UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 3:15-cv-00059-DLH-ARS
	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFF-INTERVENOR'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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ADOPTION AND JOINDER

Kimberly K. Reynolds, Governor of the State of Iowa, ("Plaintiff-Intervenor") hereby adopts and joins the entirety of Plaintiff States' Memorandum in Support of the Motion for Summary Judgment ("Plaintiff States' Memorandum"). Plaintiff States and Plaintiff-Intervenor share many common causes of action in this complaint. Out of respect for this Court's time Plaintiff-Intervenor has chosen not to reiterate duplicative arguments in this memorandum, and writes separately only to elaborate on two additional important areas that the "Clean Water Rule: Definition of Waters of the United States" (the "WOTUS Rule"), 80 Fed. Reg. 37054 (June 29, 2015), is unlawful.

ARGUMENT

The WOTUS Rule, promulgated by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, "Agencies") violates the Clean Water Act ("CWA"), the United States Constitution, and is inconsistent with Supreme Court precedent.

I. THE AGENCIES VIOLATE THE CLEAN WATER ACT BY INCLUDING NON-NAVIGABLE INTERSTATE WATERS AS JURISDICTIONAL WATERS

The Agencies have exceeded their authority under the Clean Water Act ("CWA") by asserting jurisdiction over adjacent, tributary, and "case-by-case" waters that have no or the most tenuous connection to "navigable waters." In addition, the Agencies are newly expanding and aggravating the application of a long-standing violation of the CWA and Constitution by claiming jurisdiction over any of these adjacent, tributary, and case-by-case waters if they have any potential or speculative connection to any non-navigable *inter*state waters.

The Agencies' unlawfully expansive interpretation of the CWA is evident at the outset of their explanation of the WOTUS Rule:

> The key to the agencies' interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: Waters are ''waters of the United States'' if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, *interstate waters*, or the territorial seas.

80 Fed. Reg. at 37060 (emphasis added). The insertion of "interstate waters," which necessarily includes non-navigable interstate waters, into the definition of "navigable waters" is contrary to the CWA and Supreme Court precedent. The WOTUS Rule newly "leverages" this unlawful jurisdiction over non-navigable waters by applying it to any waters subject to the WOTUS Rule's unlawfully expansive definitions of adjacent, tributary, or case-by-case waters. The Agencies have thus removed from their jurisdictional reach almost any limitation associated with navigable waters since, for example, a dry creek bed that might have a minor flow every few decades to a non-navigable interstate water would nonetheless be subject to CWA jurisdiction.

A. The Challenge To The Agencies' Expansion Of CWA Jurisdiction Over Non-Navigable Interstate Waters Is Timely.

The period for seeking review of an agency rule "may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection." *State of Ohio v. U.S. E.P.A.*, 838 F.2d 1325, 1328 (D.C. Cir. 1988). To determine whether an agency reconsidered a previously decided matter, thus reopening review of the agency action, a court "must look to the entire context of the rulemaking including all relevant proposals and reactions of the agency." *National Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998) (quoting *Public Citizen v. NRC*, 901 F.2d 147, 150 (D.C. Cir. 1990)).

State of Ohio reviewed whether a challenge to a preauthorization requirement for private claims under the Superfund statutes could be heard outside the statutory timeframe for challenging agency actions. *State of Ohio*, 838 F.2d at 1328. The preauthorization requirement had first been promulgated in 1982, and then was re-promulgated with identical language by the EPA in 1985 as a part of revisions to the original regulations. *Id.* Despite the EPA only requesting comments on new or changed provisions, the EPA took time to explain the republished portion of the regulation in the proposed rulemaking in general policy terms, and responded to at least one comment aimed directly at preauthorization requirements. *Id.* The court held that these actions by EPA were sufficient to have reopened the preauthorization rule for judicial review. *Id.* at 379.

