IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SOUTHEAST STORMWATER ASSOCIATION, INC., et al. Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, And NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION, and TENNESSEE SCENIC RIVERS ASSOCIATION, Intervenor-Defendants.	Case No. 4:15-cv-579-MW-CAS

INTERVENOR-DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case involves a challenge to an agency rule defining the scope of "waters of the United States" protected by the Clean Water Act, 33 U.S.C. § 1251 *et seq*. The challenged regulation, known as the Clean Water Rule (the Rule), emerged from a lengthy process that featured extensive public comment, broad stakeholder engagement, and deep scientific review. The challenge presented by Plaintiffs boils down to two questions: (1) is the Rule based on sound science, and (2) did the agencies follow the correct procedures? The answers to both questions are yes.

As discussed below, the Clean Water Rule is firmly based on thorough, peer-reviewed science. The literature review conducted by the agencies encompassed over 1,200 publications and multiple levels of independent Science Advisory Board review. The scope of waters that the Clean Water Rule determines fall within the purview of the Clean Water Act to protect the "biological, chemical, and physical integrity" of the nation's waters, 33 U.S.C. § 1251(a), is scientifically sound and should be upheld.

The agencies also went above and beyond complying with the public involvement and review procedures of the Administrative Procedure Act, 5 U.S.C. 500 *et seq*. The process for drafting the rule for public review and then reviewing and responding to over one million comments was, if not unprecedented in scope,

certainly one of the most extensive public processes ever undertaken for an environmental standard. The agencies acted well within the parameters of administrative procedure when, after reviewing hundreds of thousands of public comments and conducting more than 400 stakeholder meetings, they finalized a rule consistent with their scientific review and four decades of precedent construing the Clean Water Act's parameters.

The law is clear: as long as the record supports the Rule (and it does), the Court should uphold the Rule even if the record could support alternative findings. *Ark. v. Okla.*, 503 U.S. 91, 112-13 (1992).

FACTUAL AND LEGAL BACKGROUND

I. The Clean Water Act aims to restore and protect our country's waters.

Since 1972, the Clean Water Act has aimed to restore and protect our country's waters. 33 U.S.C. § 1251(a). It protects waters used for drinking, fishing, swimming, agriculture, business, recreation, and wildlife habitat.

To achieve these goals, the Clean Water Act directs the Environmental Protection Agency and the Army Corps of Engineers (the Agencies) to regulate "navigable waters." *Id.* at § 1251 *et seq.* Congress defined navigable waters as "waters of the United States." *Id.* at § 1362(7). But it did not define "waters of the United States."

As a result, for more than four decades, parties have disagreed about what the phrase means. The Supreme Court has addressed the issue three times since 1985. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); *Rapanos v. United States*, 547 U.S. 715 (2006).

The most recent case, *Rapanos v. U.S.*, produced no majority opinion. Instead, courts were left to apply a fractured decision featuring plurality and dissenting opinions of four justices each and a concurring opinion written by Justice Kennedy, which the Eleventh Circuit follows as dispositive. *See U.S. v. Robison*, 505 F.3d 1209, 1221-22 (11th Cir. 2007). Justice Kennedy's opinion construes the term "waters of the United States" to encompass waters with a functional "significant nexus" to traditional navigable waters.[1] *Rapanos*, 547 U.S. at 759, 787 (Kennedy, J., concurring). Justice Kennedy reasoned that, to protect traditional navigable waters, we must also protect the tributaries, wetlands, and other waters that are significantly connected to them.

[1] For purposes of the Clean Water Act, "traditional navigable waters" means waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce. As used in Justice Kennedy's opinion, "significant nexus" means that waters "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780.

II. The lack of clarity following *Rapanos* led to widespread underenforcement of the Clean Water Act.

Following *Rapanos*, the Agencies issued non-binding guidance describing which waters were waters of the United States and thus protected by the Clean Water Act. But because the guidance often required case-by-case decisions, it still "did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations." 80 Fed. Reg. at 37,056.

This lack of clarity led to widespread underenforcement of the Clean Water Act. As a result, smaller streams and wetlands were often left vulnerable to pollution and degradation, despite having a "significant nexus" to traditional navigable waters. *See id.* at 37,056 (explaining that the guidance document's "time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies").

Protecting these waters is critical to the Clean Water Act's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *See* 33 U.S.C. § 1251(a). According to a 2009 EPA analysis, in the continental United States, intermittent, ephemeral, or headwater streams make up 58%, or 207,476 miles, of the stream miles that provide water for public

drinking water systems.[2] *See Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.* (attached as Ex. A).[3] The Agencies concluded that approximately 117 million people—*over one third of the entire U.S. population*—get some or all of their drinking water from public drinking water systems that rely at least in part on these vulnerable streams. *Id*.

Many wetlands were also left vulnerable under the 2008 guidance. Wetlands are areas such as swamps and bogs with soils, vegetation, and hydrology indicative of regular saturation or immersion by water. *See* EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Science Report), EPA-HQ-OW-2011-0880-20858, at A-14 (2015) (attached as Ex. B). Wetlands play a critical role in protecting water quality by trapping pollutants, providing fish and wildlife habitat and food, absorbing floodwaters, and storing runoff. *See Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring); Science Report at ES-9 (2015). Because of these functions, the Agencies estimated that the Clean Water Rule's restoration of protection to wetlands would result in estimated public benefits of up to $501 million annually.

[2] Intermittent streams are those that flow during certain times of the year but not every day of every year. Ephemeral streams flow only in response precipitation.

[3] The Court may take judicial notice of information published on EPA's website. *Rahman v. Schriro*, 22 F. Supp. 3d 305, 311 (S.D.N.Y. 2014).

EPA & Corps, *Economic Analysis of the EPA-Army Clean Water Rule* ("Economic Analysis"), EPA-HQ-OW-2011-0880-20866, at 50-52 (2015) (attached as Ex. C).

III. To remedy the lack of clarity, the Agencies established a rule that was easier to understand and more predictable.

Because the 2008 guidance could be inconsistent, "[m]embers of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the [Clean Water Act] clearer, simpler, and faster." 80 Fed. Reg. at 37,056; *see also Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (noting Agencies' prior failure to develop regulations was unfortunate). In response, the Agencies set out to write a rule that was easier to understand and more consistent.

For nearly four years, the Agencies met with stakeholders and reviewed more than 1,200 peer-reviewed scientific publications, as well as relevant agency guidance, implementation manuals, and federal and state reports. Technical Support Document for the Clean Water Rule (TSD), EPA-HQ-OW-2011-0880-20869, at 93 (2015) (attached as Ex. D). The Agencies also relied on their own experience, having "made more than 400,000 CWA jurisdictional determinations since 2008." *Id*. at 178.

