



September 27, 2017

Ms. Donna Downing
Office of Water (4504–T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW.
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2017-0203; Definition of “Waters of the United States” —Recodification of Pre-Existing Rules

Submitted electronically on <https://www.regulations.gov>

Dear Ms. Downing,

Public Employees for Environmental Responsibility (PEER) is a Washington D.C.-based non-profit, non-partisan public interest organization concerned with honest and open government. Specifically, PEER serves and protects public employees working on environmental issues. PEER represents thousands of local, state and federal government employees nationwide. Many of our clients have serious concerns about the proposed definition of “waters of the United States” (WOTUS). Our comments are set forth below.

Background

In the implementation of the federal Clean Water Act (CWA), the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) assert jurisdiction over not just navigable waterways (those waters capable of being used by vessels for interstate commerce), but also tributaries to these waters, and wetlands adjacent to these waters. In addition, the agencies assert jurisdiction over some isolated wetlands and waters – that is, waters that are not physically connected to the navigable waterways, but having a significant nexus to navigable waters. In 2005, the Supreme Court heard a case challenging the agencies’ jurisdiction, and the Justices could not come to a majority decision. Instead, they developed two alternative tests to determine whether a wetland or water was jurisdictional under the CWA, or a “water of the United States:” (WOTUS). The decision did little to clarify matters, and on May 27, 2015, after extensive scientific review and a massive public comment process, the Corps and EPA issued the Clean Water Rule to address the uncertainties. The Rule was supposed to take effect on

August 28, 2015, but 13 states filed suit to stop it, including Oklahoma, led by then-Attorney General Scott Pruitt. Ultimately, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay, and the Clean Water Rule was never fully implemented.

On February 28, 2017, President Trump signed an Executive Order (EO) ordering the EPA and Corps to review the definition of WOTUS.¹ The President's EO made it clear that he wanted jurisdiction over WOTUS severely curtailed. On July 27, 2017, EPA Administrator Scott Pruitt, and Douglas Lamont, Acting Assistant Secretary of the Army for Civil Works, signed the proposed rule repealing the Clean Water Rule. The agencies also issued an accompanying economic analysis justifying the repeal.²

EPA and the Corps are implementing the Executive Order in two steps, allegedly to provide certainty to the regulated community and the public while the agencies develop a revised definition of "waters of the United States."³ Step 1 proposes to repeal the 2015 Clean Water Rule. Step 2, according to the EO, will propose a new definition of WOTUS consistent with Justice Scalia's definition in his plurality opinion for the *Rapanos* Supreme Court case. Specifically, the word "waters" in "waters of the United States" will be re-defined to include only "relatively permanent, standing or continuously flowing bodies of water"—that is, oceans, 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."

PEER's comments focus on both the proposed repeal (Step 1) and the imminent revised definition of WOTUS (Step 2). Although the Federal Register notice is limited to the repeal of the 2015 Clean Water Rule, EPA has inextricably tied the repeal to the Step 2 redefinition.⁴ Therefore, we find it impossible to comment on the proposed repeal of the Clean Water Rule in a vacuum. Our detailed comments are set forth below.

Economic analysis used to justify repeal is flawed

When the 2015 rule was finalized, it was accompanied by an economic analysis to assess the costs and benefits of the rule as required by law. The economic analysis associated with the proposed repeal is markedly different than the one developed for promulgation of the same rule.

¹ <https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

² <https://www.epa.gov/wotus-rule/economic-analysis-proposed-definition-waters-united-states-recodification-pre-existing>.

³ 82 Fed. Reg. 34899 (July 27, 2017): (Proposing to "re-codify the regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, the states, agency staff, and the public.")

⁴ *Id.* ("In a second step, the agencies will pursue a notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of 'waters of the United States'"); *id.* (the agencies "are publishing this proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of 'waters of the United States'"); *Id.* ("This rulemaking is the first step in a two-step response to the Executive Order, intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to engage in the second step: A substantive review of the appropriate scope of 'waters of the United States'").

Specifically, in the new economic analysis, the agencies argue that failure to implement the rule will avoid the costs associated with the rule, and the benefits from the rule that will never occur because of its repeal will be forfeited, or forgone. A comparison table is shown below:

Estimated Costs/Benefits of Section 404 of the CWA under the 2015 Clean Water Rule vs. the Proposed Repeal

	Annual Costs vs. Benefits of the 2015 Clean Water Rule (FY16 \$millions)		Annual Avoided Costs vs. Forgone Benefits of Proposed 2017 Repeal (FY16 \$millions)	
	Costs	Benefits	Avoided costs	Forgone benefits
CWA 404 Permit Application	\$29.4 - \$82.2	\$313.5 - \$513.2	\$29.4 - \$82.2	Not quantified
CWA 404 Mitigation - wetlands	\$55.7 - \$255.4		\$55.7 - \$255.4	
CWA 404 Mitigation - streams	\$23.3- \$46.2	Not quantified	\$23.3 - \$46.2	Not quantified
TOTAL	\$108.4 – \$383.8	\$313.5 – \$513.2	\$108.4 - \$383.8	\$0 + \$B

*\$B is a stand-in for the unquantified benefits.

