

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

STATE OF GEORGIA, *et. al.*,

Plaintiffs,

v.

ANDREW WHEELER, *et. al.*

Defendants

Case No.: 2:15-cv-00079-LGW-BWC

**INTERVENOR DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFFS’
MOTIONS FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY
JUDGMENT AND INCORPORATED MEMORANDUM OF LAW**

This case involves a challenge to an agency rule defining “waters of the United States,” (the “Clean Water Rule”), 80 Fed. Reg. 37,054, and, in turn, the jurisdictional reach of the Clean Water Act. The case boils down to two questions: (1) is the rule based on sound science, and (2) did the agencies follow adequate procedures in adopting the rule? The answers are overwhelmingly yes.

The Clean Water Rule is based on thousands of pages of science—the culmination of hundreds of peer-reviewed scientific papers, decades of agency experience, and extensive internal and external peer review by top experts in dozens of scientific fields. Regarding procedure, the agencies carefully crafted the Clean Water Rule over several years, solicited and received over one million public comments, prepared a nearly 7,500-page response to those comments, and held over 400 public meetings with individuals and groups across the country—an unprecedented level of outreach by any standard.

The law is clear: as long as the record supports the agencies' decision (and it does), the decision should be upheld even if the record could support alternative findings. *Ark. v. Okla.*, 503 U.S. 91, 112-13 (1992). In this case, Plaintiffs have the burden to show that either the science or procedures behind the Clean Water Rule violate the Administrative Procedure Act. They have failed to carry that burden. Unsubstantiated complaints and rhetorical diversions cannot discredit the many thousands of pages of scientific and technical expertise and robust public engagement that led to the rule, and Plaintiffs' statutory and constitutional arguments are meritless. This Court should uphold the Rule and dissolve its injunction.

STATEMENT OF THE CASE

Since 1972, the Clean Water Act (the "Act") has helped restore and protect our nation's waters. The Act allows the Environmental Protection Agency ("EPA") and the Army Corps of Engineers (the "Corps") (collectively, the "Agencies") to regulate "navigable waters," which Congress in turn defined as "waters of the United States." 33 U.S.C. §§ 1251 *et seq.*; *see also* 33 U.S.C. § 1362(7). Congress did not, however, define the term "waters of the United States."

Despite this lack of definition, the legislative history of the Clean Water Act makes clear that Congress intended the term to be interpreted broadly. The Conference Report for the Clean Water Act observed, "The Conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation...." S. Conf. Rep. No. 1236 (1972). The House and Senate committees expressed similar sentiments. The House Report explained, "One term that the Committee was reluctant to define was the term 'navigable waters.' The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term 'navigable waters' be given the

broadest possible constitutional interpretation....” H.R. Rep. No. 911 (1972). The Senate Report also articulated these concerns. S. Rep. No. 414 (1971).

Still, over the past four decades, parties have disagreed about the scope of the Agencies’ jurisdiction under the Clean Water Act, with industry groups and property owners seeking to avoid permitting requirements arguing for a narrow construction of the term, and those seeking to protect the environment arguing for a broad construction. Because of these disagreements, the Supreme Court has addressed the scope of the Agencies’ jurisdiction at least three times since 1985. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); *Rapanos v. United States*, 547 U.S. 715 (2006).

In response to those Supreme Court decisions, the Agencies issued guidance documents in 2003 and 2008. 80 Fed. Reg. at 37,056. However, according to the Agencies, “these two guidance documents did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations.” *Id.* at 37,056. As a result, “[m]embers of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the [Clean Water Act] clearer, simpler, and faster.” *Id.* at 37,056.

Because the guidance documents did not allow consistent enforcement of the Clean Water Act, important water bodies throughout the United States were often left vulnerable to contamination and degradation, despite having a “significant nexus” to traditional navigable waters, interstate waters, or the “territorial seas.” These water bodies included small, seasonal, and rain-dependent streams and their adjacent waters. The need for protection of these waters is not speculative. In the continental United States, intermittent, ephemeral, or headwater streams

make up 58%, or 207,476 miles, of the stream miles that provide water for public drinking water systems. See *Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.*, https://www.epa.gov/sites/production/files/2015-04/documents/2009_10_15_wetlands_science_surface_drinking_water_surface_drinking_water_national_counties.pdf (last visited Oct. 9, 2018) (attached as Ex. 1).¹

That means that approximately 117 million people—*over one third of the entire U.S. population*—get some or all of their drinking water from public drinking water systems that rely at least in part on these vulnerable streams. *Id.* Millions of people living in the states that are plaintiffs in this case depend on public drinking water systems that draw at least in part from streams that would be better protected under the Clean Water Rule than the Agencies’ guidance documents. *Id.* In Georgia, for example, over 4.9 million people—nearly half the state’s population—receive drinking water from systems that rely at least in part on intermittent, ephemeral, and headwater streams. See *Percentage of Surface Drinking Water from Intermittent, Ephemeral, and Headwater Streams in Georgia*, https://www.epa.gov/sites/production/files/2015-06/documents/2009_12_30_wetlands_science_surface_drinking_water_surface_drinking_water_ga.pdf (last visited Oct. 9, 2018) (attached as Ex. 2).

The Clean Water Rule also guarantees the protections of the Clean Water Act to important wetlands left vulnerable to contamination and degradation under the guidance documents. As Justice Kennedy has noted, “[W]etlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage.” *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). The role of wetlands in reducing

¹ The Court may take judicial notice of information published on EPA’s website. *Rahman v. Schriro*, 22 F. Supp. 3d 305, 311 (S.D.N.Y. 2014) (taking judicial notice of fact sheet published on EPA’s website).

flood peaks is particularly valuable: according to EPA, “[o]ne review of wetland studies reported that riparian wetlands reduced or delayed floods in 23 of 28 studies.” EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (“Science Report”), ID-20858, at ES-9 (2015) (attached as Ex. 3). Wetlands also “store large amounts of sediment and organic matter from upstream and from upland areas. For example, riparian areas have been shown to remove 80–90% of sediments leaving agricultural fields in North Carolina.” *Id.* Indeed, the Agencies estimate that the Clean Water Rule’s restoration of protection to wetlands may result in public benefits of \$306 to \$501 million annually. EPA & Corps, *Economic Analysis of the EPA-Army Clean Water Rule* (“Economic Analysis”), ID-20866, at 50-52 (2015) (attached as Ex. 4).

Because unpredictable enforcement often left these critically important waters vulnerable, the Agencies set out to establish a rule that was easier to understand and is more consistent. As part of the rulemaking process, the Agencies spent four years evaluating “which waters have a ‘significant nexus’ with traditional navigable waters, interstate waters, or the territorial seas[.]” requiring their protection under the Clean Water Act under Justice Kennedy’s *Rapanos* test. 80 Fed. Reg. at 37,057. In April 2014, the Agencies issued a proposed rule and solicited comments for more than 200 days. *Id.* Ultimately, the Agencies received “over one million public comments on the proposal, the substantial majority of which supported the proposed rule.” *Id.*

During the rulemaking process, the Agencies also undertook unprecedented outreach through public meetings, seeking feedback from all types of stakeholders. 80 Fed. Reg. at 37,057; *see also, e.g.*, 2014 EPA Regional Proposed Rule Meetings/Events, ID-13182 (attached as Ex. 5); 2014 EPA Headquarters Proposed Rule Meetings/Events, ID-13183 (attached as Ex. 6). All told, the Agencies conducted “over 400 meetings nationwide with states, small

businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others.” 80 Fed. Reg. at 37,057.

