

OUTDOOR ALLIANCE

April 15, 2019

U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Revised Definition of Waters of the United States proposed rule, Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Assistant Secretary James:

Outdoor Alliance strongly urges the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (collectively, the “Agencies”) to protect the waterways on which our members recreate, explore, and compete by rejecting the Proposed Rule revising the definition of Waters of the United States (“WOTUS”) that fall within the protections of the Clean Water Act (“CWA”). Put simply, our members live, work, drink, and—importantly—recreate, downstream from the waters that would lose vital CWA protections under the Proposed Rule, threatening their health and enjoyment of these unique and necessary places, and threatening Americans’ rights to clean water under the CWA.

As representatives of the outdoor recreation community who frequently encounter and often drink from (both willingly and unwillingly) the waters at issue in the Proposed Rule, we want to express how the change will have an impact far beyond the headwaters and wetlands that will lose essential CWA protections under the narrower definition of WOTUS. This effect is not limited to numbers and statistics. Stripping CWA protections for vital headwaters promises to threaten the downstream waters where our members recreate and support local economies. This result is antithetical to the CWA’s original purpose, will erode the health of our members and society at large, and ignores the overwhelming scientific consensus. In other words, the Proposed Rule will cause harm, is illegal, and must be rejected.

Who We Are

Outdoor Alliance is the only organization in the U.S. that unites the voices of outdoor enthusiasts to conserve public lands and waters and ensure those lands



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and waters are managed in a way that embraces the human-powered experience. Our coalition of national advocacy organizations includes American Whitewater, the American Canoe Association, the Access Fund, the International Mountain Bicycling Association, the Winter Wildlands Alliance, The Mountaineers, the American Alpine Club, the Mazamas, the Colorado Mountain Club, and Surfrider Foundation. Of our member organizations, American Whitewater, Surfrider Foundation, and the American Canoe Association are the most directly affected by the subject matter of this Proposed Rule because their members recreate in, on, and around the waters that will be directly affected.

American Whitewater works to protect and restore rivers, maintains a national inventory of whitewater rivers, monitors potential threats to whitewater river resources, publishes information on river conservation, works with government agencies to protect the ability of the public to have a voice in the management of rivers, advocates for legislation protecting our rivers and their aquatic resources, and provides technical advice to local groups regarding river conservation and management.

Surfrider Foundation is an international non-profit organization whose mission is the protection and enjoyment of our oceans, waves and beaches. Represented by a large grassroots, volunteer-led network of 84 domestic chapters, they run campaigns and educational programs to secure clean water and healthy beaches in coastal states nationwide.

The American Canoe Association is a national nonprofit organization serving the broader paddling public by providing education related to all aspects of paddling; stewardship support to help protect paddling environments; and sanctioning of programs and events to promote paddle sport competition, exploration, and recreation.

According to the Outdoor Industry Association, nearly half of all Americans participate in some form of outdoor recreation. That activity, in turn, supports the employment of 7.6 million Americans, leads to \$887 billion in annual consumer spending (of which \$86 billion is spent on water sports alone), and generates \$65.3 billion in federal tax revenue and \$59.2 billion in state and local tax revenue each year.



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Beyond the economic benefit, opportunities for outdoor recreation greatly improve Americans' quality of life. Spending time in the outdoors fosters a connection to place and a stewardship ethic aimed at protecting the places where we recreate. And all of this depends on clean water, regardless of whether recreation takes place on our country's oceans, rivers, lakes and streams, or on the surrounding land. Failure to act and withdraw the Proposed Rule will place these activities—and the Americans who depend upon them—at risk.

