

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW
FOUNDATION; CONNECTICUT
RIVER CONSERVANCY; CLEAN
WISCONSIN; MASSACHUSETTS
AUDUBON SOCIETY, INC.;
MERRIMACK RIVER WATERSHED
COUNCIL; NATURAL RESOURCES
DEFENSE COUNCIL, INC.; NEW
MEXICO WILDERNESS ALLIANCE;
and PRAIRIE RIVERS NETWORK,

Plaintiffs,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY; ANDREW R.
WHEELER, in his official capacity as
the Administrator of the U.S.
Environmental Protection Agency; U.S.
ARMY CORPS OF ENGINEERS; and
R.D. JAMES, in his official capacity as
the Assistant Secretary of the Army
(Civil Works),

Defendants.

COMPLAINT

Case No. 20-cv-10820

INTRODUCTION

1. The Clean Water Act is one of the most important environmental laws in the country. The law protects rivers, lakes, and streams that millions of Americans rely on for drinking water and for activities like swimming and fishing. The law also protects millions of acres of wetlands that keep those rivers, lakes, and streams clean, while reducing flood damage and providing invaluable wildlife habitat.

2. Congress passed the Clean Water Act in 1972 after decades of failed efforts to protect and clean up the country's waters. Before the Act, most waters in the United States were so dirty that they were unsafe for fishing or swimming. Waterways like Ohio's Cuyahoga River were catching fire due to industrial pollution. Fish and other wildlife in polluted waters were dying en masse. Wetlands were being filled and destroyed at an alarming rate.

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

4. Congress chose to define waters protected by the Clean Water Act broadly, intending to regulate all waters within its Commerce Clause power. The Act protects, at a minimum, traditionally navigable waters and waters that significantly impact those waters, such as rivers and streams that flow into navigable waters, as well as wetlands that play an important role in protecting the quality of navigable waters.

5. Although water pollution is still a serious problem in the United States, our water quality has improved significantly over the past several decades due in large part to the Clean Water Act's pollution-control protections. The Trump administration, however, has now issued a regulation that threatens to reverse that progress by severely limiting the waters that the federal government can protect under the Act.

6. The so-called “Navigable Waters Protection Rule” (Navigable Waters Rule) was promulgated by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (together, the Agencies) on April 21, 2020, and will become effective on June 22, 2020. The Rule purports to define the phrase “waters of the United States,” and thus, the scope of the Clean Water Act’s reach.

7. At President Trump’s direction, the Rule adopts an unreasonably narrow interpretation of the Clean Water Act, largely modeled after a plurality opinion in the Supreme Court case *Rapanos v. United States*, 547 U.S. 715 (2006). The Rule concludes that streams fed only by rain or snowfall are not “waters of the United States,” and thus, are no longer protected under the Act. The Rule also concludes that wetlands, lakes, and ponds are not “waters of the United States” unless they directly touch other “waters of the United States” or are otherwise connected to them via certain types of surface-water flow.

8. Many of the streams, wetlands, and other waters excluded from the Rule’s new definition of “waters of the United States” have been protected by the Clean Water Act for decades. These excluded waters are critically important to downstream water quality. The Rule is thus a significant and unprecedented rollback of the protections afforded by the statute.

9. The Agencies violated both the Administrative Procedure Act (APA) and the Clean Water Act when promulgating the Navigable Waters Rule.

10. First, the Agencies promulgated the Navigable Waters Rule without meaningfully considering the Rule’s impacts on the “integrity of the Nation’s waters”—

the protection of which is the sole objective of the Clean Water Act. *See* 33 U.S.C. § 1251(a). The Agencies' preliminary estimates from earlier in the rulemaking process show that the Rule may remove federal protections for nearly a fifth of the country's streams and about half of our wetlands. The Agencies now disavow that preliminary analysis, but those figures and other evidence show that the Rule may have devastating consequences on water quality across the country. The Agencies failed to adequately consider those water quality impacts when they decided to radically narrow the definition of "waters of the United States."

11. The Agencies had sufficient information to assess the potential water quality impacts of the Rule. But even if they did not, the Agencies fail to explain why it was reasonable to promulgate the Rule now in the face of such uncertainty, rather than gather more information that would allow the Agencies to conduct a meaningful analysis of the Rule's water quality impacts.

12. Second, the Agencies assert that the Navigable Waters Rule is "informed" by the same scientific evidence that underlay a prior policy, the Clean Water Rule. However, the Agencies in fact disregard – without explanation – the science-based findings they made in promulgating the Clean Water Rule. Most significantly, the Agencies claim that the Navigable Waters Rule protects waters with substantial connections to downstream navigable waters. They likewise suggest that the Rule excludes waters with less substantial connections. But the undisputed scientific evidence, and the Agencies' prior findings based on that evidence, show that the Navigable Waters Rule removes protections for waters that can have equally substantial

impacts on downstream water quality as those that the Navigable Waters Rule continues to protect.

13. Third, the Agencies misrepresent and ignore relevant parts of the scientific record on which they claim to have relied. EPA's own Science Advisory Board – a group of independent scientists charged with providing advice to the agency – advised EPA that the Rule contradicts well-established science and lacks any scientific justification. The Agencies ignored that advice and failed to adequately respond to numerous public comments raising concerns about the lack of scientific support for the Navigable Waters Rule.

14. Fourth, the Agencies' line-drawing between protected and unprotected waters is arbitrary and not reasonably explained. For instance, the Agencies assert that streams that flow ephemerally (i.e., only after rain or snowfall) are not protected under the Clean Water Act because, according to the Agencies, these streams have insufficient connections to downstream waters and do not fall within the ordinary meaning of "waters." At the same time, the Agencies conclude that permanently flowing streams *are* protected under the Act even when they are separated from a downstream water by an ephemeral stream, because the ephemeral stream provides a sufficiently substantial connection downstream and can make the waters "indistinguishable when flowing (i.e., they look like one water)." The Agencies do not adequately explain these inconsistencies.

15. Fifth, the Agencies untenably try to defend the rulemaking in part on the grounds that it will provide "clarity," "certainty," and "predictability" for developers,

farmers, and landowners. That claim is belied by the record. The Rule is filled with unclear terms and will be nearly impossible to implement.

16. The Navigable Waters Rule also violates the Clean Water Act. Like the *Rapanos* plurality opinion upon which the Rule is modeled, the Rule is inconsistent with the Clean Water Act's text, structure, and purpose. Indeed, five Justices in *Rapanos* concluded that the *Rapanos* plurality's narrow test for determining whether a water is a "water of the United States" had no statutory support. And all federal circuits that have decided the issue, including the First Circuit, have held that the Clean Water Act's reach extends beyond waters that satisfy only the *Rapanos* plurality's narrow test, which the Agencies have largely adopted in the Navigable Waters Rule.

17. The Rule does not advance the Clean Water Act's purpose to protect the "integrity of the Nation's waters." 33 U.S.C. § 1251(a). Instead, the Rule advances the Trump administration's deregulatory agenda, protecting those who want to pollute the nation's waters.

18. The Rule violates the APA and the Clean Water Act. Plaintiffs seek an order from the Court vacating and setting aside the Rule.

JURISDICTION AND VENUE

19. The Court has jurisdiction over the claims set forth in this Complaint pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 702, 704. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 623 (2018) (holding that challenges to the Agencies' regulations defining "waters of the United States" must be brought in federal district courts). The relief sought is authorized by 28 U.S.C. § 2201(a), 28 U.S.C. § 2202, and 5 U.S.C. § 706.

20. Venue is proper in the District of Massachusetts under 28 U.S.C. § 1391(e)(1)(C) because the defendants are officers or agencies of the United States and because Plaintiffs Conservation Law Foundation, Connecticut River Conservancy, Massachusetts Audubon Society, and Merrimack River Watershed Council reside in this judicial district and maintain their principal places of business in this judicial district. *See* 28 U.S.C. § 1391(c)(2).

