January 5, 2026

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U.S. Environmental Protection Agency
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: Comments of Environmental Law & Policy Center, Alliance for the Great Lakes, Clean Wisconsin, Hoosier Environmental Council, Illinois Environmental Council, Iowa Environmental Council, Michigan Environmental Council, Minnesota Environmental Partnership, and Ohio Environmental Council on the U.S. Environmental Protection Agency and United States Army Corps of Engineers' Proposed Rule Revising the Definition of "Waters of the United States" under the Clean Water Act, **Docket ID EPA-HQ-OW-2025-0322**

To the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers:

Introduction

The Environmental Law & Policy Center (ELPC), together with Alliance for the Great Lakes, Clean Wisconsin, Hoosier Environmental Council, Illinois Environmental Council, Iowa Environmental Council, Michigan Environmental Council, Minnesota Environmental Partnership, and Ohio Environmental Council, strongly oppose the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' (together, the "agencies") Proposed Rule entitled *Updated Definition of "Waters of the United States*," EPA–HQ–OW–2025–0322, and published at 90 Fed. Reg. 52498 (Nov. 20, 2025) ("Proposed Rule").

The Proposed Rule would severely reduce the "waters of the United States" subject to protection under the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., without legal or scientific support. First, the Proposed Rule applies novel interpretations to narrow the meaning of "tributaries" and "wetlands" that qualify as "waters of the United States" and exclude altogether "interstate waters," "prior converted cropland," and "ditches" in ways that conflict with Congress's intent, the agency's longstanding interpretation, and judicial precedent. Second, the proposal fails to provide an adequate factual and technical basis for these new definitions and

exclusions. Third, the agencies have failed to provide adequate notice and opportunity to comment on fundamental aspects of the Proposed Rule and the agencies' rationale, including the devastating impacts it would have on the health of water resources and everyone who relies on them. For these reasons and as further explained below, the Proposed Rule should be withdrawn.

ELPC is the Midwest's leading environmental legal advocacy organization, with members across the region. As a local and regional organization, ELPC has knowledge, information, and membership that is uniquely focused on protecting public health and natural resources in nine states, including those bordering the Great Lakes.

The **Alliance for the Great Lakes** is a nonpartisan, nonprofit organization dedicated to protecting and restoring the Great Lakes through science-based research, policy analysis, and stakeholder engagement across the region. For decades, the Alliance has worked with farmers, researchers, community-based organizations, utilities, and state and federal agencies to address nutrient pollution, wetland loss, and upstream drivers of water quality degradation.

Hoosier Environmental Council's (HEC) vision is an Indiana where all residents have abundant access to clean water, natural lands, pure air, and affordable clean energy. Its mission is to lead and collaborate with diverse coalitions to achieve a healthy natural environment and thriving sustainable communities for all. Founded in 1983, HEC is Indiana's largest state based environmental nonprofit, and it brings deep connections with communities, advocates, and elected officials across the state. HEC advances its mission through education, advocacy, policy and accountability through legal action.

The **Illinois Environmental Council (IEC)** represents over 130 environmental organizations operating in Illinois. IEC carries out our mission to advance equitable public policies that create healthy environments across Illinois through collaboration, building power, and advocacy.

The **Iowa Environmental Council (IEC)** is a broad-based environmental policy organization with a mission to create a safe, healthy environment and sustainable future for all Iowans. IEC is a coalition of 100 diverse member and cooperator organizations ranging from agricultural, conservation, and public health organizations, to educational institutions, business associations, and churches, along with hundreds of individual members that coordinate to support IEC's mission. IEC's work focuses on clean water, clean air, conservation, clean energy, and a safe climate.

The **Michigan Environmental Council (MEC)**, a 501(c)3 nonprofit organization, was formed in 1980 and represents nearly 100 member organizations from across the state. MEC works to enact enduring and equitable policies in order to fulfill our mission of championing lasting protections for Michigan's air, water, and the places we love.

Minnesota Environmental Partnership (MEP) is a statewide coalition of more than 70 environmental and conservation nonprofits organizations - and other groups that align with

MEP's mission and collaborative approach - that advocate together for clean energy, clean water, clean transportation and a healthy environment for all Minnesotans through policy initiatives, public education, and community events.

The **Ohio Environmental Council (OEC)** is a 56-year-old statewide advocacy organization based in Columbus, Ohio. The OEC pursues a clean, healthy Ohio where democracy empowers all communities to thrive in harmony with the environment. It achieves this goal through legal and policy advocacy, decision-maker accountability, and civic engagement.

Founded 55 years ago, **Clean Wisconsin** is a non-profit, non-partisan environmental advocacy organization working to secure a sustainable future for every Wisconsin community by combatting climate change and pollution in our air, water and land. With over 20,000 members and supporters around the state, we are scientists, policy experts, communications professionals and attorneys working to protect and improve Wisconsin's environment.

As just a snapshot of the important water resources that the Proposed Rule will impact but that the agencies have failed to address: the Great Lakes sustain a $6 trillion economy, contain more than 90% of North America's supply of surface freshwater, and provide drinking water for more than 40 million people in the United States and Canada.[1] All of North America's waterfowl depend on wetlands, while half of the continent's other migratory birds use them at some point during their annual life cycles.[2] Ninety percent of fish caught by American recreational anglers need wetlands for shelter, food supply, spawning, and nursery areas.[3] According to the National Park Service, between 60% and 90% of U.S. commercial fisheries depend on wetlands.[4] The agencies propose a major narrowing of the scope of waters of the United States covered by the Clean Water Act without seriously acknowledging or analyzing any of these potential impacts, which merely scratch the surface of the critical values that the Proposed Rule would affect if adopted.

I. Background

A. The Clean Water Act Broadly Protects "Waters of the United States."

Congress enacted the Clean Water Act in 1972 by a huge bipartisan majority.[5] Congress acted in response to, among other things, the nation's shock and horror when the polluted

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[1] Great Lakes Commission, *Celebrating the 50th Anniversaries of the Clean Water Act and the Great Lakes Water Quality Agreement* (Oct. 13, 2022), https://www.glc.org/wp-content/uploads/FINAL-GLC-Resolution-CWA-GLWQA-50th-20221013.pdf.
[2] Jennifer Boudart, *Multi-Species Benefits of Wetlands Conservation* (Nov. 11, 2025), https://www.ducks.org/conservation/national/multi-species-benefits-of-wetlands-conservation.
[3] *Id.*
[4] National Parks Service, *Why are Wetlands Important?* (May 16, 2025), https://www.nps.gov/subjects/wetlands/why.htm.
[5] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566.

Cuyahoga River in Ohio and Rouge River in Michigan repeatedly caught fire.[6] Unfortunately, the circumstances of the Cuyahoga and Rouge Rivers were not unique.[7] Prior to the 1972 Clean Water Act, many lakes, streams and waters across the Great Lakes region and the country were so degraded by industrial contaminants and sewage that they were not safe for swimming, fishing, or drinking.

In enacting the 1972 Clean Water Act, Congress completely revamped and reworked earlier federal water pollution control statutes to address the shortcomings of these earlier laws.[8] The Act sets two primary goals: (1) to make waters nationwide swimmable and fishable by 1983, and (2) to eliminate the discharge of pollutants into waterways by 1985.[9] To meet these goals, the Act prohibits discharging pollutants into navigable waters, the waters of the contiguous zone, or the ocean without prior authorization.[10] This prohibition applies to discharges of industrial and municipal pollutants and "dredged or fill material" (including dirt and rocks used for construction in water bodies or to fill them in to enable development) into navigable waters.[11]

Congress broadly defined "navigable waters" to include all "waters of the United States, including the territorial seas."[12] This definition reflects Congress's intent to "repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[13] In *Sackett*, the Supreme Court affirmed that "the CWA extends to more than traditional navigable waters," and it also attempted to resolve questions regarding the scope of wetlands that remain protected by the CWA after the Supreme Court's fractured opinion in *Rapanos*.[14]

B. The Proposed Rule Would Dramatically Reduce the Scope of Waters of the United States, Leaving Already Imperiled Water Even More Vulnerable to Pollution and Destruction

EPA's misguided proposal to redefine waters of the United States protected by the Act threatens to halt the hard-fought water quality improvements that have occurred under the CWA and, worse yet, return the nation's water bodies to the polluted, degraded condition that existed prior to the Act's passage. By the government's own estimate, the Proposed Rule would decrease by 80% wetlands within the contiguous United States that are covered by the Act, compared to

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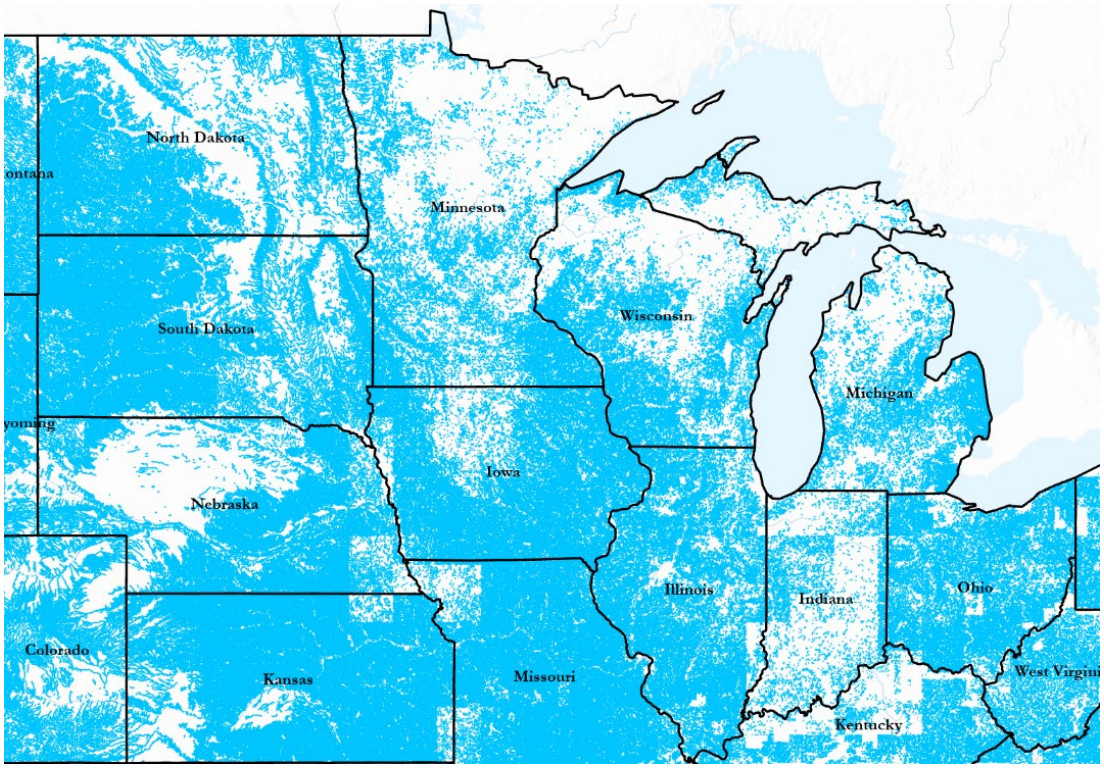
[6] *See United States v. Ashland Oil & Transp. Co*., 504 F.2d 1317, 1326 (6th Cir. 1974).
[7] *See Sackett v. EPA*, 598 U.S. 651, 711 (2023) (Kagan, J. concurring) ("[M]ake no mistake: Congress wrote the statute it meant to. The Clean Water Act was a landmark piece of environmental legislation, designed to address a problem of 'crisis proportions.'").
[8] *See City of Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981) (citing S. Rep. No. 92–414, p. 7 (1971)).
[9] 33 U.S.C. §§ 1251(a)(1), (a)(2).
[10] 33 U.S.C. §§ 1311(a), 1344(a), 1362(7), 1362(12).
[11] *See* 33 U.S.C. §§ 1342, 1344.
[12] *Id.* § 1362(7).
[13] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).
[14] *Sackett*, 598 U.S. at 672.

the current 2023 Conforming Rule.[15] The Proposed Rule could further leave up to 8 million miles of streams unprotected.[16]

