



August 13, 2018

VIA Email to [OW-Docket@epa.gov](mailto:OW-Docket@epa.gov) and online submission to [www.regulations.gov](http://www.regulations.gov)

U.S. Environmental Protection Agency  
EPA Docket Center  
Office of Water Docket  
Mail Code 28221T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Re: Definition of Waters of United States- Recodification of Pre-Existing Rules (Docket ID No. EPA-HQ-OW-2017-0203; FRL-9980-52-OW)**

To Whom It May Concern,

Buffalo Niagara Waterkeeper (“BNW”) submits the following comments on the United States Environmental Protection Agency (“EPA”) and Department of Defense, Department of the Army, Corps of Engineers (“Corps”) (jointly the Agencies) Supplemental Notice of Proposed Rulemaking entitled, “Definition of the Waters of the United States- Recodification of Pre-Existing Rules,” 83 Federal Register 32227 (July 12, 2018) (hereinafter referred to as “Supplemental Notice”).

BNW writes this comment letter to oppose the substance of the 2015 Proposed Rule and the 2018 Supplemental Notice as well as the deficient public process of the latter. BNW is a community-based organization committed to the restoration and preservation of waterways in Western New York State. In addition, BNW is a member of the Waterkeeper Alliance, a group of more than 300 Waterkeeper organizations and affiliates.

Substantively, these proposed changes create a potential for direct harm to essential waterways in the Niagara River/Lake Erie Watershed within the Western New York Region. The small waterways that risk being removed from Clean Water Act (“CWA”) jurisdiction under the proposed Rule are vital to the health of the Great Lakes system. Removing CWA protections for headwaters and those waterways further removed from a traditional navigable water creates an opportunity for increased pollution to be discharged into these waterways. This pollution will flow downstream into the Great Lakes, which provide drinking water for 40 million Americans. This lax environmental approach could open the door for another public health problem in the Great Lakes.

Procedurally, the Supplemental Notice lacks a reasoned basis for the repeal of the 2015 rule and although the Agencies’ claim that the Supplemental Notice is intended to clarify, supplement and “provide interested parties an opportunity to comment on certain important considerations and

reasons” for the Proposed Rule, it does not. The Notice does not provide what is legally required to address the Proposed Rule’s deficiencies and comply with the federal CWA, Administrative Procedures Act (“APA”), and National Environmental Policy Act (“NEPA”).<sup>1</sup>

The APA specifically requires a “reasoned explanation” for withdrawing the 2015 Clean Water Rule. None of the documents provided by the Agencies’ provide a clear reasoning. The inclusion of blanket statements asking for comment, “on any other issues that may be relevant to the agencies’ consideration of whether to repeal the 2015 rule”<sup>2</sup> does not cure this deficiency. In addition, under the CWA, the agencies must show that their action is a “permissible construction” under the terms of the Act. This is an affirmative duty of the Agencies’ and yet, the Rule and Supplemental Notice lack sufficient information to meet this bar, as well.

The Agencies’ actions are arbitrary and capricious as they have failed to state their reasoning for repealing the Clean Water Rule and have undergone a flawed public process, which has not allowed for meaningful public review and comment. If the agencies could show a reasoned explanation for their action, then public comment must be taken and answered before the Agencies’ surmise to reinterpret or change an existing law. The inverse, as has been undertaken here, is wholly inappropriate. The Agencies should not move forward with this rule until the above deficiencies are properly cured.

Further, BNW offers this letter to support the following arguments contained in the Waterkeeper Alliance et al. comments to Supplemental Notice EPA–HQ–OW–2017–0203 submitted on August 13, 2018 (“WKA Letter”):

- (1) The Agencies’ Legal Analysis of the CWA, Regulations and Case Law is Erroneous and does Not Provide Adequate Justification to Repeal or Replace the Clean Water Rule
- (2) The Supplemental Notice is Misleading, Vague and Lacks Adequate Information to Evaluate and Provide Meaningful Comments on the Definition the Agency is Actually Adopting

The relevant provision of that WKA letter have been excerpted and attached to these comments as “Attachment 1.”

BNW requests the withdrawal of this proposed Rule

Sincerely,



Margaux J. Valenti, Esq.  
Legal & Programs Advisor

---

<sup>1</sup> National Environmental Policy Act, 42 U.S.C. § 4321 et seq.

