CENTER FOR BIOLOGICAL DIVERSITY ● CENTER FOR FOOD SAFETY TURTLE ISLAND RESTORATION NETWORK ● WATERKEEPER ALLIANCE ● HUMBOLDT BAYKEEPER ● LAKE WORTH WATERKEEPER ● MISSOURI CONFLUENCE WATERKEEPER ● RUSSIAN RIVERKEEPER ● MONTEREY COASTKEEPER ● RIO GRANDE WATERKEEPER ● SNAKE RIVER WATERKEEPER ● SOUND RIVERS ● UPPER MISSOURI WATERKEEPER

Via Electronic and Certified Mail

February 13, 2020

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Lieutenant General Todd T. Semonite
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Re: Formal Notice of Intent to Sue for Violations of the Endangered Species Act; 2020 Revised Regulatory Definition of "Water of the United States"

On behalf of the Center for Biological Diversity, Waterkeeper Alliance, Center for Food Safety, Turtle Island Restoration Network, Humboldt Baykeeper – A Project of Northcoast Environmental Center, Lake Worth Waterkeeper, Missouri Confluence Waterkeeper, Monterey Coastkeeper – A Program of the Otter Project, WildEarth Guardians (Rio Grande Waterkeeper), Russian Riverkeeper, Snake River Waterkeeper, Sound Rivers, and Upper Missouri Waterkeeper ("Conservation Groups"), we ask that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA" or "Act") by the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively "EPA") in issuing on January 23, 2020 a revised regulatory definition and final rule defining the scope of waters federally protected under the Clean Water Act (hereinafter "2020 Dirty Water Rule").

EPA is violating Section 7(a)(2) of the ESA by taking an action that "may affect" ESA-listed species without having first engaged in mandatory consultation under the ESA.[1] Moreover, any implementation of the 2020 Dirty Water Rule prior to the conclusion of consultation activities constitutes a violation of Section 7(d) of the Act, which prohibits the "irretrievable commitment of resources" pending the completion of consultation.[2] These requirements obligate EPA to consult under the ESA prior to taking any action that it funds, authorizes, or carries out so that it may affirmatively "insure" that the action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat.[3]

[1] 16 U.S.C. § 1536(a)(2).
[2] 16 U.S.C. § 1536(d).
[3] 16 U.S.C. § 1536(a)(2).

Pursuant to Section 11(g) of the Act, EPA has sixty days from the postmark of this letter to come into compliance with its ESA consultation obligations.[4] If it does not remedy these ongoing violations within that time period, Conservation Groups intend to initiate litigation in federal court to resolve the matter.

NOTICED ACTION

On January 23, 2020, EPA finalized a rule amending the regulatory definition of "waters of the United States," as that term is used in the Clean Water Act ("CWA").[5] The rule, termed by EPA "The Navigable Waters Protection Rule," is currently available on EPA's website at https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf, and will be published in the Federal Register under docket number EPA-HQ-OW-2018-0149.

On October 22, 2019, prior to finalizing the 2020 Dirty Water Rule, EPA published a final rule in the Federal Register repealing a prior rule ("2019 Repeal Rule") that had in 2015 amended the regulatory definition of "waters of the United States" to define the scope of waters protected under the Clean Water Act ("2015 Clean Water Rule").[6] The 2019 Repeal Rule purported to "restore[s] the regulatory text that existed prior to the 2015 Rule," and was also taken without lawful compliance of the ESA's legal obligations.[7] Conservation Groups provided notice to EPA on December 17, 2019 of their intent to sue EPA for violations of the ESA in issuing the 2019 Repeal Rule.[8] Conservation Groups hereby incorporate that notice letter by reference into today's notice letter and in so doing provide notice under the ESA regarding violations by EPA in issuing both final agency actions.

