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.	)	

MOTION FOR SUMMARY JUDGMENT
OF PLAINTIFF STATES
TEXAS, MISSISSIPPI, AND LOUISIANA

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I. NATURE AND STAGE OF THE PROCEEDING

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, and the State of Louisiana, by and through its Attorney General, Jeff Landry, and the State of Mississippi, by and through its Attorney General, Jim Hood ("States") have brought this case to challenge 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) ("Rule" or "Final Rule").[1] On September 11, 2018, this Court temporarily enjoined the Rule as to the States of Texas, Louisiana, and Mississippi.

The States now move for summary judgment granting their petition and vacating the Rule. Summary judgment is appropriate here because it is a common mechanism for deciding cases challenging a regulation under the Administrative Procedure Act ("Act"), 5 U.S.C. § 701-706. *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769

[1] The proposed version of the Rule is attached as Exhibit A, Proposed Rule. The final version of the Rule is attached as Exhibit B, Final Rule.

(9th Cir. 1985)). Also, there is no fact dispute here. The case turns on the legal issues of whether the Rule falls outside the Federal Agencies' authority under the Clean Water Act ("CWA") as interpreted by the Supreme Court, whether the Rule violates the requirements of notice-and-comment rulemaking, and whether it violates the Commerce Clause and Tenth Amendment to the Constitution.

II. ISSUES

Issue 1. The Rule falls outside the Federal Agencies' statutory authority under the Clean Water Act.

Issue 2. The Rule violates the APA in two important respects. The Rule is arbitrary and capricious and because the final version is not a "logical outgrowth" of the proposed version, it violates notice-and-comment rulemaking.

Issue 3. The Rule exceeds Congress's Commerce Clause authority.

Issue 4. The Rule violates the States' Tenth Amendment rights.

III. STANDARD OF REVIEW

The Court should set aside the Rule if it finds any aspects are:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; or

(D) without observance of procedure required by law;
5 U.S.C. § 706(A)-(D).

As to Issue 1, this Court must set aside final EPA action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." A regulation cannot conflict with the statute that it is implementing. *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 646-48. (D.C. Cir. 1976). Where "decisions of vast economic and political significance" are concerned, the statute must "speak clearly" to authorize the agency's action. *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"). Importantly, where the text of the statute "speaks to the direct question at issue, [courts] afford no deference to the agency's interpretation of it and 'must give effect to the unambiguously expressed intent of Congress.'" *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Moreover, "[f]ederal law may not be interpreted to reach" areas traditionally subject to State regulation absent "unmistakably clear ... language." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471-72 (D.C. Cir. 2005). And ultimately, an agency order may not stand if the agency has misconceived the law. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

As to Issue 2, a rule is arbitrary and capricious if it is unsupported by the record, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41-42 (1983), does not explain why alternatives were rejected, *id.*, or fails to "treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so," *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). In addition, "conclusory statements will not do; an agency's

statement must be one of reasoning." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). And judicial review becomes "meaningless where the administrative record is insufficient...". *Mathews*, 533 F.2d at 648. In order to withstand judicial scrutiny, a regulation must follow the APA's procedural requirements for rulemaking. *Id.*

As to Issue 3, although the canon of constitutional avoidance favors construing ambiguous statutory language to avoid constitutional doubts, the legal question of the constitutionality of an agency action is part of judicial review under the APA. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). An agency order may not stand if the agency has misconceived the law. *See Chenery*, 318 U.S. at 94.

As to Issue 4, although the canon of constitutional avoidance favors construing ambiguous statutory language to avoid constitutional doubts, the legal question of the constitutionality of an agency action is part of judicial review under the APA. *See Fox Television*, 556 U.S. at 516. An agency order may not stand if the agency has misconceived the law. *See Chenery*, 318 U.S. at 94.

IV. SUMMARY OF THE ARGUMENT

Having been with us since 1972, the Clean Water Act is now middle-aged. It has been amended by Congress, implemented by the Federal Agencies through rulemaking and enforcement, and interpreted by the United States Supreme Court. Despite hard work by all three branches of government, to say nothing of the landowners who must comply with the statute if their property contains "waters of the United States," we still do not have a satisfactory definition of that term. The Federal Agencies' latest attempt to define it cannot survive judicial review. It ignores the statutory text, the Supreme Court's recent decisions—including the tests of *both* the plurality and concurrence—and core principles of federalism.

Perhaps most distressing of all, the Rule ignored the public. An ecologically and hydrologically based Proposed Rule led to widespread comment from across the country. That comment, and the record it addressed, were aimed at an approach that the Federal Agencies abandoned. The Final Rule takes a rigid, set-distance approach without even the benefit of clarity because so much is left to be determined on a case-by-case basis using "desktop" tools needed because "waters of the United States" now includes features that cannot be seen and areas that are not wet. The common understanding of "navigable" waters has broadened since it was limited to the reach of the tides, but it cannot and should not reach this far. The Rule must be vacated.

V. ARGUMENT

Issue 1. The Rule falls outside the Federal Agencies' statutory authority under the Clean Water Act.

The Rule's definition of the term "waters of the United States" cannot be squared with the text of the Clean Water Act and the Supreme Court's interpretations of that term. As the CWA makes clear, "waters of the United States" is synonymous with "navigable waters." 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas"). This means that any reasonable interpretation of "waters of the United States" must apply to navigable-in-fact waters and, at the very most, additional waters that impact the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The plain terms of the CWA do not permit the Federal Agencies to sweep in local, isolated waters and land features, which have only a tangential relationship to navigable-in-fact waters. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) ("SWANCC") ("[Federal Agencies urge] that the jurisdiction of the Corps extends to ponds that are not adjacent to open water . . . we conclude that the text of the statute will not allow this"). In fact, it is a "central requirement" of the Act that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos v. United States*, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring in the judgment). The term "navigable" indicates congressional intent to exercise its "traditional jurisdiction over waters that were

or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172.

In *Sackett v. EPA*, 566 U.S. 120, 123-24 (2012), Justice Scalia, in dicta, provided a brief history of the long-running—and still unresolved— "fuss" over the scope of "the navigable waters" subject to enforcement under the CWA. He noted the three seminal opinions on the issue. *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 124 (1985), upheld a regulation interpreting "navigable waters" to include freshwater wetland, themselves not actually navigable, that were adjacent to navigable in fact waters. *SWANCC*, 531 U.S. at 164 rejected an interpretation (the Migratory Bird Rule) that would include in "navigable waters" abandoned sand and gravel pits "seasonally ponded" but not adjacent to open water. And in *Rapanos*, the Court considered whether a wetland not adjacent to navigable-in-fact waters fell within the scope of the CWA. As Justice Scalia put it in *Sackett*, "[o]ur answer was no, but no one rationale commanded a majority of the Court." *Sackett*, 566 U.S. at 124.

