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**RE: Docket No. EPA-HQ-OW-2018-0149**

Dear Mr. McDavit and Ms. Moyer,

Thank you for the opportunity to comment on the proposed changes to the Clean Water Act's (CWA) jurisdictional definitions of "waters of the United States."<sup>1</sup> Our comments fall into three broad categories: (1) the changes to the definition of "tributary;" (2) the changes to the definition of "adjacent"; and (3) the proposal to remove "interstate waters" from the definition of "waters of the United States." But we begin with a more general note on certain legal suppositions that seemingly run throughout the proposal.

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<sup>1</sup> See 33 U.S.C. § 1362(7).

## I. The Proposal's Uses of Precedent and History Are Arbitrary and Unexplained

The geographic scope of the CWA has been more contentious than that of any of the other media statutes. But the legislative history behind CWA § 502(7) is, in one sense, unequivocal. As you are aware, Congress gave the only direct insight into its collective intent in the Conference Committee Report on what would become Pub. L. No. 92-500.<sup>2</sup> In that statement, the committee endorsed reaching the “broadest possible constitutional” extent of jurisdiction.<sup>3</sup> While much ink (and toner) has been spilled over this passage since 1972, it is categorical in its rejection of the “administrative” limits that had been placed on federal water pollution control programs to that date. Since then, only two Supreme Court majorities have construed the jurisdictional limits of the Act in any way that could be called “binding” on the agencies.<sup>4</sup> Yet, in critical places, the proposal mischaracterizes Congress’s signal in 1972 and suggests that Congress actually intended to limit the Act’s scope through § 502(7). This is arbitrary, contrary to long-standing agency interpretation and unexplained in the February 2019 notice. We believe it contributes to several critical errors in the proposal underlying the agencies’ expressed intentions to narrow the scope of several jurisdictional definitions. We highlight two types of these errors.

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<sup>2</sup> Congress’s conference committees arguably represent a uniquely authoritative explanation of the whole body’s decision(s) through its bicameral processes. See Victoria Nourse, *Misreading Law, Misreading Democracy* 90-91 (2016).

<sup>3</sup> See Conf. Report, S. Rep. No. 1236, 92d Cong., 2d Sess., 144 (1972), *reprinted in* 1 *Legis. History of the Fed. Water Pollution Control Act Amends. of 1972* (1973). “The conferees fully intend that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” *Id.* at 327.

<sup>4</sup> As you are aware, of the three cases, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), only the first two reached a majority conclusion on the proper interpretation of § 502(7). Although the proposal repeatedly invokes Justice Scalia’s opinion in *Rapanos*, that opinion lacked even the basis we ordinarily demand for affording authority to judicial opinions—a majority of the judges voting.

A. *'Navigable Waters' Are a Distinct Article I Head of Federal Authority*

When Chief Justice Marshall exclaimed that “[a]ll America understands, and has uniformly understood the word ‘commerce’, to comprehend navigation” in *Gibbons v. Ogden*,<sup>5</sup> the Court began what has become a venerated, if complex, tradition in America. *Gibbons* declared that federal jurisdiction over navigation—and, by implication, the spatial extent of navigable waters—had descended in “plenary” form to the United States via Article I, § 8.<sup>6</sup> The courts of the United States interpreting Article I have ever since understood federal authority over navigable waters to be a distinct, effectual ground for preempting inconsistent state law, jurisdiction, and/or private rights.<sup>7</sup>

The navigation servitude is the exemplar.<sup>8</sup> The beds, banks, and flowing waters of the nation’s navigable streams, rivers, and lakes have been reserved in paramount right to the people through this servitude—whatever the effects upon or connections to interstate or foreign commerce.<sup>9</sup> Since before the turn of the last century this has included tributary flow, as well.<sup>10</sup> But what this separate Article I authority has never done is limit or constrain *distinct* constitutional powers. Unfortunately, the Proposal seems to suggest the opposite in Part

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<sup>5</sup> 22 U.S. (9 Wheat.) 1, 190 (1824) (holding that state-granted monopoly to navigate by steam-power the waters of New York State not enforceable as contrary to a Federal Coasting Act of 1793).

<sup>6</sup> See *Gibbons*, 22 U.S. at 193 (“The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word ‘commerce.’”).

<sup>7</sup> See generally Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 Wash. L. Rev. 1643 (2013).

<sup>8</sup> See, e.g., *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Commodore Park*, 324 U.S. 386 (1945); *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *South Carolina v. Georgia*, 93 U.S. (3 Otto) 4 (1876); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>9</sup> The Court has often called it a “dominant servitude.” See *United States v. Rands*, 389 U.S. 121, 123 (1967) (quoting *Federal Power Comm’n v. Niagara Mohawk Power Corp.*, 347 U.S. 249 (1954)).

<sup>10</sup> See *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 709-10 (1899) (holding that a state-created right to impound and appropriate so much of the Rio Grande as to impair its downstream navigability would necessarily yield to any federal common law right of riparianism or to the flow needed for navigation).

II(E)—when it asserts that “Congress’ authority to regulate navigable waters derives from its power to regulate the ‘channels of interstate commerce’ . . . .” Proposed Rule, 84 Fed. Reg. at 4164 (*citing Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

Yet, as the Court stated in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), “[w]hatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water.” *Id.* at 175-76. This has been exactly the experience in admiralty jurisdiction pursuant to Article III and the Judiciary Act of 1789: waters are territorial in their jurisdictional aspects but that has neither exhausted nor delimited Article III’s contours.<sup>11</sup> In short, navigable waters are jurisdictional in a territorial, not just a relational, way. This stands them apart from activities or businesses that affect or interrelate with interstate and/or foreign commerce.