The Agencies condensed this information into a several-hundred-page report, which they circulated to EPA's Science Advisory Board (SAB) for peer review. 80 Fed. Reg. at 37,062; *see also* Connectivity of Streams and Wetlands to

Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013 External Review Draft) (Draft Science Report), EPA-HQ-OW-2011-0880-0004 (attached as Ex. E). To conduct the peer review, the SAB formed a panel of 27 of the country's top scientists, including hydrologists, wetland and stream ecologists, biologists, geomorphologists, biogeochemists, and freshwater scientists. 80 Fed. Reg. at 37,062. The SAB concluded that the Draft Science Report was "a thorough and technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters." SAB Science Report Review Letter, EPA-HQ-OW-2011-0880-8046, at 1 (2014) (attached as Ex. F).

In 2014, the Agencies released a proposed rule. The proposed rule identified categories of waters that, according to the Agencies' scientific review, significantly affect traditional navigable waters. After releasing the proposed rule, the Agencies solicited public comments for more than 200 days. 80 Fed. Reg. at 37,057. During that time, the Agencies received "over one million public comments on the proposal, the substantial majority of which supported the proposed rule." *Id*.

During the rulemaking process, the Agencies also held over 400 meetings across the country to solicit feedback from all types of stakeholders, including states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, federal agencies, and many others—an enormous level of outreach by any standard. *Id.*; *see also*, *e.g.*, 2014 EPA

Regional Proposed Rule Meetings/Events, EPA-HQ-OW-2011-0880-13182 (attached as Ex. G); 2014 EPA Headquarters Proposed Rule Meetings/Events, EPA-HQ-OW-2011-0880-13183 (attached as Ex. H); Final Report of the Discretionary Small Entity Outreach for the Clean Water Rule, ID-20865, at 7-8 (attached as Ex. I).

IV. The Clean Water Rule applies thorough, peer-reviewed science to establish more predictable rules and bright-line boundaries than previous guidance.

In June 2015, the Agencies published the final Clean Water Rule. The Rule establishes a three-tiered framework. First, the Rule categorically covers traditional navigable waters, interstate waters, the territorial seas, tributaries, adjacent waters, and impoundments of jurisdictional waters. 33 CFR § 328.3(a)(1)-(6). Second, the Rule categorically excludes many waters, including waste treatment systems, prior converted cropland, groundwater, stormwater control features created in dry land, many ditches, and some other waters. 33 CFR § 328.3(b). Third, the Rule requires a case-by-case evaluation of certain waters to determine if those waters have a significant nexus to downstream waters. 33 CFR § 328.3(a)(7)-(8).

Contrary to Plaintiffs' claims, the Clean Water Rule does not radically expand the Clean Water Act's reach. Compared to the Agencies' pre-2015 practice, the Rule may expand coverage slightly—by 2-5% at the most, according to the Agencies' estimates. 80 Fed. Reg. at 37,101; *see also* Economic Analysis at

vi-vii. But by increasing clarity, the Rule increases transparency and predictability and reduces underenforcement of the Clean Water Act to better protect important waters and wetlands significantly connected to navigable waters and essential for the preservation of their integrity. *See* 33 U.S.C. § 1251(a); *Rapanos*, 547 U.S. at 781 (Kennedy, J.) (authorizing agencies to protect "categories" of tributaries that "are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.").

PROCEDURAL HISTORY

In November 2015, Plaintiffs Southeast Stormwater Association, Inc., Florida Stormwater Association, Inc., Florida Rural Water Association, Inc., and Florida League of Cities, Inc. filed this action challenging the Clean Water Rule. Natural Resources Defense Council, National Wildlife Federation, and the Tennessee Scenic Rivers Association (the Conservation Groups) intervened as defendants to support the Rule. Plaintiffs have moved for summary judgment. The Conservation Groups now oppose Plaintiffs' Motion for Summary Judgment and seek summary judgment in favor of Defendants.

STANDARD OF REVIEW

The Administrative Procedure Act allows judicial review of agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law;" "in excess of statutory jurisdiction, authority, or

limitations, or short of statutory right;" or "without observance of procedure required by law." 5 U.S.C. § 706(2). "The arbitrary and capricious standard is exceedingly deferential." *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009). A rule is arbitrary and capricious only if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

ARGUMENT

I. Plaintiffs overstate the Clean Water Rule's reach.

Before turning to the merits of Plaintiffs' attack on the Clean Water Rule's legality, it is important to correct Plaintiffs' misinterpretation of several small but important provisions. First, although including them under the "case-specific" heading, Plaintiffs say that the following waters are "*automatically* considered to be 'similarly situated' and *thus jurisdictional*":

> (1) prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands; (2) any water within the 100-year floodplain of an otherwise jurisdictional water, [4] which is particularly relevant in the Southeastern United

[4] To the extent Plaintiffs intend to track the language of 33 CFR § 328.3(a)(8) in sections (2) and (3) of this paragraph, they further overstate the Rule's reach. 33 CFR § 328.3(a)(8), which requires a significant nexus analysis to establish

> States; and (3) waters, any part of which are 4,000 feet of the high tide line or OHWM of any otherwise jurisdictional water, impoundment of an otherwise jurisdictional water, or jurisdictional tributary.

Pls.' Br. at 14, ECF No. 69 (emphasis added).

That is incorrect. These waters are not "automatically" jurisdictional. Instead, the waters identified in 33 CFR § 328.3(a)(7)-(8) are jurisdictional *only* if "they are determined, on a case-specific basis, to have a significant nexus" to a traditional navigable water, an interstate water, or the territorial seas. 33 CFR § 328.3(a)(7)-(8). While prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands are considered "similarly situated" and may be combined with similar waters in their watershed for a significant nexus analysis, waters in the case-by-case category are not "automatically" jurisdictional. This distinction is not a technicality. Plaintiffs' summary implies that the Clean Water Rule covers far more waters than it does.

Plaintiffs also claim that the Rule covers stormwater features not "constructed in dry land" for the first time. Pls.' Br. at 14-15. That too is incorrect. As the Agencies made clear in their rulemaking materials, the Rule does not change existing practice.

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jurisdiction, applies to waters within the 100-year floodplain of *traditional navigable waters, interstate waters, or the territorial seas* and waters within 4,000 feet of *traditional navigable waters, interstate waters, the territorial seas, impoundments of jurisdictional waters, or tributaries*—not waters within the prescribed distances of "any jurisdictional waters," as Plaintiffs suggest.

