No. 15-3751 (lead)

In the

United States Court of Appeals

for the

Sixth Circuit

IN RE: ENVIRONMENTAL PROTECTION AGENCY
AND DEPARTMENT OF DEFENSE,
FINAL RULE: CLEAN WATER RULE:
DEFINITION OF "WATERS OF THE UNITED STATES,"
80 Fed. Reg. 37,054, Published on June 29, 2015 (MCP No. 135)

On Petitions for Review of a Final Rule
of the U.S. Environmental Protection Agency and the
United States Army Corps of Engineers

OPENING BRIEF FOR THE BUSINESS AND MUNICIPAL PETITIONERS

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CIRCUIT RULE 26.1 STATEMENT

The Business and Municipal Petitioners jointly signing this brief are:

No. 15-3751: Murray Energy Corporation

No. 15-3823: Chamber of Commerce of the United States;
National Federation of Independent Business;
State Chamber of Oklahoma;
Tulsa Regional Chamber; and
Portland Cement Association

No. 15-3850: American Farm Bureau Federation;
American Forest & Paper Association;
American Petroleum Institute;
American Road and Transportation Builders Association;
Greater Houston Builders Association;
Leading Builders of America;
Matagorda County Farm Bureau;
National Alliance of Forest Owners;
National Association of Home Builders;
National Association of Realtors;
National Cattlemen's Beef Association;
National Corn Growers Association;
National Mining Association;
National Pork Producers Council;
National Stone, Sand, and Gravel Association;
Public Lands Council;
Texas Farm Bureau; and
U.S. Poultry & Egg Association

No. 15-3858: Utility Water Act Group

No. 15-3885: AGrowStar, LLC;
Georgia Agribusiness Council, Inc.;
Greater Atlanta Homebuilders Association, Inc.;
R. W. Griffin Feed, Seed & Fertilizer, Inc.; and
Southeastern Legal Foundation, Inc.;

CIRCUIT RULE 26.1 STATEMENT—continued

No. 15-4159: Southeast Stormwater Association, Inc.;
Florida Stormwater Association, Inc.;
Florida Rural Water Association, Inc., and
Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau

No. 15-4188: Washington Cattlemen's Association;
California Cattlemen's Association;
Oregon Cattlemen's Association;
New Mexico Cattle Growers Association;
New Mexico Wool Growers, Inc.;
New Mexico Federal Lands Council;
Coalition of Arizona/New Mexico Counties for Stable Economic Growth;
Duarte Nursery, Inc.;
Pierce Investment Company;
LPF Properties, LLC; and
Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; and
Port Terminal Railroad Association

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation

No. 15-4305: American Exploration & Mining Association

No. 15-4404: Arizona Mining Association;
Arizona Farm Bureau;
Association of Commerce and Industry;
New Mexico Mining Association;
Arizona Chamber of Commerce & Industry;
Arizona Rock Products Association; and
New Mexico Farm & Livestock Bureau

CIRCUIT RULE 26.1 STATEMENT—continued

Pursuant to Sixth Circuit Rule 26.1, the foregoing Business and Municipal Petitioners make the following disclosures:

1. Are any of the petitioners subsidiaries or affiliates of publicly owned corporations?

Petitioner Murray Energy owns approximately 50% of the limited partner interest in Foresight Energy LP, a publicly owned corporation that trades on the New York Stock Exchange.

Petitioner Port Terminal Railroad Association conducts railroad terminal operations at Houston, Texas, on a for-profit basis. Its income and losses flow through to its three railroad members: Union Pacific Railroad, BNSF Railway Co., and Kansas City Southern Railway Co.

No other petitioner signing this brief is a subsidiary or affiliate of any publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the petitions, that has a financial interest in the outcome?

No.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Cases—continued

Statutes, rules, & regulations

Statutes, rules, & regulations—continued

Statutes, rules, & regulations—continued

Miscellaneous

Miscellaneous—continued

INTRODUCTION

These petitions for review challenge the Environmental Protection Agency's and U.S. Army Corps of Engineers' (the agencies') regulation defining "waters of the United States" (the Rule) within the meaning of the Clean Water Act (CWA). In both the process leading to the Rule's promulgation and the substance of the Rule, the agencies disregarded the statutory and constitutional limits on their authority.

***First*,** the agencies violated fundamental tenets of administrative law. The agencies failed to reopen the comment period after making fundamental changes to the proposed Rule, and they withheld the key scientific report on which the Rule rested until after the comment period closed. The agencies also refused to undertake required economic and environmental analyses, including a mandatory analysis of small business impacts and consideration of less burdensome alternatives; engaged in an unprecedented propaganda campaign to promote the Rule and rebuke its critics, displaying a closed mind even during the public comment period; and lobbied against legislative efforts to stop the Rule, which the U.S. Government Accountability Office has concluded was illegal.

***Second*,** the Rule expands the agencies' jurisdiction well beyond what the CWA's text and structure allows. The agencies disregarded statutory checks on their power and distorted relevant Supreme Court precedent. At bottom, the Rule reads the term *navigable* out of the CWA, asserting

jurisdiction over remote and isolated features that bear no meaningful relationship to "navigable waters."

Finally, the Rule is unconstitutional. The Due Process Clause protects the regulated public from laws that fail to put them on notice of what is prohibited or that give government agents unchecked discretion to enforce the law in arbitrary and discriminatory ways. The Rule offends both prongs of the vagueness doctrine. It opens regulated entities to severe civil and criminal penalties that rest on nebulous standards like "more than speculative or insubstantial," "similarly situated," and "in the region," and on ambiguous definitions of terms like "ordinary high water mark." These uncertain standards are impossible for the public to understand or the agencies to apply consistently. By regulating features across the landscape that have no meaningful relationship to navigable waters, the Rule also exceeds the agencies' power under the Commerce Clause and usurps State authority under the Constitution's and the CWA's federalist structure. For the reasons below and in the brief filed by thirty-one States, the Rule must be vacated.

JURISDICTION

These twelve industry and municipal petitions challenge the final agency action published at 80 Fed. Reg. 37,054 (June 29, 2015), which was "issued for purposes of judicial review" on July 13, 2015. *Id*. By order dated February 22, 2016, this Court held that it has jurisdiction under 33 U.S.C.

1369(b)(1)(F). *See* 817 F.3d 261 (6th Cir. 2016).[1] The petitions were timely filed between July 13, 2015 and November 9, 2015. Petitioners here have individual or associational standing to bring their respective challenges.[2]

ISSUES PRESENTED FOR REVIEW

1. Did the agencies promulgate the Rule without observance of procedure required by law?

2. Is the Rule arbitrary and capricious or contrary to law?

3. Does the Rule exceed the agencies' authority under the Clean Water Act or the United States Constitution?

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[1] The National Association of Manufacturers has petitioned the Supreme Court for review of this Court's jurisdictional ruling. *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.*, No. 16-299 (U.S., filed Sept. 2, 2016).

[2] The appended declarations and petitioners' record comments demonstrate that petitioners or their members "are suffering immediate or threatened injury as a result of the [Rule]." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). *See* Addendum (standing declarations). *See also, e.g.*, U.S. Chamber Comments, ID-19343 (JA__); NFIB Comments, ID-8319 (JA__); Martin Marietta, Cement and Southwest Divisions, Comments 2, ID-13994 (JA_); ConocoPhillips Comments 1-2, ID-16346 (JA_); Southern Company Comments 8-11, ID-19647 (JA_). They further demonstrate that the associational petitioners' members would have standing to sue in their own right, the interests at stake are germane to each association's purpose, and neither the claims asserted nor the relief requested requires the participation of individual members. *See Sierra Club v. EPA*, 793 F.3d 656, 661 (6th Cir. 2015). Beyond that, the agencies' failure to provide an adequate opportunity for public comment prior to acting has aggrieved all petitioners. *See JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994).

STATEMENT OF THE CASE

A. Legal background

The CWA establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[3] One element of Congress's comprehensive strategy is the program to regulate the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source," except "in compliance with" other provisions of the Act. 33 U.S.C. 1311(a), 1362(12)(A). The Act in turn defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

To "discharge" lawfully to navigable waters, a business or person must obtain a permit. Under Section 402 of the Act, EPA and authorized state agencies may issue permits for "the discharge of any pollutant." 33 U.S.C. 1342(a). Under Section 404, the Army Corps of Engineers may issue permits for "the discharge of dredged or fill material." 33 U.S.C. 1344(a).

For illegal discharges, Congress created a strict liability scheme, enforceable by agencies and private citizens with civil actions for penalties of

[3] The Act's provisions address water pollution control programs, funding, grants, research, training and many other measures, including programs managed by the States for water quality standards (33 U.S.C. 1311-14), area-wide waste treatment management (*id.* at 1288), and nonpoint source management (*id.* at 1313(d), 1329); federal assistance to municipalities for sewage treatment plants (*id.* at 1281); funding to study impacts on water quality (*id.* at 1251-74); and programs targeting specific types of pollution (*e.g.*, *id.* at 257, 1321).

up to $51,570 per violation per day. 33 U.S.C. 1319(b), (d), 1365; 81 Fed. Reg. 43,091, 43,095 (July 1, 2016). The Act also provides for criminal penalties: negligent violations bring penalties of up to $25,000 per day and one year of imprisonment; "[k]nowing" violations trigger penalties up to $50,000 per day and three years' imprisonment—or twice that in the case of a second violation. 33 U.S.C. 1319(c)(1)-(2). The government brought over 100 criminal prosecutions for negligent violations of the CWA between 1990 and 2000. *See* perma.cc/UM94-MQDA.

The CWA permitting schemes are not the sole means of protecting waters. Congress expressly "recognize[d]" and sought to "preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution" and "plan the development and use" of "land and water resources." 33 U.S.C. 1251(b). Waters and wetlands that are not "navigable waters" are protected by States and localities. As the States explain in their brief, every regulatory extension of federal jurisdiction readjusts the federal-State balance that Congress sought to preserve.

In 1974, the Corps defined "the waters of the United States" as waters that "are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). The Corps later revised the definition in 1977 to encompass not only traditional navigable waters but also "adjacent wetlands" and "[a]ll other

waters" the "degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

Although the text of the agencies' definition of "waters of the United States" remained essentially unchanged for the next 33 years, the agencies' interpretation of their own regulations continued to expand. The Supreme Court confronted those increasingly aggressive interpretations in a series of decisions beginning in 1985.

Riverside Bayview. In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Court considered the Corps' assertion of jurisdiction over "low-lying, marshy land" immediately abutting a lake and navigable creek on the ground that it was an "adjacent wetland" within the meaning of 33 C.F.R. 323.2(a)(5) (1977). The Court addressed the question whether non-navigable wetlands may be regulated as "waters of the United States" on the basis that they are "adjacent to" navigable-in-fact waters and "inseparably bound up with" them because of their "significant effects on water quality and the aquatic ecosystem." *Id.* at 131-135 & n.9. Observing that Congress intended the CWA "to regulate at least *some* waters that would not be deemed 'navigable,'" the Court held that it is "a permissible interpretation of the Act" to conclude that "a wetland that *actually abuts on* a navigable waterway" falls within the "definition of 'waters of the United States.'" *Id.* at 133, 135 (emphasis added).

SWANCC. Following *Riverside Bayview*, the agencies "adopted increasingly broad interpretations" of their regulations, asserting jurisdiction over an ever-growing set of features bearing little or no relation to traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality). One of those interpretations—the Migratory Bird Rule—was struck down in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*).

The Corps asserted CWA jurisdiction over isolated "seasonally ponded, abandoned gravel mining depressions" because they were "used as habitat by [migratory] birds." *SWANCC*, 531 U.S. at 162-165 (quoting 51 Fed. Reg. 41,217 (Nov. 13, 1986)). The Supreme Court explained that a ruling for the agency would have required the Court "to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water," a conclusion that "the text of the statute will not allow." *SWANCC*, 531 U.S. at 168. The Court stressed that, while *Riverside Bayview* turned on "the significant nexus" between "wetlands and [the] 'navigable waters'" they abut, the Migratory Bird Rule asserted jurisdiction over isolated ponds bearing no connection to navigable waters. *Id*. at 171-172. That approach impermissibly read the term "navigable" out of the statute, even though navigability was "what Congress had in mind as its authority for enacting the CWA." *Id*. at 167. The Court therefore invalidated the rule.

Rapanos. Most recently, in *Rapanos*, the Court addressed sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water." 547 U.S. at 720-721. The Corps asserted that because these sites were "near ditches or man-made drains that eventually empty into traditional navigable waters" they should be considered "adjacent wetlands" covered by the Act. *Id.* at 729.

Justice Scalia, writing for a four-Justice plurality, rejected the Corps' position because "waters of the United States" include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Rapanos*, 547 U.S. at 732, 739. In going beyond this "commonsense understanding" to classify features like "ephemeral streams" and "dry arroyos" as "waters of the United States," the agencies had stretched the text of the CWA "beyond parody" to mean "'Land is Waters.'" *Id.* at 734. And wetlands fall within CWA jurisdiction as "adjacent" wetlands "*only* [if they have] a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id.* at 742. "[A]n intermittent, physically remote connection" to navigable waters is not enough under either *Riverside Bayview* or *SWANCC*. *Id.*

Justice Kennedy concurred in the judgment. As he saw it, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus

between the wetlands in question and navigable waters in the traditional sense." *Rapanos*, 547 U.S. at 779. When "wetlands' effects on water quality [of traditional navigable waters] are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 780. While Justice Kennedy suggested that this test "*may*" allow for the assertion of jurisdiction over a wetland abutting a major tributary to a traditionally navigable water, he categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his conception of a significant nexus. *Id.* at 781; see *id.* at 778 (Act does not reach wetlands alongside "a ditch or drain" that is "remote or insubstantial" just because it "eventually may flow into traditional navigable waters"). Accordingly, he suggested that any agency regulation identifying covered tributaries would need to rest on considerations including "volume of flow" and "proximity to navigable waters" "significant enough" to provide "assurance" that they and "wetlands adjacent to them" perform "important functions for an aquatic system incorporating navigable waters." *Id.* at 781.

B. Factual background

The agencies set out through rulemaking to "increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States.'" 80 Fed. Reg. at 37,054. Despite the CWA's comprehensive programs to address water pollution generally, and the narrower focus of the discharge

prohibitions, the agencies claim their expansive definition of "waters of the United States" is needed to "protect[] upstream waters" because they "significantly affect" "downstream waters." 80 Fed. Reg. at 37,055-37,056.

1. The proposed Rule

The proposed Rule provided for jurisdiction over (1) waters used in interstate commerce, (2) interstate waters, including interstate wetlands, (3) the territorial seas, (4) impoundments of the first three categories of waters or their tributaries, (5) tributaries to the first four categories of waters, (6) waters "adjacent" to any of the first five categories of waters, and (7) all "other waters" with a "significant nexus" to any of the first three categories of waters, as determined on a case-by-case basis, subject to narrow categorical exemptions. 79 Fed. Reg. 22,188, 22,193 (Apr. 21, 2014).

