IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, *et al.*,
Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants.

No. 3:15-cv-162, consolidated with Nos. 3:15-cv-165, 3:15-cv-266, and 3:18-cv-176

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO INTERVENOR DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT IN NUMBERS 3:15-CV-165, 3:15-CV-266, AND 3:18-CV-176

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INTRODUCTION

The agencies acknowledge that the 2015 WOTUS Rule is *currently* in full force and effect in 22 States across the country (DOJ Opp. 4-5), where it "is creating significant confusion and uncertainty for states, tribes, local governments, agency staff, regulated entities, and the public, particularly in view of court decisions that have cast doubt on [its] legal viability." *Id*. at 10. The agencies also admit that the Rule is most likely unlawful for "some of . . . the same [reasons] raised by the challengers on summary judgment." *Id*. at 16. In their notice of proposed rulemaking to repeal the Rule, the agencies similarly expressed concern that the 2015 Rule is inconsistent with statutory text and Supreme Court precedent, exceeds federal Commerce Clause power, improperly usurps authority reserved to the States, and is procedurally deficient. *See* 83 Fed. Reg. 32,227 (July 12, 2018).

The agencies nevertheless take the bewildering position that a decision on the merits here would be "premature" because the agencies' reconsideration of the Rule means that "[the] case is not ripe for adjudication." DOJ Opp. 14. That is so, they say, because—in light of the pending repeal proposal—the harms flowing from the 2015 Rule "'rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id*. at 15 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)); *accord id.* at 15 (case unripe because it is "contingent on future possibilities").

The agencies are confused. We are not challenging the proposed repeal rule, which is all that might be said to "rest upon contingent future events." We are challenging the 2015 Rule itself—a final regulation, presently enforceable, contingent on nothing. The private party plaintiffs and their members live, work, and own property all across the country, including in the 22 States where the Rule is being enforced. They are suffering injury *right*

now. The prospect that the agencies might repeal the 2015 Rule at some unknown future date does not undermine the immediacy of their injuries or the fitness of these challenges for prompt judicial resolution. Indeed, even in the 28 States covered by a preliminary injunction, the relief granted by this and other courts is interlocutory and tentative, not fixed or final. In this respect, the preliminary injunctions are merely designed to maintain order while the cases proceed. There accordingly are no impediments to this Court's adjudication of the plaintiffs' motions for summary judgment.

Next, the agencies insist that we are time-barred from challenging the inclusion of "interstate waters," including features that are neither navigable nor have any significant nexus to a traditional navigable water, as among the "waters of the United States" covered under the CWA. DOJ Opp. 19-20.; *see also* NGO Opp. 27-28. That is mistaken; the agencies reopened the "interstate waters" issue by inviting comment on the issue and attempting anew to justify its inclusion. The agencies additionally reopened challenge to their assertion of jurisdiction over "interstate waters" by basing their jurisdiction over *other* features on those features' supposed connections with interstate waters.

The agencies and intervenor-defendants both assert that our procedural claims are lacking. But they fail to engage in the substance of our arguments, offering instead misdirection and mischaracterization. None of it is enough to overcome what every other court to consider the issue has determined: that the final Rule was not a logical outgrowth of the proposed Rule, and that the Rule is in many other respects procedurally defective.

Turning to the merits, the agencies appropriately decline to take a position on our substantive claims, reflecting that they have proposed to conclude that the 2015 Rule creates confusion and uncertainty and exceeds legal and constitutional limits on their CWA

jurisdiction as intended by Congress and required by Supreme Court decisions. 83 Fed. Reg. at 32,228. The intervenor-defendants attempt to fill in where the agencies leave gaps, defending the Rule's substance by saying that it comports with the scientific record. But science has to operate within the confines of the statutory text. *See Rapanos v. United States*, 547 U.S. 715, 777-78 (2006) ("Scientific evidence" and "environmental concerns provide no reason to disregard limits in the statutory text") (Kennedy, J., concurring). As we demonstrated in the opening memorandum, the Rule is plainly out of step with statute's text and the Supreme Court's precedents. No issue of deference to the agencies' interpretation of the science arises here.

ARGUMENT

A. The agencies' ripeness argument is meritless

The agencies urge this Court to decline jurisdiction over this case, asserting that a final judgment on the merits would be "premature" in light of the agencies' proposed repeal of the 2015 Rule. DOJ Opp. 14-15. Their position, in effect, is that because the case *might* become "moot" because of agency action at some unknown point in the future, it is presently "not ripe" for resolution. *Id*. at 14-16. That position has no merit. In fact, declining to exercise jurisdiction over a final regulation currently being enforced and causing immediate harms would be flatly inconsistent with the Court's "'virtually unflagging'" obligation to hear cases within its jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014) (citation omitted).

Under the ripeness doctrine, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). The "basic rationale is to prevent the courts, through

avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.*

That rationale has no application here—and it takes no complex analysis to see why.

1. To begin with, the 2015 Rule is plainly fit for judicial decision. It is a final agency action that is being enforced and presently requires the Private Party Plaintiffs and their members to adjust their conduct immediately. This is no mere "abstract disagreement[] over administrative policies" (*Abbott Labs*, 387 U.S. at 148), but a concrete dispute over the lawfulness of a final agency action that is now being enforced. A "substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately" is obviously "'ripe' for review at once." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). That is this case.

It makes no difference that the agencies are reconsidering the Rule. There is no guarantee that the proposed repeal of the Rule will be finalized—the court has "no way of knowing" the direction that the proposed rulemaking may take. *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 354 n.8 (D.C. Cir. 1993); *see also Comite De Apoyo A Los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 184 (3d Cir. 2014) (rejecting the government's ripeness argument where the agency, despite a notice of proposed repeal, was "using the challenged rules on an ongoing basis"). That is especially so here, given that the agencies have stated, quite properly, that they "are keeping an open mind" and continuing to deliberate on "whether the 2015 Rule should be repealed, modified, *or retained*." DOJ Opp. 2 (emphasis added). The agencies thus accurately frame the repeal as conditional only before this Court.

See id. at 9 ("*If* finalized, this proposal would . . .") (emphasis added); *id*. at 17 ("*If* the Agencies finalize either the repeal rule or a new definition . . .") (emphasis added).

Courts routinely review and vacate unlawful rules—even interim rules—while the agency considers a final replacement rule. *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012) (rejecting "EPA's claim that the challenged errors are harmless simply because of the pendency of a properly-noticed final rule"); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1038, 1039-40 (D.C. Cir.) (rejecting the government's argument that an agency action is not final when the agency "intends to continue considering" the rule and holding agency act ripe for review), *modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002). *Cf. Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 627 n.5 (2018) (deciding issue of jurisdiction to challenge 2015 Rule despite proposed repeal).

2. Delayed resolution would also impose substantial hardship on the Private Party Plaintiffs. On this score, "[i]t must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged statute or official conduct." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal quotation marks omitted). That is this case. It is flat wrong to say that the Rule "'w[ill] not take effect absent further action by the agency.'" DOJ Opp. 18 (citing *Anderson v. Green*, 513 U.S. 557, 559 (1995)).