Some background may be helpful here. An MS4 (or municipal separate storm sewer system) is a conveyance or system of conveyances designed to collect or convey stormwater. Sometimes, MS4s "incorporate creeks and streams, which may be channelized, piped, or otherwise modified within their drainage network." *See* Response to Comments ("RTC"), EPA-HQ-OW-2011-0880-20872, Vol. 7 at 322 (excerpts attached as Ex. J). Pre-existing jurisdictional creeks and streams are not "dry land"—a fact that remains true even after they are channelized or otherwise modified to be part of an MS4. *Id*. Under the Rule—as under the preexisting guidance and regulations—an MS4 operator cannot strip a pre-existing jurisdictional water of protection by modifying it or incorporating it into an MS4 system. On the other hand, the Rule explicitly exempts all parts of MS4s actually located in "dry land"—that is, not in "streams, rivers, wetlands, lakes, ponds, and the like." *See* 33 CFR § 328.3(b)(6); 80 Fed. Reg. at 37,098.

Contrary to Plaintiffs' claims, the Agencies have historically regulated stormwater conveyances constructed in streams, rivers, creeks, or other jurisdictional waters. The Clean Water Rule does not change that practice. According to the Agencies:

> The agencies' longstanding practice is to view stormwater control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as currently jurisdictional even where used as part of a stormwater management system. *Nothing in the*

> *proposed rule was intended to change that practice, and the final rule likewise leaves this longstanding policy in place.*

See RTC-6 at 93 (emphasis added); *see also* RTC-7 at 327 (explaining that "[t]his has been the case historically under the rules that applied to today's action and continues to be the case under the final rule"); *id.* at 328 (noting that "the Agencies have worked diligently to ensure that the final rule does not change the jurisdictional status of various components of stormwater systems").

With these two misconceptions cleared up, we turn to the merits of Plaintiffs' attack on the Clean Water Rule's legality.

II. The Clean Water Rule does not violate the Clean Water Act.

A. The Clean Water Rule correctly applies the significant nexus test.

The Clean Water Rule applies Justice Kennedy's significant nexus test to identify which waters are covered by the Clean Water Act. Plaintiffs attack the Rule by claiming that Justice Kennedy's opinion in *Rapanos* is not controlling. To the contrary, in *U.S. v. Robison*, 505 F.3d 1209, 1221-22 (11th Cir. 2007), the Eleventh Circuit held, "[W]e join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*." *Id*. This Court is bound by that decision.

Plaintiffs passingly acknowledge *Robison* in a footnote. But they contend the Eleventh Circuit "held that it would conduct a case-by-case inquiry" to determine which opinion applied. Pls.' Br. at 34. Applying *Marks v. United States*, 430 U.S.

188, 193 (1977), the Circuit interpreted the *Rapanos* holding as "the narrowest ground" to which a majority of the concurring justices would have agreed. The court explained that "the narrowest ground" meant the position that is "le[ast] restrictive of CWA jurisdiction"—in other words, the position that would cover the most waters under the Clean Water Act. *Robison*, 505 F.3d at 1221. In most cases, the court reasoned, that would be Justice Kennedy's concurrence. *Id*. at 1221.

While it is true that in rare cases the plurality opinion "may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test," *id*. at 1223, the Eleventh Circuit squarely held that Justice Kennedy's test applied and directed the district court to apply that test on remand. *Id.* at 1224. Had the Circuit intended to conduct a case-by-case inquiry, as Plaintiffs suggest, it would have done so in *Robison*.

In any event, Plaintiffs' interpretation of *Robison* would mean that a court could find a water jurisdictional under *either* the plurality test *or* Justice Kennedy's significant nexus test. It would not require a water to meet *both* tests to be jurisdictional, as Plaintiffs claim. Under Plaintiffs' reading of *Robison*, the flaw in the Clean Water Rule (which is based on the significant nexus test alone) would be that it covers too few waters—a position Plaintiffs do not take.

Plaintiffs' arguments would fare no better elsewhere. No circuit has held that the plurality opinion alone controls, or that a water must satisfy *both* the plurality

and Justice Kennedy's tests to be jurisdictional. Instead, all other circuits to consider the question have held either that Justice Kennedy's opinion controls or that if *either* Justice Kennedy's test *or* the plurality's test is met, a water is jurisdictional. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (Justice Kennedy's significant nexus standard applies); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (same); *see also United States v. Donovan*, 661 F.3d 174, 182-84 (3d Cir. 2011) (if either Justice Kennedy's or the plurality's test is met, there is a "water of the United States"); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (same); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (same).

B. The Clean Water Rule gives meaning to the word navigable.

Plaintiffs next argue that the Clean Water Rule reads "navigable" out of the Clean Water Act. To support their claim, Plaintiffs attach pictures of three water features they say are jurisdictional. They argue that the water features in the photographs are not navigable waters because, among other things, "[o]ne can neither 'navigate a concrete ditch or earthen basin…" Pls.' Br. at 27.

But the law rebuts Plaintiffs' rhetoric. The Act itself uses the term "waters of the United States" to define "navigable waters," demonstrating an obvious intent to reach waters that fall beyond traditional tests of navigability, and the Act's overall purpose—which concerns protecting the integrity of America's water quality, not

clear steamboat passage—animates the scope of that reach. *Riverside Bayview*, 474 U.S. at 133 ("In adopting this definition of 'navigable waters,' Congress evidently intended … to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."). Thus, the term navigable "is broader than the traditional understanding of the term." *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality); *see also id.* at 767 (Kennedy, J., concurring) ("[I]n enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense.").

A broad reading of "navigable" makes sense. Pollutants added to smaller, non-navigable upstream waters or wetlands can flow downstream and harm navigable waters. Thus, to protect navigable waters, the Clean Water Act must also regulate non-navigable waters that feed into navigable waters. *See* S. Rep. No. 92-414, at 77 (1972), 1972 U.S.C.C.A.N. 3668, 3742 ("It is essential that discharge of pollutants be controlled at the source.").

That is all the Rule does, and in doing so, it follows accepted practice by limiting jurisdiction to those waters with a significant nexus to navigable waters. Rather than read "navigable" out of the Clean Water Act or strip the term of its meaning, the Rule simply recognizes that to protect navigable waters, the Clean

Water Act must also protect non-navigable waters and wetlands that have a significant connection to navigable waters—just as Justice Kennedy directed.

Plaintiffs also complain that the Rule covers tributaries without a significant nexus to navigable waters. However, as discussed in Section III(A), the scientific record overwhelmingly supports the Rule's inclusion of all tributaries because they have a significant nexus to traditional navigable and interstate waters.

