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

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

v.

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

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

MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS IN NUMBERS 3:15-CV-165, 3:15-CV-266, AND 3:18-CV-176

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INTRODUCTION

These consolidated cases challenge the Environmental Protection Agency's and U.S. Army Corps of Engineers' (the agencies) 2015 regulation defining "waters of the United States" (the Rule) within the meaning of the Clean Water Act (CWA). Plaintiffs in Nos. 3:15-cv-165, 3:15-cv-266, and 3:18-cv-176 (the Private Party Plaintiffs) now move for summary judgment and ask that the Court vacate the Rule in its entirety.

In both the process leading to the Rule's promulgation and in its substance, the agencies disregarded the statutory and constitutional limits on their authority.

***First*,** the Administrative Procedure Act (APA) requires an agency to give the public an opportunity to comment before making substantive changes to a proposed rule that could not be anticipated. It also requires the agency to make available the evidence on which the proposed rule is based. The agencies flouted both requirements, failing to reopen the comment period after making important changes to the proposed rule, and withholding a key scientific report until after the initial comment period closed. The agencies also refused to undertake the required economic analysis, used illegal "covert propaganda" to generate superficial support, and engaged in illegal lobbying against legislative efforts to stop the Rule—as the U.S. Government Accountability Office concluded.

***Second*,** the Rule is arbitrary and contrary to law. It reads the term *navigable* out of the CWA, purporting to assert jurisdiction over mostly-dry and isolated land features that bear no meaningful relationship with "navigable waters." It warps Supreme Court precedents, which recognize clear and common-sense limits on the agencies' authority. And it draws arbitrary lines and declares categorical exemptions that are unsupported by scientific evidence. Congress enacted the APA to prevent this kind of arbitrary decisionmaking.

Finally, the Rule violates the Constitution, in two ways. First, the Due Process Clause protects the regulated public from statutes and rules that either fail to put them on notice of what is prohibited or give government agents unchecked discretion to enforce the law in arbitrary and discriminatory ways. The Rule offends both prongs of the vagueness doctrine: It opens regulated entities to severe civil and criminal penalties that rest on nebulous and undefined standards like "more than speculative or insubstantial" and "similarly situated," and on ambiguous definitions of terms like "ordinary high water mark" and "significant nexus." These uncertain standards are impossible for the public to understand or the agencies to apply consistently. Second—by regulating dry, isolated land features that are not channels of interstate commerce and do not substantially affect interstate commerce—the Rule exceeds the agencies' power under the Commerce Clause and usurps State authority under the Constitution's federalist structure.

Because the Rule violates the Constitution, the Clean Water Act, and the Supreme Court's precedents, and is arbitrary and capricious under the APA—and in light of the devastating consequences that it would have on the economy—the Rule must be vacated.

ISSUES AND STANDARD FOR DECISION

The question presented is whether the Rule is unlawful and should be vacated. A regulation is unlawful under the APA if it is adopted "without observation of [the] procedure required by law" (5 U.S.C. 706(2)(D)), or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)).

To determine the lawful reach of the agencies' authority under the CWA, a court must "give effect to [the] unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). Agency interpretations of Supreme Court precedent are

reviewed *de novo*, without deference. *Emp'r Sols. Staffing Grp. II, L.L.C. v. Office of Chief Admin. Hearing Officer*, 833 F.3d 480, 484 (5th Cir. 2016). Similarly, courts do not defer to an agency's interpretation that presents "serious constitutional difficulties." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008).

Vacatur is the ordinary remedy upon finding a regulation unlawful. *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 20 (D.D.C 2017) (citing *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997)).

STATEMENT OF THE CASE

A. Legal Background

The CWA establishes permitting programs designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the Act prohibits the "discharge of any pollutant," defined as "any addition of any pollutant to *navigable waters* from any point source," except "as in compliance with" other provisions of the Act. 33 U.S.C. 1311(a), 1362(12)(A) (emphasis added). The Act in turn defines "navigable waters" to mean "*the waters of the United States*, including the territorial seas." 33 U.S.C. 1362(12) (emphasis added). Discharges "in compliance with" the Act require permits. *See* 33 U.S.C. 1342(a), 1344(a).

The agencies and private citizens may enforce the Act through civil actions for injunctions and penalties of up to $37,500 per violation per day. 33 U.S.C. 1319(b), 1365; 74 Fed. Reg. 626, 627 (2009). The Act also provides for criminal penalties, in some cases in excess of $50,000 per day and three years' imprisonment. 33 U.S.C. 1319(c)(1)-(2).

In 1977, the agencies defined "waters of the United States" to encompass not only traditional navigable waters but also "adjacent wetlands" and "[a]ll other waters … the

degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). Although the text of the agencies' definition of "waters of the United States" remained essentially unchanged for the following 38 years, the agencies' interpretation of their own regulations became more expansive. The Supreme Court confronted those increasingly aggressive interpretations in a series of decisions beginning in 1985.

Riverside Bayview. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), considered the Corps' assertion of jurisdiction over "80 acres of low-lying, marshy land" abutting a lake and navigable creek, on the ground that it was an "adjacent wetland" within the meaning of 33 C.F.R. 323.2(a)(5) (1977). The Court was presented with the question whether wetlands that are neither navigable nor have navigable waters as their source may nevertheless be regulated as "waters of the United States" on the basis that they are "adjacent to" and "inseparably bound up with" traditional navigable waters. *Id*. at 131-135. Ruling for the agencies, the Court held that it is "a permissible interpretation of the Act" to conclude that "a wetland that actually abuts on a navigable waterway" falls within the "definition of 'waters of the United States.'" *Id*. at 1350.

SWANCC. Following *Riverside Bayview*, the agencies "adopted increasingly broad interpretations of [their] own regulations under the Act," asserting jurisdiction over an ever-growing catalogue of features bearing little or no relation to traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality opinion). One of those interpretations—the Migratory Bird Rule—was struck down in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*).

The Corps asserted that it had CWA jurisdiction over wholly intrastate waters "used as habitat by [migratory] birds." *SWANCC*, 531 U.S. at 164 (quoting 51 Fed. Reg. 41,217

(Nov. 13, 1986)). Municipalities' plans to use an abandoned strip mine as a landfill were thwarted when the Corps determined that "seasonally ponded, abandoned gravel mining depressions located on the project site" constituted "waters of the United States" because migratory birds had been observed using them as "habitat." *Id*. at 162-165.

After SWANCC challenged the Migratory Bird Rule, the Supreme Court held that "the text of the statute will not allow" an interpretation of the agencies' jurisdiction that "extends to ponds that are not adjacent to open water." *SWANCC*, 531 U.S. at 168. The Court stressed that, although *Riverside Bayview* had turned in large measure on "the significant nexus [that exists] between … wetlands and [the] 'navigable waters'" they abut, the Migratory Bird Rule purported to assert jurisdiction over isolated ponds bearing no evident connection to navigable waters at all—an approach that effectively read the term "navigable" out of the statute. *Id*. at 167, 171-172. The Court therefore invalidated the rule.

Rapanos. The Court most recently considered the meaning of "waters of the United States" in *Rapanos*. At issue were four sites containing "54 acres of land with sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water." 547 U.S. at 720. The Corps concluded that the land constituted waters of the United States because it lay "near ditches or man-made drains that eventually empty into [those 20-mile-distant] traditional navigable waters" and thus should be considered "adjacent wetlands" covered by the Act. *Id.* at 729.

The plurality rejected that interpretation. In their view, "waters of the United States" include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Rapanos*, 547 U.S. at 732, 739. In going beyond this

"commonsense understanding" to classify "ephemeral streams" and "dry arroyos" as a WOTUS, the agencies had stretched the text of the CWA "beyond parody." *Id.* at 734. Justice Kennedy concurred in the judgment. As he saw it, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Rapanos*, 547 U.S. at 779. Thus, when "wetlands' effects on water quality [of traditional navigable waters] are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id*. at 780.

B. Factual Background

1. The Proposed Rule

Against this legal backdrop, the agencies proposed a wholesale redefinition of "waters of the United States." 80 Fed. Reg. at 37,054. The proposed Rule provided for jurisdiction over (1) waters used in interstate commerce, (2) interstate waters, including interstate wetlands, (3) the territorial seas, (4) impoundments of the first three categories of features or their tributaries, (5) tributaries to the first four categories of features, (6) features "adjacent" to any of the first five categories of waters, and (7) all "other waters" with a "significant nexus" to any of the first three categories of waters, as determined on a case-by-case basis, subject to narrow categorical exemptions. 79 Fed. Reg. 22,188, 22,193 (Apr. 21, 2014). It defined "adjacent" as "bordering, contiguous or neighboring" any of the first five categories of waters. 79 Fed. Reg. at 22,269. "Neighboring" waters were those "located in the riparian area or floodplain" of such a water, or having a "hydrologic connection" to one. *Id.* A water with a "significant nexus" was any water that "significantly affects the chemical, physical, or biological integrity of" a jurisdictional water. *Id*.

