IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, et al., *Plaintiffs*,	}	
v.	}	Civil Action No. 3:15–cv–0162
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants*.	}	

STATES' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General For Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

MATTHEW B. MILLER
State Bar No. 24074722

LINDA B. SECORD
State Bar No. 17973400

Assistant Attorneys General
Environmental Protection Division
P. O. Box 12548, Capitol Station Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0052

Attorneys for the State of Texas, 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

February 12, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(cont.)

Case **Page**

Constitution:

Statutes:

Tex. Water Code:

Rules & Regulations:

TABLE OF AUTHORITIES
(cont.)

Rules & Regulations: **Page**

Other:

TO THE HONORABLE UNITED STATES DISTRICT COURT:

The 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, along with the States of Louisiana and Mississippi ("States"), by and through undersigned counsel and pursuant to Southern District of Texas Local Rule 7, respectfully submit this Memorandum in Support of Motion for Preliminary Injunction requesting that the Court enjoin the final rule titled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015) ("Rule"), jointly promulgated by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, "Federal Agencies").

NATURE AND STAGE OF PROCEEDINGS

This Memorandum in Support of the States' Motion for Preliminary Injunction was initially presented to this Court as an attachments (Dkt. 16-4 and 16-5) to the States' Motion for Partial Lift of Stay and Motion for Expedited Treatment (Dkt. 16). On February 2, 2016, the Court denied the States' Motion for Patial Lift of Stay and Motion for Expedited Treatment as moot (Dkt. 36). The States agree that their Motion for Partial Lift of Stay has become moot because the stay (Dkt. 15) has expired on its own terms following the Judicial Panel on Multi-District Litigation ("JPML")'s denial of Defendants' motion to transfer and consolidate this action and all other district court challenges to the Clean Water Rule. *See In re: Clean Water Rule: Definition of "Waters of the United States,"* MDL. No. 2663, Dkt. 163 (J.P.M.L.) (Oct. 13, 2015).

The stay in this Court having expired upon the JPML ruling, the States now file their request for injunctive relief, updated to reflect the current status of the case. Proceedings on this Motion for Preliminary Injunction are appropriate even in light of the current nationwide stay of the Clean Water Rule that has been imposed by the Sixth Circuit. *In re Final Rule; "Clean Water rule: Definition of Waters of the United States,"* Sixth Circuit No. 15-3799 (lead case) Dkt. 24-2; No. 15-3853 (Tx., La., and Miss. case) Dkt. 59-2 (Sept. 16, 2015). Jurisdiction in that circuit remains in dispute; the issue has been briefed and argued but the question remains pending there. Should that circuit rule that it lacks jurisdiction, the nationwide stay may dissolve before the States can seek relief here. Judicial economy in this Court will be served by the parties developing the issue of preliminary injunctive relief through motions, responses, and briefing. If quick action is necessary following a Sixth Circuit ruling, the issue will be ripe for decision by this Court. The States therefore respectfully submit the following.

INTRODUCTION

The States request that this Court enjoin the effectiveness of the final agency rule titled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015) ("Rule"), promulgated jointly by the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, "Federal Agencies" or "federal government"), pending the outcome of litigation. The States seek a preliminary injunction at this time because: (1) the Rule is now in effect; (2) the Rule immediately impacts the States' sovereignty over their lands; (3) the failure of the Federal Agencies to respond to the States request to stay its Rule; and (4) the revelation of newly

public memoranda from the U.S. Corps of Engineers, stating the agency's conclusion that the Rule will not survive judicial scrutiny. At least one federal U.S. district court judge has issued a preliminary injunction, enjoining implementation of the Rule in 13 states.

On June 29, 2015, the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, "Federal Agencies" or "federal government") took final agency action by publishing in the Federal Register the rule titled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015) ("Rule"). The Rule seeks to "clarif[y]" the federal government's definition of "the waters of the United States" within the meaning of the Clean Water Act ("CWA")—*i.e.*, the scope of the federal government's jurisdiction over those waters. Far from accomplishing that goal, the Rule further complicates the scope of federal jurisdiction over waters and even grants the Federal Agencies *additional* jurisdiction over numerous dry-land and water features. In so doing, the Rule violates the CWA, the Administrative Procedure Act ("APA"), and the United States Constitution.

