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

Dear Mr. McDavit and Ms. Moyer,

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. We also appreciate some key elements of the proposed rule. Most importantly, the agencies' commitment to protect intermittent streams is crucially important to water quality protection—as EPA's own research has amply demonstrated.

Nevertheless, as we explain in these comments, key elements of the current proposed rule are inconsistent with fundamental principles of administrative law and reflect misunderstandings of the Clean Water Act and the Constitution. Most importantly, the rule fails to address the science of clean water, which ought to be central to any Clean Water Act rulemaking; it misunderstands the federalism model called for by the Clean Water Act and implemented by EPA, the Army Corps, and their state partners; and it is premised on basic misunderstandings of constitutional law.

The proposal also stands in stark contrast with the joint EPA/Army Corps rulemaking that culminated, in 2015, in the Clean Water Rule. Then, 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 agencies' earlier good work.

The Proposed Rule Fails to Address Impacts on Water Quality

In the comments below, we focus primarily on the agencies' distorted federalism and constitutional-law arguments in favor of the rule. Nevertheless, we note at the outset that the rule fails to address its own impacts on water quality, and that this failure violates a fundamental principle of administrative law.

In many cases, the United States Supreme Court and lower courts have cautioned that a rule is arbitrary and capricious if the agency entirely fails to consider an important aspect of the problems the rule seeks to address. *E.g.* *Motor Vehicles Manufacturers' Ass'n of the U.S., Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In accordance with that foundational administrative law principle, the agencies should consider many potential consequences of a Clean Water Act rulemaking, but none is more important than impacts on clean water. Protecting water quality is the core reason for the statute's existence, its most important stated goal, and the central end pursued by its substantive provisions. A legally valid Clean Water Act rulemaking therefore must discuss impacts on water quality—which, as a close corollary, means engaging with the science of water quality protection.

This proposed rule does no such thing. While the agencies acknowledge, as they must, that the rule would remove water quality protections for thousands of streams and wetlands, they have made no attempt to describe where or how water quality would worsen as a consequence of this rule. Nor have they attempted to assess the extent of secondary consequences associated with that increase in water pollution; impacts on drinking water quality, impacts on environmental systems, and impacts on progress toward Congress's codified goals of fishable and swimmable waterways are simply not addressed. Nor have the agencies even attempted to quantify the number of streams or wetlands that would lose protection as a consequence of this rule, or the economic consequences of depriving them of that protection. 84 Fed. Reg. at 4200 (“[T]he agencies are not aware of any means to quantify changes in Clean Water Act jurisdiction that may or may not occur as a result of this proposed rule.”); *id.* at 4201 (noting that the agencies' quantitative cost-benefit analysis leaves out some of the Clean Water Act's most important programs; that analysis also is unavoidably limited by the agencies' professed lack of knowledge of the water bodies that will be affected by the proposed rule).

Equally problematic, and closely related, is the proposed rule's dismissive posture toward water quality science. Prior to the 2015 rulemaking, EPA prepared an exhaustive review of the scientific literature on streams, wetlands, and water quality. U.S. EPA, *CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE* (2015) [hereinafter *CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS*]. But this proposed rule does not mention the central conclusions of that literature review, instead attempting to dismiss it as irrelevant to the questions at hand. See 84 Fed. Reg. at 4176 (claiming that “science cannot be used to draw the line between Federal and State waters”). For the 2015 rulemaking, the

agencies also commissioned a peer review of the scientific basis of the rule. While the proposed rule does briefly mention that peer review, it does so only for the purpose of ripping one conclusion out of context. The agencies focus on the report's discussion of a "connectivity gradient" and argue that this concept provides a basis for excluding ephemeral streams and many wetlands from regulatory protection. 84 Fed. Reg. 4176. They ignore, however, the central conclusion of the report, which was that "the available science supports the conclusion that the types of water bodies identified as waters of the United States in the proposed [Clean Water Rule] exert strong influence on the physical, chemical, and biological integrity of downstream waters." Science Advisory Board Letter to Gina McCarthy, Sept. 30, 2014, at 1.¹

For a statute whose entire structure dictates science-based efforts to protect water quality, this dismissive attitude toward water quality science isn't just a legal flaw; it is absurd. And even if some balancing of water quality protection goals against other goals is necessary, that balancing cannot occur if the agencies make no attempt to measure one side of the scales.

