IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, *et al*., Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*., Defendants, CHANTELL SACKETT; MICHAEL SACKETT, Defendant-Intervenors.	Case No. 20-cv-10820-DPW

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

Defendants United States Environmental Protection Agency and the United States Army Corps of Engineers, *et al*. (the "Agencies") move the Court to remand the Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) (the "NWPR") to the Agencies and to dismiss this action. The Agencies respectfully submit this motion in lieu of filing a reply brief in support of their cross-motion for summary judgment, which is due today.

As explained more fully herein, remand is appropriate because the Agencies have completed their review of the NWPR and have decided to commence a new rulemaking to revise or replace the rule. A remand would avoid potentially unnecessary litigation in this Court over aspects of the NWPR that will be reconsidered in a new rulemaking, would conserve the parties' limited resources, and would best serve the interest of judicial economy. In addition, remand would avoid requiring the Agencies to take positions on merits questions that might appear to

pre-judge issues that will be reconsidered through notice-and-comment rulemaking. Through the Agencies' administrative rulemaking process, all members of the public, including the parties to this case, will have the opportunity to submit comments and recommendations, and the Agencies' new final rule therefore may resolve or moot some or all of the claims presented in this litigation. And, if a new rule does not resolve the parties' concerns, that rule could itself be challenged. If a challenge occurs, the parties and reviewing courts would benefit from reviewing the Agencies' new final action and new administrative record, rather than continuing to litigate the NWPR on a record that may be rendered moot and out of date.

The Agencies have conferred with the parties regarding this motion. Neither Plaintiffs nor Defendant-Intervenors the Sacketts are able to provide a position on this motion prior to reviewing it.

BACKGROUND

A. Statutory and Regulatory Overview

The Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251–1388. Among other provisions, the CWA prohibits "the discharge of any pollutant by any person" without a permit or other authorization, 33 U.S.C. § 1311(a), to "navigable waters," defined as "the waters of the United States," *id*. at § 1362(7).

The Army Corps of Engineers first promulgated regulations defining "waters of the United States" in the 1970s. Covered waters included only those waters subject to the ebb and flow of the tide or used "for purposes of interstate or foreign commerce." 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). Thereafter, the Corps broadened its interpretation of the phrase. *See, e.g.*, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). In the 1980s, the Agencies adopted regulatory

definitions substantially similar to the 1977 definition; those regulations remained in effect until 2015. *See* 33 C.F.R. § 328.3(a) (1987) (Corps); 40 C.F.R. § 232.2(q) (1988) (EPA) (collectively, the "1986 Regulations"). Over time, the Agencies refined their application of the 1986 Regulations, as informed by three Supreme Court decisions. *See, e.g.*, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

In 2015, the Agencies comprehensively revised the regulatory definition of "waters of the United States." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (the "2015 rule"). In 2019, the Agencies repealed the 2015 rule and reinstated the prior regulatory framework. 84 Fed. Reg. 56,626 (Oct. 22, 2019). In 2020, the Agencies again comprehensively revised the definition of "waters of the United States" with the NWPR.

B. The NWPR

The NWPR establishes four categories of jurisdictional waters: "(1) The territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands)." 40 C.F.R. § 120.2 (EPA); 33 C.F.R. § 328.3 (Corps); *see also* 85 Fed. Reg. at 22,273. The NWPR also establishes exclusions and defines the operative terms used in the regulatory text. 85 Fed. Reg. at 22,270; *see also id*. at 22,340–41 (regulatory text). The NWPR includes "perennial" tributaries that "flow[] continuously year-round" and "intermittent" tributaries that "flow[] continuously during certain times of the year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts)." *Id*. at 22,338. Ephemeral waters (waters that flow in direct

response to precipitation) are categorically excluded from jurisdiction under the NWPR. *Id*. at 22,340.

The NWPR also includes "adjacent wetlands" as subject to CWA jurisdiction if they directly abut a jurisdictional water, are "inundated by flooding" from a jurisdictional water during "a typical year," are separated from a jurisdictional water "only by a natural berm, bank, dune, or similar natural feature," or are separated from a jurisdictional water "only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection" between the wetlands and the jurisdictional water in a "typical year." *Id*. at 22,338. Multiple parties have challenged the NWPR in various district courts. *See* Status Report, ECF No. 107.

