



September 25, 2017

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Mr. Michael Shapiro
Acting Assistant Administrator for Water
United States Environmental Protection Agency

Douglas W. Lamont
Deputy Assistant Secretary of the Army

Re: **Comments on the 2017 Proposed Rule**
Re: Definition of “Waters of the United States”

Dear Mr. Shapiro and Mr. Lamont:

Thank you for the opportunity to submit comments on EPA and the Army Corps of Engineers’ proposed rule. As scholars of environmental law, we understand the challenging issues this rulemaking raises, and we appreciate the work the Army Corps and EPA have done to protect our nation’s water quality.

Unfortunately, as we explain in these comments, the current proposed rule is inconsistent with fundamental principles of administrative law and cannot legally proceed without major changes. The proposal also rests on false premises and lacks a sufficient explanation. In short, the proposal is deeply flawed.

In the joint EPA/Army Corps rulemaking that culminated, in 2015, in the Clean Water Rule, 80 Fed. Reg. 37053, EPA and the Army Corps invested an extraordinary amount of effort creating a rule that was grounded in science and law, and they struck a pragmatic compromise among the goals of protecting water quality, providing predictability and clarity, and managing the obligations borne by regulated actors. The most sensible and lawful path forward would be to abandon this current ill-conceived rulemaking and to defend the 2015 Clean Water Rule.

[EPA and the Corps Must Invite Comments on the Rule they Propose to Adopt.](#) One of the most important flaws in the agencies’ proposal is that they are declining to consider comments on the very rule their proposal would put into effect. This refusal to consider comments violates one of the most fundamental requirements of American administrative law.

The Administrative Procedure Act states that agencies can adopt rules only after providing notice and an opportunity to be heard.¹ In other words, it requires that the rulemaking agencies provide an opportunity for the public to comment on the rule being adopted. This is not some minor, technical requirement. Instead, the opportunity for public participation is fundamental to the administrative process, for it offers the rulemaking agency the benefit of public insight and offers the public the kind of participatory opportunities that are essential to democracy. As the Fourth Circuit recently cautioned, in a case with close parallels to the agencies' current course of action, "The important purposes of this notice and comment procedure cannot be overstated."² And nowhere in the Administrative Procedure Act is there a procedural exception for bringing back old rules.³

Despite these foundational legal requirements, the agencies declare, in the preamble, that they "wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations." In other words, they are declining to consider comments on the very rule that this proposal would put into effect. Consequently, interested parties have been denied the opportunity, afforded by the APA, to participate in the exploration and ventilation of the issues that are raised by this rulemaking exercise.⁴ It is hard to imagine a more blatant violation of the APA.

Nor is it any defense to argue that because implementation of the 2015 rule has been judicially stayed, the new rule would somehow make no change and the merits of the pre-2015 rule need not be discussed. If adopted, the new rule would change the circumstance from one in which the 2015 rule is subject to a temporary stay (assuming that stay is still in place when the final rule issues, which it may not be)⁵ to one in which the 2015 rule is permanently repealed. Obviously, that is a change.⁶

Some commenters will still discuss the contrast between the pre- and post-2015 regulations, notwithstanding the agencies' statement that they will not consider such comments. But the agencies will never know how many would-be commenters will follow the agencies' instructions and refrain from commenting on the very regulations that the agencies' propose to put in place, or what insights those comments might have offered.

¹ 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making....").

² *North Carolina Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 763 (2012).

³ *See id.* at 769-70 (rejecting a similar attempt to limit comment on a rule that was being reinstated).

⁴ *See id.*; *Lead Industries Ass'n, Inc. v. U.S. Environmental Protection Agency*, 647 F.2d 1130, 1184 (1980).

⁵ Under two circumstances, the Sixth Circuit's stay could be lifted. First, the Supreme Court may determine that the Sixth Circuit lacked jurisdiction to hear the challenge to the rule. Second, if the Supreme Court does return the case to the Sixth Circuit, the Sixth Circuit then might uphold the rule. While we are not expressing, in this letter, an opinion about which of these things should happen, we do think that each of these outcomes is quite plausible.