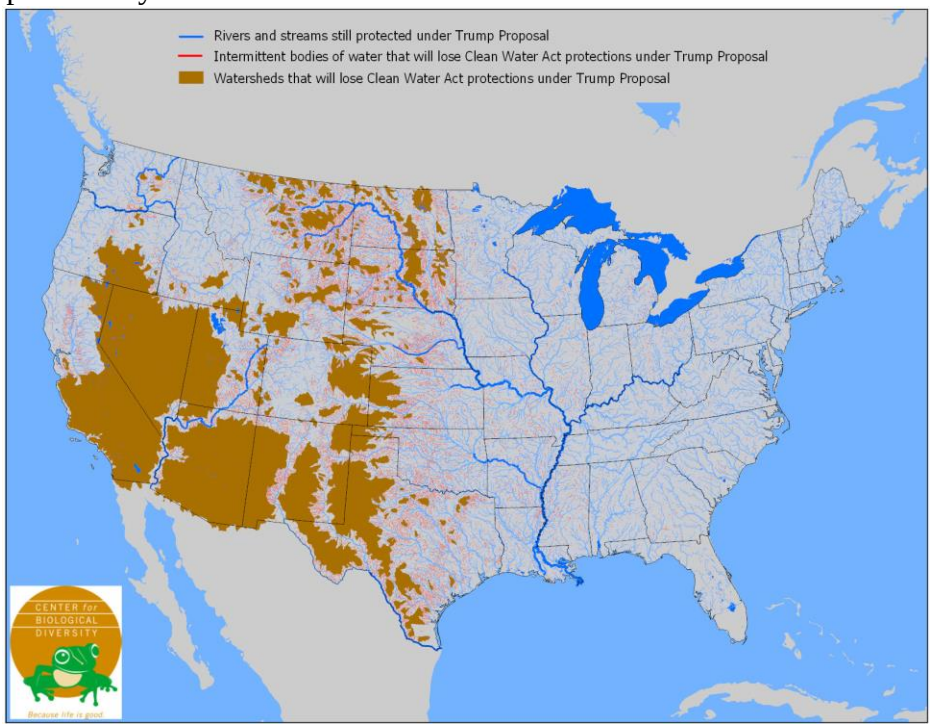
INTRODUCTION

In the 2020 Dirty Water Rule, EPA is constricting its interpretation of the definition of "waters of the United States" to categorically *exclude* ephemeral waters, all groundwater, groundwater recharge structures, and non-adjacent wetlands (as broadly defined in the rule), as well as other waterbodies that don't meet the agencies' narrowed definition of "waters of the United States." As detailed in Conservation Groups' public comments to EPA on the rule, under this narrow interpretation, millions of acres of rivers, streams, lakes, wetlands, impoundments, and other waterbodies will now be excluded from CWA jurisdictional protections.[9] These waters directly and indirectly provide and support habitat for breeding, feeding, or sheltering for a large number

[4] 16 U.S.C. §1540(g)(2)(A)(i).
[5] 33 U.S.C. 1362(7).
[6] *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56,626 (Oct. 22, 2019); *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015).
[7] *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56,626 (October 22, 2019).
[8] *See* Att. A.
[9] *See* Comments from Center for Biological Diversity at https://www.regulations.gov, docket number EPA-hq-OW-2018-0149-5076 (Apr. 15, 2019); Comments from Waterkeeper Alliance *et al*. at https://www.regulations.gov, docket number EPA-HQ-OW-2018-0149-11318 and EPA-HQ-OW-2018-0149-11319.

of endangered and threatened species across the nation, as further detailed below. This includes, but is not limited to, species in the arid West—an area that lost a vast majority of its CWA protections as a result of the rule. Yet, despite the significant anticipated effects from such a widespread reduction of CWA jurisdictional protections to aquatic ecosystems and the many threatened or endangered species that depend upon them, EPA did not even attempt to identify, quantify, or otherwise consider the adverse impacts to these species prior to finalizing the rulemaking—*e.g.*, it did not make a "no effect" determination. By finalizing the 2020 Dirty Water Rule without first coming into compliance with the substantive and procedural requirements of the ESA, EPA has failed to ensure that its actions will not jeopardize the continued existence of already imperiled species and is undermining the fundamental purpose of the ESA of "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[.]"[10]

For example, the 2020 Dirty Water Rule removes protections from all non-adjacent wetlands nationwide, which provide crucial habitat for dozens, if not hundreds, of federally-listed threatened and endangered species.[11] Streams and rivers across the country are also losing protections under the 2020 Dirty Water Rule. Using documents leaked by EPA career staff and our own analysis, the Conservation Groups estimate that the impacts from the 2020 Dirty Water Rule will be particularly severe in the western United States.[12]



[10] 16 U.S.C. § 1531(b); *see also Thomas v. Peterson*, 753 F. 2d 754 (9th Cir. 1985) ("If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.").
[11] *See, e.g.*, 2020 Dirty Water Rule Pre-Publication Version at 31, 235 ("Some commenters recommended including as waters of the United States specific waters based solely on ecological importance, such as prairie potholes . . . . As noted above, under the final rule's definition, ecological connections alone are not a basis for including physically isolated wetlands within the phrase 'the waters of the United States.'").
[12] *See* Att. B.