This point casts a harsh light on several key parts of the proposal. For example, in justifying a limiting definition of “tributary,” the proposal declares that “States traditionally exercise ‘primary power over land and water use’” and that the “Federal government should avoid pressing against the outer limits of its authority when doing so would infringe upon the traditional rights and responsibilities of States to manage their own waters.” Proposed Rule, 84 Fed. Reg. at 4174 (*quoting Solid Waste Agency*, 531 U.S. at 174). This puts things exactly backward where the waters in question are “navigable,” though. It is simply inaccurate to declare that states have traditionally exercised plenary authority over such waters—no matter how many times the agencies repeat the mistake.

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<sup>11</sup> See David W. Robertson, *Admiralty and Federalism* (1970).

Another example comes in the proposal’s characterization of “tributary” status as necessarily some function of contributory flow and that “mere hydrologic connection[s]” would be insufficient “basis for CWA jurisdiction.” Proposed Rule, 84 Fed. Reg. at 4175 (*quoting Rapanos*, 547 U.S. at 732). Oddly, the Proposed Rule in the same discussion references “bodies of water” as “geographical features”—again quoting Justice Scalia’s opinion in *Rapanos*—but suggests that the hydrologic boundaries thereof are somehow *not* constitutive of a water’s geographic expression. This seems to be eating cake and having it, too. Either a water’s hydrologic boundaries are what constitute it as a geographic feature or they do not. Of course, to selectively employ a “flow duration” approach in defining tributaries and label it somehow “more specific” than the agencies’ current methods, *see id.*, may be calculated to ignore the territorial aspect of navigable waters jurisdiction. But no ploy of the sort can be validated by suggesting that the particular “flow duration” threshold selected is “informed by the science.” *But see id.* Several specific applications of this basic error are developed below in Parts II-IV of the comments.

#### *B. Rapanos Yielded Only a Majority Judgment—Not a Majority Opinion*

Ordinarily, the authority of a dissenting opinion from any court is nil. And the force of an opinion for four Supreme Court justices who agreed with a fifth justice only that a result below should be reversed—vacating that judgment—is little more.<sup>12</sup> Opinions, after all, are not the law binding the parties.<sup>13</sup> Of course, uncertainties inherent in the scope of CWA §

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<sup>12</sup> *See, e.g., United States v. Pink*, 315 U.S. 203, 216 (1942) (“While it was conclusive and binding upon the parties as respects that controversy . . . the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases.”) (*citing Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910)).

<sup>13</sup> *See* William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1845 (2008) (“Judicial opinions cannot claim authority from the same sources as judicial judgments do. Judgments derive their authority from the

502(7) have long sent the agencies and regulated parties in search of any and all available guidance from the courts. Our traditions sometimes equate judicial interpretations of enacted texts with the law itself.<sup>14</sup> But there is an important difference: courts may only decide where and when *they* have jurisdiction. No court can conclusively establish when the executive branch has “jurisdiction” beyond the confines of a “case” or “controversy” within the meaning of Article III.<sup>15</sup>

Thus, when the lower federal courts, the agencies, and most of the organized bar accepted that *either* the plurality or Justice Kennedy’s theory of CWA § 502(7) in *Rapanos* could support agency jurisdiction over a target area,<sup>16</sup> it may have been from a familiar, “predictive” approach to the law.<sup>17</sup> By putting the dissenters’ deference to the agencies together with those other justices’ reasons—which would yield contrasting majorities of the Court by different theories—this predictive approach cast *Rapanos* as lower federal court judges would confront it.<sup>18</sup> Using this same interpretive method of judicial choice, however, the agencies now seem bent on changing their interpretation because the Supreme Court has changed. This is clear error wherever the agencies attribute one of their own discretionary

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combination of judicial power and jurisdiction . . . . Opinions must find another path to authority, if they find one at all.”).

<sup>14</sup> Cf. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land . . .”).

<sup>15</sup> See William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1834-36 (2008).

<sup>16</sup> See *United States v. Donovan*, 661 F.3d 174, 180-81 (3d Cir. 2011) (collecting cases)). By 2018, “[a]ll circuit courts that ha[d] ruled on the matter ha[d] concluded that an area meeting Justice Kennedy’s significant nexus test is within CWA jurisdiction, although some circuit courts ha[d] decided that jurisdiction applies if the area meets either the significant nexus test or the plurality’s “relatively permanent” test.” J.B. Ruhl, *Proving the Rapanos Significant Nexus*, 33(1) *Nat. Res. & Env’t.* 1, 1 (Summer 2018).

<sup>17</sup> See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Decisionmaking*, 73 *Tex. L. Rev.* 1 (1994) (arguing that, at least in some circumstances, courts rightly attempt to predict future superior court rulings); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 *Cardozo L. Rev.* 43, 67-70 (1993).

<sup>18</sup> See Jamison E. Colburn, *Governing the Gradient: Clarity and Discretion at the Water’s Edge*, 62 *Vill. L. Rev.* 81, 105-15 (2017).

choices to the “decision” in *Rapanos*. For it is undeniably true that a *majority* of that Court *rejected* the plurality’s reasoning as inconsistent with the CWA’s purpose statement in § 101(a).<sup>19</sup> If the agencies refer to a “decision” in *Rapanos* interpreting CWA § 101(a) as a limit on their authority or the jurisdictional limits of the Act, they are making not just a clear mistake. They are making a potentially catastrophic mistake. For the Supreme Court has made utterly clear on multiple occasions—to *EPA*—that it is arbitrary, capricious, and not in accordance with law to attribute the agency’s discretionary, policy-making choices to a statute that does not actually constrain its discretion. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 528-33 (2007); *Michigan v. EPA*, 135 S. Ct. 2699, 2707-08 (2015). This should be obvious, for, at the very least, claims of the sort will confuse the public about the bases of the rulemaking and what comment may or can accomplish.