The Court has consistently struck down attempts by the Federal Agencies to expand the definition of the phrase "waters of the United States" in a manner that swept in waters remote from navigable-in-fact waters. In *Rapanos*, a four-justice plurality concluded that the phrase applies only to "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality). Justice Kennedy concurred in the

judgment, reasoning instead that "waters of the United States" includes waters "navigable in fact or that could reasonably be so made" and waters with a "significant nexus" to a navigable-in-fact water. *See id*. at 759, 779 (Kennedy, J., concurring in the judgment).

In the preamble to the 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*." 80 Fed. Reg. at 37,056. However, in developing its "significant nexus" standard, the 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* 547 U.S. at 782. This standard is more expressly consistent with the text of the CWA, *see* 33 U.S.C. §§ 1251(a)-(b), Congress's commerce power, and the underlying precedent in *Riverside Bayview* and *SWANCC*. The plurality focused on the textual use of "the" and "waters" as plainly indicating that the CWA does not apply to water in general but to continuously present, fixed bodies of water not to intermittent, ephemeral, or occasional flows of water through ordinarily dry channels. *Rapanos*, 547 U.S. at 732-33. The plurality noted that this was in keeping with the traditional

understanding that navigable waters, over which Congress may exercise authority, are "rivers, "lakes," "streams," and "waterways," not dry channels. *Id*. at 732-34. And the plurality rested its analysis on the recognition in *Riverside Bayview* and *SWANCC* that, although "navigable waters" should be construed more broadly than in the 19th Century, the word navigable is not devoid of significance. *Id*. at 730-31.

But whichever *Rapanos* test applies, the Rule is not the answer to the long quest for a meaningful interpretation of "navigable waters" and its synonym, "waters of the United States." The Rule fails both the plurality's test and the significant nexus test of Justice Kennedy's concurrence.

A. The Rule fails the *Rapanos* plurality's test.

The *Rapanos* plurality concluded that the CWA "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 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and "those wetlands with a continuous surface connection to" those waters, *id*. at 742. It does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. at 739. The Rule violates these principles for at least four reasons.

First, the Rule's tributary definition includes features with intermittent or ephemeral flow in excess of the *Rapanos* plurality's reading of the CWA. The Federal Agencies admit that the Rule covers "perennial, intermittent, [and] ephemeral" streams with "flowing water only in response to precipitation events in a typical year." 80 Fed. Reg. at 37,076. But the plurality specifically found it unreasonable to read "waters of the United States" to include "channels containing merely intermittent or ephemeral flow." *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality).

Second, the Rule's *per se* coverage of adjacent waters fails the plurality's test because it does not require any continuous surface connection to relatively permanent bodies of water. The Rule includes all waters within the 100-year floodplain and within 1,500 feet of the ordinary high water mark of a primary water regardless of actual connectivity or the significance of that connectivity. §§ 328.3(c)(2)(ii). Many waters in these areas are on average connected to a primary water only once every one-hundred years, which falls far short of a "continuous surface connection" with a relatively permanent water. In addition, the Rule includes waters based solely on a connection to a "tributary," which as explained earlier can be usually dry channels. Although there may be a connection, that connection is not to a "relatively permanent, standing or flowing bod[y] of water." *See Rapanos*, 547 U.S. at 732. And because the Rule includes waters based solely on certain distances, including from any "tributary" in a long chain, *see* 33

C.F.R. § 328.3(c)(2), it sweeps in waters with no surface connection to any body of water, let alone a continuous surface connection to a primary water.

Third, the Rule's assertion of case-by-case jurisdiction also covers waters with no continuous surface connection to a relatively permanent body of water, in violation of the *Rapanos* plurality. The Rule's definition of "significant nexus" can be satisfied based on any one of a number of functions, which can be present even if a continuous surface connection is absent. For example, a usually dry channel could meet the requirement for "[c]ontribution of flow," 33 C.F.R. § 328.3(c)(5), 80 Fed. Reg. 37,106 during a rare heavy rainstorm and yet lack "a continuous surface connection" with the water.

Fourth, the Rule's inclusion of non-navigable interstate waters as a primary water, 33 C.F.R. § 328.3(a), 80 Fed. Reg. 37,104, also violates the plurality's approach. The plurality held that the CWA is concerned with protecting "a relatively permanent body of water connected to traditional interstate navigable waters." *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality). Clearly, non-navigable interstate waters fall outside of that understanding.

B. Even if Justice Kennedy's "significant nexus" test applies, the Rule fails it.

In *Rapanos*, Justice Kennedy concluded that the CWA covers only "waters that are or were navigable in fact or that could reasonably be so made" i.e., primary waters, and secondary waters with a "significant nexus" to a navigable-in-fact water. 547 U.S. at 759 (Kennedy, J., concurring in the judgment). A significant

nexus exists where the water "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of" a navigable-in-fact water. *Id.* at 780. This means that the CWA does not include waters with a "speculative or insubstantial" nexus to navigable waters. *Id.* at 780. Thus, Justice Kennedy explained that the CWA does not extend to all "wetlands (however remote)," all "continuously flowing stream[s] (however small)," *id.* at 776, and all waters containing "[t]he merest trickle, [even] if continuous," *id.* at 769. Justice Kennedy specifically rejected the Federal Agencies' approach of sweeping in all wetlands actually adjacent to tributaries of navigable waters, "however remote and insubstantial," *id.* at 778-79, explaining that the standard's breadth "preclude[d] its adoption," *id.* at 781. The Rule violates Justice Kennedy's approach in multiple respects.

1. Per se coverage of "tributaries".

The Rule's provision that all "tributaries" of primary, i.e. navigable, waters are *per se* "waters of the United States" cannot be squared with Justice Kennedy's approach. Under the Rule, a tributary is any land feature with "a bed and banks and an ordinary high water mark" and that "contributes flow"—no matter how ephemeral—"either directly or through another water" to a primary water. 33 C.F.R. § 328.3(c)(3), 80 Fed. Reg. 37,105-06. This covers land features with "one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground)." *Id.* If there is such a break,

the feature is still a tributary if it has "a bed and banks and an ordinary high water mark [that] can be identified upstream of the break." *Id.* A feature also qualifies as a tributary if it contributes flow (even through a chain of "any number" of other waters) to a primary water. *Id.*; 80 Fed. Reg. at 37,076. As a result, tributaries under the Rule include typically dry land features that indirectly and only occasionally contribute even a mere trickle into a navigable water. *See* 80 Fed. Reg. at 37,076. This wide-reaching definition fails Justice Kennedy's test because it provides no "assurance" that jurisdictional waters have a significant nexus to a navigable water. See *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment).

