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

State of Georgia, *et al.*,
Plaintiffs,
v.

Andrew Wheeler, *et al.*,
Defendants.

Case No. 2:15-cv-79-LGW-RSB

MOTION FOR SUMMARY JUDGMENT

When Congress enacted the Clean Water Act (CWA), it "chose to 'recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use …of land and water resources.'" *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (*SWANCC*) (alterations in original) (quoting 33 U.S.C. § 1251(b)). Congress thus granted to the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (collectively, the "Agencies") only limited jurisdiction, covering the nation's "navigable waters," defined as "waters of the United States." 33 U.S.C. § 1362(7). Yet, in the 2015 WOTUS Rule, 80 Fed. Reg. 37,053 (June 29, 2015), the Agencies ignored these limitations and unlawfully sought to sweep into federal jurisdiction numerous "remote and intermittent waters without evidence that they have a nexus with any navigable-in-fact waters." ECF No. 174 at 14. The Agencies also enacted this illegal and overbroad rule through a fundamentally flawed process, springing upon the States and their citizens critical components of the definition that the proposed rule did not preview. *Id.* at 15-16.

Every court to have opined on the Rule's legality, including this Court, has concluded that the Rule is likely unlawful. This Court reached that determination in June of this year, concluding that the States demonstrated a likelihood of success on the merits of their arguments that the WOTUS Rule violates the CWA and that, in addition, the Agencies adopted the Rule in contravention of the core procedural requirements of the Administrative Procedure Act ("APA"). ECF No. 174 at 10-16. The Sixth Circuit took much the same view, explaining that "it is far

from clear that the new Rule's distance limitations are" lawful, and that "the rulemaking process by which the distance limitations were adopted is facially suspect." *Ohio v. U.S. Army Corps of Eng'rs* (*In re EPA & Dep't of Def. Final Rule*), 803 F.3d 804, 807 (6th Cir. 2015) (*In re Final Rule*), *vacated in part and challenges dismissed*, *Murray Energy Corp. v. U.S. Dep't of Def.* (*In re U.S. Dep't of Def. & EPA Final Rule*), 713 F. App'x 489 (6th Cir. 2018). The district court for the District of North Dakota similarly concluded that the WOTUS Rule suffers from the "same fatal defect" that Justice Kennedy identified in *Rapanos v. United States*, 547 U.S. 715 (2006), and likely violates the APA. *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047, 1055-58 (D.N.D. 2015). Even the Agencies now seem to see the writing on the wall, recently explaining that "[t]hese rulings indicate that substantive or procedural challenges to the 2015 Rule are likely to be successful, particularly claims that the rule is not authorized under the CWA and was promulgated in violation of the APA." Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227, 32,238 (July 12, 2018).

Just so. As explained below, the WOTUS Rule is unlawful in numerous respects: it violates the CWA, the APA, and the United States Constitution. For those reasons, this Court should issue a final order vacating the WOTUS Rule.[1]

STATEMENT

A. Statutory and Regulatory Background

"The statutory term 'waters of the United States' delineates the geographic reach of many of the [CWA's] substantive provisions," *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 625 (2018), many of which impose substantial obligations on the States and their citizens. Most notably, in most cases, a person who causes pollutant discharges into "navigable waters"—defined as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7)—

[1] The States note that the Agencies have filed with this Court a certified index to the administrative record. *See* ECF No. 198-1. The parties have agreed to file, after the conclusion of the briefing schedule, a joint appendix containing excerpts of the administrative record the parties have cited in their summary-judgment briefing.

must obtain a permit under the section 402 National Pollutant Discharge Elimination System ("NPDES") program, *see id.* § 1342, or under section 404 of the CWA for the discharge of dredged or fill material, *id.* § 1344. *See generally Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 625; *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016). The process of obtaining a permit can take years and cost hundreds of thousands of dollars, *see Rapanos*, 547 U.S. at 721, and the CWA "imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without" a proper permit. *Hawkes*, 136 S. Ct. at 1812 (citing 33 U.S.C. §§ 1311(a), 1319(c), (d), 1344(a)). Forty-six States have assumed NPDES permitting responsibilities under 33 U.S.C. § 1342. *NPDES Program Authorizations*, *National Pollutant Discharge Elimination System (NPDES)*, EPA.gov, https://www.epa.gov/npdes/npdes-program-authorizations (last visited August 28, 2018). Another two have assumed permitting under 33 U.S.C. § 1344. *See* 40 C.F.R. §§ 233.70-.71. All States are also responsible for developing water quality standards for those waters of the United States within their borders. *See* 33 U.S.C. § 1313. And the States must also issue water quality certifications for every federal permit that is issued by the federal government within their borders. *See id*. § 1341(a)(1). These various obligations under the CWA are triggered if the water or feature in question is part of the "waters of the United States"; the States regulate the water quality and use of other waters under their independent sovereign authority. *See, e.g.*, Ala. Code § 22-22-2; Ga. Code Ann. § 12-5-21(a); Ky. Rev. Stat. Ann. § 151.110(1)(a); Utah Code Ann. § 73-1-1(3); W. Va. Code § 22-26-3(a).

Since 2001, the Supreme Court has twice rebuffed the Agencies' overly expansive construction of "waters of the United States." In *SWANCC*, the Court rejected the Migratory Bird Rule, which asserted federal authority over waters "[w]hich are or would be used as habitat" by migratory birds. 531 U.S. at 162, 164. The Court explained that the Corps' interpretation "would result in a significant impingement of the States' traditional and primary power over land and water use," despite having "nothing approaching a clear statement from Congress" that it had intended to "readjust the federal-state balance" by permitting such federal encroachment. *Id.* at 174. More recently, in *Rapanos*, the Court held that the Corps could not assert federal control

over intrastate wetlands that are not significantly connected to navigable-in-fact waters. The Court's majority consisted of a four-Justice plurality opinion and Justice Kennedy's concurrence in the judgment. The plurality, in an opinion written by Justice Scalia, would have held that "the waters of the United States" regulated under the CWA "include[] only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes,'" 547 U.S. at 739 (plurality opinion) (alterations in original) (quoting *Webster's New International Dictionary* (2d ed. 1954)), and "wetlands with a continuous surface connection to" those waters, *id.* at 742. For his part, Justice Kennedy reasoned that the CWA extended federal power only to navigable-in-fact waters and those waters with a "significant nexus" to navigable waters. *Id.* at 779 (Kennedy, J., concurring in the judgment). A water has a "significant nexus," Justice Kennedy explained, if it "significantly affect[s] the chemical, physical, and biological integrity of" a navigable water. *Id.* at 780. Under Justice Kennedy's approach, the Agencies are not permitted to assert jurisdiction over all "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)." *Id.* at 776; *see also id.* at 769 (the "merest trickle, [even] if continuous" is insufficient basis for jurisdiction).