Similar to *State of Ohio*, the Agencies claim that no changes were intended or made for the jurisdictional category of interstate waters as previously codified at 33 C.F.R. § 328.3(a)(2). 79 Fed. Reg. 22188, 22254 (Apr. 21, 2014) ("Proposed Rule"); 80 Fed. Reg. at 37074. The Agencies' conclusory statements are a thinly veiled attempt to avoid judicial review of the Agencies unlawful expansion of the inclusion of non-navigable interstate waters in the WOTUS Rule. The Agencies spend five pages in the proposed rule attempting to defend their authority to assert jurisdiction over all interstate waters, including a discussion of the legislative history of the CWA, predecessor statutes, and Supreme Court jurisprudence. 79 Fed. Reg. at 22254-59. By devoting significant time to defending its authority over interstate waters the EPA invited interested parties to address the issue, which Plaintiff-Intervenor was happy to do. The State of Iowa sent comments discussing interstate waters, stating: "[i]n the proposed rule, all interstate waters are deemed jurisdictional . . . [which] is not consistent with the holding in *Rapanos* . . . [i]n light of the Supreme Court's holding, EPA can no longer treat every interstate water as

jurisdictional." IA Comments, at 8, ID-12892.[1] Under *State of Ohio* the WOTUS Rulemaking reopened the question of the Agencies' federal jurisdiction over interstate waters.

The WOTUS Rule also effectively amends and expands the already unlawful inclusion of non-navigable interstate waters in the definition of navigable waters and thus this challenge is timely. The Agencies have promulgated significant jurisdictional expansions for adjacent, tributary, and case-by-case waters, which are defined as jurisdictional based off of relationships to waters codified 33 C.F.R. § 328.3(a)(1)-(5), which includes the *interstate waters* listed in subpart (a)(2). For example, tributary waters are defined, in part, as contributing flow "to a water identified in paragraphs (a)(1) through (3)" of 33 C.F.R. § 328.3, which, according to the Agencies, includes non-navigable interstate waters. By linking the unlawfully broad definitions of tributary, adjacent, and case-by-case waters to non-navigable interstate waters the Agencies newly and unlawfully expand the jurisdictional scope of interstate waters from that found in the regulations prior to the WOTUS Rule. In so doing, the Agencies have explicitly expanded their unlawful jurisdiction over non-navigable waters and necessarily re-opened their assertion of jurisdiction over non-navigable interstate waters to judicial review.

B. The Agencies Are Violating The CWA By Asserting CWA Jurisdiction Over Non-Navigable Interstate Waters

The clear text of the CWA and Supreme Court jurisprudence shows that the Agencies do not have CWA jurisdiction over non-navigable interstate waters, and that the expansion of this jurisdiction in the WOTUS Rule is unlawful.

[1] Citations to record materials cite to the abbreviated EPA docket number, the full docket number being EPA-HQ-OW-2011-0880-XXXX.

i. The Plain Text Of The CWA

The starting point of determining the Agencies' jurisdiction is the plain language of the statute. The Agencies' primary authority under the CWA is limited to "navigable waters." For example, EPA's permitting authority under the CWA is limited to the discharge of pollutants to "navigable waters," (33 U.S.C. § 1362), as is its authority to establish effluent limitations to protect water quality (33 U.S.C. § 1312). The Corps permitting authority for dredge and fill activities is likewise limited to "navigable waters." 33 U.S.C. § 1344. None of these, and other, central provisions of the CWA use the term "interstate waters." Thus, fundamental to the Agencies' CWA jurisdiction and the outcome of this litigation is the definition of "navigable waters."

Congress defined navigable waters to means the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). It is contrary to the plain meaning of the statute to claim that the definition of "navigable waters" includes waters that the Agencies themselves admit are not navigable. The discussion of "waters of the United States" cannot be divorced from the term it is supposed to define: navigable waters. Whatever "waters of the United States" means, it must ultimately be linked back to waters that are "navigable," else the subsidiary term becomes the tail that wags the dog.

Conspicuously absent from the statutory definition of navigable waters, and almost every other relevant provision of the CWA, is any mention of interstate waters. The term "interstate waters" appears only once in the CWA, in a paragraph referring to water quality standards established by States and either approved or awaiting approval by EPA as of October 18, 1972. 33 U.S.C. § 1313(a)(1). Tellingly, the balance of this section provides that when States revise or adopt a new standard (*i.e.*, after 1972), "such revised or new water quality standard shall consist

of the designated uses of the *navigable waters* involved and the water quality criteria for such waters based upon such uses." *Id.* at § 1313(c)(2)(A) (emphasis supplied). Further, EPA is directed to promulgate regulations "setting forth a new or revised water quality standard for the *navigable waters* involved." *Id.* at § 1313(c)(4) (emphasis supplied). EPA is also directed to approve State water quality plans for "*all navigable waters* within such State." *Id.* at § 1313(e)(3) (emphasis supplied). Thus, not only does the term "interstate waters" appear only once in the CWA, it does so with respect to the status of water quality standards adopted before the major amendments in 1972 that created what is now known as the Clean Water Act, a section that expressly directs that new or revised water quality standards will apply to "navigable waters."

