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 STATES' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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JURISDICTIONAL STATEMENT

Plaintiffs, States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and New Mexico State Engineer (the "Plaintiff States") submit jurisdiction is proper under 5 U.S.C. § 706, 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, and the Supreme Court's ruling in *Nat'l Ass'n of Mfrs. v. Dep't of Defense,* 138 S. Ct. 617 (2018).

Venue is proper under 28 U.S.C. § 1391(e) because the State of North Dakota resides in this judicial district.

INTRODUCTION

This case is about who—the federal government or the sovereign Plaintiff States—has authority to regulate land and water features that have no significant nexus to, and in most cases are distant or isolated from, any "navigable waters," and thus are not "waters of the United States" over which the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, Agencies) have jurisdiction under the Clean Water Act (CWA). The CWA text, Supreme Court precedent interpreting the CWA, and the U.S. Constitution reserve that authority to the States.

The final regulation entitled "Clean Water Rule: Definition of 'Waters of the United States'" (the WOTUS Rule) was promulgated by the Agencies under their statutorily delegated authority under the CWA. 80 Fed. Reg. 37054 (June 29, 2015). In the CWA, Congress explicitly chose 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). Congress balanced States' sovereign authority over their land and water by granting the federal government primary jurisdiction only over "navigable waters," defined as "the waters of the

United States, including the territorial seas." 33 U.S.C. § 1362(7).[1] The definition of navigable waters is the critical inquiry here, as it denotes where the Agencies' limited jurisdiction ends.

The Supreme Court has already identified the inherent jurisdictional limits in "navigable waters," noting 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*); *Rapanos v. United States*, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring) (a "central requirement" of the CWA is that "the word 'navigable' in 'navigable waters' be given some importance"). Congress's choice of "navigable" reflects the Constitutional limit on Congress's ability to regulate waters under the Commerce Clause and the limitations of the Tenth Amendment on federal power. *See SWANCC*, 531 U.S. at 173 (rejecting the Corps' interpretation of the CWA, in part, for implicating "significant constitutional questions" including Commerce Clause concerns).

In *SWANCC*, the Court invalidated a Corps rule asserting jurisdiction over isolated, intrastate ponds because the ponds were used by migratory birds. In *Rapanos*, the Court held that the Corps could not regulate wetlands far removed from navigable-in-fact waters, including those wetlands adjacent to ditches and drains that the Corps deemed tributaries of navigable waters. In both *SWANCC* and *Rapanos*, the Court made it clear that to preserve the federal-state balance required by both the CWA and the Constitution, the term "waters of the United States"

[1] This memorandum refers to "navigable water(s)" throughout to point to those waters traditionally under the Agencies' CWA jurisdiction and defined by prior codifications at 33 C.F.R. § 328.3(a)(1)-(3). This term is not an endorsement of the Agencies' statutory authority over these waters (interstate waters), but a reference point for discussing the WOTUS Rule's expansion of the definition of navigable waters, through the definition of "waters of the United States" in 33 C.F.R. § 328.3(a).

("WOTUS") must be given a meaning that is consistent with the term it defines—"navigable waters." Waters with a "speculative or insubstantial" relation to navigable waters "fall outside the zone fairly encompassed by the term 'navigable waters.'" *Rapanos,* 547 U.S. at 780 (Kennedy, J., concurring); *Id.* at 731 (Scalia, J., Plurality) ("qualifier 'navigable' is not devoid of significance"); *SWANCC,* 531 U.S. 172 ("We cannot agree that Congress's separate definitional use of the phrase '[WOTUS]' constitutes a basis for reading the term 'navigable waters' out of the statute.").

Nonetheless, the Agencies ignored the holdings of *SWANCC* and *Rapanos* in adopting the WOTUS Rule. When it granted the Plaintiff States' request for a preliminary injunction in 2015, this Court explicitly found that the WOTUS Rule was inconsistent with Justice Kennedy's concurrence in Rapanos. *See*, Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction, ECF No. 70 (Aug. 27, 2015) at p.11 (hereinafter "PI Order"). The WOTUS Rule not only asserts jurisdiction over the *very same* waters that the Supreme Court heldwere outside the Agencies' authority, but also asserts jurisdiction over stream beds that usually carry no water and other lands that are rarely connected to navigable-in-fact waters, if at all, only once a century. Effectively removing the "navigable" jurisdictional boundary, the Agencies claim their CWA authority reaches beyond "traditional navigable waters" to all "interstate waters." 80 Fed. Reg. at 37055. The WOTUS Rule reaches dry arroyos in New Mexico, ephemeral drainages in Wyoming, isolated Prairie Potholes on the North Dakota plains, and thousands of square miles of Alaskan land that is frozen most of the year. This case is about more than water; the Agencies seek to exercise jurisdiction over vast areas of largely dry land with no rational connection to "navigable waters." The WOTUS Rule destroys the careful balance between federal and state authority that Congress struck in the CWA, exceeds

Congress's delegable authority under the Commerce Clause, and violates the Plaintiff States' rights under the Tenth Amendment to the United States Constitution.

The WOTUS Rule is also a textbook example of procedural failures. The Agencies refused to engage properly with the public in the development of the WOTUS Rule and finalized a rule that is alien to the proposed rule. After the close of the public comment period, the Agencies made material changes in the WOTUS Rule that were not a logical outgrowth of the proposed rule and that the Plaintiff States should have had opportunity to comment on. The WOTUS Rule was also based on technical analyses unavailable to Plaintiff States during the notice-and-comment period, including what the Agencies called a "Science Report,"[2] the final version of which was published two months after the close of the public comment period.[3] Further, despite the admittedly broad impact of the WOTUS Rule, the Corps determined the WOTUS Rule would not have significant environmental or socioeconomic implications, ignoring its obligations under the National Environmental Policy Act ("NEPA").

When this Court preliminarily enjoined the WOTUS Rule in 2015, it found that the Plaintiff States had a substantial likelihood of success on the merits on a number of grounds,

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[2] "Science Report," is the Agencies name in the rulemaking for a *draft* study examining the connectivity of upstream and downstream waters (referred to in this memorandum as the "Draft Connectivity Study").

[3] The U.S. House of Representatives Committee on Oversight and Government Reform produced a 180-page report on the deficiencies with the Agencies' rulemaking process. HOUSE COMM. ON OVERSIGHT AND GOV'T REFORM, 114TH CONG., MAJ., STAFF REP. ON POLITICIZATION OF THE WATERS OF THE UNITED STATES RULEMAKING (Comm. Print 2016) (available at https://oversight.house.gov/wp-content/uploads/2016/10/WOTUS-OGR-Report-final-for-release-1814-Logo-1.pdf) ("HCOGR Report") (attached as Exhibit 1). The HCOGR Report found that (1) the Agencies used an accelerated timeline that appeared to be motivated by political considerations; (2) the Corps was cut out of the rule development process; (3) the WOTUS Rule was not based on sound science; (4) the Agencies did not consider alternatives; (5) the Agencies went to unusual lengths to avoid completing an Environmental Impact Statement ("EIS"); (6) the Agencies violated the Regulatory Flexibility Act; (7) public comments were not fully reviewed; and (8) the Agencies failed to consult fully with States, local governments, and tribes. Id. at p. 10.

including that it was likely that EPA had exceeded the authority granted to it by Congress and that it had violated the APA. *See*, PI Order, ECF No. 70. The Plaintiff States believe that they should prevail on these, and other, grounds that the WOTUS Rule should now be permanently enjoined and set aside.

STANDARD OF REVIEW

A court reviewing an informal rulemaking "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The court also "shall review the whole record or those parts of it cited by a party" and in doing so must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;" found to be "contrary to constitutional right, power, privilege, or immunity;" in "excess of statutory jurisdiction;" not in accordance with "procedure required by law;" unsupported by "substantial evidence;" or "unwarranted by the facts." *Id.* When a court reviews an agency's construction of a statute it administers, if the text is clear, the court must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). An agency's interpretation contrary to the clear statutory text is not entitled to deference. *Id.*

STATEMENT OF UNCONTESTED MATERIAL FACTS

Plaintiff States and Defendants stipulated to a revised certified index of the Administrative Record (Dkt. Nos. 190, 195), maintained at www.regulations.gov under docket number EPA-HQ-OW-2011-0880. Plaintiff States rely on that record as support for their Motion for Summary Judgment ("Motion"). The following uncontested material facts are significant.

A. Statutory and Regulatory Background

The CWA provides that "[i]t is the policy of the Congress 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). The Agencies' CWA jurisdiction is limited: Congress granted the Agencies authority only over "navigable waters," *see, e.g.*, 33 U.S.C. § 1362(12), defining such waters as "[WOTUS], including the territorial seas." *Id.* § 1362(7).

The definition of navigable waters determines the scope of many provisions in the CWA, including obligations imposed upon the Plaintiff States. Subject to some exclusions, the CWA requires any person who discharges pollutants into navigable waters to obtain a permit under the National Pollutant Discharge Elimination System ("NPDES") program, *id.* § 1342, or under section 404 of the CWA for the discharge of dredged or fill material, *id.* § 1344. Section 404 permitting has particular importance to the use and development of land because the Corps will typically require a permit for digging or filling activities on land features found to be navigable waters, even if those land features rarely contain any water. Forty-six States have assumed NPDES permitting responsibilities under 33 U.S.C. § 1342(b); another two have assumed section 404 permitting under § 1344(g). States are responsible for developing water quality standards for those navigable waters that lie within their borders, including regular reporting to EPA, implementing plans to achieve those standards in navigable waters, and taking those standards into account in permitting decisions. *Id*. §§ 1313, 1315 and 1341. The CWA authority of the Agencies and the resulting obligations of Plaintiff States are thus bound to the scope of federal jurisdiction established by the term "navigable waters."

Waters that are not navigable are not subject to federal CWA jurisdiction, and the Plaintiff States regulate the water quality and use of such waters under their independent sovereign authority. *See, e.g.,* N.D. Cent. Code Ch. 61-28; Mont. Code Ann. §§ 75-5-101 *et*

seq.; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*, and; Ark. Code Ann. § 8-4-101 *et seq.*

B. The Proposed Rule

On April 21, 2014, the Agencies published a proposed rule redefining "waters of the United States," and thus navigable waters under the CWA. Definition of ''Waters of the United States'' Under the Clean Water Act, 79 Fed. Reg. 22188 (Apr. 21, 2014) ("Proposed Rule"). The Agencies proposed to categorize WOTUS under the CWA as "all 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 "the territorial seas." *Id.* at 22268–69. The Proposed Rule then proposed three additional categories of waters that would fall within the definition of navigable: (1) all "tributaries" of navigable waters would be *per se* jurisdictional; (2) all waters "adjacent" to navigable waters would be *per se* jurisdictional," 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" navigable water. *Id.* at 22269. One of the key technical documents relied on by the Agencies in the proposal was a September 2013 draft report called *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* ("Draft Connectivity Study"). ID-0004.[4]

The Proposed Rule drew more than one million comments, including comments from virtually every State. A prevailing theme in the States' comments was that the Proposed Rule would regulate many local water and land features that did not have a significant nexus to navigable waters and thus exceeded the Agencies' limited CWA jurisdiction. *See, e.g.*, ND

[4] Citations to record materials within this memorandum are as follows: short title, a pinpoint page reference if applicable, and an abbreviated EPA docket number (such as ID-0004 in long form is EPA-HQ-OW-2011-0880-0004).

Comments 14-15, ID-15365; Multi-State Comments 2, ID-7988; WY DEQ Comments 3, ID-18020; AK DEC Comments 27, ID-19465. Plaintiff States also commented that EPA's Draft Connectivity Study failed to address adequately the significance of the connection between various waters. *See, e.g.*, AK DEC Comments 11-12, ID-19465; ND Comments 5-6, ID-15365; Draft Connectivity Study, ID-0004. Plaintiff States also protested that only a Draft Connectivity Study was available during the comment period. *See* AK DEC Comments 11, ID-19465. Commenters also called for the Agencies to comply with NEPA by preparing an EIS assessing the environmental and socioeconomic effects of the Proposed Rule. *See* AK DEC Comments 15-16, ID-19465.

C. The WOTUS Rule

The Agencies published the final WOTUS Rule on June 29, 2015. 80 Fed. Reg. 37054. The WOTUS Rule largely retains the proposal's sweeping approach to "tributaries," but promulgates a much different approach to "adjacent" waters and "case-by-case" waters that is unsupported by the record and is not a logical outgrowth of the Proposed Rule. Several of the central arguments made by the Agencies to support the final WOTUS Rule were not mentioned in the Proposed Rule or analyzed in the administrative record. The WOTUS Rule also relied on a final and significantly revised version of the Draft Connectivity Study published two months *after* the close of the comment period. *See* Connectivity Of Streams And Wetlands To Downstream Waters: A Review And Synthesis Of The Scientific Evidence, ID-20859; 80 Fed. Reg. 2100 (Jan. 15, 2015) ("Final Connectivity Study").