THE PARTIES

The Plaintiffs

21. Plaintiff Conservation Law Foundation (CLF) is a nonprofit member-supported organization dedicated to protecting New England's environment. It is incorporated under the laws of Massachusetts with its principal place of business at 62 Summer Street, Boston, MA, 02110. CLF has over 4,000 members, including more than 1,600 members in Massachusetts. CLF has long worked to protect the health of New England's waterways, from its larger crown jewel waterbodies like Lake Champlain, the Charles River, and Narragansett Bay, to smaller, seasonal and rain-dependent streams, as well as wetlands and other waters. CLF's members use and enjoy New England's waterways for recreational, aesthetic, and other purposes, including but not limited to boating, swimming, fishing, birdwatching, sightseeing, and drinking water.

22. Plaintiff Connecticut River Conservancy (CRC) is a nonprofit membership organization incorporated in Massachusetts with approximately 1,100 household memberships. It has served as the voice for the Connecticut River watershed, from source to sea, since 1952. CRC is headquartered in Greenfield, Massachusetts, with

additional offices in Connecticut and Vermont. CRC collaborates with partners across Vermont, New Hampshire, Massachusetts, and Connecticut to protect and advocate for the Connecticut River and its tributaries and to educate and engage communities. CRC brings people together to prevent pollution, improve habitat, and promote enjoyment of the Connecticut River and its tributary streams. The Navigable Waters Rule removes protections for streams and wetlands that feed into and directly impact the water quality of the Connecticut River and therefore harms CRC's members who use and enjoy the River.

23. Plaintiff Clean Wisconsin is a nonprofit membership organization dedicated to environmental education, advocacy, and legal action to protect air quality, water quality, and natural resources in the State of Wisconsin. Clean Wisconsin represents over 16,000 members and supporters throughout the state. Wisconsin is uniquely blessed with water resources. In addition to being bordered by the Mississippi River to the West and two of the Great Lakes to the North and East, Wisconsin is home to 15,000 lakes, millions of acres of wetland, and over 12,000 rivers and streams that run over 84,000 miles. Most of Wisconsin's streams run intermittently, or seasonally, and many flow only in response to rain or snowfall. Wisconsin's waters provide habitat for waterfowl like duck and geese, as well as many endangered and threatened plant and animal species. Founded in 1970, Clean Wisconsin has been fighting to protect these waters for fifty years. The Navigable Waters Rule harms the interests of Clean Wisconsin's members, who depend on Wisconsin's lakes, rivers, streams, and wetlands for their livelihood and enjoyment.

24. Plaintiff Massachusetts Audubon Society (Mass Audubon), founded in 1896, is among the oldest and largest private nonprofit, membership-based conservation organizations in New England. Mass Audubon is headquartered in Lincoln, Massachusetts. Mass Audubon's mission is to protect the nature of Massachusetts for people and wildlife. With 125,000 members, 225 full-time staff, and 14,000 volunteers, Mass Audubon stewards nearly 38,000 acres of conservation land, including 7,330 acres of wetlands; provides educational programs for 225,000 children and adults annually; and advocates for sound environmental policies at the local, state, and federal levels of government. Mass Audubon's statewide network of 100 wildlife sanctuaries welcomes visitors of all ages and serves as the base for its conservation, education, and advocacy work. The Navigable Waters Rule harms Mass Audubon's members who enjoy viewing wildlife and engaging in other recreational activities in and around wetlands, streams, and other waters in Massachusetts.

25. Plaintiff Merrimack River Watershed Council (MRWC) is a member-supported nonprofit organization based in Lawrence, Massachusetts. MRWC's mission is to improve and conserve the Merrimack River watershed for people and wildlife through advocacy, education, recreation, and science. The Merrimack River, at 117 miles in length, drains a watershed of 5,000 square miles that sustains a population of over 2.5 million people, while furnishing drinking water to over 600,000 people. Home to more than 200 New Hampshire and Massachusetts communities, the Merrimack River watershed provides major recreational opportunities, diverse fish and wildlife habitat, and stunning scenic beauty. The members of MRWC who rely on the

Merrimack River for recreational, aesthetic, and other purposes are harmed by the Navigable Waters Rule.

26. Plaintiff Natural Resources Defense Council (NRDC) is a national environmental advocacy group organized as a nonprofit membership corporation, with hundreds of thousands of members nationwide, including approximately 14,800 members in Massachusetts. NRDC's mission is to safeguard the Earth: its people, its plants and animals, and the natural systems on which all life depends. NRDC staff work to secure Clean Water Act protections for a broad range of aquatic resources, including small, seasonal, and rain-dependent streams, as well as wetlands, ponds, and other waters. In furtherance of these goals, NRDC worked to ensure that EPA and the Army Corps' prior "waters of the United States" rulemaking – the Clean Water Rule – provided robust protections for these vital resources, on which NRDC's members and many other Americans depend. NRDC's members get their drinking water from and frequently use and enjoy waters that are at greater risk of being polluted or degraded as a result of the Navigable Waters Rule.

27. Plaintiff New Mexico Wilderness Alliance (New Mexico Wild) is a statewide nonprofit organization dedicated to the protection, restoration, and continued enjoyment of New Mexico's wild lands and wilderness areas. As such, New Mexico Wild advocates for increased protections for, and the prevention of damage to, permanent, intermittent, and ephemeral streams, as well as wetlands. The Navigable Waters Rule harms New Mexico Wild's members who recreate in and depend upon clean water for their daily lives as well as their wilderness adventures.

28. Plaintiff Prairie Rivers Network (PRN) is a nonprofit organization incorporated under the laws of Illinois. PRN has approximately 1,200 members. Its mission is to protect water, heal land, and inspire change. For more than fifty years, PRN has used the creative powers of science, law, and collective action to protect and restore rivers, lakes, and wetlands. The Navigable Waters Rule harms PRN's members who regularly visit and enjoy the rivers, streams, and wetlands of Illinois for recreational activities, and who depend on rivers and lakes for their drinking water.

29. The harm to Plaintiffs' members caused by the Navigable Waters Rule is described further *infra* ¶¶ 135-155.

The Defendants

30. Defendant EPA is an agency of the U.S. government. EPA is responsible for implementing and enforcing most of the Clean Water Act's pollution-control programs. The EPA Administrator has ultimate responsibility for determining the definition of "waters of the United States" under the Act. Together with the Army Corps, EPA issued the Navigable Waters Rule.

31. Defendant Andrew R. Wheeler, EPA Administrator, is the highest-ranking official in the EPA. Administrator Wheeler signed the Navigable Waters Rule. Plaintiffs sue Administrator Wheeler in his official capacity.

32. Defendant Army Corps of Engineers is an agency of the U.S. government and a branch of the Department of the Army. The Army Corps is responsible for implementing and enforcing one of the Clean Water Act's pollution-control programs. Together with EPA, the Army Corps issued the Navigable Waters Rule.

33. Defendant Rickey Dale “R.D.” James is the Assistant Secretary of the Army for Civil Works. In that position, Assistant Secretary James supervises the Army Corps’ Civil Works program, including its implementation of the Clean Water Act. Assistant Secretary James signed the Navigable Waters Rule. Plaintiffs sue Assistant Secretary James in his official capacity.

BACKGROUND

Congress enacted the Clean Water Act to restore and maintain the integrity of the nation’s waters

34. Congress enacted the Clean Water Act with a single objective: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In drafting this provision, Congress took a “broad, systemic view” of maintaining and improving water quality, with the key word “integrity” referring “to a condition in which the natural structure and function of ecosystems [are] maintained.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (quoting H.R. Rep. No. 92-911, at 76 (1972)).

35. When Congress passed the Clean Water Act in 1972, it represented a “total restructuring” and “complete rewriting” of federal law governing water pollution. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981) (quoting the Act’s legislative history). Before the Clean Water Act, the states were primarily responsible for controlling water pollution. S. Rep. No. 92-414, at 3669 (1971). By the 1970s, Congress recognized that this state-led scheme had been “inadequate in every vital respect,”

leaving many of the nation's waters "severely polluted" and major waterways "unfit for most purposes," including swimming and fishing. *Id.* at 3674.

36. To address this water quality crisis, Congress replaced the ineffective patchwork of state laws with the Clean Water Act—"an all-encompassing program of water pollution regulation." *Milwaukee*, 451 U.S. at 318.

