PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
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January 18, 2020

Acting Inspector General Charles J. Sheehan
Office of Inspector General
1200 Pennsylvania Avenue, N.W.
Mail code: 2410T
Washington, DC 20460

Re: Violation of the U.S. Environmental Protection Agency's (EPA's) *Scientific Integrity Policy* by Andrew Wheeler, David Ross, Matt Leopold, David Fotoui, Owen McDonough, Dennis Lee Forsgren, and Anna Wildeman; sent by email to OIG_Hotline@epa.gov

Dear Acting Inspector General Sheehan:

On behalf of Public Employees for Environmental Responsibility (PEER) and the undersigned former and current federal employees, we write to request an inquiry under the *Scientific Integrity Policy* into the final Rule regarding the definition of waters of the U.S. (WOTUS), which we expect to be issued in final form during January 2020.[1] The writing of the final Rule was controlled solely by U.S. Environmental Protection Agency (EPA) Headquarters (HQ) political appointees. The final Rule contradicts the overwhelming scientific consensus on the connectivity of wetlands and waters, and the impacts that ephemeral streams and so-called "geographically isolated" wetlands have on downstream navigable waters. Moreover, the EPA employees who directed the writing of the final Rule failed to consult properly with regional experts, and did not allow these experts to voice their dissenting opinions formally. Finally, these EPA employees failed to disclose the potentially adverse impacts the final Rule will have on human health and the environment and exaggerated the uncertainties associated with these impacts. As such, the final Rule violates EPA's *Scientific Integrity Policy* (hereinafter "*Policy*").[2] We respectfully urge you to investigate the situation and remedy this violation to prevent further loss of scientific integrity at EPA, and to prevent the foreseeable harm to human health and the environment.

[1] See, e.g., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=2040-AF75, which states the final rule will be issued "01/00/2020."
[2] https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf

Complainants. This complaint is filed by PEER, a nonprofit service organization representing public employees, together with and on behalf of 44 scientists and lawyers formerly and currently working within federal agencies such as the EPA, the U.S. Army Corps of Engineers (Corps), and the U.S. Fish and Wildlife Service (USFWS).[3] Collectively, Complainants have hundreds of years of experience in aquatic and wetland science and law. Please note that *all* signatories to the Complaint attest to the fact that the Rule's WOTUS definition is not based on science, and that it will have potentially long-term negative effects on human health and the environment. Not all signatories have personal knowledge of each statement in this Complaint, but each statement is backed up by one or more signatory agency scientists or attorneys.

Subjects of Complaint. The EPA HQ employees who violated the *Scientific Integrity Policy* are Andrew Wheeler (Administrator of EPA), David Ross (Assistant Administrator for Office of Water), Matt Leopold (EPA's General Counsel), David Fotoui (Principal Deputy General Counsel), Owen McDonough (Senior Science Advisor to the Assistant Administrator, Office of Water), Dennis Lee Forsgren (Deputy Assistant Administrator for Office of Water), and Anna Wildeman (Principal Deputy Assistant Administrator for the Office of Water) (hereinafter "HQ employees"). PEER is aware many career employees[4] at EPA HQ, together with some Corps' employees, also worked on the rule, but at the direction of those individuals named above. Moreover, we are aware that regional career EPA employees were asked for limited input into the final Rule, but that the scientific expertise of many were not considered; in fact, as alleged below, their opinions were kept out of the formal record. In addition, some HQ career EPA employees were peripherally involved in the development of the Rule. Because these regional and HQ career employees were merely doing as instructed, they are not subjects of this complaint.

Complaint Summary. The HQ employees who directed the writing of the final Rule violated EPA's Scientific Integrity Policy because they: 1) did not base the Rule on science, let alone high quality science; 2) directed expert staff to refrain from submitting comments as part of the formal administrative record; 3) blocked the use of scientific information to inform policy when writing the Rule; 4) publicly mischaracterized scientific content and exaggerated uncertainties associated with the impacts of the Rule; and 5) did not welcome differing views as a legitimate and necessary part of the scientific process by failing to consult adequately with regional expertise.