B. The 2015 WOTUS Rule

On April 21, 2014, the Agencies published a proposed rule redefining "waters of the United States." Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,187 (Apr. 21, 2014) (Proposed Rule). Under this proposal, the primary waters the rule would cover were "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce," as well as "[a]ll interstate waters, including interstate wetlands" and "[t]he territorial seas" (collectively, "primary waters") *Id.* at 22,262. The Proposed Rule included, as relevant here, three additional classes of waters within federal jurisdiction: (1) all "tributaries" of primary waters; (2) waters "adjacent" to primary waters, defined to include waters lying in a "riparian area" or "floodplain"; and (3) additional waters, on

a case-by-case basis, that "alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a" primary water, meaning they "significantly affect[] the chemical, physical, or biological integrity" of a primary water. *Id.* at 22,263.

The Agencies published the final WOTUS Rule in the Federal Register on June 29, 2015. 80 Fed. Reg. 37,053. The Rule incorporates the Proposed Rule's set of primary waters and then defines, as relevant here, the following waters as "waters of the United States."

Tributaries. The Rule asserts *per se* federal jurisdiction over "[a]ll tributaries," 33 C.F.R. § 328.3(a)(5), which the Rule defines as any "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.* § 328.3(c)(3). The Agencies explain that this includes usually-dry channels that provide "intermittent, or ephemeral" flow "indirectly" through "any number" of links, 80 Fed. Reg. at 37,076, and that "remote sensing sources" and "mapping information" may be used to detect "physical indicators" identifying a bed, bank, and ordinary high water mark, *id.* at 37,076-78; *accord* 33 C.F.R. § 328.3(c)(3).

Adjacent Waters. The Rule asserts *per se* federal jurisdiction over all waters "adjacent" to primary waters, tributaries, and impoundments. 33 C.F.R. § 328.3(a)(6). The Rule defines "adjacent" waters as waters "bordering, contiguous, or neighboring" primary waters, impoundments, or tributaries. *Id.* §328.3(c)(1). This includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id.* Taking an entirely different approach from the Proposed Rule, the WOTUS Rule defines "neighboring" in relevant part as: (1) "[a]ll waters" any part of which is within 100 feet of the ordinary high water mark of a primary water, tributary, or impoundment; (2) "[a]ll waters" any part of which is within 1,500 feet of the ordinary high water mark of a primary water, tributary, or impoundment and within its 100-year floodplain; and (3) "[a]ll waters" any part of which is within 1,500 feet of the high tide line of a primary water. *Id*. § 328.3(c)(2). *Compare id.*, *with* 79 Fed. Reg. at 22,263. The WOTUS Rule also excludes from adjacent waters those waters "being used for established

normal farming, ranching, and silviculture activities." 33 C.F.R. § 328.3(c)(1). The Rule does not contain a similar exclusion for tributaries.

Case-By-Case Waters. As relevant here, the WOTUS Rule also asserts federal jurisdiction on a case-by-case basis over those "waters [at least partially] located within the 100-year floodplain of a" primary water and "waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary, so long as the Agencies find a "significant nexus" with a primary water. *Id.* § 328.3(a)(8). Under the Rule, a feature has a "significant nexus" to a primary water if, "either alone or in combination with other similarly situated waters in the region," the feature "significantly affects the chemical, physical, or biological integrity of a [primary water]" based on "any single function or combination of functions performed by the water." *Id.* § 328.3(c)(5). For example, under this approach, the Rule would sweep particular wetlands into federal jurisdiction on the basis that birds use them for foraging and feeding. *See* 80 Fed. Reg. at 37,093.

C. Procedural History

The day after the Agencies published the WOTUS Rule in the Federal Register, Plaintiff States filed the present lawsuit, ECF No. 1, and, soon thereafter, moved for a preliminary injunction, ECF No. 32. This Court denied that motion for a preliminary injunction on the basis that it lacked jurisdiction to consider the request because jurisdiction belongs to the federal courts of appeals under 33 U.S.C. § 1369. ECF No. 77. Meanwhile, Plaintiff States in this case joined 20 other States in filing protective petitions in the federal courts of appeals. *See Georgia v. Administrator, EPA*, No. 15-13252, Agency Petition/Application (11th Cir. July 20, 2015). After those petitions were consolidated in the Sixth Circuit under 28 U.S.C. § 2112, the Sixth Circuit issued a nationwide stay, blocking the WOTUS Rule on the basis that it likely violated the CWA and APA, *In re Final Rule*, 803 F.3d at 807, while also holding that it had jurisdiction over the case under 33 U.S.C. § 1369, *see Murray Energy Corp. v. U.S. Dep't of Def. (In re U.S. Dep't of Def. & U.S. EPA Final Rule)*, 817 F.3d 261, 273 (6th Cir. 2016), *rev'd*, *Nat'l Ass'n of*

Mfrs., 138 S. Ct. 617. The Supreme Court later concluded that federal district courts, not the federal courts of appeals, have jurisdiction over the WOTUS Rule challenges, *see Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 620, and the Sixth Circuit responded by dismissing the petitions challenging the WOTUS Rule and dissolving the nationwide stay, *see Murray Energy Corp.*, 713 F. App'x at 490-91. In the meantime, the Eleventh Circuit vacated this Court's order denying Plaintiff States' motion for a preliminary injunction—which had been decided below on jurisdictional grounds—and remanded the case back to this Court. *See Georgia ex. rel. Carr v. Pruitt*, 880 F.3d 1270, 1272 (11th Cir. 2018). After briefing and argument, this Court granted Plaintiff States' motion for a preliminary injunction, explaining, as relevant here, that Plaintiff States are likely to succeed on their arguments that the WOTUS Rule violates the CWA and APA. ECF No. 174 at 10-16.[2]

Meanwhile, the Agencies have taken regulatory steps to determine whether to repeal, or repeal-and-replace, the WOTUS Rule. In response to an executive order in February 2017 directing the Agencies to reconsider the Rule, *see* Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (published Mar. 3, 2017), the Agencies proposed a rule to "rescind the WOTUS Rule and recodify the pre-2015 regulatory definition of 'waters of the United States.'" ECF No. 174 at 6 (citing Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017)). Then, in November 2017, following oral argument in *National Association of Manufacturers v. Department of Defense*, the Agencies proposed a rule that added a new applicability date to the WOTUS Rule. Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017) (Proposed Rule). That "Applicability Rule" became final on February 6, 2018, making the WOTUS Rule effective on February 6, 2020. Definition of "Waters of the United States"-

[2] The Intervenor-Defendants appealed this Court's order granting preliminary injunctive relief, *see* ECF No. 190, and the appeal is now pending in the Eleventh Circuit.

Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018).[3] In the meantime, the Agencies have issued another proposed rule that clarifies their intent to repeal the WOTUS Rule in its entirety and otherwise invites additional comment on issues relating to its prior proposal to rescind the WOTUS Rule and recodify the pre-2015 regulatory definition. This new rule bolsters the case for a proposed withdrawal of the WOTUS Rule and also concedes that, given the multiple rulings against the WOTUS Rule at the preliminary-injunction stage, "substantive or procedural challenges to the 2015 Rule are likely to be successful, particularly claims that the rule is not authorized under the CWA and was promulgated in violation of the APA." 83 Fed. Reg. at 32,238.

ARGUMENT

In a challenge to an administrative rule under the APA, the question for the court on summary judgment is whether the challenging party has established that the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir. 1996); 10B Charles Alan Wright et al., Federal Practice and Procedure § 2733 (4th ed. 2013) ("Summary judgment is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency."). In conducting this analysis, the court "is not required to resolve any facts," *Fla. Keys Citizens Coal, Inc. v. U.S. Army Corps of Eng'rs*, 374 F. Supp. 2d 1116, 1126 (S.D. Fla. 2005) (quoting *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985)), but is instead limited to the administrative record before the agency when the agency issued the rule in question, *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971). Here, the WOTUS Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in

[3] The district court for the District of South Carolina issued a nationwide injunction against the Applicability Rule. *See* ECF No. 194 (citing *S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-330, ECF No. 66 (D.S.C. Aug. 16, 2018)).

accordance with law" because the Rule violates the CWA, the APA, and the United States Constitution.[4]

I. The WOTUS Rule violates the Clean Water Act.

A. The WOTUS Rule fails Justice Kennedy's test from *Rapanos*, which controls in the Eleventh Circuit.

The CWA provides that "waters of the United States" are synonymous with "navigable waters." 33 U.S.C. § 1362(7). In *Rapanos*, a majority of the Justices of the Supreme Court rejected an effort to define "waters of the United States" as sweeping in waters remote from navigable-in-fact waters. A four-Justice plurality, in an opinion written by Justice Scalia, concluded that "waters of the United States" applies only to "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739 (plurality op.) (quoting *Webster's New International Dictionary* (2d ed. 1954)). Justice Kennedy concurred in the judgment, explaining that, in his view, "waters of the United States" includes waters "navigable in fact or that could reasonably be so made" and waters with a "significant nexus" to a navigable-in-fact water. *See id.* at 759, 779 (Kennedy, J., concurring in the judgment). The Eleventh Circuit has held that under *Marks v. United States*, 430 U.S. 188 (1977), Justice Kennedy's interpretation is controlling. *See United States v. Robison*, 505 F.3d. 1208, 1222 (11th Cir. 2007). Because the Eleventh Circuit has held that Justice Kennedy's "significant nexus" test controls the CWA analysis, this Court must apply that test in evaluating the legality of the WOTUS Rule.[5]

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[4] Plaintiff North Carolina Department of Environmental Quality joins Part II.A of this brief only, and seeks summary judgment on the grounds set forth in that part alone.

[5] Justice Kennedy's test also effectively controls here because the Agencies justified the WOTUS Rule based solely on that test, so the Rule must be declared unlawful if it fails that test, even if some alternative rationale—not relied upon by the Agencies—could have justified the Rule. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). In any event, the WOTUS Rule would plainly fail the other test proposed by the Justices that made up the *Rapanos* majority: Justice Scalia's continuous-surface-connection approach. For example, the Agencies explain that under the WOTUS Rule, a feature can be a jurisdictional water even if flow is "perennial,

Justice Kennedy concluded that the CWA covers only "waters that are or were navigable in fact or that could reasonably be so made" and secondary waters with a "significant nexus" to a navigable-in-fact water. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). A significant nexus exists where the water "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of" a navigable-in-fact water. *Id.* at 780. This means that the CWA does not include waters with a "speculative or insubstantial" "effect" on navigable waters. *Id.* Thus, Justice Kennedy explained, the CWA does not extend to all "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)," *id.* at 776, or all waters containing "[t]he merest trickle, [even] if continuous," *id.* at 769. Justice Kennedy specifically rejected the Corps' approach of sweeping in all wetlands even if *actually* adjacent to tributaries of navigable waters, "however remote and insubstantial," *id.* at 778-80, explaining that the standard's breadth "preclude[d] its adoption," *id.* at 781. Justice Kennedy also drew heavily upon the Supreme Court's prior decision in *SWANCC*, where the Supreme Court held that the CWA did not permit federal jurisdiction over isolated sand and gravel pits simply because those pits "are or would be used as habitat" by migratory birds, *SWANCC*, 531 U.S. at 162, 164, 167. *See Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment),

Applying Justice Kennedy's approach from *Rapanos*—as Eleventh Circuit precedent requires—demonstrates that the WOTUS Rule is unlawful.

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intermittent, or ephemeral" with "flowing water only in response to precipitation events in a typical year," 80 Fed. Reg. at 37,076, contrary to the plurality's reading of "waters of the United States" as not including "channels containing merely intermittent or ephemeral flow," *Rapanos*, 547 U.S. at 733 (plurality op.). The Rule's adjacency category, 33 C.F.R. § 328.3(c)(1), similarly covers numerous waters without a "continuous surface connection" to any navigable water, *Rapanos*, 547 U.S. at 742 (plurality op.), including all waters within the 100-year floodplain and within 1,500 feet of the ordinary high-water mark of a primary water, impoundment, or tributary, 33 C.F.R. § 328.3(c)(2)(ii). And the WOTUS Rule's case-by-case waters category focuses upon any number of functions, none of which require a "continuous surface connection" to any navigable water. *Rapanos*, 547 U.S. at 742 (plurality op.).

