



September 3, 2021

Attn: Department of the Army, Corps of Engineers, Department of Defense; and
Environmental Protection Agency

Re: Comments on Request for Recommendations Regarding Waters of the United
States, 86 Fed. Reg. 41,911 (Aug. 4, 2021)

The Institute for Policy Integrity at New York University School of Law (“Policy Integrity”)¹ respectfully submits this comment letter in response to the request for recommendations regarding the definition of “waters of the United States.” Policy Integrity is a nonpartisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, focusing primarily on environmental issues. Policy Integrity and its staff have written extensively in opposition to the agencies’ recent rulemakings restricting their jurisdiction under the Clean Water Act, filing comment letters, publishing reports, and submitting legal briefs.

In the request for recommendations, the agencies express their intention to repeal the Navigable Waters Protection Rule and replace it with a rule defining “waters of the United States” in accordance with the purpose of the Clean Water Act.² Since that request was issued, a federal court vacated the Navigable Waters Protection Rule, finding that the rule substantially threatened water quality and violated the Clean Water Act.³ This decision provides a solid foundation for the agencies to proceed with replacing the Navigable Waters Protection Rule with a regulation that will be more protective of water quality. If the agencies proceed in that direction, however, they will need to provide sufficient justification for reversing course.⁴

In particular, the agencies’ economic analysis for the Navigable Waters Protection Rule, like their analysis for the Clean Water Rule repeal, concluded that the benefits of that rollback exceeded monetized costs. The agencies will have to provide a rational justification for reversing that conclusion.⁵ **Significant flaws in the economic analyses underlying those two**

¹ This document does not purport to present the views, if any, of New York University School of Law.

² Department of the Army, Corps of Engineers, Department of Defense & Environmental Protection Agency, Notice of Public Meetings Regarding “Waters of the United States”; Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 41,911 (Aug. 4, 2021).

³ *Pasqua Yaqui Tribe v. EPA*, 4:20-cv-00266-RM (D. Ariz. Aug. 30, 2021).

⁴ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (explaining that when an agency changes its position on an issue, it must “at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy’” (quoting *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009))).

⁵ *Fox Television*, 556 U.S. at 537 (Kennedy, J., concurring) (“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.”).

rulemakings will help the agencies justify now repealing and replacing the Navigable Waters Protection Rule.

Policy Integrity’s comment letters, reports, and amicus briefs opposing the repeal of the Clean Water Rule and promulgation of the Navigable Waters Protection Rule focused on the flaws in the economic analyses underlying that two-phased rulemaking. As those documents explain, **the agencies significantly understated the costs (i.e., forgone benefits) and overstated the benefits (i.e., costs avoided) of those rules through various fundamental flaws in their prior analysis. The arguments highlighted by Policy Integrity’s past work therefore provide a basis for the agencies now to reverse their prior findings about the economic impacts of their recent rollbacks.**

In particular, we attach hereto Policy Integrity’s report titled “Beneath the Surface: The Concealed Costs of the Clean Water Rule Rollback,”⁶ which highlights flaws in the economic analyses for both rollbacks, as well as Policy Integrity’s comment letter in response to the proposed regulation underlying the Navigable Waters Protection Rule⁷ and an amicus brief filed in one of the lawsuits challenging that rule after its promulgation.⁸ These documents make the following arguments:

- While the agencies monetized the forgone benefits from wetlands degradation resulting from their rollback rules, they broke from their prior valuation methodology and, in so doing, substantially undervalued the harms from wetlands degradation through several critical errors. For one, the agencies disregarded the interstate benefits that wetlands provide by assuming that only individuals residing within the state of the degraded wetland derive value from that wetland, assuming without justification that the benefits of wetlands protection stop at the border of each state. This assumption violates established science and economics.⁹ For instance, one study found that households as distant as 640 miles from a body of water place value on its preservation.¹⁰ In assessing the relative values that different individuals receive from wetlands preservation, the agencies should rely on evidence and reasonable assumptions rather than arbitrary cutoffs like state boundaries.

⁶ Bethany Davis Noll et al., Inst. for Pol’y Integrity, *Beneath the Surface: The Concealed Costs of the Clean Water Rule Rollback* (2020) [hereinafter “Beneath the Surface”].

⁷ Inst. for Pol’y Integrity, Comments on Revised Definition of “Waters of the United States” (submitted Apr. 15, 2019), available at https://policyintegrity.org/documents/Clean_Water_Rule_Revisions_Comment_2019.4.15-final.pdf.