In analyzing the 2020 Dirty Water Rule, Conservation Groups have been able to ascertain—although not comprehensively—that at a minimum the following listed species will be adversely affected and may even be jeopardized by the rule, due to both the direct and indirect loss of protections for broad classes of waters and the cumulative impacts upon downstream waters:

> Alameda whipsnake, Arroyo toad, Ash Meadows Amargosa pupfish, Beautiful shiner, Big Spring spinedace, Bonytail chub, Borax Lake chub, Bull Trout, California red-legged frog, California tiger Salamander (Central California DPS), California tiger Salamander (Santa Barbara County DPS), Casey's June Beetle, Chiricahua leopard frog, Coachella Valley fringe-toed lizard, Colorado pikeminnow, Conservancy fairy shrimp, Dakota skipper, Desert dace, Diminutive Amphipod, Gila chub, Hiko White River springfish, Huachuca water-umbel, Humpback chub, Least Bell's vireo, Little Colorado spinedace, Little Kern golden trout, Loach minnow, Longhorn fairy shrimp, Lost River sucker, Modoc Sucker, Mountain yellow-legged frog (Northern DPS), Mountain yellow-legged frog (Southern California DPS), New Mexican ridge-nosed rattlesnake, New Mexico meadow jumping mouse, Oregon spotted frog, Owens tui chub, Phantom Springsnail, Poweshiek skipperling, Quino checkerspot butterfly, Railroad Valley springfish, Razorback sucker, Riverside fairy shrimp, San Bernardino springsnail, San Diego fairy shrimp, Santa Ana sucker, Sharpnose shiner, Shortnose sucker, Sierra Nevada Yellow-legged Frog, Smalleye Shiner, Southwestern willow flycatcher, yellow-billed cuckoo, desert pupfish, Huachuca water umbel, northern Mexican garter snake, Spikedace, Three Forks springsnail, vernal pool fairy shrimp, vernal pool tadpole shrimp, Virgin River chub, Warner sucker, White River spinedace, White River springfish, woundfin, Yaqui catfish, Yaqui chub, Yosemite toad, Zuni bluehead sucker, river winter-run Chinook salmon, the Snake River fall-run Chinook salmon, the Snake River spring/summer run Chinook salmon, the Upper Columbia River spring-run Chinook salmon, the Upper Willamette River Chinook salmon, the Central California coast Coho salmon, the Lower Columbia River Coho salmon, the Oregon coast Coho salmon, the South Oregon and North California coasts Coho salmon, the Ozette Lake Sockeye salmon, the Snake River Sockeye salmon, the California Central Valley steelhead, the Central California coast steelhead, the Lower Columbia steelhead, the Middle Columbia steelhead, the Northern California steelhead, the Puget Sound steelhead, the Snake River Basin steelhead, the South-Central California coast steelhead, the Southern California steelhead, Hood Canal summer-run chum salmon, Southern Resident DPS of Orca, the Upper Columbia River steelhead, the Upper Willamette River steelhead, West Indian Manatee, Rio Grande chub, Rio Grande cutthroat trout, Rio Grande sucker, Rio Grande silvery minnow, Pecos sunflower, Jemez Mountains salamander, Ozark hellbender, eastern Hellbender DPS, sea otter, tidewater goby, eulachon, longfin smelt, Southern DPS of Pacific smelt, Southern DPS of green sturgeon, shortnose sturgeon, Carolina DPS of Atlantic sturgeon, Chesapeake Bay DPS of Atlantic sturgeon, Gulf of Maine DPS of Atlantic sturgeon, New York Bight DPS of Atlantic sturgeon, and South Atlantic DPS of Atlantic sturgeon.

