IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

STATE OF TEXAS,

Texas Department of Agriculture,
Texas Commission on Environmental Quality,
Texas Department of Transportation,
Texas General Land Office,
Railroad Commission of Texas,
Texas Water Development Board,

STATE OF LOUISIANA, and

STATE OF MISSISSIPPI,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA McCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works).

Defendants.

Case No. __________

COMPLAINT AND PETITION FOR REVIEW

TO THE HONORABLE UNITED STATES DISTRICT COURT:

1. This is a challenge to the legality of the final rule titled "Clean Water Rule: Definition of 'Waters of the United States,'" promulgated on June 29, 2015, by defendants United States Environmental Protection Agency; and the United States Army Corps of Engineers ("Federal Agencies"). Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg.

37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) ("Final Rule").

2. The Final Rule is an unconstitutional and impermissible expansion of federal power over the states and their citizens and property owners. Whereas Congress defined the limits of its commerce power through the Clean Water Act to protect the quality of American waters, the Environmental Protection Agency and Army Corps of Engineers, through the Final Rule, are attempting to expand their authority to regulate water and land use by the states and their citizens. The success of protecting and improving the quality of American waters has come through the cooperative work of the states and the federal government. That success is threatened when administrative agencies attempt to substitute their judgment for decisions by Congress, the courts, and the states. Moreover, the very structure of the Constitution, and therefore liberty itself, is threatened when administrative agencies attempt to assert independent sovereignty and lawmaking authority that is superior to the states, Congress, and the courts.

3. The challenge is brought by the State of Texas, by and through its Attorney General, Ken Paxton, along with the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board. The challenge is also brought by the State of Louisiana, by and through its Attorney General, Buddy Caldwell, and the State of Mississippi, by and through its Attorney General, Jim Hood.

4. The Final Rule amends the definition of "Waters of the United States" under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* ("Clean Water Act" or "CWA"). A true and correct copy of the Final Rule is attached hereto at Exhibit A.

5. The Final Rule violates the Clean Water Act, the Administrative Procedure Act, and the United States Constitution, as noted below. Plaintiffs ask this Court to vacate the Final Rule, to enjoin the Federal Agencies from enforcing the Final Rule, and for any other relief as this Court deems proper.

I. PARTIES

6. Plaintiffs are the State of Texas, along with the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board; the State of Louisiana; and the State of Mississippi.

7. The State of Texas and its state agencies, by and through its Attorney General, bring this suit to assert the rights of the state and also on behalf of its citizens.[1]

8. The State of Louisiana, by and through its Attorney General, James D. "Buddy" Caldwell, brings this suit pursuant to authority vested in its Attorney General to "institute, prosecute, or intervene in any civil action or proceeding" as "necessary for the assertion or protection of any right or interest of the state." La. Const. Art. IV, Sec. 8. The State of Louisiana also brings this action as *parens patriae* for all Louisiana residents who are adversely affected by the Final Rule's violations of the Clean Water Act, the Administrative Procedure Act, and the United States Constitution.

9. The State of Mississippi, by and through its Attorney General, Jim Hood, brings this suit pursuant to authority vested in its Attorney General "to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest" and "intervene and argue the constitutionality of any statute when notified of a challenge thereto." 7 Miss. Code § 7-5-1. The

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[1] *See* Tex. Const. Art. 4, § 22; Tex. Gov't Code, Ch. 402; *see also* Tex H.B. 1, Art. IX, § 16.01, 82nd Tex. Leg., R.S. (2011).

State of Mississippi also brings this action as *parens patriae* for all Mississippi residents who are adversely affected by the Final Rule's violations of the Clean Water Act, the Administrative Procedure Act, and the United States Constitution.

10. Defendant United States Environmental Protection Agency ("EPA") is a federal agency within the meaning of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 551(1). Pursuant to the Clean Water Act, the EPA is provided with the authority, *inter alia*, to administer pollution control programs over navigable waters.

11. Defendant the Honorable Gina McCarthy is Administrator of the EPA and a signatory of the Final Rule.

12. Defendant United States Army Corps of Engineers ("Corps") is a federal agency within the meaning of the APA. *See* 5 U.S.C. § 551(1). The Corps, *inter alia*, administers the Clean Water Act's Section 404 program, regulating the discharge of dredged or fill material in navigable waters.

13. Defendant the Honorable Jo-Ellen Darcy is Assistant Secretary of the Army (Civil Works) and a signatory of the Final Rule.

II. JURISDICTION AND VENUE

14. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 (federal question), 2202 (further necessary relief), and 5 U.S.C. §§ 701–706 (APA). There is a present and actual controversy between the parties, and Plaintiffs are challenging a final agency action pursuant to 5 U.S.C. §§ 551(13), and 704. The Court may issue further necessary relief pursuant to 28 U.S.C. § 2202, 5 U.S.C. §§ 706(1), 706(2)(A) and (C), as well as pursuant to its general equitable powers.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C), because (1) Defendants are either (a) agencies or instrumentalities of the United States or (b) officers or employees of the United States, acting in their official capacities; (2) Plaintiff State of Texas and its agencies are residents of the Southern District of Texas;[2] and (3) no real property is involved in this action.