⁶ These obligations are unaffected by the agencies' claims that they will readopt the 2015 rules only as an interim stage before completing a new rulemaking. There is no APA exception for final rules that the agency doesn't intend to keep for very long. And the agencies' currently-stated intent may be a poor predictor of their future actions. The pre-2015 regulations stayed on the books for twenty-nine years, and it is at least plausible that their staying power will continue.

In other words, they will never know the full consequences of their refusal to consider comments. We do know, however, that this refusal violates the APA.

EPA and the Corps Need to Explain their Justifications for Adopting the pre-2015 Regulations. Another fundamental principle of administrative law is that agencies must explain their reasons for adopting a rule.⁷ That requirement exists not just for final rules, but also at the proposal stage. Commenters cannot focus their comments on issues of interest to the agency if they do not know why the agency is proposing to adopt a rule.⁸

Here, however, the agencies have made hardly any effort to explain why they are proposing to adopt the pre-2015 regulations. The proposal contains not one word of discussion of the merits of those regulations. Nor does it refer to any scientific studies explaining why the 2015 regulations are preferable to the current regulations. It does briefly refer to a so-called cost benefit analysis of the new proposal, but that cost-benefit analysis involved almost no effort to calculate the benefits of water quality protection—a problem we explain in more detail below—and therefore provides no basis for reasoned policymaking.

FCC v. Fox Television Co.,⁹ which the agencies cite in support of this curious approach to rulemaking, provides no defense. *Fox Television Co.* does state that the agencies do not “always” need to meet a higher standard for replacing an old rule than they would need to meet for adopting a new rule.¹⁰ But as the Court noted, the agency often will need to address the reasoning underlying the old rule; if “its new policy rests upon factual findings that contradict those which underlay its prior policy... [i]t would be arbitrary or capricious to ignore such matters.”¹¹ And the Court reiterated the agencies’ obligation to justify the rule they are putting into effect. “[O]f course,” the Court noted, “[the] agency must show that there are good reasons for the new policy.”¹² By declining to justify (or consider comment on) the rule it is adopting, the agencies have turned this basic legal principle on its head.

Lurking behind all these rationales is an implicit suggestion that the 2015 regulations were so awful that replacing them with anything else is an improvement. But that claim, even if the agencies were to make it explicit, has its basis only in the histrionics of press releases, not in reality. As observers who have taken a close look at the 2015 Clean Water Rule have noted, the rule would actually provide greater clarity and slightly greater environmental protection while making only very limited adjustments in federal

⁷ *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016) (“One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”).

⁸ *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (1988) (“Notice must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.”).

⁹ 556 U.S. 502 (2009).

¹⁰ *Id.* at 515.

¹¹ *Id.*

¹² *Id.*; see also *Encino Motorcars, LLC*, 136 S.Ct. at 2125 (restating these requirements).

jurisdiction—some of which would explicitly and categorically remove certain types of waterways from regulatory coverage.¹³

In summary, before the agencies can rescind an existing rule or put a new rule into effect—whether that rule or some iteration of it existed previously—they need to explain, and seek comment on, their reasons. For while the agencies may change their views on policy matters, they are “obligated to explain [their] reasons for doing so”¹⁴

EPA and the Corps Cannot Ignore the Record Supporting the 2015 Rule. The 2015 Clean Water Rule grew out of one of the most ambitious and comprehensive rulemaking efforts in Clean Water Act history. As part of that ambitious effort, EPA and the Army Corps reviewed over 1,200 peer-reviewed scientific studies and compiled a detailed scientific synthesis document explaining the key findings of those studies.¹⁵ Before finalizing the scientific synthesis report, EPA published a draft version and used a Federal Register notice to seek comment upon it.¹⁶ EPA’s Science Advisory Board also reviewed and affirmed the scientific basis underlying the rule.¹⁷ Those documents—along with the hundreds of studies they cited—formed key parts of the foundation for the Clean Water Rule. But, remarkably, the current proposal does not even mention those documents, or, for that matter, any science at all.