37. The Clean Water Act regulates the discharge of pollutants into "navigable waters," which the Act defines broadly as the "waters of the United States." 33 U.S.C. § 1362(7). Under the Act, a "water of the United States" cannot be polluted or destroyed without a permit. The Act also requires the establishment of water quality standards for "waters of the United States." States may administer the Act's permitting programs and establish water quality standards for waters within their borders, so long as the state programs comply with federal law. *See id.* §§ 1313(c), 1342(b), 1344(g). States thus retain a pivotal role in administering the Clean Water Act. But the Act serves as a crucial federal floor that guards against a state-by-state race to the bottom.

38. The legislative history of the Clean Water Act shows that Congress chose to define "navigable waters" broadly as "waters of the United States" in order to protect all waters within its Commerce Clause power. However, the Act itself does not further define "waters of the United States." As a result, for nearly 50 years, EPA and the Army Corps have issued regulations defining this phrase—and thus, the scope of the Act's reach.

39. Between the 1970s and early 2000s, the Agencies and courts interpreted the scope of the Clean Water Act broadly to cover "virtually all bodies of water," *Int'l*

Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987), including navigable waters and their tributaries, wetlands neighboring those waters, and other waters that affect interstate commerce.

40. In *Riverside Bayview*, for example, the Supreme Court held in 1985 that the Army Corps had reasonably interpreted the phrase “waters of the United States” to include “adjacent” wetlands, which the Army Corps had defined as wetlands next to or reasonably close to other protected waters. 474 U.S. at 133-35. In upholding the Corps’ interpretation, the Court recognized “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems.” *Id.* at 133; *see also United States v. Marathon Dev. Corp.*, 867 F.2d 96, 98 (1st Cir. 1989) (noting that *Riverside Bayview* construed “waters protected by the Act . . . broadly . . . to include wetlands”).

41. In addition to finding that “waters of the United States” includes certain wetlands, the Agencies and courts have consistently found that tributaries of navigable waters qualify as “waters of the United States.” *See, e.g., United States v. TGR Corp.*, 171 F.3d 762, 764-65 (2d Cir. 1999) (per curiam) (citing and agreeing with other circuits’ holdings); *see also United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974) (finding it necessary to regulate tributaries of navigable waters, lest the navigable waters become “mere conduit[s] for upstream waste”).

Two Supreme Court cases in the 2000s engendered uncertainty over the scope of the Clean Water Act

42. In the 2000s, a pair of Supreme Court decisions – *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006) – created uncertainty about the scope of the Clean Water Act, although neither case invalidated the Agencies’ regulations.

43. In *SWANCC*, the Supreme Court held that the phrase “waters of the United States” did not include “nonnavigable, isolated, intrastate” ponds if the only basis for inclusion was that, as habitat for migratory birds, the ponds affected interstate commerce. 531 U.S. at 162, 166-67. The Court distinguished its opinion in *Riverside Bayview*, explaining that “[i]t was the *significant nexus* between the wetlands and ‘navigable waters’ that informed” the Court’s conclusion that adjacent wetlands were “waters of the United States.” *Id.* at 167 (emphasis added).

44. The Supreme Court next addressed the scope of the Clean Water Act in *Rapanos*, a case that produced splintered opinions with no majority. In *Rapanos*, the Court evaluated whether the Clean Water Act protects wetlands lying near ditches or tributaries “that eventually empty into traditional navigable waters.” 547 U.S. at 729. In a plurality opinion authored by Justice Scalia, four Justices adopted an extremely narrow view of the Clean Water Act. In their view, the phrase “waters of the United States” includes only “relatively permanent, standing or continuously flowing bodies of water.” *Id.* at 739. The plurality further found that only “those wetlands with a

continuous surface connection” to other “waters of the United States” are covered by the Act. *Id.* at 742.

45. The other five Supreme Court Justices rejected the *Rapanos* plurality’s interpretation of “waters of the United States” as untethered from the text, structure, and purpose of the Clean Water Act. *See id.* at 768-97 (Kennedy, J., concurring in the judgment), 800 (Stevens, J., dissenting).

46. In an opinion concurring only in the judgment, Justice Kennedy explained that the plurality’s first requirement – standing water or continuous flow, at least for a period of “some months” – made “little practical sense in a statute concerned with water quality.” *Id.* at 769. He noted that “nothing in the statute” suggests that Congress intended to exclude waterways that flow irregularly, such as in response to rainfall. *Id.* Justice Kennedy also rejected the plurality’s “continuous surface connection” requirement for wetlands, *id.* at 772, noting that it “may be the absence of an interchange of waters . . . that makes protection of wetlands critical to the statutory scheme,” *id.* at 775. According to Justice Kennedy, wetlands “come within the statutory phrase ‘navigable waters’” if they share a “significant nexus” with a traditionally navigable water – meaning the wetlands, “either alone or in combination with” other similarly situated wetlands, “significantly affect the chemical, physical, and biological integrity” of a traditionally navigable water. *Id.* at 779-80.

47. The four dissenting Justices in *Rapanos* similarly rejected the plurality’s “revisionist reading” of the Clean Water Act. *Id.* at 793 (Stevens, J., dissenting). For instance, the dissent dismissed the plurality’s purportedly textual argument that the Act

protects streams that flow year-round but not streams that flow ephemerally, because “common sense and common usage” demonstrate that both are “streams” and thus “waters.” *Id.* at 801. The dissent also pointed out that the plain meaning of “adjacent” – defined as “[l]ying near, close, or contiguous; neighboring; bordering on” – contradicted the plurality’s assertion that wetlands can only be “adjacent” if they have “a continuous surface connection” to another water. *Id.* at 805-06 (quoting Webster’s New Int’l Dictionary at 32 (2d ed.) and adding emphasis).

48. Since *Rapanos*, circuit courts either have held that Justice Kennedy’s test alone controls whether a water is a “water of the United States,” or have held that a water is a “water of the United States” if it satisfies *either* Justice Kennedy’s significant-nexus standard *or* the plurality’s test. The First Circuit has adopted the latter approach. See *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006). Not one federal circuit court has limited the Clean Water Act’s protections to waters that satisfy only the plurality’s narrow test.

49. In the wake of *Rapanos*, EPA and the Army Corps issued guidance (the *Rapanos* Guidance) to agency staff explaining that they would assert jurisdiction over waters that satisfied either the *Rapanos* plurality opinion or Justice Kennedy’s “significant nexus” test. According to the Agencies, this meant that they would categorically assert jurisdiction over traditional navigable waters, “relatively permanent” tributaries of traditional navigable waters, and “adjacent” wetlands that directly abut those waters.

50. The *Rapanos* Guidance also required the Agencies to assert jurisdiction over non-“relatively permanent” waters and non-abutting “adjacent” wetlands on a case-by-case basis if the Agencies determined that they “significantly affect the chemical, physical, and biological integrity” of downstream navigable waters, using hydrological and ecological considerations.

The Clean Water Rule clarified which waters qualify as “waters of the United States” based on their “significant nexus” to navigable waters

51. Although the *Rapanos* Guidance was intended to provide more clarity following the Supreme Court’s opinion in that case, the Agencies’ heavy reliance on case-by-case determinations to assess Clean Water Act coverage created uncertainty as well as the potential for inconsistent findings regarding the Act’s application. *See* 80 Fed. Reg. 37,054, 37,057 (June 29, 2015). These fact-bound determinations were also time consuming and resulted in underenforcement of the law.

52. The Agencies responded to this confusion by promulgating the Clean Water Rule in June 2015 to clarify the definition of “waters of the United States.” The rulemaking began in 2011 and took four years to complete. The public comment period resulted in more than one million comments, the substantial majority of which supported the rule. *Id.*

53. The Clean Water Rule identified Justice Kennedy’s “significant nexus” test as the “key” to the Agencies’ interpretation of the Act. *Id.* at 37,060. The Clean Water Rule thus concluded that waters were “waters of the United States” “if they, either

alone, or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters.” *Id.*

54. As part of the rulemaking, the Agencies prepared a voluminous report (the Connectivity Report) that summarized over one thousand peer-reviewed scientific publications on the connections between streams, wetlands, and downstream waters. *Id.* at 37,057. The draft Connectivity Report was peer reviewed by an expert panel created by EPA’s Science Advisory Board. *Id.* The Science Advisory Board was highly supportive of the Report’s conclusions. *Id.* at 37,062.