16. Because there may be a dispute between the parties as to whether original jurisdiction to review the Final Rule lies in this Court, pursuant to 28 U.S.C. § 1331, or in the U.S. Court of Appeals for the Fifth Circuit, pursuant to 33 U.S.C. § 1369(b)(1), and because the deadline for a circuit court petition for review of this agency action is only 120 days, *id.*, Plaintiffs have—out of an abundance of caution—filed a petition in the U.S. Court of Appeals for the Fifth Circuit, to challenge the Final Rule on similar grounds as those asserted herein. Such "dual filing" is common and prudent when jurisdiction may be disputed, and "careful lawyers must apply for judicial review [in the court of appeals] of anything even remotely resembling" an action reviewable under section 509(b)(1), *see Am. Paper Inst. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989), even when they believe that jurisdiction may lie elsewhere. *See Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 554 (2nd Cir. 1978) (complaint filed in district court and petition filed in circuit court "as a precaution").

III. BACKGROUND

A. The Clean Water Act Maintains the States' Regulatory Authority Over Land and Water

17. When Congress enacted the Clean Water Act Amendments of 1972, it made abundantly clear its goal to grant primary regulatory authority over land and waters to the States:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water

[2] *See Delaware v. Bender*, 370 F. Supp. 1193, 1200 (D. Del. 1974).

> resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b).

18. The Clean Water Act does, however, grant limited authority to the Federal Agencies to regulate the discharge of certain materials into "navigable waters." *See*, *e.g.*, 33 U.S.C. § 1251(a), 1342(a), 1344(a).

19. Congress defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

20. The meaning of "the waters of the United States" is significant, because it establishes, among other things, the waters for which the Federal Agencies can require Water Quality Standards ("WQS") and Total Maximum Daily Loads ("TMDLs"); the waters for which the Federal Agencies can administer permitting programs like the National Pollutant Discharge Elimination System ("NPDES") and section 404 dredge or fill permitting programs; and the waters for which the Federal Agencies can require state certifications for any discharge activity.

21. Obtaining a discharge permit is an expensive and uncertain endeavor that can take years of processing and cost hundreds of thousands of dollars. *See* U.S.C. §§ 1342, 1344. But discharging into a "water of the United States" without a permit can subject any person to civil penalties of up to $37,500 per violation, per day, as well as criminal penalties. *See Hanousek v. United States*, 528 U.S. 1102, 1103 (2000); *see also* 33 U.S.C. §§ 1311, 1319, 1365; 74 Fed. Reg. 626, 627 (2009).

22. In general, a broader definition of "the waters of the United States" will place more waters under federal authority. On the other hand, a more limited definition of "the waters of the United States" will place more waters under state and local authority. Therefore, the meaning of "the waters of the United States" is significant because it defines the parameters of cooperative

federalism under the Clean Water Act and determines whether Congress's wish "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" will be honored. 33 U.S.C. § 1251(b).

B. The Meaning of "the Waters of the United States"

23. More than 100 years before the passage of the Clean Water Act Amendments of 1972, the Supreme Court defined the phrase "navigable waters of the United States" as "navigable in fact" interstate waters. *The Daniel Ball*, 10 Wall. 557, 563 (1871).

24. In 1974, the Corps issued a rule defining "navigable waters" as those waters that have been, are, or may be used for interstate or foreign commerce. 33 C.F.R. § 209.120(d)(1) (1974).

25. In 1986, the Corps issued another rulemaking, expanding its jurisdiction to include traditional navigable waters, tributaries of those waters, wetlands adjacent to those waters and tributaries, and waters used as habitat by migratory birds that either are protected by treaty or cross state lines. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986).

26. From 1986 to 2015, the regulatory definition of "the waters of the United States" remained unchanged. *See* 33 C.F.R. 328 (1986). Markedly, during that time, the only development of the definition was in the judicial branch, where the Supreme Court took an increasingly narrow interpretation of what constitutes "the waters of the United States." *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

i. *Riverside Bayview*

27. The Supreme Court first addressed the proper interpretation of "the waters of the United States" under the Clean Water Act in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

28. *Riverside Bayview* concerned a wetland that "was adjacent to a body of navigable water," because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to . . . a navigable waterway." *Id.* at 131.

29. The Supreme Court upheld the Corps' interpretation of "the waters of the United States" to include wetlands that "actually abut[ted]" on traditional navigable waters, finding that "the Corps must necessarily choose some point at which water ends and land begins." *Id.* at 132.

ii. *SWANCC*

30. Fifteen years later, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("*SWANCC*"), the Supreme Court rejected the Corps' assertion of jurisdiction over any waters "[w]hich are or would be used as habitat" by migratory birds. 531 U.S. 159, 164 (2001) (quoting 51 Fed. Reg. 41,217 (1986)). The Court held that the Clean Water Act cannot be read to confer jurisdiction over physically isolated, wholly intrastate waters. *Id.* at 168. The Court found that "[i]n order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *Id.*

31. Observing that "[i]t was the *significant nexus* between the wetlands and the 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview*," the Court held that *Riverside Bayview* did not establish that federal jurisdiction "extends to ponds that are not adjacent to open water." *Id.* (emphasis added).