Relief Requested. PEER and the federal complainants request that: 1) the Scientific Integrity Officer and/or the Inspector General investigate this matter and issue a report containing findings stemming from this investigation. Federal wetland experts must be allowed to have meaningful input into the crafting of any future WOTUS definition. Any Rule that attempts to define the jurisdictional limitations of wetlands and waters must be based primarily on science, not solely politics and law; 2) HQ employees named in this Complaint be subject to appropriate discipline for violating the *Policy*; and 3) HQ employees named in this Complaint receive training on the *Policy*.

Background. The federal Clean Water Act (CWA) was passed in 1972 in order to remedy the poor state of our nation's waters at the time. The CWA prohibits "the discharge of any pollutant" to navigable

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[3] Please note that the current employees signing onto this complaint are not willing to be named, due to the potential for retaliation.

[4] We are using the term "career employee" to characterize staff who applied for jobs and were hired - some have been at EPA through several Administrations - as opposed to employees who were appointed by the Trump Administration.

waters from any point source. The term "navigable waters" is defined as "the waters of the United States (WOTUS), including the territorial seas." No clarification to this phrase was given, and it was left to the EPA to issue guidance and regulations to define the scope of jurisdiction. It defied common sense to restrict the definition to traditionally navigable waterways (those that are capable of being used by vessels for interstate commerce), and initially, the CWA was given a broad jurisdictional reach.

The precise meaning of WOTUS has been litigated extensively. In the years following enactment of the CWA, the Corps and EPA used different definitions. After litigation in 1977, the Corps re-defined WOTUS to include all waters which could affect interstate commerce. Finally, in 1982, the two federal agencies agreed on one definition of WOTUS:

> All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of tide; (b) All interstate waters, including interstate "wetlands"; (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition; (e) Tributaries of waters identified in paragraphs (1)-(4) of this definition; (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)-(f) of this definition.

Wetlands were defined as "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."[5] Wetlands generally include swamps, marshes, bogs, and similar areas.

In the 1985 *Riverside Bayview Homes* case, the Supreme Court ruled unanimously that the Corps could regulate intrastate wetlands adjacent to navigable waters that affected interstate commerce.[6] The Court did not decide whether wetlands isolated from navigable waterways were jurisdictional. After this ruling, the Corps and EPA began to use a clarification termed the "Migratory Bird Rule" to extend jurisdiction to isolated waters and wetlands, arguing that areas "which are or would be used as habitat by ... migratory birds that cross state lines" could affect interstate commerce, and thus were jurisdictional. In 2001, the Supreme Court, in a 5-4 decision, struck down the Migratory Bird Rule in a case commonly referred to as *SWANCC*.[7] The Court held that extending jurisdiction over these isolated wetlands exceeded the agencies' authority. Specifically, the Court said that the ponds that had formed in the abandoned gravel pit at issue in the *SWANCC* case lacked the "significant nexus" to traditionally navigable waters necessary to extend jurisdiction under the CWA.

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[5] 33 C.F.R. § 328.3(b)

[6] *United States v. Riverside Bayview*, 421 U.S. 121 (1985)

[7] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)

Post-*SWANCC*, the agencies issued guidance concluding that they could exercise jurisdiction over isolated waters if the use, degradation, or destruction of such waters could affect downstream navigable-in-fact water bodies. This guidance was based on science and informed by Congressional intent. The intent of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[8] It makes little sense only to regulate navigable waters if the degradation of smaller tributaries and wetlands upstream of those waters would lead to the impairment of the navigable waters themselves.

Matters came to a head in 2005, when the Supreme Court heard the *Rapanos*[9] case; at issue was whether the Corps could exert jurisdiction over non-navigable wetlands that did not abut navigable waters. A 4-1-4 plurality decision resulted in two alternative tests: one authored by Justice Scalia, and one authored by Justice Kennedy. The two tests were:

> **Scalia's test**: The word "waters" in "waters of the United States" means only "relatively permanent, standing or continuously flowing bodies of water"—that is, streams, rivers, and lakes. Wetlands could potentially be included, but only when they have a "continuous surface connection" to other "waters of the United States."
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> **Kennedy's test**: if the wetland at issue possesses a "significant nexus" to waters that are navigable-in-fact, they are jurisdictional. A wetland has a significant nexus to navigable-in-fact waters when the wetland significantly impacts the chemical, physical, and biological integrity of a traditionally navigable waterbody.