To make matters worse, EPA finalized the rule despite concerns raised by its own Scientific Advisory Board ("SAB") that the 2020 Dirty Water Rule is unsupported by, and contrary to, sound science.[13] The SAB, comprised of 41 scientists (many of whom were appointed by Trump administration officials), is responsible for evaluating the scientific integrity of the agency's regulations. In its letter, SAB determined that the 2020 Dirty Water Rule (at that point not finalized) "decreases protections for our Nation's waters;" "neglects established science pertaining specifically to the connectively of ground water to wetlands and adjacent major bodies of water by failing to acknowledge watershed systems;" provides "no scientific justification" for excluding groundwater and other bodies of water; "departs from established science . . . in the exclusion of adjacent wetlands that do not abut or have a direct hydrologic surface connection to otherwise jurisdictional waters;" and that aspects of the rule "conflict with . . . the objectives of the [CWA]."[14]

As summarized and then supported in greater detail in a recent complaint to EPA's Office of Inspector General from Public Employees for Environmental Responsibility ("PEER") and former and current federal employees:

> The final Rule contradicts the overwhelming scientific consensus on the connectivity of wetlands and waters, and the impacts that ephemeral streams and so-called "geographically isolated" wetlands have on downstream navigable waters. Moreover, the EPA employees who directed the writing of the final Rule failed to consult properly with regional experts, and did not allow these experts to voice their dissenting opinions formally. Finally, these EPA employee failed to disclose the potentially adverse impacts the final Rule will have on human health and the environment and exaggerated the uncertainties associated with these impacts.[15]

By ignoring "overwhelming scientific consensus" and removing such a significant portion of otherwise jurisdictional rivers, streams, lakes, wetlands, and other waterways from the CWA's definition of "waters of the United States," EPA has removed from itself and citizens any meaningful ability to protect federal waterways from discharges of untreated toxic, biological, chemical, and radiological pollutants; from being dredged and filled with impunity; and from being afforded the most fundamental human health and ecological safeguards of the CWA—the prohibition of unauthorized discharges pursuant to 33 U.S.C. § 1311(a).

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[13] *See* Draft Letter from EPA SAB to Andrew Wheeler, Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, EPA-SAB-20-xxx (Oct. 16, 2019), https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/5939af1252ddadfb852584e10053d472/$FILE/WOTUS%20SAB%20Draft%20Commentary_10_16_19_.pdf [hereinafter "SAB Commentary"] (Att. C).

[14] *Id*. at 1-3.

[15] Complaint, PEER, *et al*., to Charles J. Sheehan, Acting Inspector General, Office of Inspector General regarding *Violation of the U.S. Environmental Protection Agency's (EPA's) Scientific Integrity Policy by Andrew Wheeler, David Ross, Matt Leopold, David Fotoui, Owen McDonough, Dennis Lee Forsgren, and Anna Wildeman*, at 1 (Jan. 18, 2020), https://www.peer.org/wp-content/uploads/2020/01/1_19_20_WOTUS_scientific_Integrity_Complaint_IG.pdf (Att. D).

Stripping these waterways of CWA protections will result in individual waterways—including endangered and threatened species' habitats—being destroyed and will lead to direct degradation of species environments, cumulative downstream impacts to water bodies that will harm endangered species due to diminished water quality, and could harm or even kill any number of federally listed and protected species.

Take waterways in the State of Arizona for example. As a result of the 2020 Dirty Water Rule, at least 93 percent of the state's stream miles are expected to lose protections under the CWA.[16] In addition, approximately 99 percent of the state's lake are expected to lose CWA protection. Further, 98 percent of the state's CWA National Pollutant Discharge Elimination System ("NPDES") permits[17] deal with point-source pollution discharges into waterways that are no longer considered jurisdictional under the 2020 Dirty Water Rule. As a result, those point-source dischargers, regardless of the types of pollution they are discharging, will no longer need to maintain CWA NPDES permits or the pollution limits and accountability that those permits entail. These changes will affect endangered and threatened species in Arizona, and harm (and potentially fully destroy) the critical habitats on which those species rely.

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] a program for the conservation of such endangered species and threatened species. . . ."[18] EPA's discretionary policy decision to deny CWA protection to countless acres of wetlands, rivers, and streams, as well as other water bodies through the 2020 Dirty Water Rule is exactly the type of discretionary policy choice that is subject to the ESA's consultation requirement. The Dirty Water Rule, which is nationwide in its scope, will directly, indirectly, and cumulatively impact endangered species and their habitats, and is likely to adversely affect endangered species across the Nation. EPA is, therefore, in violation of the ESA for failing to comply with Section 7 of the Act in finalizing the rule.