Importantly, this is not the sort of problem that can be fixed in a final rule. As courts have noted, if an agency does not provide an adequate explanation of the basis for a rule in its proposal, then interested parties lack a meaningful opportunity to comment upon that proposal. *U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251-52 (1977). Instead, to promulgate a legally adequate final rule, the agencies would first need to issue a proposal that discusses the rule's impacts on water quality and the scientific basis for those positions. A still-better approach would be to abandon this rulemaking and to simply defend the thorough, and deeply science-based, work the agencies did just a few years ago.

The Proposed Rule Misunderstands Clean Water Act Federalism

Instead of grounding the proposal in concerns for water quality or in science, the agencies have purported to ground it in federalism-related policy concerns² and in law. But these rationales misunderstand the federalism model the Clean Water Act actually calls for, as well as the extent to which practices within the boundaries of federal jurisdiction are consistent with that model.

¹ On the next page, the SAB concluded that:

[t]here is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.

Science Advisory Board, *supra*, at 2. Nowhere does the preamble to the present rule even acknowledge this conclusion, and its only attempt to reconcile its position with this kind of scientific evidence is to argue that the science is not relevant.

² While the agencies claim to ground the rule in federalism, they also assert that "the proposed rule may not have federalism implications." 84 Fed. Reg. at 4202. The agencies cannot have it both ways. And the obvious motivation for this statement—the agencies do not want to discuss the rule's many negative impacts on federalism—does not justify grounding a rule in an obvious untruth.

Federalism, as understood by the authors of this proposed rule, distills to one simple principle: states should have the latitude to allow pollutants to enter more streams and wetlands and to allow more human activities to take place, and infrastructure to be built, in places that flood,³ all without any restraint from the federal government. The rule's understanding of federalism also derives from a recurring assumption, which is that states lack authority over waterways where federal jurisdiction exists. Its authors claim that the rule "is intended to strike a balance between Federal and State waters..." as though these are two separate things, and also claim that limits on federal authority are necessary to "ensur[e] that States retain authority over their land and water resources" and to "restore the authority of States, Tribes, and local governments." 84 Fed. Reg. at 4156, 4169, 4196. But the former principle offers a strange sort of federalism, and it is clearly not the sort of federalism Congress had in mind when it enacted the Clean Water Act. The latter assumption is just plain wrong. In reality, the Clean Water Act envisions a model of collaboration and overlapping authority, and within that model, federal authority often bolsters rather than displaces the authority of states.

The text, structure, and legislative history of the Clean Water Act all are filled with indications that the act's model of federalism is not based on undercutting federal authority. Instead, Congress saw water quality degradation as a "national disaster,"⁴ and it envisioned and specifically called for a strong federal role. The actual statutory text leaves no doubt that Congress wanted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and Congress opened the statute by declaring a series of ambitious "national" water quality improvement goals. 33 U.S.C. § 1251(a). That text also clearly indicates that the federal government would play a foundational role in "comprehensive programs for water quality control." The act begins by requiring EPA to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters." 33 U.S.C. § 1252. And while, as explained in more detail below, Congress provided for state roles in implementing almost every part of the act, it also repeatedly assigned the federal government a backstop role. This is not the language of a Congress that wanted narrow limits on federal authority.

The act's history also makes clear the statute's central emphasis on a strong and comprehensive federal role. In 1972, Congress enacted the Federal Water Pollution Control Act as a direct response to failed efforts to afford states unfettered primacy in the field of water quality protection.⁵ Members debated whether the dire state of water quality arose from a lack of state initiative or shortages of federal funding. But they agreed that the existing, state-centered legal system for protecting water quality was

³ An important point to bear in mind, and one that the proposed rule studiously ignores, is that wetlands and ephemeral streams are, by definition, places that flood. That means a central goal of this rulemaking is to allow more pollutants to be disposed and more structures to be built in places that flood. Some of that activity may include erecting flood control structures, but that is no guarantee, and those structures don't always work. Even when they do work, they often just redirect the flooding to other areas—including places where people may not have prepared for flooding.

⁴ A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972 96 (1972) (Statement of Rep. Jones (Alabama) explaining the need to override President Nixon's veto) ("The price of action is high. But the price of inaction is a national disaster beyond all reckoning.").

