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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 WATERKEEPER ALLIANCE, INC.;)
14 CENTER FOR BIOLOGICAL)
15 DIVERSITY; CENTER FOR FOOD)
16 SAFETY; HUMBOLDT BAYKEEPER, a)
17 program of Northcoast Environmental)
18 Center; RUSSIAN RIVERKEEPER;)
19 MONTEREY COASTKEEPER, a)
20 program of The Otter Project, Inc.;)
21 SNAKE RIVER WATERKEEPER, INC.;)
22 UPPER MISSOURI WATERKEEPER,)
23 INC.; and TURTLE ISLAND)
24 RESTORATION NETWORK,)

Case No.18-cv-3521

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

25 Plaintiffs,)

26 v.)

27 E. SCOTT PRUITT, in his official)
28 capacity as Administrator of the U.S.)
Environmental Protection Agency; U.S.)
ENVIRONMENTAL PROTECTION)
AGENCY; RICKY DALE JAMES, in his)
official capacity as Assistant Secretary of)
the Army for Civil Works; and U.S.)
ARMY CORPS OF ENGINEERS,)

Defendants.)

INTRODUCTION

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1. Water sustains all life on earth. Our nation’s rivers, streams, lakes, and wetlands provide food to eat and water to drink for millions of Americans; serve as habitat for thousands of species of fish and wildlife, including scores of threatened or endangered species; and give the public aesthetic, recreational, commercial, and spiritual benefits too numerous to count. It is for the protection of these waters that congress passed the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq.*, commonly known as the Clean Water Act (“CWA” or the “Act”).

2. Plaintiffs are regional and national public-interest environmental organizations with a combined membership numbering hundreds of thousands of members nationwide. On behalf of these members, Plaintiffs advocate for the protection of oceans, rivers, streams, lakes, and wetlands, and for the people and animal and plant species that depend on clean water.

3. By this action, Plaintiffs challenge two closely related final rules issued by Defendants regarding the statutory phrase “waters of the United States,” a phrase that proscribes the jurisdictional reach of the CWA. The first is the June 29, 2015 “Clean Water Rule,” which identifies those waters that are subject to the CWA’s critical safeguards. *Clean Water Rule: Definition of ‘Waters of the United States’*, 80 Fed. Reg. 37054 (June 29, 2015). Waters that do not meet the regulatory definition of “waters of the United States” will be unprotected as a matter of federal law, subject to myriad abuses by those who have long seen our nation’s waters as either a convenient means to dispose of waste and debris or as a resource to be dredged or filled to further their economic objectives.

4. The second is the February 6, 2018 “Delay Rule,” which makes no substantive changes to the Agencies’ regulatory definition, but delays the applicability of the Clean Water Rule by two years. *See Definition of ‘Waters of the*

1 *United States*”–*Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed.
2 Reg. 5200 (Feb. 6, 2018).

3 5. Plaintiffs filed a similar action in August 2015, challenging the Clean
4 Water Rule only. *Waterkeeper Alliance et al. v. U.S. Env’tl Protection Agency*, N.D.
5 Cal. No. 3:15-cv-03927 (filed August 27, 2015). That suit was among many filed
6 around the country in both the federal district courts and the courts of appeals; and
7 like most other litigants, Plaintiffs voluntarily dismissed their earlier suit after the
8 Sixth Circuit asserted jurisdiction over all challenges to the Clean Water Rule
9 under 33 U.S.C. § 1369(b). *See In re Clean Water Rule: Definition of Waters of U.S.*,
10 817 F.3d 261, 264 (6th Cir. 2016). Plaintiffs are filing again in this Court because
11 the U.S. Supreme Court subsequently held that review of the Clean Water Rule
12 belongs in the district courts, not the courts of appeals. *Nat’l Ass’n of Mfrs. v. Dep’t*
13 *of Def.*, 138 S. Ct. 617 (2018).

14 6. The Clean Water Rule, in part, reaffirms CWA jurisdiction over waters
15 historically protected by the Agencies, such as many tributaries and their adjacent
16 wetlands; for this reason, Plaintiffs do not seek vacatur of the Clean Water Rule in
17 its entirety, but instead seek vacatur of the Delay Rule so that the lawful parts of
18 the Clean Water Rule may take immediate effect.

19 7. However, a number of provisions of the Clean Water Rule are legally or
20 scientifically indefensible, and must therefore be excised from the rule, vacated, and
21 remanded to the Agencies. These flawed provisions impermissibly abandon waters
22 that must be protected under the CWA as a matter of law; unreasonably exclude
23 waters over which the Agencies have historically asserted jurisdiction based on
24 their commerce clause authority; arbitrarily deviate from the best available science;
25 or were promulgated without compliance with the Agencies’ notice and comment
26 obligations.

27 8. By this complaint plaintiffs allege that the Agencies violated the CWA,
28 the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”), the National

1 Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”), and the Endangered
2 Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”) when they promulgated both the Clean
3 Water Rule and the Delay Rule. Among other remedies, plaintiffs seek an order
4 holding the Delay Rule and specific portions of the Clean Water Rule unlawful and
5 setting them aside because they are “arbitrary, capricious, an abuse of discretion, or
6 otherwise not in accordance with law;” “in excess of statutory jurisdiction, authority,
7 or limitations,” and/or were promulgated “without observance of procedure required
8 by law.” 5 U.S.C. § 706(2)(A), (D).

9 JURISDICTION & VENUE

10 9. This Court has jurisdiction over the claims set forth herein pursuant to
11 5 U.S.C. § 702 (APA), 16 U.S.C. § 1540(g) (ESA citizen suit jurisdiction), and 28
12 U.S.C. § 1331 (federal question jurisdiction). The relief sought is authorized by 5
13 U.S.C. § 706(1), 16 U.S.C. § 1540(g), and 28 U.S.C. §§ 2201(a) and 2202.

14 10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1)(A)
15 because the Agencies are officers or agencies of the United States, and one or more
16 plaintiffs reside in the district within the meaning of 28 U.S.C. § 1391(d).

17 11. As required by the ESA’s citizen suit provision, 16 U.S.C. §
18 1540(g)(2)(a)(i), Plaintiffs provided Defendants and the required federal wildlife
19 management agencies with written notice of the ESA violations alleged herein by
20 letters dated August 5, 2015 (for claims related to the Clean Water Rule) and
21 February 14, 2018 (for claims related to the Delay Rule). More than 60 days have
22 passed since Plaintiffs provided their notice of intent to sue.

23 INTRADISTRICT ASSIGNMENT

24 12. Assignment to the San Francisco Division is appropriate because
25 several of the plaintiffs (including Humboldt Baykeeper, Russian Riverkeeper,
26 Monterey Coastkeeper, and Turtle Island Restoration Network) have their primary
27 place of business within this Division.

PARTIES

1
2 13. Plaintiff **Waterkeeper Alliance, Inc.** (“Waterkeeper”) is a global not-
3 for-profit environmental organization dedicated to protecting and restoring water
4 quality to ensure that the world’s waters are drinkable, fishable and swimmable.
5 Waterkeeper is comprised of more than 300 Waterkeeper Member Organizations
6 and Affiliates working in 44 countries on 6 continents, covering over 2.5 million
7 square miles of watersheds. In the United States, Waterkeeper represents the
8 interests of its 174 U.S. Waterkeeper Member Organizations and Affiliates, as well
9 as the collective interests of thousands of individual supporting members that live,
10 work and recreate in and near waterways across the country – many of which are
11 severely impaired by pollution. The CWA is the bedrock of Waterkeeper Alliance’s
12 and its Member Organizations’ and Affiliates’ work to protect rivers, streams, lakes,
13 wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate
14 Organizations and our respective individual supporting members, as well as to
15 protect the people and communities that depend on clean water for their survival.
16 In many ways, Waterkeeper and its members depend on the CWA to protect
17 waterways, and the people who depend on clean water for drinking water,
18 recreation, fishing, economic growth, food production, and all of the other water
19 uses that sustain our way of life, health, and well being. Waterkeeper has
20 thousands of members worldwide, many of whom use, enjoy, and recreate on or near
21 waters affected by the Clean Water Rule and the Delay Rule.

22 14. Plaintiff **Center for Biological Diversity** (the “Center”) is a national
23 nonprofit organization dedicated to the preservation, protection, and restoration of
24 biodiversity, native species, and ecosystems. The Center was founded in 1989 and is
25 based in Tuscon, Arizona, with offices throughout the country. The Center works
26 through science, law, and policy to secure a future for all species, great or small,
27 hovering on the brink of extinction. The Center is actively involved in species and
28 habitat protection issues and has more than 63,000 members throughout the United

1 States and the world, including over 5,900 members in this District. The Center has
2 advocated for species protection and recovery, as well as habitat protection, for
3 species existing throughout the United States, including water-dependent species.
4 The Center brings this action on its own institutional behalf and on behalf of its
5 members. Many of the Center's members and staff reside in, explore, and enjoy
6 recreating in and around numerous waters within this District that are affected by
7 the Clean Water Rule and the Delay Rule.

8 15. Plaintiff **Center for Food Safety** ("CFS") is a national non-profit
9 public interest and environmental advocacy organization working to protect human
10 health and the environment by curbing the use of harmful food production
11 technologies and by promoting organic and other forms of sustainable agriculture.
12 CFS uses legal actions, groundbreaking scientific and policy reports, books, and
13 other educational materials, market pressure, and grass roots campaigns. CFS has
14 over 950,000 members through the United States, including nearly 60,000 members
15 who reside within this District, many of whom use, enjoy, and recreate on or near
16 waters affected by the Clean Water Rule and the Delay Rule.

17 16. Plaintiff **Humboldt Baykeeper** is a program of Northcoast
18 Environmental Center, a California non-profit public interest and environmental
19 advocacy organization committed to safeguarding the coastal resources of Humboldt
20 Bay, California, for the health, enjoyment, and economic strength of the Humboldt
21 Bay community. Humboldt Baykeeper uses community education, scientific
22 research, water-quality monitoring, pollution control, and enforcement of laws to
23 protect and enhance Humboldt Bay and near-shore waters of the Pacific Ocean.
24 Humboldt Baykeeper has over 1,000 members residing within this District, many of
25 whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule
26 and the Delay Rule.

27 17. Plaintiff **Russian Riverkeeper** is a California non-profit public
28 interest and environmental advocacy organization committed to the conservation

1 and protection of the Russian River, its tributaries, and the broader watershed
2 through education, citizen action, scientific research, and expert advocacy. Russian
3 Riverkeeper has over 1,400 members residing within this District, many of whom
4 use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the
5 Delay Rule.

6 18. Plaintiff **Monterey Coastkeeper** is a project of the Otter Project, Inc.,
7 a California non-profit public interest and environmental advocacy organization
8 committed to the protection and restoration of the central California coast.
9 Monterey Coastkeeper has over 2,000 members residing within this District, many
10 of whom use, enjoy, and recreate on or near waters affected by the Clean Water
11 Rule and the Delay Rule.

12 19. Plaintiff **Snake River Waterkeeper, Inc.** is an Idaho non-profit
13 public interest and environmental advocacy organization committed to protecting
14 water quality and fish habitat in the Snake River and surrounding watershed.
15 Snake River Waterkeeper uses water-quality monitoring, investigation of citizen
16 concerns, and advocacy for enforcement of environmental laws. Snake River
17 Waterkeeper has more than 50 members, including members who reside, explore,
18 and enjoy recreating on or near waters affected by the Clean Water Rule and the
19 Delay Rule.

20 20. Plaintiff **Upper Missouri Waterkeeper, Inc.** is a Montana non-profit
21 public interest and environmental advocacy organization committed to protecting
22 and improving ecological and community health throughout Montana's Upper
23 Missouri River Basin. Upper Missouri Waterkeeper uses a combination of strong
24 science, community action, and legal expertise to defend the Upper Missouri River,
25 its tributaries, and communities against threats to clean water and healthy rivers.
26 Upper Missouri Waterkeeper has over 70 members, including members who reside,
27 explore, and enjoy recreating on or near waters affected by the Clean Water Rule
28 and the Delay Rule.

1 21. Plaintiff **Turtle Island Restoration Network, Inc.** is a national
2 non-profit public interest and environmental advocacy organization committed to
3 the protection of the world's oceans and marine wildlife. Turtle Island Restoration
4 Network works with people and communities to accomplish its mission, using
5 grassroots empowerment, consumer action, strategic litigation, hands-on
6 restoration, and environmental education. Turtle Island Restoration Network has
7 over 80,000 members worldwide, including hundreds of members who reside in this
8 District, many of whom use, enjoy, and recreate on or near waters affected by the
9 Clean Water Rule and the Delay Rule.

10 22. Each Plaintiff has one or more members who reside in, explore, or
11 recreate in areas impacted by the Final Rule's definition of "waters of the United
12 States." Some of Plaintiffs' members will suffer recreational, aesthetic, or other
13 environmental injuries due to the Agencies' final action. Specifically, the Agencies'
14 promulgation of the Clean Water Rule and Delay Rule will result in the loss of
15 Clean Water Act protections for many thousands of miles of ephemeral streams,
16 tributaries, ditches, wetlands, and other waters used and enjoyed by some of
17 Plaintiffs' members, ultimately facilitating the degradation or destruction of those
18 waters.

19 23. Defendant United States Environmental Protection Agency ("EPA") is
20 the agency of the United States Government with primary responsibility for
21 implementing the CWA. Along with the Army Corps of Engineers, EPA
22 promulgated both the Clean Water Rule and the Delay Rule.

23 24. Defendant United States Army Corps of Engineers ("Corps") has
24 responsibility for implementing certain aspects of CWA, most notably the dredge
25 and fill permitting program under CWA § 404, 33 U.S.C. § 1344. Along with EPA,
26 the Corps promulgated both the Clean Water Rule and the Delay Rule.

27 25. Defendant E. Scott Pruitt is the Administrator of the EPA, acting in
28 his official capacity. Administrator Pruitt signed the Delay Rule. In his role as the

1 EPA Administrator, Mr. Pruitt oversees the EPA's implementation of the CWA.

2 26. Defendant Ricky Dale James is the Assistant Secretary of the Army for
3 Civil Works, acting in his official capacity. Mr. James' predecessor, former Acting
4 Assistant Secretary of the Army for Civil Works Ryan A. Fisher, signed the Delay
5 Rule. In his role as Assistant Secretary of the Army for Civil Works, Mr. James
6 oversees the Corps' implementation of the CWA.

