlife Fund* may help. In that case, the U.S. Supreme Court rejected an argument that would have eliminated federal CWA protections. The Court instead called for a functional and context-sensitive analysis of the disputed activities and their effects to determine federal jurisdiction over intentional pollution discharges into groundwater that predictably flows into WOTUS. In that 6 to 3 decision, the Court laid out a clear scientific basis for closing a loophole in the CWA, affirming for the first time that pollutants that travel through groundwater and then emerge into surface waters are in fact covered by the CWA.

Redoubled research efforts also can help address knowledge gaps critical for effective water policy. Quantifying the potential "harm" to clean water that will be caused by the NWPR is critical for both litigation and future rulemaking. Thus, the scientific community will be challenged to further demonstrate the consequences of changes to physical, chemical, and biological connectivity on water quality—especially in the context of nonperennial streams and nonfloodplain wetlands.

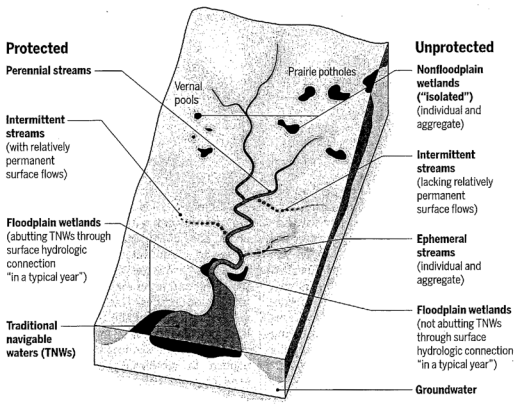
Research-based evidence on the impacts of climate change were notably absent in the NWPR and will also be critical in challenging the rule. Under current human-use and water-management schemes, many stream flows are declining, such that intermittent and perennial streams are increasingly being replaced with ephemeral streams that will lose protection. For example, the Upper Kansas River Basin lost 558 km (21%) of stream length between 1950 and 1980, presumably as a result of groundwater pumping exacerbated by climate change, with a cumulative loss of 844 km (32%) predicted by 2060 (*12*). Reduced mountain snowpack and increased evaporation have been implicated in the ~20% decline in the Colorado River's mean annual flow in comparison to the previous century; the Upper Colorado River basin supplies water to around 40 million people and supports ~16 million jobs (*13*).

Adoption of the NWPR is an indicator that the federal government is at least in part shedding the use of science and responsibility for water protection. Additional federal rollbacks of environmental protection, such as the Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, a rule finalized on 15 July, could create a perfect storm for exploitation of water resources. Although federal statutes grant latitude to state, tribal, and local governments to provide additional, more protective regulation, many states do not do so, and many even prohibit regulations more stringent than federally required (*2*, *14*). Thus, absent federal protections, many waterbodies will go unprotected.

If the NWPR remains in place, local and grassroots approaches to water conservation, including watershed councils and coalitions, information and educational plans to reduce pollution, and university extension programs, will need to further mobilize to fill the vacuum created by the new rule. Such efforts would require additional resources and heightened stakeholder coordination. ■

Protected versus unprotected waters

Multiple waterbody types were initially under consideration for protection as "waters of the United States" under the Navigable Waters Protection Rule. Ephemeral streams flow only after precipitation events, intermittent streams flow periodically or seasonally, and perennial streams flow continuously. There are many types of nonfloodplain, or "isolated" wetlands, including prairie potholes and vernal pools, as illustrated here.



GRAPHIC: MELISSA THOMAS BAUM/SCIENCE

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ACKNOWLEDGMENTS

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

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, et al., Plaintiffs, v. ANDREW R. WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency, et al., Defendants. AMERICAN FARM BUREAU FEDERATION, et al., Intervenor-Defendants.	)	No. 2:20-cv-01687-DCN

Brief of Amici Curiae Trout Unlimited, Izaak Walton League of America, Theodore Roosevelt Conservation Partnership, American Fly Fishing Trade Association, and H. Dale Hall, Former Director, U.S. Fish and Wildlife Service and Former CEO, Ducks Unlimited, in Support of Plaintiffs' Motion for Summary Judgment

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July 17, 2020
Greenville, South Carolina

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***TABLE OF AUTHORITIES ATTACHED AS EXHIBIT 1.**

INTERESTS OF *AMICI CURIAE*

Trout Unlimited is a non-profit organization with 370,000 members and supporters dedicated to conserving, protecting and restoring the Nation's trout and salmon fisheries and their watersheds. Trout Unlimited staff and volunteers, working with landowners, and local, state and federal agency partners, restore hundreds of miles of the waters at issue in this case.

Founded in 1922 by avid anglers, the Izaak Walton League of America's 40,000 members are hunters and anglers who work to conserve outdoor America for future generations. The Izaak Walton League of America members and citizens trained by the League conduct stream monitoring at hundreds of sites across the nation to ensure that stream health is maintained and improved for hunting, fishing, and safe drinking water supplies.

The Theodore Roosevelt Conservation Partnership is a non-profit organization with individual as well as 60 hunting, angling and outdoor recreation organization members dedicated to ensuring that all Americans have quality places to hunt and fish.

The American Fly Fishing Trade Association represents the business of fly fishing which includes manufacturers, retailers, outfitters and guides across the nation. The protection and enhancement of fish habitat is the foundation of our industry.

H. Dale Hall worked in wetlands and wildlife conservation for over thirty years in the U.S. Fish and Wildlife Service, where he became Director in 2005 under President George W. Bush, and nine years as the CEO of Ducks Unlimited, Inc, the largest wetlands and waterfowl habitat conservation organization in the world. He has published numerous scientific articles on wetlands and their functions, as well as co-authoring a book chapter on the fisheries values of bottomland hardwood wetlands.

Protecting our nations' waters is of critical importance to Sportsmen and Sportswomen Amici. Healthy waters support healthy fish and wildlife and help to support and sustain water-based businesses, including hunting, fishing, outdoor recreation and the recreational economy. As of 2014, an estimated 47 million people hunted and fished in the United States, and delivered an astonishing $200 billion to the country's economy, along with 1.5 million jobs.[1] So, when streams are polluted or wetlands drained, it directly affects Sportsmen Amici and Sportswomen and America's hunting and fishing economy.

Since its enactment, Amici Curiae (collectively herein "Amici") have relied upon the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251 *et seq*., with its long-standing and science-based definition of "Waters of the United States" to ensure protections for the many streams and wetlands that function to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" – the central objective of the Clean Water Act. 33 U.S.C. § 1251. The Act also sets as an explicit national goal the achievement of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water…." 33 U.S.C. § 1251(a)(2). Few other laws so clearly place the interests of hunters and anglers at their core. And sportsmen and women reciprocate, with 92% supporting broad application of Clean Water Act protections.[2]

SUMMARY OF ARGUMENT

Amici vigorously oppose the 2020 Waters of the United States Final Rule –85 Fed. Reg. 22,250 (April 21, 2020) ("Replacement Rule" or "2020 Rule") because it drastically and arbitrarily departs from law, longstanding CWA policy, and science. The Replacement Rule

[1] *See,* National Wildlife Federation, et al., "Hunters and Anglers: Fueling our Nation's Economy and Paying for Conservation," (2014), available on-line here.
[2] *See*, Weigel, Lori, "TRCP Sportsmen National Survey," (2018), available on line here.

eliminates all permit requirements for an estimated half of the Nation's stream miles and tens of millions of its remaining wetland acres, and cripples the effectiveness of the Act's remaining permit and water-quality protection framework to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. If allowed to stand, the 2020 Rule would result in increased pollution and destruction of streams, rivers, lakes, wetlands, and estuaries upon which Amici depend for fish and wildlife-related outdoor-recreation, restoration work, employment, and businesses.

Amici will not substantially repeat the persuasive arguments advanced by Plaintiffs' summary judgment brief. Rather, Amici demonstrate below that the 2020 Replacement Rule is arbitrary and capricious because: (1) the Rule disregards the primary statutory objective and goals of the CWA, the established science, and record evidence of environmental and economic impacts; (2) the Rule undermines the CWA's permit programs and will have devastating effects on the states' and tribes' ability to meet the water quality standards they set for navigable waters; and, (3) the Rule disregards the reliance interests of millions of people and businesses on longstanding protections for clean water.

Amici present below what they do every day – we discuss the science of rivers, wetlands and drinking water of the American public – the Waters of the United States. We show the science ignored by the Agencies and the sheer irrationality of the Replacement Rule in the face of the Act's permit framework and implementation in watersheds across the Nation.

ARGUMENT

I. The 2020 Replacement Rule arbitrarily eliminates all permit requirements for about half the Nation's stream miles and tens of millions of wetland acres, making it impossible to achieve the Act's primary objective to restore and maintain the chemical, physical, and biological integrity of U.S. waters.

A. The 2020 Rule excludes CWA permit review for approximately half of U.S. stream miles.

Streams that do not flow year-round, but instead flow seasonally and intermittently or ephemerally (in response to precipitation events), are the backbone of every watershed, comprising on average 60-80% of their total length of streams.[3] The 2020 Rule categorically and expressly removes CWA jurisdiction for all ephemeral streams, which the Agencies' own early estimate pegged at 18% of stream miles nationally and Trout Unlimited ("TU") scientists calculate at more than 50% of stream miles.[4] In addition, the Replacement Rule excludes intermittent (seasonal) streams that do not contribute flow "in a typical year" to a navigable water, although the Agencies did not quantify how many streams this would encompass. The 2020 Rule even eliminates protection for some perennial (year-round) streams, also without quantifying how many. *See* U.S. EPA & Dep't of the Army, *Economic Analysis for the Navigable Waters* ("Final EA") (AR 11572).[5] *Protection Rule: Definition of "Waters of the United States"* 10-11, 22-23 (Jan. 22, 2020).

The irrationality of the proposed rule is simple to describe. Imagine a navigable stream with two tributaries, one which flows year-round and one which is ephemeral, flowing only

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[3] *See* Dr. S. Mažeika Patricio Sulliván Decl., *California v. Wheeler*, 3:20-cv-00-3005-RS (N.D. Cal.), ECF No. 30-18 (Sulliván Decl.) ¶ 14 & n. 32 *citing* T. Nadeau and M.C. Rains, *Hydrological connectivity between headwater streams and downstream waters: how science can inform policy,* 43 J Am Water Resour Assoc 118 (2007).

[4] *Compare,* Ariel Wittenberg & Kevin Bogardus, "EPA Falsely Claims 'No Data' on Waters in WOTUS Rule," E&E News (Dec. 11, 2018), available on line here and here (last visited 6/20/2020) with Comment Submitted by Steve Moyer, Vice President, Government Affairs, Trout Unlimited (April 15, 2019) Attachments: Kurt Fesenmyer, GIS Director, Trout Unlimited. 2019. Trout Unlimited PowerPoint Presentation, "What it all means: waters of the U.S. on the ground." (April 4, 2019) (2019 Trout Unlimited Mapping PowerPoint) (*e.g.,* estimating ephemeral stream miles comprise 57% of U.S. stream miles), (AR 4912) available on line here.

[5] The Final EA is available on line here. Perennial waters that would not be waters of the US include those that flow into ephemeral features, which themselves do not contribute flows to a traditional navigable water or territorial sea in a typical year and perennial tributaries that similarly do not contribute such flows, *e.g.*, because they spill into the desert.

occasionally and unpredictably. Under the proposed rule, a party could completely fill the ephemeral stream or place discharge harmful substances into it without violating the CWA, while being precluded from discharging into the year-round tributary. In both instances, these actions would change the flows or cause pollution to reach the main river and cause it harm. Congress knew that water flows downhill and could not have intended that the damage from the tributaries to the navigable stream would be permitted in one case, but not the other. It is the very definition of arbitrary to exclude categorically the identical effects merely because one stream flows all year-round and another does not. Both possess the substantial nexus to navigable waters, which is the standard set in *Rapanos*.

TU scientists now estimate that approximately 4.8 million stream miles, 52% of stream channels by length in the continental U.S., will no longer benefit from CWA protection under the 2020 Rule.[6] TU scientists conducted this analysis because the government failed to conduct its own analysis of the effect of its own 2020 Rule. These percentages are much higher in certain regions and watersheds. For example, in the Southwestern United States, over 81% of stream length have ephemeral or intermittent flow.[7] Recent modeling indicates that greater than 85% of stream length in some New Mexico watersheds will lose protection under the 2020 Rule.[8] In the

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[6] Sulliván Decl. ¶ 3 & n. 4 *citing* K. Fesenmyer *et al. Majority of streams are unprotected in new interpretation of Clean Water Act.* Nature Geoscience (in review). *See* K. Fesenmyer *et al.* attached hereto as **EXHIBIT 2** (currently in review as *Majority of U.S. streams lose protection with new interpretation of Clean Water Act* at Comm. Earth Environment).

[7] Sulliván Decl. ¶ 3 & n. 5 *citing* L.R. Levick et al, *The ecological and hydrological significance of ephemeral and intermittent streams in the arid and semi–arid American Southwest,* U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046. Washington, D.C. (2008) (Levick et al (2008)) (AR 0037).

[8] *See,* Andrew G. Robertson Decl. & Exs. A-E, *California v. Wheeler*, 3:20-cv-00-3005-RS (N.D. Cal.), ECF No. 68-2-68-7 (Robertson Decl.) summarizing R. Meyer and A. Robertson. *Navigable Waters Protection Rule spatial analysis: A GIS-based scenario model for comparative analysis of the potential spatial extent of jurisdictional and non-jurisdictional waters and wetlands.* Saint Mary's University of Minnesota, Winona, MN (2020) (Only 5.2% of stream

South Platte watershed of Colorado, protection will drop from an estimated 96.5% of stream length under the 2015 Rule[9] to 55.2% under the 2020 Rule, and from 95.9% under the 2015 Rule to 26.2% under the 2020 Rule in Montana's Roanwood Creek watershed.[10]

Even in the wet Atlantic coastal plain, the categorical exclusion of ephemeral streams is significant, particularly considering the aggregate impact of losing protections for those streams along with protections for the wetlands directly and indirectly connected to those streams. For example, in the Nanticoke watershed of Delaware and Maryland, that flows to the Chesapeake Bay, jurisdictional stream length will drop from 99.2% under the 2015 Clean Water Rule to 79.7% under the 2020 Rule.[11]

The Agencies were armed with the record evidence[12] and the analytical tools to confirm these devastating impacts, but chose not to quantify or examine them. *See* 85 Fed. Reg. 22,292-

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miles in New Mexico's Rio Salado watershed, and only 8.7% in the Rio Penasco watershed would remain protected under the 2020 Rule).