⁵ See generally William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972*: Part 1, 22 STAN. ENVTL. L. J. 145, 181 (2003).

dangerously broken and that strong and comprehensive federal protection was necessary. As Representative Gross explained, “through the years the states and the local subdivisions of government, including the municipalities, failed to enforce laws and ordinances in the matter of pollution and especially the polluting of streams. This is where the breakdown really came about.” A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972 349 (1972) (hereinafter A 1972 LEGISLATIVE HISTORY). Or, as another representative more bluntly stated, “[w]e left it to the States, year after year, and we didn’t get a single thing but a bunch of nursery rhymes as to the Constitution, and we didn’t get any clean water until the Federal Government insisted upon it and made some dollars available to the states for that use.”) See, e.g., Water Pollution Control Legislation—1971: Hearings on H.R. 11896, H.R. 11895 before the Committee on Public Works, 92d Cong., 1st Sess. 273 (Rep. Jones). And members of Congress also had ready explanations for the failures of states to provide needed protection. As Minnesota Governor Wendell Anderson explained, in testimony quoted by multiple representatives,

Every governor in the country knows what is the greatest political barrier to effective pollution control. It is the threat of our worst polluters to move their factories out of any State that seriously tries to protect its environment. It is the practice of playing off one State against the other.

1 LEGISLATIVE HISTORY at 452 (Statement of Rep. Reuss).

The response, as member after member emphasized, had to be a strong federal program. As Minnesota Representative John Blatnik, a key sponsor of the House bill, explained, it was “totally restructuring the water pollution control program and making a far-reaching national commitment to clean water.” A 1972 LEGISLATIVE HISTORY, *supra*, at 350. West Virginia Senator Jennings Randolph echoed that theme, explaining how it was “one of the most significant, most comprehensive, most thoroughly debated pieces of environmental legislation ever to be considered by Congress,” and it squarely addressed “the need for strong, uniform, and enforceable standards to improve the quality of our Nation’s waters.”

The authors of the current proposal would ignore all of this legislative history, as well as the statute’s title, text, and structure, and instead would elevate a curious interpretation of 33 U.S.C. § 1251(b) into the act’s central governing principle. But that interpretation ignores basic principles of statutory interpretation and misses the actual meaning of section 1251(b).

Section 1251(b) declares “the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution” and “to plan the development and use... of land and water resources.” In context, and based on the act’s legislative history, the meaning of that language is clear: though Congress wanted a strong federally backstopped program for improving the nation’s water quality, it also wanted states to take the lead in implementing that program.

The statute’s actual text makes that meaning clear. The plain language of section 1251(b) envisions states taking an active role in protecting water quality; the language recognizes state authority to “prevent, reduce, and eliminate pollution,” not state authority to give polluters the green light. Additionally, a foundational statutory

interpretation principle “is that, when reasonably possible, a statute should be so interpreted as to harmonize all its requirements by giving effect to the whole.” *Earle v. Carson*, 188 U.S. 42, 47 (1903). Here, that principle requires harmonizing section 1251(b) with all the other provisions in section 1251 that make unmistakably clear Congress’s goal of national water quality improvement. See 33 U.S.C. § 1251(a).

The entire structure of the statute also reflects this vision of active state involvement within a comprehensive federal program. Every major Clean Water Act program reflects that basic goal. Section 301 flatly prohibits unpermitted discharges of pollutants, but section 402 authorizes states to take over implementation of the National Pollutant Discharge Elimination System, the primary permitting program for pollutant discharges. Section 303 requires the establishment of water quality standards, but actual water quality standards are set by states, and implementation of those water quality standards through total maximum daily loads and water quality planning remains a state prerogative. See *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002). Similarly, while the federal government retains exclusive authority to issue section 404 permits for navigable-in-fact waterways, for the non-commercially navigable waters that are at issue in this rulemaking, states may take over permitting authority. Section 401 also entitles states to require any recipient of a federal discharge permit, including section 404 permits, to comply with conditions necessary to protect state water quality. In practice, states routinely use section 401 to assert their authority over activities subject to federal permits. See Dave Owen, *Regional Federal Administration*, 63 UCLA L. Rev. 58, 98 (2016).