How We Are Affected

The Proposed Rule drastically limits which bodies of water enjoy the benefits of CWA protection and strips these protections from thousands of miles of streams and roughly half of the nation's remaining wetlands. This leaves those critical places without the shield of the CWA's pollution control, prevention, and clean-up programs. For example, the Proposed Rule would end protections for critical water resources such as ephemeral streams. Though ephemeral streams may only flow after a rain storm or snow melt, they provide water for larger streams and rivers, filter pollutants and capture nutrients, and provide critical habitat for wildlife. Categorically excluding all such streams from CWA protections is a dramatic departure from decades of regulatory practice that followed the overwhelming weight of scientific evidence and common sense to protect our nation's water resources. Moreover, the Proposed Rule would exclude approximately half of the nation's wetlands from CWA protections, thereby abandoning decades of previous regulatory practice. Wetlands protect the water quality of entire watersheds by filtering pollutants, storing floodwaters and reducing flood flows that can threaten property, people, and infrastructure, and provide essential fish and wildlife habitat. In short, the health of downstream waters, and the lands around them, depends on the current CWA protections for intermittent and ephemeral streams, and wetlands. Healthy wetlands and headwater streams provide the clean, flowing water that is essential for a thriving outdoor recreation community and economy. All of our members—as Americans and as proud stewards of these waters—recognize the essential need for clean water. But as boaters, paddlers, surfers, and participants in other human-powered watersports, our interest in preserving the integrity of our watersheds from source to sea runs much deeper.



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By way of example:

The status quo is barely acceptable. While some have criticized the 2015 Clean Water Rule, we believe that it provided necessary clarity by defining the scope of CWA protections for wetlands and headwater streams. But there is still much work to be done. As of March of 2016, the EPA noted that 46% of our nation's rivers and streams are in poor biological condition, and the bacteria count in 23% of the nation's rivers and streams exceeds thresholds protective of human health. Some of the waters our members count on for recreation have limits on how often they can be used due to the alarming levels of pollution. For example, the French Broad River in North Carolina is often too polluted for safe recreation. The wild Everglades in Florida contain fish too contaminated to eat. Even Lake Erie is often closed to recreation—especially in the summer months—because of the risks associated with toxic algal blooms. Thus, the protections in the 2015 Rule are not regulatory overkill—they are necessary to preserve the downstream waters and the health of those who recreate there.

Things will get worse. By stripping CWA protections from the headwaters and wetlands at issue in the Proposed Rule, our members (to say nothing of the environment) will unfortunately bear the brunt of the adverse health effects caused by upstream pollution. Exposure to pathogens in recreational waters can cause people to develop gastro-intestinal illnesses; eye, ear and nose infections; rashes and hard-to-heal Staph infections and MRSA, and even serious, life threatening diseases such as Vibriosis and Leptospirosis. There are also growing concerns in both fresh and marine waters of Harmful Algal Blooms that are fueled by nutrient pollution in the watershed and the effects of their associated toxins on human health. For instance, recreational exposure to cyanobacteria, or blue-green algae blooms, can cause symptoms that range from mild eye irritations to severe kidney damage and liver disease.

Every year, more than 20,000 beach closures and advisories are issued to protect beachgoers from exposure to pollution at the beach, but health agencies are not able to provide this protection in all of our recreational waters at all times. As a result, Americans contract 90 million cases of illness every year from exposure to pathogens in recreational waters, which costs \$2.9 billion in medical costs and loss-of-income, as estimated by a study published in Environmental Health in 2018. This



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is clear evidence that we should be doing more to protect public health in recreational waters, not less.

It deprives us of important places. Human-powered travel on water is an unparalleled experience—and an American birthright—that reveals the outdoor spaces we love in a whole new way. Whether a kayak or raft trip through the whitewater of the Grand Canyon, a late-summer paddle on a loon-filled lake in Minnesota’s Boundary Waters; a stand-up paddleboard on the crystal waters of the Florida Keys; or an afternoon surf session at Malibu, people need the water. Now, it’s time for the Agencies entrusted with protecting those resources to do so, by recognizing that their continued vitality is critical to the health and happiness of millions of Americans. All of these waters are affected by upstream pollution that would increase if the Proposed Rule is adopted.

