IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

INTERVENOR PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

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INTRODUCTION

This is a challenge to the EPA's and U.S. Army Corps of Engineers' (the "agencies'") 2015 regulation defining "waters of the United States" (the "Rule") within the meaning of the Clean Water Act (CWA). In both the process leading to the Rule's promulgation and the substance of the Rule, the agencies disregarded the statutory and constitutional limits on their authority.

First, the Rule expands the agencies' jurisdiction well beyond what the CWA's text and structure allows. The agencies disregarded statutory checks on their power and distorted relevant Supreme Court precedent. At bottom, the Rule reads the term *navigable* out of the CWA, asserting jurisdiction over isolated features that bear no meaningful relationship to "navigable waters."

Second, the Rule is unconstitutional. It is void for vagueness because it opens regulated entities to severe civil and criminal penalties that rest on nebulous standards like "more than speculative or insubstantial," "similarly situated," and "in the region," and on ambiguous definitions of terms like "ordinary high water mark." These uncertain standards are impossible for the public to understand or the agencies to apply consistently. In addition, by regulating features across the landscape that have no meaningful relationship to navigable waters, the Rule exceeds the agencies' power under the Commerce Clause and usurps State authority under the Constitution's and the CWA's federalist structure.

Finally, the agencies violated fundamental tenets of administrative law. They failed to reopen the comment period after making fundamental changes to the proposed Rule and withheld the key scientific report on which the Rule rested until after the comment period closed. The agencies also engaged in an unprecedented propaganda campaign to promote the Rule and rebuke its critics and lobbied against legislative efforts to stop the Rule, which the U.S. Government Accountability Office has concluded was illegal. And the agencies refused to undertake required economic analyses, including consideration of less burdensome alternatives.

For the reasons set forth below and in the brief filed by the plaintiff States, the intervenor plaintiffs move for summary judgment and an order vacating the Rule in its entirety.

STATEMENT OF THE CASE

A. Legal background

The CWA establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Two such programs regulate the "discharge of any pollutant." *Id.* § 1311(a). The discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source" without a permit. *Id.* §§ 1311(a), 1362(12)(A). The Act in turn defines "navigable waters" to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The meaning of "waters of the United States" thus defines the agencies' regulatory jurisdiction under the CWA.

The U.S. Army Corps of Engineers issued initial regulations defining "waters of the United States." 39 Fed. Reg. 12,115, 12,115, 12,119 (Apr. 3, 1974); 42 Fed. Reg. 37,122, 37,122, 37,144 (July 19, 1977). The agencies' interpretation of their own regulations continued to expand over the next few decades, even as the text remained the same. The Supreme Court confronted those increasingly aggressive interpretations in a series of decisions beginning in 1985.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court held that Congress intended the CWA "to regulate at least *some* waters that would not be deemed 'navigable'" and that it is "a permissible interpretation of the Act" to conclude that "a wetland that *actually abuts on* a navigable waterway" falls within the "definition of 'waters of the United States.'" *Id*. at 133, 135 (emphasis added).

Following *Riverside Bayview*, the agencies "adopted increasingly broad interpretations" of their regulations, asserting jurisdiction over an ever-growing set of features bearing little or no relation to traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality). One of those interpretations—the Migratory Bird Rule—was struck down in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). There, the Supreme Court held that, while *Riverside Bayview* turned on "the significant nexus" between "wetlands and [the] 'navigable waters'" they abut, the Migratory Bird Rule asserted

jurisdiction over isolated ponds bearing no connection to navigable waters. *Id*. at 167. That approach impermissibly read the term "navigable" out of the statute, even though navigability was "what Congress had in mind as its authority for enacting the CWA." *Id*. at 172.

Most recently, in *Rapanos*, the Supreme Court addressed sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water." 547 U.S. at 720-21 (plurality). Justice Scalia, writing for a four-Justice plurality, held that "waters of the United States" include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 732, 739. Justice Kennedy, concurring in the judgment, expressed support for a "significant nexus" test but categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his conception of a "significant nexus." *Id*. at 781.

B. The notice-and-comment process and Connectivity Report

Against this backdrop, the agencies set out through rulemaking to "increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States.'" 80 Fed. Reg. 37,054 (June 29, 2015). Despite the CWA's comprehensive programs to address water pollution generally, and the narrower focus of the discharge prohibitions, the agencies claim their expansive definition of "waters of the United States" is needed to "protect[] upstream waters" because they "significantly affect" "downstream waters." 80 Fed. Reg. at 37,055-56.

1. The proposed Rule provided for jurisdiction over (1) waters used in interstate commerce, (2) interstate waters, including interstate wetlands, (3) the territorial seas, (4) impoundments of the first three categories of waters or their tributaries, (5) tributaries to the first four categories of waters, (6) waters "adjacent" to any of the first five categories of waters, and (7) all "other waters" with a "significant nexus" to any of the first three categories of waters, as determined on a case-by-case basis, subject to narrow categorical exemptions. 79 Fed. Reg. 22,188, 22,193 (Apr. 21, 2014).

The proposed Rule defined "adjacent" as "bordering, contiguous or neighboring" any of the

first five categories of waters. 79 Fed. Reg. at 22,269. "Neighboring" waters were those "located within the riparian area or floodplain" of such a water, or having a "hydrologic connection" to one. *Id.* A water with a "significant nexus" was any water that "significantly affects the chemical, physical, or biological integrity of" a jurisdictional water. *Id.*

2. Many comments raised substantive concerns about the Rule, including its breadth and vagueness. *E.g.*, WAC Comments, ID-14568 (Ex. A).[1] Commenters also raised procedural objections, including that (1) they had no opportunity to evaluate the final "Connectivity Report," which was the scientific underpinning for the Rule; (2) the final Rule might differ significantly from the proposed Rule, requiring EPA to re-propose the Rule; and (3) the agencies had failed to comply with important regulatory requirements. *E.g.*, *id.* at 72-74, 79-80, 85-87.

In the preamble to the proposed Rule, the agencies explained that their "decision on how best to address jurisdiction over 'other waters' in the final rule will be informed by the final version of the EPA's Office of Research and Development synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters." 79 Fed. Reg. at 22,189. Although the agencies had by then prepared a "draft" of the report (later dubbed the Connectivity Report), the preamble stated that the draft was "under review by EPA's Science Advisory Board [SAB], and the rule will not be finalized until that review and the final Report are complete." *Id.* at 22,190.

After completing its review, the SAB recommended substantial changes to the Connectivity Report. SAB Review, ID-8046 (Ex. B). Although EPA ultimately revised the Connectivity Report in response to the SAB's comments, the agencies did not extend the comment period to allow the public to comment on the final Connectivity Report. The final version of that Report was not published until two months after the comment period closed. 80 Fed. Reg. 2,100, 2,100 (Jan. 15, 2015).

[1] Record materials are cited as [Short Title] [page(s)], ID-[last 4 digits of administrative docket number] (exhibit designation). We include the docket identifier in the first citation only.

3. During the comment period, EPA undertook an unprecedented public relations campaign to defend and promote its proposed Rule. The campaign aimed to discredit public concerns and marginalize opposition to the proposed Rule. While on a public road show to promote the proposed Rule, for example, EPA Administrator Gina McCarthy belittled the concerns expressed by agriculture groups as "myths," "ludicrous," and "silly." Farm Futures, *EPA's McCarthy: Ditch the Myths, Not the Waters of the U.S. Rule* (July 9, 2014), perma.cc/8F4P-XTAP (Ex. C). Those comments were consistent with the agencies' unprecedented #DitchtheMyth Twitter campaign. B-326944, 2015 WL 8618591, at *4 (Comp. Gen. Dec. 14, 2015) (Ex. D).