Additionally, the act’s structure leaves many state activities outside the scope of Clean Water Act regulation, even when the waters at issue are subject to federal Clean Water Act jurisdiction. For navigable-in-fact waters, states retain title to their submerged lands, and for all waterways, states retain public authority over the water itself. See, e.g., *Sturgeon v. Frost*, 139 S.Ct. 1066, 1074 (2019). States use that authority to allocate water use rights; indeed, most water rights are associated with waterways subject to federal Clean Water Act jurisdiction. See, e.g., Theodore E. Grantham & Joshua H. Viers, *100 Years of California’s Water Rights System: Patterns, Trends and Uncertainty*, 9 ENVTL. RES. LETTERS 084012 (2014) (mapping water rights in California; notably, most if not all of those rights come from waterways traditionally subject to Clean Water Act jurisdiction). Occasionally Clean Water Act-based water quality standards do affect the allocation of water rights, but when that happens, the effect is often to empower states against the federal government, not to undercut their authority. See, e.g. *United States v. State Water Resources Control Board*, 227 Cal. Rptr. 161 (Cal. Ct. App. 1986) (upholding state authority to require a federal agency to comply with water quality standards).⁶

Similarly, state and local governments do not lose land use planning authority just because the lands at issue contain jurisdictional waters. State land use authority over adjacent uplands is unaffected by the Clean Water Act, and while federal permits are necessary for filling jurisdictional waters, those permits are routinely granted for land uses that local governments have authorized—and are often granted subject to

⁶ Of course, federal water quality regulation also can increase the value of state-law water rights by improving the quality of the allocated water.

compensatory mitigation and other permitting requirements that the states help craft. *Regional Federal Administration, supra*, at 98-99, 103-04, 113-16; RYAN W. TAYLOR, FEDERALISM OF WETLANDS 88 (2013) (noting that every year, the federal government issues thousands of permits to fill wetlands). Finally, states retain the ability to enact laws that are more protective of water quality than the Clean Water Act. See *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 723 (1994) (Stevens, J. concurring).

These features of the statute thoroughly undercut the premise, which recurs through the proposed rule and its surrounding rhetoric, that limits on federal authority are necessary to “restore” state authority. See 84 Fed. Reg. at 4196. That authority has intertwined and coexisted with federal authority all along, just as Congress wanted. Indeed, one of the most striking lessons for those of us who have researched Clean Water Act federalism is the extent to which federal and state authority are symbiotic, with federal Clean Water Act requirements providing the foundation upon which states build their own regulatory programs. See *Regional Federal Administration, supra*, at 113-16. As summarized by the table below, federal and state authority are so heavily intertwined that narrowed federal jurisdiction will often undercut, not expand, the authority of the states. Only where states wish to allow increases in polluting activities—in other words, only where they wish to act contrary to the Clean Water Act’s reason for existence—does Clean Water Act jurisdiction undercut their authority, and even then, states do retain some flexibility to act.

Table 1: Comparison of state authority for federal jurisdictional waters and non-federal jurisdictional waters.

State Authority for Jurisdictional Waters	State Authority for non-Jurisdictional Waters
- States can regulate industrial, municipal, and stormwater pollutant discharges	- States can regulate industrial, municipal, and stormwater pollutant discharges
- States can limit discharges of dredged or fill material	- States can limit discharges of dredged or fill material
- States can decide the extent of regulation of non-point source pollution	- States can decide the extent of regulation of non-point source pollution
- States can use section 401 authority to protect state water quality from activities subject to federal permitting	- States do not have section 401 authority.
- States can rely on federal regulation for protection from out-of-state pollutant discharges	- States do not have federal protection from out-of-state pollutant discharges
- States can establish pollution-control requirements that go beyond federal requirements	- States can establish pollution-control requirements that go beyond federal requirements

- States can allocate and regulate water use rights	- States can allocate and regulate water use rights
- States can regulate land uses, including authorizing land uses that involve filling waters	- States can regulate land uses, including authorizing (in collaboration with federal authorities) land uses that involve filling waters
- States cannot allow unpermitted releases of pollutants into waters	- States can allow unpermitted releases of pollutants into waters

The act’s legislative history demonstrates that this cooperative federalism model was no coincidence, and that Clean Water Act federalism already is functioning as Congress intended. In the debates leading up to the 1972 Federal Water Pollution Control Act, members repeatedly stressed the important roles states would play in implementing the regulatory regime, but the basic concept was to “engage[] all levels of government... in a concerted national effort to cleanse our water.” A 1972 LEGISLATIVE HISTORY, *supra*, at 218 (Sen. Eagleton).