[9] As used in this brief, the "2015 Rule" refers to the Clean Water Rule the Agencies promulgated to define waters of the U.S. in 2015. 80 Fed. Reg. 37,054 (June 29, 2015). The Agencies withdrew the 2015 Rule, reinstating their 1986 definition of waters of the U.S., as modified by their 2008 guidance. *See*, 84 Fed. Reg. 56,626 (October 22, 2019). According to the Agencies' 2015 Economic Analysis, the 2015 Rule expanded jurisdiction from the 1986 rule as modified by the 2008 guidance by 2.84 to 4.65 percent. The 2015 Economic Analysis is contained here: https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

[10] *Id. See also,* L.K. Vance, *Geographically isolated wetlands and intermittent/ephemeral streams in Montana: extent, distribution, and function.* Montana Natural Heritage Program, Prepared for Montana Department of Environmental Quality and U.S. EPA (2009) (Vance 2009) *cited* in NWF Comments to the Clean Water Rule Record (November 14, 2014) (NWF CWR Comments), p. 101 & n. 265 at Docket ID No. EPA-HQ-OW-2011-0880-15020 and available here (finding that more than 60% of streams are ephemeral and would lose protection in central and eastern Montana, and more than 30% of stream miles are ephemeral and would no longer be protected in wetter, mountainous regions of the state.).

[11] Meyer and Robertson (2020), *supra* n. 8, available on line here.

[12] *See, e.g,* Comment Submitted by Steve Moyer, Vice President, Government Affairs, Trout Unlimited (April 15, 2019) (AR 4912), 5, 13 & Attachments: Fesenmyer et al, 2019 Trout Unlimited Mapping PowerPoint, available on line here; U.S. EPA, *Connectivity of streams and wetlands to downstream waters: a review and synthesis of the scientific evidence.* Technical

22,293; Final EA at 10-11, 14-17, 22-23; U.S. EPA and Department of the Army, Corps of Engineers, *Resources and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States"* (Jan. 23, 2020), EPA-HQ-OW-2018-0149 ("RPA") (AR 11573) at 10, 20-24 (ephemeral waters), 26-28 (wetlands).

B. The 2020 Rule removes CWA protections for tens of millions of the Nation's remaining wetland acres.

Wetlands serve functions important to the integrity of the associated tributary and downstream waters, acting as sponges to absorb flood waters and sediment, filtering pollutants, and providing the food chain and habitat upon which fish and wildlife depend throughout the watershed. They also provide substantial habitat for migratory birds. *See, e.g.,* Connectivity Science Report ES-2-ES-4, 4-2, 4-5, 6-6 to 6-7; 80 Fed. Reg. 37054, 37063 (June 29, 2015).[13] Removal of CWA permit review for tens of millions of wetland acres exposes them to dredging and filling and threatens the health of nearby and downstream waters. The Agencies' internal analysis of the National Hydrography Dataset (NHD)[14] and National Wetlands Inventory (NWI)[15] databases estimated that nationally, given the requirement of a "continuous surface water connection," approximately 51% of the NWI mapped wetland acreage in the U.S. would not be considered adjacent and could lose CWA protections under the Replacement Rule.[16]

Report, EPA/600/R-14/475f. U.S. Environmental Protection Agency, Washington, D.C. (2015) (Connectivity Science Report) (AR 11691) 2-17, 2-29, 3-4.

[13] *See also* Sulliván Decl.¶ 5, 14, 15 & n. 35.

[14] U.S.G.S. *National Hydrography Dataset* (NHD)(NHD provides GIS data to define the spatial locations of U.S. surface waters. High-resolution NHD is the best nationally available source for surface water data. *See* 85 Fed. Reg. at 22,329).

[15] U.S. Fish and Wildlife Service, *National Wetlands Inventory* (NWI) (the NWI is a publicly available dataset that provides detailed information on the abundance, characteristics, and distribution of U.S. wetlands.).

[16] Wittenberg & Bogardus, *supra n.* 4; *see also,* Plaintiffs' Memorandum at 9 & n. 14.

While the Agencies now disclaim this estimate due to "data limitations," RPA at 41 & n. 56, other studies indicate this initial, conservative estimate may well be close to the mark.

The 2020 Rule categorically excludes geographically isolated, non-floodplain wetlands that occupy an estimated 16.3 million acres,[17] at least 15% of the estimated 110 million wetland acres remaining in the contiguous United States.[18] In just one important geography, the Upper Midwest prairie pothole region, often called America's duck factory because it provides habitat to half of the continent's migratory waterfowl, the non-floodplain wetlands "that would lose protection equal the size of the state of West Virginia."[19]

In addition, the Agencies identify the following categories of adjacent wetlands where a portion within each category will lose CWA protections because they neither directly abut a jurisdictional stream nor have a direct hydrological surface connection to a jurisdictional stream "in a typical year:" 1) wetlands adjacent to traditionally navigable waters (TNWs); 2) wetlands adjacent to intermittent and perennial "relatively permanent waters;" and 3) wetlands adjacent to ephemeral and intermittent "non-relatively permanent waters." The Agencies fail to estimate the extent of these wetland losses, arbitrarily leaving that task to others. *See* Final EA at 14-17. *See also*, Plaintiffs' Memorandum at 9 & n. 15.

Taking into account both isolated, non-floodplain wetlands and the various categories of floodplain wetlands that do not abut or have a clear surface water connection to perennial and intermittent streams, recent geospatial modeling estimates indicate that tens of millions of the

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[17] Sulliván Decl.¶ 3 *citing* C.R. Lane and E. D'Amico, *Identification of putative geographically isolated wetlands of the conterminous United States,* 52 J. Am. Water Resources Association 705 (2016) (also cited in NWF Comments to the 2020 Replacement Rule at Docket No. EPA-HQ-OW-2018-0149-6880 at 77-78.

[18] U.S. Fish and Wildlife Service, "Status and Trends of Wetlands in the Conterminous United States 2004-2009," at 16, 37 (2009), available here .

[19] Comment on Rule by Susan Colvin, Asst Prof, Sustainable Fisheries, & Randall Colvin, Instructor, Unity College School of Biodiversity Conservation (2019), p. 2, available here.

nation's remaining wetlands could lose CWA protections due to the 2020 Rule's insistence upon evidence of a surface water connection to a tributary in a "typical year."[20] A second geospatial analysis modeling at the watershed level, comparing the 2015 Clean Water Rule and the 2020 Replacement Rule, estimates that more than 40% of wetland acres in some New Mexico watersheds will lose federal protection under the 2020 Rule, including wetlands providing important water quality, flood protection, and fish and wildlife habitat functions.[21] This 2020 modeling estimates that while the 2015 Rule protected 85.7% of Montana's Roanwood Creek wetlands, the 2020 Rule will protect only 46.6%.[22]

In wetter systems to the East, a similar geospatial analysis submitted for the 2020 rulemaking record indicates that at least 22% of wetlands would no longer be protected in Minnesota's Cottonwood River watershed, including wetlands providing important water quality, flood protection, and fish and wildlife habitat functions.[23] A related modeling analysis submitted for the record for the Nanticoke River watershed in Delaware and Maryland found that the Replacement Rule would likely exclude from CWA protection at least 20% of the wetland acres in the watershed, including an estimated 15,000 wetland acres with surface water detention

[20] Plaintiffs' Memorandum for Summary Judgment (Plaintiffs' Memorandum) at 9 & Plaintiffs' Ex. 47 at ¶ 23 (estimating the potential loss of over 45 million acres of wetlands in the coterminous U.S.).
[21] Meyer and Robertson (2020), *supra* n. 8, available on line here, Exs. A & B (2015 CWR would protect 97.3% of wetlands in the New Mexico's Rio Salado watershed, 2020 Rule would protect only 50.7%. The 2015 Rule would protect 71.5% of Rio Penasco wetlands; 2020 Rule would protect only 28%).
[22] *Id.* at Ex. C.
[23] Meyer, R. and A. Robertson. 2019. Clean Water Rule spatial analysis: A GIS-based scenario model for comparative analysis of the potential spatial extent of jurisdictional and non-jurisdictional wetlands. Saint Mary's University of Minnesota, Winona, Minnesota (Meyer and Robertson 2019) available here and submitted for the record by several commentators including NWF Replacement Rule Comments (April 15, 2019) and available here.

function, over 16,000 with wildlife habitat function, and an estimated 9,187 wetland acres with moderate to high nutrient transformation function.[24]

At the state level, the majority of North Carolina's basin, bog, bottomland hardwood forest, headwater forest, Carolina bay, floodplain pool, hardwood flat, non-riverine swamp forest, pine savanna, pocosin, and seep wetland types would likely lose federal protection under the 2020 Rule.[25] A Montana state study found that 61% of the state's wetlands lack an apparent surface water connection to any other waterbody and could lose protection.[26]

Finally, the Final EA includes some analysis of the Corps' "ORM2" jurisdictional determination database, in conjunction with USGS and NWI maps and other remote tools, which also seems consistent with the Agencies' early 51% loss estimate. For example, in assessing whether wetlands are abutting or not abutting a TNW, the Corps found that almost half (45%) of these wetlands adjacent to TNWs were not abutting, and might no longer be subject to CWA protections under the 2020 Rule's narrow definition of "adjacent wetlands." Final EA at 15-17. Further, this analysis found that only about 10% of these wetlands that are adjacent to TNWs, but are "non-abutting," have a surface connection to the TNW via a culvert or tide gate. This suggests, particularly given the data limitations the Agencies identify, that about 40% (90% of 45%) of wetlands adjacent to TNWs would likely lose CWA jurisdiction under the 2020 Rule.

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[24] Meyer, R., and A. Robertson. 2019. Clean Water Rule Spatial Modeling and Quantitative Analysis of Jurisdictional Wetlands in the Nanticoke Watershed (2019 Nanticoke Analysis), Maryland. Saint Mary's University of Minnesota, Winona, Minnesota, submitted to rulemaking docket as Attachment B at p. 89-93, Association of State Wetland Managers Comments (April 15, 2019), available here.

[25] *See, e.g.,* Letter from K. Moser, SELC to A. Wheeler, U.S. EPA, & R.D. James, Dep't of Army at 4 (April 15, 2019) (AR 9717) (Submitted by SELC to EPA Docket Center EPA-HQ-OW-2018-0149-9717 (April 15, 2019)(SELC Comments); Moffat and Nichol, Proposed Changes to the Waters of the United States (WOTUS) Definition – Summary of M&N Conclusions (April 7, 2019), attached as Ex. B to SELC Comments, available here.

[26] Vance (2009), *supra,* n. 9, at 15 & n.15.

Id. at 16. Had the Agencies applied a similar analysis to wetlands not abutting other perennial, intermittent, and ephemeral tributaries, they likely would have found that a very significant percentage of these non-abutting wetlands would lose CWA jurisdiction given the 2020 Rule's insistence on a demonstrable surface water connection in a "typical year." *Id.* *See also,* Plaintiffs' Memorandum at 42 *citing* Plaintiffs' Ex. 47 ¶¶ 6, 23 (Nearly 160,000 wetlands in the Charleston Harbor watershed are likely to lose CWA jurisdiction due to the Rule's narrow definition of "adjacent wetlands.").

In sum, while the Agencies disclaim their initial estimate, ignore record evidence, and refuse to quantify the extent of wetland losses under the 2020 Replacement Rule, it is reasonable to estimate that the Rule will categorically exclude tens of millions of the remaining wetland acres in the coterminous United States.

C. The Agencies failed to analyze the crippling effect of removing all permitting requirements for approximately half of stream miles and tens of millions of wetland acres on the chemical, physical, and biological integrity of the Nation's waters.

As discussed above, and in the Plaintiffs' briefing, the Agencies have arbitrarily ignored the overwhelming scientific evidence of the impacts of small streams and wetlands upstream on the integrity of downstream waters. This failure to consider the scientific evidence of impacts ignores the Act's objective and goals at 33 U.S.C. 1251(a) & (a)(2), permitting and water quality standard framework,[27] legislative history,[28] and Supreme Court precedent, "entirely fail[ing] to consider an important aspect of the problem," in violation of the Administrative Procedure Act ("APA"). *See* Plaintiffs' Memorandum at 17-23, *citing, inter alia, Motor Vehicles Mfrs. Ass'n of*

[27] Congress reinforced the Act's commitment to its 1251(a) objectives by explicitly requiring, e.g., that the Act's water quality and permitting standards provide for fish, wildlife, and water-based outdoor recreation. *See,* 33 U.S.C. §§ 1312 (a), 1313 (d), 1314 (a), 1317 (a)(2), 1321 (b) and (f)(4), 1343 (c), 1344(b)(1) (cross-referencing 1343(c)), and 1362(13).
[28] *See, e.g.,* Senate Committee on Public Works, S. Rep. No. 92-414, 92nd Cong., 76, 77 (1971); *see also,* Sen. Baker, 123 Cong. Rec. 26718-19 (daily ed. Aug. 4, 1977).

U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (*State Farm*). Indeed, implementing the Replacement Rule will not only undercut the Act's objectives, it will make achieving them impossible.[29]

Stream and wetland science have long been at the core of CWA decision-making. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court accepted the Corps' judgment that wetlands adjacent to lakes, rivers, streams, and other bodies of water are integral parts of the interconnected aquatic environment, noting the ability of wetlands to "filter and purify water draining into adjacent bodies of water, […] to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion," and to "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic … species."[30] Justice Kennedy's significant nexus jurisdictional standard in *Rapanos* flows from *Riverside Bayview* and *SWANCC,* calling for more than "speculative or insubstantial evidence" that "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *See, Rapanos,* 547 U.S. at 759, 779-80 (Kennedy, J. concurring in the judgment). *See* Plaintiffs' Memorandum at 31-33.