In response to this holding, the agencies issued guidance in 2008 that wetlands or waters are jurisdictional if they satisfied either of the two tests. This unfortunately did little to clarify the situation. EPA viewed the proper fix to the WOTUS problem as coming from Congress. But after Congress tried and failed to pass amendments to the CWA, EPA started a rulemaking effort to correct the problem. On May 27, 2015, after extensive scientific review and a massive public comment process, EPA issued the 2015 Clean Water Rule (CWR).[10] The CWR expanded jurisdiction over then-current waters and wetlands nationwide by roughly 2.84% to 4.65%.[11] Significant litigation ensued, and the CWR was stayed in about half of the country and went into effect in the other half until it was repealed in 2019 by the Trump administration. That repeal rule is now being challenged in the courts.

On February 14, 2019, the EPA and the Corps published a proposed rule defining the scope of WOTUS federally regulated under the CWA.[12] Even though all of the Circuit Courts in the country have ruled that the Scalia test by itself is not a proper interpretation of *Rapanos*, the proposed rule essentially codified Justice Scalia's narrow test, above; that is, it eliminated geographically isolated wetlands, ephemeral streams, and some intermittent streams from federal jurisdiction. The final version of the Rule, which is expected to be substantially the same as the proposed Rule, will be issued imminently.

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[8] 33 U.S.C. § 1251(a)

[9] *Rapanos v. United States*, 546 U.S. 932-33 (2005)

[10] 80 Fed. Reg. 37,054 (June 29, 2015)

[11] https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf at p. vii

[12] 84 Fed. Reg. 4154 (Feb. 14, 2019)

This Complaint pertains solely to the final Rule and the process that led to it. As explained below, the new definition for WOTUS is contrary to well-established science.

EPA's Scientific Integrity Policy. EPA's *Scientific Integrity Policy*[13] states in relevant part:

> Science is the backbone of the EPA's decision-making [citation omitted]. The Agency's ability to pursue its mission to protect human health and the environment depends upon the integrity of the science on which it relies. The environmental policies, decisions, guidance, and regulations that impact the lives of all Americans every day must be grounded, at a most fundamental level, in sound, high quality science. When dealing with science, it is the responsibility of every EPA employee to conduct, utilize, and communicate science with honesty, integrity, and transparency, both within and outside the Agency. To operate an effective science and regulatory agency like the EPA, it is also essential that political or other officials not suppress or alter scientific findings...[14]

In the case at hand, EPA crafted a regulation at the direction of President Trump's EO. He mandated that the agencies "shall ***consider*** interpreting the term 'navigable waters' ... in a manner consistent with the opinion of Justice Antonin Scalia"[15] in *Rapanos* (emphasis added).

As the *Policy* states, EPA's regulations, policies, and decisions impact the lives of all Americans on a daily basis, and as such, must be "grounded, at a most fundamental level, in sound, high quality science."[16] The WOTUS definition reflects the values in the *Policy* because wetlands and waters provide, among other things, flood control, irrigation water, clean and plentiful drinking water, and water supplies for industry. Protection from flooding and clean water supplies are two basic but critical requirements for human life. Climate change is exacerbating flooding and increasing the contamination/scarcity of drinking water, and as such, it is vital that EPA be rigorous and cautious about any policy or regulation that affects these functions. It is therefore worrisome that the subjects of this Complaint violated the *Policy* in order to promulgate a regulation that ignores established and accepted science regarding wetlands and waters.

Science should have been used to inform the reach of the law. The science indisputably shows the interconnectivity of ephemeral streams and geographically isolated wetlands with downstream waters, including traditionally navigable waters. Rejecting the connectivity science has led EPA to ignore the overall purpose of the CWA to enhance and maintain the integrity of waters of the U.S.