Plaintiffs do not attack any of the peer-reviewed literature supporting the inclusion of tributaries. Nor do they offer any scientific evidence of their own. Instead, they attach pictures of three water features and complain that those waters should not be jurisdictional. But Plaintiffs do not explain how they can tell the water features have an ordinary high water mark or a bed and banks, or that the waters contribute flow to a downstream navigable water, as is required to be a jurisdictional tributary. Nor do they suggest that flow from these features does not impact downstream waters. Most importantly, they offer zero *evidence* of either. Plaintiffs' unsupported speculation does not satisfy their burden.[5]

[5] More broadly, these arguments miss the mark because *Rapanos* does not require that every single water defined as a tributary have a significant nexus to jurisdictional waters on its own. Rather, Justice Kennedy held in *Rapanos* that the agencies' definition of a category of waters is valid so long as the majority of waters in that category—not necessarily every single one—has a significant impact on navigable waters. *Rapanos*, 547 U.S. at 780-81; *see also Riverside Bayview*, 474 U.S. at 135, n. 9 ("If it is reasonable for the Corps to conclude that *in the majority of cases*, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.") (emphasis added).

C. A water can be a point source and a water of the United States.

The Clean Water Act requires a permit to discharge pollutants to a "water of the United States" from a "point source." 33 U.S.C. §§ 1311(a), 1342, 1362(7), (12), (14). Plaintiffs argue that a water cannot be both a "point source" and a "water of the United States." Because stormwater conveyances, like other ditches, channels, and man-made conveyances, can be point sources, *id.* at § 1362(14), Plaintiffs argue that stormwater conveyances can never be waters of the United States. Their position is inconsistent with the Clean Water Act, judicial precedent, and decades of agency practice.

Take, for example, ditches. Because the Clean Water Act defines them as point sources, *see id.*, Plaintiffs' interpretation would mean that ditches could never be waters of the United States. But Congress, the Agencies, and courts have long allowed regulation of certain ditches as waters of the United States. For example, Section 404(f)(1)(C) of the Clean Water Act exempts certain polluting activities concerning certain ditches from the permitting requirements. This exemption indicates that some ditches are properly considered "waters of the United States."

Moreover, the federal courts of appeal have consistently held that certain man-made ditches can be regulated as waters of the United States, and agency rules and guidance have routinely regulated at least some ditches as waters of the

United States. *See* TSD at 73-76 (collecting cases and concluding that "[n]o Circuit Court has interpreted Rapanos to exclude ditches from the CWA").

In addition, shortly after the passage of the Clean Water Act, the General Counsel of EPA issued an opinion that certain ditches could be both point sources and waters of the United States. *In re Riverside Irrigation District, Ltd. and 17 Others*, 1975 WL 23864, at *4.

This approach makes sense from a practical perspective: a policy restricting point sources from ever being waters of the United States would mean that large, navigable-in-fact shipping channels or ditches would be excluded from jurisdiction, a result that would plainly violate the Clean Water Act. As President Bush's Solicitor General Paul Clement put it during the *Rapanos* argument, "it would be very absurd for the Corps to [distinguish between manmade and natural waters] since the Erie Canal is a ditch."[6]

Plaintiffs' citation to the *Rapanos* plurality is unavailing. That opinion is not controlling. In the controlling *Rapanos* opinion, Justice Kennedy rejected Plaintiffs' position, recognizing that "certain water-bodies could conceivably constitute both a point source and a water [of the United States]." 547 U.S. at 772 (Kennedy, J., concurring); *see also id*. at 802 (Stevens, J., dissenting).

[6] *Rapanos v. United States*, Oral Argument Tr. at 39 (Feb. 21, 2006), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2005/04-1034.pdf.

In any event, even the plurality opinion does not say that a point source can never be a water of the United States. It says the definitions of the terms "would make little sense if the two categories were *significantly* overlapping" and concludes that ditches, channels, and conduits "are, *by and large*" not waters of the United States. *Id.*at 735-36. This qualifying language suggests that, even under the non-controlling plurality opinion, point sources can at least sometimes be waters of the United States.

D. The Clean Water Rule correctly applies *Rapanos.*

i. Justice Kennedy's opinion permits the protection of non-wetland waters that have a significant nexus.

Plaintiffs next argue that Justice Kennedy's significant nexus test, if it applies at all, is limited to wetlands. To support their argument, Plaintiffs identify several places in his *Rapanos* concurrence where Justice Kennedy refers only to wetlands. This is unsurprising; the specific jurisdictional determination on review in *Rapanos* concerned wetlands.

However, in deciding the extent of federal jurisdiction over the wetlands in *Rapanos*, the Court necessarily examined the waters that abutted and neighbored those wetlands and the waters downstream of those, including the closest traditionally navigable waterway, Lake St. Claire. Accordingly, courts, including the Eleventh Circuit, have construed Justice Kennedy's controlling opinion to permit the protection of non-wetland waters that have a significant nexus. *See*

Rapanos, 547 U.S. at 767 ("[T]he connection between a *nonnavigable water or wetland* and a navigable water may be so close, or potentially so close, that the Corps may deem *the water or wetlands* a 'navigable water' under the Act."); *id*. at 759 ("[A] *water or wetland* must possess a 'significant nexus' to waters that are or were navigable in fact or could reasonably be made so"); *Robison*, 505 F.3d at 1218 ("Justice Kennedy wrote in his *Rapanos* concurrence that the applicable test for determining whether or not a '*water or wetland*' is 'navigable' is the so-called 'significant nexus' test.") (emphases added).

Science also supports the Rule's protection of adjacent waters other than wetlands. After reviewing the scientific literature, the Agencies concluded, "[A]djacent open waters . . . perform many of the same important functions as wetlands that impact downstream waters." TSD at 326.

In short, Plaintiffs' attempt to limit protection of non-wetland waters ignores both the text of Justice Kennedy's opinion and the scientific record.

ii. The Clean Water Rule does not assert jurisdiction based on "mere adjacency" to tributaries.

In *Rapanos*, Justice Kennedy held that the Agencies must show a significant nexus between smaller waters or wetlands and non-navigable tributaries rather than relying on adjacency alone to presume a nexus exists. *Rapanos*, 547 U.S. at 780. Plaintiffs argue that the Clean Water Rule is inconsistent with *Rapanos* because it asserts jurisdiction based on "mere adjacency to a tributary." Pls.' Br. at 30.

To the contrary, the Rule is based on science, not unsupported presumptions. The record here is fundamentally different than the record before the Court in *Rapanos*.[7] In his concurrence, Justice Kennedy invited the Agencies to "identify categories of tributaries" through "regulations or adjudication" that are significant enough that "wetlands adjacent to them are likely, in the majority of cases" to have a significant nexus to traditional navigable waters. *Rapanos*, 547 U.S. at 780-81. That is exactly what the Agencies did—they considered thorough, peer-reviewed scientific literature and data to determine which categories of waters and wetlands have a significant nexus to traditional navigable waters.