The proposed Rule defined "adjacent" as "bordering, contiguous or neighboring" any of the first five categories of waters. 79 Fed. Reg. at 22,269. "Neighboring" waters were those "located in the riparian area or floodplain" of such a water, or having a "hydrologic connection" to one. *Id.* A water with a "significant nexus" was any water that "significantly affects the chemical, physical, or biological integrity of" a jurisdictional water. *Id.*

2. The comment process and Connectivity Report

Many comments, including those of petitioners, raised substantive concerns about the Rule, including its breadth and vagueness. *E.g.*, WAC

Comments, ID-14568 (JA__).[4] Commenters also raised procedural objections, including that (1) they had no opportunity to evaluate the final "Connectivity Report"—the scientific underpinning for the Rule—in their comments; (2) the final Rule might differ significantly from the proposed Rule, requiring EPA to re-propose the Rule; and (3) respondents had failed to comply with important regulatory requirements. *E.g.*, *id.* at 72-74, 79-80, 85-87 (JA__).

In the preamble to the proposed Rule, the agencies explained that their "decision on how best to address jurisdiction over 'other waters' in the final rule will be informed by the final version of the EPA's Office of Research and Development synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters." 79 Fed. Reg. at 22,189. Although the agencies had by then prepared a "draft" of the report (later dubbed the Connectivity Report), the preamble stated that the draft was "under review by EPA's Science Advisory Board [SAB], and the rule will not be finalized until that review and the final Report are complete." *Id.* at 22,190. While the SAB's review was under way, the comment period was extended twice, closing on November 14, 2014. *See* 79 Fed. Reg. 61,590 (Oct. 14, 2014).

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[4] Pursuant to the parties' joint briefing proposal (Dkt. 97), all citations to record materials follow the following citation format: [Short Title] [page(s)], ID-[last digits of docket number] (JA__). We include the docket identifier in the first citation only.

On October 17, 2014, the SAB completed its review, recommending substantial changes to the Connectivity Report. SAB Review, ID-8046 (JA__). Although EPA ultimately revised the Connectivity Report in response to the SAB's comments, the agencies did not extend the comment period to allow the public to address the final Connectivity Report. The final version of that Report was not published until January 15, 2015—two months after the comment period closed. 80 Fed. Reg. 2,100, 2,100 (Jan. 15, 2015).

3. EPA's advocacy campaign for the proposed Rule

During the comment period, EPA undertook an unprecedented public relations campaign to defend and promote its proposed Rule.

The campaign aimed to discredit public concerns and marginalize opposition to the proposed Rule. While on a public road show to promote the proposed Rule, for example, EPA Administrator Gina McCarthy belittled the concerns expressed by agriculture groups as "myths," "ludicrous" and "silly." Farm Futures, *EPA's McCarthy: Ditch the Myths, Not the Waters of the U.S. Rule* (July 9, 2014), perma.cc/8F4P-XTAP. Those comments were consistent with the agencies' unprecedented #DitchtheMyth Twitter campaign. Op. B-326944, 2015 WL 8618591, at *5 (Comp. Gen. Dec. 14, 2015).

Another objective of the agencies' social media campaign was to defeat bills pending in the House and Senate seeking to block the Rule. *See* Op. B-326944, 2015 WL 8618591 (Comp. Gen. Dec. 14, 2015). EPA sought to influence public perception of the Rule and motivate individuals to contact

members of Congress to encourage them to oppose legislation that would block the Rule. *Id.* at *13.

To do this, EPA used its blog, Twitter account, and Facebook page to solicit supporters for a "crowdspeaking" message that supported the proposed Rule. The message was broadcast on September 29, 2014, reaching an audience of nearly two million people over social media platforms. *See id.* The message—presented to appear as though it was coming from third parties and not EPA—read: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community. http://thndr.it/-1sLh51M." Op. B-326944, 2015 WL 8618591, at *3.

EPA also launched a #CleanWaterRules Twitter campaign, which disseminated a message that hyperlinked to external third-party websites, which in turn provided a "form letter for submission" to the users' congressional representatives opposing the legislation. Op. B-326944, 2015 WL 8618591, at *4-5. A second hyperlink publicized by EPA took visitors to a page on the Natural Resources Defense Council's website, which included a button marked "Add Your Voice." *Id.* at *5. When clicked, the button took the user to an "action page" similarly criticizing proposed legislation to block the Rule and providing a form for readers to send to their senators in opposition to the pending bills. *Id.* at *5-6.

C. The final Rule and its fallout

1. The Rule

EPA published the final Rule on June 29, 2015. 80 Fed. Reg. 37,054 (June 29, 2015). The Rule purports to "make the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources." *Id.* at 37,055. It distinguishes between three broad categories of features: those that are "jurisdictional by rule," those that are jurisdictional based on a case-specific analysis, and those that are never jurisdictional.

Features jurisdictional by rule. The Rule identifies six features that are "jurisdictional by rule": **(1)** waters used or susceptible to use in interstate or foreign commerce, **(2)** interstate waters, **(3)** territorial seas, **(4)** impoundments of any "water of the United States," **(5)** tributaries to a (1)-(3) feature, and **(6)** waters that are "adjacent" to a (1)-(5) feature. 33 C.F.R. 328.3(a); *see* 80 Fed. Reg. at 37,088 (tributaries and adjacent waters are categorically jurisdictional). The Rule and its preamble further define certain operative terms:

- "Interstate waters" are those that cross state borders, "even if they are not navigable" and "do not connect to [navigable] waters." *Id.*
- A covered "tributary" is any feature that flows "directly or through another water or waters" to a (1)-(3) feature. 33 C.F.R. 328.3(c)(3). To count as a jurisdictional water, the tributary (a) must "contribute flow" directly or through any other water—such as ditches or wetlands—to a

(1)-(3) feature, and (b) must be "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark" (OHWM). *Id.* A tributary can be natural, man-altered, or man-made, and does not lose its status as a tributary if, for any length, there are one or more breaks (such as pipes, dams, debris fields, or underground segments), so long as a bed and banks and an OHWM can be identified upstream of the break.

- An "adjacent water" is any feature bordering, contiguous to, or "neighboring" a (1)-(5) feature. 33 C.F.R. 328.3(c)(1). "Neighboring" waters are waters any part of which is located
  - within 100 feet of the OHWM of any (1)-(5) feature;
  - within the 100-year floodplain of any (1)-(5) feature, and not more than 1,500 feet from the OHWM of such water; or
  - within 1,500 feet of the high tide line of a (1)-(3) feature or within 1,500 feet of the OHWM of the Great Lakes. 33 C.F.R. 328.3(c)(2).

Features jurisdictional by case-specific analysis. The Rule identifies two categories of features that are jurisdictional if they are "found after a case-specific analysis to have a significant nexus" to certain jurisdictional waters. 80 Fed. Reg. at 37,059. As a baseline matter, the Rule defines the term "significant nexus" to mean that "a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a (1)-(3) feature. 33 C.F.R. 328.3(c)(5). The Rule states, "[f]or an effect to be significant, it must be more than speculative or insubstantial." *Id.*

The Rule describes the significant-nexus analysis as a three-step process: "First, the region for the significant nexus analysis must be iden-

tified—under the rule, it is the watershed which drains to the nearest traditional navigable water, interstate water or territorial sea." 80 Fed. Reg. at 37,091. "[S]econd, any similarly situated waters must be identified—under the rule, that is waters that function alike and are sufficiently close to function together in affecting downstream waters." *Id.* "[T]hird, the waters are evaluated individually or in combination with any identified similarly situated waters … to determine if they significantly impact the chemical, physical or biological integrity of" jurisdictional waters. *Id.*

The Rule sets out a list of "functions" to be considered in determining whether a water "significantly impact[s]" the integrity of another water. 33 C.F.R. 328.3(c)(5). Those functions (only one of which need be impacted) include "retention and attenuation of flood waters," "contribution of flow," and "provision of life cycle dependent aquatic habitat." *Id.*

Two categories of "waters" are subject to this case-by-case significant nexus analysis. The first includes several features that are categorically presumed to be "similarly situated": non-adjacent Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. 33 C.F.R. 328.3(a)(7). Those water features are not further defined.

In the second category, the Rule specifies two features that are subject to significant-nexus analysis on an individual, case-by-case basis: those any part of which is "located within the 100-year floodplain" of any (1)-(3) feature

or "within 4,000 feet of the high tide line or ordinary high water mark" of any (1)-(5) feature. 80 Fed. Reg. at 37,087.

Features that are not jurisdictional. Finally, the Rule enumerates certain features that are categorically non-jurisdictional. They include "swimming pools;" "small ornamental waters;" "prior converted cropland;" "waste treatment systems;" small subsets of ditches that do not flow to a (1)-(3) feature; ditches with ephemeral or intermittent flow that do not drain wetlands, relocate a tributary, or excavate a tributary; "farm and stock watering ponds;" "settling basins;" "water-filled depressions incidental to mining or construction activity;" "puddles;" "subsurface drainage systems;" and "wastewater recycling structures."

Definitions are not provided for any excluded features. And in many instances, the features only qualify for an exclusion when they were created in or occur in "dry land" (an undefined term) or meet other vague criteria. 33 C.F.R. 328.3(b).

2. The GAO report

At the request of the Chairman of the Senate Committee on Environment and Public Works, the GAO investigated whether EPA's advocacy activities violated anti-propaganda and anti-lobbying provisions contained in federal appropriations acts. Op. B-326944, 2015 WL 8618591. The GAO's December 14, 2015 report concluded that EPA had violated those provisions. *Id.* First, the report concluded that EPA's "crowdspeaking" campaign con-

stituted unlawful "covert propaganda" because the messages posted to campaign supporters' social media accounts obscured EPA's role in authoring the messages. 2015 WL 8618591, at *6-10. Second, the report concluded that by hyperlinking to third-party websites, EPA engaged in unlawful "grassroots lobbying." *Id.* at *12-18. GAO found that EPA "associated itself" with the lobbying messages on these external websites (*id.* at *18) and thereby "appealed to the public to contact Congress in opposition to pending legislation." *Id.* at *13.

3. The stay of the Rule

Numerous interested parties—including the 57 Business and Municipal Petitioners here—filed petitions for review under 33 U.S.C. 1369(b). In all, parties filed 22 petitions for review in the courts of appeals, which were consolidated in this Court. *See In re Final Rule: Clean Water Rule*, MCP No. 135 (J.P.M.L. July 28, 2015).

This Court granted a motion to stay the Rule filed by 18 States. *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). In doing so, the Court expressed skepticism concerning the legality of the Rule, finding that "it is far from clear that the new Rule's distance limitations are harmonious" with even the most expansive reading of the Supreme Court's instructions in *Rapanos*. *Id.* The Court also observed that "the rulemaking process by which the distance limitations were adopted is facially suspect." *Id.* It noted that the petitioners had argued that the final Rule (1) violated the APA's notice and comment

requirements, and (2) was unsupported by scientific evidence and thus arbitrary and capricious under the APA. *Id.* Finding that the "petitioners have demonstrated a substantial possibility of success on the merits of their claims," the Court granted a nationwide stay. *Id.* at 807-809.

SUMMARY OF THE ARGUMENT

I. The Rule violated the basic requirements of notice-and-comment rulemaking.

First, the agencies failed to reopen the comment period after making substantial, unanticipated changes to the Rule. Under the APA, the regulated public must be able to anticipate based upon a proposed rule the requirements the final rule may impose. But the agencies' proposed Rule included no hard-and-fast distance limits (100, 1,500 and 4,000 feet) or the reference points for measuring those limits (100-year floodplains and ordinary high water marks of (1)-(3) or (1)-(5) waters) which define the reach of the "adjacency" and "significant nexus" tests in the final Rule. The regulated public had no opportunity to comment on those arbitrary standards.

Second, the agencies denied the public the opportunity to comment on the final Connectivity Report, despite acknowledging that it is the key scientific underpinning of the Rule. Courts have explained that an agency commits a serious procedural error under the APA when it fails to make the evidentiary basis for a regulation available for public comment, as the agencies did here. Only a draft of the report was furnished during the

comment period, and the draft report differed substantially from the final report. If the final report had been made available during the comment period, commenters—including petitioners here—would have expressed serious concerns about its contents. In denying them that opportunity, the agencies violated the APA.

Third, the agencies declined to respond to many important comments. Though an agency need not respond to every comment, it must adequately respond to significant comments that cast doubt on the reasonableness of an agency position. Here, major substantive concerns went unanswered. In fact, not only did the agencies refrain from answering serious comments, they publicly denigrated the comments as "silly" and "ludicrous" during the comment period, demonstrating unwillingness to consider critical comments.

Fourth, the agencies, using social media, engaged in unlawful propaganda and lobbying campaigns to drum up superficial support for the Rule and to defeat legislation intended to prevent it from coming into effect. This conduct, too, demonstrates the agencies' disregard for the notice-and-comment process, which was not an open-minded invitation for comments from the public, but an advocacy campaign by agencies with a predetermined agenda. That is anathema to the principles embodied in the APA.

Finally, the agencies failed to comply with the Regulatory Flexibility Act and the National Environmental Policy Act. Under the RFA, the agencies were required to justify the impact of the Rule on small businesses. Basing

their RFA analysis on a comparison of the Rule against the regulatory landscape as it existed *in 1986*, the agencies arbitrarily certified that the Rule would have *no* significant economic impact upon a substantial number of small entities. That conclusion ignores the facts. Likewise, the agencies failed to undertake the required NEPA analysis.

II. The Rule is arbitrary and capricious and inconsistent with the CWA's text.

To begin with, the agencies erred in making Justice Kennedy's single concurring *Rapanos* opinion the "touchstone" for the Rule. Setting aside that the Rule is incompatible with a faithful application of Justice Kennedy's opinion, the agencies' reliance on a one-Justice concurrence as though it were the holding of *Rapanos* was contrary to law.

More fundamentally, the Rule is inconsistent with the statutory language, Supreme Court precedent, and the scientific evidence that was before the agencies. The Supreme Court in *SWANCC* and *Rapanos* could not have been more clear that the word "navigable" continues to have meaning under the CWA; and yet the Rule asserts jurisdiction over countless isolated waters and dessicated land features that bear not the slightest resemblance to navigable waters.

Many specific elements of the Rule are out of step with precedent and the evidence. The definition of "tributary" covers millions of previously unregulated features. The Rule assumes that such features have a significant

nexus with the (1)-(3) features to which they contribute some flow. But that simply is not true—many largely dry ditches or gullies that qualify as tributaries under the Rule (including those that fill only occasionally, after heavy rain) have no meaningful effect on far-distant navigable waters. The "tributary" definition's grounding in a bed, banks, and OHWM does not help. As commenters repeatedly explained to the agencies, sometimes OHWMs form due to one-off precipitation events that are not indicative of regular or meaningful flow. OHWMs are not indicative of a nexus between a ditch and a traditional navigable water much less a significant nexus.

The Rule's definition of "adjacent" is likewise inconsistent with precedent and the evidence. It depends on made-up limits like the 100-year floodplain and 1,500-foot distances from an OHWM without any explanation of how or why the agencies selected those thresholds. And it departs from any plausible interpretation of the plurality or concurring opinions in *Rapanos*. The same is true of the "significant nexus" test, the application of which depends on arbitrary distances and tenuous connections.