***Scientific Integrity Policy* Applicability.** Both the subjects and the subject matter of this Complaint can be properly considered under the *Policy*.

> The *Policy* applies to the subjects of this Complaint. It provides that "...all Agency employees, including scientists, managers, ***and political appointees***, are required to follow this policy when engaging in, supervising, managing, or influencing scientific activities; ... and utilizing scientific

[13] https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf (hereinafter "*Policy*")
[14] *Id.* at 1
[15] *Id.*
[16] *Id.*

information in making Agency policy or management decisions"[17] (emphasis added). In this case, the *Policy* applies to the subjects of our Complaint, as they are all EPA employees, managers and political appointees.

The *Policy* applies to the WOTUS Rule. By dictating the content of the final Rule, which is a Rule that will determine how waters and wetlands are defined for purposes of the CWA (a scientific activity that is informed by law), HQ employees were "supervising, managing, or influencing scientific activities." In addition, the HQ employees utilized the "scientific information" in "making policy ... decisions" (i.e., a regulation). Therefore, application of this *Policy* to the WOTUS Rule is appropriate.

Specific Violations of the *Scientific Integrity Policy*. The *Policy* sets forth that EPA employees should produce scientific work of the "highest quality rigor, and objectivity" and that they should be impartial and welcome different views and opinions on scientific matters.[18] Complainants address each of these in turn:

The "scientific work" at issue is not of the highest quality. Not only does the science behind the final Rule fail the "highest quality" test mandated in the *Policy*, but it ***directly conflicts*** with the established, best-available science. Specifically, the Rule does not incorporate EPA's 2015 *Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence (Final Report)* (hereinafter "*Connectivity Report*").[19] The *Connectivity Report* was a Herculean effort that involved the review of over 1,200 peer-reviewed scientific articles and summarized the "state of the science" on connectivity of wetlands and waters in the United States. According to EPA itself, the *Connectivity Report* concludes that "[t]he scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function"[20] and that so-called geographically isolated wetland "provide physical, chemical, and biological functions that could affect the integrity of downstream waters. Some potential benefits of these wetlands are due to their isolation rather than their connectivity."[21] EPA also states: "The literature strongly supports the conclusion that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed."[22] [23] The final Rule does not provide any science that contradicts or alters the *Connectivity Report*, but instead simply rejects the majority of this comprehensive review of scientific literature. As such, the basis for the final Rule is not "highest quality" science. The final Rule is also contrary to the CWA in that it will not lead to the restoration and maintenance of the chemical, physical, and biological integrity of the nation's waters.

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[17] *Id.* at 2

[18] *Id.* at 3

[19] *Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence (Final Report)*. EPA/600/R-14/475F. U.S. Environmental Protection Agency, Washington, D.C. (2015)

[20] https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414

[21] *Id.*

[22] *Id.*

[23] Note that these three statements from EPA are currently (as of January 17, 2020) on its website and represent the best available science.

Complainants are not alone in our concern. A draft letter from an EPA Science Advisory Board (SAB) WOTUS Workgroup was recently released. The SAB stated:

> In summary, the SAB is disappointed that the EPA and Department of the Army have decided that the CWA and subsequent case law precludes full incorporation of the scientific aspects of EPA's 2015 Connectivity Report into the proposed Rule. The proposed definition of WOTUS is not fully consistent with established EPA recognized science, may not fully meet the key objectives of the CWA – "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," and is subject to a lack of clarity for implementation. The departure of the proposed Rule from EPA recognized science threatens to weaken protection of the nation's waters by disregarding the established connectivity of ground waters and by failing to protect ephemeral streams and wetlands which connect to navigable waters below the surface. These changes are proposed without a fully supportable scientific basis, while potentially introducing substantial new risks to human and environmental health.[24]

It is worth noting that most of the current SAB members were appointed by the Trump Administration. As you are aware, SAB review is important to ensure that regulations are based on the best science, and not in spite of such science. Because of this, the SAB's views on this matter should be afforded great deference.