Another objective of the agencies' social media campaign was to defeat bills pending in the House and Senate seeking to block the Rule. *See* B-326944, 2015 WL 8618591, at *5 (Ex. D). EPA sought to influence public perception of the Rule and motivate individuals to contact members of Congress to encourage them to oppose such legislation. *Id.* To do this, EPA used its blog, Twitter account, and Facebook page to solicit supporters for a "crowdspeaking" message that supported the proposed Rule. *Id.* at *2-3.

EPA also launched a #CleanWaterRules Twitter campaign, which disseminated a message that hyperlinked to external third-party websites, which in turn provided a "form letter for submission" to the users' congressional representatives opposing the legislation. B-326944, 2015 WL 8618591, at *4-5 (Ex. D). A second hyperlink publicized by EPA took visitors to a page on the Natural Resources Defense Council's website, which included a button marked "Add Your Voice." *Id*. at *5. When clicked, the button took the user to an "action page" similarly criticizing proposed legislation to block the Rule and providing a form for readers to send to their senators. *Id.* at *5-6.

C. The Rule

The agencies issued the final Rule, reinterpreting "waters of the United States," in 2015. 80 Fed. Reg. 37,054 (June 29, 2015) (the "Rule"). The Rule purports to "make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science." *Id.* at 37,057. It distinguishes between three cate-

gories of features: those that are "jurisdictional by rule," those that are jurisdictional based on a case-specific analysis, and those that are never jurisdictional. *Id.* at 37,058.

Features jurisdictional by rule. The Rule identifies six features that are "jurisdictional by rule": **(1)** waters used or susceptible to use in interstate or foreign commerce, **(2)** interstate waters, **(3)** territorial seas, **(4)** impoundments of any "waters of the United States," **(5)** tributaries to a (1)-(3) feature, and **(6)** waters that are "adjacent" to a (1)-(5) feature. 33 C.F.R. 328.3(a); *see* 80 Fed. Reg. at 37,075 (tributaries and adjacent waters are categorically jurisdictional). The Rule and its preamble further define certain operative terms:

- "Interstate waters" are those that cross state borders, "even if they are not navigable" and "do not connect to [navigable] waters." 80 Fed. Reg. at 37,074.

- A covered "tributary" is a feature that flows "directly or through another water" to a (1)-(3) feature. 33 C.F.R. 328.3(c)(3). To count as a jurisdictional water, the tributary ***first*** must "contribute[] flow" directly or through any other water—such as ditches or wetlands—to a (1)-(3) feature, and ***second*** must be "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark" (OHWM). *Id*. A tributary can be natural, man-altered, or man-made, and does not lose its status as a tributary if, for any length, there are one or more breaks (such as pipes, dams, debris fields, or underground segments), so long as a bed and banks and an OHWM can be identified upstream of the break.

- An "adjacent water" is any feature bordering, contiguous to, or "neighboring" a (1)-(5) feature. 33 C.F.R. 328.3(c)(1). "Neighboring" waters are waters any part of which is located

    - within 100 feet of the OHWM of any (1)-(5) feature;

    - within the 100-year floodplain of any (1)-(5) feature, and not more than 1,500 feet from the OHWM of such water; or

    - within 1,500 feet of the high tide line of a (1)-(3) feature or within 1,500 feet of the OHWM of the Great Lakes.

Features jurisdictional by case-specific analysis. The Rule identifies two categories of features that are jurisdictional if they are "found after a case-specific analysis to have a significant nexus" to certain jurisdictional waters. 80 Fed. Reg. at 37,058. As a baseline matter, the Rule defines the term "significant nexus" to mean that "a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical,

physical, or biological integrity" of a (1)-(3) feature. 33 C.F.R. 328.3(c)(5). The Rule states, "[f]or an effect to be significant, it must be more than speculative or insubstantial." *Id.*

The Rule describes the significant-nexus analysis as a three-step process: "First, the region for the significant nexus analysis must be identified—under the rule, it is the watershed which drains to the nearest traditional navigable water, interstate water or territorial sea." 80 Fed. Reg. at 37,091. "[S]econd, any similarly situated waters must be identified—under the rule, that is waters that function alike and are sufficiently close to function together in affecting downstream waters." *Id.* "[T]hird, the waters are evaluated individually or in combination with any identified similarly situated waters . . . to determine if they significantly impact the chemical, physical or biological integrity of" jurisdictional waters. *Id.*

The Rule sets out a list of "functions" to be considered in determining whether a water "significantly affects" the integrity of another water. 33 C.F.R. 328.3(c)(5). Those functions (only one of which need be affected) include "[r]etention and attenuation of flood waters," "[c]ontribution of flow," and "[p]rovision of life cycle dependent aquatic habitat." *Id.*

Two categories of "waters" are subject to this case-by-case significant nexus analysis. The first includes several features that are categorically presumed to be "similarly situated": non-adjacent prairie potholes, Carolina and Delmarva bays, pocosins, Western vernal pools in California, and Texas coastal prairie wetlands. 33 C.F.R. 328.3(a)(7). Those water features are not further defined.

In the second category, the Rule specifies two features that are subject to significant-nexus analysis on an individual, case-by-case basis: those any part of which is "located within the 100-year floodplain" of any (1)-(3) feature or "within 4,000 feet of the high tide line or ordinary high water mark" of any (1)-(5) feature. 80 Fed. Reg. at 37,087.

Features that are not jurisdictional. Finally, the Rule enumerates certain features that are categorically non-jurisdictional. They include "swimming pools"; "[s]mall ornamental waters"; "[p]rior converted cropland"; "[w]aste treatment systems"; small subsets of ditches that do not flow to a (1)-(3) feature; ditches with ephemeral or intermittent flow that do not drain wetlands, relocate a

tributary, or excavate a tributary; "farm and stock watering ponds"; "settling basins"; "[w]ater-filled depressions . . . incidental to mining or construction activity"; "[p]uddles"; "subsurface drainage systems"; and "[w]astewater recycling structures." 33 C.F.R. 328.3(b). Definitions are not provided for any excluded features. And in many instances, the features only qualify for an exclusion when they were created in or occur in "dry land" (an undefined term) or meet other vague criteria. *See id.*

D. The nationwide stay and preliminary injunctions of the Rule

Dozens of lawsuits were filed in the district courts and courts of appeals all throughout the country by States, the regulated community, and environmental NGOs. Three courts, most recently including this Court, entered preliminary relief against enforcement of the Rule.

According to the U.S. Court of Appeals for the Sixth Circuit, the Rule is procedurally "suspect," and "it is far from clear" that its substantive provisions can be squared with even the most generous reading of the prevailing Supreme Court precedents. *In re EPA & Dep't. of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015). Acknowledging "the pervasive nationwide impact of the new Rule on state and federal regulation of the nation's waters" and the risk of injury "visited nationwide on governmental bodies, state and federal, as well as private parties," the Sixth Circuit held that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." *Id*. at 806, 808. The Sixth Circuit thus enjoined the agencies from enforcing the Rule nationwide. *Id*. at 808-09. That injunction was later vacated when the Supreme Court held that the Sixth Circuit lacked jurisdiction over the challenges to the Rule. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

Before the Sixth Circuit entered its stay of the Rule in August 2015, the U.S. District Court for the District of North Dakota had similarly held that the challengers to the Rule were "likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055 (D.N.D. 2015). Indeed, that court found that the Rule suffered from numerous "fatal defect[s]," including that it is inconsistent with any plausible reading of Supreme Court precedent; it is arbitrary and capricious; and the

agencies failed to seek additional public comment after making major, unforeseeable changes to the version of the Rule. *See id.* at 1055-58. The court thus granted the preliminary injunction within the geographic limits of Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *Id*. at 1051 n.1, 1059-60.

