OUTDOOR ALLIANCE

AMERICAN WHITEWATER

September 3, 2021

Vance F. Stewart III, Acting Principal Deputy
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army

John Goodin, Director
Office of Wetlands, Oceans and Watersheds,
Environmental Protection Agency

Submitted By Email: OW-Docket@epa.gov

Re: Docket ID No. EPA–HQ–OW–2021–0328

Dear Mr. Stewart and Mr. Goodin:

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers, canoeists and rafters that enjoy exploring whitewater rivers. As outdoor enthusiasts that spend time on and in the water, our members have a direct interest in the health and quality of our nation's waterways–with particular interest in headwater streams and wetlands. As whitewater enthusiasts, our members depend on the rivers and streams they enjoy being free from pollution, and we support strong Clean Water Act protections for these waters.

Outdoor Alliance is a coalition of ten member-based organizations representing the human powered outdoor recreation community. The coalition includes American Whitewater, Access Fund, American Canoe Association, International Mountain Bicycling Association, Winter Wildlands Alliance, The Mountaineers, the American Alpine Club, the Mazamas, Colorado Mountain Club, and Surfrider Foundation and represents the interests of the millions of Americans who climb, paddle, mountain bike, backcountry ski and snowshoe, and enjoy coastal recreation on our nation's public lands, waters, and snowscapes.

Most whitewater rivers and streams can only be descended during higher-than-normal flows caused by rainfall or during snowmelt. Surface runoff and pollution, and specifically non-point source pollution, often spike during these times.[1] Additionally, whitewater boating requires submersion as paddlers get splashed, flip over, and occasionally swim. It is part of the fun, but

[1] An Approach for Using Load Duration Curves in the Development of TMDLs, EPA 841-B-07-006, August 2007, Document posted at: <http://www.epa.gov/owow/tmdl/techsupp.html>.

not if the water that gets in our mouths, ears, nose, and any cuts is polluted. Strong regulatory protections for surface waters are essential to protect paddlers and other river users from getting sick.

The 2015 Clean Water Rule promised to protect citizens who recreate in rivers–from paddlers to kids playing in creeks–by keeping them safe from water pollution. The agencies undertook a comprehensive public process that informed the 2015 Clean Water Rule and ensured that it would provide businesses and developers with regulatory certainty and river users with confidence that clean water would be protected and enhanced. The agencies received 1.1 million comments, with the majority in support of the rule. This rule was based on the best available science, overwhelming public support, and a high level of fidelity to the purpose of the Clean Water Act. American Whitewater and Outdoor Alliance supported this rule.

The 2020 Navigable Waters Protection Rule removed protection for vast stream mileage and did not earn our support.[2] This Rule was not based on the best available science, or even common sense principles like the recognition that water flows downhill and rivers rise after rains. Ultimately, this rule reduced protections for public health, the environment, private property, and the economy. The rule was vacated and remanded in federal court[3] and now must be replaced with a rule that fully protects our nation's waterways.

We will seek to respond to a subset of the questions asked in the Federal Register notice, as follows:

- *Science*

Since publication of this report in 2015, several papers have been published that further make the case for connectivity of waterways, including but not limited to the following:

- Leibowitz, S.G., P.J. Wigington, Jr, K.A. Schofield, L.C. Alexander, M.K. Vanderhoof, and H.E. Golden, 2018, Connectivity of stream and wetlands to downstream waters: an integrated systems framework, J Am Water Resour Assoc. 54(2): 298–322.
- Neff, B.P., D.O. Rosenberry, S.G. Leibowitz, D.M. Mushet, H.E. Golden, M.C. Rains, J.R. Brooks, and C.R. Lane, 2019, A Hydrologic Landscapes Perspective on Groundwater Connectivity of Depressional Wetlands, Water (Basel). 12(1): 50.
- Colvin, S.A.R., S.M.P. Sullivan, P.D. Shirey, R.W. Colvin, K.O. Winemiller, R.M. Hughes, K.D. Fausch, D.M. Infante, J.D. Olden, K.R. Bestgen, R.J. Danehy, L. Eby, 2019, Headwater Streams and Wetlands are Critical for Sustaining Fish, Fisheries, and Ecosystem Services, Fisheries 44(2):73-91.