The Agencies also ignored comments requesting that an EIS be prepared in compliance with NEPA and instead prepared a more limited Environmental Assessment ("EA")[5] and

[5] Final EA, ID-20867.

corresponding Finding of No Significant Impact ("FONSI"),[6] determining that the WOTUS Rule fell below the significance threshold triggering the need for full evaluation in an EIS..[7] Since the Final EA was published six months *after* the close of the public comment period and barely a month before publication of the WOTUS Rule, the Plaintiff States were effectively precluded from participating in the NEPA process.

In general, the WOTUS Rule includes three newly defined categories of navigable waters that Plaintiff States' challenge here:

Tributaries. The WOTUS Rule claims *per se* federal jurisdiction over "[a]ll tributaries," 33 C.F.R. § 328.3(a)(5),[8] defined as any "water that contributes flow, either directly or through another water" to a navigable water and 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). A tributary may be "perennial, intermittent, or ephemeral" as long as it eventually contributes flow through "any number of downstream waters." 80 Fed. Reg. at 37076. The downstream waters can include "non-jurisdictional features" (such as excluded ditches and wetlands) as long as the intermittent or ephemeral flows, at some point, connect to a "tributary system that *eventually* flows to a traditional navigable water." *Id.* (emphasis added). The presence of indicators of bed

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[6] FONSI, ID-20867.

[7] The EPA also ignored the Corps' own comments, submitted a month before the Final EA was issued, suggesting that that an EIS was appropriate. Moyer Memorandum 1, ID-20882 ("To remove from CWA jurisdiction . . . aquatic resources . . . without the benefit of a detailed analysis, such as one that would be performed as part of an EIS, would present the potential for significant adverse effects on the natural and human environment.").

[8] The WOTUS Rule's definitions of WOTUS are in several parts of the Code of Federal Regulations beginning on 80 Fed. Reg. at 37104. For ease of reference, this memorandum refers to the Code of Federal Regulations codification to pinpoint cite specific subparts of the WOTUS Rule, and uses Federal Register page number for citations to the preamble. Unless otherwise noted, all Code of Federal Regulations citations are to the WOTUS Rule codification.

and banks and an ordinary high water mark ("OHWM") also need not be continuous, so long as those indicators "can be identified upstream of the break." 33 C.F.R. § 328.3(c)(3).

Adjacent Waters. The WOTUS Rule asserts *per se* federal jurisdiction over all waters "adjacent" to navigable waters and their "tributaries." 33 C.F.R. § 328.3(a)(6). The WOTUS Rule defines "adjacent" as all waters "bordering, contiguous, or neighboring" navigable waters, impoundments, or tributaries. *Id.* § 328.3(c)(1). This definition includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id.* Departing significantly from the Proposed Rule, the WOTUS Rule then defines "neighboring" to cover: (1) "all waters" any part of which are within 100 feet of the OHWM of a navigable water or "tributary;" (2) "all waters" any part of which are within 1,500 feet of the OHWM of a navigable water or "tributary" and within its 100-year floodplain; and (3) all waters any part of which are within 1,500 feet of the high tide line of a navigable water. *Id*. § 328.3(c)(2). None of these three distance-based criteria, as they relate to adjacent waters, were in the Proposed Rule.

The WOTUS Rule also adds an exclusion from the adjacent waters categories—also not mentioned in the Proposed Rule—for "[adjacent w]aters being used for established normal farming, ranching, and silviculture activities," but a similar exclusion is not provided for *per se* jurisdictional tributaries. *Id*. § 328.3(c)(1).

Case-by-Case Waters. The WOTUS Rule allows the Agencies to exercise federal jurisdiction on a case-by-case basis over waters and land features in a way that differs significantly from the Proposed Rule. The Agencies assert jurisdiction over those "waters [at least partially] located within the 100-year floodplain of a" navigable water and "waters [at least partially] located within 4,000 feet of the high tide line or [OHWM] mark of a" navigable water, impoundment, or tributary, so long as the Agencies find a "significant nexus" with a navigable

water. 33 C.F.R. § 328.3(a)(8). Neither of these distance-based criteria for case-by-case waters were discussed in the Proposed Rule.

Water will be found to have a "significant nexus" to a navigable water if that water, "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a [navigable water]" based on "any single function or combination of functions performed by the water." *Id.* § 328.3(c)(5). For example, if bird species (e.*g.,* ducks) use a hydrologically isolated pond for occasional foraging as part of their life cycle, and during other parts of their life cycle resides in navigable-in-fact waters, that use would extend federal jurisdiction to the isolated pond. *See* 80 Fed. Reg. at 37093 ("a species is located in a [navigable water] if such a water is a typical type of habitat for *at least part* of the life cycle" (emphasis added)). Isolated wetlands or depressions could be found jurisdictional precisely *because of* their isolation—if the Agencies determine that such features store water, trap and filter sediments or pollution, or cycle nutrients, they can be considered jurisdictional because of the trapping or filtering "function" they perform. *See id*. ("the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water").

Interstate Waters. The Agencies have also re-codified a longstanding violation of the CWA and the Constitution by including all interstate waters, regardless of navigability or connection to a navigable water, as jurisdictional.

ARGUMENT

The WOTUS Rule violates the Agencies' statutory grant of authority under the CWA, the United States Constitution, and the procedural and substantive provisions of the Administrative Procedure Act ("APA") and NEPA. Given the pervasive deficiencies in the WOTUS Rule, as

also discussed by this Court when it issued the preliminary injunction, no part of the WOTUS Rule can survive on its own, and the WOTUS Rule should be permanently enjoined and set aside by the Court in its entirety.

I. THE WOTUS RULE VIOLATES THE CLEAN WATER ACT

The Agencies' interpretation and application of the term "waters of the United States," and thus "navigable waters" in the WOTUS Rule violates the CWA, both textually and under applicable Supreme Court jurisprudence.

A. The WOTUS Rule Is Inconsistent With The Language Of The CWA

The WOTUS Rule violates the CWA because the Agencies' definition of the term WOTUS is not "consistent with the language of the statute." *K Mart Corp. v. Cartier,* 486 U.S. 281, 291 (1988). The WOTUS Rule is inconsistent with "the plain meaning of the [CWA]" when viewing the "particular statutory language at issue, as well as the language and design of the statute as a whole." *Id.* This is true "in light of the language, policies, and legislative history" of the CWA. *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131 (1985). This Court observed that "it is likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue." *See*, PI Order, ECF No. 70 at p.2.

Starting with the plain language of the statute, the WOTUS Rule's expansive jurisdictional reach cannot be squared with the ordinary meaning of "navigable waters.". 33 U.S.C. § 1362(7). There can be no meaningful discussion of "waters of the United States" outside the statutory term it is intended to define: "navigable waters." *Id.* Yet the Agencies assert CWA jurisdiction over water bodies with no or little connection with navigable waters. For example, they assert CWA jurisdiction over dry channels that provide "intermittent or ephemeral" flow through "any number of downstream waters" as long as they connect to a "tributary system that eventually flows to a traditional navigable water." 80 Fed. Reg. at 37076.

Prairie Potholes are captured by the WOTUS Rule precisely because they "lack a surface hydrologic connection" to navigable waters. *Id.* at 37093. But the plain language of the CWA does not permit the Agencies to sweep isolated waters and land features into their jurisdiction that have no or at best only a remote relationship to navigable-in-fact waters. It is a "central requirement" of the CWA that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring). Adopting the WOTUS Rule's expansive jurisdictional overreach would effectively read the term "navigable" out of the CWA so that WOTUS would be defining "waters," not "navigable waters."

The WOTUS Rule also effectively eliminates Congress's express directive that the CWA must "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources." 33 U.S.C. § 1251(b). By the EPA's own admission, the WOTUS Rule covers "the vast majority of the nation's water features." Economic Analysis 11, ID-20866. By impermissibly expanding the scope of the WOTUS Rule to virtually all waters traditionally under State control, the Agencies have violated the state-federal balance Congress enshrined in the CWA.

B. The WOTUS Rule Violates Longstanding Supreme Court Precedent Interpreting The CWA

In rejecting earlier efforts by the Corps to over step its jurisdictional boundaries, the Supreme Court has already spoken to what constitutes a "reasonable interpretation of 'navigable waters.'" *Rapanos,* 547 U.S. at 767 (Kennedy, J., concurring). Before the CWA was enacted, WOTUS were limited to "waters that are 'navigable in fact' or readily susceptible of being rendered so." *Id.* at 723 (Scalia, J., plurality). After passage of the CWA, the Agencies first relied on this traditional definition of WOTUS until adopting broader definitions in 1975 and

1977. *Id. (*Scalia, J., plurality) (referencing 40 Fed. Reg. 31324–31325 (1975); 42 Fed. Reg. 37144 (1977)). *Id.* at 724.

In *Riverside Bayview*, the Supreme Court first reviewed the Agencies' broadened definitions in the context of determining whether the Corps could "exercise jurisdiction over wetlands adjacent" to conventional navigable waters. 474 U.S. at 131. The Court found the Corps' jurisdiction could extend to adjacent wetlands, noting Congressional intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. Key to the Court's holding was that it could not say the Corps' determination that "adjacent wetlands are *inseparably bound up* with the [WOTUS] . . . [wa]s unreasonable." *Id.* at 134 (emphasis added).

Sixteen years later, the Supreme Court held that CWA jurisdiction was not appropriate over "nonnavigable, isolated, intrastate waters" such as seasonal ponds, "*not* adjacent to open water." *SWANCC*, 531 U.S. at 169, 168. The Court found the CWA "to be clear" in prohibiting jurisdiction over isolated intrastate waters, and refused to defer to the Corps' jurisdictional interpretation under *Chevron*. *Id.* at 172[9] To hold that navigable waters included isolated intrastate ponds would "assume that 'the use of the word navigable in the statute . . . does not have any independent significance.'" *Id.* at 171-172.

In *Rapanos*, the Court again rejected the Corps' assertion of authority over intrastate wetlands located "near ditches or man-made drains that eventually empt[ied] into traditional navigable waters." 547 U.S. at 729 (Scalia, J., plurality). The plurality concluded that the "only plausible interpretation . . . [of] 'the [WOTUS]' includes only those relatively permanent,

[9] The Court went on to explain that *even if the text were unclear*, thus entitling the Corps to *Chevron* deference, this deference was inappropriate to avoid "significant constitutional and federalism questions." *Id.* at 174. The same constitutional concerns are relevant to the WOTUS Rule and are discussed below in section II of the Argument.

standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,]. . . oceans, rivers, [and] lakes,'" and "wetlands with a continuous surface connection to" those waters. *Id*. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)). The plurality explained that "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" are outside CWA jurisdiction. *Id.*

Justice Kennedy's stated that the Agencies have authority only over waters that are navigable-in-fact and waters with a "significant nexus" to such navigable waters. 547 U.S. at 779 (Kennedy, J., concurring). A water has a "significant nexus" if it "significantly affect[s] the chemical, physical, and biological integrity" of a navigable water. *Id.* at 780. Justice Kennedy rejected CWA jurisdiction over all "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). Justice Kennedy also rejected the Corps' "theory of jurisdiction," based on any "adjacency to tributaries, however remote and insubstantial." *Id.* at 780.

Rapanos and *SWANCC* were decided under the Agencies' prior codification defining WOTUS in a far less expansive than what the Agencies assert in the WOTUS Rule. *SWANCC* specifically noted that it could not hold that "the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." 531 U.S. at 168. The plurality in *Rapanos* noted, "because *SWANCC* did not directly address tributaries, the Corps . . . continue[d] to assert jurisdiction over waters 'neighboring' traditional navigable waters and their tributaries" in the time between *SWANCC* and *Rapanos.* 547 U.S. at 726 (Scalia, J., plurality). The plurality objected to the "Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries'." *Id.* Rejecting the Corps' approach, the plurality held that wetlands were adjacent, and thus

jurisdictional, only when they shared a "continuous surface connection to bodies that are '[WOTUS]' . . . so that there is no clear demarcation between 'waters' and wetlands." *Id.* at 742.

