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

STATE OF GEORGIA, *et al.*, *Plaintiffs*, AMERICAN FARM BUREAU FEDERATION, *et al.*, *Intervenor-Plaintiffs,* v. ANDREW WHEELER, *et al.*, *Defendants*, NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, *Intervenor-Defendants.*	Case No. 2:15-cv-79

BUSINESS INTERVENOR-PLAINTIFFS' SUPPLEMENTL BRIEF IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT AND TO AMEND THE COURT'S PRELIMINARY INJUNCTION

The Business Intervenors submit this short supplemental brief pursuant to the Court's order of December 17, 2018 to address two issues raised at the December 14, 2018 motions hearing.

First, the United States suggested that the 2015 WOTUS Rule cannot be challenged facially. 12/14/18 Hrg. Tr. 44:10-45:16 (attached as Exhibit A). It took the position, in particular, that the APA does not "permit[] for [a] facial review of [the] regulation" (*id*. at 45:5) and therefore that the Business Intervenors must "identify specific people" with "specific parcels of land" that are subject to "a specific application of the rule" who can show resulting injury (*id*. at 45:7-13). The United States seemed to suggest that, after all that, only those particular individuals would be entitled to an order of relief, leaving the broader public without protection.

That is not how the APA works. As a threshold matter, the APA unquestionably permits facial challenges to agency actions, both pre- and post-enforcement. *See, e.g.*, *Am. Petroleum Inst. v.*

EPA, 862 F.3d 50, 76 (D.C. Cir. 2017), *decision modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018) (entertaining pre-enforcement facial challenge under the APA); *Shays v. Fed. Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005) (same).

When plaintiffs prevail in such cases, the challenged rule is invalidated in its entirety, as to everyone. As Justice Blackmun explained in *Lujan*:

> In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court.

Regents of the Univ. of California v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 511 (9th Cir. 2018) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting)).[1] Thus, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 (D.C. Cir. 1989). Put another way, when a plaintiff demonstrates that a regulation exceeds the agencies' statutory and constitutional authority, or that it was promulgated in derogation of the procedural requirements of the APA, a court's order "hold[ing] unlawful and set[ting] aside [the] agency action" (5 U.S.C. § 706(2)) has universal effect.

It hardly could be otherwise. Procedurally, if the agencies' decision not to reopen the comment period was unlawful, or if their decision not to make the final Connectivity Report available for comment was unlawful, then the *whole Rule* is unlawful, soup to nuts. The problem is not its application to any particular member of the regulated public; rather, its enforcement as against *anyone* is categorically unlawful under the APA. The same goes for our substantive challenges. As

[1] Although the quoted language is from Justice Blackmun's dissent in *Lujan*, the courts of appeals have recognized that this passage "express[ed] the view of all nine Justices on this question." *Regents*, 908 F.3d at 511 (quoting *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)).

we explained in our papers and at the hearing, the WOTUS Rule's provisions for interstate features and features adjacent to tributaries are categorically inconsistent with Justice Kennedy's concurring opinion in *Rapanos*; there is no lawful application of those provisions. So too with respect to our arguments under the Commerce Clause and the Due Process Clause. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (an argument that a law is "impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests" is a claim that the law is "invalid on its face").

That is why an order categorically vacating the challenged regulation is the presumptive remedy for violations of the APA. *See* 33 Fed. Prac. & Proc. Judicial Review § 8381 (1st ed.) ("Generally speaking, where a petitioner persuades a reviewing court that an agency's action is defective due to errors of fact, law, or policy, the court should vacate that action and remand to the agency for further proceedings."); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that the agency regulations are unlawful, the ordinary result is that the rules are vacated.") (quotation marks omitted).[2]

This follows from the statute's plain text, which states that a reviewing court shall "hold unlawful *and set aside*" agency actions that are arbitrary and capricious, exceed statutory or constitutional authority, or that were promulgated without observance of proper procedure. 5 U.S.C. § 706(2) (emphasis added). *Accord FCC v. NextWave Pers. Commc'ns*, 537 U.S. 293, 300 (2003)

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[2] *See, e.g.*, *Humane Soc'y of United States v. Zinke*, 865 F.3d 585, 615 (D.C. Cir. 2017) (vacating Fish and Wildlife Service rule on basis of four consolidated challenges where each challenge was brought by an animal rights organization); *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 317 (D.C. Cir. 2011) (vacating EPA rule on basis of challenge brought by a single environmental organization); *Comcast Corp. v. FCC*, 579 F.3d 1, 3 (D.C. Cir. 2009) (vacating FCC regulation governing cable television industry on basis of challenge brought by Comcast)*; Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1273 (D. Colo. 2012) (vacating Forest Service rule on basis of challenge brought by skiing association); (emphasis added); *see also Am. Lithotripsy Soc'y v. Thompson*, 215 F. Supp. 2d 23, 24 (D.D.C. 2002) (holding CMMS regulation relating to lithotripsy medical procedure "of no force and effect" and permanently enjoining its enforcement).

("[An] agency action must be *set aside* if the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.") (emphasis added).

To "vacate" an agency action is to "nullify or cancel" it, or to "make [it] void." *Vacate*, Black's Law Dictionary (10th ed. 2014). Thus, an order "setting aside" or "vacating" an agency action is absolute; the result is, in effect, to strike the rule from the Code of Federal Regulations. This well-settled remedy is necessarily categorical and national in scope. The United States is wrong to suggest otherwise. *E.g.*, 12/14/18 Hrg. Tr. 45:24-46:4.

***Second*,** the United States noted at the hearing that many among the 22 States where the WOTUS Rule is in now in effect have expressed support for the Rule and "have sought to have the 2015 Rule go into effect." 12/14/18 Hrg. Tr. 40:15-19. With respect to our request for a preliminary injunction, the implication was that the Court should respect these States' sovereign prerogative to support of the WOTUS Rule. That is a bizarre suggestion. No State has any prerogative—sovereign or otherwise—to insist that an *unlawful* federal regulation be enforced within its borders. The Business Intervenors and their members are suffering admittedly irreparable harms in these States because of the WOTUS Rule. *E.g.*, 12/14/18 Hrg. Tr. 43:22-24 ("[T]he United States would have to concede that there are certain impacts to these business intervenors that are not compensable in a monetary way."). It is no answer to the Business Intervenors' members—the ones who are suffering these crushing, non-recoverable compliance costs—for the United States to shrug its shoulders and say that they have the bad luck to live or work in a State that is happy to allow illegal EPA actions.

The most straightforward solution is for the Court, as soon as possible, to grant summary judgment to the plaintiffs and "set aside" (5 U.S.C. § 706(2)) the WOTUS Rule. If it does not do so expeditiously, the Court should first extend the preliminary injunction to apply within the 22 States (and D.C.) not currently protected by a preliminary injunction.

Dated: December 24, 2018

Respectfully submitted,

/s/ *Timothy S. Bishop*

Timothy S. Bishop (pro hac vice)
Michael B. Kimberly (pro hac vice)
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
tbishop@mayerbrown.com
mkimberly@mayerbrown.com

Mark D. Johnson
Georgia Bar No. 395041
GILBERT, HARRELL,
SUMERFORD & MARTIN, P.C.
777 Gloucester Street, Suite 200
Brunswick, Georgia 31520
(912) 265-6700 (tel.)
(912) 264-0244 (fax)
mjohnson@gilbertharrelllaw.com

Attorneys for Business Intervenor-Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on December 24, 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*

Exhibit A

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

STATE OF GEORGIA, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
vs.	)	2:15-CV-00079-LGW-RSB
	)	
ANDREW WHEELER, et al.,	)	
	)	
Defendants.	)	

MOTIONS HEARING
BEFORE THE HONORABLE LISA GODBEY WOOD
December 14, 2018; 2:01 p.m.
Brunswick, Georgia

APPEARANCES:

For the State Plaintiffs	ANDREW A. PINSON, Esq. Office of the Attorney General 40 Capitol Square SW Atlanta, Georgia 30334 (404) 463-0770 apinson@law.ga.gov
For the Plaintiff State of South Carolina	JAMES EMORY SMITH, Esq. Office of the SC Attorney General P. O. Box 11549 Columbia, South Carolina 29211 (803) 734-3677 esmith@scag.gov
For the Intervenor Plaintiffs	MICHAEL B. KIMBERLY, Esq. Mayer Brown, LLP 1999 K Street NW Washington, DC 20006 (202) 263-3127 mkimberly@mayerbrown.com

For the Defendants Wheeler, James and US EPA	JONATHAN D. BRIGHTBILL, Esq. U. S. Department of Justice Environment & Natural Resources Division Office of the Assistant Attorney General P. O. Box 7415 Washington, DC 20044-7415 (202) 514-2766 jonathan.brightbill@usdoj.gov MARTHA MANN, Esq. U. S. Department of Justice Natural Resources Division P. O. Box 7611 Washington, DC 20044-7611 (202) 514-0223 martha.mann@usdoj.gov OTTO WOELKE LEITHART, Esq. U. S. Department of Justice United States Attorney's Office P. O. Box 8970 Savannah, Georgia 31401 (912) 201-4422 woelke.leithart@usdoj.gov
For the Defendant U. S. Army Corps of Engineers	JOHN BALLARD, Esq. MADELINE CROCKER, Esq. 100 West Oglethorpe Avenue Savannah, Georgia 31401
For the Intervenor Defendants	JAMES BLANDING HOLMAN, IV, Esq. Southern Environmental Law Center 463 King Street Suite B Charleston, South Carolina 29403 (843) 720-5270 bholman@selcsc.org
Reported by:	Debbie Gilbert, CCR Official Court Reporter 801 Gloucester Street Post Office Box 1894 Brunswick, GA 31521-1894 (912) 262-2608 or (912) 266-6006 debra_gilbert@gas.uscourts.gov

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P R O C E E D I N G S

(Call to order at 2:01 p.m.)