C. This Litigation

Plaintiffs filed their complaint on April 29, 2020, and amended their complaint on August 3, 2020. ECF Nos. 1, 19. Plaintiffs allege that the NWPR violates the APA for a variety of reasons, including that the Agencies failed to adequately consider water quality impacts and that the NWPR's exclusion of ephemeral streams and certain wetlands is arbitrary and capricious. Am. Compl. ¶¶ 192–200, ECF No. 19. In October 2020, the Sacketts intervened as defendants. ECF Nos. 36, 40. While contesting Plaintiffs' challenges to the NWPR, the Sacketts also allege that the NWPR adopted an unlawfully overbroad definition of "waters of the United States." ECF No. 44, Affirmative Defenses. On October 15, 2020, Plaintiffs moved for summary judgment and sought vacatur of the NWPR. ECF Nos. 30–34. On December 3, 2020, the Agencies cross-moved for summary judgment and opposed Plaintiffs' motion. ECF Nos. 45–46. The Sacketts also filed a summary judgment response. ECF No. 47. Plaintiffs' response and

reply was filed on February 16, 2021. ECF No. 100. The Agencies' reply brief is due today, after two extensions. ECF No. 106.

D. The Agencies' Review of the NWPR and Decision to Initiate New Rulemaking

The Agencies promulgated the NWPR to define the phrase "waters of the United States," which appears in Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7). On January 20, 2021, following the presidential transition, President Biden issued Executive Order 13990, entitled "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021) ("EO 13990"). In relevant part, EO 13990 states that it is the policy of the new administration

> to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

Id. at 7037. EO 13990 directs federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." *Id*.

Over the past few months, the Agencies have been reviewing the NWPR pursuant to EO 13990. As explained in the attached declarations, the Agencies have now reviewed the NWPR and have decided to initiate new rulemaking to define "waters of the United States." Ex. 1,

Declaration of Radhika Fox ("Fox Decl.") ¶¶ 8–10; Ex. 2, Declaration of Jaime Pinkham ("Pinkham Decl.") ¶¶ 8–10.

STANDARD OF REVIEW

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 42 (1983). Further, an agency's interpretation of a statute it administers is not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). Voluntary remand is proper where an agency requests "a remand (without confessing error) in order to reconsider its previous position." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Maine v. Wheeler*, No. 1:14-CV-00264-JDL, 2018 WL 6304402, at *2 (D. Me. Dec. 3, 2018) (same). In other words, remand should be granted so long as "the agency intends to take further action with respect to the original agency decision on review." *Limnia, Inc. v. Dep't of Energy*, 857 F.3d 379, 381, 386 (D.C. Cir. 2017).

"Generally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *California Communities Against Toxics v. U.S. E.P.A*., 688 F.3d 989, 992 (9th Cir. 2012) (granting remand and citing *SKF USA Inc.*, 254 F.3d at 1029); *see also Limnia, Inc*., 857 F.3d at 386–87 (refusing remand where agency had no intention to revisit challenged decision).

Voluntary remand is appropriate when the request is reasonable and timely. *See Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002); *see also Arizona Pub. Serv. Co. v. EPA*, 562 F.3d

1116, 1122 (10th Cir. 2009) (granting EPA's motion for voluntary remand). In exercising its discretion to grant remand, a court may consider whether any party opposing remand would be unduly prejudiced. *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015).

ARGUMENT

Remand is proper in this case because the Agencies have completed their review of the NWPR and have decided to initiate new rulemaking to define "waters of the United States." Fox Decl. ¶¶ 8–10; Pinkham Decl. ¶¶ 8–10. Remand would also conserve judicial resources and would not unduly prejudice the parties.