First, the Rule sweeps in features based upon the fact that they "contribute[] flow," 33 C.F.R. § 328.3(c)(3), 80 Fed. Reg. 37,105-06, even if the flow is "intermittent" or "ephemeral" and "only in response to precipitation events," 80 Fed. Reg. at 37,076-77; see also *id.* (adding that the presence of such "tributaries" may be "infer[red]" through "desktop tools" where not apparent through "direct field observation"). This disregards Justice Kennedy's concern that the "volume and regularity" of flow are relevant to decide whether a feature plays a sufficient role in "the integrity of an aquatic system" to establish a significant nexus to a navigable-in-fact water, *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). Justice Kennedy expressly rejected jurisdiction over features with "[t]he merest trickle [even] if continuous." *Id.* at 769.

Second, the Rule's ordinary high-water mark criterion does not sufficiently identify "flow" to satisfy Justice Kennedy's test. The Rule defines an ordinary high water mark as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(c)(6), 80 Fed. Reg. 37,106. In *Rapanos*, Justice Kennedy rejected reliance on the ordinary high water mark as a "determinative measure" for establishing a significant nexus. 547 U.S. at 761, 781 (Kennedy, J., concurring in the judgment) (citing 33 C.F.R. § 328.3(e) (2005)). Justice Kennedy concluded that the use of an ordinary high water mark as a standard could "provide[] a rough measure of the volume and regularity of flow" if it were consistently applied. *Id.* at 781. "Yet the breadth of this standard . . . seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.* Such a standard would sweep in waters "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781-82.

In fact, the Federal Agencies' own studies demonstrate that the presence of an ordinary high water mark has no connection to water flow and fails to provide assurance of a significant nexus to navigable waters. For example, a 2006 Corps study found "no direct correlation between the location of OHWM indicators and

the inundation areas" in the arid southwest.[2] Rather, the indicators are "frequently the result of moderate to extreme flood events," and "are not associated with any return interval event or with physical channel features found in the field." *Id.* Similarly, a 2013 Corps study concluded that "OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics."[3] In short, the presence of an ordinary high water mark provides no indication of the regularity of flow and no indication of other channel characteristics that could justify a significant nexus.

Third, the "bed and banks" requirement is an even less reliable measure of water flow than the ordinary high water mark rejected by Justice Kennedy. For example, the Rule finds a "tributary" and "significant nexus" "even where the flow is broken up by a road, a wetland or other barrier." RRC Comments 2, ID-14547 (JA___); see also TWDB Comments 3, ID-16563 (JA___) ("Drier areas of the State would see the greatest increase in jurisdictional tributaries due to the greater number of intermittent or ephemeral streams in those areas. The greatest effect would likely be on some off-channel reservoirs that are proposed in the upper reaches of intermittent streams and in areas between major streams.").

[2] Robert W. Lichvar et al., U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of "Waters of the United States" in Arid Southwestern Channels* ERDC/CRREL TR-06-5 14 (2006), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1001678; *see also* AMA Comments 1011, ID-13951 (JA___).

[3] Lindsey Lefebvre, et al., U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* ERDC/CRREL-TR-13-2 17 (2013), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1017540; *see also* AMA Comments 11, ID-13951 (JA___).

Particularly in the arid west, channels with a bed and banks do not necessarily convey even a minimal amount of water. "From a practical standpoint, determining the ordinary high water mark of a bed and bank is a notoriously difficult task." OAG Comments 4, ID-5595 (JA___). The bed and banks requirement thus provides no assurance that a water "significantly affect[s] the chemical, physical, and biological integrity of" a navigable water, *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

Fourth, any doubt about the propriety of the Rule's tributaries category is dispelled by its inclusion of the remote "drains, ditches and streams" that Justice Kennedy specifically found to fall outside the CWA. *Id.* at 781. The Rule covers "[d]itches with perennial flow, . . . [d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, . . . [and] [d]itches, regardless of flow, that are excavated in or relocate a tributary." 80 Fed. Reg. at 37,078. Under this definition, "any landowner who has a ditch on his or her private property is at risk of having the federal government exert regulation over that ditch and impose burdensome and expensive federal regulations over dry land." OAG Comments 4, ID-5595 (JA___). The Federal Agencies' explanation that they will identify some ditches based not on current conditions but on the "historical presence of tributaries," 80 Fed. Reg. at 37,078-79, simply confirms their failure to comply with the limits of Justice Kennedy's analysis.

2. Per se coverage of all "adjacent waters."

The Rule's *per se* coverage of all "adjacent" waters is also irreconcilable with Justice Kennedy's approach. The Rule defines adjacent waters as, *inter alia*, (1) "all waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary; (2) all "waters located within the 100-year floodplain of a" primary water, impoundment, or tributary "and not more than 1,500 feet from the ordinary high water mark of such water;" and (3) "all waters [at least partially] located within 1,500 feet of the high tide line of a" primary water. 33 C.F.R. § 328.3(c)(2), 80 Fed. Reg. 37,105.

The Rule's assertion of jurisdiction over "adjacent waters" solely on account of their connection to a tributary necessarily lacks a "significant nexus" to interstate, navigable waters and is thus, illegal. Indeed, this aspect of the Rule flagrantly violates Justice Kennedy's explicit holding in *Rapanos*. Justice Kennedy rejected the Federal Agencies' prior approach of asserting jurisdiction over all wetlands actually adjacent to tributaries of navigable-in-fact waters. *Rapanos*, 547 U.S. at 778-83 (Kennedy, J., concurring in the judgment). Yet, in the Rule, the Federal Agencies double down on this unlawful assertion of authority by defining adjacency itself far more broadly than the adjacency notion that Justice Kennedy found insufficiently specific when dealing with tributaries of navigable-in-fact waters.

The Rule's adjacency definition also fails to satisfy Justice Kennedy's test, even when not dealing with tributaries because it includes *per se* coverage of all

waters within the 100-year floodplain and within 1,500 feet of a primary water or a "tributary," 33 C.F.R. § 328.3(c)(2)(ii); 80 Fed. Reg. 37,105. This blanket coverage includes no "assurance" that a water "significantly affect[s]" the "chemical, physical, and biological integrity" of a "navigable waters in the traditional sense," 547 U.S. at 779-81 (Kennedy, J., concurring in the judgment). A blanket assumption that a hydrologic connection exists merely because a water feature is situated in the 100-year floodplain fails Kennedy's requirement of having some assurance of hydrologic linkage.