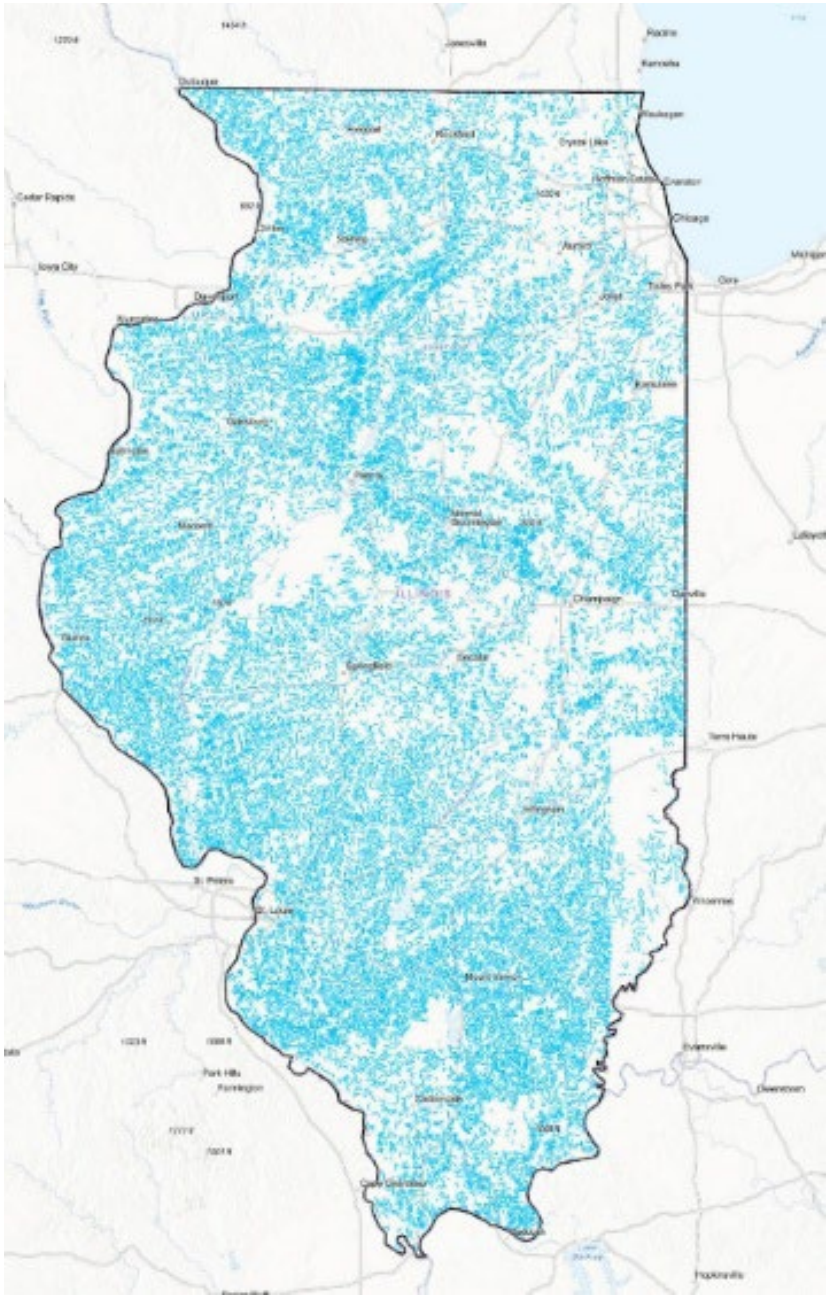
The potential effects within the Great Lakes region are astonishing. The agencies have not attempted to quantify the full scope of the waters that would lose Clean Water Act protections under the Proposed Rule. By way of illustration, the figures below show the intermittent and ephemeral waters (in blue) in the Midwest and Great Lakes regions that could be affected if the Proposed Rule is adopted.



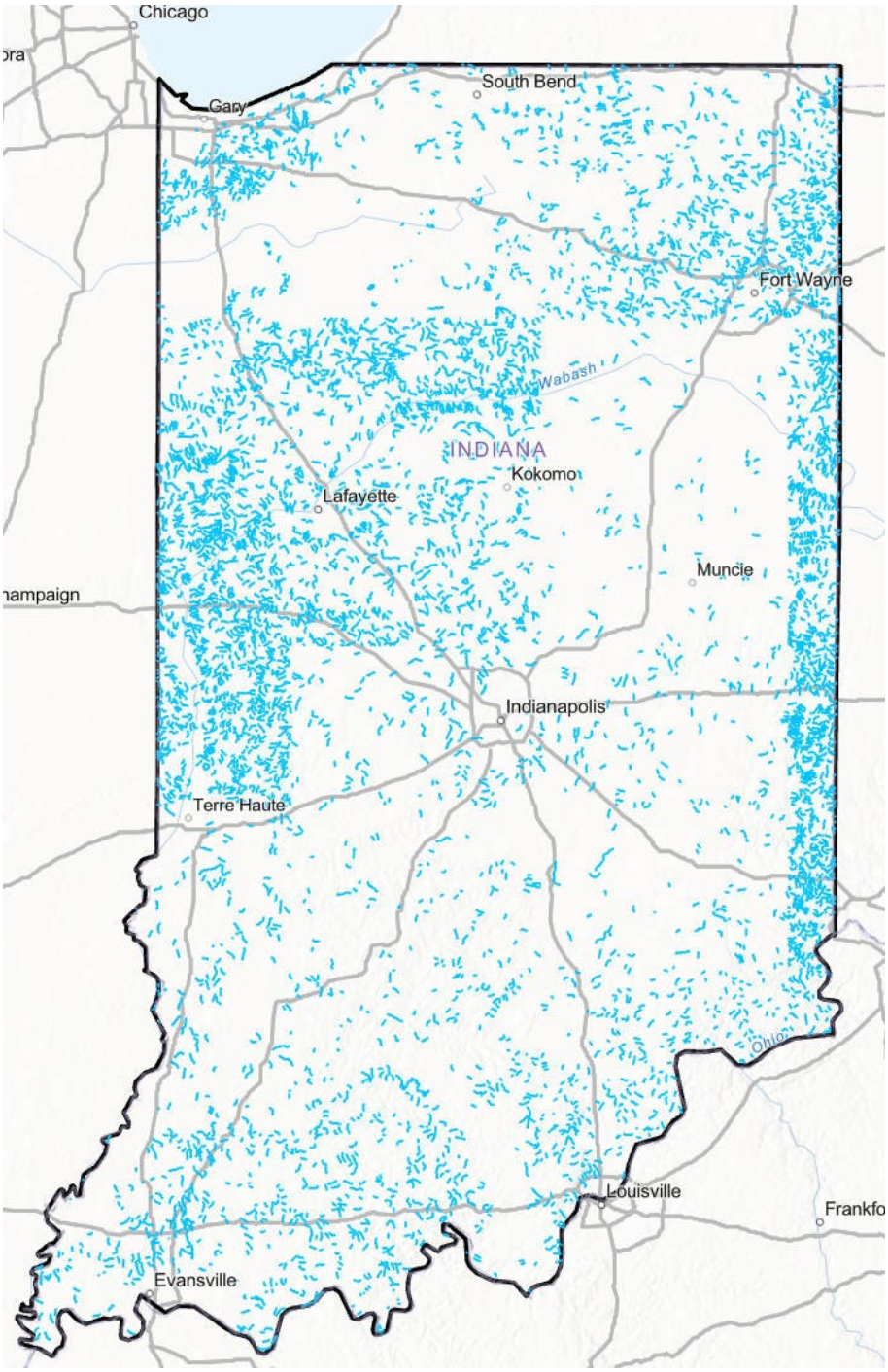
ELPC Comment Fig. 1, Ephemeral and Intermittent Waters in Midwest States, Data source: National Hydrography Dataset Plus (NHDPlus) Version 2

[15] 2024, EPA and USACE Proposed Regulatory Impact Analysis, Document ID EPA-HQ-OW-2025-0322-0120 ("Proposed IRA"), Table 3-1.

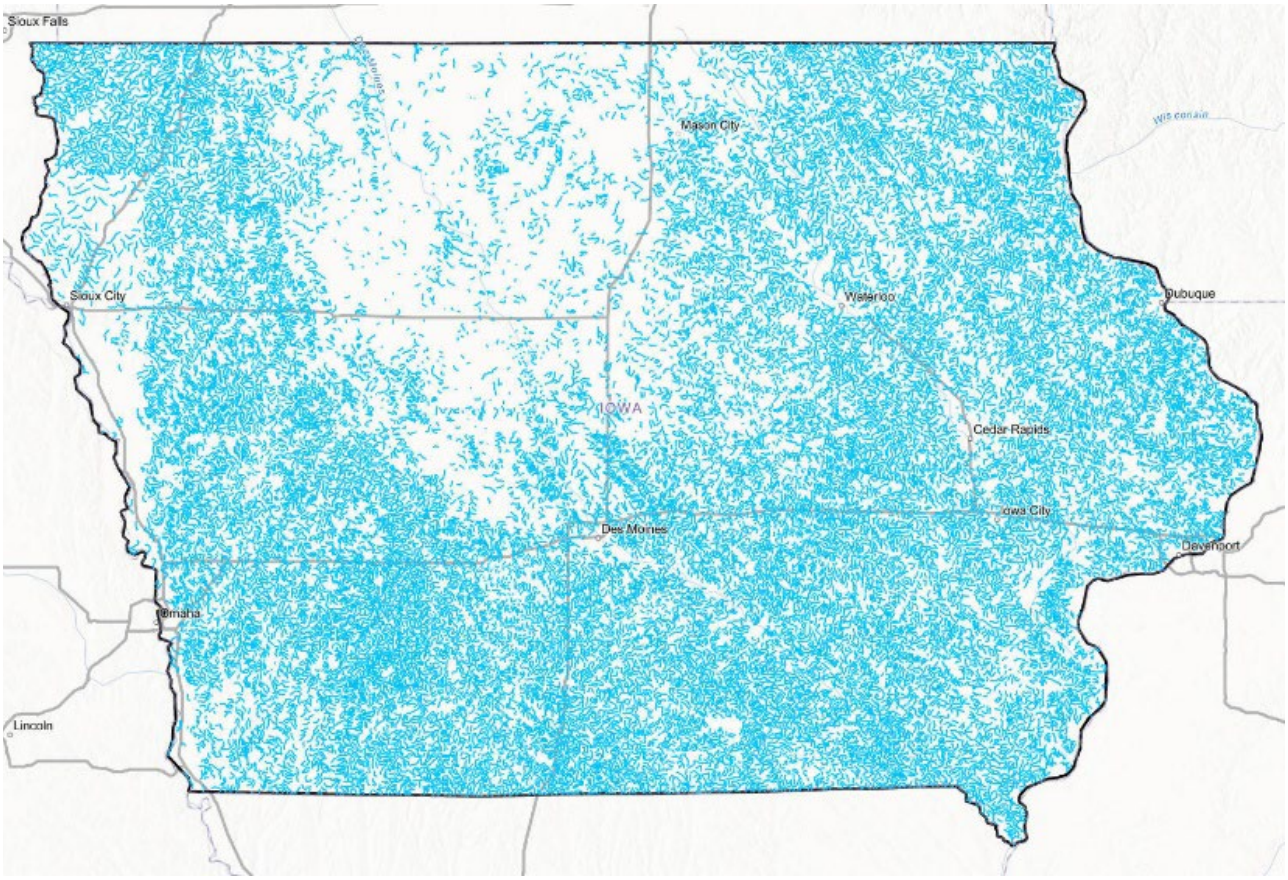
[16] *See* NRDC, *Mapping Destruction: Using GIS Modeling to Show the Disastrous Impacts of* Sackett v. EPA *on America's Wetlands*, at 15 & Table 2 (Mar. 2025), https://www.nrdc.org/sites/default/files/2025-03/Wetlands_Report_R_25-03-B_05_locked.pdf (showing that between 2.5-8 million miles of streams in the U.S. would lose Clean Water Act protections if only perennial streams (i.e., those that flow year-round) are considered "waters of the United States.") (Ex. 1) (hereinafter "2025 NRDC").



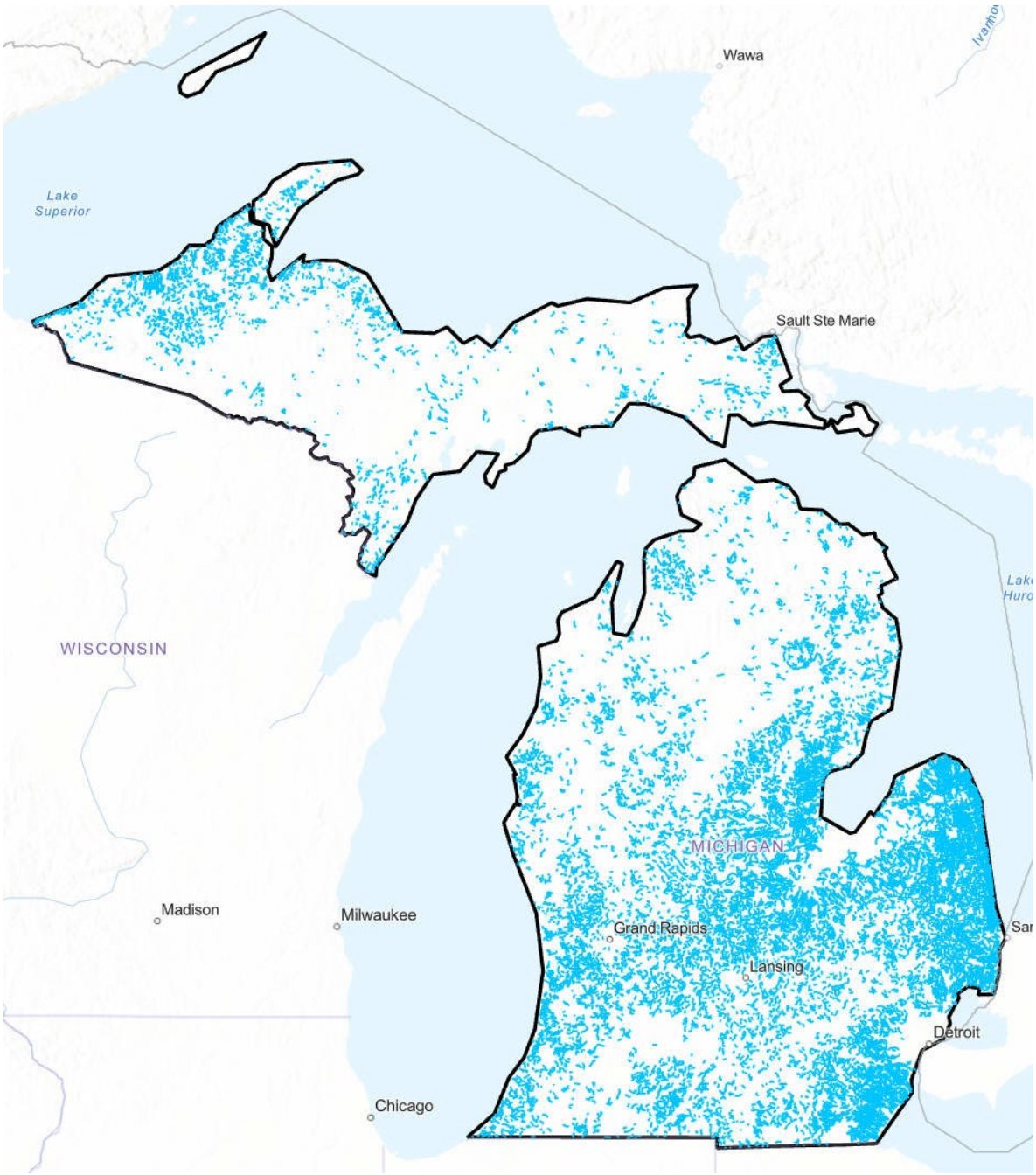
ELPC Comment Fig. 2, Ephemeral and Intermittent Waters in Illinois, Data source: National Hydrography Dataset Plus (NHDPlus) Version 2.