1. The WOTUS Rule's assertion of *per se* jurisdiction over "tributaries" fails Justice Kennedy's "significant nexus" test.

The WOTUS Rule asserts federal jurisdiction over all "tributaries," which the Rule defines as any "water," no matter how ephemeral, that has "a bed and banks and an ordinary high water mark" and that "contributes flow, either directly or through another water" to a primary water. 33 C.F.R. § 328.3(c)(3); *see* 80 Fed. Reg. at 37,076. This definition would apply to any feature with "one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground)." 33 C.F.R. § 328.3(c)(3). According to the Agencies, jurisdictional "tributaries" may be identified using "remote sensing sources" or "mapping information." 80 Fed. Reg. at 37,076-78. A feature would also qualify as a tributary if it contributes flow—even through "any number" of other waters—to a primary water. *Id.* at 37,076. And under the Rule, "tributaries need not be demonstrated to possess any specific volume, frequency, or duration of flow, or to contribute flow to a traditional navigable water in any given year or specific time period." 83 Fed. Reg. at 32,228. As a result, tributaries under the Rule include even typically-dry features that, despite having a high water mark at some point along the feature, indirectly and only occasionally contribute even a mere trickle to a navigable water. *See* 80 Fed. Reg. at 37,076.

This wildly overbroad definition of "tributaries" fails Justice Kennedy's "significant nexus" test. The WOTUS Rule asserts jurisdiction over features that "contribute[] flow," 33 C.F.R. § 328.3(c)(3), even if the flow is "intermittent" or "ephemeral" and "only in response to precipitation events," 80 Fed. Reg. at 37,076. But under Justice Kennedy's opinion in *Rapanos*, standards that ensure sufficient "volume and regularity" of flow are critical to establishing a significant nexus, *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment), lest features with only the "[t]he merest trickle, [even] if continuous," be swept improperly into federal jurisdiction, *id.* at 769. The WOTUS Rule's tributary definition also relies heavily upon the concept of an ordinary high-water mark ("OHWM"), defined 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, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(c)(3), (6). But in *Rapanos*, Justice Kennedy rejected reliance on the OHWM as a "determinative measure" for establishing a significant nexus, 547 U.S. at 761, 781 (Kennedy, J., concurring in the judgment) (citing 33 C.F.R. § 328.3(e) (2005)), because the breadth of the OHWM standard "seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," *id.* at 781. As this Court has pointed out, the WOTUS Rule has this "same fatal defect." ECF No. 174 at 12. Indeed, the WOTUS Rule covers "[d]itches with perennial flow, … [d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, … [and] [d]itches, *regardless of flow*, that are excavated in or relocate a tributary." 80 Fed. Reg. at 37,078 (emphasis added). These are much the same "drains, ditches, and streams" carrying only minor water volumes that Justice Kennedy explained fall outside of the Agencies' authority. *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment).

2. The WOTUS Rule's assertion of *per se* jurisdiction over "adjacent" waters fails Justice Kennedy's "significant nexus" test.

The WOTUS Rule asserts federal jurisdiction over all "adjacent" waters, defined, as relevant here, as (1) "[a]ll waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary; (2) "[a]ll waters [at least partially] located within the 100-year floodplain of a" primary water, impoundment, or tributary "and not more than 1,500 feet from the ordinary high water mark of such water"; and (3) "[a]ll waters [at least partially] located within 1,500 feet of the high tide line of a" primary water. 33 C.F.R. § 328.3(c)(1), (2). This is contrary to Justice Kennedy's *Rapanos* standard in multiple respects.

As a threshold matter, given that the WOTUS Rule's definition of "tributaries" is unlawfully overbroad, its adjacent-waters definition is necessarily unlawful to the extent that

definition applies to waters adjacent to tributaries. As explained above, the WOTUS Rule's *per se* coverage of all tributaries violates Justice Kennedy's test because it sweeps in waters and land features that send only the "merest trickle[s]" into navigable waters. 547 U.S. at 769 (Kennedy, J., concurring. It necessarily follows that waters with only a geographical relation to such "mere trickle" tributaries—which is all the "adjacency" category requires—also lack a "significant nexus" to interstate, navigable waters.

The Rule violates Justice Kennedy's approach in other respects, too. Perhaps most obviously, the Rule's coverage of all waters within the 100-year floodplain and within 1,500 feet of a primary water, impoundment, or tributary would cover small ponds, drainages, and wetlands simply because these could have a relationship with such waters during a *once-in-a-century storm*. *See* 33 C.F.R. § 328.3(c)(1), (2)(ii). Asserting federal jurisdiction based upon such an infrequent connection to navigable-in-fact waters simply cannot be squared with Justice Kennedy's insistence that "waters of the United States" must "significantly affect" the "chemical, physical, and biological integrity" of a "navigable water[] in the traditional sense." 547 U.S. at 779-80 (Kennedy, J., concurring in the judgment). The Rule's other two distance-based adjacency categories—"[a]ll waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary, and "[a]ll waters [at least partially] located within 1,500 feet of the high tide line of a" primary water—are similarly incompatible with Justice Kennedy's approach. 33 C.F.R. § 328.3(c)(2)(i), (iii). EPA's own Science Advisory Board explained that "the available science supports defining adjacency or determination of adjacency on the basis of *functional relationships*, rather than solely on the basis of *geographical proximity or distance* to jurisdictional waters." 80 Fed. Reg. at 37,064 (emphases added) (citation omitted). Yet, the Agencies *did* base definitions of adjacent waters "solely" on "geographical proximity," therefore failing to provide assurance that these features "play an important role in the integrity of … navigable waters." *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment).

3. The WOTUS Rule's assertion of jurisdiction on a case-by-case basis exceeds the scope of federal jurisdiction permitted under Justice Kennedy's "significant nexus" test.