7 LEGAL BACKGROUND

8 **I. Overview of the Clean Water Act**

9 27. In 1972 Congress adopted amendments to the Clean Water Act in an
10 effort "to restore and maintain the chemical, physical, and biological integrity of the
11 Nation's waters." 33 U.S.C. § 1251(a). The 1972 amendments established, among
12 other things, a national goal "of eliminating all discharges of pollutants into
13 navigable waters by 1985" and an "interim goal of water quality which provides for
14 the protection and propagation of fish, shellfish, and wildlife, and provides for
15 recreation in and on the water . . . by 1983." *Id.* § 1251(a).

16 28. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any
17 pollutant by any person, unless such discharge complies with the terms of any
18 applicable permits, and sections 301, 302, 306, 307, 318, 402, and 404 of the Act. 33
19 U.S.C. § 1311(a). "Discharge of a pollutant" means "any addition of any pollutant to
20 navigable waters from any point source." *Id.* § 1362(12). "Navigable waters" are
21 broadly defined as "the waters of the United States." *Id.* § 1362(7).

22 29. While Congress left the term "waters of the United States" undefined,
23 the accompanying Conference Report indicates that it intended the phrase to "be
24 given the broadest possible constitutional interpretation." S. Rep. No. 92-1236,
25 p.144 (1972).

26 30. CWA section 402, 33 U.S.C. § 1342, establishes the statutory
27 permitting framework for regulating pollutant discharges under the National
28 Pollutant Discharge Elimination System ("NPDES") program. CWA section 404, 33

1 U.S.C. § 1344, establishes the permitting framework for regulating the discharge of
2 dredged or fill material into waters of the United States.

3 **II. Case Law Interpreting “Waters of the United States”**

4 31. The definition of “waters of the United States” significantly impacts
5 the Agencies’ and the States’ implementation of the CWA, as it circumscribes which
6 waters are within the Agencies’ regulatory authority under the Act, *i.e.*, which
7 waters are jurisdictional. The Act does not protect waters that are not “waters of the
8 United States” from pollution, degradation, or destruction, and it is not unlawful
9 under the Act to dredge and fill them or discharge pollutants into them without a
10 permit.

11 32. The Agencies last addressed the definition of “waters of the United
12 States” by promulgating essentially identical rules in the mid-1970s. Those
13 regulations asserted jurisdiction over traditionally navigable waters, non-navigable
14 tributaries to those (and other) waters, wetlands adjacent to other jurisdictional
15 waters, and any “other waters,” the use, degradation, or destruction of which could
16 affect interstate or foreign commerce. *See, e.g.*, 33 C.F.R. § 328.3(a)(1), (5), (7), and
17 (3) (2014), respectively.

18 33. The Clean Water Rule is the Agencies’ most recent attempt to define
19 “waters of the United States.” The impact of the Rule is sweeping; it will result in a
20 massive net loss of CWA jurisdiction as compared to the Agencies’ historic
21 interpretation of the Act under their prior rule.

22 34. The Agencies’ efforts were undertaken against the backdrop of three
23 Supreme Court cases addressing this statutory phrase. *See United States v.*
24 *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern*
25 *Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)
26 (“SWANCC”); and *Rapanos v. United States*, 547 U.S. 715 (2006).

27 35. In *Riverside Bayview*, the Court upheld the Corps’ broad interpretation
28 of the phrase “water of the United States” to include wetlands adjacent to

1 traditionally navigable waters. 474 U.S. at 139.

2 36. In *SWANCC*, the Court rejected the Corps' assertion of CWA
3 jurisdiction over isolated intrastate waters where the sole asserted basis for
4 jurisdiction was the use of the relevant waters by migratory birds under the
5 Migratory Bird Rule, 51 Fed. Reg. 41217 (1986). See 531 U.S. at 163–64.

6 37. In *Rapanos*, a divided Court announced widely divergent standards for
7 determining CWA Act jurisdiction over wetlands adjacent to non-navigable
8 tributaries. Justice Scalia, writing for the four-justice plurality, held that the Corps
9 could not categorically assert jurisdiction over all wetlands adjacent to ditches or
10 man-made drains that discharge into traditional navigable waters. 547 U.S. at 725,
11 757 (Scalia, J.) In his concurring opinion, Justice Kennedy indicated that only those
12 waters possessing “a significant nexus with navigable waters” are subject to CWA
13 jurisdiction. *Id.* at 759. He further explained that

14 wetlands possess the requisite nexus, and thus come within the
15 statutory phrase ‘navigable waters,’ if the wetlands, either alone or in
16 combination with similarly situated lands in the region, significantly
affect the chemical, physical, and biological integrity of other covered
waters more readily understood as ‘navigable.’

17 *Id.* at 780. Justice Kennedy also recognized that the Agencies had authority under
18 the Act to “identify categories of tributaries that, due to their volume or flow, . . .
19 their proximity to navigable waters, or other relevant considerations, are significant
20 enough that wetlands adjacent to them are likely, in the majority of cases, to
21 perform important functions for an aquatic system incorporating navigable waters.”
22 *Id.* at 781.

23 38. Writing for the four dissenters in *Rapanos*, just as he had done in
24 *SWANCC*, Justice Stevens recognized the “comprehensive nature” of the CWA as
25 well as “Congress’ deliberate acquiescence” to the Agencies’ long-standing definition
26 of “waters of the United States,” and thus would have deferred to that definition
27 and the Corps’ assertion of jurisdiction over the wetlands and ditches at issue in the
28

1 case. 547 U.S. at 797, 803. Justice Breyer joined the dissenting opinion by Justice
2 Stevens, but also wrote separately to emphasize that “the authority of the Army
3 Corps of Engineers under the CWA extends to the limits of congressional power to
4 regulate interstate commerce.” 547 U.S. at 811.

5 39. As Justice Stevens noted in his *Rapanos* dissent,

6 Given that all four Justices who have joined this opinion would uphold the
7 Corps’ jurisdiction in both of these cases—and in all other cases in which
8 either the plurality’s or Justice KENNEDY’s test is satisfied—on remand
each of the judgments should be reinstated if *either* of those tests is met.

9 547 U.S. at 810. Thus, every federal court of appeals to consider the scope of CWA
10 jurisdiction following *Rapanos* has held that a water is jurisdictional *at least*
11 whenever Justice Kennedy’s “significant nexus” test is satisfied.¹ No Circuit has
12 held that the Justice Scalia’s approach is the exclusive method for establishing
13 CWA jurisdiction.
14

15 **III. The Clean Water Act’s Permit Exclusion for Farming Activities**

16 40. Clean Water Act section 404(f)(1) excludes certain activities from
17 regulation under the Act. 33 U.S.C. § 1344(f)(1). As relevant here, section
18 404(f)(1)(A) states that “the discharge of dredged or fill material [] from normal
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21
22 ¹ See *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993
23 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 1225 (2008); *United States v. Johnson*, 467
24 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S.Ct. 375 (2007); *United States v. Donovan*,
25 661 F.3d 174 (3d Cir. 2011); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009);
26 *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), *cert. denied*,
27 128 S.Ct. 45 (2007); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); and
28 *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *reh’g denied*, 521 F.3d
1319 (2008), *cert. den. sub nom United States v. McWane, Inc.*, 129 S.Ct. 627 (2008);
see also Precon Development Corp. v. U.S. Army Corps of Engineers, 633 F.3d 278
(4th Cir. 2011) (where the parties stipulated that Justice Kennedy’s test was the
appropriate test).

1 farming, silviculture, and ranching activities ... is not prohibited by or otherwise
2 subject to regulation under” CWA sections 402, 404, or 301(a). 33 U.S.C. §
3 1344(f)(1)(A).
4

5 41. CWA section 404(f)(2) provides an exception to this exclusion,
6 commonly referred to as the “Recapture Provision”:

7 Any discharge of dredged or fill material into the navigable waters
8 incidental to any activity having as its purpose bringing an area of the
9 navigable waters into a use to which it was not previously subject,
10 where the flow or circulation of navigable waters may be impaired or
the reach of such waters be reduced, shall be required to have a permit
under this section.

11 33 U.S.C. § 1344(f)(2).

12 42. Notably, section 404(f) does not affect the jurisdictional status of
13 waters under the CWA. Rather, sections 404(f)(1) and (2), read together, mean that
14 a person does not need a CWA section 404 permit to discharge dredged or fill
15 material from normal farming, silviculture, and ranching activities into a
16 jurisdictional water *unless* (1) such discharge brings the water “into a use to which
17 it was not previously subject”, *e.g.*, a new use; and (2) the discharge impairs the flow
18 or circulation of the navigable water or the reach of the water.

19 43. The fact that the Recapture Provision refers several times to
20 “navigable waters,” a term which the Act defines to mean waters of the United
21 States, further demonstrates that waters in which activities subject to the 404(f)(1)
22 permit exemption take place are still jurisdictional. This interpretation is borne out
23 by the Agencies’ long-standing policies as well as the legislative history of CWA
24 section 404(f). *See, e.g.*, CONG. REC. S19654 (daily ed. Dec. 15, 1977) (Senator
25 Muskie noting that the section 404(f)(1) exemption was only intended to eliminate
26 permitting requirements for certain “narrowly defined activities that cause little or
27 no adverse effects either individually or cumulatively.”)
28

1 IV. The National Environmental Policy Act

2 44. The National Environmental Policy Act (“NEPA”), enacted by Congress
3 in 1969, is our “basic national charter for protection of the environment.” 40 C.F.R. §
4 1500.1(a). One of the core goals of NEPA is to “promote efforts which will prevent or
5 eliminate damage to the environment.” 42 U.S.C. § 4321. As such, NEPA directs all
6 federal agencies to assess the environmental impacts of proposed actions that
7 significantly affect the quality of the human environment.

8 45. The Council on Environmental Quality (“CEQ”) promulgated uniform
9 regulations to implement NEPA that are binding on all federal agencies. Those
10 regulations designed to “insure that environmental information is available to
11 public officials and citizens before decisions are made and actions are taken” and to
12 “help public officials make decisions that are based on understanding of
13 environmental consequences, and take actions that protect, restore, and enhance
14 the environment.” 40 C.F.R. § 1500.1(b)–(c). The Corps has its own NEPA
15 regulations, codified at 33 C.F.R. Part 230, which the Corps uses in conjunction
16 with the CEQ regulations.

17 46. NEPA requires all federal agencies to prepare a “detailed statement”
18 assessing the environmental impacts of all “major Federal actions significantly
19 affecting the quality of the human environment.” 42 U.S.C. § 4332(C). This
20 statement is known as an Environmental Impact Statement (“EIS”). CEQ’s
21 regulations establish a standard format for EISs, including a summary, purpose
22 and need for action, alternatives, affected environment, and environmental
23 consequences. 40 C.F.R. § 1502.10.

24 47. A “major Federal action” is an action “with effects that may be major
25 and which are potentially subject to Federal control and responsibility.” 40 C.F.R. §
26 1508.18. Promulgation of a rule is an expressly identified “Federal action” under
27 NEPA. *Id.* § 1508.18(b)(1).

28 48. NEPA regulations define significance in terms of an action’s context

1 and intensity. *See* 40 C.F.R. § 1508.27. An action’s context must be analyzed
2 nationally, regionally, and locally. *See id.* § 1508.27(a). An action’s intensity must be
3 analyzed on the basis of at least 10 factors, any one of which can indicate that an
4 EIS is required. *See id.* § 1508.27(b). For example, an EIS may be required if a
5 major action is in proximity of “wetlands, wild and scenic rivers, or ecologically
6 critical areas,” “likely to be highly controversial,” “establish[es] a precedent for
7 future actions with significant effects,” or “may adversely affect an endangered or
8 threatened species.” *See id.* Moreover, a “significant effect may exist even if the
9 Federal agency believes that on balance the effect will be beneficial.” *Id.* §
10 1508.27(b)(1).

11 49. An agency that is uncertain whether an EIS is required may first
12 develop an Environmental Assessment (“EA”). An EA is a “concise public document”
13 that “provide[s] sufficient evidence and analysis” for determining whether to
14 prepare an EIS or issue a finding of no significant impact (“FONSI”). 40 C.F.R. §
15 1508.9(a). The EA must discuss the need for the proposed project, as well as
16 environmental impacts and alternatives, *see* 40 C.F.R. § 1508.9(b); it must provide
17 sufficient evidence and analysis for determining whether an EIS is appropriate; and
18 it must include a discussion of “appropriate alternatives if there are unresolved
19 conflicts concerning alternative uses of available resources[.]” 33 C.F.R. § 230.10. If,
20 after preparing an EA, the federal agency determines that the proposed action is not
21 likely to significantly affect the environment, it may issue a “finding of no
22 significant impacts” (“FONSI”).

23 50. NEPA requires an agency to take a “hard look” at the environmental
24 consequences of the agency’s proposed action, and to base its decision not to prepare
25 an EIS on a “a convincing statement of reasons why potential effects are
26 insignificant.” *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

27 51. The information presented in an EA or an EIS must be of high quality.
28 NEPA regulations provide that “[a]ccurate scientific analysis, expert agency

1 comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. §
2 1500.1(b).

3 52. Although the CWA exempts most actions taken by the EPA
4 Administrator under the Act from NEPA, 33 U.S.C. § 1372(c)(1), it contains no such
5 exemption for actions taken by the Corps.

6 **V. The Endangered Species Act**

7 53. Section 2(c) of the Endangered Species Act (“ESA”) states that it is “the
8 policy of Congress that all Federal departments and agencies shall seek to conserve
9 endangered species and threatened species and shall utilize their authorities in
10 furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines
11 “conservation” to mean “the use of all methods and procedures which are necessary
12 to bring any endangered species or threatened species to the point at which the
13 measures provided pursuant to this Act are no longer necessary.” *Id.* § 1532(3).