The absence of any scientific discussion in the rulemaking proposal threatens to create two more foundational legal violations. First, a rule is legally deficient if its authors “entirely failed to consider some important aspect of the problem” before them.¹⁸ The science of clean water should be integral to any Clean Water Act rulemaking, and the agencies’ failure to even mention that science creates a gaping hole in the reasoning supporting the rule. Second, agencies must explain the scientific basis for the decisions they are making. That obligation does not apply, of course, if the agencies simply intend to ignore science, though such ignorance creates other massive legal problems. But if there is some alternative scientific record in which the agencies intend to ground their decisions, they are obligated to set it forth in the proposed rulemaking so that commenters may give it a proper vetting.¹⁹ They cannot wait until the rulemaking reaches its final stage.

Legal Uncertainty Provides no Basis for Repealing the 2015 Rule. One of the very few justifications the agencies offer for their proposed repeal is legal uncertainty. They argue

¹³ See, e.g., Jamison Colburn, *Governing the Gradient: Clarity and Discretion at the Water’s Edge*, 62 *Vill. L. Rev.* 81 (2017); Dave Owen, *Little Streams and Legal Transformations*, 2017 *Utah L. Rev.* 1, 2-4.

¹⁴ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983).

¹⁵ U.S. EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2015); see also U.S. Evtl. Prot. Agency, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (2015).

¹⁶ *Notification of a Public Meeting of the Science Advisory Board or Review of the EPA Water Body Connectivity Report*, 78 *Fed. Reg.* 58,536 (Sept. 24, 2013).

¹⁷ Letter from Science Advisory Board to the Honorable Gina McCarthy, September 14, 2014.

¹⁸ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁹ See *United States v. Nova Scotia Foods Corp.*, 568 F.2d 240, 252 (2nd Cir. 1977) (“When the basis for a proposed rule is a scientific decision, the scientific material which is believed to support the rule should be exposed to the view of interested parties for their comment.”).

that if the rule is not repealed and litigation proceeds in multiple courts, then regulated entities will be uncertain about which rules apply. There are two major problems with this rationale.

First, it greatly overstates the degree of uncertainty. The courts have multiple methods for avoiding the kind of uncertainty that EPA and the Army Corps now claim to fear. Courts also are quite capable of taking note of persuasive authority and reaching consistent decisions. And if a circuit split does result, the Supreme Court can grant certiorari. Some degree of uncertainty is a possibility, but that threat is both minor and manageable.

Second, this rationale, if adopted, would provide a blank check for subverting the APA's requirement of reasoned decision-making. Almost any agency regulation is subject to judicial review, and that possibility of judicial review always creates legal uncertainty, at least initially, about the future status of any rule that might be challenged. This rationale, if adopted, therefore would allow for the revocation of any recent rule without any other substantial reason. The APA demands more of an explanation than that.

The Agencies' Cost-Benefit Analysis Provides no Basis for Switching from the Clean Water Rule to the Pre-2015 Regulations.

One of the agencies' only efforts to compare the pre-2015 regulations and the 2015 Clean Water Rule is an economic analysis that purports to address the costs and benefits of the new rule. For regulatory decision-making purposes, however, that analysis is nearly worthless.

The fundamental problem with that analysis is that it purports to measure the impacts on compliance costs of repealing the 2015 Clean Water Rule while actively ignoring the impacts of this repeal on water quality protection. One of the most important impacts of the Clean Water Rule would be to increase (slightly, because the rule makes only modest shifts in jurisdiction) regulatory protection of streams and wetlands, with important benefits for natural ecosystems, downstream water quality, flood protection, and recreation.²⁰ Thus, one of the most important impacts of the new proposal would be to take that slight increase in protection away.

Those lost benefits are not trivial; protecting "the chemical, physical, and biological integrity of the Nation's waters" is the central purpose of the Clean Water Act.²¹ In the analysis for the 2015 Clean Water Act rule, the agencies found that its projected benefits (between \$347.0 million and \$586.0 million, in 2016 dollars) far outweighed its costs (between \$162.2 million and \$476.2 million, in 2016 dollars).²² The largest benefits category that could be quantified and monetized came from the Section 404 program to

²⁰ See Owen, *supra* note __, at 6-14 (summarizing scientific research on the benefits provided by small aquatic features).