Undoubtedly, the scientific basis for the rule is sound. Before issuing the Clean Water Rule, the Agencies reviewed “more than 1,200 peer-reviewed scientific papers and other data and information including jurisdictional determinations, relevant agency guidance and implementation manuals, and federal and state reports that address connectivity of aquatic resources and effects of downstream waters.” Technical Support Document for the Clean Water Rule (“Tech. Support Document”), ID-20869, at 93 (attached as Ex. 7). As part of this process, the Agencies invited 27 of the nation’s top scientists—hydrologists, wetland and stream ecologists, biologists, geomorphologists, biogeochemists, and freshwater scientists—to review, discuss, and receive public comment on the proposed rule. 80 Fed. Reg. at 37,062. They concluded that “the available science supports the conclusion that the types of water bodies identified as ‘waters of the United States’ in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters.” *Id.* at 37,064. The Agencies themselves provided substantial expertise as well, having “made more than 400,000 CWA jurisdictional determinations since 2008. Of those, more than 120,000 have been case-specific significant nexus determinations. The agencies have made determinations in every state in the country, from the arid West to the tropics of Hawaii, from the Appalachian Mountains in the East to the lush forests of the Northwest.” Tech. Support Doc. at 178.

The Agencies used this scientific foundation to craft regulatory language that was “easier to understand, consistent, and environmentally more protective” than the Agencies’ prior regulations and guidance, and on June 29, 2015, the Agencies published the final Clean Water Rule. 80 Fed. Reg. at 37,057. The following day, Georgia, West Virginia, Alabama, Florida,

Kansas, Kentucky, South Carolina, Utah, and Wisconsin filed this action challenging the Clean Water Rule. ECF No. 1. Three weeks later, on July 20, Plaintiffs filed an amended complaint joining North Carolina and Indiana as Plaintiffs. ECF No. 31. In July 2015, eleven days after the Plaintiffs filed an amended complaint, National Wildlife Federation and One Hundred Miles (the “Conservation Groups”) filed an unopposed motion to intervene as defendants. ECF No. 36. Nearly three years later, seventeen industry groups moved to intervene as plaintiffs, asserting additional challenges to the Clean Water Rule. ECF No. 178. The Court granted both motions to intervene in July 2018. ECF Nos. 182 and 187. The Conservation Groups now oppose Plaintiffs’ Motions for Summary Judgment and seek summary judgment in favor of the defendants.

STANDARD OF REVIEW

The Court’s review of an agency decision is governed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, “[i]f the intent of Congress is clear, ‘that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *Id.* at 842-43. If a statute is silent or ambiguous, “the question for the court is whether an agency’s interpretation is based on permissible construction of the statute.” *Id.* At this step, the court must give “considerable weight” to the agency’s “construction of a statutory scheme it has been trusted to administer.” *Id.* In other words, “Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer.” *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (noting that the Agencies enjoy “plenty of room to operate” in interpreting their authority under the Act).

The Court’s review is further governed by the Administrative Procedure Act, which allows judicial review of agency action that is “arbitrary, capricious, and abuse of discretion, or

otherwise not in accordance with the law;” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;” or “without observance of procedure required by law.” 5 U.S.C. § 706(2). “The arbitrary and capricious standard is exceedingly deferential.” *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009). A rule is arbitrary and capricious only if the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* The court is “not authorized to substitute [its] judgment for the agency's as long as [the agency's] conclusions are rational.” *Id.*

ARGUMENT²

A. The Clean Water Rule does not violate the Clean Water Act.

1. The Rule does not violate Supreme Court precedent.

Under Justice Kennedy’s test in *Rapanos*, a water may be considered a “water of the United States” if it has a “significant nexus” to a traditional navigable water, an interstate water, or the territorial seas (sometimes called “primary waters”). *See Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). Under that test, a significant nexus exists where the water “either

² The Agencies previously filed a thorough, 245-page merits brief defending the Clean Water Rule. *See* ECF No. 160-2; *see also In re EPA & Dep’t of Def. Final Rule*, No. 15-3751 (6th Cir.), ECF No. 149-1 (“DOJ Br.”). Courts across the country have admonished agencies that take inconsistent positions in litigation depending on the administration, noting that such a “considerable paradox” makes “a travesty of the principle of deference to interpretations of statutes by the agencies responsible for enforcing them, since that principle is based on a belief either that agencies have useful knowledge that can aid a court or that they are delegates of Congress charged with interpreting and applying their organic statutes consistently with legislative purpose.” *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012), *aff’d*, 571 U.S. 220 (2014). The Court should thus consider the Agencies’ prior defense of the Clean Water Rule.

alone or in combination with similarly situated lands in the regions, significantly affect[s] the chemical, physical, and biological integrity of other covered waters....” *Id.* at 780. In his concurrence, Justice Kennedy explained that the Corps could, through “regulations or adjudication,” “identify *categories* of tributaries that, due to their volume of flow..., their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the *majority* of cases, to perform important functions for an aquatic system incorporating navigable waters”—clearly contemplating that the Agencies could establish categorical rules so long as those rules were supported by science. *Id.* at 780-81 (emphasis added).

That is precisely what the Clean Water Rule does. Following *Rapanos*, the Agencies meticulously reviewed all available science about how waters are connected to determine which categories of waters significantly affect the physical, chemical, or biological integrity of other covered waters, and thus meet Justice Kennedy’s significant nexus test. Put differently, the Clean Water Rule does not question or expand the legal basis for Clean Water Act jurisdiction articulated by Justice Kennedy; it simply reflects the application of more thorough science than was readily available in 2006—exactly as Justice Kennedy requested. Plaintiffs may complain about the Agencies’ conclusions—specifically, the inclusion of tributaries and adjacent waters—but they offer no evidence to meet their burden of showing that the Clean Water Rule “runs counter to the evidence before the [Agencies]” or “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *See Miccosukee Tribe*, 566 F.3d at 1264.

2. The Rule’s definition of “tributary” is lawful.

Under the Clean Water Rule, tributaries to primary waters are considered waters of the United States and entitled to protection under the Clean Water Act. 80 Fed. Reg. at 37,104. A tributary is defined by the Clean Water Rule as a water that contributes flow, either directly or through another water, to a primary water that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. *Id.* at 37,105-106. The Agencies, based on their expertise and their review of the scientific literature, determined that those waters meeting this definition of tributary have a significant nexus to other covered waters, and thus meet Justice Kennedy’s test for jurisdiction under *Rapanos*, “because they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.” *Id.* at 37,068-69.