Finally, the Rule paradoxically treats some features as both "point sources" and jurisdictional waters. The Act defines "discharge of a pollutant" as "any addition of any pollutant *to* navigable waters *from* any point source." Yet the Rule allows a single feature to be treated both as a point source from which pollutants can be discharged and a water into which discharges can

occur. Failure to grapple with the implication of treating point sources as "waters of the United States" ignores the Act's basic framework.

III. The Rule violates the Constitution in two distinct ways.

First, the Rule—which interprets a criminal statute—is unconstitutionally vague. The vagueness doctrine addresses two due process concerns: ensuring fair notice to the citizenry, and defining standards that prevent those enforcing the law from acting in an arbitrary or discriminatory way. The Rule implicates both concerns. The definition of OHWM, for example, turns on factors like "changes in the character of soil" and "presence of litter and debris" and allows bureaucrats to rely on whatever "other ... means" they deem "appropriate" in deciding when an OHWM is present and where it lies, including by relying solely on historical data. Similarly, the definition of a significant nexus turns on nebulous considerations like "more than speculative or insubstantial," "in the region," and water "integrity." The definitions give the public no meaningful guidance as to when covered features are present on their property, and they virtually guarantee arbitrary enforcement.

Second, the Rule violates the Commerce Clause and federalism principles. The Supreme Court has read the Commerce Clause to mean, as relevant here, that Congress may regulate "the channels of interstate commerce" and "those activities that substantially affect interstate commerce." Yet the Rule sweeps in countless features that are not channels of, and have

no meaningful effect on, interstate commerce. Under the canon of constitutional avoidance, these concerns are at minimum a basis for construing the statutory text narrowly.

ARGUMENT

I. THE RULE WAS PROMULGATED WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW

The first of several fatal flaws in the Rule is that it was adopted "without observance of procedure required by law." 5 U.S.C. 706(2)(D). That is so for three categories of reasons: The agencies deprived the public of a meaningful opportunity to comment on critical aspects of the final Rule and declined to respond to the comments submitted; EPA violated anti-propaganda and anti-lobbying provisions in governing appropriations laws; and it failed to comply with the Regulatory Flexibility Act and NEPA.[5]

A. The final Rule was promulgated in violation of basic principles of notice-and-comment rulemaking

The heart of the APA rulemaking process is the notice-and-comment procedure. The process begins when an agency publishes a "notice of proposed

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[5] These and other "serious flaws in the rulemaking process" are detailed in a 181-page congressional report, which concludes that EPA "cut corners, disregarded statutes and executive orders, and ignored serious concerns voiced by experts, the states, and American citizens," "rush[ing] promulgation of the rule" to satisfy "political considerations" and appease "outside special interest groups." Comm. on Oversight and Gov't Reform, U.S. House of Representatives, 114th Cong., Majority Staff Report, *Politicization of the Waters of the United States Rulemaking* 180 (Oct. 27, 2016), available at perma.cc/LH2S-X87U.

rule making." 5 U.S.C. 553(b). That notice must include "either the terms or substance of the proposed Rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). After the notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. 553(c).

Notice-and-comment serves three purposes. "First, notice improves the quality of agency rulemaking by ensuring that agency regulations will be tested by exposure to diverse public comment." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). "Second, notice and the opportunity to be heard are an essential component of fairness to affected parties." *Id.*; *accord Dismas Charities, Inc. v. DOJ*, 401 F.3d 666, 678 (6th Cir. 2005). "Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review." *Small Refiner*, 705 F.2d at 547.

The agencies gamed the APA at every turn. They made substantial changes to the Rule between publication of the proposed Rule and promulgation of the final Rule, without reopening the comment period. They withheld the final version of the Connectivity Report until after the comment period closed, denying the public any opportunity to comment on it or its relevance to the proposed Rule. And they ridiculed or ignored important comments received during the comment period.

1. The final Rule is not a logical outgrowth of the proposed Rule

For a regulation to comply with the notice and comment requirements of Section 553, "the final rule the agency adopts must be a 'logical outgrowth' of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The logical-outgrowth test asks whether "[a] party, *ex ante*, should have anticipated that" the requirements contained in the final rule "might be imposed." *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 446 (D.C. Cir. 1991) (brackets omitted). If not, "a second round of notice and comment is required," so interested parties have an opportunity to comment on the elements of the Rule that could not be anticipated. *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994).

The "object" of the logical-outgrowth requirement is "fair notice." *Coke*, 551 U.S. at 174; *see Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 454 (6th Cir. 2013). "While a final rule need not be an exact replica of the rule proposed in the Notice" (*Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986)), "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner*, 705 F.2d at 547. The final Rule here fails the outgrowth test.

There was no way to anticipate from the proposed Rule that the final Rule would define key jurisdictional concepts using the arbitrary distances

and reference points the agencies chose. In the proposed Rule, the agencies defined "adjacent" waters as those "bordering, contiguous [with] or neighboring" a (1)-(5) feature. 79 Fed. Reg. at 22,269. "Neighboring" features were defined as those "located in the riparian area or floodplain" or having a "hydrologic connection." *Id.* In the final Rule, "neighboring" features were defined in very different terms, to include "waters located within 100 feet of the ordinary high water mark" of a (1)-(5) feature, "waters located within the 100-year floodplain" of a (1)-(5) feature but "not more than 1,500 feet from the ordinary high water mark of such water," and "waters located within 1,500 feet of the high tide line" of a (1)-(3) water. 80 Fed. Reg. at 37,105.

Much the same goes for the case-by-case applicability of the "significant nexus" test for non-categorically jurisdictional features. In the proposed Rule, any water, wherever located, could be deemed jurisdictional based on a significant nexus to a (1)-(3) water. The final Rule, by contrast, applies a case-by-case "significant nexus" analysis to features "located within the 100-year floodplain" of a (1)-(3) feature or "within 4,000 feet of the high tide line or ordinary high water mark" of a (1)-(5) feature. 80 Fed. Reg. at 37,105.

These distances and reference points are central to the Rule's operation, but there was no way to anticipate their inclusion in the final Rule. The final Rule is therefore not a logical outgrowth of the proposed Rule. "When the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical

distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1058 (D.N.D. 2015). "Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance." *Id.* This alone is sufficient to vacate the Rule.

2. The agencies denied the public an opportunity to comment on the final Connectivity Report

The Rule must be vacated because the agencies denied interested parties any opportunity to comment on the final Connectivity Report, which compiled the scientific literature and analysis on which the agencies relied to determine the hydrological "connectivity" of various features.

The proposed Rule was accompanied only by a draft of the Connectivity Report, which was at the time undergoing review by the Scientific Advisory Board, or SAB.[6] The SAB subsequently recommended numerous substantive changes to the Connectivity Report, and the agencies made several notable changes in response. SAB Review, ID-8046 (JA__). For example, the final Report introduced a new, continuum-based approach that analyzed the connectivity of particular waters to downstream waters along various "[d]imensions." Final Connectivity Report 1-4, ID-20858 (JA__). And it added

[6] Congress directed the administrator of the EPA to establish the SAB, a Federal Advisory Committee, to "provide such scientific advice as may be requested by the Administrator." 42 U.S.C. 4365(a).

important new material to a case study on "Southwestern Intermittent and Ephemeral Streams." *Id.* at 5-7 (JA__). Both changes were responses to SAB criticisms of the proposed Rule, both go to the heart of the legal and scientific flaws of the Rule that are being challenged here, and both would have garnered comments from petitioners had they been disclosed to the public during the comment period.[7]

The final Connectivity Report, however, was not published until two months after the comment period closed. 80 Fed. Reg. 2,100 (Jan. 15, 2015). As many commenters explained, the delayed release of the final Report—combined with the agencies' refusal to extend the comment period to accommodate the delay—made it impossible for interested parties to review and comment on the final Report's conclusions and methodology. *E.g.*, WAC Comments 73 (JA__); Murray Energy Comments 6, ID-13954 (JA __).

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[7] The final Connectivity Report cited 349 scientific and academic sources that were not included in the draft Report, including 36 sources published between when the draft and final Reports were issued. There is no question that the public would have commented on these additions if given the opportunity. The WAC comments criticized the draft Report for, among other things, failing to provide metrics to measure the significance of a nexus to traditional navigable waters (at 25-26 (JA__)); analyzing "significant nexus" as a binary rather than a gradient (at 27 (JA__)); and failing to assess the significance of the effects of ephemeral features on downstream waters (at 35 (JA__)). *See also, e.g.*, NAHB Comments 37, 49, 90, & 141-42, ID-19540 (JA__). These and other commenters would have expanded and refined these criticisms in light of the new sources and analysis, had they been given the opportunity to do so.

This is no trivial oversight. The agencies "interpret[ed] the scope of 'waters of the United States' … based on the information and conclusions in the Science Report, other relevant scientific literature, [and] the Technical Support Document that provides additional legal and scientific discussion for issues raised in this rule." 80 Fed. Reg. at 37,065.[8] "In light of this information," they "made scientifically and technically informed judgments about the nexus between the relevant waters and the significance of that nexus." *Id*. Because the significant nexus approach underpins the entire Rule and the agencies' legal justification for it, it is no overstatement to say that the Connectivity Report is the evidentiary linchpin of the Rule. *See* 80 Fed. Reg. at 37,057 (explaining that the Connectivity Report "provides much of the technical basis for [the] [R]ule").

EPA's decision not to make the final Report available until after the comment period had closed is inexplicable. It is, after all, "fairly obvious" that "studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). "An agency commits serious procedural error when it fails to reveal portions of the technical basis

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[8] The "Science Report" is the Connectivity Report. The Technical Support Document aggregated and summarized the agencies' scientific analysis, including the Connectivity Report and the SAB review. *See* Tech. Supp. Doc. 93-163, ID-20869 (JA__).

for a proposed rule in time to allow for meaningful commentary." *Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007). That is precisely what happened here.

3. The agencies failed to consider important comments

The agencies additionally failed in their responsibility under the APA to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Though an agency need not "respond to every comment" (*Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984)), it must adequately respond to significant comments that "cast doubt on the reasonableness of a position taken by the agency." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).

Here, interested parties submitted numerous comments fitting this description. In particular, many commenters expressed concern that the proposed Rule would unduly expand the area subject to federal regulatory jurisdiction, trenching in equal parts on common sense and traditionally local land-use regulation. *See, e.g.*, WAC Comments 39 (JA__); U.S. Chamber Comments 6, ID-19343 (JA__); Murray Comments 19 (JA__). Rather than engage these comments, the agencies brushed them aside.

a. For example, several members of the public with land holdings in the arid West commented that the proposed Rule's expansive definition of covered "tributaries" was vastly overinclusive. They explained that many

lands in the West contain features that the agencies claim are excluded from jurisdiction (*e.g.*, desert washes, arroyos, gullies, rills, and channels), but which would in fact often be covered by the Rule any time they arguably exhibit a bed and banks and an ordinary high water mark. *See, e.g.*, Freeport-McMoRan Comments 5, ID-14135 (JA__); Ariz. Mining Ass'n Comments 7-8, ID-13951 (JA__); N.M. Cattle Growers Ass'n Comments 12, ID-19595 (JA__). Yet due to the highly erodible nature of the soil in the West, these features are often formed by a single rain event and rarely carry water. Freeport-McMoRan Comments 5 (JA__). Thus, the commenters explained, it made no sense to rely on physical characteristics that might indicate a tributary in a wet, humid climate for purposes of identifying tributaries in the arid West. *E.g.*, Ariz. Mining Ass'n Comments 7 (JA__).

Despite the serious nature of these comments, neither the preamble to the final Rule nor any other agency pronouncement addresses applicability of the Rule in the arid West. The final Rule notes generically that commenters "suggested that the agencies should exclude ephemeral streams from the definition of tributary," and responds that ephemeral streams will lack sufficient flow to form "the physical indicators required" by the definition of "tributary." 80 Fed. Reg. at 37,079. But that discussion is not responsive to concerns about channels and gullies in the arid West, which *do* sometimes have the physical indicators the Rule requires.

b. Members of the farming community commented that the proposed Rule would eviscerate several statutory permit exemptions applicable to agricultural activities. AFBF Comments 13-17, ID-18005 (JA__). They explained, for example, that although farming activities such as plowing, seeding, harvesting and farm pond construction are exempt from Section 404 permitting requirements (*see* 33 U.S.C. 1344(f)(1)), the CWA's "recapture" provision[9] (33 U.S.C. 1344(f)(2)) will frequently be triggered when common features on the farm, such as erosional features, ephemeral drains and farm ditches, become "tributaries" under the Rule. Beyond that, the proposed Rule would override the Section 402 permit exemption for agricultural stormwater runoff and irrigation (33 U.S.C. 1342(l)(1)) by regulating as "tributaries" the ditches and drainages that carry stormwater and irrigation water. AFBF Comments 16-17 (JA__). Again, the agencies did not respond.

The agencies turned a blind eye to these serious comments in the final Rule, offering only a terse, unsubstantiated assertion that the Rule "does not affect any of the [statutory] exemptions" and "does not add any additional permitting requirements on agriculture." 80 Fed. Reg. at 37,055. But "[a] dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office*, 567 F.2d at 35-36.

[9] The "recapture" provision requires permitting for otherwise exempt activities when they "impai[r]" the flow of navigable waters. AFBF Comments 14-15 (JA__).

c. The agencies also demeaned certain comments and commenters, confirming their closed mind throughout the process. Administrator McCarthy, for example, publicly dismissed the concerns expressed by agricultural interests (many of the same concerns that appear in this brief) as "silly" and "ludicrous" and "myths." Farm Futures, *Ditch the Myths*, perma.cc/8F4P-XTAP. The APA requires agencies to listen to and answer comments and concerns on proposed rules; "these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). Congress, in enacting the APA, assuredly did not contemplate agencies engaging in publicly funded campaigns to discourage negative comments by publicly (and superficially) rejecting criticisms while the comment period or agency consideration of a rule remains open.

B. EPA's advocacy campaigns were unlawful

The agencies' entire course of conduct—from springing major changes on the public without seeking additional comment to hiding the evidentiary underpinning of the Rule and campaigning against criticism—all indicate that the agencies never took the notice-and-comment process seriously. Making that all the more apparent, EPA violated federal anti-propaganda laws, anti-lobbying laws, and the basic principles of administrative rule-making when it unlawfully promoted the proposed Rule.

1. EPA's "crowdsourcing" campaign constituted illegal "covert propaganda"

The Financial Services and General Government Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, which authorized funding for EPA during the relevant time, prohibits use of appropriations "for publicity or propaganda purposes." *Id.*, div. E, § 718. *Accord* Pub. L. No. 113-235, div. E, § 718, 128 Stat. 2130, 2383 (2015) (2015 appropriations). The GAO has repeatedly held that "materials … prepared by an agency … and circulated as the ostensible position of parties outside the agency amount to [prohibited] covert propaganda." Op. B-305368, 2005 WL 2416671, at *5 (Comp. Gen. Sept. 30, 2005).