[2] Our comments on the draft rule are included as an Appendix.
[3] Pasqua Yaqui Tribe, et al. v. United States Environmental Protection Agency, et al., No. CV-20-00266-TUC-RM.

- Lane, C.R., S.G. Leibowitz, B.C. Autrey, S.D. LeDuc, L.C. Alexander, 2018, Hydrological, Physical, and Chemical Functions and Connectivity of Non-Floodplain Wetlands to Downstream Waters: A Review, J Am Water Resour Assoc. 54(2): 346-371.

When our members enjoy the recreational opportunity of traveling from headwater areas to the sea, they directly experience the hydrologic connectivity and biological connectivity that defines the experience.

• *Environmental justice interests*

For many Americans in rural and urban areas, their local river is the only affordable and available place for them to swim and engage in subsistence fishing. These existing and beneficial uses of rivers, protected under the Clean Water Act, are available to all Americans, including those that can't readily afford a pool membership or store-bought seafood. They are also among the uses of our nation's rivers that render people most vulnerable from a public health perspective.[4]

This is one of many reasons that the jurisdictional scope of the Clean Water Act needs to be science-based and actually result in fishable and swimmable waters. Any rule that deems streams non-jurisdictional that flush into larger waterways following rain or snowmelt, or wetlands that are capable of discharging pollution into rivers, will simply not protect vulnerable populations downstream.

• *Climate implications*

Climate change models predict change in air temperature and rainfall affecting instream flows and stream power with a commensurate effect on the mobility and dilution of contaminants as well as sediment loads and geomorphic processes; additionally, increased water temperature will affect chemical reaction kinetics and biochemistry of aquatic organisms.[5] Recognizing river system connectivity that includes headwaters and wetlands is critical to the health of river ecosystems that struggle to adapt to a changing climate. The overall health of these rivers is important for biological integrity that is in turn a fundamental aspect of the recreational experience our members enjoy.

• *The scope of jurisdictional tributaries*

For the purposes of the Clean Water Act, all rivers, streams and wetlands that have a significant nexus to navigable waterways (i.e., the potential to carry pollutants into navigable waterways) should be jurisdictional. The EPA has already performed a comprehensive scientific review to answer the question of which waters fall into this category. In January 2015, the EPA's Office of

[4] Nicole, W., 2013, Meeting the Needs of the People: Fish Consumption Rates in the Pacific Northwest, Environmental Health Perspectives, Vol. 121, No. 11-12, <https://doi.org/10.1289/ehp.121-A334>.
[5] Whitehead, P.G., R.L. Wilby, R.W. Battarbee, M. Kernan, and J. Wader, 2009, A review of the potential impacts of climate change on surface water quality, Hydrological Sciences Journal 54(1) 101-123.

Research and Development released the report entitled *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence.* It included more than 1,000 peer-reviewed studies that confirmed that the physical, chemical, and biological integrity of water bodies is directly connected to upstream tributaries, wetlands, and other waters. Scientists in government, academia, non-profit, and private industry organizations performed an extensive peer-review on the document, as did the EPA's Science Advisory Board. This process confirmed the importance of continuing to protect the hydrologically connected headwater streams and wetlands that were historically protected under the Clean Water Act.

Our members' direct experience paddling whitewater rivers confirms this. They are in rivers after it rains and experience first-hand the way that riparian wetlands and intermittent streams–and the pollution within them–flow into rivers at high water. The 2015 Clean Water Rule offered assurance that paddlers could enjoy cleaner waters.

Within this context, ephemeral streams must be jurisdictional. Ephemeral streams are hydrologically connected to downstream, larger, and clearly jurisdictional waters. That this connection may only happen following rains or snowmelt is irrelevant, since rain or snowmelt is inevitable on some timescale, and thus hydrologic connectivity is inevitable, natural, and reasonably foreseeable. We say ephemeral streams must be jurisdictional because pollution discharged into their channels <u>will be</u> washed downstream when the stream has flow, whether that occurs contemporaneously with the pollution discharge or some months later when flows are present. As an analogy, discharging pollution into a dry ephemeral stream is like placing trash on the beach at low tide, knowing that the inevitable high tide will wash the trash into the ocean and cause pollution. While less predictable in periodicity, the return of flows to ephemeral streams is no less certain than the return of high tide to beaches.