Plaintiffs complain generally that tributaries have no impact on the physical, chemical, or biological integrity of primary waters, and thus should not be jurisdictional. But the scientific literature says otherwise, and Plaintiffs cite nothing—except their own comments—to attack the Agencies’ conclusions (all of which are backed by extensive citations to peer-reviewed scientific literature, as identified in the Technical Support Document and Science Report). For example, peer-reviewed scientific studies overwhelmingly show that tributaries, even when seasonal, are a dominant source of water in most rivers, like the smaller capillaries in the body that feed into larger vessels. They directly impact flow volume, temperature, dissolved oxygen, and other physical conditions in primary waters. Tech. Support Document at 246; *see also* Science Report at 3-5 to 3-21. Indeed, one study found that ephemeral tributaries accounted for 76% of the flow of the Rio Grande after a storm event. Tech. Support Document at 246; *see also* Science Report at 3-7 to 3-8. Tributaries can also transport sediment to downstream waters, further impacting the

physical integrity of those waters. Tech. Support Document at 247; *see also* Science Report 3-13 to 3-17. (*See* Tech. Support Doc. at 246-249 for a full discussion of impacts to physical integrity of covered waters.) Tributaries also significantly affect the chemical integrity of primary waters by impacting the amount and form of nutrients and carbon received by downstream waters. Tech. Support Document at 249; *see also* Science Report at 3-21 to 3-27. (*See* Tech. Support Doc. at 249-254 for a full discussion of impacts to chemical integrity of covered waters.) And, likewise, tributaries affect the biological integrity of primary waters. Tech. Support Doc. at 254; *see also* Science Report at 3-37 to 3-45. They may be directly linked by the movement of living organisms (or their eggs or seeds), or they may increase the amount and quality of habitat or provide sources of food for downstream organisms. Tech. Support Document at 254-55. (*See* Tech. Support Doc. at 254-256 for a full discussion of impacts to biological integrity of covered waters.) As the Scientific Advisory Board (SAB) found in reviewing the Proposed Rule, “[t]here is strong scientific evidence to support the EPA's proposal to include *all* tributaries within the jurisdiction of the Clean Water Act.” 80 Fed. Reg. at 37,064 (emphasis added).

Plaintiffs also criticize the Clean Water Rule’s definition of tributary as “wildly overbroad,” and imply that the definition does not provide any standards to “ensure sufficient ‘volume and regularity’ of flow.” State Br. at 11, ECF No. 203. However, as discussed in the Technical Support Document at pages 232-275, the Agencies carefully limited the definition of tributary to those waters scientifically shown to have sufficient flow to significantly affect the physical, chemical, and biological integrity of primary waters, as Justice Kennedy directed. The definition requires that a tributary contributes flow, either directly or indirectly, to a primary water. 80 Fed. Reg. at 37,105-106. This requirement ensures that, to meet the definition of tributary, the water must be part of the tributary system of a primary water. *See id.* at 37,076. The

definition of tributary also requires two physical indicators of flow: (1) a bed and banks, and (2) an ordinary high water mark. According to the Agencies, these physical indicators are “only created by sufficient and regular intervals of flow.” *Id.* “The physical indicators of bed and banks and ordinary high water mark [therefore] demonstrate that there is sufficient volume, frequency, and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus.” *Id.* at 37,058. Again, these conclusions are supported by copious scientific evidence and agency expertise, and Plaintiffs offer no evidence to challenge the Agencies’ conclusion and no science to support their own position.

Plaintiffs next misleadingly argue that the Clean Water Rule’s definition of tributary runs afoul of Justice Kennedy’s rejection of the use of the ordinary high water mark as a “determinative measure” for establishing a significant nexus. State Br. at 12; Intervenor Br. at 15-16, ECF No. 199. But Justice Kennedy acknowledged that an ordinary high water mark “may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute ‘navigable waters’ under the Act.” *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring). His concern was instead that the existing standard may allow the unsupported regulation of “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it,” including, for example, the isolated ponds discussed in *SWANCC*. *Id.* at 781-82. As discussed below, those concerns have been answered in the present rule.

First, the agencies amassed a large scientific basis for determining that the defined tributaries do bear a sufficient significant nexus to constitute navigable waters under the Act. Neither Justice Kennedy nor the litigants in *Rapanos* had the benefit of more than 1,200 peer-reviewed scientific publications and hundreds of pages of technical support to elucidate that

nexus. It bears repeating: before issuing the Clean Water Rule, the Agencies reviewed “more than 1,200 peer-reviewed scientific papers and other data and information including jurisdictional determinations, relevant agency guidance and implementation manuals, and federal and state reports that address connectivity of aquatic resources and effects of downstream waters.” Tech. Support Document at 93. The Agencies likewise had the benefit of peer review by 27 of the nation’s top scientists, 80 Fed. Reg. at 37,062, who confirmed that the available science strongly supported the inclusion of all tributaries. 80 Fed. Reg. at 37,064. By contrast, in *Rapanos*, the Court emphasized the “paucity of the record,” noting that they lacked even basic information about the waters in question, such as “whether the ditches and drains near each wetland are ‘waters’ in the ordinary sense....” 547 U.S. at 757; *see also id.* at 727. Put simply, the Agencies have far more scientific support for their determinations now than the Court had twelve years ago when it questioned the possible breadth of ordinary high water mark determinations in *Rapanos*. As discussed above, the Clean Water Rule does not question or expand the legal basis for Clean Water Act jurisdiction articulated by Justice Kennedy, as intimated by Plaintiffs; it merely reflects the application of more thorough science than was readily available in the *Rapanos* record in 2006, just as Justice Kennedy requested.

Second, the Rule answers Justice Kennedy’s concern about an unlimited tributary definition encompassing isolated waters. The Clean Water Rule does not regulate isolated ponds, like those in *SWANCC*, or drains and ditches simply because they carry minor intermittent water volumes “toward” a navigable water. Instead, the Rule regulates only waters that have been scientifically shown to impact the physical, chemical, or biological integrity of other covered waters, exactly as Justice Kennedy directed.

Third, and contrary to Plaintiffs' suggestion, the Clean Water Rule does *not* use the ordinary high water mark as the sole measure for identifying tributaries. Instead, the Clean Water Rule explicitly requires the contribution of flow to a primary water, *and* a bed and banks, *and* an ordinary high water mark. The definition requires the combination of these characteristics to qualify as a tributary under the Clean Water Rule. In other words, the presence of an ordinary high water mark alone would not be sufficient to meet the requirements of a tributary and it is not, as Plaintiffs claim, the determinative measure for establishing a significant nexus. 80 Fed. Reg. at 37,076.

The Industry Intervenors also cite, without proper context, an observation from a 2006 Corps report noting that ordinary high water mark indicators can be "distributed randomly" in arid landscapes like the western United States. However, this comment ignores that, in 2008, the Corps published a regional manual to specifically address and remedy the challenges of identifying ordinary high water marks in the arid West, noting the use of other indicators to identify the ordinary high water mark, such as the limits of the active floodplain, "which are easily identified in the field" and "less variable over time." *See* Response to Comments ("RTC"), ID-20872, available at <https://www.epa.gov/cwa-404/response-comments-clean-water-rule-definition-waters-united-states> (last accessed Oct. 5, 2018) (excerpts attached as Ex. 8), Topic 8 at 313-314; Robert W. Lichvar et al., U.S. Army Corps of Eng'rs, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual* (2008) at 28, 31; *see also* RTC-8 at 313-14, 316-17, 345-46, and RTC-9 at 25-28; Science Report at Section B.5; DOJ Br. at 71-76.