The HQ employees (in this complaint) failed to welcome differing scientific views and opinions. The *Policy* mandates that employees "[w]elcome differing views and opinions on scientific and technical matters as a legitimate and necessary part of the scientific process."[25] Although the HQ employees did hold occasional conference calls with regional experts, and maintained a WOTUS Sharepoint site where career employees could insert their comments, the career employees were explicitly cautioned to ***not*** provide formal comments that would become part of the docket, which resulted in these comments being withheld from the public. Forbidding scientists from publicly expressing their scientific concerns flies in the face of the *Policy*.

Career employees continually expressed their concern that the Rule abandoned the established science in the *Connectivity Report* and they were dismissed with no justification. The HQ employees directed the career employees to respond to the myriad thoughtful public comments submitted on the proposed rule, but were told to respond from a policy or legal stance, not a scientific one. Therefore, HQ employees did not welcome experts' views, science was suppressed, and experts' opinions were stifled, especially pertaining to consideration of the public comments and writing the final Rule.

Specific Violations of the Culture of Scientific Integrity. The *Policy* outlines four areas of scientific integrity at EPA, two of which apply here: 1) promoting a culture of scientific integrity; and 2) public communications:[26]

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[24] https://aboutblaw.com/NRJ
[25] *Policy* at 3.
[26] *Policy* at 3.

The final Rule, and the process used to develop the Rule, does not promote a culture of scientific integrity. The *Policy* provides that "[s]uccessful application of science in Agency policy decision relies on the integrity of the scientific process both to ensure the validity of scientific information and to engender public trust in the Agency."[27] This culture of scientific integrity is supposed to enhance transparency and protect Agency scientists.

In order to promote a culture of scientific integrity within the Agency, employees must "foster honest investigation, open discussion...and a firm commitment to evidence."[28] The HQ employees named above abandoned these tenets when writing the new rule.

First, no "honest investigation" occurred. Complainants directly observed that the HQ employees were not interested in an investigation into the connectivity of geographically isolated wetlands and ephemeral and intermittent waters, or their impacts on downstream waters. HQ employees were determined to drastically decrease federal jurisdiction over wetlands and waters, and they ignored all information that did not support their desired result. An honest investigation would have taken the new findings and conclusions in the 2015 *Connectivity Report* into account, but that did not occur. An honest investigation would also have allowed career employees to offer their expertise into the process of writing the final Rule, but that did not occur either. In sum, EPA leadership ignored substantial scientific sources that should have been assessed in order to inform the jurisdictional reach of the CWA.

Second, the Complainants observed that HQ employees were uninterested in open discussions with regional and career HQ staff, as evidenced by their order forbidding career employees from submitting formal comments that would be seen by the public. ***It is important to note that this is not merely a difference of scientific opinion between HQ employees and the career employees.*** This is the difference between established science, and excluding and manipulating that established science. Complainants freely admit that there can be differing scientific opinions in many instances, but in this case, virtually all of the peer-reviewed science contradicts the final Rule. HQ employees are entitled to their own opinions, but not to their own set of unsupported facts.

Third, it is clear that the HQ employees were not committed to the scientific evidence, as they dismissed the critical findings of the *Connectivity Report* and did not produce or point to any evidence that supported their new position of a severely restricted WOTUS jurisdiction. The scientific method - formulating a hypothesis based on the evidence, testing that hypothesis, and then analyzing the data and coming to a conclusion - is inconsistent with dismissing previous findings without the evidence to do so.

The science used in the final Rule is not of the highest quality. According to the *Policy*, promoting a culture of scientific integrity also requires that the Agency produce scientific products "of the highest quality, rigor, and objectivity for use in policy decisions."[29] As discussed above, the exhaustive *Connectivity Report* was of the highest quality and rigor, and yet was largely ignored in the writing of the final Rule.

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[27] *Id.*
[28] *Id.*
[29] *Id.*

The *Policy* prohibits all employees, including leadership, from "suppressing ... scientific findings or conclusions"[30] in order to promote a culture of scientific integrity. In this case, the HQ employees suppressed scientific conclusions by asking career employees to refrain from submitting their formal comments on the proposed Rule. Even if HQ employees were aware of the career employees' concerns, failure to submit these concerns into the docket results in keeping this information from the public and reducing transparency. In sum, the final Rule is not based on science, and the science that career employees offered was suppressed by the HQ employees.