This single and limited use of the term "interstate waters" can hardly be interpreted to mean that wherever the term "navigable waters" appears throughout the CWA, what Congress really meant was "navigable waters or non-navigable interstate waters." Congress was clearly aware of both terms: it used "interstate waters" once in a limited manner in single section of the CWA, and used "navigable waters" at least 78 times. The 1972 amendments to the Federal Water Pollution Control Act that created the modern CWA "were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). Had Congress intended that non-navigable waters should be included in the definition of "navigable waters," it could easily have done so. But it did not. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *National Ass'n of Mfrs. v.*

Department of Defense, 138 S. Ct. 617, 631 (2018) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)).

ii. Legislative History Of The CWA

The Agencies attempt to defend the inclusion of non-navigable waters in the definition of navigable waters not with CWA text, but by referring to predecessor statutes that regulated pollution in "interstate waters." 79 Fed. Reg. at 22255 ("the Water Pollution Control Act of 1948 . . . stated that the 'pollution of *interstate waters*' . . . [i]n 1961 . . . the FWPCA . . . substitute[d] the term 'interstate or navigable waters' for 'interstate waters'"). The Agencies then assert that because the predecessor statutes specifically regulated pollution in interstate waters, Congress intended for the CWA to do the same. This assertion is nonsensical, and precisely backwards. In each predecessor statute, Congress was aware of the term "interstate waters," and chose to use it in defining the predecessor statute's scope. By choosing to leave the term "interstate waters" out of the CWA, Congress made the conscious choice to define the Agencies' jurisdiction in terms of "navigable waters." Had Congress intended to include non-navigable interstate waters in the definition of "navigable waters" it easily could have done so (though that would have created a strangely contradictory definition).

The Agencies also claimed that Congress amended the Water Pollution Control Act in 1961 to "substitute the term 'interstate or navigable waters' for 'interstate waters,' demonstrating that Congress wanted to be very clear that it was *asserting jurisdiction over both types of waters.*" 79 Fed. Reg. at 22256 (emphasis added). The Agencies betray their own point with this observation. Congress was clearly aware that "interstate waters" and "navigable waters" have separate jurisdictional reaches, and chose not to include non-navigable interstate waters in the definition of navigable waters in the CWA.

iii. Relevant Supreme Court Precedent Does Not Support The Agencies' Jurisdictional Assertions Over Non-Navigable Interstate Waters

Reflecting the central role of "navigable waters" in the CWA, the Supreme Court has observed that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). Justice Kennedy, in an influential concurring opinion, wrote that a "central requirement" of the Act is that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos v. United States*, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring). Justice Kennedy went on to state that the Agencies only have authority over waters that are navigable-in-fact and waters with a "significant nexus" to such navigable waters. *Id.* at 779 (Kennedy, J., concurring). Thus the Supreme Court has consistently limited the Agencies' CWA jurisdiction to waters that have a significant connection to waters that are navigable-in-fact, making legally untenable the Agencies' claim that navigable waters include admittedly non-navigable interstate waters.

The Agencies claim that "it is not reasonable to read [the Supreme Court's] decisions in *SWANCC* and *Rapanos* to question the jurisdictional status of interstate waters or to impose additional jurisdictional requirements on interstate waters." *Id.* They obscure the issue, which is not the jurisdictional status of interstate waters generally, but whether Congress granted the Agencies CWA jurisdiction over non-navigable interstate waters. The Supreme Court was very clear, regardless of the test applied, that the term "navigable" must play a central role in determining what constitutes a "navigable water" subject to the Agencies' CWA jurisdiction. What is unreasonable is the Agencies' assertion that, without any support in the text of the

statute or a Supreme Court opinion, the definition of "navigable waters" includes waters that they themselves admit are not navigable.

In the Proposed Rule, the Agencies relied on two cases - *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) as support for the proposition that the Agencies have regulatory jurisdiction over non-navigable interstate waters. 79 Fed. Reg. at 22256. However, neither of these cases dealt with the scope of the Agencies' authority under the CWA or jurisdiction over non-navigable waters.