Justice Kennedy's concurrence stated that the Corps' attempt to tie adjacency to tributary (as opposed to navigable) waters was too broad a jurisdictional hook. 547 U.S. at 781-782. Both the plurality and the concurrence in *Rapanos* rejected the Corps' definitions of adjacency contained within the pre-WOTUS Rule version of 33 C.F.R. § 328.3(a)(7) (effective to August 27, 2015). Thus, the Supreme Court rejected a theory that would allow federal CWA jurisdiction to be asserted over a distant or remote water body based on a series of limited connections among non-jurisdictional water bodies that might ultimately lead to an even more attenuated connection to a navigable-in-fact water body; precisely what the Agencies are trying to do in the WOTUS Rule.

The Agencies now seek to expand their jurisdiction and ignore *Rapanos* by unlawfully reworking the definitions of "adjacent," "neighboring," and "tributary" waters in the WOTUS Rule.[10] The Agencies have also re-codified a violation of the CWA and the Constitution by including all interstate waters, regardless of navigability or connectivity to a navigable water, as jurisdictional. This Court found that the WOTUS Rule suffered from the same "fatal defect" as did the Corps' rule rejected in *Rapanos*, observing that the WOTUS Rule allows EPA to regulate waters that "do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable water." *See*, PI Order, ECF No. 70 at p.11. In addition, for reasons discussed in more detail below, and consistent with the Supreme Court's determination in *SWANCC*, 531

[10] The 8th Circuit Court of Appeals has held that the Agencies may assert CWA jurisdiction under either the plurality or the concurrence in *Rapanos*. *See United States v. Bailey,* 571 F.3d 791, 799 (8th Cir. 2009). Which opinion in *Rapanos* is applied is unimportant at this stage, as the WOTUS Rule fails under either the plurality or concurring opinion.

U.S. at 172, the Agencies' interpretation of the term "navigable waters" is not due any deference under *Chevron*. 467 U.S. 837 (1984).[11]

i. The WOTUS Rule Violates *Rapanos* And The CWA In *Per Se* Coverage Of Tributary Waters

The WOTUS Rule's provision that all "tributaries" of navigable waters are *per se* WOTUS cannot be squared with the statute or *Rapanos*. Since the WOTUS Rule defines "waters of the United States" to include any "interstate waters," that means any "tributaries," however defined, to non-navigable interstate waters are subject to CWA jurisdiction, with no connection of any kind, much less a significant one, to navigable waters.

Under the WOTUS Rule, a tributary is any land feature with "a bed and banks and an [OHWM]" and that "contributes flow"—no matter how small or ephemeral—"either directly or through another water" to a navigable water. 33 C.F.R. § 328.3(c)(3). As a result, tributaries under the WOTUS Rule include typically dry land features that indirectly and only sometimes contribute even a mere trickle that might eventually reach a navigable water, even if the flow is "intermittent" or "ephemeral" and "only in response to precipitation events." 80 Fed. Reg. at 37076. The presence of such "tributaries" may even be "infer[red]" through "desktop tools" where not apparent through "direct field observation." *Id.* at 37077.

Thisdefinition fails the plurality's test in *Rapanos*, which found it unreasonable to read WOTUS to include "channels containing merely intermittent or ephemeral flow." *Rapanos,* 547 U.S. at 733 (Scalia, J., plurality). It also fails Justice Kennedy's test because it provides no "assurance" that jurisdictional waters have a *significant* nexus to a navigable water. *See Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring). This Court noted that "this is precisely the

[11] In addition, for reasons discussed in more detail below, and consistent with the Supreme Court's determination in SWANCC, 531 U.S. at 172, the Agencies' interpretation of the term "navigable waters" is not due any deference under Chevron. 467 U.S. 837 (1984).

concern Justice Kennedy had in *Rapanos*, and indeed the general definition of 'tributary' is strikingly similar," concluding that the definition of a tributary here includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term." *See*, PI Order, ECF No. 70 at p.11.

Justice Kennedy wrote that "volume and regularity" of flow are relevant to decide whether a feature plays a sufficient role in "the integrity of an aquatic system" to establish a significant nexus to a navigable-in-fact water, and expressly rejected federal jurisdiction over features with "[t]he merest trickle [even] if continuous.". *Rapanos*, 547 U.S. at 769 and 781 (Kennedy, J., concurring). The WOTUS Rule's OHWM criterion does not satisfy Justice Kennedy's test. The WOTUS Rule defines an OHWM 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)(6). This definition is largely a descriptor of a land feature, not a descriptor of water or flow, much less "navigable waters." Justice Kennedy rejected reliance on the OHWM as a "determinative measure" for establishing a significant nexus, noting "the breadth of this 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." 547 U.S. at 761, 781 (Kennedy, J., concurring). Such a standard would sweep in waters "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781–82.

The Agencies' own studies show that the inadequacy of an OHWM as a criterion A 2006 Corps study found "no direct correlation between the location of OHWM indicators and . . .

inundation areas" in the arid southwest.[12] OHWM indicators are "frequently the result of moderate to extreme flood events," and "are not associated with any return interval event or with physical channel features found in the field." *Id.* A 2013 Corps study concluded that "OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics."[13] The Rawhide Wash in Scottsdale, Arizona provides a compelling example of why these studies are accurate. The Wash conveyed water flow only 12 times over a 15-year period, *for a total of 18 hours during that entire time*. City of Scottsdale Comments 3, ID-18024. Like most washes, the flow is highly episodic and infiltrates the permeable soils long before it reaches a navigable-in-fact water; therefore even those 18 hours of "flow" in a 15-year period cannot be characterized as connected to waters that are navigable-in-fact. *Id.* Under the WOTUS Rule, similar dry washes throughout the arid southwest would be subject to automatic federal jurisdiction, transforming the Clean *Water* Act into the Clean *Land and Water* Act.

The "bed and banks" requirement is an even less reliable measure of water flow. For example, "erosional channels or cuts often will appear to have a distinguishable bed and banks . . . but [those] are not evidence that the channels actually contribute flow to [navigable waters]." AMA Comments 9, ID-13951; *see also* WAC Comments 34, ID-14568 ("Bed, banks, and OHWM can be seen even in features without ordinary flow."). Particularly in the arid west,

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[12] Lichvar, Robert et al., U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of "Waters of the United States" in Arid Southwestern Channels* 14 (2006), https://erdc-library.erdc.dren.mil/xmlui/bitstream/handle/11681/5327/CRREL-TR-06-5.pdf?sequence=1&isAllowed=y, as cited in AMA Comments 10-11, ID-13951.

[13] Lefebvre, Lindsey et al., U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* 17 (2013), https://erdc-library.erdc.dren.mil/xmlui/bitstream/handle/11681/5496/ERDC-CRREL-TR-13-2.pdf?sequence=1&isAllowed=y, as cited in AMA Comments 11, ID-13951.

channels with a bed and banks need not convey even a minimal amount of water. *See* Freeport Comments 2, ID-14135; City of Scottsdale Comments 3–5, ID-18024. The bed and banks requirement thus provides no assurance that a water "significantly affect[s] the chemical, physical, and biological integrity of" a navigable water. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

The Agencies seek to fend off challenges to the OHWM and bed and bank criteria by codifying the statement that "[t]hese physical indicators demonstrate there is volume, frequency, and duration of flow sufficient" to qualify tributary waters as jurisdictional. 33 C.F.R. § 328.3(c)(3). This conclusory, unsupported statement is cherry-picked from language in Justice Kennedy's concurrence, does not reflect the lack of volume, frequency and flow criteria, and is not based on any evidence in the record. The evidence in the record (of which the comments of Scottsdale and Freeport discussed above are just examples) proves that one cannot extrapolate volumes of flow or proximity to navigable waters simply with reference to physical features such as debris or a discernable OHWM. To the contrary, the record shows even the most ephemeral flows with no connection to navigable waters can generate these land features, and the record does not support the Agencies' conclusion that the presence of such dry land features creates *per se* CWA jurisdiction.

The WOTUS Rule also 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" that fall outside the permissible scope of the CWA. 80 Fed. Reg. at 37078 (emphasis added). These are the "drains, ditches and streams" carrying only minor water volumes that Justice Kennedy rejected in *Rapanos*. 547 U.S. at 781 (Kennedy, J., concurring).

ii. The WOTUS Rule Violates *Rapanos* And The CWA In *Per Se* Coverage Of Adjacent Waters

Because the WOTUS Rule's *per se* coverage of "tributaries" is unlawful, any assertion of jurisdiction over "adjacent waters" is illegal to the extent that it relies on a connection with an unlawfully defined "tributary."

The WOTUS Rule's *per se* coverage of all "adjacent" waters is also irreconcilable with *Rapanos*. The WOTUS Rule defines adjacent waters as, among other things, (1) "all waters [at least partially] located within 100 feet of the [OHWM] of a" navigable water, impoundment, or tributary; (2) all "waters located within the 100-year floodplain of a" navigable water, impoundment, or tributary "and not more than 1,500 feet from the [OHWM] of such water;" and (3) "all waters [at least partially] located within 1,500 feet of the high tide line of a" navigable water. *Id*. § 328.3(c)(2).

The plurality in *Rapanos* requires a "continuous surface connection" for adjacent waters to be jurisdictional, which ephemeral or intermittent tributaries do not maintain nor do arbitrary distance-based criteria establish. 547 U.S. at 757 (Scalia, J., plurality). The concurrence also rejected the notion that waters adjacent to a tributary are *per se* jurisdictional absent some additional significant nexus, stating "[i]ndeed, in many cases wetlands adjacent to tributaries . . . might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781-782 (Kennedy, J., concurring). The Agencies double down on their unlawful assertion of authority by defining adjacency far more broadly than the prior rule rejected in *Rapanos*.

"Neighboring," is defined with novel distance-based criteria that effectively cause "adjacent" to read as "within 1,500 feet from the [OHWM]" of an ephemeral tributary. 33 C.F.R. 328.3(c)(2)(ii). Waters are *per se* jurisdictional solely by distance-based proximity to

non-navigable tributaries. The *Rapanos* plurality rejected federal jurisdiction based on adjacency to "ordinarily dry channels through which water occasionally or intermittently flows." 547 U.S. at 733 (Scalia, J., plurality). Justice Kennedy's concurrence also rejected federal jurisdiction solely based on adjacency to non-navigable tributaries because of the potential for overreach, requiring a separate significant nexus to be established "on a case-by-case basis." Id. at 782 (Kennedy, J., concurring).

The WOTUS Rule's distance-based approach is invalid under *Rapanos* even when not dealing with tributaries, extending CWA jurisdiction to small ponds, drainages, and wetlands simply because they might have a relationship with this water during a once-in-a-century storm. *See* 33 C.F.R. 328.3(c)(2)(ii) (linking jurisdiction to the 100-year floodplain). This falls far short of the plurality's *continuous* surface connection requirement, and violates the concurrence's approach, which requires "assurance" that a water "significantly affect[s]" the "chemical, physical, and biological integrity" of "navigable waters in the traditional sense." 547 U.S. at 779–80 (Kennedy, J., concurring). As Justice Kennedy explained, "[a] mere hydrologic connection should not suffice in all cases," because it "may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784–85. A potential once-in-a-hundred-years hydrologic connection is surely too insubstantial given its infrequency, and would effectively extend the Agencies' CWA jurisdiction to a vast amount of land based on 100-year flood plain maps.

The WOTUS Rule's categorical claim of federal jurisdiction over all "adjacent" waters as far as 1,500 feet from a "tributary" is far more expansive than the rule rejected in *Rapanos* as "precluded" by the CWA. *See* 547 U.S. at 748-49 (Scalia, J., plurality) ("[i]t is not clear why roughly defined physical proximity should make such a difference—without actual abutment, it

raises no boundary-drawing ambiguity, and it is undoubtedly a poor proxy for ecological significance"); *see also id.* at 778-79 (Kennedy, J., concurring) (Corps cannot regulate simply "whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."). The WOTUS Rule goes beyond what was rejected by Justice Kennedy because it would exercise jurisdiction over wetlands, ditches, or drains even without any evidence of any eventual flow into traditional navigable waters. The WOTUS Rule's labeling these waters as "adjacent" also fails under *SWANCC*, which both the plurality and concurrence relied on in *Rapanos.*[14]

The WOTUS Rule's other two distance-based adjacency categories—"all waters [at least partially] located within 100 feet of the [OHWM] of a" navigable water, impoundment, or tributary, and "all waters [at least partially] located within 1,500 feet of the high tide line of a" navigable water—are similarly unlawful. 33 C.F.R. § 328.3(c)(2). Even the EPA's Science Advisory Board noted 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 of distance* to jurisdictional waters.'" 80 Fed. Reg. at 37064 (citation omitted) (emphasis added). Yet the Agencies based their definitions of adjacent waters "solely" on "geographical proximity." These arbitrary distance-based criteria provide no assurance that the covered land features "play an important role in the integrity of . . . navigable waters." *Rapanos*, 547 U.S. at 781–82 (Kennedy, J., concurring).