2. The comment process and Connectivity Report

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

In the preamble to the proposed Rule, the agencies explained that their "decision on how best to address jurisdiction over 'other waters'" would be informed by the so-called Connectivity Report, which compiled the scientific literature and analysis on what the agencies relied on to analyze the hydrological "connectivity" of various water features. The proposed Rule was accompanied only by a draft of the Connectivity Report, which was at the time undergoing review by the Scientific Advisory Board, or SAB. The SAB "recommended numerous substantive changes to the Connectivity Report." WAC Comments at 73, ID-4568; *see* SAB Review at 1-3, 35-58. The agencies made several notable changes to the Connectivity Report in response to the SAB's review. The final Connectivity Report, however, was not published until two months after the comment period closed. 80 Fed. Reg. 2,100, 2,100 (Jan. 15, 2015).

3. EPA's advocacy campaign

During the comment period, EPA undertook an unprecedented public relations

[1] All citations to record materials use the following citation format: [Short Title] [page(s)], ID-[last digits of docket number]. We include the docket identifier in the first citation only.

campaign aimed to discredit public concerns and marginalize opposition to the proposed Rule. While on a public road show to promote the proposed Rule, for example, EPA Administrator Gina McCarthy belittled the concerns expressed by agriculture groups as "myths," "ludicrous" and "silly." Farm Futures, *EPA's McCarthy: Ditch the Myths, Not the Waters of the U.S. Rule* (July 9, 2014), perma.cc/8F4P-XTAP. Those comments were consistent with the agencies' #DitchtheMyth Twitter campaign. Op. B-326944, 2015 WL 8618591, at *5 (Comp. Gen. Dec. 14, 2015). EPA's social media campaign also sought to motivate individuals to contact members of Congress to encourage them to oppose legislation that would block the Rule. *See* Op. B-326944, 2015 WL 8618591, *13 (Comp. Gen. Dec. 14, 2015). EPA used its blog, Twitter account, and Facebook page to solicit supporters for a "crowdspeaking" message that supported the proposed Rule. The message—presented to appear as though it was coming from third parties and not EPA—read: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community. http://thndr.it/1sLh51M." Op. B-326944, 2015 WL 8618591, at *3.

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

C. The final Rule and its fallout

1. The Rule

EPA published the final Rule on June 29, 2015. 80 Fed. Reg. 37,054 (June 29, 2015). The Rule purports "make the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources." *Id.* at 37,055. It attempts to do this by distinguishing between three broad categories of waters: waters that are "jurisdictional by rule," waters that are jurisdictional based on a case-specific analysis, and waters that are never jurisdictional.

Waters jurisdictional by rule. The Rule identifies six water features that are considered categorically "jurisdictional by rule": **(1)** "traditional navigable waters," **(2)** interstate waters, **(3)** territorial seas, **(4)** impoundments of any water deemed to be a "water of the United States" under the Rule, **(5)** tributaries to a (1)-(3) feature, and **(6)** features that are "adjacent" to a (1)-(5) feature. 33 C.F.R. 328.3(a). The Rule and its preamble further define the operative terms as follows:

- "Traditional navigable waters" are "all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 80 Fed. Reg. at 37,074.
- "Interstate waters" are waters that cross state borders, "even if they are not navigable" and "do not connect to [navigable] waters." *Id*.
- "Territorial seas" are open seas within three miles seaward of the ordinary low water line along the coast. 33 U.S.C. 1342(8).

We call these first three categories of waters **"(1)-(3) features."**

- A covered "tributary" is any water that flows "directly or through another water or waters to a traditional navigable water, interstate water, or territorial sea." 33 C.F.R. 328.3(c)(3). To count as a jurisdictional water, the tributary (a) must

"contribute flow" directly or through any other water—such as ditches or wetlands—to a traditional navigable water, interstate water, or territorial sea, and (b) must be "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark" (OHWM). *Id*.

- OHWM is defined broadly as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, and other appropriate means." 33 C.F.R. 328.3(c)(6).

We call tributaries, together with (1)-(3) features and impoundments of jurisdictional waters, **"(1)-(5) features."**

- An "adjacent water" is defined as any water bordering, contiguous to, or "neighboring" a (1)-(5) feature. 33 C.F.R. 328.3(c)(1). "Neighboring" waters are defined as waters, any part of which are located
  - within 100 feet of the OHWM of any (1)-(5) feature;
  - within the 100-year floodplain of any (1)-(5) feature, and not more than 1,500 feet from the OHWM of such water; or
  - within 1,500 feet of the high tide line of a traditional navigable water, interstate water, or territorial sea, or within 1,500 feet of the OHWM of the Great Lakes. 33 C.F.R. 328.3(c)(2).

Waters jurisdictional by case-specific analysis. The Rule identifies two categories of waters that may be jurisdictional if they are "found after a case-specific analysis to have a significant nexus" to certain jurisdictional waters. 80 Fed. Reg. at 37,059. As a baseline matter, the Rule defines the term "significant nexus" as a "significant effect (more than speculative or insubstantial) on the chemical, physical, or biological integrity, of a traditional navigable water, interstate water, or territorial sea," assessed either "alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform." 33 C.F.R. 328.3(c)(5).

Into the first category of waters subject to this analysis, the agencies have placed five subcategories of waters that are always "similarly situated": non-adjacent Prairie potholes,

Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. 33 C.F.R. 328.3(a)(7). Those water features are not further defined.

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

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

To "add clarity and transparency" to the third step of the analysis, the Rule sets out a list of "functions" that must be considered (but only one of which need be impacted) in determining whether a water "significantly impact[s]" the integrity of another water. 33 C.F.R. 328.3(c)(5). Those functions include "sediment trapping," "nutrient recycling," "pollutant trapping, transformation, filtering, and transport," "retention and attenuation of flood waters," "runoff storage," "contribution of flow," "export of organic matter," "export of food resources," and "provision of life cycle dependent aquatic habitat." *Id*.

Waters that are not jurisdictional. Finally, the Rule enumerates certain waters that are categorically nonjurisdictional. They include "swimming pools;" "small ornamental

waters;" "prior converted cropland;" "waste treatment systems;" small subsets of ditches that do not flow to a (1)-(3) feature; ditches with ephemeral or intermittent flow that do not drain wetlands, relocate a tributary, or excavate a tributary; "farm and stock watering ponds;" "settling basins;" "water-filled depressions incidental to mining or construction activity;" "puddles;" "subsurface drainage systems;" and "wastewater recycling structures"—but in many instances, only when these features occur in "dry land," which is undefined. 33 C.F.R. 328.3(b).

2. The GAO report

At the request of Senator James Inhofe, the GAO investigated whether EPA's advocacy activities had violated anti-propaganda and anti-lobbying provisions contained in federal appropriations acts. *See* Opinion B-326944, 2015 WL 8618591. The GAO issued its report on December 14, 2015, concluding that EPA had violated the provisions. *Id*.

First, the report concluded that EPA's use of Thunderclap constituted unlawful "covert propaganda." 2015 WL 8618591 at *6. GAO explained that the "purpose of the publicity or propaganda prohibition is to ensure that the government identifies itself as the source of its communications" (*id*. at *8), and it found that the Thunderclap campaign ran afoul of this principle because the messages posted to campaign supporters' social media accounts did not identify EPA's role in authoring the messages. *Id*. at *8-*10.

Second, the report concluded that, by hyperlinking to the Surfrider and NRDC pages encouraging readers to contact their legislators, EPA had engaged in unlawful "grassroots lobbying." *Id*. at *12-*18. GAO found that EPA had "associated itself" with the lobbying messages on these external websites by linking to them (*id*. at *18) and had thereby "appealed to the public to contact Congress in opposition to pending legislation." *Id*. at *13.

3. The nationwide stay and preliminary injunctions of the Rule

Plaintiffs here filed suits challenging the Rule. Dozens of additional lawsuits and petitions for review were filed in the district courts and courts of appeals across the country by States, the regulated community, and environmental NGOs.

The petitions for review were consolidated before the Sixth Circuit. Finding the Rule procedurally "suspect" and that "it is far from clear" that its substantive provisions can be squared with even the most generous reading of the prevailing Supreme Court precedents, the Sixth Circuit issued a nationwide stay of the Rule. *In re EPA & Dep't. of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015).

Before the Sixth Circuit entered its stay of the Rule in August 2015, the District of North Dakota had similarly held that the challengers to the Rule were "likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule" as the Rule suffered from numerous "fatal defect[s]." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055 (D.N.D. 2015). The court there granted a preliminary injunction within the geographic limits of the 13 plaintiff States before it. *Id*. at 1051 n.1, 1059-60.

The Supreme Court subsequently determined that jurisdiction over the challenges to the Rule belonged in the district courts. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). Proceedings before the district courts thus re-commenced, and the Southern District of Georgia held that the challengers there "overwhelmingly" demonstrated a substantial likelihood of success on the merits that the Rule violates both the CWA and APA APA and entered a preliminary injunction against enforcement of the Rule in 11 additional states. *Georgia v. Pruitt*, 2018 WL 2766877, at *9 (S.D. Ga. 2018).

Most recently, this Court agreed that the Rule is legally suspect and entered a pre-

liminary injunction against enforcement of the Rule in three States. Dkt. No. 140.