More recently, this Court agreed that the plaintiffs have "overwhelmingly" demonstrated a substantial likelihood of success on the merits that the Rule violates both the CWA and APA. Dkt. 174, at 25. As this Court explained, the Rule is "plague[d]" by the "same fatal defect" that doomed prior EPA regulations because it reaches drains, ditches, and streams "remote from any navigable-in-fact" water. *Id.* at 12-13 (quoting *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring)); *id*. at 14 (the Rule is unlawful because it asserts jurisdiction over "remote and intermittent waters" lacking a "nexus with any navigable-in-fact waters"). The Court also held that the rule is procedurally defective because certain of its aspects are not "logical outgrowth[s]" of the proposed rule, and thus an additional comment period was required. *Id.* at 14-16. The Court thus enjoined the Rule's enforcement within the territorial limits of Alabama, Florida, Georgia, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, and Kentucky.

E. Subsequent administrative proceedings

While the challenges to the Rule were ongoing, the agencies published a notice of rule-making in the *Federal Register*, proposing to repeal and replace the Rule in a "comprehensive, two-step process." 82 Fed. Reg. 34,899, 34,899 (July 27, 2017). The first step of this process—what we refer to as the "Repeal Rule"—would "rescind" the Rule, restoring the status quo ante by regulation. *Id.* "In a second step," the government "will conduct a substantive re-evaluation of the definition of 'waters of the United States.'" *Id*.

The Repeal Rule was published on July 27, 2017, and a Supplemental Notice of Proposed Rulemaking was published on July 12, 2018. *See* 83 Fed. Reg. 32,227 (July 12, 2018) (Supplemental Notice). The Supplemental Notice explains the agencies' concern that the Rule is not legally supportable, noting "court rulings against the 2015 Rule suggest that the interpretation of the

'significant nexus' standard as applied in the 2015 Rule may not comport with and accurately implement the legal limits on CWA jurisdiction intended by Congress and reflected in decisions of the Supreme Court." *Id*. at 32,228. The Supplemental Notice points to specific legal defects embedded in the Rule, including an "expansive interpretation" of "significant nexus" that conflicts with Judge Kennedy's plurality opinion in *Rapanos*, a failure to give proper effect to the term "navigable" in the CWA, and a "broad reliance on biological functions" in determining jurisdiction at odds with the CWA and *Rapanos*, along with numerous other legal deficiencies and faulty assumptions. *Id*. at 32,240-41.

Based on their "review and reconsideration of their statutory authority," the agencies have concluded the Rule is not legally supportable. 83 Fed. Reg. at 32,238. "[R]ather than achieving [its] stated objectives of increasing regulatory predictability and consistency under the CWA, retaining the 2015 Rule creates significant uncertainty . . . compounded by court decisions that have increased litigation risk and cast doubt on the legal viability of the rule." *Id.* at 32,237.[2]

ARGUMENT

A. The Rule violates the plain text of the CWA, the relevant Supreme Court decisions, and the Constitution

The Rule asserts jurisdiction over vast tracts of the United States, including countless miles of man-made ditches and municipal stormwater systems, dry desert washes and arroyos in the arid West, "tributaries" from which water has long since disappeared and that are invisible to the naked eye, ponds on never-mapped 100-year floodplains, and virtually all land in Alaska and the water-rich Southeast. Many of these land and water features bear little or no relation to the traditional definition

[2] In light of the time needed to promulgate the final Repeal Rule, and anticipating that the Supreme Court would dissolve the Sixth Circuit's nationwide stay, the agencies set out "to maintain the status quo" pending further rulemaking. 82 Fed. Reg. 55,542, 55,542 (Nov. 22, 2017). The agencies thus amended the Rule with "an applicability date" to provide "continuity and regulatory certainty" while "the agencies continue to work to consider possible revisions." 83 Fed. Reg. 5,200, 5,200 (Feb. 6, 2018). Environmental organizations challenged the Applicability Date Rule, which was enjoined nationwide in August 2018. *See S.C. Coastal Conservation League v. Pruitt*, 2018 WL 3933811 (D.S.C. 2018). The 2015 Rule has thus come into effect in the 26 states not subject to a preliminary injunction.

of navigable waters that Congress had in mind when it enacted the CWA. Whatever leeway the Act may give the agencies to regulate "navigable waters" (33 U.S.C. § 1362(7)), the statutory text is not limitless and "does not authorize this 'Land is Waters' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734 (2006) (plurality).

1. The Rule reads the word "navigable" out of the CWA

As the Supreme Court explained in *SWANCC*, the phrase "navigable waters" demonstrates "what Congress had in mind as its authority for enacting the CWA": its "commerce power over navigation" and therefore "over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172; *id.* at 168 n.3. In Justice Kennedy's concurrence in *Rapanos*—upon which the Rule is ostensibly based—Justice Kennedy agreed that "the word 'navigable'" must "be given some importance." *Rapanos*, 547 U.S. at 778-79.

The Rule ignores this admonition. If allowed to come into effect, it would allow the agencies to assert federal regulatory jurisdiction over desiccated ditches (as "tributaries") and any isolated water features that happen to be nearby (as waters with a "significant nexus"). For example:

Figure 1: The red lines likely constitute an "ordinary high water mark," and the feature is likely to be deemed a "navigable water." Am. Petroleum Inst. Comments 129, ID-15115 (Ex. E).

Figure 2: Dade City Canal in Florida is not currently a WOTUS but would likely be deemed a "tributary" under the 2015 Rule. Fla. Stormwater Ass'n Comments 10, ID-7965 (Ex. F).

Figure 3: This feature was deemed a WOTUS in 2014 after the Corps concluded that it exhibits an ordinary high water mark. AFBF Comments, App. A at 31, ID-18005 (Ex. G).

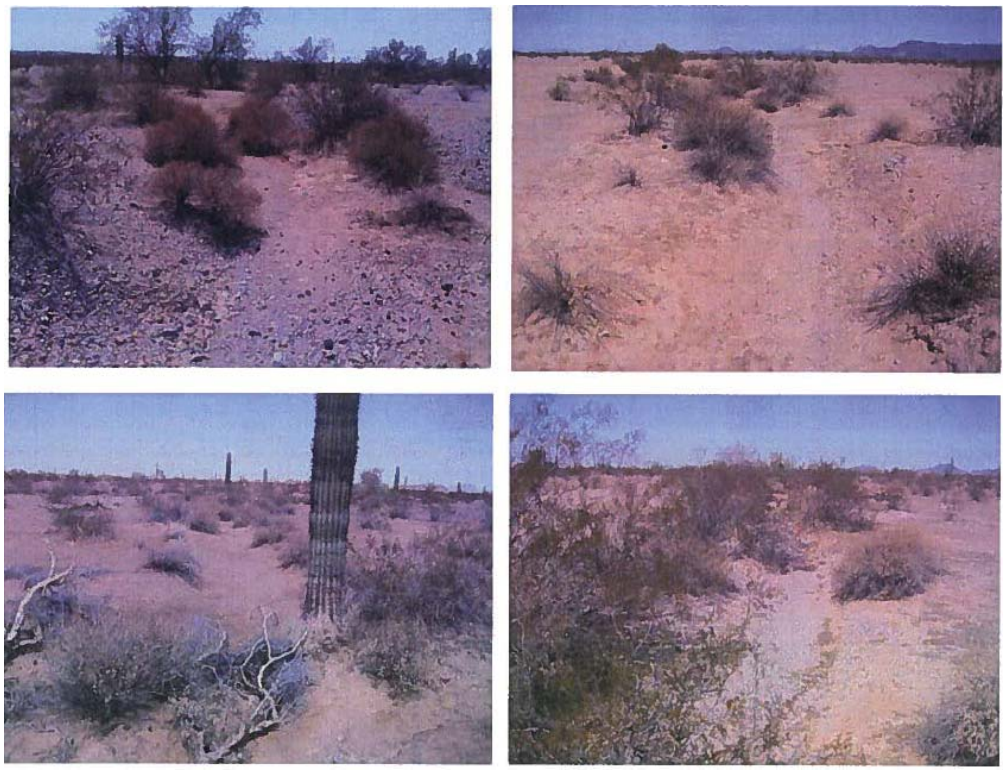

Figure 4: Typical ephemeral arid washes, likely to be deemed waters of the United States under the Rule. Freeport-McMoRan Comment 3, at 5-6, ID-14135 (Ex. H).