EPA's social media campaign violated this law. EPA used Thunderclap (a "crowdspeaking" platform) to recruit supporters of the proposed Rule. Op. B-326944, 2015 WL 8618591, at *2 (Comp. Gen. Dec. 14, 2015); *see* perma.cc/9CHN-87T8 (archived Thunderclap page). Once the campaign reached a minimum threshold of supporters, Thunderclap disseminated a message through each supporter's social media account. 2015 WL 8618591, at *2. The message, to an audience of 1.8 million, read: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community." *Id.* at *3. The statement concluded with a hyperlink to EPA's webpage promoting the proposed Rule. *Id.* Nothing identified EPA as the author; to anyone reading the message, "it appeared that their friend

independently shared a message of his or her support for EPA and clean water." *Id.* at *8.

According to the GAO, this is the very definition of covert propaganda. EPA "used supporters as conduits of an EPA message … intend[ing] to reach a much broader audience," without disclosing "that the message was prepared and disseminated by EPA." *Id.* This sort of surreptitious messaging is "beyond the range of acceptable agency public information activities," "reasonably constitutes 'propaganda,'" and was accordingly unlawful. Op. B-223098, 1986 WL 64325, at *1 (Comp. Gen. Oct. 10, 1986).

This alone is a basis for vacating the Rule. "Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect … regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation." *Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013). EPA's covert propaganda campaign, particularly when taken together with its other social media efforts, demonstrates a lack of such fairness and transparency and a closed-mindedness to criticism of the proposed Rule.

2. EPA unlawfully lobbied against Congress's attempts to block the Rule

EPA also violated the anti-lobbying laws. Anti-lobbying provisions in appropriations statutes prohibit executive agencies from using appropriated funds "for the preparation" of materials "designed to support or defeat

legislation pending before the Congress, except in presentation to the Congress itself." Pub. L. No. 113-235, div. E, § 715, 128 Stat. 2130, 2382-83 (2015). GAO has long held that these provisions prohibit an agency from engaging in "grassroots lobbying" by appealing "to the public to contact Members of Congress in support of, or in opposition to, pending legislation" that the agency supports or opposes. B-326944, 2015 WL 8618591, at *12.

That is exactly what EPA did. Its blog post discussing the importance of clean water to surfers and brewers linked to two external webpages that the GAO concluded made a "clear appeal" to the public to contact members of Congress to oppose pending legislation that would have blocked the Rule. B-326944, 2015 WL 8618591, at *15. It was not a close call: after encouraging readers to "[u]rge your senators to defend Clean Water Act safeguards for critical streams and wetlands," the pages presented form letters for visitors to submit electronically to their senators. *See* perma.cc/MB6B-QFCF. By linking to these external websites, "EPA associated itself with the messages conveyed by these self-described action groups." B-326944, 2015 WL 8618591, at *18. In doing so, EPA directed the public to engage in lobbying activities against efforts to block the Rule, and thereby engaged in illegal "grassroots lobbying."

In light of EPA's unlawful propaganda and lobbying campaigns, there can be no doubt that the Rule was promulgated "without observance of procedure required by law." 5 U.S.C. 706(2)(D). Petitioners were entitled by

law to be "treated with fairness and transparency," and the APA required the agencies to give their criticisms "due consideration." *Iowa League of Cities*, 711 F.3d at 871. Not only did the agencies tie the hands of commenters with incomplete evidence, a refusal to engage serious concerns of regulated entities, and a failure to reopen the comment period after major changes to the Rule, but EPA's extraordinary lobbying campaigns revealed that, throughout the rulemaking, the agencies had closed minds all along. The APA forbids that kind of close-minded approach.

C. The agencies failed to comply with the Regulatory Flexibility Act and other applicable statutes

1. The agencies violated the RFA

The Rule failed to comply with the Regulatory Flexibility Act (RFA). Congress enacted the RFA because federal agencies were routinely finalizing rules without considering their impact on small businesses and on other governmental bodies. Proponents recognized that smaller entities usually lack the financial resources to comply with costly regulatory mandates and often bear disproportionate compliance costs. The RFA amended the APA to require agencies to give consideration to the challenges facing small entities. *See* Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 Duke L.J. 213, 227-31 (1982).

a. The RFA requires an agency to perform a "regulatory flexibility analysis" that estimates the full impact of any proposed rule on small entities

and determines whether less burdensome alternatives are available. 5 U.S.C. 603(a)-(d). The agency must summarize an initial analysis in the Federal Register at the time the rule is proposed (5 U.S.C. 603(a)) and publish a final analysis, taking account of public comments, with the final rule. 5 U.S.C. 604(a). These procedures are mandatory unless the agency certifies that the rule will not "have a significant economic impact upon a substantial number of small entities." 5 U.S.C. 610(a).

Despite clear indications that the Rule would impose widespread hardship on small businesses and small governmental entities (*see* SBA Letter, ID-7958 (JA__)), the agencies certified in the preamble to the proposed Rule that the Rule would not "have a significant economic impact upon a substantial number of small entities." 79 Fed. Reg. at 22,220. That certification was premised on the absurd claim that the Rule *narrows* the agencies' jurisdiction under the CWA. 80 Fed. Reg. at 37,102. The analysis supporting that conclusion is deeply flawed.

The starting point for any comparative analysis, according to EPA, is the immediate status quo ante. EPA, *Guidelines for Preparing Economic Analyses* 5-1 (2010) (2014 update), perma.cc/8TWH-SMJX. That is consistent with OMB guidance, which requires that comparative economic analyses (including RFA analyses) take as the status quo ante "the best [possible] assessment of the way the world would look absent the proposed action." OMB, Circular A-4 (2003), perma.cc/Q335-NPYA.

In conformity with that guidance, public commenters—relying on the regulatory landscape the day before the proposed Rule was published—explained that the agencies' RFA certification was wrong, and that the Rule would require small businesses and municipalities across the country to obtain countless new and costly CWA permits, forcing many to "forgo … development plans." NFIB Comments 7, ID-8319 (JA__). The Small Business Administration—an independent federal agency created by Congress to assist and protect the interests of small business concerns—submitted similar comments urging the agencies to withdraw their certification. ID-7958 (JA__).

b. These concerns are not hypothetical. For example, Michael Jacobs, a small-business owner in Oklahoma, has an undeveloped 50-acre plot of land next to his home. *See* M. Jacobs Declaration ¶ 5 (Addendum 74a-79a). Prior to the Rule, Mr. Jacobs had planned to clear his property for cattle grazing and farming, improvements that would "greatly increase the value of the property." *Id.* ¶¶ 7-8. But because the property contains a small creek bed—which is usually about 5-6 inches deep but "will often go dry"—the creek is likely to be deemed a "tributary" under the Rule. *Id.* ¶¶ 14, 20. As a result of the Rule, Mr. Jacobs has therefore been forced to halt all plans for improving his property because the new regulation, if allowed to go into effect, will require him to obtain a costly jurisdictional determination from the Corps and, depending on the outcome, a permit from EPA. *Id.* ¶ 22.

Mr. Jacobs is not alone. Robert Reed is a small business owner who farms and grazes 3,000 acres of land in Matagorda County, Texas. *See* R. Reed Declaration ¶¶ 1-5 (Addendum 122a-124a). His lands have several previously nonjurisdictional drainage ditches that would also likely count as "tributaries" under the Rule if it were allowed to come into effect. *Id.* ¶ 10. As a consequence, Mr. Reed would have to take about 5%-10% of his fields out of production, at a cost of tens of thousands of dollars (*id.* at ¶¶ 11-14)—an enormous burden for a small family farmer like him.

Indeed, the agencies have conceded that the Rule would result in a 2.84–4.65% *expansion* of jurisdiction when "[c]ompared to a baseline of recent practice." 80 Fed. Reg. at 37,101. And (using underinclusive estimates) they acknowledged that, as a result of the Rule, CWA permitting costs would increase by tens of millions of dollars, and mitigation costs by over one hundred million dollars, throughout the Nation each year. *Economic Analysis of Proposed Rule* 13-18 (Mar. 2014), ID-0003 (JA__); *Economic Analysis of the EPA-Army Clean Water Rule* x-xi (May 2015), ID-20866 (JA__).

c. For purposes of their RFA certification, the agencies ignored these facts. Rather than basing their analysis on "the best [possible] assessment of the way the world would look absent the [Rule]" (OMB Circular A-4), the agencies instead based their conclusion that "the rule will not have a significant economic impact on a substantial number of small entities" on an assertion that "fewer waters will be subject to the CWA under the rule" as

compared with "historic practice[s]" *dating to 1986* (80 Fed. Reg. at 37,101-102)—practice[s] that have since been superseded. *See* EPA, *2008 Rapanos Guidance and Related Documents*, perma.cc/6ZPF-PPME.

In support of that obviously mistaken approach, the agencies offered no explanation beyond the *ipse dixit* that the 1986 practices "represent [an] appropriate baseline for comparison." 80 Fed. Reg. at 37,101. Not only is that wrong as a matter of common sense, but a "conclusory statement with no evidentiary support in the record does not prove compliance with the Regulatory Flexibility Act." *Nat'l Truck Equip. Ass'n v. NHTSA*, 919 F.2d 1148, 1157 (6th Cir. 1990); *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency conclusions must be supported by reasoning and evidence).

The agencies should have compared the Rule's effects on small businesses against *current* regulatory guidance. Their decision to use a long-outdated baseline "remove[d] from consideration the economic analysis required by statute," in violation of the RFA. *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 127-28 (D.D.C. 2004).

2. The agencies violated the National Environmental Policy Act

The agencies also failed to comply with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), which required the agencies to prepare an

environmental impact statement. The basis for the agencies' violation of that law is fully developed by the State Petitioners. *See* State Br. Part IV.

II. THE RULE IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW

The Rule asserts jurisdiction over vast tracts of the United States, including countless miles of man-made ditches and municipal stormwater systems, dry desert washes and arroyos in the arid west, "tributaries" from which water has long since disappeared and that are invisible from the ground, ponds on never-mapped 100-year floodplains, and virtually all land in the water-rich Southeast. Many of these land and water features bear little or no relation to the traditional definition of navigable waters Congress had in mind when it enacted the CWA. Whatever leeway the Act may give the agencies to regulate "navigable waters" (33 U.S.C. 1362(7)), the statutory text is not limitless and "does not authorize this 'Land is Waters' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734 (plurality). At bottom, the agencies' approach to the Rule—like their approach to the Migratory Bird Rule rejected in *SWANCC* and the "any connection" theory rejected in *Rapanos*—is inconsistent with both the law and the scientific evidence.

A. The agencies acted unlawfully in using Justice Kennedy's *Rapanos* concurrence as the "touchstone" of the Rule

In *Rapanos*, a four-Justice plurality opined that "waters of the United States" do not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall," and

include "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right." 547 U.S. at 734, 742. Justice Kennedy, providing the fifth vote for the judgment, took the view that "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and [traditional] navigable waters," which requires a significant effect on "the chemical, physical and biological integrity" of navigable waters. *Id.* at 779.

In promulgating the Rule, the agencies took Justice Kennedy's "significant nexus" test for jurisdictional wetlands "as the touchstone" and applied it across the board "to other categories of water bodies." 79 Fed. Reg. at 22,192. As a result of making Justice Kennedy's "significant nexus standard" the "key" to the Rule, the agencies acknowledged, "some tributaries as defined in the final rule may not be 'relatively permanent'" and thus would fail "the [*Rapanos*] plurality's test." TSD 48-49, 67 (JA__, __). The agencies' choice to treat Justice Kennedy's *Rapanos* concurrence as controlling expanded the scope of their jurisdiction to cover features that the four Justices in the plurality held were outside the scope of the CWA.

There is much wrong with the agencies' approach to *Rapanos*. As both we and the States elsewhere demonstrate, a *faithful* application of Justice Kennedy's opinion is in fact incompatible with the Rule, which reaches countless features with only "speculative or insubstantial" effects on navigable waters—features that Justice Kennedy concluded are not jurisdictional under

his significant nexus approach. 547 U.S. at 780-781. *See* Part II.B, *infra*; State Br. Part I.A.

We focus in this section, however, on whether elevating the one-Justice concurrence to a determinative role was legally permissible. This Court in *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009), discussed the law relevant to determining the holding of *Rapanos* but ultimately found it unnecessary to decide the question. Here, the question is squarely presented because the Rule explicitly is based on the concurrence. As a matter of law, the concurrence is not the (or a) holding of *Rapanos*. That by itself shows that the Rule is not in accordance with law and must be vacated.[10]

1. The agencies' selection of Justice Kennedy's concurrence as "the touchstone" of CWA jurisdiction is entitled to no deference

The agencies' determination that Justice Kennedy's *Rapanos* concurrence is controlling is entitled to no deference. To justify their reliance on a single Justice's concurring opinion, the agencies cherry-picked from conflicting judicial precedents addressing how to apply *Rapanos*. *See* 79 Fed. Reg. at 22,252-262 (Appendix B, Legal Analysis); TSD 48-49, 67 (JA__). But neither the agencies' reading of those cases, nor of *Rapanos* itself, is entitled

[10] Petitioners agree with the States that, having adopted Justice Kennedy's opinion as the "touchstone" for the Rule, the agencies are stuck with it for purposes of judicial review. Here, we address an *additional* ground for vacatur, which is that the agencies were legally mistaken in their exclusive reliance on the *Rapanos* concurrence.

to any deference. Courts "do not defer to [an agency] with respect to the interpretation of judicial precedent." *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 692 (6th Cir. 2001); *see also, e.g.*, *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (there is "no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the [Supreme] Court's opinions"), *vacated on unrelated grounds*, 524 U.S. 11 (1998). It is for this Court to determine the holding of *Rapanos*, not the agencies.

2. The agencies improperly relied on the Rapanos *dissent.*

The agencies also relied on the *dissenting opinion* in *Rapanos* as support for the Rule. *See*, *e.g.*, TSD 51 (JA__) (looking "to the votes of the dissenting Justices" to construct "a majority view"); 79 Fed. Reg. at 22,260 (approvingly citing the dissent's view of adjacency); 80 Fed. Reg. at 37061 (relying on the dissent's view that the agencies would be free to follow either the plurality's or Justice Kennedy's opinion). That was impermissible.

The Supreme Court in *Marks v. United States*, 430 U.S. 188, 193 (1977), "instruct[ed] lower courts … to *ignore dissents*" when determining the holding of a divided Supreme Court decision. *Cundiff*, 555 F.3d at 208 (emphasis added). The agencies offered no justification for adopting the Kennedy concurrence over the plurality test except their citation to the dissent's view (and cases relying on it). 80 Fed. Reg. at 37061. That was improper under

Marks and *Cundiff* and by itself renders the Rule arbitrary and capricious and not in accordance with law.

3. The agencies erred in basing the Rule on Justice Kennedy's Rapanos *concurrence.*

Once these questions of deference and the role of the *Rapanos* dissent are cleared aside, the question remains of how to interpret the relevant opinions in *Rapanos*—the four-Justice plurality and single-Justice concurrence—to determine a holding that binds the agencies and courts.