Finally, the States argue that the Clean Water Rule's definition of tributary includes certain ditches that fall outside the Agencies' authority under Justice Kennedy's opinion. State

Br. 12. But the argument appears to be premised on a willful misunderstanding of the Clean Water Rule's treatment of ditches. The Rule:

- 1) excludes all intermittent and ephemeral ditches that have been excavated through uplands such as a farmer's field unless they drain wetlands;
- 2) includes perennial ditches that:
 - a) have been excavated through uplands *but only if*
 - b) the feature meets the definition of a tributary, i.e.,:
 - i) has a bed and banks and ordinary high water mark *and*
 - ii) flows into a primary water directly or indirectly; and
- 3) includes perennial, intermittent, and ephemeral ditches that are in relocated or excavated streams.

See 80 Fed. Reg. at 37,078.

Thus, contrary to the assertions of the States, the Clean Water Rule does *not* regulate all ditches regardless of flow. State Br. 12. Rather, as described above, a substantial number of ditches are specifically *excluded* from coverage under the Clean Water Rule. 80 Fed. Reg. at 37,105. As a result, the Clean Water Rule regulates most, but not all, ditches that can carry pollutants downstream. This is entirely consistent with, and mandated by, the Clean Water Act and Supreme Court precedent interpreting that Act.

3. The Rule's definition of "adjacent waters" is lawful.

Under the Clean Water Rule, waters that are "adjacent to" a primary water, impoundment, or tributary are considered waters of the United States. 80 Fed. Reg. at 37,104. Adjacent waters are defined as "bordering, contiguous, or neighboring." *Id.* at 37,105. Neighboring waters are those waters located: (i) within 100 feet of the ordinary high water mark of a jurisdictional water; (ii) within the 100-year floodplain of a jurisdictional water and not

more than 1,500 feet from the ordinary high water mark of that jurisdictional water; or (iii) within 1,500 feet of the high tide line of a primary water or the ordinary high water mark of the Great Lakes. *Id.* at 37,105. The Agencies reasonably concluded that adjacent waters as defined under the Clean Water Rule “have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters.” *Id.* at 37,058. Again, Plaintiffs offer no real evidence or scientific documentation showing otherwise.

The Agencies’ determination is strongly supported by the scientific evidence. *See* Tech. Support Doc. at 275-326. The Science Report, the Technical Support Document, and other scientific literature “consistently support[] the conclusion that covered adjacent waters provide similar functions and work together to maintain the chemical, physical, and biological integrity of the downstream” primary waters “because of their hydrological and ecological connections to, and interactions with, those waters.” 80 Fed. Reg. at 37,069. That functional connectivity is “particularly evident where covered adjacent waters are located within the floodplain of the traditional navigable water, interstate water, the territorial seas, covered tributary, or impoundment to which they are adjacent.” *Id.*

Industry Intervenors argue that the inclusion of waters adjacent to tributaries and other navigable waters runs counter to Justice Kennedy’s *Rapanos* concurrence. Intervenor Br. at 17-18. However, Justice Kennedy acknowledged wetlands adjacent to navigable waters to be jurisdictional because of “a reasonable inference of ecological interconnection.” *Rapanos*, 547 U.S. at 780. Justice Kennedy’s issue with inferring a significant nexus for wetlands adjacent to tributaries of navigable waters was based on the Agencies’ existing standard for tributaries. *Rapanos*, 547 U.S. at 780-81. Justice Kennedy acknowledged that “[t]hrough regulations or

adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.” *Id.* at 780-81. The Agencies have created just such a regulation with the Clean Water Rule, relying on science rather than a simply a “reasonable inference.” The Clean Water Rule defines tributaries and adjacent waters based on extensive scientific evidence to cover those waters which perform important functions and significantly affect primary waters.

The Clean Water Rule is also consistent with precedent in defining adjacent waters to include adjacent open waters that are not wetlands. Industry Intervenor characterize the inclusion of non-wetland waters as a “sweeping approach.” Intervenor Br. at 18. However, under the 1986 regulations, open waters that were not wetlands were subject to Clean Water Act jurisdiction if they met certain criteria under the “other waters” provision. *See* 33 C.F.R. § 328.3(a)(3) (1987). Justice Kennedy’s concurrence in *Rapanos* also clearly contemplated the inclusion of nonnavigable waters, as well as wetlands, if they had a close connection to a navigable water. *See Rapanos*, 547 U.S. at 767 (“[T]he connection between a *nonnavigable water* or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the *water* or wetland a ‘navigable water’ under the Act.”) (emphasis added). Whether a pond or a wetland is found within the floodplain of a river, both waters would likely be equally connected to the river and serve important functions that would benefit the river ecology. Accordingly, the Agencies reasonably considered both non-wetland waters and wetlands in determining the existence of a significant nexus for adjacent waters.

Plaintiffs also attack the Clean Water Rule's use of the 100-year floodplain based on a misunderstanding of how waters are connected within a floodplain and what 100-year floodplain actually means. *See* State Br. at 13; Intervenor Br. at 18-19. If an area adjacent to a river is considered within the 100-year floodplain that does not mean that the area is only going to flood once every 100 years; it means that there is a 1% chance that the river will flood to a prescribed elevation line at any given year. *See* Tech. Support Document at 124. Thus, a river could flood to the edge of the 100-year floodplain two years in a row. Furthermore, a river can flood to a point short of the edge of the floodplain on a regular basis. Therefore, wetlands and other waters located in a floodplain may flood much more frequently than once in every 100 years.

Consequently, Plaintiffs are wrong when they state that waters in a floodplain connect to the adjacent primary water every 100 years and that is not a sufficient connection. Intervenor Br. at 18. The unrebutted scientific evidence demonstrates that wetlands and open waters within the 100-year floodplain impact primary waters by connecting "aquatic environments through both surface and shallow subsurface hydrological flowpaths." 80 Fed. Reg. at 37,070; *see also* Tech. Support Document at 299-301. Waters within the floodplain are "uniquely situated in watersheds to receive and process water that passes over densely vegetated areas and through subsurface zones before reaching streams and rivers." 80 Fed. Reg. at 37,070. Floodplain waters provide vital functions within a river system such as through flood storage and acting as a buffer to mitigate pollution. *Id.* The connection between floodplain waters and wetlands goes far beyond the probability of flooding.

The geographic boundaries in the Clean Water Rule's definition of adjacent waters are also reasonable. The States argue that the Agencies based the definition of adjacent waters "solely on geographical proximity." States Br. at 13. This mischaracterization of the definition

of adjacent waters fails to recognize that the geographic boundaries were drawn *based on scientific evidence that waters within those boundaries significantly affect primary waters*, and therefore satisfy the significant nexus test. For example:

The agencies established a 100 foot threshold from the water’s lateral limit in the definition of neighboring because, based on the agencies’ expertise and experience implementing the CWA and in light of the science, the agencies concluded this was a reasonable and practical boundary within which to conclude the waters clearly significantly affected the integrity of traditional navigable waters, interstate waters, or the territorial seas, and these ‘adjacent waters’ are ‘waters of the United States.’