Many ephemeral streams have large channels and are full-fledged rivers when seasonal flows are present, supporting significant whitewater paddling and riparian communities. Certainly these rivers and streams, many of which are in arid regions of the country, are larger than many smaller streams that flow all year in the East. However, size and periodicity of flow is far less important than hydrologic connectivity in terms of the purposes of the Clean Water Act. With this said, we recognize the need to differentiate land from waterways for purposes of the Clean Water Act. We suggest that a jurisdictional river or stream need only have *evidence of fluvial activity*, principally evidence of concentrated flowing water. Such evidence may include a defined bed or banks, deposited sand or other sediments, debris, or riparian vegetation.

Other indicators mentioned in the Notice, all fail to one degree or another to answer the basic question, "If someone discharges pollution into this area will it eventually and predictably flow downstream," in one or more geographical regions and/or stream type in the United States. Watershed size is not relevant to springfed rivers, flow duration is not relevant in the desert, distance from traditionally navigable waters has no bearing on connectivity, etc. Evidence of fluvial activity therefore must include a wide range of potential indicators to account for geographic variability and to account for all waterways that could carry pollutants downstream.

Restricting Clean Water Act jurisdiction to exclude some hydrologically connected waterways would put the health of the millions of Americans who enjoy recreating on and in rivers at risk. In order to protect this population, the definition of “Waters of the United States” must be solidly grounded in wetland and stream science and include all parts of our country that have evidence of fluvial activity.

- *The scope of jurisdictional ditches*

Hydrologic connectivity, in our opinion, should be the driving factor in this consideration. If pollution discharged into a ditch is reasonably likely to flow into a jurisdictional waterway, then the ditch should be jurisdictional.

- *The scope of adjacency*

Hydrologic connectivity, in our opinion, should be one key factor in this consideration. At a minimum, if pollution discharged into a wetland is reasonably likely to flow into a jurisdictional waterway under natural conditions including high rainfall and high flows, then the wetland should be jurisdictional. It does not matter, in meeting Clean Water Act mandates in rivers and streams, whether the hydrologic connection to a polluted wetland is surface water or groundwater. Thus, the jurisdiction of the Clean Water Act should extend to wetlands with evidence of hydrological connectivity, whether via surface water or groundwater.

In terms of adjacency, we feel a minimum standard should be that wetlands within the 100-year flood zone of any river or stream should be jurisdictional because of the near-certainty of pollution in such wetlands being mobilized into other jurisdictional waters when (not if) those floods happen.

The Federal Register notice asks for feedback on a category of waters including non-adjacent, intrastate, non-navigable waters, such as certain prairie potholes, playa lakes, Carolina Bays, and more, that are not proximate (reasonably close) to jurisdictional waters or lack natural tributary connections or ditching to connect them to a tributary network. We agree with the 2015 Clean Water Rule which considered these waters jurisdictional if they met specific criteria and were found to have a significant nexus to downstream traditional navigable waters, interstate waters, or territorial seas. At a minimum, we suggest that if such water bodies have more than one owner of adjacent or submerged land, and/or has public access, Clean Water Act jurisdiction would play a vital role in protecting beneficial and existing uses, including recreation, that are afforded to members of the public via property rights or public access rights.

- *Exclusions from the definition*

Exclusions should only be included in the new rule that in no way increase the likelihood that unregulated pollution could enter jurisdictional waterways and threaten the values protected under the Clean Water Act, including human health and outdoor recreation.

Conclusion

Since the Clean Water Act was enacted in 1972, our nation's rivers have recovered in a remarkable way. However, we're far from meeting the Act's goal of making all of our waterways fishable, swimmable and drinkable. Many rivers and streams are far from thriving, and are very near critical thresholds for public health and ecological function. We need to expand, and certainly not reduce, the waters covered under the Clean Water Act to improve the health of our nation's rivers, which will have a direct positive impact on our environment, human health, local economies, and our quality of life. We ask that a new rule be created that is substantially similar to, and at least as protective as, the 2015 Clean Water Rule.

Sincerely,

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Appendix

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

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.
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.

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 nations 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 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 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 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-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, 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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Mara Dias
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cc: Adam Cramer, Executive Director, Outdoor Alliance
Chris Winter, Executive Director, Access Fund

Wade Blackwood, Executive Director, American Canoe Association
Mark Singleton, Executive Director, American Whitewater
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Tom Vogl, Chief Executive Officer, The Mountaineers
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