32. In *SWANCC*, the Court reiterated its holding in *Riverside Bayview* that federal jurisdiction extends to wetlands that actually abut navigable waters, because protection of these adjacent, actually-abutting wetlands was consistent with congressional intent to regulate wetlands that are "inseparably bound up with 'waters of the United States.'" *Id.* at 172 (quoting *Riverside Bayview*, 474 U.S. at 134).

iii. *Rapanos*

33. In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court again rejected the Corps' assertion of expanded authority over non-navigable, intrastate waters that are not significantly connected to navigable, interstate waters. The Court emphasized that the traditional concept of "navigable waters" must inform and limit the construction of the phrase "the waters of the United States." *Rapanos* raised the question of whether wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters" are "waters of the United States." *Rapanos*, 547 U.S. at 729. The court of appeals held they were, but the Supreme Court held that they were not. *Id.* at 716–17. The Court's majority consisted of two opinions, both of which rejected the Corps' assertion of jurisdiction.

34. Citing the ordinary meaning of "the waters of the United States," the four-justice plurality held that "waters of the United States" include "only relatively permanent, standing or flowing bodies of water," such as "streams, oceans, rivers, lakes, and bodies of water forming geographical features." *Id.* at 732–33 (internal quotation marks omitted). The plurality found that in going beyond this "commonsense understanding" and classifying waters like "ephemeral streams," "wet meadows," "man-made drainage ditches" and "dry arroyos in the middle of the desert" as "waters of the United States," the Corps had stretched the statutory text "beyond parody." *Id.* at 734 (internal quotation marks omitted). The plurality also rejected the view that

wetlands adjacent to ditches, when those ditches do not meet the definition of "waters of the United States," may nevertheless be subjected to federal regulation on the theory that they are "adjacent to" the remote "navigable waters" into which the ditches ultimately drain. *Id*. at 739–40.

35. Justice Kennedy concurred in the judgment, but noted that both the plurality and the dissent would expand CWA jurisdiction beyond permissible limits. He wrote that the plurality's coverage of "remote" wetlands with a surface connection to small streams would "permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach" (i.e., wetlands near to, but lacking a continuous surface connection with, navigable-in-fact waters). *Id*. at 776–77 (Kennedy, J., concurring in the judgment). This, he said, was "inconsistent with the Act's text, structure, and purpose." *Id*. at 776 (Kennedy, J., concurring in the judgment). As for the dissent, Justice Kennedy said the Act "does not extend so far" as to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id*. at 778–79 (Kennedy, J., concurring in the judgment). As a result, Justice Kennedy rejected both sides' jurisdictional theories, refuting tests that rely on mere hydrologic connections to, and mere proximity to, navigable waters or features that drain into them.

36. Justice Kennedy employed a different test. In his view, the Corps may deem a water or wetland "a 'navigable water' under the Act" if it has a "significant nexus" to a traditional navigable water. *Id*. at 767 (Kennedy, J., concurring in the judgment). For "wetlands adjacent to navigable-in-fact waters," Justice Kennedy thought there is a "reasonable inference of ecologic interconnection" that is sufficient to sustain the Corps' "assertion of jurisdiction for those wetlands . . . by showing adjacency alone." *Id*. at 780 (Kennedy, J., concurring in the judgment). Justice Kennedy also said the Corps "may choose to identify categories of tributaries that, due to their

volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely . . . to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 781 (Kennedy, J., concurring in the judgment). But the Federal Agencies' regulations, which allow "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," were so broad that they could not be "the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity" of traditional navigable waters. *Id.* "Indeed, in many cases wetlands adjacent to tributaries covered by this standard 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 781–82 (Kennedy, J., concurring in the judgment). Given the over-breadth of the regulations, Justice Kennedy concluded that the Corps "must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries." *Id.* at 782 (Kennedy, J., concurring in the judgment).

37. Neither the plurality opinion nor Justice Kennedy's opinion in *Rapanos* repudiated any aspect of the *SWANCC* or *Riverside Bayview* decisions.

C. Despite Contrary Precedent, the Federal Agencies Redefine "Waters of the United States" to Expand Clean Water Act Jurisdiction

38. On April 21, 2014, the Federal Agencies published for comment "Definition of 'Waters of the United States' Under the Clean Water Act." *See* 79 Fed. Reg. 22,188 (proposed April 21, 2014) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) ("Proposed Rule").

39. The stated purpose for the rulemaking is to "defin[e] the scope of waters protected under the [CWA], in light of the statute, science, Supreme Court decisions . . . and the agencies'

technical expertise." Final Rule at 37,054. The Federal Agencies assert that the rule will "increase CWA program predictability and consistency by clarifying the scope of "waters of the United States" protected under the Act." *Id.*

40. On May 27, 2015, Administrator McCarthy and Assistant Secretary Darcy took final agency action when they signed the Final Rule.

41. On June 29, 2015, the Final Rule was published in the Federal Register. This Rule amends 33 C.F.R. § 328 as well as 40 C.F.R. §§ 110, 112 116, 117, 122, 230, 232, 300, 302, and 401, to be effective as of August 28, 2015. Accordingly, the Federal Agencies' promulgation of the Final Rule is now ripe for judicial review.

i. The Final Rule Maintains *Per se* Federal Jurisdiction Over Certain Waters

42. The Final Rule reasserts that traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters are jurisdictional by rule. 33 C.F.R. § 328.3(a)(1)-(4) (2015).[3]

43. Plaintiffs do not dispute that these waters have traditionally been jurisdictional. For purposes of clarity, these waters will be referred to as "traditional waters".

ii. The Federal Agencies Broadly Define "Tributaries" and Claim *Per se* Jurisdiction over All "Tributaries" of Traditional Waters

44. The Final Rule asserts that all "tributaries" of all traditional waters are jurisdictional by rule. *See id.* § 328.3(a)(5).