In *Marks*, the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193. However, this Court in *Cundiff* explained that the search for the "narrowest opinion" that "relies on the least doctrinally far-reaching common ground" "breaks down" when, as in *Rapanos*, neither opinion is a "logical subset" of the other. 555 F.3d at 209 (internal quotation marks omitted). To the contrary, this Court observed, "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's views." *Id.* at 210. In consequence, "*Rapanos* is not easily reconciled with *Marks*" and "the question becomes what to do." *Id.*

One possibility is to find the holding of *Rapanos* in those propositions as to which the plurality and Justice Kennedy did agree. Although there may be "little common ground" between the plurality and Justice Kennedy (*id.*), there is some agreement between them on important issues. The plurality and Justice Kennedy agreed that "the word 'navigable' in 'navigable waters [must] be given some importance." 547 U.S. at 778 (Kennedy, J.); *see id.* at 731 (plurality). They also agreed that the CWA reaches some waters and wetlands that are not navigable-in-fact but that have a substantial connection to navigable waters, though they disagreed whether the sufficient connection is "a continuous surface connection," requiring a "relatively permanent standing or continuously flowing bod[y] of water" (547 U.S. at 739, 742 (plurality)), or instead a "nexus" that is "significant" enough to "affect the chemical, physical, and biological integrity" of the navigable water (*id.* at 784-785 (Kennedy, J.)).

Despite this difference in characterizing the necessary connection, both Justice Kennedy and the plurality agreed that, applying their tests, "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less the waters or "wetlands [that] lie alongside [such] a ditch or drain." 547 U.S. at 781 (Kennedy, J., concurring); *see id.* at 778-781 (identifying "volume of flow" and "proximity" as relevant factors and ruling out jurisdiction over features with a "remote," "insubstantial," or "specula-

tive" effect on navigable waters) (Kennedy, J.); *id.* at 733-734 (jurisdiction reaches "continuously present, fixed bodies of water"; "intermittent or ephemeral flow" of the sort found in "drainage ditches," "storm sewers and culverts," and "dry arroyos" is insufficient) (plurality); *id.* at 742 (wetlands with "an intermittent, physically remote hydrologic connection" to jurisdictional waters lack a "significant nexus") (plurality). Under a common-denominator approach, those are controlling holdings of *Rapanos* that bind the agencies. And under that approach the Rule must be vacated because, as we describe below (*infra*, Part II.B), its definitions of "tributaries" and of "adjacent" assert jurisdiction over features that are remote from navigable waters and carry only minor, ephemeral, or intermittent water volumes towards them, and wetlands alongside such features.

An alternative approach to determining the holding of *Rapanos*, in light of the difficulties this Court identified in *Cundiff*, is to require CWA jurisdictional rules to satisfy *both* opinions, because that is the narrowest "position" taken by the majority opinions, read together. *Marks*, 430 U.S. at 193. *See* API Comments 2-3, ID-15115 (JA__); WAC Comments 15-17 (JA__). Under that approach, *Rapanos* requires that jurisdictional waters have a relatively permanent flow that reaches traditional navigable water, that wetlands have a continuous surface connection to navigable waters, and that the flow or connection is sufficient in frequency, duration, and proximity to

affect the chemical, physical, and biological integrity of covered waters. Again, the Rule clearly fails this test.

Either of these approaches is compatible with *Marks*. What is not compatible with *Marks*, because it plainly is not the narrowest reading of the *Rapanos* majority opinions, is to say that waters of the United States are those defined by *either* Justice Kennedy or the plurality, or by Justice Kennedy alone. Because the Rule was based on a faulty legal premise, it must be vacated.

B. The Rule is inconsistent with statutory language, Supreme Court precedent, and the scientific evidence

Even if it were appropriate for the agencies to base jurisdiction over tributaries, adjacent waters, and isolated other waters solely on Justice Kennedy's significant nexus test, the Rule stretches and distorts that test beyond recognition. It reaches countless features that lack the "volume of flow" and "proximity" necessary to ensure that effects on navigable waters are more than "insubstantial" or "speculative." 547 U.S. at 778-781 (Kennedy, J., concurring).

1. The Rule reads the word "navigable" out of the Clean Water Act

"Statutory interpretation, as [the Supreme Court] always say[s], begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). And the text "must, if possible, be construed in such fashion that every word has some operative effect." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

The CWA grants the agencies jurisdiction over "navigable waters" (33 U.S.C. 1311(a)), which in turn are defined as "the waters of the United States." 33 U.S.C. 1362(12). "Congress' separate definitional use of the phrase 'waters of the United States' [does not] constitute[] a basis for reading the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. Although "the word 'navigable' in the statute" may have "limited effect," it does not have "no effect whatever." *Id*. at 172-173 (citing *Bayside Riverview*, 474 U.S. at 133). On the contrary, the phrase "navigable waters" demonstrates "what Congress had in mind as its authority for enacting the CWA": its "commerce power over navigation" and therefore "over waters that were or had been navigable in fact or which could reasonably be so made." *Id*. at 168 n.3, 173, citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940); *see The Daniel Ball*, 77 U.S. (8 Wall.) 557, 563 (1870). Justice Kennedy agreed that "the word 'navigable'" must "be given some importance" and emphasized that if jurisdiction over wetlands is to be based on a "significant nexus" test, the nexus must be to "navigable waters *in the traditional sense*." 574 U.S. at 778-779. If the word "navigable" is to have any meaning, Justice Kennedy explained, the CWA cannot be understood to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id*. at 778.

The Rule ignores this admonition. As commenters explained at length, the Rule will allow the agencies to assert federal regulatory jurisdiction over desiccated ditches (as "tributaries") and any isolated water features that happen to be nearby (waters with a "significant nexus"). For example:

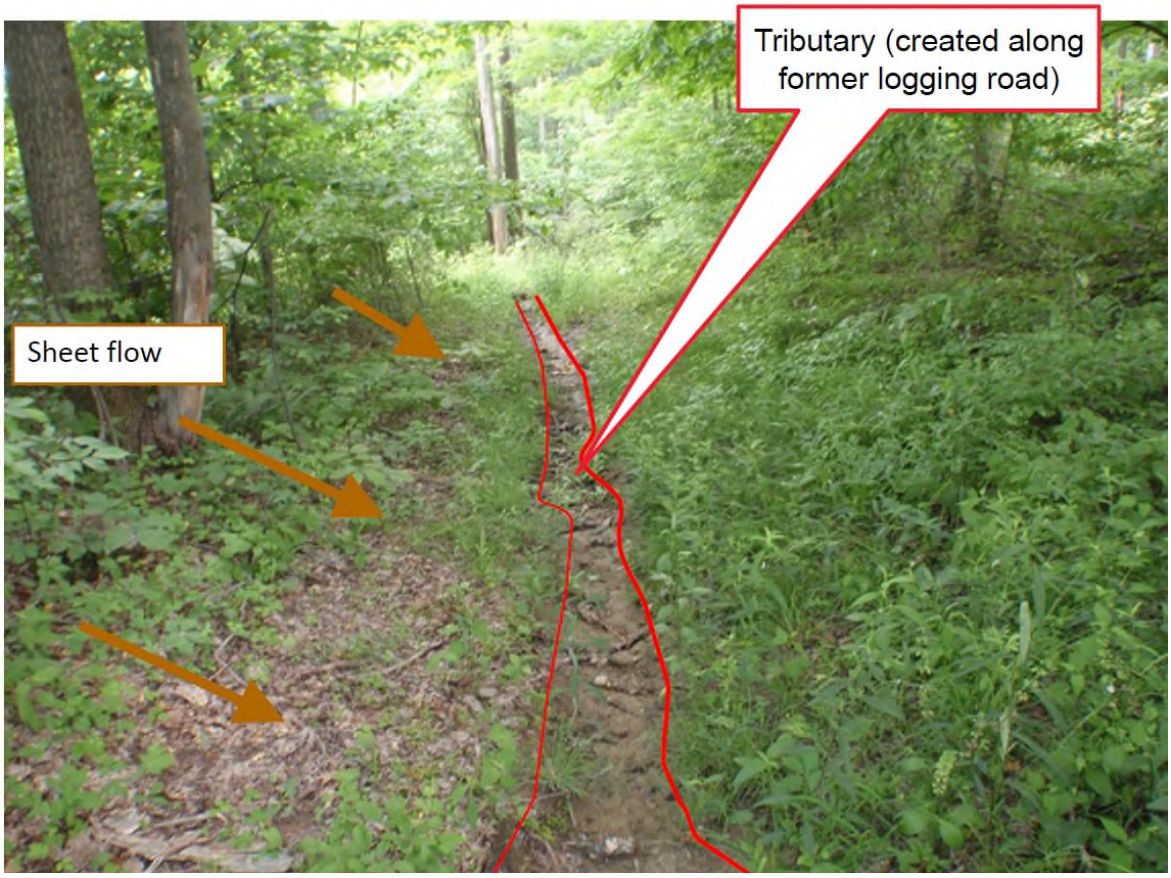


Figure 1: Because the red lines likely constitute an "ordinary high water mark" with a bed and banks between them, the feature depicted above is likely to be a "navigable water" under the Rule's definition of a tributary. Am. Petroleum Inst. Comments, ID-15115 (JA__).

Figure 2: Dade City Canal in Florida is a man-made, mostly dry conveyance for flood control. Dade City Canal is not currently a water of the United States but would likely be deemed a "tributary" under the Rule. Fla. Stormwater Ass'n Comments 10, ID-7965 (JA__).

Figure 3: This feature was deemed to be a "water of the United States" in 2014 after the Corps concluded that it exhibits an ordinary high water mark. AFBF Comments, App. A (JA__). *See also* perma.cc/US3K-GKP3.

Figure 4: Typical ephemeral arid washes, likely to be deemed waters of the United States under the Rule. Freeport-McMoRan Comments (JA__).

As a matter of plain meaning, treating features like these as "tributaries" to "navigable waters"—and treating barely damp, isolated "wetlands" nearly a mile away as likewise "waters of the United States" because they are located within 4,000 feet of such "tributaries"—simply makes no sense.

Take, for example, the "seasonally ponded, abandoned gravel mining depressions" that were at issue in *SWANCC*. 531 U.S. at 164. Those very same "nonnavigable, isolated, intrastate waters" (*id.* at 169)—which five Justices agreed were *not* covered by the Clean Water Act—would likely be

covered by the Rule. The depressions are within 4,000 feet of Poplar Creek, a tributary to the navigable Fox River. And there can be little doubt that the Corps would find the existence of a significant nexus to the Fox River because the depressions retain water.

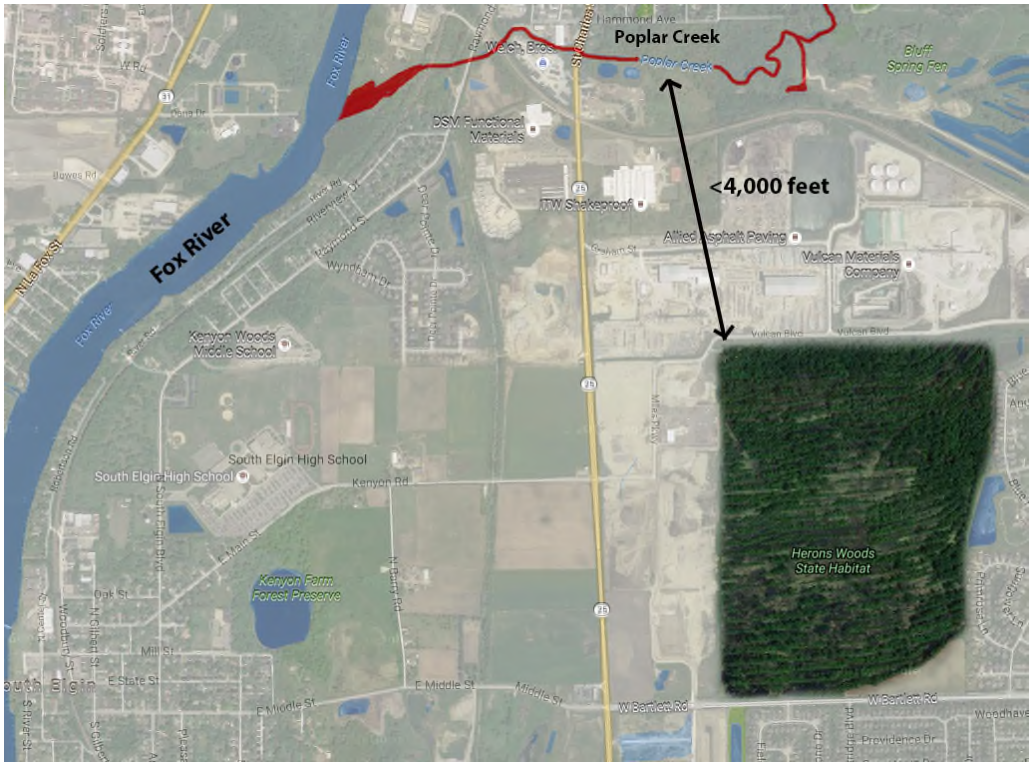


Figure 5: The water features at issue in SWANCC were the long shallow ponds that fill seasonally in what is now the Herron Woods State Habitat. *See* perma.cc/GU2S-XZ4S.

The Rule's coverage of all "interstate waters" (33 C.F.R. 328.3(a)(2)) likewise ignores the word "navigable," replacing it with the word "interstate," and ignores Congress's choice to *remove* the term "interstate waters" from the Act. *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) ("interstate"), and Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) ("interstate or navigable"), with 33 U.S.C. 1362(7) ("navigable"). The agencies purport to assert jurisdiction over all interstate water features, even when they "are not

[traditional] navigable [waters]" and "do not connect to such waters." 80 Fed. Reg. 37,054, 37,074. An interstate water need not be navigable—an intermittent trickle or isolated pond is enough, so long as it crosses a state line. The agencies thus claim jurisdiction over features that are not navigable, cannot be made navigable, have no nexus ("significant" or otherwise) to a navigable water or commerce, are not adjacent to, and do not contribute flow to, a navigable water, simply because the feature "flow[s] across, or form[s] a part of, state boundaries." 80 Fed. Reg. at 37,074. And this overreach is compounded by the Rule's treatment of all "interstate waters" as if they were traditional navigable waters. As a result, any trickle that crosses a state line can be the starting point for the assertion of jurisdiction over its "tributaries" or "adjacent" wetlands.

The Rule accordingly cannot stand, for "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law," but "'the power to adopt regulations to carry into effect the will of Congress.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214 (1976).

2. The Rule's definition of "tributaries" is inconsistent with precedent and the evidence

Setting aside the Rule's excision of the word "navigable," several other aspects of the Rule are irreconcilable with Supreme Court precedent, the scientific evidence, and (quite often) simple logic.

a. The Rule defines "tributary" to include any feature contributing any flow to a (1)-(3) feature, "either directly or through another water," and "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. 328.3(c)(3). Because flow may be "intermittent or ephemeral" (80 Fed. Reg. 37,076), jurisdiction extends to minor creek beds, municipal stormwater systems, ephemeral drainages, and dry desert washes that are dry for months, years, or even decades at a time, as long as they exhibit a bed, banks, and OHWM. A feature may qualify despite passing "through any number of [non-jurisdictional] downstream waters" or natural or man-made physical interruptions (*e.g.*, culverts, dams, debris piles, boulder fields, or underground features) *of any length*, so long as a bed, banks, and OHWM can be identified upstream of the break. 33 C.F.R. 328.3(c)(3). And the agencies need not use current facts; they may use historical information alone. *See, e.g.*, 80 Fed. Reg. at 37,081, 37,098.