14 54. To fulfill the purposes of the ESA, each federal agency is required to
15 engage in consultation with the Fish and Wildlife Service (“FWS”) and National
16 Marine Fisheries Service (“NMFS”) (collectively “the Services”), as appropriate, to
17 “insure that any action authorized, funded, or carried out by such agency ... is not
18 likely to jeopardize the continued existence of any endangered species or threatened
19 species or result in the adverse modification of habitat of such species ... determined
20 ... to be critical.” 16 U.S.C. § 1536(a)(2).

21 55. Such consultation is required for “any action [that] may affect listed
22 species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is broadly defined in
23 the ESA’s implementing regulations to include, *inter alia*, “the promulgation of
24 regulations.” *Id.* § 402.02 (emphasis added).

25 56. At the completion of consultation, the Services are required to issue a
26 Biological Opinion that determines if the agency action is likely to jeopardize any
27 affected species. If so, the Biological Opinion must specify “Reasonable and Prudent
28 Alternatives” that will avoid jeopardy and allow the agency to proceed with the

1 action. The Services may also “suggest modifications” to the action (called
2 Reasonable and Prudent Measures) during the course of consultation to “avoid the
3 likelihood of adverse effects” to the listed species even when not necessary to avoid
4 jeopardy. 50 C.F.R. § 402.13.

5 57. The ESA further provides that after federal agencies initiate
6 consultation, the agencies “shall not make any irreversible or irretrievable
7 commitment of resources with respect to the agency action which has the effect of
8 foreclosing the formulation or implementation of any reasonable and prudent
9 alternative measures which would not violate subsection (a)(2) of this section.” 16
10 U.S.C. § 1536(d). The purpose of this prohibition is to maintain the environmental
11 status quo pending the completion of consultation.

12 58. The ESA’s citizen suit provision authorizes citizens to commence suit
13 against, *inter alia*, federal agencies that are alleged to be in violation of any
14 provision of the Act. 16 U.S.C. § 1540(g)(1)(A).

15 **VI. The Administrative Procedure Act**

16 59. The Administrative Procedure Act (“APA”) imposes procedural
17 requirements on federal agency rulemaking. 5 U.S.C. § 553. Under the APA,
18 agencies are required to publish notice of proposed rules in the Federal Register,
19 including “the terms or substance of the proposed rule or a description of the
20 subjects and issues involved.” *Id.* § 553(b)(3).

21 60. Following notice of a proposed rulemaking, agencies are required to
22 provide the public with the opportunity to submit “written data, views, or
23 arguments” which must then be considered and responded to by the agency. 5
24 U.S.C. § 554(c).

25 61. APA section 702 provides a private cause of action to any person
26 “suffering legal wrong because of agency action, or adversely affected or aggrieved
27 by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702.

28 62. Only final agency actions are reviewable under the APA. 5 U.S.C. §

1 704. Promulgation of a final rule is a “final agency action” for APA purposes.

2 63. Under the APA, a court must “hold unlawful and set aside agency
3 actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of
4 discretion, or otherwise not in accordance with law;” “in excess of statutory
5 jurisdiction, authority, or limitations, or short of statutory right;” or “without
6 observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (C), (D).

7 **GENERAL FACTUAL ALLEGATIONS**

8 **I. General Factual Background**

9 64. As the Agencies correctly noted in the preamble to the Proposed Clean
10 Water Rule,

11 “Waters of the United States,” which include wetlands, rivers, streams,
12 lakes, ponds and the territorial seas, provide many functions and
13 services critical for our nation’s economic and environmental health. In
14 addition to providing habitat, rivers, lakes, ponds and wetlands
15 cleanse our drinking water, ameliorate storm surges, provide
16 invaluable storage capacity for some flood waters, and enhance our
17 quality of life by providing myriad recreational opportunities, as well
18 as important water supply and power generation benefits.

19 79 Fed. Reg. at 22,191.

20 65. Many types of waters are connected in a hydrologic cycle, and a key
21 purpose of the CWA is to ensure protections for waters that may not themselves be
22 navigable in fact, but which affect such waters. As EPA’s own Office of Research
23 and Development has summarized,²

- 24
- 25 • “The scientific literature unequivocally demonstrates that
26 streams, individually or cumulatively, exert a strong influence
27 on the integrity of downstream waters. All tributary streams,
28 including perennial, intermittent, and ephemeral streams, are
physically, chemically, and biologically connected to downstream

26 ² U.S. EPA, Office of Research and Development, *Connectivity of Streams &*
27 *Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*
28 *(January 2015)* at ES-3, 4, *available at* <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414>.

1 rivers via channels and associated alluvial deposits where water
2 and other materials are concentrated, mixed, transformed, and
3 transported.”

- 4 • “The literature clearly shows that wetlands and open waters in
5 riparian areas and floodplains are physically, chemically, and
6 biologically integrated with rivers via functions that improve
7 downstream water quality, including the temporary storage and
8 deposition of channel-forming sediment and woody debris,
9 temporary storage of local ground water that supports baseflow
10 in rivers, and transformation and transport of stored organic
11 matter.”
- 12 • Wetlands and open waters in non-floodplain landscape settings
13 (hereafter called “non-floodplain wetlands”) provide numerous
14 functions that benefit downstream water integrity. These
15 functions include storage of floodwater; recharge of ground water
16 that sustains river baseflow; retention and transformation of
17 nutrients, metals, and pesticides; export of organisms or
18 reproductive propagules to downstream waters; and habitats
19 needed for stream species. This diverse group of wetlands (e.g.,
20 many prairie potholes, vernal pools, playa lakes) can be
21 connected to downstream waters through surface-water, shallow
22 subsurface-water, and ground-water flows and through biological
23 and chemical connections.”

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66. In addition, EPA’s own Scientific Advisory Board (SAB) has concluded
that “groundwater connections, particularly via shallow flow paths in unconfined
aquifers, can be critical in supporting the hydrology and biogeochemical functions of
wetlands and other waters. Groundwater also can connect waters and wetlands that
have no visible surface connections.”³

67. Many types of waters excluded from CWA jurisdiction by the Clean
Water Rule provide important habitat for fish, wildlife and threatened and

³ Letter from Dr. David T. Allen, Chair, EPA Science Advisory Board, to EPA
Administrator Gina McCarthy, *Science Advisory Board (SAB) Consideration of the
Adequacy of the Scientific and Technical Basis of the EPA’s Proposed Rule titled
“Definition of Waters of the Untied States under the Clean Water Act”* (Sept. 30,
2014), at 2-3, available at [http://yosemite.epa.gov/sab/sabproduct.nsf/0/
518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf).

1 endangered species. For example, salmon and steelhead in the Pacific Northwest
2 regularly use and require certain types of streams, ditches and ditched or
3 channelized streams during their life cycle. Small wetlands and ponds are
4 important habitat for numerous amphibians and reptiles. Moreover, fish, wildlife,
5 and threatened and endangered species found within traditionally navigable waters
6 are often very sensitive to pollution are harmed from the cumulative impacts to
7 headwater tributaries and wetlands upstream. These species have the potential to
8 receive less or no protection against pollution or destruction under the Clean Water
9 Rule than they did under the Agencies' prior definition of "waters of the United
10 States."

11 68. At the same time, other types of waters which are afforded greater
12 protection under the Clean Water Rule than under the prior regulatory definition
13 also provide habitat for numerous ESA-listed species. For example, several
14 categories of wetlands, including prairie potholes, Carolina and Delmarva bays,
15 pocosins, western vernal pools in California, and Texas coastal prairie wetlands
16 provide habitat for endangered species such as whooping cranes, Northern Great
17 Plains piping plovers, and prairie shrimp, among others.

18 **II. The Clean Water Rule**

19 69. On April 21, 2014, the Agencies published in the Federal Register a
20 proposed rule entitled *Definition of 'Waters of the United States' Under the Clean*
21 *Water Act* ("Proposed Clean Water Rule"). 79 Fed. Reg. 21,188–22,274 (Apr. 21,
22 2014).

23 70. The Proposed Clean Water Rule provided the public with an
24 opportunity to file comments until July 21, 2014. The comment period was extended
25 twice, ultimately requiring comments to be filed not later than November 14, 2014.
26 *See* 79 Fed. Reg. 35,712 (June 24, 2014); 79 Fed. Reg. 61,590 (Oct. 14, 2014).

27 71. Each plaintiff in this action submitted written comments on the
28 Proposed Clean Water Rule during the public comment period, including at least

1 the following: a letter dated November 14, 2014 and submitted electronically to EPA
2 Docket No. EPA-HQ-OW-2011-0880 on behalf of Waterkeeper Alliance, Humboldt
3 Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper,
4 Upper Missouri Waterkeeper, and others; a letter dated November 14, 2014 and
5 submitted electronically to EPA Docket No. EPA-HQ-OW-2011-0880 on behalf of
6 Center for Biological Diversity, Center for Food Safety, and Turtle Island
7 Restoration Network; and a letter dated November 14, 2014 and submitted
8 electronically to EPA Docket No. EPA-HQ-OW-2011-0880 on behalf of Center for
9 Biological Diversity and others.

10 72. On June 29, 2015, the Agencies issued the final Clean Water Rule. 80
11 Fed. Reg. 37054 (June 29, 2015). The Clean Water Rule revised eleven regulatory
12 provisions where the phrase “waters of the United States” is defined, 40 C.F.R.
13 Parts 110, 112, 116, 117, 122, 230, 232, 300, 301, and 401, which govern various
14 regulatory programs implemented by EPA or the Corps under their CWA
15 authorities.

16 73. The Clean Water Rule effectively placed all of the nation’s waters into
17 one of three categories for purposes of CWA jurisdiction:

- 18 (1) Waters that are *per se jurisdictional*, including traditional navigable
19 waters; interstate waters; the territorial seas; tributaries (as defined
20 elsewhere in the rule) of traditional navigable waters, interstate waters,
21 and territorial seas; impoundments of other jurisdictional waters; and all
22 waters that are adjacent to (as defined elsewhere in the rule) the waters
23 described above;
- 24 (2) Waters that are *per se non-jurisdictional*, including (among others)
25 waters converted to waste treatment systems; certain types of ditches;
26 ephemeral features that do not meet the definition of a tributary;
27 groundwater; and waters outside the 100-year floodplain and more than
28 4,000 feet of the high tide line or ordinary high water mark of a
traditional navigable water, interstate water, the territorial seas,
impoundment of other jurisdictional waters, or tributary; and

1 (3) Waters which will be assessed for jurisdiction on a case-specific basis by
2 applying a *significant nexus analysis*, including (among others) all
3 adjacent waters being used for established normal farming, ranching, and
4 silviculture activities; all of certain categories of waters, including prairie
5 potholes, pocosins, and western vernal pools; all waters within the 100-
6 year floodplain of a traditional navigable water, interstate waters, or the
7 territorial seas; and all waters located within 4,000 feet of the high tide
8 line or ordinary high water mark of a traditional navigable water,
9 interstate water, the territorial seas, impoundment of other jurisdictional
10 waters, or tributary.

11 *See* 80 Fed. Reg. at 37,104. Substantially the same definition of waters of the
12 United States was incorporated into the relevant definition sections of eleven
13 separate regulations implementing the CWA. *See id.* at 37,104-127.

14 74. On July 13, 2015, the Clean Water Rule became a “final agency action”
15 within the meaning of 5 U.S.C. § 704.

16 75. On May 26, 2015, the Corps issued a Final EA on the Clean Water
17 Rule.⁴ As part of its EA, the Corps issued a FONSI after concluding “that adoption
18 of the rule is not a major Federal action significantly affecting the quality of the
19 human environment within the meaning of the National Environmental Policy Act
20 for which an environmental impact statement is required.” *Id.*

21 **III. Tributaries under the Final Clean Water Rules**

22 76. The Clean Water Rule defines “tributary” as “a water that contributes
23 flow, either directly or through another water” to a traditional navigable water,
24 interstate water, or territorial seas, and “that is characterized by the presence of
25 the physical indicators of a bed and banks and an ordinary high water mark.” 80
26 Fed. Reg. at 37,105; 33 C.F.R. § 328.3(c)(3). As the Agencies explain in the preamble
27 to the Clean Water Rule, this definition “requires the presence of a bed and banks
28

29 ⁴ *See* Finding of No Significant Impact: Adoption of the Clean Water Rule:
30 Definition of Waters of the United States (May 26, 2015), *available at*
31 [http://www2.epa.gov/sites/production/files/2015-05/documents/](http://www2.epa.gov/sites/production/files/2015-05/documents/finding_of_no_significant_impact_the_clean_water_rule_52715.pdf)
32 [finding_of_no_significant_impact_the_clean_water_rule_52715.pdf](http://www2.epa.gov/sites/production/files/2015-05/documents/finding_of_no_significant_impact_the_clean_water_rule_52715.pdf). (hereinafter,
33 “FONSI”).

1 *and* an additional indicator of ordinary high water mark such as staining, debris
2 deposits, or other indicator[.]” 80 Fed. Reg. at 37,076 (emphasis added).

3 77. As EPA has noted, the definition of tributary in the Clean Water Rule
4 “narrows the waters that meet the definition of tributary compared to current
5 practice that simply requires one indicator of ordinary high water mark”—e.g., the
6 presence of defined bed and banks.⁵

7 78. The Clean Water Rule’s definition of tributary, which includes only
8 those waters that have a bed and banks *and* an additional indicator of an ordinary
9 high water mark, lacks legal and scientific support. EPA’s Scientific Advisory Board
10 “advised EPA to reconsider the definition of tributaries because not all tributaries
11 have ordinary high water marks” and urged EPA to change the definition’s wording
12 to “bed, bank, and other evidence of flow.” 80 Fed. Reg. at 37,064. The Scientific
13 Advisory Board explained that “[a]n ordinary high water mark may be absent in
14 ephemeral streams within arid and semi-arid environments or in low gradient
15 landscapes where the flow of water is unlikely to cause an ordinary high water
16 mark.”⁶

17 79. EPA’s own scientific analyses underpinning the Clean Water Rule do
18 not provide support for the requirement that a tributary have both bed and banks
19 and an ordinary high water mark to have a significant nexus with downstream
20 waters and thus be per se jurisdictional under the CWA. While EPA noted that
21 available science “supports the conclusion that sufficient volume, duration, and
22 frequency of flow are required to create a bed and banks and ordinary high water
23 mark” within a tributary, TSD at 171, this self-evident conclusion has no bearing on
24 whether a particular tributary (or group of similarly situated tributaries)

25
26 ⁵ U.S. EPA and U.S. Dept. of the Army, *Technical Support Document for the*
27 *Clean Water Rule: Definition of Waters of the United States* (May 27, 2015) at 67
(hereinafter, “TSD”).