<sup>2</sup> Supplemental Notice, 83 Fed. Reg. at 32249

## ATTACHMENT 1

Waterkeeper Alliance et al. Comments to Supplemental Notice EPA–HQ–OW–2017–0203  
(*Excerpted*)

### **The Agencies’ Legal Analysis of the CWA, Regulations and Case Law is Erroneous and Does Not Provide Adequate Justification to Repeal or Replace the Clean Water Rule**

Many of the issues, questions and statements that may “potentially” form the basis for this Proposed Rule are premised on the Agencies’ flawed legal analysis of the CWA and selected case law. Notably, even the Agencies are not convinced that their legal analyses are correct. When discussing the basis for the Proposed Rule, the best the Agencies can muster are equivocal statements to the effect that they are “concerned” that the 2015 Clean Water Rule may exceed the Agencies authority under the CWA, may affect the state-federal balance, and may be supported by erroneous findings and assumptions.<sup>18</sup> All of these concerns, as articulated by the Agencies, are premised on the Agencies’ new erroneous interpretations of the Clean Water Act, implementing regulations and case law.<sup>3</sup>[WKA letter fn. 19]

Without providing any explanation for the Agencies’ extreme departure from their longstanding agency interpretations and positions, including some that have endured at the Agencies and with the courts since the inception of the CWA, the Supplemental Notice set forth erroneous and often misleading descriptions of (1) the legal basis for the Clean Water Rule,<sup>4</sup>[20] (2) the issues and positions of the litigants in cases challenging the Clean Water Rule, (3) the historic scope of and

---

<sup>3</sup>[19] See Previous Comments incorporated by reference herein, supra note 3. Additionally, the Agencies severely misconstrue the plurality and Justice Kennedy’s Opinions in *Rapanos*, particularly with regard to the Agencies positions regarding wetlands and tributaries, and, through partial citation of a quote, the Supreme Court’s holding in *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 385 (2006). The Agencies also erroneously conclude that the plurality and Justice Kennedy in *Rapanos* “agree in principle that the determination must be made using a two-part test that considers: (1) the proximity of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality and Justice Kennedy also agree that the proximity between the wetland and the tributary must be close.” The plurality and Justice Kennedy did not establish a two-part test and the portion of the Supplemental Notice that rely on and evaluate the “second part of the two-part tests established by the plurality and Justice Kennedy” to support this action are arbitrary, capricious and contrary to law.

<sup>4</sup> [20] For example, the Agencies state that they “now believe that they previously placed too much emphasis on the information and conclusions of the Connectivity Report when setting jurisdictional lines in the 2015 Rule, relying on its environmental conclusions in place of interpreting the statutory text and other indicia of Congressional intent to ensure that the agencies’ regulations comport with their statutory authority to regulate.” Supplemental Notice, at 32241. However, the Agencies do not meaningfully explain why they now believe that, what part of the statute or indicia of Congressional intent would cause the to deemphasize the science or exactly how that would change their view of the Clean Water Rule.

bases for CWA jurisdiction, (4) the purpose and meaning of provisions in the CWA itself, (5) selected case law interpreting the Clean Water Act, and (6) Congressional intent regarding the scope and functioning of the CWA. In each of these contexts, the Agencies appear to be signaling a willingness to adopt the legal positions of industry and the states that oppose the 2015 Clean Water Rule in pending litigation, and the Agencies appear to be seeking information and argument through this rulemaking process to justify that extreme and unreasonable shift in the Agencies' position. The previous, and longstanding, view of the Agencies and the positions of other interested parties are not discussed, considered or evaluated in the Supplemental Notice in any meaningful way.

While it is acceptable in certain circumstances for agencies to make policy shifts,<sup>5</sup>[21] it is not permissible for Agencies to reinterpret an entire statute and attempt to narrow its scope contrary to long-standing interpretations in order to achieve policy goals that are contrary to the objective and goals of that statute. Yet it is apparent from the Proposed Rule and this Supplemental Notice that the Agencies are attempting to find some way to reinterpret the CWA and case law to justify repealing and replacing the Clean Water Rule based on the Agencies' erroneous view of the directives of Executive Order 13778.<sup>6</sup>[22]

First, the policy set forth in Section 1 of Executive Order 13778 is that “[i]t is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.”<sup>7</sup>[23] As explained in detail in the previous comments on the Proposed Rule,<sup>8</sup> [24] this policy is not consistent with the policy set forth in the CWA, and reinterpreting the CWA to achieve those policy goals is contrary to law.

To summarize, in 1972 Congress adopted lengthy and complex amendments to the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). This is the central policy Congress established for the CWA that should drive the Agencies’ review and rulemaking process. Accordingly, Congress provided that the CWA applies to all “waters of the United States, including the territorial seas.”<sup>9</sup>[25] The Conference Report accompanying the CWA confirms that Congress intended the phrase “waters of the United States” to be given the broadest possible constitutional interpretation.”<sup>10</sup> [26] The intended

---

<sup>5</sup>[21] See Waterkeeper Alliance et al. Comments on Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA-HQ-OW-2017-0644 (Dec. 13, 2017) and Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), supra note 3.

<sup>6</sup>[22] Executive Order 13778 – Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12497 (2017).

<sup>7</sup> [23] Id. at sections 1 and 2.

<sup>8</sup> [24] Waterkeeper Alliance et al Comments on Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017), supra note 3.

<sup>9</sup> [25] 33 U.S.C. § 1362(7).