The 2006 *Rapanos* significant nexus standard and the 2008 Rapanos Guidance sparked EPA research conducting, compiling, and synthesizing some 1,200 peer-reviewed scientific

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[29] *See also* Plaintiffs' Memorandum at 32-34 (By ignoring the CWA's science mandate and undercutting its primary objective, the Agencies violate the CWA as well as the APA).

[30] 474 U.S. at 134-35, 139 (citations omitted) (internal quotation marks omitted). Twelve years later, Chief Justice Rehnquist observed, "It was the *significant nexus* between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes." Solid Waste Agency of N. Cook Cty v. US Army Corps of Eng.,* 531 U.S. 159, 167 (2001) ("*SWANCC*") (emphasis added).

studies of the chemical, physical, and biological influences of streams and wetlands on downstream waters in a watershed, and culminating in the 2015 Connectivity Science Report ("Connectivity Report" or "Report").[31] The Report underwent an extensive public peer review by an EPA Science Advisory Board ("SAB") panel of scientists in 2013-2014 and provided the scientific foundation for the proposed and final 2015 Rule. *See* 80 Fed. Reg. at 37,057. *See also* Plaintiffs' Memorandum at 5-6 & 18-19.

In eliminating discharges to so many wetlands and ephemeral streams from the CWA permitting framework and other CWA protections, the Agencies have arbitrarily ignored the Connectivity Report, recommendations of the EPA SAB Panel,[32] and the ever-growing body of evidence that streams and wetlands are biologically, chemically, and hydrologically connected throughout every watershed. This science demonstrates that these streams and wetlands contribute to freshwater ecosystem integrity, and that their destruction and degradation undermines and degrades the integrity of the waters downstream.[33] *See also,* Plaintiffs' Memorandum at 19-21 & 31.

For example, the Agencies categorically exclude ephemeral streams, ignoring the Report's "strong scientific support for the conclusion that ephemeral streams exert a strong influence on the character and functioning of downstream waters." *See* 85 Fed. Reg. at 22,251; Final EA at 107 (acknowledging that ephemeral and intermittent streams "perform similar

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[31] Connectivity Science Report *supra,* n.12.
[32] EPA Science Advisory Board's finding at SAB Letter to Gina McCarthy. October 17, 2014. *SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands.*(AR 0386).
[33]Sulliván Decl. ¶¶6-7 & notes 17-19 *citing* Connectivity Science Report, *supra,* n. 12 & SAB Letter to Gina McCarthy, October 17, 2014 (2014 SAB Connectivity Science Report Review) available here.

hydrological and ecological functions, including moving water, sediments, and nutrients, providing connectivity within the watershed and habitat to wildlife.").[34]

The Agencies also disregard the Report's findings that, with or without a direct surface water connection, floodplain wetlands serve functions important to the integrity of associated tributaries and downstream waters, including acting as sources of key nutrients and dissolved organic compounds and providing spawning and rearing habitat for many species of fish and other aquatic organisms.[35] They also disregard the SAB's findings of the important role that both floodplain and non-floodplain wetlands play in supporting the food chain and habitat upon which fish and wildlife depend throughout the watershed.[36]

The Agencies then impose, without scientific justification, a novel "typical year" test to exclude periods of flooding or drought.[37] This test ignores the Connectivity Report's findings that floodplain wetlands without a direct surface water connection to a jurisdictional water in a "typical year" are key players in reducing the number and severity of floods, as well as in storing stormwater runoff and minimizing non-point pollution.[38] It also disregards that atypical flood years are also critical for stream function, *i.e.* to mobilize sediment and wash accumulated

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[34] *See also, e.g.,* Connectivity Science Report at ES-5 & ES-7 ("[T]he evidence for connectivity and downstream effects of ephemeral streams was strong and compelling."). *See also,* Plaintiffs' Memorandum at 19-20 & 24-25.
[35] Connectivity Science Report at 4-4; *see also id.* at 4-2, 4-5, 6-6 to 6-7; 80 Fed. Reg. at 37,062-37,063.
[36] *Id.;* Sulliván Decl. ¶16.
[37] 85 Fed. Reg. at 22,274-75.
[38] Sulliván Decl. ¶¶47-48 & n. 168 *citing, inter alia,* M. Acreman and J. Holden, *How wetlands affect floods,* 33 Wetlands 773 (2013); EPA SAB Letter to Andrew R. Wheeler, Administrator, U.S. EPA, *Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act* (Feb. 27, 2020) (SAB 2020 Rule Commentary) (Plaintiffs' Ex. 57).

pollutants downstream.[39] *See also* Plaintiffs' Memorandum at 25-27 (discussing the scientific and policy flaws of imposing the "typical year" limitation on stream and wetland jurisdiction).

In addition, the Agencies ignore the aggregate hydrological and biological contributions of similarly situated wetland complexes such as California vernal pools or prairie potholes to the physical, chemical, and biological integrity of their watersheds, and the significant adverse consequences of doing so.[40]

The Agencies also disregard the close, integrated connections between surface water and groundwater flow systems that characterize how natural waters accumulate on any given landscape, fundamentally mischaracterizing the very nature of water connectivity. For example, the health of a river depends in no small part on the boundary where river water and groundwater mix in the gravel under and around the river channel.[41]

In sum, without scientific justification and in contravention of extensive record evidence, the Agencies categorically exclude from CWA permit review and water quality standard protections millions of ephemeral stream miles, some intermittent and perennial streams, and tens of millions of acres of both floodplain and non-floodplain wetlands, crippling CWA efforts to maintain and restore the integrity of U.S. waters. By ignoring the underlying connectivity science, the Agencies undermine the primary statutory objective, goals, and permitting framework of the CWA. As such, the Agencies have acted arbitrarily and capriciously, running

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[39] *See, e.g.,* Connectivity Science Report, p. 3-15 and papers cited therein.

[40] Sulliván Decl. ¶14; Connectivity Science Report at ES-5-6, ES-10-14; 80 Fed. Reg. at 37,063-37,064, 37071-37,072; EPA SAB Letter to Gina McCarthy, Administrator, *SAB Consideration of the Adequacy of the Scientific and Technical Basis for the Proposed Rule Titled Definition of Waters of the United States under the Clean Water Act.* U.S. EPA (September 30, 2014) (2014 SAB Clean Water Rule Review) at 3, available here; *See also* U.S. EPA and U.S. Army Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015) (2015 TSD), at 330-349.

[41] Sulliván Decl. ¶18; Connectivity Science Report at ES-2-3; 80 Fed. Reg. at 37,063; SAB 2020 Rule Commentary at 3-4; 2014 SAB Clean Water Rule Review, *supra* n. 40, at 3.

afoul of decades of Supreme Court precedent. *See, e.g., State Farm* at 43. *See also* Plaintiffs' Memorandum at 34 *citing, inter alia, Maislin Indus., U.S., Inc.* v. *Primary Steel,* 497 U.S. 116, 134-35 (1990) (By ignoring the CWA's science mandate and undercutting its primary objective, the Agencies violate the CWA as well as the APA). *See also, County of Maui v. Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1468 &1474 (2020) (rejecting EPA's CWA interpretation because it would allow "easy evasion of the statutory provision's basic purposes.").

II. The 2020 Rule's elimination of all CWA permit requirements for approximately half of the Nation's remaining stream miles and tens of millions of its wetland acres undermines the Act's primary objective and cripples the Act's many programs designed to work together to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The rulemaking record, the underlying science, and the facts presented in the challenges to the 2020 Rule provide overwhelming evidence that eliminating all CWA permit requirements and water quality standard protections for an estimated half of the Nation's stream miles and tens of millions of its remaining wetland acres will significantly degrade those waters as well as the downstream waters they support. This radical reduction in protection potentially renders futile these remaining, ongoing efforts to meet state water quality standards.

In order to achieve those water quality standards, the CWA created an interrelated system of regulatory and incentive provisions. These provisions work together towards restoring water quality; many of them are implemented by the states pursuant to mandates from the EPA. CWA §402 created the National Pollution Discharge Elimination System (NPDES) which requires "point sources" of pollution to obtain permits. Reduction of pollutants from end-of-pipe systems—such as industrial waste, municipal wastewater, and mining operations—into waters is managed under §402 permits. State agencies administer this NPDES system in all but four states (and the District of Columbia). Section 303 requires states to establish water quality standards

for all waters in their borders. Under §302, NPDES permits must ensure compliance with these water quality standards and, under §303(d), states may adopt additional requirements in permits, and through other means, if needed to restore impaired waters. Finally, the §404 permit program controls discharges of dredge and fill materials to streams and wetlands so that they maintain hydrologic function—passing water from upstream down, moderating flood flows, providing cold and clean groundwater inflows in dry times, managing sediment and nutrient inputs and creating fish and wildlife habitat. Unlike the §402 permit program, only two states issue §404 permits; others rely on the Corps of Engineers to do so. This means that, especially with §404, the scope of CWA jurisdiction defines the limits of protection for the Nation's waters.

Removing approximately half of stream miles and tens of millions of wetland acres from the agencies' jurisdiction for all permit purposes, but especially §404 permits, will make it much more difficult to achieve the water quality standards required under §303. Removing these waters from CWA jurisdiction will place enormous stress on the CWA's other provisions, and indeed make their implementation potentially futile. Much of this stress will be borne by state agencies who implement most of the provisions of the CWA. Permitting provisions for activities in jurisdictional waters will have to be made even more stringent do to upstream pollution and loss to wetland and hydrologic function. The increased burden will be borne by state agencies who implement most of the provisions of the CWA and by businesses that discharge into or conduct activities in jurisdictional waters.

A. The 2020 Rule's elimination of CWA permit obligations is so extensive that it likely makes achieving the Act's objective impossible, because the Act's programs will be so crippled that they will not be able to protect the Nation's waters.

The Agencies admit the 2020 Rule will degrade the functions of ephemeral streams and non-floodplain, isolated wetlands, resulting in an increase in downstream flooding, increased

water pollution in jurisdictional waters, increased oil spill pollution, and increased drinking water treatment costs. However, they fail to quantify any of these impacts. *See* RPA at 10, 20-24 (ephemeral waters), 26-28 (wetlands). *See* RPA at 10, 20-24 (ephemeral waters), 26-28 (wetlands) and, *e.g.,* Final EA at Figure III-9 & 105-107. *See e.g.,* U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, "Economic Analysis for the Proposed Revised Definition of 'Waters of the United States,'" at 133-134 (Dec. 14, 2018). *See also* Plaintiffs' Memorandum at 22 (discussing and including Figure III-9 graphic).

The Agencies also acknowledge that the 2020 Rule will undermine the effectiveness of CWA programs essential to maintaining the integrity of the nation's waters, including §303 water quality standards, §303(d) "Total Maximum Daily Load" (TMDL) non-point source pollution reduction programs, state and tribal §401 certification programs, §402 and §404 discharge permits, and §311 oil spill prevention programs. *See, e.g.* Final EA at 28-32.

The Agencies acknowledge that the 2020 Rule will disproportionately degrade the quality of waters in the arid West, ignoring the Act's mandate to maintain and restore water quality of waters for the whole country.[42] This admission comes without explanation for how to reconcile abandoning huge swaths of the waters on the Nation's more arid landscapes with effective implementation of the Act's remaining permit obligations. Nor does it explain how a rule that will result in substantial pollution of one region's waterways fits the Act's fundamental purpose to create a baseline level of protection for all the Nation's waters. Congress passed the Clean Water Act in 1972 in part because the 1965 Water Quality Act, which had put states in the lead

[42] *See* RPA at 22, 61; EA at 56 (fewer facilities requiring NPDES permits in the arid West); Final EA at 61-62 (fewer construction and industrial stormwater discharge permits in the arid West); Final EA at 107 (importance of ephemeral streams in the arid West for replenishing groundwater, "which people in the study area heavily depend on for irrigation and drinking water supply (Levick et al., 2008)).")

to protect water quality had failed (as had the earlier effort in 1948). *See* Plaintiffs' Memorandum at 36 (1972 CWA as a "total restructuring" assigning the federal government the primary role in response to earlier failed, fractured state efforts).

While acknowledging that the 2020 Rule dismantles the Act's comprehensive protection for the Nation's waters, the Agencies cavalierly assert that future protections will "depend[]on state or tribal regulations…where such regulations exist." *See* RPA at 86 (impacts to §402 and §404 permitting); *See also,* RPA at 59, 61-62 (with respect to TMDLs), 64 & 70 (with respect to 311 oil spill programs), and 80, 84 & 86 (with respect to 401, 402, & 404 permitting). *See* 85 Fed. Reg. at 22,269. The CWA simply does not empower the Agencies to pass the buck in this way.

On the contrary, the elimination of federal protection for such a large swath of the nation's waters will put enormous stress on states and tribes that implement both the other provisions of the CWA for remaining jurisdictional waters and state programs. Nowhere in the 2020 Rule federal register notice, EA, or RPA do the Agencies attempt to address whether, and how, the Rule will affect implementation of the CWA's other provisions. The 2020 Rule's elimination of CWA permit obligations is so extensive that it may make the Act's other provisions too weak to "restore the chemical, physical, and biological integrity of the Nation's waters."

B. The extensive loss of protected stream and wetland areas resulting from the Rule will degrade the chemical, physical, and biological integrity of the Nation's waters.

The Clean Water Act is widely considered one of the Nation's most successful environmental laws. Its permitting requirements and grant programs have improved the quality of thousands of miles of rivers and streams across the country and have protected thousands of acres of wetlands from destruction. Yet, almost fifty years after its passage, the work is not done.