The difference between the economic analysis associated with the 2015 Clean Water Rule and the analysis for the proposed repeal is simple: the agencies zeroed out all benefits associated with wetlands protection in the most recent economic analysis. They claim the justification for zeroing out the benefits is due to the “uncertainty” associated with the willingness to pay (WTP) studies, “because public attitudes toward nature protection could have changed.”⁵ Indeed, public attitudes have changed. In the economic analysis associated with the 2015 Clean Water Rule, the agencies stated, “However, since the early 1990s [when the WTP articles were published] there may also have also been other changes such as awareness of wetland services and changes in income that could *increase* WTP” (emphasis added).⁶ In 2015, EPA and the Corps acknowledged that public attitudes would likely lead to an increase in WTP; however in 2017, under the Trump Administration, this measure is suddenly too speculative to be of any use. Specifically, the agencies now state that because of the age of the studies used in the 2015 Rule, and because of the uncertainty of how the states will react to the repeal, the uncertainty is too large to include any benefits at all.

⁵ “Economic Analysis for the Proposed Definition of ‘Waters of the United States’ – Recodification of Pre-existing Rules,” pp. 8-9.

⁶ https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf, p. 45.

The entire economic analysis is fatally flawed, as it does not comply with Executive Orders and agency directives; it ignores current WTP studies; it does not consider the best scientific data; it ignores valid economic theories; and it was politically driven. Each of these matters is discussed below.

The economic analysis does not comply with Executive Orders and OMB Circular: In the economic analysis accompanying the proposed repeal, the agency states that it considered Executive Orders (EO) 12866 and 13563, OMB Circular A-4, and the EPA’s “Guidelines for Preparing Economic Analyses.”⁷ The agencies were required to conduct this analysis as the WOTUS rulemaking includes “significant regulatory actions.”⁸ The current economic analysis supporting the proposed repeal does not comply with these three directives.

EO 12866 states that the “American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society...”⁹ The Clean Water Rule of 2015 did precisely this: it protected the health, safety and environment of the American people, while also providing an economic benefit. The “costs on society” are more than the monetary costs of complying with a permitting scheme. They must include the costs to society of *not* imposing the regulation proposed to be repealed, including the costs associated with purifying drinking water, preventing flooding, and maintaining fisheries and wildlife habitat. In this case, the agencies did not consider the costs on society of repealing the Clean Water Rule and re-defining WOTUS.

EO 12866 also requires federal agencies to only promulgate regulations required by law, necessary to interpret the law, or are made necessary by compelling public need. Furthermore, when deciding whether to regulate, the agencies must consider “all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”¹⁰ Finally, agencies must “base [their] decisions on the best reasonable obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulations.”¹¹ The proposed repeal of the 2015 Clean Water Rule is not consistent with these parameters. The repeal is unnecessary - there is no compelling public need, and the courts are in the process of interpreting the legality of the stayed rule. Moreover, in their proposed repeal, the agencies are ignoring the best available scientific, technical, and economic information (explained in more detail, below).

⁷ EPA-HQ-OW-2017-0203-0002 (June 2017), <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0002>.

⁸ Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

⁹ Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

¹⁰ *Id.*

¹¹ *Id.*

Executive Order 13563 was issued in order to improve regulation and regulatory review.¹² It reiterates that a key goal of the regulatory system is protecting public health, welfare, safety, and our environment while achieving economic growth and innovation. To do so, it must be based on the best available science.¹³ Again, the proposed repeal is not based on the best available science; in fact, it ignores both the science and the economics of wetland protection.

OMB Circular A-4 provides guidance to agencies attempting to implement Executive Order 12866's mandate to create either a cost-effectiveness analysis (CEA) or a benefit-cost analysis (BCA) or both.¹⁴ In preparing a BCA/CEA, the Circular mandates that agencies consider a wide range of values. Those include easily monetized ones, such as the cost to implement the rule on private industry, and goods for which there is no market price, either because the market does not value it properly or because it cannot be bought or traded. If possible, the agencies should also consider other values, like a person's aesthetic valuation of a resource. All of these various values must be considered across time. The economic analysis conducted by the agencies in support of the proposed repeal did not consider *any* of these other values.

The economic analysis does not use best available science and data. Potential costs associated with an expansion of jurisdiction include: 1) costs to the regulated community (*e.g.*, development of plans, permit applications, mitigation costs, penalties for violating the laws); and 2) costs to the regulators (*e.g.*, employees necessary to review permit applications, issue permits, conduct inspections, etc.). Potential benefits associated with an expansion of jurisdiction include: 1) avoided costs of environmental damage (*e.g.*, adverse impacts to fisheries, water quality, drinking water and recreational sites); and 2) direct values and services of the natural resources (*e.g.*, flood storage and water purification provided by wetlands, recreational values, fishing and hunting, etc.). In the 2015 Rule, EPA and the Corps used a WTP analysis to look at benefits, in order to capture the inherent value of the wetlands.