80 Fed. Reg. at 37,085. The Agencies made similar scientific analyses to support all the geographic boundaries in the definition of adjacent waters. *Id.* at 37,085-86. In other words, the Clean Water Rule asserts jurisdiction over adjacent waters based on extensive science showing the existence of a significant nexus—not “solely” based on geographical proximity.

4. The Rule’s significant nexus test for case-by-case waters for is lawful.

Under the Clean Water Rule, “‘significant nexus’ means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of a [primary water].” 80 Fed. Reg. at 37,106 (emphasis added) (stating the Justice Kennedy test). The States complain that, under Justice Kennedy’s standard in *Rapanos*, a water has a significant nexus, and thus may be considered jurisdictional, only if that water significantly affects the chemical, physical, *and* biological integrity of a primary water. However, although Justice Kennedy quoted the phrase “chemical, physical, and biological integrity” from the Clean Water Act, he plainly did not mean to require that all three categories of integrity be impacted for there to be a significant nexus to a primary water. If that were the case, waters contributing to the chemical and physical integrity of a primary water, but not to the biological integrity of that water, would be subject to unregulated

pollution—an outcome that would quite clearly violate the spirit and letter of the Clean Water Act, which explicitly seeks to protect “the chemical, physical, *and* biological integrity of our Nation’s waters.” 33 U.S.C. § 1251 (emphasis added). It is safe to say that Justice Kennedy did not covertly intend to contradict the clear language of the Clean Water Act and thereby drastically narrow its reach.

Further, as the Agencies pointed out in their Sixth Circuit brief supporting the Rule, DOJ Br. at 127, Justice Kennedy identified a number of different functions that may create a significant nexus to a primary water, such as pollution trapping, flood control, and runoff storage. *Rapanos*, 547 U.S. at 786. Tellingly, these functions would not impact all three types of integrity, clearly implying that Justice Kennedy did not intend to require a water to impact the chemical, physical, *and* biological integrity of a primary water to be jurisdictional. *Id.*; *see also United States v. Robertson*, 875 F.3d 1281, 1294 n. 4 (9th Cir. 2017) (affirming jury instruction that a water has a significant nexus to traditional navigable waters if it significantly affects the chemical, physical, *or* biological integrity of traditional navigable waters, and explaining that “these instructions follow the standard set out in Justice Kennedy’s concurrence”).

5. The Rule does not read “navigable” out of the Clean Water Act.

Plaintiffs next complain that the Clean Water Rule’s coverage of all interstate waters reads the term “navigable” out of the Clean Water Act. First, interstate waters have been protected under the Clean Water Act for decades, and the Clean Water Rule does not change their status. 79 Fed. Reg. 21,888, 22,200 (“The Agencies do not propose to make any changes to this section of the regulation.”); Tech. Support Document at 190. Because the Agencies did not reconsider whether interstate waters were jurisdictional under the Clean Water Act, they did not reopen the time period for judicial review. *See Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397-

98 (D.C. Cir. 1989) (finding challenge to EPA regulation time-barred where EPA did “not reopen the question” at issue in a later regulation and instead merely “reaffirmed its previous position and at most briefly reiterated its prior reasoning”). Plaintiffs’ argument that the Rule unlawfully protects all interstate waters, regardless of navigability, is therefore time-barred.

Second, even if the challenge were timely, the structure and language of the Clean Water Act plainly protects waters beyond navigable-in-fact waters. H.R. Rep. No. 911 (1972); S. Rep. No. 414 (1971); S. Conf. Rep. No. 1236 (1972); Tech. Support Document at 6-9. In passing the Clean Water Act, Congress defined the term “navigable waters” to mean “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Courts have repeatedly interpreted Congress’s chosen definition to mean that it intended the Clean Water Act to extend beyond traditional tests of navigability to the outer limits of the Commerce Clause. *See, e.g., Nat. Res. Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (“Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability.”); *see also* Tech. Support Document at 22-30. Put simply, both Congress and the Courts have found that interstate waters, whether they are navigable-in-fact or not, are covered by the protections of the Clean Water Act.

B. The Rule is not a “substantial and transformative encroachment” on state law.

The States also argue that the Clean Water Rule is unlawful because it is a “substantial and transformative encroachment on an area of traditional state power.” State Br. at 15. Their argument fails for several reasons. First, the scope of the Clean Water Rule is narrower in some respects than the scope of the pre-existing regulations. *See* Tech. Support Document at 30-34. Among other things, for the first time, the Rule categorically excludes certain waters from jurisdiction and provides a 4,000 foot distance cut-off for all waters. Because the Clean Water

Rule does not significantly expand jurisdiction under the Clean Water Act, but rather clarifies that jurisdiction, it cannot possibly encroach on States' rights. *See* Tech. Support Doc. at 30-34.

Second, the States' reliance on *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) is misplaced. In that case, the Supreme Court emphasized that "EPA itself has repeatedly acknowledged that [applying certain permitting requirements] would be inconsistent with—in fact, overthrow—the Act's structure and design." *Id.* at 2442. Here, the Agencies have fully documented how the Clean Water Rule falls fully within the design and structure of the Act.

Third, unlike in the cases cited by the States, the promulgation of the Clean Water Rule is a plain attempt to follow the instruction of the Supreme Court—not to encroach on state law. Not only is the scientific basis for the Rule rooted in Supreme Court precedent, the drafting of the Rule itself came at the behest of the Court. *See Rapanos*, 547 U.S. at 780-81 (Kennedy, J., concurring) (noting that the Agencies could clarify their jurisdiction "[t]hrough regulations"); 547 U.S. at 758 (Roberts, C.J., concurring) (noting Agencies' prior failure to develop regulations was unfortunate). Far from substantially expanding federal power, the Agencies did exactly what they were *supposed* to do—draft a rule consistent with Supreme Court precedent.

C. The Clean Water Rule is constitutional.

1. The Rule is not unconstitutionally vague.

Plaintiffs also argue that the Clean Water Rule is unconstitutionally vague. But the Constitution does not require "perfect clarity" or "precise guidance." *United States v. Williams*, 553 U.S. 285, 304 (2008) (rejecting the notion that "the mere fact that close cases can be envisioned renders a statute vague"). Instead, a regulation is "void for vagueness" only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* Courts have regularly

found that regulations far less specific than the Clean Water Rule satisfy constitutional requirements. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (anti-noise ordinance prohibiting noise that “tends to disturb” others not vague because vagueness doctrine allows “flexibility and reasonable breadth, rather than meticulous specificity”); *see also* Tech. Support Doc. at 88 (collecting cases). Under Eleventh Circuit case law, the threshold to invalidate a regulation for vagueness is high: the Circuit has made clear that it “appl[ies] the void-for-vagueness doctrine outside the First Amendment context *only rarely*” and only when the text “is impermissibly vague in *all* of its applications.” *Am. Iron & Steel Inst. v. Occupational Safety & Health Admin.*, 182 F.3d 1261, 1277 (11th Cir. 1999) (emphasis added) (rejecting vagueness challenge to regulation as “wholly without merit”).