As a matter of plain meaning, treating features like these as "tributaries" to "navigable waters"—and treating barely damp, isolated "wetlands" nearly a mile away as likewise "waters of the United States" because they are located within 4,000 feet of such "tributaries"—is as nonsensical as it is legally impermissible.

The Rule's coverage of "all interstate waters" (33 C.F.R. 328.3(a)(2)) likewise ignores the word "navigable" (replacing it with the word "interstate") and ignores Congress's choice to *remove* the term "interstate waters" from the Act. *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) ("interstate"), *with* Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) ("interstate or navigable"), *with* 33 U.S.C. § 1362(7) ("navigable"). The agencies purport to assert jurisdiction over all interstate water features, even when they "are not [traditional] navigable [waters]" and "do not connect to such waters." 80 Fed. Reg. at 37,074. Thus, an intermittent trickle or isolated pond is enough, so long as it crosses a state line.

In sum, the agencies claim jurisdiction over features that are not navigable; cannot be made

navigable; have no nexus ("significant" or otherwise) to an actually navigable water; and are not adjacent to, and do not contribute flow to, a navigable water—simply because the feature "flow[s] across, or form[s] a part of, state boundaries." 80 Fed. Reg. at 37,074. This overreach is compounded by the Rule's treatment of all "interstate waters" as if they were traditional navigable waters. As a result, any trickle that crosses a state line can be the starting point for the assertion of jurisdiction over "tributaries" or "adjacent" wetlands.

2. The Rule's definition of "tributaries" is unlawful

Several other aspects of the Rule are irreconcilable with Supreme Court precedent, scientific evidence, and (quite often) simple logic.

a. The Rule defines "tributary" to include any feature contributing any flow to a traditional navigable water or interstate feature, "either directly or through another water," and "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. 328.3(c)(3). Because flow may be "intermittent[] or ephemeral" (80 Fed. Reg. at 37,076), jurisdiction under the Rule extends to minor creek beds, municipal stormwater systems, ephemeral drainages, and dry desert washes that are dry for months, years, or even decades at a time, as long as they exhibit a bed, banks, and "ordinary high water mark" (OHWM). A feature may qualify despite passing "through any number of [non-jurisdictional] downstream waters" or natural or man-made physical interruptions (*e.g.*, culverts, dams, debris piles, or underground features) *of any length*, so long as a bed, banks, and OHWM can be identified upstream of the break. *Id*; 33 C.F.R. 328.3(c)(3). And the agencies need not use current facts; they may use historical information alone. *See*, *e.g.*, 80 Fed. Reg. at 37,081, 37,098.

The Rule defines OHWM to mean "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 80 Fed. Reg. at 37,106. That is the same definition that Justice Kennedy criticized in *Rapanos* as too

uncertain and attenuated to serve as the "determinative measure" for identifying wetlands adjacent to a tributaries as waters of the United States. 547 U.S. at 781. Because an OHWM is an uncertain indicator of "volume and regularity of flow," it 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*." *Id*. at 781-82. The definition's reach is thus vast, covering countless miles of previously unregulated features. And the definition is categorical, sweeping in many isolated, often dry land features regardless whether their "effects on water quality are speculative or insubstantial." *Id.* at 780.

By treating all tributaries as categorically jurisdictional—even ones "carrying only minor water volumes toward" a "remote" navigable water (*id.* at 788, 781)—the Rule is inconsistent with Justice Kennedy's "significant nexus" approach.

b. For similar reasons, the rule's definition of "tributary" is inconsistent with the scientific evidence. The crux of that definition is the presence of a bed, banks, and OHWM. The underlying premise is that an "OHWM forms due to some regularity of flow and does not occur due to extraordinary events." Technical Support Document 239, ID-20869 (Ex. I). When an OHWM is present, the reasoning goes, a water feature with relatively constant and significant water flow must also be present. But that premise is demonstrably false.

Nowhere is that more apparent than in the arid West, where erosional features with beds, banks, and OHWMs often reflect one-time extreme water events, and are not remotely reliable indicators of regular flow. *See* Ariz. Mining Ass'n Comments 7-11, ID-13951 (Ex. J). In the desert, rainfall occurs infrequently; and sandy, lightly vegetated soils are highly erodible. Thus washes, arroyos, and other erosional features often reflect physical indicators of a bed, banks, and OHWM, even if they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow. *See* Barrick Gold Comments 15-16, ID-16914 (Ex. K). Because arid systems lack regular flow, the channels do not "heal" or return to an equilibrium state, as they do in wet, humid climates. Freeport-McMoRan Technical

Comments 7 (Ex. L).

The Corps' experience bears this out; their studies have found "no direct correlation" between the location of OHWM indicators and future water flow in arid regions. *See* Ariz. Mining Ass'n Comments 10-11 (Ex. J) (quoting U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability* 14 (2006) (Ex. M)). In fact, "OHWM indicators are distributed randomly throughout the [arid] landscape and are not related to specific channel characteristics." *Id*. at 11 (quoting U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes* 17 (2013) (Ex. N)). Needless to say, "randomly" distributed indicators cannot provide a rational basis for a blanket "significant nexus" finding.

3. The Rule's definition of "adjacent" is unlawful

The rule's categorical approach to "adjacent" waters (33 C.F.R. 328.3(a)(6)) runs into similar problems. The rule defines "adjacent" as "bordering, contiguous, or neighboring." *Id.* at 328.3(c)(1). The term "neighboring" is defined to include, among other things, (i) waters within 100 feet of the OHWM of a navigable water or tributary and (ii) waters within the 100-year floodplain of such a water and within 1,500 feet of its OHWM. *Id.* at 328.3(c)(2). This definition is insupportable for no fewer than four reasons.

First, the Court in *Riverside Bayview* described "wetlands adjacent to [jurisdictional] bodies of water" as wetlands "adjoining" and "actually abut[ting] on" a traditional "navigable waterway." 474 U.S. at 135 & n.9. Jurisdictional adjacent wetlands thus are those "inseparably bound up with the 'waters' of the United States" and not meaningfully distinguishable from them. *Id.* at 134-35 & n.9. For the same reason, the Court in *SWANCC* rejected the agencies' assertion of jurisdiction over *isolated* non-navigable waters "that [we]re *not* adjacent to open water" and thus not "inseparably bound up" with "navigable waters." 531 U.S. at 167-68, 171.

Second, by asserting jurisdiction based on adjacency not only to traditional navigable waters, but to any tributary, the Rule violates Justice Kennedy's *Rapanos* concurrence. Justice Kennedy rejected the idea that a wetland's mere adjacency to a *tributary* could be "the determinative measure"

of whether it was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." 547 U.S. at 781. In Justice Kennedy's view, "mere adjacency to a tributary of this sort is insufficient." *Id.* at 786. Yet the Rule doubles down on precisely this disfavored approach: It categorically asserts jurisdiction over "waters" (many of which are dry more often than wet) based on their "adjacency" to "tributaries" "however remote and insubstantial" (*id.* at 779-80), including ephemeral drains, ditches, and streams remote from navigable waters.