The agencies fault the 2015 economic analysis due to the age of the WTP studies used. They state, "The studies were published between 1986 and 2000, although the agencies attempted to find more recent studies. More recent wetland studies were not available. The age of these studies introduces uncertainty, because public attitudes toward nature protection could have changed."¹⁵ While it is true that there are very few recent WTP studies on these types of wetlands, there are some. Specifically, a 2014 paper found that there is a "mean aggregate willingness to pay of \$105 billion" for large-scale wetland restoration in coastal Louisiana alone.¹⁶ Another 2011 study found that the "conservative

¹² Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

¹³ *Id.*

¹⁴ https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/

¹⁵ Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, pp. 8-9.

¹⁶ Daniel R. Petrolia, Matthew G. Interis, and Joonghyun Hwang, *America's Wetland? A National Survey of Willingness to Pay for Restoration of Louisiana's Coastal Wetlands*, Marine Resource Economics 29, no. 1 (March 2014): 17-37.

aggregate ... estimates were ranging from \$0.4 billion to \$2.3 billion for WTP” to preserve wetlands.¹⁷ The economic analysis conducted for the proposed repeal completely ignored these recent WTP studies and it appears the agencies did not even bother to try finding such research.

WTP is an inherently flawed measure. In the field of economics, the question of how to properly determine the value of a good or service has been hotly debated since the field’s foundation. Assigning value is an important aspect of economic function, as it allows us to directly compare different (and sometimes abstract) goods and services through the medium of money. Because “value” is often subjective, and depends on the varying tastes of consumers, there is little consensus on what the conceptually “proper” value of something is or how that value is determined. As a result, economists have proposed several competing methods for establishing value, each with its own strengths and weaknesses. Of these value theories, WTP has emerged as a frequently used method due to its wide potential for application and adaptability to different contexts. However, as described below, it has inherent limitations, and, as described in the next section, if the agencies determined not to use this theory, it should have looked at ample other types of evidence regarding the value of wetlands.

WTP is an umbrella term that covers three distinct subtypes: revealed WTP (using purchasing behavior to determine the value of a particular good), imputed WTP (determining the value of something by how much someone is willing to pay to prevent the negative consequences of its absence), and expressed WTP (surveying recipients of a good or service to determine how much they are willing to pay). The biggest limitation of using WTP is that you are not actually measuring the value of the environment and/or the goods and services it provides; you are measuring what people *think* the value of the environment is and using that as a proxy. This valuation method actually leads to *underestimations* of the value of a clean environment, as most people do not have the financial and environmental knowledge to understand the full benefits of the environment and then price it accordingly.

Even if people responding to WTP surveys do fully understand the benefits of preserving wetlands, they will answer how much they are willing to pay in terms of their own income, not in absolute terms. WTP studies consistently show that WTP rises with income. This means that WTP is a function of income, not just of how much the environment is worth to someone.¹⁸ Therefore, depending on the income brackets of the respondents, WTP studies can *drastically undervalue* the worth of the environment.

¹⁷ Kim, T-G., and Petrolia, D.R. 2013. Public perceptions of wetland restoration benefits in Louisiana. ICES Journal of Marine Science, 70: 1045-1054.

¹⁸ See, e.g., Tyllianakas, E. and D. Skuras, *The income elasticity of Willingness-To-Pay (WTP) revisited: A meta-analysis of studies for restoring Good Ecological Status (GES) of water bodies under the Water Framework Directive (WFD)*, J. of Envir. Management, Vol. 182, pp. 531-541 (2016); Baumgartner, S. et al., *Income Equality and Willingness to Pay for Environmental Public Goods*, J. of Envir. Economics and Management, (forthcoming).

The economic analyses for both the 2015 Clean Water Rule and the proposed repeal rely on WTP studies. While flawed, they are instructive. However, rather than attempt to improve the accuracy of the 2015 economic analysis, the proposed repeal simply excludes the benefit calculations, which results in an even more inaccurate analysis. The economic analysis of the 2015 Clean Water Rule produced an outcome that is generally correct but perhaps lacking in precision, while the new analysis gives the plainly false impression that the economic benefits of the rule are so insignificant as to be excludable. In short, the new economic analysis is not based on empirical evidence and appears to serve as little more than a hastily cobbled together argument to support a desired result negating the value of wetlands.

Economic analysis should have examined services provided by wetlands and isolated waters. There are a plethora of recent scientific articles about the value of the services provided by wetlands.¹⁹ Some value wetlands as high as \$241,000 per acre per year.²⁰ Another article, specifically discussing the values of prairie potholes (wetlands that would undoubtedly be considered non-jurisdictional under the proposed Step 2 redefinition), states that there would be a net loss of \$3.4 billion over the next 20 years for just three services: carbon sequestration, reduction in sedimentation, and waterfowl production.²¹ The economic analysis conducted by the agencies did not even attempt to quantify the wetland services based on this research. By ignoring the actual monetary value of the services wetlands provide, the agencies are not using the best available science in its decision-making.

The economic analysis is devoid of any numbers or meaningful analysis. The economic analysis supporting the proposed repeal fails to use any numbers to discuss the distributional effects of the costs and outcomes. For example, the report spends four paragraphs speculatively discussing how the Clean Water Rule *may* lead to unemployment and associated health consequences, while devoting just two sentences to the idea that there may be job gains in some industries. The net effect of this approach is essentially to push a specific narrative about how repeal will help poorer people and increase employment. Unsurprisingly, this narrative does not hold up under review.