55. The Connectivity Report reached a number of “major conclusions” that informed the Agencies’ interpretation of the phrase “waters of the United States.” *Id.*

56. First, the Report concluded that “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers” and “exert a strong influence on the integrity” of those waters. Connectivity Report at ES-2. According to the Report, the scientific evidence of the downstream effects of ephemeral streams was “strong and compelling.” *Id.* at ES-7.

57. Second, the Connectivity Report concluded that the literature shows that wetlands, lakes, and ponds located in floodplains are “highly connected to streams and rivers,” because they perform functions that “improve downstream water quality,” even if there is an infrequent surface connection between the waters. *Id.* at 4-39, ES-2. According to the Report, even wetlands “that rarely flood can be important because of long-lasting effects on streams and rivers.” *Id.* at 4-39. Floodplain wetlands also store

large amounts of stormwater, sediment, and contaminants that could otherwise harm downstream water quality. *Id.* at ES-3.

58. Finally, the Connectivity Report concluded that non-floodplain wetlands, lakes, and ponds can influence downstream water quality by storing floodwater and serving as “sinks” that stop and transform pollutants that would otherwise flow into downstream waters. *Id.* at ES-3 to ES-4, ES-10 to ES-11; *see also id.* at 4-42 to 4-43 (noting that where wetlands perform this sink function, their impact on downstream waters stems from their “isolation, rather than their connectivity” to those waters).

59. Based on this scientific evidence of the substantial connections between streams, wetlands, and downstream waters, the Clean Water Rule restored categorical protections for all “tributaries” and for all waters, including wetlands, “adjacent” to other jurisdictional waters. 33 C.F.R. § 328.3(a)(1)-(6) (2015). Tributaries were defined as waters – whether perennial, intermittent, or ephemeral – that contribute flow to a navigable water and that have a “bed and banks and an ordinary high water mark.” *Id.* § 328.3(c)(3) (2015). Adjacent waters included those located within 100 feet of, or within the 100-year floodplain and 1,500 feet of, a protected water. *Id.* § 328.3(c)(1)-(2) (2015).

60. The Agencies determined that the science showed these waters had the requisite “significant nexus” to downstream navigable waters and thus qualified as “waters of the United States” under the Clean Water Act. 80 Fed. Reg. at 37,055, 37,058, 37,068-71. For instance, the Agencies found that a bed, banks, and an ordinary high water mark – required by the Clean Water Rule’s definition of “tributary” – demonstrate “sufficient volume, frequency, and flow” to establish that the connection to

downstream waters is “significant.” *Id.* at 37,058, 37,076. Likewise, the Agencies found that “adjacent” waters, as defined by the rule, function together to “significantly affect the chemical, physical, or biological integrity” of traditionally navigable waters. *Id.* at 37,069-70; *see id.* at 37,058.

61. In addition to waters within the categories described above, the Clean Water Rule allowed certain other waters to qualify as “waters of the United States” if a case-specific analysis showed that they had a “significant nexus” to downstream navigable waters. 33 C.F.R. § 328.3(a)(7)-(8) (2015).

62. After the Agencies published the Clean Water Rule, various parties challenged the rule in different district courts across the country. Two of those district courts denied motions to preliminarily enjoin the Clean Water Rule, *see Ohio v. EPA*, No. 15-cv-2467, 2019 WL 1368850, at *1 (S.D. Ohio Mar. 26, 2019); *Oklahoma ex rel. Hunter v. EPA*, No. 15-cv-0381, 2019 WL 2288446, at *7 (N.D. Okla. May 29, 2019), while three district courts entered regionally limited preliminary injunctions of the rule, *see North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018); *Texas v. EPA*, No. 15-cv-00162, 2018 WL 4518230, at *1-2 (S.D. Tex. Sept. 12, 2018). Two of those courts subsequently granted summary judgment to the plaintiffs on certain claims, but both courts declined to vacate the rule. *See Texas v. EPA*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1382-83 (S.D. Ga. 2019).

The Trump administration has made multiple illegal attempts to dismantle the Clean Water Rule and curtail the Clean Water Act's protections

63. As soon as President Trump took office, his administration moved to dismantle the Clean Water Rule and replace it with a new rule that would appease industry groups long opposed to strong federal protections for the country's waters.

64. In February 2017, President Trump signed an executive order requiring EPA and the Army Corps to propose a rule "rescinding or revising" the Clean Water Rule. Exec. Order No. 13,778 § 2(a) (Feb. 28, 2017). The order directed the Agencies to "consider interpreting the term 'navigable waters' . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*." *Id.* § 3.

65. Following President Trump's directive, the Agencies began to dismantle the Clean Water Rule on multiple illegal fronts.

66. First, the Agencies proposed repealing the Clean Water Rule and replacing it with the pre-2015 regulatory regime. *See* 82 Fed. Reg. 34,899, 34,900 (July 27, 2017). The final rule repealing the Clean Water Rule became effective two years later on December 23, 2019. *See* 84 Fed. Reg. 56,626 (Oct. 22, 2019). Many parties have brought legal challenges to the repeal rule, including Plaintiff NRDC. *See, e.g.,* Compl., S.C. *Coastal Conservation League v. Wheeler*, 2:19-cv-03006-DCN (D.S.C. Oct. 23, 2019).

67. Second, while the Agencies' repeal proposal was pending, the Agencies issued a regulation suspending the Clean Water Rule for two years. *See* 83 Fed. Reg. 5200 (Feb. 6, 2018). But two different courts struck down and vacated that suspension as illegal. *See Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196, at *7

(W.D. Wash. Nov. 26, 2018); Order, *S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-00330-DCN (D.S.C. Dec. 4, 2018), ECF No. 89.

68. Third, the Agencies proposed replacing the Clean Water Rule with an entirely new rule – the Navigable Waters Rule. When proposing the Navigable Waters Rule, EPA Administrator Wheeler announced that the Agencies had “fulfill[ed] the president’s objective”: to get rid of federal regulations so that “Americans,” i.e., businesses, can more easily “develop, build, and invest in projects.” In other words, the Rule makes it easier for developers to pave over and pollute waters by removing the federal government’s authority to protect those waters.

The Proposed Rule and the Comment Process

69. The Agencies published the proposed Rule on February 14, 2019. 84 Fed. Reg. 4154 (Feb. 14, 2019). Public comments on the proposal were due 60 days later, on April 15, 2019. *Id.*

70. The Agencies’ proposal was a significant departure from their prior policies, including the Clean Water Rule. The proposal categorically removed Clean Water Act protections for many waters, such as ephemeral (i.e., rain-dependent) streams and many floodplain wetlands, that the Agencies had protected under the Act for decades.

71. Preliminary estimates conducted by the Agencies in 2017 suggested that the proposed Rule could result in a large proportion of streams and wetlands across the country losing Clean Water Act protections. Specifically, the Agencies estimated (according to national datasets) that at least 18% of the country’s streams are ephemeral,

and thus would no longer be protected under the Agencies' proposal. Other record documents indicated that this was an underestimate of the amount of streams that would lose protection under the Agencies' proposal "because the actual percentage of ephemeral streams across the country is likely higher than 18 percent." Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States," at 40 (Dec. 11, 2018). In their 2017 preliminary analysis, the Agencies also estimated that removing protections for wetlands not directly touching another "water of the United States" would exclude about half of the country's wetlands.

72. Despite these indications that a significant proportion of the country's waters could lose protection under the Agencies' proposal, the Agencies did not meaningfully assess, or take into account, the water quality impacts of their unprecedented narrowing of the Clean Water Act when redefining "waters of the United States."

73. Many public comments expressed concern about the Agencies' failure to adequately assess the proposed Rule's impacts on water quality, citing evidence indicating that those impacts could be significant. Comments expressed particular concern about the proposed Rule's consequences in the arid West, where the Agencies had previously estimated (based on national datasets) that about 39% of streams are ephemeral.

74. Numerous public comments also expressed concern about the lack of scientific support for the proposed Rule. For instance, these comments explained that interpreting the phrase "waters of the United States" as excluding ephemeral streams

and many floodplain wetlands would be inconsistent with the 2015 Connectivity Report's conclusions that these waterbodies significantly impact the quality of navigable waters.