<sup>10</sup> [26] S. Rep. No. 92-1236, at 144 (1972).

breadth of the CWA is also apparent in the comprehensive goals, programs and directives in the Act, as well as in the legislative history, administrative decisions and case law interpreting the CWA.<sup>11</sup> [27] In contrast to the policy in Section 1 of Executive Order 13778, the policy Congress established in the CWA is not focused on promoting economic growth, minimizing regulatory uncertainty or pushing a particular ideology regarding states' rights.

Second, Commenters have already provided detailed comments on the scope, goals and relevant provisions of the CWA, case law interpreting the CWA, historic jurisdictional waters, the scope of the 2015 Clean Water Rule, and the proper definition of “water of the United States” on many previous occasions. Previously submitted comments also address the Agencies’ request for comment “on whether the 2015 Rule is consistent with the statutory text of the CWA and relevant Supreme Court precedent, the limits of federal power under the Commerce Clause as specifically exercised by Congress in enacting the CWA, and any applicable legal requirements that pertain to the scope of the agencies’ authority to define the term “waters of the United States.” We therefore urge the Agencies to review and consider those comments, and to revise their view of the law in a manner that is consistent with those comments and the CWA, which are incorporated by reference herein.<sup>12</sup>[28]

In summary, and contrary to the Agencies’ assertion in the Supplemental Notice, as the Supreme Court held in *International Paper Co. v. Ouellette*, the CWA established “an all-encompassing program of water pollution regulation” that “applies to all point sources and virtually all bodies of water.”<sup>13</sup>[29] The Supreme Court, in *United States v. Riverside Bayview Homes, Inc.*, held that Congress took a “broad, systemic view of the goal of maintaining and improving water quality” with the word integrity referring to “a condition in which the natural structure and function of ecosystems [are] maintained” and, the “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’”<sup>14</sup>[30] To accomplish these goals, the Supreme Court in *Bayview* concluded, Congress defined the “waters covered by

---

<sup>11</sup>[27] See also, *Quarles Petroleum Co. v. United States*, 551 F.2d 1201, 1206 (Ct. Cl. 1977) (“In addition, the overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States.”).

<sup>12</sup>[28] See Previous Comments incorporated by reference herein, supra note 3.

<sup>13</sup>[29] *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted). By contrast, the Agencies here appear to wrongly believe that protecting the vast majority of waters in the United States would be contrary to the CWA. See Supplemental Notice, at 32229 and 32248

<sup>14</sup>[30] *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing H.R.Rep. No. 92-911, p. 76 (1972); S.Rep. No. 92-414, at 77 (1972); U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742). The Agencies’ Proposed Rule Notice misconstrues *Bayview* by describing the Opinion as simply one that “deferred to the Corps’ ecological judgment that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 82 Fed. Reg. 34900 (July 27, 2017). The unanimous Supreme Court Opinion in *Bayview* is far more significant in determining the definition of “waters of the United States” than indicated by the Agencies’ description.

the Act broadly” to encompass all “waters of the United States.”<sup>15</sup>[31] Additionally, neither SWANCC nor Rapanos limit or establish the outer bounds of this Commerce Clause authority for purposes of the CWA and the Agencies’ statements to the contrary in the Supplemental Notice are erroneous.<sup>16</sup> [32] Consistent with Congressional intent, EPA (1973)<sup>17</sup> [33] and the Corps (1977)<sup>18</sup> [34] adopted regulations further defining “waters of the United States” for the purposes of the CWA to include broad categories of waters, including ‘other waters’ such as intermittent rivers, streams, tributaries and perched wetlands where the use or destruction could affect interstate commerce, in order to protect the entire aquatic system as opposed to focusing on solely on those waters protected by traditional navigability tests. Those regulations have never been invalidated by any court, which demonstrates the fallacy of the Agencies’ new narrow “potential” view of the law.<sup>19</sup> [35]

Third, contrary to Congressional intent, the plain language of the CWA,<sup>20</sup>[36] regulatory history and case law, the Agencies intend to elevate and transform the significance of a single provision of one section of the CWA, Section 101(b), and somehow balance it against another subsection, Section 101(a), in order to define “waters of the United States” under the CWA. For example, the Agencies assert “[t]o maintain that balance, the agencies must determine what Congress had in mind when it defined “navigable waters” in 1972 as simply “the waters of the United States”—and must do so in light of, inter alia, the policy directive to preserve and protect the states’ rights and responsibilities.”<sup>21</sup>[37] This position is so out of line with the CWA that, in an feeble attempt to support this legally invalid view, the Agencies actually cite part of a subsection of a single provision of the CWA, 33 U.S.C. §1370, and misleadingly quote it as follows: that “nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such

---

<sup>15</sup> [31] *Id.*

<sup>16</sup> [32] In SWANCC, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. See 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in SWANCC, the Supreme Court “expressly declined to reach” the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court “on precisely how to read Congress’ limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion). However, “in *Rapanos* it appears five justices had no constitutional concerns in any event ... [Justice Kennedy] asserted a broad theory of federal authority under the Commerce Clause ...” *Am. Farm Bureau Fed’n v. U.S. E.P.A.*, 792 F.3d 281, 305 (3d Cir. 2015), cert. denied sub nom., *Am. Farm Bureau Fed’n v. E.P.A.*, 136 S. Ct. 1246, 194 L. Ed. 2d 176 (2016) (citing *U.S. v. Rapanos*, 547 U.S. at 777 (Kennedy, J. concurring).