45. Furthermore, the Final Rule defines "tributary" for the first time as "a water that contributes flow, either directly or through another water" to a traditional water and "is

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[3] The Final Rule amends the definition of "the waters of the United States" under 33 C.F.R. § 328, as well as 40 C.F.R. §§ 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. For simplicity, Plaintiffs will only cite to 33 C.F.R. § 328, but Plaintiffs' arguments apply to all C.F.R. sections amended under the Final Rule.

characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark." *Id*. § 328.3(c)(3).

46. Under the Final Rule, a tributary can be "natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches . . . ." *Id*. A water does not lose its classification as a tributary—even when it has man-made or natural breaks, no matter the length—"so long as a bed and banks and ordinary high water mark can be identified upstream of the break." *Id*.

47. "Ordinary high water mark" is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means." *Id*. § 328.3(c)(6).

48. The Final Rule fails to account for frequency and duration of flow, meaning the Federal Agencies can assert jurisdiction over "tributaries" in the forms of dry ponds, ephemeral streams, intermittent channels, and even ditches—as long as the Federal Agencies can find a bed and banks and the existence, at some point in history, of an ordinary high water mark.

49. Despite championing Justice Kennedy's concurrence in *Rapanos* throughout the Final Rule, the Federal Agencies ignore Justice Kennedy's admonishment concerning the use of the "ordinary high water mark" as a determinative measure for tributaries. Justice Kennedy stated that "the breadth of the standard—which 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—precludes its adoption as the determinative measure . . . ." *Rapanos*, 547 U.S.

at 782 (Kennedy, J., concurring in the judgment).[4] Not only do the Federal Agencies adopt the "ordinary high water mark" as a determinative measure for tributaries in the Final Rule—they greatly expand it from the Proposed Rule. The Proposed Rule required "the *presence* of a bed and banks and ordinary high water mark," *see* Proposed Rule at 22,199, while the Final Rule requires the "presence of *physical indicators* of a bed and banks and ordinary high water mark." 33 C.F.R. § 328.3(c)(3) (2015) (emphasis added).

50. Assuming, *arguendo*, that Justice Kennedy intended the "significant nexus" test in *Rapanos* to be stretched to tributaries, the Final Rule would fail that test, because it places all tributaries of traditional waters under the Federal Agencies' authority without regard to the tributaries' actual impact on the "chemical, physical, and biological integrity of" any traditional waters. *See Rapanos*, 547 U.S. at 717. Under the Final Rule, a tributary that only has a small, infrequent, and historically-traceable flow into a traditional water, is nevertheless within the Federal Agencies' jurisdiction. 33 C.F.R. § 328.3(c)(3) (2015).

51. The Final Rule's inclusion of tributaries also violates the plurality's opinion in *Rapanos* because the definition includes a feature with any flow into a traditional water, even if that flow does not constitute a "continuous surface connection." *Rapanos*, 547 U.S. at 742.

iii. The Federal Agencies Broadly Define "Significant Nexus" and Claim *Per se* Federal Jurisdiction Over Certain Waters They Deem to Have a "Significant Nexus" to Traditional Waters

52. For the purpose of determining whether or not a water has a "significant nexus," the Final Rule requires that the water's effect on a downstream traditional water be assessed by evaluating the following functions: (i) sediment trapping; (ii) nutrient recycling; (iii) pollutant

[4] The Federal Agencies contradict Justice Kennedy even further by explicitly including "ditches" in the regulatory definition of "tributary." *Compare* 33 C.F.R. § 328.3(a)(5), *with Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment).

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 located in a traditional navigable water, interstate water, and/or territorial sea. 33 C.F.R. § 328.3(c)(5) (2015).

53. Under the Final Rule, a water has a "significant nexus" "when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, and biological integrity" of the downstream traditional navigable water, interstate water, and/or territorial sea. *Id*. This definition exceeds Clean Water Act authority under *SWANCC* and *Rapanos*. In *SWANCC*, the Court refused the federal government's assertion of jurisdictional authority over an isolated, intrastate water because of the Migratory Bird Rule. *See SWANCC*, 531 U.S. at 168. Under the Final Rule's framework, the Federal Agencies have effectively reasserted the theory previously rejected in *SWANCC*—that the federal government can assert jurisdiction when, for example, the nesting of migratory birds, "alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, and biological integrity" of the downstream traditional navigable water, interstate water, and/or territorial sea. *See* 33 C.F.R. § 328.3(c)(5)(ix) (2015).

iv. The Federal Agencies Broadly Define "Adjacent Waters" and Claim *Per se* Jurisdiction Over All Adjacent Waters

54. The next category of waters deemed automatically jurisdictional by the Final Rule are all waters that are "adjacent" to traditional waters, impoundments, or tributaries. *See id.* § 328.3(a)(5). But in claiming *per se* jurisdiction over all "neighboring" waters—whether or not

there is a significant nexus and whether or not there is a continuous surface connection—the Final Rule goes beyond the authority of the Clean Water Act and the opinions in *Rapanos*.

55. "Adjacent waters" are waters "bordering, contiguous or neighboring" traditional waters, impoundments, or tributaries. *Id*. at § 328.3(c)(1). The category includes "wetlands, ponds, lakes, oxbows, impoundments, and similar water features," as well as "waters separated by constructed dikes or barriers, natural river berms, beach dunes." *Id*. at § 328.3(a)(5).