Similarly, the 1977 amendments affirmed this commitment to cooperative federalism. By 1977, jurisdictional disputes had brought increased prominence to questions about the Clean Water Act’s jurisdictional scope. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135-39 (1985) (summarizing legislators’ discussions of these issues). The House of Representatives’ bill would have responded to that debate by limiting federal authority. Under the House version, the Army Corps of Engineers and EPA would still permit fills in larger waterways, but regulatory protection of tributary waterways would have been subject to state discretion, without any federal involvement unless a state governor formally agreed that federal regulation was appropriate. See H.R. 3199, 95th Cong., 1st Sess. 17 § 16(f) (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra*, at 1158. The Senate bill, meanwhile, maintained the full jurisdiction established by EPA, the Army Corps, and the courts, while also including multiple provisions designed to streamline permitting, and, importantly, allowing states to assume responsibility for permitting fills in waterways that were not navigable-in-fact. See S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra*, at 708.

The conference members chose, and Congress enacted, the Senate’s approach. See 33 U.S.C. § 1344. In debates over the conference bill, member after member emphasized the importance of preserving a broad jurisdictional scope while giving states the option (which members assumed the states would exercise) of leading implementation. Senator Edmund Muskie, for example, praised the bill for “extend[ing] our pollution control capability to the limits of the resource jurisdiction of the United States,” and “maintaining the full scope of Federal regulatory authority,” while also providing for “the substitution of adequate state programs.” 4 LEGISLATIVE HISTORY at 426, 470. Similarly, Senator Howard Baker emphasized the importance of retaining “comprehensive jurisdiction over the Nation’s waters” while also allowing “State permit programs to assume the primary permitting responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters that lie outside the Corps program in the so-called phase I waters.” 4 LEGISLATIVE HISTORY at

523. By design, the system of broad federal jurisdiction—coupled with robust state involvement—remained intact.

In summary, the text, structure, and legislative history of the Clean Water Act all make clear that Congress was not seeking to use definitional terms to limit federal authority. It wanted to empower the federal government to make sure that water quality improved, and it wanted the states to be centrally involved in achieving that national goal. The present administration may not share that goal, but its political whims are no basis for ignoring the intent of the Congresses that enacted and amended the Clean Water Act.

A final point about this federalism structure bears emphasis: it was, and is, true to the Founding Fathers' vision. Though contemporary federalism debates often ignore this fact, the federalist structure of the Constitution was an alternative to the Articles of Confederation, which failed, as the framers recognized, in large part because the federal government was too weak. In the absence of strong federal authority, states faced collective action problems; they enacted legislation that favored their short-term, parochial interests yet threatened the viability of the nation's economy and security. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1440-51 (1987). The framers therefore drafted, and the people adopted, a Constitution that envisioned a stronger federal government, and that would direct both federal and state authority toward the collective good. Federalism, therefore, is not simply about undercutting federal authority. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837-41 (1995) (Kennedy, J., concurring) (noting the federal government's importance to federalism). American constitutional federalism instead envisions the states and the federal government both playing important roles. And while the Founding Fathers may have worried most that states would enact protectionist economic regulation, they surely would have recognized, had they witnessed the modern industrial age, the same potential for interstate harm arising from water pollution, which pays no respect to state lines.

In summary, this rule is not necessary to restore federalism or state authority. It would do nothing of the kind, and instead would undercut the federalism structure that the Clean Water Act constructs, that the states and the federal government have partnered to successfully implement, and that remains true to the Framers' vision. The only authority the Clean Water Act really compromised was the authority of polluters to pollute, and to dress that authority up in the guise of federalism falsely demeans our constitutional structure.