28 ⁶ Letter from Dr. David T. Allen, *supra* note 3, at 2.

1 “provide[s] many common vital functions important to the chemical, physical, and
2 biological integrity of downstream waters” and should thus be *per se* jurisdictional.
3 *Id.* at 235. Indeed, the TSD explicitly recognized, and did not dispute, the SAB’s
4 view that “from a scientific perspective there are tributaries that do not have an
5 ordinary high water mark but still affect downstream waters.” *Id.* at 242.

6 **IV. Ditches and Ephemeral Features under the Proposed and Final** 7 **Clean Water Rules**

8 80. In its Proposed Clean Water Rule, EPA stated that certain ditches
9 meet the definition of “tributary,” and are therefore “waters of the United States,” if
10 they satisfy the following criteria: “they have a bed and banks and ordinary high
11 water mark and they contribute flow directly or indirectly through another water to
12 (a)(1) through (a)(4) waters.” 79 Fed. Reg. at 22,203.

13 81. Under the Proposed Clean Water Rule, two types of ditches were *per se*
14 excluded, regardless of whether they satisfied the requirements of another category
15 of “water of the United States”: (1) “[d]itches that are excavated wholly in uplands,
16 drain only uplands, and have less than perennial flow,” and (2) “[d]itches that do
17 not contribute flow, either directly or through another water, to a traditional
18 navigable water, interstate water, the territorial seas or an impoundment of a
19 jurisdictional water.” 79 Fed. Reg. at 22,273–74. The Proposed Rule also exempted
20 gullies, rills, and “non-wetland swales.” *Id.* at 22,263.

21 82. The SAB provided comments on this aspect of the Proposed Clean
22 Water Rule, and specifically rejected the Rule’s exclusion of ditches as “not justified
23 by science.” The SAB explained: “There is . . . a lack of scientific knowledge to
24 determine whether ditches should be categorically excluded. Many ditches in the
25 Midwest would be excluded under the proposed rule because they were excavated
26 wholly in uplands, drain only uplands, and have less than perennial flow. However,
27 these ditches may drain areas that would be identified as wetlands under the
28

1 Cowardin classification system and may provide certain ecosystem services.” SAB
2 Report at 3.

3 83. Members of the SAB panel also expressed concerns regarding the
4 Proposed Clean Water Rule’s exclusion of ephemeral streams, noting for example
5 that such waters are ecologically important to downstream water quality (especially
6 in the arid southwest), *see supra* paragraph 66 and n.5; can deliver nutrients and
7 other agricultural pollutants to downstream waters when tiled;⁷ and may provide
8 valuable habitat for certain organisms that have adapted to them.⁸

9 84. In the final Clean Water Rule, the Agencies significantly altered the
10 provision regarding ditches, changing the exclusion to include: “[d]itches with
11 ephemeral flow that are not a relocated tributary or excavated in a tributary”;
12 “[d]itches with intermittent flow that are not a relocated tributary, excavated in a
13 tributary, or drain wetlands”; and, “[d]itches that do not flow, either directly or
14 through another water, into a water identified in paragraphs (a)(1) through (3) of
15 this section.” 80 Fed. Reg. 37,105.

16 85. In the Clean Water Rule, the Agencies also significantly expanded the
17 exclusion for ephemeral features so that it applies to “[e]rosional features, including
18 gullies, rills, and other ephemeral features that do not meet the definition of
19 tributary, non-wetland swales, and lawfully constructed grassed waterways.” *Id.* In
20 the Preamble to the Clean Water Rule, the Agencies explained that the term
21 “ephemeral features” broadly encompasses “ephemeral streams that do not have a
22 bed and banks and ordinary high water mark.” *Id.* at 37,058.

23
24 ⁷ Memorandum from Dr. Amanda D. Rodewald, Chair of the Science Advisory
25 Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report, to
26 Dr. David Allen, Chair of the EPA Science Advisory Board, Comments to the
27 Chartered SAB on the Adequacy of the Scientific and Technical Basis of the
Proposed Rule Titled “Definition of ‘Waters of the United States’ Under the Clean
Water Act” (Sep. 2, 2014) at 8.

28 ⁸ *Id.* at 25, Revised Comments by Kurt D. Fausch on the proposed rule
“Definition of ‘Waters of the United States’ Under the Clean Water Act.”

1 86. EPA’s own scientific analyses underpinning the Clean Water Rule do
2 not provide support for its categorical exemptions of certain types of ditches and
3 ephemeral features. According to EPA, “[t]he scientific literature documents that
4 tributary streams, *including perennial, intermittent, and ephemeral streams*, and
5 certain categories of ditches are integral parts of river networks.” TSD at 243
6 (emphasis added). In the preamble to the Proposed Clean Water Rule, EPA noted
7 that “tributary streams, *including perennial, intermittent, and ephemeral streams*,
8 are chemically, physically, or biologically connected to downstream rivers via
9 channels and associated alluvial deposits where water and other materials are
10 concentrated, mixed, transformed, and transported.” 79 Fed. Reg. at 22224.

11 87. In the preamble to the final Clean Water Rule, EPA explained that the
12 effects tributaries exert on downstream waters “occur even when the covered
13 tributaries flow infrequently (such as ephemeral covered tributaries), and even
14 when the covered tributaries are great distances from the traditional navigable
15 water, interstate water, or the territorial sea.” 80 Fed. Reg. at 37,069.

16 88. EPA has also noted that man-made and man-altered tributaries—such
17 as “ditches, canals, channelized streams, piped streams, and the like,” TSD at 256—
18 “likely enhance the extent of connectivity” between streams and downstream rivers,
19 “because such structures can reduce water losses from evapotranspiration and
20 seepage.” In other words, to the extent perennial, intermittent, and ephemeral
21 tributaries have significant impacts on downstream waters, the increased flow
22 associated with man-made or man-altered ditches may actually exacerbate these
23 effects.

24 89. Despite noting the significant impacts that ditches and ephemeral
25 streams have on downstream waters, the Agencies have provided no legal or
26 scientific basis for excluding ditches that are ephemeral, intermittent, or indirectly
27 connected to traditional navigable waters, interstate waters, or the territorial seas,
28 nor have the Agencies provided a legal or scientific basis for *per se* excluding

1 ephemeral features such as ephemeral streams that do not meet the definition of
2 tributary.

3 90. The Agencies provided no justification, legal, scientific or otherwise, for
4 concluding that all tributaries are “waters of the United States,” yet categorically
5 exempting certain types of ditches—a category of tributary under the Clean Water
6 Rule—and other ephemeral waters that may have a significant nexus with
7 traditional navigable waters, interstate waters, or the territorial seas.

8 91. Finally, the Agencies have provided no legal or scientific basis for
9 exempting ditches that flow into traditional navigable waters, interstate waters, or
10 the territorial seas, despite concluding that such waters are “waters of the United
11 States” in the Proposed Rule. *Compare* 79 Fed. Reg. 22,273–74 (excluding “[d]itches
12 that do not contribute flow . . . to water identified in paragraphs (l)(1)(i) through (iv)
13 of this section”), *with* 80 Fed. Reg. 37,105 (excluding “[d]itches that do not flow,
14 either directly or through another water, into a water identified in paragraphs (a)(1)
15 through (3) of this section”).

16 **V. Limits on the Application of the Significant Nexus Test under the** 17 **Proposed and Final Clean Water Rules**

18 92. In the final Clean Water Rule, the Agencies defined waters of the
19 United States to include “all waters located within 4,000 feet of the high tide line or
20 ordinary high water mark of” a per se jurisdictional water (other than adjacent
21 waters), “where they are determined on a case-specific basis to have a significant
22 nexus” with such water. 80 Fed. Reg. at 37,114.

23 93. Under the Clean Water Rule, most waters located *more than* 4,000 feet
24 of the high tide line or ordinary high water mark of a per se jurisdictional water
25 other than an adjacent water (hereinafter collectively referred to as “qualifying per
26 se jurisdictional waters”) are automatically excluded from CWA jurisdiction, even if
27 those waters have or may possess a significant nexus with the jurisdictional water
28

1 or otherwise have a significant affect on interstate commerce.⁹ *See* 80 Fed. Reg. at
2 37,086 (describing the “exclusive” and “narrowly targeted circumstances” under
3 which case-specific significant nexus determinations can be made under the Clean
4 Water Rule).

5 94. The Proposed Clean Water Rule did not include the 4,000-foot
6 limitation—or any other distance limitation—on the application of the significant
7 nexus test to other waters. Instead, the Proposed Rule would have extended CWA
8 jurisdiction to all “other waters, including wetlands, provided that those waters
9 alone, or in combination with other similarly situated waters, including wetlands,
10 located in the same region, have a significant nexus to” traditional navigable
11 waters, interstate waters, and the territorial seas. 79 Fed. Reg. at 22,268. For
12 example, under the Proposed Rule, a wetland complex located 5,000 feet from a
13 qualifying per se jurisdictional water could be subject to CWA jurisdiction if it was
14 shown to possess a significant nexus with a traditional navigable water, an
15 interstate water, or a territorial sea.

16 95. In the preamble to the Proposed Clean Water Rule, the Agencies
17 identified and solicited public comment on several alternatives to their proposal to
18 codify the significant nexus test as the basis for determining jurisdiction over all
19 other non-adjacent waters. *See* 79 Fed. Reg. at 22214-17. None of these alternatives
20 suggested the possibility that the Agencies might establish an outermost limit on
21 the application of the significant nexus test at 4,000 feet, or might use any other
22 distance as the basis for excluding waters from CWA jurisdiction.

23 96. In establishing the “4,000 foot bright line boundaries for these case-
24

25 ⁹ Under the Clean Water Rule, a case-by-case significant nexus analysis also
26 applies to five categories of waters that the Agencies “have determined are
27 ‘similarly situated’ for purposes of a significant nexus determination” (such as
28 prairie potholes and western vernal pools), as well as to waters within the 100-year
floodplain of a traditional navigable water, interstate water, or territorial sea. 80
Fed. Reg. at 37,086.

1 specific significant nexus determinations” in the Clean Water Rule, the Agencies
2 purport to be “carefully applying the available science.” 80 Fed. Reg. at 37,059. But
3 the opposite is true; indeed, as noted in the preamble to the Clean Water Rule,
4 EPA’s own Scientific Advisory Board “found that distance could not be the sole
5 indicator used to evaluate the connection of ‘other waters’ to jurisdictional waters.”
6 *Id.* at 37,064.

7 **VI. Adjacent Waters and Normal Farming Activities under the Proposed**
8 **and Final Clean Water Rules**

9 97. Prior to the Clean Water Rule, the Agencies considered all wetlands
10 adjacent to a traditional navigable water to have a “significant nexus” to that water,
11 in recognition of the fact that waters and their adjacent wetlands are properly
12 viewed as one system due to their hydrological connection with one another. Thus,
13 prior to the Proposed or Final Clean Water Rule, the Agencies considered all
14 adjacent wetlands to be jurisdictional under the CWA.

15 98. Under both the Proposed and the Final Clean Water Rule, “waters of
16 the United States” include all waters that are “adjacent” to a traditional navigable
17 water, interstate water, territorial sea, impoundment of a jurisdictional water, or
18 tributary. *See* 79 Fed. Reg. at 22,206-07; 80 Fed. Reg. at 37,058.

19 99. In the Proposed Clean Water Rule the Agencies proposed to define
20 “adjacent” as follows:

21 The term *adjacent* means bordering, contiguous or neighboring.
22 Waters, including wetlands, separated from other waters of the United
23 States by man-made dikes or barriers, natural river berms, beach
dunes and the like are “adjacent waters.”

24 79 Fed. Reg. at 22,270 (citing proposed 40 C.F.R. § 232.2).

25 100. In the preamble to the Proposed Clean Water Rule, the Agencies stated
26 that the rule “does not affect any of the exemptions from CWA section 404
27 permitting requirements provided by CWA section 404(f), including those for
28

1 normal farming, silviculture, and ranching activities.” 79 Fed. Reg. at 22,199 (citing
2 33 U.S.C. § 1344(f); 40 CFR 232.3; 33 CFR 323.4).

3 101. In the final Clean Water Rule, however, the Agencies added the
4 following language to the definition of adjacent: “Waters being used for established
5 normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not
6 adjacent.” *See, e.g.*, 80 Fed. Reg. at 37,105; 33 C.F.R. § 328(c)(1).

7 102. This addition was made by EPA on “the day that the draft final rule
8 was sent to OMB to begin the inter-agency review process”¹⁰ and was not subjected
9 to the Agencies’ scientific review or the Corps’ NEPA evaluation.

10 103. In the preamble to the Clean Water Rule, the Agencies state that the
11 language added to the definition of adjacent “interprets the intent of Congress[.]” 80
12 Fed. Reg. at 37,080. But by enacting section 404(f) of the CWA, Congress sought to
13 exempt discharges from certain types of *activities* from the requirement to obtain a
14 permit pursuant section 404; it did not intend to remove any category of waters
15 from the Act’s jurisdiction.

16 104. As a result of this addition to the definition of “adjacent” from the
17 Proposed Clean Water Rule to the final Clean Water Rule, waters being used for
18 established normal farming, ranching, and silviculture activities now must satisfy
19 the significant nexus test in order to be jurisdictional—even if they are physically
20 adjacent to a traditional navigable water would therefore have been *per se*
21 jurisdictional under the Proposed Clean Water Rule or prior agency practice.