The agencies argue the parties face no hardship from a delay because a regional preliminary injunction is in place. That is mistaken, for two reasons.

First, everyone agrees (as they must) that the Rule is in effect in 22 States and the District of Columbia. The Private Party Plaintiffs' members with operations in those jurisdictions are now subject to regulation under the Rule and have had to alter their conduct to

conform with it. That by itself is sufficient to ripen the controversy here. According to the Supreme Court, delay imposes hardship when—as here—a regulation is presently "ha[ving] an immediate and substantial impact upon the respondents." *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967); *see also Abbott Labs.*, 387 U.S. at 152 (a regulation is sufficiently "immediate as to render the issue appropriate for judicial review" where it has a "direct effect on the day-to-day business" of the parties).

As we explained at the hearing before the Court on September 11, 2018 (Dkt. 145 at 28-31), these harms are very real: Regulated entities are incurring significant compliance costs as they obtain permits they would not otherwise need or refrain from development projects that have been made economically infeasible by the 2015 WOTUS Rule. *See also* Motion for an Amended Preliminary Injunction, *Georgia v. Pruitt,* 2:15-cv-79, Dkt. 208 at 11-16 (S.D. Ga. Sept. 26, 2018). Indeed, it's enough just to show that persistent doubts about the validity of the Rule have "plagued" the regulated community. *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 581 (1985) (such uncertainties "impose a palpable and considerable hardship") (internal quotation marks omitted). Even the agencies acknowledge these harmful uncertainties. DOJ Opp. 8-9; 83 Fed. Reg. at 32,237.[1] Thus, this situation is markedly contrary to *Texas Independent Producers and Royalty Owners Association v. EPA*, 413 F.3d 479 (E.D.N.Y. 2005), where petitioners challenged a Deferral Rule delaying the operation of an underlying regulation that would ultimately require the petitioners obtain

[1] *Wyoming v. Zinke*, 871 F.3d 1133, 1142-43 (10th Cir. 2017)—cited at page 39 of the agencies' brief—does not suggest otherwise. There, the district court had already invalidated the challenged regulation. *Id.* at 1137. In the interim, the agency had instituted procedures to rescind the invalidated regulation. Because the challenged regulation had already been set aside, withholding judicial review would not have imposed *any* recognizable hardship. *Id.* at 1142-43. Here the opposite is true.

permits. The Court found "[p]etitioners have not demonstrated how a possible change in permitting requirements a year from now [under the deferred, underlying regulation] could seriously affect an industry that, by its own admission, is unable to plan far in advance." *Id.* at 483. Here, there is no uncertainty: the challenged requirements are currently operative and imposing harm on the regulated public.

Second, even as to the 28 States where the Rule is enjoined, it is settled that a preliminary injunction is inherently tentative and does not deprive a court of continuing Article III jurisdiction. Were it otherwise, preliminary injunctions would function as final judgments. That is not the law. A preliminary injunction is "'by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive.'" *SEC v. First Fin .Grp.*, 645 F.2d 429, 434 n.8 (5th Cir. 1981) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 739, 742 (2d Cir. 1953)). The preliminary injunctions against enforcement of the 2015 Rule are "designed to maintain order" based on "tentative findings" while the cases proceed; they are provisional only and do not provide final relief. 18B Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction* 2d § 4478.1 (2d ed. 2002). Thus, even in those States where the Rule is not being enforced, the regulated public remains "immediately in danger" (*O'Shea*, 414 U.S. at 494) of being subject to the Rule.

At bottom, there is no credible basis for saying that a final regulation that is presently being enforced and imposing substantial hardship on the challengers is not ripe for judicial review. The Court should address the challenge to the 2015 Rule before it.

B. The challenge to "interstate waters" is not time barred

We demonstrated in our opening memorandum (at 29-32) that the Rule effectively reads the word "navigable" out of the CWA. Nowhere is that conclusion more clear than with respect to the Rule's coverage of "interstate waters," which are categorically jurisdictional regardless of whether they are navigable or have any appreciable connection to a navigable water. *See* 80 Fed. Reg. 37,054, 37,074 (June 29, 2015) ("Interstate waters" are those that cross state borders, "even if they are not navigable" and "do not connect to [navigable] waters").

The agencies and intervenor-defendants (DOJ Opp. 19-20; NGO Opp. 27-28) assert that our challenge to "interstate waters" is untimely. They contend that (1) the APA requires challenges to final agency actions to be brought within six years, (2) the provision for "interstate waters" predated the 2015 Rule by more than six years, and (3) the Rule did not change the provision for "interstate waters." Therefore, they say, the challenge is time barred. That is incorrect.

It is well settled that the period for seeking judicial review of an agency's rule or other interpretation "may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection." *Ohio v. EPA,* 838 F.2d 1325, 1328 (D.C. Cir. 1988). The "general principle" of this so-called reopener doctrine is that "if the agency has opened the issue up anew, even though not explicitly, its renewed adherence is substantively reviewable." *Ass'n of Am. RRs v. I.C.C.,* 846 F.2d 1465, 1473 (D.C. Cir. 1988). The doctrine thus provides that "the time for seeking review [runs] anew from the time of re-promulgation" when "the agency [holds] out [the unchanged section] as a proposed regulation, offer[s] an explanation for its language, solicit[s] com-

ments on its substance, and respond[s] to the comments in promulgating the regulation in its final form." *Ohio*, 838 F.2d at 1328 (internal quotation marks omitted).

That is just what happened here: The agencies expressly held out coverage of "interstate waters" as part of the proposed 2015 Rule, offered an extensive justification for that coverage, and took and responded to comments on the issue. For example, the notice of the proposed 2015 Rule included a highly detailed discussion of why, in the agencies' view, "the plain language of the Clean Water Act and the statute as a whole clearly indicate Congress' intent to include interstate waters within the scope of 'navigable waters' for purposes of the Clean Water Act." 79 Fed. Reg. 22,188, 22,254 (Apr. 21, 2014) (initial capitals and emphasis omitted); *see also generally id.* at 22,254-59 (discussion of the basis for agency jurisdiction over interstate waters). And as the agencies expressly acknowledged in the preamble to the final 2015 Rule, "[t]he agencies received a number of comments on interstate waters." 80 Fed. Reg. at 37,075. "Some commenters," for example, "asserted that interstate waters required a significant nexus to a traditional navigable water in order to be jurisdictional after *Rapanos*." *Id*. The agencies then responded substantively to these comments, explaining that "[t]he agencies disagree" that interstate waters should not categorically be included within the their regulatory jurisdiction "for the reasons described above, in Appendix B to the proposed rule, and in the Technical Support Document." *Id*. That is a textbook example of reopening the issue for renewed comment, objection, and legal challenge. *Ohio*, 838 F.2d at 1328.