<sup>17</sup>[33] 38 Fed. Reg. 10834 (1973).

<sup>18</sup> [34] 42 Fed. Reg. 37122 (1977).

<sup>19</sup> [35] The Agencies “concern” that the definitions of “tributary” and “adjacent” were too broad and may not have given sufficient effect to the term “navigable” are without support in the law or science. See Supplemental Notice.

<sup>20</sup> [36] The Agencies acknowledge that “Congress established several key policies that direct the work of the agencies to effectuate those goals” but then proceed to disregard all of those policies in favor of their view of Section 101(b). Other provisions and policies are not even discussed in relation to the determining the definition of “waters of the United States.” Supplemental Notice, at 32232.

<sup>21</sup> [37] Supplemental Notice, at 32233.

States.”<sup>22</sup>[38] In actuality, Section 1370 states: Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”<sup>23</sup>[39] Additionally, the Agencies are taking this portion of Section 1370 out of context and interpreting it without regard for its well-established meaning in the overall context of the CWA, and without regard to or evaluation of many other provisions of the CWA that are actually relevant to the intended scope of the CWA.<sup>24</sup>[40]

The CWA does not authorize the Agencies to balance the objective of the Act expressed in Section 101(a) and with one of the policies expressed 101(b) in order to withdraw the CWR or in adopting a different definition of “waters of the United States” under the CWA. Having due regard for the role of the states is not the same thing as defining “waters of the United States” in a manner that reduces federal, and increases state, jurisdiction – which is plainly the Agencies goal in elevating and contorting the meaning of CWA Section 101(b). Additionally, the CWA has many policies, goals and objectives<sup>25</sup>[41] – not just two – and the intent of Congress as to which waters would be protected under the CWA cannot be gleaned by balancing the national need for clean water against state’s responsibilities and rights to prevent, reduce, and eliminate pollution. That is nonsensical. The objective of the CWA and its many policies and goals cannot simply be given the same weight and then “balanced.” Additionally, it is patently obvious that the states can take a primary role in eliminating pollution in waters that are protected by the federal CWA.<sup>26</sup>[42] This is the system of cooperative federalism under the CWA that has been in place since 1972.<sup>27</sup> [43]

---

<sup>22</sup> [38] Supplemental Notice, at 32232.

<sup>23</sup> [39] 33 U.S.C. §1370

<sup>24</sup> [40] The Agencies similarly selectively quote and mischaracterize the meaning and intent behind CWA Sections 1255, 1256, 1258, and 1268 for the erroneous proposition that Congress created a “non-regulatory statutory framework to provide technical and financial assistance to the states to prevent, reduce, and eliminate pollution in the broader set of the nation’s waters.” Supplemental Notice, at 32232. The Great Lakes, Long Island Sound, Chesapeake Bay, as well as other waters, and their watersheds are protected as “waters of the United States” under the CWA to which regulatory programs apply. The CWA makes technical assistance and grants available to assist states and others in achieving the requirements and goals of the CWA – the grants and technical assistance are not independent non-regulatory programs for non-jurisdictional waters.

<sup>25</sup>[41] Inexplicably, the Agencies also state in the Proposed Rule Notice that “[t]he objectives, goals, and policies of the statute are detailed in sections 101(a)-(g) of the statute, and guide the agencies’ interpretation and application of the Clean Water Act,” but immediately thereafter, the Agencies focus their analysis solely on portions of Sections 101(a) and 101(b). Proposed Rule, at 34902

<sup>26</sup> [42] This fact is expressly acknowledged in the Supplemental Notice: “In addition, states and tribes retain sovereign authority to protect and manage the use of those waters that are not navigable waters under the CWA. See, e.g., *id.* at 1251(b), 1251(g), 1370, 1377(a). Forty-seven states administer the CWA section 402 permit program for those waters of the United States within their boundaries, and two administer the section 404 permit program.” Supplemental Notice, at 32233.