As Plaintiffs point out, the Rule defines some categories in terms of distance or adjacency, as Justice Kennedy contemplated. *See id.* (noting that Agencies could identify these categories based on "volume of flow…, *their proximity to navigable waters*, or other relevant considerations") (emphasis added). For example, the Rule treats waters located within 100 feet of certain other covered waters as jurisdictional. But their inclusion is based on science, not an unsupported inference. For waters within 100 feet of a navigable water or tributary, the Agencies explained that "the primary water quality and habitat benefits will generally occur within a several hundred foot zone of a water," and that fish,

[7] Neither Justice Kennedy nor the litigants in *Rapanos* had the benefit of more than 1,200 peer-reviewed scientific publications and hundreds of pages of technical support to identify which waters have a significant nexus to traditional navigable waters.

amphibians, reptiles, and small mammals "will use at least a 100-foot zone for foraging, breeding, nesting, and other life cycle needs." TSD at 298 (citing scientific publications).

Contrary to Plaintiffs' claims, the Agencies did exactly what Justice Kennedy directed. They applied peer-reviewed science to identify "categories" of waters that—"due to their volume of flow…, their proximity to navigable waters, or other relevant considerations"—are significant enough that wetlands adjacent to them are "likely, in the majority of cases" to have a significant nexus to traditional navigable waters. *See Rapanos*, 547 U.S. at 780-81.

iii. The definition of tributary does not violate the significant nexus test.

Plaintiffs also complain that the Rule "defines 'tributary' by physical characteristics, rather than concern as to whether flow may be 'intermittent or ephemeral.'" Pls.' Br. at 31. Plaintiffs miss the point.[8] A tributary's physical characteristics *are* indicative of flow. According to the Science Report, a tributary *must* have a sufficient volume, duration, and frequency of flow to form physical marks like an ordinary high water mark, bed, or banks. *See* Science Report at 3-45 ("[T]he very existence of a continuous bed and bank structure provides strong geomorphologic evidence for connectivity"); 5-10 ("Formation of a channel

[8] Plaintiffs also imply that a tributary's only requirements are a bed, banks, and an ordinary high water mark. They leave out that a tributary must also contribute *flow* to downstream navigable or interstate waters. 33 CFR § 328.3(c)(3).

indicates that connectivity, in terms of its combined descriptors (frequency, duration, magnitude, timing) is sufficiently strong (or 'effective') and outweighs terrestrialization processes (e.g., revegetation, wind-mediated processes, soil formation processes)."); *cf. id.* at 2-2 (noting that "channels" are defined by the presence of continuous bed and bank structures); *see also* TSD at 69, 171, 234, 235, 241, 245, 272, 325; 33 CFR § 328.3(c)(3).

In other words, water features that are not substantial enough to significantly affect downstream waters do not have enough volume or power to create an ordinary high water mark, a bed, banks, or other physical marks on the landscape, and thus would not be considered a tributary under the Rule.[9]

III. The Clean Water Rule complies with the Administrative Procedure Act.

A. The Clean Water Rule's inclusion of ephemeral and intermittent tributaries is based on thorough scientific evidence.

Plaintiffs complain that the Rule asserts jurisdiction over ephemeral and intermittent waters without evidence that those streams have a significant nexus to navigable waters. But the Agencies have previously regulated intermittent and ephemeral and intermittent streams, including under the 2008 guidance that Plaintiffs ask this Court to reinstate.

[9] *See also* Section III(A) (discussing scientific evidence supporting the inclusion of ephemeral and intermittent tributaries).

Instead of regulating intermittent and ephemeral streams on a case-by-case basis (like the 2008 guidance did), the Clean Water Rule categorically includes intermittent and ephemeral tributaries. That is because the scientific literature overwhelming showed that *all* tributaries—including ephemeral or intermittent ones—significantly impact the physical, chemical, and biological integrity of downstream waters. *See* Science Report at ES-2 (concluding that "*all* tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream waters") (emphasis added); *see also id.* at 6-1; 80 Fed. Reg. at 37,064; Science Advisory Board Review at 3; TSD at 246, 249, 254. The Technical Support Document alone cites hundreds of scientific studies supporting its conclusions on this point. *See, e.g.* TSD at 246-256.

Regarding intermittent and ephemeral streams specifically, the Agencies concluded:

> Tributaries do not need to flow perennially to have a significant nexus to downstream waters…. *Despite their intermittent or ephemeral flow, these streams nonetheless perform the same important ecological and hydrological functions documented in the scientific literature as perennial streams,* through their movement of water, nutrients, and sediment to downstream waters.

TSD at 259 (emphasis added); *see also id.* at 259-71 (citing scientific literature).

To get around the science, Plaintiffs complain that the Agencies looked only at "water-rich" systems. Pls.' Br. at 39. Not so. The Science Report and Technical Support Document cite literature and data from various climates, including arid

and semi-arid regions. *See, e.g.*, TSD at 259 (addressing the "hydrological and ecological significance of ephemeral and intermittent streams in the arid and semi-arid Southwestern United States and their connections to downstream waters"); RTC-9 at 25-28 (describing scientific evidence regarding tributaries in arid and semi-arid regions). In fact, the Science Report has an entire section dedicated to arid southwestern streams. *See id*.

Apart from that complaint, Plaintiffs do not allege that the Agencies' science is flawed or attack any of the peer-reviewed literature supporting the Agencies' conclusion. Nor do they offer any scientific evidence of their own to support their position. Instead, they cherry-pick two out-of-context quotations. Read fully, however, the quoted passages contradict their position.

First, Plaintiffs claim the Agencies "concede" that "the evidence of connectivity for [intermittent and ephemeral] features is 'less abundant.'" Pls.' Br. at 39. For context, here is the full sentence:

> Although less abundant, *the available evidence for connectivity and downstream effects of ephemeral streams was strong and compelling*, particularly in context with the large body of evidence supporting the physical connectivity and cumulative effects of channelized flows that form and maintain stream networks."

80 Fed. Reg. at 37,079 (emphasis added).

Second, Plaintiffs say the Agencies admit that the jurisdictional status of intermittent and ephemeral streams has "long been 'called into question.'" Pls.' Br. at 39. The Agencies actually say:

> The [Science] Report provides case studies of prairie streams and Southwest intermittent and ephemeral streams, two stream types whose jurisdictional status has been called into question *in the past*. These case studies highlight the *importance of these streams to downstream waters, despite their small size and ephemeral or intermittent flow regime*.

79 Fed. Reg. at 22,231 (emphasis added).

In short, contrary to Plaintiffs' representations, the evidence is "strong and compelling" that ephemeral and intermittent streams have a significant nexus to downstream navigable waters.