Freshwater habitats are vital to fish and wildlife, but too many remain severely impaired. EPA rates 46% of U.S. streams and rivers as in poor condition.[43] Extinction rates for species dependent on freshwater habitats are four to five times higher than their terrestrial counterparts[44] due to habitat loss and pollution.[45] Seasonal waterways and non-floodplain, isolated wetlands provide important physical habitats for various life stages of fish and wildlife and contribute to the physical, chemical, and biological integrity of downstream receiving waters on which additional fish and wildlife depend.[46] Ephemeral streams, non-floodplain wetlands, and floodplain wetlands play an important role in buffering excess nutrients and sediment.[47]

1. *The Rule's elimination of CWA permitting obligations for so many streams and wetlands will significantly degrade fish and wildlife habitat and the physical, chemical, and biological integrity of the nation's waters.*

By leaving so many headwater streams and wetlands subject to increased pollution, dredging and filling, the 2020 Rule will severely impair the quality of downstream waters that depend on the functions performed by streams and wetlands throughout the watershed.[48] Headwater streams and wetlands are critical for sustaining aquatic ecosystems, fisheries, and overall watershed integrity, including slowing and retaining flood waters and sediment and nutrient pollution, as well as providing habitat.[49] Several fish species occupy primarily

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[43]EPA, National Rivers and Streams Assessment 2008-2009, at xiii, available here.
[44] Ricciardi, Anthony, and Joseph B. Rasmussen. "Extinction rates of North American freshwater fauna." Conservation biology 13.5 (1999): 1220-1222.
[45] Miller, Robert R., James D. Williams, and Jack E. Williams. "Extinctions of North American fishes during the past century." Fisheries 14.6 (1989): 22-38.
[46] Colvin, Susan A.R. *et al*., *Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services*." Fisheries 44.2 (2019): 73-91.
[47]Connectivity Science Report, *supra* n.12, at ES-5-6, ES-10-14.
[48]*See* Sulliván Decl. ¶3 & notes 13-14 *citing* Colvin, *et al.* (2019), *supra* n. 46; L.F. Creed et al., *Enhancing protection for vulnerable waters.* 10 Nat Geosci 809 (2017).
[49]Colvin *et al* (2019), *supra* n. 46 (also submitted to 2020 rulemaking record by American Fisheries Society (April 15, 2019) available here).

headwaters tributaries, many of which are intermittent or ephemeral.[50] By removing CWA protections for all ephemeral streams, as well as their associated wetlands, the 2020 Rule subjects approximately half the Nation's stream miles[51] and associated wetlands to loss of habitat for many fish and wildlife species, including many that are already threatened or endangered.[52] The degradation of these headwaters then compounds pollution and habitat degradation downstream.[53] Increased alteration of ephemeral stream hydrology can increase peak flows and increase the transport of eroded sediment downstream, increasing sediment loads in downstream waters.[54] Excess sedimentation is the most common form of pollution in streams and rivers, and has been estimated to cause $16 billion in environmental damage annually.[55] Sediment pollution harms aquatic biota, such as fish and aquatic invertebrates.[56]

By eliminating CWA permit requirements for tens of millions of the remaining wetland acres in the U.S., the Rule removes from federal protection millions of wetland acres that provide essential pollution-trapping, flood control, and fish and wildlife habitat. The extensive, cumulative, and lasting loss of these functions will lead to increases in nutrient, sediment, and

[50] *Id.* (The fry of at least one Colorado rare and endangered fish use wetlands as habitat).
[51] *See* Sulliván Decl. ¶ 3 & n. 4 *citing* K. Fesenmyer *et al.* (in review), *supra,* n.6. *see also,* K. Fesenmyer, 2019 Trout Unlimited Mapping PowerPoint, *supra,* n.4.
[52] *See* Sulliván Decl. ¶¶ 3 & 16.
[53] *See* Sulliván Decl. ¶¶ 3 & 14, Connectivity Science Report at ES-5 to ES-6; 80 Fed. Reg. at 37,063-37,064.
[54] *See* Sulliván Decl. ¶ 28 & n. 5 *citing* Levick *et al* (2008) (AR 0037). *See also* Connectivity Science Report at 3-14, 3-15.
[55] Sulliván Decl. ¶ 28 *citing* Mid-America Regional Council, Kansas City, MO. *What is a watershed? What is sediment pollution?* available here.
[56] *See* Sulliván Decl. ¶ 28 & n. 96 *citing* T.R. Angradi, *Fine sediment and macroinvertebrate assemblages in Appalachian streams: a field experiment with biomonitoring applications*, 18 Journal of the North American Benthological Society 49 (1999).

other pollution, increases in flooding and flood damage, reductions in water storage during times of drought, and reductions in fish and wildlife populations.[57]

Small wetlands, often outside the floodplain, can provide landscape-scale pollution control, for example, by removing 50% of nutrient pollution runoff from cities and farms.[58] Non-floodplain wetlands such as the Midwest's prairie potholes also help remove nutrient pollution; draining them therefore risks introducing high levels of phosphorus elsewhere in the watershed.[59] Potholes also store water during drought and recharge aquifers, contributing to baseflow of many interstate streams and rivers. Similarly, the draining and filling of Atlantic coastal plain pocosins has elevated stream peak flows, turbidity, and ammonium, nitrate, and phosphate, while decreasing salinity in adjacent estuaries, degrading both.[60]

By removing millions of streams and wetlands from permit review and any mitigation requirement, the 2020 Rule threatens many water-dependent threatened and endangered species, undermining the biological integrity of the Nation's waters. The list of imperiled species includes scores of fish species from darters, pupfish, dace, chub, and shiners to sturgeon, trout, steelhead, and salmon.[61] Conversion of Carolina bays, Delmarva potholes, and vernal pools to logging,

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[57] *See* Sulliván Decl. ¶¶ 3, 5, 14, 16; Connectivity Science Report at ES-5-6, ES-10-14; 80 Fed. Reg. at 37,063-37,064, 37071-37,072 and *supra* n. 41.

[58] *See* Sulliván Decl. ¶ 41 *citing* F.Y. Cheng and N.B. Basu, *Biochemical hotspots: role of small water bodies in landscape nutrient processing,* 53 Water Resources Research 5038 (2017); *see also* Connectivity Science Report at ES-10.

[59] *See* Sulliván Decl. ¶ 41 *citing* P. Badiou *et al*., *Phosphorus retention in intact and drained prairie wetland basins: implications for nutrient export,* 47 J Environ Qual 902 (2018).

[60] *See* Sulliván Decl. ¶ 41 *citing* R.R. Sharitz and C.A. Gresham, *Pocosins and Carolina bays.* p. 343-377. Southern forested wetlands. Ecology and management. Lewis Publishers, Boca Raton, Florida (1998); 80 Fed. Reg. at 37,072.

[61] *See* Sulliván Decl. ¶49; *See also,* Colvin *et al* (2019), *supra* n. 46, at 78-82; Michael R. Bower, et al., *Habitat Features Affect Bluehead Sucker, Flannelmouth Sucker, and Roundtail Chub Across a Headwater Tributary System in the Colo. River Basin*, 23 J. FRESHWATER ECO. 3, pp. 347-58 (Sept. 2008).

agriculture, and urban development eliminates refuge and breeding habitat for vertebrate and invertebrate species, including rare, threatened, and endangered species.[62]

The Army Corps issues over 52,000 Section 404 permits on average each year.[63] In the West, elimination of §404 permits for ephemeral streams and non-floodplain wetlands means large portions of watersheds may be paved over without permit review and without any requirement to minimize or mitigate harm. The elimination of §404 permits for an estimated 4.8 million miles of ephemeral streams,[64] at least 16.3 million acres of non-floodplain, geographically isolated wetlands,[65] and millions more of non-abutting floodplain wetlands will subject those upstream and upslope waters to pollution, development, dredging, and filling. It will also eliminate the permanent protection of restored or intact non-floodplain wetlands or ephemeral streams, which is routinely required as mitigation under issued §404 permits.

2. *Several examples demonstrate how the loss of protection against, and mitigation for, filling ephemeral streams and non-floodplain and non-abutting floodplain wetlands will degrade the Nation's waters.*

The following examples highlight projects that currently require §404 permits even though they discharge to ephemeral waters, non-floodplain wetlands, or non-abutting floodplain wetlands. They demonstrate how the loss of permanent protection for these features' hydrological function can ripple through whole watersheds, with significant adverse consequences.

The New England Clean Energy Connect transmission line would run from the Canadian border to central Maine, crossing 25 ephemeral streams along its approximately 60-mile route

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[62] *See* Sulliván Decl. ¶ 41; Connectivity Science Report at B-4.
[63] U.S. ENVTL. PROT. AGENCY, *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking* (Aug. 2019) Table 3-1 at 7, available here.
[64] Fesenmyer, Kurt A. *et al.* (2020) at Exhibit 2.
[65] Lane and D'Amico (2016), *supra* n. 17.

through the Kennebec River basin.[66] If built under the 2019 rule, the project would have to spend over $2 million to permanently protect vernal pools, over $3 million to permanently protect other of the region's wetlands, and over $2 million to mitigate for stream impacts, among other required §404 permit mitigation.[67] Under the 2020 Rule, this and future projects would no longer have to permanently protect the important watershed hydrologic functions that vernal pools and dozens of ephemeral streams provide. As a result, the downstream waterbodies that remain subject to Clean Water Act jurisdiction will receive more pollution and degradation, making compliance with water quality standards much more difficult and imposing higher burdens on downstream permitees.[68]

In Montana's Tongue River basin, in 2015, approximately 35.21% of 142 waters that were impacted by projects permitted under §404 were ephemeral streams and non-floodplain wetlands.[69] If the new Rule had been in effect, loss of permit conditions and mitigation would have degraded or eliminated these streams and wetlands would face degradation or elimination, resulting in increased downstream delivery of pollutants, including nutrients[70] and sediment,[71] as well as higher downstream peak flows and flood risk.[72] Degradation in the Tongue Basin could also lead to degradation in the iconic Yellowstone River downstream.[73]

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[66]GOOGLE EARTH PRO, *Maine Data Maps – NECEC Project* (2019) (available on the State of Maine website, these maps depict the route of the transmission line and stream crossings and wetlands along the route. Ephemeral stream crossings are labeled as such on the maps.).
[67]Army Corps of Engineers, Public Notice on Permit Application File No. NAE-2017-01342 (2019) at Table 1-1, available here.
[68]Colvin *et al* (2019), *supra* n. 46.
[69]U.S. ARMY CORPS OF ENGINEERS, *AJD Form*, at 9-12 (2015), available here.
[70]Cheng, Frederick Y., and Nandita B. Basu. *Biogeochemical hotspots: Role of small water bodies in landscape nutrient processing*. Water Resources Research 53.6 (2017): 5038-5056 *cited supra,* at n. 58.
[71]Levick *et al.* (2008) (AR 0037), *cited supra,* at n. 7 & 54.
[72]Acreman, M., and J. Holden (2013) *cited supra,* at n. 38.
[73]American Rivers, Yellowstone River (2019) (world-renown blue ribbon trout fishery).

The West faces high rates of urbanization.[74] For example, two and one half percent of the 18,000 acres in Bernalillo County New Mexico, home to Albuquerque, were converted to urban land use between 2001 and 2016.[75] This included a new residential development near Tijeras Arroyo, an ephemeral tributary to the Rio Grande, a traditional navigable water.[76] The 350-lot project, Juan Tabo Hills West, permanently filled 4.2 acres of ephemeral streams. The developer mitigated these impacts by permanently preserving 12.3 acres of Tijeras Arroyo and building a half-acre stormwater retention pond.[77] Under the 2020 Rule, similar future developments will neither offset their adverse impacts nor mitigate lost hydrologic function. As a result, Bernalillo County's continuing urbanization will contribute sediment, alter flow regimes, and amplify flood impacts to over 1,600 miles of the Rio Grande's downstream receiving waters. These waters supply surface drinking water to 1.2 million residents in New Mexico and Texas[78], and support warmwater and coldwater fisheries.[79]

Although more than a hundred times as many §404 as §402 permits are issued each year,[80] the elimination of §402 permits on ephemeral streams and non-floodplain wetlands under the 2020 Rule is significant. In Colstrip, Montana, the Rosebud coal mine's industrial outfall into an alleged ephemeral stream was litigated last year, *Montana Env'tal Info. Center v. Montana Dept. Env'tal Quality,* 2019 MT 213, ¶99-100, and was remanded to determine the

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[74]White, Eric M., Anita T. Morzillo, and Ralph J. Alig. *Past and projected rural land conversion in the US at state, regional, and national levels*. Landscape and Urban Planning 89.1-2 (2009): 37-48.

[75] U.S. GEOLOGICAL SURVEY, *National Land Cover Dataset Land Cover Change* (2016), available here

[76]U.S. ENVTL. PROT. AGENCY, *Clean Water Act Approved Jurisdictional Determinations Database* (2020), available here.

[77]U.S. ARMY CORPS OF ENGINEERS, *Juan Tabo Hills West Subdivision Project (Action No. SPA-2012-00299-ABQ)* (2014), available here.

[78]U.S.D.A. FOREST SERV., *Forests to Faucets* (2020) available here.

[79]N.M. ENV'T DEP'T, *OpenEnviroMap* (2020) available here.

[80] U.S. ENVTL. PROT. AGENCY, *supra* n. 63.

contested issues of whether the receiving water was intermittent or ephemeral, and what water quality standards applied. Under the 2020 Rule, the Rosebud mine's heavy metals and other mining waste could be introduced into ephemeral streams without a §402 permit. Yet during any wet, rainy period, the mining waste would still flow downstream to the Yellowstone River.

The preamble to the 2020 Rule states that a §402 permit is no longer required for a discharge of pollutants into an ephemeral stream, although it then describes potential exceptions or speculative workarounds. 85 Fed. Reg. at 22,297. The final 2020 Rule itself, however, carves out no such exceptions. The Supreme Court recently rejected a different categorical exclusion from needing a §402 permit. Considering the categorical exclusion from permitting for a discharge of pollutants traveling from a point source through groundwater to navigable waters, the Court held in *County of Maui* that the CWA "require[s] a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters." 140 S. Ct. at 1468. Discharges of pollutants into an ephemeral stream such as the Rosebud mine's, above, would almost certainly fail the Court's seven-part "functional equivalent" test, creating prohibited "loopholes that undermine the statute's basic federal regulatory objectives" and undermine states' regulation of water quality. *Id.* at 1477.