The Proposed Rule Misunderstands the Constitution

Intertwined with the proposed rule's misunderstanding of federalism is a misunderstanding of constitutional doctrine. The agencies insist that the scope of federal Clean Water Act jurisdiction can derive only from Congress's commerce power over navigation, and that this power requires the narrow jurisdictional scope that they propose. See 84 Fed. Reg. 4201 (citing *SWANCC*, 561 U.S. at 168 n.3). But this theory is wrong. The relevant constitutional question is whether the Commerce Clause would authorize jurisdiction under *any* prong of the *Lopez* analysis. And the answer—even if one were to artificially limit the inquiry to Congress's power over channels of interstate

commerce—is that broader jurisdiction would clearly be constitutional. The agencies’ constitutional half-arguments therefore provide no basis for their proposed rule.

In a Commerce Clause analysis, the governing standard comes from *United States v. Lopez*, 514 U.S. 549 (1995), which establishes three bases upon which a law can be upheld. If the law regulates things in interstate commerce, channels of interstate commerce, or activities that substantially affect interstate commerce, then it is constitutional. *Id.* at 558-59.

Federal Clean Water Act jurisdiction, as it has been applied now for decades, easily meets this standard. Water is an item of interstate commerce, as is obvious from daily life, and as the Supreme Court has held. *Sporhase v. Nebraska*, 458 U.S. 941 (1982). And that commerce, as anyone who drinks water is well aware, depends upon water quality. Any water quality protection—including protections of water features, like aquifers, over which the federal government has rarely asserted Clean Water Act jurisdiction—therefore fits well within the scope of Congress’s Commerce Clause authority. And while that may sound like a sweeping assertion, it ultimately is just basic common sense. Natural resources are the foundations of commerce, and no natural resource is more important than water.

Water also is a channel of interstate commerce—indeed, at the time of the Constitution’s drafting, it was the most important channel. And while that commerce generally did not take place through physically isolated wetlands or ephemeral streams, those resources are intricately connected to commerce over larger waterways. As EPA’s own studies have made clear, one of the most important functions of small tributary streams and wetlands is to store and gradually release flow, limiting the downstream floods (which can make commercial traffic dangerous or impossible) and increasing flows that otherwise would run low or disappear during dry periods. CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS, *supra*, at 3–5; Dave Owen, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1, 7-8; COMM. ON REDUCING STORMWATER DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, NAT’L RESEARCH COUNCIL, URBAN STORMWATER MANAGEMENT IN THE UNITED STATES 151-53, 166-70 (2009). The value of lakes and rivers for waterborne commerce depends on what happens in their headwaters.

Water quality regulation, even of small wetlands and streams, also clearly affects interstate commerce. Effects on commerce in drinking water and on waterborne commerce of other goods are just part of these effects. The presence and quality of water are crucially important to many manufacturing industries. See, e.g. Steve Carmody, *GM May Soon Get Back on Flint Water*, *Michigan Radio*, June 13, 2008, <https://www.michiganradio.org/post/gm-may-soon-get-back-flint-water> (noting that GM’s need to find an alternative water source was one early sign of the Flint crisis). United States residents spend millions on water-oriented recreation, and those expenditures directly depend on the Clean Water Act’s success in achieving its goal of making waterways fishable and swimmable. See Christina Kakoyannis & George H. Stankey, *Assessing and Evaluating Recreational Uses of Water Resources: Implications for an Integrated Management Framework 2* (2002), https://www.fs.fed.us/pnw/pubs/pnw_gtr536.pdf (“Water is often rated by recreationists as the most important attribute of their chosen setting”). The list easily could go on and

on, and it underscores the same reality that led Congress to enact the Clean Water Act in the first instance: water is important to people in a huge variety of economically significant ways.

While the proposed rule purports to be grounded in constitutional concerns, it simply ignores this analysis. It does so because it claims, citing a single footnote in *SWANCC*, that Congress never intended to ground the Clean Water Act in anything more than federal authority over waterborne commerce. 84 Fed. Reg. 4201. But there are at least four problems with this rationale (beyond the reality, as noted above, that connecting small tributary waterways relates directly to protecting waterborne commerce).

First, this rationale mischaracterizes the footnote it cites. In that footnote, the Court did not actually say that Congress only intended to exercise its authority over waterborne navigation. Instead, the Court said that it did not find clear evidence *in the statute's legislative history* for the proposition that Congress had a broader intent. 56 U.S. at 168 n.3. The Court also characterized that legislative history as “ambiguous.” *Id.* And that is as far as the Court went. The Court did not hold that the statute was grounded solely in Congress’s power over navigation, and EPA and the Army Corps’ claims to be bound by that position therefore are specious.