56. "Neighboring" is defined as "(1) [w]aters located in whole or part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary; . . .(2) [w]aters located in whole or part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary; . . . or (3) [w]aters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas." *Id*. at § 328.3(c)(2).

57. Even when a water does not meet the criteria of "neighboring," it can still be jurisdictional as an "adjacent water" through a case-by-case significant-nexus analysis as proposed under the Final Rule. *See id.* at § 328.3(a)(7)–(8).

58. From a legal standpoint, the Final Rule's coverage of all "adjacent waters" fails both Justice Kennedy's and the plurality's tests under *Rapanos*.

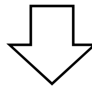
59. The Final Rule's coverage of all "adjacent waters" is inconsistent with Justice Kennedy's approach because, among other things, it grants *per se* jurisdiction to waters that have no "significant nexus" to traditional waters of the United States. Instead, the Final Rule will establish federal jurisdiction over water features never contemplated under *SWANCC* or *Rapanos* by virtue of simply being near—not connected to—traditional waters of the United States. *See*

Rapanos, 547 U.S. at 779 (Kennedy, J., concurring in the judgment). The Final Rule's coverage of all "adjacent waters" is inconsistent with the plurality's test because, among other things, it grants *per se* jurisdiction to waters that have no "continuous surface connection" to traditional waters of the United States. *Id.* at 772 (Kennedy, J., concurring in the judgment).

60. From a practical standpoint, the Final Rule's definition of "adjacent waters" does nothing to further the Federal Agencies' express goal to "clarify the scope of waters protected under the CWA." For a landowner, including a state, to determine whether a particular water feature is subject to the Federal Agencies' jurisdiction (and, therefore, subject to permitting requirements under the CWA), the landowner would be forced to perform—or, more likely, pay an expert to perform—the following analysis:

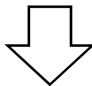
Step 1

Landowner must determine the location of the ordinary high water mark of the nearest traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary, as defined by the Final Rule;



Step 2

Landowner must determine whether any part of the feature at issue is within 100 feet of the ordinary high water mark *or* within 1,500 feet of the high tide line. If so, then the *entire water feature* is subject to federal jurisdiction. If not, the landowner can proceed to step 3;

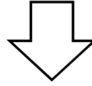


Step 3

Landowner must determine where the 100-year floodplain is located[5] and whether any part of the feature at issue is within the 100-year floodplain of a traditional navigable water, interstate water, territorial sea, impoundment of a

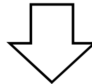
[5] This may be a difficult task. When discussing their reliance on the 100-year floodplain in the preamble to the Final Rule, the Federal Agencies acknowledge that "much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground. The agencies will determine if a particular map is no longer accurate based on factors, such as streams or rivers moving out of their channels with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is deemed by the agencies to be out of date, the agencies will rely on other available tools to identify the 100-year floodplain . . . ." Final Rule at 37,081.

jurisdictional water, or tributary, as defined by the Final Rule. If so, proceed to Step 4. If not, proceed to Step 5.



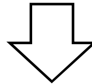
Step 4

Landowner must determine whether any part of the feature at issue is within 1,500 feet of the ordinary high water mark of the water found in Step 3. If so, then the entire feature at issue is subject to federal jurisdiction. If not, Landowner must proceed to Step 5.



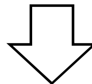
Step 5

Landowner must determine whether any part of the feature at issue is within 4,000 feet from the ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary, as defined by the Final Rule. If so, proceed to Step 6. If not, still proceed to Step 6.



Step 6

If any part of the feature at issue is within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea *or* within 4,000 feet from the ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary, as defined by the Final Rule, Landowner must then have a case-by-case significant nexus analysis performed on the feature at issue and the relevant water.



Step 7

If the Federal Agencies determine that the feature at issue has a significant nexus to the relevant traditional navigable water, interstate water, territorial sea, impoundment, or tributary, the feature is subject to federal jurisdiction. If the Federal Agencies determine that the feature does not have a significant nexus to the relevant traditional navigable water, interstate water, territorial sea, impoundment, or tributary, the feature at issue is not subject to federal jurisdiction.

61. It is unrealistic for the Federal Agencies to expect that landowners will possess the expertise, patience, and resources to employ this onerous test to determine whether their land can fall under the Final Rule's definition of "adjacent waters." Nor should states and their taxpayers

be forced to spend funds for such onerous jurisdictional determinations. Moreover, it is unrealistic for the Federal Agencies to expect that such a complicated standard can be applied predictably and consistently across the nation.

62. In addition to exceeding practicality and Supreme Court precedent, the Federal Agencies' promulgation of the broad definition of "adjacent waters" violates notice requirements under the APA.

63. The APA requires agencies to provide a "[g]eneral notice of proposed rulemaking" and provide "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . ." 5 U.S.C. §§ 553(b)–(c). This includes the requirement that an agency's final rule may differ from its proposed rule only to the extent that the final rule is a "logical outgrowth" of the rule as originally proposed. *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). And a final rule is a logical outgrowth of a proposed rule only to the extent that interested parties "'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

64. In both the Proposed Rule and the Final Rule, waters that are "adjacent" to traditional waters, and tributaries and impoundments of traditional waters, are themselves "waters of the United States." And, in both the proposed and final rules, "adjacent waters" include "neighboring waters." *See* Proposed Rule at 22,260; *see also* 33 C.F.R. § 328.3(a)(5) (2015).