22 105. The Agencies’ only stated reasoning for this last-minute addition to the
23 Rule is that farmers play a “vital role” in providing the United States with food,
24 fiber, and fuel, and thus the Agencies wanted to “minimize potential regulatory

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26 ¹⁰ Memorandum from Lance Wood, Assistant Chief Counsel for
27 Environmental Law and Regulatory Programs, U.S. Army Corps of Engineers, to
28 Maj. Gen. John Peabody, Deputy Commanding General for Civil and Emergency
Operations, U.S. Army Corps of Engineers, *Legal Analysis of Draft Final Rule on
Definition of “Waters of the United States”* (Apr. 24, 2015) at 5.

1 burdens on the nation’s agriculture community.” 80 Fed. Reg. at 37,080. The
2 Agencies do not attempt to explain how the CWA section 404(f)(1) exemption is
3 related to “adjacent” waters; nor do the Agencies provide any scientific justification
4 for changing how they treat waters adjacent to traditionally navigable waters.

5 106. In addition, in the preamble to the Clean Water Rule, the Agencies
6 purport to include all waters “adjacent” to traditional navigable waters, interstate
7 waters, and the territorial seas as waters of the United States “based upon their
8 hydrological and ecological connections to, and interactions with, those waters.” 80
9 Fed. Reg. at 37,058. But in the preamble to the Clean Water Rule the Agencies state
10 that a wetland “being used for established normal farming, ranching, and
11 silviculture activities” “shall not be combined” with other adjacent wetlands when
12 conducting the significant nexus analysis, regardless of the hydrological connection
13 between the wetlands or the effects that the entire wetlands system, as a whole,
14 have on the chemical, physical, or biological integrity of adjacent traditional
15 navigable waters, interstate waters, territorial seas, or tributaries.

16 107. Nothing in the record or the available science suggests that the mere
17 presence established normal farming, ranching, and silviculture activities affects a
18 water’s hydrological and ecological connections to other waters.¹¹

19 108. Moreover, nothing in the preamble to the Proposed Clean Water Rule
20 suggested that the Agencies were considering the creation of an entirely new
21 concept of adjacency that excludes all waters in which established normal farming,
22 ranching, and silvicultural activities occur—even when those waters are bordering,
23 contiguous, or neighboring another jurisdictional water as a matter of geographic
24 fact. *See* 79 Fed. Reg. at 22,207-11.

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27 ¹¹ *See* Wood Memorandum, *supra* note 8, at 5 (describing the addition of this
28 sentence “indefensible,” “a textbook example of rulemaking that cannot withstand
judicial review,” and “highly problematic, both as a matter of science and for
purposes of implementing the final rule”).

1 109. Indeed, nothing in the preamble to the Proposed Clean Water Rule
2 even hinted that Agencies might conclude that established farming practices played
3 any role whatsoever in identifying which waters are subject to CWA jurisdiction.
4 *See, e.g., id.* at 22,210 (“The agencies proposal to determine ‘adjacent waters’ to be
5 jurisdictional by rule is supported by the substantial physical, chemical, and
6 biological relationship between adjacent waters” and other jurisdictional waters.)
7 Instead, the Agencies noted that the “existing definition of ‘adjacent’ would be
8 generally retained under” the Proposed Clean Water Rule. *Id.* at 22,207.

9 **VII. Groundwater under the Proposed and Final Clean Water Rule**

10 110. The Agencies have a longstanding and consistent interpretation that
11 the CWA may cover discharges to groundwater that has a direct hydrological
12 connection to surface waters. *See, e.g., National Pollutant Discharge Elimination*
13 *System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg.
14 47990-01 (Nov. 16, 1990). This interpretation has been upheld by numerous
15 courts.¹²

16 111. The Agencies proposed definition of “waters of the United States”
17 excluded all “groundwater, including groundwater drained through subsurface
18 drainage systems.” 79 Fed. Reg. at 22,193. In the preamble to the Proposed Clean
19 Water Rule, EPA explained that the reasoning behind this exclusion was that the
20 agencies had never interpreted “waters of the United States” to include
21 groundwater. *Id.* at 22,218.

22 112. The SAB provided comments on the proposed definition and
23 specifically noted that there was no scientific justification for the groundwater

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25 ¹² *See, e.g., Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp.
26 1333, 1357-58 (D.N.M. 1995); *Washington Wilderness Coalition v. Hecla Mining Co.*,
27 870 F.Supp. 983, 990 (E.D. Wash.1994); *Sierra Club v. Colo. Ref. Co.*, 838 F.Supp.
28 1428, 1433–34 (D. Colo. 1993); *McClellan Ecological Seepage Situation v.*
Weinberger, 707 F.Supp. 1182, 1195–96 (E.D. Cal.1988), *vacated on other grounds*,
47 F.3d 325 (9th Cir.1995), *cert. denied*, 516 U.S. 807, 116 S.Ct. 51, 133 L.Ed.2d 16
(1995); *New York v. United States*, 620 F.Supp. 374, 381 (E.D.N.Y.1985).

1 exclusion. *See* Letter from Dr. David T. Allen, *supra* note 3, at 3. The SAB went on
2 to comment:

3 The available science . . . shows that groundwater connections,
4 particularly via shallow flow paths in unconfined aquifers, can be
5 critical in supporting the hydrology and biogeochemical functions of
6 wetlands and other waters. Groundwater also can connect waters and
7 wetlands that have no visible surface connections.

8 *Id.*

9 113. Several individual members of the SAB further explained their
10 concerns regarding the Proposed Clean Water Rule’s categorical exclusion of all
11 groundwater to EPA. For example, Dr. David Allen, chair of the SAB, questioned
12 the exclusion because “an important pathway for some nutrients and contaminants
13 is via subsurface drainage systems to ditches that may not have perennial flow, but
14 which may deliver much of the nonpoint runoff to downstream waters”, and
15 concluded that “this exclusion is a concern, and should be recognized as such.”¹³

16 114. Similarly, SAB member Dr. Robert Brooks stated that the
17 groundwater exclusion “seems ill-advised because of the likely connectivity of
18 surface flows into features such as karst sinkholes, with a potential to contaminate
19 groundwater aquifers used for human water supplies, plus the possibility of
20 reconnections to surface water a reasonable distance away.” *Id.* at 17. And SAB
21 member Dr. Kenneth Kolm concluded that “[i]n no cases should groundwater that is
22 shown to be connected to ‘waters of the US’ be exempt.” *Id.* at 49.

23 115. The Agencies ignored the expert advice of their scientific advisors, and
24 included the *per se* exclusion of all “[g]roundwater, including groundwater drained
25 through subsurface drainage systems” in the Final Clean Water Rule. *See* 80 Fed.
26 Reg at 37,104, 37,114.

27 ¹³ U.S. EPA, Compilation of Preliminary Comments from Individual Panel
28 Members on the Scientific and Technical Basis of the Proposed Rule Titled
“Definition of ‘Waters of the United States’ Under the Clean Water Act” (August 14,
2014) at 14.

1 116. Pursuant to this exclusion, groundwater that that has a significant
2 nexus to a traditional navigable water, interstate water, or a territorial sea is not a
3 water of the United States, even if it is immediately adjacent to and is directly
4 connected that water.

5 117. In the preamble to the Clean Water Rule, the Agencies explained that
6 their reasoning for categorically excluding all groundwater from the definition of
7 “waters of the United States” is that they have never interpreted groundwater to
8 fall within this definition, and that “[c]odifying these longstanding practices
9 supports the agencies’ goals of providing clarity, certainty, and predictability for the
10 regulated public and regulators, and makes rule implementation clear and
11 practical.” 80 Fed. Reg at 37,073. Yet the Agencies categorically regulate all other
12 waters that are adjacent to traditional navigable waters, interstate waters, the
13 territorial seas, or their tributaries. The Agencies provided no legal or scientific
14 basis for categorically excluding all groundwater from the definition of “waters of
15 the United States.”

16 **VIII. Waste Treatment Systems under the Proposed and Final Clean Water** 17 **Rule.**

18 118. On May 19, 1980, EPA promulgated a rule establishing the
19 requirements for several environmental permitting programs, including the NPDES
20 program. *See* 45 Fed. Reg. 33,290 (May 19, 1980). As part of this action, EPA
21 promulgated a definition of the term “waters of the United States.” That rule stated
22 that:

23 Waste treatment systems, including treatment ponds or lagoons
24 designed to meet the requirements of the CWA (other than cooling
25 ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria
26 of this definition) are not waters of the United States. *This exclusion*
27 *applies only to manmade bodies of water which neither were originally*
created in waters of the United States (such as disposal area in
wetlands) nor resulted from the impoundment of waters of the United
States.

28 45 Fed. Reg. 33,290, 33,424 (emphasis added); *see also* 40 C.F.R. § 122.3 (1980). The

1 preamble to this 1980 rule explains that the second sentence of this regulation was
2 included “[b]ecause CWA was not intended to license dischargers to freely use
3 waters of the United States as waste treatment systems[.]” 45 Fed. Reg. 33,290,
4 33,298.

5 119. Two months later EPA suspended the second sentence of this
6 regulation (italicized above) by removing it from the regulation entirely. In its place,
7 EPA inserted a footnote stating that the sentence was “suspended until further
8 notice.” 45 Fed. Reg. 48,620 (July 21, 1980). EPA explained in a Federal Register
9 notice that it was suspending this sentence due to industry’s objections that the
10 regulation “would require them to obtain permits for discharges into existing waste
11 water treatment systems, such as power plant ash ponds, which had been in
12 existence for many years.” *Id.*

13 120. EPA did not provide the public with an opportunity to comment on the
14 suspension at the time the action was taken in 1980. Instead, EPA noted its intent
15 to “promptly develop a revised definition and to publish it as a proposed rule for
16 public comment. At the conclusion of that rulemaking, EPA will amend the rule, or
17 terminate the suspension.” *Id.*

18 121. EPA never developed a revised definition, and thus never submitted a
19 proposed rule regarding this limitation on the waste treatment system exclusion for
20 notice and comment. The public has therefore never had the opportunity to
21 comment on or legally challenge the suspension of the sentence.

22 122. Due to the “suspension” of the second sentence of the waste treatment
23 system exclusion found at 40 C.F.R. § 122.3 in 1980, subsequently promulgated
24 regulatory definitions of “waters of the United States” did not include that sentence.
25 As such, this suspension—and the Agencies’ obligation to take action to resolve it—
26 has seemingly been forgotten, as the Agencies continue to promulgate definitions of
27 “waters of the United States” that do not, because of the ongoing suspension,
28 contain this limitation on the exclusion for waste treatment systems.

1 123. The Proposed Clean Water Rule included the “suspended” second
2 sentence of the waste treatment system exclusion, but noted in a footnote that the
3 suspension was still in effect. *See* 79 Fed. Reg. at 22,268. In addition, in the
4 preamble to the Proposed Clean Water Rule the Agencies purport to make only
5 “ministerial” changes to the waste treatment system exclusion, and thus stated that
6 were not seeking comment on this exclusion. *Id.* at 22,190, 22,217. However, these
7 “ministerial” changes included the addition of a comma not in the existing
8 exclusion.

9 124. The definition of “waters of the United States” in 40 C.F.R. § 122.2, as
10 revised by the Clean Water Rule, provides that “[t]he following are not ‘waters of
11 the United States’ even where they otherwise meet the terms of (1)(iv) through (viii)
12 of the definition” [i.e., even if they are otherwise jurisdictional as impoundments,
13 tributaries, adjacent waters, or waters with a significant nexus to traditional
14 navigable waters, interstate waters, or the territorial seas]:

15 Waste treatment systems, including treatment ponds or lagoons
16 designed to meet the requirements of the Clean Water Act. This
17 exclusion applies only to manmade bodies of water which neither were
18 originally created in waters of the United States (such as disposal area
in wetlands) nor resulted from the impoundment of waters of the
United States. [See Note 1 of this section.]

19 80 Fed. Reg. at 37,114. As it did before, “Note 1” of the revised 40 C.F.R. § 122.2
20 purports to continue the suspension of the last sentence of the waste treatment
21 system exclusion.

22 125. In the Clean Water Rule, the Agencies lifted the suspension of the last
23 sentence in 40 C.F.R. § 122.2’s exclusion for waste treatment system, and then
24 reinstated the suspension. *See* 80 Fed. Reg. at 37,114. The preamble to the Clean
25 Water Rule describes the changes to the waste treatment system exclusion as
26 “ministerial” and notes that “[b]ecause the agencies are not making any substantive
27 changes to the waste treatment system exclusion, the final rule does not reflect
28 changes suggested in public comments.” *Id.* at 37,097.

1 126. However, the Agencies note in the preamble to the Clean Water Rule
2 that they did, in fact, respond to comments that the addition of the comma
3 narrowed the exclusion, by removing the comma. 80 Fed. Reg. at 37,114. Thus, the
4 agencies responded to some substantive comments on the scope of the exclusion, but
5 not others. Several plaintiffs submitted comments on the Proposed Clean Water
6 Rule that were not addressed by the Agencies. And, moreover, in responding to
7 some of the comments, the Agencies adopted a *broader* exclusion (e.g., excluding
8 more waste treatment systems) than had been contemplated by the Proposed Rule.

9 127. The Clean Water Rule does not define “waste treatment systems.”
10 Thus, under the waste treatment system exclusion in the Final Rule (including the
11 ongoing suspension of the last sentence of that exclusion), certain types of waters
12 such as adjacent wetlands, ponds, or tributaries are not subject to CWA jurisdiction
13 if they are deemed to be part of a “waste treatment system”— *even if* they are
14 themselves naturally occurring waters, were created entirely within a naturally
15 occurring water, or were created by impounding another water of the United States.
16 For example, under the Clean Water Rule an industrial facility could unilaterally
17 destroy CWA jurisdiction over a naturally occurring wetland or tributary merely by
18 using that wetland or tributary as part of its on-site “waste treatment system.” This
19 exemption is contrary to the fundamental purposes of the CWA and flies in the face
20 of any permissible reading of “waters of the United States.” *See* 33 U.S.C. § 1251(a).