B. The Clean Water Rule's distance provisions are not arbitrary and capricious.

Plaintiffs next argue that the Clean Water Rule is arbitrary and capricious because it applies various "unexplained distance criteria within floodplains" to define adjacency. Pls.' Br. at 40. Under the Rule, if a water if located within 100 feet of a traditional navigable water, an interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary, it is protected by the Clean Water Act. 33 CFR § 328.3(c)(2)(ii). If a water is located within the 100-year floodplain of one of these waters *and* also within 1,500 feet of that water, it is also protected under the Clean Water Act. *Id.* If a water is located within 4,000 feet of

one of these waters (whether it is in the floodplain or not), the Agencies determine jurisdiction on a case-by-case basis. 33 CFR § 328.3(a)(8).

Plaintiffs criticize the Rule's 1,500-foot limit on adjacent waters and 4,000-foot limit on waters subject to a significant nexus analysis. But those limits *narrow* the Rule's scope. For example, the 4,000-foot limitation *excludes* waters not located within 4,000 feet of certain other waters, rather than allowing a case-by-case determination for all waters. Similarly, the 1,500-foot limit on floodplain waters excludes waters located more than 1,500 feet from certain other waters from the definition of neighboring, even if those waters are located within the 100-year floodplain. These provisions, which *shrink* the scope of the Clean Water Act, presumably cause no injury to Plaintiffs.

Second, Plaintiffs criticize the Rule's use of the 100-year floodplain.[10] But the Agencies did not choose this limitation "from thin air," as Plaintiffs complain. Pls.' Br. at 41. The record wholly supports the protection of floodplain waters:

> Floodplain waters improve water quality through the assimilation, transformation, or sequestration of pollutants, including excess nutrients and chemical contaminants such as pesticides and metals, that can degrade downstream water integrity. In addition to providing effective buffers to protect downstream waters from point source and nonpoint source pollution, these systems form integral components of river food webs, providing nursery habitat for breeding fish and

[10] Plaintiffs do not specifically criticize the inclusion of waters within 100-feet of certain jurisdictional waters. To the extent they do, however, the record shows that "the primary water quality and habitat benefits will generally occur within a several hundred foot zone of a water." 80 Fed. Reg. at 37,085; *see also* § II(D)(ii).

> amphibians, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Lateral expansion and contraction of the river in its floodplain result in an exchange of organic matter and organisms, including fish populations that are adapted to use floodplain habitats for feeding and spawning during high water, that are critical to river ecosystem function. Floodplain wetlands and open waters also affect the integrity of downstream waters by subsequently releasing (desynchronizing) floodwaters and retaining large volumes of stormwater, sediment, and contaminants in runoff that could otherwise negatively affect the condition or function of downstream waters.

TSD at 300 (internal citations omitted).

In selecting a 100-year floodplain, as opposed to a different floodplain interval, "the agencies looked principally to the extensive experience the Corps has gained in making significant nexus determinations since the *Rapanos* decision." 80 Fed. Reg. at 37,090. As they put it, "the agencies have developed extensive experience making significant nexus determinations, and that experience and expertise informed the judgment of the agencies in establishing both the 100-year floodplain boundary and the 4,000 foot boundary." *Id.*

That said, the Agencies acknowledged that they chose the 100-year floodplain interval in part "to provide greater clarity and consistency." 80 Fed. Reg. at 37,082. That does not make their decision arbitrary. Under the APA, the question is whether the Agencies' choices are "within a zone of reasonableness," not whether their numbers are "precisely right." *WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001) (quotation marks omitted). Within the bounds of what is

supported by the scientific evidence, administrability and enforceability can and should be a consideration in setting a regulatory standard. *See id.* at 459.

In support of their argument, Plaintiffs cite *WJG Telephone Co. v. FCC*, 675 F.2d 386, 388 (D.C. Cir. 1982). That case, however, supports the *Agencies'* position, not Plaintiffs'. In *WJG*, the FCC adopted a rule that required operators of certain maritime radio stations to serve at least 60% of a waterway. Petitioners challenged the FCC rule, arguing, among other things, that the 60% figure was arbitrary and capricious because the FCC drew the 60% requirement "virtually from its hat." The D.C. Circuit agreed that "the exact genesis of the 60% coverage requirement is unclear," but concluded it was not arbitrary or capricious. The court reasoned, "When a line has to be drawn…[the Agency] is authorized to make a 'rational legislative-type judgment.'" *Id*. at 389. According to the court, "If the figure selected by the agency reflects its informed discretion, and is neither patently unreasonable nor 'a dictate of unbridled whim,' then agency's decision adequately satisfies the standard of review." *Id*. The *WJG* holding therefore undermines, not supports, Plaintiffs' case.

In short, the chosen limitations may not be perfect, and are likely even under-inclusive in some ways. "But perfection is not the standard against which we judge agency action." *Edison Elec. Inst. v. E.P.A.*, 391 F.3d 1267, 1274 (D.C. Cir. 2004). The Agencies' selection of the 100-year floodplain was reasonable,

practical, and supported by science. The court should not second-guess that judgment.

C. The Clean Water Rule is a logical outgrowth of the proposed rule.

The APA requires that Agencies publish notice of their proposed rulemaking and afford the public an opportunity to comment. 5 U.S.C. § 553. Once an agency has given proper notice, however, it is allowed to modify the proposed rule. Put differently, "the rule is not required to remain frozen in its vestigial form." *Hi-Tech Pharm., Inc. v. Crawford*, 505 F. Supp. 2d 1341, 1348 (N.D. Ga. 2007), *aff'd*, 544 F.3d 1187 (11th Cir. 2008). Indeed, one of the key purposes of the notice-and-comment period is to allow an agency to reconsider and, if needed, revise, the proposed rule based on comments received. *See Miami-Dade Cty. v. U.S. E.P.A.*, 529 F.3d 1049, 1059 (11th Cir. 2008) ("Such a restriction would undermine the purpose of notice and comment."); *see also Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058-59 (D.C. Cir. 2000).

To this end, a new comment period is required only if the final rule is not a "logical outgrowth" of the proposed rule. *See Miami-Dade Cty.*, 529 F.3d at 1058. A final rule is considered a logical outgrowth of a proposed rule as long as "interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Id.* at 1059 (finding final rule by EPA a "logical outgrowth" of

the proposed rule, even when "neither the EPA, nor any other party, has pointed to any evidence that the EPA specifically put [certain elements of the final rule] up for comment" and "no party has pointed to any comment specifically addressing [the elements at issue]"); *see also Am. Iron & Steel Inst. v. Occupational Safety & Health Admin.*, 182 F.3d 1261, 1277 (11th Cir. 1999).