The economic analysis describes not only what costs would be avoided from repealing the Clean Water Rule, but also how those costs are distributed across the population. Among the claims made are that the costs of the Rule may be regressive (the highest burden on the lowest-income people) due to an increase in food costs, and that compliance costs would lower labor earnings and returns to capital. The analysis provides

¹⁹ See e.g., Barbier EB, Georgiou IY, Enchelmeyer B, Reed DJ (2013) The Value of Wetlands in Protecting Southeast Louisiana from Hurricane Storm Surges. PLoS ONE 8(3): e58715; Jenkins, W.A., *Valuing ecosystem services from wetlands restoration in the Mississippi Alluvial Valley*, Ecological Economics 69 (2010) 1051–1061; Batker, D., de la Torre, I., Costanza, R., Swedeen, P., Day, J., Boumans, R., & Bagstad, K. (2010). *Gaining Ground: Wetlands, Hurricanes, and the Economy: The Value of Restoring the Mississippi River Delta*. Earth Economics Project Report.

²⁰ Kozak, J. et al, *The geography of ecosystem service value: the case of the Des Plaines and Cache River wetlands, Illinois*, 31(1) Applied Geography 303-311 (2011).

²¹ Gascoigne, W.R., et al., *Valuing ecosystem and economic services across land-use scenarios in the Prairie Pothole Region of the Dakotas, USA*, Ecological Economics, 70 (2011) 1715-1725.

only vague theoretical evidence for these claims with *no* associated numbers, meaning there is no discussion of the magnitudes of the suggested outcomes that would help in determining the overall net effect. The effect of these claims is to incorrectly and deceptively portray the Clean Water Rule as disproportionately burdening lower-income people, despite it being an established fact that it is disproportionately lower-income individuals who consistently bear the costs of water pollution.²²

For example, the analysis argues that because agricultural businesses will be affected by the new costs of compensatory mitigation, these costs will be passed on to consumers in the form of higher prices. Since lower-income people spend a larger portion of their income on food, the agencies argue, this price increase will affect lower-income people the most. Because of this, the analysis claims that the costs of the Clean Water Rule may end up being regressive. No numbers or citations of studies that have researched this relationship are provided, so it is unclear how big of an effect this will be, if it is an effect at all. While it is true that businesses tend to pass on higher production costs to consumers in the form of higher prices, it is highly unlikely that the compliance costs of the Clean Water Rule will cause a significant increase in food prices. The main reason for this is the relative size of the compliance costs compared to the output of the agriculture industry. According to the numbers provided by the EPA analysis, the estimation of costs of compliance in the high-end scenario is about \$476 million. By comparison, the Department of Agriculture's Economic Research Service estimates that farming output is worth about \$137 billion.²³ That means that even if the costs of the Clean Water Rule end up being the highest estimate, and if the totality of those costs falls solely on the agriculture industry (a highly unlikely scenario), the cost increase that the industry faces will be .003% of its output. If we expand that from just farm output to the food industry as a whole (food that comes off the farm and goes to grocery stores, restaurants, biofuel plants, etc., all of which would be affected by higher food prices), the cost increase is a mere .0005% of the industry's \$992 billion output. In either case, the costs relative to the size of the industry are far too small to cause any significant increase in prices. Furthermore, for prices as a whole to rise, the costs of the Clean Water Rule would have to fall more or less evenly across all agricultural producers. Most agricultural businesses would not be affected by the Clean Water Rule given the small number of newly jurisdictional waters; therefore, it is unlikely that food prices will rise even if certain individual businesses face significant cost increases.

The analysis also argues that regulatory compliance costs will decrease labor earnings and returns to capital. A decrease in labor earnings is unlikely; the compliance costs are so small in comparison to the industry's output that there would be no need for cost-

²² See, Harter, L., et al., *Addressing Nitrate in California's Drinking Water*, University of California - Davis, Groundwater Nitrate Project, Implementation of Senate Bill X2 1, Prepared for California State Water Resources Control Board, March 2012; Morello-Frosch, Rachel, *Discrimination and the Political Economy of Environmental Inequity*, Environment and Planning C: Government and Policy. 2002, Vol. 20, pp. 477-496; Torras, M., Boyce, J. K., *Income, inequality, and pollution: a reassessment of the environmental Kuznets Curve*, Ecological Economic, Vol. 25, Issue 2, May 1998, pp 147-160.

²³ <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/>

saving measures like reduced wages. Even if individual businesses were drastically affected, the market as a whole would keep wages in place.

Given these findings, it seems more likely that the small burden that would result from the Clean Water Rule would not fall disproportionately on lower-income Americans. The two aspects that would be most likely to affect lower-income Americans, food prices and labor earnings, are unlikely to change due to the size of the costs relative to output and the way markets work. Meanwhile, the one aspect that is likely to change (though by a small amount) is returns to capital, which affects higher-income Americans (the wealthy investors who actually own the land and factories). Therefore, it would seem that the costs of the Clean Water Rule, small as they are by comparison to output, would mostly fall on the higher-income population through reduced returns to capital, making the costs of the Clean Water Rule progressive (rising with income). The corollary of this is that rescinding the Clean Water Rule would mostly benefit the higher-income population, as they would be the ones who avoid the costs of the rule. Therefore, the distribution of costs is essentially the opposite of what the economic analysis suggests.