Third, the Rule improperly relies on adjacency to assert jurisdiction not only over "wetlands," but all other "waters." The Supreme Court has never approved such a sweeping approach. *See Riverside Bayview*, 474 U.S. at 139; *Rapanos*, 547 U.S. at 742 (plurality). According to the *Rapanos* plurality, non-wetland "waters"—especially those separated from traditional navigable waters by physical barriers or significant distances—"do not implicate the boundary-drawing problem" that justified deference to the agency's approach to adjacency in *Riverside Bayview*. 547 U.S. at 742. For this reason, courts have rejected past attempts to assert "adjacency" jurisdiction over non-wetlands. *E.g.*, *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707-08 (9th Cir. 2007).

Fourth, the Rule improperly defines "adjacency" based on "the 100-year floodplain" (33 C.F.R. 328.3(c)(2)(ii)), which is the region in which the risk of flooding in any given year is 1 percent. Such infrequent contact with jurisdictional waters flouts the "*continuous* surface connection" required by the *Rapanos* plurality. 547 U.S. at 742 (emphasis added). And under Justice Kennedy's test, a water that is "connected to [a] navigable water by flooding, on average, once every 100 years" (*Rapanos*, 547 U.S. at 728 (plurality)) cannot be said to "significantly affect the chemical, physical, and biological integrity of [the] other covered water[]." *Id*. at 780 (Kennedy, J.). At most, such a water would have an "insubstantial" "effect[] on water quality" that "fall[s] outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id*. Within any given floodplain, moreover, the Rule applies unexplained distance criteria. 33 C.F.R. 328.3(c)(2)(ii). As officials in the Corps acknowledged, longstanding agency guidance previously held that "it is not

appropriate to determine significant nexus based solely on any specific threshold of distance." Moyer Memo 2, ID-20882 (Ex. O).

4. The Rule is unconstitutionally vague

The 2015 Rule is unconstitutionally vague. "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The first concern is "to ensure fair notice to the citizenry" (*Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007)), so regulated individuals and entities "know what is required of them [and] may act accordingly." *Fox Television*, 567 U.S. at 253. The second concern is "to provide standards for enforcement" (*Fire Fighters*, 502 F.3d at 551), "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 567 U.S. at 253. The Rule offends both of these concerns.

Ordinary high water mark. Take first the concept of an "ordinary high water mark" (33 C.F.R. 328.3(c)(6))—the crux of a "tributary" (*id.* § 328.3(c)(3)) and the starting point for marking off the applicable distances for "adjacent" and "neighboring" waters (*id.* § 328.3(c)(1)-(2)) and waters with a "significant nexus." *Id.* § 328.3(a)(8).

To begin with, ambiguous standards for the presence of an OHWM like "changes in the character of soil" and "presence of litter and debris" invite arbitrary enforcement. *See* 33 C.F.R. 328.3(c)(6). But even if that were not enough, the Rule expressly allows agency staff to rely on whatever "other . . . means" they deem "appropriate" in deciding when an OHWM is present and where it lies. *Id.* 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*, at 3 (Dec. 7, 2005) (Ex. P). Regulators can reach any outcome they please, and regulated entities cannot know the outcome until they are already exposed to civil and criminal liability, including crushing penalties.

Matters are made worse by the methods prescribed for identifying an OHWM, which are standardless and cannot be replicated by the regulated public. Agency staff making an OHWM deter-

mination *do not even need to visit the site*. "Other 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 not only that regulators will not need to visit a site, but that an OHWM will exist when they *say* it exists, even if it's not visible to the naked eye. Landowners will have to sleuth out the "prior existence" of an OHWM and "historical presence of tributaries"—with no limit to how far back they must go—based on unclear criteria such as "lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence." *Id*. at 37,077-78.[3]

Significant nexus. The standardless discretion of the Rule is equally apparent with respect to the "case-by-case" significant nexus test. 80 Fed. Reg. at 37,058. At every stage, the test turns on subjective observations and opaque analyses.

Consider a landowner with a small, isolated pond on her property. To determine whether she needs a federal permit to discharge into the pond (for example, by building a swimming pier), the landowner must first identify all traditional navigable waters, interstate waters, and tributaries anywhere within 4,000 feet—*nearly a mile*—of the pond. Setting aside the vagueness of what counts as a "tributary" in the first place, imagine the landowner finds a tributary within the 4,000-foot limit. She must then sort out whether regulators will conclude that the pond, together with "other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of the nearest traditional navigable water or interstate feature. 33 C.F.R. 328.3(c)(5).

- Waters are "similarly situated" when "they function alike and are sufficiently close to function together in affecting downstream waters." 33 C.F.R. 328.3(c)(5). But when does a pond function "alike" with other ponds, and when does it function distinctly and alone? And

[3] Among the "remote sensing or mapping information" the agencies may rely on to detect an invisible OHWM from afar are "local stream maps," "aerial photographs," "light detection and ranging" (also known as LiDAR, which means topographic maps drawn by lasers mounted on drones), and other unidentified "desktop tools that provide for the hydrologic estimation of a discharge." 80 Fed. Reg. at 37,076-77. The agencies will use these sources "independently to infer" and "to reasonably conclude the presence" of an OHWM. *Id*. at 37,077.

what does "sufficiently close" mean? Is a mile too far? 10 miles? 100 miles?

- These "similarly situated" waters must "significantly affect[]" the "biological integrity" of the nearest traditional navigable water or interstate feature. 33 C.F.R. 328.3(c)(5). But what is "biological integrity," and when is an effect on water integrity *significant*? The agencies' explanation—that an effect is significant when it is "more than speculative or insubstantial" (*id.*)—is no more clear than the nebulous word it purports to define.

- How are landowners expected to identify all "similarly situated" waters within hundreds of thousands of acres (requiring them to trespass on others' land), and then determine if they, together with the waters on their own land, "significantly affect" a tributary's water "integrity"? 33 C.F.R. 328.3(c)(5).

These so-called standards fail to put the regulated community on notice of when the Clean Water Act actually applies to their lands.

Categorical exemptions. Many of the rule's categorical exemptions from jurisdiction are also vague. For example, the agencies inserted an exemption for "[p]uddles." 33 C.F.R. 328.3-(b)(4)(vii). But what is a puddle? The agencies assert jurisdiction over "depressional wetlands" (80 Fed. Reg. at 37,093), without regard for size or permanence. When does a recurring puddle become a small depressional wetland? For example:

Figure 5: Small "depressional wetland" or large puddle? AFBF Comments App. A at 38 (Ex. G).

This is not a hypothetical concern. The Corps determined that the following feature is not a parking-lot puddle, but a jurisdictional *wetland*. According to common experience, it's a *puddle*:

Figure 6: Delineated "Water Feature 21" in Project SPK 2002-00641. *See* Staff of S. Comm. on Env't & Pub. Works, 114th Cong., *Expansion of Jurisdiction Claimed Under the Clean Water Act* 21 & n.87 (2016), perma.cc/W6U3-583Y (Ex. Q).

Similar ambiguity arises with respect to the Rule's categorical exemption for "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary." 33 C.F.R. 328.3(b)(4)(vi). As we explained above, there is no way for the regulated public to know when the "volume, frequency, and duration of flow" of such erosional features is "sufficient to create a bed and banks and an ordinary high water mark" to qualify as a "tributary." *Id.* § 328.3(c)(3). The agencies' discretion in interpreting those provisions makes their applicability impossible to predict.

5. The Rule violates the Commerce Clause

The Rule violates the Constitution in another way: The agencies have pushed their jurisdiction beyond its Commerce Clause limits. The Constitution grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has read those words "to mean that Congress may

regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). The Rule sweeps in countless land features that are not channels of, and have no substantial effect on, interstate commerce.