THE COURT: Good afternoon.

SPEAKERS: Good afternoon, Your Honor.

THE COURT: Ms. Sharp, call the next case.

THE CLERK: CV2:15-79, Plaintiff State of Georgia, State of West Virginia, State of Alabama, State of Florida, State of Kansas, Commonwealth of Kentucky, State of South Carolina, State of Utah, State of Wisconsin, the North Carolina Department of Environment and Natural Resources, State of Indiana, Intervenor Plaintiffs American Farm Bureau Federation, American Forest & Paper Association, American Petroleum Institute, American Road and Transportation Builders Association, Georgia Association of Manufacturers, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand and Gravel Association, Public Lands Council, US Poultry & Egg Association, versus defendants Andrew Wheeler, R. D. James, United States Environmental Protection Agency, United States Army Corps of Engineers, and Intervenor Defendants Natural Resource Defense Council, One Hundred Miles, National Wildlife Federation, South Carolina Coastal Conservation League.

On behalf of the plaintiff states, we have Andrew Pinson. On behalf of intervenor plaintiffs, we have Michael Kimberly. On behalf of Defendants Andrew Wheeler, R. D. James and United States Environmental Protection Agency, we have Jonathan Brightbill, Martha Mann, Woelke Leithart. On behalf of the United States Army Corps of Engineers, we have John Ballard and Madeline Crocker, and on behalf of the intervenor defendants, we have Blanding Holman.

THE COURT: Ready for the plaintiffs?

MR. PINSON: Yes, ma'am.

THE COURT: And ready for the defense?

MR. BRIGHTBILL: Yes, ma'am.

THE COURT: Counsel, let me start by welcoming you to Brunswick, Georgia. The briefs are voluminous. There are four pending motions and I want to assure you that I have studied the motions and the briefs so you don't need to use your time at the podium educating me about the background facts that are included in your briefs because I did study those so that will free you up to talk about the issues that are in play.

I also had the chance to study and very much appreciate the two filings that were made today. I believe I got one from each side, the agency status report as well as the plaintiffs' notice that details some of the very recent developments, including this Tuesday's December 11th issue of a rule for comment, and I've looked at the list of all the other

cases that are pending across the country and the status of those.

There's a couple of ways we can proceed to hear these four motions. We could go issue by issue or party by party, and I think what makes the most sense is just go in docket order, and I believe the very first two motions were filed, the first motion was filed by the intervenor plaintiffs. That was a motion for summary judgment and then the State of -- the states filed a motion for summary judgment followed by the intervenor plaintiffs' motion to amend the preliminary injunction that I issued earlier this year, and finally there's a cross motion for summary judgment that has been filed by intervenor defendants.

Let me begin, then, with the first motion that was filed by the intervenor plaintiffs. Who will speak on their behalf?

MR. KIMBERLY: Your Honor, Michael Kimberly.

THE COURT: Counsel, if you will approach the podium, and while you're there I want to hear about both your pending motions, the summary judgment as well as your request that I expand what is a preliminary injunction that applies in just the states that served as plaintiffs.

It's my understanding that you would like me to enlarge that preliminary injunction so that it applies all over the country; is that correct?

MR. KIMBERLY: That's right, Your Honor. I think

whether and how The Court deals with the preliminary injunction motion will depend in part on how it deals with the pending summary judgment motions.

So I guess I would like to approach the two motions in four steps. I would like to talk first about addressing the merits. I would like to talk about the statutory text and then I would like to talk about some of the procedural arguments that we make.

Besides that, I will talk about at the third step some constitutional issues that we think are inherent in the WOTUS rule, and then finally I will follow up with sort of procedural issues about what kind of relief we're asking The Court for, bearing in mind, as Your Honor said, that you've read the briefs.

So just to take a step back, we're here challenging a rule that was promulgated in 2015. It was enforced for about six weeks, and from that point forward, through a series of judicial interventions and an administrative intervention, was put on hold for about three years.

As Your Honor now knows, it's in force in 22 states as a consequence of a patchwork of preliminary injunctions that have issued since its promulgation.

THE COURT: Well, in the District of South Carolina, one judge there invalidated the applicability, 2020.

MR. KIMBERLY: That's correct.

THE COURT: And so now it crept up in the states that don't have, like ours and the plaintiffs in this case, a preliminary injunction.

MR. KIMBERLY: That is correct, Your Honor, and in the meantime -- so and what the District of South Carolina did was it not only entered a permanent injunction against enforcement of the applicability date rule, it also vacated the rule.

THE COURT: And Washington did as well.

MR. KIMBERLY: And Washington in the meantime has done the same. Two days ago the Southern District of New York heard argument and additional challenges to the applicability date rule and that court has since taken the issue under advisement, so the applicability date rule is now twice over vacated and it's under consideration by a third court as well.

So as a consequence, then, this rule that every court that has addressed it has concluded is at least suspect on its merits is in force in 22 states and the District of Columbia.

So if I may, I will focus first on some of the issues that we have with the rule and then I will talk a bit more about the practical consequences of the current state of play.

Before I explain what our concerns are with the inconsistency of the rule of the statutory text, I will say as a threshold matter, we concede, as do the state plaintiffs in their briefs, that for present purposes, according to Eleventh

Circuit precedent, that Justice Kennedy's concurring opinion in *Rapanos* is deemed controlling.

THE COURT: That controls.

MR. KIMBERLY: I would like to make clear for purposes of preserving the issue that that is not something that we concede is correct as a matter of broader law although we do appreciate that this Court is --

THE COURT: That's what we're dealing with, right.

MR. KIMBERLY: In the Eleventh Circuit, Your Honor, you are bound by what the Eleventh Circuit has said.

So there are, I think, three aspects of the 2015 WOTUS rule that are inconsistent with Justice Kennedy's concurring opinion in *Rapanos*.

The first of those is a topic that has not received as much attention in the states' briefing but we think is an important point, and that's coverage of interstate waters.

The rule, the preamble to the final rule is clear that coverage of interstate waters, which are defined as any water feature that crosses a state border, that jurisdiction over those waters is categorical, and it does not depend on whether such waters have any nexus at all, much less a significant one, to what would be considered a traditional navigable water.

Justice Kennedy, in his concurrence, was quite clear that to the extent the Clean Water Act covers water features

that are not traditionally navigable, it covers waters that have a significant impact or significant nexus with such waters.

Avowedly, the coverage of interstate waters is inconsistent with that requirement, and indeed what we have seen in the federal defendants' proposal for replacement rule issued just two days ago -- or it might have been just yesterday; the days kind of blur together -- is that the agencies now agree, and in their notice of proposed rulemaking, they have explained how it is that coverage of interstate waters crept into coverage under the Clean Water Act as a vestige of prior enactments and that, properly understood, the Clean Water Act does not, in fact, cover interstate waters.

So that's Point Number 1, and I gather on the notice of proposed rulemaking it's not one you will see contested by the federal defendants here.

The second feature of the Clean Water -- excuse me, of the --

THE COURT: Hasn't the Supreme Court itself stated that the Clean Water Act was designed to regulate waters that wouldn't necessarily be deemed navigable under the classical understanding of navigation? I'm thinking of the *Riverside Bayview* case in particular.

MR. KIMBERLY: Certainly, it has, and I think that's clear in Justice Kennedy in *Rapanos* as well. We do not take the position that the Clean Water Act can be interpreted to cover

only truly traditional navigable waters.

We acknowledge, according to Supreme Court precedent, that indeed it covers more. The question is how to read the Supreme Court's precedence to extend beyond what is traditionally navigable, and what Justice Kennedy has suggested is there needs to be a truly significant nexus such that there would be a real and appreciable effect on downstream waters.

And, again, the coverage for interstate waters in the preamble to the 2015 rule expressly disavows that there has to be any such connection.

And so any water feature -- it could be a small, intermittent brook that has no connection to a truly navigable water but by dint of the fact that it crosses a state line -- would be deemed jurisdictional, and we don't see any way to square that position either with the text of the statute standing on its own or viewed through the lens of *Rapanos*, *Swank* and *Bayside Riverview*, *Riverside Bayview*.

So now if I may, I will talk briefly about tributaries as well. This is the second of the three elements of the rule that we think are inconsistent with Justice Kennedy's concurrence and the text of the statute.

Justice Kennedy -- and this is at Page 18 of our opening brief -- I'm sorry, that's as to adjacency. This is at Pages 12 to 15 of our opening brief where we provide pictorial evidence of the sorts of features that would be considered

tributaries under the 2015 WOTUS rule.

Under the rule, they needn't carry water regularly. All they did to do is exhibit an ordinary high water mark and contribute flow, even indirectly, meaning it can go underground and be groundwater for a while and appear later on.

This is inconsistent, we think, both with the scientific evidence as a basis for asserting jurisdiction, particularly as it relates to the arid west, because the Corps itself in a number of its own studies and memoranda has made clear that ordinary high marks are randomly --

THE COURT: Is it your argument that it is my role to decide who is right scientifically about the ordinary high water mark?

MR. KIMBERLY: No. I think it would be enough to observe that the rule covers features, particularly in the arid west, that reflect extreme one-time weather events that do not, in fact, indicate -- as Justice Kennedy said in his own concurrence, that, in fact, do not indicate regular flow.

THE COURT: And I am not going to put you on the spot at the podium and make you refer me to the exact place in the record that does this, but for the purposes of any followup briefing that you may want to do, what I'm looking for is specific evidence in the record demonstrating that the definition of "tributaries" does, in fact, cover isolated dry regions away from water or isolated ponds.