Courts must often form a best interpretation of the law that reaches past existing opinions and judgments.<sup>20</sup> For courts must decide the “cases” and “controversies” brought to them, whether convenient or not. But it is quite another thing for administering agencies to treat Justice Scalia’s opinion for himself and three others in *Rapanos* and *Carabell* as having expressed *anything* authoritative at all about CWA §§ 502(7) or 101(a). It did not. Even suggestions to that effect poison the agencies’ exercise of soliciting public comments on their proposal. Indeed, with all of the personnel changes on the Supreme Court since 2006, this approach is deeply at odds with the fact that the CWA delegated authority *to the agencies* to interpret and administer it, at least in the first instance, for their expertise, nationwide

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<sup>19</sup> *See Rapanos v. United States*, 547 U.S. 715, 810 (2006) (Stevens, J., dissenting).

<sup>20</sup> *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (plurality opinion) (“The traditional function of the courts [is] to decide cases before them based on their best current understanding of the law.”).

jurisdiction, accountability to the president, and powers to act by rule. And yet the proposal makes this key mistake in multiple discussions.<sup>21</sup>

To focus the analysis of these two different mistakes, our comments analyze them as they factor into three distinct contexts in the proposal: tributaries, adjacency, and interstate waters.

## II. Changing the Definition of “Tributary”

In 2014, when the current definition of tributary was being proposed, the agencies stated unequivocally that “Ephemeral and Intermittent Tributaries Significantly Affect the Chemical, Physical [and] Biological Integrity” of covered waters.<sup>22</sup> The finding was significant, of course, because restoring and maintaining the chemical, physical, and biological integrity of “the Nation’s waters” is “[t]he objective” of the Clean Water Act.<sup>23</sup> As you know, ephemeral and intermittent streams are held apart from “perennial” streams in the proposal by what the agencies term a “flow duration” requirement: where perennial streams “mean surface water flowing continuously year-round during a typical year,” 84 Fed. Reg. at 4173, “intermittent” and “ephemeral” streams are not as presumptively permanent. This approach creates several problems.

First, as EPA’s *Connectivity Report* documented in January 2015, a river system consists of a river network and its watershed:<sup>24</sup> “[d]ownstream waters are the time-integrated

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<sup>21</sup> See, e.g., Proposed Rule, 84 Fed. Reg. at 4196 (“The agencies believe that this proposal is also more consistent with *Rapanos* than the 2015 Rule.”).

<sup>22</sup> See U.S. Dept. of Defense & U.S. EPA, Proposed Rule—Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22188, 22231 (2014).

<sup>23</sup> Pub. L. No. 92-500, § 101(a), 86 Stat. 816, 816 (1972), *codified at* 33 U.S.C. § 1251(a). As the proposed rule recognizes them in a footnote, Section 101 differentiated two national “goals” from six national “policies.” See Proposed Rule, 84 Fed. Reg. at 4163-64 n.18. But the Act has only one “objective.”

<sup>24</sup> See U.S. EPA, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence* (EPA/600/R-14/475F at 2-4 (2015) (hereafter “*Connectivity Report*”).



result of all waters contributing to them.”<sup>25</sup> The proposal cites the Science Advisory Board (SAB) letter to Gina McCarthy of October 2014 to the effect that changes in watershed or river network integrity upstream will have some probability of ramifications downstream and that such probabilities would decrease “at flow regimes less than perennial and intermittent.” Proposed Rule, 84 Fed. Reg. at 4176 (*citing* Letter to Gina McCarthy, SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Oct. 17, 2014)). Indeed, the proposal takes a critical step that SAB did not take in referencing a sketch diagram SAB offered with its critique: the proposal erroneously attributes the ideal of a probabilistic approach to a *finding* of SAB’s on the point.<sup>26</sup> SAB did nothing of the sort in that letter and, so far as the agencies disclosed, no one has yet proven that this probabilistic ideal can be realized.

More importantly, the proposal’s inference does not follow from the findings in the *Connectivity Report* or any other scientific evidence in the record. For it is a fallacy of composition: that minor tributaries, because their causal impacts may be less individually significant than larger tributaries, are less causally important to downstream waters. The *Connectivity Report* in fact emphatically rejected this inference about minor tributaries and for good reason: it is rather like inferring that because no atoms are alive, nothing made of atoms can be alive.<sup>27</sup> Collectively, intermittent and ephemeral streams comprise almost 60% of total

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<sup>25</sup> *Connectivity Report*, *supra*, at ES-5.

<sup>26</sup> See Proposed Rule, 84 Fed. Reg. at 4176 (“SAB found perennial and intermittent streams have a greater probability to impact downstream waters compared to ephemeral streams.”). What SAB said in fact was that this kind of probabilistic analysis should be “possible” in terms of connectivity pathways. See Letter to Gina McCarthy, SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* 53-54 (Oct. 17, 2014).

<sup>27</sup> See *Connectivity Report*, *supra*, at 3-1 (“[F]irst-order streams [the smallest] cumulatively contribute approximately 60% of the total mean annual flow to all northeastern U.S. streams and rivers.”); *id.* at 3-2 (“Streams range greatly in size in terms of both drainage area and discharge. In general, their abundance is inversely related to their size.”); *id.* at 3-45 (“Streams that link larger water bodies through networks of continuous bed and bank are the rule. The network structure reflects the aggregate and cumulative nature of the connections between distant headwater streams and the downstream river.”).

stream miles in the contiguous United States.<sup>28</sup> This is why the agencies' current approach includes minor tributaries as parts of a water's geographic expression. From a purely spatial perspective, narrowing the CWA's jurisdiction over supposedly minor tributaries by excluding ephemeral streams entirely and severely limiting the intermittent streams covered almost seems calculated to frustrate the Act's singular objective—restoring and maintaining the chemical, physical and biological integrity of the Nation's waters.<sup>29</sup>

The Proposed Rule's attempt at a "flow duration" limit on jurisdictional tributaries may, of course, track some unarticulated political objective. First of all, as you are surely aware, global climate disruption is rendering such calculations increasingly fraught.<sup>30</sup> Indeed, *no* flood events' return intervals are as regular as the standard metrics suggest.<sup>31</sup> For much of rural America there are little or no observational data, for example, leaving only contentious estimative techniques to calculate such boundaries.<sup>32</sup> Indeed, a 100-year floodplain's spatial extent is not real; it is nominal. Still, flood plains are vitally connected to waters however either is defined. In short, flow averages themselves are deceptive.