65. In the Proposed Rule, however, neighboring waters were defined in terms of a hydrological connection. Specifically, "neighboring waters" were "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a

jurisdictional water." *See* Proposed Rule at 22,261, 22,271. Further, a "riparian area" was defined as "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*. In the Proposed Rule, the Federal Agencies' justification for regulating "adjacent waters" was based on what it deemed to be their "significant nexus"—as that term was used by Justice Kennedy—to traditional waters in that such adjacent waters "significantly affect the chemical, physical, and biological integrity of those waters." *Id*. at 22,260.

66. In the Final Rule, "riparian" is nowhere to be found, and the only reference to subsurface hydrology is in the exceptions to federal jurisdiction. 33 C.F.R. § 328.3(b)(5) (2015). Instead, the Final Rule defines "neighboring waters" exclusively in terms of distance—not hydrological connection—to traditional waters, impoundments, and tributaries. *See id.* § 328.3(c)(2).

67. There was no reason for Plaintiffs to anticipate a change in the definition of "adjacent" waters from hydrological connection to distance alone, especially because the latter is wholly without support in either the plurality opinion or Justice Kennedy's concurrence in *Rapanos*. Accordingly, the Final Rule's definition of "adjacent" waters is not a logical outgrowth of the Proposed Rule.

68. This sweeping inclusion of "adjacent" waters exceeds the Federal Agencies' authority under the Clean Water Act, violates the APA, and goes beyond the precedent established in *Riverside Bayview*, *SWANCC*, and *Rapanos*.

v. The Final Rule Establishes Two Categories of "Waters" that Will Be Evaluated on a Broad Case-by-Case Basis

69. Under the Final Rule, two categories of waters will be subjected to a case-by-case "significant nexus" analysis. The first category, referred to as "a(7) waters," identifies five specific

subcategories of "waters" that will be subject to case-by-case determinations. 33 C.F.R. § 328.3(a)(7) (2015). These include prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands. *Id.* These "a(7) waters" are deemed jurisdictional when they are determined on a case-specific basis to have a "significant nexus" to a traditional navigable water, interstate water, or territorial sea. *Id.* The Final Rule further states that "a(7) waters" that lie within the same watershed are "similarly situated" by rule and, therefore, will be aggregated for purposes of the Federal Agencies' significant nexus analysis. *Id*. § 328.3(c)(5).

70. The second category, referred to as "a(8) waters" are "[a]ll waters located within the 100-year floodplain of a [traditional water] and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a [traditional water, tributary, or adjacent water]." *Id.* § 328.3(a)(8). These "a(8) waters" are deemed jurisdictional when they are determined on a case-specific basis to have a "significant nexus" to a traditional water. *Id*. Moreover, if only a "portion" of an "a(8) water" is determined to have a "significant nexus" to a traditional water, the entire "a(8) water" is subject to CWA jurisdiction. *Id*.

71. Significantly, the Federal Agencies acknowledge in their own economic analysis of the Final Rule 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.[6] Therefore, the Federal Agencies admit that the Final Rule will expose more than "the vast majority of the nation's water features" to the possibility of CWA jurisdiction.

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[6] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 11, http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

72. This case-by-case, aggregating approach exceeds the Federal Agencies' authority under the Clean Water Act and goes beyond the precedent established in *SWANCC* and *Rapanos*.

vi. The Federal Agencies' Reliance on the "Significant Nexus" Standard Is Flawed, As Is Their Application of the Standard

73. In the preamble to the Final Rule, the Federal Agencies make clear that "[a]n important element of the agencies' interpretation of the CWA is the significant nexus standard . . . first informed by the ecological and hydrological connections the Supreme Court noted in *Riverside Bayview*, developed and established by the Supreme Court in *SWANCC*, and further refined in Justice Kennedy's opinion in *Rapanos*." Final Rule at 37,056.

74. In developing its "significant nexus" standard, however, the Final Rule relies almost exclusively on Justice Kennedy's concurrence in *Rapanos*. This reliance is misplaced. While the Federal Agencies will undoubtedly argue that relying on Justice Kennedy's concurrence is proper in a fractured opinion such as this, that opinion does not grant the Federal Agencies permission to exceed their authority under the Clean Water Act and the Constitution. Even Justice Kennedy acknowledged in *Rapanos* that "[t]o be sure, the significant-nexus requirement may not align perfectly with the traditional extent of federal authority." *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment).

75. The Federal Agencies would have been more prudent to rely on the *Rapanos* plurality's holding that "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes. *Rapanos*, 547 U.S. at 739 (quoting Webster's New Int'l Dictionary 2882 (2d ed. 1954)). That standard is more expressly consistent with the goals of the Clean Water Act, *see* 33 U.S.C. §§ 1251(a)–(b), Congress's commerce power, and the underlying precedent in *Riverside Bayview* and *SWANCC*.

76. Instead, the Final Rule relies almost exclusively on a "significant nexus" standard that goes far beyond what was contemplated by Justice Kennedy in *Rapanos* and eclipses any authority under *Riverside Bayview* and *SWANCC*.

77. In *Riverside Bayview*, the Supreme Court stated that "the waters of the United States" under the Clean Water Act referred primarily to "rivers, streams, and other hydrographic features more conveniently identifiable as 'waters.'" 474 U.S. at 131. Nowhere did *Riverside Bayview* suggest that "the waters of the United States" should include anything beyond that.