I want to make sure I'm pinpointing the point in the record that --

MR. KIMBERLY: Certainly, and I can, Your Honor, here at the podium point you to a couple of our exhibits. That would include the Arizona Mining Association's comments. This is Exhibit J to our motion for summary judgment. This is Barrick Gold's comments at Page 15 and 16, Exhibit K to our motion for summary judgment, and the Freeport McMoRan technical comments. This is at Page 7 Exhibit L to our motion for summary judgment.

What's more, as I mentioned, Your Honor, the Corps' own experience bears out that ordinary high water marks are not a reliable indicator of regular free flow.

This is Exhibit J -- excuse me, Exhibit M to our motion for summary judgment and Exhibit N to our motion for summary judgment.

And what the Corps of Engineers held in particular -- and I'm quoting now -- is "OHWM" -- that's ordinary high water mark -- "indicators are distributed randomly throughout the arid landscape and are not related to specific channel characteristics," and this is reflected in those other exhibits that I cited to you just a moment ago, that because the arid west does not experience regular exposure to water the way that, for instance, Georgia does, these sorts of one-time extreme water events don't heal in the same way that they would in more water-rich environments, and so you could find evidence and,

indeed as I said, we cited evidence, including on Page 14 of our opening brief, Figure 4 shows some examples of what would be deemed an ordinary high water mark with a bed and banks between them, and you look at the picture and it's quite clear, this a dry desert, and yet these features are being deemed waters of the United States subject to regulation under the Clean Water Act.

I will say something now about adjacency, which is another issue that arises in Justice Kennedy's concurrence in *Rapanos*. Justice Kennedy said in particular at Page 786 of his opinion -- that's 547 US 786 -- that mere adjacency to a tributary is insufficient to categorically assert jurisdiction over that adjacent feature.

THE COURT: Is it your position that adjacency can only include wetlands and no other type?

MR. KIMBERLY: Well, I don't think it's -- my clients haven't taken a position on that particular question in this litigation, and I don't think The Court would necessarily have to get that specific or go that far.

I think it would be enough to say that it is inconsistent with Justice Kennedy's concurrence to say categorically that any feature that is deemed adjacent to a tributary will necessarily have a significant -- a substantial effect on a traditional navigable water.

THE COURT: Part of the response that I think I'm

going to hear from your opponents across the aisle is that when Justice Kennedy was making those statements about adjacent wetlands, he was basing that on existing standards for tributaries at that time. How do you respond?

MR. KIMBERLY: That's true, and his discussion of tributaries, in the context of making that comment, imbedded in that discussion is exactly the criticism of ordinary high water mark that I was just telling you about.

He assumed, then, for purposes of further discussion that taking as given ordinary high water mark is a scientifically adequate basis for inferring regular flow, that even then still adjacency to such a feature would not suffice.

THE COURT: Is the nature of your criticism, does it go at its heart to the specific limits that are contained in that deposition, or is it your contention that usage of geographic limits in any form is a problem?

MR. KIMBERLY: Well, that I think bears on the second point that I was going to get into and I'm happy to do that now.

THE COURT: Okay.

MR. KIMBERLY: It's to say that -- and actually it really bears on two points, both a substantive point and a procedural point, as to these distance limitations.

The problem with the distance limitations, which are imbedded in the definition of "adjacency" and "significant nexus" is that there is no scientific explanation or evidence to

support a conclusion that a feature that is 1499 feet away does have a significant nexus when one that is 1501 feet away does not.

And at the risk of alighting two different points, what I'll say also is that was not something, this incorporation of hard-and-fast distance limits, our position is was not something that the public was put on adequate notice to comment meaningfully on.

Certainly we would have commented on the inherent problems of using such limits if we had been aware. The Government's position is that four words appearing on Page 22,208 of --

THE COURT: Gave you notice that this was going to come up.

MR. KIMBERLY: Indeed. In Volume 79 of the Federal Register these four words "establishing specific geographical limits," in the course of an 88-page document --

THE COURT: You've seen their citation to the Eleventh Circuit case that -- I guess the case dealt with what workers are going to wear and --

MR. KIMBERLY: Right.

THE COURT: -- they at the end included a thread count or something like that.

MR. KIMBERLY: Right.

THE COURT: And the Eleventh Circuit said that you

can't come back with those kind of numerical details.

MR. KIMBERLY: So I guess -- and I think this is the *Alabama Power* --

THE COURT: We're jumping ahead a little bit to your problem with the process but nevertheless...

MR. KIMBERLY: It's an important point, though, Your Honor. I think there are two things to say about that. One, that case took -- it concerned a different statutory scheme.

THE COURT: How does that matter?

MR. KIMBERLY: It's specific to OSHA, so I think the standards are a little bit different under that scheme, but even if it were a traditional EPA case subject to the same rule, what happened there was a simple correction. There had been a final rule. The agency then issued a correction to the final rule. It didn't in that case incorporate --

THE COURT: If they had called this a correction and hadn't had 1500 feet or whatever and then just corrected it to include it, then that would be okay?

MR. KIMBERLY: I don't think so, no, Your Honor, because these are two -- there that was a continuity and consistency in the basic substance of what the agency was doing.

Here we had a proposed rule that depended on hydrological relationships and functional relationships, and as I say, there is no evidence that these sort of hard-and-fast distance limitations are at all expositive of those sorts of

functional relationships.

It's a completely substantively different way of defining what kind of a connection is relevant and necessary, and so -- and I'll note also the agencies' response is to say members of the public did comment on the possibility of distance limitations being used.

They point to -- the intervenor defendants proudly note that over a million comments were submitted, and it's quite true. The Government can point to just 13 out of over one million comments that address the question of distance, and, in fact, if you look at some of those comments, they don't really. I mean, they try to suggest that one of my clients here, the National Association of Manufacturers, submitted a comment relevant to distance limitations, when that is facially inaccurate.

They suggest that the National Association of Manufacturers in one of its comments cited a study that itself cited the possibility of a distance limitation. That is not meaningful comment on either the appropriateness of using distance limitations or, taking as given that distance limitations will be used, what the appropriate distances are.

THE COURT: Before we leave adjacency, address for me the issue about the hundred-year floodplain and what about that violates the Clean Water Act and how it goes beyond what you contend is the limit.

MR. KIMBERLY: Well, I think there are some similar concerns applied. There are many different ways of drawing basic time intervals for floodplains. There's a five-year floodplain, the likelihood of a flood over a five-year period.

THE COURT: You're saying basically they pulled the hundred-year out of -- I think they say it coincides with insurance usage.

MR. KIMBERLY: That's right. Unclear how that relates to functional relationships between water features, and I think beyond that, one of the concerns that they raised or rationals that they raised for using the 100-year floodplain is that there is a well-recognized preexisting map of 100-year floodplains, but, of course, the problem is -- and I'm forgetting the name of the agency -- I apologize -- that produces that map but it's known to be --

THE COURT: FEMA.

MR. KIMBERLY: Exactly, the FEMA 100-year floodplain maps are well known to be inaccurate and unreliable. They do provide a clear line to draw, but if we are just to take the FEMA map as the gospel, it's again not clear how that maps onto what the scientific evidence shows and how the regulated public was to understand that functional relationships would be translated into this what we take to be scientifically arbitrary decision that the 100-year floodplain is the one to use.

THE COURT: All right.

MR. KIMBERLY: Okay. So maybe now I will talk just briefly about some of the other procedural issues that we think are presently live. We've talked a bit about the failure to put the public on notice of the use of distance limitations. This, I think, relates also to significant nexus.

So let me say something briefly about the connectivity report. So the draft report that was made public and was the basis for public comments differed significantly from the final report that ended up being the underpinning for the final rule. The draft report purported to include references and the difference is this.

The draft did not base its central analyses on the existence of a continuum, a gradient of relationships. In the final report, Finding Number 4, Conclusion Number 4 in the executive summary, is all about the importance of the continuum of hydrological relationships.

THE COURT: As I understand it, there were almost 350 scientific sources added to the report.

MR. KIMBERLY: That's exactly right.

THE COURT: Is it your contention that the issues that you complain of, all of those, none of those were covered by the original scientific information? All of that was included in the 349 added scientific --

MR. KIMBERLY: Yeah. I can't provide Your Honor with a breakdown of how many of the 349 were used in service of this

continuum argument. I can say a number of them were.

I think that the case that has occupied the parties' attention before this case in the briefing is *Solite*. I think the difference there is --

THE COURT: You know, we tried to line up, it looks like the defendants have cited to three instances in the draft report showing that there is reference to a continuum-based approach.

MR. KIMBERLY: No, it's true, and actually they give seven pinpointed references, seven pinpointed references in a 331-page document. But, in fact, many of those are citations to documents --

THE COURT: Well, do you have to do eight or what?

MR. KIMBERLY: Well, I think you have to have a meaningful discussion, so, for example, I think -- frankly what it looks like to me is that what the Government did is it just did a word search for the word "continuum" and it put those seven pages up in its brief.

When you look, for instance, at the first pinpointed citation that the Government gives, all it does is cite a document that has "continuum" in the title.

It doesn't actually explain that thinking about these relationships over a continuum is the appropriate way to do it.

And that is so of a number of the other citations as well.

So I think if you look at the differences between the draft report and the final report focusing on Conclusion Number 4, you will see significant substantive differences predicated on a significant portion of those 349 new citations.

It's true, as the intervenor defendants point out, that there were over 100 citation in the draft report, but when you consider that 349 were added, it suggests that there is significant additional work being done here.

And they rely on *Solite* to suggest otherwise, but in *Solite* what was going on is the evidence that had been cited was superseded by studies that had taken place in the interim, and those same studies, the words of the court were "confirmed the findings of the original draft summary of the relevant evidence."

Here the same can't be said. It's not just that it confirmed -- the additional 349 citations confirmed what the draft study said. The final study and those new 349 citations responded to the concerns of the science advisory board, which were significant substantive concerns, and were used to support this entirely new concept of a continuum, and the public was not given an opportunity to comment on those very significant changes in the report.