Here, the Clean Water Rule is neither too difficult for ordinary people to understand, nor so standardless as to encourage discriminatory enforcement. *See, e.g., United States v. Lucas*, 516 F.3d 316, 328 (5th Cir. 2008) (rejecting vagueness challenge to application of CWA jurisdiction because “the prevalence of wet property ... and an area network of creeks and their tributaries leading to the Gulf, some of which connected to wetlands on the property, should have alerted ‘men of common intelligence’ to the possibility that wetlands were waters of the United States”). Quite the opposite, the very purpose of the Clean Water Rule is to provide states, landowners, developers, and enforcement agencies additional clarity about the jurisdictional reach of the Clean Water Act by creating categorical rules based on extensive scientific and technical expertise. 80 Fed. Reg. at 37,055; *see also* Tech. Support Document at 87-89. The Rule quite plainly identifies waters that are jurisdictional, waters that are not jurisdictional, and a limited set of waters requiring a case-by-case determination. Indeed, the

very problems Plaintiffs complain about—the categorical inclusion of some tributaries and floodplain waters, for example—stem from the Rule’s clarity, not from any so-called vagueness.

In any event, a landowner may seek a formal determination regarding whether a wetland is jurisdictional under the Clean Water Rule, a long-standing practice reaffirmed as recently as October 2016. *See* Regulatory Guidance Letter 16-01 (Oct. 2016), <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll9/id/1256> (last visited Oct. 9, 2018) (attached as Ex. 9). Courts, including those in this Circuit, have found that such an opportunity to seek guidance from an agency may mitigate any due process concern. *See, e.g., Mason v. Florida Bar*, 208 F.3d 952, 959 n. 4 (11th Cir. 2000) (rejecting vagueness challenge because “the availability of advisory opinions to gauge the application of [the rule at issue] bolsters [the rule's] validity”).

2. The Rule does not violate the Commerce Clause or the Tenth Amendment.

Plaintiffs next complain that the Clean Water Rule violates the Commerce Clause. But the Commerce Clause allows the federal government to regulate interstate waters and activities affecting interstate waters. *See Rapanos*, 547 U.S. at 782 (Kennedy J., concurring). As Justice Kennedy explained, the “significant nexus” test therefore “does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption.” *Id.* Plaintiffs also argue that the Clean Water Rule violates the Commerce Clause because it regulates waters that *lack* a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. But as discussed in detail above, the Clean Water Rule covers only waters that science plainly shows have a significant nexus to primary waters, and Plaintiffs have not shown otherwise, as is their burden. Therefore, Plaintiffs’ Commerce Clause arguments fail for the same reasons set forth above: the Agencies’ significant nexus determination are backed by

extensive science and entitled to deference, and Plaintiffs offer no evidence or scientific basis to undermine those determinations.

The States also complain that the Clean Water Rule violates the Tenth Amendment. The Tenth Amendment prohibits the federal government from compelling states to administer or enact a federal regulatory program. *New York v. United States*, 505 U.S. 144, 167 (1992). Where Congress has the authority to regulate an activity under the Commerce Clause, however, the Tenth Amendment does not prohibit the federal government from engaging in “cooperative federalism”—that is, either “offer[ing] States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.” *Id.* Under the Clean Water Act, states may elect to participate in the implementation of the Act, but may also decline to do so and place the regulatory requirements on the federal government. Therefore, because the Clean Water Rule does not compel any action by the States, it does not violate the Tenth Amendment. *See* Tech. Support Document at 90-91.

D. The Clean Water Rule complies with the Administrative Procedure Act.

1. The Rule is supported by a thorough, science-based record.

The States suggest that the Clean Water Rule is not supported by the record or sound science. This is simply wrong. As noted above, before issuing the Clean Water Rule, the Agencies reviewed “more than 1,200 peer-reviewed scientific papers and other data....” Tech. Support Document at 93. According to the Agencies, “the purpose of the review and synthesis [was] to summarize current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters.” *Id.* at 94-95; *see generally* Science Report. As part of this process, an independent panel of twenty-seven leading technical experts reviewed the proposed

rule and concluded that “the available science supports the conclusion that the types of water bodies identified as ‘waters of the United States’ in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters.” 80 Fed. Reg. at 37,064. Indeed, the Agencies spent years evaluating “which waters have a ‘significant nexus’ with traditional navigable waters, interstate waters, or the territorial seas[,]” requiring their protection under the Clean Water Act. *Id.* at 37,057.

Tellingly, Plaintiffs do not offer any specific evidence that the science itself is flawed. They do not specifically critique any of the more than 1,200 peer-reviewed publications supporting the Rule or question the academic background or credibility of a single of the 27 highly regarded technical experts who confirmed the scientific basis for the Rule. Instead, they offer general complaints about the scope of the Rule that do not meet their heavy burden under the Administrative Procedure Act. The law is quite clear: that Plaintiffs dislike the jurisdictional reach of the Clean Water Act does not make the Rule or the Act itself unenforceable. *See Miccosukee Tribe*, 566 F.3d at 1264 (noting that the Court is “not authorized to substitute [its] judgment for the agency's as long as [the agency's] conclusions are rational.”).

2. The Rule’s distance-based limitations are logical outgrowths of the Proposed Rule.

Plaintiffs also argue that certain provisions in the Clean Water Rule are not logical outgrowths of the proposed rule and thus the Agencies violated the Administrative Procedure Act (“APA”) because they did not give adequate notice of the changed provisions. The APA requires that Agencies publish notice of their proposed rulemaking and afford the public an opportunity to comment. 5 U.S.C. § 553. Once an agency has given proper notice, however, it is allowed to modify its proposed rule. Put differently, “the rule is not required to remain frozen in its vestigial form.” *Hi-Tech Pharm., Inc. v. Crawford*, 505 F. Supp. 2d 1341, 1348 (N.D. Ga.

2007), *aff'd*, 544 F.3d 1187 (11th Cir. 2008). Indeed, one of the key purposes of the notice-and-comment period is to allow an agency to reconsider and, if needed, revise, the proposed rule based on comments received. *See Miami-Dade Cty. v. U.S. E.P.A.*, 529 F.3d 1049, 1059 (11th Cir. 2008) (“Such a restriction would undermine the purpose of notice and comment.”); *see also Ass’n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058-59 (D.C. Cir. 2000).

Instead, a new comment period is required only if the final rule is not a “logical outgrowth” of the proposed rule. *See Miami-Dade Cty.*, 529 F.3d at 1058 (finding final rule by EPA a “logical outgrowth” of the proposed rule, even when “neither the EPA, nor any other party, has pointed to any evidence that the EPA specifically put [certain elements of the final rule] up for comment” and “no party has pointed to any comment specifically addressing [the elements at issue]”). A final rule is considered a logical outgrowth of a proposed rule as long as “interested parties ‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *Id.* at 1059; *see also Am. Iron & Steel Inst. v. Occupational Safety & Health Admin.*, 182 F.3d 1261, 1277 (11th Cir. 1999) (final rule was logical outgrowth of proposed rule because the parties “could reasonably have anticipated that the final standard might eliminate a mandatory role for physicians” since OSHA had requested comments on “the extent of the role that should be given to [non-physician] health professionals”).