In *Illinois v. Milwaukee*, the State of Illinois sued four Wisconsin cities, including Milwaukee, to enjoin their alleged pollution of Lake Michigan, the undeniably interstate and navigable water with which Illinois shared a shoreline. *Illinois*, 406 U.S. at 93. In determining whether Illinois could sue, the Supreme Court examined whether existing federal pollution control statutes had "occupied the field" of federal common law, thus preempting Illinois' nuisance action under federal common law. *Id.* at 101-08. The Supreme Court held that existing water pollution regulations in 1971 had not yet occupied the field, and Illinois' suit could proceed. *Id.* at 107. After the major amendments to the water pollution laws in 1972 leading to the creation of the CWA, the Supreme Court revisited whether Illinois could proceed under federal common law and ruled that the CWA now preempted federal common law nuisance claims. *City of Milwaukee*, 451 U.S. at 317.

The Agencies' claim that nothing in *City of Milwaukee* "limits the applicability of these protections of interstate waters to navigable interstate waters or interstate waters connected to navigable waters," is misleading. 79 Fed. Reg. at 22257. The issue of what constitutes a "navigable water" was not before the Supreme Court, which was not surprising given that the alleged discharges and pollution were to waters that were both navigable and interstate: Lake

Michigan. Further, the question of the Agencies' CWA jurisdiction also was not before the Supreme Court. Therefore, the Supreme Court's conclusion that the CWA "occupied the field" for purposes of determining whether federal common law could be used to litigate alleged CWA permit violations has no bearing on the Agencies' claim that the term "navigable waters" includes non-navigable interstate waters.

C. The Agencies Assertion Of CWA Jurisdiction Over Non-Navigable Interstate Waters Violates The U.S. Constitution

The Agencies' interpretation of the CWA to allow them to exercise jurisdiction over non-navigable interstate waters and any water connected to them in any way violates the United States Constitution and Congress's Commerce Clause authority. The Supreme Court in *SWANCC* and *Rapanos* recognized that Congress's authority to regulate waters relates back to waters that are "navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. 715, 579 (Kennedy, J., concurring) (citing to *SWANCC*, 531 U.S. at 167). This rooted in Congress's Commerce Clause authority.

Congress, via grant by the U.S. Constitution, may "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. This grant of authority is "subject to the limitations contained in the Constitution," including the Tenth Amendment. *New York v. U.S.*, 505 U.S. 144, 156 (1992). Courts have held that Congress's Commerce Clause authority is limited to: (1) "channels of interstate commerce;" (2) the "instrumentalities of commerce;"[2] and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). A regulation or statute that implicates the Commerce Clause will not be held to change the existing federal-state balance,

[2] The WOTUS Rule clearly is not based on a theory of jurisdiction in instrumentalities of commerce and Plaintiff-Intervenor therefore does not address it in this memorandum.

"unless Congress conveys its purpose clearly" that it intends to do so. *Lopez*, 514 U.S. 549, at 562 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Non-navigable interstate waters are not "channels of interstate commerce." It would be unrealistic to say that an intermittent or ephemeral stream that happens to cross a state line, or a wetland located on a state line, is a channel of interstate commerce based solely on the fact that a state line was crossed. Nor are these water features "instrumentalities of commerce." The question is thus whether these water features are activities that "substantially affect interstate commerce" allowing Congress and the Agencies to exercise jurisdiction.

The Agencies have not provided justification that non-navigable interstate waters without a connection to navigable waters substantially affect interstate commerce. In fact, the Agencies implicitly acknowledge that no such effects exist by defining the first category of jurisdictional waters under 33 C.F.R. § 328.3(a)(1) as: "All waters which are currently used, were used in the past, *or may be susceptible to use in interstate or foreign commerce*, including all waters which are subject to the ebb and flow of the tide." (emphasis added). Had the Agencies thought that interstate waters were susceptible to use in interstate commerce, there would be no need to list them separately, without any qualification, in subsection (a)(2). Twice in the WOTUS Rule the Agencies also refer federal jurisdictional waters as waters that "*could* affect interstate or foreign commerce." 80 Fed. Reg. at 37076, 37084 (emphasis added). "Could" is a far cry from substantially affecting interstate commerce as required under *Lopez*. In any event, the Agencies' completely discard any concept of even a speculative connection with interstate commerce in § 328(a)(2), where all interstate waters, whether navigable or not, even speculatively related to commerce or not, are presumptively jurisdictional.