75. Concerns about the lack of scientific support for the proposed Rule also came from former members of the Science Advisory Board's panel that had reviewed the Connectivity Report. These scientists informed the Agencies that the proposed Rule "ignores or misrepresents much of the Connectivity Report and subsequent SAB review" and "draws incomplete or incorrect conclusions," and is therefore "inconsistent with the best available and most current science." As a result, they cautioned that the proposed Rule "would have severe and long-lasting negative consequences for water protection and environmental conditions throughout the U.S."

76. EPA's current Science Advisory Board similarly advised EPA that the Agencies' proposed rulemaking both neglected and departed from established science. In October 2019, the Science Advisory Board provided Administrator Wheeler with a draft commentary on the proposed Rule, which concluded that the proposal was not "consistent with established EPA recognized science" because, among other things, the proposal "fail[ed] to protect ephemeral streams and wetlands which connect to navigable waters below the surface."

77. At a public meeting on January 17, 2020, the Science Advisory Board announced that it planned to revise its commentary on the proposed Rule the following week. However, the Agencies did not wait for the Science Advisory Board's revised

commentary. Instead, Defendants Wheeler and James signed the final Rule on January 23, 2020, before the Board provided EPA with their final commentary.

78. The Science Advisory Board's final comments on the proposed Rule concluded that it "does not incorporate the best available science," is "inconsistent with the body of science previously reviewed by [the Board]," and "lacks a scientific justification, while potentially introducing new risks to human and environmental health."

The Navigable Waters Rule

79. The Navigable Waters Rule defines "waters of the United States" as: (1) the "territorial seas" and other traditionally navigable waters; (2) "[t]ributaries" of such waters; (3) certain "[l]akes and ponds, and impoundments of jurisdictional waters"; and (4) wetlands "[a]djacent" to other jurisdictional waters (other than waters that are themselves wetlands). 33 C.F.R. § 328.3(a); 85 Fed. Reg. 22,250, 22,273 (Apr. 21, 2020). All other waters are categorically excluded from the definition of "waters of the United States." 33 C.F.R. § 328.3(b).

Tributaries

80. The Rule defines a "tributary" as a "river, stream, or similar naturally occurring surface water channel that contributes surface water flow to [a traditionally navigable water] in a typical year either directly or through one or more [jurisdictional] waters." *Id.* § 328.3(c)(12).

81. A "tributary" must be "perennial or intermittent" in a "typical year." *Id.*

82. A stream is “perennial” under the Rule if it flows “continuously year-round.” *Id.* § 328.3(c)(8).

83. A stream is “intermittent” under the Rule if it flows “continuously during certain times of the year and more than in direct response to precipitation.” *Id.* § 328.3(c)(5). The Rule says that an example of an “intermittent” stream is one that flows “seasonally when the groundwater table is elevated or when snowpack melts.” *Id.*

84. A stream is “ephemeral” and therefore not considered a “tributary” under the Rule if it flows “only in direct response to precipitation,” such as “rain” or “snow fall.” *Id.* § 328.3(c)(3).

85. An “intermittent” or “perennial” stream remains a protected “tributary” under the Rule if it contributes surface flow to a downstream navigable water in a “typical year” through certain types of non-jurisdictional features, such as ephemeral streams, debris piles, boulder fields, or certain underground features like tunnels or subterranean rivers. *Id.* § 328.3(c)(12); 85 Fed. Reg. at 22,277.

Adjacent Wetlands

86. Under the Rule, wetlands are “waters of the United States” only if they are “[a]djuvant” to other jurisdictional waters (except waters that are themselves wetlands). 33 C.F.R. § 328.3(a)(4).

87. The Rule defines “adjacent wetlands” as wetlands that: (i) “abut,” meaning they “touch at least at one point or side of,” another jurisdictional water (other than a wetland); (ii) “are inundated by flooding from” another jurisdictional water (other than a wetland) in a “typical year”; (iii) are separated from another jurisdictional

water (other than a wetland) “only by a natural berm, bank, dune, or similar natural feature”; or (iv) are separated from another jurisdictional water (other than a wetland) by an “artificial dike, barrier, or similar artificial structure,” but only if the structure allows for a “direct hydrologic surface connection” between the waters in a “typical year.” *Id.* § 328.3(c)(1).

88. The preamble to the Rule contends that wetlands separated from another jurisdictional water by a “natural berm, bank, dune, or other similar natural feature” are “adjacent” wetlands because those natural features “are evidence of a dynamic and regular direct hydrologic surface connection” between the jurisdictional water and the wetland. 85 Fed. Reg. at 22,307.

89. A wetland is not “adjacent” under the Rule if it contributes surface flow to a navigable water only via flooding or “sheet flow,” such as surface runoff during storm events, even if those surface connections occur in a “typical year.” *Id.* at 22,310.

Lakes and Ponds

90. Lakes, ponds, and impoundments of jurisdictional waters are “waters of the United States” under the Rule if they “contribute surface water flow to a [navigable] water” through another jurisdictional water in a “typical year,” or are “inundated by flooding from” another jurisdictional water (except wetlands) in a “typical year.” 33 C.F.R. § 328.3(c)(6).

91. Lakes, ponds, and impoundments of jurisdictional waters remain “waters of the United States” if they contribute surface flow to a downstream jurisdictional water in a “typical year” through certain types of non-jurisdictional features, such as

ephemeral streams, debris piles, boulder fields, or certain underground features like tunnels or subterranean rivers. *Id.*; 85 Fed. Reg. at 22,277.

The Navigable Waters Rule is arbitrary and capricious

The Agencies failed to meaningfully consider the impacts of the Navigable Waters Rule on the nation's water quality

92. The record evidence, including the Agencies' own preliminary analysis, shows that the Navigable Waters Rule removes Clean Water Act protections from a significant number of streams and wetlands across the country. *See supra* ¶¶ 71-73.

93. The undisputed scientific evidence in the record also shows that the streams and wetlands no longer protected under the Rule significantly impact the quality of downstream navigable waters. *See supra* ¶¶ 56-58.

94. Thus, as many commenters emphasized, the Rule is likely to have significant detrimental impacts on the quality of waters across the country, which in turn will have negative consequences for members of the public who rely on these waters for drinking water, recreational activities, or other purposes, or who live near waters that will be at increased risk of flooding due to the Rule. Loss of wetlands and poorer water quality as a result of the Rule will also have negative impacts on fish, birds, and other wildlife that depend on these waters for food or habitat.

95. The Agencies failed to adequately consider these potential water quality impacts when redefining the phrase "waters of the United States" in the Navigable Waters Rule.

96. The Agencies claim that the Rule “strikes a better balance” between the Clean Water Act’s objective to protect water quality and other purported policy goals of the statute. But the Agencies do not explain how they could strike this “balance” without adequately evaluating the Rule’s harm to water quality that they were supposedly “balancing” against other priorities.

97. Because the sole objective of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), the Rule’s impact on water quality is the most important factor that the Agencies were required to consider when promulgating the Rule. The Agencies’ failure to meaningfully consider this factor was arbitrary and capricious.

The Agencies’ findings in the Navigable Waters Rule contradict their prior findings without justification

98. The definition of “waters of the United States” in the Navigable Waters Rule excludes many waters that the Agencies previously found to have significant effects on downstream water quality. The Agencies do not reasonably explain why they ignored those prior findings, and drew conclusions that directly contradict those prior findings without justification.

99. For example, the Rule declares that ephemeral streams (i.e., streams that flow only in response to rain or snowfall) are not “waters of the United States.” In justifying this exclusion, the Agencies suggest that ephemeral streams provide only “speculative or insubstantial functions” to downstream navigable waters and that

their “consequences” for downstream water quality are not significant enough to warrant federal protection. 85 Fed. Reg. at 22,288 (quoting 80 Fed. Reg. at 37,090).

100. However, excluding ephemeral streams on these grounds directly contradicts, with no reasoned explanation, findings that the Agencies made in promulgating the Clean Water Rule. For example, when promulgating the Clean Water Rule, the Agencies found that ephemeral streams can have “substantial consequences” on the integrity of downstream waters, 80 Fed. Reg. at 37,064, and “if these waters are polluted or destroyed, there is a significant effect downstream,” *id.* at 37,056. These factual findings were supported by scientific evidence. The Agencies do not dispute that scientific evidence or reasonably explain why they are disregarding their prior findings, which were based on that scientific evidence. The Agencies’ failure to provide a reasoned explanation for disregarding prior findings is arbitrary and capricious.