The analysis of the distribution of the benefits that would be forfeited if the Clean Water Rule were ultimately repealed is also flawed. The agencies accurately note that lower-income and minority populations are the most affected by pollution, and as such would forego the most benefits if the Rule is repealed. However, the agencies then make the more dubious claim that it is impossible for us to determine the distribution of health outcomes of the Clean Water Rule because there may be a gentrification effect that deprives the lower-income population of the benefits. In other words, once water quality improves, higher income people would be willing to move into previously low-income areas, thus forcing lower-income populations away from the new benefits. The purpose of this second claim is to obfuscate the reality that lower-income and minority populations will gain the most from the Rule, and will therefore have the most to lose from its repeal.

The analysis accurately claims that the baseline incidence of negative health outcomes is greater among the lower-income and minority populations. This occurs not only because these populations are more likely to be polluted, but also because of greater susceptibility to disease due to physiology and community-wide health issues and a higher level of pre-existing conditions. Though there are no explicit details about how the newly protected waters are distributed with regards to population groups, the fact that lower-income and minority populations currently suffer the most from environmental pollution means that these are the populations that will most likely benefit from the Clean Water Rule. Accordingly, these populations have the most to lose from the Rule's repeal. Given this fact, the distribution of the foregone benefits seems to be tilted heavily towards lower-income and minority populations, with higher income populations unlikely to forego benefits due to their unlikelihood of being the main beneficiaries of the Rule in the first place.

The analysis correctly claims that in a normal economy, increased regulations do not change the overall number of jobs, but instead lead to a different distribution of jobs. However, the analysis then makes the misleading claim that there may be persistent

employment loss in areas with weak labor markets. These claims regarding employment loss are overstated and inaccurate, intentionally designed to obscure the effects of repealing the Clean Water Rule. The analysis latches onto the negative possibilities without any mention of magnitude or any empirical evidence, while completely omitting the positive possibilities, which results in an analysis extremely biased and utterly useless.

The analysis devotes several paragraphs to discussing research on how unemployed workers have shorter life spans and suffer from more health problems. What the analysis does not do is reveal that these effects are conditional on job losses actually happening in significant numbers. This section offers *absolutely no insight* into how labor markets will be affected by the repeal of the Clean Water Rule, and misses the point entirely. While unemployment leads to worse health, it is also the case that worse health leads to unemployment. If you are frequently unable to work because of sickness, the kinds of jobs you can have and the number of hours you can work are severely limited. Obviously, people living in places with unclean water sources are more prone to illness; if waters were protected by the Clean Water Rule, people drinking that water would be healthier and better able to work. This would not only lead to higher wages and earnings for workers, but it would also improve the income for businesses located in those areas because they would be getting more work out of a healthier work force, which would create more jobs and possibly lure more businesses in. Since we know that lower-income and minority populations are the most affected by water pollution, it is clear that these populations would benefit tremendously from the Clean Water Rule in terms of health and employment.

The agencies portray the Clean Water Rule as having no clear benefits, but numerous dire risks, therefore justifying its repeal. The analysis claims that the repeal of the Clean Water Rule will decrease administrative and business costs by reducing uncertainty, which is incorrect; it claims that by repealing the Rule, lower-income populations would avoid higher prices and lower labor earnings, when in reality it is actually business and capital owners who will avoid the costs of the Rule through its repeal; it incorrectly claims that it is impossible to tell who stands to lose the most potential benefits of the Clean Water Rule, which is meant to dodge the reality that lower-income and minority populations have the most to benefit, and therefore the most benefit to lose from the repeal; it suggests that poorer and more rurally isolated communities face a serious unemployment threat, which overstates the potential for this effect and completely ignores the likely positive employment outcomes.

The economic analysis spins the story that if the Clean Water Rule goes into effect, the burden of the new regulations will cause companies to close up shop and cut jobs in the poor rural towns that have already been hit hard by the recent recession, exacerbating unemployment and forcing the population to deal with worse health and higher food prices. What this narrative attempts to hide is the alternative scenario where a poor community has its water cleaned up, making the population healthier and more able to work, which attracts new businesses to the town and the water, creating more jobs and raising income, all of which comes at the cost of slightly higher regulatory costs and

slightly lower profits for some business and capital owners. The blatant false narrative is unsupported both by the facts, and by the science.

The economic analysis was politically driven. Agency employees with first-hand knowledge of the development of the economic analysis state that “EPA career staff were verbally directed by political staff to... simply [delete] the majority of the benefits of the rule.”²⁴ One economist stated that EPA “monkeyed” with the 2013 estimates to ensure that the avoided costs were higher than the foregone benefits.²⁵ Indeed, there can be no other explanation for the bizarre economic analysis accompanying the proposed repeal. The reduction of benefits associated with wetland protection to essentially zero flies in the face of every scientific and economic article written about wetlands valuation. Moreover, this deletion of economic values of wetlands is directly contrary to the comprehensive analysis, and the legal record, put forth by the agencies in 2015.