In reality the Agencies are attempting to regulate activities on lands that have non-navigable interstate waters, leveraged to include activities on intrastate lands that might have the most speculative connections to these non-navigable interstate waters. For example, as noted in section II.B.ii of Plaintiff States' Memorandum the Agencies could prohibit an individual from disposing of yard wastes in a gully on his or her property if that gully is located within 1,500 feet of the ordinary high water mark of an interstate water (regardless of navigability or connection to a navigable water), or if an animal utilized the gully for a portion of its life cycle before leaving for a non-navigable interstate water not hydrologically connected to the gully. These non-economic activates do not substantially affect any sort of interstate commerce, alone or in cumulative nature. *Lopez*, 514 U.S. at 567 (rejecting the Government's attempts to determine effects on interstate commerce based on cumulative, non-economic actions).

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people." U.S. CONST., amend. X. States "retain a significant measure of sovereign authority" as long as "the Constitution has not divested them" of that authority. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985). "[R]egulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). Additionally, "land-use regulation is one of the historic powers of the States." *City of Edmonds v. Oxford House*, 514 U.S. 725, 744 (1995). The CWA sought 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).

Allowing the Agencies to regulate *all* interstate waters, without first determining whether a requisite significant nexus exists to navigable-in-face waters or waters which could reasonably

be so made significantly infringes on States' rights to regulate the use of land. The WOTUS Rule violates Plaintiff-Intervenor's rights under the Tenth Amendment by exceeding Congress's delegable Commerce Clause authority. *New York,* 505 U.S. at 157.

II. THE CONNECTIVITY STUDY DOES NOT SUPPORT THE WOTUS RULE

The Agencies effort to cloak the WOTUS Rule in "science," a term that is repeated over sixty-five times in the preamble to the WOTUS Rule, suffers from both procedural and substantive defects. The Agencies' rely primarily on a report called *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* ("Connectivity Study"), referring to it over forty times (typically as the "Science Report"). This reliance is flawed procedurally because only a draft of the Connectivity Study was available for public comment, and the Agencies made major changes to the Study after the close of the comment period. Substantively, the Connectivity Study does not address the key matters at issue in this case: what constitutes a "navigable water" and when is the connection between a non-navigable water and navigable-in-fact waters a "significant nexus."

A. Major Changes Were Made To The Connectivity Study After The Close Of The Comment Period

When the WOTUS Rule was proposed, it relied upon a 2013 draft of the Connectivity Study. ID-0004. Many commenters expressed concerns that only a draft of the Study was available during the public comment period. *See, e.g.*, AK DEC Comments 11, ID-19465. Months after the close of the public comment period, EPA released a final version of the Connectivity Study. ID-20859; 80 Fed. Reg. 2,100 (Jan. 15, 2015). It was this final Connectivity Study, that was not made available for public comment, that the Agencies relied on and cited to extensively in the final WOTUS Rule.

In a May 12, 2016 letter responding to the Science Advisory Board's ("SAB") October 17, 2014 comments on the 2013 draft Connectivity Study, EPA identified what it called several "major changes" reflected in the final Connectivity Study:

- The discussion of so-called "cumulative effects" was significantly revised, including adding a new "major conclusion" on this topic (there are only five "major conclusions") and including in other chapters of the Study additional summaries of peer-reviewed literature on this subject.

- The framework for representing the hydrological, chemical and biological flow paths between waters was revised, not only graphically but in discussions throughout the *Study*.

- The final *Study* included a new review of literature on metrics and approaches for measuring connectivity.

- The text on hydrologic exchanges between main channels and off-channel surface and shallow subsurface waters located at channel margins was expanded.

- Additional discussion and examples of biogeochemical transformations, other than nitrate removal, that affect the mobility of dissolved chemicals were added.

- EPA stated that it had continued to review relevant literature (this is reflected in part by the fact that list of references increased by four pages from the draft to the final).

Attached as Exhibit 1. None of these "major changes" to the Connectivity Study were made available for public comment. Given the importance the Agencies' place on the Connectivity Study (at least forty references) and the science it purportedly represents in the WOTUS Rule (over sixty-five references to the "science" the Agencies claim originates from the Connectivity Study), this failure to make this self-described "major changes" available for public comment is a violation of the Administrative Procedure Act ("APA").