⁸ Brief of Amicus Curiae Institute for Policy Integrity at New York University School of Law for Affirmance in Support of Plaintiff-Appellee State of Colorado, *Colorado v. EPA*, 989 F.3d 874 (10th Cir. 2021). Policy Integrity filed amicus curiae briefs supporting five other challenges to the Navigable Waters Protection Rule. Those briefs are available at <https://policyintegrity.org/projects/update/amicus-brief-on-navigable-waters-protection-rule>.

⁹ Beneath the Surface, *supra* note 6, at 10.

¹⁰ Ronald J. Sutherland & Richard G. Walsh, *Effect of Distance on the Preservation Value of Water Quality*, 61 Land Econ. 281, 282 (1985).

- Because the agencies ignored the benefits that individuals derive from out-of-state wetlands, their estimate of the wetlands-related harms from their rollback rules accounted for impacts only on in-state residents. Yet here, too, critical errors further diminished the projected forgone benefits estimates. For instance, while the agencies' commissioned meta-analysis found that local residents valued wetlands the most, the agencies inappropriately ignored this benefit by assuming that no residents live close to affected wetlands. Even assuming that local residents constitute a minority, the additional valuation that those individuals place on degraded wetlands could still be substantial. The agencies could use federal data sets showing the location of wetlands to inform plausible estimates of such a valuation. In the absence of complete data, the agencies could consider performing sensitivity analysis around reasonable estimates of local residents.¹¹
- The economic analyses further reduced the benefits of in-state wetlands by applying an arbitrary and unreasonably low baseline acreage of 10,000 per state. This is an unreasonably low number, given that most states have a total of far more than 10,000 acres of wetlands. (Alaska alone, in fact, has approximately 175 million acres of wetlands.)¹² And because the meta-analysis found a concavity of willingness-to-pay estimates depending on the baseline acreage, selecting an arbitrarily low baseline reduces the estimate of total forgone benefits.¹³ Rather than rely on the baseline of 10,000 acres per state, the agencies could apply more realistic baselines that still fall within the sample of baseline values included in the meta-analysis. Plausible options suggested by experts include 220,000—the highest value from the studies in the meta-analysis, and the one that most closely resembles the average per-state acreage¹⁴—or 40,000, which represents the mean acreage from the underlying studies in the meta-analysis.¹⁵
- The economic analyses for the rollback rules also understated the long-term harms of wetlands degradation by using a multiplier of only 4.4 to convert annualized willingness-to-pay values for wetlands preservation into cumulative values representing lump sum willingness to pay. This assumes an unusually high discount rate of nearly 23%—far beyond the discount rates of 3% and 7% that are

¹¹ Beneath the Surface, *supra* note 6, at 10–12.

¹² *Id.* at 12–13.

¹³ See Jeffrey Mullen, Ph.D., Final Review of the 2018 EPA Economic Analysis for the Proposed Revised Definition of Waters of the United States 34 tbl. 8.1, *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717> (Exhibit D) (showing forgone benefits of both rollback rules using baseline acreage of 220,000 per state).

¹⁴ *Id.* at 19.

¹⁵ An Evaluation of the Revised Definition of “Waters of the United States,” by Peter Howard, PhD, Institute for Policy Integrity at NYU School of Law and Jeffrey Shrader, PhD, School of International and Public Affairs (SIPA) at Columbia University 10 (Apr. 11, 2019), *available at* <https://www.regulations.gov/document?D=EPA-HQOW-2018-0149-5272> (explaining that the mean, rather than the median, supplies an appropriate baseline estimate).

normally applied in regulatory impact analysis. The agencies can correct this flaw by using a higher multiplier commensurate with these standard discount rates.¹⁶