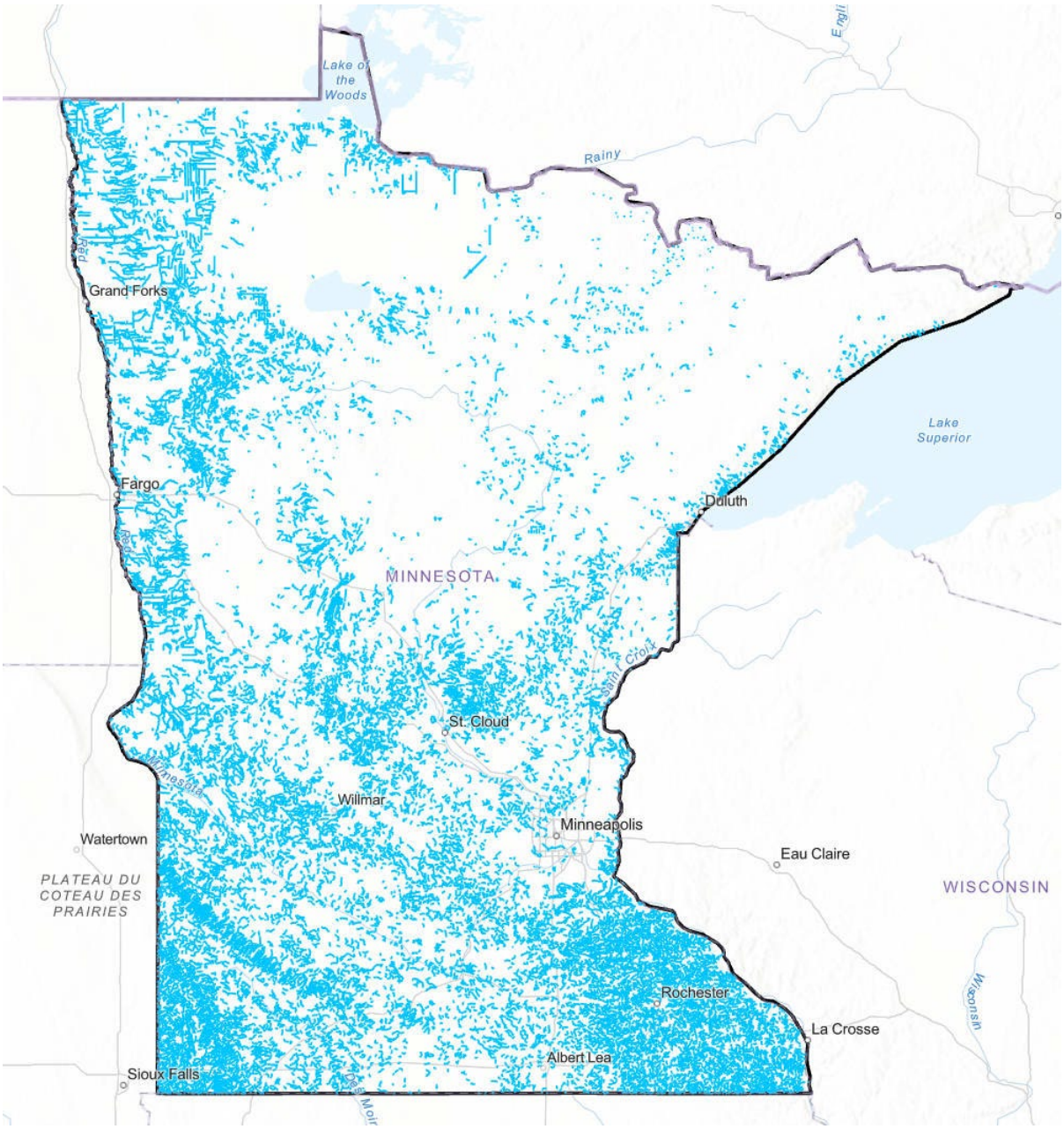
ELPC Comment Fig. 3, Ephemeral and Intermittent Waters in Indiana, Data source: National Hydrography Dataset Plus (NHDPlus) Version 2.



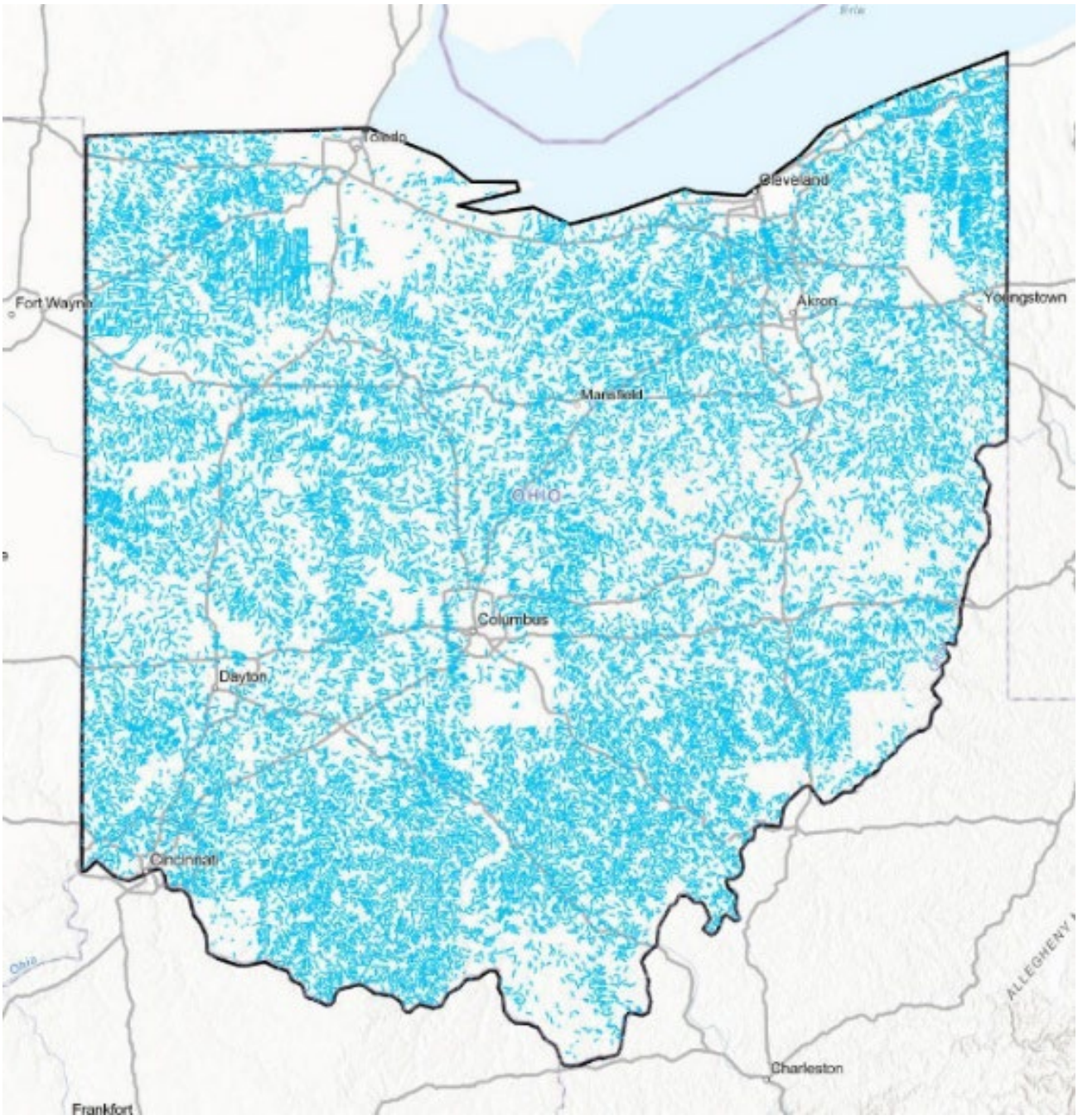
ELPC Comment Fig. 4, Ephemeral and Intermittent Waters in Iowa, Data source: National Hydrography Dataset Plus (NHDPlus) Version 2.



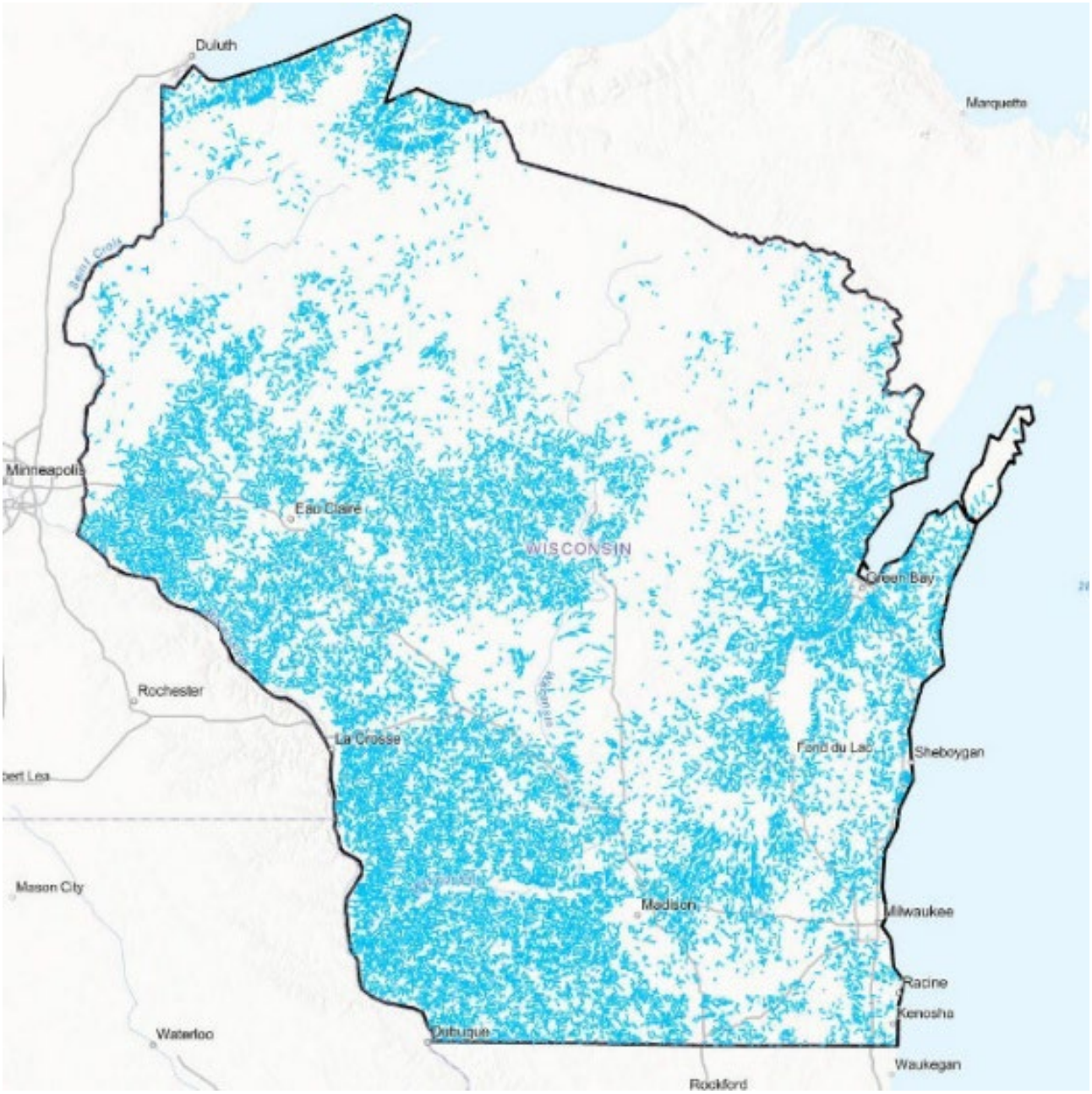
ELPC Comment Fig. 5, Ephemeral and Intermittent Waters in Michigan, Data source: National Hydrography Dataset Plus (NHDPlus) Version 2.



ELPC Comment Fig. 6, Ephemeral and Intermittent Waters in Minnesota, Data source: National Hydrography Dataset Plus (NHDPlus) Version 2.



ELPC Comment Fig. 7, Ephemeral and Intermittent Waters in Ohio, Data source: National Hydrography Dataset Plus (NHDPlus) Version 2.



ELPC Comment Fig. 8, Ephemeral and Intermittent Waters in Wisconsin, Data source: National Hydrography Dataset Plus (NHDPlus) Version 2

While it may be hard to imagine waterways as polluted as those that inspired the 1972 Act's passage, we have a long way to go before meeting Congress's goals of eliminating discharges of pollutants and having fishable, swimmable waterways, and clean drinking water. According to EPA, most waters are still impaired for at least one use.[17] As reflected in a 2017 EPA report to Congress, 55 percent of the rivers and streams assessed by states did not meet water quality standards.[18] EPA also found that only 28 percent of river and stream miles had healthy biological communities and only 35 percent had healthy fish communities.[19] The National Lakes Assessment, evaluating the health of our nation's lakes between 2017 and 2022, found that roughly half of the country's lakes are in poor condition due to nitrogen and phosphorus pollution.[20] A 2024 U.S. Fish & Wildlife Service report revealed that the nation lost approximately 670,000 acres of vegetated wetlands from 2009 to 2019, a faster decline than was reported for 2004–2009.[21] However, the agencies' proposal to exclude waters and wetlands from the scope of the Clean Water Act will make it impossible to close the gap between water quality today and Congress's goals.