THE COURT: Let me get you to skip to the part of your argument about the advocacy activities --

MR. KIMBERLY: Sure.

THE COURT: -- that you've detailed in your motion.

I understand that the GAO and others have found that to be amiss, but how does that factor in to whether the APA was violated?

MR. KIMBERLY: Well, I think principally what it shows is that the agencies had a closed mind to comments. The fact that they were engaged in proactive lobbying and advocacy and propaganda in service of promulgating their rule shows that they were not, in fact, open to the criticisms that they were hearing from members of the regulated public. I think that is where I think it principally plays in.

And the law on that point, which is undisputed, I think is clear. This incidentally is one of the issues on the flip side that is coming up in the applicability date rule litigation, and if it's sauce for the goose, it's sauce for the gander.

THE COURT: Right, and then let me get you on the motion for summary judgment to briefly go through anything you want to add about your constitutional arguments.

MR. KIMBERLY: Yes, Your Honor.

THE COURT: Like the vagueness, Commerce Clause.

MR. KIMBERLY: And those are the two points for us are Commerce Clause and vagueness.

The Commerce Clause points I think substantially overlap with a lot of what I was saying before about the text.

The rule I think by its terms -- well, actually, let me back up and say first the Supreme Court has recognized that the Clean Water Act, that Congress' authority for enacting the Clean Water Act, derives from the Commerce Clause and particularly its regulation over channels of commerce and then in turn over conduct that substantially affects interstate commerce.

It's clear that if a -- if a water feature is not itself actually navigable, can't be made so, then the Congress' authority for regulating that water feature can't derive from its authority over channels of commerce. It's got to derive under the substantial effects test, and again looking at the interstate waters is one example.

The agencies expressly disavow that there has to be any substantial effect on channels of commerce and traditional navigable waters, and indeed the agencies in their description of what constitutional authority authorizes the 2015 rule say that these features could significant -- substantially affect interstate commerce, but, of course, that isn't the legal standard.

The legal standard is that they actually significantly do, and I think all The Court needs to do is look at that one line to see that the agencies have effectively abandoned any at least traditional as we understand it Commerce Clause justification for the 2015 clean water rule, and I know

also Mr. Pinson will be addressing some of those Commerce Clause issues, so if I may, I will focus also on and principally on the vagueness problems, and I think there are three features that are worth highlighting here.

First, ordinary high water mark, ordinary high water mark plays a very important role in the 2015 WOTUS rule, but there are no specific required characteristics, and so, for instance, there is a GAO report -- and this is on Page 23 of our reply brief -- it notes "the difficulty" -- and I'm quoting now -- "the difficulty and ambiguity associated with identifying an ordinary high water mark" --

THE COURT: And is your argument that it's difficult for the public to predict or impossible for them to figure out?

MR. KIMBERLY: I think it's -- so there are two features of the vagueness doctrine that are relevant here. The first is whether the public is put on notice, fair notice.

The second is whether the standards that are announced in the regulations give regulators unchecked discretion to apply the rule arbitrarily. I think probably the cleanest and easiest way to understand what is going on is in that second bucket, that it just give too broad discretion.

THE COURT: What about the ability to use mapping technology?

MR. KIMBERLY: That's an important part of the ordinary high water mark problem, because, of course, what the

2015 rule provides is that these unidentified characteristics, these unexplained characteristics, can be discerned not by government agents in the field visiting property and looking at it, but by using laser-assisted satellite imagery and indeed discerning bed and banks and ordinary high water mark where none is visible in the field, and so a landowner can have a water of the United States on his or her property without even knowing it until the Government comes knocking on the door saying it's there and they can't see it.

THE COURT: Is this technology or any models available to the public for --

MR. KIMBERLY: I don't believe the LIDAR -- the technology is called LIDAR. I don't believe the LIDAR-assisted technology is available to the public, although Mr. Brightbill might correct me on that if I'm wrong, but my understanding is that it is not, and so the bottom line is at least as far as ordinary high water mark is concerned, the agencies will find it when they want to find it.

I think beyond that, significant nexus, a number of elements of the significant nexus test also suffer from vagueness problems. For example, a landowner, to determine whether or not a water has a significant nexus, has to conduct a 4000-foot radius survey looking for other waters that are, quote, similarly situated to that water, but it's not at all clear what that means or how that standard puts the public on

notice.

Those waters that are similarly situated and function alike with the landowner's water feature have to, quote, significantly affect the integrity of a downstream traditional navigable water, but it's not clear what "integrity" means nor is it clear what "significant effect" means. The agencies defined "significant effect" as anything more than speculative or insubstantial.

Well, that doesn't help a landowner any, and in the end, anything that is more than speculative or insubstantial would be whatever the agencies say that it means.

THE COURT: Let me get you to switch gears to your other issue and that is regarding the expansion of the preliminary injunction that's already in play in this case, and let me pretermit some of the arguments by saying I'm not concerned about the timing of your motion.

That's not going to hold me back, and I'm not concerned with the particular rule of civil procedure. I am concerned with the substance of a preliminary injunction requirement as it applies to the non-states.

As I know you're aware, having read my original preliminary injunction, the heart of the factor regarding the harm focused uniquely on the harm that the state sovereigns will experience, the stated insult to their sovereignty, the necessity to gear up certain regulatory state procedures.

None of that would apply on the irreparable harm to your clients in the same way that it would apply to states.

So absent those kind of harms that are sort of uniquely available to state entities, what is it that you've brought before me that shows the concrete kind of harm that I need to look for in examining whether to expand this preliminary injunction?

MR. KIMBERLY: So there are two things to say about this, Your Honor, and I will start backward and say, as an initial matter, I think the very easiest way for The Court to avoid this question is simply to enter a final judgment in favor of the plaintiffs, and if it did so expeditiously, it would moot the need for a preliminary injunction because, of course, that would be vacating the rule, striking it from the Code of Federal Regulations, which, of course, would apply throughout the country.

Setting that aside -- and that is my first answer. Setting that aside, I think the second answer is to point to unrecoverable, nonrecoverable compliance costs and this was something --

THE COURT: And have some of those been expended?

MR. KIMBERLY: They have, yes, and that is in the record, for instance, in the declaration of Janet Price for Rayonier, Incorporated, which is --

THE COURT: Your opponents say, well, you've got a

sprinkling of those things but not something in every state.

MR. KIMBERLY: Well, and I think the answer to that, Your Honor, is the Eleventh Circuit's own case law on this point concerning what it takes to establish associational standing. The theory behind associational standing I think conceptually is not something so different from something akin to a class action, but the point is that the association stands in the shoes of its members before The Court and presses those members' interests.

In order to have standing to bring such a claim, according to Eleventh Circuit case law, all we need to prove is that one of our national associations has one client that has suffered injury, and that would be enough to press a claim on behalf of the entire membership, and we've done that many, many times over as we demonstrate from Pages 6 to 8 of our reply brief in support of the preliminary injunction motion.

THE COURT: I appreciate your argument, and let me turn to our next filer then.

Thank you, Mr. Kimberly.

MR. KIMBERLY: Thank you, Your Honor.

THE COURT: I believe the next motion was filed by the states, a motion for summary judgment. Mr. Pinson, will that be you?

MR. PINSON: Yes, Your Honor. May I approach?

Thank you, Your Honor.

So as you know, there's a lot of overlap between these two sets of briefs, and you've covered some of it already so I won't --

THE COURT: And you don't need to replow that ground.

MR. PINSON: I appreciate that.

So I would like to start I guess with one point that I think has not been raised so much here yet, which is the agencies no longer defend this rule at least on its substance. I think that matters, and it matters for thinking about this at the outset because --

THE COURT: What does that do to Chevron deference?

MR. PINSON: That's exactly what I was getting to, Your Honor, and we cite in our brief the *Global Tel Link*, which is a recent DC Circuit case, which says if the agencies are no longer asking for deference and they have abandoned the position, then you no longer get it.

That matters in particular for our claims that the agencies exceeded their statutory authority because, if you look at the *Rapanos* opinion, of course, Justice Kennedy does point to and decides that in view of deference, and he says, "Even with deference, this goes too far."

THE COURT: So you're saying that we remove the cloak of deference because of --

MR. PINSON: That's -- Your Honor, I think it means the question reduces to you deciding what is the best reading of

the statutory text, of course, in light of *Rapanos*, but without the cloak of deference, so I think that's an important point to get at at the start.

So I would like to, I guess, talk about we have three basic sets of claims in our briefing. Of course, we have the claims about exceeding statutory authority under the Clean Water Act. Our procedural claims largely are the notice and comment claims, and then we have some constitutional claims.

I'll start with the statutory authority claims under the Clean Water Act, and again, we've covered some of this already in this hearing.

So I would like to kind of pinpoint what I think is maybe the clearest violation of the Clean Water Act and one that maybe you don't have to get into the weeds so much in terms of the science.

You asked whether it's your role to decide who is right scientifically in terms of is there a significant nexus with respect to certain waters.

And we agree with the intervenor plaintiffs as far as the evidence that's in the record with respect to ephemeral waters and things like that, but at least with respect to one piece, you don't really have to engage with what the scientific basis is or whether that's enough because Justice Kennedy's already told us in *Rapanos*, and that's again that passage where he discusses adjacency to tributaries.

I think it's critical to note that in that case, he has already as a matter of law said that ordinary high water mark as a basis for defining adjacency and including it categorically is not sufficient; right?

And so what that means is that, as a matter of law, there is not a significant nexus created by tributaries as defined, so we don't have to look at -- they cite 1200 new studies that weren't there when Justice Kennedy issued that opinion.