The Rule imposes federal authority outside of these areas, and thus improperly steps into the realm of the States' regulatory authority. As an initial matter, the Rule reaches far beyond Congress's authority to protect in-fact navigable waters; that is, those waters that can be used as channels of interstate commerce. *See SWANCC*, 531 U.S. at 172 (the CWA is authorized by Congress's "traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made"). While Congress has authority to regulate more than the channels themselves, regulation under this authority is limited to protecting those channels. For example, "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941). But the Rule sweeps in numerous local land and water features that are not navigable-in-fact and have no appreciable connection to navigable-in-fact waters.

The agencies' assertion of authority in *SWANCC* raised grave constitutional issues because the waters there were remote from navigable-in-fact waters (*see* 531 U.S. at 174); under the 2015 Rule, the more expansive assertion of authority over local land and water features is far worse. No one could seriously say that channels of interstate commerce include an ephemeral trickle that happens to cross a state line, a dry wash in a Western desert, or an isolated wetland that is 4,000 feet from the nearest intermittent tributary that is itself miles away from any truly navigable water.

Nor could anyone say that such features "'substantially affect[]' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). Even analyzed separately under this prong of the commerce power, the Rule is unlawful. Precisely because it covers mostly dry, remote land features with no meaningful connection with actual waterways, the Rule "effectually obliterate[s] the

distinction between what is national and what is local." *Id.* at 557. On this score, even the agencies themselves equivocated during the rulemaking, asserting without citation that waters covered by the Rule "*could affect* interstate or foreign commerce." 80 Fed. Reg. at 37,084 (emphasis added). *Could affect* is a far cry from *substantially do affect*. *Gonzales v. Raich*, 545 U.S. 1 (2005), is of no assistance to the agencies, for nothing about stretching CWA authority to non-economic, isolated or remote ponds or ditches is "an essential part of a larger regulation of economic activity." *Id.* at 36.

The Rule additionally subverts the constitutional balance of power between the Federal Government and the States. The CWA reflects traditional views of the division of regulatory authority over waters. Navigable waters of the United States, which are part of or connected to channels of interstate commerce, are regulated by the Federal Government. At the same time, Congress "recognize[d]" and sought to "preserve[] and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The Rule's sweeping assertion of federal jurisdiction upsets this balance between state and federal authority without any warrant in the text or history of the CWA, and in direct contradiction of 33 U.S.C. § 1251(b).

Given the judiciary's "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States" (*Lopez*, 514 U.S. at 580-81 (Kennedy, J., concurring)), no court should countenance the agencies' assault on local jurisdiction over land use. Regulation of "development and use" of "land and water resources" is a "quintessential state and local power" preserved by the CWA. *Rapanos*, 547 U.S. at 737-38 (plurality); 33 U.S.C. § 1251(b). The Rule's dramatic encroachment on state authority violates the federalism principles embodied in the Constitution and the text of the CWA itself.

B. The Rule was promulgated in violation of the law

As though the substantive flaws with the Rule were not enough, there are also three principal procedural flaws with the Rule requiring its vacatur: The agencies deprived the public of a meaningful opportunity to comment on critical aspects of the final Rule and declined to respond to the

comments submitted; EPA violated anti-propaganda and anti-lobbying provisions in governing appropriations laws; and it failed to comply with the Regulatory Flexibility Act.[4]

1. The final Rule was promulgated in violation of basic principles of notice-and-comment rulemaking

The heart of the APA rulemaking process is the notice-and-comment procedure. The process begins when an agency publishes a "notice of proposed rule making." 5 U.S.C. § 553(b). That notice must include "either the terms or substance of the proposed Rule or a description of the subjects and issues involved." *Id.* § 553(b)(3). After the notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c).

Notice-and-comment serves three purposes. "First, notice improves the quality of agency rulemaking by ensuring that agency regulations will be 'tested by exposure to diverse public comment.'" *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). "Second, notice and the opportunity to be heard are an essential component of 'fairness to affected parties.'" *Id.*; *accord Dismas Charities, Inc. v. DOJ*, 401 F.3d 666, 678 (6th Cir. 2005). "Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review." *Small Refiner*, 705 F.2d at 547.

The agencies gamed the APA at every turn. They made substantial changes to the Rule between publication of the proposed Rule and promulgation of the final Rule, without reopening the comment period. They withheld the final version of the Connectivity Report until after the comment period closed, denying the public any opportunity to comment on it or its relevance to the proposed Rule. And they ridiculed or ignored important comments received during the comment period.

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[4] These and other "serious flaws in the rulemaking process" are detailed in a 181-page congressional report, which concludes that EPA "cut corners, disregarded statutes and executive orders, and ignored serious concerns voiced by experts, the states, and American citizens," "rush[ing] promulgation of the rule" to satisfy "political considerations" and appease "outside special interest groups." Comm. on Oversight and Gov't Reform, U.S. House of Representatives, 114th Cong., Majority Staff Report, *Politicization of the Waters of the United States Rulemaking* 180 (Oct. 27, 2016), perma.cc/LH2S-X87U (Ex. R).

a. For a regulation to comply with the notice and comment requirements of Section 553, "the final rule the agency adopts must be 'a logical outgrowth' of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The logical-outgrowth test asks whether "[a] party, *ex ante*, should have anticipated that" the requirements contained in the final rule "might be imposed." *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 446 (D.C. Cir. 1991) (brackets omitted). If not, "a second round of comment is required" so that interested parties have an opportunity to comment on the elements of the Rule that could not be anticipated. *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994).

The "object" of the logical-outgrowth requirement is "fair notice." *Coke*, 551 U.S. at 174. "While a final rule need not be an exact replica of the rule proposed in the Notice" (*Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986)), "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner*, 705 F.2d at 547. The final Rule here fails the outgrowth test.

There was no way to anticipate from the proposed Rule that the final Rule would define key jurisdictional concepts using the arbitrary distances. In the proposed Rule, the agencies defined "adjacent" waters as those "bordering, contiguous [with] or neighboring" a (1)-(5) feature. 79 Fed. Reg. at 22,269. "Neighboring" features were defined as those "located within the riparian area or floodplain" or having a "hydrologic connection." *Id.* In the final Rule, "neighboring" features were defined in very different terms, to include "waters located within 100 feet of the ordinary high water mark" of a (1)-(5) feature, "waters located within the 100-year floodplain" of a (1)-(5) feature but "not more than 1,500 feet from the ordinary high water mark of such water," and "waters located within 1,500 feet of the high tide line" of a (1)-(3) water. 80 Fed. Reg. at 37,105.

Much the same goes for the case-by-case applicability of the "significant nexus" test for non-categorically jurisdictional features. In the proposed Rule, any water, wherever located, could be deemed jurisdictional based on a significant nexus to a (1)-(3) water. The final Rule, by contrast, applies a case-by-case "significant nexus" analysis to features "located within the 100-year flood-

plain" of a (1)-(3) feature or "within 4,000 feet of the high tide line or ordinary high water mark" of a (1)-(5) feature. 80 Fed. Reg. at 37,107.

These distances and reference points are central to the Rule's operation, but there was no way to anticipate their inclusion in the final Rule and thus no opportunity to comment on them. The final Rule is therefore not a logical outgrowth of the proposed Rule. "When the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1058 (D.N.D. 2015). "Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance." *Id.* This alone is sufficient to vacate the Rule.

b. The Rule must be vacated also because the agencies denied interested parties any opportunity to comment on the key factual underpinning of the Rule, dubbed the Connectivity Report, which compiled the scientific literature and analysis on which the agencies relied to determine the hydrological "connectivity" of various features.