The agencies' proposal to gut the Clean Water Act is a windfall for polluters, but it is not what the American people want. Polls show near universal support for strong water pollution control: 96% of voters say protecting the health and safety of drinking water is important and 94% say protecting the water in our nation's lakes, streams and rivers is important.[22]

As explained in more detail below, the Proposed Rule conflicts with Congress's direction in the Clean Water Act to broadly protect waters of the United States, contravenes judicial and agency precedent, and is not supported by any scientific rationale. Therefore, the agencies should withdraw it.

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[17] EPA, *National Rivers and Streams Assessment: The Third Collaborative Survey* (Sept. 2024), https://riverstreamassessment.epa.gov/webreport/.
[18] EPA, *National Water Quality Inventory: Report to Congress*, EPA 841-R-16-011 (Aug. 2017), https://www.epa.gov/sites/default/files/2017-12/documents/305brtc_finalowow_08302017.pdf.
[19] EPA, *National River and Streams Assessment 2018-19 Key Findings* (last updated Nov. 28, 2025), https://www.epa.gov/national-aquatic-resource-surveys/national-river-and-streams-assessment-2018-19-key-findings.
[20] EPA, *National Lakes Assessment: The Fourth Collaborative Survey of Lakes in the United States* (Aug. 2024), https://nationallakesassessment.epa.gov/webreport/#keyfindings-on-2022-condition.
[21] M. W. Lang, J. C. Ingebritsen, and R. K. Griffin, *Status and Trends of Wetlands in the Conterminous United States 2009 to 2019*, U.S. FISH & WILDLIFE SERVICE (Mar. 22, 2024), https://www.fws.gov/sites/default/files/documents/2024-04/wetlands-status-and-trends-report-2009-to-2019_0.pdf (Ex. 2).
[22] Walton Family Foundation, *Poll Shows Near-Universal Support for Protecting Water in Our Nation's Lakes, Streams and Rivers* (Mar. 21, 2024), https://www.waltonfamilyfoundation.org/about-us/newsroom/poll-shows-near-universal-support-for-protecting-water-in-our-nations-lakes-streams-and-rivers (Ex. 3).

II. The Proposed Rule Drastically Reduces the Scope of Streams, Lakes, and Wetlands from Clean Water Act Protections Without Legal or Factual Basis.

A. The Proposed Rule's Definition of "Relatively Permanent" Unlawfully and Unreasonably Limits the Waters of the United States.

The current rules implementing the CWA define the waters of the United States to include "relatively permanent" tributaries to jurisdictional waters and "relatively permanent" intrastate lakes and ponds with a continuous surface connection to jurisdictional waters.[23] In the Proposed Rule, the agencies propose adding a definition of "relatively permanent" waters as limited to "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."[24] Further, the Proposed Rule would require that the continuous surface hydrology be present for the "entirety of the wet season."[25] The proposed definition of "relatively permanent" is unlawful, arbitrary, and capricious for at least the following reasons.

1. The Proposed "Wet Season" Requirement is Legally and Scientifically Unjustified.

The agencies should reject the proposed definition of "relatively permanent" because it is unlawful and arbitrary and capricious. First, the limitation on relatively permanent waters to include only waters that are flowing during the "wet season" is unduly restrictive and has no legal and technical basis. The term "wet season" appears nowhere in the Clean Water Act.[26] Moreover, the proposed "wet season" requirement would exclude intermittent and seasonal waters from the Act's protections, contrary to Congress's intent. *See supra* ELPC Fig. 1-9 (depicting intermittent and ephemeral waters in the Midwest and Great Lakes region).

Nor does judicial precedent require or support the Proposed Rule's "wet season" requirement. In the 2023 Rule, the agencies codified the *Rapanos* plurality "relatively permanent" test that the Supreme Court recently endorsed in *Sackett*.[27] Following *Sackett*, the agencies confirmed that sections of the 2023 Rule discussing the *Rapanos* plurality standard "remain relevant to implementing the post-*Sackett* Amended Final Rule" and the agencies did not amend those portions of the 2023 Rule.[28] Therefore, *Sackett* does not provide a reason for the agencies to redefine "relatively permanent" to turn on the addition of an atextual requirement that flow occur during the "wet season." Indeed, the agencies' proposed use of the "wet season"

[23] 40 C.F.R. §§ 120.2(a)(3), (5).
[24] 90 Fed. Reg. 52517.
[25] 90 Fed. Reg. 52518.
[26] *Cf. Sackett*, 598 U.S. at 680 ("the CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it").
[27] 88 Fed. Reg. 3142-43 (January 18, 2023) (amending 40 C.F.R. § 120.2 and 33 C.F.R. § 328.3); *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[28] *See* Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) (Sept. 27, 2023).

contravenes the *Rapanos* Court's use of the word "seasonal," as it would exclude "seasonal rivers" that happen to flow outside of the "wet season" tied to precipitation.[29]

Further, nothing in *Sackett* or the *Rapanos* plurality opinion attempts to quantify any minimum flow duration—much less specify that the flow duration must equal that of the agencies' "wet season." To the contrary, both opinions specifically recognize that temporary interruptions in flow do not sever jurisdiction under the relatively permanent standard.[30] Yet, under the Proposed Rule, surface hydrology would be required to be continuous throughout the "entirety of the wet season."[31] Thus, rather than implementing *Sackett* or *Rapanos,* the proposed addition of a "wet season" requirement would remove protections over some "relatively permanent" lakes, rivers, and streams that might be subject to drought, or "seasonal" rivers the Court considered jurisdictional under the Act.[32]

Tellingly, over the course of administering the Act for nearly 50 years, the agencies have consistently and across multiple administrations rejected such arbitrary rules. In the 2020 Rule, for example, the agencies expressly rejected providing "a specific duration (*e.g.,* the number of days, weeks, or months) of surface flow that constitutes intermittent flow, as the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions."[33] Similarly, in the 2023 Rule, the agencies rejected fixed flow durations, emphasizing that "flow duration varies extensively by region" and that "a more flexible approach . . . accounts for specific conditions in each region."[34] The agencies provide no basis—let alone a reasonable one—for departing from this long established and scientifically supported interpretation that the CWA does not require the imposition of inflexible flow durations untethered to actual hydrographic conditions of intermittent waters.[35]

Tributaries, even when seasonal, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to main stem river segments.[36] Yet, under the proposed definition, seasonal waters appear to be excluded simply because the presence of surface hydrology does not overlap with or last as long as the "wet season" for precipitation.[37] Though the Proposed Rule acknowledges these seasonal and regional differences that affect the flow of water, it fails to reconcile them with its constrained inclusion of "wet season" as the test

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[29] *See* 90 Fed. Reg. 52518 (the phrase "at least during the wet season" is intended to periods when "average monthly precipitation exceeds evapotranspiration").
[30] *See* 598 U.S. at 678; 547 U.S. at 732 n.5 (plurality opinion).
[31] 90 Fed. Reg. 52518.
[32] *See id.*
[33] 85 Fed. Reg. 22292 (April 21, 2020).
[34] 88 Fed. Reg. 3085.
[35] *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 388 (2024) (noting that courts afford weight to agency interpretations that are "issued contemporaneously with the enactment of the statute" and "consisten[t] with earlier and later pronouncements").
[36] 2015, EPA Final Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F, at 305 (citations omitted) (hereinafter the "2015 Science Report").
[37] 90 Fed. Reg. 52518 (acknowledging that "surface hydrology may not always overlap with the wet season").

for waters considered to be "relatively permanent."[38] That is, the Proposed Rule ignores that even streams that flow part of the year or part of the "wet season" play a critical role in maintaining the quality and supply of our drinking water and aid water conservation.[39] By failing to account for this well-documented variability, not to mention the dramatic impacts climate change is having on temperatures, rainfall patterns and seasons, the Proposed Rule would exclude waters that are vital to downstream water quality and watershed resilience. Accordingly, the "wet season" requirement is not only contrary to the Act, but also scientifically unsupported and therefore arbitrary and capricious.[40]

In the Proposed Rule preamble, the agencies suggest that they would use the Advanced Precipitation Tool (APT) and the Web-based Water-Budget Interactive Modeling Program (WebWIMP) to identify the "wet season."[41] These tools appear to provide generalized information about precipitation trends. The agencies do not explain why these tools are appropriate for identifying relatively permanent waters or how they would be used to determine the status of a particular water. Given the variability of factors that might affect streamflow that go beyond precipitation, it would be arbitrary and capricious for the agencies to rely on them alone to determine whether a water is a "water of the United States." Moreover, the agencies' proposed test does not appear to account for variability in precipitation. Because the tools are based on monthly average precipitation data, the results may be skewed toward excluding waters. For example, if the data reflects a drier than average year, many intermittent streams may be excluded. The agencies should provide more detailed explanation why these tools are appropriate in determining flow in a particular water body, including examples of site-specific applications and a more detailed justification for why the use of these tools is appropriate in determining whether a water has relatively permanent flow such that it is a water of the United States.

The agencies also claim that the "wet season" test is "intended to establish a clear and easily implementable definition" of relatively permanent waters.[42] However, the agencies fail to explain what the "wet season" test is, acknowledging that it may be variable across different parts of the country but failing to say how (or even whether) they will take that variability into

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[38] *See* 90 Fed. Reg. 52517-18.

[39] U.S. EPA, *Importance of Streams*, (last updated Dec. 2, 2025), https://www.epa.gov/cwa-404/learn-about-streams#importance; EPA, *Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams: State Maps* (last updated Aug. 14, 2025), https://www.epa.gov/cwa-404/surface-drinking-water-provided-intermittent-ephemeral-and-headwater-streams-state-maps.

[40] Likewise, the agencies should reject the alternative proposal to limit "relatively permanent" waters to only "perennial" waters. 90 Fed. Reg. 52519. Doing so would exclude all intermittent and ephemeral waters, which could amount to leaving 2.5-8 million miles of streams unprotected. *See supra* n.16. As noted, the *Rapanos* plurality explicitly provided that waters should not lose protection because they might be dry in extraordinary circumstances or only flow seasonally. *Rapanos*, 547 U.S. at 732 n.5 (plurality opinion). The Court in *Sackett* also recognized that waters could be subject to dry spells or low tides that might temporarily interrupt water flow without severing jurisdiction. *See* 598 U.S. at 678. The proposed alternative is therefore unlawful and arbitrary and capricious.

[41] 90 Fed. Reg. 52519 n.48.

[42] 90 Fed. Reg. 52518.

account.[43] In a similarly confusing vein, the agencies say both that the "wet season" "can be viewed as a bright line test, as it would provide a required duration threshold for which a water must have standing or flowing water in order to be considered jurisdictional," while at the same time being "[u]nlike typical bright line approaches."[44] Contrary to the agencies' claims of wanting to establish a predictable and implementable standard, the agencies have introduced confusion. The agencies should not finalize a rule that they have not explained.

2. The Proposed Exclusion of Upstream Waters Based on Temporary Interruptions in Flow is Legally and Technically Unsupported.

The Proposed Rule would exclude from the definition of "tributary" waters that "contribute[] surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow." The proposed exclusion of upstream waters based on temporary interruptions in flow is unduly restrictive and should be rejected.

Tributaries have long been considered to be "waters of the United States" under the Clean Water Act.[45] Indeed, even the Clean Water Act's concededly more narrow predecessors recognized the need to regulate tributaries of navigable waters, as well as those waters that are navigable-in-fact.[46] As already noted, *supra* 3-4, Congress enacted the Clean Water Act Amendments in 1972 to extend federal water pollution control, not to retreat from pre-CWA protections. It defies common sense to conclude, as the agencies do in the Proposed Rule, that upstream segments of tributaries should be excluded from the coverage under the current Clean Water Act merely because natural or man-made features may temporarily interrupt the flow even of relatively permanent waters.