The WOTUS Rule asserts jurisdiction, on a case-by-case basis, over waters that the Agencies find have a "significant nexus to a" primary water, when (1) "located within the 100-year floodplain of a" primary water; or (2) "located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). The Agencies will find a "significant nexus" if a feature "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]." 33 C.F.R. § 328.3(c)(5) (emphasis added). The functions that qualify for this inquiry include, among others, "[c]ontribution of flow," "[e]xport of organic matter," "[e]xport of food resources," and "[p]rovision of life cycle dependent aquatic habitat" for "species located in" primary waters. *Id.*

The WOTUS Rule's approach to case-by-case waters far exceeds Justice Kennedy's articulation of the "significant nexus" required for federal jurisdiction. Justice Kennedy concluded that the CWA allowed federal jurisdiction only where the water "significantly affects" the "chemical, physical, *and* biological integrity" of a navigable water in the traditional sense. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment) (emphasis added). The WOTUS Rule, in contrast, permits federal jurisdiction based upon any one sliver of "chemical, physical *or* biological" connection. 33 C.F.R. § 328.3(c)(5) (emphasis added). This Court recently identified one obvious example of how this is unlawful. In *SWANCC*, "[t]he Army Corps had attempted to justify the rule at issue … on the ground that 121 bird species had been observed at the site, including several known to depend on aquatic environments for a significant portion of their life. Similarly, the WOTUS Rule asserts that, standing alone, a significant 'biological effect'—including an effect on 'life cycle dependent aquatic habitat[s]'—would place a water within the CWA's jurisdiction." ECF No. 174 at 13 (quoting 33 C.F.R. § 328.3(c)(5)); *accord* 80 Fed. Reg. at 37,094 (discussing what may qualify as "[e]vidence of biological connectivity and the effect on waters"). The Agencies have since confirmed that the gravel pits

in *SWANCC* are within the 4,000 feet reach of a primary water, impoundment, or tributary, such that those pits "would be subject to, and might satisfy, a significant nexus determination under the [WOTUS] Rule's case-specific analysis." 83 Fed. Reg. at 32,242; *accord id.* at 32,242-47 (cataloging other potential examples of the expansive breadth of the significant nexus standard articulated in the WOTUS Rule).

4. The WOTUS Rule's assertion of jurisdiction tied to interstate, non-navigable waters fails Justice Kennedy's test.

The WOTUS Rule also violates Justice Kennedy's test because the set of *primary waters* over which it asserts federal jurisdiction—the set of waters from which the Rule's definitions of tributaries, adjacency, and case-by-case waters then operate—includes a category of waters that are not "navigable in fact," *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment), and "could [not] reasonably be so made," *id.* at 759. In particular, the Rule's set of primary waters covers "interstate waters, including interstate wetlands," 33 C.F.R. § 328.3(a)(2), without *any* inquiry into the interstate waters' navigability or connection to waters that are navigable. This violates Justice Kennedy's *Rapanos* standard, since the WOTUS Rule asserts federal jurisdiction over waters that are not navigable-in-fact, and then extends jurisdiction to waters with a nexus to *those* non-navigable waters.

B. The WOTUS Rule also violates the Clean Water Act because the Act does not supply a clear congressional authorization for the Rule's substantial and transformative encroachment on an area of traditional state power.

Given the WOTUS Rule's breathtaking reach, the Rule is unlawful under the CWA for an additional reason: it is not supported by a *clear* congressional authorization. The Supreme Court has developed two clear-statement principles that are relevant here, and the CWA does not offer a sufficiently clear statement to authorize the WOTUS Rule under either one.

First, the Supreme Court has explained that a statute should not be read as asserting the outer boundaries of Congress' authorization, absent a clear congressional statement. *See SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). "This concern is heightened where the

administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id* at 173. Thus, if Congress intends to legislate "[i]n traditionally sensitive areas, such as legislation affecting the federal balance," it must say so plainly. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 544 (1994) ("To displace traditional state regulation … the federal statutory purpose must be 'clear and manifest.'"). Most relevant here, in *SWANCC*, the Supreme Court invalidated the Migratory Bird Rule in part because it could find "nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit," given that such broad federal jurisdiction "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Rather than expressing a desire to readjust the federal-state balance in this manner," the Court explained, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources.'" *Id.* (alterations in original) (quoting 33 U.S.C. §1251(b)).

These principles apply with even more force to the WOTUS Rule. As noted above, the WOTUS Rule reaches not only the same waters and land features that led to the Court's decision in *SWANCC*, but goes significantly beyond those waters to reach innumerable other largely isolated, entirely intrastate waters and usually-dry features. And, of course, just as in *SWANCC*, the Agencies cannot point to any clear statement authorizing this capacious reach. The CWA provides only that the Agencies may require permits for pollutant discharges to "navigable waters," defined as "waters of the United States." As the Supreme Court has already concluded, this text does not support an expansive intrusion into local land-use decisions. *See id.* at 174. Quite the opposite: Congress in the CWA expressed an intent to "recognize, preserve, and protect the primary responsibilities and rights of States …. to plan the development and use … of land and water resources." 33 U.S.C. § 1251(b).

Second, the Supreme Court has recently held that agencies need clear congressional authorization to exercise transformative power over matters of vast economic and political

significance. In *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (*UARG*), EPA sought to expand two Clean Air Act programs to cover numerous additional sources. *Id.* at 2443. The Court held that this was unlawful, reasoning that when a federal regulatory agency seeks to "bring about an enormous and transformative expansion" in its authority to make "decisions of vast 'economic and political significance,'" *id.* at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)), under a "long-extant statute," it must point to a clear statement from Congress, *id.* The Court made the same point in *King v. Burwell*, 135 S. Ct. 2480 (2015), explaining that Congress does not implicitly delegate to agencies "question[s] of deep 'economic and political significance.'" *Id.* at 2489 (citation omitted).

Like the *SWANCC* clear-statement principle, the *UARG* clear-statement principle applies directly to the WOTUS Rule and makes plain that the Rule is unlawful. The WOTUS Rule transforms the relationship between the federal and state governments when it comes to the core sovereign matter of water and land-use management. As the *Rapanos* plurality explained, "extensive federal jurisdiction … would authorize the [Agencies] to function as …. *de facto* regulator[s] of immense stretches of intrastate land … with the scope of discretion that would befit a local zoning board." 547 U.S. at 738 (plurality op.). What was true of the assertion of federal jurisdiction in cases like *Rapanos* and *SWANCC* is an even more apt description of the WOTUS Rule, which reaches even further than the regulatory decisions at issue in those prior cases. Even if one were to accept as true the Agencies' own unrealistically underinclusive estimate that the WOTUS Rule increases federal determinations by 2.84 to 4.65 percent, 80 Fed. Reg. at 37,101, that expansion is a significant intrusion into state sovereign decisions without the clear congressional authorization such an intrusion requires.