The Agencies' dismissal of the magnitude of the impacts of the Replacement Rule on water quality, and their indirect dismantling of the Act's comprehensive permit protections for the Nation's waters "entirely fail[s] to consider an important aspect of the problem," in violation of the APA. The Replacement Rule is arbitrary and capricious. *State Farm* at 43.[81]

III. The Agencies' elimination of permitting for all of the activities that discharge to approximately half the Nation's stream miles and tens of millions of its wetland

[81] *See also* Plaintiffs' Memorandum at 32-34 (By ignoring the CWA's science mandate, failing to consider the impacts of removing so many streams and wetlands from CWA requirements, and undercutting its primary objective, the Agencies violate the CWA and the APA).

acres will significantly harm the outdoor recreation, fisheries, and restoration economy and the rural communities that depend on it.

A. The Agencies failed to consider the reliance interests of Amici in all previous, substantially broader federal protections for the waters of the U.S.

For almost fifty years, Amici have relied on the Agencies to apply a broad, science-based definition of "Waters of the United States" to ensure federal protection for the significant watershed components - streams and wetlands - that together maintain and restore the physical, chemical, and biological integrity of the Nation's waters, achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water…." 33 U.S.C. § 1251(a)(2). Amici organizations representing individual anglers, hunters, boaters, and birdwatchers as well as outdoor recreation businesses, have invested heavily in conservation advocacy and restoration projects, as well as organizing countless volunteer hours to conserve and restore streams, rivers, lakes, and wetlands as fish and wildlife habitat in support of fish and wildlife and fish and wildlife-related outdoor recreation.[82] In addition, our individual members have contributed millions of dollars in license and other user fees that directly support fish and wildlife habitat.

The Agencies' abandonment of CWA protections for approximately 50% of the remaining stream miles and tens of millions of wetland acres in the U.S., crippling collective efforts to restore and maintain the integrity of the Nation's waters, without addressing the serious reliance interests of Amici (and the many others impacted by this policy reversal[83]) is arbitrary and capricious. *See,* Plaintiffs' Memorandum at 23 *citing, inter alia, Department of Homeland*

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[82] Amici investment supports state fish and wildlife resources owned or held in trust for the use and enjoyment of the people of the State. *See, e.g., Betchart v. Department of Fish & Game,* 158 Cal.App.3d 1104, 1106 (1984); Cal. Fish & Game Code, § 1801; Wis. Stat. § 29.011.

[83] *See, e.g.,* Ralph B. Brown and John F. Toth Jr., 17 *Southern Rural Sociology*, "Natural Resource Access and Interracial Associations: Black and White Subsistence Fishing in the Mississippi Delta," at 81, 104 (2001), available here.

Security et al v. University of California Board of Regents, 140 S. Ct. 1891, 1914-1915 (June 18, 2020). *See also* Plaintiffs' Memorandum at 41-44 (detailing reliance interests of Plaintiffs' members ignored by the Agencies in promulgating the 2020 Rule).

B. The removal of protections for so many streams and wetlands will significantly harm outdoor recreation, commercial fishing, and restoration businesses and the rural communities that depend on them.

On an annual basis, headwater streams provide $15.7 trillion and non-floodplain wetlands, alone, provide $673 billion in ecosystem services for the conterminous U.S. and Hawaii.[84] These waters' increased degradation and destruction at the scale the Rule portends threatens the economy, including water-dependent sectors of particular interest to Amici.

Nationally, trout anglers spent $3.5 billion on their pursuits, supported over 100,000 jobs, and had a $10 billion economic impact, including $1.3 billion in federal and state tax revenues in 2006[85] and 30.1 million freshwater anglers spent $29.9 billion on freshwater fishing trips in 2016.[86] Fishing generated an annual $2.75 billion in spending and $200 million in state sales and income taxes in Wisconsin, alone.[87]

Commercial and recreational fisheries contributed over $212 billion in economic impact and 1.7 million jobs in 2016.[88] Headwaters have both direct and indirect impacts on the health of fisheries. North Carolina predicts that the significant loss of wetlands triggered by the 2020 Rule

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[84]Colvin *et al*. (2019), *supra* n. 46, *citing* Nadeau and Rains (2007) and Lane and D'Amico (2016), *cited supra* at n. 2 & nn. 17 and 65, respectively.

[85] U.S. Fish and Wildlife Service, *2011 National Survey of Fishing, Hunting and Wildlife-Associated Recreation*, FHW//11-NAT (rev'd 2014) available here.

[86] U.S. Department of Interior, U.S. Fish and Wildlife Service, and U.S. Department of Commerce, U.S. Census Bureau. *2016 National Survey of Fishing, Hunting and Wildlife-Associated Recreation*, available here.

[87]*See* Siebert Decl. ¶15, *California v. Wheeler*, 3:20-cv-00-3005-RS (N.D. Cal.), ECF No. 30-7.

[88] National Marine Fisheries Service. 2018. Fisheries Economics of the United States, 2016. U.S. Department of Commerce, NOAA Tech. Memo. NMFS-F/SPO-187a, 243 pp., available here.

will adversely impact the state's commercial and recreational fisheries that had an estimated revenue of $430 million and an economic impact of $3.9 billion in 2017, respectively.[89]

A recent Outdoor Industry Association report shows that consumers spend $887 billion annually on outdoor recreation; consumers spent over $175 billion on fishing, kayaking, rafting, canoeing, scuba diving and other water sports alone.[90] In 2019, Colorado residents and visitors spent an estimated $10.8 billion on outdoor recreation, including water sports, fishing, and wildlife-watching, within Colorado's river basins. This retail spending contributed an estimated $18.8 billion in economic output, supporting over 131,000 jobs and $6.3 billion in household income.[91]

In 2006, more than 1.3 million waterfowl hunters expended approximately $900 million, generating an estimated 28,000 jobs and a total related industry output of $2.3 billion.[92] Birding, much of it also water-related waterfowl watching by 77% of away-from-home birders, supported total trip-related and equipment expenditures of $36 billion in 2006, generating 671,000 jobs and a total industry output of $82 billion.[93]

The restoration industry, including the private sector mitigation banking industry, directly provides 126,111 jobs a year, from engineers and construction firms to greenhouses and

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[89] *See* Smith Decl. ¶13, *California v. Wheeler*, 3:20-cv-00-3005-RS (N.D. Cal.), ECF No. 30-6.
[90] Outdoor Industry Association. 2017. The Outdoor Recreation Economy, available here. The Agencies were aware of this information as a result of public comments submitted for the record. *See, e.g.,* Kassen, Melinda, *Comments of the Theodore Roosevelt Conservation Partnership*, submitted 4/15/19 to Docket ID No. EPA-HQ-OW-2018-0149, p. 4.
[91] Business for Water Stewardship & Southwick Assoc., The Economic Contributions of Water-Related Outdoor Recreation in Colorado (March 9, 2020) 5, available here.
[92] Carver, E. 2008. *Economic impact of waterfowl hunting in the United States. Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.* U.S. Fish and Wildlife Service, Report 2006-2, 13 pp.
[93] Carver, E. 2009. *Birding in the United States. Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.* U.S. Fish and Wildlife Service, Report 2006-4, 15 pp.

nurseries. Overall, the restoration industry contributes 221,398 jobs each year and has a gross economic impact of nearly $25 billion each year.[94]

The total annual cost of the nutrient pollution of U.S. freshwaters, which will only increase in severity under the 2020 Rule, is estimated to be $2.2 billion, including recreational and angling costs, property value losses, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity.[95]

Non-floodplain wetlands contribute trillions of dollars in flood damage reduction benefits.[96] For example, prairie potholes in the flood-prone Red River valley alone contribute $800 million in avoided flood damage and other benefits.[97]

The Agencies misleadingly underestimate the effect of the 2020 Rule on the outdoor recreation economy, fishermen, hunters, boaters, swimmers, and other outdoor enthusiasts, as well as impacts on commercial fisheries and the fishing industry. They misleadingly assume that wetland benefits are valued only by in-state residents,[98] and they significantly undercount the

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[94] Todd BenDor *et al.*, *Estimating the Size and Impact of the Ecological Restoration Economy*, PLoS One, 3, 7-9 (2015).

[95] Dodds, W.F. *et al*. 2009. *Eutrophication of U.S. freshwaters: Analysis of potential economic damages*. Environmental Science and Technology 43:12-19.

[96] *See, e.g.*, Brody, S.D. *et al.* 2014. *Examining the impact of land use/land cover characteristics on flood losses*. Journal of Environmental Planning and Management 57: 1252-1265 and Jacob, John S., et al, *Houston-Area Freshwater Wetland Loss, 1992-2010* (2014) available here (discussed and cited in NWF Comments to the 2020 Rule Record, *supra,* n. 17, p. 85-86). *See, also,* Narayan, et al., "The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA" 7 *Scientific Reports*, article 9463 (2017), cited in TRCP Comments to the 2020 Rule Record, p. 13 ("wetlands avoided $625 Million in direct flood damages during Hurricane Sandy").

[97] Hall, H. Dale, Comments of Ducks Unlimited on Clean Water Rule (November 5, 2014) (CWR Comments of DU) at 39-44, 49-50, 69 at Docket ID No. EPA-HQ-OW-2011-0880-11014 *citing, inter alia,* Kurz et al. 2007. *An evaluation of basinwide, distributed storage in the Red River Basin: The Waffle Concept.* Energy & Environmental Research Center.

[98] *See* Final EA at 207 and Draft EA at 62-65. *See*, Kling Report (2019); Whitehead Report (2019) (more than 80% of the benefits of wetlands protection are interstate). *See, e.g.,* TRCP Comments, *supra* n. 96, p. 12, and citations therein.

number of wetlands in each state.[99] Economists demonstrated in the record that correcting these errors shows that the 2020 Rule could result in over $1.6 billion in annual benefits foregone under the §404 program alone, and that the costs of the 2020 Rule significantly outweigh its benefits.[100] The Agencies failure to consider and inform decision-makers and the public of the full economic cost and foregone benefits of the 2020 Rule renders the rulemaking and the final rule arbitrary and capricious. *State Farm* at 43.

CONCLUSION

The Agencies' removal of CWA protections for an estimated half of the remaining stream miles and tens of millions of wetland acres in the continental U.S., will cripple the ability of the Act's other programs to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Doing so without considering the underlying connectivity science, without quantifying or analyzing the extent and harmful environmental and economic impacts of those lost protections, and without considering the reliance interests of Amici is arbitrary, capricious, and contrary to law in violation of the APA. Amici urge the Court to grant summary judgment to Plaintiffs and vacate the 2020 Replacement Rule.

[*SIGNATURE PAGE FOLLOWS*]

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[99] *Compare* Final EA at 210 (assuming 10,000 acres of wetlands in each state), *with id.* at 199 (stating that the fewest acres of wetlands in any state, according to the National Wetlands Inventory, is 57, 052, with a high of 12.2 million).

[100] *See, e.g.,* SELC Comments, *supra* n. 22; John C. Whitehead, Comments on "Economic Analysis for the Proposed Revised Definition of 'Waters of the United States'" (EPA-Army 2018) (April 9, 2019), attached as Ex. C to SELC Comments; Jeffrey D. Mullen, Ph.D., Draft Review of the 2018 EPA Economic Analysis for the Proposed Definition of "Waters of the United States" (April 10, 2019), attached as Ex. D to SELC Comments (2020 Rule could result in over $1.6 billion in annual benefits foregone under the Section 404 program alone).

Respectfully submitted,

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July 17, 2020
Greenville, South Carolina

EXHIBIT 1

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TABLE OF AUTHORITIES

Cases

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EXHIBIT 2

Fesenmyer, K.A, S.J. Wenger, D.S. Leigh, and H.M. Neville. Majority of U.S. Streams Lose Protection with New Interpretation of Clean Water Act. Manuscript submitted 18 May 2020 to *Communications Earth & Environment*. Status as of 13 July 2020: Under peer review

Majority of U.S. Streams Lose Protection with New Interpretation of Clean Water Act

Ephemeral streams are essential to water quality and healthy ecosystems and will lose protection under the recently announced Navigable Waters Protection Rule. The National Hydrography Dataset and a simple headwater stream map derived from digital elevation models enable rapid assessment of ephemeral stream abundance, here estimated to comprise 52% of conterminous U.S. stream channels by length.

On January 23, 2020 the United States Army Corps of Engineers and Environmental Protection Agency announced the Navigable Waters Protection Rule (NWPR), redefining the "Waters of the United States" – those streams and wetlands that fall under the regulatory jurisdiction of the federal 1972 Clean Water Act. For flowing waters, the largest change is the removal of protections for ephemeral streams, which flow only in direct response to precipitation events. Ephemeral streams with an ordinary high-water mark (i.e., a defined channel) have been covered under the Clean Water Act since 1986, but under the new rule a permit will no longer be required to dredge, fill, or discharge pollutants into these channels. For streams, only perennial and intermittent streams that flow to territorial waters or traditional navigable waters used for interstate commerce will remain protected.

In announcing the new rule, the regulatory agencies concluded that limitations of the best available national maps of streams and stream types, including "errors of omission, errors of commission, positional inaccuracies, misclassification of flow regime, and different (map) definitions compared to both existing and proposed regulations" precluded the agencies from

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quantifying "the potential extent of waters whose CWA jurisdictional status could change under the proposed revised definition" *(1)*. In doing so, the agencies wrongly suggest that there is no useful information regarding the location and relative abundance of ephemeral streams across the country and obfuscate the potential impacts of the proposed rule. We demonstrate it is straightforward to use readily available topographic data to estimate the total extent of ephemeral streams and assess the scope of impact of the rule across the U.S.