The States filed action challenging the Rule on June 30, 2015.

On or around July 30, 2015, the U.S. House of Representatives Committee on Oversight and Reform released a set of documents authored by the Corps regarding the Rule.[1] In one of the documents, the Corps noted shortly before the Rule was to be published that it is "not likely to survive judicial review in federal courts." *See* U.S. Army Corps of Engineers, *Memorandum for Deputy Commanding General for Civil and*

[1] These documents were made publicly available by the House Committee on Oversight: https://oversight.house.gov/wp-content/uploads/2015/07/Army-Corps-Memoranda.zip

Emergency Operations (Attn: MG John W. Peabody), Through the Chief Legal Counsel (Attn: David R. Cooper), from Lance Woods, Assistant Chief Counsel, Environmental Law and Regulatory Programs, Regarding Legal Analysis of Draft Final Rule on Definition of Waters of the United States, at 10, attached as **Exhibit A**. The States agree. The Corps acknowledged, further, that:

> It will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of acres of truly isolated waters (which have no shallow or confined surface connection to the tributary system of the navigable or interstate waters) do in fact have a "significant nexus" with navigable or interstate waters.

Id. Again, the States agree.

On July 28, 2015, the Attorneys General of Texas, Louisiana, and Mississippi, along with Attorneys General and directors of state agencies from 28 other states, sent the Federal Agencies a letter, asking that implementation of the Rule be postponed pending judicial challenges to the Rule. *See* **Exhibit B**. The States received no response. On August 20, 2015, the Attorneys General of Texas and Louisiana, along with directors of state agencies from 27 other states, sent the Federal Agencies another request for a stay. *See* **Exhibit C**. The States again received no response.

On August 27, 2015, the U.S. District Court for the District of North Dakota issued a preliminary injunction, enjoining implementation of the Rule in the states of Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *See* Doc. No. 70, *North Dakota v. EPA*, No. 3:15-cv-00059 (D. N.D.) ("North Dakota PI"), attached hereto as **Exhibit D**.

On August 28, 2015, the Rule became effective, and on September 16, the Sixth Circuit issued a nationwide stay of the Rule. *In re Final Rule; "Clean Water rule: Definition of Waters of the United States,"* Sixth Circuit No. 15-3799 (lead case) Dkt. 24-2; No. 15-3853 (Tx., La., and Miss. case) Dkt 59-2 (Sept. 16, 2015), attached hereto as **Exhibit E**. Concerned that this stay may dissolve when the Sixth Circuit rules that it lacks jurisdiction, the States now turn to this Court to protect their sovereign interests and enjoin the Federal Agencies from implementing the Rule pending judicial review.

The States seek an injunction, because implementation of the Rule will drastically reconfigure the landscape of federal-state cooperation in implementing the CWA and impermissibly infringe on the States' sovereign authority to regulate land and water use within their borders. Importantly, the Federal Agencies have not—and cannot—demonstrate any compelling reason that the Rule's effectiveness cannot be stayed pending judicial review. The Federal Agencies urge that the Rule is necessary to "increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States.'" 80 Fed. Reg. at 37,054. Despite this purported goal, the Federal Agencies insist on rushing implementation of the Rule in the face of numerous challenges to their supposed "clarification." The Federal Agencies' rush to implement the Rule undercuts their argument that the Rule is purely meant to "clarif[y]" jurisdiction. *Id.* at 37,054. As a result, their approach is designed to push a massive expansion of federal jurisdiction over State and private lands (which may or may not have water, navigable or not) into practice before the federal courts have an opportunity to review the important legal issues raised by the States and private plaintiffs.