I. The Agencies Have Established Grounds for Voluntary Remand.

An agency may seek remand because it wishes to revisit its interpretation of the governing statute, the procedures it followed in reaching its decision, or the decision's relationship to other agency policies. *SKF USA Inc.*, 254 F.3d at 1028–29. The Agencies seek remand for these exact reasons. The Agencies conducted a review of the NWPR. Fox Decl. ¶ 10; Pinkham Decl. ¶ 10. Through that review, the Agencies "have identified substantial concerns with the NWPR and have determined that additional consideration should be given to certain aspects of the NWPR through notice-and-comment rulemaking[.]" *Id.*

Voluntary remand is appropriate because the Agencies have identified "substantial and legitimate concerns" with the NWPR and intend to embark upon a rulemaking process to replace the rule. *SKF USA Inc.*, 254 F.3d at 1029 ("[I]f the agency's concern [with the challenged action] is substantial and legitimate, a remand is usually appropriate."). The Agencies have explained that they have substantial concerns about certain aspects of the NWPR and the effects of the NWPR on the nation's waters, including whether the NWPR adequately considered the CWA's statutory objective in determining the scope of "waters of the United States" and, as a

result, whether the process adequately considered the effects of the NWPR on the integrity of the nation's waters. Fox Decl. ¶¶ 10, 12; Pinkham Decl. ¶¶ 10, 12. For example, the Agencies have identified concerns about whether sufficient consideration was given to the impact of the NWPR's categorical exclusion of ephemeral waters. Fox Decl. ¶ 14; Pinkham Decl. ¶ 14. In addition, the Agencies have noted on-the-ground effects of the NWPR since the rule went into effect, which reinforces their conclusion that a new rulemaking in which the Agencies will reconsider issues of concern with the NWPR and its impacts is warranted. Fox Decl. ¶¶ 15–20; Pinkham Decl. ¶¶ 15–20.

Remand would give the Agencies an opportunity to fully explore and address these issues and the concerns of the parties and other stakeholders, through the administrative rulemaking process. Fox Decl. ¶ 14; Pinkham Decl. ¶ 14. Remand would also allow the Agencies to develop a new administrative record, which would benefit the Court and the parties if a new rule were to be litigated. "[T]his kind of reevaluation is well within an agency's discretion," *Nat'l Assn of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (citing *Fox Television Stations, Inc.*, 556 U.S. at 514–15), and courts should allow it. *See also Util. Solid Waste Activities Group v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018).

Moreover, deferring to the Agencies' new rulemaking process also promotes important jurisprudential interests. "In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from 'entangling themselves in abstract disagreements over administrative policies, and . . . protect[s] the agencies from judicial interference' in an ongoing decision-making process." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386–87 (D.C. Cir. 2012) (citation omitted). Allowing the administrative process to run its course here will let the Agencies "crystalliz[e] [their] policy

before that policy is subjected to judicial review," *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999), and avoid "inefficient" and unnecessary "piecemeal review." *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 30 (D.C. Cir. 1984) (citation and internal quotation marks omitted).

Courts have granted remand in similar situations. In *SKF USA Inc.*, the Federal Circuit found a remand to the Department of Commerce appropriate in light of the agency's change in policy. 254 F.3d at 1025, 1030. Likewise, in *FBME Bank Ltd.*, the District Court for the District of Columbia remanded a rule to the Department of the Treasury to allow the agency to address "serious 'procedural concerns,'" including "potential inadequacies in the notice-and-comment process as well as [the agency's] seeming failure to consider significant, obvious, and viable alternatives." 142 F. Supp. 3d at 73.

The Agencies are not requesting vacatur of the NWPR during the remand. Vacatur "rests in the sound discretion of the reviewing court" and it depends on several factors, including (1) "the severity of the errors"; (2) "the likelihood that they can be mended without altering the [rule]"; and (3) "the balance of equities and public interest considerations." *Cent. Maine Power Co. v. F.E.R.C.*, 252 F.3d 34, 48 (1st Cir. 2001). In light of the Agencies' stated intent to address their substantial concerns with the NWPR through a new rulemaking, the Agencies request that the Court order a remand and are not including a request for vacatur.

II. Granting Remand Conserves Judicial Resources.

Granting remand here promotes judicial economy and conserves the parties' and the courts' resources. Courts "have recognized that '[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts.'" *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting

Commonwealth of Pennsylvania v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). "Remand has the benefit of allowing 'agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete.'" *Util. Solid Waste*, 901 F.3d at 436 (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)). Allowing the Agencies to proceed with a new rulemaking allows them to address concerns with the NWPR through the administrative process. The Agencies might resolve the parties' concerns through that process, potentially rendering unnecessary future litigation that could strain the courts' and parties' resources. Remand would preserve those resources.