101. The Navigable Waters Rule also declares that wetlands are not “waters of the United States” if they are inundated by flooding from a jurisdictional water less frequently than a “typical year.” The Agencies explain that they have adopted this policy in part to “ensure[] that a sufficient surface water connection occurs and that the connection is not merely ‘possible’ or ‘speculative.’” 85 Fed. Reg. at 22,310. However, that conclusion again contradicts the Agencies’ science-based findings in promulgating the Clean Water Rule that wetlands lying near jurisdictional waters have “significant” connections to such waters even if they lack a regular surface-water connection. 80 Fed. Reg. at 37,058. The Agencies do not explain why these “significant” connections, based on undisputed scientific evidence, are now too “speculative.”

102. Elsewhere in the Navigable Waters Rule, the Agencies similarly exclude waters from the definition of “waters of the United States” based on the Agencies’ findings that they have “insubstantial” or “speculative” connections to navigable waters, which directly contradict the Agencies’ prior findings made in support of the Clean Water Rule without justification.

The Agencies’ claim that the Navigable Waters Rule is “informed” by science runs counter to the evidence

103. The Agencies claim that they “relied on” science to “inform” their new definition of “waters of the United States” in the Navigable Waters Rule, 85 Fed. Reg. at 22,288, but that claim is contradicted by the record.

104. For example, contrary to the Agencies’ assertions, there is no scientific support for their decision to categorically exclude all ephemeral streams from the Rule’s definition of “waters of the United States.” The Agencies assert that their decision is based in part on the “connectivity gradient” between waters – a conceptual model developed by EPA’s Science Advisory Board as part of its review of the draft Connectivity Report in 2014. According to the Agencies, the “connectivity gradient” supports their decision to remove protections from all ephemeral streams because it “depicts a decreased ‘probability that changes . . . will be transmitted to downstream waters’ at flow regimes less than perennial and intermittent.” *Id.* at 22,288 (alteration in original) (citation omitted). However, the evidence belies the Agencies’ assertion.

105. More than a dozen former members of the Science Advisory Board panel responsible for reviewing the Connectivity Report publicly denounced the Agencies as

“misrepresenting” the connectivity gradient concept to draw conclusions “not supported by the science.”

106. As those scientists explained in their comments to the proposed Rule, the Agencies ignore the fact that ephemeral streams, while individually less likely to transmit pollutants to downstream waters compared to perennial streams, are “often extremely abundant and widespread.” Because of their aggregate effects, the science shows that “destroying or degrading . . . ephemeral streams can have drastic effects for watersheds, water quality, water supply, and key organisms like fish.”

107. The Agencies similarly assert that the Rule’s definition of protected “adjacent” wetlands – which excludes wetlands unless they “abut” or have other limited surface-water connections to jurisdictional waters in a “typical year” – is “informed” by science. But, again, the undisputed scientific evidence contradicts that assertion.

108. For example, the Agencies claim that their decision is supported by scientific evidence that wetlands “closer to rivers and streams” are more likely to be connected to those waters than wetlands that are farther away. *Id.* at 22,314 (quoting Connectivity Report at ES-4). However, this evidence does not provide support for the Rule that the Agencies promulgated. The Rule protects *only* wetlands that directly “abut” or have specified surface-water connections to streams and rivers – not all wetlands that are close to those waters. In fact, the Agencies’ “abutting” and surface-water-connection requirements are inconsistent with the established scientific evidence that wetlands that do not satisfy those requirements – such as wetlands that connect to

streams and rivers below the surface – are significantly connected to those waters because they improve water quality.

109. The Agencies also claim that they used science to “inform” other parts of the Navigable Waters Rule, but there is no scientific support for many of their conclusions. For instance, the Agencies claim that science supports their decision to protect wetlands separated from jurisdictional waters by a single natural feature, like a dune, as “inseparably bound up with” those waters. *Id.* at 22,271. But the Agencies give no support for their implicit, corollary conclusion that similarly-situated but excluded wetlands – like those separated by *two* dunes – are not just as “inseparably bound up.”

110. EPA’s Science Advisory Board expressed significant concern about the lack of scientific support for the Rule, as well as the Agencies’ decision to disregard the established science.

111. Many members of the public also expressed concern about the Rule’s lack of scientific justification and the Agencies’ misrepresentations of well-established science. However, the Agencies did not adequately address or respond to those significant and relevant comments.

The Agencies do not reasonably explain their decision to exclude certain waters from the definition of “waters of the United States”

112. The Agencies’ decisions to exclude certain waters from the Rule’s definition of “waters of the United States” are not reasonably explained because they are internally inconsistent, conclusory, and/or illogical.

113. For instance, the Agencies declare that wetlands are “waters of the United States” if they are inundated by flooding from another jurisdictional water in a “typical year,” because these wetlands have a “direct hydrologic surface connection” to the jurisdictional water “during the flood event.” *Id.* at 22,310. However, if a direct hydrological surface connection in a “typical year” occurs in the opposite direction—*from* the wetland *to* the jurisdictional water—the Agencies conclude that the wetland does not qualify as a “water of the United States.” *Id.* The Agencies do not provide a reasonable explanation for treating these wetlands differently.

114. There is also no reasonable explanation for the Agencies’ decision that ephemeral streams are not “waters of the United States,” given, for instance, the Agencies’ conclusion that other jurisdictional waters are protected under the Clean Water Act when they are connected to navigable waters via ephemeral streams. The Agencies explain that an ephemeral stream does not sever the jurisdiction of an upstream water because ephemeral streams provide a “regular and predictable surface water connection” and “allow[] such waters to connect and become indistinguishable when flowing (*i.e.*, they look like one water).” *Id.* at 22,302, 22,278. The Agencies do not explain how these findings are consistent with their conclusion that ephemeral streams do not qualify as “waters” under the Act and supposedly have insufficient connections to downstream navigable waters.

115. The Agencies further claim that it makes “practical sense” to exclude waters connected to navigable waters via groundwater because “groundwater [itself] is not jurisdictional.” *Id.* at 22,278. Yet the Agencies do not explain how that rationale is

consistent with their finding that waters connected to navigable waters via other non-jurisdictional features, such as ephemeral streams, boulder fields, debris piles, and certain “subsurface connections,” are protected by the Act.

116. The Agencies similarly fail to provide reasoned explanations for excluding other waters from the definition of “waters of the United States.” For example, the Agencies repeatedly assert that the Rule excludes certain waters because the Agencies have concluded that such waters are “more appropriately regulated by States and Tribes.” However, these repeated assertions are conclusory, circular, and made without reasonable explanations.

The Agencies claim that the Navigable Waters Rule promotes “clarity,” but the Rule is riddled with unclear terms that will create confusion, unpredictability, and uncertainty

117. The Navigable Waters Rule also includes ambiguous and undefined terms that will create confusion and make the Rule extremely difficult to implement. These unclear terms and near-certain implementation problems contradict the Agencies’ assertion that their new definition of “waters of the United States” will promote “clarity,” “predictability,” and “certainty” for the Agencies and the regulated community. *Id.* at 22,318.

118. For example, the Agencies’ own statements demonstrate that it will be difficult to distinguish between “intermittent” streams (which are protected) and “ephemeral” streams (which are unprotected), undermining the Agencies’ claims that the Rule’s definitions of these terms provide a “clear regulatory line between jurisdictional and excluded waters.” *Id.* at 22,288.

119. According to the Agencies, the Rule's definition of "ephemeral" streams means streams that flow in response to "individual precipitation events," while the definition of "intermittent" means streams that flow in response to an "accumulation of precipitation." However, the Agencies' own attempt to differentiate between these types of streams shows that the "regulatory line" is far from "clear": "A foot of new snow fall on the high plains of southern Wyoming in May will typically melt quickly under the intense sun of subsequent days, while a foot of snow in northern Wisconsin in January will likely contribute to seasonal snowpack that may not melt until spring thaw. The first scenario *is more likely* to cause ephemeral flow, the second *is more likely* to cause intermittent flow." *Id.* at 22,276 (emphases added).