The U.S. District Court for the District of North Dakota already issued a preliminary injunction against the Federal Agencies. *See* Exhibit D. In granting a preliminary injunction enjoining the Rule's effectiveness pending litigation, the Court concluded that "[t]he States are likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule." *Id.* at 9. The Court also determined that the "States have a fair chance of success on the merits" that the Rule is likely to be arbitrary and capricious. *Id.* at 12. The Court also found that the "States here have demonstrated that they will face irreparable harm in the absence of a preliminary injunction" citing a "loss of sovereignty" and "unrecoverable monetary harm." *Id.* at 15-16. Lastly, the Court determined that the balance of harms and the public interest favored an injunction. *Id.* at 17-18 ("[T]he public would benefit from [a] preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress."). The States of Texas, Louisiana and Mississippi ask now for this Court to follow the precedent set by the District of North Dakota.[2]

In light of the Corps documents, the States ask this Court to enjoin the Federal Agencies from implementing the Rule pending outcome of this litigation.

[2] The Federal Agencies will likely urge this Court to deny the States' Motion for lack of jurisdiction. This is because the Federal Agencies believe any challenge to the Rule must fall within appellate court jurisdiction under 33 U.S.C. § 1369(b)(1). *See* 80 Fed. Reg. at 37,104. This is incorrect as a matter of law, because the Rule falls outside the limited, enumerated scope of judicial review under 33 U.S.C. § 1369(b)(1). As such, proper jurisdiction is with *district courts* under 28 U.S.C. § 1331. *See e.g.*, *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012). Therefore, this Court—like the U.S. District Court for the District of North Dakota—should vest jurisdiction.

The States are entitled to a preliminary injunction because: (1) the States are likely to succeed on the merits, because the Rule violates the U.S. Constitution, the CWA, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, and Supreme Court precedent; (2) the Rule causes immediate and irreparable harm; (3) an injunction will not cause any harm to the Federal Agencies; and (4) an injunction will serve the public interest by allowing meaningful judicial review of the Rule before its jurisdictional overreach further harms the States.

BACKGROUND

The CWA establishes a system of cooperative federalism, recognizing that States have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" and to "consult with the administrator in the exercise of [her] authority under this chapter." 33 U.S.C. § 1251(b). This system of cooperative federalism requires the States to promulgate water quality standards, designate impaired waters, issue total maximum daily loads, and certify federal permits as compliant with state law. The States of Texas, Louisiana, and Mississippi also administer delegated permitting programs under the CWA. In the Rule, the Federal Agencies admit to an increase in control of traditional state-regulated waters of between 2.84 to 4.65 percent. 80 Fed. Reg. 37,101. By extending the reach of the CWA, the Rule infringes on state sovereignty and fundamentally redefines the scope and burden of the States' authority and obligations under the CWA.

The Rule declares that "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which

are subject to the ebb and flow of the tide" as well as "[a]ll interstate waters, including interstate wetlands" and "the territorial seas" are also per se jurisdictional waters. *Id.* at 37,104. These waters are referred to herein as "traditional waters," because the jurisdictional test for all other waters is based on a relationship to one of these three categories of waters. All intrastate "tributaries" of traditional waters are *per se* jurisdictional waters. *Id*. The Rule defines "tributary" as "a water that contributes flow, either directly or through another water" to a primary water and "is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." *Id*. at 37,105. A water is defined as a tributary even if it has man-made or natural breaks, "so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." *Id*. at 37,106. An "ordinary high water mark" ("OHWM") 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*.

The Rule's definition of tributary sweeps within the Federal Agencies' authority ephemeral streams and channels that are usually dry. It also makes man-made features such as ditches—which are not all explicitly excluded—*per se* jurisdictional by sweeping them into the definition of tributary. Under the Rule, all intrastate waters that are "adjacent" to traditional waters, impoundments, or tributaries are *per se* jurisdictional. *Id*. at 37,104. "[A]djacent waters" are waters "bordering, contiguous, or neighboring" primary waters, impoundments, or tributaries. *Id*. at 37,105. The category includes "waters

separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id*. It also includes wetlands within or abutting the ordinary high water mark of an open water, such as a pond or lake. *Id*

"Neighboring" includes "[a]ll waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary. *Id*. at 37,105. And includes "[a]ll waters [at least partially] located within the 100-year floodplain of a" traditional water, impoundment, or tributary "and not more than 1,500 feet from the ordinary high water mark of such water." *Id*. "Neighboring" also includes "[a]ll waters [at least partially] located within 1,500 feet of the high tide line." *Id*.