HQ employees did not "enhance transparency" within agency scientific processes. The *Policy* requires that agency managers and leadership review a scientific product using "only" scientific quality considerations.[31] In the case at hand, HQ employees did not restrict their review to only scientific quality considerations; in fact, it appears that they rejected almost all science and substituted political considerations. There is no way to accurately determine which wetlands and waters will restore and maintain the chemical, physical and biological integrity of the Nation's waters as mandated by the CWA *without* using science. In order to promulgate the now-defunct 2015 CWR, EPA assessed over 1,200 peer-reviewed scientific articles. While the Rule must be supported by the law, it must also be based on good science per the *Policy*. Furthermore, as stated above, the *Rapanos* decision was a plurality decision and subsequent Circuit Court decisions have uniformly held that it cannot serve as the sole basis for asserting jurisdiction under the CWA. The EPA has chosen the wrong legal standard to apply.

HQ employees did not "enhance transparency" when they communicated their scientific findings. The *Policy* requires that EPA employees accurately contextualize uncertainties, and describe probabilities associated with both optimistic and pessimistic projections.[32] There are many uncertainties associated with the final Rule, most importantly the lack of data regarding how many miles of streams and acres of wetlands will be vulnerable to filling and pollution, and whether States will pick up the slack in light of the void left by the federal government. The effects of this uncertainty were not communicated to the public; rather, EPA freely admits it is unable to quantify the economic and environmental effects of the final Rule, but it provides neither optimistic nor pessimistic effects projections, per the *Policy*.

HQ Employees Did Not Assure the Protection of Agency Scientists. The *Policy* purports to protect EPA's scientists by prohibiting managers and agency leadership from "intimidating or coercing scientists to alter scientific data, findings, or professional opinions" and states they "shall not knowingly misrepresent, exaggerate, or downplay areas of scientific uncertainty associated with policy decisions."[33] HQ employees engaged in both of these behaviors:

HQ employees asked career employees to suppress their professional opinions and keep them out of the public record. As stated above, HQ employees asked career employees to refrain from providing their scientific comments to the docket.

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[30] *Id.* at 4
[31] *Id.* at 4
[32] *Id.*
[33] *Id.* at 5

HQ employees knowingly misrepresented and downplayed scientific uncertainty associated with implementation of the Rule. The *Policy* states that "...policy makers shall not knowingly misrepresent, exaggerate, or downplay areas of scientific uncertainty associated with policy decisions."[34] On December 10, 2018, David Ross told reporters on a press call that estimates in the public domain of the percentage of wetlands and waters that will no longer be jurisdictional are untrue: "If you see percentages of water features that are claimed to be in, or reductions, there really isn't (sic) the data to support those statistics. No one has that (sic) data." However, a 2017 slideshow prepared by EPA and the Corps – obtained through a Freedom of Information Act request – showed that EPA does have those data.[35] While these data may be underestimates of what will be lost should the Rule be finalized as is, EPA HQ employees had these data, kept them from the public, and misrepresented them. Another EPA study showed that 60% of all U.S. streams are ephemeral, and up to 81% are ephemeral in the arid Southwest.[36] Administrator Andrew Wheeler disputed these figures when touting the new Rule without providing any science to back up his statements.[37]

While there is scientific uncertainty associated with the *exact* percentage of streams and acres of isolated wetlands that will lose jurisdiction, it is inaccurate for EPA to claim that there is no data. Indeed, it is EPA's own data that supports these figures cited above. Therefore, at least two of the HQ employees knowingly misrepresented and exaggerated the scientific uncertainty associated with implementation of the Rule, contrary to the *Policy*.