Second, and crucially, the title, plain text, and structure of the Clean Water Act belie any notion that Congress was acting solely to exercise its power over navigation. As the statute makes overwhelmingly clear, Congress intended to comprehensively protect water quality, not just the navigability of waterways. The law’s goals include “protection and propagation of fish, shellfish, and wildlife,” supporting “recreation in and on the water,” eliminating “the discharge of toxic pollutants in toxic amounts,” and establishing “programs for the control of nonpoint source pollution.” 33 U.S.C. § 1251(a). Congress further required adoption of water quality standards for all covered waters “taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, or other purposes, and also taking into consideration their use and value for navigation.” *Id.* at § 1313(c). This is not the language of a Congress that cared only about its power to protect navigation.⁷

Third, this position mistakes the relevant question. The Court has never required that Congress, in the legislative history for a statute, specifically identify the specific basis upon which it is justifying its statute. Nor would it make any sense to do so, particularly for a statute that predates by two decades the *Lopez* test. The Court’s review, like all review of statutes’ constitutionality, asks whether a basis for constitutionality exists, not whether Congress has anticipated decades-later Court decisions and invoked the correct set of magic words. See *Perez v. U.S.*, 402 U.S. 146, 156 (1971) (rejecting any inference that Congress “need make particularized findings in order to legislate); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (upholding the Civil Rights Act against a Commerce Clause challenge even though “Congress had included no formal findings.”).

⁷ See Holly Doremus and A. Dan Tarlock, *Can the Clean Water Act Succeed as an Ecosystem Protection Law?*, J. ENERGY & ENVTL. L. 46, 49 (2013) (“As of 1972, then, the federal water pollution law included a clear ecosystem protection purpose, although it did not use that term.”); see also Robert L. Glicksman, Mathew R. Batzel, *Science, Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark*, 32 WASH. U. J. L. & POL’Y 99, 109-110 (2010).

Fourth and finally, even if the agencies had correctly discerned the meaning of that footnote, it has been eclipsed by later decisions. In *Rapanos*, four justices agreed that there was no constitutional issue with the scope of EPA's and the Army Corps' regulatory coverage, and a fifth (Justice Kennedy), declined to join in, and expressed skepticism about, the plurality's constitutional-avoidance arguments. Justice Kennedy's entire discussion of this subject--a discussion that addresses weaknesses in the constitutional avoidance arguments raised by the plurality (and relied heavily upon by EPA and the Army Corps in the present rulemaking)—bears quoting:

The concerns addressed in *SWANCC* do not support the plurality's interpretation of the Act. In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. Here, in contrast, the plurality's interpretation does not fit the avoidance concerns it raises. On the one hand, when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority. On the other hand, by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach. Even assuming, then, that federal regulation of remote wetlands and nonnavigable waterways would raise a difficult Commerce Clause issue notwithstanding those waters' aggregate effects on national water quality, but cf. *Wickard v. Filburn*, 317 U.S. 111 (1942); see also *infra*, at 2249–2250, the plurality's reading is not responsive to this concern. As for States' “responsibilities and rights,” § 1251(b), it is noteworthy that 33 States plus the District of Columbia have filed an *amici* brief in this litigation asserting that the Clean Water Act is important to their own water policies. See Brief for State of New York et al. 1–3. These *amici* note, among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate.

547 U.S. at 776-77. This passage makes clear Justice Kennedy's view that some expansive interpretations of the Clean Water Act could raise Commerce Clause questions. But his reference to “aggregate effects on national water quality” and his cite to *Wickard v. Filburn*—which offered one of the Court's most expansive interpretations of that authority—clarify his view that there would be no Commerce Clause issue with the protection of waterways with a substantial nexus, in the aggregate, to water quality in navigable-in-fact streams. Just a few pages later, Justice Kennedy made that conclusion explicit. His significant-nexus standard, he stated, “does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption.” 547 U.S. at 782.

In summary, EPA's and the Army Corps' attempts to ground their constitutional theories in precedent fail. Those theories are inventions grounded in the policy preferences of

the present administration, not interpretations of statutory text or principles established by prior judicial decisions.

Thank you for considering these comments.

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