The proposed Rule was accompanied only by a draft of the Connectivity Report, which was at the time undergoing review by the Scientific Advisory Board, or SAB.[5] The SAB subsequently recommended numerous substantive changes to the Connectivity Report, and the agencies made several notable changes in response. SAB Review (Ex. B). For example, 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 1-4, ID-20858 (Ex. S). And it added important new material to a case study on "Southwestern Intermittent and Ephemeral Streams." *Id.* at 5-7. Both changes were responses to SAB criticisms of the proposed Rule, both go to the heart of

[5] Congress directed the administrator of the EPA to establish the SAB, a Federal Advisory Committee, to "provide such scientific advice as may be requested by the Administrator." 42 U.S.C. § 4365(a).

the legal and scientific flaws of the Rule, and both would have garnered comments from intervenor plaintiffs had they been disclosed to the public during the comment period.[6]

The final Connectivity Report, however, was not published until two months *after* the comment period closed. 80 Fed. Reg. 2,100 (Jan. 15, 2015). As many commenters explained, the delayed release of the final Report—combined with the agencies' refusal to extend the comment period to accommodate the delay—made it impossible for interested parties to review and comment on the final Report's conclusions and methodology. *E.g.*, WAC Comments 73 (Ex. A); Murray Energy Comments 6, ID-13954 (Ex. T).

This is no trivial oversight. The agencies "interpret[ed] the scope of 'waters of the United States' … based on the information and conclusions in the Science Report, other relevant scientific literature, [and] the Technical Support Document that provides additional legal and scientific discussion for issues raised in this rule." 80 Fed. Reg. at 37,065.[7] "In light of this information," they "made scientifically and technically informed judgments about the nexus between the relevant waters and the significance of that nexus." *Id*. Because the significant nexus approach underpins the entire Rule and the agencies' legal justification for it, it is no overstatement to say that the Connectivity Report is the evidentiary linchpin of the Rule. *See id.* at 37,057 (explaining that the Connectivity Report "provides much of the technical basis for [the] [R]ule").

EPA's decision not to make the final Report available until after the comment period had

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[6] The final Report cited 349 scientific and academic sources that were not included in the draft Report, including 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. The WAC comments criticized the draft Report for, among other things, failing to provide metrics to measure the significance of a nexus to traditional navigable waters (at 25-26); analyzing "significant nexus" as a binary rather than a gradient (at 27); and failing to assess the significance of the effects of ephemeral features on downstream waters (at 35). *See also*, *e.g.*, NAHB Comments 37, 49, 90, 141-42, ID-19540 (Ex. U). These and other commenters would have expanded and refined these criticisms in light of the new sources and analysis, had they been given the opportunity.

[7] The "Science Report" is the Connectivity Report. The Technical Support Document aggregated and summarized the agencies' scientific analysis, including the Connectivity Report and the SAB review. *See* Technical Support Document 93-163 (Ex. I).

closed is inexplicable. It is, after all, "fairly obvious" that "studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007). That is precisely what happened here.

c. The agencies additionally failed in their responsibility under the APA to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Though an agency need not "respond to every comment" (*Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984)), it must adequately respond to significant comments that "cast doubt on the reasonableness of a position taken by the agency." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).

Here, interested parties submitted numerous comments fitting this description. In particular, many commenters expressed concern that the proposed Rule would unduly expand the area subject to federal regulatory jurisdiction, trenching in equal parts on common sense and traditionally local land-use regulation. *See, e.g.*, WAC Comments 39 (Ex. A); U.S. Chamber of Commerce Comments 6, ID-19343 (Ex. V); Murray Energy Comments 19 (Ex. T). Rather than engage these comments, the agencies brushed them aside.

For example, several members of the public with land holdings in the arid West commented that the proposed Rule's expansive definition of covered "tributaries" was vastly overinclusive. They explained that many lands in the West contain features that the agencies claim are excluded from jurisdiction (*e.g.*, desert washes, arroyos, gullies, rills, and channels), but which would in fact often be covered by the Rule any time they arguably exhibit a bed and banks and an ordinary high water mark. *See, e.g.*, Freeport-McMoRan Comment 3, at 5 (Ex. H); Ariz. Mining Ass'n Comments 7-8 (Ex. J); N.M. Cattle Growers Ass'n Comments 12, ID-19595 (Ex. W). Yet due to the highly erodible

nature of the soil in the West, these features are often formed by a single rain event and rarely carry water. Freeport-McMoRan Comments 5. Thus, the commenters explained, it made no sense to rely on physical characteristics that might indicate a tributary in a wet, humid climate for purposes of identifying tributaries in the arid West. *E.g.*, Ariz. Mining Ass'n Comments 7 (Ex. J).

Despite the serious nature of these comments, neither the preamble to the final Rule nor any other agency pronouncement addresses applicability of the Rule in the arid West. The final Rule notes generically that commenters "suggested that the agencies should exclude ephemeral streams from the definition of tributary," and responds that ephemeral streams will lack sufficient flow to form "the physical indicators required" by the definition of "tributary." 80 Fed. Reg. at 37,079. But that discussion is not responsive to concerns about channels and gullies in the arid West, which *do* sometimes have the physical indicators the Rule requires.

In another example, members of the farming community commented that the proposed Rule would eviscerate several statutory permit exemptions applicable to agricultural activities. AFBF Comments 13-17 (Ex. G). They explained that although farming activities such as plowing, seeding, harvesting, and farm pond construction are exempt from Section 404 permitting requirements (*see* 33 U.S.C. § 1344(f)(1)), the CWA's "recapture" provision[8] (*id.* § 1344(f)(2)) will frequently be triggered when common features on the farm, such as erosional features, ephemeral drains, and farm ditches, become "tributaries" under the Rule. Beyond that, the proposed Rule would override the Section 402 permit exemption for agricultural stormwater runoff and irrigation (*id.* § 1342(l)(1)) by regulating as "tributaries" the ditches and drainages that carry stormwater and irrigation water. AFBF Comments 16-17 (Ex. G). Again, the agencies did not respond.

The agencies turned a blind eye to these serious comments in the final Rule, offering only a terse, unsubstantiated assertion that the Rule "does not affect any of the [statutory] exemptions" and "does not add any additional permitting requirements on agriculture." 80 Fed. Reg. at 37,055. But

[8] The "recapture" provision requires permitting for otherwise exempt activities when they "impai[r]" the flow of navigable waters. AFBF Comments 14-15 (Ex. G).

"[a] dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office*, 567 F.2d at 35-36.

2. EPA's advocacy campaigns were unlawful

The agencies also engaged in a lobbying campaign in support of the Rule and a propaganda campaign against its critics. In this way, EPA violated federal anti-lobbying and anti-propaganda laws and the basic principles of administrative rulemaking.

a. The Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, which authorized funding for EPA during the relevant time, prohibits use of appropriations "for publicity or propaganda purposes." *Id.*, tit. 7, § 718; *accord* Consolidated and Furthering Continuing Appropriations Act, Pub. L. No. 113-235, tit. 7, § 718, 128 Stat. 2130, 2383 (2014).

EPA's social media campaign violated this law. The General Accountability Office (GAO) has repeatedly held that "materials . . . prepared by an agency . . . and circulated as the ostensible position of parties outside the agency amount to [prohibited] covert propaganda." B-305368, 2005 WL 2416671, at *5 (Comp. Gen. Sept. 30, 2005) (Ex. X). Yet EPA used Thunderclap (a "crowd-speaking" platform) to recruit supporters of the proposed Rule and disseminate a misleading message. B-326944, 2015 WL 8618591, at *2-3 (Comp. Gen. Dec. 14, 2015) (Ex. D); *see* perma.cc/9CHN-87T8 (archived Thunderclap page) (Ex. Y). The message, to an audience of 1.8 million, read: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community." B-305368, 2005 WL 2416671, at *3 (Ex. X). The statement concluded with a hyperlink to EPA's webpage promoting the proposed Rule. *Id.* Nothing identified EPA as the author; to anyone reading the message, "it appeared that their friend independently shared a message of his or her support for EPA and clean water." *Id.* at *8.