In addition, continuing to litigate this case wastes the Agencies' and the parties' resources in the present, resources that could be better spent on the rulemaking process. Because many of the issues presently before the Court will be re-evaluated in the Agencies' new rulemaking, remand of the NWPR will allow the Agencies to focus their resources on the new rulemaking, with input from the parties and other interested stakeholders. Fox Decl. ¶ 14; Pinkham Decl. ¶ 14. In particular, ongoing litigation could interfere with the Agencies' rulemaking, as the Agencies would have to prioritize pending litigation deadlines. *See Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C. 2013) (because agency did "not wish to defend" the action, "forcing it to litigate the merits would needlessly waste not only the agency's resources but also time that could instead be spent correcting the rule's deficiencies.").

Although merits briefing is nearly complete, the Court need not resolve the competing summary judgment motions nor consider the many *amicus curiae* briefs before it, ECF Nos. 30–35, 45–47, 56, 68, 72–73, 80–81, 87, 89, as the Agencies' new rulemaking may render some or all of the various disputes moot. The Agencies' new rulemaking may fully address and resolve

the parties' concerns or, at least, narrow the issues if the parties were to challenge a new rule arising out of the new rulemaking. Even if remand does not resolve all of the claims presented by the parties, subsequent judicial review will likely turn on a new and different record that will necessarily alter the nature of this Court's review. Therefore, continuing to litigate the very same issues that the Agencies may resolve through a new rulemaking, "would be inefficient," *FBME Bank*, 142 F. Supp. 3d at 74, and a waste of judicial resources.

III. Remand Would Not Prejudice the Parties.

Remand would not prejudice any party. The Agencies intend to consider and evaluate issues raised in the various legal challenges to the NWPR during the rulemaking process, including arguments made by the parties in this case. Fox Decl. ¶¶ 8–10; Pinkham Decl. ¶¶ 8–10. As addressed above, the Agencies may revise or replace the NWPR in a way that resolves Plaintiffs' claims. For example, Plaintiffs claim that the Agencies did not adequately consider the CWA's statutory objective and arbitrarily excluded ephemeral waters and certain wetlands. Pls.' Mem. of Law at 18, 23–28, ECF No. 31. The Agencies intend to consider these very issues on remand. Fox Decl. ¶ 13; Pinkham Decl. ¶ 13. Through their rulemaking process, the Agencies will consider the policies set forth in EO 13990 and intend to ensure that "waters of the United States" is defined in a manner consistent with the CWA's statutory objective. In addition, the parties will have the opportunity to participate through the notice and comment process by submitting comments on any new proposed rule. Fox Decl. ¶ 10; Pinkham Decl. ¶ 10.

CONCLUSION

The Agencies have identified numerous concerns with the NWPR, many of which have been raised by Plaintiffs in this case, and intend to evaluate those concerns through a new notice-

and-comment rulemaking. Fox Decl. ¶¶ 9–20; Pinkham Decl. ¶¶ 9–20. Where, as here, the Agencies have committed to reconsidering the challenged action, the proper course is remand to allow the Agencies to address their concerns through the administrative process. The Agencies respectfully ask the Court to remand the NWPR, without vacatur, and to dismiss this case, rather than requiring the Agencies to litigate a rule that may be replaced.

Respectfully submitted this 9th day of June, 2021.

/s/ *Sarah Izfar*
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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2021, I electronically transmitted the foregoing to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to registered counsel for all parties.

/s/ Sarah Izfar

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
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DECLARATION OF RADHIKA FOX

I, Radhika Fox, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, information contained in the records of the United States Environmental Protection Agency ("EPA" or "the Agency"), and information supplied to me by current EPA employees.

1. I am the Principal Deputy Assistant Administrator for the Office of Water in EPA. I have served in this position since January 2021.
2. As Principal Deputy Assistant Administrator, I am responsible for, and provide counsel to, the Administrator on policy, planning, program development and implementation, management, and control of the technical and administrative aspects of the Office of Water. I manage the Agency's programs under the Clean Water Act ("CWA"), Safe Drinking Water Act, and the Marine Protection, Research, and Sanctuaries Act.
3. Within EPA, the Office of Water has primary responsibility for the rulemaking process related to the CWA.