Additionally, the Rule allows the Federal Agencies to exercise authority on a case-by-case basis over waters not covered by any other part of the Rule—i.e., not already included in a *per se* category—that, alone or in combination with other similarly situated waters have a "significant nexus" to a traditional water. *Id.* at 37,104-05. This includes five enumerated geographic features, including Texas prairie potholes, regardless of how remote they are to a traditional water. The Rule further includes within federal jurisdiction, on a case-by-case basis, "[a]ll waters [at least partially] located within the 100-year floodplain of a" traditional water that have a significant nexus to a traditional water. *Id*. at 37,105. It further includes, on a case-by-case basis, "all waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary that have a significant nexus to a traditional water. *Id*.

The case-by-case test the Federal Agencies will apply under the Rule is whether waters alone or in combination with "similarly situated waters in the region . . . significantly

affect[] the chemical, physical, or biological integrity" of a traditional water. *Id*. at 37,106. "Region" is defined as "the watershed that drains to the nearest [primary water]." *Id*. Waters with only a shallow sub-surface connection or no hydrologic connection whatsoever to a primary water, impoundment, or tributary can satisfy this test. The Federal Agencies admit in their economic analysis of the Rule that these definitions will increase the jurisdictional scope of the CWA over existing practice. *See* U.S. EPA and Corps, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, at 5-6 (May 20, 2015) (hereinafter "Economic Analysis"). If the Rule is implemented, this expansion of federal jurisdiction will harm the States in their capacity as partners and regulators in implementing programs for which the States have direct and delegated authority under the CWA. As acknowledged in the Federal Agencies' Economic Analysis, the Rule will result in an increased volume of permit applications, water quality certifications, and other administrative actions that the States will have to address. *Id*. at 53. This poses an enormous and immediate burden on the States.

The significant expansion of the Federal Agencies' jurisdiction also infringes on the sovereign authority of the States—which previously had exclusive jurisdiction over state waters. Since 2000, the Supreme Court has twice refused the Federal Agencies' attempts to, as here, assign themselves additional federal jurisdiction in violation of the CWA, the constitutional, and other federal authority. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Eng's*, 531 U.S. 159 (2001). Implementation of the Rule will place a significant hardship on the States and others that have immediately pending and proposed infrastructure projects by

increasing the cost, timing, and complexity of obtaining necessary permits or approvals from the Federal Agencies.

Further, the Rule will significantly impact water supply, agricultural, oil and gas, and mining operators as they attempt to toe the line between established state regulatory programs and the Federal Agencies' new burdensome and conflicting federal requirements. This uncertainty threatens states like Texas, Louisiana, and Mississippi, who rely on revenues from industry development to fund a wide variety of state programs for the benefit of their citizens.

In the face of the longstanding history of partnership between the States and the federal government, and out of disregard of the sovereign interests implicated and immediate harm to States caused by the Rule, the Federal Agencies curiously conclude that the Rule "does not have federalism implications." 80 Fed. Reg. at 37,102. This conclusion lacks credibility given that the Federal Agencies declined to even conduct a federalism analysis, despite numerous requests by States and other concerned parties. In the attached memorandum from the EPA Administrator and the Assistant Secretary of the Army, the Agencies conclude that—rather than work with the States to assess and address the federalism implications of the Rule—the Federal Agencies should continue to proceed without acknowledging the Rule's impact on state sovereignty. U.S. EPA and Corps, *Memorandum for Deputy Assistant Administrator for Water Regional Administrators (Regions I-X) Chief of Engineers Division And District Engineers* (July 7, 2015), attached hereto as **Exhibit F**.

SUMMARY OF THE ARGUMENT

The States meet all of the criteria for preliminary injunctive relief. Because Defendants have promulgated a Rule that exceeds their authority, fails to comply with the APA, and violated the 10th Amendment and the Clear statement Canon, the States are likely to succeed on the merits of their challenge to the Rule. The States will be harmed by compliance with the new Rule, much more so than the Defendants are by observing the pre-Rule status quo. And the public interest favors an injunction.