The high-resolution National Hydrography Dataset The U.S. Geological Survey's 1:24,000 scale high-resolution National Hydrography Dataset (NHD) is widely regarded as the most comprehensive national map for characterizing the location and flow type of surface waters across the conterminous U.S. The NHD was originally derived from topographic maps produced by cartographers interpreting aerial photographs, and the agencies are correct that the dataset has errors and inconsistencies in stream location, upstream extent, and classification. However, we demonstrate here that these issues are not obstacles to reasonable estimates of ephemeral stream abundance in the U.S.

First, there is no basis to the agencies' claim that different map definitions limit the use of the NHD for estimating the effect of the NWPR, as the NHD and NWPR use consistent definitions of perennial, intermittent, and ephemeral streams. Relevant to the new rule, an NHD ephemeral stream "contains water only during or after a local rainstorm or heavy snowmelt" *(2)*, while an ephemeral stream in the NWPR is a "surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall)" *(1)*. Intermittent streams, those channels with "surface water flowing continuously during certain times of the year and more than in direct response to precipitation" *(1)*, and perennial streams, those channels with continuous, year-round stream flow, also have consistent definitions. Second, the agencies cite positional inaccuracies as

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a limitation, but the horizontal position errors of the NHD are irrelevant for describing national patterns. While these errors would affect the evaluation of whether a specific waterway or stream is subject to Clean Water Act jurisdiction (e.g., it lies within a parcel of land slated for development), such determinations have been and will continue to be made by field visits to the stream.

Errors of omission likely represent the largest source of error in the NHD. Early versions of the high-resolution NHD only included intermittent and perennial flow typing; ephemeral flow typing has only been added recently in ten Western states. In the latest version of the dataset, ephemeral stream typing remains largely absent in 38 states *(Fig. 1 a)*. This is despite the widespread presence of ephemeral streams on the ground: assessments in forested landscapes across the U.S. – including locations where ephemeral stream typing is absent in the NHD – describe ephemeral channels as comprising 49 - 71% of the length of field-surveyed stream networks *(3,4)*. Even where ephemeral stream typing is included in the NHD, ephemeral stream channels visible in field surveys are often omitted due to limitations in the scale and resolution of the source topographic maps used to produce the NHD. Research in headwater streams in forest, prairie, and desert ecosystems found that the NHD represented only 8 - 50% of the total length of the stream network visible on the ground *(3-7)*. The majority of omitted, unmapped features in these studies were dry stream channels or ephemeral streams, but even perennial streams are omitted by the NHD in some cases.

Quantifying ephemeral streams Because the primary limitations of the NHD relate to the omission of ephemeral stream typing and undermapping of ephemeral streams visible in the field, the NHD provides a conservative baseline for readily characterizing the *minimum* extent of streams affected by the NWPR. To characterize the total length of this baseline we used a

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geographic information systems (GIS) version of the high-resolution NHD *(2)* and selected flowlines typed as perennial, intermittent, and ephemeral. We excluded NHD canals and ditches and any flowlines overlapping mapped agricultural lands because of long-standing Clean Water Act exemptions of "prior converted cropland" and "normal farming, silviculture, and ranching activities," including maintenance of drainage ditches and irrigation infrastructure *(1)*.

Ephemeral streams with defined channels constitute the true headwaters of the stream network. To address undermapping of ephemeral stream channels in the NHD, we extended the NHD network by estimating channel headwaters using a GIS analysis based on 30-meter resolution digital elevation models. Studies have described ephemeral stream channel heads as initiating with as little as 0.1 ha of upstream watershed area in steep landscapes and up to 10 ha in flat landscapes *(8)*. We modeled these stream channels based on a conservative 5 ha upstream contributing watershed area threshold *(Fig 1 b, c)*. Our approach likely under-mapped stream channels in mountainous landscapes and over-mapped stream channels in flat landscapes, but we argue that it provides a reasonable first-approximation for estimating the nationwide length of unmapped ephemeral stream channels excluded from the new interpretation of the law. As with our analysis of the NHD, we removed any portion of the modeled stream network overlapping agricultural land use. Additional details on all methods are provided as Supplementary Information.

The total length of flowing waters mapped in the NHD and jurisdictional under the Clean Water Act prior to the NWPR totaled 9.3M km, of which 2.1M km (23%) were typed as ephemeral. We combined the NHD and our modeled stream network to produce a total national stream length estimate of 14.8M km. Assuming that all stream channels from the modeled stream network not mapped in the NHD are ephemeral, and with the addition of features mapped as

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ephemeral in the NHD, ephemeral streams formerly subject to the Clean Water Act in the conterminous U.S. represent 7.7M km, or 52% of stream channels by length *(Fig. 1 d)*. These streams will lose protection under the Navigable Waters Protection Act. The data that support these findings are available on the Open Science Framework (https://osf.io/0) with the identifier [data DOI upon acceptance].

Ephemeral streams sustain clean water and ecosystems The NWPR ignores the best-available science on the role of ephemeral streams for maintaining water quality and healthy ecosystems *(9)*. In 2015 the EPA's own Office of Research and Development provided a comprehensive synthesis of the crucial role of headwater streams, including ephemeral reaches, in support of the Clean Water Rule, a regulation that codified protection of ephemeral streams under the Clean Water Act but was replaced with the NWPR *(10)*. That review and more recent science shows that, although individually small, ephemeral reaches are conduits for disproportionate exchange with the terrestrial environment and collectively provide ecosystem services that are of great value to humans *(10,11)*. Much like wetlands, the network of ephemeral streams absorbs stormwater runoff and reduces flooding downstream *(13)*. Ephemeral streams also play a critical role in filtering sediment, pollutants and agricultural run-off *(11,12)*. The smallest streams are the most active locations for nitrogen transformation, improving water quality and reducing algal blooms in rivers, lakes and estuaries downstream *(10)*. Furthermore, ephemeral streams play an important role in releasing groundwater and building downstream thermal refugia that are critical for cold-water dependent species (e.g. salmon and trout), and loss of headwater streams has been tied to lower downstream productivity and reduced viability of downstream biota *(10)*. In addition to these downstream beneficial impacts, headwater streams, including ephemeral streams, themselves support a surprising amount of biodiversity *(10,11,13)*, much of it imperiled.

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Missed Opportunities Given these contributions to clean water and healthy ecosystems, a rule change to allow dredging, filling, and discharging pollutants into ephemeral streams should, at a minimum, consider the spatial extent of these features. We show that these features can be estimated rapidly, and furthermore demonstrate that they are abundant and ubiquitous. Federal agencies already have the capability to produce accurate estimates of headwater streams at watershed- and basin- scales *(14)*. Our coarse assessment provides conterminous U.S.-scale estimates that can be improved to incorporate recent advances in GIS-based channel mapping and flow characterization including addition of other topographic, soil, vegetation, runoff, and climate variables, remote sensing products *(7,14,15)*, and advanced computing techniques. High-resolution topographic mapping (e.g., Lidar) and big data collections for training and validating models (e.g., historical and ongoing field determinations of Clean Water Act jurisdiction) will only further advance the accuracy of those potential refinements. However, existing data are sufficient to give a sense of the magnitude of the loss of protection under the NWPR: even accounting for exemption of agricultural activities, the NWPR removes protection from a majority of the streams in the conterminous U.S.

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Supplementary Information:

Methods

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Fig. 1. Patterns of ephemeral streams in the conterminous U.S. **a**, Percent of total stream network typed as ephemeral in high-resolution NHD by subbasin (8-digit hydrologic unit code) – note that ephemeral streams are not mapped in most states. **b, c**, Examples of high-resolution NHD with flow typing, ephemeral stream channels in modeled stream network, and agricultural land use in NLCD 2011 overlaid on hillshaded topography in Jolon Creek, California (b) and Chatham Run, Pennsylvania (c) – modeled stream network raster is simplified for cartographic purposes; scale bar segments represent 2 km. **d**, Percent of the total stream network estimated as ephemeral in the combined high-resolution NHD and modeled stream network after excluding areas of overlap with agriculture by subbasin.

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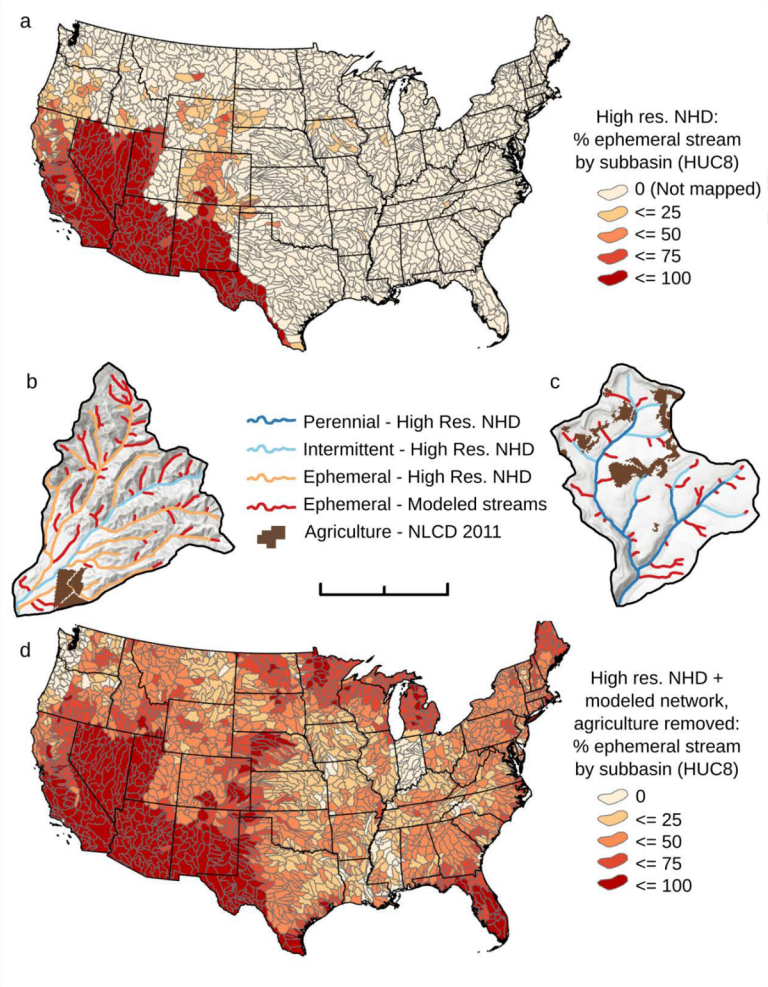

Fig 1.

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Supplementary Information for

Majority of U.S. Streams Lose Protection with New Interpretation of Clean Water Act

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Methods

We used national flow accumulation and slope raster datasets derived from a hydrologically-conditioned 30-meter resolution digital elevation model *(1)* to delineate the location of headwater channels that contribute to the mapped stream features in the National Hydrography Dataset (NHD). Flow accumulation datasets quantify the upslope area contributing to each pixel in the gridded dataset *(2)*. Flow accumulation datasets alone or in combination with slope datasets improve the accuracy of stream channel mapping in comparison to maps like the NHD *(2, 3)*. We further refined the network by removing areas with slopes equal to 0% to resolve problematic flow accumulation in flat areas *(2)* and by masking areas mapped as open water in the 30-meter resolution 2011 National Land Cover Dataset *(4)*.

To remove the portions of the NHD *(5)* and our modeled stream network that overlap with agricultural land use, we clipped those flowlines and raster cells that intersected with pasture/hay or cultivated crops mapped in the 2011 National Land Cover Dataset *(4)*.

We summarized the length of the NHD and cell count of the total modeled stream network within subbasins (8-digit hydrologic unit code watersheds) in the conterminous U.S. For the total modeled stream network, we converted the cell count to a length by multiplying by

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30m. We then subtracted the length of the NHD from the modeled stream network to calculate the length of the modeled stream network not included in the NHD and set all negative values to zero. We summed the length of the NHD and the length of the modeled stream network not in the NHD to calculate the total national stream length estimate.

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September 16, 2020

The Honorable John Barrasso
Chairman of the Senate Committee on
Environment and Public Works
307 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Thomas Carper
Ranking Member on the Senate Committee on
Environment and Public Works
513 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of the over 400-member companies of the National Stone, Sand & Gravel Association (NSSGA), I welcome today's hearing, titled *"Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean Water Act."* The newly implemented Navigable Waters Protection Rule (NWPR) maintains robust federal protections over our waterways while providing clear and concise rules for industry regarding what bodies of water are covered and what is not.

NSSGA is the leading advocate and resource for the aggregates industry, who provide the critical raw materials found in virtually every surface transportation project; roads, highways, bridges, runways, pipelines and much more. Our membership represents more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the United States. Because of the facilities we operate and the work we execute, we must follow a myriad of various permitting guidelines and federal oversight, and each agency rule we follow has a direct impact on our industry's ability to provide critical raw materials as affordable and quickly as possible. If a federal rule created confusion or arbitrarily delayed a quarry from expanding or opening, it presents real consequences on the public works projects our material is needed and ultimately impacts project costs provided by the taxpayer.

As we experienced under the 2015 Obama-era Waters of the United States (WOTUS) rule and even before that, NSSGA members found the requirements very difficult to comply with, with significant differences in different Army Corps districts. For example, the new rule clearly excludes settling ponds from federal jurisdiction. When this was not clearly excluded, members faced unreasonable and costly requirements that did not improve the environment. Even when these settling ponds were wholly contained and disconnected from legitimate "navigable waters" we had members who had to use precious resources and lose valuable time under the Clean Water Act.

With the new NWPR's implementation, our industry clearly understands what is covered by the rule versus what isn't, and unlike the 2015-era WOTUS rule, the current NWPR affords our multi-state operators certainty and uniformity across the country. As you continue to work on infrastructure investment and finding paths for a multi-year bill like the Committee's unanimously supported bill, *America's Transportation and Infrastructure Act*, consider the positive direct impacts provided by NWPR and how such clear and concise rules facilitate successful and effective aggregate production.

I appreciate your committee's willingness to give this rule a proper forum and review of its implementation, and I greatly appreciate your collective leadership advancing sound infrastructure policies and continuing the call for infrastructure investment. As you continue to review the Navigable

Waters Protection Rule and explore other matters relevant to the aggregates industry, please consider NSSGA a partner. Thank you again for your time and interest on this critical issue.