4. Subsequent Administrative Proceedings

In July 2017, the agencies published a notice of rulemaking proposing to repeal and replace the Rule in a "comprehensive, two-step process" process. *See* 82 Fed. Reg. 34,899, 34,899 (July 27, 2017). The first step of this process would rescind the 2015 Rule, restoring the status quo ante by regulation. *Id.* "In a second step," the government "will conduct a substantive re-evaluation of the definition of 'waters of the United States.'" *Id*. The proposal was published on July 27, 2017, and a Supplemental Notice of Proposed Rulemaking was published on July 12, 2018. *See* 83 Fed. Reg. 32,227 (July 12, 2018) (Supplemental Notice). The Supplemental Notice expresses the agencies' doubts concerning the Rule's legality and clarifies their intent to permanently repeal it. *Id.*[2]

SUMMARY OF ARGUMENT

This Court has already found that the 2015 Rule is legally suspect and entered a preliminary injunction against its enforcement. Dkt. No. 140. Every court to consider the issue has agreed: the Rule is riddled with fatal defects. *See In re EPA & Dep't. of Def. Final Rule*, 803 F.3d at 807; *Georgia*, 2018 WL 2766877, at *9; *North Dakota*, 127 F. Supp. 3d at 1055. Because the Rule is manifestly unlawful, vacatur is appropriate.

1. The Rule violated the basic requirements of notice-and-comment rulemaking in

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

numerous respects. ***First,*** the agencies failed to reopen the comment period after making substantial, unanticipated changes to the Rule. Under the APA, the regulated public must be able to anticipate based upon a proposed rule the requirements the final rule may impose. But the agencies' proposed Rule included no hard-and-fast distance limits (100, 1,500 and 4,000 feet) or the reference points for measuring those limits (100-year floodplains and ordinary high water marks of (1)-(3) or (1)-(5) features) that define the reach of the "adjacency" and "significant nexus" tests in the final Rule. The regulated public had no opportunity to comment on those arbitrary standards.

Second, the agencies denied the public the opportunity to comment on the final Connectivity Report, despite acknowledging that it is the key scientific underpinning of the Rule. An agency commits a serious procedural error under the APA when it fails to make the evidentiary basis for a regulation available for public comment.

Third, the agencies declined to respond to many important comments. An agency must adequately respond to significant comments that cast doubt on the reasonableness of an agency position. Here, major substantive concerns went effectively unanswered.

Fourth, the agencies, using social media, engaged in unlawful propaganda and lobbying campaigns to drum up superficial support for the Rule and to defeat legislation intended to prevent it from coming into effect. This conduct violated the law and demonstrates the agencies' lack of an open mind during notice-and-comment process.

Finally, the agencies failed to comply with the Regulatory Flexibility Act (RFA). The RFA required the agencies to justify the impact of the Rule on small businesses. Here, the agencies arbitrarily certified that the Rule would have *no* significant economic impact upon a substantial number of small entities.

2. The Rule is substantively inconsistent with the statutory language, Supreme Court precedent, and the scientific evidence. The Supreme Court in *SWANCC* and *Rapanos* held that the word "navigable" continues to have meaning under the CWA. Yet the Rule asserts jurisdiction over countless isolated waters and desiccated land features that bear not the slightest resemblance to navigable waters.

Other elements of the Rule are out of step with precedent and the evidence. The definition of "tributary" covers millions of previously unregulated features. The Rule assumes that such features have a significant nexus with the (1)-(3) features to which they contribute some flow. But that simply is not true—many largely dry ditches or gullies that qualify as tributaries under the Rule have no meaningful effect on far-distant navigable waters. The grounding of the definition in an OHWM does not help. Sometimes OHWMs form due to one-off precipitation events that are not indicative of regular or meaningful flow. OHWMs are not indicative of a nexus between a ditch and a traditional navigable water, much less a significant nexus.

The Rule's definition of "adjacent" is likewise inconsistent with precedent and the evidence. It depends on made-up limits like the 100-year floodplain and 1,500-foot distances from an OHWM without any explanation of how or why the agencies selected those thresholds. And it departs from any plausible interpretation of the plurality or concurring opinions in *Rapanos*. The same is true of the "significant nexus" test, the application of which depends on arbitrary distance limits and arbitrary considerations like political boundaries.

Finally, the Rule paradoxically treats some features as both "point sources" and jurisdictional waters. The Act defines "discharge of a pollutant" as "any addition of any pollutant *to* navigable waters *from* any point source." Yet the Rule allows a single feature to be

treated both as a point source from which pollutants can be discharged and a water into which discharges can occur.

3. The Rule violates the Constitution in two distinct ways. ***First,*** the Rule—which interprets a criminal statute—is unconstitutionally vague. The vagueness doctrine addresses two due process concerns: ensuring fair notice to the citizenry, and defining standards that prevent those enforcing the law from acting in an arbitrary or discriminatory way. The Rule implicates both concerns. The definition of OHWM, for example, turns on factors like "changes in the character of soil" and "presence of litter and debris" and allows bureaucrats to rely on whatever "other ... means" they deem "appropriate" in deciding when an OHWM is present and where it lies, including by relying solely on historical data. The definitions give the public no meaningful guidance as to when covered features are present on their property, and they virtually guarantee arbitrary enforcement.

Second, the Rule violates the Commerce Clause and federalism principles. Congress may regulate "the channels of interstate commerce" and "those activities that substantially affect interstate commerce." Yet the Rule sweeps in countless features that are not channels of, and have no meaningful effect on, interstate commerce. Under the canon of constitutional avoidance, these concerns are at minimum a basis for construing the statutory text narrowly and denying the agencies deference.

ARGUMENT

I. THE RULE WAS PROMULGATED WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW

The Rule was adopted "without observance of procedure required by law." 5 U.S.C. 706(2)(D). The agencies deprived the public of a meaningful opportunity to comment on

critical aspects of the final Rule and declined to respond to the comments submitted; EPA violated anti-propaganda and anti-lobbying provisions in governing appropriations laws; and it failed to comply with the RFA.[3]

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

When an agency publishes a "notice of proposed rule making," (5 U.S.C. 553(b)), that notice must include "either the terms or substance of the proposed Rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). After the notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. 553(c). This process serves three essential purposes: it (1)" ensur[es] that agency regulations will be tested by exposure to diverse public comment;" (2) fosters fairness by ensuring an opportunity to be heard; and (3) develops the record to "enhance the quality of judicial review." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

The agencies' process defeated these goals. The agencies made substantial changes to the Rule between publication of the proposed Rule and promulgation of the final Rule, without reopening the comment period. They withheld the final version of the Connectivity Report until after the comment period closed, denying the public any opportunity to comment on it or its relevance to the proposed Rule. And they ridiculed or ignored important

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

comments during the comment period.

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

For a regulation to comply with the notice and comment requirements of Section 553, "the final rule the agency adopts must be a 'logical outgrowth' of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The logical-outgrowth test asks whether "[a] party, *ex ante*, should have anticipated that" the requirements contained in the final rule "might be imposed." *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 446 (D.C. Cir. 1991) (brackets omitted). If not, "a second round of notice and comment is required," so interested parties have an opportunity to comment on the elements of the Rule that could not be anticipated. *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994). "[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner*, 705 F.2d at 547. The final Rule here fails the outgrowth test.

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

Much the same goes for the case-by-case applicability of the "significant nexus" test for non-categorically jurisdictional features. In the proposed Rule, any water, wherever located, could be deemed jurisdictional based on a significant nexus to a (1)-(3) feature. The final Rule, by contrast, applies a case-by-case "significant nexus" analysis to features "located within the 100-year floodplain" of a (1)-(3) feature or "within 4,000 feet of the high tide line or ordinary high water mark" of a (1)-(5) feature. 80 Fed. Reg. at 37,105. These distances and reference points are central to the Rule's operation, but there was no way to anticipate their inclusion in the final Rule, and no opportunity to comment on their propriety. "Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance." *North Dakota*, 127 F. Supp. 3d at 1058. This alone is sufficient to vacate the Rule.

2. The agencies denied the public an opportunity to comment on the final Connectivity Report

The Rule must be vacated because the agencies denied interested parties any opportunity to comment on the final Connectivity Report, which compiled the scientific literature and analysis on which the agencies relied to determine the hydrological "connectivity" of various features. The proposed Rule was accompanied only by a draft of the Connectivity Report, which was undergoing review by the SAB. The SAB subsequently recommended numerous substantive changes to the Connectivity Report, and the agencies made several notable changes in response. SAB Review, ID-8046. For example, the final Report introduced a new, continuum-based approach that analyzed the connectivity of particular waters to downstream waters along various "[d]imensions." Final Connectivity Report 1-4,

ID-20858. And it added important new material to a case study on "Southwestern Intermittent and Ephemeral Streams." *Id.* at 5-7. Both changes go to the heart of the legal and scientific flaws of the Rule and would have garnered comments from the Private Party Plaintiffs had they been disclosed during the comment period.[4]

The final Connectivity Report, however, was not published until two months after the comment period closed. 80 Fed. Reg. 2,100 (Jan. 15, 2015). The delayed release combined with the agencies' refusal to extend the comment period made it impossible for interested parties to review and comment on the final Report's conclusions and methodology. *E.g.*, WAC Comments 73; Murray Energy Comments 6, ID-13954. This is no trivial oversight. The agencies "interpret[ed] the scope of 'waters of the United States' … based on the information and conclusions in the Science Report, other relevant scientific literature, [and] the Technical Support Document that provides additional legal and scientific discussion for issues raised in this rule." 80 Fed. Reg. at 37,065.[5] "In light of this information," they "made scientifically and technically informed judgments about the nexus between the relevant waters and the significance of that nexus." *Id*. Because the significant nexus approach underpins the entire Rule and the agencies' legal justification for it, it is no overstatement to say that the Connectivity Report is the evidentiary linchpin of the Rule. *See* 80 Fed. Reg. at

[4] The final Connectivity Report cited 349 scientific and academic sources that were not included in the draft Report, including 36 sources published between when the draft and final Reports were issued. The WAC comments criticized the draft Report for, among other things, failing to provide metrics to measure the significance of a nexus to traditional navigable waters (at 25-26); analyzing "significant nexus" as a binary rather than a gradient (at 27); and failing to assess the significance of the effects of ephemeral features on downstream waters (at 35). *See also, e.g.*, NAHB Comments 37, 49, 90, & 141-42, ID-19540. These and other commenters would have expanded and refined these criticisms in light of the new sources and analysis, had they been given the opportunity to do so.