EPA must protect the current employee Complainants. The *Policy* states that whistleblower protections are extended to "all EPA employees who uncover or report allegations of scientific ... misconduct, or who express a differing scientific opinion, from retaliation or other punitive actions."[38] The current career employees signing onto this Complaint anonymously are understandably concerned about potential retaliation. PEER expects EPA to abide by the terms of this *Policy* and refrain from attempts to uncover the identity of these employees or retaliate against them. PEER will take any legal action necessary to protect them.

Specific Violations of Public Communications. The *Policy* states that "[s]cientific research and analysis comprise the foundation of ***all*** major EPA policy decisions" (emphasis added).[39] The WOTUS Rule is no exception to this statement; science should provide the foundation to this Rule. The *Policy* goes on to say that "...the Agency should maintain vigilance toward ensuring that scientific research and results are presented openly and with integrity ... [and] accuracy ..."[40] The *Policy* also states that there should be "unfiltered dissemination ... uncompromised by political or other interference"[41] of scientific information. Clearly, HQ employees did not abide by this requirement; they suppressed comments of the career employees and misrepresented data to the media and the public.

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[34] *Id.*
[35] https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf
[36] https://www.epa.gov/sites/production/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf
[37] https://www.npr.org/2018/12/11/675477583/trump-epa-proposes-big-changes-to-federal-water-protections
[38] *Policy* at 5
[39] *Id.*
[40] *Id.*
[41] *Id.*

The *Policy* also states that "[w]hen an Agency employee substantively engaged in the science informing an Agency policy decision disagrees with the scientific data, scientific interpretations, or scientific conclusions that will be relied upon for said Agency decision, the employee is encouraged to express that opinion, complete with rationale, preferably in writing."[42] In this case, when career employees disagreed with the conclusions of HQ employees, the career employees were asked to refrain from putting their opinions in writing to be formally submitted into the docket.

Facts to Confirm in a Scientific Integrity Investigation. Complainants respectfully request that EPA's Scientific Integrity officials, and/or the Inspector General, investigate by:

1) interviewing the SAB members who wrote the letter about WOTUS, cited above;
2) interviewing regional and career EPA employees who were peripherally involved in the WOTUS re-write;
3) interviewing retired EPA officials who are considered national experts on wetland science, including but not limited to the national experts who are signatories to this Complaint;
4) interviewing the agency scientists who wrote the *Connectivity Report*;
5) reviewing the comments on the WOTUS Sharepoint site; and
6) reviewing communications among and between regional and HQ employees regarding the WOTUS Rule.[43]

Conclusion. The WOTUS Rule severely restricts CWA jurisdiction over wetlands and waters. EPA's own estimates (which were hidden from the public and were obtained through a FOIA) state that a minimum of 1.35 million miles of streams and 40 million acres of wetlands would be removed from CWA jurisdiction, exacerbating flooding and water and drinking water contamination for millions of Americans. HQ employees did not base the Rule on science. Instead of validating or contradicting the comprehensive science contained in the *Connectivity Report*, HQ employees dismissed much of the science in that report. HQ employees suppressed the scientific opinions of career EPA employees - EPA has qualified expert scientists on staff at HQ and across the country, but this expertise was suppressed and dismissed. Because of this, EPA's career employees were not given the opportunity to do their best work or contribute their expertise to the development of the Rule. There was no honest investigation, no commitment to the evidence, no culture of robust scientific inquiry and discussion, and no transparency. These HQ employees have suppressed evidence, misrepresented data, exaggerated uncertainties, and let perceived policy implications improperly override undisputed scientific conclusions. This case is *not* one of a difference of personal views: the overwhelming number of former and current agency personnel, together with the SAB and independent scientists, all agree that the HQ employees improperly rejected science when finalizing the WOTUS Rule.

Thank you for your attention to this important matter. The WOTUS Rule has the potential to impact human health and the environment significantly, and as such must be based on the best available science. Instead, HQ employees politicized the agency's analysis and undermined the culture of scientific integrity within EPA. Failing to take action in this matter will show that EPA has abandoned all pretense of making science-based decisions, which is counter to its mission of protecting human health and the environment.

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[42] *Id.*

[43] Note that PEER has requested these documents through FOIA, but has yet to receive them.

Sincerely,

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and on behalf of 9 additional federal employees, including current employees