78. In *SWANCC*, the Supreme Court reiterated its holding in *Riverside Bayview* that wetlands that were "inseparably bound" up with traditional navigable waters constituted waters of the United States. *SWANCC*, 531 U.S. at 172. In clarifying its holding in *Riverside Bayview*, the *SWANCC* Court stated the "inseparability" between a wetland that *actually abutted* a traditional navigable water produced a "significant nexus" that guided the court's previous decision. *Id*. at 168 (emphasis added). *SWANCC* stated that under the Federal Agencies' concept of jurisdiction, the court would have to hold that the Clean Water Act extends to waters that are not adjacent to open water, and "that the text of the statute will not allow this." *Id*. Therefore, nothing in either *Riverside Bayview* or *SWANCC* suggests that the concept of a "significant nexus" justifies CWA jurisdiction over anything beyond wetlands that *actually abut* traditional navigable waters.

79. Finally, in *Rapanos*, while Justice Kennedy further developed the "significant nexus" concept, he maintained that the standard remained rooted in *Riverside Bayview*, where the court held that wetlands actually abutting navigable waters were jurisdictional because they are "integral parts of the aquatic environment" that Congress expressly chose to regulate. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in the judgment) (quoting *Riverside Bayview*, 474 U.S. at 135).

80. The Federal Agencies' almost exclusive reliance on a "significant nexus" standard does not provide a valid legal justification for the overly expansive definition of "the waters of the United States" in the Final Rule. The Final Rule still must comply with the Clean Water Act, the Constitution, and guiding precedent. It does not. On the contrary, the Final Rule attempts to confer federal jurisdiction to waters that were not contemplated as jurisdictional under any reasonable reading of *Rapanos*, *SWANCC*, and *Riverside Bayview*. Moreover, it is noteworthy that Justice Kennedy's concern was that both the majority- and minority-plurality opinions would expand CWA jurisdiction beyond permissible limits, *see Rapanos*, 547 U.S. at 776–77 (Kennedy, J., concurring in the judgment), thereby reinforcing Plaintiffs' position that the Federal Agencies are not properly relying on Justice Kennedy's "significant nexus" standard.

vii. The Final Rule Establishes Exclusions that Lack Certainty and Will Require Case-Specific Determinations

81. In broadly defining a number of new terms, the Federal Agencies have not only riddled the CWA with uncertain and unpredictable standards, but they have also made unclear which waters they explicitly intend to exclude from CWA jurisdiction.

82. The Final Rule excludes a list of seven types of water features, each of which contains limiting qualifications. Specifically, many of the exclusions only qualify if they "do not meet the definition of tributary," *see* 33 C.F.R. § 328.3(b)(4)(vi); "are not a relocated tributary or excavated in a tributary," *see id*. at § 328.3(b)(3)(i)–(ii); and are water features that were "created in dry land," *see id*. at §§ 328.3(b)(4)(i)–(v) and 328.3(b)(4)(vii).

83. As shown above, the Final Rule's definition of "tributary" is overbroad and in conflict with Justice Kennedy's concurrence in *Rapanos*. This will establish federal jurisdiction over waters—and lands—whose only defining characteristics are that they possess an historic "ordinary high water mark" and in some way "contribute flow."

84. Furthermore, the Federal Agencies do not define "dry land," nor do they state what "created in dry land" means. As a result, prudent property owners, including the states, will not know whether certain water features meet these exclusions unless they expend significant resources to have the proper analyses performed—all in an effort to prove to the Federal Agencies that their land should be excluded from CWA jurisdiction, and with no guarantee that they will succeed in that effort.

D. The Final Rule Harms Plaintiffs

85. The Final Rule harms Plaintiffs by (1) expanding the number of waters subject to federal regulation; (2) eroding the states' authorities over their own waters; (3) increasing the states' burdens and diminishing the states' abilities to administer their own programs; and (4) undermining the states' sovereignty to regulate their internal affairs as guaranteed by the Constitution.

86. In their own economic analysis of the Final Rule, the Federal Agencies estimate that—had the Final Rule been in place during fiscal years 2013 and 2014—the agencies would have found that an additional 2.84 to 4.65 percent of "waters" were subject to CWA jurisdiction.[7] This contradicts the Federal Agencies' statement in the preamble to the Final Rule: "The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as 'waters of the United States' under the rule than under the existing regulations." Final Rule at 37,054.

87. As a result, Plaintiffs will be required to establish water quality standards under CWA Section 303, 33 U.S.C. § 1313, for miles of newly regulated waters that will likely include

[7] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 12–13, http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

ephemeral tributaries, innumerable ponds, prairie potholes, Texas coastal prairie wetlands, and ditches. The states will be required to certify that federal actions meet those standards under CWA Section 401, 33 U.S.C. § 1341. This will impose significant, immediate harms to the states and state agencies involved in this action.

88. The Final Rule erodes Plaintiffs' authorities over their waters. The CWA clearly states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). Moreover, the Tenth Amendment provides States with traditional authority over their own lands and waters. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (holding that "regulation of land use [is] a function traditionally performed by local governments"). The Federal Rule would shift primary responsibility over traditional state lands and waters from the States to the federal government. This will impose significant, immediate harms to the States and state agencies involved in this action.