That doesn't matter because Justice Kennedy has already said as a matter of law these aren't sufficient, and so, again, I think that's sort of a key thing that I don't want to lose here, is that Justice Kennedy pointed out tributaries as a definition that's impermissible, and then if you look at the rule here, it hasn't materially changed.

The "tributary" definition still starts with an ordinary high water mark. They have added to that definition of "bed and banks."

Of course, bed and banks, as the rule itself says, was already an indicator of ordinary high water mark in the prior rule, so the new rule doesn't change or alter what it was looking at with respect to what makes a tributary, and Justice Kennedy said that's not sufficient.

Looking through the defendants' briefing, nothing that I saw in the record going through made clear that bed and

banks added anything significant as far as setting some type of limit as to volume or regularity of flow that would have satisfied Justice Kennedy, and again I think certainly, you know, that's even more significant of a flaw if you take into account that there is no deference here.

So in our briefing, we also address sort of separately adjacent waters, tributaries. I'm happy to answer any further questions that you have about those, but I think --

THE COURT: You also raise in your brief the case-by-case category and the problems that you have with that. Doesn't there have to be some sort of fallback or catch-all category, just for practical purposes?

MR. PINSON: Your Honor, I think under Justice Kennedy's opinion, he allows for the possibility that you would have case-by-case analysis of whether waters have a significant nexus.

Given that controlling opinion, we can't say that the agencies cannot have some case-by-case category. The problem is with the breadth of this case-by-case category and what we view as the agency's overly expansive view of what significant nexus is permissible, and the agencies themselves point out in -- I believe it's their -- one of their recent notices of proposed rulemaking, the rescission one, that under this 4000-foot rule as far as case-by-case waters, that virtually the vast majority of the nation's water features could be included in that, and

then when you tack on that those waters can be included based on one of nine separate -- any one of nine separate sort of factors with respect to biological, chemical or physical connections, it could be that all of those are sort of permissibly jurisdictional under that rule.

THE COURT: Just from a big-picture procedural standpoint, acknowledging there are so many moving parts to this and so many places in the country, you, as the state defendants, are protected, shall we say, from the 2015 application presently.

Why should The Court not let, as the defendants argue, the present rulemaking play out and the rule that was announced this week, why not let that play out? Why weigh in on a motion for summary judgment or otherwise on a rule that is no longer being carried forward by the administration?

MR. PINSON: So a couple of points. First of all, I think that the doctrine that they relying on, prudential ripeness, the Supreme Court has at least looked upon it disfavorably in the past couple of years, right. In *Susan B. Anthony List* and in *Lexmark*, it said a court's --

THE COURT: You've got to decide cases that come before you.

MR. PINSON: It's a virtually unflagging obligation. The doctrine, of course, in the Eleventh Circuit is still there, but those decisions should give, I think, any court pause with

respect to sort of how aggressive they are in applying them.

THE COURT: What is your -- and I'm going to ask this across of the folks across the aisle as well -- what is your understanding as far as the time trajectory of where we're going from this point forward with regard to the December 11th rule?

MR. PINSON: Your Honor, I don't know as far as the December 11th rule or even the repeal whether the -- when or where those will be finalized, and, of course, I think it's important to note that the agencies have said, as they must, that they are keeping an open mind, right? So this Court cannot know whether and when specifically these rules will be finalized.

THE COURT: Presumably the comments they get and so forth might change their mind and they not go forward in principle with what's been proposed.

MR. PINSON: That's how the APA process is supposed to work.

THE COURT: Designed to work.

MR. PINSON: And until that point, again, the rule is in effect in 22 states. It's -- we are protected.

THE COURT: Not for you.

MR. PINSON: We are protected by virtue of this Court's preliminary injunction. I am not aware and I did not see the agencies or the other defendants cite any case that says a preliminary injunction alone can take away a Court's sort of

jurisdiction or even as a matter of prudential ripeness mean that they should not decide the case.

THE COURT: All right, Mr. Pinson. Thank you.

I believe our next motion then was filed by -- it looks like it was -- make sure we go in order and the next motion was filed by intervenor defendants -- is that correct -- cross motion for summary judgment?

MR. HOLMAN: It's up to you.

THE COURT: Who would like to speak on behalf of the intervenor defendants?

MR. HOLMAN: That would be me.

THE COURT: Would that be you?

MR. HOLMAN: Yes, Your Honor. Pardon me. I thought I was going to be going after the US but I will --

THE COURT: It matters not. If the US is poised to go, we will do it that way.

MR. BRIGHTBILL: Thank you, Your Honor. May I approach?

THE COURT: On behalf of the United States agencies, are you going to be speaking for all of them?

MR. BRIGHTBILL: Yes, Your Honor, and thank you. My name is Jonathan Brightbill from the Department of Natural Resources Division in Washington at the Department of Justice. With me is my colleague Martha Mann. Also with me are John Ballard and Madeline Crocker from the Army Corps of Engineers in

the Savannah District and Woelke Leithart from the US Attorney's Office, so I appreciate the opportunity to appear before you today and address the views of the United States on these issues.

As Your Honor knows, this is an instance where there are a lot of courts that are simultaneously dealing with similar issues.

This is one of a dozen cases that are currently -- have a -- at least on their docket -- a pending challenge to the 2015 Waters of the United States Rule that was promulgated by the agencies.

THE COURT: Now, some of those are stayed.

MR. BRIGHTBILL: That's right, Your Honor.

THE COURT: Is that correct?

MR. BRIGHTBILL: Yes.

THE COURT: We've got the Western District of Washington, they stood down. Northern District of Florida, they stood down. Northern District of Georgia, they stood down. Southern District of Texas, they stood down.

So they are sort of waiting to see what everybody else does, so to speak, but there are still about eight or nine courts that are grappling currently with some of these issues according to the notice that you filed this morning.

MR. BRIGHTBILL: Yes, Your Honor, that's right.

A tremendous amount of party and judicial resources

are continuing to be spent dealing with these issues, and even once these issues are decided potentially at various district court levels, there may be appeals, and whether you call it prudential ripeness or whether you call it merely courts exercising their inherent discretion to manage their dockets and decide that they are going to stay the case that's before them and allow an administrative proceeding to play out before they weigh in, one way or another, Your Honor, the United States continues to ask this Court to exercise that discretion.

THE COURT: Let me just also ask you a very practical question.

The new rule that was announced December 11th, however how long it takes, the 60-day comment period and then whatever happens after that, at the end of the day, once you and your clients decide what to do about that rule, wouldn't you think it might be possible that some of the parties perhaps that are here today might challenge that rule in multiple courts and just as what befell the 2015 rule might some day befall this 2018 rule, and we would have multiple parties in multiple courts.

At some point, somebody has to decide something and let it move on up the chain perhaps some day to the US Supreme Court to fill in some of what Justice Kennedy has told us.

MR. BRIGHTBILL: We absolutely agree with that, Your Honor.

THE COURT: Tell me what, understanding that I wouldn't hold you to any of these days, but just give me an idea about what kind of time period this latest round of rulemaking might undergo.

MR. BRIGHTBILL: Yeah, I'm happy to do that, Your Honor. That are two rules pending as Your Honor is aware, or proposed rules, I should say.

THE COURT: Repeal and replacement.

MR. BRIGHTBILL: Right, there's a repeal and replacement, very popular in politics these days to talk about repeal and replacement.

So with respect to the repeal rule, the repeal rule was finalized the end of August or, excuse me, the comment period was finalized.

THE COURT: We've seen that, but I'm talking about the replace one going forward. What is our timeframe --

MR. BRIGHTBILL: Sure. I can address that as well, Your Honor.

So on the replacement rule that was publicized on Tuesday, it has not yet been published in the Federal Register. It will publish in the Federal Register sometime in the next couple of weeks, and that will commence a 60-day comment period.

At that point, then the agencies will gather the comments, review the comments, determine whether the comments are things that can be, within the confines of the proposed

rulemaking, adjustments made or not, within the limits of the logical outgrowth doctrine and other things, or if at that point they would potentially have to do a supplemental notice, but if that is not required in response to the comments that are received and the agencies are of the view that they can proceed, you could theoretically -- and, again, this is just an estimate of counsel. This is not a representation on behalf of the agencies. You could theoretically see something sometime this summer on that.

Your Honor, I would like to come back to a note that the comment period on the repeal rule, which is a second rulemaking which also has the opportunity to in no small --

THE COURT: Reconsider, absolutely.

MR. BRIGHTBILL: Yes, so that comment period concluded the end of August, Your Honor, and so for the last several months, the agencies have obviously been spending a tremendous amount of time and resources focused on getting the proposed rule out on the replacement part of this whole thing.

There's now a comment period that is with the ball in the court of the people, so to speak, Your Honor, and so it would be possible if they decide to move forward with the replacement or the repeal rule, excuse me, in the interim for you to see that in the next couple of months.

So in light of all of that, and in light of the very dynamic that you were referring to, Your Honor, which is that

there could be litigation with respect to the additional rules that come out and where does this all end, Your Honor, that's precisely the reason why the United States has been asking this Court and all the other courts to stay their hand because the point at which it's the view of the United States that this should end at least from an administrative process and then we let the courts go about doing and determining who is right at the end of the day on all this is after the reconsideration processes are complete.

Until that time, there's still the opportunity here for issues to become mooted, for questions to become narrowed.

THE COURT: While that may be your desire, it's not the reality right now in many states. In many states, the 2015 law is in effect.

MR. BRIGHTBILL: In many states, the 2015 law is in effect, Your Honor, and I would note that in the states where -- in many of the states where the 2015 law is in effect, those states which are non-parties to this proceeding have sought to have that 2015 law go into effect, Your Honor.

THE COURT: Right. That's their choice. I understand.