[14] After noting that Riverside Bayview had upheld federal jurisdiction "over wetlands that actually abutted on a navigable waterway," the Court in SWANCC rejected jurisdiction over "ponds that are not adjacent to open water." 531 U.S. at 167, 168; see Sackett v. EPA, 566 U.S. 120, 123-24 (2012) (contrasting abutting waters in Riverside Bayview with non-adjacent waters in SWANCC and Rapanos).

iii. The WOTUS Rule Violates *Rapanos* And The CWA In Case-By-Case Determinations For Other Waters

The WOTUS Rule's approach to case-by-case jurisdictional waters is also inconsistent with *Rapanos*. The Agencies assert jurisdiction over all waters (and thus associated land features) determined to have a "significant nexus to a" navigable water, provided that the waters are (1) "located within the 100-year floodplain" of a navigable water; or (2) "located within 4,000 feet of the high tide line or [OHWM]" of a navigable water, impoundment or tributary. 33 C.F.R. § 328.3(a)(8). Based on the "functions performed by the water," a "significant nexus" exists if the water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a [navigable water]." 33 C.F.R. § 328.3(c)(5). The functions include, among others, "contribution of flow," "export of organic matter," "export of food resources," and "provision of life cycle dependent aquatic habitat" for "species located in" navigable waters. *Id.*

The "functions" list violates the plurality holding in *Rapanos*, as a usually dry channel could meet the Agencies' criterion for "[c]ontribution of flow," 33 C.F.R. § 328.3(c)(5), during a rare rainstorm and yet lack "a continuous surface connection" with the navigable waters called for in *Rapanos*. 547 U.S. at 717. Similarly, an isolated body of water that is episodically used by some wildlife might affect the "[p]rovision of life cycle dependent aquatic habitat . . . for species located in a [navigable] water," 33 C.F.R. § 328.3(c)(5), and yet lack a "continuous surface connection" with the navigable water (the "connection" of a bird flying 10 miles from an isolated body of water to a navigable river can, by itself, transform the isolated body of water with no hydrological connections of any kind to any other waters into a "navigable water"). The Supreme Court already rejected such an expansive definition in *SWANCC*, invalidating a rule asserting jurisdiction over isolated, local ponds because the ponds were used by migratory birds.

Going beyond the language of the CWA and Supreme Court precedent, the Agencies claim jurisdiction over land features and water bodies precisely because they have no connection at all with any navigable waters under the remarkable theory that, for example, a collection of unconnected and typically dry Prairie Potholes collect water that might, without these Prairie Potholes, potentially find its way to navigable waters. *See* 80 Fed. Ref. at 37071. This turns the CWA upside down, as jurisdiction is now based on the *lack* of any hydrologic connection with navigable waters.

The "functions" list also violates Justice Kennedy's concurrence. Justice Kennedy allows jurisdiction when a water "significantly affects" the "chemical, physical, *and* biological integrity" of "waters more readily understood as 'navigable'." *Rapanos,* 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added). By contrast, the WOTUS Rule does not apply Justice Kennedy's conjunctive and holistic requirement, asserting jurisdiction when *either* the "chemical, physical, *or* biological integrity" of a water is significantly affected. 33 C.F.R. § 328.3(c)(5) (emphasis added). By requiring an effect only on one of the three factors (chemical, physical, or biological), and in fact based on only one of the nine listed "functions," the Agencies effectively "dilute" Justice Kennedy's significant nexus test by more than two-thirds and replace a holistic and comprehensive view of the integrity of navigable waters with one that allows the Agencies to cherry pick data tied to any one of several narrow factors to suit their desired policy results.

iv. The WOTUS Rule Violates *Rapanos* And The CWA By Including All Interstate Waters, Regardless Of Their Relationship to Navigable Waters

The Agencies assert unqualified jurisdiction over "*all* interstate waters," even if they are not navigable. 33 C.F.R. § 328.3(a)(2). This assertion violates the plain text of the CWA

limiting the Agencies' jurisdiction to "navigable waters" and *Rapanos.* In *Rapanos* Justice Kennedy tied the definition of "navigable waters" to waters that are "navigable in fact or that could reasonably be so made." *Rapanos,* 547 U.S. at 759 (Kennedy, J., concurring). Inclusion of *all* interstate waters, not matter what connection (if any) they maintain to a navigable water is in clear violation of the CWA and Justice Kennedy's significant nexus test.

C. The CWA Does Not Authorize The Expansive And Transformative WOTUS Rule

The WOTUS Rule exceeds the statutory authority delegated to the Agencies by Congress. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power," courts require a "clear indication that Congress intended that result." *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)). Similarly, Congress does not grant a "transformative expansion" of authority to regulate matters of "vast economic and political significance" absent a clear statement. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (internal quotations omitted) ("*UARG*"). Such statements are missing here.

The Supreme Court in *SWANCC* noted that the Corps' attempts to extend its jurisdictional reach to isolated ponds not adjacent to open waters implicated concerns of "significant impingement of the States' traditional and primary power over land and water use," and the potential to "readjust the federal-state balance." *SWANCC*, 531 U.S. at 174. So the Court "read the statute as written to avoid the significant constitutional and federalism" concerns and rejected the Corps' attempt to regulate at, or beyond, the limits of Congress' power.[15]

[15] For these and other reasons the Agencies are not entitled to any deference under *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984); *See Nat'l Mining Ass'n v. Kempthorne,* 512 F.3d 702, 711 (D.C. Cir. 2008) "Th[e] canon of constitutional avoidance trumps *Chevron* deference . . . we will not submit to an agency's interpretation . . . if it 'presents serious constitutional difficulties'.")

Similarly, in *UARG*, the Supreme Court rejected EPA's effort to expand significantly its regulation of greenhouse gas emissions, explaining that when an agency seeks to "bring about an enormous and transformative expansion" in its authority to make "decisions of vast 'economic and political significance'" under a "long-extant statute," it must point to a clear statement from Congress. 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The Court affirmed this principle in *King v. Burwell*, holding that courts are not to presume that Congress would implicitly delegate to agencies "question[s] of deep 'economic and political significance'" because, if "Congress wished to assign [such] question[s] to an agency, it surely would have done so expressly." 135 S. Ct. 2480, 2489 (2015) (citation omitted).

In the WOTUS Rule, the Agencies claim transformative authority to readjust fundamentally the federal-state balance of land and water use, implicating significant political and economic concerns. As the plurality noted in *Rapanos*, "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 (Scalia, J. plurality). By the Agencies' own admission, the WOTUS Rule will result in an increase in determinations of federal jurisdiction. 80 Fed. Reg. at 37101. The Agencies acknowledge that "the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea" and that the 100-year floodplain encompasses an even larger area. Economic Analysis 11, ID-20866. This increase in federal jurisdiction includes the same types of isolated waters at issue in *SWANCC* and *Rapanos*, and allows the Agencies to function as a zoning board with the authority to

prohibit effectively or control construction of roads and buildings, farming, and many other activities almost anywhere in the nation.

The WOTUS Rule also has significant economic implications for the landowners, businesses, and public agencies that will be subject to additional federal permitting requirements, demonstrating again the WOTUS Rule's transformative expansion of federal authority. As the Supreme Court observed recently, "[t]he costs of obtaining . . . a permit [from the Corps] are significant," *U.S. Army Corps of Eng'rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1812 (2016), and "the permitting process can be arduous, expensive, and long," *id.* at 1815. Indeed, more than a decade ago "[o]ver $1.7 billion [wa]s spent each year by the private and public sectors obtaining wetland permits alone." *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality) (quotation omitted). The WOTUS Rule's reach is far beyond waters, encompassing many land features that may rarely, if ever, contain water or have water pass through them. And the presence of any one of these jurisdictional land features on a parcel subjects the use of the entire parcel to federal scrutiny. The WOTUS Rule's expansion of the Agencies' authority will also result in lost opportunities when permits improperly required under the expanded federal regime are denied or are too costly to justify a project in the first place.

The Agencies cannot point to a clear statement from Congress authorizing such a transformative expansion of the Agencies' authority over local land and water use. The CWA's jurisdictional limitation on the term "navigable waters" cannot plausibly be construed to authorize clearly the wide reach of the WOTUS Rule. If anything, Congress's 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), combined with the Supreme Court's repeated admonitions that the Agencies' jurisdiction must have some

significant nexus to navigable-in-fact waters, warrants narrowly construing the Agencies' jurisdiction.

II. THE WOTUS RULE VIOLATES THE UNITED STATES CONSTITUTION

The WOTUS Rule violates the U.S. Constitution in at least three significant ways. First, it violates the Tenth Amendment by intruding upon the Plaintiff States' sovereign interests in regulating their land and water resources as recognized by the reservation of state sovereignty and core federalism principles enshrined in the CWA. Second, it exceeds Congress's constitutional authority under the Commerce Clause because it provides for federal jurisdiction over isolated waters with no meaningful impact on or connection to interstate commerce. And third, it violates the Due Process Clause because it is unconstitutionally vague.

A. The WOTUS Rule Violates Plaintiff States' Rights Under The Tenth Amendment

Under the Tenth Amendment, "[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. The Plaintiff States unquestionably "retain a significant measure of sovereign authority . . . to the extent the Constitution has not divested them their original powers." *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 549 (1985). Under States' sovereign authority, "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *accord City of Edmonds v. Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States").

Congress expressly recognized the Plaintiff States' inherent powers over local lands and water resources in the CWA. 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources."). In *SWANCC*, the Supreme Court

likewise recognized States' "traditional and primary power over land use" in rejecting the Corps' attempt to assert jurisdiction over isolated intrastate waters. 531 U.S. at 174. The Court noted that allowing the Corps' to assert jurisdiction over isolated intrastate ponds would "result in significant impingement of the States' traditional and primary power of land and water use." *Id.* Similarly, in *Rapanos* the plurality found that any federal attempt to regulate isolated intrastate waters would be "an unprecedented intrusion into traditional state authority," and would "stretch[] the outer limits of Congress' commerce power and raise[] difficult questions about the ultimate scope of that power." 547 U.S. at 738 (Scalia, J., plurality).

The WOTUS Rule's overbroad assertion of authority over local land and water features that have no or only a remote connection to navigable-in-fact waters invades the Plaintiff States' sovereign authority, in violation of their Tenth Amendment rights. The definitions in the WOTUS Rule extend federal jurisdiction to isolated, usually-dry, and entirely intrastate land and water features remote from any navigable waterway. The Agencies displace state and local land regulation, and act as a "*de facto*" federal "zoning board" for waters and lands traditionally under state regulations. *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). The issue is not merely the breadth of jurisdiction asserted by the federal government, but also the scope of regulatory power that the federal government would exercise in those areas. *See SWANCC*, 531 U.S. at 173.

The practical effect on the Plaintiff States from the WOTUS Rule's expansion of federal authority is breathtaking. From Prairie Potholes in North Dakota, to arroyos in New Mexico, and ephemeral drainages in Wyoming, the WOTUS Rule extends federal jurisdiction to virtually every potentially wet area of the country, including their associated dry land features. *See* 33 C.F.R. § 328.3(a). 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 about 25 "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 sweeps so broadly that the Agencies oddly find it necessary to explicitly disclaim authority over "puddles" and swimming pools "created in dry land." *Id*. § 328.3(b)(4).