In *Sackett*, the Supreme Court confirmed its prior understanding of the term "waters of the United States" to include traditional navigable waters, such as rivers, oceans, and lakes *and* "relatively permanent bod[ies] of water *connected* to traditional interstate navigable waters."[47] *Sackett* also acknowledged that "temporary interruptions in surface connection" may occur

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[43] *See* 90 Fed. Reg. 52518, 52520-21.
[44] *Id.*
[45] 33 C.F.R. § 328.3(a)(5) (1987); 33 C.F.R. §§ 323.2(a)(3), (4) (1978); 80 Fed. Reg. 37058; *see also Ashland Oil*, 504 U.S. F.2d at 1329 (In enacting the CWA, "Congress was concerned with pollution of tributaries of navigable streams as well as with the pollution of the navigable streams.").
[46] For example, the Refuse Act of 1899 (Section 13 of the Rivers and Harbors Act) prohibited discharge of refuse material into any "navigable water of the United States *or into any tributary of* any navigable water of the United States." 30 Stat. 1152 (Chap. 425, section 13) (emphasis added). And the Clean Water Act's immediate predecessor, the Federal Water Pollution Control Act, established procedures for abatement of "(t)he pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge *into a tributary of such waters*)." 33 U.S.C. § 1160(a) (1970) (emphasis added).
[47] 598 U.S. 678 (quoting *Rapanos*, 547 U.S. at 742).

without affecting jurisdiction.[48] Thus, a break in a relatively permanent water created by a natural or man-made feature need not and should not result in the exclusion of connected upstream waters as a legal matter. To conclude otherwise would create a loophole in CWA protection that the Supreme Court has recognized should be avoided. For example, in *Sackett*, the Court recognized with regard to wetlands that "temporary interruptions in surface connection may sometimes occur" without affecting jurisdiction.[49] Similarly, in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, the Supreme Court held that an indirect pollution flow from a point source to a navigable water did not destroy jurisdiction over a point source under the CWA.[50]

Moreover, as a factual and scientific matter, tributaries and connected streams serve as the source of pollutants, sediment, and flow carried to waters downstream, notwithstanding temporary breaks in flow, and thus there is no rational basis to exclude them as "waters of the United States" under the Clean Water Act.[51] Take for example, a break in flow created by a man-made dam. According to a 2000 report by the U.S. Geological Survey (USGS), virtually every river in the lower 48 states is regulated by a dam, lock, or other diversion, which collectively can store 60% of the nation's entire riverflow.[52] By withholding and regulating flow, dams affect both upstream and downstream water quality in numerous ways, including increasing or decreasing volume, moving sediment, and impacts to vegetation, habitat, and fish and other aquatic species.[53] Defining upstream or downstream segments from a tributary or stream as outside the scope of the Clean Water Act simply because flow in those segments is sometimes interrupted by to varying degrees ignores the dynamic effects a dam has on water quality, and would irrationally exclude those interrupted segments from Clean Water Act protections.

Because excluding waters upstream of a temporary break in flow in an otherwise permanently flowing water would be contrary to Congress's intent and would impact waters upstream of the break, as well as downstream waters, the agencies should reject the proposed definition of "relatively permanent" to exclude upstream waters that may be temporarily interrupted by natural or man-made breaks in flow.

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[48] *Id.*
[49] *Sackett*, 598 U.S. at 678.
[50] 590 U.S. 165, 186 (2020); *see also id.* 179 (rejecting a reading of the CWA that would create a "large and obvious loophole" that would allow a polluter to "simply move the pipe back . . . a few yards" and avoid the discharge permit requirement).
[51] 2015 Science Report at 3-47 & Tables 3-1, 4-3; U.S. Environmental Protection Agency and Department of the Army, *Technical Support Document of the Final "Revised Definition of the 'Waters of the United States'" Rule* (Dec. 2022) at 151-52, https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf (hereinafter "2022 Technical Report") ("Where the hydrologic connection still exists, chemical and biological connections mediated by the hydrologic connection can also still exist. Similarly, flow through boulder fields does not sever the hydrologic connection.").
[52] M. Collier, R. Webb, & J. Schmidt, *Dams and Rivers: A Primer on the Downstream Effects of Dams*, UNITED STATES DEPARTMENT OF INTERIOR, U.S. GEOLOGICAL SURVEY, Circular 1126, at 1-2 (2000 Rev.) (hereinafter "USGS 2000 Report"), https://pubs.usgs.gov/publication/cir1126 (Ex. 4).
[53] USGS 2000 Report, at 3.

B. The Proposed Rule's Definition of "Continuous Surface Connection" is Unlawful and Arbitrary and Capricious.

The Proposed Rule would define the phrase "continuous surface connection" to mean "having surface water at least during the wet season and abutting (*i.e.,* touching) a jurisdictional water."[54] The Proposed Rule would also restrict jurisdiction by subdividing wetlands so that "only those portions of a wetland with continuous surface hydrology at least during the wet season, and that are abutting, would be jurisdictional as adjacent wetlands, no matter the full delineated scope of the wetland."[55]

As is clear from the Clean Water Act's text, which broadly defines "navigable waters" as "waters of the United States," and has been observed by the Supreme Court, Congress intended the scope of the Act to extend beyond merely those waters that are traditionally navigable.[56] Thus, since 1977, the U.S. Army Corps has defined the term to include not only traditional navigable or navigable-in-fact waters, but also tributaries of such waters, and wetlands.[57] Thus, once again, the agencies' Proposed Rule contravenes Congress's intent and the agencies' longstanding interpretation.[58]

The agencies are also wrong that their unduly narrow proposed definition of "continuous surface connection" is necessary to address the Supreme Court's decision in *Sackett*. The Supreme Court has now confirmed multiple times that adjacent wetlands are included within "waters of the United States."[59] Most recently, in *Sackett* the Supreme Court expressly adopted and approved the *Rapanos* plurality test for determining when adjacent wetlands are "waters of the United States":

> In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that "waters" may fairly be read to include only those wetlands that are "as a practical matter indistinguishable from waters of the United States," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S., at 742, 755. . . . That occurs when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in

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[54] 90 Fed. Reg. 52527.
[55] *Id.*
[56] 33 U.S.C. §§ 1362(7), 1344(g); *Riverside Bayview,* 474 U.S. at 133.
[57] 33 C.F.R. § 323.2(c) (1978) (stating that wetlands generally include "swamps, marshes, bogs and similar areas"). EPA has treated wetlands as waters since 1973. 38 Fed. Reg. 10834 (May 22, 1973). In addition, the agencies' regulations have long defined the term "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *See, e.g.,* 76 Fed. Reg. 22188, 22191 (Apr. 21, 2014); 42 Fed. Reg. 37122, 37144 (July 19, 1977).
[58] 42 Fed. Reg. 37144, fn.2 ("Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation.").
[59] *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 132 (1985); *Rapanos v. United States*, 547 U.S. 715 (2006). Although the *Rapanos* decision was fractured, all Justices agreed that "waters of the United States" include some waters that are not navigable, including wetlands. *Id.* at 716, 742.

> their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id*., at 742, 126 S. Ct. 2208; cf. 33 U.S.C. § 2802(5). . . . We agree with this formulation of when wetlands are part of "the waters of the United States."[60]

The *Sackett* Court does not reject adjacency as a criterion for determining when a wetland is protected under the Clean Water Act. Instead, the *Sackett* court explains which adjacent wetlands should be protected under the Act. Nor does *Sackett* impose a "wet season" test to determine a continuous surface connection or otherwise require that a wetland must have a surface water connection for the entirety of the wet season.

The agencies' definition of "wetland" at the time *Rapanos* was decided did not require surface water for any specific period, or at all.[61] Thus, the agencies' proposed new definition of "continuous surface connection" wrongly assumes that when *Sackett* adopted the *Rapanos* plurality it meant to give the term "wetland" a different meaning than the *Rapanos* Court or the agencies' established regulatory meaning. That makes no sense.

Moreover, the agencies' proposed alternative that a "continuous surface connection" must be a continuous surface *water* connection, is also unsupported. The *Rapanos* plurality opinion endorsed by *Sackett* clearly indicates that a "physical connection" or a hydrological one is sufficient to the "continuous surface connection." As Justice Scalia noted in *Rapanos*, Congress's 1977 Clean Water Act amendments explicitly rejected a proposal to limit adjacent wetlands to those periodically inundated by contiguous navigable waters.[62]

The agencies' Proposed Rule's limitations on wetlands are also arbitrary and capricious because they would exclude the vast majority of wetlands, despite their ecological value to maintaining the quality of other waters to which they are connected. EPA has previously found that wetlands are "among the most productive ecosystems in the world, comparable to rain forests and coral reefs."[63] Yet, by the agencies' own analyses, the proposed "continuous surface" definition would eliminate 95% of wetlands in Illinois, from those previously protected; all but 3.5% in Indiana; nearly 97% in Michigan; nearly 98% in Minnesota; and almost 94% in Ohio.[64] Those wetlands losses can be expected to have devastating impacts to the drinking water quality,

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[60] 598 U.S. at 678-79 (footnote omitted).
[61] *See* 33 C.F.R. § 328.3(b) (2005) ("wetlands" means "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.").
[62] *Rapanos*, 547 U.S. at 751; s*ee also id.* at 743 (explaining that a direct hydrologic connection may not be needed, because other provisions of the Clean Water Act afford jurisdiction even when the connection of a jurisdictional water is not direct).
[63] EPA, *How Do Wetlands Function and Why are they Valuable?*, https://www.epa.gov/wetlands/how-do-wetlands-function-and-why-are-they-valuable (last visited Jan. 2, 2026).
[64] *See* U.S. Envtl. Prot. Agency & Department of the Army, Regulatory Impact Analysis for the Proposed Updated Definition of Waters of the United States Rule, at 46-47, Table 3-1 (Nov. 2025), https://www.regulations.gov/document/EPA-HQ-OW-2025-0322-0120 (hereafter "2025 RIA").

flood protection, wildlife habitat, groundwater abundance and safety, and climate mitigation functions and values that those wetlands now provide.[65]

No states stand to potentially lose more than Michigan, Minnesota, and Wisconsin. In March 2025, NRDC undertook an analysis of impacts to wetlands following *Sackett*. Even in the least damaging of the three regulatory scenarios NRDC modeled, these states were projected to lose federal protections for more than 1 million acres of wetlands.[66] Compared to the rest of the Great Lakes basin, Michigan, Minnesota, and Wisconsin have retained the greatest share of their historic wetlands: roughly 50 percent each. Risks to these areas from the Proposed Rule are concentrated in three specific areas: shoreline along Michigan's Upper Peninsula, woodland bogs in northern Minnesota, and the agricultural communities of the Wisconsin River watershed. Loss of this extent of wetlands protections is expected to hit those regions particularly hard with flooding, drinking water contamination, and increased wildfire risk.[67]

At the other end of the spectrum, several Great Lakes states have already lost 90% or more of their wetlands and cannot afford to lose more. Illinois, Ohio, and Indiana have already lost between 85 percent and 90 percent of these ecosystems to development and agriculture. [68] As a result of these losses, the remaining wetlands in Illinois, Indiana, and Ohio are crucial for maintaining water purity, recharging groundwater, watering livestock, and preventing flooding.

The agencies' proposal's approach fails to account in any way for the special circumstances that wetlands and small streams play in many ecosystems, contrary to science and longstanding agency past practice. For example, the agencies have historically considered wetland mosaics, like tundra and bogs, to be delineated as one wetland.[69] In these special wetland areas, wetland and non-wetland components intermingle and are physically and functionally integrated.[70] Thus, the agencies have long concluded that "science demonstrates that these wetlands function as a single wetland matrix and ecological unit having clearly hydrophytic vegetation, hydric soils, and wetland hydrology."[71] These functions are completely ignored by the agencies' proposal. By failing to address the science and ignoring their own past findings, the agencies' conclusion is arbitrary and capricious.[72]

Further, the agencies' proposed definition does not meet its own pronounced goal of providing clarity. By giving jurisdictional wetlands (which would be required to have surface water throughout the wet season) a meaning different from the ordinary and scientific meaning

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[65] *Id.*
[66] NRDC Report, *supra* at n.16.
[67] C. Thorsberg, *Three Great Lake States are at Greatest Risk as EPA Rolls Back Wetlands Protections*, CIRCLE OF BLUE (Nov. 20, 2025), https://www.circleofblue.org/2025/water-policy-politics/three-great-lakes-states-at-greatest-risk-as-epa-rolls-back-wetland-protections/ (hereinafter "EPA Rollback") (Ex. 5).
[68] EPA Rollback.
[69] 2022 Technical Report at 260-61.
[70] *Id.*
[71] *Id.* (citing U.S. Army Corps of Engineers wetlands delineation manuals from 2007 and 2012).
[72] *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (hereinafter "*State Farm*").

of wetland (which does not require surface water, *see* 40 C.F.R. § 120.1(c)(1) and 2022 Technical Report at 169), the Proposed Rule also introduces unneeded confusion and implementation obstacles. For this additional reason, the Proposed Rule is arbitrary and capricious and should be withdrawn.

C. The Proposed Rule would Exclude Categories of Waters without Legal or Technical justification.

1. The Exclusion of Interstate Waters is Unlawful and Unreasonable.

The Proposed Rule would remove "interstate waters" as a category of "waters of the United States," despite Congressional intent and longstanding agency regulations.[73] The exclusion of interstate waters also unreasonably subjects downstream states and localities to pollution from sources in upstream states without recourse. The exclusion of interstate waters from the definition of "waters of the United States" is thus unlawful and unreasonable and should be withdrawn.

Interstate waters are plainly "waters of the United States," as they cross or form the boundary between more than one state. Accordingly, the agencies have included interstate waters among the primary waters encompassed with the regulatory definition of "waters of the United States" for decades.[74]

In the proposal, the agencies contend that interstate waters are not waters of the United States because unlike prior iterations of water pollution control statutes, the 1972 Clean Water Act amendments refer to "navigable waters" but not "interstate waters."[75] It is simply unreasonable to construe "waters of the United States" to exclude interstate waters. Interstate waters, i.e., waters that flow across more than one state, fit within the plain meaning of "waters of the United States." Further, interpreting "waters of the United States" to exclude interstate waters is contrary to Congress's express intent for the 1972 amendments to be broader, not narrower, than predecessor statutes.[76]

For similar reasons, the agencies' attempt to wave away Supreme Court decisions in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), and *City of Milwaukee* v. *Illinois,* 451 U.S. 304 (1981), is inapt. As the agencies acknowledge, the second of those decisions recognized that the 1972 amendments significantly broadened the waters covered by the Act.[77] The agencies fail to explain how that fact undermines the inclusion of interstate waters as "waters of the United States." The salient point of law from these two cases is that the Court ultimately concluded that

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[73] 90 Fed. Reg. 52533.
[74] *See, e.g.*, 38 Fed. Reg. 13528, 13529 (May 22, 1973) (codified at 40 C.F.R. § 125.1 (1973)); 42 Fed. Reg. 37122, 37144 (Jul. 19, 1977); 51 Fed. Reg. 41206 (Nov. 13, 1986) (codified as 33 C.F.R. § 328.3(a)(2) (1987)).
[75] 90 Fed. Reg. 52517.
[76] *See supra* 2-3 (explaining Congress's recognized intent to repudiate limits of earlier pollution control statutes in enacting the 1972 Clean Water Act amendments).
[77] 90 Fed. Reg. 52517.

the 1972 amendments "occupied the field" of water pollution control and therefore superseded the federal common law of nuisance.[78] The proposed exclusion of interstate waters from "waters of the United States," means that downstream states and other recipients of upstream pollution that originates across state lines would have no recourse under federal law, contrary to the Court's holding.[79]

The agencies also rely on the Supreme Court's decision in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) ("*SWANCC*"), as supporting their removal of "interstate waters" from Clean Water Act's scope.[80] However, *SWANCC* dealt with isolated ponds and wetlands. It did not deal with waters that crossed state lines and therefore does not support excluding interstate waters and wetlands from the "waters of the United States."[81]

The agencies articulate no other basis for excluding interstate waters from the definition of "waters of the United States." Accordingly, the proposal is unreasonable, counterfactual, and unsupported by any legal precedent, and should be withdrawn.