4. Within the Department of the Army ("Army"), the Office of the Assistant Secretary of the United States Army for Civil Works has primary responsibility for the rulemaking process related to the CWA.
5. These two offices have the responsibility of implementing the definition of "waters of the United States" regarding their respective CWA regulatory actions and programmatic activities.
6. In 2015, EPA and the Army (collectively "the agencies") promulgated a rule (the "Clean Water Rule") establishing a new definition of "waters of the United States"—a key term used to identify the jurisdictional scope of the CWA.
7. On April 21, 2020, the agencies, under the Trump Administration, promulgated the Navigable Waters Protection Rule (NWPR), which comprehensively revised regulations defining the term "waters of the United States."
8. The agencies, after completing a review of the NWPR, have decided to initiate another rulemaking to revise the term "waters of the United States." As described below, the Biden Administration's EPA and Army have substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the nation's waters.
9. The agencies' review of the NWPR was at the direction of President Biden. On January 20, 2021, President Biden signed Executive Order 13990 ("EO 13990") on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis to pronounce the Administration's policy "to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce

greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." EO 13990 directed all Federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." And "[f]or any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." The order also specifically revoked Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule), which had resulted in promulgation of the NWPR.

10. Pursuant to the direction in EO 13990, the agencies have carefully reassessed the administrative record for and the legal and scientific basis of the NWPR. The agencies have also thoroughly reviewed the challenges to the NWPR presented by the parties in the pending litigation. The agencies have completed this assessment and decided to initiate rulemaking to revise the term "waters of the United States." Among the factors that the agencies considered are: the text of the CWA; Congressional intent and the objective of the CWA; U.S. Supreme Court case law; the impacts resulting from the NWPR; concerns raised by stakeholders about the NWPR, including implementation-related issues; the principles outlined in EO 13990; and issues raised in ongoing litigation challenging the NWPR. As further described below, the agencies have identified substantial concerns with the NWPR and have determined that additional considerations should be given to certain aspects of the NWPR through notice-

and-comment rulemaking, including concern that when interpreting the jurisdictional scope of the CWA, the NWPR did not appropriately consider the effect of the revised definition of "waters of the United States" on the integrity of the nation's waters, as well as concern over the loss of waters protected by the CWA.

11. Congress enacted the CWA in 1972 with the statutory objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 1251(a) of Title 33, U.S. Code. One of the Act's principal tools in achieving the statutory objective is through its general prohibition on the discharge of pollutants to "waters of the United States," the statutory phrase that generally establishes the jurisdictional scope of the Act.
12. Certain statements in the NWPR preamble call into significant question whether the agencies' consideration of science and water quality impacts in developing the rule was consistent with these goals. For example, the agencies explicitly and definitively stated in numerous places in the NWPR administrative record that they did not rely on agency documents in the record that provided some limited assessment of the effects of the rule on water quality in determining the scope of the definition of "waters of the United States." *See, e.g.*, 85 Fed. Reg. at 22,332, 22,335 ("[T]he final rule is not based on the information in the agencies' economic analysis or resource and programmatic assessment.").
13. The agencies now believe that consideration of the effects of a revised definition of "waters of the United States" on the integrity of the nation's waters is a critical element in assuring consistency with the statutory objective of the CWA. *See, e.g.*, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468-69 (2020) ("*Maui*") (emphasizing the importance of considering the CWA's objective when determining the scope of the Act and finding that "[t]he Act's provisions use specific definitional language to achieve this result,"

including the phrase "navigable waters"). Based on a careful evaluation of the record of the NWPR, including the above-quoted statement, the agencies have substantial and legitimate concerns regarding the adequacy of consideration of the CWA's water quality goals in the development of the NWPR. As such, the agencies believe it is appropriate to reconsider these issues—and, in particular, the effects of the "waters of the United States" definition on the chemical, physical, and biological integrity of the nation's waters—in a new rulemaking.

14. In light of the text, structure, and legislative history of the Act, and *Maui* and other Supreme Court decisions, the agencies have concluded there must be some consideration of the effects of a revised definition of "waters of the United States" on the integrity of the nation's waters. Based on the record at the time the agencies promulgated the NWPR, significant concerns exist about the sufficiency of the agencies' consideration of the effects of the NWPR on the chemical, physical, and biological integrity of the nation's waters when determining the limits of the specific definitional language "waters of the United States" in the NWPR. For example, the agencies are concerned that the NWPR did not look closely enough at the effect ephemeral waters have on traditional navigable waters when the agencies decided to categorically exclude all ephemeral waters. New rulemaking will provide the agencies an additional opportunity to evaluate these issues and allow all interested stakeholders to contribute to this process through rulemaking comments and other public processes.