Whether they are engaged in canoeing, climbing, hiking, mountain biking, paddling, camping or any other form of outdoor recreation, Americans should not have to risk being exposed to polluted waters as a part of enjoying time outdoors. Rather, the nearly one-half of all Americans who participate in sustainable outdoor recreation should be able to do so in healthy, ecologically sound surroundings.

The economy will suffer. The Commerce Department’s Bureau of Economic Analysis (“BEA”) has published recent statistics from the Outdoor Recreation Satellite Account demonstrating the impact the outdoor recreation economy has on the economy as a whole. Specifically, outdoor recreation accounted for 2.2% (\$412 billion) of current-dollar GDP in 2016 (the latest year for which data is available). Conventional outdoor recreation (including boating, hiking and bicycling) accounted for 32.7% (\$134.7 billion) of outdoor recreation gross output. The BEA report also shows that, using inflation-adjusted GDP, the outdoor recreation economy grew 1.7% in 2016—faster than the 1.6% growth for the U.S. economy overall. In addition, real gross output, compensation, and employment all grew faster in the outdoor recreation sector than in the overall economy in 2016. This growth has, in part, flowed from water that is now cleaner thanks to the CWA.

Clean water is also an invaluable asset to local economies. For example, the Pigeon River in North Carolina was, for many decades, so polluted that it was biologically dead. The river has been cleaned up as a result of action taken under the CWA, and, in 2000, the river was healthy enough that fish could be re-introduced. As a



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result of the clean-up, use of the river has skyrocketed, with rafters, kayakers and canoeists returning to the river to rediscover what had once been lost to pollution—and to reinvigorate the local economies along its banks. All of this will change for the worse if the Agencies do not continue to protect upstream waters from pollution.

Finally, the protections we seek are less expensive than downstream water treatment to remove pollutants from the water. A recent EPA study found that every \$1 spent on source-water protection saves \$27 in water treatment costs. In other words, if the Proposed Rule is adopted, we—along with all American taxpayers—will be paying more (in downstream water treatment costs) for less clean water.

This is not a “state vs. federal” issue, it is an American issue. Some have argued that states can adequately regulate the waters affected by the Proposed Rule. Not so. A close reading of the current 2015 Clean Water Rule reveals that states already play an important role in carrying out the CWA’s goals, objectives, and policies by acting in partnership with the Federal government. As the 2015 Rule recognizes: “[s]tate, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the [2015 Rule].” 80 Fed. Reg. 37,054, 37,054 (June 29, 2015). Such partnerships are necessary because waters—and the pollution they may carry—are not confined by a state’s borders.

As boaters know, water flows downhill—whether into the next class IV stretch of whitewater in the next canyon, or the next state. Accordingly, the 2015 Rule went to great lengths to clarify and establish the “significant nexus” standard, which provides that waters are waters of the United States if they, “either alone or in combination with similarly situated waters in the region,” significantly affect the “chemical, physical, or biological integrity of traditional navigable waters, **interstate water**, or the territorial seas.” 80 Fed. Reg. at 37,091 (emphasis added). Implicit in this definition is the recognition that pollution in one state will have a compounded “chemical, physical, or biological” effect downstream—regardless of how robust the downstream states’ regulatory regimes may be. And without CWA protections for the types of headwaters and wetlands threatened by the Proposed Rule, those effects will undoubtedly be worse. The 2015 rule was based on extensive scientific evidence and sought to ensure that headwaters received adequate protection to



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assure downstream water quality. The Proposed Rule, by contrast, threatens to pollute the entire system.

Why The Proposed Rule Is Illegal

The Proposed Rule not only affects us as outdoor recreation enthusiasts, but also as citizens. By virtue of the activities we pursue, we have a strong interest in ensuring that environmental policy supports a conservation ethic and is carried out in a way that is based in scientific fact. The Proposed Rule does neither.