Conclusion on the economic analysis associated with the repeal. The agencies relied on an economic analysis that failed to: 1) comply with applicable EOs and the OMB circular; 2) review recent studies on WTP (while simultaneously dismissing the older studies for being dated); 3) apply the science on the actual value of wetlands from services provided; 4) examine both sides of the impacts to jobs, food prices, and health benefits, to make it seem like low-income communities would be more impacted by the Clean Water Rule; and 5) inexplicably deleted all values associated with wetlands preservation for political reasons. As such, the economic analysis is fatally flawed, as is the justification for the repeal that relies on this economic analysis.

Repeal of the 2015 Clean Water Rule will not eliminate confusion among the regulated community.

By repealing the 2015 Rule, the agencies are not “establish[ing] a clear regulatory framework that would avoid ... inconsistencies, uncertainty and confusion.”²⁶ In fact, the reason the agencies promulgated the 2015 Clean Water Rule was in order to eliminate confusion existing around the country. Specifically, the 2015 Rule: 1) “reduces existing confusion and inconsistency regarding the regulation of ditches”; 2) eliminated the parenthetical “other than waters that are themselves wetlands” in the description of “adjacent wetlands” because the phrase was “unnecessary and confusing”; 3) identified all erosional features as non-jurisdictional to “avoid confusion”; and 4) created a specific exclusion for stormwater control features to “address... confusion.”²⁷ By returning to the pre-2015 Clean Water Rule era, the confusion that existed will continue to exist. While the agencies claim that this confusion will be eliminated once Step 2 of this process is

²⁴ https://www.epw.senate.gov/public/_cache/files/2/e/2e67da92-19ad-4ae4-b4bb-c07c99d4c779/E2981B00AD67A8E6E5C3A454B93EF850.carper-questions-epa-on-verbal-direction-to-delete-economic-data-in-clean-water-rule-rewrite.pdf

²⁵ <https://www.bna.com/epa-water-rule-n73014462367/>

²⁶ 82 Fed. Reg. 39403

²⁷ <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>

promulgated, the timing of such a regulatory change is speculative and its currently unknown provisions may well not reduce confusion. It is inevitable that the agencies will be sued once they attempt to delete federal protections for 60% to 90% of wetlands in the United States, and therefore relying on this speculative future regulation is contrary to public interest and indefensible in justifying the current rulemaking.

The states and tribes will be adversely affected by the proposal to repeal the 2015 Clean Water Rule and replace it with a Scalia-type approach

If the definition of WOTUS changes, the implementation of various sections of the CWA would change as well. Streams and wetlands that used to be jurisdictional (and therefore used to require a CWA permit from the Corps or EPA to discharge pollutants into them) would no longer be considered a WOTUS; therefore discharges into them would no longer require a permit. The sections of the CWA analyzed in both the 2015 Clean Water Rule and the proposed repeal include:

- 1) CWA Section 303, which includes development of state water quality standards, monitoring and assessment of water quality, and development of total maximum daily loads (TMDLs).
- 2) CWA Section 311, which addresses oil spill prevention and preparedness. These requirements apply to facilities that produce or store large quantities of oil.
- 3) CWA Section 401, which gives states, tribes, and interstate agencies the authority to review federal permits or licenses that may result in a discharge to waters of the United States, in order to certify whether such discharges will meet applicable water quality standards and pertinent state or tribal laws.
- 4) CWA Section 402 (point sources), the National Pollutant Discharge Elimination System (NPDES) program, permits discharges to WOTUS from point sources (*e.g.*, pipes).
- 5) Other CWA Section 402 provisions (discharge of stormwater, concentrated animal feeding operations (CAFOs), and pesticide application), which involve discharging into WOTUS.

The preamble of the proposed Step 1 rule indicates that this Administration wants 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.”²⁸ However, by eliminating federal jurisdiction from many wetlands and waters, and allowing disparate state protection schemes, states downstream of more lax states will have reduced drinking water protection and flood control. Moreover, elimination of federal jurisdiction will reduce monies from the federal government to the states for catastrophes such as oil

²⁸ 82 Fed. Reg. 34902

spills. If waters are no longer jurisdictional under the federal Clean Water Act, federal money will not be available to restore/clean them. Finally, many states do not have the resources to augment their wetland protection laws; where the federal government once helped protect state resources, this protection will be removed. If the agencies' goals are to eliminate confusion, relying on a patchwork of state and municipal laws to protect wetlands and streams *is not the solution*.

Step 2 of this process, implementing the Scalia reasoning into the definition of WOTUS, is unsupported by science and is contrary to Congressional intent

A 2015 EPA press release on the Clean Water Rule stated "About 117 million Americans - one in three people - get drinking water from streams that lacked clear protection before the Clean Water Rule."²⁹ With repeal of this rule, we lose protections of these streams, and *jeopardize the drinking water of approximately one-third of Americans*. Furthermore, if Step 2 of this process proceeds, and the Scalia definition of WOTUS is implemented, we lose far more protection.