Secondly, disguising a flow duration test as a recommendation from SAB or even as an objective with SAB's endorsement is wrong, contrary to settled principles of notice and

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<sup>28</sup> See Scott Leibowitz *et al.*, *Connectivity of Streams and Wetlands to Downstream Waters: An Integrated Systems Framework*, 54 J. Amer. Water Res. Ass'n 298, 304 (2018).

<sup>29</sup> See 33 U.S.C. §1251(a).

<sup>30</sup> Modeling future flood intervals or severity confronts significant structural uncertainties. However, changes in either flood frequency or severity (or both) can be expected if either seasonal precipitation or temperatures change regionally. See Iman Mallakpour & Gabriele Villarini, *The Changing Nature of Flooding Across the Central United States*, 5 NATURE CLIM. CH. 250 (2015).

<sup>31</sup> See, *e.g.*, James H. Eychaner, *Lessons from a 500-year Record of Flood Elevations*, Ass'n of State Floodplain Managers Tech. Report No. 7 (2015), available at [http://www.floods.org/ace-files/documentlibrary/publications/asfpmpubs-techrep7\\_2015.pdf](http://www.floods.org/ace-files/documentlibrary/publications/asfpmpubs-techrep7_2015.pdf). Eychaner found that fewer than half of the return intervals were within 50% of the nominal average interval, indicating extreme variability from one of the few truly deep records of observational data. *Id.* at 7. Factoring climate change probabilistically would lessen confidence in many if not most 100-year floodplain estimates.

<sup>32</sup> See James H. Eychaner, *Lessons from a 500-year Record of Flood Elevations*, Ass'n of State Floodplain Managers Tech. Report No. 7 (2015) at 6-7.

comment rulemaking, and not conducive to effective public participation.<sup>33</sup> As a matter of fact, the flow duration distinctions the agencies have proposed to use in distinguishing jurisdictional from non-jurisdictional tributaries find no basis in either the *Connectivity Report* or in the SAB's review of the draft of that report. The *Connectivity Report* documents five distinct mechanisms of connectivity: sourcing/sinking of chemicals, sediment, water, and biota; refuge; transformation; and time-lagging.<sup>34</sup> None of these functions is mutually exclusive of the others or necessarily constant over time.<sup>35</sup> But together they comprise four dimensions of connectivity: longitudinal (streamflow); lateral (riparian transitions); vertical (subsurface to surface to atmospheric transfers); and temporal (seasonality, *etc.*).<sup>36</sup> Whole systems analyses across the dimensions have thus far tended to confirm that connectivity is not a fixed characteristic of a river system but rather varies over space and time.<sup>37</sup>

To be sure, where enough is known about a particular river network and its watershed, the probability distributions suggested may well be feasibly derived. But the *Connectivity Report* was unequivocal: "when considering the effect of an individual stream or wetland, all contributions and functions of that stream or wetland should be evaluated cumulatively."<sup>38</sup> Not only does a flow duration approach skew arbitrarily against including intermittent and ephemeral streams despite what may be their significant impacts downstream.<sup>39</sup> It effectively rules all tributaries out of jurisdictional status unless and until adequate flow averages can be

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<sup>33</sup> See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 386-91 (D.C. Cir. 1981); *United States v. Nova Scotia Food Prods., Corp.*, 568 F.2d 240 (1st Cir. 1977).

<sup>34</sup> See *Connectivity Report*, supra, at ES-6.

<sup>35</sup> See *Connectivity Report*, supra, at ES-6-7.

<sup>36</sup> See *Connectivity Report*, supra, at 1-4.

<sup>37</sup> See Scott Leibowitz *et al.*, *Connectivity of Streams and Wetlands to Downstream Waters: An Integrated Systems Framework*, 54 J. Amer. Water Res. Ass'n 298, 304 (2018).

<sup>38</sup> See *Connectivity Report*, supra, at ES-5.

<sup>39</sup> See *Connectivity Report*, supra, at § 3.6.

attributed to those tributaries.<sup>40</sup> This ‘out-until-proven-in’ approach is contrary to the statute’s single stated objective, to the balance of interpretations by the Article III judiciary since 1972, and to long-standing agency practice.

Finally, the proposal states that it is impossible to measure the jurisdictional losses that will ensue if its narrowed definition of tributary is finalized. *See* Proposed Rule, 84 Fed. Reg. at 4200. The National Hydrography Dataset, however, suggests that Arizona, Nevada, New Mexico, and Utah, where 94%, 89%, 88% and 79% of the streams are intermittent or ephemeral, respectively,<sup>41</sup> would stand to lose a great deal of CWA jurisdiction. The proposal thus raises a curious (if not also suspect) inference: whether the proposed narrowing of covered tributaries—admittedly a “legal and policy decision,” *see* Proposal, 84 Fed. Reg. at 4175—is also a “legal” or “policy” decision to avoid being specific about how much jurisdiction is being cut through the rulemaking?<sup>42</sup>

Separating significant from insignificant tributaries has always been problematic in ‘navigable waters’ law. Yet the courts have long accepted that, to manage mainstem rivers, an authority must be able to manage its tributaries.<sup>43</sup> Indeed, the Supreme Court itself long ago recognized that seasonality and annual variations in flow should not control the jurisdictionality of a stream or river.<sup>44</sup> The Corps of Engineers’ 1977 rules obliquely set a presumptive flow-volume threshold for tributaries, but that rule’s use in practice was

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<sup>40</sup> In this vein, the Proposal must construct separate definitions for distinguishing ephemeral, intermittent and perennial streams, *e.g.*, precipitation patterns of a “typical year,” which introduce their own measurement problems. *See* Proposed Rule, 84 Fed. Reg. at 4173-77.