North Dakota is particularly affected by the overreach of the WOTUS Rule. *See* ND Comments, ID-15365. North Dakota straddles the Central and Great Plains regions and has a relatively flat topography. *Id.* at 9. Floodplains under the WOTUS Rule will be miles wide, allowing the Agencies to assert jurisdiction over lands *miles* removed from any body of water. *Id.; see also* EmPowerND Comments 1-2, ID-13604 (noting that 6% of the North Dakota's total acreage is in floodplain areas); North Dakota Stockmen's Association ("NDSA") Comments 27, ID-13688 (noting that Prairie Potholes cover more than 300,000 square miles nationwide). The WOTUS Rule also overreaches to classify all Prairie Pothole wetlands, features abundant in North Dakota, as *per se* jurisdictional. *Id.* at 7. 33 C.F.R. § 328.3(a)(7)(i). But these geological areas of depression in North Dakota's plains occasionally fill with water on an approximate 200-year cycle where many depressions are functionally dry uplands or isolated wetlands for *most of the period of record,* only rarely connecting to other waters during extended wet periods. ND. Comments 6-7, ID-15365. Prairie Potholes are often remote and only remotely connected to navigable waters through several degrees of other water bodies. *Id.* Prairie Potholes are also closely linked to farming in North Dakota, and forcing them into a federal regulatory regime removes them from the expertise of local regulators and farmers who are better equipped to manage these lands. *Id.*

Alaska also presents a telling example of the breadth of the WOTUS Rule's expansion of federal authority. *See* AK DEC Comments 18–20, ID-19465. Forty-three percent of Alaska is

wetlands, covering more than 174 million acres. *Id.* at 4. Many of those wetlands are frozen much of the year, and are underlain with permafrost. *Id.* at 21. During the warmer seasons, the surface soils become inundated when thawing conditions generate near-surface water that cannot penetrate the underlying permafrost, causing the soils to exhibit wetland-like characteristics. *Id.* These areas can extend for hundreds of miles inland from the main navigable-in-fact waterways, as much of northern Alaska is covered in "continuous permafrost." *Id*. at 19. These lands are subject to federal jurisdiction by virtue of the WOTUS Rule's definition of neighboring: "The entire water is neighboring *if a portion* is located within 1,500 feet of the [OHWM] and within the 100-year floodplain." 33 C.F.R. § 328.3(c)(2)(ii) (emphasis added). As Alaska warned the Agencies, the Proposed Rule would "federalize land use decisions for State, local and private lands" in Alaska because "nearly all waters and wetlands in Alaska" would be subject "to regulation by the EPA and the Corps." AK Gov. Comments 1, ID-19465. This conclusion applies equally to the WOTUS Rule.

The City of Scottsdale, Arizona provides another compelling example in a completely different ecological region. *See* City of Scottsdale Comments, ID-18024. The City is replete with ephemeral drainages that flow in response to "high intensity and short duration storms." *Id.* at 3. The flow is limited in duration, and typically infiltrates through the highly permeable soils long before it could reach a navigable-in-fact water, if at all. *See, e.g., id.* (describing Rawhide Wash as flowing 0.014% of the time over a 15-year period). A single storm may produce flow in one wash, but others a mile away could be bone dry. *See id.* All washes in the region are marked by a bed and banks and an OHWM, sometimes created after a single rain event. *See id.* These dry washes will be *per se* jurisdictional under the WOTUS Rule, despite not having any

connection to navigable waters and historically being treated as non-jurisdictional under the Agencies' post-*Rapanos* guidance. *See id.* at 4.

The Agencies are asserting jurisdiction over traditionally State-regulated waters and associated lands, impairing the Plaintiff States' authority to establish and enforce their own policies for their waters and lands. Any implication that waters and lands falling outside federal CWA jurisdiction are somehow "unregulated" and thus "unprotected" must be rejected: what is at issue here are the limits of federal jurisdiction, not environmental protection. Waters that fall outside the scope of federal jurisdiction remain subject to regulation as state waters through local laws and regulations. *See, e.g.,* N.D. Cent. Code Ch. 61-28.; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. § 8-4-101 *et seq.* Instead of Plaintiff States regulating the land and water within their borders to advance their own sovereign responsibilities to protect their resources and citizens, the WOTUS Rule would have them defer to the federal government's vast regulatory overreach. This intrusion into the "quintessential state activity" and historical powers over land-use violates the 10th Amendment.

B. The WOTUS Rule Exceeds Congress's Commerce Clause Authority

The Constitution grants Congress the 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. That power extends only to three areas: (1) "channels of interstate commerce;" (2) the "instrumentalities of commerce;"[16] and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Congress exercises its Commerce Clause power "subject to the limitations contained in the Constitution," including the

[16] The WOTUS Rule is not based on a theory of jurisdiction in instrumentalities of commerce and Petitioner States therefore do not address it in this memorandum.

Tenth Amendment. *New York v. U.S.,* 505 U.S. 144, 156 (1992). Here, the "Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation" on Congress's Commerce Clause power. *Id.* at 157.

i. Channels Of Interstate Commerce

The WOTUS Rule exceeds Congress's delegable authority to regulate "channels of interstate commerce." As the Supreme Court explained in *SWANCC*, the CWA is authorized by Congress's "traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.'" 531 U.S. at 172; *id.* at 168 n.3 (finding no indication that "Congress intended to exert anything more than its commerce power over navigation"). The Court noted "Congress evidenced its intent to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of the term." *Id.* at 167. However, a "central requirement" of the CWA is that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos,* 547 U.S. at 778 (Kennedy, J., concurring). The WOTUS Rule instead sweeps in many 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 dry or ephemeral stream beds that might flow just once every one-hundred years, as well as interstate waters the Agencies admit are not navigable.

In *SWANCC*, the Court rejected the Agencies' assertion of authority over similarly situated, isolated intrastate waters, noting that this authority was not "consistent with the Commerce Clause." 531 U.S. at 162. The Agencies implicitly acknowledged that their attempted jurisdictional reach was beyond the channels of interstate commerce by seeking to justify it under the third prong of Commerce Clause power, which the Court declined to assess under constitutional avoidance principles. *Id.* at 173 ("Respondents argue that the . . . [r]ule . . .

falls within Congress's power to regulate intrastate activities that 'substantially affect' interstate commerce.").

Rapanos also touched on the limits of the Agencies' Commerce Clause authority under the CWA. The plurality noted that the CWA provides for regulation of waters "*other than* those . . . used . . . to transport interstate or foreign commerce," but ultimately did not need to decide the precise limits of CWA jurisdiction over *waters*, as the Agencies' had tried to regulate non-waters, or dry lands. 547 U.S. at 731-732. (Scalia, J., plurality). The concurrence devised a significant nexus test it claimed would avoid "serious constitutional or federalism difficulty" in the context of waters "*that are adjacent to tributaries*." *Id.* at 782 (Kennedy, J., concurring) (emphasis added). The concurrence's significant nexus test was applied to the prior codification of 33 C.F.R. § 328.3 (effective to August 27, 2015), which was much narrower than the WOTUS Rule. This new assertion of even broader federal jurisdiction raises "serious constitutional or federalism difficulties" that *Rapanos's* concurrence did not address and exceeds the Agencies' authority to regulate the use of channels of interstate commerce. Furthermore, the Agencies' attempt to reassert jurisdiction over non-navigable interstate waters in the WOTUS Rule, regardless of their connection to navigable waters, exceeds the Agencies' authority to regulate channels of interstate commerce.

ii. Activities Substantially Affecting Interstate Commerce

The WOTUS Rule also exceeds Congress's delegable authority to regulate economic activities that "substantially affect interstate commerce." When a regulation or statute implicates the Commerce Clause, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Lopez,* 514 U.S. 549, at 562 (citing *United States v. Bass,* 404 U.S. 336, 349 (1971).

In *Lopez*, the Court determined that the law reached activity—specifically, the possession of a firearm in a school zone—that was "in no sense an economic activity." 514 U.S. at 567. The Court rejected the argument that Congress had the authority to reach this non-economic activity because, in aggregate, guns in school zones would not have a substantial effect on interstate commerce. That aggregation would involve "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. The WOTUS Rule involves precisely this piling on of speculative inferences to regulate similarly non-economic activities.[17] As the *Rapanos* plurality observed, "[i]n deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'" 547 U.S. at 721 (Scalia, J., plurality) (quoting 33 C.F.R. § 320.4(a) (2004)). The Agencies could prohibit an individual from disposing of leaves or brush in a shallow swale on his or her property provided that the swale is within 1,500 feet of the OHWM of a "tributary" to a navigable water, or if a bird nested in the swale for a portion of its life cycle before leaving for a navigable water not hydrologically connected to the swale. That is "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567. The same analysis applies to the Agencies attempt to regulate *all* interstate waters, regardless of their connection to a navigable water. Many interstate waters have no connection to a water that is "navigable in fact or that could reasonably be so made." *Rapanos,* 547 U.S. at

[17] While the WOTUS Rule certainly creates economic burdens, as evidenced by sections III and IV, these burdens are unrelated to interstate commerce, but rather only result from the Agencies' regulatory overreach.

759 (Kennedy, J., concurring). These waters thus have no ability to "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 567.

The WOTUS Rule also fails to "express[ly] . . . limit its reach to [activities that] have an explicit connection with or effect on interstate commerce." *Id.* at 562. Under the WOTUS Rule, there is no rational basis for concluding that failure to regulate activities such as leaf or yard waste disposal into dry stream beds that "contribute[] flow"—no matter how ephemeral or infrequent—"either directly *or through another water*" to a navigable water significantly affects interstate commerce. 33 C.F.R. § 328.3(c)(3) (emphasis added).

Because the WOTUS Rule violates Congress's delegable Commerce Clause authority, it also violates Plaintiff States' rights under the Tenth Amendment. *New York,* 505 U.S. at 157.

C. The WOTUS Rule Violates The Due Process Clause

"No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST., Amend. V. A statute or regulation is constitutionally invalid under the Due Process Clause if it prohibits conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A law is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *Chicago v. Morales*, 527 U.S. 41, 56 (1999) (internal quotation omitted). Vagueness concerns are particularly acute where, as with the CWA, the law at issue involves a criminal prohibition. *See Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Under these standards, the WOTUS Rule is unconstitutionally vague.

The Agencies' repeated failures to provide a lawful definition for the statutory term "navigable waters" threaten that term's legality. As Justice Kennedy noted recently in an opinion joined by Justices Thomas and Alito, "the [CWA's] reach is 'notoriously unclear' and the

consequences to landowners . . . can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)). This lack of clarity "raise[s] troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Id*. at 1817. For the third time the Agencies have promulgated an interpretation of the term "navigable waters" that cannot withstand constitutional scrutiny, including because it is vague and "essentially limitless," *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring). And, as the Supreme Court has explained: "the failure of persistent efforts. . . to establish a standard" under a broadly worded statutory phrase can lead the courts to declare that phrase unconstitutional. *Johnson*, 135 S. Ct. at 2558 (quotation omitted).The WOTUS Rule's tributary definition fails to provide notice to ordinary people of what waters and lands are subject to CWA jurisdiction. Tributaries are defined, in part, as water "characterized by the presence of the physical indicators of a bed and bank and an [OHWM]," that "contributes flow, either directly or through another water" or through "any number of downstream waters" to a navigable water, but may also have any number of "constructed" or "natural breaks" along the path of contributing flow. 33 C.F.R. § 328.3(c)(3). The Corps' 2004 Field Guide explains, "selection of reliable OHWM field indicators [is] challenging" and "especially difficult in arid regions" even for present channels.[18] The Agencies explain that they will use remote sensing and desktop tools to determine the OHWM and bed and banks of tributaries where "physical characteristics of bed and banks and another indicator of [OHWM] are absent in the field." 80 Fed. Reg. at 37077. In other words, even with no evidence

[18] R.W. Lichvar & J.S. Wakeley, U.S. Army Corps of Eng'rs, *Review of Ordinary High Water Mark Indicators for Delineating Arid Streams in the Southwestern United States* (2004), http://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/; *see also* AMA Comments 10, ID-13951

of a bed and bank to the naked eye, the Agencies can assert federal jurisdiction over an indentation on the landscape that appears through sophisticated digital photography and satellite imaging to which ordinary people lack access, and would not have the expertise to interpret even if they did have access.

The WOTUS Rule's inclusion of "[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" is similarly unconstitutionally vague. 80 Fed. Reg. at 37078. The Agencies explain that the ditches will be identified by the "historical presence of tributaries using a variety of resources, such as historical maps, historical aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." *Id*. at 37,078–79. It is exceedingly difficult (or impossible) under this standard for an ordinary individual to know if a ditch will be covered. Even if the individual has the capability to conduct historical research, it is unclear how far back in time the individual must look for a previously existing tributary and whether that person would have the expertise to know what to look for.

The WOTUS Rule's case-by-case waters category presents similar problems for landowners, amplified by the Agencies' broad discretion in making case-by-case decisions and the possibility of inconsistent outcomes. The Agencies will look at any water that is "[at least partially] located within the 100-year floodplain of a" navigable water or "waters [at least partially] located within 4,000 feet of the high tide line or [OHWM] of a" navigable water, impoundment, or tributary, 33 C.F.R. § 328.3(a)(8), and then engage in a largely unguided case-by-case analysis, looking at whether the water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological

integrity of a [navigable] water" based on "any single function or combination of functions performed by the water." *Id.* § 328.3(c)(5). Given the number of factors that the Agencies' staff must consider, *see, e.g.*, 80 Fed. Reg. at 37093 (referencing sediment trapping, nutrient recycling, food export, flood control, and many other factors), the public will not know how any particular jurisdictional inquiry will turn out, nor may they have any reason to believe that an inquiry is even necessary.