<sup>27</sup> [43] See e.g., *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 129 (D.C. Cir. 1976) (“Thus, without the national standards required by s 301, the fifty states would be free to set widely varying pollution limitations. These might arguably be different for every permit issued ... The plainly expressed purpose of Congress to require nationally

Fourth, if the Agencies corrected the legal errors in the Supplemental Notice, many of the questions and issues identified by the Agencies for comment would be resolved in a manner that would eliminate them as a basis for withdrawing the Clean Water Rule. For example:

**EPA Question:** The agencies are concerned and seek comment on whether the 2015 Rule significantly expanded jurisdiction over the preexisting regulatory program, as implemented by the agencies, and whether the expansion altered State, tribal, and local government relationships in implementing CWA programs.

**Commenters Response:** The 2015 Clean Water Rule did not significantly expand jurisdiction over the preexisting regulatory program, nor did it alter State, tribal, and local government relationships. In fact, as set forth in previous comments incorporated herein, the Clean Water Rule reduced or eliminated jurisdiction over many types of waters. The agencies “concern” is based on an erroneous view of the law, inadequate factual information to evaluate historic jurisdiction in comparison to jurisdiction under the Clean Water Rule, and a undisclosed narrow interpretation of the pre-existing regulatory definition. Additionally, the “concern” about whether the Clean Water Rule expanded jurisdiction should not be determinative of whether it should be withdrawn and replaced.

**EPA Question:** “The agencies solicit comment on whether the 2015 Rule is flawed in the same manner as the Migratory Bird Rule, including whether the 2015 Rule raises significant constitutional questions similar to the questions raised by the Migratory Bird Rule as discussed by the Supreme Court in SWANCC.”

**Commenters Response:** No. This question misapprehends the issues and rulings in SWANCC.

**EPA Question:** “The agencies request comment on whether the examples illustrate the concerns expressed by the recent court decisions discussed above that the 2015 Rule may have exceeded the significant nexus standard articulated by Justice Kennedy in the Rapanos opinion and concerns expressed by certain commenters that the 2015 Rule may have created additional regulatory uncertainty over waters that were previously thought beyond the scope of CWA jurisdiction.”

**Commenters Response:** The Agencies do not possess and/or have not disclosed adequate information to make this determination. The Agencies expressly acknowledge the Supplemental Notice that the examples they provide “are intended to be illustrative, and are not intended to attempt to quantify or reassess previous estimates of CWA jurisdiction, as the agencies are not aware of any map or dataset that accurately or with any precision portrays CWA jurisdiction at any point in the history of this complex regulatory program.”<sup>28</sup>[44] Similarly, it is not technically

---

uniform interim limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.”)

<sup>28</sup> [44] Supplemental Notice, at 32244.

sound to use a comparison of Section 305b Report estimates and draft NHD maps to support an evaluation of jurisdictional coverage before and after the Clean Water Rule. The Agencies expressly acknowledge that they “are not aware of any national, regional, or state-level map that identifies all “waters of the United States” and acknowledge that there are limitations associated with existing datasets.”<sup>29</sup>[45] Additionally, the agency guidance and other means used to reduce the number and types of waters protected by the pre-existing regulations are inconsistent with the CWA and Supreme Court precedent. Lastly, the fact that the Clean Water Rule may have expanded jurisdiction over some types of waters is not a valid legal basis for withdrawing it. Additionally, contrary to the statements in the Supplemental Notice, the Clean Water Rule actually illegally reduced jurisdiction over tributaries and streams.<sup>30</sup>[46] This response applies to all of the other questions relating to jurisdictional comparisons.

EPA Question: “The agencies are concerned that because the 2015 Rule may assert jurisdiction over 100 percent of streams as the agencies assumed in the 2015 Rule Economic analysis, certain states, particularly those in the arid west, would see significant expansion of federal jurisdiction over streams. The agencies solicit comment on whether such expansions conflict with the assumptions underlying and statements justifying the 2015 Rule, and if such expansions were consistent with the policy goals of section 101(b) of the CWA.”

Commenters Response: The fact that the agencies may have made that assumption for the purposes of the Economic Analysis does not mean that 100% of streams in the United States are protected under the Clean Water Rule. To the contrary, the Clean Water Rule reduced jurisdiction over streams. Additionally, expanding federal jurisdiction over streams for the purpose of achieving the goals of the CWA – i.e. protecting water quality in the Nation’s waters – supports rather than conflicts with the purpose of Section 101(b).

EPA Question: “The agencies are requesting comment on whether these responses to these issues [related to scope of jurisdiction and ephemeral streams] are adequate. While some ephemeral streams may have been jurisdictional after a case-specific analysis pursuant to the Rapanos Guidance, and while challenges to some of those determinations have been rejected by the Courts, the agencies are requesting public comment on whether these prior conclusions and assertions were correct.”

Commenters Response: It is accurate to say that ephemeral streams have historically been protected under the federal CWA. We cannot comment on whether portions of the Agencies’ characterizations to the Court in pending litigation are accurate, and do not believe that is a relevant or appropriate inquiry.

EPA Question: “The agencies request comment, including additional information, on whether the water features at issue in SWANCC or other similar water features could be deemed jurisdictional under the 2015 Rule, and whether such a determination is consistent with or

---

<sup>29</sup> [45] Supplemental Notice, at 32246.