²¹ See 33 U.S.C. 1265(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

²² Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, Tables A-3 and A-4.

protect against wetlands loss. This category accounted for about 88 to 90 percent of the rule's total monetary benefits.

To produce the cost-benefit analysis for the proposal to repeal the 2015 Clean Water Rule, the agencies simply flipped the columns of the 2015 rule's analysis: The costs became the benefits (*i.e.*, the "avoided costs"), and the benefits became the costs (*i.e.*, the "forgone benefits"). The *political* problem (from the Administration's perspective) with taking this step is that it would have resulted in the analysis concluding that the agencies' proposal to repeal the 2015 Clean Water Rule would generate net costs. Such a conclusion is tantamount to admitting that the proposal would make society worse off by being implemented. The agencies appear to have responded to this "problem" by simply eliminating the Section 404 program's benefits, which accounted for the vast majority of the benefits from the 2015 Clean Water Rule, from its calculations.

The rationale the agencies offered for eliminating these benefits is unpersuasive. They contended that the willingness-to-pay studies from which the estimates for these benefits were derived were too old. The analysis explained that the age of these studies, which were published between 1986 and 2000, made them unreliable because "public attitudes toward nature could have changed" and because economists might have developed better techniques for measuring the public's willingness to pay for environmental protections in the intervening years.²³

Despite their professed concerns about the age of the studies, it is noteworthy that the authors of the economic analysis chose not to obtain more updated studies, or to make any other accommodation to the likelihood that people value wetlands. If anything, the public's attitude toward nature in general, and wetlands in particular, has almost certainly improved since the studies were published. For example, Hurricanes Katrina, Sandy, and Harvey have shined an intense spotlight on the value of wetlands in mitigating natural disaster-related damages (and the costs of building in areas prone to flooding), while the public's appreciation for these resources as habitat for endangered species among other ecosystem services has also likely grown. Moreover, the willingness-to-pay studies are methodologically predisposed to producing underestimates as well, since the respondents in such studies are necessarily and inevitably constrained by their ability to pay. Consequently, any ensuing advances in economic surveying methodologies would likely serve to correct for the systematic underestimates these studies tend to produce.

The bottom line is that if the original estimate of the benefits of protecting against wetland loss was inaccurate, it was because that estimate was far too low. Short of obtaining more updated willingness-to-pay studies, the most rational response for the agencies would have been to retain the original estimate as a placeholder representing a conservative, low-end value for those benefits, not to throw it out completely.

²³ Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules at 8-9.

In *Massachusetts v. EPA*,²⁴ the United States Supreme Court noted that the rationale for a rule must connect to the text and core purposes of the statute that the rule purports to implement.²⁵ EPA therefore cannot justify its rulemaking based on the numbers in a document that declines to quantify the core values of the governing statutory scheme. Instead, any Clean Water Act rulemaking should account for the value of clean water. The agencies plainly chose not to do so here. Instead, relying on sloppy analysis and flawed logic, they went out of their way to exclude from the cost-benefit analysis any consideration of the most significant environmental and public health benefits implicated by the 2015 Clean Water Rule.

Clean Water Act Section 101(b) Provides No Basis for Replacing the Clean Water Rule with the Pre-2015 Regulations.

The agencies' other stated rationale is that they are proposing to repeal the Clean Water Rule so they can think about the implications of Clean Water Act section 101(b), which speaks to the role of states in Clean Water Act implementation. There are three key problems with this rationale.

First, it is a non sequitur. The agencies do not need to repeal the Clean Water Rule in order to consider the implications of Clean Water Act section 101(b). Instead, they are free to ponder the implications of Clean Water Act section 101(b) with the 2015 Clean Water Rule still in place. Indeed, the agencies have not even tried to explain why it is easier to consider Clean Water Act section 101(b) under the pre-2015 regulations than under the 2015 Clean Water Rule.