15. The agencies have also decided to initiate a new rulemaking in light of information regarding the impact of the NWPR on the scope of CWA jurisdiction informed by nearly a full year of implementation. Staff at EPA and the Army have reviewed approved jurisdictional determinations and identified indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practices. These indicators include an increase in

determinations by the Corps that waters are non-jurisdictional and an increase in projects for which CWA Section 404 permits are no longer required. The agencies have also found that preliminary jurisdictional determinations (through which applicants proceed with permitting as though all resources were jurisdictional) are much less common under the NWPR, indicating that fewer project proponents believe waters are jurisdictional from the start. Of the 40,211 individual aquatic resources or water features for which the Corps made approved jurisdictional determinations under the NWPR between June 22, 2020 and April 15, 2021, approximately 76% were found to be non-jurisdictional. Many of the non-jurisdictional waters are excluded ephemeral resources (mostly streams) and wetlands that are not adjacent under the NWPR. The agencies are aware of 333 projects that would have required Section 404 permitting prior to the NWPR, but no longer do under the NWPR. The agencies are also aware that this number is not the full universe of projects that no longer require Section 404 permitting under the NWPR, partly because to the extent that project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams, the effects of such projects are not tracked in the Corps database. As a whole, the reduction in jurisdiction is notably greater than the deregulatory effects discussed in the rule preamble and the economic analysis case studies.

16. These changes have been particularly significant in arid states. In New Mexico and Arizona, for example, of over 1,500 streams assessed under the NWPR, nearly every one has been found to be a non-jurisdictional ephemeral resource, which is very different from the status of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.[1]

[1] These non-jurisdictional ephemeral resources are predominantly ephemeral streams, but a small portion may be swales, gullies, or pools.

17. The agencies have heard concerns from a broad array of stakeholders, including states, tribes, scientists, and non-governmental organizations, that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms. These entities have identified specific projects and discharges that would no longer be subject to CWA protections because the waters at issue would no longer be jurisdictional. In many cases permit applications have been withdrawn. For example, stakeholders have raised concerns about dredge and fill activities on large swaths of wetlands in sensitive areas, in the floodplains of jurisdictional waters, or even within several hundred yards of traditional navigable waters, that are proceeding without CWA regulatory protection or compensatory mitigation. Stakeholders have also identified for EPA many other wetlands and streams, newly deemed non-jurisdictional, which are likely to be filled for commercial and housing developments, mines, water pipelines, and other forms of development without CWA oversight.

18. Projects are proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized, and, based on available information, will therefore result in discharges without any regulation or mitigation from federal, state, or tribal agencies. *See* Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States" at 40 (Jan. 22, 2020) (indicating that a large number of states do not currently regulate waters more broadly than the CWA requires, and are "unlikely to increase state regulatory practices" following the NWPR). One project that stakeholders have identified for EPA is the construction of a high-pressure oil pipeline that would cut through a drinking water well field, which is expected to result in discharges to nearly 100 ephemeral streams that appear to be no longer jurisdictional under

the NWPR; another project is the construction of a mine that would destroy hundreds of previously jurisdictional wetlands, deemed non-jurisdictional under the NWPR, next to a National Wildlife Refuge.

19. Tribes in arid areas have also indicated that they will disproportionately suffer from the reduction in protections, including tribal lands that intersect or are within the New Mexico state boundary. Some tribes have estimated that the NWPR removes more than 80% of stream miles within their jurisdictions from CWA protections, amounting to more than 1,400 miles of streams. These tribes lack the authority and the resources to independently regulate surface waters within and upstream of their reservations, and therefore cannot protect their scarce waters from upstream dischargers, such as uranium and coal mines.

20. Ephemeral streams, wetlands, and other aquatic resources provide numerous ecosystem services, and there could be cascading and cumulative downstream effects from impacts to these resources, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity.[2] The agencies have substantial concerns about the consideration of these effects on the chemical, physical, and biological integrity of the nation's waters in the NWPR rulemaking process.

[2] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report), EPA/600/R–14/475F (Washington, DC: U.S. Environmental Protection Agency (2015)). https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the EPA.