<sup>41</sup> *See* D.C. Goodrich *et al.*, Southwestern Intermittent and Ephemeral Stream Connectivity, 54 J. Amer. Water Res. Ass’n 400, 400 (2018).

<sup>42</sup> *See* Proposal, 84 Fed. Reg. at 4200 (“[T]he agencies are not aware of any means to quantify changes in CWA jurisdiction with any precision that may or may not occur as a result of this proposed rule.”).

<sup>43</sup> *See State of Okla. ex rel. Phillips v. Guy F. Atkinson*, 313 U.S. 508, 516-17 (1941) (linking flood control work on the Red River and its tributaries in Oklahoma to flood control planning on the Mississippi).

<sup>44</sup> *Cf. Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921) (“Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.”).

eventually mired in field office discretion and the slippage inherent in nationwide permitting programs.<sup>45</sup> Long before the 2015 rulemaking, lower courts rejected—virtually without exception—the argument that ditches, because they are artificial, should be beyond reach.<sup>46</sup> Today, a vast range of lower court precedents hold that non-navigable tributaries fall within § 502(7).<sup>47</sup> Even the seeming cultural mistake of categorizing engineered ditches as “tributaries” has been ratified by the Supreme Court.<sup>48</sup> Thus, the proposal’s recognition that “[e]xcluded geographic features, such as ditches, may function as “point sources” under CWA section 502(14),” Proposed Rule, 84 Fed. Reg. at 4195, while true, does not change the fact that artificial channeling can and typically does serve the exact same functions that natural tributaries serve. When these artificial channels supply more of that functionality even than

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<sup>45</sup> See U.S. Army Corps of Eng’rs, Final Rule—Navigation and Navigable Waters, 42 Fed. Reg. 37122, 37129 (1977) (noting that tributaries are included up to their “headwaters,” which “is the point on the stream above which individual or general permits *ordinarily* will not be required”) (emphasis added). Headwaters were defined as flowing at five cubic feet per second annual average. *Id.* The Corps eventually winnowed the circumstances in which nationwide permits automatically authorized discharges to these supposed “headwaters.” See William E. Taylor & Kate L. Geoffroy, General and Nationwide Permits, in *Wetlands Law and Policy: Understanding Section 404 151*, at 159-60 (Kim Diana Connolly *et al.* eds., 2005). The Corps’ failure to better define tributary jurisdiction did not go wholly unnoticed by courts prior to *Rapanos*. See, e.g., United States v. R.G.M. Corp., 222 F. Supp.2d 780, 783-85 (E.D. Va. 2002).

<sup>46</sup> See, e.g., United States v. Holland, 373 F. Supp. 665, 673 (M.D. Fla. 1974); United States v. DeFelice, 641 F.2d 1169, 1173 (5th Cir. 1981); United States v. Huebner, 752 F.2d 1235, 1239-40 (7th Cir. 1985); United States v. Tull, 769 F.2d 182, 185-86 (4th Cir. 1985), *rev’d in part on other grounds*, Tull v. United States, 481 U.S. 412 (1987); United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997); United States v. Buday, 138 F. Supp.2d 1282 (D. Mont. 2001); Headwaters v. Talent Irr. Dist., 243 F.3d 526, 533 (9th Cir. 2001); *In re Needham*, 354 F.3d 340, 346 (5th Cir. 2003); United States v. Deaton, 332 F.3d 698, 707-12 (4th Cir. 2003). *Rapanos* changed nothing here. See, e.g., United States v. Brink, 795 F. Supp.2d 565 (S.D. Tx. 2011); United States Vierstra, 803 F. Supp.2d 1166 (D. Idaho 2011); United States v. Hamilton, 952 F. Supp.2d 1271 (D. Wyo. 2013). The rare exceptions, see, e.g., United States v. RGM Corp., 222 F. Supp.2d 780, 786 (E.D. Va. 2002), were disclaimed or overruled. *Cf. Deaton*, 332 F.3d at 711-12 (rejecting arguments that small, artificial ditches draining wetlands cannot be jurisdictional).

<sup>47</sup> See, e.g., United States v. Moses, 496 F.3d 984, 988-89 (9th Cir. 2007); United States v. Deaton, 332 F.3d 698, 710-12 (4th Cir. 2003); Treacy v. Newdunn Assocs., 344 F.3d 407, 417 (4th Cir. 2003); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975).

<sup>48</sup> In unanimously reversing the Ninth Circuit’s characterization of the Los Angeles River’s flow from its concrete-lined to its more “natural” reaches downstream as the origins of a “point source,” Justice Ginsburg’s opinion in *Los Angeles County* characterized “the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway” as *flow* of that waterway, pure and simple. See Los Angeles County Flood Con. Dist. v. Natural Resources Defense Council, Inc., 133 S. Ct. 710, 713 (2013).

the proximate natural channels, using indicators like a bed, banks, and ordinary high-water mark—as was done in the 2015 rule—captures more about connectivity than average flows can.<sup>49</sup>

### III. Changing the Definition of Adjacency

The current definition of adjacency is structured in part to reflect the “significant nexus” interpretation of *Solid Waste Agency, Riverside Bayview*, and CWA § 502(7) that Justice Kennedy offered in his opinion in *Rapanos/Carabell* and that the majority at least suggested in *Solid Waste Agency*.<sup>50</sup> The agencies have implied in the preamble to the proposal that that approach “impairs” the right or “jurisdiction” of the States and that a narrower definition is better.<sup>51</sup> Although the preamble several times states that the improvement comes in the form of better “clarity,”<sup>52</sup> unless this enhancement is a euphemistic reference to the personnel changes at the Supreme Court since 2006,<sup>53</sup> it is hard to know what the agencies mean. According to the proposal, eliminating jurisdiction if a wetland’s hydrologic connection is merely “ephemeral,” or if that wetland does not “actually abut[]’ navigable-in-fact waters

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<sup>49</sup> See Dept. of the Army, Corps of Eng’rs & Environmental Protection Agency, Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054, 37079 (2015) (hereafter “Final Rule”).