MR. BRIGHTBILL: Exactly. They affirmatively litigated to bring that result about, Your Honor. So at the end of the day, until there is a conclusion of the administrative proceedings, it continues to be the view of the United States

anyway that this court and frankly all of these courts should stand down, allow those proceedings to conclude so we can narrow the issues and frankly save some amount of judicial resources before everyone gets out to the races here deciding who's right.

THE COURT: How does that square with *Susan B. Anthony List*?

MR. BRIGHTBILL: *Susan B. Anthony List* is --

THE COURT: It's a case that says you shouldn't do that.

MR. BRIGHTBILL: Okay, so it doesn't say that you shouldn't do that per se, Your Honor. I mean, it certainly talks about elements of prudential ripeness and an unfailing duty ultimately to decide the case, but that doesn't purport to override the inherent discretion of this District Court and every district court to manage its docket and make judgments.

There's also not a holding there, Your Honor. There's a suggestion and a question about whether that doctrine is appropriate, and perhaps that doctrine may be inappropriately applied in the facts of that case, but in this particular set of circumstances, you have agencies that are affirmatively going forward and have made the judgment to take a look at this again. We're not done yet. We've heard what you're saying. We're going to go back to the drawing board and see if there is some merit to what you're putting forward.

THE COURT: Let me ask you to move on then to your

substantive arguments.

MR. BRIGHTBILL: Certainly. So with respect to the substantive arguments -- and I just want to clarify and explain a little bit the position of the United States on this.

As you know from the briefs, because of this reconsideration process that's underway, the United States will not take a position on the substantive questions relating to the 2015 rule.

THE COURT: That's understandable.

MR. BRIGHTBILL: As has been pointed out here, the agencies have already been accused of not keeping an open mind in these administrative proceedings, and, therefore, in light of the fact that they are reconsidering that prior rule but they haven't admittedly made a final decision to repeal or replace that rule, they are maintaining an open mind, and, in fact, should the agencies finalize a decision that would be to maintain that rule, they would want to have continued to maintain an open mind throughout that proceeding so as to remove any such challenges to a subsequent decision by the agency.

THE COURT: And I can understand why you need to stand down on those issues, but nevertheless the procedural arguments that have been raised with regard to whether your clients followed the APA with regard to the 2015 rule, I think those are things that you've addressed.

MR. BRIGHTBILL: Yes, and my colleague, Ms. Mann, is

going to address those arguments on behalf of the United States.

THE COURT: All right.

MR. BRIGHTBILL: So I want to, if I could, just move ahead and address this issues of the business intervenors requesting a nationwide vacatur or a nationwide injunction.

So universal nationwide injunctions covering all persons, states, non-parties are an extraordinary remedy.

THE COURT: And in South Carolina, what was different? Why should they have done that but we shouldn't here?

MR. BRIGHTBILL: Frankly, that judge should not have done that, Your Honor, and the United States made that point and articulated these same concerns to that court, and the United States is continuing to evaluate its options in that particular case, Your Honor.

THE COURT: Do you share The Court's observation that, insofar as the irreparable harm prong goes in evaluating the need for an injunction, a preliminary injunction, that the kind of harms identified by this Court that would befall the states don't apply with equal force to private parties?

MR. BRIGHTBILL: I want to be real careful about this, Your Honor, because I think the United States would have to concede that there are certain impacts to these business intervenors that are not compensable in a monetary way, and it would not be the position of the United States that such

entities could never demonstrate irreparable harm in any facts or any rulemakings. It is the position --

THE COURT: My question was different than that.

MR. BRIGHTBILL: Yeah.

THE COURT: It was: Does the United States join in the position that the kind of harm that might befall states if this rule were to go in place, even for a interim period, is different than the kind of harm that might befall private parties?

MR. BRIGHTBILL: I would agree, Your Honor, that the states did describe a different character of harms than the types that have been articulated by the business intervenors, but at the end of the day, the United States is of the view that, given the nature of review that this Court has engaged in, which is a review of a rule pursuant to the APA and the limits on such reviews that have been put by the Supreme Court in terms of the level of specificity that must be shown in terms of the individuals identifying harms, the nature of that harm, that these business intervenors have not to this stage of the proceedings -- and this is the summary judgment stage -- demonstrated those harms sufficient to establish the application of an injunction or a vacatur, for that matter, Your Honor, on a nationwide basis or even an individual basis with the key decisions for this Court's review being the decisions written both by Justice Scalia, one being the *Lujan versus National*

Wildlife Federation in 1990 and then the more recent *Summers v. Earth Institute*.

What those decisions specify and call for is that, in instances where you don't have a provision, a statutory provision, which permits for the facial review of a regulation, such as the case here, it's necessary in order to obtain such relief for a party to come in and identify specific people who have, at specific parcels of land or at aspecific instance, specific defined geographic area, from a specific application of the rule or regulation that they are seeking to challenge, which is frankly fairly traceable and a result of an injury that comes from that new regulation or that regulation, that changed regulation, whatever it is, as compared to the regime that came before it, all of those things need to be demonstrated and established, Your Honor, and it is the view of the United States that those showings have not been made in this proceeding.

THE COURT: Let me get you to switch, then, to the motions for summary judgment that have been filed.

Is Ms. Mann going to cover all of that?

MR. BRIGHTBILL: Yes. If I could.

THE COURT: Anything else you would like to say with regard to the preliminary injunction?

MR. BRIGHTBILL: Just a couple of quick points here, Your Honor, in response to some things that were noted. It was suggested that a decision by this Court would vacate the rule on

a nationwide basis, kind of strike from the Federal Register. I just want to make clear that that is not the view of the United States and that is not actually something that this Court is empowered to do under the APA.

Furthermore, there was an issue raised with respect to organizational standing and that organizational standing gives those broad organizations the ability to bring claims on behalf of their members and they have to identify specific members.

That's fine insofar as it goes as bringing a claim, Your Honor, but as the Supreme Court recently made clear in the decision of the *Town of Chester v. City of Laredo*, it's necessary when you get to the remedy stage of actually determining how broad you're going to go about entering an injunction, Your Honor, you need to actually then establish standing with respect to those particular persons, places and applications of the regulations, and so the broad level, the organizational standing, that was fine for getting them in the door, Your Honor, and allowing them to argue, but in terms of the scope in your injunction, you are limited by the Supreme Court and how it has interpreted the limits of Article III and the traditional equitable powers of this and other district courts in the scope of the relief you can grant.

Finally, Mr. Pinson made a reference to the *Global Tel* decision, which I think is not -- that decision is not quite

on all fours, Your Honor, with the situation that we have here with the important distinction being that while the agencies have proposed to take away that prior interpretation and proposed to remove the WOTUS rulemaking or replace it with another additional or different WOTUS rulemaking, that agency action is not final, and so as a technical matter, that still remains the past agency decision and the interpretation of the agencies until it is repealed or replaced.

Thank you, Your Honor.

THE COURT: Thank you.

Let me hear then from Ms. Mann.

And Ms. Mann, let me start you off with a Chevron question. You heard from across the aisle that they contend Chevron deference doesn't even apply in this case anymore because the agency to whom deference would ordinarily be due is not pressing forward anymore.

What is the United States' position with regard to that argument?

MS. MANN: Two things, Your Honor. One is that, with respect to the issues that are not significantly intertwined with the issues that are under reconsideration, I'm going to present some argument mostly on procedural issues today.

I think that Mr. Brightbill was attempting to answer your question with his last response, which is to say that, until the agencies repeal or replace, I don't believe that they

have abandoned the idea. They recognize that rule. They have not withdrawn the briefs in the cases, but at this point it is under reconsideration.

That's why the agencies have opted to keep an open mind, to not come in and brief those issues as they are reconsidering them.

THE COURT: At what point, what action does the agency have to take before Chevron deference disappears? At what point in that process does that happen?

MS. MANN: Quite candidly, Your Honor, I haven't thought about that myself and I haven't discussed it with either cocounsel or my clients, but if it is something that The Court would appreciate further briefing on --

THE COURT: I will commend that to you.

MS. MANN: -- it would be a good idea.

THE COURT: Yes.

MS. MANN: I'm sorry not to have an answer for you as I stand here now.

THE COURT: I would rather someone admit that than make it up.

MS. MANN: Thank you.

I'm going to touch on a few of the points that were raised I believe mostly by the intervenor defendants with regard to some of the procedural-type arguments.

First, Your Honor, I will touch on four things.

First, the challenge to the rule's inclusion of interstate waters, the United States still continues to say it is untimely. Second, the final rule is the logical or a logical outgrowth of the proposal. Third, the agency has provided adequate notice of the scientific basis for the rule. And fourth and finally, the plaintiff intervenors antilobbying and propaganda claims should be rejected. The agency has complied with all of the applicable procedural requirements, and their arguments, they don't come even close to showing that the agencies acted with an unalterably closed mind.

And first with respect to interstate waters, it is an untimely claim. "Interstate waters" have been defined as jurisdictional since 1978.

THE COURT: Does the agency reopen the issue by submitting it for comment and responding to comments about it?

MS. MANN: Your Honor, I'm not intending to come in and rehash our brief. I know you've read them and you've read them well. I can tell by the questions that you have here today.

We had discussed in our brief that where an agency doesn't signal reconsideration of its previous rule interpreting a statute that the agency is not reopening the issue or restarting the clock for review.

In their reply brief, the plaintiffs and plaintiff intervenors contend, they cite some cases for the proposition

that a prior regulation is reopened and the statutory limitations are started where an agency does a few things: Holds out the previous regulatory text as a proposal; offers an explanation for the language -- this is the important one -- solicits comments on that substance and then responds to the comments received.

Here the agencies did not put this out as a proposal. They stated quite clearly at 79 Fed Register 22,200 that the proposal does not change that provision of the regulations and that they were not taking up the issue again, and significantly for your purposes, Your Honor, the agencies never sought comment on that part of the regulatory text.