Dated: 6/9/2021

Radhika Fox
Principal Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, *et al*., Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*., Defendants, CHANTELL SACKETT; MICHAEL SACKETT, Defendant-Intervenors.	Case No. 20-cv-10820-DPW

DECLARATION OF JAIME A. PINKHAM

I, Jaime A. Pinkham, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, information contained in the records of the Office of the Assistant Secretary of the Army for Civil Works ("Civil Works" or "the Agency"), and information supplied to me by Civil Works employees under my supervision.

1. Currently, I am serving as the Acting Assistant Secretary of the United States Army for Civil Works. I have served in this position since April of this year.
2. As the Acting Assistant Secretary of the United States Army for Civil Works, my principal duty involves the overall supervision of the functions of the Department of the Army ("Army") relating to programs for conservation and development of national water resources, including flood control, navigation, shore protection, and related purposes. In particular, I establish policy direction for, and supervision of, Army functions relating to all aspects of the Civil Works program which is executed by the United States Army Corps of Engineers ("Corps").

3. Within the United States Environmental Protection Agency ("EPA"), the Office of Water has primary responsibility for the rulemaking process related to the CWA.
4. Within the Army, the Office of the Assistant Secretary of the United States Army for Civil Works has primary responsibility for the rulemaking process related to the CWA.
5. These two offices have the responsibility of implementing the definition of "waters of the United States" regarding their respective CWA regulatory actions and programmatic activities.
6. In 2015, EPA and the Army (collectively "the agencies") promulgated a rule (the "Clean Water Rule") establishing a new definition of "waters of the United States"—a key term used to identify the jurisdictional scope of the CWA.
7. On April 21, 2020, the agencies, under the Trump Administration, promulgated the Navigable Waters Protection Rule (NWPR), which comprehensively revised regulations defining the term "waters of the United States."
8. The agencies, after completing a review of the NWPR, have decided to initiate another rulemaking to revise the term "waters of the United States." As described below, the Biden Administration's EPA and Army have substantial concerns about the lawfulness of aspects of the NWPR and the harmful effects of the NWPR on the nation's waters.
9. The agencies' review of the NWPR was at the direction of President Biden. On January 20, 2021, President Biden signed Executive Order 13990 ("EO 13990") on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis to pronounce the Administration's policy "to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who

disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." EO 13990 directed all Federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." And "[f]or any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." The order also specifically revoked Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule), which had resulted in promulgation of the NWPR.

10. Pursuant to the direction in EO 13990, the agencies have carefully reassessed the administrative record for and the legal and scientific basis of the NWPR. The agencies have also thoroughly reviewed the challenges to the NWPR presented by the parties in the pending litigation. The agencies have completed this assessment and decided to initiate rulemaking to revise the term "waters of the United States." Among the factors that the agencies considered are: the text of the CWA; Congressional intent and the objective of the CWA; U.S. Supreme Court case law; the impacts resulting from the NWPR; concerns raised by stakeholders about the NWPR, including implementation-related issues; the principles outlined in EO 13990; and issues raised in ongoing litigation challenging the NWPR. As further described below, the agencies have identified substantial concerns with the NWPR and have determined that

additional considerations should be given to certain aspects of the NWPR through notice-and-comment rulemaking, including concern that when interpreting the jurisdictional scope of the CWA, the NWPR did not appropriately consider the effect of the revised definition of "waters of the United States" on the integrity of the nation's waters, as well as concern over the loss of waters protected by the CWA.

11. Congress enacted the CWA in 1972 with the statutory objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 1251(a) of Title 33, U.S. Code. One of the Act's principal tools in achieving the statutory objective is through its general prohibition on the discharge of pollutants to "waters of the United States," the statutory phrase that generally establishes the jurisdictional scope of the Act.

12. Certain statements in the NWPR preamble call into significant question whether the agencies' consideration of science and water quality impacts in developing the rule was consistent with these goals. For example, the agencies explicitly and definitively stated in numerous places in the NWPR administrative record that they did not rely on agency documents in the record that provided some limited assessment of the effects of the rule on water quality in determining the scope of the definition of "waters of the United States." *See, e.g.*, 85 Fed. Reg. at 22,332, 22,335 ("[T]he final rule is not based on the information in the agencies' economic analysis or resource and programmatic assessment.").