<sup>30</sup> [46] See Final Waterkeeper Comments on EPA-HQ-OW-2011-0880, supra note 3.

otherwise well-within the agencies’ statutory authority, would be unreasonable or go beyond the scope of the CWA . . . .”

Commenters Response: Only one type of “water feature” was at issue in SWANCC – an abandoned sand and gravel pit – and it is unclear what the Agencies mean by a similar water feature. The holding in SWANCC is limited to the Corps’ assertion of jurisdiction over that feature under the Migratory Bird Rule for the purposes of Section 404(a) of the CWA. The decision did not invalidate other grounds for asserting jurisdiction under the CWA. It is certainly possible and appropriate that an abandoned sand and gravel pit, depending on its location, functions and/or connectivity to other waters, could be protected under the CWA either with or without the Clean Water Rule.

EPA Question: “Interested parties are encouraged to provide comment on whether the 2015 Rule is consistent with the statutory text of the CWA and relevant Supreme Court precedent, the limits of federal power under the Commerce Clause as specifically exercised by Congress in enacting the CWA, and any applicable legal requirements that pertain to the scope of the agencies’ authority to define the term ‘waters of the United States.’”

Commenters Response: Commenters covered this question extensively in previous comments that are incorporated by reference herein. The Agencies were obligated to articulate their own rationale and views on these issues in the Supplemental Notice if these issues will form the basis of the Agencies’ Final Rule, however, the Agencies have failed to do so.

EPA Question: “The agencies are considering whether the 2015 Rule’s coverage of waters based, in part, on their location within the 100-year floodplain of a jurisdictional water is consistent with the policy articulated in CWA section 101(b) that States should maintain primary responsibility over land and water resources . . . . Given these concerns, the agencies request comment on whether the 2015 Rule’s use of the 100-year floodplain as a factor to establish jurisdiction over adjacent waters and case-specific waters interferes with States’ primary responsibilities over the planning and development of land and water resources in conflict with CWA section 101(b).”

Commenters Response: This is not a valid inquiry given the meaning of Section 101(b) and the goals and purposes of the CWA. However, protecting waters located within the 100 year floodplain under the CWA will not interfere with states responsibilities and rights in any way. Additionally, the Agencies should have completed this evaluation and articulated their position prior to issuing the Proposed Rule and prior to issuing the Supplemental Notice nearly a year later so the public could evaluate and comment on it.

EPA Question: The agencies also seek comment on to what extent the 100-year floodplain component to the 2015 Rule conflicts with other federal regulatory programs, and whether such a conflict impacts State and local governments.”

Commenters Response: More explanation and information is required in order to fully comment in response to this question. However, protecting waters located in the 100 year floodplain under the CWA does not conflict with other federal regulatory programs, and to the extent the Agencies believe there is a conflict or impact they consider relevant to this action, it should have

been identified and evaluated by the Agencies prior to issuing the Proposed Rule and prior to issuing the Supplemental Notice nearly a year later so the public could evaluate and comment on it.

EPA Question: “The agencies seek comment on that analysis and whether the 2015 Rule readjusts the federal-state balance in a manner contrary to the congressionally determined policy in CWA section 101(b).”

Commenters Response: This question is incredibly vague and it is unclear what analysis the Agencies are referencing. However, the Clean Water Rule is not contrary to CWA Section 101(b).

EPA Question: “The agencies thus solicit comment on whether the definitions in the 2015 Rule would subject wholly intrastate or physically remote waters or wetlands to CWA jurisdiction, either categorically or on a case-by-case basis, and request information about the number and scope of such waters of which commenters may be aware.”

Commenters Response: The Agencies should know better than anyone what waters are covered under the 2015 Clean Water Rule, as it is the Agencies’ own rule. The Agencies also possess extensive information regarding the existence of intrastate and “remote” waters. It would be impossible to characterize all of them by “number and scope,” but protection of many types of intrastate waters and waters characterized by some as “remote” is required under the CWA. To the extent this question is relevant to the Agencies’ determination on the Proposed Rule, the Agencies must provide information on the issue to the public and articulate how the information informs their decision about the rule to allow for comment prior to adopting the Proposed Rule.

EPA Question: “Further, the agencies solicit comment about whether these, or any other, aspects of the 2015 Rule as finalized would, as either a de facto or de jure matter, alter federal-state relationships in the implementation of CWA programs and State regulation of State waters, and whether the 2015 Rule appropriately implements the Congressional policy of recognizing, preserving, and protecting the primary rights of states to plan the development and use of land and water resources.”

Commenters Response: This question is vague and misconstrues the meaning and importance of Section 101(b). Altering the definition of “waters of the United States” can impact state regulation of waters by eliminating or adding authority to protect water quality under the CWA – depending on whether jurisdiction is expanded or reduced. Reduction in jurisdiction can cause great harm to states, as they are often dependent on federal funding and support to protect waterways against pollution and destruction.