II. The WOTUS Rule violates the Administrative Procedure Act.

In promulgating the WOTUS Rule, the Agencies transgressed two important requirements under the APA: the obligation to make proposed rules available for meaningful public comment, 5 U.S.C. § 553(b), and the mandate to avoid "arbitrary [or] capricious"

rulemaking, *id.* § 706(2)(A). In the context of this case, these two requirements have an important relationship, which highlights a critical flaw in the WOTUS Rule. Specifically, an agency's failure to abide by the strictures of notice-and-comment rulemaking deprives the agency of meaningful public input, thereby increasing the likelihood of arbitrary decision-making and frustrating the courts' ability to conduct review based on complete information. As noted above, when an agency's decision is subjected to litigation under the APA, the merits arguments are limited to the administrative record. This record will often consist of the "responsive data or argument" submitted during the notice-and-comment period. *Glob. Van Lines, Inc. v. Interstate Commerce Comm'n*, 714 F.2d 1290, 1298 (5th Cir. 1983) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945)). But the record is only adequate—allowing both for rational agency decision-making and meaningful judicial review—when the notice is sufficiently comprehensive and relevant to the rule that the agency ultimate adopts. Sufficient notice is thus essential to ensure "affected parties [have] an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *See Int'l Union, UMWA v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). When an agency adopts a final rule that is not a "logical outgrowth" of the proposal, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), the result will often be the imposition of significant regulatory requirements without sufficiently developed record support.

The WOTUS Rule is an outsized example of such an agency-induced breakdown in the APA's rulemaking process. The Agencies constructed the Rule around a number of elements that appeared nowhere in the proposed rule, including five central distance-based components, an unduly narrow exclusion, and other features that appeared nowhere in the proposal. Given the utter failure to notify interested parties about these key components of this transformative rule, parties did not submit any meaningful comments on them. This, in turn, led the Agencies to adopt a final rule unsupported by record evidence.

A. The Agencies violated the APA's notice-and-comment requirement.

The APA's notice-and-comment mandate, 5 U.S.C. § 553(b), is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review," *Int'l Union*, 407 F.3d at 1259. For notice-and-comment to carry out these important objectives, the final rule must be a "logical outgrowth" of the proposal. *Long Island*, 551 U.S. at 174. A final rule satisfies the logical-outgrowth test only if affected parties "should have anticipated that [the] requirement" embodied in the final rule might be adopted, including because the agency satisfied its duty of informing the public of "the range of alternatives being considered with reasonable specificity." *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

The failure to comply with the APA's notice requirement, including the logical-outgrowth test, "almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). Thus, in *Small Refiner*, EPA "gave general notice that it might make unspecified changes in the definition of small refinery." 705 F.2d at 549. The D.C. Circuit concluded that EPA failed to comply with the notice-and-comment requirement by adopting a particular past-ownership requirement on the definition of "small refinery" that EPA had not previewed in the notice. *Id.* at 548-49. Similarly, in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), the D.C. Circuit held that a final rule violated notice-and-comment when the agency's listing of hazardous waste went from a "largely supplementary function" in the proposal to a "heavy emphasis" in the final rule. *Id.* at 751-52. And in *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009), the agency violated the APA by proposing to allow affected parties to recommend comparison groups based on the most recent year's data, but then adopting a rule that allowed data comparison over the previous four years. *Id.* at 1078, 1082. *See also Int'l Union*, 407 F.3d at 1259-60; *cf. Miami-Dade Cty. v. U.S. EPA*, 529 F.3d 1049, 1058 (11th Cir. 2008).

The WOTUS Rule is "not a logical outgrowth of the proposed rule." ECF No.174 at 13.

1. The WOTUS Rule's distance-based components are not logical outgrowths of the Proposed Rule.

The Proposed Rule defined "adjacent waters" as including waters within a "riparian area" or "flood plain" of a primary water, impoundment, or tributary. 79 Fed. Reg. at 22,263. In the final WOTUS Rule, however, the Agencies adopted three entirely new distance-based components: (1) waters within 100 feet of a primary water, impoundment, or tributary; (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or tributary; and (3) waters within 1,500 feet of the high-tide line of a primary water. 33 C.F.R. § 328.3(c)(2). Nothing in the proposal gave regulated parties notice that any of these three components were under consideration, so there was no reason interested parties "should have anticipated" them. *Small Refiner*, 705 F.2d at 549. Had the Agencies complied with the APA and provided proper notice, the numerous interested parties—from all sides of this issue—surely would have submitted comments, data, and detailed maps addressing the practical import and reasonableness of adopting these components. But proper notice was not given, so unsurprisingly, the Agencies cannot identify a single public comment addressing these distance-based components. Accordingly, the WOTUS Rule was not "tested via exposure to diverse public comment," and was, instead, adopted in a manner manifestly "[un]fair[ ] to affected parties," including because it gave "affected parties [no] opportunity to develop evidence in the record to support their objections to the rule." *Int'l Union*, 407 F.3d at 1259. This procedural failure also deprived the Agencies of information from those parties "most interested" and "best informed," *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (9th Cir. 1994), regarding this subject matter: the regulated community and the state regulators who implement the CWA and related state programs.

The fact that the Agencies, in the Proposed Rule, generally sought comment about "establishing specific geographic limits" for "distance limitations," 79 Fed. Reg. at 22,208, does not suffice as adequate notice of the WOTUS Rule's particular and specific distance-based

components. This solitary and highly generalized request did not permit the Agencies to adopt *any* distance-based definition of adjacency, as to the reference point—*e.g.*, a primary water, "impoundment," or "tributary"; "floodplain"; "high tide line"; *or any other feature*—and to the distance from that reference point—"100 feet," "1,500 feet," *or any other distance*—without seeking public input. A contrary conclusion would, impermissibly, justify the Agencies adopting "*any* final [adjacency] rule." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005).

And although the Agencies' notice-and-comment failures would be unlawful regardless of the subject-matter of the rule-making involved, the deeply consequential, far-reaching nature of the rule here makes the failure particularly unacceptable. The question of what waters fall within the jurisdictional definition of "water of the United States" directly implicates the regulation of millions of acres of local land and water features. If the Agencies wanted to build the definition of adjacency around distances from certain reference points, they were required to inform the public of "the range of alternatives being considered with reasonable specificity," *Small Refiner*, 705 F.2d at 549, as to both the particular reference points themselves and the particular distances. The Agencies' failure on this score led to an APA violation orders of magnitude more significant than the prosaic APA shortfalls as to the definition of a "small refinery," *Id.* at 549, whether the listing of wastes would play a "supplementary" or "heavy" role, *Shell Oil*, 950 F.2d at 751-52, or whether data from one or four years could be considered, *CSX*, 584 F.3d at 1078.