Similarly, thus, the Rule's categorical claim of federal jurisdiction over all "adjacent" waters as far as 1,500 feet from a "tributary" is far more expansive than the Federal Agencies' jurisdictional theory Justice Kennedy rejected in *Rapanos* as precluded by the CWA. See *id.* at 781; see also *id.* at 778-79 (The Federal Agencies cannot regulate simply "whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.").

The Rule's other two distance-based adjacency categories—"all waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary, and "all waters [at least partially] located within 1,500 feet of the high tide line of a" primary water—are similarly unlawful. 33 C.F.R. § 328.3(c)(2), 80 Fed. Reg. 37,105. EPA's Science Advisory Board noted that "'the available science supports defining adjacency or determination of adjacency on the basis of functional relationships,' rather than

'solely on the basis of geographical proximity of distance to jurisdictional waters.'" 80 Fed. Reg. at 37,064 (citation omitted). The Federal Agencies blanket definition of adjacency based "solely" on "geographical proximity" do not provide the necessary assurance that the covered land features "play an important role in the integrity of . . . navigable waters," *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring in the judgment).

3. Case-by-case waters.

The Rule's approach to case-by-case jurisdictional waters is also inconsistent with Justice Kennedy's test. Under the Rule, the Federal Agencies can assert jurisdiction over all waters determined to have a "significant nexus to a" primary water, provided that the waters are: (1) "located within the 100-year floodplain of a" primary water; or (2) "located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment or tributary. 33 C.F.R. § 328.3(a)(8); 80 Fed. Reg. 37,105. Based on the "functions performed by the water," a "significant nexus" exists if the water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of a [primary water]." 33 C.F.R. § 328.3(c)(5) 80 Fed. Reg. 37, 106 (emphasis added). The functions include, among others, "[c]ontribution of flow," "[e]xport of organic matter," "[e]xport of food resources," and "[p]rovision of life cycle dependent aquatic habitat" for "species located in" primary waters. *Id.* By EPA's own admission, the definition covers "the

vast majority of the nation's water features." Economic Analysis 11, ID-20866 (JA___). This breadth exceeds what Congress intended and is unlawful.

Additionally, the Rule's definition of "significant nexus" covers far more waters than permitted under Justice Kennedy's approach. For example, it expressly permits the Federal Agencies to find a "significant nexus" if "[p]lants and invertebrates" "'hitchhik[e]'" on waterfowl. Connectivity Study 5-5, ID-20859 (JA___). 33 C.F.R. § 328.3(c)(5), 80 Fed. Reg. at 37,063, 37,072, 37,094 (permitting jurisdiction based on "dispersal" of wildlife). Migrating wildlife is a hydrologic connection already expressly rejected by the Supreme Court as too remote. In *SWANCC*, the Supreme Court rejected the Federal Agencies' argument that it had jurisdiction over isolated sand and gravel pits based merely on the presence of "approximately 121 bird species" that "depend upon aquatic environments for a significant portion of their life requirements." *SWANCC*, 531 U.S. at 164. As Justice Kennedy explained in *Rapanos*, the Federal Agencies' argument in *SWANCC* did not establish a sufficient "connection" between the isolated pits and navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment). But here, nevertheless, the Rule returns to the very criteria already rejected by the Supreme Court. The Rule is thus unlawful and must be vacated.

C. CWA does not contain the clear congressional authorization necessary for a rule as intrusive as this one.

Even if the Rule were not plainly foreclosed by the CWA, it would still exceed the Federal Agencies' statutory authority because its transformational exercise of

authority is not clearly authorized by Congress. Congress does not delegate to Federal Agencies authority at the outer reaches of Congress's power except in clear terms. *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. Nor does Congress grant transformative authority to regulate matters of vast political and economic significance absent a clear statement. *Util. Air Reg. Grp.*, 134 S. Ct. at 2444 ("*UARG*"). Both of these principles are violated by the Rule, which lacks a clear statement from Congress to justify the Rule's assertion of the broad authority that it claims.[4]

1. The Rule violates the principle that clear congressional authorization is required for a rule that raises serious federalism concerns.

It is a "well-established principle that it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Thus, if Congress intends to legislate "in traditionally sensitive areas, such as legislation affecting the federal balance," it must make its intention plain. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also BFP v. Resolution Tr. Corp.*, 511

[4] For these and other reasons, the Federal Agencies are not entitled to any deference under *Chevron*, 467 U.S. 837.

U.S. 531, 544 (1994) ("To displace traditional state regulation . . . the federal statutory purpose must be 'clear and manifest.'"); *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016) (finding that "[a]ny attempt by the federal government to interpose itself into [the] state-subdivision relationship therefore must come about by a clear directive from Congress").

The Supreme Court applied this clear statement rule in *SWANCC* to invalidate an assertion of CWA jurisdiction by the Corps far less capacious than what is at issue in the Rule. Finding "nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit," the Court rejected the agency's claimed jurisdiction because it "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. The Court noted that "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" *Id.* (quoting 33 U.S.C. § 1251(b)).

Similarly, the plurality in *Rapanos* applied the clear statement rule to bolster its rejection of the Federal Agencies' attempt to extend CWA jurisdiction to "intermittent" and "ephemeral flows of water." 547 U.S. at 737-38 (Scalia, J., plurality). The plurality found that any attempt to federally regulate such water would not only be "an unprecedented intrusion into traditional state authority," but would also "stretch[] the outer limits of Congress's commerce power and

raise[] difficult questions about the ultimate scope of that power." *Id.* at 738. That sort of authority requires a "clear and manifest statement from Congress," and "the phrase 'the waters of the United States' hardly qualifies" as such a statement. *Id.*; *see also id.* ("[W]e would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

The Rule likewise reaches and even exceeds the outer bounds of Congress's constitutional authority. The Rule's expansion of federal authority over intrastate waters will "impinge[] o[n] the States' traditional and primary power over land and water use," and "readjust the federal-state balance." *SWANCC*, 531 U.S. at 174. The Rule's coverage of intermittent waters, ephemeral waters, and isolated sometimes-wet lands "presses the envelope of constitutional validity," *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality) (citation omitted), far more so than the challenged agency actions in *Rapanos* and *SWANCC*.

The CWA provides only that the Federal Agencies may require permits for pollutant discharges to "navigable waters" defined as "waters of the United States." This text does not support the Federal Agencies' expansive interpretation, and certainly does not do so clearly. *See SWANCC*, 531 U.S. at 174. To the contrary, Congress expressed an intent to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources," 33 U.S.C. § 1251(b).