Application of the reopener doctrine under these circumstances is particularly appropriate because the state of the law has developed significantly since the agencies first asserted jurisdiction over "interstate waters" shortly after the CWA was enacted. Arguments based on

the reasoning in *Rapanos*, *SWANCC*, and *Riverside Bayview* are not "arguments that [were] available to [the parties or the agencies] at the time the [original] rule was adopted." *Nat'l Mining Ass'n v. Office of Hearings & Appeals*, 777 F. Supp. 2d 164, 174 (D.D.C. 2011). The parties thus "had an entirely new ground for attacking the regulations." *Id*. That is added reason to apply the reopener doctrine.

Beyond all that, the agencies must be understood as having reopened the "interstate waters" issue because the Rule drastically alters the kind and quantity of features that may be deemed jurisdictional on the basis of their *connection to* non-navigable interstate waters. Under the 2015 Rule, "tributaries" to interstate waters are jurisdictional (33 C.F.R. 328.3-(c)(3)), as are features "adjacent" to interstate waters (33 C.F.R. 328.3(c)(1)), and features with a "significant nexus" to interstate waters (33 C.F.R. 328.3(c)(5)). By elevating interstate waters among the core features to which other features may be linked for jurisdictional purposes, the Rule dramatically expands the role and significance of "interstate waters" under the CWA. This, too, provides a new ground for objecting to the agencies' inclusion of "interstate waters" as among the features categorically deemed to be "waters of the United States." The Court accordingly should address the Rule's improper coverage of all "interstate waters," which reads the word "navigable" out of the CWA. *See* Opening Mem. 29.

C. The WOTUS Rule was promulgated without observance of lawful procedure

We explained in our opening brief how the rule is riddled with legal flaws that require vacatur: the final rule deviates substantially from the proposal; the parties lacked a meaningful opportunity to comment on the Connectivity Report; and the agencies did not meaningfully address significant public comments. The agencies' responses are unpersuasive.

1. The final rule is not a logical outgrowth of the proposed rule

The agencies and intervenor-defendants defend the drastic changes made between the proposed rule and final Rule, without opportunity for further comment, as a "logical outgrowth" of the proposal. DOJ Opp. 22-29; NGO Opp. 35-39. That is incorrect. The logical outgrowth test cannot save a rule where "'interested parties would have had to 'divine [the agency's] unspoken thoughts,' because the final rule was surprisingly distant from the proposed rule.'" *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (citation omitted). Rather, a proposed rule "must provide sufficient detail and rationale for the rule to permit interested parties to participate meaningfully" in the rulemaking process. *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

a. Reasonable parties could not anticipate distance limitations in the final definition of "adjacent waters." The agencies and intervenor-defendants contend that those distance limits are a "logical outgrowth" because EPA "sought comment on a number of ways to address and clarify jurisdiction over 'adjacent waters,' including establishing a floodplain interval (e.g., a 50-year or 100-year floodplain) and providing clarity on reasonable proximity as an important aspect of adjacency." DOJ Opp. 24; NGO Opp. 36. A simple read of the federal record shows otherwise. The agencies requested:

> comment on other whether there are other reasonable options for providing clarity for jurisdiction over waters with these types of connections.…Options could include asserting jurisdiction over all waters connected through a shallow subsurface hydrologic connection or confined surface hydrologic connection regardless of distance; asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone of a jurisdictional water; considering only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; or **establishing specific geographic limits** for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for

> example, distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent.

79 Fed. Reg. at 22,208 (emphasis added). This vague, passing mention of "geographic limits" as one possibility out of a list of several fails to identify any of the necessary details. It does not indicate, for example, the possible type or range of geographic limit under consideration, why a geographic limit might be appropriate, or how the geographic limit might be measured or selected. Nor did the proposal suggest that geographic limits might be tied to geographic features like floodplains, rather than measured by purely numerical metrics of distance. And it very obviously did not propose particular limits like the 1,500-foot and 4,000-foot limits that were ultimately sprung on the public in the Rule. Indeed, the agencies expressly acknowledge that none of the final Rule's various "quantitative measures" "appear[ed] in the proposed rule, and thus the agencies did not receive public comment on these specific measures." 83 Fed. Reg. at 32,229.[2]

The fact that "geographic limit" is slipped in among a list of alternative methods with no elaboration does not render the final Rule a "natural subset" of the proposal. *Cf. La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1081 (D.C. Cir. 2003) (final rule was a natural subset where the proposal merely suggested a different means for the same ultimate result). Nor, more fundamentally, does it provide an opportunity for meaningful

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[2] Of course, the agencies were not required to "identify the precise numerical limit." *Ala. Power Co. v. OSHA*, 89 F.3d 740 (11th Cir. 1996). The issue here is that the agency did not say anything that suggested a numerical limit was on the table *at all*. Regardless, *Alabama Power* does not apply here. That case was governed by 29 U.S.C. 655(b)(2), which requires an opportunity to comment on standards that are modified. The court determined that a final rule simply clarified rather than modified a proposal that had permitted natural fabrics in the workplace, where the final rule elaborated that while "natural fabrics are in no way prohibited altogether . . . certain conditions to which a worker may be exposed call for either a heavyweight natural fabric, or a lightweight flame retardant natural fabric." *Id*. at 745.

participation in notice and comment. Indeed, the idea that a generic request for "comment on other whether there are other reasonable options" including (among many others) "establishing specific geographic limits" (79 Fed. Reg. at 22,208) would give the public notice that they should anticipate and comment on 1,500-foot and 4,000-foot thresholds inconsistently sprinkled throughout the Rule borders on ridiculous. Again, although a proposal may rely on a "description of the subjects and issues covered by a proposed rule, [the] description must provide sufficient detail and rationale for the rule to permit interested parties to participate meaningfully." *Horsehead*, 16 F.3d at 1268 (internal quotation marks omitted). Much smaller leaps between proposals and final rules have failed the logical outgrowth test. *See, e.g.*, *CSX Transp., Inc.*, 584 F.3d at 1082 (rule not a logical outgrowth where release of one-year data proposed but final rule expanded to four years).

The agencies and intervenor-defendants suggest that *comments* regarding distance limitations establish adequate notice. *See* DOJ Opp. 26 (citing *Am. Trucking Ass'ns, Inc. v. FMCSA*, 724 F.3d 243, 253 (D.C. Cir. 2013)); NGO Opp. 37. But comments alone are not enough. While "insightful comments may be reflective of notice and may be adduced as evidence of its adequacy," other courts have rejected "bootstrap arguments predicating notice on public comments alone." *Horsehead*, 16 F.3d at 1268.

b. Reasonable parties also could not anticipate distance limitations in the definition of waters with a significant nexus. Relying on a case that "stretches the concept of 'logical outgrowth' to its limits," *NRDC v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir. 1988), the agencies and intervenor-defendants argue that the distance limitations smuggled into the final definition of case-specific waters were a logical outgrowth of the proposal because the "germ" of a distance limitation was contained in the proposal. The agencies (at 30) see this

"germ" in the proposal that case-specific waters should be "sufficiently close" to a jurisdictional water. The intervenor-defendants see it in the statement that case-specific significant nexus determinations would be based on the "location" of the water. NGO Opp. at 38 (quoting 79 Fed. Reg. 22,214). But neither the bare-bones phrase "sufficiently close" nor the one-off word "location" give the remotest notice that a particular numerical measure of distance would be the standard. That is especially so in a context where different types of "connections" were under discussion.[3]

These unexplained, isolated statements do not provide the notice necessary to comport with the purpose of APA notice and comment rulemaking. The "germ" referenced in *Thomas* that drove the agency to alter a standard for determining emissions limitations "was obvious at an early stage" and "constantly asserted" as a theme during the rulemaking. 838 F.2d at 1242. And the EPA in *Thomas* afforded the parties a two-week comment period to address the specific change. Neither circumstance is present here.