13. The agencies now believe that consideration of the effects of a revised definition of "waters of the United States" on the integrity of the nation's waters is a critical element in assuring consistency with the statutory objective of the CWA. *See, e.g.*, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468-69 (2020) ("*Maui*") (emphasizing the importance of considering the CWA's objective when determining the scope of the Act and

finding that "[t]he Act's provisions use specific definitional language to achieve this result," including the phrase "navigable waters"). Based on a careful evaluation of the record of the NWPR, including the above-quoted statement, the agencies have substantial and legitimate concerns regarding the adequacy of consideration of the CWA's water quality goals in the development of the NWPR. As such, the agencies believe it is appropriate to reconsider these issues—and, in particular, the effects of the "waters of the United States" definition on the chemical, physical, and biological integrity of the nation's waters—in a new rulemaking.

14. In light of the text, structure, and legislative history of the Act, and *Maui* and other Supreme Court decisions, the agencies have concluded there must be some consideration of the effects of a revised definition of "waters of the United States" on the integrity of the nation's waters. Based on the record at the time the agencies promulgated the NWPR, significant concerns exist about the sufficiency of the agencies' consideration of the effects of the NWPR on the chemical, physical, and biological integrity of the nation's waters when determining the limits of the specific definitional language "waters of the United States" in the NWPR. For example, the agencies are concerned that the NWPR did not look closely enough at the effect ephemeral waters have on traditional navigable waters when the agencies decided to categorically exclude all ephemeral waters. New rulemaking will provide the agencies an additional opportunity to evaluate these issues and allow all interested stakeholders to contribute to this process through rulemaking comments and other public processes.

15. The agencies have also decided to initiate a new rulemaking in light of information regarding the impact of the NWPR on the scope of CWA jurisdiction informed by nearly a full year of implementation. Staff at EPA and the Army have reviewed approved jurisdictional determinations and identified indicators of a substantial reduction in waters covered under

the NWPR compared to previous rules and practices. These indicators include an increase in determinations by the Corps that waters are non-jurisdictional and an increase in projects for which CWA Section 404 permits are no longer required. The agencies have also found that preliminary jurisdictional determinations (through which applicants proceed with permitting as though all resources were jurisdictional) are much less common under the NWPR, indicating that fewer project proponents believe waters are jurisdictional from the start. Of the 40,211 individual aquatic resources or water features for which the Corps made approved jurisdictional determinations under the NWPR between June 22, 2020 and April 15, 2021, approximately 76% were found to be non-jurisdictional. Many of the non-jurisdictional waters are excluded ephemeral resources (mostly streams) and wetlands that are not adjacent under the NWPR. The agencies are aware of 333 projects that would have required Section 404 permitting prior to the NWPR, but no longer do under the NWPR. The agencies are also aware that this number is not the full universe of projects that no longer require Section 404 permitting under the NWPR, partly because to the extent that project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams, the effects of such projects are not tracked in the Corps database. As a whole, the reduction in jurisdiction is notably greater than the deregulatory effects discussed in the rule preamble and the economic analysis case studies.

16. These changes have been particularly significant in arid states. In New Mexico and Arizona, for example, of over 1,500 streams assessed under the NWPR, nearly every one has been found to be a non-jurisdictional ephemeral resource, which is very different from the status

of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.[1]

17. The agencies have heard concerns from a broad array of stakeholders, including states, tribes, scientists, and non-governmental organizations, that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms. These entities have identified specific projects and discharges that would no longer be subject to CWA protections because the waters at issue would no longer be jurisdictional. In many cases permit applications have been withdrawn. For example, stakeholders have raised concerns about dredge and fill activities on large swaths of wetlands in sensitive areas, in the floodplains of jurisdictional waters, or even within several hundred yards of traditional navigable waters, that are proceeding without CWA regulatory protection or compensatory mitigation. Stakeholders have also identified for EPA many other wetlands and streams, newly deemed non-jurisdictional, which are likely to be filled for commercial and housing developments, mines, water pipelines, and other forms of development without CWA oversight.

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I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided by employees under my supervision.

Dated: June 9, 2021

Jaime A. Pinkham
Acting Assistant Secretary of the Army
for Civil Works
U.S. Department of the Army