21 128. In the Preamble to the Clean Water Rule, the Agencies unambiguously
22 recognize that adjacent waters, tributaries, and impoundments are jurisdictional by
23 rule because “the science confirms that they have a significant nexus to traditional
24 navigable waters, interstate waters, or territorial seas.” 80 Fed. Reg. at 37,058,
25 37,075. Thus, the Agencies construe the Clean Water Rule as making these waters
26 jurisdictional “in all cases” and suggest that “no additional analysis is required” to
27 assert CWA jurisdiction over them. *Id.* at 37,058. These statements, however, are
28 flatly contradicted by the waste treatment system exclusion, which excludes

1 adjacent waters, tributaries, and impoundments of jurisdictional waters (among
2 others) that are deemed to be part of a “waste treatment system.”

3 4 **IX. Abandonment of “Other Waters” under the Clean Water Rule**

5 129. For decades prior to the Clean Water Rule, the Agencies asserted
6 jurisdiction over all other waters “the use, degradation, or destruction of which
7 would affect or could affect interstate or foreign commerce.” *See, e.g.*, 33 C.F.R. §
8 328.3(a)(3) (2014). Under this regulatory definition, many waters of regional or
9 national importance were properly afforded CWA protections, consistent with stated
10 Congressional policy.

11 130. Among these previously protected “other waters” are closed basins in
12 New Mexico that include many non-tributary rivers, streams and wetlands; wholly
13 intrastate waters such as the Little Lost River in southern Idaho that does not flow
14 into a traditionally navigable water but instead flows into the Snake River Plain
15 Aquifer; and hundreds of “isolated” glacial kettle ponds such as those found on Cape
16 Cod in Massachusetts that, in addition to being tourist attractions, are vital to
17 protecting that region’s drinking water.

18 131. Purportedly on the basis of a single sentence from the Supreme Court’s
19 decision in *SWANCC*, in the Clean Water Rule the Agencies “concluded that the
20 general other waters provision in the existing regulation based on [Commerce
21 Clause effects unrelated to navigation] was not consistent with Supreme Court
22 precedent.” TSD at 78 (citing *SWANCC*, 531 U.S. at 172). Thus, in the Clean Water
23 Rule the Agencies rely almost exclusively on the significant nexus test. As a result,
24 because many of these “other waters” are not themselves navigable in fact, and lie
25 beyond 4,000 feet from otherwise jurisdictional navigable waters, tributaries, or
26 adjacent wetlands, they are *per se* non-jurisdictional under the Clean Water Rule.

27 132. Elsewhere in the rulemaking record, however, the Agencies recognize
28 that the Supreme Court in *SWANCC* “did not vacate (a)(3) of the existing

1 regulation” and that “[n]o Circuit Court has interpreted SWANCC to have vacated
2 the other waters provision of the existing regulation.” TSD at 77-78.

3 133. The Agencies do not provide any further factual, scientific, legal, or
4 policy reasons for their change of course with respect to these other waters that are
5 abandoned by the Clean Water Rule, notwithstanding the Agencies’ decades-old
6 practice of asserting jurisdiction over them.

7 **X. The Corps’ EA/FONSI for the Final Clean Water Rule**

8 134. Concurrently with the issuance of the Clean Water Rule, the Corps
9 released its Final EA and FONSI, in which the Corps concluded that the adoption of
10 the Final Rule would not significantly affect the quality of the human environment
11 and thus an EIS was not required. FONSI at 1.

12 135. The Corps based its FONSI largely upon an analysis in which it
13 purported to review a random selection of 188 “negative jurisdictional
14 determinations” made by Corps personnel in the years 2013 and 2014. Purportedly
15 based upon this review, the Corps estimated that “there would be an increase of
16 between 2.8 and 4.6 percent in the waters found to be jurisdictional with adoption of
17 the rule.” Final EA at 21. These assumptions echo statements found in the
18 Agencies’ economic analysis of the Final Rule, which states that “increases in
19 jurisdictional determinations ranging from a 2.84 percent to a 4.65 percent relative
20 to recent practice, utilizing the FY13 and FY14 jurisdictional determination
21 dataset.”¹⁴

22 136. However, the analyses referenced in the Final EA and the Economic
23 Analysis were incomplete; they only looked at *negative* jurisdictional determinations
24 that might become *positive* under the Clean Water Rule; they did not consider
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26

27 ¹⁴ U.S. EPA and U.S. Army Corps of Engineers, *Economic Analysis of the*
28 *EPA-Army Clean Water Rule* (May 20, 2015) at 14 (hereinafter, “Economic
Analysis”).

1 whether any waters found to be jurisdictional under then-current policy might be
2 found non-jurisdictional under the Final Rule:

3 Reviewing how current positive JDs may become negative as a result
4 of the final rule was determined to be outside the scope of this
5 analysis. Analyzing only negative JDs allows for an estimation of
6 only the potential increase in assertion of CWA jurisdiction, as
7 viewed through the lens of CWA 404 activity during the baseline
8 period of these fiscal years. The agencies recognize that the rule
9 may result in some currently-jurisdictional waters being found to be
10 non-jurisdictional.

11 Economic Analysis at 7-8.

12 137. The Final EA and the Economic Analysis, and in particular their
13 reliance on the Agencies' analysis of prior negative jurisdictional determinations as
14 the basis for a "no significant impact" finding, was deeply flawed. With respect to
15 the Economic Analysis of the Clean Water Rule, one senior Corps officer stated:

16 [T]he Corps data provided to EPA has been selectively applied out of
17 context, and mixes terminology and disparate data sets. . . . In the
18 Corps' judgment, the documents contain numerous inappropriate
19 assumptions with no connection to the data provided, misapplied data,
20 analytical deficiencies, and logical inconsistencies.¹⁵

21 138. Other analyses in the record refute the Agencies' conclusion that there
22 will be a net increase in the number of waters found to be jurisdictional under the
23 Clean Water Rule. For example, a technical analysis performed by Jennifer Moyer,
24 Acting Chief of the Corps' Regulatory Program, concluded that as many as 10% of
25 wetlands previously found to be jurisdictional would *lose* their CWA protections as a
26 result of the Clean Water Rule. In fact, the preamble to the Rule expressly
27 recognizes that the scope of CWA jurisdiction under the Clean Water Rule "is
28 narrower than that under the existing regulation." 80 Fed. Reg. at 37,054.

29 ¹⁵ Memorandum from Maj. Gen. John Peabody, Deputy Commanding General
30 for Civil and Emergency Operations, U.S. Army Corps of Engineers, to Jo-Ellen
31 Darcy, Assistant Secretary of the Army for Civil Works (May 15, 2015).

1 139. The Final EA barely mentions impacts to fish and wildlife resulting
2 from promulgation of the Clean Water Rule, and gives no particular attention to
3 threatened or endangered species protected by the Endangered Species Act (“ESA”).
4 See Final EA at 24. In a cursory two-paragraph discussion, the Final EA merely
5 references the dubious “additional protections associated with the incremental
6 increase” in the amount of waters covered by the CWA as a result of the Clean
7 Water Rule, and presumes that there would be an “expected . . . beneficial impact
8 on fish and wildlife for which the protected waters provide habitat.” *Id.*

9 140. The Corps undertook no NEPA analysis whatsoever for the Delay
10 Rule. It did not consider or assess the likely impacts from delaying by two years the
11 Clean Water Rule’s *per se* protections for certain tributaries, adjacent wetlands, and
12 other waters, nor did it consider or assess the impacts of delaying by two years the
13 Agencies’ ability to assert jurisdiction over categories of waters like prairie potholes,
14 Carolina and Delmarva bays, pocosins, western vernal pools in California, and
15 Texas coastal prairie wetlands that provide important habitat for many aquatic
16 species, including threatened and endangered species.

17 **XI. The Agencies Failure to Consult under the ESA**

18 141. Although the Clean Water Rule results in the loss of CWA protections
19 for certain tributaries, potentially thousands of miles of ditches and ephemeral
20 streams, thousands of acres of wetlands that lie more than 4,000 feet from a
21 traditionally navigable water, and other waters that provide habitat for dozens of
22 ESA-listed threatened and endangered species, the Agencies failed to consult with
23 the Services under Section 7(a)(2) of the ESA prior to the promulgation of the Clean
24 Water Rule.

25 142. Further, although the Delay Rule postpones the effective date of the
26 Clean Water Rule by two years—effectively denying *per se* jurisdiction under the
27 CWA to waters such as tributaries and adjacent wetlands, which provide vital
28 habitat for numerous ESA-listed species—the Agencies failed to consult with the

1 Services under Section 7(a)(2) of the ESA prior to the promulgation of the Delay
2 Rule.

3 **XII. Litigation over the Clean Water Rule**

4 143. Until recently, the question of which court has jurisdiction over
5 challenges to the Clean Water Rule remained in dispute. In the wake of the rule's
6 promulgation, more than a dozen suits were filed in various district courts under
7 the Administrative Procedure Act, and 14 separate petitions for judicial review were
8 filed under CWA section 509(b), 33 U.S.C. 1369(b). While the district court cases
9 proceeded independently, the petitions for judicial review were consolidated and
10 transferred to the Sixth Circuit, which held that it had exclusive jurisdiction over
11 the matter. *In re Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 264
12 (6th Cir. 2016). However, the Supreme Court reversed that decision in a unanimous
13 opinion, and remanded the case to the Sixth Circuit to dismiss the consolidated
14 petitions for review. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

15 144. By order dated February 28, 2018, the Sixth Circuit dismissed the
16 consolidated judicial review actions for lack of jurisdiction, and simultaneously
17 dissolved the nationwide stay of the Clean Water Rule it had put in place on
18 October 9, 2015. *In re Clean Water Rule*, 713 Fed. Appx. 489 (Feb. 28, 2018).

19 145. At least three other district court actions challenging the Clean Water
20 Rule have been revived since the Supreme Court's decision in *National Association*
21 *of Manufacturers*. All of those suits were filed by states opposed to the Clean Water
22 Rule in its entirety, and none of them include ESA claims such as those Plaintiffs
23 allege here. *North Dakota v. EPA*, No. 15-cv-00059 (D.N.D. filed June 29, 2015);
24 *Georgia v. Pruitt*, No. 15-cv-00079 (S.D. Ga. filed June 30, 2015); *Texas v. EPA*, No.
25 3:15-cv-162 (S.D. Tex. filed June 29, 2015).

26 **XIII. The Delay Rule and the Agencies' Efforts to Roll Back Clean Water 27 Act Protections**

28 146. In the wake of the 2016 presidential election and the resulting change
in administration, the Agencies' new leadership made clear their intent to

1 significantly curtail the jurisdictional reach of the CWA. On February 28, 2017,
2 President Donald Trump signed Executive Order 13778, instructing the Agencies to
3 review the Clean Water Rule and to “publish for notice and comment a proposed
4 rule rescinding or revising the rule, as appropriate and consistent with law.” 82
5 Fed. Reg. 12,497 (March 3, 2017). That Executive Order was immediately followed
6 by the publication of the Agencies’ Notice of Intention To Review and Rescind or
7 Revise the Clean Water Rule, providing advance notice of their forthcoming
8 rulemaking. 82 Fed. Reg. 12,532 (March 6, 2017).

9 147. The Agencies have described what they intend to be a two-step process
10 to review and revise the definition of “waters of the United States”: First,
11 promulgation of a rule rescinding the Clean Water Rule and recodifying the
12 regulatory definition that existed before the 2015 Clean Water Rule, as modified by
13 the Agencies’ undisclosed interpretations of caselaw, agency practice and
14 unidentified policy documents; and second, a rulemaking in which the Agencies will
15 conduct a substantive reevaluation of the definition—and, presumably, attempt to
16 narrow the reach of the CWA.

17 148. The Agencies initiated “step one” of their approach in July 2017 with a
18 proposed rule which, if finalized, would effectively rescind the Clean Water Rule
19 and replace it with the “exact same regulatory text that existed prior to” that rule,
20 as modified by “applicable guidance documents (e.g., the 2003 and 2008 guidance
21 documents, as well as relevant memoranda and regulatory guidance letters), and
22 consistent with the SWANCC and Rapanos Supreme Court decisions, applicable
23 case law, and longstanding agency practice.” Proposed Rule, *Definition of “Waters of
24 the United States”—Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34,899,
25 34,900, 34,903 (July 27, 2017) (“Proposed Repeal Rule”). The Agencies accepted
26 comments on the Proposed Repeal Rule through September 27, 2017, but a final
27 Repeal Rule has not been promulgated.

28 149. The Agencies claim to have initiated “step two” of their plan in late

1 2017 by engaging in stakeholder outreach, initiating consultation with state, local,
2 and tribal governments, and soliciting recommendations on an entirely new
3 definition of waters of the United States. The Agencies have not published a
4 proposed rule as a result of this effort. *See* EPA, Waters of the United States:
5 Rulemaking Process, at <https://www.epa.gov/wotus-rule/rulemaking-process>.

6 150. Struggling to find either a rational legal basis for the wholesale
7 rescission of the Clean Water Rule or coherent and timely administrative process
8 for their intended “step one” and “step two” rulemakings, the Agencies published
9 the Proposed Delay Rule on November 22, 2017, and made it available for a 21-day
10 public comment period. 82 Fed. Reg. 55,542 (Nov. 22, 2017). The Agencies sought
11 comment only on “whether it is desirable and appropriate to add an applicability
12 date” to the Clean Water Rule, and not on the underlying substantive definition of
13 the statutory phrase “waters of the United States” or other matters the Agencies
14 intend to address under their two-step process. *Id.* at 55544-45.

15 151. Plaintiffs submitted comments on the Proposed Delay Rule by letter
16 dated December 13, 2017.

17 152. Less than eleven weeks after the proposed rule was published, the
18 final Delay Rule was promulgated. *Definition of “Waters of the United States”–*
19 *Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5200 (Feb.
20 6, 2018). The Agencies received approximately 4,600 comments on the proposed
21 rule, which they claim to have “carefully considered” during the eight weeks
22 between the close of the comment period and publication of the final Delay Rule. *Id.*
23 at 5203.