- The economic analysis for the Navigable Waters Protection Rule also presented case studies of several watersheds that understated the forgone benefits of wetlands protection. While the case studies monetized forgone benefits using a single economic study—Blomquist and Whitehead (1998)—one of that study’s authors, John C. Whitehead, explained that the agencies inappropriately used the median valuation of wetlands benefits that the study reported rather than the mean, which was at least 3.25 times higher than the median value.¹⁷ Additionally, while Blomquist and Whitehead (1998) reported annualized willingness-to-pay estimates, the agencies used their estimates as lump-sum values. If they retain the case studies, the agencies can correct this error by deriving lump-sum values using standard discount rates.¹⁸
- The economic analyses for the rollback rules also improperly presumed that many states would revise their existing laws to fill the regulatory gap, further reducing the estimated forgone benefits. Yet EPA guidance counsels against speculating about future rulemakings in regulatory impact analysis.¹⁹ And numerous indicators suggest that states are unlikely to completely fill the regulatory gap, including the cross-border externalities from water pollution, the economies of scale from federal regulation, and the antipathy that many states have shown toward additional regulation.²⁰ In fact, several states—such as Wisconsin and North Carolina—have legal limitations that would restrict regulation over waters outside federal jurisdiction, yet the agencies assume regardless that those states will fill the regulatory gap.²¹ In future analyses, the agencies should not presume that states will enact new laws or policies to entirely fill the regulatory gap.
- The economic analyses for the rollback rules also severely overstate the compliance costs saved, drastically and without explanation increasing the per-acre compliance costs from the Clean Water Rule. All in all, the high-end mitigation-cost estimates from the Navigable Waters Protection Rule were nearly five times higher than those used in the Clean Water Rule, with the low-end estimates more than six times higher.²² In fact, there is a reasonable chance that

¹⁶ Amicus Brief of Institute for Policy Integrity, *supra* note 8, at 19–20.

¹⁷ Dr. John C. Whitehead, Comments on the Economic Analysis for the Proposed Revised Definition of ‘Waters of the United States 13–14, *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717> (Exhibit C).

¹⁸ *Beneath the Surface*, *supra* note 6, at 14–15.

¹⁹ EPA, Guidelines for Preparing Economic Analyses 5-13 (2010) (warning against anticipating rules unless they are “imminent or reasonably anticipated with a high degree of certainty”).

²⁰ *Beneath the Surface*, *supra* note 6, at 13–14.

²¹ Policy Integrity Comments, *supra* note 7, at 15.

²² *Beneath the Surface*, *supra* note 6, at 17.

compliance costs have dropped over time, due to the availability of flexible compliance options like wetland mitigation bank credits.²³ The agencies should therefore revisit these compliance cost estimates in future analyses.

- The economic analyses present the rollback rules as net beneficial, despite failing to monetize key forgone benefits of those rules including benefits from stream mitigation and oil/hazardous substance liability. When revisiting these analyses, the agencies should give more careful consideration to the magnitude of these forgone benefits, such as by assessing the number of waters or stream miles affected.²⁴ Of course, such an analysis would not be strictly necessary if the agencies conclude that the monetized benefits of any future rulemakings exceed the full cost of those rules, since in that case the rules would be net beneficial regardless of the magnitude of unmonetized benefits.²⁵
- In any economic analyses of future rulemakings, the agencies should carefully reconsider any other key assumptions that were changed in the analyses of the rollback rules, including assumptions about the size of riparian buffers and mitigation ratios.

For these reasons, which are discussed further in the attached documents, the agencies should reconsider their rollback rules and the economic analyses supporting them.

Sincerely,

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Max Sarinsky, Senior Attorney
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Enclosures

- 1) Bethany Davis Noll et al., Inst. for Pol’y Integrity, *Beneath the Surface: The Concealed Costs of the Clean Water Rule Rollback* (2020).
- 2) Inst. for Pol’y Integrity, Comments on Revised Definition of “Waters of the United States” (submitted Apr. 15, 2019).
- 3) Brief of Amicus Curiae Institute for Policy Integrity in Support of Plaintiff-Appellee State of Colorado, *Colorado v. EPA*, 989 F.3d 874 (10th Cir. 2021).

²³ Policy Integrity Comments, *supra* note 7, at 31–32 (citing Palmer Hough & Rachel Harrington, *Ten Years of the Compensatory Mitigation Rule: Reflections on Progress and Opportunities*, 49 ENV’T L. REP. 10018, 10022–23 (2018), a study from two EPA scientists documenting how mitigation banks expanded both in terms of absolute numbers and geographic distribution between 2008 and 2018).

²⁴ *Beneath the Surface*, *supra* note 6, at 6–9.

²⁵ See, e.g., Economic Analysis of the EPA-Army Clean Water Rule x (May 20, 2015) (finding that rule is net beneficial because monetized benefits alone exceed total costs, even though some key benefits were unmonetized).