Under Eleventh Circuit precedent, the APA does not require an agency to include precise numerical limits in a proposed rule at all in order to include numerical limits in the final rule. For example, in *Alabama Power Co. v. OSHA*, 89 F.3d 740 (11th Cir. 1996), a power company petitioned for review of an OSHA standard addressing clothing requirements for employees who would be exposed to flames or other hazards. The proposed rule permitted all natural fabrics,

regardless of weight. The final rule specified certain weights of natural fabrics that would be allowed—specifically, the final rule required workers to wear cotton fabrics greater than 11 ounces under certain conditions. *Id.* at 745. The Eleventh Circuit found that, even though the 11-ounce requirement did not appear in the proposed rule, the final rule was a logical outgrowth of that rule. *Id.*

Here, Plaintiffs complain that the Clean Water Rule’s distance-based limitations are not a logical outgrowth of the Proposed Rule. The distance-based limitations, however, though not specified in the Proposed Rule, were within the realm that interested parties could and should have anticipated. For example, the Agencies specifically sought comment on different ways to define “adjacent waters”—including “establishing *specific geographic limits*” or “*distance limitations*.” 79 Fed. Reg. at 22,208 (emphasis added).

In fact, many commenters—including states and industry groups—complained that the proposed definition of “adjacent” was “too vague” and “too expansive” in comments to the Agencies. RTC-3 at 18. As the Agencies noted after reviewing comments, the “dominant request was to identify specific limits.” *Id.* Several commenters suggested, opposed, or commented on the use of numerical distance limitations to define the term “adjacent” during the comment period, reinforcing the argument that the imposition of distance limitations was foreseeable. *See Miami-Dade Cty.*, 529 F.3d at 1059 (“[A]lthough they may not provide the only basis upon which an agency claims to have satisfied the notice requirement, comments may be adduced as evidence of the adequacy of notice.”). For example, Georgia, *a lead plaintiff in this case*, supported the inclusion of “specific geographic limits,” “including, for example, distance limitations,” and clear floodplain rules. RTC-3 at 153-54; *see also id.* at 129 (responding to Utah’s request that the Rule “include an explicit requirement” for reasonable proximity);

compare State Br. at 20 (“[U]nsurprisingly, the Agencies cannot identify a single public comment” addressing distance-based limitations); *see also* DOJ Br. at 187-88, 190 (collecting comments on distance limitations for determining adjacency). As this Circuit and others have recognized, comments addressing a specific issue (like the distance-based limitations here) provide evidence that the notice was adequate. *See Miami-Dade Cty.*, 529 F.3d at 1059.

Likewise, the distance-based limitations for case-specific waters are a logical outgrowth of the proposed rule and of the Agencies’ proposal that case-specific significant nexus determinations be based in part on the “location” of the water. *See* 79 Fed. Reg. 22,214. In addition, like with the distance-based limitations used for adjacency determinations, the fact that comments addressed the possibility of distance-based determinations for case-specific waters is further evidence of the adequacy of notice. *See* DOJ Br. at 192-93 (collecting comments).

3. Plaintiffs are not entitled to an additional exclusion from the definition of tributaries.

The States further complain that the Agencies excluded farming activities from *per se* jurisdiction under the definition of “adjacent” but did not exclude farming activities from *per se* jurisdiction under the definition of “tributary.” In other words, after receiving one exclusion they wanted, they are upset that they didn’t get another. However, Plaintiffs are not entitled to both exclusions simply because they received one. In any event, any failure by the Agencies to provide proper notice of this exclusion is harmless error, and the States have not demonstrated otherwise. *See Miami-Dade*, 529 F.3d at 1061 (“[B]efore we may vacate an agency action [for procedural failure] during the notice-and-comment period, we must take ‘due account ... of the rule of prejudicial error.’”).

4. All interested parties had the opportunity to comment on the scientific foundation of the Clean Water Rule.

The Industry Intervenors complain that they had no opportunity to comment on the final Science Report prior to the close of the public comment period. Specifically, they complain that although they had ample opportunity to comment on the Draft Science Report, the Agencies made several changes to the final Science Report in response to review by the SAB.

The Industry Intervenors cite *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) to support their argument that the technical basis for a proposed rule must be revealed to the public. In that case, the agency produced five partially redacted studies to support a sweeping FCC rule. By contrast, the Agencies here cited nearly 1,000 studies in the Draft Science Report—all unredacted and available to the public in the rulemaking docket. *See generally* Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September, 2013 External Review Draft) (“Draft Science Report”), ID-0004 (attached as Ex. 10). In *American Radio*, the Court held it was inappropriate for the agency to “cherry-pick” which supporting data it provided, cautioning, “[P]artially redacted pages indicate that a study’s core scientific recommendations may reveal the limitations of its own data and that its conclusions may reveal methodology or illuminate strengths and weaknesses of certain data or the study as a whole.” *Am. Radio*, 524 F.3d at 238.

Here, no party disputes that the Agencies published a Draft Science Report at the same time they published the proposed rule and allowed interested parties substantial time to comment on the draft report. And unlike in *American Radio*, no party alleges the Draft Science Report was either cherry-picked or redacted. Quite the opposite, the record plainly shows that the Draft Science Report contained a transparent review of nearly 1,000 peer-reviewed scientific studies on the “connectivity or isolations of streams and wetlands relative to large water bodies such as

rivers, lakes, estuaries, and oceans” and underwent several rounds of internal and external peer review prior to publication. *See* Draft Science Report at 1-1, 1-3. This more than satisfies the APA’s requirement to allow comment on the technical basis for a rule.

Still, Industry Intervenors complain that there were changes between the publication of the Draft Science Report and the promulgation of the final Clean Water Rule. For example, the Industry Intervenors claim that “the final Report introduced a new, continuum based approach that analyzed the connectivity of particular waters to downstream waters along various ‘dimensions.’” Industry Brief at 27. But, as the Agencies have pointed out, the Draft Science Report discussed (1) “the ‘River Continuum Concept’ in the scientific literature”; (2) “the factors that ‘determine where components of a [river] system fall on the connectivity-isolation gradient at a given time’”; and (3) “the ‘continuum of connectivity’ in wetlands such as prairie potholes.” DOJ Br. at 199 (citing Draft Science Report at 3-4; 3-33; 4-21 to 4-23; 5-57; 6-3).

Contrary to the Industry Intervenors’ intimations, although the SAB panel provided guidance to improve the Science Report, they ultimately concluded that the Draft Science Report was “a thorough and technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters.” SAB Science Report Review, ID-8046, at 1 (attached as Ex. 11). Far from committing “serious procedural error,” the Agencies took all necessary steps to ensure the jurisdictional reach of the Clean Water Act was based on a thorough scientific and technical foundation, and that the technical and scientific basis for the Rule was available to all stakeholders for review and comment.