The notice-and-comment mandate within the APA, 5 U.S.C. § 553(b), "ensure[s] that agency regulations are tested via exposure to diverse public comment . . . ensure[s] fairness to affected parties, and . . . give[s] 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, United Mine Workers of America v. Mine Safety and Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005). "Complying with notice and comment provisions when required by the APA 'is not a matter of agency choice.'" *Iowa League of Cities v. EPA*, 711 F.3d 844, 872 (8th Cir. 2013) (quoting *Reno-Sparks Indian Colony v. EPA*, 336F.3d 899, 909 n.11 (9th Cir. 2003)). If a rule is unsupported by the record it will be held to be arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).

Here the Agencies denied interest parties the ability to comment on the self-described "major changes" to the Connectivity Study, blocking any feedback and substantive discussion on the key scientific document the Agencies relied upon as support for the WOTUS Rule. This is in direct violation of the notice and comment requirements of the APA.

B. The Connectivity Study Does Not Support The Agencies' Unlawful Assertions of CWA Jurisdiction

The key matters at issue in this litigation are what the definition of "navigable waters" and when a connection between non-navigable waters and navigable-in-fact waters is significant enough to be subject to the Agencies' CWA jurisdiction. The Connectivity Study does not address either of these key points. Therefore, the Agencies' frequent and lengthy references to science represented by the Connectivity Study do not provide record support for the WOTUS Rule and are largely irrelevant to the outcome of this litigation.

At the outset, the term "navigable waters" did not even appear in the 2013 draft Connectivity Study that was available for public comment (the term "navigable" appeared in a single reference in the 69-page long references list). The term "navigable waters" appears three times in the final Connectivity Study, but only in an obvious effort, after the close of the comment period, to try to fabricate a link between the Connectivity Study and the WOTUS Rule in Table 1-1:

Table 1-1. Translating connectivity-related questions between policy and science. This table presents a crosswalk of regulatory and scientific questions this report addresses. Policy questions use regulatory terms (shown in quotation marks) that lack scientific definitions or are defined differently in scientific usage. All terms used in this report reflect scientific definitions and usage.

Policy question	Science question
What tributaries have a "significant* nexus" to "traditional navigable waters"?	What are the connections to and effects of ephemeral, intermittent, and perennial streams on downstream waters?
What "adjacent" waters have a "significant* nexus" to "traditional navigable waters"?	What are the connections to and effects of riparian or floodplain wetlands and open waters on downstream waters?
What categories of "other waters" have a "significant* nexus" to "traditional navigable waters"?	What are the connections to and effects of wetlands and open waters in non-floodplain settings on downstream waters?

* "Significant," as used here, is a policy determination informed by science; it does not refer to statistical significance.

ID-20859, at p. 1-2. EPA's effort to "crosswalk" regulatory and scientific questions must be rejected because it is clear that the paired questions are not equivalent. For example, the "scientific question" about the nature of "connections" does not answer the question of what constitutes a "significant nexus." Further, a scientific inquiry about the nature of "connections" between "upstream" and "downstream" waters does not address whether any such waters have a "significant nexus" to so-called "traditional navigable waters." The "scientific questions" the Connectivity Study set out to address are in no way equivalent to the "regulatory questions" at issue in the WOTUS Rule and this case, and thus the answers to those "scientific questions" do not support the central conclusions of the WOTUS Rule.[3] This should come as no surprise, given the title of the study itself. Its purpose was to explore the nature and extent of "connectivity" between "upstream" and "downstream" waters writ large, not the more focused question at issue in the WOTUS Rule and this litigation: whether and when there is a "significant nexus" between non-navigable waters and navigable-in-fact waters.

[3] Several commenters noted that the Connectivity Study did not address the issue of "significant nexus." *See, e.g.*, AK DEC Comments 11-12, ID-19465; ND Comments 5-6, ID-15365.

EPA's statements in the Connectivity Study itself, as well as the Agencies' statements when promulgating the WOTUS Rule, demonstrate that the Connectivity Study does not have much bearing on the questions at issue in this litigation. The very first paragraph of the first page of the executive summary of the Connectivity Study states that it "neither considers nor sets forth legal standards for CWA jurisdiction, nor does it establish EPA policy." ID-20859, at p. 1-2; ES-1. Thus, according to EPA, the Connectivity Study did not even consider the standards for CWA jurisdiction. In promulgating the WOTUS Rule, the Agencies conceded that the science indicates that "connectivity" between waters is a gradient and that determining when that connectivity becomes a "significant nexus" is a policy decision. *See, e.g.*, 80 Fed. Reg. at 37057.