And to the extent, one other point to make in response to the reply briefs is that to the extent that plaintiffs and plaintiff intervenors are challenging waters that have a relationship to interstate waters, those challenges are not really relevant to whether the interstate waters claims are timely or not. That goes to the question of whether adjacent waters or case-specific waters are appropriate or not.

THE COURT: Let me get you to jump to the logical outgrowth.

MS. MANN: We're together. I was just turning the page. As Your Honor knows, the APA has provisions requiring that either the substance of a proposed rule or a description of the subjects and issues involved need to be part of the

proposal.

As the Eleventh Circuit has stated in *Miami/Dade County versus EPA*, the purpose of notice and comment is to allow an agency to reconsider and sometimes change its proposal based on the comments of affected persons.

All that's required for a final rule to be a logical outgrowth of a proposal is that the agency expressly seeks comment on a particular issue or makes clear that it's contemplating a particular change.

Here there were three areas that the parties have raised with respect to logical outgrowth. One is the distance limitations and the definition of "neighboring," which is part of adjacent waters, and the goal of this rulemaking, the agencies believe, was clearly stated as wanting to provide greater clarity by identifying specific areas and characteristics for jurisdictional adjacent waters.

"Adjacent waters," as Your Honor may know, have been interpreted as broadly or applied broadly --

THE COURT: Let me kind of cut to the quick.

MS. MANN: Sure.

THE COURT: I think the question is really here there doesn't seem to be any range of distance that was proposed. Would you argue that you could have come in and instituted a thousand-year floodplain or 1500 miles instead of 1500 feet?

What is the limit if you can just say something about

geographical limitations and then for the final rule come up with anything?

MS. MANN: Well, Your Honor, it was very specifically stated that the agencies would assess the distance and that they specifically requested comment on establishing --

THE COURT: When you say "it was specifically," what was the distance that was specific about it?

MS. MANN: Well, I think your question is: Does an agency have to come in and say, okay, we're thinking of --

THE COURT: No, it's not.

MS. MANN: -- five feet to 5000 feet?

THE COURT: That's a part of it.

MS. MANN: But with respect to the range of alternatives, that language comes from the *Small Refiner Lead Phased Down Task Force* case out of the DC Circuit from 1983.

THE COURT: It does, but would you argue you could have used a 5000-year floodplain? Could you have used 1500 miles instead of 1500 feet?

MS. MANN: Well, I certainly think that there could have been an arbitrary and capricious vulnerability if you were to have done something like that, but I do think that where you're notifying the public, "Look, this has been interpreted fairly broadly and what we're trying to do here is to make clear that the limits we set" --

THE COURT: If we say 5000 is arbitrary and

capricious and you say 100 isn't, what's the standard? How do I decide 100 isn't but 5000 is? What...

MS. MANN: Well, the question is whether the -- with respect to the procedural claim --

THE COURT: That's your question but mine is that one, so can you answer it?

MS. MANN: Well, I think what you're asking is more can the agency support it, but if you are asking the question could the agency have come out with any number, I don't know that I can answer that question as I stand here because --

THE COURT: I think you said no but my next question was --

MS. MANN: No --

THE COURT: -- If they can't come up with any number, how do we judge what kind of number? What's too much?

MS. MANN: Well, I think that that's the arbitrary and capricious part of the analysis. The --

THE COURT: How do I judge in this context "This is arbitrary and capricious but this isn't"?

MS. MANN: The question is not whether that number stands up to scrutiny as reasonable. The question for the procedural claim is should somebody have understood when they read the proposal that the agency might put a number in there and the answer to that question is yes.

THE COURT: And so once you answer yes, they are

entitled to put any number in there?

MS. MANN: That's a -- that's a -- that's a different part of the argument.

THE COURT: Right, and that's what I'm asking you to answer.

MS. MANN: And that is not something -- that is one of the issues that is under reconsideration. The agencies have put forth a different definition --

THE COURT: But for this suit, all right -- I understand you might fix that later -- but for this suit, what is your answer?

MS. MANN: Well, as we've tried to make clear, Your Honor, we're not engaging on that question at this time. The question that I'm hoping to engage with you on right now is whether somebody should have understood that there could be a number in the final rule.

THE COURT: And I understand your argument on that different issue.

MS. MANN: And I'm glad you brought up the *Alabama Power* case, Your Honor, the Eleventh Circuit, because I think that that's very on all fours and so is the *Small Refiner* case out of the DC Circuit.

In that case and in *Alabama Power*, the purpose of the agency's rulemaking was quite clear. In *Alabama Power* they were concerned about folks that worked around electric utilities

getting sparks and catching on fire, so the weight of the fabrics that came out in the ultimate correction was something that the Eleventh Circuit said people should have understood that because that's the purpose of the rule.

The same thing in the *Small Refiner* case where the agencies had made clear they were trying to get rid of loopholes and so there were two things that were into issue in the notice arguments, and one of them was whether past producers would be subjected to the limits that were imposed there by the EPA, and the DC Circuit said, "Yeah, people understood what the purpose of this rule was, to get rid of these loopholes, and even though that past producer component of the final regulation wasn't in the proposal, people were on notice," and so...

THE COURT: Let me get you to go to the connectivity report.

MS. MANN: Sure.

THE COURT: There's two parts of that that I'm struggling to understand. The 36 scientific reports that were published after the draft science report and added to the final science report, what was the substance of that?

MS. MANN: Well, Your Honor, there were over a thousand -- as the other side recognizes, there were quite a number of scientific sources that were cited to in the draft report.

And between the time that the draft report and the

final report were completed, the agencies added additional sources.

Some of those were suggested by members of the science advisory board that had reviewed the draft report, but I think it's quite telling, if you read the briefing, that the parties challenging that cannot point to anything about the report or the sources that they can say would have changed or what they would have said about that that impacts this case.

If they say they would have refined --

THE COURT: So it's your position that there was no new additional information in anything added to the final science report that would have needed public comment in any way?

MS. MANN: No, Your Honor, we don't believe so. The concept of a continuum, you mentioned earlier that there were many citations that the agencies provided -- and I can repeat them but I think you already know them -- where the agencies had referred both in the proposal to a gradient in the relation of waters to each other and in the draft report to discussing connectivity as something that has a continuum, and even if the agencies hadn't used the word "continuum," which they did -- I think the plaintiff intervenors acknowledge that -- the concepts were very much real in the report, and they don't point to any part of the report or any source and say, "Aha, if we had known this specific thing, here are the things that we would have said."

All they say is that they would have refined or enlarged the comments that they already made. The additional sources that were added only confirmed the same information that was already in the report.

THE COURT: They teased out three subjects, topics, that they say the public was not able to comment on, the failing to provide metrics to measure the significance of the nexus to traditional navigable waters, analyzing significant nexus as a binary choice rather than as a gradient and finally failing to assess the significance of effects of ephemeral features on downstream waters.

How do you respond to those three issues that they say the public didn't have an opportunity to comment on at all? Were those included in the draft report?

MS. MANN: Those concepts and those -- the scientific information was there. There were additional supporting sources that were added.

THE COURT: Wait, when you say "was there," you mean in the draft report?

MS. MANN: The concepts and the science were there, Your Honor. The idea --

THE COURT: By "there," do you mean the draft report?

MS. MANN: In the draft report. I apologize for confusing you, but the agencies had addressed -- you know, when you asked the question about metrics, I'm not sure if we're

getting to distance limitations or what other metrics you're referring to, so I want to be careful there.

I don't want to overstate the position, but I think that if you look at -- and they have had multiple chances with their motions here, both on the preliminary injunction motions and their motions for summary judgment, to point to you and say, "Your Honor, look at this source; there is nothing like this in the draft report and this is what we would have said."

Without showing with some specificity what they would have said and what specific information they would have been looking at when they made those statements, those claims are just on incredibly weak ground.

If you don't have any more questions on that, I'm going to turn to the antilobbying and propaganda claims.

THE COURT: And I think I understand your arguments in that regard. It's my understanding that you take the position that nothing improper was done, and at bottom, there is no private cause of action for any of that anyway.

Is that --

MS. MANN: Well, one comment I would make, after reading their reply brief, and this is our chance to kind of come back and beyond to respond to that. It started out in their summary judgment motion that they were making this procedural claim, that the agency had violated these antilobbying provisions, but as you look at their reply, they

have shifted at that point. They acknowledge that they don't have a private right of action. They acknowledge that the GAO found that the agencies had met all the applicable procedural requirements and they --

THE COURT: The GAO report was not glowing for the agency.

MS. MANN: Well, there are two separate GAO reports, Your Honor. The one that they've cited to was a report where the GAO was looking at whether there had been violations of the antilobbying provision, but after every single rulemaking that the agencies -- any agency does, the GAO looks at the rule, looks at the supporting information that the agency in question provides and they let the agency know, yes, you've met your procedural requirements, or no, you haven't.

And that was a different report than the one that they are citing to, but the GAO did, in fact, find that the agencies had made all of their applicable procedural requirements.

The point that I wanted to make to you, Your Honor, is that their argument shifts from their opening brief to their reply to one of saying, "There's a closed mind here," and that's a different argument, and what I would point Your Honor to is that there is a presumption that an agency official is presumed to be objective and capable of judging a particular controversy fairly and on the basis of those circumstances, and courts have

found that to rebut this presumption, a plaintiff has to make a, quote, clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding, and that's from *Association of National Advertisers versus FTC*, out of the DC Circuit. That is a very high bar.

THE COURT: I understand your argument.

MS. MANN: No circuit court has ever found an unalterably closed mind.

THE COURT: Let me turn, then, to man who has been waiting patiently and that is Mr. Holman.

Thank you, Ms. Mann.

MS. MANN: Thank you, Your Honor.