The Rule defines OHWM to mean "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." 80 Fed. Reg. at 37,106. That is the same definition that Justice Kennedy criticized in *Rapanos* as too uncertain and attenuated to serve as the "determinative measure" for identifying waters of the United States. 547

U.S. at 781. Because an OHWM is an uncertain indicator of "volume and regularity of flow," it brings within the agencies jurisdiction "remote" features with only "minor" connections to navigable waters—features that "in many cases" are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781-782 (Kennedy, J.).

The definition's reach is thus vast, covering countless miles of previously unregulated features.[11] And the definition is categorical, sweeping in many isolated, often dry land features regardless whether "their effects on water quality are speculative or insubstantial." *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). To be sure, Justice Kennedy contemplated that the Corps might, by rule, "identify categories of tributaries" (and adjacent wetlands) that, due to "volume of flow," "proximity to navigable waters," and other relevant considerations "are significant enough" to support federal jurisdiction. *Id.* at 780-81. But the Rule eschews consideration of frequency

[11] *See, e.g.*, NAHB Comments 56-59, 121-123, ID-19574 (JA__) (the Rule will extend jurisdiction over nearly 100,000 miles of intermittent and ephemeral drainages in each of Kansas and Missouri alone); NSSGA Comments 21, ID-14412 (JA__) (mountain-range watersheds in central California coastal region); UWAG Comments 51-53, ID-15016 (JA__) (drainage ditches in southeastern coastal plains); Waters Working Group Comments 27, ID-19529 (JA__) (water supply systems and municipal separate storm sewer systems); Comments of Delta County, Colorado 3, ID-14405 (JA__) ("artificial stock ponds west of the Mississippi"); Murray Energy Corp. Comments 11, ID-13954 (JA__) (mine site drainage ditches and culvert conveyances); AAR Comments 4, ID-15018 (JA__) (rail ditches).

and volume of flow or proximity to navigable waters, proclaiming that the presence of "physical indicators" of bed and banks and OHWM guarantee there will be a significant nexus to navigable waters. *See* 80 Fed. Reg. at 37,076. But that is wrong. For example, although many ephemeral washes in Maricopa County, Arizona experience flow infrequently (*e.g.*, less than once per year, with each flow event lasting less than 5 hours) and the Corps has previously found that many such washes *do not* have a significant nexus, these washes often exhibit physical indicators of an OHWM and therefore would be treated under the Rule as jurisdictional tributaries. *See* City of Scottsdale Comments 2-3, ID-18024 (JA __).

Even if *some* features meeting the Rule's definition of tributary have a "significant nexus" with traditional navigable waters, "[i]n other instances" it is clear that they do not. *Rapanos*, 547 U.S. at 767. By treating all tributaries as categorically jurisdictional—even ones "carrying only minor water volumes toward" a "remote" navigable water (*id.* at 788, 781)—the Rule is inconsistent with Justice Kennedy's "significant nexus" approach, to say nothing of the plurality opinion.

b. For similar reasons, the Rule's definition of "tributary" is inconsistent with the scientific evidence. The crux of that definition is the presence of a bed, banks, and OHWM. The underlying premise is that an "OHWM forms due to some regularity of flow and does not occur due to extraordinary events." TSD 239 (JA__). When an OHWM is present, the reasoning goes, a

water feature with relatively constant and significant water flow must also be present. But that key predicate of the Rule is demonstrably false.

In attempting to show that *all* "tributaries" nationwide have significant physical, biological, or chemical connections to navigable waters, the agencies focused on non-representative, water-rich systems. *See*, *e.g.*, 80 Fed. Reg. at 37,068-37,075. Yet the agencies concede that the jurisdictional status of some tributaries—especially "intermittent and ephemeral" features that may not experience flow for months and years at a time—had long been "called into question" (79 Fed. Reg. at 22,231) and that the evidence of connectivity for such features is "less abundant." 80 Fed. Reg. at 37,079.

Nowhere is that more apparent than in the arid West, where erosional features with beds, banks, and OHWMs often reflect one-time, extreme water events, and are not reliable indicators of regular flow. *See* Ariz. Mining Ass'n Comments 7-11 (JA__). In the desert, rainfall occurs infrequently, and sandy, lightly-vegetated soils are highly erodible. Thus washes, arroyos, and other erosional features often reflect physical indicators of a bed, banks, and OHWM, even if they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow. *See* Barrick Gold Comments 15-16, ID-16914 (JA__). Because arid systems lack regular flow, the channels do not "heal" or return to an equilibrium state, as they do in wet, humid climates. Freeport-McMoRan Technical Comments 7, ID-14135 (JA__).

The Corps' experience bears this out; their studies have found "no direct correlation" between the location of OHWM indicators and future water flow in arid regions. *See* Ariz. Mining Ass'n Comments 10-11 (JA__) (quoting U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability* 14 (2006)). In fact, "OHWM indicators are distributed randomly throughout the [arid] landscape and are not related to specific channel characteristics." *Id.* at 11 (JA__) (quoting U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes* 17 (2013)). Needless to say, "randomly" distributed indicators cannot provide a rational basis for a blanket "significant nexus" finding.

Thus, in the arid west, dry channels deemed "tributaries" under the Rule are unlikely to have any impact (much less a significant one) on downstream jurisdictional waters. In this context, the agencies' categorical approach to jurisdictional tributaries is as unsupported by scientific evidence as it is irreconcilable with Justice Kennedy's *Rapanos* opinion.

All of this is well reflected in the record. While it may make sense to assume that a defined "tributary" affects downstream "aquatic species" in water-rich environments, that assumption is out of place for intermittent and ephemeral channels that lack flow for months or years at a time. *See* Ariz. Mining Ass'n Comments 14 (JA__). *See also* GEI Consultants Report 3, ID-15059 Att. 2 at 3 (JA__) ("because the OWHM is a more demonstrated humid system criteria, its scientific reliability varies between regions depending on

climatic and geomorphic conditions"). Similarly, chemical connectivity is "not relevant" in arid systems where "water moves quickly across the landscape" and "dissipates," because chemical processes require "a long residence time in channels." Freeport-McMoRan Comments 4-5 (JA__). Evidence of actual transport distances in ephemeral "tributaries" likewise dooms any blanket finding of connectivity. *See* Ariz. Mining Ass'n Comments 12 (JA__); Barrick Gold Comments 15-16 (JA__).

In attempting to justify the Rule's effects in arid ecosystems, the agencies relied almost exclusively on a case study of the San Pedro River. *See* 79 Fed. Reg. at 22,231-22,232; Connectivity Report at B-37, B-55 (JA__). But the San Pedro is demonstrably *un*representative of arid regions nationwide. *See*, *e.g.*, Southwest Developers Comments 2, ID-15362 (JA__) (of "1,016 publications" in the Draft Connectivity Report, "only three include research on arid west headwaters in small watersheds"). And where the Connectivity Report briefly asserts that characteristics "similar to the San Pedro River" "have been observed in [three] other southwestern rivers," it acknowledges that each of those systems has *more* flow than the San Pedro. Connectivity Report B-48 to B-49 (JA__).

The difference is one of kind, not degree. The mainstem San Pedro has surface flows 261 days a year because its tributaries generate large storm-water runoff, due to unusual soil composition that prevents water loss. *See* Freeport-McMoRan Comments 6 (JA__). By contrast, the Santa Cruz River (a

typical feature in arid regions) has a median annual flow of *zero* cubic feet per second, is dry 90% of the time, and is part of a system of "tributaries" that generally have less frequent surface flow than the mainstem channel, "behave more like deep sandboxes than streams," and lack surface flow or a shallow subsurface connection to groundwater. *See id.*; Freeport-McMoRan Technical Comments 4, 12-15 (JA__). By relying heavily on the San Pedro, the agencies arbitrarily overstated the connections between arid channels and downstream navigable waters. And an agency errs by relying "almost exclusively" on a sample of data but offering "no assurance" that it "was in any way representative" of the universe of regulated entities. *E.g.*, *Saint James Hosp. v. Heckler*, 760 F.2d 1460, 1466-67 (7th Cir. 1985).

c. The Rule also implausibly asserts that there is a significant hydrological nexus between every tributary and the nearest (1)-(3) feature, despite intervening man-made or natural breaks of literally "any length." 33 C.F.R. 328.3(c)(3). As one authoritative report before the agencies explained, "the science does not support the Agencies' assertion that a significant nexus between a tributary and a traditional navigable water is not broken where the tributary flows through a culvert or other structure." GEI Report 6 (JA__).

Indeed, EPA's own Science Advisory Board noted that the Connectivity Report lacked sufficient information on the influence of human alterations on connectivity and "generally exclude[d] the many studies that have been

conducted in human-modified stream ecosystems." SAB Report 31 (JA__). It is often the entire *point* of such breaks to sever connectivity (GEI Report 5-6 (JA__)), as is sometimes the case with dams, for example. *Cf.* 79 Fed. Reg. at 22,235 (acknowledging that dams cut off flow and store water for flood control, irrigation water supply, and energy generation). It was arbitrary and capricious for the agencies to reach, on unexplained grounds, a result inconsistent with the SAB's conclusion.

3. The Rule's definition of "adjacent" is inconsistent with precedent and the evidence

The Rule's categorical approach to "adjacent" waters (33 C.F.R. 328.3-(a)(6)) runs into similar problems. The Rule defines "adjacent" as "bordering, contiguous, or neighboring." The term "neighboring" is defined to include, among other things, (i) waters within 100 feet of the OHWM of a navigable water or tributary, and (ii) waters within the 100-year floodplain of such a water and within 1,500 feet of its OHWM. 33 C.F.R. 328.3(c)(2). This definition is insupportable for four reasons.

First, the Rule conflicts with *Riverside Bayview*, *SWANCC*, and *Rapanos*, which consistently have given the word "adjacent" its ordinary meaning. The Court in *Riverside Bayview*, for example, described "wetlands adjacent to [jurisdictional] bodies of water" as wetlands "adjoining" and "actually abut[ting] on" a traditional "navigable waterway." 474 U.S. at 135. Jurisdictional adjacent wetlands thus are those "inseparably bound up with

the 'waters' of the United States" and not meaningfully distinguishable from them. 474 U.S. at 134-135 & n.9. For the same reason, the Court in *SWANCC* rejected the agencies' assertion of jurisdiction over *isolated* non-navigable waters "that [we]re *not* adjacent to open water" and thus not "inseparably bound up" with "navigable waters." 531 U.S. at 167-168, 171.

Rapanos continued this plain-language approach to adjacency. As this Court recently explained, *Rapanos* stands for the proposition that, regardless whether the word adjacent may be "ambiguous … in the abstract," it clearly includes "'physically abutting'" *and not* "merely 'nearby.'" *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 743 (6th Cir. 2012) (quoting 547 U.S. at 748). To conclude, as the Rule does, that the word "adjacent" can be understood to cover merely "nearby" waters based on notions of "functional relatedness," rather than "physical and geographical proximity" (*id.* at 735) would "extend[]" the meaning of the word "beyond reason." *Id.* at 743.

Second, by asserting jurisdiction based on adjacency not only to traditional navigable waters, but to any (1)-(3) feature, the Rule violates Justice Kennedy's *Rapanos* concurrence. Justice Kennedy rejected the idea that a wetland's mere adjacency to a *tributary* could be "the determinative measure" of whether it was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." 547 U.S. at 781. "[W]etlands adjacent to [such] tributaries," Justice Kennedy explained, "might appear little more related to navigable-in-fact

waters than were the isolated ponds [in *SWANCC*]." *Id.* at 781-782. On that understanding, Justice Kennedy voted to vacate the agencies' assertion of jurisdiction over wetlands supposedly "adjacent" to a ditch that indirectly fed into a navigable lake. *Rapanos*, 547 U.S. at 764; *accord id.* at 730 (plurality). In his view, "mere adjacency to a tributary of this sort is insufficient." *Id.* at 786. Similarly, Justice Kennedy disagreed with asserted jurisdiction over wetlands based on a mere surface water connection to a non-navigable tributary; some greater "measure of the significance of the connection for downstream water quality" was required. *Id.* at 784-785.

Yet the Rule doubles down on precisely this disfavored approach. It categorically asserts jurisdiction over "waters" (many of which are dry more often than wet) based on their "adjacency" to "tributaries" "however remote and insubstantial" (547 U.S. at 764), including ephemeral features, drains, ditches, and streams remote from navigable waters. A blanket inclusion of adjacent "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like" (33 C.F.R. 328.3(c)(1)) improperly asserts jurisdiction over a feature isolated by a man-made barrier *whose precise aim and effect* is to interrupt any hydrologic connection to a jurisdictional water.

Third, the Rule improperly relies on adjacency to assert jurisdiction not only over "wetlands," but all other "waters." The Supreme Court has never approved such a sweeping approach. *See Riverside Bayview*, 474 U.S. at 139; *Rapanos*, 547 U.S. at 742 (plurality). According to the *Rapanos* plurality,

non-wetland "waters"—especially those separated from traditional navigable waters by physical barriers or significant distances—"do not implicate the boundary-drawing problem" that justified deference to the agency's approach to adjacency jurisdiction in *Riverside Bayview*. 547 U.S. at 742.

For this reason, courts have rejected past attempts to assert "adjacency" jurisdiction over non-wetlands. In one such case, for instance, the Ninth Circuit rejected jurisdiction over an isolated pond located a mere 125 feet from a navigable tributary of San Francisco Bay, despite evidence that the tributary occasionally flowed into that pond (but not vice-versa) by overtopping a levee. *See S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir. 2007). That situation, in the court's view, "falls far short of the nexus that Justice Kennedy required in *Rapanos*." *Id.* Yet under the Rule here, the agencies would assert jurisdiction over that feature and countless others like it. Such an approach is insupportable.

Fourth, the Rule improperly defines "adjacency" based on "the 100-year floodplain" (33 C.F.R. 328.3(c)(2)(ii)), which is the region whose risk of flooding in any given year is 1%. Such infrequent contact with jurisdictional waters flouts the "*continuous* surface connection" required by the *Rapanos* plurality. *Id.* at 742. And under Justice Kennedy's test, a water that is "connected to [a] navigable water by flooding, on average, once every 100 years" (*Rapanos*, 547 U.S. at 728 (plurality)) cannot be said to "significantly affect the chemical, physical, and biological integrity of the other covered water[]."

Id. at 780 (Kennedy, J., concurring). At most, such a water would have an "insubstantial" "effect[] on water quality" that "fall[s] outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

Within any given floodplain, moreover, the Rule applies unexplained distance criteria. 33 C.F.R. 328.3(c)(2)(ii). As officials in the Corps acknowledged, longstanding agency guidance previously held that "it is not appropriate to determine significant nexus based solely on any specific threshold of distance." Moyer Memo 2, ID-20882 (JA__). "Agencies are," of course, "free to change their existing policies," but if they do so, they "must at least 'display awareness that [they are] changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 2126 (quoting same). And "[i]t follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Id.* (quoting *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

4. The "significant nexus" test resurrects the invalidated Migratory Bird Rule

Although the Rule's case-by-case "significant nexus" test (33 C.F.R. 328.3(a)(7)-(8)) is ostensibly based on *SWANCC* and Justice Kennedy's opinion in *Rapanos*, it misapplies both and asserts jurisdiction broader than the theories of connection rejected in those cases.