2. The Exclusion of Prior Converted Cropland is Unlawful and Unreasonable.

In the Proposed Rule, the agencies state that they are retaining an exclusion for prior converted cropland that was promulgated in 1993.[82] The agencies also propose to add regulatory language to allegedly clarify the meaning of "prior converted cropland" for Clean Water Act purposes, including when prior converted cropland loses its exemption status.[83] The agencies fail to articulate an adequate legal basis for the exemption or support for the agencies' proposed definition, which would unreasonably expand the historic use of the exemption.

Importantly, the term "prior converted cropland" does not appear in the Clean Water Act. EPA codified a regulatory exclusion in 1993, to further a policy of consistency between the Clean Water Act and provisions of the Food Security Act administered by the Department of Agriculture (USDA), known as "Swampbusters."[84] As an initial matter, consistency with the Food Security Act was not an adequate legal justification for the promulgation of the exclusion in 1993. The agencies cannot exclude waters that Congress otherwise required the agencies to protect simply for administrative ease.

Even if the agencies had authority to exempt prior converted cropland in 1993, the proposal admits that Congress subsequently amended the Food Security Act, such that the

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[78] *City of Milwaukee*, 451 U.S. at 317-18.
[79] *Contra City of Milwaukee*, 451 U.S. at 326.
[80] *See* 90 Fed. Reg. 52517.
[81] *SWANCC*, 531 U.S. at 159.
[82] 90 Fed. Reg. 52535.
[83] *Id.*
[84] 16 U.S.C. § 3801 et seq. *See* 58 FR 45034–36 (August 25, 1993).

"definition of 'prior converted cropland' in [that statute] and the definition being established in this proposed rule have different purposes and they are substantively different."[85] The agencies' proposed five-year grandfathering of a prior converted cropland exclusion when it is no longer in agricultural use goes even further afield from any plausible statutory basis. The 1996 Food Security Act amendments modified the meaning of prior converted cropland for purposes of the Swampbusters program.[86] Under the amended Food Security Act provisions, prior converted cropland would only retain its exempted status under Swampbusters as long as the area is devoted to an agricultural use.

Rather than remove the "prior converted cropland" exclusion, however, the agencies double down on it. Under the Proposed Rule, "[a]n area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands." Under this proposed definition, the owner of a piece of land classified as a prior converted cropland could retain that status in perpetuity and freely discharge pollutants without a permit, so long as livestock visit the parcel to graze at least once every five years, and even if that parcel is *never* used for the production of an agricultural commodity. The agencies cannot rely on consistency with the Food Security Act provisions when Congress has long since changed them.

As a substitute rationale, the agencies argue that excluding prior converted cropland is authorized by Clean Water Act policy in favor of recognizing states' jurisdiction over land use and water resources. However, the agencies do not point to any relevant state laws or otherwise articulate a basis for concluding that state law could allow discharges of pollutants or the destruction of wetlands that meet the Clean Water Act definition of waters of the United States. Absent legal justification, the exclusion should be removed from the agencies' regulations altogether.

Although the agencies decline to quantify or otherwise analyze the impacts of the prior converted cropland exclusion, the record acknowledges past estimates indicating as much as 53 million acres of wetlands could be considered prior converted cropland.[87] It is arbitrary and capricious for the agencies to allow the polluting and destruction of wetlands that would otherwise qualify as "waters of the United States" even when those wetlands are no longer in agricultural use and without addressing the detrimental impact such destruction would have on protection of water quality and other values wetlands contribute to the nation's water resources.[88]

[85] 90 Fed. Reg. 52537 n.102.
[86] Pub. L. No. 104-127, 110 Stat 988 (1996).
[87] 2025 RIA, at 20.
[88] *State Farm*, 463 U.S. at 43 (agencies must articulate a rational connection between the decision made and the facts found).

This is a separate reason for withdrawing the proposed prior converted cropland exclusion and definition. [89]

3. The Exclusion of Ditches that Function as Tributaries is Unlawful and Unreasonable.

The Proposed Rule unlawfully and unreasonably expands the meaning of excluded "ditches" to include ditches with relatively permanent flow into to waters of the United States.[90] These ditches would carry polluted effluent and fill material into downstream waterways. In fact, that is often the purpose of digging such a ditch. Discharge of pollutants, including dredge and fill materials, into waters of the United States either when a ditch functions as a tributary or as a conveyance is expressly prohibited.[91] Allowing pollution by ditches that function as tributaries would permit a glaring loophole from the Clean Water Act's protections.

Because some ditches may function as tributaries—i.e., carry or channel relatively permanent flow to another water of the United States—such waters have consistently been included within the meaning of "waters of the United States" and not subject to the more narrow exclusion for ditches.[92] The Proposed Rule fails to acknowledge its departure from the agencies' historic treatment of ditches, let alone explain it.[93] Accordingly, the agencies new interpretation should not be entitled to any weight and should not be adopted.[94]

The agencies' exclusion of ditches that function as tributaries would also contravene Supreme Court precedent. As noted by the Court in *Sackett*, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.[95] For the same reasons, ditches with relatively permanent flow to other waters of the United States should not be excluded from CWA protections.

III. The Agencies' Failure to Analyze Costs to the Public as Well As Avoided Costs by Regulated Entities in Promulgating This Widely Impactful Rule Is Arbitrary and Capricious.

The agencies acknowledge that this proposed redefinition of "waters of the United States" is a significant regulatory action pursuant to Executive Order 12866.[96] Under this

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[89] In addition, the proposed definition is likely to cause confusion and created new inconsistencies by using the term "agricultural product" instead of the term "agricultural commodity" as used in the Department of Agriculture's definition. *Compare* 7 C.F.R. § 12.2 *with* 33 C.F.R. § 328.3(c)(9).
[90] 90 Fed. Reg. 52538, 52545.
[91] 33 U.S.C. §§ 1311(a); 1344(a).
[92] *Compare* 33 C.F.R. § 328.3(b)(3).
[93] 90 Fed. Reg. 52545.
[94] *Loper Bright Enterprises*, 603 U.S. at 388 (noting courts should give great weight to agency interpretations issued contemporaneously with the enactment of the statute and consistently held).
[95] *Sackett*, 598 U.S. at 678 n.16; *cf. County of Maui*, 590 U.S. 165, 186 (2020); *see also id.* at 179 (rejecting a reading of the CWA that would create a "large and obvious loophole" that would allow a polluter to "simply move the pipe back . . . a few yards" and avoid the discharge permit requirement).
[96] 2025 RIA, at 1 (available at EPA-HQ-OW-2025-0322).

Executive Order, the agencies are required to conduct "an assessment of the potential *costs and benefits* of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate…."[97] In the Regulatory Impact Analysis accompanying the Proposed Rule ("2025 RIA"), the agencies repeatedly state that cost savings will accrue from the proposed redefinition because it will significantly narrow the waters subject to federal protection.[98]

However, the agencies also concede that there are "forgone benefits over time, including habitat support, recreation, and aesthetic benefits" which will accrue as a result of the proposed redefinition.[99] But the agencies claim that they are "unable at this stage to quantify the costs, avoided costs, and forgone benefits of the proposed rule."[100] The agencies' characterization of the costs and benefits is unbalanced. The agencies rely on the benefits to regulated entities of decreased compliance costs, while disregarding the forgone benefits associated with the categories of waters which would no longer be protected under the proposed redefinition.

Agency action is arbitrary and capricious unless agencies consider "relevant factors" and "important aspect[s] of the problem" when promulgating a significant rulemaking.[101] As an initial matter, *the* express and driving objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to "eliminate the discharges of pollutants."[102] The agencies' focus on cost savings to polluters, while all but ignoring the foregone benefits toward achieving the driving purpose of the Act is facially arbitrary and capricious and contrary to Executive Order 12866's requirement for an explanation that is consistent with the Clean Water Act's mandate.

The Supreme Court has clearly held that "cost [is] ***a centrally relevant factor*** when deciding whether to regulate."[103] While agencies have some discretion as to how to evaluate costs absent specific Congressional direction, agencies may not only consider one side of the analysis, in fact, it must meaningfully evaluate *both* benefits and costs. This Supreme Court has clarified this important point by reasoning that "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the ***advantages and the disadvantages*** of agency decisions."[104] The agencies must adhere to this standard before issuing a final rule to redefine Clean Water Act jurisdictional coverage.

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[97] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (emphasis added).
[98] *See* 2025 RIA at 2, 4, 5, 28, 31, 55, 85, 86.
[99] *Id.* at 5.
[100] *Id.* at 28.
[101] *State Farm*, 463 U.S. at 43 (emphasis added).
[102] 33 U.S.C. § 1251(a).
[103] *Michigan v. E.P.A.,* 576 U.S. 743, 753 (2015) (hereafter "*Michigan v. EPA*") (emphasis added).
[104] *Id*.

A. The Agencies' Failure to Quantitatively Assess Impacts to CWA Section 404 Programs Despite Previously Conducting Such Analyses During Other "Waters of the United States" Rulemakings Is Arbitrary and Capricious.

The Proposed Rule will have a significant impact on the scope of wetlands protected by Section 404 of the Clean Water Act.[105] As the EPA and U.S. Army Corps have long recognized, wetlands provide important functions, including water purification, groundwater recharge, habitat for birds and other wildlife, flood retention, climate mitigation, and more.[106] The agencies claim that they intend to propose an approach to quantify the impacts to Clean Water Act Section 404 programs, including destruction of and degradation of wetlands.[107] Despite this speculative promise, the agencies have not conducted any such analysis in the 2025 RIA accompanying the proposal. Loss of forgone benefits associated with wetlands is a crucial cost factor that must be considered; therefore, the agencies must conduct a thorough quantitative analysis of such costs.

The agencies have the capability to do such an analysis as demonstrated by the 2020 Navigable Waters Protection Rule Economic Impacts Analysis.[108] Without taking a position on the sufficiency or completeness of such analyses, in that economic analysis the agencies dedicated an appendix to conducting a wetland meta-analysis to analyze the loss of foregone benefits associated with a shift in Clean Water Act coverage for wetlands.[109] Furthermore, the 2018 Economic Analysis for the Proposed Revised Definition of "Waters of the United States," which formed the basis of the 2020 NWPR, also quantitatively analyzes the annual forgone benefits of a loss in wetlands protections.[110] In contrast, the 2025 RIA for the current proposal frames the issue as if "environmental outcomes" should not be included in the evaluation of cost. The agencies lay out the potential impacts of the proposed redefinition on Clean Water Act Section 404 in chart format and categorically find that the "cost outcome" is "lower permit costs."[111] That same chart then separates out "environmental outcomes" into a different category and ascribes a singular vague outcome—"more impacted areas, fewer mitigation measures."[112] This is insufficient. The agencies must meaningfully calculate the costs of the adverse environmental outcomes to weigh them against the decrease in compliance costs analyzed by the 2025 RIA. These forgone benefits are crucially relevant factors that the agencies must consider. EPA recognizes the purpose of Clean Water Act Section 404 is to avoid adverse impacts on

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[105] 33 U.S.C. § 1344. *See* 2025 RIA at 5.
[106] *See* U.S. Envtl. Prot. Agency, *Why Are Wetlands Important?* (last updated July 23, 2025), https://www.epa.gov/wetlands/why-are-wetlands-important.
[107] *See* 2025 RIA at 80.
[108] U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States" (Jan. 22, 2020) at 207-11 (hereafter "2020 NWPR EIA").
[109] 2020 NWPR EIA at 207-11.
[110] U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, Economic Analysis for the Proposed Revised Definition of "Waters of the United States," (Dec. 14, 2018) at 81-82 (hereafter "2018 EIA").
[111] *See* 2025 RIA at 84, Figure 4-3.
[112] *Id*.

waters and wetlands where possible and minimize harm to aquatic resources.[113] Therefore, to understand the impact on waters and wetlands and effectuate this purpose, the agencies must consider these forgone benefits. The agencies' failure to consider such a "centrally relevant factor" of this rulemaking is arbitrary and capricious under controlling case law.[114]

B. The Agencies Fail to Qualitatively Discuss the Environmental Harm that Will Be Caused by the Proposed Rule Shrinking the Scope of Vitally Important Clean Water Act Programs.