[5] The "Science Report" is the Connectivity Report. The Technical Support Document aggregated and summarized the agencies' scientific analysis, including the Connectivity Report and the SAB review. *See* Tech. Supp. Doc. 93-163, ID-20869.

37,057 (explaining that the Connectivity Report "provides much of the technical basis for [the] [R]ule").

EPA's decision not to make the final Report available until after the comment period had closed is inexplicable. It is, after all, "fairly obvious" that "studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007). That is precisely what happened here.

3. The agencies failed to consider important comments

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

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

a. For example, several members of the public commented that the proposed Rule's expansive definition of covered "tributaries" was overinclusive. They explained that many lands in the West contain features that the agencies claim are excluded from jurisdiction (*e.g.*, desert washes, arroyos, and gullies), but which would in fact often be covered by the Rule any time they exhibit a bed and banks and an OHWM. *See, e.g.*, Freeport- McMoRan Comments 5, ID-14135; Ariz. Mining Ass'n Comments 7-8, ID-13951; N.M. Cattle Growers Ass'n Comments 12, ID-19595. Yet due to the highly erodible nature of the soil in the West, these features are often formed by a single rain event and rarely carry water. Freeport-McMoRan Comments 5. Thus, the commenters explained, it made no sense to rely on physical characteristics that might indicate a tributary in a wet, humid climate for purposes of identifying tributaries in the arid West. *E.g.*, Ariz. Mining Ass'n Comments 7.

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

b. Members of the farming community commented that the proposed Rule would eviscerate several statutory permit exemptions. AFBF Comments 13-17, ID-18005. They explained, for example, that although farming activities such as plowing and seeding are exempt from Section 404 permitting requirements (*see* 33 U.S.C. 1344(f)(1)), the CWA's "recapture" provision (33 U.S.C. 1344(f)(2))—which requires permitting for otherwise

exempt activities when they "impair" the flow of navigable waters—will frequently be triggered when common features on the farm, such as erosional features and ditches, become "tributaries" under the Rule. Beyond that, the proposed Rule would override the Section 402 permit exemption for agricultural stormwater runoff and irrigation (33 U.S.C. 1342(l)(1)) by regulating as "tributaries" the ditches and drainages that carry stormwater and irrigation water. AFBF Comments 16-17. Again, the agencies did not respond, offering only a terse, unsubstantiated assertion that the Rule "does not affect any of the [statutory] exemptions" and "does not add any additional permitting requirements on agriculture." 80 Fed. Reg. at 37,055. But "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office*, 567 F.2d at 35-36.

c. The agencies also demeaned certain comments and commenters. During the comment period, for example, Administrator McCarthy, publicly (and prematurely) dismissed the concerns expressed by agricultural interests (many of the same concerns that appear in this brief) as "silly" and "ludicrous" and "myths." Farm Futures, *Ditch the Myths*, perma.cc/8F4P-XTAP. The APA requires agencies to listen to and answer comments and concerns on proposed rules; "these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

B. EPA's advocacy campaigns were unlawful

As a GAO investigation into EPA's advocacy activities concluded, EPA violated anti-propaganda and anti-lobbying provisions contained in federal appropriations acts. Op. B-326944, 2015 WL 8618591. These violations render the agencies' failure to take the notice-and-comment process seriously all the more apparent.

1. EPA's "crowdsourcing" campaign constituted illegal "covert propaganda"

The Financial Services and General Government Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, which authorized funding for EPA during the relevant time, prohibits use of appropriations "for publicity or propaganda purposes." *Id*., div. E, § 718. *Accord* Pub. L. No. 113-235, div. E, § 718, 128 Stat. 2130, 2383 (2015) (2015 appropriations). "[M]aterials … prepared by an agency … and circulated as the ostensible position of parties outside the agency amount to [prohibited] covert propaganda." Op. B-305368, 2005 WL 2416671, at *5 (Comp. Gen. Sept. 30, 2005).

EPA's social media campaign violated this law. EPA used Thunderclap (a "crowdspeaking" platform) to recruit supporters of the proposed Rule. Op. B-326944, 2015 WL 8618591, at *2 (Comp. Gen. Dec. 14, 2015); *see* perma.cc/9CHN-87T8 (archived Thunderclap page). Once the campaign reached a minimum threshold of supporters, Thunderclap disseminated a message through each supporter's social media account. 2015 WL 8618591, at *2. The message, to an audience of 1.8 million, read: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community." *Id*. at *3. The statement concluded with a hyperlink to EPA's webpage promoting the proposed Rule. *Id.* Nothing identified EPA as the author. According to GAO, this sort of surreptitious messaging is "beyond the range of acceptable agency public information activities," "reasonably constitutes 'propaganda,'" and was accordingly unlawful. Op. B-223098, 1986 WL 64325, at *1 (Comp. Gen. Oct. 10, 1986).

This alone is a basis for vacating the Rule. "Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect … regulated entities by

ensuring that they are treated with fairness and transparency after due consideration and industry participation." *Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013). EPA's covert propaganda campaign, particularly when taken together with its other social media efforts, demonstrates a lack of such fairness and transparency.

2. EPA lobbying efforts were unlawful

Anti-lobbying provisions in appropriations statutes prohibit executive agencies from using appropriated funds "for the preparation" of materials "designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself." Pub. L. No. 113-235, div. E, § 715, 128 Stat. 2130, 2382-83 (2015). These provisions prohibit an agency from engaging in "grassroots lobbying" by appealing "to the public to contact Members of Congress in support of, or in opposition to, pending legislation" that the agency supports or opposes. B-326944, 2015 WL 8618591, at *12.

That is exactly what EPA did. Its blog post discussing the importance of clean water to surfers and brewers linked to two external webpages that the GAO concluded made a "clear appeal" to the public to contact members of Congress to oppose pending legislation that would have blocked the Rule. B-326944, 2015 WL 8618591, at *15. GAO found that EPA "associated itself" with the lobbying messages on these external websites (*id.* at *18) and thereby "appealed to the public to contact Congress in opposition to pending legislation." *Id.* at *13. In light of EPA's unlawful propaganda and lobbying campaigns, the Rule was promulgated "without observance of procedure required by law." 5 U.S.C. 706(2)(D).

C. The agencies violated the RFA

The RFA requires an agency to perform a "regulatory flexibility analysis" that estimates the impact of a proposed rule on small entities and determines if less burdensome

alternatives are available. 5 U.S.C. 603(a)-(d). The agency must summarize an analysis in the Federal Register at the time the rule is proposed (5 U.S.C. 603(a)) and publish a final analysis, taking account of public comments, with the final rule. 5 U.S.C. 604(a). These procedures are mandatory unless the agency certifies that the rule will not "have a significant economic impact upon a substantial number of small entities." 5 U.S.C. 610(a).

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

The starting point for any comparative analysis, according to EPA, is the immediate status quo ante. EPA, *Guidelines for Preparing Economic Analyses* 5-1 (2010) (2014 update), perma.cc/8TWH-SMJX. That is consistent with OMB guidance, which requires that comparative economic analyses (including RFA analyses) take as the status quo ante "the best [possible] assessment of the way the world would look absent the proposed action." OMB, Circular A-4 (2003), perma.cc/Q335-NPYA. In conformity with that guidance, public commenters—relying on the regulatory landscape the day before the proposed Rule was published—explained the Rule would require small businesses and municipalities across the country to obtain countless new and costly CWA permits, forcing many to "forgo … development plans." NFIB Comments 7, ID-8319. The Small Business Administration —an independent federal agency created by Congress to protect small business concerns—submitted similar comments urging the agencies to withdraw their certification. ID-7958.

These concerns are not hypothetical. Small business owners have been required to halt projects or take land out of production because their lands contain previously non-jurisdictional features that may be jurisdictional under the 2015 Rule. *See* M. Jacobs Declaration ¶ 5-8, 14, 20; R. Reed Declaration ¶¶ 1-5, 10-14.

Indeed, the agencies conceded that the Rule would result in a 2.84–4.65% *expansion* of jurisdiction when "[c]ompared to a baseline of recent practice." 80 Fed. Reg. at 37,101. And (using underinclusive estimates) they acknowledged that, as a result of the Rule, CWA permitting costs would increase by tens of millions of dollars, and mitigation costs by over one hundred million dollars, throughout the Nation each year. *Economic Analysis of Proposed Rule* 13-18 (Mar. 2014), ID-0003; *Economic Analysis of the EPA-Army Clean Water Rule* x-xi (May 2015), ID-20866.