120. Despite the lack of clarity as to whether a stream qualifies as "intermittent" or "ephemeral" under the Rule, the Agencies nonetheless dismiss concerns that it will be difficult to tell these waters apart, explaining that "scientists, environmental consultants, and other water resource professionals, including agency staff, have used the terms 'perennial,' 'intermittent,' and 'ephemeral' for decades in the field." *Id.* at 22,293. However, the Agencies acknowledge that the Rule's definitions of "intermittent" and "ephemeral" are *different* from the "generally-accepted scientific definitions," as well as from how the Agencies have defined these waters in the past. *Id.* The Agencies do not explain how the Rule's novel definitions of "ephemeral" and "intermittent" will be easy to implement.

121. The sheer number of tools and datasets that the Agencies intend to use to distinguish between "intermittent" and "ephemeral" streams also undermines the

Agencies' claims of efficiency, clarity, and predictability, and contradicts the Agencies' claim that these tools are "generally available for the public to use" such that regulated parties can easily determine whether a water is protected without needing to involve the Agencies. *Id.* at 22,292. The tools identified by the Agencies include, among other things, "stream gage data," "elevation data," "historic or current water flow records," "flood predictions," "statistical evidence," "aerial imagery," "remote sensing information," "local flow data collected by government agencies," "trapezoidal flumes," "pressure transducers," "streamflow duration assessment methods," "mapping sources," "photographs," "regional regression analysis," "topographic data," and "modeling tools" developed by academia, the government, and other stakeholders. *Id.* at 22,292-94.

122. The Agencies do not make clear which of these tools are currently available and which of them will require the Agencies to rely on data that do not yet exist, raising further implementation challenges. While the Agencies assert that they will be able to distinguish between "intermittent" and "ephemeral" streams "using readily available resources," they contradictorily acknowledge that implementation will involve "the development of new tools." *Id.* at 22,293; *see also id.* at 22,294.

123. Also problematic is the "typical year" concept, which serves as the Rule's lynchpin for deciding whether certain waters receive Clean Water Act protections. For instance, a stream must be "intermittent" in a "typical year" to qualify as a "water of the United States" under the Rule. 33 C.F.R. § 328.3(a)(2), (c)(12). Additionally, a wetland,

lake, pond, or impoundment can be a “water of the United States” if it is inundated by flooding, but only if that flooding occurs in a “typical year.” *Id.* § 328.3(c)(1)(ii), (c)(6).

124. The Rule defines a “typical year” as “when precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.” *Id.* § 328.3(c)(13).

125. Although the Agencies claim that the “typical year” requirement will provide a “predictable framework” for implementing the Rule, 85 Fed. Reg. at 22,273-74, there is no support for that claim.

126. For instance, the Rule never defines “geographic area” in the “typical year” definition. Although the Agencies say that watershed boundaries “should be a consideration” in defining a “geographic area,” they provide no guidance on what other types of boundaries could be used, while conceding that climate records may not be available for certain watersheds. *Id.* at 22,275.

127. Another problematic aspect of the “typical year” definition is the Agencies’ reliance on a “rolling thirty-year period.” A thirty-year average means that the “typical year” will skew towards historical conditions that may no longer accurately represent today’s climate. The Agencies do not adequately consider whether they can reasonably determine a “typical year” based on a rolling thirty-year average of data, given that significant changes in the climate have occurred in recent years and are likely to continue, and even accelerate, in the future.

The Navigable Waters Rule is inconsistent with the text, structure, and purpose of the Clean Water Act

128. The definition of “waters of the United States” in the Navigable Waters Rule is inconsistent with the text, structure, and purpose of the Clean Water Act.

129. The Agencies justify their decision to remove Clean Water Act protections from ephemeral streams and various wetlands by claiming that their interpretation of “waters of the United States” is consistent with the Clean Water Act. However, that justification cannot stand. The Agencies’ interpretation of the Act is based almost entirely on the four-Justice plurality opinion in *Rapanos*. But five Supreme Court Justices held that the *Rapanos* plurality’s interpretation of the Clean Water Act was untethered from the text, structure, and purpose of the statute. *See supra* ¶¶ 45-47. The Agencies’ Rule violates the statute for the same reasons.

130. For example, the Agencies claim that they are removing Clean Water Act protections for all “ephemeral” streams because they have determined, based on the *Rapanos* plurality opinion, that streams must have “relatively permanent” flow to qualify as “waters” under the Act. 85 Fed. Reg. at 22,273, 22,288-89. But that reasoning was properly rejected by both Justice Kennedy and the four dissenting Justices in *Rapanos* because it has no statutory support. *See, e.g., Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment) (explaining that the “relatively permanent” requirement makes little sense, considering the “merest trickle, if continuous,” would be protected, “while torrents thundering at irregular intervals” would not).

131. Similarly, based on the *Rapanos* plurality opinion, the Agencies conclude that non-abutting wetlands are excluded from the Act unless they have certain types of regular surface-water connections to other jurisdictional waters. Again, that reasoning has no statutory support.

132. The Agencies also unreasonably exclude streams and wetlands that “significantly affect the chemical, physical, and biological integrity” of downstream waters. *Id.* at 779-80 (Kennedy, J., concurring in the judgment). As Justice Kennedy made clear in *Rapanos*, and as the Court recognized in *SWANCC* and *Riverside Bayview*, because the purpose of the Clean Water Act is to protect the integrity of the nation’s waters, it is unreasonable to interpret “waters of the United States” under the Act in a way that ignores impacts on water quality.

133. The Agencies also try to justify their narrow interpretation of the phrase “waters of the United States” by claiming that it effectuates the statute’s “policy” of recognizing and preserving the “primary responsibilities and rights” of states over their water resources. 85 Fed. Reg. at 22,287-88 (quoting 33 U.S.C. § 1251(b)). However, the Agencies misinterpret this “policy.” Section 1251(b) recognizes the states’ primary role in *implementing* the Clean Water Act; it does not limit the scope of the Act’s protections.

134. Further, the Agencies offer no principled way for this “policy” to divide “waters of the United States” from “state waters.” The “policy” of state responsibility in the abstract does not give the Agencies license to eliminate federal protections for certain categories of waters simply because the Agencies declare, arbitrarily, that those waters should be regulated by the states.

The Navigable Waters Rule harms Plaintiffs' members

135. Plaintiffs bring this action on behalf of their members with interests in waters that have lost Clean Water Act protections under the Navigable Waters Rule.

136. The Rule harms Plaintiffs' members because it denies the protection of the Clean Water Act to these water resources, creating a substantial risk that they will be polluted, destroyed, or otherwise degraded.

137. Plaintiffs' members use, enjoy, and benefit from waterbodies, such as larger rivers and lakes, that are downstream from waters that have lost Clean Water Act protections under the Rule. The Rule creates a substantial risk that these downstream waterbodies will be polluted or degraded. *See supra* ¶¶ 56-58, 94, 106, 108, 132.

138. The quality of both the upstream and downstream waters is of fundamental importance to Plaintiffs' members who use and rely on downstream waters for their enjoyment, drinking water, and livelihoods.

139. These harms to Plaintiffs' members will be redressed by an order vacating the Rule.

Harm to Recreational Interests

140. The Navigable Waters Rule creates a substantial risk that waters on which Plaintiffs' members rely to view wildlife, swim, fish, kayak, canoe, row, raft, hike, and conduct other recreational activities will be polluted or degraded.

141. Ephemeral streams, wetlands, and downstream waterways directly and indirectly provide and support breeding, feeding, or sheltering habitat for wildlife across the nation, including many endangered and threatened species.

142. Wetlands support a diverse range of animals by, for example, acting as integral components of food webs, and providing nesting sites for birds, nursery habitat for amphibians, colonization opportunities for invertebrates, and maturation habitat for insects.

143. Plaintiffs' members enjoy viewing birds, plants, and other wildlife that reside in or otherwise depend on wetlands at risk of being polluted, degraded, and destroyed by the Rule. As a result, there is a substantial risk that Plaintiffs' members' enjoyment of these plants and animals will be diminished.

144. Plaintiffs' members also enjoy viewing species that live in or depend on downstream waters, such as rivers, lakes, streams, and coastal waters, at risk of being polluted or degraded as a result of the Rule.

145. Plaintiffs' members in New England, for instance, enjoy viewing a variety of birds throughout the region, including bald eagles, ospreys, peregrine falcons, and federally endangered piping plovers along the Merrimack River and its tributaries, and bald eagles along the Connecticut River. Plaintiffs' members also enjoy viewing various fish species throughout New England's waterways, including tuna and sunfish at the mouth of the Merrimack River and federally endangered shortnose sturgeons in both the Merrimack and Connecticut Rivers.