2. The regulated parties lacked a meaningful opportunity to comment on the final Connectivity Report

The agencies and NGOs contend that parties had an adequate opportunity to comment on the Connectivity Report, despite the fact that its final version was published after the notice and comment window closed, because the final Report "simply clarified and expanded

[3] The intervenor defendants argue that we cannot challenge the 4,000-foot threshold because this change narrowed the final rule from the proposal and thus could not have prejudiced us. NGO Opp. 38. This is not so. *See* Opening Mem. at 20. Regardless, the issue is not that the agencies simply added a cut-off distance limiting the reach of an otherwise clearly articulated proposal. As we explained (*id.*), the agencies' unpredictably transformed the rule from "an ecologically and hydrologically based rule to one that finds itself based in geographic distance." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1058 (D.N.D. 2015).

upon concepts and topics in the *Draft* Science Report." DOJ Opp. 34 (emphasis added); *see also* NGO Opp. 39.

It is true that "an agency may add supporting documentation for a final Rule in response to comments, as well as supplementary data that expands on or confirms the information contained in the proposed rule." DOJ Opp. 34 (citing *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). But that is not what happened here.

The SAB "recommended numerous substantive changes to the Connectivity Report." WAC Comments 73; *see* SAB Review. The agencies thus made several notable changes to the Connectivity Report in response to the SAB's review. As a starting point, the final Report cited 349 scientific and academic sources that were not included in the draft Report. While the agencies claim that many of these were somehow identified in the rulemaking docket or cited in *other* parties' comments to the proposed rule, they admit that 149 of these new studies could not have been brought to parties' attention, and that 23 such studies "provided new information." DOJ Opp. at 35-36. Also among these are 36 sources published *between* when the draft and final Reports were issued. There is no question that the public would have commented on these additions if given the opportunity.

While the draft mentioned measuring connectivity on a gradient (NGO Opp. 40), the final Report introduced a new, continuum-based approach that analyzed the connectivity of particular waters to downstream waters along various "[d]imensions." Final Connectivity Report, at 1-4. And it added a new case study on the connectivity to downstream waters of "Southwestern Intermittent and Ephemeral Streams." *Id.*, at 5-7. Both of those changes were responses to SAB criticisms of the proposed Rule, and both would have garnered additional comments from the Private Party Plaintiffs had they been disclosed to the public during the

comment period.

An additional round of notice and comment is required where a new study is relied on to support the final rule and "critical" to the agency's decision and analysis. *Idaho Farm Bureau*, 58 F.3d at 1403. It is a basic requirement of rulemaking that "the scientific material which is believed to support the rule should be exposed to the view of interested parties for their comment," because "[o]ne cannot ask for comment on a scientific paper without allowing the participants to read the paper." *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

The agencies and intervenor-defendants suggest that the Private Party Plaintiffs do not meet their burden to establish "how they may have responded [to the new material] if given the opportunity." DOJ Opp. 35; NGO Opp. 41. Not so. As we explained in our Motion for Summary Judgment, based on the "349 scientific and academic sources that were not included in the draft Report," members of the Private Party Plaintiffs would have "expanded and refined" their criticisms to the draft Report for failing to provide metrics to measure the significance of a nexus to traditional navigable waters (WAC Comments, at 25-26); analyzing "significant nexus" as a binary choice rather than a gradient (*id.* at 27); and failing to assess the significance of the effects of ephemeral features on downstream waters (*id.* at 35). *See also, e.g.*, NAHB Comments, at 37, 49, 90, 141-42; Opening Mem. 28 n.6. Even more, the intervenor-defendants admit that: "While the SAB's review of the *draft* Science Report recommended more studies from human-modified stream ecosystems [citing the Private Party Plaintiffs' Opening Mem. at 35], the *final* Science Report does extensively discuss human modifications." NGO Opp. at 18. This is another example of omitted studies on which the private party plaintiffs would have submitted comments; here, they would have

commented to challenge a significant nexus between tributaries and features with intervening man-made breaks. *See* Opening Mem. 35. The private party plaintiffs also explained that several of their members submitted comments stating that the agencies' failure to extend the comment period in light of the delayed release of the Science Report deprived them of the opportunity to comment on the Report's conclusions and methodology. Opening Mem. 28.

3. The agencies failed to consider and respond to significant comments

The intervenor-defendants dispute that the agencies failed to consider and respond to significant comments, but cite to replies that do not demonstrate agency engagement with commenters' key concerns. NGO Opp. 42-43. For example, the agencies did not adequately respond to the concern that the proposed rule would eviscerate permitting exceptions for agricultural activities. The intervenor-defendants point to a response explaining that the proposal "maintains all statutory exemptions, expands regulatory exemptions, and does not add any additional permitting requirements for agriculture." NGO Opp. 43 (citing RTC-1, at 13-14). But this terse, unexplained statement failed to address the relevant concerns: that the CWA's recapture provision would operate to catch agricultural activities that would otherwise be exempt, and that the expansion of jurisdictional "tributaries" would catch agricultural stormwater and irrigation ditches. *See* Opening Mem. 23. Terse assertions that fail to engage the underlying concern are not the kind of responses that the APA requires.

The agencies also failed meaningfully to address the Rule's vastly overbroad coverage of mostly-dry land features in the arid West. On this score, the intervenor-defendants say (NGO Opp. 42) that the agencies' documentation of "the applicability of the definition of 'tributary' in the Southwest" is an adequate response to comments that reliance on an

OHWM is out of place in dry environments. The agencies' response once again does not show engagement with these substantive comments. It is also wrong.

As public commenters explained at length—with numerous citations to the Corps' own studies—that an OHWM is *not* an indication of regular flow in arid environments and that basing a definition of "tributaries" on the presence of an OHWM will sweep in features carrying only minor water volumes on irregular and often one-time-only intervals. *E.g.*, Tech. Supp. Doc., ID-20869; Ariz. Mining Ass'n Comments, ID-13951. A few stray references to the arid west in the preamble to the final Rule do not show that the agencies substantively addressed the Rule's coverage in the arid west.

Finally, the intervenor-defendants suggest that the agencies did not demean comments that Administrator McCarthy dismissed as "ludicrous" or "myths" because those comments *were* myths, and the agencies actually conducted "unprecedented" outreach. NGO Opp. 43. This statement only reinforces our point: The agencies engaged in an unprecedented lobbying campaign to discredit opposition to the Rule rather than consider and respond to substantive comments. Opening Mem. 24-26.