Lastly, the Agencies have failed to provide adequate explanation and support for their proposed findings, many of which depend on answers to these or other questions/evaluations (which have not been resolved by the Agencies in the Supplemental Notice) and/or erroneous interpretations of the CWA, regulations and case law. These problems are clearly demonstrated by the fact that Agencies repeatedly characterize their statements throughout the Supplemental Notice in equivocal terms such that the public cannot discern the Agencies’ position or reasoning. Such

statements do not constitute reasoned bases for this Proposed Rule. For example, the Agencies state in the Supplemental Notice:

- The agencies are proposing to repeal the 2015 Rule in part because the 2015 Rule may have impermissibly and materially affected the states and the distribution of power and responsibilities among the various levels of government and therefore likely should have been characterized as having federalism implications when promulgated in 2015.<sup>31</sup>[47]
- Because such findings would, if adopted by the agencies, negate a key finding underpinning the 2015 Rule, the agencies request comment on whether to repeal the 2015 Rule on this basis.<sup>32</sup>[48]
- Though the agencies have previously said that the 2015 Rule is consistent with the Commerce Clause and the CWA, the agencies are in the process of considering whether it is more appropriate to draw a jurisdictional line that ensures that the agencies regulate well within our constitutional and statutory bounds.<sup>33</sup>[49]
- As a result of the agencies’ review and reconsideration of their statutory authority and in light of the court rulings against the 2015 Rule that have suggested that the agencies’ interpretation of the “significant nexus” standard as applied in the 2015 Rule was expansive and does not comport with and accurately implement the limits on jurisdiction reflected in the CWA and decisions of the Supreme Court, the agencies are also concerned that the 2015 Rule lacks sufficient statutory basis.<sup>34</sup>[50]
- The agencies are concerned that certain findings and assumptions supporting adoption of the 2015 Rule were not correct, and that these conclusions, if erroneous, may separately justify repeal of the 2015 Rule.<sup>35</sup> [51]

The agencies are concerned and seek comment on whether the 2015 Rule significantly expanded jurisdiction over the preexisting regulatory program, as implemented by the agencies, and whether that expansion altered State, tribal, and local government relationships in implementing CWA programs. The agencies therefore propose to repeal the 2015 Rule . . .<sup>36</sup> [52]

---

<sup>31</sup> [47] Supplemental Notice, at 32251.

<sup>32</sup> [48] Supplemental Notice, at 32248.

<sup>33</sup> [49] Supplemental Notice, at 32249, note 74.

<sup>34</sup> [50] Supplemental Notice, at 32238.

<sup>35</sup> [51] Supplemental Notice, at 32238. The Agencies are seeking comment on a slew of findings and assumptions in the Supplemental Notice to help them answer this “concern.” Unfortunately, the public will not have any opportunity to weigh in on the validity of any conclusions the Agencies reach that may form the basis for repealing the Clean Water Rule given the Agencies unlawful and arbitrary approach to this Proposed Rule.

<sup>36</sup> [52] Supplemental Notice, at 32238.

- [A]s a result of the agencies’ review and reconsideration of their statutory authority and in light of the court rulings against the 2015 Rule that have suggested that the agencies’ interpretation of the “significant nexus” standard as applied in the 2015 Rule was expansive and does not comport with and accurately implement the limits on jurisdiction reflected in the CWA and decisions of the Supreme Court, the agencies are also concerned that the 2015 Rule lacks sufficient statutory basis.<sup>37</sup>[53]
- The agencies are concerned that this important change in the interpretation of “similarly situated waters” from the proposed 2015 Rule and the 2008 Rapanos Guidance may not be explainable by the scientific literature, including the Connectivity Report cited throughout the preamble to the 2015 Rule, in light of the agencies’ view at the time that “[t]he scientific literature does not use the term ‘significant’ as it is defined in a legal context.” 80 FR 37062.<sup>38</sup> [54]
- [T]he agencies are now considering whether the definitional changes in the 2015 Rule would have a more substantial impact on the scope of jurisdictional determinations made pursuant to the CWA than acknowledged in the analysis for the rule and would thus impact the balance between federal, state, tribal, and local government in a way that gives inadequate consideration to the overarching Congressional 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).<sup>39</sup> [55]

The Agencies are required to provide the public with a reasoned explanation for why they are proposing to reverse course with regard to the Clean Water Rule, but have failed to do so. Their burden is not satisfied by the articulation of questions, potential concerns and potential findings that may be made in the future based on information the Agencies may receive as result of this Supplemental Notice. The public has a right to know and comment on the Agencies’ basis, positions and explanation for this action, and this information must be provided prior to finalizing this Proposed Rule.