Here, Plaintiffs complain that the Clean Water Rule's distance-based provisions for determining adjacency are not a logical outgrowth of the proposed rule. But these provisions were within the realm of changes that interested parties could and should have anticipated. For example, the Agencies specifically sought comment on different ways to define "adjacent waters"—including "establishing *specific geographic limits* for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example, *distance limitations*…." 79 Fed. Reg. at 22,208 (emphases added). In response, several commenters suggested, opposed, or commented on the use of numerical distance limitations to define the term "adjacent," reinforcing the argument that the imposition of distance limitations was foreseeable. *See Miami-Dade Cty.*, 529 F.3d at 1059 ("[A]lthough they may not provide the only basis upon which an agency claims to have satisfied the notice requirement, comments may be adduced as evidence of the adequacy of notice."); *see also* RTC-3 at 153-54; 129 (responding to relevant comments).

In any event, under Eleventh Circuit precedent, the APA does not require an agency to include precise numerical limits in a proposed rule in order to include numerical limits in the final rule. For example, in *Alabama Power Co. v. OSHA*, 89 F.3d 740 (11th Cir. 1996), a power company petitioned for review of an OSHA standard addressing clothing requirements for employees who would be exposed to flames or other hazards. The proposed rule permitted all natural fabrics, regardless of weight. The final rule specified certain weights of natural fabrics that would be allowed—specifically, the final rule required workers to wear cotton fabrics greater than 11 ounces under certain conditions. *Id.* at 745. The Eleventh Circuit found that, even though the 11-ounce requirement did not appear in the proposed rule, the final rule was a logical outgrowth of that rule. *Id*. Like in *Alabama Power*, Plaintiffs' logical outgrowth claims are meritless.

D. All stakeholders had an opportunity to comment on the Science Report.

When the Agencies published the proposed rule, they released the Draft Science Report, which analyzed over 1,000 peer-reviewed publications on the connections between streams and wetlands and downstream waters. 79 Fed. Reg. at 22,190; *see also generally* Draft Science Report. After the SAB reviewed the draft, the Agencies extended the comment period to allow stakeholders to comment on the SAB's findings. 79 Fed. Reg. at 61,590-01. Based on public

comments and the SAB's review and comments, the Agencies released a final Science Report in January 2015, following the close of the comment period.

Plaintiffs now complain that there were changes between the publication of the Draft Science Report and the final Science Report—namely, "a new, continuum based approach that analyzed the connectivity of particular waters to downstream waters along various dimensions and added new materials." Pls.' Br. at 42. As a result, Plaintiffs argue that the Agencies should have extended the 200-day comment period to allow even more opportunity to comment.

However, the Science Report's "continuum-based approach" was not "new," despite Plaintiffs' best efforts to paint it as such. The Draft Science Report used a continuum-based approach too. *See* Draft Science Report at 3-4, 4-21 to 4-23, 6-3 (discussing the "River Continuum Concept"); *id.* at 3-33 (discussing the factors that "determine where components of a [river] system fall on the connectivity-isolation gradient"); *id.* at 5-57 (discussing the "continuum of connectivity" in wetlands); 79 Fed. Reg. at 22,193 ("There is a gradient in the relation of waters to each other, and this is documented in the [draft science report].").[11]

[11] In response to the SAB comments, the final Science Report put a "greater emphasis" on the gradient nature of connectivity. RTC-9 at 15. However, the approach was not new, nor did the revisions "have a significant bearing or effect on the Report's overall assessment of connectivity or conclusions that underpin the Proposed Rule." *Id.*

Contrary to Plaintiffs' claims, the final Science Report merely supplemented and refined the approach already disclosed in the draft report. That is entirely permissible. For example, in *Solite Corp. v. EPA*, 952 F.2d 473 (D.C. Cir. 1991), EPA issued a proposed rule and contemporaneously released a scientific report containing the data on which the rule was based. Later, EPA replaced the scientific report with a different, supplementary one that included additional data. Like here, the petitioners in *Solite* complained that this "last minute" replacement violated the APA by depriving petitioners of their opportunity to comment on the later report, which was issued after the close of the comment period. The D.C. Circuit Court of Appeals held that the agency's reliance on the supplemental report did not violate the APA's notice and comment provisions "because EPA's methodology remained constant, and because the added data was used to check or confirm prior assessments." *Id.* at 485.

Moreover, although Plaintiffs complain that they were not allowed to comment on the final Science Report, they do not suggest what the substance of their additional comments would have been or how they would have differed from those already submitted, as they are required to do. *See Miami-Dade Cty.*, 529 F.3d at 1061 (to show prejudicial error on a notice-and-comment claim, a petitioner "must indicate with reasonable specificity… how it might have responded if given the opportunity"); *see also Texas Office of Pub. Util. Counsel v. F.C.C.*, 265 F.3d

313, 326 (5th Cir. 2001) ("[T]he petitioners must show how they were prejudiced by the [agency]'s failure to solicit additional comments, and how they would have responded had they been given the opportunity to submit additional responses."); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 540-41 (D.C. Cir. 1983) ("It is also incumbent upon a petitioner objecting to the agency's late submission of documents to indicate with 'reasonable specificity' what portions of the documents it objects to and how it might have responded if given the opportunity.").

IV. The Clean Water Rule is constitutional.

A. The Clean Water Rule complies with the Commerce Clause.

Plaintiffs next argue that the Clean Water Rule violates the Commerce Clause. Not so. It is settled law that Congress may regulate "the channels of interstate commerce." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012). The power to regulate the channels of interstate commerce—such as navigable waters—necessarily includes the power to regulate waters that significantly impact those navigable waters. *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring) (applying the Act to waters with a "significant nexus" to navigable waters does not raise constitutional difficulties or federalism concerns); *id.* at 782-83 (citing Supreme Court case law explaining, inter alia, that regulation of tributaries may be required to manage a navigable water). That is what the Clean

Water Rule does. Plaintiffs argue that the Rule violates the Commerce Clause because it regulates waters that *lack* a significant nexus to traditional navigable waters. But as addressed above, the Clean Water Rule covers only waters that science shows have a significant nexus to traditional navigable waters. Plaintiffs' Commerce Clause arguments therefore fail with their Clean Water Act arguments.

Congress may also regulate "activities that substantially affect interstate commerce," *Sebelius*, 567 U.S. at 536, which includes interstate water pollution. Water pollution that flows from one state to another can have economic consequences, and Congress could rationally conclude that regulating interstate water pollution is needed to address substantial effects on interstate commerce. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981) (Commerce Clause permits regulation of "activities causing air or water pollution . . . that may have effects in more than one State"); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 105 & n.6 (1972).