ARGUMENT

I. The States are Likely To Succeed on the Merits

The first consideration in the preliminary injunction analysis is the likelihood that the plaintiff will prevail on the merits. The Fifth Circuit has stated that the likelihood of success required in a given case depends on the weight and strength of the other three factors. *See Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576–77 (5th Cir. 1974). Although some doubt has been cast on this "sliding scale" approach, it is clear that, at a minimum, the plaintiff must demonstrate a "substantial case on the merits." *See, e.g.*, *Southerland v. Thigpen*, 784 F.2d 713, 718 n.1 (5th Cir. 1986). Thus, to meet the first requirement for a preliminary injunction, the States "must present a prima facie case," but "need not show a certainty of winning." 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.3 (3d ed. 2014) (hereinafter "Wright & Miller").

In the present case, the States will likely succeed on the merits because, in promulgating the Final Rule, the Federal Agencies: (1) violated their grant of authority by

Congress; (2) failed to comply with the APA; and (3) violated the 10th Amendment and the Clear Statement Cannon.

A. The Federal Agencies violated their grant of authority.

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 significance 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*." 80 Fed. Reg. at 37,056. However, in developing its "significant nexus" standard, the Final Rule relies almost exclusively on Justice Kennedy's concurrence for its authority. This reliance is misplaced. The Federal Agencies would have been more prudent to rely on the *Rapanos* plurality's holding that wetlands not directly abutting a traditional navigable-in-fact water had to have a "continuous surface connection" to a navigable-in-fact water. *Rapanos* at 782. This standard is more expressly consistent with the goals of the CWA, *see* 33 U.S.C. §§ 1251(a)-(b), Congress's commerce power, and the underlying precedent in *Riverside Bayview* and *SWANCC*. Although there is substantial uncertainty that the Federal Agencies' adoption of a jurisdictional standard embraced by a single Justice is appropriate, or that extrapolation of that standard beyond wetlands is permissible, the Final Rule fails to satisfy Justice Kennedy's significant nexus test.

Justice Kennedy's analysis begins by emphasizing that the purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the [traditional navigable interstate] waters." *Rapanos* at 779. Accordingly, the Agencies' jurisdiction

over waters that are not traditionally navigable depends upon the existence of a significant nexus between the [waters] in question and traditional navigable waters. *See Rapanos* at 780. By Justice Kennedy's reasoning, without this "significant nexus," isolated waters will not significantly affect the chemical, physical, and biological integrity of traditional waters, and thus fall outside the regulatory jurisdiction of the Federal Agencies.

Justice Kennedy's concurrence in *Rapanos*, although specifically addressing the Federal Agencies' jurisdiction over wetlands adjacent to tributaries of traditional navigable waters, infers that the Federal Agencies may have jurisdiction over certain categories of tributaries that, due to their volume of flow, their proximity to navigable waters, or other relevant considerations, have a significant nexus to traditional navigable water. *See Rapanos* at 781. In that case, the Corps had defined a tributary as a water that "feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high-water mark, defined as a line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics." *Rapanos* at 781. Justice Kennedy, however, concluded that the Corp's definition of "tributary" was overly broad, stating:

> [T]he breadth of this 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 of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.

Rapanos at 781. As in *Rapanos*, the Final Rule's definition of "tributary" in this case is overly broad and exceeds the authority granted to the Federal Agencies by Congress in the CWA.

The definition of "tributary" in the Final Rule is strikingly similar to the definition rejected by Justice Kennedy in *Rapanos*. The Final Rule defines "tributaries" as "a water that contributes flow . . . to a traditional water that "is characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark." 80 Fed Reg. 37,105-06. A water meets this definition regardless of whether its contribution of flow is direct or measurable, or even if the required "physical indicators" are interrupted by man-made or natural breaks "of any length." *Id.* So, the definition set forth under the Final Rule allows for regulation of any area that has a trace amount of water so long as "the physical indicators" of a bed and bank and high water mark exist, regardless of whether it actually has a significant nexus to a traditional navigable water. Accordingly, this standard fails Justice Kennedy's significant nexus test.

Therefore, because the definition of "tributary" under the Final Rule the overbroad, exceeding even Justice Kennedy's limits on CWA jurisdiction, Texas has established a fair chance of success on the merits of its claim that the Final Rule violates the congressional grant of authority to Agencies.