Typically, a person subject to the law has no way to know his or her land contains a water of the United States before an enforcement action is commenced, unless he or she requests a jurisdictional determination. That the Corps *voluntarily* provides jurisdictional determinations (and is not required by the CWA or otherwise to continue to do so) does not render the the WOTUS Rule any less vague or excuse the unconstitutional vagueness. *See Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring) (noting that the CWA's "reach is 'notoriously unclear'" and that the Corps' jurisdictional determinations have "no legally binding effect on the [EPA]." (citations omitted)). That the Corps finds it necessary to provide clarification by offering jurisdictional determinations outside the permitting process (even under the pre-WOTUS Rule regulations) only furthers the conclusion that the Agencies' regulations are unconstitutionally vague.

III. THE WOTUS RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The APA establishes procedures, requirements, and standards governing the promulgation and review of agency rulemakings. 5 U.S.C. § 500 et seq. Here, the Agencies have violated two critical requirements of the APA: (1) failing to comply with the requirements of notice-and-comment rulemaking, and; (2) promulgating a rule that is arbitrary and capricious and unsupported by the administrative record.

A. The Agencies Failed To Comply With Statutory Notice-and-Comment Procedures

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*, *United Mine Workers of America v. Mine Safety and Health Admin.,* 407 F.3d 1250, 1259 (D.C. Cir. 2005). These procedures "ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994). A final rule must be a "logical outgrowth" of the proposal. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (citations omitted). The D.C. Circuit has explained that adopting a rule that is not a logical outgrowth of the proposal "almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014).

The WOTUS Rule is a textbook example of insufficient notice-and-comment resulting in a procedurally flawed and arbitrary and capricious rule. The Agencies built the jurisdictional reach of the term "navigable waters" around definitional changes never noticed in the Proposed Rule. These definitions included: distance-based criteria affecting adjacent waters, distance- and connectivity-based criteria affecting case-by-case waters, and exclusions for farming and ranching uses. The lack of notice deprived parties of the opportunity to comment meaningfully on those criteria, thereby undermining informed agency decision-making. These failures, in turn, contributed to the promulgation of the WOTUS Rule that is unsupported by anything approaching adequate record evidence, undermining meaningful judicial review.

Small Refiner examines what notice is sufficient for a final rule to be a "logical outgrowth" of a proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983). In *Small Refiner*, the EPA "gave general notice that it might make unspecified changes in the definition of small refinery." *Id.* at 549. Ultimately, the EPA adopted a past ownership requirement that excluded refineries owned by a larger refinery before an arbitrary, unmentioned date. *Id.* at 514. In invalidating the final rule, the D.C. Circuit noted that the "[a]gency notice must describe the range of alternatives being considered with reasonable specificity." *Id.* at 549. A final rule satisfies that test if affected parties "should have anticipated that [the] requirement" embodied in the final rule might be adopted. *Id.*

The WOTUS Rule includes distance-based criteria, connectivity-based criteria, and other provisions that are central to the WOTUS Rule but were never noticed in the Proposed Rule.

i. Distance-Based Criteria For Adjacent Waters

The Proposed Rule defined "adjacent waters" as all waters within a so-called "riparian area" or "flood plain" of a navigable water. 79 Fed. Reg. at 22269. The WOTUS Rule adopted three entirely new distance-based criteria to define adjacency: (1) waters within 100 feet of a navigable water, impoundment, or "tributary;" (2) waters within a 100-year floodplain and 1,500 feet of a navigable water, impoundment, or "tributary;" and (3) waters within 1,500 feet of the high-tide line of a navigable water. 33 C.F.R. § 328.3(c)(2).

None of these three central "adjacency" distance-based criteria appeared in the Proposed Rule or are a logical outgrowth of the proposal, because no interested party "should have anticipated" them. *Small Refiner*, 705 F.2d at 549. Had proper notice been given, the public would have submitted comments addressing the legality and practical import of such criteria, including whether they had any merit at all.

Even the Corps was in the dark about these significant modifications to the Proposed Rule until months after the close of the public comment period. *See* Moyer Memorandum 1, ID-20882 ("It was unknown to the Corps until early February [2015] that Army and EPA were contemplating a "bright-line" cut off of CWA jurisdiction either 5,000 or 4,000 linear feet from the [OHWM].").

The Agencies have argued that they did not violate the APA because they sought comment on "'establishing specific geographic limits' for adjacency such as 'distance limitations.'" Dkt. 66, at 12 (quoting 79 Fed. Reg. at 22208–09[19]). This request was in the context of "using *shallow subsurface or confined surface hydrological connections* as a basis for adjacency." 79 Fed. Reg. at 22208 (emphasis added); *see* note 19 below. Unspecified distance limitations based on hydrological connections are a far cry from the WOTUS Rule's imposition of precise physical distances between waters (or dry land features) and other waters with no hydrological connections. Asking about the merits of "geographical limitations" in general does not establish a predicate that allows the Agencies arbitrarily to pick for the final rule, any distance-based criteria.

The proposed definition of "neighboring" was rooted in "riparian" and "floodplain" proximity, with no hint of distance-based criteria. *Id.* at 22263. Riparian was proposed as the "transition between terrestrial and aquatic ecosystems" and "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." *Id.* at 22196, 22199. Floodplain was described as "an area bordering inland or coastal waters . . . formed by sediment deposition . . . and is inundated during

[19] The full text of the relevant portion of the sentence being: "establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example, distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent." 79 Fed. Reg. at 22208.

periods of moderate to high water flows." *Id.* at 22199. Nothing in this proposed language suggests that arbitrary numerical distance limitations, unrelated to the actual ecological and hydrological connection of waters, would be adopted in the WOTUS Rule. This Court wrote that the "definition of 'neighboring' under the final rule is not likely a logical outgrowth of its definition in the proposed rule," observing that the "final rule greatly expanded the definition of 'neighboring' such that an interest person would not recognize the promulgated rule as a logical outgrowth of the proposed rule." *See,* PI Order, ECF No. 70 at p.14. Additionally, the mention of "moderate" flows in the proposed description of floodplain does not indicate that flows as rare as a once in one-hundred year event would be chosen as a benchmark. As in *Small Refiner,* the Agencies failed to "describe the range of alternatives being considered with reasonable specificity." 705 F.2d at 549.

The Agencies' approach resulted in a final rule never "tested via exposure to diverse public comment," and was 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. It also deprived the Agencies of information from those "most interested" and "best informed" about this subject matter: the regulated community and the state regulators who implement the CWA and related state programs at the field level. *See Phillips Petroleum*, 22 F.3d at 620.

ii. Distance And Connectivity-Based Criteria For Case-by-Case Waters

The Proposed Rule defined a category of case-by-case waters that would be subject to CWA jurisdiction in the event the Agencies determined *any other water* had a "significant nexus" with a navigable water, with "significant nexus" defined, in part, as "significantly affect[ing] the chemical, physical, or biological integrity of a water identified" as jurisdictional.

79 Fed. Reg. at 22263. Many parties raised concerns about the expansive reach of the Agencies' ability to determine that *any other water* was jurisdictional on a case-by-case basis. *See, e.g.,* ND Comments 4, 14-15, ID-15365; AK DEC Comments 12, ID-19465, at 91.

The Agencies sought to address the illegality of their proposal by including in the WOTUS Rule quantitative and other criteria not suggested in the Proposed Rule. The case-by-case analysis would now consider as jurisdictional: (1) waters within the 100-year floodplain of a navigable water; and (2) waters within 4,000 feet of the OHWM or high tide line of a navigable water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8); 80 Fed. Reg. at 37105. The WOTUS Rule also added nine functional criteria[20] that did not appear in the proposal, and defined the terms "OHWM" and "high tide line" for the first time. *Id.* § 328.3(c)(5). This Court concluded that "when the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule. Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance." *See*, PI Order, ECF No. 70 at p.15.

The most the Agencies have been able to muster in support of proper notice is the Proposed Rule's observation that "'distance of hydrologic connection' is one of the factors that could be considered when evaluating a connection with a downstream water." Dkt. 66, at 12, n.3 (quoting 79 Fed. Reg. at 22214). But this opaque sentence, which has nothing to do with the

[20] The functions being: (i) Sediment trapping, (ii) Nutrient recycling, (iii) Pollutant trapping, transformation, filtering, and transport, (iv) Retention and attenuation of flood waters, (v) Runoff storage, (vi) Contribution of flow, (vii) Export of organic matter, (viii) Export of food resources, and (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species in a water identified in paragraphs (a)(1) through (3) of this section. 33 C.F.R. § 328.3(c)(5).

nine functional criteria or definitions of OHWM or high tide line, appeared to be addressing factors that the Agencies would consider *in conducting* a case-by-case determination. Limited by its own terms to the context of hydrologic connections, this vague observation did not suggest that the Agencies were considering or requesting comments on specific distance-based criteria, including when there is no hydrological connection. The subsections of the proposal that follow this single sentence consist of three-and-a-half pages discussing potential requirements for case-by-case waters, and *none* of the approaches contemplates adopting criteria based on specific distances from specific reference points or the other new criteria that appeared for the first time in the WOTUS Rule. *See* 79 Fed. Reg. at 22214–17.

iii. The Farm And Ranching Exclusions

The Agencies adopted an exclusion in the WOTUS Rule stating "waters being used for established normal farming, ranching, and silviculture activities" were exempt from *per se* jurisdiction under the WOTUS Rule's adjacency category, but not from the tributary category. 33 C.F.R. § 328.3(c)(1); 80 Fed. Reg. at 37105. At no point in the Proposed Rule did the Agencies notice that they were considering treating farmland differently as between the "adjacent" and "tributary" waters. In fact, the Agencies specifically stated in the Proposed Rule *in four separate locations* that it would "not affect any of the exemptions provided by the CWA section 404(f), including those for normal farming, silviculture, and ranching activities." 79 Fed. Reg. 22218; *Id.* at 22189, 22193, and 22199. Had the Agencies informed the public that they were contemplating this exclusion within part of the statutory definition, the Plaintiff States and affected farmers would have submitted comments on the proposed changes. If the Agencies have given notice that this farmland exclusion was under consideration, the States would have argued that the exclusion should be expanded to cover both *per se* categories, which is why the unexpected addition of an exclusion that benefits the States' farmers prejudice the States.

B. The WOTUS Rule's Expansive Interpretation Of "Significant Nexus" Is Arbitrary And Capricious

A rule is arbitrary and capricious if it is unsupported by the record. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43-44 (1983). The Agencies claim that the WOTUS Rule is grounded in sound science—indeed, the term "science" is repeated over seventy times in the preamble to the WOTUS Rule, with another forty-six references to the Agencies' Final Connectivity Study.[21] The Agencies also claim that science, as documented in the Final Connectivity Study, shows that Justice Kennedy's significant nexus test is satisfied by the WOTUS Rule's expansive new definition of WOTUS. In fact, the Final Connectivity Study highlights a fundamental disconnect between the actual science in the record and the Agencies' portrayal of that science in justifying the WOTUS Rule.

According to the preamble to the WOTUS Rule, the scientific basis is that water flows downhill to create hydrological connections and that the "protection of upstream waters is critical to maintaining the integrity of the downstream waters." 80 Fed. Reg. at 37063, 37056. This assertion is nothing but a truism and implies a limitless expansion of federal power. There is no debate that upstream waters contribute to downstream waters, but that only establishes—at most—a "nexus" between the two (not every water has a downstream connection). For CWA jurisdictional purposes, any such nexus, it must eventually be a link to a navigable water, and not any nexus will do: the upstream waters must have a "significant nexus" with downstream navigable waters.