2. For purposes of their RFA certification, the agencies ignored these facts. They based their conclusion on an assertion that "fewer waters will be subject to the CWA under the rule" as compared with "historic practice[s]" *dating to 1986* (80 Fed. Reg. at 37,101-102)—practice[s] that have since been superseded. *See* EPA, *2008 Rapanos Guidance and Related Documents*, perma.cc/6ZPF-PPME. In support of that obviously mistaken approach, the agencies offered no explanation beyond the *ipse dixit* that the 1986 practices "represent [an] appropriate baseline for comparison." 80 Fed. Reg. at 37,101. Not only is that wrong as a matter of common sense, but it is also unsupported by reasoning and evidence. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency conclusions must be supported by reasoning and evidence). The agencies' decision to use a long-outdated baseline rather than *current* regulatory guidance "remove[d] from consideration the economic analysis required by statute," in violation of the RFA. *Cape Hatteras Access Pres.*

All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 127-28 (D.D.C. 2004).

II. THE RULE IS CONTRARY TO LAW

The Rule asserts jurisdiction over vast tracts of the United States, including millions of miles of man-made ditches and municipal stormwater systems, dry desert washes and arroyos in the arid west, and virtually all of the water-rich Southeast. Whatever leeway the Act may give the agencies to regulate "navigable waters" (33 U.S.C. § 1362(7)), the statutory text is not limitless. To the contrary, "an administrative agency's power" is always "limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, (1988). The agencies lost sight of this essential check on their power, ignoring the statute's language and distorting the Supreme Court's precedents beyond recognition.

A. The Rule is inconsistent with statutory language, Supreme Court precedent, and the scientific evidence

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

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

The Rule ignores this admonition. It allows the agencies to assert federal regulatory jurisdiction over desiccated ditches (as "tributaries") and any isolated features that happen to be nearby (as waters with a "significant nexus"). As a matter of plain meaning, treating a desiccated ditch as a "tributary" to "navigable water"—and treating barely damp, isolated

"wetlands" nearly a mile away as likewise "waters of the United States" because they are located within 4,000 feet of such "tributaries"—is impermissible. For example:

Figure 1: With an "ordinary high water mark" with a bed and banks between them, the feature depicted above is likely to be a "navigable water." API Comments, ID-15115.

Figure 2: This feature was deemed a "water of the United States" after the Corps concluded that it has an ordinary high water mark. AFBF Comments, App. A.

As a matter of plain meaning, treating features like these as "tributaries" to "navigable waters" makes no sense.

There is perhaps no better illustration of these concerns than the "seasonally ponded, abandoned gravel mining depressions" that were at issue in *SWANCC*. 531 U.S. at 164. Those very same "nonnavigable, isolated, intrastate waters" (*id*. at 169) that five justices agreed were *not* covered by the Clean Water Act *would* be covered by the Rule. The depressions are well within 4,000 feet of Poplar Creek, a tributary to Fox River, a traditional navigable water. *See* perma.cc/GU2S-XZ4S. And there can be little doubt that the Corps would find the existence of a substantial nexus to the creek.

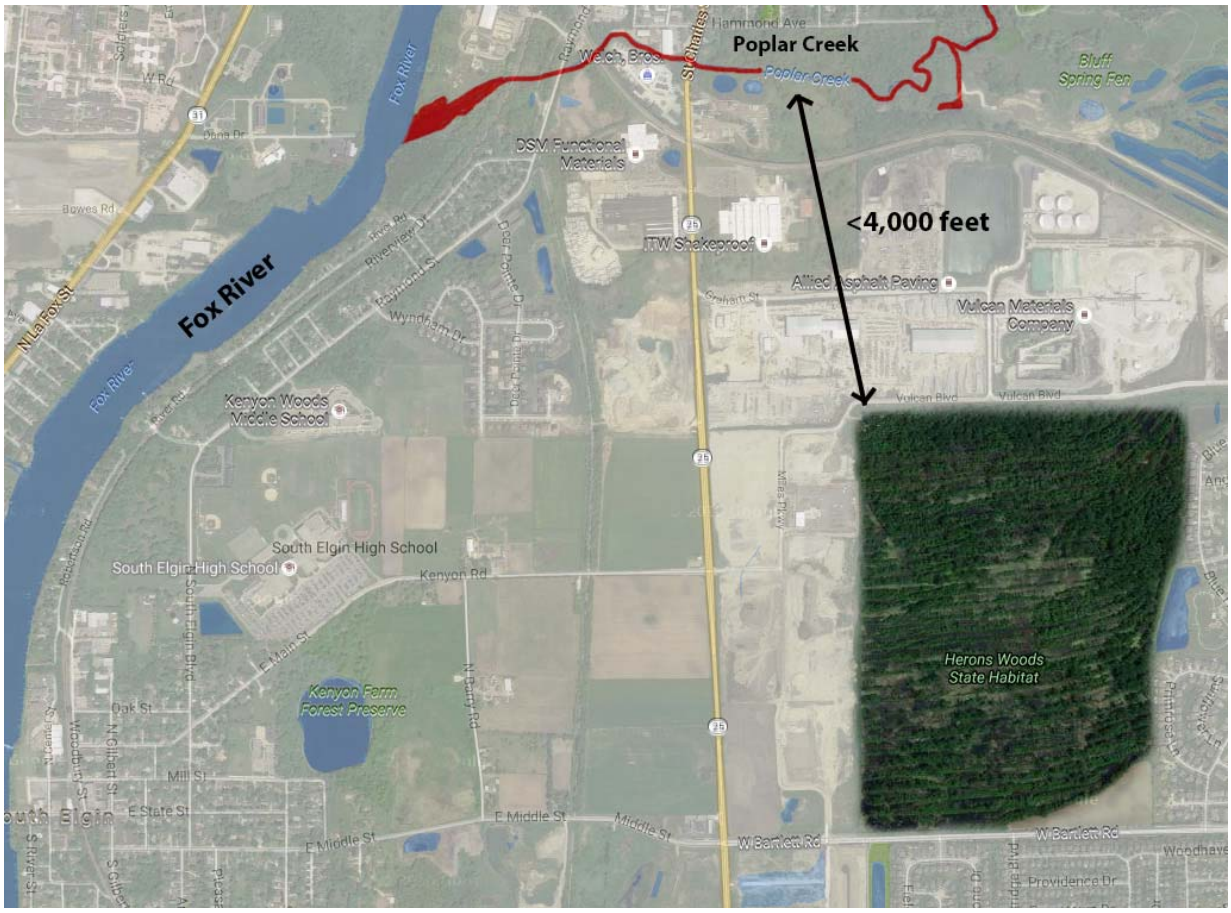


Figure 3: The water features at issue in *SWANCC* were the long, shallow ponds that fill seasonally in what is now the Herron Woods State Habitat.

The Rule's coverage of all "interstate waters" (33 C.F.R. 328.3(a)(2)) likewise ignores the word "navigable," replacing it with the word "interstate," and ignores Congress's choice to *remove* the term "interstate waters" from the Act. *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) ("interstate"), and Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) ("interstate or navigable"), with 33 U.S.C. 1362(7) ("navigable").

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

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

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

a. The Rule defines "tributary" to include any feature contributing any flow to a traditional navigable water or interstate feature, "either directly or through another water," and "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. 328.3(c)(3). Because flow may be "intermittent[] or ephemeral" (80 Fed. Reg. at 37,076), jurisdiction under the Rule extends to minor creek beds, municipal stormwater systems, ephemeral drainages, and dry desert washes that are dry for months, years, or even decades at a time, as long as they exhibit a bed, banks, and "ordinary high water mark," or OHWM. A feature may qualify despite passing "through any number of

[non-jurisdictional] downstream waters" or natural or man-made physical interruptions (*e.g.*, culverts, dams, debris piles, or underground features) *of any length*, so long as a bed, banks, and OHWM can be identified upstream of the break. *Id*; 33 C.F.R. 328.3(c)(3). And the agencies need not use current facts; they may use historical information alone. *See*, *e.g.*, 80 Fed. Reg. at 37,081, 37,098.

The Rule defines OHWM to mean "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 80 Fed. Reg. at 37,106. That is the *same* definition that Justice Kennedy criticized in *Rapanos* as too uncertain and attenuated to serve as the "determinative measure" for identifying waters of the United States. 547 U.S. at 781. Because an OHWM is an uncertain indicator of "volume and regularity of flow," it brings within the agencies' jurisdiction "remote" features with only "minor" connections to navigable waters—features that "in many cases" are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id*. at 781-782 (Kennedy, J.). The definition's reach is thus vast, covering countless miles of previously unregulated features.[6] And the definition is categorical, sweeping in many

[6] *See, e.g.*, NAHB Comments 56-59, 121-123, ID-19574 (the Rule will extend jurisdiction over nearly 100,000 miles of intermittent and ephemeral drainages in each of Kansas and Missouri alone); NSSGA Comments 21, ID-14412 (mountain-range watersheds in central California coastal region); UWAG Comments 51-53, ID-15016 (drainage ditches in southeastern coastal plains); Waters Working Group Comments 27, ID-19529 (water supply systems and municipal separate storm sewer systems); Comments of Delta County, Colorado 3, ID-14405 ("artificial stock ponds west of the Mississippi"); Murray Energy Corp. Comments 11, ID-13954 (mine site drainage ditches and culvert conveyances); AAR Comments 4, ID-15018 (rail ditches).

isolated, often dry land features regardless whether "their effects on water quality are speculative or insubstantial." *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). By treating all tributaries as categorically jurisdictional—even ones "carrying only minor water volumes toward" a "remote" navigable water (*id.* at 788, 781)—the Rule is inconsistent with Justice Kennedy's "significant nexus" approach, to say nothing of the plurality opinion.