The purpose of the significant nexus standard, Justice Kennedy explained in *Rapanos*, was "to give the term 'navigable' some meaning" by limiting federal jurisdiction to wetlands (not all waters) with a significant impact on traditional navigable waters. 547 U.S. at 778-779. To that end, a water is jurisdictional in his view only if it "significantly affect[s] the chemical, physical, and biological integrity of … waters more readily understood as 'navigable.'" *Id.* at 780. This standard, in Justice Kennedy's understanding, excluded features that are too "remote" or whose "effects on [navigable] water quality are speculative or insubstantial." *Id.*

By contrast, the Rule asserts jurisdiction if a feature affects the "chemical, physical, *or* biological integrity" of a traditionally navigable or interstate water (33 C.F.R. 328.3(c)(5) (emphasis added)), thereby ignoring the conjunctive nature of both the statute and Justice Kennedy's test.

This is a crucial distinction. By requiring only one type of connection, the Rule effectively reinstates the Migratory Bird Rule invalidated by the Supreme Court in *SWANCC*. 531 U.S. at 167. In particular, it asserts

jurisdiction based on singular functional connections, including the "[p]rovision of life cycle dependent aquatic habitat" (33 C.F.R. 328.3(c)(5)(ix)), between one water and some other distant water (including a distant interstate trickle). That is the exact theory of jurisdiction reflected in the Migratory Bird Rule, under which isolated non-navigable ponds were jurisdictional solely "because they serve[d] as habitat for migratory birds." *SWANCC*, 531 U.S. at 171-172.

5. The Rule's hard distances and other criteria are unsupported by scientific evidence

Between the proposed Rule and the final Rule, the agencies introduced hard distance tests and categorical exemptions—never subject to public comment—that are unsupported by the scientific evidence.

Bright line distances and floodplains. The Rule asserts categorical "adjacency" jurisdiction over features that are both within the 100-year floodplain of a (1)-(5) feature and within 1,500 feet of its OHWM. *See* 33 C.F.R. 328.3(c)(2)(ii). It also asserts the categorical adjacency of waters within 100 feet of the OHWM of a (1)-(5) feature, as well as waters within 1,500 feet of the high tide line of a (1)-(3) feature. *Id.* at (c)(2)(i), (iii). Similarly, the Rule asserts jurisdiction over all waters within the 100-year floodplain of a (1)-(3) feature or 4,000 feet of the OHWM of a (1)-(5) feature, where those waters are found to have a "significant nexus" to a (1)-(3) feature. 33 C.F.R. 328.3(a)(8). Those arbitrary selections go effectively

unexplained and are unsupported by the evidence. This alone is a basis for vacating the Rule, for an agency "may not pluck a number out of thin air." *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982).

The agencies essentially admit that the 100-year floodplain was chosen based on administrative convenience, not science. *See* 80 Fed. Reg. at 37,089 (100-year floodplain serves "purposes of clarity" and "regulatory certainty"). But a floodplain of *any* interval would serve that purpose, and a 100-year floodplain serves it less well than using a shorter period for which flood limits can be determined more easily and with more certainty. Nevertheless, the agencies ignored comments urging that a one- or five-year floodplain would be a better metric. *E.g.*, Nat'l Lime Ass'n Comments 13-16, ID-14428 (JA__); N.C. Farm Bur. Comments 13, ID-15078 (JA__). The agencies concede the lack of "scientific consensus" over the appropriate flood interval. *See* EPA, *Questions and Answers—Waters of the U.S. Proposal* 5, perma.cc/7RRP-V46X. To be sure, they cited the Science Report's generic statement that "floodplains are physically, chemically and biologically integrated with rivers via functions that improve downstream water quality." 80 Fed. Reg. at 37,085. But the relevance of "floodplains" *in general* does not justify reliance on a 100-year floodplain *in particular*. There is no scientific basis for using the 100-year interval to determine the agencies' regulatory jurisdiction—an interval that both expands CWA jurisdiction and adds to its uncertainty.

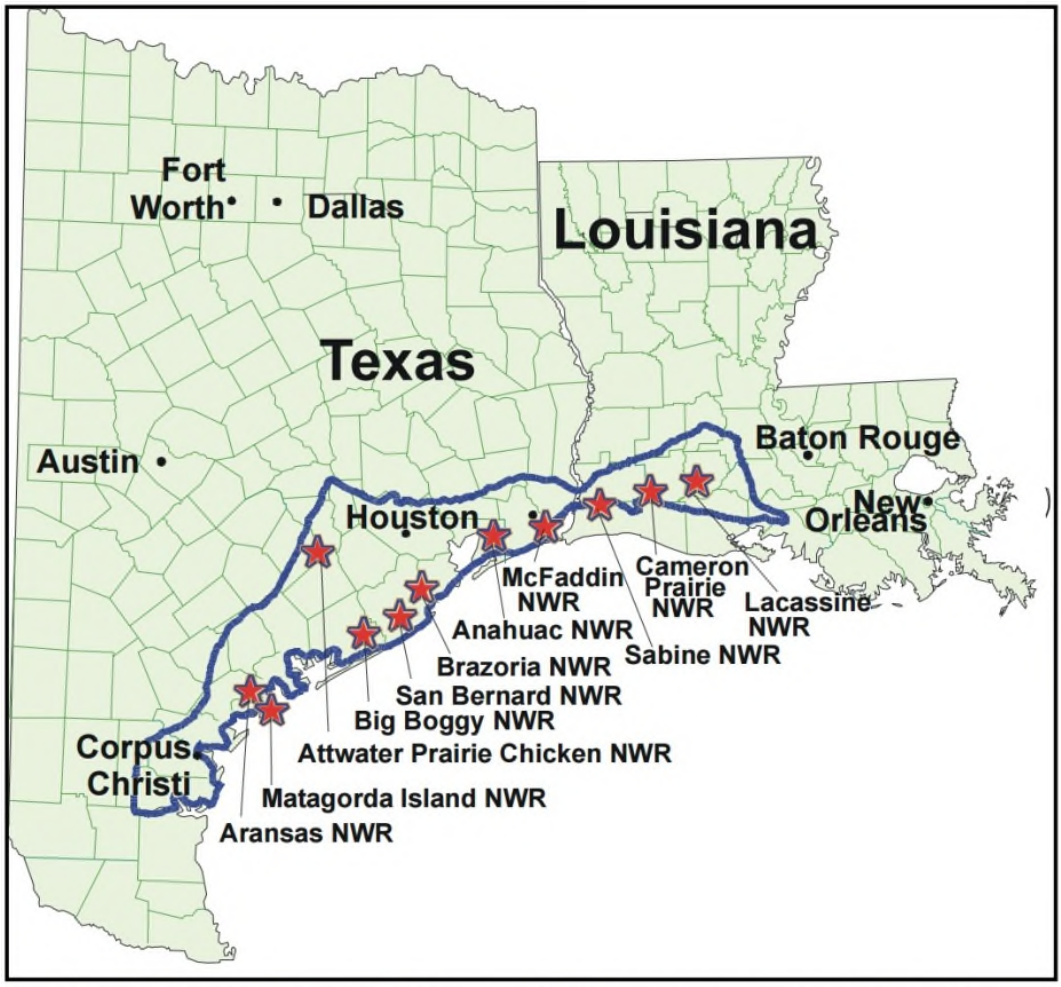
When choosing the 1,500-foot adjacency boundary, the agencies relied on unidentified "scientific literature," their own "technical expertise and experience," and the convenience "of drawing clear lines." 80 Fed. Reg. at 37,085. The same is true of the nearly mile-wide (4,000 foot) significant-nexus boundary. The agencies again invoked their "extensive experience making significant nexus determinations" as having "informed the[ir] judgment." *Id.* at 37,090. But they offered no evidentiary basis for plucking those numbers from what they *admitted* was otherwise thin air. *See* 80 Fed. Reg. at 37,090 ("the science does not point to any particular bright line").

Merely intoning "technical expertise" is "not sufficient" in the absence of "specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose." *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). Courts may "defer to [an agency's] expertise [only] if it provides substantial evidence to support its choice and responds to substantial criticism of [the] figure." *United Distrib. Cos. v. FERC,* 88 F.3d 1105, 1141 n.45 (D.C. Cir. 1996). That evidence is lacking here.

Ditches. The Rule's arbitrariness is underscored by its categorical assertion of jurisdiction over some (but not all) ditches—an ambiguous term that is nowhere defined in the Rule. *See* 33 C.F.R. 328.3(b) "[N]o scientific literature is presented that ... evaluates the effects that ditches have on the integrity of downstream waters." WAC Comments 41 (JA__). Thus, as the chair of the SAB's review panel explained, "many research needs must be

addressed in order to discriminate between ditches that should be excluded and included." Rodewald Transmittal Mem. 7, ID-7617 (JA__). Or, as another panel member explained, by "focus[ing] on research from natural systems," the Connectivity Report "d[id] not provide sufficient information on which to discuss the role of these man-made features." *Id.* at 43 (JA__). For their parts, the agencies did not dispute the absence of evidence supporting the Rule's arbitrary assertion of jurisdiction over some ditches. Response to Comments (Topic 6) 89, ID-20872 (JA__). On the contrary, they acknowledge scientific "uncertainty" on the matter. *Id.* at 23 (JA__).

Texas coastal prairie wetlands. The Rule identifies several water features that *per se* "function alike and are sufficiently close to function together in affecting downstream waters," with no need to conduct a case-specific analysis. 80 Fed. Reg. at 37,059. Among them are Texas coastal prairie wetlands, which the agencies define as "freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands," but only those "*located along the Texas Gulf Coast*." 80 Fed. Reg. at 37,072 (emphasis added). There is no conceivable scientific basis for using political boundaries in an analysis of hydrological function. And if such features are not "similarly situated" as a categorical matter within Louisiana, neither are they when located in Texas. *See* U.S. Geological Survey, Nat'l Wetlands Research Center, *Coastal Prairie* (June 2000), perma.cc/A28R-HCH5:



Location of the coastal prairie. The stars indicate management and restoration sites in the Department of the Interior. (NWR = National Wildlife Refuge).

6. The Rule paradoxically treats some features as both "point sources" and jurisdictional waters

The Rule asserts jurisdiction over "man-altered[] or man-made water[s]" including "rivers, streams, canals, and ditches not excluded under [Section 328.3(b)]" and "channelized" waters and "piped streams," "even where used as part of a stormwater management system." 33 C.F.R. 328.3-(c)(3); 80 Fed. Reg. at 37,100. "Jurisdictional ditches" include those with "intermittent flow that are a relocated tributary, or are excavated in a

tributary, or drain wetlands," and those "regardless of flow, that are excavated in or relocate a tributary." 80 Fed. Reg. at 37,078.

The agencies concede that, under this definition, ditches and storm-water conveyances may be treated as "*both* a point source and a 'water of the United States.'" *Id.* at 37,098 (emphasis added). But the Act's structure and plain text "conceive of 'point sources' and 'navigable waters' as separate and distinct categories." *Rapanos*, 547 U.S. at 735 (plurality). That follows from the Act's definition of "discharge of a pollutant," which is "any addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. 1362(12)(A) (emphases added). A point source is "any discernible, confined and discrete conveyance," including any ditch, channel, tunnel, conduit, or fissure "from which pollutants are or may be discharged." *Id.* 1362(14). Similarly, Section 402 of the Act, requires permits for "discharge *from* municipal storm sewers" "*into* the navigable waters." 33 U.S.C. 1342(p)(3)(B), (a)(4) (emphasis added). Such point source discharges are subject to extensive regulation, including permit-imposed effluent limitations. *E.g.*, 40 C.F.R. 122.41-.44; *id.*, 133.102, 403. There is thus no need to designate these conveyances as waters of the United States, which could preclude their use for their intended water management purposes.

Figure 6: Ditch #5 in Pinellas County, Florida, is a manmade stormwater conveyance that discharges through a wetland into a navigable creek. It is already regulated as a point source. Under the Rule, it will be *additionally* regulated as a "water of the United States." Fla. Stormwater Ass'n Comments 13 (JA__).

Under the Act, point sources (like storm sewers) are conveyances that collect pollutants and convey them for treatment before they are discharged to WOTUS. To require them to meet water quality standards intended by Congress to apply to WOTUS "make[s] little sense." *Rapanos*, 547 U.S. at 735 (plurality). Because Congress defined ditches and other wastewater and stormwater conveyances as "point sources" by statute (33 U.S.C. 1362(14)), they cannot also be "waters" by regulation. Congress plainly understood such conveyances to be something *from* which pollutants are discharged, and not jurisdictional waters into which discharges are made. The agencies say that

they must treat these conveyances as jurisdictional waters, lest wrongdoers attempt to avoid the permit requirement by introducing pollutants into upstream ditches and sewers. That is just wrong. The agencies (and States) closely regulate point sources using existing permitting programs.

The Rule's dual classification of some "point sources" as "waters" would impose tremendous costs on municipal bodies (and businesses) that must manage sewage, wastewater, and stormwater. In just one example, Pinellas County, Florida estimates that it and its co-permittees will be forced to spend between $430 million and $2.72 billion in remediation if their stormwater conveyances and drainage ditches are made jurisdictional. The Rule would require them—counterproductively—to divert substantial resources from the protection of critical waterbodies, including Tampa Bay and other crucial, environmentally rich inlets along the Gulf of Mexico. *See* Pinellas County Comments 4, ID-4426 (JA__). The Rule will thus distort local priorities and allocations of limited resources to the detriment of water quality protection. *See* Fla. Stormwater Ass'n Comments 8-14 (JA__).

III. THE RULE VIOLATES THE CONSTITUTION.

There is yet another reason for vacating the Rule: It violates the Due Process and Commerce Clauses of the Constitution.

A. The Rule is unconstitutionally vague.

Not only does the Rule fail to give the public fair notice of when and where discharges are unlawful, but it gives malleable discretion to bureau-

crats to determine which land features are jurisdictional "waters" and which are not. "'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "This requirement of clarity in regulation is [therefore] essential to the protections provided by the Due Process Clause of the Fifth Amendment" and "requires the invalidation of laws that are impermissibly vague." *Id.* (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

"[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns." *Fox Television*, 132 S. Ct. at 2317. The first concern is "to ensure fair notice to the citizenry" (*Ass'n of Cleveland Fire Fighters v. Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007)), so regulated individuals and entities "know what is required of them [and] may act accordingly" (*Fox Television*, 132 S. Ct. at 2317). The second concern is "to provide standards for enforcement" (*Fire Fighters*, 502 F.3d at 551), "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 132 S. Ct. at 2317.