According to the GAO, this is the very definition of covert propaganda. EPA "used supporters as conduits of an EPA message . . . intend[ing] to reach a much broader audience," without disclosing "that the message was prepared and disseminated by EPA." B-326944, 2015 WL 8618591, at *8 (Ex. D). This sort of surreptitious messaging is "beyond the range of acceptable

agency public information activities," "reasonably constitute[s] 'propaganda,'" and was accordingly unlawful. B-223098, 1986 WL 64325, at *1 (Comp. Gen. Oct. 10, 1986) (Ex. Z).

b. According to the GAO, EPA also violated the anti-lobbying laws. Anti-lobbying provisions in appropriations statutes prohibit executive agencies from using appropriated funds "for the preparation" of materials "designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself." Pub. L. No. 113-235, tit. 7, § 715, 128 Stat. 2130, 2382-83. GAO has long held that these provisions prohibit an agency from engaging in "grassroots lobbying" by appealing "to the public to contact Members of Congress in support of, or in opposition to, pending legislation" that the agency supports or opposes. B-326944, 2015 WL 8618591, at *12 (Ex. D).

That is exactly what EPA did. Its blog post discussing the importance of clean water to surfers and brewers linked to two external webpages that the GAO concluded made a "clear appeal" to the public to contact members of Congress to oppose pending legislation that would have blocked the Rule. B-326944, 2015 WL 8618591, at *15 (Ex. D). It was not a close call: after encouraging readers to "[u]rge your senators to defend Clean Water Act safeguards for critical streams and wetlands," the pages presented form letters for visitors to submit electronically to their senators. *See id.* at *6; perma.cc/MB6B-QFCF (form letter page) (Ex. AA). By linking to these external websites, "EPA associated itself with the messages conveyed by these self-described action groups." B-326944, 2015 WL 8618591, at *18 (Ex. D). In doing so, EPA directed the public to engage in lobbying activities against efforts to block the Rule, and thereby engaged in illegal "grassroots lobbying."

In light of EPA's unlawful propaganda and lobbying campaigns, there can be no doubt that the Rule was promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). The regulated community were entitled by law to be "treated with fairness and transparency," and the APA required the agencies to give their criticisms "due consideration." *Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013). They were denied that, by illegal propaganda and lobbying

that shows the agencies had a closed mind to criticism.

3. The agencies failed to comply with the Regulatory Flexibility Act

The RFA requires an agency to perform a "regulatory flexibility analysis" that estimates the full impact of any proposed rule on small entities and determines whether less burdensome alternatives are available. 5 U.S.C. § 603(a). The agency must summarize an initial analysis in the *Federal Register* at the time the rule is proposed (*id.*) and publish a final analysis, taking account of public comments, with the final rule. *Id.* § 604(a). These procedures are mandatory unless the agency certifies that the rule will not "have a significant economic impact upon a substantial number of small entities." *Id.* § 610(a).

Despite clear indications that the Rule would impose widespread hardship on small businesses and small governmental entities (*see* SBA Comments 4, ID-7958 (Ex. BB)), the agencies certified in the preamble to the proposed Rule that the Rule would *not* "have a significant economic impact on a substantial number of small entities." 79 Fed. Reg. at 22,220. That certification was premised on the absurd claim that the Rule *narrows* the agencies' jurisdiction under the CWA. 80 Fed. Reg. at 37,102. The analysis supporting that conclusion is deeply flawed.

Public commenters explained that the agencies' RFA certification was wrong, and that the Rule would require small businesses and municipalities across the country to obtain countless new and costly CWA permits, forcing many to "forgo . . . development plans." Nat'l Fed'n of Indep. Bus. Comments 7, ID-8319 (Ex. CC). The Small Business Administration—an independent federal agency created by Congress to assist and protect the interests of small business concerns—submitted similar comments urging the agencies to withdraw their certification. *See* SBA Comments 1 (Ex. BB).

But for purposes of their RFA certification, the agencies ignored these facts. Rather than basing their analysis on "the best [possible] assessment of the way the world would look absent the [Rule]" (OMB, *Circular A-4* (Sept. 17, 2003), perma.cc/Q335-NPYA) (Ex. DD), the agencies instead based their conclusion that "the rule will not have a significant economic impact on a

substantial number of small entities" on an assertion that "fewer waters will be subject to the CWA under the rule" as compared with "historic practice." 80 Fed. Reg. at 37,101-02. But the "historic practice" that the agencies selected was not the post-*Rapanos* guidance issued in 2008; it was instead the practice *before that*, which has since been superseded. *See* EPA, *2008 Rapanos Guidance and Related Documents*, perma.cc/6ZPF-PPME (Ex. EE).

In support of that obviously mistaken approach, the agencies offered no explanation beyond the bald conclusion the 1986 practices "represent [an] appropriate baseline for comparison." 80 Fed. Reg. at 37,101. Not only is that wrong as a matter of common sense, but a "conclusory statement with no evidentiary support in the record 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); *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency conclusions must be supported by reasoning and evidence).

The consequences of these oversights are not academic. The agencies have conceded that the Rule would result in a 2.84 to 4.65 percent *expansion* of jurisdiction when "[c]ompared to a baseline of recent practice." 80 Fed. Reg. at 37,101. And (using underinclusive estimates) they acknowledged that, as a result of the Rule, CWA permitting costs would increase by tens of millions of dollars, and mitigation costs by potentially over one hundred million dollars, throughout the nation each year. *Economic Analysis of Proposed Revised Definition of Waters of the United States* 13-18, ID-0003 (Ex. FF); *Economic Analysis of the EPA-Army Clean Water Rule* x-xi, ID-20866 (Ex.GG). Common sense and common experience suggest that the true numbers are far larger.

C. The Rule should be vacated in its entirety

The Rule is a nationwide rule with nationwide consequences. Intervenor plaintiffs are national organizations with national memberships who will suffer nationwide injury if the Rule is not set aside. *See* Addendum of Declarations to Opening Brief for the Business and Municipal Petitioners, *In Re EPA & Dep't of Def. Final Rule*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 129-2) (Ex. HH); Appendix to Plaintiffs' Mot. for a Nationwide Preliminary Injunction at Tabs 2-4, *Am.*

Farm Bureau Fed'n v. EPA, No. 3:15-cv-165 (S.D. Tex. Feb. 7, 2018) (Ex. II). The Rule accordingly must be vacated in its entirety.

That is the ordinary form of relief in APA cases. The Act directs courts to "set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2). Thus, when a court has determined that a regulation is unlawful, "the practice of the court is ordinarily to vacate the rule." *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 20 (D.D.C 2017) (citing *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997)); *see also Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated."). That is the remedy warranted here.

An across-the-board vacatur is particularly appropriate here because any order short of a nationwide vacatur would perpetuate a patchwork regulatory regime. The complications of such a regime are highly detrimental to regulated parties and regulators alike. As just one example, what are the agencies to do when a multistate project implicates earth-moving activities in small, isolated features characterized as wetlands across portions of different states subject to different regulatory requirements? That single project would be subject to two fundamentally different permitting demands. The same problem would be multiplied many times over throughout the country in similar cases. It is against the public interest to allow enormously consequential national regulations like the WOTUS Rule—which subject commonplace activities involved in building, farming, and pest management to a complex and burdensome federal permitting and enforcement scheme—to apply differently depending on whether the activity happens to be located on one side of a state line or the other.

The nature of the violations proven here, as well as the harm those violations are causing, is national in scope. The terms of the equitable relief should match the harm.

CONCLUSION

The motion for summary judgment should be granted, and the Rule should be vacated.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2018, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of Georgia on all parties registered for CM/ECF in the above-captioned matter.

/s/ *Timothy S. Bishop*
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