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

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

In attempting to justify the Rule's effects in arid ecosystems, the agencies relied almost exclusively on a case study of the San Pedro River. *See* 79 Fed. Reg. at 22,231-

22,232; Connectivity Report at B-37, B-55. But the San Pedro is demonstrably *un*representative of arid regions nationwide. *See*, *e.g.*, Southwest Developers Comments 2, ID-15362 (of "1,016 publications" in the Draft Connectivity Report, "only three include research on arid west headwaters in small watersheds"). And where the Connectivity Report briefly asserts that characteristics "similar to the San Pedro River" "have been observed in [three] other southwestern rivers," it acknowledges that each of those systems has *more* flow than the San Pedro. Connectivity Report B-48 to B-49. By relying heavily on the San Pedro, the agencies arbitrarily overstated the connections between arid channels and downstream navigable waters. And an agency errs by relying "almost exclusively" on a sample of data but offering "no assurance" that it "was in any way representative" of the universe of regulated entities. *E.g.*, *Saint James Hosp. v. Heckler*, 760 F.2d 1460, 1466-67 (7th Cir. 1985).

c. The Rule also implausibly asserts that there is a significant hydrological nexus between every tributary and the nearest (1)-(3) feature, despite intervening man-made or natural breaks of literally "any length." 33 C.F.R. 328.3(c)(3). Indeed, EPA's own SAB noted that the Connectivity Report lacked sufficient information on the influence of human alterations on connectivity and "generally exclude[d] the many studies that have been conducted in human-modified stream ecosystems." SAB Report 31. It was arbitrary and capricious for the agencies to reach, on unexplained grounds, a result inconsistent with the SAB's conclusion.

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

The Rule's categorical approach to "adjacent" waters (33 C.F.R. 328.3(a)(6)) runs into similar problems. The Rule defines "adjacent" as "bordering, contiguous, or neigh-

boring." The term "neighboring" is defined to include, among other things, (i) features within 100 feet of the OHWM of a navigable water or tributary, and (ii) features within the 100-year floodplain of such a water and within 1,500 feet of its OHWM. 33 C.F.R. 328.3(c)(2). This definition is insupportable for four reasons.

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

Second, by asserting jurisdiction based on adjacency not only to traditional navigable waters, but to any tributary, the Rule violates Justice Kennedy's *Rapanos* concurrence. Justice Kennedy rejected the idea that a wetland's mere adjacency to a *tributary* could be "the determinative measure" of whether it was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." 547 U.S. at 781. Yet the Rule categorically asserts jurisdiction over "waters" based on their "adjacency" to "tributaries" "however remote and insubstantial" (*id.* at 779-80), including ephemeral drains, ditches, and streams remote from navigable waters.

Third, the Rule improperly relies on adjacency to assert jurisdiction not only over "wetlands," but all other "waters." According to the *Rapanos* plurality, non-wetland "waters"—especially those separated from traditional navigable waters by physical barriers

or significant distances—"do not implicate the boundary-drawing problem" that justified deference to the agency's approach to adjacency in *Riverside Bayview*. 547 U.S. at 742. For this reason, courts have rejected past attempts to assert "adjacency" jurisdiction over non-wetlands. *E.g.*, *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir. 2007).

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

4. The "significant nexus" test resurrects the invalidated Migratory Bird Rule

Although the Rule's case-by-case "significant nexus" test (33 C.F.R. 328.3(a)(7)-(8)) is ostensibly based on *SWANCC* and Justice Kennedy's opinion in *Rapanos*, it misapplies both and asserts jurisdiction broader than the theories of connection rejected in those cases.

The purpose of the significant nexus standard, Justice Kennedy explained in *Rapanos*, was "to give the term 'navigable' some meaning" by limiting federal jurisdiction to wetlands (not all waters) with a significant impact on traditional navigable waters. 547 U.S. at 778-779. A water is thus jurisdictional only if it "significantly affect[s] the chemical, physical,

and biological integrity of … waters more readily understood as 'navigable.'" *Id.* at 780. This standard excluded features that are too "remote" or whose "effects on [navigable] water quality are speculative or insubstantial." *Id.* By contrast, the Rule asserts jurisdiction if a feature affects the "chemical, physical, *or* biological integrity" of a traditionally navigable or interstate water (33 C.F.R. 328.3(c)(5) (emphasis added)), thereby ignoring the conjunctive nature of both the statute and Justice Kennedy's test.

This is a crucial distinction. By requiring only one type of connection, the Rule effectively reinstates the Migratory Bird Rule invalidated by the Supreme Court in *SWANCC*. 531 U.S. at 167. In particular, it asserts jurisdiction based on singular functional connections, including the "[p]rovision of life cycle dependent aquatic habitat" (33 C.F.R. 328.3(c)(5)(ix)), between one water and some other distant water (including a distant interstate trickle). That is the theory of jurisdiction reflected in the Migratory Bird Rule, under which isolated non-navigable ponds were jurisdictional solely "because they serve[d] as habitat for migratory birds." *SWANCC*, 531 U.S. at 171-172.

5. The Rule's hard distances and other criteria are unsupported by scientific evidence

Between the proposed Rule and the final Rule, the agencies introduced hard distance tests and categorical exemptions—never subject to public comment—that are unsupported by the scientific evidence.

Bright line distances and floodplains. The Rule asserts categorical "adjacency" jurisdiction over features that are both within the 100-year floodplain of a (1)-(5) feature and within 1,500 feet of its OHWM. *See* 33 C.F.R. 328.3(c)(2)(ii). It also asserts the categorical adjacency of waters within 100 feet of the OHWM of a (1)-(5) feature, as well as waters

within 1,500 feet of the high tide line of a (1)-(3) feature. *Id*. at (c)(2)(i), (iii). Similarly, the Rule asserts jurisdiction over all waters within the 100-year floodplain of a (1)-(3) feature or 4,000 feet of the OHWM of a (1)-(5) feature, where those waters are found to have a "significant nexus" to a (1)-(3) feature. 33 C.F.R. 328.3(a)(8). Those arbitrary selections go effectively unexplained and are unsupported by the evidence. This alone is a basis for vacating the Rule, for an agency "may not pluck a number out of thin air." *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982); *see also Sys. Fuels, Inc. v. United States*, 642 F.2d 112, 114 (5th Cir. 1981) ("shield of agency expertise" forfeit when agency act is "automatic" and "unreasoned").

The agencies essentially admit that the 100-year floodplain was chosen based on administrative convenience, not science. *See* 80 Fed. Reg. at 37,089 (100-year floodplain serves "purposes of clarity" and "regulatory certainty"). But a floodplain of *any* interval would serve that purpose, and a 100-year floodplain serves it less well than using a shorter period for which flood limits can be determined more easily and with more certainty. Nevertheless, the agencies ignored comments urging that a one- or five-year floodplain would be a better metric. *E.g.*, Nat'l Lime Ass'n Comments 13-16, ID-14428; N.C. Farm Bur. Comments 13, ID-15078. The agencies concede the lack of "scientific consensus" over the appropriate flood interval. *See* EPA, *Questions and Answers—Waters of the U.S. Proposal* 5, perma.cc/7RRP-V46X. To be sure, they cited the Science Report's generic statement that "floodplains are physically, chemically and biologically integrated with rivers via functions that improve downstream water quality." 80 Fed. Reg. at 37,085. But the relevance of "floodplains" *in general* does not justify reliance on a 100-year floodplain *in particular*. There is no scientific basis for using the 100-year interval to determine CWA jurisdiction—

an interval that both expands CWA jurisdiction and adds to its uncertainty.

When choosing the 1,500-foot adjacency boundary, the agencies relied on unidentified "scientific literature," their own "technical expertise and experience," and the convenience "of drawing clear lines." 80 Fed. Reg. at 37,085. The same is true of the nearly mile-wide (4,000 foot) significant-nexus boundary: The agencies invoked their "extensive experience making significant nexus determinations" as having "informed the[ir] judgment." *Id*. at 37,090. But they offered no evidentiary basis for plucking those numbers from what they *admitted* was otherwise thin air. *See* 80 Fed. Reg. at 37,090 ("the science does not point to any particular bright line"); *see also Texas v. EPA*, 690 F.3d 670, 678 (5th Cir. 2012) ("lack of findings moots any suggestion that [courts] must defer to … technical expertise").

Merely intoning "technical expertise" is "not sufficient" in the absence of "specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose." *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). Courts may "defer to [an agency's] expertise [only] if it provides substantial evidence to support its choice and responds to substantial criticism of [the] figure." *United Distrib. Cos. v. FERC,* 88 F.3d 1105, 1141 n.45 (D.C. Cir. 1996). That evidence is lacking here.