24 153. As the Agencies note in the preamble to the Delay Rule, they are
25 currently enjoined from enforcing the Clean Water Rule in thirteen states, due to a
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27
28

1 preliminary injunction issued by the U.S. District Court for the District of North
2 Dakota.¹⁶

3 154. This injunction, the Agencies contend, when combined with other
4 litigation over the Clean Water Rule, is “likely to lead to uncertainty and confusion
5 as to the regulatory regime applicable, and to inconsistencies between the
6 regulatory regimes applicable in different States, pending further rulemaking by
7 the agencies.” 83 Fed. Reg. at 5202. Hence the Agencies’ stated purpose for the
8 Delay Rule is to establish an interim framework by which “the scope of CWA
9 jurisdiction will be administered nationwide exactly as it is now being administered
10 by the agencies, and as it was administered prior to the promulgation of the 2015
11 Rule.” *Id.*

12 155. The Agencies contend that the Delay Rule will ensure that “the scope
13 of the CWA remains consistent nationwide” and that, pending further rulemaking,
14 they will

15 administer the regulations in place prior to the 2015 [Clean Water] Rule, and
16 will continue to interpret the statutory term “waters of the United States” to
17 mean the waters covered by those regulations, as they are currently being
implemented, consistent with Supreme Court decisions and practice, and as
informed by applicable agency guidance documents.

18 83 Fed. Reg. at 5200.

19 156. Uncertainty and inconsistency is in fact greatly increased by the Delay
20 Rule, which returns the Agencies, the regulated community, and the general public
21 to a vague definition of “waters of the United States”, apparently including the
22 current Administration’s undisclosed interpretation of the prior definition which
23 would be premised on conflicting case law and inconsistent agency interpretations
24 of unidentified agency guidance, practice, letters, and memoranda. *See, e.g.*,

25
26
27 ¹⁶ *See North Dakota v. EPA*, D.N.D. No. 15-cv-00059, Mem. Op. and Order
28 Granting Pls’ Mot. for Prelim. Inj. (Dkt. #70, Aug. 27, 2015); Order Limiting the
Scope of Prelim. Inj. to Plaintiffs (Dkt. #79, Sept. 4, 2015).

1 Lawrence Hurley, Supreme Court's murky CWA ruling created legal quagmire
2 (Greewire, Feb. 7, 2011), at <https://www.eenews.net/greewire/stories/1059944930/>.

3 157. As they readily admit, the Agencies now propose to identify and define
4 waters of the United States primarily by following the prior regulatory definition of
5 “waters of the United States,” as interpreted by case law and their 2001 and 2008
6 guidance documents issued in the wake of the *SWANCC* and *Rapanos* decisions. 83
7 Fed. Reg. at 5201.¹⁷ Those guidance documents require the Agencies’ and their field
8 staff to undertake a resource intensive, case-by-case assessment for a huge number
9 of arguably jurisdictional waters such as intermittently flowing tributaries and
10 wetlands adjacent to such tributaries. *See, e.g., Rapanos* Guidance at 4, 8
11 (explaining that for many waters the Agencies will assert jurisdiction “on a case-by-
12 case basis, based on the reasoning of the *Rapanos* opinions.”). The Agencies’ also
13 plan to use their unexplained interpretation of caselaw they deem relevant, as well
14 as other undisclosed agency guidance, practice, letters, and memoranda.

15 158. In its review of the *Rapanos* Guidance the Agencies now propose to
16 implement, the U.S. Fish and Wildlife Service expressed its concern that “Corps
17 Districts may implement the guidance inconsistently across the Nation due to
18 language that appears open to subjective interpretation, potentially leading to
19 increased degradation/destruction of waters.” Fish and Wildlife Service, Comments
20 on EPA and Corps Guidance Regarding Clean Water Act Jurisdiction Following
21 *Rapanos/Carabel* (Feb. 5, 2008), *available at*

22
23
24 ¹⁷ Citing Joint Memorandum providing clarifying guidance regarding the
25 Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United*
26 *States Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), available at 68
27 FR 1991, 1995 (Jan. 15, 2003) (hereinafter “*SWANCC* Guidance”) and Joint
28 Memorandum, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s
Decision in *Rapanos v. United States & Carabell v. United States*,” (signed
December 2, 2008), available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (hereinafter “*Rapanos*
Guidance”).

1 https://www.fws.gov/habitatconservation/rapanos_carabell/DOI_comments_on_post_
2 [Rapanos_Guidance.pdf](https://www.fws.gov/habitatconservation/rapanos_carabell/DOI_comments_on_post_).

3 159. The Agencies' intention to rely on undisclosed agency guidance,
4 practice, letters, and memoranda and "relevant" post-*Rapanos* case law only adds to
5 the uncertainty and confusion. As the Ninth Circuit has recently explained, the
6 fractured decision in *Rapanos*

7 paints a rather complex picture, and one where without more it might not be
8 fair to expect a layman of normal intelligence to discern what was the proper
9 standard to determine what are waters of the United States.

10 *United States v. Robertson*, 875 F.3d 1281, 1289 (9th Cir. 2017). The courts of
11 appeals "have adopted different approaches" to CWA jurisdiction, giving rise to
12 "competing precedents interpreting *Rapanos*, and further uncertainty engendered"
13 by subsequent appellate decisions. *Id.* at 1289-90.

14 160. Within some circuits, absent a promulgated definition of "waters of the
15 United States," CWA jurisdiction requires a showing of a significant nexus,
16 consistent with Justice Kennedy's concurring opinion in *Rapanos*. Within others,
17 jurisdiction may also be shown with a "continuous surface connection" as described
18 in Justice Scalia's plurality opinion. Some courts have foresworn either test and
19 have instead relied on the Agencies' prior regulatory definition or pre-*Rapanos* case
20 law. In the words of Chief Justice Roberts, "[l]ower courts and regulated entities . . .
21 now have to feel their way on a case-by-case basis." *Rapanos*,
22 547 U.S. at 758.

23 161. With the Delay Rule in place, therefore, CWA jurisdiction is potentially
24 subject to eleven different formulations based on the caselaw alone, and the
25 Agencies' intent to assert impermissible, unfettered discretion by relying on
26 undisclosed agency guidance, practice, letters, and memoranda to establish the
27 bounds of CWA jurisdiction will result in even greater confusion and conflict.
28

1 162. The Agencies themselves previously stated that a purpose of the Clean
2 Water Rule was to place parameters “on waters requiring a case-specific
3 determination” and to create a “clearer definition of significant nexus [to] address
4 the concerns about uncertainty and inconsistencies” 80 Fed. Reg. at 37,095.

5 163. The Delay Rule does not adopt the Agencies’ Proposed Repeal Rule.
6 The Delay Rule does not recodify the prior regulatory definition of “waters of the
7 United States”, nor does it create any new regulatory definition that the Agencies
8 will follow during the two-year delay period.

9 164. In promulgating the Delay Rule, the Agencies asserted that they “are
10 under no obligation to address the merits of the [Clean Water] Rule because the
11 addition of an applicability date to the [Clean Water] Rule does not implicate the
12 merits of that rule.” 88 Fed. Reg. at 5205. Thus, the Agencies did not respond to the
13 substance of Plaintiffs’ comments on the Proposed Delay Rule with respect to (a) the
14 potential for the Delay Rule to result in the degradation or destruction of significant
15 critical habitat for ESA-listed species; (b) the myriad flaws found in the Agencies’
16 cursory, 5-page economic analysis of the costs and benefits of the Delay Rule; and (c)
17 the Agencies’ failure to comply with the CWA, APA, ESA and NEPA, among other
18 comments.

19 165. Even though promulgation of the Delay Rule will significantly affect
20 the quality of the human environment, the Corps did not engage in any sort of
21 NEPA review prior to its promulgation. The Corps did not assess any alternatives to
22 the Proposed Delay Rule; did not analyze any direct, indirect, or cumulative impacts
23 of the rule’s promulgation; and did not prepare either an environmental assessment
24 or an environmental impact statement.

25 166. Even though promulgation of the Delay Rule is an action that may
26 affect ESA-listed species, the Agencies did not engage in either formal or informal
27 consultation with the Services under Section 7 of the ESA prior to promulgating the
28 Delay Rule, nor did they take any further action to ensure that the Rule will not

1 jeopardize the continued existence of ESA-listed species or the lead to the
2 destruction or adverse modification of critical habitat.

3 **FIRST CLAIM FOR RELIEF**

4 **Clean Water Rule:**
5 **Violations of the National Environmental Policy Act and the**
6 **Administrative Procedure Act**

7 167. The preceding paragraphs are incorporated herein by reference as if
8 fully set forth below.

9 168. NEPA regulations require that EAs include a “brief discussions of the
10 need for the proposal, of alternatives as required by [NEPA], of the environmental
11 impacts of the proposed action and alternatives, and a listing of agencies and
12 persons consulted.” 40 C.F.R. § 1508.9.

13 169. NEPA regulations require that a FONSI “present[] the reasons why an
14 action . . . will not have a significant effect on the human environment and for
15 which an environmental impact statement therefore will not be prepared.” 40
16 C.F.R. § 1508.13.

17 170. NEPA requires federal agencies to prepare an EIS for all “major
18 Federal actions significantly affecting the quality of the human environment.” 42
19 U.S.C. § 4332(C).

20 171. The Agencies’ promulgation of the Clean Water Rule is a major
21 Federal action significantly affecting the quality of the human environment because
22 the Final Rule fundamentally alters the CWA’s regulatory landscape and
23 establishes regulatory exclusions from the protections of the Act where none existed
24 before.

25 172. The Clean Water Rule’s effects on the environment are significant for
26 the additional reasons that it affects the regulation of myriad activities in the
27 proximity of “wetlands, wild and scenic rivers, or ecologically critical areas;” is
28 “highly controversial;” establishes “a precedent for future actions with significant
effects;” and may adversely affect numerous endangered species or their critical

1 habitat. 40 C.F.R. § 1508.27(b)(3), (4), (6), and (9).

2 173. The Corps' EA and FONSI were arbitrary, capricious, an abuse of
3 discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. §
4 706(2)(A), for at least the following reasons:

5 (a) The FONSI was based upon the incorrect assumption in the EA
6 that the Clean Water Rule would increase jurisdictional
7 determinations from 2.84 percent to 4.65 percent relative to recent
8 agency practice, when in fact the Clean Water Rule is likely to lead
9 to a *net decrease* in jurisdictional determinations of up to 10
10 percent;

11 (b) The FONSI was based largely upon the EPA's *Economic Analysis of*
12 *the EPA-Army Clean Water Rule* (May 20, 2015), which in turn was
13 based upon flawed, incomplete, or selectively-chosen data regarding
14 waters found to be jurisdictional under current agency practice;

15 (c) The FONSI was reached without any consideration in the EA of
16 several last-minute changes to the Clean Water Rule, including the
17 exclusion of farmed wetlands from the definition of "adjacent" and
18 the 4,000-foot distance limitation on the application of the case-by-
19 case significant nexus analysis.

20 174. Moreover, the Corps' decision not to prepare an EIS for the Clean
21 Water Rule was arbitrary, capricious, an abuse of discretion, and otherwise not in
22 accordance with law under the APA, 5 U.S.C. § 706(2)(A), because the Corps failed
23 to take a "hard look" at the potential environmental impacts of the Clean Water
24 Rule and failed to provide a convincing statement of reasons why the potential
25 effects of the Rule are insignificant.

26 **SECOND CLAIM FOR RELIEF**

27 **Clean Water Rule: Violation of the Administrative Procedure Act**
28 ***(Failure to Provide Sufficient Notice and Comment Opportunities)***

175. The preceding paragraphs are hereby incorporated by reference as if

1 fully set forth below.

2 176. The APA requires that “[g]eneral notice of proposed rule making shall
3 be published in the Federal Register,” and that the notice include “either the terms
4 or substance of the proposed rule or a description of the subjects and issues
5 involved[.]” 5 U.S.C. §§ 553(b), (b)(3).

6 177. Once notice of a proposed rule has been given, an agency is required to
7 “give interested persons an opportunity to participate in the rule making through
8 submission of written data, views, or arguments with or without opportunity for
9 oral presentation.” 5 U.S.C. § 553(c).

10 178. For the APA’s notice requirements to be satisfied, a final rule need not
11 be identical to the proposed rule, but it must at least be a “logical outgrowth” of the
12 proposed rule. A final rule is a logical outgrowth of the proposed rule if “interested
13 parties reasonably could have anticipated the final rulemaking” based on the
14 proposed rule. *Natural Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th
15 Cir. 2002).

16 179. Multiple components of the Clean Water Rule were neither included in
17 nor a logical outgrowth of the Proposed Rule, including at least the following:

- 18 A. The definition of “adjacent,” which states that “[w]aters being used
19 for established normal farming, ranching, and silviculture activities
20 (33 U.S.C. 1344(f)) are not adjacent.” *See, e.g.*, 80 Fed. Reg. at
21 37,105;
- 22 B. The 4,000-foot distance limit on the application of the significant
23 nexus test included in subsection (a)(8) of the Clean Water Rule.
24 *See, e.g.*, 80 Fed. Reg. at 37,105;
- 25 C. The per se exclusion of three categories of ditches from CWA
26 jurisdiction. *See, e.g.*, 80 Fed. Reg. at 37,105;
- 27
28

1 D. The per se exclusion of “[e]rosional features, including . . . other
2 ephemeral features that do not meet the definition of tributary.”

3 *See, e.g.*, 80 Fed. Reg. at 37,058, 37,099;

4 E. The suspension of the last sentence in the waste treatment system
5 exclusion. *See, e.g.*, 80 Fed. Reg. at 37,097.

6 180. In addition, the Agencies responded to some substantive comments on
7 the scope of the waste treatment exclusion system, but not others.

8 181. The Agencies’ failure to provide sufficient notice and comment
9 opportunities on these components of the Clean Water Rule violated the APA, 5
10 U.S.C. §§ 553(b), (b)(3), (c), and the Agencies’ inclusion of these components in the
11 Clean Water Rule was without observance of the procedures required by law. *Id.* §
12 706(2)(D).

13 **THIRD CLAIM FOR RELIEF**

14 **Clean Water Rule: Violations of the Administrative Procedure Act**
15 ***(Definition of “Tributary”)***

16 182. The preceding paragraphs are hereby incorporated by reference as if
17 fully set forth below.

18 183. In the Clean Water Rule, the Agencies defined “tributary” as “a water
19 that contributes flow, either directly or through another water” to a traditional
20 navigable water, interstate water, or territorial seas, and “that is characterized by
21 the presence of the physical indicators of a bed and banks and an ordinary high
22 water mark.” 80 Fed. Reg. at 37,105.