B. The Federal Agencies failed to comply with APA requirements.

1. The Rule is arbitrary and capricious.

A court must set aside a final agency rule if it finds that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5. U.S.C. § 706(2)(A). The scope of this "standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). However, the agency has a duty to "examine

the relevant data and articulate a satisfactory explanation for its action." *Id.* An agency must base its explanation on a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Under its *per se* jurisdictional definitions, the Federal Agencies will automatically determine that any water has a significant nexus to a traditional navigable water, so long as the water fits within the definition of a "tributary," as defined under the Rule. The Federal Agencies' rationale for this position stems from scientific literature showing that "tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks." *See* Corps and EPA, *Tech. Supp. Document for the Clean Water Rule: Definition of Waters of the United States*, 243 (May 27, 2015). However, the waters described in the scientific literature cited by the Agencies are only a subset of the waters broadly defined as a "tributary" under the Rule. The Rule provides that tributaries are any water "that contributes flow" to a traditional navigable water that "is characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark." 80 Fed Reg. 37,105-06.

The Agencies conflate "tributaries," as defined under the Final Rule, with "streams" as described in the scientific literature. For example, in the Tech Support Doc, the Agencies state:

> The incremental effects of individual *streams* are cumulative across entire watersheds and therefore must be evaluated in context with other *streams* in the watershed. Thus, science supports that *tributaries* [as defined under the Final Rule] within a point of entry watershed are similarly situated.

Id. at 245 (emphasis added). The evidence before the Agencies only supports a significant nexus determination for a limited subset of waters meeting the definition of "tributary." As a result, the Agencies have failed to establish a "rational connection between the facts found" and the Rule as it will be promulgated. *See Burlington Truck Lines, Inc.*, 371 U.S. at 168. Thus, the Agencies' categorical determination that all waters meeting the definition of a "tributary" have a significant nexus to a traditional navigable water is arbitrary and capricious.

Additionally, the Final Rule arbitrarily establishes distances from a navigable water that are subject to regulation. The Corps explained in a memorandum to EPA:

> [T]he draft final rule adds new provisions to allow the agencies to assert CWA jurisdiction on a case-by-case basis over lakes, ponds, or wetlands that contribute flow to navigable or interstate waters and that are located no more than 4000 feet from a stream's OHWM/HTL. The same provision excludes from CWA jurisdiction altogether any lake, pond, or wetland that contributes a flow of water to navigable or interstate waters, but that lies more than 4000 feet from the same OHWM/HTL. This 4000-feet bright line rule is not based on any principle of science, hydrology or law, and thus is legally vulnerable. . . . ***This rule not likely to survive judicial review in the federal courts.***

Exhibit A at 9 (emphasis added). Although a "bright line" test is not inherently arbitrary, the Final Rule must be supported by some scientific evidence justifying the 4,000-foot limit. In this case, however, it appears that the 4,000-foot limit is correct merely because EPA says it is.

Therefore, the Rule is arbitrary and capricious in violation of the APA and must be vacated. The Rule conflates waters described in the scientific literature with a broader

category of waters defined as of "tributaries," and it arbitrarily establishes geographic jurisdictional distances.

2. The Rule is not a "logical outgrowth" of the proposed rule.

The APA requires the Federal Agencies to publish a proposed rule including "the terms or substance of the proposed rule or a description of the subjects and issues involved" and afford "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *See* 5 U.S.C. § 553(b)-(c). Where a final rule adopted differs from the rule proposed, the final rule must be a "logical outgrowth of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). A final rule cannot stand unless reasonable parties "should have anticipated that [the] requirement" could be promulgated from the proposed rule. *Small Refiner Lead Phase-Down Task Force v. U.S. E.P.A.*, 705 F.2d 506, 549 (D.C. Cir. 1983).