4. The Agency showed a closed mind by engaging in an unlawful advocacy campaign

We showed that the EPA engaged in an unlawful advocacy campaign to bolster the Rule. Opening Mem. 24-26. The agencies' response misses the point. We assert no cause of action based on that illegal conduct. In consequence, our standing to bring such a claim, and whether a private cause of action exists to challenge the agencies' illegal conduct, is beside the point. Our point instead is that the GAO report documenting that the EPA engaged in a covert propaganda campaign in violation the Appropriations Act and anti-lobbying

provisions evidences that the agencies approached the promulgation of the 2015 Rule with a closed mind—a fact that is highly relevant to our APA claims.

Under the APA, the plaintiffs were entitled to "fairness and transparency" in the rulemaking process. *Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013). The agencies' covert propaganda campaign shows that opponents of the Rule did not receive the "due consideration" to which they were entitled. *Id.* Instead, the EPA used social media to seed unthinking third-party comments in favor of the Rule, without disclosing that *the government* was the source of the message. And it linked to the websites of action groups to encourage readers to lobby Congress to defeat legislation aimed at blocking the Rule. This was not a mere matter of "two cited examples of social media use." NGO Opp. 46. This was a campaign that reached 1.8 million. Opening Mem. 25-26. The GAO had no trouble finding those biased activities were unlawful propaganda and lobbying.

The agencies' unlawful conduct distorted the rulemaking process by introducing elements "without observance of procedure required by law." 5 U.S.C. 706(2)(D).[4] And it leaves the clear impression that the agencies were more interested in pushing through their regulation than listening without bias to the views of stakeholders—an impression confirmed by their failure properly to address comments, discussed above. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (APA requires agency respond to significant comments that "cast doubt on the reasonableness of a position taken by the agency"). The agencies responded to comments not with neutral, well-reasoned analysis, but with covert

[4] The intervenor-defendants' argument (NGO Opp. 45) that the Rule cannot have been adopted contrary to 5 U.S.C. 706(2)(D) because GAO "concluded the Agencies *had* complied with procedural requirements" in 8 U.S.C. 801(a)(1)(B)(i)-(iv) is off-base. Section 801(a)(1)(B)(i)-(iv) simply establishes the "federal agency promulgating the rule" submitted certain materials to the Comptroller General and each House of Congress.

(sometimes overt) propaganda that became progressively more strident as the regulated community exposed the flaws in the proposal. *See* Opening Mem. 31-32.

5. The agencies violated the Regulatory Flexibility Act

The intervenor-defendants assert that the agencies' inaccurate and conclusory certification that the Rule would not "have a significant economic impact on a substantial number of small entities" (79 Fed. Reg. at 22,220) shows a "'reasonable, good faith-effort'" that meets its requirements under the RFA. NGO Opp. 44 (quoting *Alenco Commc'ns, Inv. v. F.C.C.*, 201 F.3d 608, 625). But a "conclusory statement with no evidentiary support in the record"—which is all the agencies supplied here—"does not prove compliance with the Regulatory Flexibility Act." *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157 (6th Cir. 1990).

The agencies rested their conclusion about the non-impact of the Rule on small businesses on the obviously bogus notion that the Rule *narrows* the scope of the CWA and ignored comments explaining that the Rule expands jurisdiction. The failure to address these concerns is not "harmless error" and merits vacatur. "[E]ven when an agency decides (rightly or wrongly, and with or without compliance with the requisite procedures) that it need not prepare regulatory flexibility analyses, the impact of the rule upon small entities can be placed at issue in the public comments, and the agency's failure to make adequate response to serious alleged deficiencies in this regard can of course be grounds for reversal." *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984). And, separately from the agencies' failure to address that concern, vacatur is merited because the agency's defective analysis premised on the Rule narrowing jurisdiction reveals the overall unreasonableness of the final Rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 539 (D.C. Cir.

1983) ("[A] reviewing court should consider the regulatory flexibility analysis as part of its overall judgment whether a rule is reasonable and may, in an appropriate case, strike down a rule because of a defect in the flexibility analysis.").

D. The Rule is inconsistent with the text of the Clean Water Act and Supreme Court precedent and exceeds constitutional limits on federal authority

1. The Rule misapplies the significant nexus standard to sweep in countless land features

In our opening memorandum (at 29-35), we explained how the Rule is inconsistent with statutory language and Supreme Court precedent in that it reads navigable out of the statute and employs sweeping definitions of "tributaries" and "adjacent" waters. The intervenor-defendants reply first by asserting that the Rule lawfully asserts jurisdiction over covered waters under Justice Kennedy's significant nexus standard in *Rapanos*. NGO Opp. 9-10. But instead of engaging with the standard in *Rapanos*, at first blush they attempt to cast the matter as an issue of scientific expertise by pointing to "peer-reviewed science and agency experience." *Id.* at 12-13.

Our arguments regarding the definitions of tributary, adjacency, and import of the word "navigable" concern the statutory language and Supreme Court precedent within which the agencies must operate. As Justice Kennedy put it in *Rapanos*, "[s]cientific evidence" and "environmental concerns provide no reason to disregard limits in the statutory text." *See Rapanos v. United States*, 547 U.S. 715, 777-78 (2006) (Kennedy, J., concurring). The agencies recognize this, too: They cannot rely on "environmental conclusions in place of interpreting the statutory text and other indicia of Congressional intent" to ensure they remain within their "statutory authority to regulate." 83 Fed. Reg. at 32,241.

The point, therefore, is not that scientific evidence is lacking, but that the Rule must comply with Congressional intent as expressed in the statutory text. And the Clean Water Act, by its plain terms, applies to *navigable* waters and waters closely connected to them—not to every intermittent trickle or dry drainage ditch that a scientific study may show has some attenuated connection with a navigable water. If the Act's language is read to "extend to the furthest stretch of its indeterminacy" as the intervenor-defendants suggest, there would be no end to federal jurisdiction because, "[r]eally, universally, relations stop nowhere." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997) (internal quotation marks omitted); *accord id*. at 813 n.7 ("as many a curbstone philosopher has observed, everything is related to everything else") (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring)). Deposits on an open field could, in theory, be carried away by sheet-flow runoff during a rain event, ultimately reaching some distant erosional feature that flows into to an even more distant brook that scientific studies show "affects" some far-off river; but that would not justify including "open fields" within the definition of "navigable waters."

The intervenor-defendants later argue that *Rapanos* supports the sweeping assertion of jurisdiction in the Rule. NGO Opp. at 24-25. They suggest that Justice Kennedy rejected the rule at issue in *Rapanos* only because he was lacking "assurance" that certain waters had a significant nexus, and that more scientific research now offers that assurance. *Id.*

But Justice Kennedy's *Rapanos* concurrence is clear: The word 'navigable'" cannot be ignored and must "be given some importance." *Rapanos*, 547 U.S. at 778-79 (Kennedy, J., concurring). The agencies may not regulate as waters of the United States "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes

toward it." *Id.* at 781. Yet that is exactly what the Rule does. *See* Opening Mem. 29-32. Dancing around the text of the Act and Supreme Court precedent by citing scientific studies does not change Justice Kennedy's significant nexus test.