Sincerely,

Michael W. Johnson
President and CEO
National Stone, Sand and Gravel Association

cc: Members of the Senate Committee on Environment and Public Works

Mark Ryan (https://www.ryankuehler.com/post/intermittent-streams-under-the-2020-wotus-rule-a-view-from-the-field)

Intermittent Streams Under the 2020 WOTUS Rule: A View From the Field

When the new WOTUS rule was proposed earlier this year, I commented that it would not be easy to administer, despite the pronouncements to the contrary from EPA.

I'm now doing work with a client who has a pond on an intermittent stream. Under the 2015 Rule, the analysis would be easy. It would be jurisdictional as a tributary. Period.

Under the new rule, I need to know whether the stream fits the definition of ephemeral or intermittent to know whether it's covered. To do that, I need to know if it has "surface water flowing continuously during certain times of the year and more than in direct response to precipitation." 33 C.F.R. § 328.3(c)(5). To know that, I have to know whether it has flow "in a typical year," 33 C.F.R. § 328.3(c)(12), which is further defined as "when precipitation and other climatic variable are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." 33 C.F.R. § 328.3(c)(13).

Easy. Right? I've been working CWA jurisdictional issues for about 30 years, and I didn't know where to start, short of hiring a consultant, which my client likely can't afford, and I doubt many consultants have figured this one out yet. I spoke with a contact at the Corps, and he said that the Corps' Engineer Research and Development Center (ERDC) is developing an online tool to help people determine which streams might be intermittent. Also, USGS, is developing a probability-based tool to figure out what a rolling 30-year average flow looks like. The Corps is also considering looking at macroinvertebrates as another tool to figure out intermittency.

None of these complex tools, however, will tell you whether a particular stream is intermittent. They're just tools. You'll still have to make judgment calls and get into arguments with EPA and the Corps if they disagree. There will likely be guidance documents coming out, which will further complicate the issue with more detailed tests, benchmarks and considerations. (Note the new guidance rule just went into effect, making it harder to do guidance; see my May 19 blogpost for more). It will be interesting to see how the agencies end up interpreting this conundrum they've created, and how much litigation will ensue.

Looking at this new rule from the field, it's far from clear what streams are covered under the CWA.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

State of California, *et al.*,
Plaintiffs,
v.
Andrew Wheeler, *et al.*,
Defendants.

Case No. 3:20-cv-3005-RS

STATE INTERVENORS' NOTICE OF MOTION AND MOTION TO INTERVENE IN SUPPORT OF DEFENDANTS

Hr'g Date:	July 9, 2020
Hr'g Time:	1:30pm
Dep't:	San Francisco Courthouse, Courtroom 3, 17th Floor
Judge:	Honorable Richard Seeborg
Action Filed:	May 1, 2020

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NOTICE OF MOTION

Pursuant to Local Rule 7-1(b) and consistent with this Court's May 27, 2020 Order Regarding Motions to Intervene and Motions for Leave to Submit Amicus Briefs (Doc. 80), the States of Georgia, West Virginia, Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming ("State Intervenors") respectfully request leave to submit without oral argument this Motion to Intervene in Support of Defendants in the above-captioned case.

In the alternative, the State Intervenors notice that on July 9, 2020, at 1:30pm, or as soon as this matter may be heard before the Honorable Richard Seeborg in the above-titled Court, located at the San Francisco Courthouse, Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102, the State Intervenors will, and hereby do, move for the same relief.

The State Intervenors hereby move for leave to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permissively under Federal Rule of Civil Procedure 24(b).

The State Intervenors submit in support this notice of motion and accompanying motion to intervene in support of defendants; proposed opposition to plaintiffs' motion for preliminary injunction; and proposed answer. The State Intervenors consulted with counsel for the plaintiffs and the defendants; the defendants take no position and the plaintiffs reserve the right to oppose.

MOTION AND MEMORANDUM TO INTERVENE IN SUPPORT OF DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 24(a)(2), the State Intervenors respectfully move to intervene in support of Defendants in this action concerning "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328). In the alternative, the State Intervenors move for leave to intervene pursuant to Federal Rule of Civil Procedure 24(c).

BACKGROUND

A. Statutory Background

The statutory term "waters of the United States" limits the geographic reach of federal regulatory jurisdiction under the Clean Water Act. Most notably, the Act's key permitting programs for discharges of pollutants, 33 U.S.C. § 1342 (section 402), and "dredged or fill material," *id.* § 1344 (section 404), require permits for discharges into "navigable waters," which the Act defines as "the waters of the United States, including the territorial seas," *Id.* § 1362(7). And the Act requires states to develop water quality standards—which designate the use for which a given body of water is to be protected, and then set criteria that must be met to safely allow that use—for "waters of the United States" within their borders. *See id.* § 1313. For farmers, developers, homeowners, and landowners, whether their land includes a feature covered under the Act determines whether they must first obtain a federal permit—a process that can take years and often costs tens or hundreds of thousands of dollars—to develop or use their property. *See Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) (citing 33 U.S.C. §§ 1362(12), 1362(6)). And unauthorized discharges can subject an individual to fines and other civil or criminal penalties. 33 U.S.C. §§ 1311(a), (f), 1319, 1365.

Recent Supreme Court decisions addressing the agencies' attempts to define the "waters of the United States" subject to federal jurisdiction have rebuffed them as too expansive. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 174 (2001) (rejecting assertion of federal jurisdiction over isolated ponds based on mere ecological connection to jurisdictional waters); *Rapanos*, 547 U.S. at 739, 742 (plurality op.) (rejecting assertion of jurisdictions beyond "relatively permanent, standing or continuously flowing bodies of water" and "wetlands with a continuous surface connection to" those waters); *id.* at 776 (Kennedy, J., concurring) (rejecting assertion of jurisdiction over all "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)").

B. The 2015 Rule.

In June 2015, the agencies issued a final rule defining "waters of the United States." 80 Fed. Reg. at 37,054 (June 29, 2015) (2015 Rule). Many of the State Intervenors, among others,

challenged that rule as contrary to the CWA, the Administrative Procedure Act, and the Constitution. Reflecting the strength of these challenges, the rule was enjoined—and in some cases, declared unlawful—by multiple federal courts. *See*, *e.g.*, *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1383 (S.D. Ga. 2019); *North Dakota, et al*. v. *EPA, et al.*, 127 F. Supp. 3d 1047 (D. N.D. 2015); Order, *Texas v. EPA*, Case No. 3:15-cv-162 (S.D. Tex. Sept. 12, 2018) (Doc. 140).

While this litigation was ongoing, the President issued an Executive Order in early 2017 directing the agencies to review the prior rule. Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Feb. 28, 2017). The federal agencies ultimately approached this goal in two steps: (1) rescinding the old rule and re-codifying the pre-existing rules, then (2) issuing a new rule defining "waters of the United States" consistent with the CWA and its underlying cooperative federalism framework. *See*, *e.g.*, Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 17, 2017). Many of the State Intervenors submitted comments in support of these proposed actions. *See*, *e.g.*, State of West Virginia et al., Comments On The Proposed Rule Entitled Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019) (joined by West Virginia, Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Utah).

C. The 2020 Rule

In October 2019, the Environmental Protection Agency and Army Corps of Engineers ("the agencies") published a final rule repealing the 2015 Clean Water Rule. Definition of "Waters of the United States"—Recodification of Pre-existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019). The agencies then published a second rule formally clarifying the definition of "waters of the United States" under the Clean Water Act. *See* The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. 328) ("2020 Rule"). In the 2020 Rule, the agencies concluded that the 2015 rule did not reflect the CWA's proper legal limits and adopted, instead, an approach that largely tracks Justice Scalia's plurality opinion in *Rapanos*. *Id*. at 22,265. The agencies also recognized that it was

inappropriate to push the statute's jurisdictional limits without a clear statement from Congress authorizing the encroachment into traditional state prerogatives. *Id.* at 22,260, 22,272.

On May 1, 2020, the plaintiffs filed this action challenging the 2020 Rule, seeking declaratory and injunctive relief. Doc. 1. The plaintiffs argued that the agencies acted arbitrarily and capriciously in repealing the 2015 rule and asked this Court to vacate and set aside the 2020 Rule. *Id.* at 21, 22. On May 18, 2020, the plaintiffs moved for a nationwide preliminary injunction. Doc. 30.

INTERESTS AND GROUNDS FOR INTERVENTION

Intervention should be permitted as of right because the State Intervenors "claim[] an interest relating to the property or transaction that is the subject of the action, and [are] so situated that disposing of the action may as a practical matter impair or impede the [State Intervenors'] ability to protect [their] interest," and "existing parties [do not] adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Ninth Circuit has interpreted this standard as requiring State Intervenors to show that: (1) "the application is timely"; (2) they have "a significant protectable interest relating to the . . . subject of the action"; (3) the action may "impede or impair" their ability to protect their interests; and (4) existing parties "may not adequately represent . . . [their] interests." *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). The State Intervenors easily fulfill all four of these factors.

A. The application is timely.

The Rules of Civil Procedure do not set a deadline for intervention, but plaintiffs filed their complaint on May 1, 2020, and the State Intervenors are filing this motion just 31 days after that date and before any the federal defendants have filed any answer or responsive pleading. Perhaps more relevant, this motion is being filed just 14 days after plaintiffs filed a motion for a preliminary injunction seeking nationwide relief—a remedy that would have significant consequences for all States. Intervention at this early stage also would not delay this action as the State Intervenors are simultaneously filing an answer and proposed response to plaintiffs' motion for preliminary injunction.

B. The State Intervenors have a significant protectable interest in ensuring the proper interpretation of the federal government's jurisdiction over their sovereign lands and waters.

The State Intervenors have clear and substantial protectable interests at stake in this action. The "property" that is the subject of this action, particularly given the plaintiffs' request for nationwide relief, includes the sovereign lands and waters within the State Intervenors' borders that is potentially subject to federal jurisdiction under the CWA. *Day*, 505 F.3d at 965. Further, the "regulation of land use" that is the consequence of deeming waters "waters of the United States" is a "quintessential state and local power." *Rapanos*, 547 U.S. at 738 (plurality op.); *see also* 33 U.S.C. § 1251(b). It follows that regulating and protecting intrastate waters is an important element of state sovereignty. *Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 632 (2013) (citing *United States v. Alaska*, 521 U.S. 1, 5 (1997)). These interests are at the heart of this action, which seeks to expand the scope of federal regulatory jurisdiction over the States' lands and waters.

Moreover, the scope of the term "waters of the United States" does not just set federal jurisdiction over waters within the States: it sets the scope of the States' responsibilities under the CWA. That Act was built on a cooperative federalism framework. Congress enacted the CWA with a 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). And as contemplated by the Act, the large majority of states have assumed authority to administer the CWA's core permitting regime, *see* U.S. Envtl. Protection Agency, *NPDES Program Authorizations* (July 2019), *available at* https://www.epa.gov/sites/production/files/2020-04/documents/npdes_authorized_states_2020_map.pdf. The States are also required to issue water-quality certifications for every federal permit issued within their borders. *See* 33 U.S.C. § 1341(a). The scope of those programs depends on what counts as "waters of the United States," and the scope of that term thus determines what regulatory duties and costs the States must absorb.

These substantial effects of the definition of "waters of the United States" on the State Intervenors' interests drove their efforts to challenge the 2015 Rule, which attempted to render the "vast majority of the nation's water features" subject to federal jurisdiction. U.S. EPA & Department of the Army, *Economic Analysis of the EPA-Army Clean Water* at 11 (May 20, 2015) (Docket ID: EPA-HQ-OW-2011-0880-20866), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866. This kind of encroachment on the States' sovereign power to regulate their water resources lacked statutory or even constitutional justification. *See*, *e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n Inc*., 452 U.S. 264, 286-87 (1981) (explaining that a federal rule violates States' Tenth Amendment powers when it addresses matters that are indisputably attributes of state sovereignty, and when compliance with the rule would directly impair States' ability to structure integral operations); *see also*, *e.g.*, *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001). The 2020 Rule, by contrast, better respects the States' traditional regulatory authority over their lands and waters by returning federal regulators to their appropriate lane. The State Intervenors thus have substantial interests that are threatened by the plaintiffs' action, which seeks to re-impose expansive federal jurisdiction in this area of traditional state authority. If the plaintiffs have interests in this action, the State Intervenors undoubtedly have a protectable interest, too.

C. The disposition of this action could impede the State Intervenors' ability to protect their interests.

The risk this action poses to the State Intervenors' interests is readily apparent. Many of the State Intervenors challenged the 2015 Rule because its expansive assertion of jurisdiction threatened to saddle them and their citizens with substantial costs and infringed their traditional sovereign authority over their lands and waters. *See* Order, *North Dakota v. U.S. Envtl. Prot. Agency*, Case No. 3:15-cv-59 (N.D. Aug. 27, 2015 (ECF No. 70) (enjoining 2015 Rule in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming); Order, *Georgia v. McCarthy*, Case No. 2:15-cv-79 (S.D. Ga. June 8, 2018) (ECF No. 174) (enjoining the 2015 Rule in Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and

Wisconsin); Order, *Texas v. EPA*, Case No. 3:15-cv-162 (S.D. Tex. Sept. 12, 2018) (ECF No. 140) (enjoining the 2015 Rule in Louisiana, Mississippi, and Texas). And many of the State Intervenors also supported and continue to support the agencies' promulgation of the 2020 Rule as a necessary and important clarification of federal jurisdiction over their sovereign lands and waters. *See* 84 Fed. Reg. 4154; Macy Decl. ¶ 8; Parfitt Decl. ¶ 3; Singletary Decl. ¶ 4; Swonke Decl. ¶¶ 7–8. Now, the plaintiffs challenge the 2020 Rule as "arbitrary, capricious, and not in accordance with law" and seek to have it set aside and vacated. Doc. 1, at 24. Further, and most pressing, the plaintiffs seek universal injunctive relief in their motion for a preliminary injunction. If the plaintiffs secure their requested relief, the consequences will extend to the State Intervenors, too, even though they support implementation of the 2020 Rule and strongly oppose the plaintiffs' requested "relief." *See, e.g.*, *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (explaining that the "prospect of significant interference with … self-government" weighs against injunctive relief); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001). And aside from intervening in this case to defend against that challenge, there is no other ready recourse for the State Intervenors to combat an injunction issued by this Court that applies within their geographic boundaries.