Whether there is a nexus between upstream waters and downstream navigable waters, and whether any such nexus is "significant" are the key legal questions that, as the Agencies acknowledge, *science does not answer*. "While the agencies agree defining significant nexus by

[21] These numbers are based on a pdf word searches of "science" and "Science Report," in the preamble to the WOTUS Rule, 80 Fed. Reg. 37054.

quantified metrics would improve clarity, for the reasons discussed in the Science Report . . . such an approach is not supported by the science at this time." Response to Comments, Topic 9, 23, ID-20872. This does not come as a surprise, since the Draft Connectivity Study available during the public comment period was, as the title reveals, focused on "connectivity." ID-0004. The term "navigable" does not appear in the Draft Connectivity Study except in one citation in the long list of references. *Id.* Thus, the Draft Connectivity Study has little to offer on the central term that defines the Agencies' CWA jurisdiction: "navigable waters." The terms "significant nexus" or "significant connection" also do not appear. *Id.*

The Final Connectivity Study, published by the EPA two months *after* the close of the public comment period, also does not mention "navigable waters" and "significant nexus," but not in a meaningful way. *See* ID-20859. The Final Connectivity Study's attempt to translate Justice Kennedy's significant nexus test into scientific terms exemplifies these shortcomings:

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. Each relevant "policy question" was translated into a "science question" that removed the key issues in this case: "navigable waters" and "significant nexus," and replaced them with generic concepts, such as "connections" between "waters," with no reference

to whether they are connections to navigable waters or whether the connections are significant. The explanation states that "policy questions" (i.e., the ones at issue in this case) either lack scientific definitions or are defined differently by science and that all the terms used in the Final Connectivity Study reflect scientific usage; i.e., the Study does not address or answer the "policy questions." *Id.* Science also does not save the WOTUS Rule from its fatal Constitutional defects (discussed above in section II). For example, scientific discussions of "connectivity" do not cure the WOTUS Rule's violation of the Commerce Clause (which involves a different set of connections) or render the unconstitutionally vague provisions of the WOTUS Rule suddenly clear.

The Agencies admit that while "[t]he science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters . . . it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA." *Id.* at 21. The Agencies made that determination based largely on legal and policy considerations, not on the science (or anything else) in the record. *See id.* at 17 ("The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health."). The Agencies' many references to the Final Connectivity Study fail to provide record support for the essential question of the *significance* of the nexus between isolated waters and navigable waters or many of the specific criteria arbitrarily selected by the Agencies (e.g., the distance-based criteria). Further, the term "connectivity" is not the same or equivalent of the term "nexus" used in the WOTUS Rule. The term "connectivity" does not appear in the WOTUS Rule, and the WOTUS Rule's detailed definition of "significant nexus" includes many factors and technical criteria that are not in the

Final Connectivity Study's short and simple definition of "connectivity."[22] As a result, the difference between the WOTUS Rule and the Final Connectivity Study is not just the lack of the concept of "significance" in the study; rather, the terms "nexus" and "connectivity" are defined differently in the two documents, and one cannot transfer the conclusions of the study to the WOTUS Rule by simply attaching the policy concept of "significance" to the term "connectivity."[23]

The Agencies own statement makes it clear that science does *not* determine when the nexus between upstream and downstream waters becomes "significant." Instead significance in the WOTUS Rule rests on other, non-scientific, factors: the Agencies' interpretation of the statute and Supreme Court opinions, and "the agencies' expertise." *See id*. at 17 (quoted above). The former are not the special purview of the Agencies, and are ultimately for this Court, which leaves the Agencies' relying on their "expertise" as the essential record-based linchpin of the WOTUS Rule. *See id.* at 21.

Grounding "significant" in the WOTUS Rule on the Agencies' "expertise" and "practical experience" is arbitrary and capricious for two separate reasons: First, the Agencies' pre-Rule experience was with "existing procedures and guidance that often depend[ed] on individual, time-consuming, and *often inconsistent* analyses of the relationship between a particular stream, wetland, lake, or other water with downstream navigable waters." Final EA at 3, ID-20867. "Often inconsistent" agency experience cannot and does not justify the Agencies' many

[22] "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." Final Connectivity Study p. A-2, ID-20859.

[23] Another example of why the Final Connectivity Study cannot be relied on to support the WOTUS Rule is in the discussion of "tributaries." The Connectivity's simple definition, "a stream or river that flows into a higher order stream or river," bears no relationship to the long definition in the WOTUS Rule, rendering any effort to transfer the Study's discussion of "tributaries" to the WOTUS Rule suspect. Final Connectivity Study p. A-13, ID-20859.

determinations in the WOTUS Rule about when a "nexus" between upstream and downstream waters is "significant." Second, nowhere in the record do the Agencies explain how they applied their "experience" or "expertise" to determine precisely where on the "continuum of connectivity," a "nexus" between upstream and downstream waters becomes a "significant nexus." Response to Comments, Topic 9, at 23, ID-20872. For example, there is nothing in the record, including the Agencies' expertise, that explains the imposition of specific distance-based criteria or what specific expertise led the Agencies to conclude that it was the lack of hydrological connections supported their conclusion that Prairie Potholes could be "navigable waters." Absent that explanation, the record fails to support a central determination made in the WOTUS Rule.

The determination of a mere existence of a connection—*even a continuous one*—is insufficient under Justice Kennedy's approach. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring). Nor is it consistent with the text of the statute. *SWANCC*, 531 U.S. at 172. But that is all the Final Connectivity Study shows. The Agencies have therefore failed to "articulate a rational connection between the facts found" and the expansive definitions in the WOTUS Rule, one of the hallmarks of arbitrary decision-making. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (citations omitted).

C. The WOTUS Rule's Treatment Of Distance, Connectivity, And Exclusion-Based Criteria Is Arbitrary And Capricious

A reviewing "court shall . . . hold unlawful and set aside" any final rules that are "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). An agency rule is arbitrary and capricious if an agency relies on factors that Congress did not intended it to consider, fails to consider an important aspect of the problem, explains its decision that sidesteps the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise. *State Farm,* 463 U.S. at 43. A rule is also arbitrary and capricious if it 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). In addition, "conclusory 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). 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).

The distance, connectivity, and exclusion criteria in the WOTUS Rule fail the APA's arbitrary and capricious standard. The Agencies argue that the distance-based criteria are "reasonable and practical," consistent with unspecified "experience," and supported by "the implementation value of drawing clear lines." 80 Fed. Reg. at 37085–91. Such "conclusory statements," unsupported by the record, are legally insufficient. *Amerijet*, 753 F.3d at 1350 (D.C. Cir. 2014). To the extent the record says anything about these criteria, the Agencies' SAB rejected any distance-based approach, arguing 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.

Nothing in the administrative record supports the Agencies' decision to choose the specific distance criteria of 100 feet, 1,500 feet, 4,000 feet, a 100-year flood plain, rather than continue with the proposed riparian and subsurface hydrologic connection criteria. This Court observed that it was "unable to determine the scientific basis for the 4,000 feet standard," and that "the Rule must be supported by some evidence why a 4,000 foot standard is scientifically supportable." *See*, PI Order, ECF No. 70 at p.13. Furthermore, nothing in the administrative record supports switching to distance-based criteria to determine jurisdiction over adjacent or

case-by-case waters. There is no "rational connection between the facts found and choice[s] made" by the Agencies, as there are no facts in the administrative record whatsoever. *State Farm,* 463 U.S. at 43.

IV. THE WOTUS RULE VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA requires federal agencies to prepare a detailed "environmental impact statement" (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An EIS must include a "detailed [written] statement" about "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided." *Id*. An EIS should inform the decision-maker and the public of reasonable alternatives that are designed to minimize the adverse impacts or enhance the quality of the environment. *Id*.; *see also* 40 C.F.R. §§ 1502.1, 1508.11. An EA, on the other hand, is only suitable for a proposed action that will not have a significant impact on the environment. 40 C.F.R. §§ 1501.3, 1501.4.

NEPA requires "federal agencies to take a 'hard look' at the environmental consequences of major federal actions before they are taken." *Sierra Club v. United States Army Corps of Eng'rs,* 446 F.3d 808, 815 (8th Cir. 2006) (citations omitted). Unless exempted by statute, all agencies must comply with NEPA. 42 U.S.C. § 4332; 40 C.F.R. § 1507.1. EPA enjoys such an exemption for some activities under the CWA, *see* 33 U.S.C. § 1371(c), but the Corps does not.

As a part of its hard look "an agency is required to 'consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.'" *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 242 (D.C. Cir. 2008) (citation omitted). A consideration of alternatives under NEPA ensures "a fully informed and well-considered decision" and rulemaking should be set aside for "substantial procedural or substantive

deficiencies." *Vermont Yankee Nuclear Power Corp., v. Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 551-58 (1978).

The Corps violated NEPA in two significant ways. First, the Corps failed to prepare an EIS for the WOTUS Rule, instead issuing a FONSI and a legally deficient EA. As one of the most far-reaching environmental regulations ever adopted, the WOTUS Rule easily qualifies as "a major federal action significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), and the Agencies' finding that WOTUS Rule has no significant impact on the human environment—based on the EA and FONSI—is arbitrary and capricious and must be set aside. *See Audubon Soc. Of Cent. Arkansas v. Dailey,* 977 F.2d 428, 434 (8th Cir. 1992). Second, the Corps also violated NEPA by evaluating an unreasonably restricted range of alternatives, considering only two options—the WOTUS Rule and a "no action" alternative in which the Corps would continue regulating under the existing rule and post-*Rapanos* agency guidance.

A. The Corps Failed To Prepare An Environmental Impact Statement

An agency's NEPA decision must be the product of "reasoned decision making," and "simple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Del. Riverkeeper Network v. FERC,* 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotations omitted). Agency conclusions based on "unexplained conflicting findings about the environmental impacts" violate NEPA. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015). Here, the Corps violated NEPA by failing to prepare an EIS, a decision the Corps based on: (1) reliance on an insufficient EA and (2) failing to consider factors mandated for consideration by NEPA.

i. The Environmental Assessment Was Flawed And Failed To Take A Hard Look At The Environmental Consequences

In reviewing an agency's decision not to prepare an EIS, the Eighth Circuit has adopted the "hard look" doctrine requiring a consideration of the environmental consequences of agency action. *Audubon Soc. Of Cent. Arkansas v. Dailey,* 977 F.2d 428, 434 (8th Cir. 1992). "A proper consideration of the . . . impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993–94 (9th Cir. 2004) (finding an EA inadequate) (quotation omitted). The EA prepared by the Corps falls far short of the "hard look" that NEPA requires.

The "Environmental Consequences" section of the EA provides a brief, two-page summary of how much the WOTUS Rule will expand federal jurisdiction, but makes no serious attempt to assess the environmental and socioeconomic effects of that new federal jurisdiction. Final EA 21–23, ID-20867. Instead, the EA's "analysis" of environmental consequences, comprising only four pages, has sections relating to wildlife, recreation, and flood risk reduction. *Id*. at 24–27. Each of those sections contains only *two* or *three* short paragraphs, and only *one sentence* of analysis, each of which is conclusory and virtually identical. *Id*. Those single sentences of "analysis" assert that the extension of federal jurisdiction is expected to benefit the environment, but the Corps fails to support this assertion with any evidence or effort to quantify the benefits.

For example, the EA states "[t]he additional protections associated with the incremental increase in the amount of waters subject to Clean Water Act jurisdiction is expected to have a beneficial impact on recreation, based on the increase in wildlife available for hunting, fishing,

bird watching, and photography." *Id*. at 25. Nowhere does the Corps describe why it believes the WOTUS Rule will lead to an increase in wildlife or attempt to quantify that increase. And most important, the Corps fails to mention whether the Plaintiff States are already regulating the same waters under state law and whether the net effect of duplicative regulation would have any positive or negative effect on wildlife. This imprecision is precisely the kind of drive-by analysis courts have rejected under NEPA. *See, e.g.*, *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 996.

The fundamental purpose of NEPA to force federal agencies genuinely to consider the environmental costs and benefits of major federal actions is thwarted here by the Corps' refusal to analyze or quantify the environmental, socioeconomic, or other effects of its sweeping WOTUS Rule. The Corps' decision to avoid preparing an EIS also excluded the Plaintiff States from participating in the NEPA process for the WOTUS Rule as "cooperating agencies," *see* 40 C.F.R. §§ 1501.6 and 1508.5 (2018), further eroding the cooperative federalism principles enshrined in our nation's laws *and explicitly set forth in the CWA*. *See* George T. Frampton, *Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies To Be Cooperating Agencies* 2 (July 28, 1999), *available at* https://www.energy.gov/sites/prod/files/G-CEQ-DesigNonfedCoopAgencies.pdf.

ii. The Corps Failed To Consider Other NEPA-Relevant Factors In Its Decision Not to Prepare An EIS

The Corps' implausible conclusion that the WOTUS Rule does not significantly affect the human environment is not only unsupported by the EA, but was reached without considering legally-prescribed, mandatory factors for such assessments. And it is inconsistent with the Agencies' claims about the importance and value of the WOTUS Rule: they cannot have it both ways, defending the WOTUS Rule with exaggerated claims about its necessity and benefits, yet avoiding NEPA by downplaying its significance.