Implementing the Scalia definition would significantly reduce the number of wetlands, streams and ponds that are considered jurisdictional. Some scientists estimate that 60% - 90% (in the arid west) of waters and wetlands would no longer be protected under the Clean Water Act under this definition.³⁰ For example, in Colorado, there are approximately 95,000 miles of streams, but only about 15 miles of those are truly navigable. Under the Scalia definition, most of Colorado's water, together with waters in downstream states, could be at risk from pollution and filling.³¹ Implementation of this definition has been called "the most dramatic reduction in federal protection for streams, wetlands, ponds, lakes and other water bodies in the history of the Clean Water Act."³²

The prospect of such a diminished jurisdictional reach is unimaginable. It would adversely impact much of the nation's fisheries, wildlife habitat, drinking water, and flood control. The societal costs associated with such a change would be astronomical, both from a human health perspective, and from direct costs. Wetlands provide flood protection, water purification, fisheries and wildlife habitat, groundwater recharge, and many other functions. Impacts from increased severity of storms and flooding associated with climate change would be greatly exacerbated with increased wetland filling. Because the Scalia definition, or anything vaguely similar, is not grounded in science or the congressional intent of the Clean Water Act, it would without a doubt end up in litigation.

²⁹ <https://www.epa.gov/newsreleases/clean-water-rule-protects-streams-and-wetlands-critical-public-health-communities-and>.

³⁰ See e.g., <http://news.nationalgeographic.com/2017/03/waters-of-the-us-rule-conservation-colorado/>

³¹ *Id.*

³² <https://thinkprogress.org/waters-of-the-united-states-rule-scalia-trump-rewrite-7327a1343836/>

The repeal is not legally justified as it does not provide a reasoned analysis

Furthermore, through its deceptively faulty economic analyses and vague policy arguments, EPA has failed to provide a reasoned analysis as to why this repeal is justified under the standard put forth by the Supreme Court. According to Scalia's opinion in *FCC v. Fox Television Stations, Inc.*, "the agency must show that there are *good reasons* for the new policy," which EPA has glaringly failed to provide.³³ While EPA does not need to demonstrate that their new policy is *better* than the current WOTUS rule, it must clearly demonstrate that "*there are good reasons for it, and that the agency believes it to be better*," which the conscious change of course adequately indicates."³⁴

In fact, EPA does not address the merits of the 2015 Rule at all, or why it would be better to repeal it, or why the pre-existing regulatory scheme is believed to be better than the 2015 Rule. EPA in fact makes no such claim, but instead relies entirely on the specious claim that returning to the pre-2015 regulatory scheme would avoid uncertainty, due to the uncertain outcome of litigation challenging that rule.

Within EPA's rushed and illogical explanation for the repeal of the WOTUS final rule, the Agency does not explain why a repeal is necessary for the Agency to change its course. That could be achieved through the mere issuance of a new rule to supplant the old one. It appears that EPA is not taking that course, but first repealing the 2015 Rule, in order to remove the scientific record of the 2015 final rule. This way, EPA can avoid having to address why it *believes* that the future Step 2 Rulemaking is a *better* regulatory model to protect the waters of the U.S. as mandated under the CWA than the Rule it is replacing. By issuing this repeal, EPA is seeking to do little more than eradicate the relevancy of the scientific record of the 2015 rule from consideration in its future rulemaking, in order to follow the non-binding plurality opinion of Scalia in *Rapanos*.

EPA's claim that repeal will avoid uncertainty does not withstand scrutiny. Preventing uncertainty was the entire reason that the 2015 rule was promulgated in the first place. The rule provided certainty based on input from numerous stakeholders and contained reams of scientific data to support its justifications. Repeal of the 2015 rule would merely return to the regulatory scheme that was found to be so uncertain that it necessitated litigation before the Supreme Court and a multi-year regulatory review process. Furthermore, this repeal serves as little more than a tool to avoid a Supreme Court ruling on the validity of the 2015 Rule, a decision that would provide certainty about the rule itself. Furthermore, the uncertainty about the 2015 Rule claimed by EPA is a direct result of litigation brought by Administrator Pruitt himself while serving as Attorney General of Oklahoma.

In addition, the claimed uncertainty is entirely speculative, since the 2015 Rule is now stayed and the status quo is the same as what this repeal seeks – implementation of pre-2015 Rule law and policies. This is another indication that the reasons given for the repeal are disingenuous and intended to mask the real intent of dispensing with the 2015

³³ 556 U.S. 502, 515 (2009) (emphasis added).

³⁴ *Ibid.*

Rule in order not to have to confront its scientific basis and relative merits when a new rule is proposed in Step 2.

This proposed rule fails to meet any of the *FCC v. Fox* standards and fails to address the scientific arguments put forth by the agency itself that the 2015 Rule was justified and necessary to resolve any uncertainty.