Ditches. The Rule's arbitrariness is underscored by its categorical assertion of jurisdiction over some (but not all) ditches—an ambiguous term nowhere defined in the Rule. *See* 33 C.F.R. 328.3(b) "[N]o scientific literature is presented that ... evaluates the effects that ditches have on the integrity of downstream waters." WAC Comments 41. Thus, as the chair of the SAB's review panel explained, "many research needs must be addressed in order to discriminate between ditches that should be excluded and included." Rodewald Transmittal Mem. 7, ID-7617. Or, as another panel member explained, the Connectivity

Report "d[id] not provide sufficient information on which to discuss the role of these man-made features." *Id.* at 43. For their parts, the agencies did not dispute the absence of evidence supporting the Rule's arbitrary assertion of jurisdiction over some ditches. Response to Comments (Topic 6) 89, ID-20872. To the contrary, they acknowledge scientific "uncertainty" on the matter. *Id.* at 23.

6. The agencies' classification of Texas Coastal Prairie Wetlands is arbitrary and capricious

For a water to be considered jurisdictional under the Rule's case-by-case significant nexus test, it must significantly affect the chemical, physical, or biological integrity of a (1)-(3) feature, either alone or with other "similarly situated" waters "in the region." But the agencies have determined that so-called Texas Coastal Prairie Wetlands (and a handful of other regionally-specific features like Delmarva Bays) *categorically* "function alike and are sufficiently close to function together in affecting downstream waters," regardless of any analysis of their functions with other such features "in the region."

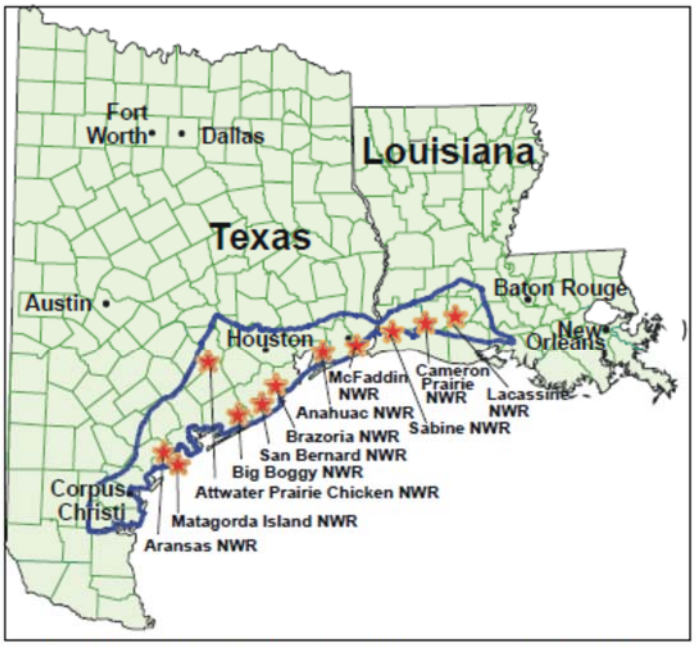
That conclusion is plainly arbitrary and capricious both because Texas Coastal Prairie Wetlands are not meaningfully defined and because, insofar as the agencies have attempted to define such features at all, they have done so using political boundaries between States, which is scientifically irrelevant.

First, the Rule purports to define Texas Coastal Prairie Wetlands as "freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast." 80 Fed. Reg. at 37105. But the agencies readily admit that "the term Texas coastal prairie wetlands" is essentially made up, and "not used uniformly in the scientific literature." 80 Fed. Reg. at 37072. Yet that does not stop the

agencies from asserting, without scientific support, that Texas Coastal Prairie Wetlands "are locally abundant and in close proximity to other coastal prairie wetlands." *Id*. at 37073. In other words, scientists do not agree as to which wetlands are so-called Texas Coastal Prairie Wetlands, but the Rule goes on to pretend that they do—how else could it conclude that Texas Coastal Prairie Wetlands are always in close proximity to "other" wetlands?

Beyond all that, the Rule also fails to describe why Texas Coastal Prairie Wetlands should be aggregated categorically without regard to distance, whereas other closely grouped wetlands are not. The absence of such explanation in the record is the very definition of arbitrary and capricious rulemaking.

And there is more. Remarkably, the features that the Rule calls "Texas Coastal Prairie Wetlands" only "along the Texas Gulf Coast" (80 Fed. Reg. at 37105), despite that identical wetlands are—according to the government itself—found on the *Louisiana* Gulf Coast:



Location of the coastal prairie. The stars indicate management and restoration sites in the Department of the Interior. (NWR = National Wildlife Refuge).

Figure 4: "Texas Coastal Prairie Wetlands" appear in Louisiana. *See* U.S. Geological Survey, Nat'l Wetlands Research Center, *Coastal Prairie*, perma.cc/A28R-HCH5.

From this map, it is clear that Texas Coastal Prairie Wetlands cover a wide geographic area, including approximately 22 Texas counties and 8 Louisiana parishes extending inland up to 100 miles. That conclusion is consistent with the preamble to the Rule, which states that "[a]long the Gulf of Mexico from western Louisiana to south Texas, freshwater wetlands occur as a mosaic of depressions, ridges, intermound flats, and mima mounds." 80 Fed. Reg. at 37072-73. Yet there is no conceivable scientific basis for using political boundaries in an analysis of hydrological function. If such features are not "similarly situated" as a categorical matter within Louisiana, neither are they when located in Texas.

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

The Rule asserts jurisdiction over "man-altered[] or man-made water[s]" and "channelized" waters and "piped streams," "even where used as part of a stormwater management system." 33 C.F.R. 328.3(c)(3); 80 Fed. Reg. at 37,100. "Jurisdictional ditches" include those with "intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands," and those "regardless of flow, that are excavated in or relocate a tributary." 80 Fed. Reg. at 37,078.

The agencies concede that, under this definition, ditches and stormwater conveyances may be treated as "*both* a point source and a 'water of the United States.'" *Id.* at 37,098 (emphasis added). But the Act's structure and plain text "conceive of 'point sources' and 'navigable waters' as separate and distinct categories." *Rapanos*, 547 U.S. at 735 (plurality). That follows from the Act's definition of "discharge of a pollutant," which is "any addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. 1362(12)(A) (emphases added). A point source is "any discernible, confined and discrete conveyance,"

including any ditch, channel, tunnel, conduit, or fissure "from which pollutants are or may be discharged." *Id.* 1362(14). Similarly, Section 402 of the Act, requires permits for "discharge *from* municipal storm sewers" "*into* the navigable waters." 33 U.S.C. 1342(p)(3)(B), (a)(4) (emphasis added). Such point source discharges are subject to extensive regulation, including permit-imposed effluent limitations. *E.g.*, 40 C.F.R. 122.41-.44; *id.*, 133.102, 403. There is thus no need to designate these conveyances as waters of the United States, which could preclude their use for their intended water management purposes.

Under the Act, point sources (like storm sewers) are conveyances that collect pollutants and convey them for treatment before they are discharged to WOTUS. To require them to meet water quality standards intended by Congress to apply to WOTUS "make[s] little sense." *Rapanos*, 547 U.S. at 735 (plurality). Because Congress defined ditches and other wastewater and stormwater conveyances as "point sources" by statute (33 U.S.C. 1362(14)), they cannot also be "waters" by regulation. Congress plainly understood such conveyances to be something *from* which pollutants are discharged, and not jurisdictional waters into which discharges are made. The agencies say that they must treat these conveyances as jurisdictional waters, lest wrongdoers attempt to avoid the permit requirement by introducing pollutants into upstream ditches and sewers. That is just wrong. The agencies (and States) closely regulate point sources using existing permitting programs.

III. THE RULE VIOLATES THE CONSTITUTION

A. The Rule is unconstitutionally vague

"[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012). The first concern is to ensure fair notice to the citizenry, so regulated individuals and entities

"know what is required of them [and] may act accordingly." *Id*. at 253. The second concern is "to provide standards for enforcement" (*Fire Fighters*, 502 F.3d at 551), "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 567 U.S. at 253. The Rule offends both concerns: it fail to give the public fair notice and gives agency bureaucrats malleable discretion to determine which land features are jurisdictional.

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

To begin, ambiguous standards for the presence of an OHWM like "changes in the character of soil" and "presence of litter and debris" invite arbitrary enforcement. But even if that were not enough, the Rule expressly allows agency staff to rely on whatever "other ... means" they deem "appropriate" in deciding when an OHWM is present and where it lies. 33 C.F.R. 328.3(c)(6). In fact, "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination." U.S. Army Corps of Eng'rs, *Regulatory Guidance Letter No. 05-05*, at 3 (Dec. 7, 2005). Regulators can reach any outcome they please, and regulated entities cannot know the outcome until they are already exposed to criminal liability, including crushing fines.

Matters are made worse by the methods prescribed for identifying an OHWM, which are standardless and cannot be replicated by the regulated public. Agency staff making an OHWM determination *do not even need to visit the site*. "Other evidence, besides direct field observation," can "establish" an OHWM. 80 Fed. Reg. at 37,076. The preamble warns that

regulators may use, for example, desktop computer models "independently to infer" jurisdiction where "physical characteristics" of bed and banks and OHWM "are *absent* in the field." *Id*. at 37,077 (emphasis added). That means an OHWM will exist when they *say* it exists, even if it's not visible to the naked eye.

Significant nexus. The standardless discretion of the Rule is equally apparent with respect to the "case-by-case" significant nexus test. 80 Fed. Reg. at 37,058. The test turns on subjective observations and opaque analyses. Consider a landowner with a small, isolated pond on her property. To determine whether she needs a federal permit to discharge into the pond, the landowner must first identify all traditional navigable waters, interstate waters, and tributaries anywhere within 4,000 feet—*nearly a mile*—of the pond. Setting aside the vagueness of what counts as a "tributary" in the first place, imagine the landowner finds a tributary within the 4,000-foot limit. She must then sort out whether regulators will conclude that the pond, together with "other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of the nearest traditional navigable water or interstate feature. 33 C.F.R. 328.3(c)(5). These so-called standards fail to put the regulated community on notice of when the CWA applies.