LEGAL BACKGROUND

Section 2(c) of the ESA establishes "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act]."[19] The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[20] As the Supreme Court has unequivocally summarized, the ESA's "language, history, and structure" make clear and "beyond doubt" that "Congress intended endangered species to be afforded the highest of priorities" and endangered species should be given "priority over the 'primary missions' of federal agencies."[21] Simply put, "[t]he plain intent of Congress in

[16] Ariel Wittenberg, *A 'Gap in Protection': Ariz. Looks for a Plan B under WOTUS, E&E News* (Jan. 28, 2020), https://www.eenews.net/stories/1062202283 (Att. E).
[17] In Arizona these permits are generally referred to as "AZPDES permits."
[18] 16 U.S.C. §§ 1531-1544; *id.* § 1531(b).
[19] 16 U.S.C. § 1531(c)(1).
[20] *Id.* § 1532(3).
[21] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174-75 (1978).

enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*."[22]

To fulfill the substantive purposes of the ESA, each federal agency is required under Section 7 of the Act to engage in consultation with the U.S. Fish and Wildlife Service ("FWS") and/or the National Marine Fisheries Service ("NMFS" or, collectively, the "Services") to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . determined . . . to be critical."[23] The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agency to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the agency taking the proposed action.[24]

EPA's duty to engage in the Section 7 consultation process prior to taking any action that "may affect" a threatened or endangered species or their habitats is firmly established by the unambiguous text of the ESA.[25] Section 7 consultation is required for every *discretionary* agency action that "may affect listed species or critical habitat."[26] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[27] The Services' joint regulations further, clearly require programmatic consultations on federal, nationwide rulemakings that impact listed species. [28]

At the completion of consultation, the Services are required to issue a Biological Opinion that determines if the agency action is likely to jeopardize any affected species. If so, the Biological Opinion must specify "Reasonable and Prudent Alternatives" that will avoid jeopardy and allow the agency to proceed with the action. The Services may also "suggest modifications" to the action, called "Reasonable and Prudent Measures," during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy.[29] Only where the action agency determines that its action will have "no effect" on listed species or designated critical habitat is the consultation obligation lifted.[30]

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[22] *Id*. at 184 (emphasis added).
[23] 16 U.S.C. § 1536(a)(2).
[24] *See Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987).
[25] *See, e.g., Tenn. Valley Auth.*, 437 U.S. at 188 (In describing the "broad sweep" of the statute's authority, the Court established that "[i]n passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, [. . .] creates a number of limited 'hardship exemptions,' none of which would even remotely apply to the Tellico Project. In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius,* we must presume that these were the only 'hardship cases' Congress intended to exempt").
[26] *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007); 50 C.F.R. § 402.14(a).
[27] *Id.* § 402.02 (emphasis added); *see also Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994); *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988); *National Wildlife Fed'n v. FEMA*, 345 F. Supp. 3d 1151, 1169 (W.D. Wash. 2004).
[28] *See, e.g.*, Interagency Cooperation – Endangered Species Act of 1973, as Amended; Incidental Take Statements, 80 Fed. Reg. 26,832 (May 11, 2015).
[29] 50 C.F.R. § 402.13.
[30] 50 C.F.R. § 402.14(a).

Section 7(d) of the ESA provides that after federal agencies initiate consultation on an action under the Act, the agencies "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[31] The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

Finally, Section 7(a)(1) of the ESA provides that all federal agencies "shall in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species."[32] Thus, the ESA imposes on all federal agencies affirmative obligations to conserve threatened and endangered species.[33] Under these unambiguous terms and in light of the facts of the current rulemaking, the ESA requires that EPA consult with the Services and prepare a Biological Opinion prior to taking action on the 2020 Dirty Water Rule.