<sup>50</sup> See Final Rule, 80 Fed. Reg. at 37093; see also *Solid Waste Agency of N. Cook Cty. v. United States*, 531 U.S. 159, 167 (2001) (“It was the significant nexus between the wetlands and the “navigable waters” that informed our reading of the CWA in *Riverside Bayview Homes*.”). Notably, the district court in *Riverside Bayview* found no direct “hydrological connection” between the parcel at issue and any nearby navigable waters. See *United States v. Riverside Bayview Homes*, 729 F.2d 391, 394-95 (6th Cir. 1984) (“Judge Kennedy found . . . that *there have been long periods of time when none of the property was inundated by water from contiguous or adjacent navigable waters. Indeed, this has been true most of the time.*”) (emphasis in original).

<sup>51</sup> See Proposed Rule, 84 Fed. Reg. at 4186-87.

<sup>52</sup> See, e.g., Proposed Rule, 84 Fed. Reg. at 4186 (“The agencies believe . . . that this proposal provides better clarity for the regulators and the regulated community alike while adhering to the basic principles articulated in all three Supreme Court cases on point.”).

<sup>53</sup> Since 2006 justices O’Connor, Souter, Stevens, Scalia, and Kennedy have been replaced by justices Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh, respectively.

addressed in *Riverside Bayview*,”<sup>54</sup> will go some way toward eliminating the “case-by-case applications” of adjacency that only Justice Kennedy seemed to envision.<sup>55</sup> From the face of the proposal, however, this is hardly assured. What must be directly abutting—the wetland or the parcel of property of which the wetland is a part?<sup>56</sup> What if the wetland is abutting and/or created by impounded or otherwise engineered waters?<sup>57</sup> And, given the variability of watersheds, wetlands, and the mechanisms of their connectivity, what should constitute a sufficiently “direct hydrologic surface connection”?<sup>58</sup> In short, in several places the explanation of what is proposed raises distinct sources of the same old confusions and does little or nothing to clarify them.

The Corps’ 1977 rules introduced the concept of *adjacency* to reach wetlands that are in some way proximate to jurisdictional waters.<sup>59</sup> The terms used ever since to define adjacency have included “neighboring,” a tie many courts found rather elastic following *Riverside Bayview Homes*.<sup>60</sup> Eliminating terms like “neighboring” in favor of some novel

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<sup>54</sup> See Proposed Rule, 84 Fed. Reg. at 4186.

<sup>55</sup> See Proposed Rule, 84 Fed. Reg. at 4189.

<sup>56</sup> See, e.g., No. Calif. River Watch v. City of Healdsburg, 496 U.S. 993, 996 (9th Cir. 2007); United States v. Lucas, 516 F.3d 316, 322 (5th Cir. 2008).

<sup>57</sup> See, e.g., United States v. So. Investment Co., 876 F.2d 606, 612-13 (8th Cir. 1989); United States v. City of Ft. Pierre, 747 F.2d 464, 466-67 (8th Cir. 1984).

<sup>58</sup> See, e.g., United States v. Deaton, 332 F.3d 698,702-05 (4th Cir. 2003); Leslie Salt Co. v. United States, 896 F.2d 354, 358-60 (9th Cir. 1990); United States v. Heubner, 752 F.2d 1235, 1237-38 (7th Cir. 1985); United States v. Tilton, 705 F.2d 429, 431 (11th Cir. 1983).

<sup>59</sup> See 40 Fed. Reg. at 37144 (finalizing 33 C.F.R. § 323.2(d) (defining the term “adjacent” to mean “bordering, contiguous, or neighboring. Wetlands separated from others [jurisdictional waters] by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”)). The Corps specified no more in its 1977 rulemaking than to say that “adjacent wetlands” were in “reasonable proximity” to covered waters. *Id.* at 37129.

<sup>60</sup> See, e.g., United States v. Osborne, 2012 WL 1095960 (N.D. Ohio 2012) (denying defendant’s motion for summary judgment because government’s allegation that defendant’s wetlands were less than 300 feet from a navigable-in-fact water was sufficient); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) (large parcel bordering navigable lake with wetlands set far back from shoreline); Baccarat Fremont Devs., LLC v. United States Army Corps of Eng’rs, 425 F.3d 1150 (9th Cir. 2005) (holding that adjacency need not involve any hydrological connection); Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003) (holding that parcel separated from navigable water by constructed highway which then established hydrologic connection via 2.4 miles of creeks flowing to navigable water was “adjacent”); United States v. Banks, 115 F.3d 916 (11th Cir. 1996) (finding wetlands connected primarily through ground water and common biota

“abutting” and/or hydrologic connection test, however, only assures that the attention will shift to the supposedly shared legal boundary and/or the quality and sufficiency of the surface connection(s). As the Ninth Circuit in *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526 (9th Cir.2001), read the 1977 regulations, a significant hydrological or ecological connection to downstream navigable waters was not necessary and, to the contrary, could consist of connections via irrigation ditching alone. *Id.* at 533; *see also* Baccarat Fremont v. U.S. Army Corps of Eng’rs, 425 F.3d 1150, 1156-57 (9th Cir. 2005). Variabilities in flow, interruptions from engineered works, *e.g.*, berms, dikes, *etc.*, and other nonlinearities or human interventions are, practically speaking, the norm in the field. It is quite late in the day, after people have long been prosecuted and punished for filling wetlands the adjacency of which was proved simply by their storage or transformative capacities and not for their continual surface connection to downstream waters, to reinvent the adjacency concept wholesale. *See, e.g.*, United States v. Cundiff, 555 F.3d 200, 212 (6th Cir. 2009); Leslie Salt Co. v. United States, 896 F.2d 354, 358-60 (9th Cir. 1990).