Though the intervenor-defendants' principal error is to misread Justice Kennedy's test, they also err in suggesting that Justice Kennedy's opinion is controlling and the plurality can be ignored. NGO Opp. 11-12.

Marks v. United States, 430 U.S. 188 (1977), held that "[w]hen there is no majority opinion, the narrower holding controls." *Panetti* v. *Quarterman*, 551 U.S. 930, 949 (2007). Thus, where a concurring opinion adopts a narrower variant of the plurality's *reasoning*, the concurring opinion controls. To serve as the narrower ground under *Marks*, however, an opinion "must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment." *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (emphasis added). Beyond a "Russian nesting doll" case, *Marks* has no application. It does not permit a court to give precedential effect to any opinion that is *different* from—*i.e.*, neither a narrower nor a broader version of the reasoning of—the plurality opinion. See, *e.g.*, *Glossip* v. *Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (explaining that *Marks* was inapplicable where one opinion was "unrelated to, and thus not any broader or narrower than," the other).[5]

[5] Some courts of appeals have taken a different approach, holding instead that an opinion is controlling if it "necessarily produce[s] *results* with which a majority of the Court from that case would agree," regardless of whether its *reasoning* overlaps in any meaningful way with the other opinions. *United States v. Hughes*, 849 F.3d 1008, 1015 (11th Cir.), *rev'd and remanded*, 138 S. Ct. 1765 (2018). But that approach would "turn a single opinion that lacks majority support into national law" (*King*, 950 F.2d at 782)—yielding the untenable result that "the views of one justice, with whom no one concurs," represents "the law of the land." *Dague* v. *City of Burlington,* 935 F.2d 1343, 1360 (2d Cir. 1991).

2. The Rule reads the word "navigable" out of the statute

As we showed in our opening memorandum (at 29-32), the Rule's extension of regulatory jurisdiction over dry ditches, intermittent rivulets, isolated wetlands, as well as water features of any sort that happen to cross a state line effectively reads the word "navigable" out of the statute.

The intervenor-defendants assert that the examples pictured in our opening memo would not be jurisdictional. NGO Opp., at 26; Opening Mem., at 29-31. But the record shows that the Rule would reach these features. For example, with regard to Figure 1, the record explains:

> The old logging road in this picture was categorized by Agency field personnel in a jurisdictional determination as a non-relatively permanent tributary with bed, bank, and high water mark, but one which failed the test for a significant nexus due to minimal sheet flows into its channel, and so was considered non-jurisdictional under current guidance. Under the Proposed Rule, which defines *per se* any feature with bed, bank and ordinary high water mark as a tributary without regard to frequency, this would be a Federally-protected jurisdictional water.

API Comments, at 83, ID-15115; Opening Mem., at 30. Notably, the intervenor-defendants do *not* argue that jurisdiction over these features would comport with the CWA's text.

The intervenor-defendants next claim it is an "unfounded assertion" that the gravel depressions at issue in *SWANCC* would be covered by the current Rule. But it is not unfounded at all. As we explained, the depressions are less than 4,000 feet from a tributary to a traditional navigable water, and almost certainly covered by adjacency jurisdiction. Opening Mem. 31. The intervenor-defendants weakly suggest that, even if the Rule would cover the same gravel depressions in *SWANCC*, *SWANCC* held only that the rule at issue in that case "as applied to the ponds" exceeded the agencies' statutory authority. NGO Opp. 27.

Exactly. Under the same logic in *SWANCC*, "isolated ponds" do not qualify as navigable waters. Yet the Rule at issue here would treat them that way.

The intervenor-defendants further assert (NGO Opp. 28) that we are wrong to say that the Rule's coverage of interstate waters—regardless of navigability—cannot be squared with the statutory text. This is because, they claim, "predecessors to the Clean Water Act explicitly protected interstate waters, regardless of navigability," and "the Act retained these protections." NGO Opp. 28. As evidence that the Rule lawfully protects interstate waters "regardless of navigability" (*id.*), they point to an off-point provision that suggests no such thing: a section on "water quality standards and implementation plans" which retains existing water quality standards for interstate waters adopted by States and in effect prior to October 1972. 33 U.S.C. 1313(a)(1). The intervenor-defendants ignore, however, our observation (*See* Opening Mem. 32) that Congress removed "interstate waters" from the general provisions of the Act. Thus, even with respect to interstate waters, "the word 'navigable'" cannot be ignored and must "be given some importance." *Rapanos*, 547 U.S. at 778-79 (Kennedy, J., concurring). Agencies, no less than courts, "must give effect to every clause and word of" the statutes they purport to interpret. *Setser v. United States*, 566 U.S. 231, 239 (2012) (internal ellipses and quotation marks omitted).

What is more, the Rule's inclusion of all interstate waters is compounded by the Rule's treatment of all such waters as if they were traditional navigable waters, allowing any feature that crosses a state line—no matter how large or small, wet or dry—to serve as the starting point for the assertion of jurisdiction over its "tributaries" or "adjacent" features. We made this point in the opening memorandum (at 32), but the intervenor-defendants again ignore our arguments.

3. The definition of "tributary" is unlawful

We explained in the opening memorandum (at 32-35) how the Rule's definition of "tributary" covers "remote" features with only "minor" connections to navigable waters—features that "in many cases" are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring). That is largely due to the Rule's inclusion of features that only contribute "intermittent[] or ephemeral" flow (80 Fed. Reg. at 37,076) and dependence on the presence of "ordinary high water marks" with a "bed and banks" between them. As we explained, those malleable requirements are easily satisfied even when there is no regular or significant flow associated with them, especially in dry environments like vast tracts throughout the arid West.

The intervenor-defendants' response is to fall back on statutory *exceptions* to the definition of tributary, noting the Rule exempts certain ephemeral ditches and storm water control features. *See* 33 C.F.R. § 328.3(b)(3)(i), (b)(6). But, as a practical matter, that is cold comfort because it is entirely unclear what the difference is between an ephemeral ditch or storm water control feature versus a tributary is entirely unclear.

They further parrot the refrain that "all tributaries, including ephemeral and intermittent ones, significantly impact the physical, chemical, and biological condition of downstream rivers" and claim that a bed, banks, and OHWM are indicators of regular flow. NGO Opp. 14, 16. That is simply incorrect. In the western United States, in particular, erosional features with beds, banks, and OHWMs frequently reflect one-time water events; they assuredly are not reliable indicators of regular flow. *See* Opening Mem. 34. We cited several public comments that are chock full of citations to scientific analyses that went unaddressed

by the agencies in the rulemaking and leave no doubt that the Rule's definition of "tributary" sweeps in features "carrying only minor water volumes toward" a "remote" navigable water that in no way "bear a sufficient nexus with other regulated waters." *Rapanos*, 547 U.S. at 781, 788; *see, e.g.*, Freeport-McMoRan Tech. Comments (citing peer reviewed studies from the *Journal of Hydraulic Engineering*, *Ecohydrology*, *Water Resources Research*, and multiple topical anthologies), *E.g. id*.; Ariz. Mining Ass'n Comments, ID-13951, at 7-11 (citing Army Corps of Engineers' own studies). [6]

Without disputing that the Rule sweeps in many ditches, the intervenor-defendants challenge the Private Party Plaintiffs' arguments regarding the Rule's unlawful assertion of jurisdiction over often-dry ditches under the definition of "tributary." NGO Opp. 19. They mischaracterize our argument as "attack on the Rule's exclusion of certain ditches from coverage." NGO Opp. 18-19. Our point is not that some ditches are arbitrarily *not* covered. Rather, it is that the Rule initially asserts jurisdiction over all ditches accompanied by a vague exemption for some with no basis or evidence to support why ditches are covered at all. Opening Mem. at 40. On this point, the intervenor-defendants offer no meaningful response at all.