146. In New Mexico, Plaintiffs' members enjoy viewing migratory birds, bighorn sheep, beavers, porcupines, and other wildlife in and around waterways like the Rio Grande.

147. In these regions and in other parts of the country, Plaintiffs' members also enjoy hiking along and swimming, rafting, canoeing, kayaking, rowing, and fishing in waters at risk of being polluted or degraded as a result of the Rule.

148. The Navigable Waters Rule creates a substantial risk that Plaintiffs' members' enjoyment of viewing wildlife and conducting other recreational pursuits will be diminished.

Harm to Drinking Water Sources

149. The Rule also harms Plaintiffs' members because it creates a substantial risk that harm will occur to the rivers, lakes, and reservoirs that Plaintiffs' members in New England and other regions of the country, including Illinois and New Mexico, rely on as sources of drinking water.

Harm to Business Pursuits

150. The Navigable Waters Rule also creates a substantial risk that harm will occur to waters on which Plaintiffs' members rely for various business pursuits.

151. Plaintiffs' members, for instance, are outdoor educators, outfitters, and fishing guides, work with the seafood industry, and own hiking and fishing lodges. Each of these businesses depends on safe and clean water.

152. By removing Clean Water Act protections for ephemeral streams, wetlands, and other waters, the Navigable Waters Rule creates a substantial risk of harm to Plaintiffs' members whose businesses and livelihoods rely on waters that are at risk of pollution or degradation as a result of the Rule.

Harm to Property and Community Infrastructure

153. The Navigable Waters Rule creates a substantial risk of harm to Plaintiffs' communities and properties, which will be negatively impacted by the pollution and destruction of ephemeral streams, wetlands, and downstream waters.

154. For instance, Plaintiffs' members in New Mexico rely on the state's unique acequias system – a series of aqueducts and canals – for irrigation and farming on their properties. The Rule creates a substantial risk of harm to these acequias, which are fed by ephemeral streams that are no longer protected by the Clean Water Act under the Rule.

155. Plaintiffs' members' communities are located near waters that are at increased risk of flooding due to the loss of wetland protections as a result of the Rule. If these waters experience more severe flooding, Plaintiffs' members and their communities will suffer.

**FIRST CLAIM FOR RELIEF
(Violation of the APA, 5 U.S.C. § 706)**

156. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs.

157. Under section 706(2)(A) of the APA, a reviewing court must set aside final agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Navigable Waters Rule is arbitrary and capricious and not in accordance with law for a number of reasons.

158. First, the Agencies failed to meaningfully consider the most important aspect of the rulemaking: whether the Rule will frustrate the Clean Water Act's sole objective, which is to protect the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Agencies' failure to adequately consider this factor was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Even if, as the Agencies incorrectly claim, there was insufficient information to assess this crucial factor, it was arbitrary and capricious for the Agencies to promulgate the Rule in the face of such significant uncertainty.

159. The Agencies also do not reasonably explain how they could have "balanced" the Rule's objective to protect water quality with other purported policy objectives without understanding, and thus weighing, the magnitude of the Rule's negative impacts on water quality.

160. Second, the Agencies exclude many waters that, according to the Agencies' own prior findings, significantly impact the quality of traditionally navigable waters. The Agencies disregard those prior findings, while drawing contradictory conclusions about those waters' significance, without justification. Because the Agencies do not give a reasoned explanation for disregarding findings and undisputed facts that underlay a prior policy, the Rule is arbitrary and capricious. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

161. Third, the Agencies claim that the Rule is "informed" by the science, but misrepresent the evidence on which they purport to rely, while ignoring other relevant scientific evidence without any explanation. Although EPA's Science Advisory Board as

well as many public commenters raised concerns about the lack of scientific support for the Rule, the Agencies did not adequately address or respond to those comments.

162. Fourth, the Agencies' decision to exclude certain waters from the definition of "waters of the United States" is neither reasonably explained nor rationally connected to the Agencies' findings.

163. Finally, there is no support for the Agencies' claim that the Rule will promote "clarity," "predictability," and "certainty." To the contrary, the record demonstrates that key aspects of the Rule will create uncertainty and unpredictability.

164. Accordingly, the Navigable Waters Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and must be vacated in accordance with section 706(2)(A) of the APA.

SECOND CLAIM FOR RELIEF
(Violation of the APA, 5 U.S.C. § 706, and Clean Water Act, 33 U.S.C. § 1251 *et seq.*)

165. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs.

166. At President Trump's behest, the Agencies largely modeled their interpretation of "waters of the United States" on the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). But as five Justices concluded, the plurality's constricted interpretation of "waters of the United States" is untethered from the text, structure, and purpose of the Clean Water Act. *Id.* at 776 (Kennedy, J., concurring in the judgment); *id.* at 800 (Stevens, J., dissenting). The Navigable Waters Rule is likewise inconsistent with the text, structure, and purpose of the statute.

167. All federal appellate courts that have decided the issue, including the First Circuit, have concluded that the scope of the Clean Water Act extends beyond waters that satisfy the plurality's narrow interpretation.

168. Congress required the Agencies to protect the "waters of the United States," but the Rule does not protect all "waters of the United States." The Navigable Waters Rule therefore violates the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, is "short of statutory right," and is "not in accordance with law" under the APA, 5 U.S.C. § 706(2)(A), (C).

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

169. Declare that Defendants are each in violation of the Administrative Procedure Act and the Clean Water Act because the Navigable Waters Rule is an arbitrary, capricious, and unlawful rule, as described above;

170. Vacate and set aside the Navigable Waters Rule;

171. Grant Plaintiffs their costs of suit including reasonable attorneys' fees to the extent permitted by law; and

172. Grant Plaintiffs such further relief as the Court may deem necessary or appropriate.

Dated: April 29, 2020

Respectfully submitted,

/s/ Nancy S. Marks

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**Pro hac vice motion pending*

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***Application for admission pending*

Counsel for Conservation Law Foundation, Connecticut River Conservancy, Massachusetts Audubon Society, and Merrimack River Watershed Council

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

See attachment

(b) County of Residence of First Listed Plaintiff Suffolk (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See attachment

DEFENDANTS

See attachment

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question, 4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, LABOR, IMMIGRATION, FORFEITURE/PENALTY, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 5 U.S.C. §§ 702, 706(2)
Brief description of cause: Challenge to unlawful final agency action under the Administrative Procedure Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/29/2020 SIGNATURE OF ATTORNEY OF RECORD /s/ Nancy S. Marks

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Attachment to Civil Cover Sheet

Plaintiffs

Conservation Law Foundation
Connecticut River Conservancy
Clean Wisconsin
Massachusetts Audubon Society, Inc.
Merrimack River Watershed Council
Natural Resources Defense Council, Inc.
New Mexico Wilderness Alliance
Prairie Rivers Network

Defendants

U.S. Environmental Protection Agency
Andrew R. Wheeler, in his official capacity as the Administrator of the U.S.
Environmental Protection Agency
U.S. Army Corps of Engineers
R.D. James, in his official capacity as the Assistant Secretary of the Army (Civil Works)

Plaintiffs' Attorneys

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Conservation Law Foundation v. U.S. Environmental Protection Agency

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

- I. 160, 400, 410, 441, 535, 830*, 835*, 850, 891, 893, R.23, REGARDLESS OF NATURE OF SUIT.
- II. 110, 130, 190, 196, 370, 375, 376, 440, 442, 443, 445, 446, 448, 470, 751, 820*, 840*, 895, 896, 899.
- III. 120, 140, 150, 151, 152, 153, 195, 210, 220, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 367, 368, 371, 380, 385, 422, 423, 430, 450, 460, 462, 463, 465, 480, 490, 510, 530, 540, 550, 555, 560, 625, 690, 710, 720, 740, 790, 791, 861-865, 870, 871, 890, 950.

*Also complete AO 120 or AO 121. for patent, trademark or copyright cases.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES NO

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES NO

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES NO

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES NO

7. Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).

YES NO

A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division Central Division Western Division

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division Central Division Western Division

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES NO

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Nancy S. Marks

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