As the *Connectivity Report* made clear, several of the mechanisms and the dimensions of connectivity between upstream streams and wetlands and downstream waters have little to do with temporal continuity of surface water connections or with legal boundaries.<sup>61</sup> The latter make no difference to chemical, physical, or biological properties and processes and, as the best scientific information available suggests, durations of flow continuity of wetlands to

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shared with navigable waters almost a half mile away to be adjacent); United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993) (finding wetland parcel draining to a tributary up-gradient of that tributary’s jurisdictional boundary to be “adjacent” and therefore jurisdictional); United States v. Malibu Beach, Inc., 711 F. Supp. 1301 (D.N.J. 1989) (holding that wetlands on a beach parcel bordering an inlet subject to the ebb and flow of the tide “adjacent”).

<sup>61</sup> *See, e.g., Connectivity Report, supra*, at § 4.3.4 (The dynamic nature of river systems is most apparent in riparian areas and floodplains, where a shifting landscape mosaic supports diverse communities of aquatic, amphibious, and terrestrial plant and animal species adapted to periodic or episodic inundation of riparian areas and floodplains.”).



navigable waters are often (1) variable; (2) difficult (if not impossible) to measure; and (3) inferior to other functional metrics for quantifying connectivity.<sup>62</sup> With non-floodplain wetlands especially, the variability in functions can be acute.<sup>63</sup> One of the “major conclusions” in 2015 was that generalizations about non-floodplain wetlands were inherently “difficult” because of the lack of information on both function and connectivity.<sup>64</sup> For the agencies to exclude them categorically, thus, seems premature at best and factually unfounded at worst.

For example, many observations confirm that large quantities of snowmelt and precipitation can be accumulated in small, non-riparian wetlands that then significantly reduces downstream flooding and/or water quality standards violations.<sup>65</sup> Especially as climate change increases the lateral expansions and contractions of our river networks in unpredictable ways, non-floodplain wetlands’ categorical exclusion from CWA jurisdiction seems ill-timed at least.<sup>66</sup> And as Leibowitz and colleagues have been studying for years now, in two adjacent basins where the upper has net input of water exceeding its surface storage capacity and overflows, the connectivity of the two is much less contingent than historic flow durations would suggest.<sup>67</sup> Indeed, sinking and lagging functions are the nominal *opposites* of

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<sup>62</sup> See Scott Leibowitz *et al.*, *Connectivity of Streams and Wetlands to Downstream Waters: An Integrated Systems Framework*, 54 J. Amer. Water Res. Ass’n 298, 312-15 (2018).

<sup>63</sup> See *Connectivity Report*, *supra*, at § 4.4.3 (collecting studies of non-floodplain wetlands’ effects on water quality through transformation and time-lagging mechanisms); Scott Leibowitz *et al.*, *Connectivity of Streams and Wetlands to Downstream Waters: An Integrated Systems Framework*, 54 J. Amer. Water Res. Ass’n 298, 303-04 (2018).

<sup>64</sup> See *Connectivity Report*, *supra*, at § 6.1.3 at 6-5 (“[F]ew scientific studies explicitly addressing connections between non-floodplain wetlands and river networks have been published in the peer-reviewed literature. Even fewer publications specifically focus on the frequency, duration, magnitude, timing, or rate of change of these connections.”).

<sup>65</sup> See *Connectivity Report*, *supra*, at § 4.4.2.3.

<sup>66</sup> See *Connectivity Report*, *supra*, at § 4.4.3 (“In some cases. Non-floodplain wetlands directly modify the water quality in downstream waters through their relative lack of surface water connections; this modification is accomplished by removal, sequestration, or transformation of pollutants such as nitrogen, phosphorous, and metals . . .”).

<sup>67</sup> See Scott G. Leibowitz *et al.*, *Intermittent Surface Water Connectivity: Fill and Spill vs. Fill and Merge Dynamics*, 36 Wetlands S323, S324 (2016).

flow duration, making clear that storage capacity itself can often be the key to downstream water quality.<sup>68</sup>

Finally, as with the other changes ostensibly done to protect the sovereignty of the states, it makes little sense to specially define a jurisdictional term (“waters”) found throughout a statute which has been structured from top to bottom as a “cooperative federalism” bargain by little more than the assertion that broader jurisdictional scope diminishes state autonomy. The Supreme Court itself, in its first merits opinion on the 1972 amendments, acknowledged as much by recognizing the federal role in assuring state program integrity by assuring that the necessary waters are jurisdictional.<sup>69</sup> State autonomy is *already* protected in the CWA by a myriad of mechanisms and rules. Narrowing the waters to which the Act or its associated programs may even conceivably apply is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

#### **IV. Removing Interstate Waters**

It is telling just how the proposal invokes several major precedents on “navigable waters” like *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), *The Montello*, 87 U.S. 430 (1874), and *United States v. Utah*, 283 U.S. 64 (1931).<sup>70</sup> Each of those precedents, of course, construed navigability for its own specific purposes. The only thing they have in common are waters implicating federal interests. And the proposal, like many rulemakings before it, lumps such precedents together under the heading of “traditional navigable waters and territorial

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<sup>68</sup> See *Connectivity Report*, supra, at § 4.4.2.3; Ken M. Fritz *et al.*, Physical and Chemical Connectivity of Streams and Riparian Wetlands to Downstream Waters: A Synthesis, 54 J. Amer. Water Res. Ass’n. 323, 329-33 (2018).

<sup>69</sup> See *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 224-25 n.39 (1976) (observing that state discharge permit programs authorized under CWA § 402 necessarily leave open the possibility of EPA’s remaining an active permitting presence in the state because a state program may cover less than all navigable waters).