Second, the APA does not authorize agencies to adopt or repeal rules just because they think they might later come up with a reason for doing so. Yet that is what the agencies are now proposing. Importantly, they have not identified any Clean Water Act section 101(b) problem with the 2015 Clean Water Rule. Nor have they identified a failure to consider section 101(b) in that 2015 rulemaking; as they acknowledge, the agencies actually did consider federalism issues in that rulemaking.²⁶ Instead, all the agencies have really said is that they if they give more thought to Clean Water Act section 101(b), they might come up with a rationale for repealing the Clean Water Rule, so they're just going to go ahead and repeal it right away. The APA does not acknowledge that sort of act-first, think-later policymaking.

Third, if the agencies did attempt to find a section 101(b) problem with the 2015 Clean Water Rule, they would not be able to do so. The Clean Water Rule is entirely consistent with the values at the core of the Clean Water Act.

In its entirety, section 101(b) states:

²⁴ 549 U.S. 497 (2007).

²⁵ *Id.* at 532.

²⁶ 82 Fed. Reg. at 34902 (citing 80 Fed. Reg. at 37059).

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

The underlying policy goal is obvious: Congress wanted the states integrally involved in the national project of cleaning up waterways. That goal becomes even more obvious when section 101 is considered as a whole, for subsection 101(b) is preceded by provisions that declare, in no uncertain terms, Congress's commitment to achieving massive improvements in water quality.²⁷ The text and structure of the rest of the act also clarify that Congress wanted the states enlisted in a national effort to restore water quality. Sections 303, which requires states to set water quality standards,²⁸ 401, which requires recipients of federal discharge permits to obtain state certifications of compliance with water quality standards,²⁹ and 402, which allows states to assume delegated authority to implement the National Pollutant Discharge Elimination System, are just three examples of this pattern of including states in a mandatory project of water quality restoration.³⁰

²⁷ Section 101 also states:

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
- (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
- (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;
- (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and
- (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

33 U.S.C. § 1251(a). The proposed rulemaking ignores these congressional policies.

²⁸ 33 U.S.C. § 1313.

²⁹ 33 U.S.C. § 1342.

³⁰ 33 U.S.C. § 1341.

For decades, Clean Water Act implementation has respected those goals. Forty-six states have assumed authority to implement the NPDES system.³¹ State-set water quality goals still are key drivers for several of the act's other substantive provisions. And even the section 404 program, which governs permitting for stream and wetland fills and is implemented primarily by the Army Corps of Engineers, is designed to provide ample opportunity for state involvement and influence.³²

The 2015 Clean Water Rule did not abandon that respect for the states' interests in helping protect water quality. Its modest adjustments in federal jurisdiction would have brought a few additional aquatic features within the scope of the Clean Water Act's regulatory protections, and thus would have limited state discretion to leave those waters—and the downstream rivers, lakes, and oceans into which they feed—unprotected. But the agencies made that adjustment in jurisdictional standards because an overwhelming body of scientific evidence told them those protections were necessary for achieving the Clean Water Act's core goal of water quality protection. The slightly increased protections also would be implemented in ways that would integrally involve the states. States still would set water quality standards; states still would administer NPDES permits for discharges into all jurisdictional waterways, if they choose to do so; and states still would be deeply involved in helping set permitting requirements and compensatory mitigation policies for stream and wetland fills. States, in short, would remain integrally involved in the national project of protecting water quality. That is exactly what Clean Water Act section 101(b), along with its sister provisions, calls for.

The Agencies' Rationales for Avoiding a Regulatory Flexibility Analysis and a Federalism Analysis Make No Sense.

In the proposed rulemaking document, the agencies claim that no federalism analysis is necessary because the rulemaking will have no federalism effects. That rationale is impossible to square with the agencies' claim that a core reason for this rulemaking is to reconsider the implications of section 101(b), which pertains to federalism. It is also impossible to square with the rhetoric surrounding the proposed new rule. In public statements, the President and the EPA Administrator have repeatedly claimed that this rulemaking effort is specifically designed to empower states. They cannot have it both ways.

³¹ See State NPDES Program Authority, https://www.epa.gov/sites/production/files/2015-10/documents/state_npdes_prog_auth.pdf (last visited August 24, 2017).