B. The Clean Water Rule is not unconstitutionally vague.

Plaintiffs also argue that the Clean Water Rule is unconstitutionally vague. Quite the opposite, the Rule provides more—not less—clarity by establishing "clearer definitions" and more "bright-line boundaries" than the previous regulatory regime. 80 Fed. Reg. at 37,055.

Case law is clear: the Constitution does not require "perfect clarity" or "precise guidance." *United States v. Williams*, 553 U.S. 285, 304 (2008). Instead, a regulation is "void for vagueness" only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* The Clean Water Rule is neither. *Cf. United States v. Lucas*, 516 F.3d 316, 328 (5th Cir. 2008) (rejecting vagueness challenge to application of CWA jurisdiction because "the prevalence of wet property… and an area network of creeks and their tributaries leading to the Gulf, some of which connected to wetlands on the property, should have alerted 'men of common intelligence' to the possibility that wetlands were waters of the United States"). Indeed, many of the problems Plaintiffs complain about—the categorical inclusion of some tributaries and floodplain waters, for example—stem from the Rule's clarity, not from any so-called vagueness.

Courts have regularly found that regulations far less specific than the Clean Water Rule satisfy constitutional requirements. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (anti-noise ordinance prohibiting noise that "tends to disturb" others not vague because vagueness doctrine allows "flexibility and reasonable breadth, rather than meticulous specificity"); *see also* TSD at 88 (collecting cases).

Plaintiffs' arguments about specific terms fare no better. For example, Plaintiffs complain that the phrase "ordinary high water mark" allows "[r]egulators [to] reach any outcome they please." Pls.' Br. at 37. They are wrong. The Rule retains the definition of ordinary high water mark from the previous guidance and regulations. 80 Fed. Reg. at 37,076 ("To provide additional clarity and for ease of use for the public, the agencies are including the Corps' existing definition of ordinary high water mark in EPA's regulations as well."). The definition offers some flexibility to address different circumstances in different parts of the county, but the Agencies have issued regulatory guidance and comprehensive regional field manuals for guidance. *See, e.g.,* U.S. Army Corps of Eng'rs, Reg. Guidance Letter 05-05 (Dec. 7, 2005)[12]; Robert W. Lichvar et al., U.S. Army Corps of Eng'rs, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual* (2008).[13] The comprehensive direction contained in the Rule, agency guidance, and field guides distinguishes this case from those cited by Plaintiffs, where regulators were left to guess at the meaning of undefined terms like "indecent language" without any guidance. *Compare F.C.C. v. Fox Tel. Stations*, 567 U.S. 239, 243 (2012).

[12] Available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1253.

[13] Available at https://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/Ordinary_High_Watermark_Manual_Aug_2008.pdf.

Next, Plaintiffs lament that the Rule "fail[s] to explain what constitutes a puddle." Pls.' Br. at 37. But the preamble to the Rule says: "A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event." 80 Fed. Reg. at 37,099. Certainly a three-line definition of "puddle" is enough.

Plaintiffs also complain that the Rule does not define "dry land." The phrase "dry land" has been used since at least 1986 and is included in preambles to the 1986 and 1988 regulations. 80 Fed. Reg. at 37,098. Still, despite 30 years of use and "in keeping with the goal of providing greater clarity," the Agencies explained:

> "Dry land" refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds and the like. However, it is important to note that a "water of the United States" is not considered "dry land" just because it lacks water at a given time. Similarly, an area remains "dry land" even if it is wet after a rainfall event.

80 Fed. Reg. at 37,098. This guidance is far from vague. Although the Agencies acknowledge that the term is subject to "geographic and regional variability," *id.*, it certainly is not "so standardless as to encourage discriminatory enforcement."

It is true that terms like "ordinary high water mark" and "dry land" offer some flexibility. But that does not render a rule unconstitutionally vague. *See U.S. Telecom*, 825 F.3d at 737 ("[A] regulation is not impermissibly vague because it is 'marked by flexibility and reasonable breadth, rather than meticulous

specificity.'"). Contrary to Plaintiffs' intimations, "[t]here is no requirement . . . that statutes [or regulations] define every factual situation that may arise." *United States v. Biro*, 143 F.3d 1421, 1430 (11th Cir. 1998). "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous…."*Id.*

V. The Agencies did not engage in an unlawful lobbying campaign.

Plaintiffs also argue that the Agencies violated the Anti-Lobbying Act, 18 U.S.C. § 1913, in promulgating the rule. First, there is no private right of action for a claim that an agency has misused appropriated funds, and, in any event, Plaintiffs have no standing to bring this claim. *Nat'l Treasury Emp. Union v. Campbell*, 654 F.2d 784, 790-93 (D.C. Cir. 1981) (*citing Cort v. Ash*, 422 U.S. 66, 78 (1975)). Second, as put by the Agencies, "[t]he GAO opinion in no way found that EPA acted in bad faith, or that the Agencies had 'closed minds all along.'" *In re: EPA, No. 1503751* (6th Cir.), Br. for Respondents, ECF No. 149-1, at 207-10; *see also* Letter from Gina McCarthy, EPA, to Eugene Dodaro, GAO (Sept. 15, 2016) (disagreeing with the GAO's conclusion).[14]

[14] Available at https://www.epa.gov/sites/production/files/2016-11/documents/epa_reply_to_gao_social_media_op_9-15-16_0.pdf.

VI. The Agencies complied with the Regulatory Flexibility Act.

Contrary to Plaintiffs' claims, the Agencies fully satisfied their obligations under the Regulatory Flexibility Act, which requires an agency to gauge the impact of a proposed rule on small entities. The Agencies certified, as required by the Act, "that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). Even if the Agencies' certification were improper, however, the Clean Water Rule would still be valid. The Agencies completed significant outreach and analysis, conducting over 400 public meetings in all and seeking feedback from all types of stakeholders including small entities and businesses. This level of outreach to small businesses more than satisfies the procedural requirements of the Regulatory Flexibility Act, rendering any noncompliance harmless error. *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003) ("Any hypothetical noncompliance [with the RFA] would thus have been harmless, since the available remedy would simply require performance of the economic assessments that EPA actually made); *cf. Miami-Dade*, 529 F.3d at 1061.

CONCLUSION

It may be that Plaintiffs would like a different regulation, but that is not the question in this case. Rulemaking is the province of agencies, not regulated

entities. The only question is whether Plaintiffs have met their burden to show reversible flaws in the Rule's science or procedures. They have not.

Respectfully submitted this 5th day of April, 2018.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that this filing complies with the size, font, and formatting requirements of Local Rule 5.1(C). Although the motion, at 9,844 words (excluding the caption, table of contents, signature block, and certificates) exceeds the word limit, an unopposed request to exceed that limit has been filed pursuant to Local Rule 7.1(F).

/s/ *Catherine Wannamaker*

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ *Catherine Wannamaker*