---

<sup>37</sup> [53] Supplemental Notice, at 32238. The Agencies do not provide any reasoned explanation for why their review and reconsideration of their statutory authority leads them to their “concern” about lack of statutory authority for the Clean Water Rule or why it would lead them to “proposing to conclude in the alternative that, at a minimum the interpretation of the statute adopted in the 2015 Rule is not compelled, and a different policy balance can be appropriate.” Id. Accordingly, this is arbitrary and capricious.

<sup>38</sup> [54] Supplemental Notice, at 32240.

<sup>39</sup> [55] Supplemental Notice, at 32242. To support the Agencies ongoing consideration and evaluation of this potential change in the Agencies view of jurisdictional changes, the Agencies are soliciting comments from the public on a host of questions and selected jurisdictional determinations. Obviously, the public will be illegally precluded from reviewing and commenting on the results of the Agencies evaluation since they inappropriately failed to complete it before providing the public with an opportunity for review and comment.

## **The Supplemental Notice is Misleading, Vague and Lacks Adequate Information to Evaluate or Provide Meaningful Comments on the Definition the Agency is Actually Adopting**

Contrary to the Agencies' stated primary basis for this rulemaking, establishing "regulatory certainty,"<sup>40</sup>[56] the Proposed Rule would create unbounded uncertainty as it does not identify or evaluate what waters would be protected under the "re-codified" definition (as informed by undisclosed interpretations) after the rule becomes final. Additionally, even with this Supplemental Notice, the Agencies are continuing to avoid comments on the substance of what the definition of "waters of the United States" should be under the CWA after repeal of the Clean Water Rule. The Agencies simply assert, without any factual or legal basis whatsoever in support, that the regulatory framework (not simply the regulation) "is more familiar to and better-understood by the agencies, states, tribes, local governments, regulated entities, and the public." They make this assertion despite the fact that Agencies have never explained what that "regulatory framework" is or what waters will be protected under it. In sum, the Agencies are still attempting to change the legal definition of "waters of the United States" without engaging in adequate substantive evaluation of it, in violation of the CWA and the APA.<sup>41</sup> [57]

As noted in previous comments incorporated herein by reference, the Agencies do not intend to implement the pre-2015 regulatory definitions of "waters of the United States" as written and interpreted by the courts over the last several decades. Instead, the Agencies state in the Proposed Rule Notice that they will "implement those prior regulatory definitions) [sic], informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice."<sup>42</sup>[58] Although the meaning of this statement is incredibly vague given the history of these definitions, the Agencies manage to make their intentions even more opaque later in the Notice by adding additional interpretative materials to the list and indicating that they are only examples of what the Agencies will use to implement the Proposed Rule after it is finalized. This second list includes "applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the SWANCC and Rapanos Supreme Court decisions, applicable case law, and longstanding agency practice."<sup>43</sup> [59]

The Supplemental Notice only serves to further reduce regulatory certainty in the event the Proposed Rule is adopted as it states that the Agencies will "interpret the statutory term 'waters

---

<sup>40</sup> [56] The Agencies have also utterly failed to articulate a reasonable basis for asserting the Clean Water Rule created regulatory uncertainty. In essence, the Agencies are simply adopting the positions of litigants opposing the rule and ignoring the substantial record of contrary opinion.

<sup>41</sup> [57] See Waterkeeper Alliance et al. Comments on Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, Docket ID No: EPA-HQ-OW-2017-0644, supra note 3.

<sup>42</sup> [58] Proposed Rule, 82 Fed. Reg. at 34900.

<sup>43</sup> [59] Id. at 34902

of the United States’ to mean the waters covered by those regulations, as the agencies are currently implementing those regulations consistent with Supreme Court decisions and longstanding practice, as informed by applicable guidance documents, training, and experience.”

With the addition of these vague and wide-ranging provisos, it is quite literally impossible to determine how the Agencies will define and interpret “waters of the United States” if the Proposed Rule is finalized. As a result, the public has not had an opportunity to comment on that definition, and the Agencies have failed to demonstrate that their rule, as implemented, would be a permissible construction of the CWA – i.e. that the action is not “arbitrary, capricious, or manifestly contrary to the statute.”<sup>44</sup>[60]

The Supplemental Notice states that “[g]iven the significant civil and criminal penalties associated with the CWA, it is important for the agencies to promote regulatory certainty while striving to provide fair and predictable notice of the limits of federal jurisdiction. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-25 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (characterizing fair notice as possibly the most fundamental of the protections provided by the Constitution’s guarantee of due process, and stating that vague laws are an exercise of ‘arbitrary power . . . leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up’). After withdrawal and replacement of the Clean Water Rule with pre-2015 regulatory definition, the public will be in the dark about what the CWA demands due to the Agencies’ determination to modify the actual text of the law with vague and undisclosed standards based on documents, guidance, legal interpretations, practice, training, and education. Accordingly, the Proposed Rule is the epitome of an agency exercise of arbitrary power.

---

<sup>44</sup> [60] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).