5. The Agencies considered and responded to comments.

The Industry Intervenors also complain that the Agencies violated the APA by failing to consider and respond to significant comments. But in their *7,500-page* response to comments,

the Rule's Preamble, and the Technical Support Document, the Agencies responded to (and, in many cases, quoted) the comments complained about by the Industry Intervenors. *See generally* RTC; Tech. Support Document; 80 Fed. Reg. 37,054. For example, the Industry Intervenors argue that the Agencies failed to respond to their "concern that the proposed Rule would unduly expand the area subject to federal regulatory jurisdiction." Intervenor Br. at 29. Far from "brush[ing] them aside," the Agencies meaningfully responded to these comments. *See, e.g.*, RTC-1 at 171-72 (noting that the final rule does not establish any new regulatory requirements and does not change any relationship between federal, state, tribal, and local implementers of the Clean Water Act); Tech. Support Doc. at 30-34 (noting that final rule is narrower than existing regulations and responding to comments about federal authority); *see also* RTC-4 at 453-55 (responding to and disagreeing with Chamber of Commerce comment that the analysis of "significant nexus" was an expansion of jurisdiction); RTC-5 at 18-19 (responding to and disagreeing with commenters who stated that the proposal expands Agencies' jurisdiction and noting that the rule does not cover any new types of waters that were not historically regulated under the Clean Water Act); *see also* DOJ Br. at 202 (collecting comment responses).

The Industry Intervenors likewise complain that "[no]agency pronouncement addresses" commenters' concerns about the applicability of the Clean Water Rule in the arid West. Quite the opposite, the Agencies fully responded to and addressed these comments. *See, e.g.*, RTC-8 at 313-14 (addressing regional variations in hydrology and climate and noting that certain indicators "have already been applied to hydrologic and climatic circumstances found in the arid southwest and western mountain in field delineation manuals," including the "Arid West OHWM manual"), *id.* at 316-17 (directing commenters to "The Field Guide for the Identification of OHWM in the Arid West" for "additional, more specific guidance for identifying the OHWM

within the Arid West Region” and noting that the approach in the arid west is “based on stream geomorphology and vegetation response to the dominant stream discharge”), *id.* at 345-46, and RTC- 9 at 25-28 (noting that “the final Science Report has an entire section dedicated to arid southwestern ephemeral and intermittent streams”); Science Report at Section B.5.

The Industry Intervenors also allege that the Agencies failed to respond to concerns that the rule would eliminate permitting exemptions for agricultural activities. Again, the Agencies’ 7,500-page Response to Comments squarely addresses these concerns. *See, e.g.*, RTC-1 at 13-14 (“This rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of ‘waters of the United States’ to make it clear that this rule does not add any additional permitting requirements on agriculture.”); RTC-6 at 30-31 (“Certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.”); RTC-7 at 311, Topic 12 at 747, 750-51, 755-56. That the Plaintiffs do not like these responses—or the Rule itself—does not make them inadequate under the Administrative Procedure Act.

E. The Agencies complied with the Regulatory Flexibility Act.

The Industry Intervenors argue that the Agencies violated the Regulatory Flexibility Act, which requires an agency to gauge the impact of a proposed rule on small entities. This argument fails for several reasons. First, the Agencies certified, as required by the Act, “that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). The Agencies based their certification on, among other things, the fact that the Rule was definitional and thus did not directly impose a regulatory burden on small entities. But even if the Agencies’ certification were improper (which it was not), the Rule would still be valid because the Agencies completed the required outreach and analysis under the

Regulatory Flexibility Act, rendering any noncompliance harmless error. *See, e.g., Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003) (“Any hypothetical noncompliance [with the RFA] would thus have been harmless, since the available remedy would simply require performance of the economic assessments that EPA actually made). For example, in 2011, in collaboration with the Office of Management and Budget and the Small Business Association, the Agencies conducted an outreach meeting of small business participants from the oil and gas sector, the farming and agriculture sector, the construction and development sectors, the manufacturing sector, municipal storm sewer systems or publicly owned treatment plants, and non-governmental organizations to gather input on Clean Water Act jurisdictional policies. Final Report of the Discretionary Small Entity Outreach for the Clean Water Rule, ID-20865, at 7-8 (attached as Ex. 12). In 2014, the Agencies again met with small entities in these sectors and others. *Id.* at 11. The Agencies also held over 400 other public meetings, conducting unprecedented outreach to a wide range of stakeholders and seeking feedback from all types of stakeholders including small entities. *See* 80 Fed. Reg. at 37,057; *see also* 2014 EPA Regional Proposed Rule Meetings/Events; 2014 EPA Headquarters Proposed Rule Meetings/Events. The Agencies also responded to comments about the economic impact of the Rule on small entities, *see, e.g.,* RTC- 11 at 112-16, 213-15, and made changes to the final Rule in response.

F. The Agencies did not engage in unlawful advocacy campaigns.

Finally, the Industry Intervenors argue that EPA violated the Appropriations Act of 2014 and the Anti-Lobbying Law, 18 U.S.C. § 1913, in promulgating the rule. First, there is no private right of action for a claim that an agency has misused appropriated funds, *Nat'l Treasury Emp. Union v. Campbell*, 654 F.2d 784, 790-93 (D.C. Cir. 1981) (*citing Cort v. Ash*, 422 U.S. 66, 78 (1975)), and the Industry Intervenors have no standing to bring this claim, *id.* Second, as put by

Agencies, “[t]he GAO opinion in no way found that EPA acted in bad faith, or that the Agencies had ‘closed minds all along.’” DOJ Br. at 207-10 (further discussing GAO report and the Agencies’ compliance with anti-lobbying laws).

CONCLUSION

Plaintiffs’ substantive arguments under the Administrative Procedure Act, the Clean Water Act, and the U.S. Constitution come down to science. No one (including the Eleventh Circuit) seriously disputes that Justice Kennedy held that waters are covered under the Clean Water Act if they have a “significant nexus” to primary waters.

The question, then, is whether the Agencies had a sufficient scientific basis for identifying waters under the Clean Water Rule as having a “significant nexus”—as defined by Justice Kennedy—to primary waters. The Agencies’ position that they did is supported by more than 1,200 scientific publications and confirmed by 27 of the nation’s top scientists, among other things. That determination is entitled to deference under Supreme Court and Eleventh Circuit precedent. By contrast, the Plaintiffs do not cite any independent scientific publication (except the SAB Report, which affirms the scientific basis behind the Rule, and a 2006 and 2013 Corps report that are taken out of context) in nearly seventy pages of briefing. It may be that the Plaintiffs would like a different regulation, just as it may be that this Court would reach a different result than the Agencies if it were conducting its own scientific inquiry.

But those are not the questions in this case. The only question on the Rule’s substance is whether Plaintiffs have met their burden to overcome the required deference on the Agencies’ determinations. The answer to that question is no.

Respectfully submitted this 10th day of October,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2018, I electronically filed the foregoing *Intervenor Defendants' Response in Opposition to Plaintiffs' Motions for Summary Judgment and Cross-Motion for Summary Judgment and Incorporated Memorandum of Law* with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorneys of record.

s/ Megan Hinkle Huynh _____