2. The Rule violates the principle that federal agencies cannot exercise transformative power over matters of vast economic and political significance without clear congressional authorization.

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

In the Rule, the Federal Agencies assert transformative authority. The Rule seeks to change fundamentally the allocation of federal and state authority in land and water use. As the plurality noted in *Rapanos*, "extensive federal jurisdiction . . . would authorize the [Federal Agencies] to function as [] *de facto* regulator[s] of immense stretches of intrastate land . . . with the scope of discretion that would befit a local zoning board." 547 U.S. at 738 (Scalia, J. plurality). By the Federal Agencies' own estimate, the Rule will result in an increase in determinations of

federal jurisdiction by 2.84 to 4.65 percent. 80 Fed. Reg. at 37,101. Even accepting as true this underinclusive estimation of the Rule's expansion, this seemingly small percentage translates to the assertion of authority over a vast amount of additional water and sometimes-wet land. Such an expansion of authority conflicts with the findings of *Rapanos* and *SWANCC* and allows the Federal Agencies to function as a zoning board with the authority to effectively regulate road construction, building construction, farming, and numerous other activities almost anywhere in the nation.

The economic implications of the Rule for the landowners, businesses, and public Federal Agencies that will be subject to additional federal permitting requirements further demonstrate the Rule's transformative expansion of federal authority. As the Supreme Court observed recently, "[t]he costs of obtaining . . . a permit [from the Corps] are significant," *U.S. Army Corps of Eng'rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1812 (2016), and "the permitting process can be arduous, expensive, and long," *id.* at 1815 (citing *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality)). Indeed, "[o]ver $1.7 billion is spent each year by the private and public sectors obtaining wetland permits." *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality) (quotation and citation omitted). And those are just the costs associated with permitting. Among other economic implications, the Rule's expansion of the Federal Agencies' authority will result in lost opportunities when permits improperly required under the expanded federal regime are delayed or are too costly to justify a project in the first place.

The Federal Agencies cannot point to a clear statement from Congress authorizing such a transformative expansion of the Federal Agencies' authority over local land and water use. The phrase "waters of the United States" in the CWA cannot plausibly be construed to clearly authorize the wide reach of the Rule.

Issue 2. The Rule violates the APA in two important respects. The rule is arbitrary and capricious and because the final version is not a "logical outgrowth" of the proposed version, it violates notice-and-comment rulemaking

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

A. 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) (JA ___). However, the waters described in the scientific literature cited by the Federal 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 Federal 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 Federal 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 Federal Agencies only supports a significant nexus determination for a limited subset of waters meeting the definition of "tributary." As a result, the Federal 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 B at 9 (emphasis added). Although a "bright line" test is not inherently arbitrary, the 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 justifiable 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, which, as discussed below, violate the APA because they were not subject to public notice and comment.

B. The Rule violates the APA's notice and comment requirements.

1. Notice-and-comment is critical to proper rulemaking.

An agency must make its rules available for meaningful public comment. 5 U.S.C. § 553(b). Failure to abide by the strictures of notice-and-comment rulemaking deprives the agency of meaningful comment, increases the likelihood of arbitrary decision-making, and frustrates the courts' ability to conduct meaningful review. For example, when a party challenges a final rule in court, that "judicial review of an agency decision is typically limited to the administrative record." *Kappos v. Hyatt*, 566 U.S. 431, 438 (2012). In turn, the record the party will need to rely upon will often consist of the "responsive data or argument" submitted during the notice-and-comment period. S. Rep. No. 752 at 200 (1945).

That is why one of the principal purposes of the notice-and comment requirement is "to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *See Int'l Union, UMWA v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *see also Ohio Dep't of Human Servs. v. U.S. Dep't of Health & Human Servs.*, 862 F.2d 1228, 1236 (6th Cir. 1988). Importantly, when an agency adopts a final rule that is not a "logical outgrowth" of the proposal, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), the result will often be the imposition of significant regulatory requirements on which the record is underdeveloped, or in an extreme example like this case, silent.

The APA's notice-and-comment mandate, 5 U.S.C. § 553(b), is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union*, 407 F.3d at 1259. These procedures "ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994). To secure these critical objectives, the final rule must be a "logical outgrowth" of the proposal. *Long Island*, 551 U.S. at 174. A final rule satisfies that test if affected parties "should have anticipated that [the] requirement" embodied in the final rule might be adopted, including because the agency satisfied its duty of informing the

public of "the range of alternatives being considered with reasonable specificity." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

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

Similarly, in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), the court vacated a final rule where the listing of hazardous waste went from a "largely supplementary function" in the proposal to a "heavy emphasis" in the final rule. *Id.* at 751-52. And in *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076 (D.C. Cir. 2009), the agency violated the APA by proposing to allow parties to recommend comparing data from the most recent year, but then adopting a rule that allowed data comparison over the past four years. *Id.* at 1082; *accord Int'l Union*, 407 F.3d at 1259-60; *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

2. After basing the proposed rule on hydrological considerations, the Federal Agencies switched focus and built the final rule around distance-based components and an unduly narrow exclusion that were never submitted for notice-and-comment.

The Rule is a textbook example of insufficient notice-and-comment resulting in a procedurally flawed and arbitrary and capricious rule. The Federal Agencies built the jurisdictional reach of the term "navigable waters" around definitional changes never noticed in the proposed version of the Rule ("Proposed Rule"). These definitions included: distance-based criteria affecting adjacent waters, distance—and connectivity—based criteria affecting case-by-case waters, and exclusions for farming and ranching uses. 80 Fed. Reg. 37,105. The lack of notice deprived parties of the opportunity to comment meaningfully on those criteria, thereby undermining informed agency decision-making. These failures, in turn, contributed to the promulgation of a Rule that is unsupported by anything approaching adequate record evidence, undermining meaningful judicial review.

(a) Distance-Based Criteria for Adjacent Waters

The proposed version of the Rule defined "adjacent waters" as all waters within a so-called "riparian area" or "floodplain" of a primary i.e., navigable, water. 79 Fed. Reg. at 22,269. In the final version, the Federal Agencies adopted three entirely new distance-based components to define adjacency: (1) waters within 100 feet of a primary water, impoundment, or "tributary;" (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or "tributary;" and (3)

waters within 1,500 feet of the high-tide line of a primary water. 80 Fed. Reg. 37,105.