23 184. The Agencies’ requirement that waters must have both bed and banks
24 and an ordinary high water mark in order to meet the definition of “tributary” and
25 therefore be jurisdictional under the CWA lacks scientific basis and is contrary to
26 the recommendations of EPA’s own Science Advisory Board.

27 185. The Agencies’ requirement that tributaries must have both bed and
28 banks and an ordinary high water mark in order to be jurisdictional under the CWA

1 is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance
2 with law within the meaning of the APA, and is in excess of the Agencies' statutory
3 authority. 5 U.S.C. § 706(2)(A), (C).

4 **FOURTH CLAIM FOR RELIEF**

5 **Clean Water Rule: Violation of the Administrative Procedure Act**
6 ***(Exclusion of Ditches and Ephemeral Features from***
7 ***Clean Water Act Jurisdiction)***

8 186. The preceding paragraphs are hereby incorporated by reference as if
9 fully set forth below.

10 187. In the Clean Water Rule, the Agencies defined waters of the United
11 States to exclude “[d]itches with ephemeral flow that are not a relocated tributary
12 or excavated in a tributary”; “[d]itches with intermittent flow that are not a
13 relocated tributary, excavated in a tributary, or drain wetlands”; “[d]itches that do
14 not flow, either directly or through another water, into a water identified in
15 paragraphs (a)(1) through (3) of this section”; and “[e]rosional features, including . .
16 . other ephemeral features that do not meet the definition of tributary.” 80 Fed.
17 Reg. at 37,105.

18 188. There is no legal or scientific basis for *per se* excluding these categories
19 of waters from CWA jurisdiction.

20 189. At a minimum, to the extent that these types of waters, either alone or
21 in combination with other waters similarly situated, possess a significant nexus
22 with traditional navigable waters, interstate waters, or the territorial seas, they are
23 “waters of the United States” and therefore must be subject to the Act’s protections.
24 *See Rapanos*, 547 U.S. at 780.

25 190. The *per se* exclusion of these three categories of ditches and ephemeral
26 streams from CWA jurisdiction is arbitrary and capricious, an abuse of discretion,
27 and otherwise not in accordance with law within the meaning of the APA, and is in
28 excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

FIFTH CLAIM FOR RELIEF

1 **Clean Water Rule: Violation of the Administrative Procedure Act**
2 ***(Exclusion of Waters More than 4,000 Feet Beyond the High Tide Line or***
3 ***Ordinary High Water Mark of Qualifying Waters from***
4 ***Clean Water Act Jurisdiction)***

5 191. The preceding paragraphs are hereby incorporated by reference as if
6 fully set forth below.

7 192. In the Clean Water Rule, the Agencies defined waters of the United
8 States to include “all waters located within 4,000 feet of the high tide line or
9 ordinary high water mark of” a qualifying per se jurisdiction water “where they are
10 determined on a case-specific basis to have a significant nexus” with a traditional
11 navigable water, an interstate waters, or a territorial sea. 80 Fed. Reg. at 37,114.

12 193. There is no legal or scientific basis for automatically excluding from
13 CWA jurisdiction all waters more than 4,000 feet from a qualifying per se
14 jurisdictional water.

15 194. At a minimum, to the extent that waters located more than 4,000 feet
16 of the high tide line or ordinary high water mark of a qualifying per se jurisdiction
17 water, either alone or in combination with other waters similarly situated, possess a
18 significant nexus with traditional navigable waters, interstate waters, or the
19 territorial seas, they are “waters of the United States” and therefore must be
20 subject to the Act’s protections. See *Rapanos*, 547 U.S. at 780.

21 195. The automatic exclusion from CWA jurisdiction of all waters more
22 than 4,000 feet from a qualifying per se jurisdictional water is arbitrary and
23 capricious, an abuse of discretion, and otherwise not in accordance with law within
24 the meaning of the APA, and is in excess of the Agencies’ statutory authority. 5
25 U.S.C. § 706(2)(A), (C).

26 **SIXTH CLAIM FOR RELIEF**

27 **Clean Water Rule: Violation of the Administrative Procedure Act**
28 ***(Exclusion of Waters in Which 404(f) Activities Occur from the***
 Definition of “Adjacent”)

 196. The preceding paragraphs are hereby incorporated by reference as if

1 fully set forth below.

2 197. The Clean Water Rule defines “adjacent” in a manner that excludes
3 “[w]aters being used for established normal farming, ranching, and silviculture
4 activities[.]” See 80 Fed. Reg. at 37,080, 37,118. In the Clean Water Rule, the
5 Agencies cite CWA section 404(f), 33 U.S.C. 1344(f),

6 198. By defining “adjacent” in this manner in the Clean Water Rule, the
7 Agencies changed their long-standing policy regarding their treatment of adjacent
8 farmed wetlands without any legal, scientific, or technical justification or support
9 for the change.

10 199. Moreover, the Agencies’ exclusion of waters in which established
11 normal farming, ranching, and silviculture activities occur from the definition of
12 “adjacent” is inconsistent with CWA section 404(f)(1)(A); that provision creates a
13 limited permitting exemption for discharges of dredged or fill material only that
14 result from “normal farming, silviculture, and ranching activities[.]” 33 U.S.C. §
15 1344(f)(1)(A). That permitting exemption not affect the jurisdictional status of the
16 waters into which the exempted discharges occur.

17 200. The Agencies’ definition of “adjacent” in the Clean Water Rule is thus
18 arbitrary and capricious, an abuse of discretion, and otherwise not in accordance
19 with law within the meaning of the APA, and is in excess of the Agencies’ statutory
20 authority. 5 U.S.C. § 706(2)(A), (C).

21 **SEVENTH CLAIM FOR RELIEF**

22 **Clean Water Rule: Violation of the Administrative Procedure Act** 23 ***(Exclusion of Groundwater from Clean Water Act Jurisdiction)***

24 201. The preceding paragraphs are hereby incorporated by reference as if
25 fully set forth below.

26 202. The Clean Water Rule excludes “[g]roundwater, including groundwater
27 drained through subsurface drainage systems” from the definition of waters of the
28 United States. The Agencies have not provided any legal, scientific or technical
basis to support this exclusion. The Agencies’ own in-house scientific experts have

1 stated that there is no scientific justification for this exclusion.

2 203. At a minimum, to the extent that groundwater, either alone or in
3 combination with other waters similarly situated, possesses a significant nexus
4 with traditional navigable waters, interstate waters, or the territorial seas, it is a
5 “water of the United States” and therefore must be subject to the CWA’s
6 protections. *See Rapanos*, 547 U.S. at 780.

7 204. The Agencies’ exclusion of groundwater from CWA jurisdiction is
8 arbitrary and capricious, an abuse of discretion, and otherwise not in accordance
9 with law within the meaning of the APA, and is in excess of the Agencies’ statutory
10 authority. 5 U.S.C. § 706(2)(A), (C).

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14 **EIGHTH CLAIM FOR RELIEF**

15 **Clean Water Rule: Violation of the Administrative Procedure Act**
16 ***(Exclusion of Waste Treatment Systems from Clean Water Act Jurisdiction)***

17 205. The preceding paragraphs are hereby incorporated by reference as if
18 fully set forth below.

19 206. The Clean Water Rule excludes “waste treatment systems” from the
20 definition of waters of the United States, even where such systems would otherwise
21 be jurisdictional as impoundments, tributaries, adjacent waters, or waters with a
22 significant nexus to traditional navigable waters, interstate waters, or the
23 territorial seas. 80 Fed. Reg. at 37,114; 40 C.F.R. § 122.2.

24 207. This waste treatment system exclusion is not limited to man-made
25 bodies of water, and indeed the Agencies expressly continued the suspension of such
26 a limitation in the Clean Water Rule. Thus, the exclusion on its face applies equally
27 to naturally occurring waters (such as adjacent waters, tributaries, or ponds) and
28 impoundments that have been determined to be a “waste treatment system,” or part
of such a system.

1 214. Further, the Agencies' failure to assert jurisdiction over waters long
2 protected on the basis of their interstate commerce impacts unrelated to navigation
3 is contrary to the language and purpose of CWA and Congress' intent that waters
4 be protected to the fullest extent allowed by the commerce clause.

5 215. To the extent it fails to assert jurisdiction over "other waters" that
6 were previously protected on the basis of interstate commerce impacts unrelated to
7 navigation, the Clean Water Rule is arbitrary and capricious, an abuse of discretion,
8 and otherwise not in accordance with law within the meaning of the APA, and is in
9 excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

10 **TENTH CLAIM FOR RELIEF**

11 **Clean Water Rule: Violation of the Endangered Species Act**

12 216. The preceding paragraphs are hereby incorporated by reference as if
13 fully set forth below.

14 217. Promulgation of the Clean Water Rule is an "an action [that] may
15 affect listed species or critical habitat" under Section 7(a)(2) of the ESA and its
16 implementing regulations, 50 C.F.R. § 402.02(b), because, *inter alia*, it significantly
17 reduces CWA protections for waters such as intermittent and ephemeral streams,
18 ditches, wetlands, and groundwater that are used as habitat for numerous ESA-
19 listed species, thereby increasing the likelihood that such habitat will be destroyed
20 and the species will be harmed.

21 218. The Agencies failed to consult with the U.S. Fish and Wildlife Service
22 and the National Marine Fisheries Service to prepare a Biological Opinion prior to
23 the promulgation of the Clean Water Rule, as required by ESA section 7(a)(2), 16
24 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.14.

25 219. The Agencies failed to "insure" that promulgation of the Clean Water
26 Rule "is not likely to jeopardize the continued existence of" any threatened or
27 endangered species or "the destruction or adverse modification" of critical habitat,
28 in violation of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2).

1 to take a “hard look” at the potential environmental impacts of the Delay Rule and
2 failed to provide a convincing statement of reasons why the potential effects of the
3 Rule are insignificant.

4 **TWELFTH CLAIM FOR RELIEF**

5 **Delay Rule: Violations of the Administrative Procedure Act**

6 227. The preceding paragraphs are hereby incorporated by reference as if
7 fully set forth below.

8 228. The Delay Rule is a final agency action subject to judicial review under
9 the APA.

10 229. An agency action is arbitrary and capricious if the agency failed to
11 consider an important aspect of the problem, offered an explanation for its decision
12 that runs counter to the evidence, or is so implausible that it could not be ascribed
13 to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass’n.*
14 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

15 230. The Delay Rule is arbitrary and capricious, an abuse of discretion, and
16 otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. §
17 706(2)(A), for at least the following reasons:

- 18 (A) The Agencies failed to consider an important aspect of the
19 problem, including most importantly the environmental and
20 economic costs of delaying implementation of the Clean Water
21 Rule by two years;
- 22 (B) The Agencies’ only stated basis for the Delay Rule—preserving
23 the “status quo” to achieve certainty and predictability in
24 assertion of CWA jurisdiction—has no support in, and in fact is
25 contradicted by, the administrative record; and
- 26 (C) The Agencies failed to meaningfully and substantively respond to
27 comments submitted on the Proposed Delay Rule by Plaintiffs and
28 others regarding the Rule’s likely impacts to the environment and

1 ESA-listed species.

2 **THIRTEENTH CLAIM FOR RELIEF**

3 **Delay Rule: Violation of the Endangered Species Act**

4 231. The preceding paragraphs are hereby incorporated by reference as if
5 fully set forth below.

6 232. Promulgation of the Delay Rule is an “an action [that] may affect listed
7 species or critical habitat” under Section 7(a)(2) of the ESA and its implementing
8 regulations, 50 C.F.R. § 402.02(b), because, *inter alia*, it undermines CWA
9 protections for waters afforded per-se protections under the Clean Water Rule such
10 as tributaries and their adjacent wetlands, waters that are used as habitat for
11 numerous ESA-listed species, thereby increasing the likelihood that such habitat
12 will be destroyed and the listed species using them will be harmed.

13 233. The Agencies failed to consult with the U.S. Fish and Wildlife Service
14 and the National Marine Fisheries Service to prepare a Biological Opinion prior to
15 the promulgation of the Delay Rule, as required by ESA section 7(a)(2), 16 U.S.C. §
16 1536(a)(2), and 50 C.F.R. § 402.14.

17 234. The Agencies failed to “insure” that promulgation of the Delay Rule “is
18 not likely to jeopardize the continued existence of” any threatened or endangered
19 species or “the destruction or adverse modification” of critical habitat, in violation of
20 ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2).

21 235. The ESA violations set forth above will continue until they are abated
22 by an order of this Court. This Court has jurisdiction to enjoin the Agencies’
23 violations of the ESA alleged above and such relief is warranted under 16 U.S.C. §
24 1540(g).

25 **REQUEST FOR RELIEF**

26 WHEREFORE, Plaintiffs respectfully request that the Court:

- 27 (1) Declare that the Corps’ issuance of the FONSI prepared along with the
28 Clean Water Rule was arbitrary, capricious, an abuse of discretion, or

1 otherwise not in accordance with law;

2 (2) Declare that portions of the Clean Water Rule, and the entirety of the
3 Delay Rule, are unlawful because they are arbitrary, capricious, an
4 abuse of discretion, not in accordance with law, or in excess of the
5 Agencies' statutory authority;

6 (3) Declare that portions of the Clean Water Rule are unlawful because
7 the were promulgated without observance of procedure required by
8 law;

9 (4) Enter an order vacating the Corps' FONSI and instructing the Corps to
10 comply with NEPA for both the Clean Water Rule and the Delay Rule;

11 (5) Enter an order vacating only those unlawful portions of the Clean
12 Water Rule, leaving the remainder of the Rule in place;

13 (6) Enter an order vacating the Delay Rule;

14 (7) Award Plaintiffs their reasonable fees, costs, expenses, and
15 disbursements, including attorneys' fees associated with this litigation
16 under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and the
17 ESA, 16 U.S.C. § 1540(g)(4); and

18 (8) Grant Plaintiffs such additional and further relief as the Court may
19 deem just, proper, and necessary.

20
21
22
23 Dated this 13th day of June, 2018.

24
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