Under the Administrative Procedures Act (“APA”), “one of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions,” including by discussing “the relevant data” before the agency. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). As the Supreme Court has explained, “an agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J. concurring); *see also id.* at 516 (“a reasoned explanation is needed for disregarding facts ... that underlay or were engendered by the prior policy”) (Scalia, J., plurality decision); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (expressing concern regarding system in which “agency [may] reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail) (Gorsuch, J., concurring) (emphasis in original). In short, if an agency promulgates a rule that is at odds with—or ignores—relevant facts or data, particularly facts or data that supported prior iterations of the rule, the new rule will receive no deference. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (Agency action is not entitled to deference where the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

Here, the Agencies have voluminous data regarding the impact of the Proposed Rule, including the scientific evidence collected and generated in connection with the 2015 Rule—a 408-page report titled the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which served as a basis for the 2015 Rule. The Connectivity Report relies on over 1,200 peer-reviewed studies and, according to the Agencies, represents the “state-of-the-



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science on the connectivity and isolation of waters in the United States” as of January 2015. The Connectivity Report sheds light on the proper interpretation of the phrase “waters of the United States,” because it illustrates the interconnectedness of various waterways and wetlands that contribute to the nation’s water systems. As important, the Report also makes factual findings regarding the 2015 Rule’s impact on environmental outcomes and human health—two concerns that animate the CWA and our members.

Notwithstanding the Report’s clear relevance, the Proposed Rule sidesteps its key conclusions and ignores the overwhelming weight of scientific evidence bearing on this issue. While the Proposed Rule cites the Connectivity Report a handful of times, it does so only to cherry-pick the portions of the Report that the Agencies deem favorable. Nowhere does the Proposed Rule engage with the Report’s substantive findings, such as its findings related to the 2015 Rule’s environmental and health impacts. Nor does the Proposed Rule discuss any of the 1,200 peer-reviewed studies that form the basis of the Connectivity Report. And although the Proposed Rule gives little weight to the Report’s scientific findings, it offers no competing scientific data that undermines, refutes, or calls into question any of the Report’s findings. As currently drafted, therefore, the Proposed Rule violates the APA by ignoring inconvenient facts and failing to base its proposal on any relevant scientific data.

Moreover, the Proposed Rule is procedurally defective for the additional reason that the 60-day period for comments is inadequate. Under the APA, “the opportunity for comment must be a meaningful opportunity.... That means enough time with enough information to comment and for the agency to consider and respond to the comments.” *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 450 (3d Cir. 2011) (internal quotations and citations omitted). When considering complex matters like those contemplated by the Proposed Rule, agencies typically provide at least 120 days for comments—twice what the Agency is currently allotting for the Proposed Rule. Courts have found that 60 day comment-periods may be deficient, particularly when an agency receives multiple requests that the period be extended. *Estate of Smith v. Bowen*, 656 F. Supp. 1093, 1099 (D. Colo. 1987) (“This court concludes that the Rule is invalid because the procedure followed was flawed. The comment period of 60 days was inadequate. The Secretary’s failure to extend that period pursuant to the numerous requests to do so was arbitrary and capricious.”). In light of numerous requests, the complexity of the Proposed Rule,



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and the detrimental effect of a hasty action, the Agencies should extend the comment period to 120 days.

In concluding, we urge the Agencies to do right by the millions of Americans who share a passion for human-powered watersports, who support the local economies that flourish because of those activities, and who work to preserve the places they love. Adopting the Proposed Rule would bring direct harm to those who have an intimate connection to the water. And it would do so based on no scientific evidence and a questionable legal foundation. Given these circumstances, the Outdoor Alliance, along with its member organizations, strongly oppose the Proposed Rule, and urge the Agencies to preserve the definition of WOTUS as set forth in the 2015 Clean Water Rule. Indeed, the Outdoor Alliance opposes any definition of WOTUS that excludes ephemeral and intermittent streams, or adjacent wetlands, as all are vital to water quality protection in the downstream navigable waterways where its members pursue their recreational activities—and hope to continue doing so with their children and grandchildren in a safe, clean environment.

Sincerely,



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