³² See Dave Owen, *Regional Federal Administration*, 63 UCLA L. Rev. 58 (2016). One particular quote, from an Army Corps staff division office staff member, summarizes the article's findings about state involvement:

One . . . strength of the program . . . is that we can tailor the program, within sideboards, so that it fits as well as it could possibly be with the individual state program. . . . [W]e want to make sure that we're working hand-in-glove with the states. . . . Each state does its business a little differently, and (if) we have one-size-fits-all for fifty states across the nation I think it's going to compromise the effectiveness of the program. If we can work individually with each state and generally follow the rules and regulations but try to tailor the program to interact effectively with the state programs, I think it's a good thing. I think we've been very successful doing that.

Id. at 115.

Similarly, the agencies' rationale for avoiding a Regulatory Flexibility Analysis is patently false. The agencies claim that no such analysis is necessary because the rule will not change the legal status quo. But the rule will make important legal changes; a rule that currently is subject to a temporary stay will instead be permanently repealed. Indeed, in other parts of the rulemaking document (and in political officials' public statements), the agencies have trumpeted that change as the key reason for the rulemaking. Again, they cannot have it both ways. They (and their political overseers) cannot brag that the proposed rule will make dramatic changes, yet then refuse to acknowledge those same changes when that acknowledgment would oblige the agencies to do a little more work.

Additionally, lest there is any doubt, the proposed rule will have negative impacts on many businesses, both small and large. For some businesses, including many manufacturers, clean water is an important process input. For others, it is a commodity; while most of the water supply industry consists of large companies, some small businesses are involved. Other businesses rely on the amenities associated with water quality. Any business associated with recreational hunting or fishing, for example, or water-based tourism, has a direct stake in the protection of water quality and in the preservation of aquatic habitats. Perhaps most important of all, clean water is a daily need for every employee of every business in the nation. Any rule that reduces the scope of water quality protections affects thousands of businesses in a variety of ways.

Any business that has infrastructure in or near flood zones, or that insures such infrastructure, also has a direct stake in the proposed rule. A central purpose of the proposed rule is to remove regulatory constraints on filling streams and wetlands, and thus to allow people to build more infrastructure in places that flood. That will place the built infrastructure at risk. By removing the capacity of the filled streams and wetlands to absorb floodwaters, filling also will exacerbate downstream flooding risks.³³ As Hurricane Harvey recently demonstrated, the economic (and human) costs of such flooding can be astronomical, and small businesses are by no means immune to those costs.

In addition, another group of businesses has a particularly direct stake in the proposed rule. In many parts of the country, private mitigation banks restore aquatic habitats and sell credits to businesses and to government entities that cannot build their projects without filling some streams or wetlands.³⁴ In other words, these mitigation banks have created a business model out of environmental compliance; they make money by facilitating accommodations between the need for development and the need for environmental protection. But these banks cannot function without regulatory protection of streams and wetlands, for without that protection, there is no market for their credits.

³³ See *Rapanos v. United States*, 547 U.S. 715, 775 (2006) (Kennedy, J. concurring) (“As the Court noted in *Riverside Bayview*, ‘the Corps has concluded that wetlands may serve ... to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion.’”) (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985)).

³⁴ See EPA, Mitigation Banking Factsheet, <https://www.epa.gov/cwa-404/mitigation-banking-factsheet> (last visited September 18, 2017).

Even a reduction in protection will automatically dampen that demand.³⁵ There are now hundreds of these businesses, and again, nearly all of them are small. And while the proposed rule will not eliminate the market for their services, it will undercut that market, doing mitigation banking businesses real harm.

* * * * *

For decades, EPA and the Army Corps of Engineers have worked diligently to protect the United States' waters, and the nation has benefited tremendously from those efforts. Unfortunately, the proposed rulemaking is a step away from that tradition. For the reasons outlined above, we urge the agencies to abandon the rulemaking and, instead, to return to their defense of the 2015 Clean Water Rule.

Sincerely,

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³⁵ The Army Corps's RIBITS database provides information on the hundreds of mitigation banks operating in the United States. See https://ribits.usace.army.mil/ribits_apex/f?p=107:2.

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