MR. BRIGHTBILL: Your Honor, may I address your question about *Global Tel Link?*

THE COURT: In a followup brief. I will look forward to reading that.

Mr. Holman.

MR. HOLMAN: Thank you, Your Honor.

THE COURT: On behalf of the intervening defendants.

MR. HOLMAN: That's right, Your Honor.

May it please The Court, I'm Bland Holman and I would like to start today with something that hasn't been discussed, which is the statute, the Clean Water Act and its objectives, which are to restore and maintain the chemical, physical and

biological integrity of the nation's waters.

THE COURT: I think part of the reason it hasn't been discussed is because this is a chance to talk about things that I may not have been briefed on, and we're getting down to the nitty-gritty of the issues that have been raised, and I appreciate that's at the heart of why you're here and the importance of that statute.

MR. HOLMAN: Your Honor, I --

THE COURT: That will not be lost in my examination, and I appreciate you going into it, but I don't think it will advance the ball to spend a long time reading sections of that.

MR. HOLMAN: I was already going to move to "waters of the United States" -- you understand that is the definition that's at issue -- can't be interpreted without any look at the statute's purpose or intentions, which is what I feel is going on on this side of the room, and if we could just go ahead and jump to the actual definition of "tributaries," which seems to be one of the substantive issues there, just so The Court is clear, because this also has not been mentioned, the definition of "tributary," the rule has three elements.

There needs to be flow. There needs to be ordinary high water mark and there needs to be bed and banks, and the agency was well within the parameters of having its -- reaching a conclusion that these are indicators of flow and significant nexus, and Your Honor has asked very specifically about things

in the record showing that, and if Your Honor -- I would be pleased to go through showing that there is abundant evidence in this record showing that these tributaries, that definition which will capture tributaries with flow affect the physical, chemical and biological integrity of the nation's water. Just as an example --

THE COURT: Let me ask you: Do you maintain that the indicators that you are talking about are never caused by one-time large events?

MR. HOLMAN: One-time large events, you mean like a thousand-year flood?

THE COURT: Something of that nature.

MR. HOLMAN: I don't know that that -- to me -- our answer to that is the -- the correct question is whether or not the definitions capture waters of the United States.

THE COURT: And that is what I'm -- do these indicators always demonstrate a significant nexus?

MR. HOLMAN: Your Honor, I don't think they have to always, even if there's a false positive, within Justice Kennedy's opinion, the discussion is in most of the cases.

THE COURT: Given the nature of the definition in the statute itself is your argument, I would think.

MR. HOLMAN: Our position is that the notion that the definition is not supported by record evidence is absolutely counter to the record.

The fact that there may in some -- one could imagine some scenario where there is some water out there of the hundreds of thousands of waters of the United States that may not have a significant nexus perhaps doesn't disprove the rule.

It's a rule and it is allowed, they are allowed to base it on the science, and what the science shows is that these are definitions that include flow and they include streams with connections.

For example, just for an example, biological connection between tributaries and downstream waters, EPA cites studies, these tributaries export plankton, vegetation, fish eggs, insects, invertebrates like worms or crayfish, smaller fish that are -- they cite many, many studies that show this, so I don't really understand the position that The Court has been asked to put itself in, which is to second-guess the science, because there is no credible claim that the science is lacking, and I think under the applicable standard of review, that means that this Court has to affirm the rule, because the test is whether or not it runs counter to the evidence before the agencies were so implausible that it could not be ascribed to a difference in the view or the product of agency expertise under the *Miccosukee Tribe* case, which is binding on this case, irrespective of the deference issue.

The question is whether or not this is an arbitrary and capricious rule on the record that's before the agency, and

the record is overwhelming and it shows these are indicators of flow. It shows that this complies completely with Justice Kennedy's test.

A lot of the focus in the briefing was on the merest trickle and saying these tests could capture the merest trickle and that therefore violates Justice Kennedy's test, and I would submit, Your Honor, that the records shows that at 80 Federal Register at Page 37,076 the agency makes a finding that bed, banks and ordinary high water mark are only created by sufficient and regular intervals of flow, so the key is there's enough flow in these streams to actually move things. They are moving the earth. They are creating a channel, and they are putting things on the beds and the banks. That is not a trickle.

That is not a trickle, and it does not run afoul of Justice Kennedy's opinion.

If I might turn to the proximity issue which Your Honor was asking about. I would start with Justice Kennedy's opinion itself where he actually includes the notion of proximity. He says, "Wetlands can perform critical functions related to the integrity of other waters, functions such as pollutant trapping, flood control and run-off storage," so he is talking about flood control. So using the floodplain as a denominator here is within the bounds of that opinion and the evidence shows --

THE COURT: When you say the floodplain, you mean the hundred-year floodplain?

MR. HOLMAN: Well, flood control is a function that could be served, you could select different flood intervals in drawing your line and it --

THE COURT: I was just asking about your language when you said "the floodplain." You mean the floodplain of any given area?

MR. HOLMAN: Well, I will read several pieces of evidence and we can talk about the issues that The Court has with the hundred-year floodplain, but as a general matter, floodplain is a general description of an area that is adjacent --

THE COURT: That's what I mean. You're using just generically, the floodplain of whatever area.

MR. HOLMAN: I am, Your Honor, but I think it's not -- that doesn't mean that's an endless term. It doesn't mean that it covers the million-year floodplain. I think that in the science --

THE COURT: No. Go on to something else. That's not at all what --

MR. HOLMAN: Well, the record is clear that floodplains, wetlands and open waters within the hundred -- here's a specific technical cite for the hundred-year floodplain.

Wetlands and open waters within the hundred-year floodplain impact primary waters by connecting, quote, aquatic environments through both surface and shallow water, subsurface hydrological flow paths, so the evidence is there, and Justice Kennedy recognized in his opinion that proximity matters.

So here we have evidence in the record showing that wetlands and water bodies that are in the floodplain have these connections to these navigable waters and that the agency was within its rights to define the floodplain as setting the significant nexus standard.

Now one point that was made about the ordinary high water mark, which was another focus of the discussion earlier, it was claims that the ordinary high water mark is as a matter of law unacceptable to this Court. So in other words, The Court doesn't have to mind all this science stuff. It doesn't have to look behind the agency and see whether or not the 1200 studies that it looked at over the course of several years in drawing these lines, it doesn't have to second-guess all that.

It can just go to straight to Justice Kennedy and just figure out the ordinary high water mark is simply unlawful, and, Your Honor, I would submit to you that is not a proper reading and I would like to read to you from the opinion where Justice Kennedy says, "An ordinary high water mark," he says, "this standard presumably provides a rough measurement of the volume and regularity of flow," and he says, "It may well; it

may well provide a reasonable measure of whether specific minor tributaries bear sufficient nexus with other regulated waters to constitute navigable waters under the act; yet the breadth of the standards" -- he goes on to flag some concerns.

He says that "The breadth of that standard raised concerns and precludes its adoption as the determinative measure whether the wetlands adjacent to them are likely to be" -- and, Your Honor, I just want to be clear.

I don't think that is a statement by Justice Kennedy saying ordinary high water mark can never be a factor, it can never be a driving factor in determination, especially where the agency has multiple grounds to back up its determination that these proximate lines include water that's significant nexus, and the fact that some waters may fall within the definition and The Court might think that those specific waters do not have significant nexus does not mean the rule is invalid.

THE COURT: Is it your position that the 2015 WOTUS rule is actually narrower than what predated it?

MR. HOLMAN: It is narrower in certain respects. And specifically I believe the 2015 rule does not include waters that affect interstate commerce or could affect interstate commerce, and I believe that was excluded in the 2015 rule, so it is narrower.

It's also clearer because, of course, the regime that preceded it was a basically a case-by-case test for the entire

country. Even if you are outside of the floodplain, even if you were more than 4000 feet away from the ordinary high water mark, you had to get a case-by-case test, and one of the -- frankly one of the misgivings conservationists had about this rule is that it said if you are outside these limits, you don't get a case-by-case test.

So the rule is clearer. It is narrower, and it also exclude waters from doing case by case, and it gives clear guidelines. They are based on distance. They are based on measurable things, and so the notion that this doesn't provide any kind of constitutional, you know, void-for-vagueness concerns, I don't really understand that, especially compared to the predecessor which is what the injunctive relief you've been asked to give would put back in place.

THE COURT: And yet the agencies estimate that the land covered would increase from 2.84 percent to 4.6 whatever percent; is that a calculation that you dispute?

MR. HOLMAN: Your Honor, I'm not in a position to dispute that calculation.

THE COURT: I understand.

MR. HOLMAN: My understanding is that's a conservative figure. You know, the Corps of Engineers has done -- I believe the figure is 400,000 jurisdictional determinations. That's in the record, and I would say to you that one of the things that stood out to me in the record is

that the positive jurisdictional determinations they made where they're finding significant nexuses that they were mostly all within the 4000-foot limit.

So, in other words, while it's doing this case-by-case analysis, it's finding based on that record that those fit within the rule that it's prescribed, so that fits with what it did with the rule.

THE COURT: Thank you, Mr. Holman.

MR. HOLMAN: Thank you.

THE COURT: Counsel, I know each of you have probably more to say. But what I will do is allow you to supplement the record.

You're not required to -- you're invited to -- within ten days from today's date. If you think of something on your way home that you wish you had said or had the opportunity to respond to, or if some of my questions raised something that you would like to follow up on -- I think we identified a couple of areas as we went along.

But I appreciate very cogent arguments and I will look for -- again you're not required but you're invited to follow up with additional briefing.

Counsel, thank you and we will be in recess.

(Proceedings concluded at 3:42 p.m.)

CERTIFICATION

I certify that the foregoing is a true and correct transcript of the stenographic record of the above-mentioned matter.

_____ 12/15/2018

Debra Gilbert, Court Reporter Date