"Significance" under NEPA is defined in terms of "context" and "intensity." 40 C.F.R. § 1508.27 (2018)[24]. Context requires analysis of the effects on "society as a whole (human, national), the affected region, the affected interests, and the locality." *Id.* at (a). Intensity "refers to the severity of impact." *Id.* at (b).

The administrative record shows that the Corps did not consider either the "context" or the "intensity" factors in its NEPA analysis. The Corps' failure to consider these factors violates NEPA. *See State Farm*, 463 U.S. at 43 (vacatur is required if the agency "entirely failed to consider an important aspect of the problem"). In addition, both factors overwhelmingly support a finding that the WOTUS Rule will significantly affect the human environment.

1. *Context*

Context depends on "the setting of the proposed action." 40 C.F.R. § 1508.27(a) (2018). The WOTUS Rule is nationwide in scope, affecting all 50 States. It was the broad geographic reach of this regulation that partially prompted this Court to assert jurisdiction and issue a preliminary injunction. Dkt. No. 70, at 16 ("the Rule will irreparably diminish the States' power over their waters"). Given the uniform application to all 50 States, the Corps should have analyzed the national effects of the WOTUS Rule.

By the Agencies' own estimates, the WOTUS Rule will result in "an increase of between 2.8 and 4.6 percent in the waters found to be jurisdictional." Final EA 21, ID-20867. The Agencies' estimates are grossly understated, and significantly mislead the public about the regulatory and economic implications of the WOTUS Rule. For example, Kansas estimated a 460% increase in federal jurisdiction in that State alone, with another 133,000 miles of ephemeral streams newly subject to CWA jurisdiction. KS Comments 2 & App. A, ID-14794. Alaska is concerned that the WOTUS Rule will regulate "nearly all waters and wetlands" within

[24] As defined in the C.F.R., "significantly" is not constrained by bright line limitations.

that State. AK Gov. Comments 1, ID-19465. So too is New Mexico. NM ED Comments 10, ID-16552 (the WOTUS Rule "would in effect engulf all streams, drainage systems, and watersheds within the State"). Ninety-six percent of Arizona's streams "flow only part of the time or only in direct response to precipitation events," AZ DEQ Comments 2, ID-16437, and "approximately 80% of Wyoming's stream miles are intermittent or ephemeral." WY DEQ Comments 4, ID-18020. Even if the Agencies' estimates were accurate, the WOTUS Rule will have profound implications on federal and state regulatory programs, private landowners, and the regulated community. For example, the Agencies performed more than 400,000 jurisdictional determinations between 2008 and 2015. 80 Fed. Reg. at 37065. Even small percentage increases in jurisdiction will trigger thousands of additional federal regulatory interactions between the public and private sector each year.

More important, it is the total impact of the WOTUS Rule, not the percentage increase in its coverage that is relevant under NEPA. Yet the EA does not mention, let alone address, the total amount of additional jurisdictional waters or the related land features the WOTUS Rule covers. This was improper. See *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d 989 at 997. In fact, the Agencies affirmatively chose not to analyze these figures. Final EA 28, ID-20867 ("a determination was made that there would be an incremental increase . . .of waters found to be subject to jurisdiction . . . [n]o analysis was made to determine the actual number of acres of waters that would be and for this reason it is not possible to estimate the number of acres that would be captured").

The Corps simply ignored this "context" when proclaiming the WOTUS Rule lacks significant effect. If the Corps had sought to accurately quantify the actual impacts of the WOTUS Rule, there is no way it could have articulated a "rational connection" between these

impacts and its FONSI. *Bowman Transp.*, 419 U.S. at 285. Indeed, as the Corps' own staff recognizes, absent an EIS "it is not possible to estimate" or "verify" the percentage of water bodies that would be affected by the WOTUS Rule, and particularly by the changes made between the Proposed Rule and the WOTUS Rule. Moyer Memorandum, ID-20882. Instead, "[t]his is precisely the type of research and analysis that would be undertaken in completing an Environmental Impact Statement (EIS)." *Id*. at 3.

The Corps also ignored the very large regional variations in the nation's waterways when analyzing the potential effects of the WOTUS Rule. Geographical and hydrological features—including those covered by the "other waters category"—are not evenly distributed across the United States. *See, e.g.,* 33 C.F.R. § 328.3(a)(7). Although the Agencies knew of that fact, and were repeatedly reminded of it during the public comment period, they unreasonably failed to address this "context" in the EA. *See, e.g.*, AK DEC Comments 12, ID-19465. Instead, they relied on broad national averages to estimate the total costs and benefits associated with the WOTUS Rule, marginalizing the potentially disparate treatment for individual States. *See, e.g.*, Final EA 25–26, ID-20867 ("To estimate annual costs and benefits, the agencies uniformly applied the 2.8 and 4.6 percent incremental change in jurisdiction to the total costs and benefits for the Sections 311, 401, 402, . . . and 404 programs to account for an estimated increase in permitting and regulatory activities that would result.").

2. *Intensity*

The "intensity" factors also support a finding that the WOTUS Rule "significantly" affects the human environment. Ten specified factors measure the "severity of impact" associated with a federal action, and include

> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
> …

> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
> …
> (10) Whether the action threatens a violation of Federal, State, or local law ….

40 C.F.R. § 1508.27(b) (2018). The administrative record shows that the Corps did not consider these, or *any* of the ten available factors. This does not meet the "hard look" standard. *Sierra Club,* 446 F.3d at 815; *see State Farm*, 463 U.S. at 43 (the agency "entirely failed to consider an important aspect of the problem").

Focusing on just of few factors, the WOTUS Rule rises to the level of significance that warrants full analysis in an EIS. For example, the WOTUS Rule is without a doubt highly controversial. *See* 40 C.F.R. § 1508.27 at (b)(4). "Controversy in the NEPA context does not necessarily denote public opposition to a proposed action, but a substantial dispute as to the size, nature, or effect of the action." *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (wide disputes about the loss of farmland acreage controversial enough to warrant EIS). This case is nothing if not a dispute over the expanding "size, nature, or effect" of the WOTUS Rule. The Corps failed to consider this factor in the EA.

The WOTUS Rule also establishes a precedent for future actions with significant effects and represents a decision in principle about future considerations, *see* 40 C.F.R. § 1508.27 at (b)(6), because it sets controlling guidelines for hundreds of thousands of future regulatory decisions, *see* 80 Fed. Reg. at 37065. Each positive jurisdictional determination rendered under the WOTUS Rule will have substantial legal, economic, and environmental impacts on the property where it is made and any projects planned for that property, often extending to property that has no direct relationship to jurisdictional waters. *See Hawkes*, 136 S. Ct. at 1814–15. Expanding federal jurisdiction necessarily increases this burden. In *Hawkes*, for example, the

required environmental analysis for a CWA permit was estimated at $100,000, and it can be much more. *Id.* at 1816.

Finally, as already discussed in section II.A., the WOTUS Rule "threatens a violation of Federal, State, or local law," 40 C.F.R. § 1508.27 at (b)(10), as dozens of organizations and States informed the Agencies during the public comment period on the Proposed Rule. *See, e.g.*, Multi-State Comments 2, ID-7988 ("the Proposed Rule . . . seeks to place the lions' share of intrastate water and land management in the hands of the Federal Government."); Waters Advocacy Coalition Comments 3–4, ID-14568 ("[P]roposed [R]ule federalizes waters . . . impinging on the States' traditional and primary power over land and water use"). Many of those same legal concerns were recognized by this Court and the 6th Circuit Court in temporarily staying the WOTUS Rule. Dkt. No. 70 ("Once the Rule takes effect, the States will lose their sovereignty over intrastate waters").

B. The Corps Failed To Consider A Reasonable Range Of Alternatives

The flawed EA and resulting failure to prepare an EIS fundamentally undermined the Corps' NEPA analysis of the WOTUS Rule, but it was not the only defect.

"An agency is required to 'consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.'" *Am. Radio*, 524 F.3d at 242 (citation omitted); *see also* 42 U.S.C. § 4332(C)(iii). The same holds true whether an agency is preparing an EA or an EIS. *Partners in Forestry Co-op.*, 638 F. App'x at 464. "[T]he purpose of an EA, which is defined in regulations of the Council on Environmental Quality (CEQ) as a concise document describing the environmental impacts of *proposed actions and alternatives,* 40 C.F.R. § 1508.9 (1992), is to provide the agency with the basic information needed to decide on the next step." *Charter Tp. Of Huron, Mich. V. Richards*, 997 F.2d 1168, 1174 (6th Cir. 1993) (emphasis added). Courts are skeptical when agencies unreasonably limit the range of

alternatives they consider. *See, e.g., Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006) (The Court noted it was "hard pressed" to understand limiting review to "three alternatives-approval, disapproval, or no action."). Here, the Corps considered only two alternatives – the proposed WOTUS Rule or no action. Final EA 3, ID-20867 ("This EA analyses the impacts of either . . . the proposed action . . . or selecting the No Action alternative."). Given the wide-ranging scope of the WOTUS Rule and the alternate approaches available, this range of alternatives could not comply with NEPA.

The Corps considered only one alternative to the WOTUS Rule, a "no action" alternative, where "the current procedures, processes, and definitions used by the USACE to complete jurisdictional determinations would continue to be utilized and the process and procedures would not be impacted by the changes to jurisdiction with the adoption of the final proposed rule." Final EA 23, ID-20867. The Corps did not consider the far different Proposed Rule as an option in its NEPA analysis. The Corps "considered whether to analyze the draft rule in th[e] Environmental Assessment, but removed it from further consideration because it is no longer a viable option to accomplish the purpose and need for action." *Id*. at 13. The Corps did not explain why it was not a "viable option" except that the decision was made "upon a review of the substantive comments received during the public comment period." *Id*.

What is most troubling about the Corps' limited consideration of alternatives is that several other feasible alternatives were available. Many State Plaintiffs submitted comments favoring an alternative that would adopt a narrower definition of WOTUS that would enable them to implement their own state laws and policies to protect their own lands and waters using their on-the-ground expertise. *See, e.g.*, ND Comments 14–15, ID-15365. The Corps should and could have addressed the alternative of limiting CWA jurisdiction to traditional navigable

waterways and waters that are closely tied to those waters along the lines set forth by the Supreme Court in *Rapanos*. Such an approach would enable state governments to tailor their own laws and regulations more closely to the topography of their land and to make local land use decisions more responsive to the local community directly affected, while still leaving genuine navigable waterways under federal regulation. *See* WY DEQ Comments 7, ID-18020.

Several commenters also suggested that instead of adopting a single, unitary definition for the entire country, separate definitions could be adopted on a regional or state-by-state basis. *See, e.g.,* AK DEC Comments 11–12, ID-19465; PA DOA Comments 2, ID-14465 ("Administering a detailed and specific but 'one-size-fits-all' definition applicable nationwide in States with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule will undermine existing state law protections."). Separate definitions would take into account the fact that a bed and banks may be indicia of streams in wetter parts of the country, but that in other regions beds and banks are often found in bone-dry washes. Regions with extensive farmland that becomes flooded only in rare wet years, such as the northern plains, could have a definition that takes this into account. ND Comments 6, ID-15365. The definition of WOTUS applicable to Alaska could specifically address the complications caused by widespread permafrost. AK DEC Comments 11–12, ID-19465. Separate state or regional WOTUS definitions are a perfectly reasonable and feasible alternative that should have been addressed in the EA.

The Corps failed "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives," *Am. Radio*, 524 F.3d at 242 (citations omitted). The Corps' decision to ignore—without comment—the principle alternatives that had

been advocated by the Plaintiff States is arbitrary, capricious, and contrary to the fundamental objectives of NEPA.

CONCLUSION

For all the reasons stated above, the WOTUS Rule should be permanently enjoined and set aside. Plaintiff States' also request oral argument.

Respectfully submitted this 1st day of June, 2018,

State of North Dakota
WAYNE STENEHJEM
Attorney General

/s/ Paul M. Seby
Paul M. Seby
Special Assistant Attorney General
Greenberg Traurig, LLP
1200 17th Street Suite 2400
Denver, CO 80202
Telephone: (303) 572-6584
sebyp@gtlaw.com

Jennifer L. Verleger
Margaret I. Olson
Assistant Attorneys General
Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501
Phone: (701) 328-2925
wstenehjem@nd.gov
jverleger@nd.gov
maiolson@nd.gov

Attorneys for Plaintiff State of North Dakota

[Additional Counsel of Record are set forth in Plaintiffs States' Motion for Summary Judgment]