The difference between scientific questions addressed by the Connectivity Study and the legal and policy determination of what constitutes a "navigable water" is illustrated by Supreme Court precedent. The plurality's opinion in *Rapanos* concluded that "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" are not jurisdictional under the CWA. *Rapanos* at 739. Similarly, Justice Kennedy, in his concurrence, noted that the Agencies would violate the CWA by claiming jurisdiction over "wetlands (however remote)" or all "continuously flowing stream[s] (however small)." *Id.* at 776; *see also id.* at 769 ("merest trickle, [even] if continuous" is insufficient). This was a rejection of the Corps' "theory of jurisdiction," based on "adjacency to tributaries, however remote and insubstantial." *Id.* at 780. Thus some of the central themes of the Connectivity Study, including taking a broad watershed approach that takes into account the cumulative effect of even the smallest connections, do not fit with the Supreme Court's legal and policy pronouncements on what constitutes a "navigable water." However valuable the Connectivity Study may be from scientific or ecological perspectives, it has little or no contribution to make to

the process of determining the Agencies' CWA jurisdiction in a manner that satisfies the statute, Supreme Court precedent, and the Constitution.

The yawning gap between the *Connectivity Report* and the policy determinations made in the WOTUS Rule is further reflected at the most basic level by the differences in definitions. For example, the Agencies' assertion that "connectivity for purposes of interpreting the scope of 'waters of the United States' under the CWA serves to demonstrate the 'nexus' between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea" is sleight-of-hand and simply wrong. 80 Fed. Reg. at 37062. The term "connectivity" used in the Connectivity Study bears no relationship to the term "nexus" in the WOTUS Rule. The term "connectivity" does not appear in the WOTUS Rule, and the Rule's detailed definition of "significant nexus" includes, for purposes of defining "nexus," many factors and technical criteria that are not in the Connectivity Study*'s* short and simple definition of "connectivity."[4] Further, the Connectivity Study does not contain any scientific or technical discussion about "navigable waters," making it preposterous to transform the Study's conclusions about connectivity between upstream and downstream waters into scientific conclusions about the "nexus" (as that term is defined in the WOTUS Rule) between non-navigable and navigable waters.

Another example of the disconnect between the Connectivity Study and the WOTUS Rule is the difference between the definitions of another key term, "tributaries." The Connectivity Study's short definition ("a stream or river that flows into a higher order stream or river") bears no relationship to the long and complex definition in the WOTUS Rule that runs to

[4] "The degree to which components of a river system are joined, or connected, by various transport mechanisms; connectivity is determined by the characteristics of both the physical landscape and the biota of the specific system." ID-20859, A-2.

over 250 words. With such different starting points on key concepts such as "connectivity," "nexus" and "tributary," and the Connectivity Study not even addressing central concepts of the WOTUS Rule such as "navigable waters" or defining terms central to the Agencies' CWA jurisdiction such as "adjacent" or "neighboring," the conclusions of the Connectivity Study are largely not transferable to, and thus do not provide record support for, conclusions about the Agencies' CWA jurisdiction.

It does not come as a surprise that the Agencies' cannot rely on the Connectivity Study to justify the specific jurisdictional determinations that they made in the WOTUS Rule. For example, the Connectivity Study does not establish or recommend any specific distance-based criteria in the WOTUS Rule for determining what constitutes a navigable water, such as the use of a 1,500 foot demarcation in the definition of "neighboring" waters, or applying the 5,000 foot distance criterion for purposes of case-by-case determinations. By the Agencies' own admission, the Connectivity Study is simply not relevant to any of their conclusions regarding what constitutes a "significant' nexus between non-navigable and navigable-in-fact waters. For all these reasons, the Connectivity Study does not support the various arbitrary jurisdictional determinations the Agencies' have made in the WOTUS Rule and, absent such record support, the WOTUS Rule is arbitrary and capricious. *State Farm*, 463 U.S. at 43-44 (1983).

CONCLUSION

For all the reasons articulated above and within Plaintiff States' Memorandum, the WOTUS Rule should be set aside.

Respectfully submitted this 1st day of June, 2018,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2018, I electronically filed the attached document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ *David S. Steward*
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