2. The Rule's case-by-case assertion of jurisdiction based on specific distance requirements is not a logical outgrowth of the Proposed Rule.

The Agencies made virtually identical notice-and-comment errors when it comes to defining case-by-case waters. The Proposed Rule included an unlimited, illegal approach to such waters, proposing to apply the CWA to any water that, in the Agencies' judgment, had a "significant nexus" to a primary water. 79 Fed. Reg. at 22,263. In the WOTUS Rule, the Agencies mandated that their overbroad case-by-case approach would cover, as relevant here: waters within (1) the 100-year floodplain of a primary water or (2) 4,000 feet of a primary water,

impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). The Agencies' Proposed Rule nowhere suggested that either of these components were under consideration, so no regulated parties "should have anticipated" that the Agencies would adopt them. *Small Refiner*, 705 F.2d at 549.

The fact that the Proposed Rule observed that "distance of hydrologic connection" was one factor that could be considered in conducting the case-by-case approach, 79 Fed. Reg. at 22,214, did not notify the public that the Agencies were considering hard-and-fast distance requirements for case-by-case waters, let alone inform the public of "the range of alternatives being considered with reasonable specificity," *Small Refiner*, 705 F.2d at 549, as to either the particular reference points or the particular distances being considered. Indeed, the subsections of the proposal that follow that single sentence comprise three-and-a-half pages discussing potential requirements for case-by-case waters, yet *nowhere* in those pages do the Agencies suggest they might adopt bright-line, distance-based limitations from particular reference points, let alone the particular distance and reference-point combinations in the final rule. *See* 79 Fed. Reg. at 22,214-17.

3. The Rule's partial farming exclusion is not a logical outgrowth of the Proposed Rule.

In the WOTUS Rule, the Agencies excluded "waters being used for established normal farming, ranching, and silviculture activities" from *per se* jurisdiction under the Rule's adjacency category, but not from the tributary category. *Compare* 33 C.F.R. § 328.3(c)(1), *with id.* § 328.3(c)(3). But "unlike the final rule, the proposed rule made no mention of exempting waters on farmland only from the 'adjacent waters' category." ECF No.174 at 16. Had the Agencies informed the public that they might adopt an exclusion, the States could have submitted comments explaining why farmland should be excluded from *all per se* categories.

B. Numerous aspects of the WOTUS Rule lack adequate record support.

A final rule must be "set aside" if that rule is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). A rule is arbitrary and capricious if it is unsupported by the record, *see Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983),

does not explain why alternatives were rejected, *id.*, or fails to "treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so," *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). "[C]onclusory statements will not do; an agency's statement must be one of *reasoning*." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). And judicial review becomes "meaningless where the administrative record is insufficient." *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976). Numerous aspects of the WOTUS Rule fail these basic requirements of reasoned decision making.

Perhaps most obviously, the three distance-based components of the adjacency definition, as well as the two distance-based components of case-by-case waters, entirely lack record support. While the Agencies claimed that these distance-based components were "reasonable" and "practical," consistent with unspecified "experience," and supported by "the implementation value of drawing clear lines," 80 Fed. Reg. at 37,085-91, those components are nothing more than insufficient "[c]onclusory statements," *Amerijet*, 753 F.3d at 1350. Although some type of bright-line, distance-based approach perhaps could survive review if supported by a proper administrative record, the Agencies provided no such record here (and indeed frustrated entirely interested parties' ability to help them build that record by springing the distance-based components upon an unsuspecting public, without following the strictures of proper notice-and-comment rulemaking). To the contrary, the record included the Agencies' own Science Advisory Board's rejection of a distance-based approach, which was grounded in the conclusion that "the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water." SAB 2-3, ID-7531; *see also* 80 Fed. Reg. 37,064.[6] And nothing in the record supports the Agencies' decision to choose the specific distances—100 feet, 1,500 feet, or 4,000 feet—over *any* alternative distances from their chosen or alternative reference points.

[6] Citations to materials in the administrative record follow the following citation format: [ShortTitle] [pincite], ID-[last digits of docket number].

Similarly arbitrary is the Rule's approach to farmland—excluding it from the adjacency category, but not from the tributaries category. While the Agencies reasonably explained that an exclusion is justified because of "the vital role of farmers in providing the nation with food, fiber, and fuel," 80 Fed. Reg. at 37,080, they did not explain why this same rationale would not demand an exclusion from the tributaries category. This violates the bedrock APA requirement that an agency must "treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." *Babbitt*, 92 F.3d at 1258.

Finally, and more generally, the "WOTUS Rule asserts jurisdiction over remote and intermittent waters without evidence that they have a [significant] nexus with any navigable-in-fact waters." ECF No. 174 at 16. The Agencies repeatedly claimed that the Rule was grounded in science, but the Agencies' asserted "scientific" basis is merely the banal fact that water that flows downhill creates hydrological connections. *See* 80 Fed. Reg. at 37,063. This truism does nothing to advance the *legal* inquiry because, as Justice Kennedy held, the question under the CWA is not a mere nexus, but a "significant" nexus. *Rapanos*, 547 U.S. at 767. The Agencies wholly failed to explain, in a rational, record-based manner, why, for example, a connection to a navigable-in-fact water during a once-in-a-century rainstorm creates a nexus that is legally sufficient to establish federal jurisdiction.

III. The WOTUS Rule violates the United States Constitution.

A. The Rule exceeds Congress's Commerce Clause authority.

The Supreme Court has held that Congress's power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, extends only to: (1) "channels of interstate commerce"; (2) the "instrumentalities of interstate commerce"; and (3) "activities that substantially affect interstate commerce," *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The WOTUS Rule goes beyond Congress' Commerce Clause authority and is thus unlawful.

In enacting the CWA, Congress relied exclusively upon its authority over channels of interstate commerce—that is, "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—but the WOTUS Rule far exceeds that authority. As the Supreme Court explained in *SWANCC*, there is no indication that, in adopting the CWA, "Congress intended to exert anything more than its commerce power over navigation." *Id.* at 168 n.3. This is correct as a matter of statutory construction, given that the relevant portions of the CWA protect only "navigable waters," *see, e.g.*, 33 U.S.C. §§ 1362(7), (12), and make no reference to instrumentalities of commerce or those matters substantially affecting interstate commerce, beyond that directly related to navigable waters. The Agencies agree, recently explaining that "the power conferred on the agencies to regulate the waters of the United States is grounded in Congress' commerce power over navigation." 83 Fed. Reg. at 32,237.