Categorical exemptions. Many of the rule's categorical exemptions from jurisdiction are also vague. For example, the agencies inserted an exemption for "puddles." 33 C.F.R. 328.3(b)(4)(vii). But what is a puddle? The agencies assert jurisdiction over "depressional wetlands" (80 Fed. Reg. at 37,093), without regard for size or permanence. When does a recurring puddle become a small depressional wetland? This is not a hypothetical concern.

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

Figure 5: Delineated "Water Feature 21" in Project SPK 2002-00641. According to common experience, it's a puddle. *See Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act* 21 & n.87 (Sept. 20, 2016), perma.cc/W6U3-583Y.

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

Named water features. The Rule's treatment of specific named water features, like Texas Coastal Prairie Wetlands, is also vague. The Rule's definition of such features as

"freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast" does not clear up the confusion. The regulated public has no way to know when wetlands "along" the Texas coast (how near the coast do they have to be?) are part of a "mosaic" (how tightly packed do they have to be?). Similar uncertainties exist with identification of the other listed features.

Jurisdictional determinations. The Corps' jurisdictional determination (JD) process does not cure the problem. We are unaware of any other circumstance in which a citizen must obtain a case-specific government report, at great personal expense, to be informed of the limits of the law. *See Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) ("This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property"). And members of the Supreme Court have observed that "the reach and systemic consequences of the Clean Water Act remain a cause for concern" because "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1374-1375 (2012) (Alito, J., concurring)). JDs cannot solve that constitutional problem when they are guided by a vague rule; are available only in the Section 404 context, not to determine the need for a Section 402 permit (*see* 33 C.F.R. 331.2); and are not binding on environmental NGOs, who are free to bring civil enforcement actions under the Rule's nebulous standards.

B. The Rule violates the Commerce Clause and federalism principles

1. The Supreme Court has read the Commerce Clause "to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,'

and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 1566, 2578 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). The CWA is authorized by Congress's "traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made," (*SWANCC*, 531 U.S. at 172), that is, those waters that can be used as channels of interstate commerce. While Congress has authority to regulate more than the channels themselves, regulation under this authority is limited to protecting those channels. But the Rule sweeps in numerous local land and water features that are not navigable-in-fact and have no appreciable connection to navigable-in-fact waters.

The agencies' assertion of authority in *SWANCC* raised grave constitutional issues because the waters there were remote from navigable-in-fact waters (*see* 531 U.S. at 174); under the 2015 Rule, the more expansive assertion of authority over local land and water features is far worse. No one could seriously say that an ephemeral trickle that happens to cross a state line, a dry wash in a Western desert, or an isolated wetland that is 4,000 feet from the nearest intermittent tributary that is itself miles away from any truly navigable water—is a channel of interstate commerce. Nor could anyone say that such features "'substantially affect[]' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). Precisely because it covers mostly dry, remote land features with no meaningful connection with actual waterways, the Rule "effectually obliterate[s] the distinction between what is national and what is local." *Id.* at 557. On this score, even the agencies equivocate, asserting without citation that waters covered by the Rule "*could* affect interstate or foreign commerce." 80 Fed. Reg. at 37,084 (emphasis added). *Could affect* is a far cry from *substantially do affect.*

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

Given the judiciary's "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States" (*Lopez*, 514 U.S. at 580-581 (Kennedy, J., concurring)), the Court should not countenance the agencies' assault on local jurisdiction over land use. Regulation of "development and use" of "land and water resources" is a "quintessential state and local power" preserved by the CWA. *Rapanos*, 547 U.S. at 738. The Rule's dramatic encroachment on state authority violates the federalism principles embodied in the Constitution and the text of the CWA itself.

C. The constitutional concerns are a basis for construing the statutory text narrowly and disentitling the agencies to *Chevron* deference

1. The Court need not hold that the Rule violates the Due Process and Commerce Clauses in order to invalidate it on these grounds. It is enough to say that the agencies' interpretation of the statutory text is an unreasonable one in light of the serious constitutional concerns it implicates. That is so for three independent reasons.

First, it is a foundational canon of statutory interpretation that "statutes should be interpreted to avoid constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 379 (2005). According to that well settled maxim, "the judiciary must rightly presume that Congress acts consistent with its duty to uphold the Constitution" and "make every effort to construe statutes so as to find their constitutional foundations and thus avoid needless constitutional confrontations." *NMA v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). *Accord, e.g.*, *United States v. Rumely*, 345 U.S. 41, 45 (1953) ("'It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality'"). The is no serious question but that the Rule *does* raise very serious constitutional doubts, as we have just shown. The Court accordingly should invalidate the Rule because it runs afoul of the constitutional avoidance canon.

Second, according to the so-called clear statement rule, a statute cannot be read to "displace traditional state regulation" unless "the federal statutory purpose [is] 'clear and manifest.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). "[U]nless Congress conveys its purpose clearly," in other words, "it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).

That principle precludes reading the CWA to displace state and local authority over general land use, not only because there is no clear statement authorizing such displacement of traditional state regulation, but because Congress in fact made the *opposite* statement: The Act expressly "preserve[s] and protect[s] the primary responsibilities and rights of States" to regulate "land and water resources." 33 U.S.C. 1251(b).

More generally, because one must "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional auth-

ority," if an agency's statutory interpretation "invokes the outer limits of Congress' power, [the Court must require] a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172-173. There simply is none here.

Finally, because the CWA is a criminal statute, the rule of lenity requires resolution of any ambiguities in the statutory language against the government. Consistent with the vagueness doctrine, this "'time-honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

The rule applies with full force here. The Supreme Court has recognized that administrative "interpretations of statutory criminal penalties [may] provide such inadequate notice of potential liability [that they] offend the rule of lenity." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704 n.18 (1995). Just so here. And "[b]ecause [courts] must interpret the statute consistently," the rule of lenity applies to any statute, like the CWA, that "has both criminal and noncriminal applications," no matter whether the rule is raised in the civil or criminal context. *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992) (plurality opinion)).

2. For the same reasons that the rules of constitutional avoidance, clear statements, and lenity all require vacating the Rule's overbroad interpretation of the CWA, they disentitle the agencies to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). It is fundamental that the "canon of constitutional avoidance trumps *Chevron* deference" and that courts may "not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties." *NMA*, 512 F.3d at 711 (citing *Edward J.*

DeBartolo Corp. v. Fla. Gulf Coast Council, 485 U.S. 568, 575 (1988)). *Chevron* deference cannot, in other words, require that courts defer to an agency's avowed decision to push the bounds of constitutional limits. That is especially true with respect to a criminal statute like the CWA; after all, criminal statutes "are for the courts, not for the Government, to construe." *Abramski v. United States*, 134 S.Ct. 2259, 2274 (2014).

There is more. "*Chevron* deference is not warranted … where the agency errs by failing to follow the correct procedures in issuing the regulation," including—as here—when the agency fails to "give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125, (2016). On top of that, the Rule is presented as an interpretation of the Supreme Court's opinions (including Justice Kennedy's *Rapanos* concurrence (80 Fed. Reg. at 37,060)), more so than an interpretation of the statutory words themselves. The agencies would not be entitled to *Chevron* deference in this circumstance in any event. *See Negusie v. Holder*, 555 U.S. 511, 521-523 (2009) (an agency does not exercise its *Chevron* discretion by interpreting judicial precedents). In short, no deference is warranted here.

IV. THE RULE SHOULD BE VACATED IN ITS ENTIRETY

When a federal court has determined that a federal regulation is unlawful, "the practice of the court is ordinarily to vacate the rule." *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 20 (D.D.C. 2017) (citing *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997)); *see also Nat'l Mining Assln v. U.S. Army Corps of Englrs*, 145 F.3d 1399, 1409 (D.C. Cir.1998) ("We have made clear that when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated.") (citation and quotations omitted). Indeed, "the Administrative Procedure Act itself

contemplates vacatur as the usual remedy when an agency fails to provide a reasoned explanation for its regulations." *AARP v. U.S. Equal Employment Opportunity Comm'n*, 292 F. Supp. 3d 238, 242 (D.D.C. 2017). The Act directs courts to "set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706(2).

A wholesale setting aside of the WOTUS Rule is particularly appropriate here for two reasons. First, the Rule is a nationwide rule with nationwide consequences. And the Private Party Plaintiffs are national organizations whose national memberships will continue to suffer injury if the Rule is not set aside altogether.

Second, the Rule is in force and effect in just 22 States, while the remainder of the States enjoy the protection of one of three preliminary injunctions currently in place. *See supra* p. 13. The complications of such a regime are disruptive for both regulators and the regulated public alike. As we explained at length in the preliminary injunction motion (3:15-cv-165, Dkt. No. 61), it would against the public interest to allow an enormously consequential national regulation like the WOTUS Rule to continue to apply or not to apply depending on whether the activity happens to be located on one side of a state line or the other.

CONCLUSION

The Court should vacate the Rule.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will cause copies of each to be served upon all counsel of record.

/s/ *Timothy S. Bishop*