ENDANGERED SPECIES ACT VIOLATIONS

I. Failure to Insure No Jeopardy; Failure to Insure Against Destruction or Adverse Modification of Critical Habitat

a. The 2020 Dirty Water Rule "May Affect" Endangered and Threatened Species and their habitats, and Requires Consultation under the ESA

EPA's duty to engage in the Section 7 consultation process prior to taking any action that "may affect" a threatened or endangered species or their habitats is firmly established by the unambiguous text of the ESA. Under Section 7 and its implementing regulations, each federal agency must insure that *any action* authorized, funded, or carried out by the agency—including discretionary rulemaking activities—is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species.[34]

As the Supreme Court explained in *Tennessee Valley Authority v. Hill*, the language of Section 7 "admits of no exception."[35] Indeed, Congress was well aware of the "broad sweep" of Section 7

[31] 16 U.S.C. § 1536(d); *see also Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 n.6 (9th Cir. 1998); *Marsh*, 816 F.2d at 1389.
[32] 16 U.S.C. § 1536(a)(1).
[33] *Pyramid Lake Paiute Tribe v. U.S. Dept of Navy*, 898 F.2d 1410, 1416-17 (9th Cir.1990); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261-62 & n. 3 (9th Cir.1984).
[34] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).
[35] *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) ("In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, [] creates a number of limited 'hardship exemptions,' none of which would even remotely apply to the

because it reflects Congress' intent to give endangered species priority over the primary missions of federal agencies like the EPA.[36] In sum, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."[37]

That requirement applies here. Agency "action" under the ESA is broadly defined to include, among other things, "all activities or programs of any kind" that "directly or indirectly caus[e] modifications to the land, water, or air."[38] By definition, the 2020 Dirty Water Rule will result in modifications to waters and the protections that are afforded, thereby impairing water quality and impacting wetland-dependent species (among other species dependent on rivers, streams, lakes and other waters); this exceeds the "relatively low" consultation threshold set out in the ESA.[39]

Congress made the "may affect" threshold "relatively low" to ensure that "actions that have *any chance* of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA."[40] According to the Fish and Wildlife Consultation handbook, "may affect" is met whenever "a proposed action may pose *any* effects on listed species or designated critical habitat."[41] This analysis includes an examination of both the direct effects of the action as well as its indirect effects, including effects resulting from the proposed action which are later in time, but are still reasonably certain to occur."[42] Consultation is still required even if the effects of the action are "beneficial, benign, adverse or of an undetermined character."[43] Thus, an agency must consult in every situation except those where its actions will have "no effect" on listed species.

Here, the 2020 Dirty Water Rule will result in decreased protections for waterways, including rivers, streams, lakes, wetlands, and other waters, across the nation under the CWA. As a result, fewer waters will be protected and more waters can be expected to be destroyed—waters that are essential for the health and continuation of endangered and threatened species.

b. The 2020 Dirty Water Rule was a Discretionary Action by EPA Subject to ESA Consultation Obligations

EPA's choice to severely curtail the jurisdictional definition of "waters of the United States" through the 2020 Dirty Water Rule was just that: a discretionary choice. While the Supreme

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Tellico Project. In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius,* we must presume that these were the only 'hardship cases' Congress intended to exempt.").

[36] *Id*. at 141.

[37] *Id*. at 184.

[38] 50 C.F.R. § 402.02; *see also Connor v. Burford*, 848 F. 2d 1441, 1453 (9th Cir. 1988) ("We interpret the term 'agency action' broadly."); *North Slope Borough v. Andrus*, 642 F. 2d 589 (D.C. Cir. 1980).

[39] *Cal. ex rel. Lockyer v. U.S. Dep't of Agric*., 575 F.3d 999, 1018 (9th Cir. 2009).

[40] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012) (emphasis added).

[41] U.S. Fish & Wildlife Serv. and Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at xvi (Mar. 1998) (emphasis in original).

[42] 50 C.F.R. § 402.02.

[43] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012); *see also Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1145 (D. Mont. 2014).

Court in *National Ass'n of Home Builders v. Defenders of Wildlife* identified a narrow exception to the Section 7 consultation requirement when the federal agency has no statutory discretion to act, that exception does not apply here.[44]

In *Home Builders*, the Court held that Section 402(b) of the CWA does not require ESA consultations because EPA action under Section 402(b) is nondiscretionary: once a state has "met nine specified criteria" under the law, EPA "shall approve" and transfer the NPDES permitting authority to the state.[45] That holding is inapplicable to this rulemaking, which is not similar to *Home Builders* as a matter of law or in fact.