The WOTUS Rule cannot be justified by Congress' authority to protect "channels of interstate commerce." "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941). But as explained above, the WOTUS rule covers numerous local land and water features that are not navigable-in-fact and have only an extremely tangential, if any, connection to navigable-in-fact waters—including connections that might happen only every one-hundred years. As this Court put it, the WOTUS Rule covers "remote and intermittent waters without evidence that they have a nexus with any navigable-in-fact waters." ECF No. 174 at 14.

Nor can the WOTUS Rule be justified under the other two categories of congressional authority under the Commerce Clause: "instrumentalities of interstate commerce" or "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. Nothing in the relevant statutory provision relates to instrumentalities of interstate commerce, and Congress has not sought to create a comprehensive regulatory scheme for water and land-use management

sufficient to invoke the substantial-effects category. *See Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment).

And even if this Court were to hold that the substantial-effects category could apply to a regulation under the CWA, the WOTUS Rule would not fall within that category. In *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court rejected efforts by Congress to regulate non-economic activities based on an argument that those non-economic activities, taken in the aggregate, would have a substantial effect on interstate commerce. In *Lopez*, the Court held that the possession of a firearm in a school zone was "in no sense an economic activity," and then rejected the argument that Congress had the authority to reach this non-economic activity because, in the aggregate, guns in school zones would have a substantial effect on interstate commerce. 514 U.S. at 561, 567. Similarly, in *Morrison*, the right to bring a civil action in federal court for victims of gender-motivated violence targeted "noneconomic activity," whereas every case "in our Nation's history" that upheld Commerce Clause regulation of intrastate activity involved "activity [that was] economic in nature." 529 U.S. at 613. The federal government's argument relied on an impermissible "but-for causal chain from the initial occurrence of violent crime ... to every attenuated effect upon interstate commerce." *Id.* at 615.

The WOTUS Rule would fail under *Lopez* and *Morrison* even if the doctrine announced in those cases applied here. The Rule fails to "express[ly] ... limit its reach to [activities that] have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Indeed, *any* activity that leads to the discharge of a pollutant into a water falling under the WOTUS Rule's overbroad definition of "waters of the United States" would be implicated. And of course, the Rule's assertion of case-by-case jurisdiction is based on an analysis that has little (if anything) to do with commerce. For example, the Agencies may assert authority over a water because it "[e]xport[s] … organic matter" to a primary water. 33 C.F.R. § 328.3(c)(5)(vii). In other words, if a bird flies from a primary water to another water or feature and a plant or invertebrate "hitchhik[es]," Connectivity Study 5-5, ID-20859, on the bird's feathers and travels back to the primary water, that could be sufficient for the Agencies to assert jurisdiction under

the Rule. Or if the feature "[e]xport[s] … food resources," 33 C.F.R. § 328.3(c)(5)(viii), because a bird travels to eat, the Agencies could deem it jurisdictional under the Rule. Finally, the Rule relies on an attenuated causal chain that "obliterate[s] the distinction between what is national and what is local," *Lopez*, 514 U.S. at 557 (quotations omitted), requiring only an extremely tenuous connection to navigable-in-fact waters for the assertion of broad federal jurisdiction.

B. The Rule violates the States' Tenth Amendment rights.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution … are reserved to the States respectively, or to the people." U.S. Const., amend. X. Tenth Amendment concerns are implicated when a federal rule regulates the "states as states," when it addresses matters that are attributes of state sovereignty, and when compliance with the rule would impair a State's ability to structure integral operations. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 286-87 (1981). State authority to manage local lands "is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982); *cf.* 33 U.S.C. § 1251(b). In *SWANCC*, for example, the Supreme Court relied on this core "traditional state power" to explain its narrower interpretation of the CWA. 531 U.S. at 173-74.

The WOTUS Rule's assertion of massive federal authority over local land and water features invades the States' sovereign authority in violation of their Tenth Amendment rights. As explained above, the Rule's definitions extend federal jurisdiction to remote, usually dry, and entirely intrastate land and water features far from any navigable waterway. An assertion of CWA jurisdiction necessarily displaces state and local land regulation, and allows the Agencies to act as a "*de facto*" federal "zoning board." *Rapanos*, 547 U.S. at 738 (plurality op.). Indeed, once federal jurisdiction is triggered, the potential scope of that power is exceedingly broad. *See, e.g.*, 33 C.F.R. § 320.4(a) (identifying over 20 "public interest" factors the Corps considers when determining whether to issue a section 404 permit, including economic, aesthetics, land use, historic properties, safety, and food and fiber production).

The WOTUS Rule's expansion of federal jurisdiction over traditional state land and water resources also regulates "States as States," *Hodel*, 452 U.S. at 286-87, because of the extensive cooperative federalism principles embodied in the CWA. States develop water quality standards for federal jurisdictional waters within their borders. 33 U.S.C. § 1313. They also review those standards at least every three years, *id*. § 1313(c), and report to EPA on the quality of all federal waters in the State every other year, *id*. § 1315(b). States also must develop complicated total maximum daily loads for any water not meeting established water quality standards. *Id*. § 1313(d). In addition, States are required to issue water-quality certifications for permits the federal government issues within their borders, including section 404 permits issued by the Corps. *See id*. § 1341(a)(1). For the 46 States with authority to implement the NPDES program under 33 U.S.C. § 1342, additional federal waters means additional permitting responsibilities. Further, through the WOTUS Rule, the Agencies are attempting to assert regulatory authority over traditionally state-regulated waters. Again, notably, waters that fall outside the scope of federal jurisdiction remain subject to regulation as state waters through local laws and regulations. *See, e.g.,* Ala. Code § 22-22-2; Ga. Code Ann. § 12-5-21(a); Ky. Rev. Stat. Ann. § 151.110(1)(a); Utah Code Ann. § 73-1-1(3); W. Va. Code § 22-26-3(a). The WOTUS Rule's displacement of state authority impairs the States' abilities to establish and enforce their own policies for their waters and lands.

CONCLUSION

This Court should grant summary judgment in favor of the Plaintiff States and hold unlawful and vacate the WOTUS Rule.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I served this motion by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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