In addition, the Agency has deceitfully sought to remove extremely relevant economic information from the rule's cost-benefit analysis to meet the political desires of the Administrator and his political appointees.³⁵ Federal courts have long recognized that “[r]easoned decisionmaking can use an economic model to provide useful information about economic realities, provided there is a conscientious effort to take into account what is known as to past experience and what is reasonably predictable about the future.”³⁶ However, the Office of the Administrator has sought to remove this relevant information to support political agendas, basing the repeal on the perceived irrelevance of this cost-benefit data despite such information remaining salient under federal law. The Agency justifies the nullification of data demonstrating WTP for wetlands on the basis that no recent data is available showing the value of wetlands. However, it is exceedingly clear that wetlands – which would be regulated as waters of the U.S. under the 2015 rule – provide clear and concrete financial benefits to the American people. Rather than refute the figures in the 2015 analysis with counter figures or new data, the Agency reduced the economic benefits of wetlands to zero, effectively nullifying an economic analyses that contrary to the political desires of the Office of the Administrator. Research and data does not support the contention that they have no value; wetlands prevented \$625 million dollars in damage during Hurricane Sandy alone – more than the entire cost of implementing the 2015 rule.³⁷ It is evident that the Agency is using such tricks as a way of masking political motivations as “good reasons,” and to avoid a presenting any legitimate reasons that it believes repeal is a better course of action for fulfilling the duties mandated by the CWA – a requirement that the Supreme Court requires for the reversal of an Agency's regulatory scheme.

This proposed repeal does not pass the laugh test for demonstrating why it considers repeal, rather than leaving the 2015 Rule in place, to better fulfill the requirements of the CWA. Instead, it serves merely to remove scientific data from consideration so that the Agency may promulgate a new rule following a non-binding interpretation of Justice Scalia in *Rapanos* without having to refute the voluminous scientific record created for the 2015 rule. Furthermore, as discussed above, it is evident that the agencies are using this repeal as a tool to provide financial benefits to a small number of wealthy dischargers at the expense of the health and well-being of low-income individuals, while making a pseudo-argument that the current regulation is a “regressive” rule.

³⁵ See *Scott Pruitt is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, Coral Davenport and Eric Lipton, NY Times, Aug. 11, 2017, <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html>

³⁶ *American Petroleum Institute v. EPA*, No. 09-1038, (D.C. Cir. 2017), quoting *American Public Gas Ass'n. v. FPC*, 567 F.2d 1016, 1037 (D.C. Cir. 1977).

³⁷ See *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, Narayan, et al. *Scientific Reports* 7, Article number: 9463 (2017), available at <https://www.nature.com/articles/s41598-017-09269-z>

It must also be stated that while President Trump’s Executive Order directed EPA to consider a replacement regulation in line with Scalia’s opinion in *Rapanos*, that interpretation is only a plurality opinion and *not the binding law of the Supreme Court*. While an Executive Order provides direction to the administrative agencies that the President oversees, it is not by itself a legal justification for action unless it is supported by statutory or case law. In short, Executive Orders do not change federal law and to act based solely upon the direction in this Executive Order without legal, scientific and policy justification cannot justify agency action.

If the Agencies proceed with the repeal of the Clean Water Rule, they should begin a Negotiated Rulemaking for Step 2

If the agencies proceed with the repeal of the 2015 Clean Water Rule, regardless of the flawed and illegal reasoning behind it or the vocal public rejection of such a repeal, we request that a Negotiated Rulemaking be utilized for Step 2. Because there is so much at stake here, and so many parties that can be adversely affected (including states, tribes, and Environmental Justice communities) a Negotiated Rulemaking will ensure that a consensus is reached. In fact, the agencies themselves admitted that this topic is of great import when they stated, “The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations on the ultimate regulation.”³⁸

Conclusion

The justification for the proposed repeal of the 2015 Clean Water Rule is not supported by the facts. Moreover, it is not legally justified as it does not provide a reasoned analysis. Repeal of the Rule would not eliminate confusion among the regulated community, and both states and tribes would be adversely impacted by this proposed action. The economic analysis is deeply flawed and politically motivated. Finally, the proposed Step 2 of this process is unsupported by science and contrary to congressional intent, and would be devastating both environmentally and financially to the United States.

EPA Administrator Pruitt directed his staff to delete the benefits of wetlands protection in the economic analysis, and persists in deceiving the public about the Rule. For example, in a public relations video paid for by the National Cattleman’s Beef Association in August of 2017, Administrator Pruitt is seen saying, “...we’re trying to fix challenges from the 2015 rule, where the Obama Administration re-imagined their authority under the Clean Water Act and defined a water of the United States as being a puddle, a dry creek bed, and ephemeral drainage ditches (sic) ...”³⁹ However, the 2015 Clean Water Rule *explicitly* exempts things like puddles and ephemeral drainage ditches from

³⁸ Fed. Reg. page 34902

³⁹ <https://www.youtube.com/watch?v=vTVd54WyhDQ>

jurisdiction.⁴⁰ The misinformation disseminated by Pruitt’s EPA on this matter is disturbing, and only serves to underscore the political motivation behind this proposed repeal.

Thank you for the opportunity to comment.

Sincerely,

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⁴⁰ <https://www.federalregister.gov/d/2015-13435/p-509>; “The following are not waters of the United States...ditches with ephemeral flow...puddles...”