The definition of "neighboring" under the Final Rule is not a logical outgrowth of its definition in the Proposed Rule. The Federal Agencies materially altered the definition in the Final Rule by substituting ecological and hydrological concepts with geographical distances. The Proposed Rule defined waters of the United States as "includ[ing] waters located within the riparian area or floodplain of a [primary water, impoundment, or tributary], or waters with a shallow subsurface hydrological connection or confined surface hydrological connection to such a jurisdictional water." 79 Fed. Reg. 22,264. However, the Final Rule, as adopted, defines "neighboring" as including any water which is at least partially "located within 100 feet of the ordinary high water mark of [a primary water, impoundment, or tributary]" and any water which is at least partially located within 1,500

feet of the ordinary high water mark of a primary water, impoundment, or tributary which is also located within the 100-year floodplain of that water. 80 Fed Reg. 37,105.

The Federal Agencies never proposed replacing the reference to the riparian area with a hard and fast geographic limit of 100 feet from the ordinary high water mark of a primary water, impoundment, or tributary. *See* 79 Fed. Reg. 22,208-09 (seeking input on "establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency" and "placing geographic limits on what water outside the floodplain or riparian zone are jurisdictional"). Nor did the Federal Agencies discuss an arbitrary 1,500 foot limitation on waters within the 100-year floodplain that could be considered "adjacent." *Id*.

Accordingly, the Final Rule greatly expanded the definition of "neighboring" such that a reasonable party would not have anticipated the Final Rule as a logical outgrowth of the Proposed Rule.

C. The Rule violates state sovereignty and the Clear-Statement Canon

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. Under the Rule, the Federal Agencies admit to an increase in control of traditional state-regulated waters of between 2.84 to 4.65 percent. 80 Fed. Reg. 37,101. Therefore, the 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).

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).

The Rule violates the Constitution by asserting authority over isolated, intrastate waters and displacing the States' sovereign rights. The Supreme Court in *SWANCC* rejected the Federal Agencies' assertion that certain isolated waters were "waters of the United States" because, *inter alia*, this would "alter[] the federal-state framework by permitting federal encroachment upon" the States' "traditional and primary power over

land and water use." 531 U.S. at 173-74. The Rule covers not only the isolated waters at issue in *SWANCC*, but also many other isolated waters and sometimes wet lands. The Rule thus violates the States' sovereign rights under the Tenth Amendment to manage and protect their intrastate waters. *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001)

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

II. The States Will Suffer Irreparable Harm if the WOTUS Rule is Implemented

To obtain a preliminary injunction, the States must establish that they will suffer irreparable harm. Absent a preliminary injunction, the States will immediately lose their sovereignty over intrastate waters that will instead be subject to the scope of the CWA. The Federal Agencies admit to an increase in control of traditional state-regulated waters of between 2.84 to 4.65 percent. 80 Fed. Reg. 37,101.

When filing their complaint on June 30, 2015 (almost two months prior to the Rule becoming effective on August 28, 2015), the States originally chose to not seek a preliminary injunction. This calculus changed in light of a number of post-Complaint activities, namely: (1) the Rule is now in effect; (2) the Rule is currently impacting the States' sovereignty over their lands and waters; (3) failure of the Federal Agencies to respond to the States' request to stay the Rule; (4) the revelation of newly-public correspondence from the Corps to the EPA, stating its conclusion that the Rule will not survive judicial review; and (5) the issuance of an injunction against the Federal Agencies

for its harm on the sovereign rights of 13 states, including New Mexico, with whom Texas shares a border. In light of these and other post-Complaint developments, and in tandem with the Rule's chilling effect, the States are now certain that, absent a stay, they will suffer clear, irreparable harm.

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

33 U.S.C. § 1251(b).

Moreover, States have a constitutional right to maintain their "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *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"). Consistent with that authority, the States have enacted comprehensive regulatory schemes to protect, maintain, and improve the quality of waters in their borders, consistent with the CWA's mission to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *See e.g.*, Tex. Water Code §§ 26.011 *et seq.*

Because the States' sovereign interests in controlling their own waters and lands are put at stake by the Rule, the States will be irreparably harmed if the Rule is implemented

without the States having "a full and fair opportunity to be heard on the merits." *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