The agencies clearly failed to pay attention to both the "advantages and disadvantages of [the] agency decision[]."[115] The agencies assert that "data limitations . . . prevent quantification"[116] of the Proposed Rule's impacts on multiple Clean Water Act programs and claim that they are discussing the impacts qualitatively; but closer inspection of the RIA shows that they fail to do even that. Instead, the agencies shrug off any meaningful analysis through discussions of "water quality disbenefits," "ecosystem impacts," and other vague and meaningless terms.[117] The agencies' complete failure to meaningfully analyze, quantitatively or qualitatively, any of the forgone benefits that will accrue in relation to Clean Water Act sections 303, 311, 401, and 402 when they had done so in the past and while they discuss the benefits that will accrue to corporations, make their action arbitrary and capricious.[118]

Section 303: Water Quality Standards and Total Maximum Daily Loads

Section 303 of the Clean Water Act requires states and authorized tribes to set water quality standards for waters of the United States. Those water quality standards "are the foundation for a wide range of programs" and "serve multiple purposes including establishing the water quality goals for a specific waterbody . . . [and] . . . a basis for water quality assessment[,] and a target for Clean Water Act restoration activities such as TMDLs [Total Maximum Daily Loads]."[119] TMDLs are an essential feature of the Clean Water Act, designed to limit pollution into impaired waters to help fulfill the Clean Water Act's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[120] The agencies acknowledge that this Proposed Rule could "reduc[e] the total number, stream miles, or acres of water covered under the scope of Clean Water Act 303(d) and the number of TMDL restoration plans developed under the Clean Water Act."[121] Yet, the agencies fail to discuss, qualitatively or quantitatively, how reducing the scope of this vital program will harm the "chemical, physical,

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[113] *See* U.S. Envtl. Prot. Agency, *Permit Program under CWA Section 404* (last updated Feb. 26, 2025), https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404.
[114] *Michigan v. E.P.A.*, 576 U.S. at 753.
[115] *Michigan v. E.P.A.*, 576 U.S. at 753.
[116] 2025 RIA at 55.
[117] *See, e.g.*, *id.* at 68, 73.
[118] *See Michigan v. E.P.A.*, 576 U.S. at 753.
[119] 2025 RIA at 55.
[120] 33 U.S.C.A. § 1251(a).
[121] 2025 RIA at 57.

and biological integrity of the Nation's waters."[122] Instead, the agencies only state that the change "could result in reduced regulatory attention to aquatic ecosystems if other mechanisms for restoration are not available or utilized."[123]

Clean Water Act Section 311: Oil Spill Prevention, Preparedness, Reporting, and Response

Section 311 of the Clean Water Act addresses the risk and harm of discharging oil and hazardous substances into waters of the U.S. through EPA's Spill Prevention, Control, and Countermeasure regulations and the spill notification and removal procedures in the National Contingency Plan.[124] These are essential programs designed to minimize the risk and mitigate the harms from the very real threat of oil and other hazardous substance spills. The agencies acknowledge that spill preparedness requirements "are affected by changes in the scope of jurisdictional waters."[125] For spill response, the "Oil Spill Liability Trust Fund (OSLTF) provides funding to cover removal costs incurred by the U.S. Coast Guard and the EPA and by State and Tribal governments" but only if "the oil spill incident affected or substantially threatened a water subject to Clean Water Act jurisdiction."[126] The agencies acknowledge that the Proposed Rule would therefore "transfer [] the response burden from the OSLTF to the State or Tribe."[127] Despite acknowledging the significant impacts this Proposed Rule would have on these vital Clean Water Act programs, the agencies engage in no discussion of the environmental harm that would result and only state that data limitations "make[] it difficult to quantify the potential impact of the proposed rule."[128]

Clean Water Act Section 401: State and Tribal Roles

Section 401 of the Clean Water Act is a critical tool that has enabled states and tribes to ensure that activities associated with federally licensed and permitted discharges will not impair water quality in their respective states and tribal lands.[129] This program covers many important types of federally permitted projects like highways, dams, and pipelines which could cause water pollution if not properly regulated. The agencies acknowledge that the Proposed Rule's impact to the Clean Water Act's scope would decrease the applicability of Section 401 certification, giving the example that "if an activity is no longer subject to a Federal license or permit due to a change in the jurisdictional status of a waterbody, such as the proposed rule's exclusion of ephemeral streams, section 401 certification would not be required."[130] The agencies acknowledge that the Proposed Rule therefore "could also result in discharges into newly non-jurisdictional

[122] 33 U.S.C. § 1251(a).
[123] 2025 RIA at 57-58.
[124] 33 U.S.C. § 1321.
[125] 2025 RIA at 59-60.
[126] *Id.* at 64.
[127] *Id.* at 65.
[128] *Id.*
[129] *See* 33 U.S.C. § 1341.
[130] 2025 RIA at 67.

waterbodies and lead to ecosystem impacts and related forgone benefits," but they do not describe or analyze those ecosystem impacts or foregone benefits at all.[131]

Clean Water Act Section 402: National Pollutant Discharge Elimination System

Section 402 of the Clean Water Act covers the National Pollutant Discharge Elimination System (NPDES) which requires individuals to obtain a permit before discharging pollutants into the waters of the United States.[132] The agencies acknowledged the sharp curtailment of the scope of NPDES permitting under the Proposed Rule but failed to meaningfully discuss the environmental impact of that curtailment.[133]

To highlight an example of particular importance to the Midwest and Great Lakes, the agencies only mention that NPDES programs cover discharges from concentrated animal feeding operations (CAFOs), but do not discuss how the Proposed Rule's decreased regulation of those discharges would harm the environment at all.[134] This departs from previous agency practice. The economic analysis for both the 2015 and 2019 "waters of the United States" definitional rules discuss, qualitatively and quantitatively, the environmental impact from CAFOs that would result from changes to the definition of "waters of the United States."[135] Midwesterners know firsthand of the massive environmental harm caused by CAFOs and the public deserves to know how this rule will decrease regulation of and increase pollution from CAFOs.

Under Section 402, regulators can also issue NPDES General Permits for certain common types of activities which may cause water pollution. While EPA discusses these General Permits, it again fails to analyze the environmental impact that will be caused by decreasing the number of projects that will be required to obtain a General Permit to control their pollution. As an example, for construction stormwater permits, the agencies did not at all discuss the environmental harm that would be caused by the Proposed Rule reducing the jurisdictional scope of the Clean Water Act which would therefore decrease the number of construction projects required to obtain this permit. The agencies only state that they anticipate "the potential

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[131] *Id.* at 68.
[132] 33 U.S.C. § 1344.
[133] 2025 RIA at 68, 71.
[134] *Id.* at 68.
[135] *See, e.g.*, 2018 EIA at 83 (estimating the annual foregone benefits from reduced CAFO Administration and Implementation); U.S. Envtl. Prot. Agency & U.S. Department of Army, *Economic Analysis of the EPA-Army Clean Water Rule*, at 28 (May 20, 2015), https://www.epa.gov/sites/default/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf (noting that the monetized benefits that would result from increased protection under the Clean Water Act include "improved surface water quality (measured in terms of enhanced recreational value), reduced nitrates in private wells, reduced shellfish bed closures from pathogen contamination, and reduced fish kills from episodic events." Non-monetized benefits included "human health and ecological benefits of reduced exposure to pollutants associated with CAFO manure; reduced eutrophication of coastal and estuarine waters due to both nutrients and runoff and deposition of ammonia volatized from CAFOs; reduced human illness due to pathogen exposure during recreational activities in estuaries and coastal waters; improvements in soil properties due to reduced over-application of manure, together with an increased acreage receiving manure applications at agronomic rates; reduced pathogen contamination in private drinking water wells, and reduced cost of commercial fertilizers for non-CAFO operations.").

environmental impacts from construction activities due to a change to the definition of 'waters of the United States' would likely be modest," but do not elaborate on what any of those environmental impacts might be.[136]

The agencies know the environmental benefits of the construction stormwater general permit. EPA developed both the permit and the underlying Construction and Development effluent limitations guidelines (ELGs) that apply to permitted activities. While developing those ELGs, EPA noted that construction sites have been documented to increase water pollution, with pollutants such as "sediment and turbidity," "nitrogen and phosphorus," "metals, trash and debris, nutrients, organic matter, pesticides, petroleum hydrocarbons, polycyclic aromatic hydrocarbons (PAHs), and other toxic organics."[137] EPA found that construction pollution causes "impacts on waterbodies and biological impacts on aquatic organisms and communities . . . impaired drinking water supplies, recreation, navigation, fishing, water storage, aesthetics, property value, irrigation, industrial water supplies, and stormwater (including flood) management."[138] This new Proposed Rule would increase all of those negative environmental impacts. The agencies must meaningfully inform the public of the tangible environmental harm that would be caused if the Proposed Rule is finalized. Simply stating that there would be "modest" "potential environmental impacts" is insufficient.

Throughout the RIA, the agencies are using vague, meaningless terms to avoid discussing the concrete, tangible environmental harm that will result from its proposed action. The public should know the real impact this rule would have. The agencies' failure to discuss these harms either qualitatively or quantitatively while touting the benefits to corporations and other polluters makes its action arbitrary and capricious.[139]

Further, the agencies fail to meaningfully assess the value of ecosystem services demonstrating a change in position from previous Economic Impact Analyses ("EIAs"). In the 2025 RIA, the agencies refer to the 2020 NWPR ecosystem services analysis and claim that "reductions in [ecosystem] services will be small, infrequent, and dispersed over wide geographic areas, thereby limiting the significance…."[140] The 2020 NWPR does not support the proposition that such services are "small or infrequent"; in fact, the 2020 NWPR "recognize[s] the importance and economic benefits of protecting water resources and do not dispute that streams, wetlands, and other waters serve a variety of important functions."[141] In previous EIAs,

[136] 2025 RIA at 72.
[137] U.S. Envtl. Prot. Agency, *Environmental Impact and Benefits Assessment for Final Effluent Guidelines and Standards for the Construction and Development Category*, at 1-1 (Nov. 2009), https://www.epa.gov/sites/default/files/2015-06/documents/cd_envir-benefits-assessment_2009.pdf.
[138] *Id.* at 1-2.
[139] *See Michigan v. E.P.A.,* 576 U.S. at 753 (emphasis added).
[140] 2025 RIA at 91.
[141] 2020 NWPR EIA at 108.

the agencies meaningfully accounted for forgone ecosystem service benefits associated with a revisions to the definition of "waters of the United States."

For example, the 2020 NWPR found that a reduction in "waters of the United States" would interact with CWA section 404 and produce many adverse environmental outcomes including: reduced wetland habitat resulting in reduced ecosystem values, increased flood risk resulting in downstream inundation damages, and degraded aquatic habitats resulting in reduced ecosystem values provided by surface waters.[142] That same analysis found that a definitional change would interact with CWA section 402 to produce similar adverse environmental outcomes including: the same degradation of aquatic habitats resulting in reduced ecosystem services value, greater pollutant loads resulting in greater waterbody impairments and higher restoration costs, and an increase in sediment concentrations and deposition resulting in higher drinking water treatment and dredging costs.[143] Finally, that analysis also evaluated the interaction of a definitional change with CWA Section 311 and found that this shift in coverage would increase oil spill risk, frequency, magnitude and would further reduce response effectiveness resulting in adversely effected ecosystems that would increase spill response cost and damages.[144]

Without bearing on the sufficiency of such analysis, the agencies clearly have the capacity to conduct scientific research and modeling to both qualitatively describe and quantitatively estimate the adverse impact to ecosystem services from a shift in Clean Water Act jurisdictional coverage.[145] The agencies now claim that such analyses are too difficult to conduct because of underlying uncertainties or the minimal nature of the associated costs.[146] A loss in crucial ecosystem services is certainly a relevant factor in analyzing costs as demonstrated by previous EIAs. The agencies are required to consider any centrally relevant factor, especially costs like these.[147] Failing to conduct such analyses, especially when the agencies have shown the capability to do so in the past, is arbitrary and capricious because it shows a lack of consideration for an "important aspect of the problem" by excluding a "relevant factor" from the analysis.[148]

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[142] *See id* at 105, Figure III-9.
[143] *See id*.
[144] *See id*.
[145] *See id.* at 107 (where the agencies qualitatively describe the ecosystem services provided by wetlands and ephemeral streams, at 128 (where the agencies model CWA program impacts including quantitative assessments of impacts to wetland abutting ephemeral streams and ephemeral streams in a case study), at 126 (where the agencies model water quality impacts re
[146] *See* 2025 RIA at 28 (where the agencies note that "[g]iven the uncertainties with the limited available data, the agencies are unable at this stage to quantify the costs, avoided costs, and forgone benefits of the proposed rule."); *see also* 2025 RIA at 91 (where the agencies downplay the value of ecosystem services by describing them as "small, infrequent, and dispersed").
[147] *See Michigan v. E.P.A.*, 576 U.S. at 753.
[148] *See State Farm*, 463 U.S. at 43.

C. The Agencies' Failure to Meaningfully Analyze Costs to the States, Despite Demonstrating the Ability to Calculate Such Costs in Previous Rulemakings, Is Arbitrary and Capricious.

The agencies mention, in passing, the potential costs to the states resulting from the proposed redefinition of "waters of the United States" but fail to analyze such costs in any level of detail. In the 2025 RIA the agencies note that "because of the deregulatory nature of this proposed rule… the agencies anticipate subsequent State action may address at least a portion of any adverse effects on ecosystems, habitats, and their enjoyment by recreational stakeholders."[149] This passing recognition is insufficient.