4. The definition of "adjacent" is unlawful

We showed in the opening memorandum (at 35-37) that the agencies' approach to "adjacent" features is inconsistent with (1) *United States v. Riverside Bayview Homes, Inc.* because it sweeps in countless features that are not "inseparably bound up" with the water

[6] And, contrary to the intervenor defendants' assertion, our issue with the study on the San Pedro River in the Connectivity Report is not that it is included in the scientific record at all, but rather that the agencies relied almost exclusively on this study, which is unrepresentative. Opening Mem. at 35.

that they supposedly neighbor (474 U.S. 121, 134 (1985)); (2) Justice Kennedy's *Rapanos* concurrence, which expressly rejected the notion that jurisdiction could be based on "mere adjacency to a tributary" (547 U.S. at 786); (3) and (4) the *Rapanos* plurality, which explains the agency's approach to adjacency jurisdiction in *Riverside Bayview* does not as apply to non-wetland waters, and which requires a "continuous surface connection" for an adjacency determination (*id.* at 742). Separately from these conflicts with Supreme Court precedent, we explained that the Rule's hard distance limitations are unsupported by the evidence. Opening Mem. 38-40.

The intervenor-defendants awkwardly chop up their response to these four problems, addressing them it in scattered pieces. Rather than focusing on the *law*, moreover, the intervenor-defendants for the most part simply trumpet their favored theme—they insist that the Rule's coverage of "adjacent" waters "is supported by the science." NGO Opp. 20. Thus, they assert that the Rule lawfully covers waters within a 100-year floodplain as "adjacent" waters, because evidence shows waters within a floodplain are "highly connected" to rivers and tributaries. NGO Opp. 20-21. But they do not back this statement up. In making this claim, the intervenor-defendants fail to justify the agencies' decision to use the 100-year floodplain rather than the 50-year, 500-year, or any other time-delineated floodplain. The selection of the 100-year floodplain cutoff was entirely arbitrary. So, too, was the decision to impose a 1,500-foot distance limit from the primary water's OHWM.

The intervenor-defendants tepidly defend the distance limits as "reasonable," asserting that the geographic boundaries selected based on the agencies "review of the scientific literature" and "technical expertise and experience." NGO Opp. 22 (quoting 80 Fed. Reg. 37,085). Setting aside that the public had no opportunity to comment on the distance limits

or scientific evidence that supposedly supports them, the intervenor-defendants again miss the point. The question is not whether features *within* the boundaries have been shown to "significantly affect" the primary water; it is whether the evidence justifies the drawing of those boundaries in the first place because they mark some magical differentiation in "significant effect" on the primary water—as though any feature 1,499 feet from the feature has a significant effect, but any that is 1,501 feet from it does not. On that critical question, there is *zero* evidence. Merely intoning "technical expertise" is "not sufficient" in the absence of "specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose." *In re EPA*, 803 F.3d 804, 807-08 (6th Cir. 2015).

And there are many more issues with this adjacency definition, apart from its arbitrary line drawing. Regarding the other deficiencies embedded in the Rule's definition of adjacent, the intervenor-defendants do not attempt to defend the Rule's failure to comply with the continuous surface connection requirement in the *Rapanos* plurality, admitting the Rule "does not purport" to "abide by its limitations." NGO Opp. 24.

They further defend the assertion of adjacency jurisdiction not only over wetlands, but also over all other waters, by again claiming the *Rapanos* plurality can be disregarded, and the suggesting the exercise of this jurisdiction is "reasonable." NGO Opp. 30. First, the plurality in *Rapanos* cannot be ignored. Second, even if it is not controlling, the *Rapanos* plurality is right: Non-wetland waters "do not implicate the boundary drawing problem" underlying the Court's deference to the agency's Rule in *Riverside Bayview*, and thus this approach is not justified as to non-wetland waters. 547 U.S. at 742.

The intervenor-defendants argue that the Rule's assertion of adjacency jurisdiction meets the standards set in *Riverside Bayview* and *SWANCC* because "waters with a

significant nexus are inseparably bound up with downstream waters." NGO Opp. 29. That is little more than word-play. *Riverside Bayview* spoke in terms of surface connections, such that one water feature cannot meaningfully be distinguished from another. 474 U.S. at 131-135. It very plainly did not contemplate a river being "inseparably bound up" (*id.*) with mostly dry water features nearly a mile away that the agencies think exert some influence on "sediment trapping" or "nutrient recycling" in the river. 33 C.F.R. 328.3(c)(5).

Finally, the intervenor-defendants suggest that the aggressive assertion of adjacency jurisdiction based solely on a water's proximity to a tributary is justified, despite its apparent conflict with Justice Kennedy's concurrence, because Justice Kennedy suggested that the Corps might be able to identify a subset of tributaries that perform significant functions. NGO Opp. 25. But that is not what the Rule does. Instead, it asserts adjacency jurisdiction *categorically* based on an even broader definition of tributaries than the one that faced the Court when *Rapanos* was decided. As the agencies frankly acknowledge, the Rule's expansive definitions mean that "the vast majority of water features in the United States" are covered. 83 Fed. Reg. at 32,229; *accord* Economic Analysis of the EPA-Army Clean Water Rule 11 (May 2015), ID-20866.

5. The rule resurrects the invalidated Migratory Bird rule

The intervenor-defendants claim that the 2015 Rule does not reinstate the Migratory Bird Rule contrary to *SWANCC*, because the 2015 Rule, unlike the Migratory Bird Rule, bases jurisdiction on a biological nexus to traditional navigable waters. NGO Opp. 31. But the basis for this convoluted theory is just as defunct: *SWANCC* rejected the jurisdictional theory that "isolated ponds" qualify as navigable waters "because they serve as a habitat." 531 U.S. at 172. As other courts have found, the 2015 Rule "fails for the same reason that the

rule in *SWANCC* failed because it "asserts that, standing alone, a significant 'biological effect'—including an effect on 'life cycle dependent aquatic habitat[s]'—would place a water within the CWA's jurisdiction." *Ga. v. Pruitt*, 326 F. Supp. 3d 1356, 1365 (S.D. Ga. 2018) (some internal quotation marks omitted).