First, EPA has consistently demonstrated through its multiple rulemakings that it possesses substantial discretion to administratively review and amend the jurisdictional scope of the CWA as it relates to the definition of jurisdictional waters of the United States. Indeed, because the CWA does not command EPA to promulgate a particular set of regulations setting forth either the general limits or specific exemptions to define the scope of "waters of the United States" that are protectable under the law, its decision to do so in the 2020 Dirty Water Rule represents a clear discretionary action by EPA.

Indeed, as David Ross, EPA's Assistant Administrator for the Office of Water, conceded in an interview on December 11, 2018, the 2020 Dirty Water Rule:

> is a legal call . . . we took a look at Supreme Court precedent and also *made some policy decisions on where to draw the line* that were informed by science.[46]

The 2020 Dirty Water Rule also clearly provides in the preamble "[t]o develop this revised definition of 'waters of the United States,' the agencies looked to the text and structure of the CWA, as informed by its legislative history and Supreme Court guidance, and took into account the agencies' expertise, *policy choices*, and scientific principles."[47] Indeed, EPA itself agrees, arguing within its own preamble that, "[i]n defining the term 'waters of the United States' under the CWA, Congress gave the agencies discretion to articulate reasonable limits on the meaning of that term[.]"[48]

By making a discretionary policy decision to narrow the scope of the "waters of the United States" through a rulemaking, EPA must—just like every other federal agency—consult if the 2020 Dirty Water Rule's direct or indirect effects cross the "may affect" threshold of the ESA. Case law reinforces the proposition that a regulation that may affect endangered species must be

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[44] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007); 50 C.F.R. § 402.14(a).
[45] *Id*. at 650.
[46] Ariel Wittenberg, *Legal Analysis, Not Science, Drives WOTUS Stream Protections*, E&E News (Dec. 11, 2018), https://www.eenews.net/eenewspm/stories/1060109359/ (Att. F).
[47] 2020 Dirty Water Rule Pre-Publication Version at 9 (emphasis added); *see also id*. at 101 ("The final rule therefore is also based on the text, structure, and legislative history of the CWA, the reasoned policy choices of the executive branch agencies authorized by Congress to implement the Act, and the agencies' technical and scientific expertise administering the CWA over nearly five decades."); *id*. at 183 ("The agencies have considered the full range of comments and have finalized a rule *that balances* these diverse viewpoints.") (emphasis added).
[48] *Id*. at 297.

the subject of consultation.[49] Because the 2020 Dirty Water Rule will almost certainly result in adverse effects on endangered species and their critical habitats as it is implemented in the future, consultations must occur with the Services.

EPA's failure to follow the procedural and substantive requirements of the ESA, therefore, clearly violates the law.

II. Irreversible or Irretrievable Commitment of Resources

Section 7(d) of the ESA prohibits a federal agency from "mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[50] By failing to consult with the Services, EPA has guaranteed that some wetlands and other waters will be degraded or destroyed without the possibility that a reasonable and prudent measure could ever be implemented to protect a listed species or its critical habitat because the Agencies have improperly foreclosed the possibility of consultations in the rule. Accordingly, EPA is also in violation of Section 7(d) of the ESA.

CONCLUSION

As the above makes clear, by failing to initiate and complete consultation with the Services regarding the effects of the 2020 Dirty Water Rule on listed species and their critical habitat, and by failing to ensure against jeopardy, EPA is in violation of the Endangered Species Act. EPA's finalization of the rule without consultation constitutes ongoing violations of the Act.[51] To remedy these violations, EPA must vacate its action finalizing the rule and immediately initiate consultation. To do otherwise places the agency in ongoing violation of Sections 7(a)(2) and 7(d) of the Act.

If the Environmental Protection Agency and U.S. Army Corps of Engineers do not act within 60 days to correct the violations described in this letter, we will pursue litigation. If you would like to discuss this matter, please contact us.

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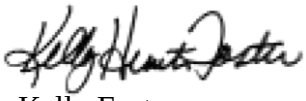
[49] *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F.Supp.3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*., 481 F.Supp.2d 1059 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F.Supp.2d 1158 (W.D. Wash. 2006).
[50] 16 U.S.C. § 1536(d).
[51] 16 U.S.C. §1536.



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