Throughout the 2025 RIA, the agencies repeatedly note that states may continue regulating despite the reduced jurisdictional scope of the Clean Water Act or may increase regulatory action to offset the decreased federal protection of all of the vital Clean Water Act programs discussed in Section I.B above.[150] If states choose to fill the gaps left behind by this proposed redefinition, they may incur significant costs to do so, yet the 2025 RIA completely fails to attempt to quantify those costs. The agencies have at least made attempts to account for such costs in the past. For example, the 2020 NWPR provided qualitative descriptions of permitting costs to states associated with the impact of CWA Section 402.[151] Additionally, the agencies laid out the administrative costs that states would incur to supplement CWA Section 404 permitting.[152] Furthermore, the 2018 EIA for the proposed "waters of the United States" redefinition included an analysis of state response categories including "regulation of dredged and fill material," under CWA Section 404, and "surface waters discharge permitting" under CWA Section 402.[153] This analysis broke down potential responses by each individual state and found that many states would respond by either partially filling the gap or entirely filling the gap left behind by the redefinition.[154] While this analysis was insufficient in its quantitative costs assessment, it at minimum provided qualitative descriptions of the actions and subsequent costs states would incur to bolster waters protections left behind by a redefinition. This proposed

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[149] *Id.* at 91.
[150] *See, e.g.*, 2025 RIA at 58 (discussing CWA section 301: "States may continue to apply their own State law-based programs to identify and restore impaired waters, although this activity would not be required under the Clean Water Act for waters that would not be jurisdictional under the proposed rule."); *id.* at 65 (discussing CWA section 311, noting that the proposed rule could "transfer [] the response burden [oil spill response and clean up] from the OSLTF to the State or Tribe."); *id.* at 67 (discussing CWA section 401, "reduced Clean Water Act coverage will likewise reduce the applicability of section 401. States and Tribes may continue to apply State and Tribal law to non-jurisdictional waters within their boundaries, as authorized and applicable.").
[151] 2020 NWPR EIA at 63-65.
[152] *Id.* at 177-79 (where the agencies describe "404 [a]ssumption [a]pplication/[i]nvestigation Costs," "[h]iring [c]osts, "[t]raining [c]osts," "[i]nformation [t]echnology [c]osts," "[a]dministrative [r]evision [c]osts," "[p]ermit [r]eview [c]osts," "[a]nnual [r]eport [c]osts," and "[l]egal [c]osts.").
[153] 2018 EIA at 39-44.
[154] *See id.* at 41, Table II-2 (where the agencies categorized State responses to a shift in CWA Section 404 coverage); *see also id.* at 44, Table II-4 (where the agencies categorized State responses to a shift in CWA Section 402 coverage).

redefinition will create both administrative costs, in the form of permitting, and pollution remediation costs. States will have to bear the brunt of both forms of costs.

Further, the agencies are assuming that states will fill the gap left behind by the Proposed Rule without considering the alternative scenarios of the states deciding not to fill the gap at all. If that occurs, the cost of the regulation will be loss of ecosystem services, increased pollution, and other environmental harms. As explained more in Section I.B above, the agencies completely failed to consider the potential environmental costs of this rollback. The agencies must consider the alternative, and perhaps likely,[155] scenario that states may not fill the gap left by the Proposed Rule and account for the environmental costs that will result.

The agencies must meaningfully analyze both cost categories before issuing a final redefinition. The failure to analyze these state costs, in any meaningful manner, is arbitrary and capricious under controlling caselaw because such analysis is an "important aspect of the problem" that has been excluded as a "relevant factor" in pre-publication rulemaking analyses.[156]

IV. The Agencies Have Not Provided the Required Notice and Opportunity to Comment by Failing to Present Either the Proposed Methodology of a Costs Analysis or the Cost Analysis Itself.

Instead of quantifying or otherwise meaningfully analyzing the costs of this Proposed Rule, the agencies are instead soliciting comments on potential data and methodology to analyze costs and benefits of the proposed redefinition.[157] However, the agencies have yet to conduct such analyses and therefore have not made them available for comment. Before the issuance of any final rule, the agencies "should give notice as to its intended methodology while the public still has an opportunity to analyze, comment, and influence the proceedings."[158] Further, the agency should disclose all relevant scientific data underlying its Proposed Rule. An agency's "failure to notify interested persons of the scientific research upon which the agency was relying" on can make agency action arbitrary and capricious if it "prevented the presentation of relevant comment."[159]

The agencies failed to provide such a sufficient notice of their methodology here. Multiple times in the RIA, the agencies fail to quantify the impact the Proposed Rule will have on the Clean Water Act's jurisdictional scope or quantify the environmental harms that will result. Instead, the agencies merely propose potential analysis and methodologies they may use, without providing sufficient notice and comment.

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[155] B. Davis Noll et al., *The Concealed Costs of the Clean Water Rule Rollback*, INST. FOR POL'Y INTEGRITY, BENEATH THE SURFACE, at 13-14 (Apr. 2020), https://policyintegrity.org/files/publications/Clean_Water_Rule_Policy_Report.pdf. (Ex. 6) (describing why it is unlikely that states will fill the regulatory gap left by decreasing the scope of the Clean Water Act).
[156] *See State Farm*, 463 U.S. at 43.
[157] *See* 2025 RIA at 28.
[158] *Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1212 (5th Cir. 1991), *opinion clarified* (Nov. 15, 1991).
[159] *United States v. Nova Scotia Food Products Corp*., 568 F.2d 240, 251 (2d Cir. 1977).

Perhaps the most significant example of this is the impacts to wetlands that will result from the decreased scope of the Clean Water Act's Section 404 program. Despite acknowledging that this program will likely be the most impacted by the Proposed Rule and despite the agencies' previous practice of monetizing those impacts, here, the agencies fail to quantify the impacts that the Proposed Rule will have on our Nation's vitally important wetlands. Instead, the agencies are "proposing an approach to monetizing Clean Water Act section 404 permit impacts for the final rule RIA that is ***generally similar*** to the approach in the 2020 NWPR Economic Analysis."[160] The agencies describe their proposed approach to quantifying the foregone environmental impacts only sparsely, stating:

> the agencies propose estimating forgone benefits using a wetlands valuation meta-analysis of 21 observations from 11 studies as was performed under the NWPR analysis. However, the agencies ***intend to incorporate additional studies***, as well as ***update the methodological approaches*** used in the meta-analysis.[161]

Monetizing environmental harms is an incredibly complex issue, with substantial disagreement on proper methodology.[162] A scant two-paragraph description and vague assertion that the agencies will use a "generally similar approach" as the 2020 NWPR, while also saying they will update the "methodological approaches" is a completely insufficient description of the agencies' methodology to allow the public to provide a meaningful "opportunity to analyze, comment, and influence the proceedings."[163] The agencies failure to disclose the additional studies they intend to incorporate is likewise insufficient notice and "prevent[s] the presentation of relevant comment" from the public. For comparison, the 2018 Economic Analysis for the Proposed Revised Definition of the Waters of the United States spent 21 pages discussing its updated methodology for quantifying wetlands benefits and disclosed all sources used.[164] When commenters were given a more proper notice and comment opportunity on the methodology used in the 2020 NWPR[165] rulemaking, the commenters were able to analyze and comment on the proceeding and present relevant comment."[166]

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[160] 2025 RIA at 80 (emphasis added).
[161] 2025 RIA at 81 (emphasis added).
[162] *See, e.g.*, SELC EA Economist Reports (Exs. 7 & 8).
[163] *Corrosion Proof Fittings*, 947 F.2d at 1212.
[164] 2018 EIA at 63-83.
[165] The 2020 NWPR Economic Analysis that the agencies may adopt a "generally similar approach" to was published after the public comment period ended. However, the 2020 NWPR Economic Analysis used "the same approach the agencies used in the proposed rule analysis (U.S. EPA and Army, 2018b)." The proposed rule economic analysis was published prior to the notice and comment period and the comments referenced in this paragraph were submitted based on that economic analysis.
[166] *See, e.g.*, John C. Whitehead, Comments on "Economic Analysis for the Proposed Revised Definition of 'Waters of the United States'" (EPA-Army 2018), Prepared for the Southern Environmental Law Center (April 9, 2019) (Ex. 7); Jeffrey D. Mullen, Final Review of the 2018 EPA Economic Analysis for the Proposed Revised Definition of "Waters of the United States" (Apr. 11, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-9717. (Ex. 8).

Here, the agencies have not provided sufficient information to allow commenters, and the rest of the public, to provide meaningful comments on the methodologies they intend to use to monetize the impacts this Proposed Rule will have. To the extent that the agencies proposed methodology is actually similar to that used in the 2020 NWPR, commenters note that the 2020 NWPR methodology was critiqued as "seriously flawed,"[167] "systematically discounting the benefits of streams and wetlands,"[168] "fraught with methodological errors, unexplained steps, and obvious inaccuracies,"[169] and "provid[ing] little useful information."[170]

This example is not exhaustive as multiple times in the RIA the agencies noted that they "intended" to analyze the impact of this Proposed Rule, without actually analyzing it or adequately describing its proposed methodology.[171] Rather than rushing to push through an inadequately considered Proposed Rule, the agencies should actually analyze the impact of its proposal, explain its reasoning, and give the public a real and meaningful "opportunity to analyze, comment, and influence the proceedings."[172] The agencies rulemaking process here completely fails to accomplish those very basis purposes of the notice and comment rulemaking process. Therefore, the proposal should be withdrawn or supplemental notice should be provided.

Conclusion

The undersigned organizations object to the Proposed Rule because it would severely reduce the "waters of the United States" subject to protection under the Clean Water Act, contrary to the law, science, and facts. As shown above:

- The Proposed Rule's novel interpretations of "tributaries" and "wetlands" that qualify as "waters of the United States," and exclusion of "interstate waters," "prior converted cropland," and "ditches" from the Act's scope conflict with

[167] National Wildlife Foundation, Comment Letter Re: Docket ID Number EPA-HQ-OW-2018-0149: Comments on Revised Definition of "Waters of the United States" Federal Register, Vol. 84, No. 31 (Feb. 14, 2019), at 97 (Apr. 15, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-6880. (Ex. 9).
[168] *Id.*
[169] Natural Resources Defense Council Comment Letter Re: Docket ID No. EPA–HQ–OW– 2018–0149, at 61 (Apr. 15, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-7673. (Ex. 10).
[170] Southern Environmental Law Center, Comment Letter Re: Revised Definition of Waters of the United States Docket No. EPA-HQ-OW-2018-0149, at 41 (Apr. 15, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-9717. (Ex. 11).
[171] *See e.g.*, RIA at 26 ("The agencies intend to quantify jurisdictional impacts in the final rule regulatory impact analysis to the extent practicable. After any such quantification, the agencies intend to use the ORM2 database to estimate changes in jurisdictional determinations attributed to the rule to inform the associated potential impact of the rule on water resources, which could in turn be used to estimate potential change in CWA 404 activity and associated permit and mitigation costs. "); RIA at 43 (" The agencies intend to work to quantify the regulatory impacts to waters related to the proposed tributary interpretation of non-relatively permanent flow features serving to sever upstream Federal jurisdiction in any final rule analysis, to the extent practicable. A proposed methodology for calculating those impacts is described below."); RIA at 44 ("The agencies intend to estimate the change in CWA jurisdiction of wetlands due to the proposed definition of "continuous surface connection" for the final rule, to the extent practicable.")
[172] *Corrosion Proof Fittings*, 947 F.2d at 1212.

Congress's intent, the agency's longstanding interpretation, and judicial precedent.

- The proposal fails to provide an adequate factual and technical basis for these new definitions and exclusions.
- The agencies have failed to provide adequate notice and opportunity to comment on fundamental aspects of the Proposed Rule and the agencies' rationale, including the devastating impacts it would have on the health of water resources and everyone who relies on them.

For all these reasons, the Proposed Rule should be withdrawn.

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EXHIBITS

Exhibit 1	NRDC, *Mapping Destruction: Using GIS Modeling to Show the Disastrous Impacts of* Sackett v. EPA *on America's Wetlands* (Mar. 2025)
Exhibit 2	M. W. Lang, J. C. Ingebritsen, and R. K. Griffin, *Status and Trends of Wetlands in the Conterminous United States 2009 to 2019*, U.S. FISH & WILDLIFE SERVICE (Mar. 22, 2024)
Exhibit 3	Walton Family Foundation, *Poll Shows Near-Universal Support for Protecting Water in Our Nation's Lakes, Streams and Rivers* (Mar. 21, 2024)
Exhibit 4	M. Collier, R. Webb, & J. Schmidt, *Dams and Rivers: A Primer on the Downstream Effects of Dams*, UNITED STATES DEPARTMENT OF INTERIOR, U.S. GEOLOGICAL SURVEY, Circular 1126 (2000 Rev.)
Exhibit 5	C. Thorsberg, *Three Great Lake States are at Greatest Risk as EPA Rolls Back Wetlands Protections*, CIRCLE OF BLUE (Nov. 20, 2025)
Exhibit 6	B. Davis Noll et al., *The Concealed Costs of the Clean Water Rule Rollback,* INST. FOR POL'Y INTEGRITY, BENEATH THE SURFACE (Apr. 2020)
Exhibit 7	John C. Whitehead, Comments on "Economic Analysis for the Proposed Revised Definition of 'Waters of the United States'" (EPA-Army 2018), Prepared for the Southern Environmental Law Center (April 9, 2019)
Exhibit 8	Jeffrey D. Mullen, Final Review of the 2018 EPA Economic Analysis for the Proposed Revised Definition of "Waters of the United States" (Apr. 11, 2019)
Exhibit 9	National Wildlife Foundation, Comment Letter Re: Docket ID Number EPA-HQ-OW-2018-0149: Comments on Revised Definition of "Waters of the United States" Federal Register, Vol. 84, No. 31 (Feb. 14, 2019) (Apr. 15, 2019)
Exhibit 10	Natural Resources Defense Council Comment Letter Re: Docket ID No. EPA–HQ–OW– 2018–0149 (Apr. 15, 2019)
Exhibit 11	Southern Environmental Law Center, Comment Letter Re: Revised Definition of Waters of the United States Docket No. EPA-HQ-OW-2018-0149 (Apr. 15, 2019)