6. Texas Coastal Prairie Wetlands

We explained in the opening memorandum why the Rule's treatment of Texas Coastal Prairie Wetlands (TCPW) is indefensible. The intervenor-defendants say (NGO Opp. 32) that our arguments on this score "are waived, lack merit, and mischaracterize the Agencies' findings." That is wrong, wrong, and wrong again.

First, the Private Party Plaintiffs assuredly have standing to challenge the TCPW provision. Several members of Plaintiff TARGET specifically commented on the provision during the comment period. *See, e.g.*, GHBA comments 5-6 (commenting, among other things, that there is no "uniform approach" to defining TCPW and that treating them as necessarily connected is not supported by the scientific evidence); West Houston Association Comments 6-7 (similar).

As for substance, the intervenor-defendants do not refute the that the Rule arbitrarily protects TCPW despite the acknowledged presence of other identical wetlands. The record specifically acknowledges that TCPW are "in close proximity to other coastal prairie wetlands and function together cumulatively [and] [c]ollectively as a complex." 80 Fed. Reg. at 37072-37073. But with no rationale or explanation, the Rule singles out (1) TCPW, not these "other coastal prairie wetlands" and (2) only the TCPW within the State of Texas. And it does so even though "[t]he term Texas coastal prairie wetlands is not used uniformly in the

scientific literature." 80 Fed. Reg. 37072. It would be hard to imagine a clearer example of an arbitrary and capricious regulation.

7. The Rule paradoxically treats some features as both "point sources" and jurisdictional waters

As we explained, the Rule nonsensically treats ditches and stormwater conveyances as both point sources and waters of the United States. Opening Mem. 43. The intervenor-defendants respond that because "channels" are listed among other items that constitute point sources, under our reading "large, navigable-fact-shipping channels" could not be considered navigable waters of the United States. NGO Opp. 34. That is no response. Congress defined point source as a "confined and discrete conveyance." 33 U.S.C. 1362(14). There is no indication that Congress, by including "channel" among "discrete conveyances," intended to include large shipping channels as point sources.

8. The Rule is unconstitutionally vague

The intervenor-defendants attempt to salvage the standardless discretion apparent in the Rule because "[t]he Fifth Circuit has twice upheld Clean Water Act jurisdictional determinations." NGO Opp. 48. These cases do not speak as to whether the 2015 Rule is vague: they were decided under the *prior* regulatory regime and in different circumstances such that they do not apply here. The first, *United States v. Lucas*, 516 F.3d 316, entailed an as-applied challenge in which the defendants received warnings from "multiple agencies" that they were violating the CWA and in which the property contained a "prevalence" of wetlands "and an area network of creeks and their tributaries leading to the Gulf, some of which connected to wetlands on the property." *Id.* at 328. In the second, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 917 (5th Cir. 1983), "the landowners were well

aware that at least a significant portion of their land was a wetland." The concerns here are a far cry from those cases: the 2015 Rule extends jurisdiction far beyond properties containing apparent wetlands and with obvious connections to large bodies of water.

The intervenor-defendants' argument that the OHWM concept does not introduce ambiguity because it is "defined by reference to specified, physical characteristics or 'other appropriate means'" is no more helpful. NGO Opp. 48. As we have explained, "the difficulty and ambiguity associated with identifying" an OHWM means that "if [you] asked three different district staff to make a jurisdictional determination, [you] would probably get three different assessments." GAO, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, at 20-22 (Feb. 2004). And, while the use of remote tools *alone* does not cause this unconstitutional ambiguity, their use spikes the prevalent uncertainty given that "[o]ther evidence, besides direct field observation," can "establish" an OHWM. 80 Fed. Reg. at 37,076. The preamble warns that regulators may use, for example, desktop computer models "independently to infer" jurisdiction where "physical characteristics" of bed and banks and OHWM "are *absent* in the field." *Id*. at 37,077 (emphasis added). That means an OHWM will exist when they *say* it exists, even if it is not visible to the naked eye. In fact, "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination." U.S. Army Corps of Eng'rs, *Regulatory Guidance Letter No. 05-05* (Dec. 7, 2005), at 3.

The standard for significant nexus does not help. The issue is not merely that it is "difficult to determine whether the significant nexus test is satisfied" (NGO Opp. 49); rather, under the Rule landowners lack notice whether their lands may contain a jurisdictional water *at all*. On top of all of this, we have shown through the text and with practical examples that

the confusion surrounding the applicability of exemptions are not "close calls" (NGO Opp. 50). *See* Opening Mem. 46. The intervenor-defendants do not disagree that Figure 5 in our opening memorandum depicts one example of this lack of clarity. *See id.* at 47.

The Rule's "uncertain reach" is especially troubling given the "draconian penalties" for CWA violations, which include criminal as well as civil penalties. *Sackett v. EPA*, 566 U.S. 120, 132-33 (2012) (Alito, J., concurring). The Rule invites the exercise of "arbitrary power" that "leav[es] people in the dark about what the law demands" and allows the agencies "to make it up." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). Due process does not permit that approach.

9. The Rule violates the Commerce Clause

To defend the Rule's constitutionality under the Commerce Clause, the intervenor-defendants state that "waters covered by the Rule are, or significantly impact, navigable and interstate waters." NGO Opp. 51. This argument crumbles easily. The Rule does not comply with the significant nexus test as laid out in *Rapanos*; instead, it captures waters far removed from waters that are navigable-in-fact, or can be used as channels of interstate commerce. Because the Rule captures features that do not "'substantially affect[]' interstate commerce" (*United States v. Lopez*, 514 U.S. 549, 559 (1995))—admittedly including trivial, non-navigable interstate waters—it violates the Commerce Clause.

* * *

Because they are in the midst of reconsidering the 2015 Rule, the agencies take no position in their summary judgment submission on our arguments regarding the Rule's substantive defects that require vacatur. The agencies do, however, express concerns that

"certain findings and assumptions supporting adoption of the 2015 Rule were not correct, and that these conclusions, if erroneous, may separately justify repeal of the 2015 Rule." DOJ Opp. 10. The agencies elaborate on those legal defects in their Supplemental Notice of Proposed Rulemaking (83 Fed. Reg. 32,227), which—unlike the 2015 rulemaking—takes seriously the substantial defects we have identified and seeks comment on them.

Faced with agencies that now appear to recognize that the 2015 Rule suffers from serious legal defects, the intervenor-defendants do not take on the legal authority that we have shown the Rule violates. Instead, they attempt to save the Rule by suggesting it is the result of the 2015 agencies' scientific expertise. NGO Opp. 1, 12-13. But resolution of this challenge does not turn on questions of evidence or *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). As we have shown, the Rule is unlawful because it violates the plain text of the CWA, Supreme Court precedent, as well as the Constitution. It accordingly must be vacated.

CONCLUSION

The motion for summary judgment should be granted, and the Rule should be vacated. The intervenor-defendants' Cross Motion for Summary Judgment should be denied.

Dated: December 3, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will cause copies of each to be served upon all counsel of record.

/s/ *Timothy S. Bishop*