None of these three central "adjacency" distance-based components are a logical outgrowth of the proposal, because no interested party "should have anticipated" them, *Small Refiner*, 705 F.2d at 549. Had proper notice been given, parties from all sides would have submitted comments, data, and detailed maps, addressing the practical import and reasonableness of adopting these particular components. This did not occur because the public had no idea these components were being considered. Even the Corps was in the dark about distance-based modifications to the Proposed Rule until months after the close of the public comment period. *See* Moyer Memorandum 1, ID20882 ("It was unknown to the Corps until early February [2015] that Army and EPA were contemplating a "bright-line" cut off of CWA jurisdiction either 5,000 or 4,000 linear feet").

The Federal Agencies will no doubt argue that they did not violate the APA because they sought comment on "'establishing specific geographic limits' for adjacency such as 'distance limitations.'" 79 Fed. Reg. at 22,208–09[5]. But this request was in the context of "using *shallow subsurface or confined surface hydrological connections* as a basis for adjacency." 79 Fed. Reg. at 22,208

[5] The full text of the relevant portion of the sentence being: "establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example, distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent." 79 Fed. Reg. at 22,208.

(emphasis added). Unspecified distance limitations based on hydrological connections are a far cry from the Rule's imposition of precise physical distances between waters (or dry land features) and other waters with no hydrological connections. Asking about the merits of "geographical limitations" in general does not establish a predicate that allows the Federal Agencies arbitrarily to adopt, as a final rule, any distance-based definition of adjacency whatsoever, including both as to the reference point—e.g., "primary water, impoundment, or tributary;" "floodplain;" "high tide line;" *or any other feature*—and to the distance from that reference point—"100 feet," "1,500 feet," *or any other distance*—without seeking public input. This approach could be used to justify virtually "any final [adjacency] rule" and must be rejected. *Envtl. Integrity*, 425 F.3d at 998.

The proposed definition of "neighboring" was rooted in "riparian" and "floodplain" proximity, with no hint of distance-based criteria. 79 Fed. Reg. 22,263. Riparian was proposed as the "transition areas between terrestrial and aquatic ecosystems" and "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." *Id.* at 22,196; 22,199. Floodplain was described as "an area bordering inland or coastal waters . . . formed by sediment deposition . . . and is inundated during periods of moderate to high water flows." *Id*. at 22,199. Nothing in this proposed language suggests that arbitrary numerical distance limitations, unrelated to the actual ecological and hydrological connection of waters, would be adopted in the Rule. Additionally, the mention of

"moderate" flows in the proposed description of floodplain does not indicate that flows as rare as a once in one-hundred year event would be chosen as a benchmark. As in *Small Refiner*, the Federal Agencies failed to "describe the range of alternatives being considered with reasonable specificity." 705 F.2d at 549.

The Federal Agencies' approach thus resulted in a final rule that was never "tested via exposure to diverse public comment," and was adopted in a manner manifestly "[un]fair[] to affected parties," including because it gave "affected parties [no] opportunity to develop evidence in the record to support their objections to the rule." *Int'l Union*, 407 F.3d at 1259. It also deprived the Federal Agencies of information from those "most interested" and "best informed" regarding this subject matter: the regulated community and the state regulators who implement the CWA and related state programs at the field level. *Phillips Petroleum*, 22 F.3d at 620.

While the Federal Agencies' approach would be unlawful regardless of the context, it is particularly unacceptable given the scope of this rulemaking. The decision as to what qualifies as a "water of the United States" affects how millions of acres of local land and water features are regulated for purposes of the CWA. If the Federal Agencies wanted to build the definition of adjacency around distances from certain reference points, they were duty-bound to inform the public of "the range of alternatives being considered with reasonable specificity," *Small Refiner*, 705 F.2d at 549, as to *both* the reference points themselves *and* the distances. The

Federal Agencies' failure on this score led to an APA failure that is much more significant than the comparatively banal notice failures involving the definition of "small refinery," *Small Refiner*, 705 F.2d at 549, whether the listing of wastes would play a "supplementary" or "heavy" role, *Shell Oil*, 950 F.2d at 751-52, or whether data from one or four years could be considered, *CSX*, 584 F.3d at 1078.

(b) Distance-Based Criteria For Case-by-Case Waters

The Proposed Rule defined a category of case-by-case waters that would be subject to CWA jurisdiction in the event the Federal Agencies determined *any other water* had a "significant nexus" with a navigable water, with "significant nexus" defined, in part, as "significantly affect[ing] the chemical, physical, or biological integrity of a water identified" as jurisdictional. 79 Fed. Reg. at 22,263. Many parties raised concerns about the expansive reach of the Federal Agencies' ability to determine that *any other water* was jurisdictional on a case-by-case basis. *See, e.g.*, RRC Comments 3, ID-14547 (JA___); TDA Comments 1, ID-18854 (JA___); TCEQ comments 7-8, ID-14279 (JA___); OAG Comments 2, ID-5595 (JA___); TxDOT Comments 4, ID-12757 (JA___); TWDB Comments 7, ID-16563 (JA___).

The Federal Agencies sought to address the illegality of their proposal by including in the Rule quantitative and other criteria not suggested in the Proposed Rule. The case-by-case analysis would now consider as jurisdictional: (1) waters within the 100-year floodplain of a navigable water; and (2) waters within 4,000 feet of the ordinary high water mark or high tide line of a navigable water,

impoundment, or tributary. 33 C.F.R. § 328.3(a)(8); 80 Fed. Reg. at 37,105. The Rule also added nine functional criteria[6] that did not appear in the proposal, and defined the terms "ordinary high water mark" and "high tide line" for the first time. *Id.* § 328.3(c)(5). These are material alterations substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the Proposed Rule. As noted by the North Dakota District Court, nothing in the call for comment would have given notice to an interested person that the rule could change from an ecologically—and hydrologically—based rule to one that finds itself based in geographic distance. *North Dakota v. EPA*, No. 3:15-cv-59 ECF No. 70 at 15.

The proposed version of the Rule observed that "'distance of hydrologic connection' is one of the factors that could be considered when evaluating a connection with a downstream water." 79 Fed. Reg. at 22,214. But this opaque sentence, which has nothing to do with the nine functional criteria or definitions of ordinary high water mark or high tide line, appeared to be addressing factors that the Federal Agencies would consider in conducting an all-things-considered, case-by-case determination. Limited by its own terms to the context of hydrologic

[6] The functions being: (i) Sediment trapping, (ii) Nutrient recycling, (iii) Pollutant trapping, transformation, filtering, and transport, (iv) Retention and attenuation of flood waters, (v) Runoff storage, (vi) Contribution of flow, (vii) Export of organic matter, (viii) Export of food resources, and (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species in a water identified in paragraphs (a)(1) through (3) of this section. 33 C.F.R. § 328.3(c)(5), 80 Fed. Reg. 13, 106.

connections, this vague observation did not suggest that the Federal Agencies were considering or requesting comments on hard-and-fast distance-based criteria, including when there is no hydrological connection, let alone inform the public of "the range of alternatives being considered with reasonable specificity," *Small Refiner*, 705 F.2d at 549, as to either the particular reference points or the particular distances being considered. The subsections of the proposal that follow this single sentence consist of three-and-a-half pages discussing potential requirements for case-by-case waters, and *none* of the approaches contemplates adopting criteria based on specific distances from specific reference points or the other new criteria that appeared for the first time in the Rule. *See* 79 Fed. Reg. at 22,214–17.

