

continues to face almost 50 years after the passage of the Clean Water Act, it is plain that the Act's requirements and enforcement desperately need to be supported and strengthened, not diminished. Weakening the Clean Water Act by further reducing the scope of federal jurisdictional waters and assuming that state and tribal governments all have the desire, will, resources, and capacity to pick up the slack, would be an unreasonable and unsupportable course of action.

As the agencies are well-aware, the passage of the Clean Water Act and a host of other federal laws in the 1970s occurred as a direct result of public outcry regarding dangerous pollution problems that resulted from failures by states to protect people and public trust resources from pollution.³⁴ The agencies also know that most states and tribal governments will not be able or willing to sufficiently regulate dangerous pollution on deregulated rivers, streams, and wetlands utilizing state law alone and without the federal regulatory “floor” established by the Clean Water Act. For example, information gathered by the agencies after the adoption of the NWPR demonstrated that states and tribal governments had not replaced, and in many instances could not replace, the federal protections provided by the Clean Water Act for the nation's waters. For example, in a section of the 2021 Proposed Definition entitled “*States and Tribes Did Not Fill the Regulatory Gap Left by the NWPR*,” the agencies stated that “[g]iven the limited authority of many states and tribes to regulate waters more broadly than the Federal government, the narrowing of federal jurisdiction would mean that discharges into the newly non-jurisdictional waters would in many cases no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation's waters.”³⁵ In fact, instead of stepping in to address lost protections, certain states actually began taking deregulatory steps to change their state regulatory practices to match the NWPR.³⁶

The NWPR was particularly dangerous because it stripped protections against uncontrolled industrial, municipal, agricultural, and other pollution discharges into many—and in some parts of the country, nearly all—rivers, streams, lakes, ponds, wetlands, and other waters. It left vast swaths of the Nation's waters unprotected against dangerous pollution discharges and destructive dredging and filling that harm drinking water supplies, fisheries, and recreational waters, people, endangered and threatened species, and the nation's vast, interconnected aquatic ecosystems that have been exposed to dangerous levels of pollution and destruction in both directly impacted and downstream waters. It irresponsibly impeded the ability of states, tribes, communities, and even of other federal agencies and EPA itself, to protect waters and ecosystems and the people and wildlife that depend on them across the country.

After it had been in place for only a short time, the agencies noted that a “broad array of stakeholders—including states, Tribes, local governments, scientists, and non-governmental

³⁴ See Hines History of the CWA, *supra* note 7, at 81-82.

³⁵ 2021 Proposed Definition, 86 Fed. Reg. at 69415.

³⁶ See EPA & DEP'T OF THE ARMY, MEMORANDUM FOR THE RECORD: REVIEW OF U.S. ARMY CORPS OF ENGINEERS ORM2 PERMIT AND JURISDICTIONAL DETERMINATION DATABASE TO ASSESS EFFECTS OF THE NAVIGABLE WATERS PROTECTION RULE (2021), https://www.epa.gov/sites/default/files/2021-06/documents/3_final_memo_for_record_on_review_of_data_web_508c.pdf; EPA, ATTACHMENT A: DATA ANALYSIS (2021), https://www.epa.gov/sites/default/files/2021-06/documents/combined_4_thru_12_508.pdf.