<sup>70</sup> See *Proposed Rule*, 84 Fed. Reg. at 4168-70.

seas.” Id. at 4170. The reason this is so telling is because the exact *same* characterization of Supreme Court precedents spurred the original administrative action clarifying that CWA § 502(7) “waters” *included* “interstate waters” in 1973.<sup>71</sup> For the following reasons, rescinding that 1973 action now is arbitrary, capricious, and not in accordance with law.

The Supreme Court first decided that interstate waters implicated its own original jurisdiction—through the Judiciary Act of 1789—at the turn of the last century. *See Missouri v. Illinois*, 180 U.S. 208, 240-42 (1900) (holding that bill for injunction of upstream pollution was in pursuit of state’s sovereign interests and therefore within the Court’s original jurisdiction); *Kansas v. Colorado*, 185 U.S. 125, 139-40 (1902) (noting sources of Court’s jurisdiction and the necessity that the Court fashion unique rules of decision). It did so in recognition of the federal interests implicated in such disputes. *See id.*

Even putting aside that the agencies said as recently as 2014 that “the CWA is clear that Congress intended the term “navigable waters” to include interstate waters,”<sup>72</sup> an administrative action eliminating interstate waters from the Act’s reach—purportedly because of states’ sovereignty and the supposed infringement thereof from including them—is curious to say the least. As the Supreme Court observed in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), “[i]nterstate waters have been a font of controversy since the founding of the Nation.” Id. at 98. No less a figure than Justice Holmes, who once wrote that a “river is more than an amenity, it is a treasure,” *New Jersey v. New York*, 283 U.S. 336, 342 (1931), declared for the Court in 1907 that New Jersey could legally prohibit out-of-state transfers of water from the Passaic River, a tributary of New York Harbor. *See Hudson County Water Co. McCarter*, 209

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<sup>71</sup> EPA issued the original clarification in 1973—without comment—in its first CWA permitting regulations. *See* U.S. EPA, Final Rule—National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13528-29 (1973).

<sup>72</sup> 79 Fed. Reg. at 22254.

U.S. 349, 356-57 (1907) (rejecting takings, contract, due process, and commerce clause challenges). Sovereignty and water, in short, go hand-in-glove—except where *more than one* sovereign claims the glove. In that nexus, as the Supreme Court has acknowledged over and over, uniquely federal interests are necessarily implicated.

Although a later Court substantially curbed the *McCarter* holding, see Sporhase v. Nebraska, 458 U.S. 951, 954-58 (1982), it still landmarks the federal nature of interstate water disputes of all kinds. No interstate compact can exhaustively catalogue or treat the subjects for dispute—leaving, inevitably, federal law and/or federal jurisdiction to the conflict-resolution burden—if for no other reason than that it must be federal law governing compacts’ interpretation. See Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120, 2133-36 (2013). Federal jurisdiction to hear such cases and to protect interstate waters, rather than being a threat to state sovereignty, is in fact an essential safeguard of it. See *id.* at 2130 n.8; State ex rel. Dyer v. Sims, 341 U.S. 22, 28-31 (1951). Without this federal interest leading to federal jurisdiction, downstream states throughout the nation are simply rendered less sovereign.

As the *Arkansas* Court held, applying the law of the downstream state to pollution discharges in an upstream state inevitably poses a sensitive “policy choice,” *Arkansas*, 503 U.S. at 113-14, and one that the states themselves may not be able to resolve amicably. Such conflicts of law are precisely why the Supreme Court took interstate waters cases into its original jurisdiction: where the sovereign or proprietary interests of states conflict, no state can authoritatively govern. Perhaps the most famous (surely the longest running) of these disputes, over Chicago’s reversal of the Chicago River’s flow from Lake Michigan to the Illinois River, confirms the *nature* of these federal interests—not just their magnitude. See Wisconsin v. Illinois, 449 U.S. 48, (1980) (*Wisconsin VI*) (revising decree); Wisconsin v. Illinois, 289 U.S.

395, 399-406 (1933) (*Wisconsin III*) (reviewing the basis of dispute). The Court has even acted on these interests when the threat is to an upstream state's share of anadromous fish from downstream states' governance of their relevant habitat. *See e.g., Idaho ex rel. Evans v. Oregon & Washington*, 444 U.S. 380, 390-93 (1980). In other words, the Court itself has recognized that biotic connections between upstream and downstream states can implicate uniquely federal interests—to say nothing of protecting waters' more obviously functional attributes.

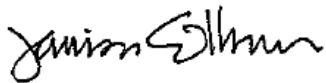
Finally, the Supreme Court has held that nuisance actions on interstate waters are no longer appropriate under federal common law. *See Illinois v. Milwaukee*, 451 U.S. 304, 316-19 (1981). But this was only because it found the scope and depth of CWA controls to be so comprehensive as to supplant that body of judge-made law. *See id.* at 318 (“Congress’ intent in enacting [Pub. L. No. 92-500] was clearly to establish an all-encompassing program of water pollution regulation.”). Will removing interstate waters from the definition of “waters of the United States” now shift the onus back to the federal courts to re-start a now-moribund field of federal common law as to these waters that the agencies propose to excise from the Act’s reach? That is the sort of uncertainty the agencies are shifting to the users of interstate waters and to the states if this proposal is finalized.

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In closing, we urge the agencies to reconsider the proposal as explained in our comments above. While even a casual familiarity with the Administration’s avowed hostilities toward the “administrative state” makes evident the *motive* behind this proposal, the actual legal and scientific bases justifying it are nowhere provided in the February 2019 notice. The nation’s signature clean water law has resisted past efforts aimed at its repeal—almost five decades’ worth of them. With some estimates putting three-quarters of all listed endangered

and threatened species in the water- or wetland-dependent category and climate change so dramatically disrupting historic precipitation patterns, this is no time to be hobbling that law on the pretense that cutting its jurisdictional scope is somehow administratively efficient or required by law. It is neither.

Respectfully,



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