89. The Final Rule drastically increases Plaintiffs' burdens and harms Plaintiffs' abilities to administer their state programs. Because the Final Rule expands federal jurisdiction, state agencies will be forced to devote more resources to procuring CWA section 402 and 404 permits. For example, because the Final Rule defines "tributaries" to include ditches and flood channels, as well as features like prairie potholes and Texas coastal prairie wetlands, agencies will be forced to obtain CWA section 402 and/or 404 permits for work in those areas that may disturb

soil or otherwise add any pollutant that could affect those features. Individual CWA section 404 permits have a median cost of $155,000 and can take more than a year to obtain.[8]

90. Given the jurisdictional uncertainty that will be caused by the Federal Agencies' definition of "adjacent waters" and the unpredictability of the Federal Agencies' significant nexus analysis, cautious, law-abiding landowners—including governmental entities—will be forced to expend resources if there is even a remote possibility that a project may affect a water of the United States. Moreover, the vagueness of the Final Rule and the requirement of states to inquire whether waters, on a case-by-case basis, are subject to CWA jurisdiction, tortures any notion that land- and water-use are traditional rights and responsibilities of the states.

91. These factors will impose significant, immediate harms to the States and state agencies involved in this action.

IV. CLAIMS FOR RELIEF

<u>Claim One</u>: The Final Rule Violates the Administrative Procedure Act

92. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as if set forth in full herein.

93. Under the APA, a final agency action may be held unlawful and set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . .; in excess of statutory jurisdiction, authority or limitations . . .; or without observance of procedure required by law." 5 U.S.C. § 706(2).

94. The Clean Water Act only authorizes the Federal Agencies to assert jurisdiction over "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344, 1362(7).

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[8] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 35–39, http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

95. The Final Rule exceeds the Federal Agencies' statutory authority and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" because it confers jurisdiction to the Federal Agencies over lands and waters that fall outside of the law established by the Clean Water Act, as interpreted by *Riverside Bayview*, *SWANCC*, and *Rapanos*. *See* 5 U.S.C. § 706(2).

96. Secondly, under the APA, an agency must provide a "[g]eneral notice of proposed rulemaking" and provide "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . ." 5 U.S.C. §§ 553(b)–(c). This requirement includes the requirement that an administrative agency's final rule may differ from its proposed rule only to the extent that the final rule is a "logical outgrowth" of the rule as originally proposed. *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). And a final rule is a logical outgrowth of a proposed rule only to the extent that interested parties "'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

97. For the reasons above, the Final Rule is not a "logical outgrowth" of the proposed rule. Therefore, the Final Rule violates the APA, 5 U.S.C. §§ 553(b)–(c).

Claim Two: The Final Rule Violates the Commerce Clause

98. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as if set forth in full herein.

99. The federal government lacks a general police power and may only exercise powers expressly granted to it by the Constitution. *See* U.S. CONST., amend. X.; *United States v. Lopez*, 514 U.S. 549, 566 (1995).

100. The Clean Water Act was enacted pursuant to Congress's authority to regulate interstate commerce under Article I, Section 8 of the Constitution. As a result, the Federal Agencies violate the Constitution when their enforcement of the Clean Water Act extends beyond the regulation of interstate commerce. *See SWANCC*, 531 U.S. at 173; *see also United States v. Darby*, 312 U.S. 100, 119–20 (1941) (holding Congress may regulate intrastate activity only where the activity has a "substantial effect" on interstate commerce).

101. The Final Rule violates the Constitution because it will subject to Clean Water Act jurisdiction thousands of miles of intrastate waters that have no substantial effect on interstate commerce. Regulating these waters falls outside the scope of Congress's—and, therefore, the Federal Agencies'—constitutional authority.

102. Therefore, the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . .; in excess of statutory jurisdiction, authority or limitations . . . ; or without observance of procedure required by law." 5 U.S.C. § 706(2).

C. Claim Three: The Final Rule Violates State Sovereignty and the Clear Statement Canon

103. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as set forth in full herein.

104. 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.

105. The Final Rule encroaches upon the rights of the states to regulate lands within their borders. Land-use planning, regulation, and zoning are not enumerated powers granted to the federal government. They are the basic, fundamental functions of local governmental entities. Authority over these functions is reserved, traditionally, to the states under the Tenth

Amendment. *See SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("Among the rights and powers reserved to the States under the Tenth Amendment is the authority to its land and water resources."); *FERC v. Mississippi*, 456 U.S. 742, 768, n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"); *see also* 33 U.S.C. § 1251(b).

106. The courts traditionally expect "a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). The phrase "the waters of the United States" does not constitute such a clear and manifest statement. *Id.* On the contrary, the Clean Water Act instructs the Federal Agencies 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). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

107. Therefore, the Final Rule violates the Tenth Amendment, the clear statement canon, and 33 U.S.C. § 1251(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Adjudge and declare that the rulemaking titled "Clean Water Rule: Definition of 'Waters of the United States,'" promulgated in 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 is unlawful because it is inconsistent

with, and in excess of, the EPA's and U.S. Army Corps of Engineers' statutory authority under the CWA;

(2) Adjudge and declare that the Final Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with law;

(3) Adjudge and declare that the Final Rule violates the Constitution of the United States.

(4) Vacate the Final Rule;

(5) Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorney's fees, associated with this litigation; and grant Plaintiffs such additional and further relief as the Court may deem just, proper, and necessary.

Respectfully submitted,

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