Yet the final version of the Rule is replete with distance criteria, not just case-by-case coverage focused upon (1) waters within the 100-year floodplain of a primary water, and (2) waters within 4,000 feet of a primary water, impoundment, or tributary but also to establish a *per se* jurisdictional finding for all waters and lands (1) within 100 feet of the ordinary high water mark of a primary water, impoundment, or tributary, (2) within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or tributary, or (3) within 1,500 feet of the high tide line of a primary water. 80 Fed. Reg. 37,105.

The Federal Agencies argue that these distance-based components are "reasonable and practical," consistent with unspecified "experience," and

supported by "the implementation value of drawing clear lines." 80 Fed. Reg. at 37,085-91. Such "conclusory statements" are insufficient, *Amerijet*, 753 F.3d at 1343, 1350. Moreover, the Federal Agencies' Science Advisory Board rejected any distance-based approach, arguing that "the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water." SAB 2-3, ID-7531 (JA___).

Given that the Federal Agencies adopted the distance-based components without record support and without explaining why alternative distances and reference points were rejected, *State Farm*, 463 U.S. at 41-42, and then justified these components by "conclusory" statements, *Amerijet*, 753 F.3d at 1350, the Rule is plainly unlawful.

(c) The Rule's exclusion of farmland from the per se adjacent waters category, but not the per se tributary category, was not part of the proposed version of the Rule and is also arbitrary and capricious.

The Federal Agencies adopted an exclusion in the Rule stating, "waters being used for established normal farming, ranching, and silviculture activities" were exempt from *per se* jurisdiction under the Rule's adjacency category, but not from *per se* jurisdiction under the tributary category. 33 C.F.R. § 328.3(c)(1); 80 Fed. Reg. 37,105. At no point in the Proposed Rule did the Federal Agencies reveal that they were considering treating farmland differently as between the "adjacent" and

"tributary" waters. In fact, the Federal Agencies specifically stated in the Proposed Rule *in four separate locations* that it would "not affect any of the exemptions provided by the CWA section 404(f), including those for normal farming, silviculture, and ranching activities." 79 Fed. Reg. 22,218; *Id.* at 22,189, 22,193, and 22,199. Had the Federal Agencies informed the public that they were contemplating this exclusion, the States and farmers would have submitted comments explaining why farmland should be excluded from *all per se* categories. In the Rule, the Federal Agencies explained that this exclusion was justified in light of "the vital role of farmers in providing the nation with food, fiber, and fuel." 80 Fed. Reg. 37,080. While the States agree with this rationale, that justification applies just as strongly to excluding farmland from the *per se* tributary category.

The Federal Agencies "nowhere even hinted," *CSX*, 584 F.3d at 1082, that they were considering treating farmland differently as between the adjacency and "tributary" categories. The Federal Agencies' failure to explain their decision to exclude farmland from one *per se* category, but not the other, violates the mandate that an agency must "treat similar cases in a similar manner unless it can provide a legitimate reason," *Babbitt*, 92 F.3d at 1258.

In at least the above three ways, the Rule is not a logical outgrowth of the Proposed Rule. The D.C. Circuit has explained that adopting a final rule that is not a logical outgrowth of the proposal "almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). Vacatur of the Rule is the proper outcome here.

Issue 3. The Rule exceeds Congress's Commerce Clause Authority.

The Constitution grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. That power extends only to three areas: (1) "channels of interstate commerce;" (2) the "instrumentalities of interstate commerce;" and (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In both *SWANCC* and *Rapanos*, the Supreme Court determined that Congress' exercise of its Commerce Clause authority in the CWA could not be stretched to include isolated ponds providing habitat for migratory birds (*SWANCC*) or property at least 11 miles from navigable water (*Rapanos*).

In *SWANCC*, the Court rejected the Federal Agencies' assertion of authority over isolated intrastate waters, noting that this authority was not "consistent with the Commerce Clause." 531 U.S. at 162. The Rule challenged here reaches even farther and cannot be justified as a valid exercise of Congress' authority under the Commerce Clause to regulate "channels of interstate commerce."[7] As the Supreme Court explained in *SWANCC*, the CWA is authorized by Congress's "traditional

[7] Nor can the Rule be justified under the other two categories of congressional authority under the Commerce Clause: "instrumentalities of interstate commerce" or "activities that substantially affect interstate commerce." Lopez, 514 U.S. at 558-59. Nothing in the relevant statutory provision relates to instrumentalities of interstate commerce, and Congress has not sought to create a comprehensive regulatory scheme for water and land-use management sufficient to invoke the substantial-effects category. See *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment).

jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'" 531 U.S. at 172; *id.* at 177 n.3 (finding no indication that "Congress intended to exert anything more than its commerce power over navigation"). The Court noted "Congress evidenced its intent to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of the term." *Id.* at 167. However, a "central requirement" of the CWA is that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring). The Rule instead sweeps in many local land and water features that have only an extremely tangential, if any, connection to navigable-in-fact waters, including dry or ephemeral stream beds that might rarely flow.

Like the rule that was struck down in *Rapanos*, the Rule "stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power," without a clear statement from Congress authorizing this "agency theory of jurisdiction that presses the envelope of constitutional validity." 547 U.S. at 738 (Scalia, J., plurality). And Justice Kennedy noted in concurrence that the significant nexus test he would require was necessary to avoid "serious constitutional or federalism difficulty" in the context of waters "*that are adjacent to tributaries*." *Id.* at 782 (Kennedy, J., concurring) (emphasis added). The concurrence's significant nexus test was applied to the prior codification of 33 C.F.R. § 328.3 (effective to August 27, 2015), which was much narrower than the Rule. Yet, despite the message of the *Rapanos* plurality *and* the concurrence, the

Rule now reasserts jurisdiction over non-navigable interstate waters that are only remotely connected, if at all, to navigable waters. This exceeds the Federal Agencies' authority to regulate channels of interstate commerce. Because the Rule exceeds Congress's delegable Commerce Clause authority, it is unlawful and should be vacated.

Issue 4. The Rule violates the States' Tenth Amendment rights.

Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const., amend. X. Tenth Amendment concerns are implicated when a federal rule regulates the "states as states," when it addresses matters that are indisputably attributes of state sovereignty, and when compliance with the rule would directly impair a State's ability to structure integral operations in areas of traditional state functions. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286-87 (1981). The federal system "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011).

State authority to regulate and manage local lands and waters is a core sovereign interest. Indeed, state authority in this realm "is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982).

That is why Congress so clearly recognized the States' inherent powers over local lands and water resources in the CWA, *see* 33 U.S.C. § 1251(b), and purposefully integrated federalism principles throughout the Act. In *SWANCC*, the Supreme Court relied on this core "traditional state power" to explain its narrower interpretation of the CWA. 531 U.S. at 172-73. The provision of the rule at issue in *SWANCC* exceeded the Federal Agencies' authority, the Court held, because it covered "nonnavigable, isolated, intrastate waters" such as seasonal ponds. *Id.* at 170-71. The Court supported its determination by finding that the Federal Agencies' interpretation would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power"—specifically, the States' "traditional and primary power over land and water use." *Id.* at 173.

The Rule's overbroad assertion of authority over local land and water features that have only a remote connection to navigable-in-fact waters invades the States' sovereign authority, in violation of their Tenth Amendment rights. As already discussed, the definitions in the Rule extend federal jurisdiction to remote, usually-dry, and entirely intrastate land and water features remote from any navigable waterway. Once the Federal Agencies assert federal jurisdiction, they displace state and local land regulation, and act as a "*de facto*" federal "zoning board." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). The issue is not merely the breadth of jurisdiction asserted by the federal government, but also the scope of regulatory power that the federal government would exercise in those areas. *See*

SWANCC, 531 U.S. at 173.[8] Here, that regulatory power is the "[r]egulation of land use"—"a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality).

The Rule's unlawful expansion of federal jurisdiction over traditional state lands and water resources necessarily regulates "states as states," *Hodel*, 452 U.S. at 286-87, because of the extensive cooperative federalism principles embodied in the CWA. For example, all States are required to develop water quality standards for federal jurisdictional waters within their borders. 33 U.S.C. § 1313. They must also review those standards at least every three years, *id*. § 1313(c), and report to EPA on the quality of all federal waters in the State every other year, *id*. § 1315(b). States must also develop complicated total maximum daily loads for any water not meeting established water quality standards. *Id*. § 1313(d). States are also required to issue water quality certifications for every permit the federal government issues within their borders, including section 404 permits issued by the Corps. *See id*. § 1341(a)(1). For the forty-six States (including Texas, Louisiana, and Mississippi) with authority to implement the NPDES program under 33 U.S.C. § 1342, additional federal waters means additional permitting responsibilities. Finally, expanded federal jurisdiction directly affects state highway, water management, transmission line, and pipeline projects, triggering federal permitting

[8] Indeed, once federal jurisdiction is triggered, the potential scope of that power is exceedingly broad. *See, e.g.*, 33 C.F.R. § 320.4(a) (identifying approximately 25 "public interest" factors the Corps considers when determining whether to issue a section 404 permit, including economic, aesthetics, land use, historic properties, safety, and food and fiber production).

requirements for potential impacts to newlyminted federal waters. TPWD Comments 4, ID-16563 (JA___); TXDOT Comments 4-5, ID-12757 (JA___); RRC Comments 1-2, ID-14547 (JA___).

The practical impact upon the States from the Rule's expansion of federal authority is breathtaking. From wetlands in Alaska to prairie potholes in North Dakota, arroyos in New Mexico, ephemeral drainages in Wyoming, and coastal prairie wetlands in Texas, the Rule extends jurisdiction to virtually every potentially wet area of the country. In Texas, areas such as playa lakes, prairie potholes, coastal depression complexes, and karstic features lacking perennial, channelized surface connection to a traditional navigable water could now fall under the reach of the Rule, even though, as with the playa lakes of the Texas Panhandle, they can be miles from a water course. TWDB Comments 7, ID-16563 (JA___). In fact, the Rule sweeps so broadly that the Federal Agencies find it necessary explicitly to disclaim authority over "puddles" and swimming pools "created in dry land." 33 C.F.R. § 328.3(b)(4); 80 Fed. Reg. 37,105. The Federal Agencies acknowledge that "the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea" and that the 100-year floodplain encompasses an even larger area. Economic Analysis 11, ID-20866 (JA___). These areas are swept within the jurisdictional reach of the Rule.

The Rule's additional regulation will come at a steep financial cost to the States. For example, the Federal Agencies have estimated that the Rule will impose

additional obligations on the States of between $798,000 and $1.3 million per year under the section 401 water quality certification program. Economic Analysis 19, ID-20866 (JA___). The NPDES storm water permit program will add $360,000 each year to state budgets, *id*. at 25 (JA___), and another $270,000 to regulate confined animal feeding operations, *id*. at 27-28 (JA___). The States believe that these and other estimates in the Federal Agencies' Economic Analysis are grossly understated. *See, e.g*., TDA Comments 2-3, ID-18854 (JA___); RRC Comments 4, ID-14547 (JA___).

In addition, through the Rule, the Federal Agencies are asserting regulatory authority over traditionally state-regulated waters. This displacement of state authority impairs the States' abilities to establish and enforce their own policies for their waters and lands. For example, waters that fall outside the scope of federal jurisdiction remain subject to regulation as state waters through local laws and regulations. *See, e.g.*, Tex. Water Code §§ 26.001 *et seq.;* Miss. Code Ann. §§ 49-17-1 *et seq.* and 51-3-1, *et seq.* and 11 Miss. Admin. Code Pt. 6, Ch.1 and 11 Miss. Admin. Code Pt. 7, Ch. 1. Instead of regulating land and water within their borders to advance their own sovereign interests, the States must now defer to the federal government's framework and policies established under the CWA.

V. CONCLUSION AND PRAYER

There are many reasons to vacate this Rule. It cannot be supported by the plain language of the Clean Water Act, it cannot pass either test set by the plurality and concurrence in *Rapanos*, it cannot be justified as a valid exercise of congressional authority under the Commerce Clause, and it cannot be excused in the face of the Tenth Amendment. Perhaps most egregious is its violation of the APA's notice-and-comment rulemaking. The APA is virtually a how-to guide to proper rulemaking, but it was not followed here. When that type of procedural error occurs, vacatur is required. Texas, Mississippi, and Louisiana pray for vacatur now.

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CERTIFICATE OF SERVICE

I certify that on October 18, 2018, a copy of the foregoing document was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on all attorneys in this case.

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