The second concern is the "more important aspect of the vagueness doctrine." *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983) (citing *Goguen*, 415 U.S. at 574). According to this strand of the law, a regulation is constitu-

tionally invalid if it fails to establish objective guidelines for enforcement. *Id*. In the absence of such objective guidelines, the law "may permit 'a standardless sweep [that] allows [government agents] to pursue their personal predilections.'" *Id*. at 358. Invalidation is therefore necessary when a regulation "is so imprecise that [arbitrary or] discriminatory enforcement is a real possibility." *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991). That is the case here.

Ordinary high water mark. Take first the concept of an "ordinary high water mark" (33 C.F.R. 328.3(c)(6))—the crux of a "tributary" (33 C.F.R. 328.3(c)(3)) and the starting point for marking off the applicable distances for "adjacent" and "neighboring" waters (33 C.F.R. 328.3(c)(1), (2)) and waters with a "significant nexus." 33 C.F.R. 328.3(a)(8). See *supra*, p. 57 (definition of OHWM).

As though "changes in the character of soil" and "presence of litter and debris" as indicators of an OHWM were not already sufficiently vague to permit arbitrary enforcement, the Rule expressly allows agency staff to rely on whatever "other . . . means" they deem "appropriate" in deciding when an OHWM is present and where it lies. 33 C.F.R. 328.3(c)(6). In fact, "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination." U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 05-05 at 3 (Dec. 7, 2005). Regulators can reach any outcome they

please, and regulated entities cannot know the outcome until they are already exposed to criminal liability, including crushing fines.

As well-respected scientific commentators observed during the rulemaking, "[t]here is ambiguity and uncertainty associated with all the primary indicators of OHWM. It is particularly difficult to differentiate between [non-jurisdictional] gullies and [jurisdictional] ephemeral channels with these types of ambiguous indicators. Delineating down to this scale significantly magnifies the degree of subjectivity that must be applied and the intensity of disputes that could arise." GEI Report at 7 (JA__).

Matters are made worse by the methods prescribed for identifying an OHWM, which are standardless and cannot be replicated by the regulated public. Agency staff making an OHWM determination *do not even need to visit the site*. "Other evidence, besides direct field observation," can "establish" an OHWM. 80 Fed. Reg. at 37,076. Worse still, the preamble warns that regulators may use desktop computer models "independently to infer" jurisdiction where "physical characteristics" of bed and banks and OHWM "*are absent in the field*." *Id*. at 37,077. Thus landowners must sleuth out the "prior existence" of an OHWM and "historic presence of tributaries"—with no limit to how far back they must go—based on unclear criteria such as "lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence." *Id*.

Among the "remote sensing or mapping information" the agencies may rely on to detect an OHWM from afar are "local stream maps," "aerial photographs," "light detection and ranging" (LIDAR—topographic maps drawn by lasers mounted on drones), and other unidentified "desktop tools that provide for the hydrologic estimation of a discharge." 80 Fed. Reg. at 37,076-37,077. The agencies will use these sources "independently to infer" and "reasonably [to] conclude the presence" of an OHWM. *Id*. at 37,077.

There is no mistaking what all of this means. Agency bureaucrats reviewing satellite images and other non-public surveillance data will determine from distant, government offices when and where OHWMs and tributaries lie without ever putting their eyes on the scene or putting their feet on the ground. And because the supposed standard for reaching these conclusions rests exclusively on the agencies' own "experience and expertise" (80 Fed. Reg. at 37,076), the term OHWM will simply come to mean whatever the agencies say it means, which will inevitably vary from field-office to field-office and case to case. *See Rapanos*, 547 U.S. at 781-782. (Kennedy J., concurring).[12] That is flatly inconsistent with the Fifth Amendment.

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[12] *See also* GAO, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, at 20-22 (Feb. 2004) ("the difficulty and ambiguity associated with identifying the" OHWM means that "if [you] asked three different district staff to make a jurisdictional determination, [you] would probably get three different assessments"), perma.cc/8NZM-3W52.

Significant nexus. The standardless discretion of the Rule is equally apparent with respect to the "case-by-case" significant nexus test. 80 Fed. Reg. at 37,059. At every stage, the test turns on subjective observations and opaque analyses.

Consider a landowner with a small, isolated pond on her property. To determine whether she needs a federal permit to discharge into the pond (for example, by building a swimming pier) the landowner must first identify all traditional navigable waters, interstate waters, and tributaries anywhere within 4,000 feet—*nearly a mile*—of the pond. Setting aside the vagueness of what counts as a "tributary" in the first place, imagine the landowner finds a tributary within the 4,000-foot limit. She must then sort out whether regulators will conclude that the pond, together with "other *similarly situated waters in the region*, *significantly affects* the chemical, physical, or biological *integrity*" of the nearest (1)-(3) water. 33 C.F.R. 328.3(c)(5) (emphasis added). That is an ambiguous task.

- Waters are "similarly situated" when "they function alike and are sufficiently close to function together in affecting downstream waters." 33 C.F.R. 328.3(c)(5). But when does a pond function "alike" with other ponds, and when does it function distinctly and alone? And what does "sufficiently close" mean? Is a mile too far? 10 miles? 100 miles?

- These "similarly situated" waters must "substantially affect" the "water integrity" of the nearest (1)-(3) water, including its capacity for "sediment trapping," "nutrient recycling," and "provision of life-cycle dependent aquatic habitat," among other functions. 33 C.F.R. 328.3(c)(5). But when is an effect on water integrity *significant*? The agencies' explanation—that an effect is significant when it is "more

than speculative or insubstantial" (33 C.F.R. 328.3(c)(5))—is no more clear than the nebulous word it purports to define.

- "In the region" means in the "the watershed that drains to the nearest" (1)-(3) feature (33 C.F.R. 328.3(c)(5)), unless of course the watershed is too big, in which case it "may be reasonable" to use instead a "typical 10-digit hydrologic unit" that ranges between 40,000 and 250,000 acres in size. 80 Fed. Reg. at 37,092. But how are regulated entities to know the boundaries of watersheds millions or hundreds-of-thousands of acres in size, and how are they to know when regulators will deem it "reasonable" to use hydrological sub-units instead? More fundamentally, how are landowners expected to identify all "similarly situated" waters within hundreds of thousands of acres (requiring them to trespass on others' land), and then determine if they, together with the waters on their own land, "substantially effect" a tributary's "water integrity"?

These so-called standards fail to put the regulated community on notice of when the Clean Water Act actually applies to their lands. On the face of it, the significant nexus test permits arbitrary enforcement based on vague notions like "sufficiently close," "more than speculative or insubstantial," and "in the region." Who is to say what those words mean, until a government agent comes knocking on the door *saying* what they mean?

Categorical exemptions. Many of the Rule's categorical exemptions from jurisdiction are vague. For example, in apparent response to comments by agricultural groups (*e.g.*, AFBF Comments 2-3 (JA__)), the agencies inserted an exemption for "puddles." 33 C.F.R. 328.3(b)(4)(vii). But what is a puddle? The agencies use the significant nexus test to assert jurisdiction over "depressional wetlands" (80 Fed. Reg. at 37,093), without regard for size or

permanence. But when does a recurring puddle become a small depressional wetland? For example:

Figure 7: Small depressional wetland or puddles? AFBF Comments App. A (JA__).

This is not a hypothetical concern. The Corps determined in 2007 that the following feature is not a parking-lot puddle, but a jurisdictional wetland:

Figure 8: Delineated "Water Feature 21" in Project SPK 2002-00641. According to common experience, it's a puddle. *See Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act* 21 & n.87 (Sept. 20, 2016), perma.cc/W6U3-583Y.

Similar ambiguity arises with respect to the Rule's categorical exemption for "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary." 33 C.F.R. 328.3(b)(4)-(vi). As previously explained (Part II.B.2), there is no way for the regulated public to know when the "volume, frequency, and duration of flow" of such erosional features is "sufficient to create a bed and banks and an ordinary high water mark" to qualify as a "tributary." 33 C.F.R. 328.3(c)(3). The

agencies' discretion in interpreting those provisions makes their applicability impossible to predict.

Named water features. The Rule's treatment of specific named water features like Texas Coastal Prairie Wetlands, is also vague. Indeed, the agencies have admitted that "[t]he term Texas coastal prairie wetlands is not used uniformly in the scientific literature." 80 Fed. Reg. 37,072. The Rule's definition of such features as "freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast" does not clear up the confusion. The regulated public has no way to know when wetlands "along" the Texas coast (how near the coast to they have to be?) are part of a "mosaic" (how tightly packed do they have to be?). Similar uncertainties exist with identification of the other listed features.

"Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). "Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce." *Id.* The Rule, including its approach to OHWM, significant nexus, and exemptions, "does not even begin to meet this constitutional requirement." *Id.*

Jurisdictional determinations. The Corps' jurisdictional determination (JD) process does not cure the problem. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1811-1816 (2016). We are unaware of any other circumstance in which a citizen must obtain a case-specific government report, at great personal expense, to be informed of the limits of the law. *See Hawkes*, 782 F.3d 994, 1003 (8th Cir. 2015) ("This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property"). A JD also does nothing to address the Rule's encouragement of arbitrary and discriminatory enforcement—it is merely another instance in which that arbitrariness can manifest itself.

Members of the Supreme Court have observed that "the reach and systemic consequences of the Clean Water Act remain a cause for concern" because "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1374-1375 (2012) (Alito, J., concurring)). JDs cannot solve that constitutional problem when they are guided by a vague rule; are available only in the Section 404 context, not to determine the need for a Section 402 permit (*see* 33 C.F.R. 331.2); and are not binding on environmental NGOs, who are free to bring civil enforcement actions under the Rule's nebulous standards.

B. The Rule violates the Commerce Clause and federalism principles

1. As the States describe in detail (State Br. Part III.B), the agencies have pushed their jurisdiction beyond its Commerce Clause limits. The Supreme Court has read the Commerce Clause "to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 1566, 2578 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). The Rule sweeps in countless land features that are not channels of, and have no substantial effect on, interstate commerce.

No one could seriously say that an ephemeral trickle that happens to cross a state line, a dry wash in a Western desert, or an isolated wetland that is 4,000 feet from the nearest intermittent tributary that is itself miles away from any truly navigable water—is a channel of interstate commerce. Nor could anyone say that such features "'substantially affect[]' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). On this score, even the agencies equivocate, asserting without citation that waters covered by the Rule "*could* affect interstate or foreign commerce." 80 Fed. Reg. at 37,084 (emphasis added). *Could affect* is a far cry from *substantially do affect*.

2. The Rule additionally implicates the balance of power between the Federal Government and the States. The CWA reflects traditional views of

the division of regulatory authority over waters. "Navigable" "waters of the United States," which are part of or connected to channels of interstate commerce, are regulated by the Federal Government. At the same time, Congress "recognize[d]" and sought to "preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use … of land and water resources." 33 U.S.C. 1251(b). The Rule's sweeping assertion of federal jurisdiction upsets this balance between state and federal authority without any warrant in the text or history of the CWA, and in direct contradiction of 33 U.S.C. 1251(b).

Given the judiciary's "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States" (*Lopez*, 514 U.S. at 580-581 (Kennedy, J., concurring)), the Court should not countenance the agencies' assault on local jurisdiction over land use. Regulation of "development and use" of "land and water resources" is a "quintessential state and local power" preserved by the CWA. *Rapanos*, 547 U.S. at 738; 33 U.S.C. 1251(b). The Rule's dramatic encroachment on state authority violates the federalism principles embodied in the Constitution and the text of the CWA itself. *See* State Br. Part III.

C. The constitutional concerns are a basis for construing the statutory text narrowly

1. The Court need not hold that the Rule violates the Due Process Clause or Commerce Clause to invalidate it. It is enough to hold that the

agencies' interpretation of the statutory text is an unreasonable one in light of the serious constitutional concerns it implicates. That is so for three independent reasons.

First, it is a foundational canon of statutory interpretation that "statutes should be interpreted to avoid constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 379 (2005). According to that well-settled maxim, "the judiciary must rightly presume that Congress acts consistent with its duty to uphold the Constitution" and "make every effort to construe statutes so as to find their constitutional foundations and thus avoid needless constitutional confrontations." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). *Accord, e.g.*, *United States v. Rumely*, 345 U.S. 41, 45 (1953) ("It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality"). The Rule clearly *does* raise very serious constitutional doubts. The Court accordingly should invalidate the Rule because it runs afoul the constitutional avoidance canon.

Second, according to the so-called clear statement rule, a statute cannot be read to "displace traditional state regulation" unless "the federal statutory purpose [is] 'clear and manifest.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). "[U]nless Congress conveys its purpose clearly," in other words, "it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).

That principle precludes reading the CWA to displace state and local authority over general land use, not only because there is no clear statement authorizing such displacement of traditional state regulation, but because Congress in fact made the *opposite* statement: The Act expressly "preserve[s] and protect[s] the primary responsibilities and rights of States" to regulate "land and water resources." 33 U.S.C. 1251(b).

More generally, because one must "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," if an agency's statutory interpretation "invokes the outer limits of Congress' power, [the Court must require] a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172-173. There simply is none here.

Finally, because the CWA is a criminal statute, the rule of lenity requires resolution of ambiguities in the statutory language against the government. This "'time-honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

The lenity rule applies with full force here. The Supreme Court has recognized that administrative "interpretations of statutory criminal penalties [may] provide such inadequate notice of potential liability [that they]

offend the rule of lenity." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704 n.18 (1995). And "[b]ecause [courts] must interpret the statute consistently," the rule of lenity applies to any statute, like the CWA, that "has both criminal and noncriminal applications," no matter whether the rule is raised in the civil or criminal context. *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992) (plurality opinion)). The vagueness concerns outlined above support vacatur of the Rule based on the rule of lenity.

2. For the same reasons that the rules of constitutional avoidance, clear statement, and lenity all require vacating the Rule's overbroad interpretation of the CWA, they disentitle the agencies to *Chevron* deference. *See Chevron USA v. NRDC*, 467 U.S. 837 (1984). It is fundamental that the "canon of constitutional avoidance trumps *Chevron* deference" and that courts may "not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties." *NMA*, 512 F.3d at 711 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Council*, 485 U.S. 568, 575 (1988)). *Chevron* deference does not require courts to defer to an agency's avowed decision to push the bounds of constitutional limits. That is especially true with respect to criminal statutes like the CWA, which "are for the courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

What is more, "*Chevron* deference is not warranted" where the agency "fail[s] to follow the correct procedures in issuing the regulation," including—as here—when the agency fails to "give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Neither is deference warranted when a rule rests on an agency's interpretation of Supreme Court opinions—here principally Justice Kennedy's *Rapanos* concurrence. *See Negusie v. Holder*, 555 U.S. 511, 521-523 (2009) (an agency does not exercise its *Chevron* discretion by interpreting judicial precedents). In short, no deference is warranted.

CONCLUSION

The Rule should be vacated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for the Business & Municipal Petitioners certifies that this brief:

(i) complies with the type-volume limitation set by this Court's Case Management Order No. 5 (Dkt. 125) because it contains 21,000 words, including footnotes and excluding the parts of the brief exempted by Rule 32-(a)(7)(B)(iii) and Circuit Rule 32(b)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

I certify that that on November 1, 2016, the foregoing Brief for Business & Municipal Petitioners was served electronically via the Court's CM/ECF system on counsel of record for all parties.

/s/ *Michael B. Kimberly*