D. The existing parties will not adequately represent the interests of the State Intervenors.

Unlike the plaintiffs, the State Intervenors believe the 2020 Rule strikes a reasonable balance between the roles of federal regulators and the States in protecting land and water resources. The State Intervenors view the 2020 Rule as a substantial improvement over the prior rule. The new rule builds on Justice Scalia's plurality opinion in *Rapanos*, 85 Fed. Reg. at 22314, which the State Intervenors will argue best comports with the text and purposes of the CWA—and at a minimum avoids serious constitutional concerns. *Rapanos*, 547 U.S. at 737-38 (plurality op.). The 2020 Rule's approach also preserves the longstanding role of the States as primary regulators of intrastate lands and waters by allowing for federal jurisdiction over only relatively permanent bodies of water, and leaving within state control those areas that benefit the most

from regulation according to "local policies 'more sensitive to the diverse needs of a heterogeneous society.'" *Bond v. United States*, 564 U.S. 211, 221 (2011). The Court should hear from States on both sides of the issue before ruling on this important question.

The defendants—officials and agencies of the federal government—will not adequately represent the State Intervenors' interests, either. Although the defendants will also urge the Court to reject the Complaint, their rationale could differ substantively from the bases the State Intervenors intend to advance. The State Intervenors' interests could also differ from those of the agencies when it comes to proper interpretation of the CWA's cooperative federalism framework, for example. The defendants also cannot respond to the plaintiffs' arguments in the same manner that the State Intervenors can: as same-level sovereigns in our federal form of government. Further, the State Intervenors will be able to explain their own regulatory programs better than other litigants. And if the Court holds that the 2020 Rule is unlawful, the plaintiffs may seek a remedy that would increase the federal defendants' power and impose irreparable economic harms on the State Intervenors. Given this dynamic, the State Intervenors' interests are not adequately represented by any of the existing parties.

E. In the alternative, the Court should permit intervention under Rule 24(b).

Finally, in the event this Court does not grant intervention as a matter of right, the Court should permit the State Intervenors to intervene in this matter pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), which provides: "On timely motion, the court may permit anyone to intervene who … has a claim or defense with the main action a common question of law or fact." The State Intervenors' motion is timely and will not delay these proceedings, as explained above. Moreover, their position in support of the 2020 Rule plainly involves common questions of law and fact with this action. Their direct opposition to plaintiffs' claims satisfies the "common question" requirement for permissive intervention. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002). The State Intervenors therefore satisfy the requirements for permissive intervention to protect their important interests in this case.

CONCLUSION

For the reasons stated above, the State Intervenors request that the Court grant their motion to intervene as of right, or, in the alternative, grant leave for State Intervenors to intervene.

Respectfully submitted.

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*Application for Admission Pro Hac Vice Pending or Forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I served this motion to intervene in support of defendants by filing it with this Court's ECF system.

/s/ *Andrew A. Pinson*
Andrew A. Pinson

September 16, 2020

The Honorable John Barrasso
Chairman
U.S. Senate Committee on Environment and Public Works
Washington, D.C. 20510

The Honorable Thomas R. Carper
Ranking Member
U.S. Senate Committee on Environment and Public Works
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

The Waters Advocacy Coalition (WAC) appreciates the Senate Environment and Public Works Committee's attention to implementation of the Navigable Waters Protection Rule (NWPR).[1] As a coalition of multiple trade associations representing a large cross-section of the nation's economy, WAC strongly supports the NWPR and the clarity it provides on the scope of the Clean Water Act (CWA). Through the new rule, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) ("the agencies") are ending years of legal uncertainty over the extent of "Waters of the United States" (WOTUS) while also protecting water quality and restoring the proper role of states and local governments in managing our nation's water resources. However, in order to realize these benefits and the potential of the NWPR to facilitate job creation, food production, infrastructure development, and other critical economic activity, the agencies must effectively implement the new rule.

Multi-Year Effort Brings Results

WAC applauds the White House and agencies for their ongoing, multi-year commitment to resolve WOTUS uncertainty. On February 28, 2017, President Trump issued Executive Order 13778, which required the agencies to review the 2015 Clean Water Rule ("2015 Rule")[2] and revise or rescind it consistent with law and legal precedent.[3] The agencies diligently responded by proposing a new rule on December 11, 2018, repealing the 2015 Rule on September 12, 2019, and announcing the NWPR on January 23, 2020. Throughout the process, they actively solicited stakeholder feedback through multiple listening sessions and comment periods. Further, court decisions reinforced their efforts; including, notably, a ruling from the U.S. District Court for the Southern District of Georgia on August 22, 2019 finding that the 2015 Rule exceeded the agencies' authority under the CWA. A second ruling from the U.S. District Court for the Northern District of California on June 19, 2020 denied a multi-state request for a preliminary injunction on the NWPR.

Most recently, the agencies have focused their efforts on implementation of the new rule. Since the NWPR went into effect on June 22, 2020 (in all states except Colorado), the agencies have

[1] 85 Fed. Reg. 22250 (April 21, 2020).
[2] 80 Fed. Reg. 37105 (June 29, 2015).
[3] Exec. Order No. 13,778, 82 Fed. Reg. 12497 (February 28, 2017).

issued four "implementation memos"[4] and posted six recorded trainings to a dedicated website.[5] Further, EPA is developing an "antecedent precipitation tool" to help stakeholders determine whether conditions are appropriate for making jurisdictional determinations, and USACE is conducting regular trainings for the staff of its District offices.

WAC Members Anticipate Positive Experiences

The new rule's clarity, and agency resources, are expected to make the NWPR easier to implement consistently on the ground compared to previous WOTUS rules. For example, because the NWPR predominately bases jurisdictional determinations on observable surface connections, the rule will make it easier for landowners to ascertain whether they require CWA Section 404 permits for projects. These changes will make the entire permitting process more efficient—by both reducing permitting timelines and providing landowners, consultants, and USACE staff with greater flexibility on timing to conduct field visits and inspections. These changes will also qualify more projects for nationwide permits compared to time-intensive individual permits.

Next Steps and Opportunities

Additional implementation efforts provide opportunities to make the federal permitting process even more efficient. As Congress and the agencies move forward with implementation, they should consider the following recommendations:

- *Ensure implementation consistency between EPA and USACE, and their respective regional and District offices*: The recently-issued "Coordination Memo" establishes a thorough process to ensure consistent implementation of the NWPR across the country. The agencies must follow that process and take action, such as restructuring or personnel changes, when implementation goals are not met.

- *Create a single online platform for all NWPR guidance documents*: Consistent with Executive Order 13891, EPA has posted all agency guidance online for public review. WAC encourages USACE to do the same, compiling various guidance documents from across all District offices into one central database.

- *Engage stakeholders in any implementation workshops*: Interactive workshops that facilitate feedback on stakeholders' implementation experiences will provide the agencies with helpful recommendations for additional NWPR guidance. WAC as well as other

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[4] The implementation memos include Elevation and Coordination Procedures for Certain Determinations under the Clean Water Act ("TNW Memo"), Memorandum to the Field on Exemptions from Regulation under Section 404(f)(1)(C) of the CWA for the Construction or Maintenance of Irrigation Ditches and for the Maintenance of Drainage Ditches, Memorandum to the Field Concerning Implementation of the Navigable Waters Protection Rule, Section 404 of the Clean Water Act and the Food Security Act (FSA) of 1985, Memorandum to the Field on Coordination to Ensure Consistent Implementation of the Navigable Waters Protection Rule ("Coordination Memo").

[5] *See* https://www.epa.gov/nwpr/training-and-implementation-materials#ImplementationMemos (September 10, 2020).

members of the public have extensive experience addressing implementation issues in the field as they have arisen under prior definitions of "waters of the United States."

- *Remove post-Rapanos guidance, consistent with the final rule's preamble*: The "TNW Memo" elevates determinations based solely on "use in recreation" to the agencies for review. However, as WAC requested in its comments on the proposed WOTUS rule, the agencies should rescind the 2007 guidance that discusses recreation as the basis for TNW determinations.

- *Clarify that positive jurisdictional determinations will require the presence of all three wetland factors*: The NWPR defines "uplands" to include areas that lack three wetland factors (i.e., plants, soils, hydrology). But the Regional Supplements still allow "problem areas" to be identified as jurisdictional wetlands, even if they lack the three criteria. This inconsistency should be addressed in further guidance or memos. Any variance would need to be explained and well-justified.

- *Extend timelines for federal wetlands permits from five years to the life of a project*: CWA Section 404 refers to five-year terms for certain permits. Because many infrastructure projects extend past five-year time periods, landowners must regularly reapply for permit extensions. Congress should amend the CWA to extend the time period to the life a project.

Thank you for the opportunity to provide feedback on NWPR implementation. WAC looks forward to working with the Committee, White House, agencies, and other stakeholders as we continue to implement the new rule and realize its benefits for the regulated community and environment.

Sincerely,

Agricultural Retailers Association
American Exploration & Mining Association
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Petroleum Institute
American Road & Transportation Builders Association
Associated Builders and Contractors
Associated General Contractors of America
Association of American Railroads
Club Management Association of America
Edison Electric Institute
Florida Sugar Cane League
Golf Course Superintendents Association of America
Independent Petroleum Association of America
Industrial Minerals Association – North America
Leading Builders of America
National Association of Home Builders

National Association of Manufacturers
National Association of REALTORS®
National Corn Growers Association
National Mining Association
National Rural Electric Cooperative Association
National Stone, Sand, and Gravel Association
Southeastern Lumber Manufacturers Association
The Fertilizer Institute
Treated Wood Council
United Egg Producers
U.S. Chamber of Commerce
USA Rice

https://governor.wyo.gov/media/news-releases/2020-news-releases/wyoming-joins-23-state-effort-to-protect-property-owners

Wyoming Governor Mark Gordon

Wyoming joins 23-State effort to protect property owners

June 5, 2020

CHEYENNE, Wyo. – Wyoming joined 22 other states earlier this week in litigation alongside property owners, ranchers, farmers and energy producers to convince a federal district judge to uphold the Trump administration's Navigable Waters Protection Rule. The rule gives greater certainty to landowners by providing predictable and reasonable lines between waters subject to federal and state regulation under the Clean Water Act.

Through the Wyoming Attorney General, Governor Mark Gordon joined in this broad effort against an attempt to reinstate an overreaching Obama-era water rule referred to as the Waters of the United States (WOTUS) rule.

Wyoming is home to countless sources of water that never reach a navigable waterway, many of which would come under Federal control should WOTUS be reinstated.

"It is vital that Wyoming stand up for its right to be the prime caretaker and regulator of waters that are strictly within our state," Governor Gordon said. "We know how to protect our waters far better than the Federal government."

The motion to intervene, filed earlier this week, seeks to ensure the court considers Wyoming's interests and that of its coalition partners when it decides a challenge brought by a separate group of attorneys general led by New York and California.

The coalition's motion to intervene here and its proposed opposition to a preliminary injunction were filed in U.S. District Court for the Northern District of California.

-END-

Senator BARRASSO. As well, I ask unanimous consent to enter into the record letters of support for today's hearing from the National Stone, Sand, and Gravel Association, and the Waters Advocacy Council, which includes members from the retail, energy, transportation, construction, and many other sectors.

[The referenced information follows:]

Senator CARPER. Can I just mention one last thing? One of the things that the Chairman and I and members of this committee, Democrat and Republican, have worked on, is legislation dealing with hydrofluorocarbons and trying to phase them down over the next 15 years or so. I am very proud of the bipartisan products that we developed. Hopefully, it is going to be included in the energy legislation that was referenced earlier by Senator Whitehouse.

A good friend of the Chairman, and a pretty good friend of mine now, is a fellow from Wyoming, who is Assistant Secretary of the Department of the Interior, and he has a saying that he shared with us here in this room, and it is that bipartisan solutions are lasting solutions, that is what he said. Bipartisan solutions are lasting solutions.

On this issue, we have the issue of clean water, Waters of the U.S., navigable waters, navigable rivers, and so forth. We have a situation where we have one administration coming forth with one rule, and then a new administration coming forth with another rule. We are going to have an election on November 3d, and that might even be changed, and who is going to be living and working out of the White House. And we face the prospect of doing it again. It is almost like ping-pong.

I don't know if it is unrealistic, but wouldn't it be nice if we could somehow find the middle. I like to quote Ted Kennedy when I was new in the Senate. I asked him, I said to him, why, Senator Kennedy, a very liberal Democrat, you know, all these Republicans in the Senate, they always want you to be their lead Democrat on bipartisan legislation that they are introducing. And I said, why do they always want you to be their lead Democrat?

And I will never forget what he said. He said, "I am always willing to compromise on policy; I am never willing to compromise on principle." Always willing to compromise on policy, never willing to compromise on principle. At the end of the day, I think, we probably aren't that far apart in agreeing on the principles. We are struggling, at least through these regulatory processes, coming together on the policies.

This issue is not going to go away; we are going to have an opportunity here to probably to revisit in a new Congress, maybe with a new administration. These are important issues, and I hope that we can just bring our best efforts to bear as we have with hydrofluorocarbons and climate change, and get us to a better place. Thank you.

Senator BARRASSO. Well, thanks for your continued partnership, friendship, and leadership. Thank you.

Thanks to all three of our witnesses today. It was a very productive hearing. I am very grateful for all of you. We had 11 different members participating in the hearing today. Some may have additional questions that they will submit to you in writing, so we will

keep the hearing record open for 2 weeks, and we would appreciate your response to those questions.

Thank you all again for a very informative hearing today. With that, this hearing is adjourned.

[Whereupon, at 11:37 a.m., the hearing was adjourned.

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