III. The Balance of Harms Tilts in Favor of an Injunction

The balance of harms tilts in favor of an injunction because enjoining implementation of the Rule pending outcome of the litigation will not cause the Federal Agencies any harm. As demonstrated above, the States will suffer imminent and irreparable harm from the implementation of the Rule. In contrast, the Federal Agencies will not be able to demonstrate imminent, irreparable harm, as an injunction will merely force them to maintain the same jurisdiction over waters they've been bound by under the CWA, as informed by *Rapanos*, and *SWANCC*. *See e.g. Texas v. United States*, 787 F.3d 733, 766 (5th Cir. 2015) (Finding that the balance of harms tilts in favor of the states when the federal government cannot show it will be harmed by a stay.) The Federal Agencies' stated purpose in promulgating the Rule is to "increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States.'" 80 Fed. Reg. at 37,054. Rushing implementation of the Rule before its legal sufficiency is established is contrary to this goal. The Corps' own attorneys noted that the Rule fails to "include an adequate provision for . . . transitioning from the existing rule to the new rule." Ex. A at 7. Therefore, delaying implementation of the rule will actually benefit the Federal Agencies by providing them an opportunity to develop the tools necessary to implement the Rule. *See e.g.* Exhibit F.

IV. The Public Interest Favors an Injunction

"[I]t is always in the public interest to protect constitutional rights." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998) (internal quotation omitted). Here, an injunction is warranted because the Rule infringes on the sovereign interests of the States in violation of the Tenth Amendment. The public interest will be served by enjoining implementation of the Rule until the constitutionality and legality of the Rule have been thoroughly reviewed and ruled upon by this Court.

The public interest also favors an injunction because the Rule exceeds the jurisdictional scope of the CWA. While it is true that "important public interests are served by the [CWA]," *Rapanos*, 547 U.S. at 777, delaying implementation of the Rule would simply preserve CWA jurisdiction prior to the Rule. Importantly, from 1986 to 2015, the regulatory definition of "the waters of the United States" remained unchanged except by the Supreme Court. *See* 33 C.F.R. 328 (1986). If the Rule's implementation is enjoined, the CWA will continue to be implemented as it has for years. On the contrary, allowing the Rule to go into effect—when it will likely be vacated at a later date—disserves the public and the purpose of the CWA by creating unnecessary confusion and inconsistent regulatory structures.

CONCLUSION

The States request that the Court grant their Motion for Preliminary Injunction pending resolution of the States' challenges on the merits.

Respectfully Submitted,

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

MATTHEW B. MILLER
Assistant Attorney General
Texas Bar No. 24074722
matt.miller@texasattorneygeneral.gov
Southern District Bar No. 2638649

Linda B. Secord
LINDA B. SECORD
Assistant Attorney General
Texas Bar No. 17973400
linda.secord@texasattorneygeneral.gov
Southern District Bar No. 1850549

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel. (512) 463-2012
Fax. (512) 320-0911

Attorneys for the State of Texas

JEFF LANDRY
Attorney General of Louisiana

WILBUR L. "BILL" STILES
First Assistant Attorney General

/s/ Steven B. "Beaux" Jones
STEVEN B. "BEAUX" JONES
La. Bar Roll No. 33915
Southern District ID No. 1850546
DUNCAN S. KEMP, IV
La. Bar Roll No. 34172
Southern District Application Pending
Assistant Attorneys General
Environmental Section
Office of the Louisiana Attorney General
1885 N. Third Street
Baton Rouge, Louisiana 70802
Phone: (225) 326-6085
Fax: (225) 326-6099
Email: Jonesst@ag.state.la.us

Attorneys for the State of Louisiana

JIM HOOD
Attorney General of the State of Mississippi

/s/ *Mary Jo Woods*
MARY JO WOODS
Special Assistant Attorney General
Miss. Bar No. 10468
Mississippi Attorney General's Office
Post Office Box 220
Jackson, Mississippi 39205
Phone: (601) 359-3020
Facsimile: (601) 359-2003
Email: mwood@ago.state.ms.us

Attorneys for the State of Mississippi

CERTIFICATE OF SERVICE

I certify that on February 12, 2016, a copy of the foregoing Memorandum in Support of Motion for Preliminary Injunction was served electronically through the U.S. District Court for the Southern District of Texas's CM/ECF system on all registered counsel.

/s/ Linda B. Secord